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Addendum

The FSU Undergraduate Law Review would like to formally recognize editor James Arch. Neither of the two articles that James edited this semester have been included in this publication due to unforeseen circumstances, but we do not wish for his work to go unnoticed. James worked tirelessly on both articles and consistently met the deadlines and expectations of our organization; for that, the ULR executive board would like to acknowledge and thank him for his contributions.

The Potential Influence of Recent Affirmative Action Supreme Court Decisions on Future College Admissions

Writer: Leona Rindle

Editor: Anya Finley

I. Background of Affirmative Action

Affirmative action is the effort to rectify past wrongdoings, such as racism and slavery, by favoring individuals that were previously discriminated against, specifically ethnic and racial minorities. The term was first utilized by President John F. Kennedy in 1961 in Executive Order 10925, which called for the use of affirmative action to achieve nondiscrimination. Although this order was primarily focused on discrimination in employment, the concept was quickly applied to educational discrimination as well.[1] The 1960s and 1970s saw a rise in the creation of affirmative action programs at universities across the United States due to the Civil Rights Movement, which caused more widespread support against racial discrimination.

These programs were legally challenged in 1978 by Allan Bakke, a White man who claimed that the affirmative action program at the medical school of the University of California at Davis discriminated against him and violated his rights.[2] Bakke based his claim on the fact that the medical school had 16 out of 100 seats set aside for underrepresented or disadvantaged individuals.[3] In this case, titled *Regents of the University of California v. Bakke*, the Supreme Court determined that racial quotas were unconstitutional, as they were in violation of the 14th

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[1] Wil Del Pilar, *A Brief History of Affirmative Action and the Assault on Race-Conscious Admissions* (2023), *available at* https://edtrust.org/resource/a-brief-history-of-affirmative-action-and-the-assault-on-race-conscious-admissions/.

[2] Genevieve Bonadies Torres, *Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds* (2020), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/.

[3] Torres, *supra* note 2.

Amendment, but that the consideration of race as a factor in the admission decision was permissible.[4] This court case was very important because it was the first to establish educational affirmative action programs as constitutional, as long as certain guidelines were followed.

However, *Bakke* only marked the beginning of the affirmative action debate. Over three decades, bans against collegiate affirmative action programs have been established in ten states.[5] Two further notable Supreme Court cases that challenged affirmative action are *Gratz v. Bollinger* and *Grutter v. Bollinger* from 2003, which focused on the affirmative action policies at the University of Michigan and the University of Michigan Law School, respectively. The ruling in *Grutter* determined that the law school's program was constitutional because of its goal of producing an educational benefit through greater diversity and because it views each applicant holistically, with race being one of many factors. However, the undergraduate admissions' affirmative action program was declared unconstitutional due to the fact that it endowed applicants with points based on their race or ethnicity and did not have a holistic approach, unlike the law school.[6] These two cases provided further guidelines for affirmative action admission programs. They directly influenced the decision in *Abigail Fisher v. University of Texas at Austin* (2016), where the affirmative action program was declared constitutional due to its goal of obtaining the educational benefits of diversity in its student body.[7] Overall, the Supreme Court generally upheld affirmative action programs that were more general and holistic.

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[4] Dorothy F. Garrison-Wade & Chance W. Lewis, *Affirmative Action: History and Analysis* (2004), *available at* https://files.eric.ed.gov/fulltext/EJ682488.pdf.
[5] Genevieve Carlton, *A History of Affirmative Action in College Admissions* (2023), *available at* https://www.bestcolleges.com/news/analysis/2020/08/10/history-affirmative-action-college/.
[6] *Affirmative Action Policies Throughout History*, *available at* https://www.aaaed.org/aaaed/History_of_Affirmative_Action.asp.
[7] *Affirmative Action Policies Throughout History*, *supra* note 6.

The debate of collegiate affirmative action programs has ranged across more than five decades. However, a clear end has not been reached. The recent Supreme Court decisions about the Harvard College and University of North Carolina's affirmative action programs have demonstrated that the debate is still ongoing. It is important to understand the history of collegiate affirmative action to understand the possible implications of these recent decisions.

II. Recent Supreme Court Affirmative Action Rulings

Affirmative action rulings are based on whether the programs violate the Equal Rights Clause of the 14th Amendment or not. This consideration was also used in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*. The Harvard case focused primarily on discrimination against Asian Americans through the admissions program, while the UNC case discussed whether its admissions program was too race conscious.[8] In both court cases, it was determined that the admissions programs violated the Equal Rights Clause of the 14th Amendment, thereby declaring the programs unconstitutional.[9] Both cases were filed by the Students for Fair Admissions (SFFA), an organization that was founded by Edward Blum. Blum has been an incessant opponent to civil rights, particularly affirmative action efforts. SFFA has provided him with a way to endorse anti-affirmative efforts. Through it, Blum filed the two lawsuits against Harvard and UNC in 2014 on the basis of violation of the Equal Rights Clause of the 14th Amendment and Title VI of the 1964 Civil Rights Act, which prohibits racial discrimination.[10] The Harvard lawsuit was especially unique because it was the first to be filed against a private

[8] Elissa Nadworny, *Why the Supreme Court decision on affirmative action matters* (2023), *available at* https://www.npr.org/2023/06/29/1176715957/why-the-supreme-court-decision-on-affirmative-action-matters.
[9] Nadworny, *supra* note 8.
[10] Torres, *supra* note 2.

university and to be focused on the discrimination against Asian Americans.[11] Both the District Court of Massachusetts and the Court of Appeals for the First Circuit denied the claim that Harvard's admissions program violated the 14th Amendment or Civil Rights Act.[12] However, the SFFA's persistence caused the case to end up in the Supreme Court and be consolidated with the lawsuit against UNC through the use of appeals and writ of certiorari. This finally occurred in 2022, eight years after the initial lawsuit started.[13] During that time, many students at Harvard and UNC, particularly those belonging to minority groups, have argued for race-conscious admissions and its benefits.[14] Additionally, several of those students had the opportunity to testify for the admissions programs in court, which presented the benefits of having a diverse campus, as well as having sufficient students within minority groups, which allows them to form communities on campus.[15] College students were a very important resource throughout the different trials on the path to the Supreme Court because they persistently argued for race-conscious admissions programs by sharing their experience and naming specific benefits.

However, despite these efforts, the majority opinion in the Supreme Court declared both admissions programs unconstitutional, claiming that race consciousness violates the Constitution.[16] This ruling has effectively ended collegiate affirmative action across the United States, terminating the decades-old legal precedents of affirmative action rulings.

III. Future Implications of the Ruling

Although it is too soon to tell the actual implications that this ruling will have on colleges across the United States, particularly the enrollment of minorities, it can be reasonably predicted

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[11] Torres, *supra* note 2.
[12] *Affirmative Action Policies Throughout History*, *supra* note 6.
[13] *Affirmative Action Policies Throughout History*, *supra* note 6.
[14] Torres, *supra* note 2.
[15] Torres, *supra* note 2.
[16] Carlton, *supra* note 5.

that minority enrollment and the overall diversity at colleges will decrease substantially. Several states have already banned race-conscious admissions programs in decades prior, namely California in 1996, Washington in 1998, and Michigan in 2006.[17] These bans allow us to predict the influence of this nationwide ban. Studies in those states have highlighted a decrease in racial diversity at colleges. Additionally, bans in the individual states were eventually expanded to modify other race-conscious programs, such as scholarships, recruitment, and more.[18] It can be reasonably predicted that the nationwide ban will have a similar impact and will affect much more than just the admissions programs at colleges, furthering the negative impact of the decision on racial minorities and the opportunities available to them.

IV. Possible Solutions

There are other ways that colleges can maintain diversity on their college campuses, despite the banning of affirmative action programs. According to Chief Justice Roberts, race can continue to be considered in the application process, but only by how it has affected the student's life.[19] However, even that approach is limited, as admissions officers may not give essays focused on overcoming racial discrimination a higher value unless it is due to that student's courage and/or determination rather than their race.[20] Some other ways that admissions officers can increase diversity in their application and acceptance pool is by reducing and/or eliminating the reliance on standardized testing, improving access to a four-year degree program from community college, removing financial barriers, or expanding outreach and recruitment

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[17] Nadworny, *supra* note 8.
[18] Nadworny, *supra* note 8.
[19] Marissa Meredith, *Future Implications of SFFA v. Harvard: Potential Curtailing of Diverse Environments* (2023), *available at* https://www.americanbar.org/groups/diversity/DiversityCommission/publications/the-innovator/vol7-issue2/feature2/.
[20] Christina Pazzanese, *Harvard united in resolve in face of Supreme Court's admissions ruling* (2023), *available at* https://news.harvard.edu/gazette/story/2023/06/harvard-united-in-resolve-in-face-of-supreme-courts-admissions-ruling/.

programs to other middle and high schools.[21] Such reforms would make it easier for racial minorities to apply and enroll at elite higher education institutions. Other alternatives have also been utilized in states that had previously banned race-conscious programs, such as admitting the top percentage of high school students in that state.[22] However, alternatives have not been able to produce the same amount of diversity as considering race in admissions does.[23] This demonstrates that, although there are alternatives, they have a very limited impact.

Despite the tremendous setback that the recent affirmative actions ruling have caused with the diversification of college campuses, universities, such as Harvard and Columbia, will continue to fight towards this goal without the use of affirmative action admissions programs,[24] although that fight may be a lot more difficult now.

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[21] Sarah Hinger, *Moving Beyond the Supreme Court's Affirmative Action Rulings* (2023), *available at* https://www.aclu.org/news/racial-justice/moving-beyond-the-supreme-courts-affirmative-action-rulings#:~:text=The%20work%20to%20ensure%20educational,continues%2C%20despite%20the%20court%27s%20decision.&text=At%20the%20end%20of%20its,affirmative%20action%20in%20college%20admissions.

[22] Nadworny, *supra* note 8.

[23] Nadworny, *supra* note 8.

[24] Pazzanese, *supra* note 20.

Cameras in the Courtroom

Writer: Alyssa Robinson

Editor: Madison Tilton

Court trials are integral to the Judicial Process. Everyone is guaranteed a fair trial under the Constitution. With the rise of media and broadcasting, it makes sense that the media would expand to include the televising of court trials. While most state courts allow for cameras in the courtroom, federal courts and the Supreme Court have tighter restrictions: federal courts have pilot programs allowing cameras only in civil cases, and the Supreme Court broadcasts their oral arguments, which are available for listening on their website. This paper seeks to analyze the impact that televised court cases have on our judicial process.

The inclusion of cameras in the courtroom has been the subject of debate for quite some time. Televising court cases gives the public the ability to participate in the trial process, which has its drawbacks and advantages. On one hand, it allows the public to learn more about the court process, similar to the televised congressional hearings. Supporters of televised court cases often cite the court case *Richmond Newspapers, Inc. v. Virginia*, which established that "criminal trials must be open to the public unless there is evidence to support an overriding countervailing interest."[1] While this decision does not specifically discuss televised court cases, supporters often use it to argue that televising court cases is a form of opening trials to the public and that not televising them would be unconstitutional.[2] Dissenters often argue that broadcasting these cases can often be to the detriment of the people involved in them. This argument has an extensive history to it. After an attempted lawsuit arguing that cameras in the courtroom disrupted the right

[1] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).
[2] Hetzel & Ruth Ann Strickland, *Cameras in the Courtroom* (Sept. 19, 2023), *available at* https://firstamendment.mtsu.edu/article/cameras-in-the-courtroom/.

to fair trial, the American Bar Association did attempt to ban cameras in the courtroom in 1937. This was reaffirmed by the court case *Estes v. Texas,* which "served for almost 20 years as the basis for denying the press access to bring cameras into the courtroom."[3] Eventually, though, the Supreme Court ruling of *Chandler v. Florida* stated that the Constitution doesn't prohibit the use of cameras in the courtroom.[4] While that might have been the end of the constitutional debate over this issue, it most certainly was not the end of the modern-day debate regarding televised courtrooms and their effects on the judicial process.

To better explain this, we can examine two historic modern-day court cases: one civil and one criminal. In 1995, O. J. Simpson was tried for the murder of his ex-wife, Nicole Brown Simpson, and her acquaintance, Ron Goldman. Due to the notoriety of Simpson, the case gained a lot of attention very quickly. The presiding judge, Lance Ito, was presented with the choice of allowing cameras inside the courtroom. While initially reluctant, Judge Ito ultimately allowed them in. This decision was to his own detriment. Paul Thaler, a communications department chair at Adelphi University, argues that,

> in a way, [Judge Ito] became infatuated with [the cameras]. He would reportedly go home and turn multiple television sets on to watch the day's proceedings. I do believe that at the end of the trial, Ito was a broken man in many ways. He realized his case had gotten out of control.[5]

Thaler also discusses the impact that trials like this could have on the jury. While it is true that juries are sequestered, this does not inherently mean that they are immune from the pressures of a popular media trial. In addition, the fact that this trial ended up being "the longest trial, with the longest-sitting sequestered jury, in the history of California," did not help.[6] Thaler argues that a

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[3] *Id.*
[4] *Id.*
[5] Lilah Raptopoulos, *The OJ Simpson case 20 years later: making 'trials into television'* (June 17, 2014), *available at* https://www.theguardian.com/world/2014/jun/17/oj-simpson-trial-cameras-court-justice-culture.
[6] *Id.*

combination of time and television pressure had something to do with why the jurors came to such a quick decision: "Jurors aren't allowed to be televised, but what is it like for jurors to go home after coming up with an unpopular verdict? Are they looking over their shoulders? I don't have an answer, but the question matters."[7] Thaler also argues that the reason for the length of the trial was because it was televised.

> There's no question. A witness that could have taken an hour to testify was on the stand for days. There were endless hearings about all sorts of legal issues, and every lawyer took their time before that camera. Judge Ito lost control. He knew he was being observed by a huge public audience and was trying to be open-minded. So the cameras really affected the course of justice.[8]

When presented with all of that evidence, it is easy to see the effects of cameras in the courtroom on the judicial process. It begs the question: Why would someone allow cameras in the courtroom in the first place? Well, for Simpson, it allowed him to advocate for himself not only in the court of law but also in the court of public opinion. Additionally, media scrutiny allows for judges and prosecutors to be held accountable and not do anything improper.

In recent times, we've become witness to another famous trial known as *Depp v. Heard*, a civil case between actor Johnny Depp and his former wife Amber Heard. Taking place in 2022, the case had another form of interference not seen before. In addition, since this was a civil case, the jury was not sequestered; they were exposed to the social media discussions surrounding the trial. Ezra Marcus at *The New York Times* argues that, in many ways, this trial became a spectacle due to the famous parties involved:

> In addition to the live coverage on TV, YouTube, and various news and entertainment websites, countless short clips edited for maximum virality have circulated on Instagram and TikTok — 'fancams,' in social media parlance,

[7] *Id.*
[8] *Id.*

> featuring forensic analyses of Mr. Depp's and Ms. Heard's trial attire, and courtroom exchanges that have been described as 'SAVAGE.'[9]

This case very quickly became about the court of public opinion as much as it became about libel.

When examining these two cases, the drawbacks to putting cameras in the courtroom become clear. Keeping that in mind, the question then becomes what to do about it. While there are drawbacks, the ability for people to be aware of the court process can be extremely important. It can add pressure on members of our legal system to do their job properly since they know they will be scrutinized. Being aware of the effects that televising court cases can have is necessary to maximize the benefits and minimize the consequences. The cases highlighted above are high profile and involve celebrities. In the digital age, it is impossible to avoid having these trials in the media, but being aware of the effects of cameras in the courtroom is necessary for the future of both the media and television.

[9] Ezra Marcus, *Johnny Depp Case Brings Stan Culture Into the Courtroom* (Apr. 29, 2022), *available at* https://link.gale.com/apps/doc/A754488366/AONE?u=fcla_main&sid=googleScholar&xid=cbeaa8a0.

Affirmative Action Analysis: Supreme Court Ruling Means Repercussions for Students All Over the United States

Writer: Makenna Metayer

Editor: Pamela Healy

I. Introduction

The year is 1961 and President John F. Kennedy had just issued Presidential Executive Order 10925 to use "affirmative action"—a newly coined term that was supposed to encourage the participation of historically disadvantaged groups in the workforce. The executive order reads: "take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." As soon as the words were written, affirmative action effectively became a term to engender the inclusion of minorities in spaces they were not previously welcomed. Women and people of color were allowed to flourish in the American workforce. By 1978, the impact of this singular executive order extended beyond the workplace and became a fundamental component of college admissions in the United States. While it initially empowered women and people of color in the workforce and led to the establishment of equal labor opportunities, it eventually evolved into a critical factor in college admissions across the nation. This transformation in 1978 marked a pivotal moment when the principle of affirmative action was applied to higher education, forever changing the landscape of college admissions in the United States.

Now, in the year 2023, things have changed again because the Supreme Court of the United States issued a momentous ruling in the case of *Students for Fair Admissions Inc. V. President and Fellows of Harvard College.* This ruling effectively struck down the use of affirmative action in college admissions, reshaping what the college admissions process will look

like in the years to come. The ruling reversed what Kennedy's coined term "affirmative action" could mean and is currently shaping the future of higher education in America.

II. Historic Case for Affirmative Action in College Admissions

Long before the landmark 2023 ruling, the use of affirmative action in college admissions, once sporadic and unregulated, was legally standardized. In 1978, a lawsuit was brought against the University of California Davis (UCD) medical school admissions practices because their admissions utilized a racial quota system, which included reserved seats within the medical class for ethnic minorities. Bakke, a twice rejected white male applicant to the UCD medical school had admissions scores above the average of admitted students. Bakke contended that he was rejected from admission in favor of minority students admitted through the reserved seating program and went on to sue the medical school, arguing that the strict quota system was a violation of the Civil Rights Act of 1964 in the case of *Regents of the University of California v. Bakke*.[1]

After being argued at the federal level, Bakke's case reached the Supreme Court of California, which found merit in Bakke's argument. The court ruled that the University of California's school admissions system using racial quotas was a discriminatory practice towards racial groups, finding that no one can be rejected because of their race. As a result of the decision, the medical school appealed the ruling of the California Supreme Court to the United States Supreme Court (SCOTUS). The SCOTUS ultimately held the ruling of the lower court, that the university's admissions standard, which used race as a "definite and exclusive basis for an admission," was in fact a violation of the Equal Protection Clause of the Fourteenth Amendment and violated Title VI of the Civil Rights Act of 1964. However, because the

[1] *Regents of the University of California v. Bakke*, *available at* https://www.law.cornell.edu/wex/equal_protection.

university argued that their practices were in place to allow for diversity in classrooms and remedy racial inequalities within America, they *only* ruled against **"**racial quotas;" they did *not* rule against "affirmative action" within the college admissions process. This ruling left an impression on higher education in the U.S. because affirmative action could continue, but within the bounds of the law.

Affirmative action since then has been widely used for college admissions, except in the nine states that banned race-based policies: Arizona (2010), Florida (1999), Idaho (2020), Michigan (2006), Nebraska (2008), New Hampshire (2011), Oklahoma (2010), Washington (1998), and California (1996). Now a well-known competitive state for college admissions, Michigan's collegiate process has looked different since the Supreme Court held that the ban of affirmative action was constitutionally possible prior to the 2023 case against affirmative action. Michigan voters supported a state constitutional amendment to ban the use of racial consideration in college admissions. Even though the referendum received a majority of support from Michigan voters, the federal appeals court of Michigan rendered the amendment invalid, a decision that was later reversed by the United States Supreme Court.

The decision, noted by Justice Kennedy, is constitutionally protected, therefore the ban on affirmative action was reinstated for the state of Michigan's publicly funded universities. University of Michigan's selective admissions enrolled less than 10% of their applicant pool from the 2021-2022 applications process and, without affirmative action consideration, college students hoping to gain admission will be considered 'holistically.' While policies and opinions were evolving in many major states, a substantial number of American higher education institutions, ranging from prestigious Ivy League universities to community colleges, continued

to consider race as a factor in college admissions. This practice remained legally protected until the *Students For Fair Admissions Inc v. President And Fellows of Harvard College* case.

III. *Students For Fair Admissions, INC. v. President And Fellows Of Harvard College*

Case Overview

The *Students For Fair Admissions Inc v. President And Fellows of Harvard College* case implicated Harvard College and the University of North Carolina for using race as a factor in admissions by focusing on the examination of whether their rigorous admission procedures violated the Equal Protection Clause in the Fourteenth Amendment. The petitioner in the case, "Students for Fair Admissions" (SFFA), is a non-profit membership group comprising parents and students. According to the organization, its members are individuals who hold the belief that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional. The SFFA sued Harvard College and the University of North Carolina respectively. In both bench trials, the admissions processes were ruled permissible. The Harvard College case was granted certiorari and arguments began on October 31, 2022. The basis of the argument by the petitioner was that the highly selective admissions process violated the Equal protection Clause of the Fourteenth Amendment.

The SCOTUS began by reviewing the Harvard College application process to understand the way race affects each prospective student's application. The published Supreme Court's opinion of the case described the review as being a threefold process, beginning with the initial screening of an application by a primary reader. This first reader gives a "numerical value for each listed category: academics, extracurriculars, athletic, school support, personal, and overall

category."[2] In this admissions review, the first reader can and does consider the applicant's race in their decision making, which may or may not be reflected in these numerical values. Race, in terms of the application, is then taken into account by the applications review subcommittees when the regional committees make recommendations to the full admissions committee. The final review is done by a 40-member admissions committee that evaluates the recommended applications and discusses the prospective applicant pool by race, which, according to Harvard's director of admissions, serves the purpose of ensuring "there is no 'dramatic drop-off" in minority admissions compared to the prior class."[3] The final step of the Harvard admissions process is when the racial composition of the dwindled prospective class is revealed to the committee, who then performs a final round of cuts. Throughout the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."[4] Even in states with an affirmative action ban (prior to the 2023 ruling), privately-funded universities were allowed to retain race-based admission, but if the Supreme Court of the United States ruled in favor of reversing affirmative action usage all over the country this would impact privately-funded and publicly-funded institutions the same. Keeping this in mind, with consideration to past Supreme Court case rulings and decisions, the Court began its review of the *Students For Fair Admissions, INC. v. President And Fellows Of Harvard College* case.

After a review of the University of North Carolina admissions process, Justice Jackson found a statistic showing that the role race does play a factor within the UNC admissions

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[2] Supreme Court of the United States, STUDENTS FOR FAIR ADMISSIONS, INC. v. PRESIDENT AND FELLOWS OF HARVARD COLLEGE Syllabus page 2, *available at* https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf.
[3] *Id.*
[4] *Id.*

process. Jackson stated, "2016–2021, the school accepted a lower 'percentage of the most academically excellent in-state Black candidates'—that is, 65 out of 67 such applicants (97.01%)—than it did similarly situated Asian applicants—that is, 1118 out of 1139 such applicants (98.16%)."[5] The lower court for the UNC case reviewed the admission process, finding their race-conscious admissions within accordance with the law; this is a topic of discussion in the court's opinion.

IV. The Law Behind the Lawsuit

The Students For Fair Admissions sued Harvard College and the University of North Carolina alleging a potential violation of the Equal Protection Clause of the Fourteenth Amendment. The organization believes that a group of students, specifically Asian-American students, had been unfairly treated by Harvard's consideration of race within its admissions. In regards to the University of North Carolina Chapel Hill, the petitioner argues that the admissions process is unfair for white and Asian-American applicants in comparison to minority applicants because UNC "unfairly uses race to give significant preference to underrepresented minority applicants to the detriment of white and Asian-American applicants."[6]

The Fourteenth Amendment of the United States Constitution extends citizenship to all people who are born or naturalized in America. At the time it was passed by the Senate, this law was particularly climate changing because it also extended citizenship to formerly enslaved people. In regards to the Equal Protection Clause of the Fourteenth Amendment:

> 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

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[5] *Id.*

[6] *Lawyers' Committee for Civil Rights Under Law - Litigation Defending Race-Conscious Admissions in Higher Education*, *available at* https://www.lawyerscommittee.org/students-for-fair-admissions-sffa-v-university-of-north-carolina-at-chapel-hill/#:~:text=Case%20Summary&text=In%20SFFA%20v%20UNC%2DChapel,Civil%20Rights%20Act%20of%201964.

> of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[7]

The petitioner defends that the law had been broken because of the race-based admissions system used by the colleges. Additionally, the SSFA lawsuit asserts that both universities violated Title VI of the Civil Rights Act of 1964, which offers protection against discrimination on the grounds of race, color, and national origin. The Equal Protection Clause of the Fourteenth Amendment does *potentially* allow for exceptions in the realm of college admission; however, the process of an exception has to undergo "strict scrutiny."[8] Previous supreme court cases *Grutter v. Bollinger* and *Fisher v. University of Texas at Austin* have provided the grounds for a twofold questioning that encompasses the intent and goal and evaluates the specific use of a racial classification.

V. Opinions of the Court

The 6-3 vote to reverse affirmative action included Chief Justice John Roberts, writing for the majority, alongside conservative justices Thomas, Kavanaugh, Gorsuch, Coney Barrett, and Alito. Justices Sotomayor, Jackson, and Kagan dissent.

A part of Chief Justice John Roberts's explanation for the majority aligns with the idea that race has been used negatively by Harvard College and the University of North Carolina Chapel Hill, thus going against the Supreme Court's past rulings and reproaching that race cannot be used against an applicant. Though these two admissions programs may not explicitly say or make decisions that use race as a refusal, Justice Roberts elaborates that "college admissions are zero-sum, a benefit provided to some applicants but not to others necessarily

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[7] *Fourteenth Amendment reading of the law and its components*, *available at* https://www.archives.gov/milestone-documents/14th-amendment#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws.

[8] "Strict Scrutiny" which asks first whether the racial classification is used to "further compelling governmental interests," Grutter v. Bollinger, 539 U. S. 306, 326, and second whether the government's use of race is "narrowly tailored," page 4 syllabus *Id.*

advantages the former group at the expense of the latter."[9] In the wake of the decision, race-based, race-preferential, and race-conscious race consideration as the sole factor is no longer legally protected among college admissions within the United States of America.

However, Justice Roberts emphasized that race consideration on the basis of an applicant is allowed, where universities and colleges can consider race for an applicant to explain how (their) race affected their personhood, character, and/or experiences. Roberts stressed that the court's decision did not bar universities from ever[10] considering race on a case-by-case basis. Schools, he indicated, can consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[11] Justice Thomas, in a following concurring opinion, states notably that "affirmative action highlights our racial differences with pernicious effect,"[12] and goes on to cite former opinions in the case of *Grutter*. Thomas furthers the argument, seeing affirmative action as a possible risk of discrimination and, in the *Fischer v. University of Texas* case, Justice Thomas wrote (in dissent) that "I would overrule *Grutter v. Bollinger*, 539 U. S. 306 (2003), and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."[13]

Justice Sonia Sotomayor, a longtime champion of affirmative action in college admissions, wrote the dissenting opinion. Justice Sotomayor references Justice Thomas for the majority throughout the written dissent, showing disapproval and lack of evidence for Thomas' arguments that race-conscious admissions could be harmful towards racial minorities or

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[9] Opinion Analysis SCOTUS blog, *available at* https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions/.
[10] *Opinion Analysis SCOTUS blog*, *available at* https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions/.
[11] *Id.*
[12] *Id.*
[13] *Fisher v. University of Texas*, 579 U.S. 365 (2016).

discriminating against other races. Sotomayor further argues that the strict scrutiny exception is not met in the SFFA's case against Harvard and UNC's respective admissions, stating that "even assuming for the sake of argument that Harvard engages in racial discrimination through the personal rating, there is no connection between that rating and the remedy that SFFA sought and that the majority grants today: ending the limited use of race in the entire admissions process."[14] Members of the Court supporting the majority opinion include with the ruling reasoning that the Constitution should be, if it is not already, colorblind—a widely debated term even among the members of the Supreme Court themselves. In terms of this, Justice Sotomayor defends that the Court cannot meaningfully speak to a "colorblind" constitution, nor is the Constitution in fact colorblind.

VI. What Can Be Expected After The Supreme Court Ruling

Our society has already seen the effects of life after an affirmative action policy reversal. Laws against race-based admissions in the nine states that banned affirmative action *before* this SCOTUS ruling saw different outcomes for diversity. In California, after voters outlawed affirmative action in admissions, diversity dropped significantly amongst minority populations who were successful in gaining admissions to schools a part of the University of California (UC) higher educational system. The University of California, Los Angeles and the University of California Berkeley saw their respective school environments drop in the population of African American students enrolled in the year after the affirmative action ban took place. Princeton University economist Zachary Bleemer published a study on the effects of the race based admissions policy ban on the University of California. Bleemer found that minority students wishing to gain admission to the two most competitive universities in California (UCLA and UC

[14] *Id.*

Berkeley) immediately following the ban had lower numbers in enrollment, with Black and Hispanic enrollment declining by about 40% the year after the ban was issued.[15] Today, UC state universities do maintain a level of diversity within the admitted classes that, while not completely equal to their demographic population, range from higher and lower in comparison to the other U.S state university representations. On the other hand, the states that had effectively banned race-conscious admissions have seen little changes. New Hampshire saw little diversity changes in the time after the ban had been implemented. However, the U.S Census as of last July found that of the over a million population estimate the race origin of "White alone" accounts for 92.6% of the population,[16] which could contribute to the lack of diversity enrollment change. Dissimilarly, Washington State has functioned with race-neutral admissions for over two decades and, while it saw a drop in enrollment numbers of students of color at public universities in 1998, it also saw the rates of admission and enrollment recover in the following year.[17]

Some scholars estimate the possible decreases in enrollment of historically underrepresented students, while others find that diversity within higher education will still thrive because of the characteristics of our society today. For private schools that have used affirmative action in the banned states and for state universities employing race based admissions, the next few admission cycles for students will look different than before. Institutions have begun planning around the ruling and determining what admissions to their formerly race-based admissions process schools will look like. Gabrielle Starr, the current

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[15] Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility after California's Proposition 209* (2022), 115–160, *available at* https://doi.org/10.1093/qje/qjab027.

[16] United States Census Bureau New Hampshire, *available at* https://www.census.gov/quickfacts/fact/table/NH/PST045222.

[17] Seattle Times *WA public colleges match private schools on diversity despite affirmative action restriction*, *available at* https://www.seattletimes.com/education-lab/wa-public-colleges-match-private-schools-on-diversity-despite-affirmative-action-restriction/#:~:text=After%20voters%20passed%20a%20ban,ways%20to%20ensure%20racial%20diversity.

president of Pomona College, a private school in California that in prior admission cycles heavily considered affirmative action, commented, "Nothing in the ruling will change how we recruit … Our initial plans will include making sure we are as extensive as possible in where we are meeting with students and counselors around the country."[18] Even with the ruling, many institutions have remained committed to valuing and reaching for diversity within higher education. Harvard University's current president, Claudine Gay, released a video message statement championing diversity, finding that [as an institution] "we continue to believe—deeply—that a thriving diverse intellectual community is essential to academic excellence and critical to shaping the next generation of leaders."[19] The disappointment from the Supreme Court ruling has been palpable for school campuses all over the country. President Mark Wrigton and President-elect Ellen Granberg of George Washington University expressed discontent with the ruling in a letter to students explaining that race-conscious admissions have aided their university's community for decades. The GW representatives wrote that they are "deeply disappointed by the U.S. Supreme Court's recent ruling" and "want to be clear that … a diverse student body is essential to our mission, and it is a key element of a high-quality education that best prepares our students to succeed, thrive, and lead locally and globally."[20] The collegiate response to the Supreme Court strike down of affirmative action has been eye-opening for current college students and also for those hoping to attend.

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[18] NBC News - U.S. News, *California ended affirmative action in the '90s but retains a diverse student body*, *available at* https://www.nbcnews.com/news/us-news/california-ended-affirmative-action-90s-retains-diverse-student-body-rcna91846.

[19] Video Statement, *available at* https://www.thecrimson.com/article/2023/10/13/gay-video-address/. Direct quote from : https://www.harvardmagazine.com/2023/08/jhj-affirmative-action#:~:text=We%20continue%20to%20believe%E2%80%94deeply,the%20next%20generation%20of%20leaders.%E2%80%9D.

[20] U.S. Supreme Court Ruling on Race-Conscious Admissions, *available at* https://president.gwu.edu/us-supreme-court-ruling-race-conscious-admissions-0.

The U.S educational system is far from perfect, with a major criticism being the disproportionate amount of school funding received by schools with more minority students versus schools with less students of color and more Caucasian students. Educational funding in relation to property value pushes higher-valued areas to retain more school funding; the unbalance comes from the number of students at these schools in comparison to demographics of the country and state being made up of less minority students and more white students. In regard to this, many students worry about the effects on diversity within schools and equality in the admissions process for students of color in the wake of changing admissions policies. Proponents of affirmative action have long argued that race-based admissions give students of color a chance to have a "leveled playing field" when applying to college: "Affirmative action allows students of color a chance to attend schools in the face of competition from a larger body of white students. It prevents racially motivated applicant rejections and gives us a much needed helping hand."[21]

VII. Conclusion

Affirmative action was never specified to be for college admissions in the United States. The policy quickly gained traction, opening doors for many underrepresented groups and minorities to receive admission to universities and colleges. American educational needs are reinventing themselves as social growth continues and the needs at different points of our society come and go. This reversal will change the college admissions process later this year and in the coming years for students applying to universities and colleges within the United States. It has been sixty-two years since the introduction of affirmative action and repealing a long-term policy like this will have ripple effects for our society. Affirmative action redefined college admission

[21] Haylin, St. Peter, *What Students Are Saying About the End of Race-Based Affirmative Action in College Admissions*.

procedures, but without it, they will be defined again. When affirmative action becomes just a policy we ‘used to use’ in consideration of student applicants, it is possible universities will abide by the ruling but ultimately never stop considering the differences among students: their financial backgrounds, ethnicities, races, and all factors in their personhood that play a part in a student’s becoming. From the first class of students given admission after the introduction of affirmative action, to the last class who had the help of the policy, the institutions that recognized the importance of diversity and used affirmative action to reinforce and maintain it are now a part of our history. The impact of affirmative action, a term coined by former President Kennedy all those years ago, will not be forgotten. Nonetheless, now that many colleges and universities will have to change their policies in the aftermath of the reversal, education will once again weather the change—for better or for worse.

First Amendment and Refusal to Register a Trademark

Writer: Anya Finley

Editor: Kayla Mathai

I. Introduction

Historically, trademarks have been considered speech, meaning they are subject to the provisions of the First Amendment. This means that generally, free speech will be prioritized over policies governing the registration of trademarks. However, there are a few noteworthy exceptions. One of these exceptions falls under the Lanham Act, which broadly identifies several things that cannot be trademarked.[1] One such portion of the Act, 1052(c), bars the registration of trademarks that include a living person's name without their consent.[2] This clause of the Lanham Act is also colloquially referred to as the living individual clause. The Lanham Act was enacted by Congress in 1946 to clarify which trademarks would be registered and to protect both consumers and producers.[3] In recent years the Lanham act has been challenged in the Supreme Court a number of times.

In November, the Supreme Court held oral arguments for *Vidal v. Elster*, which considered whether this section of the Lanham Act results in a breach of the First Amendment's protection of free speech and possible viewpoint discrimination. In *Vidal*, the respondent Steve Elster had attempted to register a trademark that said "Trump Too Small," but the request was ultimately rejected due to section 1052(c).[4] Since former U.S. president Donald J. Trump is still alive and did not give his consent for his name to be utilized in this trademark, this trademark

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[1] 15 USC § 1052.
[2] *Id.*
[3] Lanham Act, Legal Information Institute, *available at* https://www.law.cornell.edu/wex/lanham_act#:~:text=%C2%A7%C2%A7%201051%20et%20seq,mark%20is%20likely%20to%20occur. (last visited Nov 26, 2023).
[4] Petition for Writ of Certiorari at page 6, Vidal v. Elster, No. 22-704 (2023).

constituted a violation of 1052(c). Elster claimed that the refusal to trademark this statement infringed on his First Amendment right to free speech, and it constituted viewpoint discrimination, as it prevented him from sharing something he classified as political speech.[5]

After the United States Patent and Trademark Office (USPTO) Trademark Trial and Appeal Board confirmed that Elster's trademark fell under the provisions of 1052(c), Elster appealed.[6] The United States Court of Appeals for the Federal Circuit reversed USPTO's decision, holding that Elster's First Amendment rights had been infringed, and that section 1052(c) did result in viewpoint discrimination.[7] Following this decision, Katherine Vidal appealed the case on behalf of the United States Patent and Trademark Office.[8]

In this case, the Supreme Court Justices had two essential questions they had to address. Firstly, they questioned whether the refusal to register a trademark infringed upon one's First Amendment right.[9] If failing to register a trademark does not meaningfully affect one's right to free speech, it may not constitute a violation of the First Amendment. More specifically, if 1052(c) does not affect anyone's right to free speech, it does not violate the First Amendment. Next, the Supreme Court considered whether failure to register a trademark that contains political speech constitutes viewpoint discrimination.[10]

Based on the oral arguments and the precedent discussed throughout them, it appears that the Supreme Court will likely overturn the Federal Circuit's decision. While each of the Justices

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[5] Brief of Respondent in Opposition to Petition for Writ of Certiorari at page 1, Vidal v. Elster, No. 22-704 (2023).
[6] Brief of Respondent in Opposition to Petition for Writ of Certiorari at page 1, Vidal v. Elster, No. 22-704 (2023).
[7] *Id.* at 15.
[8] Petition for Writ of Certiorari at page 6, Vidal v. Elster, No. 22-704 (2023).
[9] Petition for Writ of Certiorari at page 2, Vidal v. Elster, No. 22-704 (2023).
[10] Brief of Respondent in Opposition to Petition for Writ of Certiorari at page 15, Vidal v. Elster, No. 22-704 (2023).

appeared to have different reasons for supporting this decision, this decision is justified on the grounds that failure to register a trademark did not infringe on Elster's right to free speech.

II. Free Speech and Viewpoint Discrimination

The First Amendment protects free speech regardless of political, religious, cultural, or other beliefs. Traditionally, the Supreme Court has held that trademarks constitute speech, and that failure to register a trademark infringes on one's ability to speak freely. In *Matal v. Tam*, the Supreme Court held that the registration of a trademark couldn't be denied on the basis that the trademark was disparaging or brought contempt to a living or dead person or group of people.[11] Through doing so the Supreme Court affirmed that, in *Tam* at least, trademarks are a form of speech.[12]

Established in *Rosenberger v. University of Virginia*, viewpoint discrimination, a limitation on free speech, occurs when particular viewpoints, such as political, religious, or social views are targeted and discriminated against.[13] Even if a law or act does not explicitly censor or discriminate against a viewpoint, the law may still be overturned if the effect or operation of the law results in discrimination against a viewpoint. According to Elster, this is the case for section 1052(c). Elster argued that 1052(c) violated his free speech rights through viewpoint discrimination.[14] Elster claimed that a trademark containing negative speech regarding someone, such as Trump, was unlikely to receive that individual's consent.[15] Since Elster's

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[11] *Matal v. Tam.*, 582 U.S. 218 (2017).
[12] *Id.* at 223.
[13] *Rosenberger v. University of Va.*, 515 U.S. 819 (1995).
[14] Brief of Respondent in Opposition to Petition for Writ of Certiorari at page 15, Vidal v. Elster, No. 22-704 (2023).
[15] *Id.* at 15.

potential trademark consisted of criticism of a public figure, Donald Trump, Elster argued that his statement was political speech.[16] Elster concluded that since his political speech was unlikely to receive consent, and ultimately be registered as a trademark, his viewpoint was discriminated against.[17]

While trademarks have been considered speech in cases such as *Tam*, it is unclear if 1052(c) truly limited speech in Elster's case. Vidal argued that trademarking is a government benefit and that 1052(c) is simply a condition of that benefit.[18] Restrictions on speech have long been differentiated from government benefits.[19] A restriction on speech prevents a person from saying something or communicating a message, while a government benefit is an additional protection or opportunity that one can apply for. In this case, the government benefit is the opportunity to have a trademark registered, and the condition is 1052(c).

Because of 1052(c)'s nature as a condition of a government benefit, Vidal argued that failing to register a trademark did not infringe on Elster's free speech. Elster is still able to say "Trump Too Small," print that message on t-shirts, and sell those t-shirts.[20] While Elster may not be able to trademark this message, nothing is stopping him from using it or saying it in other ways. Since Elster's free speech is not being infringed upon, Vidal argues that no viewpoint is being discriminated against since the condition itself is "viewpoint neutral."[21] According to Vidal, the condition is viewpoint-neutral as it "does not consider whether the mark is flattering, critical, or neutral with respect to the named individual."[22]

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[16] *Id.* at 2.
[17] *Id.* at 15.
[18] Transcript of Oral Argument at page 6, Vidal v. Elster (2023) (No. 22-704).
[19] Transcript of Oral Argument at page 6, Vidal v. Elster (2023) (No. 22-704).
[20] *Id*. at 3.
[21] *Id.* at 4.
[22] *Id.* at 4.

III. Application of *Matal v. Tam*

Both the appellant and respondent relied heavily on *Tam* for the justification of their arguments. Vidal argued that *Tam* differs from *Elster* because in *Tam* the trademark they were seeking to register had true value as a source identifier.[23] The trademark addressed in *Tam* was a band's name that had originally been rejected as it was considered disparaging.[24] Vidal acknowledges that in *Tam* the trademark had meaningful value and to reject it would mean that the band would need to select a name that is nonrepresentative or insufficiently representative of their group.[25] Vidal contrasts this with the case at issue. In Elster's case, rejecting the trademark would not mean that Elster is unable to freely speak or express himself since he is still able to use the message "Trump Too Small" in several ways.[26]

Elster views *Tam* as analogous in the way they view trademarks as speech rather than a government benefit. In *Tam,* the Supreme Court rejected the idea that a trademark was considered a government subsidy or benefit.[27] Justice Samuel Alito identified government benefits as ones that provide the applicant with a cash subsidy or some equivalent.[28] In both *Tam* and *Elster*, no cash benefit or equivalent is given to people who successfully register a trademark. This differentiation poses a concern for Vidal's ability to secure, at minimum, Justice Alito's vote.

It is also worth noting another key difference that may result in the Justices swaying away from the decision made in *Tam.* The disparagement clause that was at issue in *Tam*

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[23] *Matal v. Tam.*, 582 U.S. 218 (2017).
[24] *Id.* at 229.
[25] Transcript of Oral Argument at page 32, Vidal v. Elster (2023) (No. 22-704).
[26] *Id.* at 3.
[27] *Matal v. Tam.*, 582 U.S. 218 (2017).
[28] *Matal v. Tam.*, 582 U.S. 218 (2017).

discriminated on the basis of a viewpoint.[29] The clause forbade registering trademarks that were "disparaging," without any clear way of determining what qualified. In doing so, it discriminated against viewpoints that might be socially unaccepted or crude, but are nonetheless protected by the First Amendment.[30] Unlike the disparagement clause, section 1052(c) uses a clear-cut policy that applies regardless of what the trademark says or the viewpoint it purports.[31] This differentiation may be an important one in settling the question of whether 1052(c) results in viewpoint discrimination.

IV. Expectations for the Decision

While Justice Alito may be a difficult vote to secure, based on the logic he applied in *Tam,* it appears like many of the Justices are prepared to overturn the Federal Circuit's decision. Justice Sonia Sotomayor, in particular, seems convinced by the claim that no speech is restricted by 1052(c) and that this section is a condition on a government benefit. During oral arguments, Justice Sotomayor shared her stance on the issue, saying "The question is, is this an infringement on speech? And the answer is no."[32] This is a point Justice Clarence Thomas seemed to agree with, as he questioned Elster's counsel on what speech was being burdened.[33]

Justice Neil Gorsuch also seemed inclined to overturn the Federal Circuit's decision but based his discussion on history as opposed to the argument that no speech is restricted.[34] Justice Gorsuch noted the United States' tradition of allowing content-based restrictions on trademarks that utilize some names, including a living person's name.[35]

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[29] *Matal v. Tam.*, 582 U.S. 218 (2017).
[30] *Id.* at 229.
[31] 15 USC § 1052.
[32] Transcript of Oral Argument at page 20, Vidal v. Elster (2023) (No. 22-704).
[33] *Id.* at 44.
[34] *Id.* at 14.
[35] *Id.* at 14.

Chief Justice John Roberts also discussed an important point that wasn't central to Vidal's argument, but that nonetheless hurts Elster's argument. Justice Roberts questioned whether Elster's ability to register "Trump Too Small" could infringe on other individuals' right to free speech, since they would no longer be able to print that message on shirts and sell them.[36] If Elster was granted the trademark, they'd be the only one who could sell that message.[37]

V. Conclusion

While it appears that the Supreme Court will side with Vidal and overturn the Federal Circuit decision, it will be interesting to see which of the various explanations is adopted by the majority. If the Supreme Court holds that trademark registration is a government benefit and does not restrict free speech, this could limit the amount of free speech cases regarding trademarking. Alternatively, if the Supreme Court continues in differentiating trademarks from government benefits, as they did in *Tam*, there could continue to be an influx of First Amendment-related cases.

Note from the writer: It is important to note that this piece was published on December 3rd, 2023, prior to the publishing of the Supreme Court's final decision for *Vidal v. Elster.* Any arguments made in this article are based on the available case information and oral arguments.

[36] *Id.* at 60.
[37] *Id.* at 60.

Legal Ramifications of Social Media's Effects on Minors

Writer: Laura Dobel

Editor: Jenny Sanchez

I. Introduction

The advent of social media has undeniably transformed the way we communicate, connect, and share information, particularly for younger generations. The proliferation of social media platforms has led to various legal efforts aimed at protecting minors from potential danger. This paper explores the legal precautions taken by social media platforms to protect young users and goes into the increasing legal ramifications that these platforms have on minors. Despite the legal protection put in place, the impact of social media on minors is escalating, necessitating a reevaluation of existing laws and regulations.

II. The Rise of Social Media

Social media's rise in popularity has been a digital revolution right before our eyes. Popular media platforms such as Facebook, Instagram, Twitter, and TikTok have all become an integral part of the daily lives of many, especially minors. Statistically, 95% of all teens from the ages of 13-17 use social media platforms. The explosive growth of social media usage among young people has been accompanied by heightened legal activity. Concerns over the impact on minors have prompted lawmakers to examine the legal landscape, demand action, and take matters into their own hands. Various states in the United States have been actively crafting legislation to address the involvement of minors and social media. For example, there have been efforts to establish minimum age requirements for social media usage, such as the [1]Protecting Kids on Social Media Act, a federal bipartisan bill introduced in 2023. This act aims to prohibit

[1] Protecting Kids on Social Media Act, H.B. 1, (2023).

minors under the age of 16 from using social media unless a parent or guardian provides their consent. The rationale behind this legislation is to shield minors from potential online risks. Risks such as: cyberbullying, inappropriate content, privacy concerns, etc. While they have good intentions, these efforts raise questions about the feasibility and practicality of age restrictions and parental consent requirements.

III. Taking Action

Social media platforms have recognized the need to protect their younger users and have implemented various legal precautions. One of the more common safety requirements for them is setting a minimum age requirement, typically 13 years, as part of their terms of service. These age restrictions are intended to prevent younger children from accessing social media platforms. Research indicates that users below a certain age may be ill-equipped to navigate online risks and make informed decisions[2], which is why they should not be on the platforms. Content moderation and reporting systems are another vital legal measure. These systems allow users to report inappropriate or harmful content, leading to its quick removal and the suspension of accounts that break community guidelines. Platforms like YouTube have gone further by introducing YouTube Kids. YouTube Kids is a child-friendly counterpart designed to filter content suitable for young audiences. Netflix also added a children's option to their platform that only allows kids to watch kid-friendly content. These efforts aim to address the legal ramifications of minors encountering harmful content on social media.[3] In addition, the Children's Online Privacy Protection Act, also known as COPPA, imposes requirements on

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[2] *Will legislation actually keep teens off social media?* (2023), *available at* https://www.governing.com/policy/will-legislation-actually-keep-teens-off-social-media#:~:text=State%20 lawmakers%20have%20been%20 trying,the%20user%20is%20aware%20that.

[3] Jesse Greenspan, *Social media can harm kids. Could new regulations help?* (2023), *available at* https://www.scientificamerican.com/article/social-media-can-harm-kids-could-new-regulations-help/.

platforms to obtain verifiable parental consent before collecting personal information from children under 13. This legal measure aims to protect minor's personal information and privacy, resulting in reducing risks associated with data breaches and the unauthorized collection of data.

IV. Harmful Effects

Despite these legal precautions, the effects of social media on minors are increasing tremendously and giving rise to various legal ramifications. Cyberbullying stands out as a critical concern. The capability in which individuals can anonymously target and harass others on social media platforms has led to an increase in cyberbullying cases among minors. Overall, around 27% of minors have reported their experience with getting cyberbullied. This can lead to emotional distress, low self-esteem, and in extreme cases even suicide[4]. The addictive nature of social media and constant exposure to curated content contribute to detrimental effects on minor's mental health. Issues such as anxiety, depression, and low self-esteem are exacerbated by the pressures of comparing oneself to others, which are often perpetuated on popular social media platforms. The legal consequences of these effects may involve claims of negligence against platforms for not doing enough to protect their users.[5] Inappropriate and harmful content remains a persistent concern. Minors may inadvertently or intentionally access explicit content, raising concerns about exposure to age-inappropriate material and the potential legal repercussions for platforms. Data breaches and unauthorized collection of minors' data also pose significant legal challenges and may violate privacy laws. This then leads to potential consequences for such platforms.[6]

V. Conclusion

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[4] *Id.*
[5] *Id.*
[6] *Summary Social Media and Children 2023 Legislation*, National Conference of State Legislatures (2023).

The legal precautions that social media sites enforce to protect minors using their platforms are appreciated and demonstrate the industry's commitment to addressing the concerns of policymakers and the public. However, the effects that these platforms continue to have on minors are increasing, leading to mounting legal ramifications. Cyberbullying, mental health concerns, and exposure to inappropriate content have emerged as significant legal challenges. To address these issues, a balance needs to be developed between protecting minors and preserving the principles of free expression. There is a strong need for developed compromises between social media platforms, lawmakers, and child advocacy groups to revisit and adapt the legal framework to reflect the evolving media platforms and mass media. Moreover, the responsibility to protect minors on social media is a shared one among many. It involves not only legal measures, but also active involvement from parents, educators, and society as a whole. The pursuit of a harmonious coexistence between minors and social media, within the framework of the law, remains an ongoing and dynamic challenge that needs our help.

The Nature of Agritourism: A Plea for Abuse Prevention

Writer: Sebastian Jean

Editor: Anya Finley

I. The Economic Reality of Farming in Florida

Farming does not bring in a lot of monetary value on the macro level; farmers are not bringing in a lot of cash. Farm businesses experienced a decrease in average net cash income from 2022 to 2023.[1] This is a big deal because agriculture is a major industry in Florida. According to the Florida Department of Agriculture and Consumer Services, in 2017, there were 114,590 people employed in this sector;[2] the Sunshine State has around 47,500 farms that produce or perform a variety of agricultural services from bee-keeping to grape harvesting (viticulture) and these farms need a lot of people to keep them running. These farms make up nearly 10 million acres of land which is roughly 20% of Florida's total land mass.[3] In 2022, the agricultural sector contributed 7.730 billion dollars to Florida's GDP, which was 1.4 trillion dollars.[4] So despite the usage of so much land and manpower, the agricultural industry only accounted for 0.004% of Florida's Real GDP in 2022. Agriculture is a large part of Florida's history, tracing back to the founding of Florida. Agriculture means a lot to the state and affects every Floridian citizen's life in some way. Protecting the agricultural industry is always an important goal to the Florida Legislature.

II. The Implementation and Intentions of Agritourism

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[1] Farm Sector Income & Finances: Farm Business Income, U.S. Department of Agriculture, Economic Research Service (2023).

[2] Florida Agriculture Overview and Statistics, Florida Department of Agriculture and Consumer Services, *available at* https://www.fdacs.gov/Agriculture-Industry/Florida-Agriculture-Overview-and-Statistics.

[3] Wendy Francesconi & Taylor Stein, *Expanding Florida's Farming Business to Incorporate Tourism*, University of Florida IFAS Extension (2021).

[4] Clifford Woodruff, GDP by State, U.S. Bureau of Economic Analysis (BEA) (2023).

In order to help farmers stay afloat, The Florida Legislature decided to legalize and encourage a new avenue of revenue that could be easily implemented on almost all commercial farms; the Florida Legislature fully leaned into the idea of agritourism. Many have engaged in an "agritourism activity" which has tremendous benefit for farmers facing extreme competition. The Florida legislature defines an "agritourism activity" as "any agricultural related activity consistent with a bona fide farm, livestock operation, or ranch or in a working forest which allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy activities, including farming, ranching, historical, cultural, civic, ceremonial, training and exhibition, or harvest-your-own activities and attractions. An agritourism activity does not include the construction of new or additional structures or facilities intended primarily to house, shelter, transport, or otherwise accommodate members of the general public. An activity is an agritourism activity regardless of whether the participant paid to participate in the activity."[5]

Agritourism was meant to level the playing field between industrial farms and medium and small-sized farms. Not only in Florida, but across the country, medium and small-sized farms have had to compete with their industrial counterparts in a market with rising business costs; this obstacle is one of many that challenge the viability of medium and small-sized farms which makes agritourism that much more important. On March 8, 2016, the former governor of Florida, Rick Scott, signed House Bill (HB) 59 into law. HB 59 served multiple functions; however, the main function of the bill was to outline the conditions under which agritourism could take place and to revise the definition.[6] Despite this revision, the way the bill is worded is

[5] Fla. Stat. § 570.86 (2019).
[6] Ledger Staff Report, Gov. Scott signs agritourism bill in Lakeland, https://www.theledger.com/story/news/2016/05/26/gov-scott-signs-agritourism-bill-in-lakeland/27144540007/

problematic for a few reasons. Agritourism in the state of Florida needs more regulations because of the lack of definitions, loose parameters, and high potential for abuse.

The way that The Florida State Legislature has defined it now basically deems any activity that takes place on a farm as an agritourism activity. Some popular agritourism activities include weddings, U-pick farms, winery tours, horseback riding, corn mazes, petting zoos, and many, many more. As long as an activity satisfies one of the prongs, it qualifies. The spirit of agritourism is to provide agriculturally based establishments an opportunity to bring in additional revenue by giving the general public the chance to derive recreational, entertainment, or educational value from the property. One of the most popular types of agritourism activities are weddings, which does not fall into any of the three categories listed above.

III. Agritourism Abuse in The Gerald P. Zarrella Trust et al. v. Town of Exeter et al.

A wedding on agricultural land does not inherently provide the general public with any recreational, entertainment, or educational value. However, because the Florida Legislature accepts "ceremonial activities" as agritourism, it still qualifies. There is no legal definition of "ceremonial" found in the Florida Statutes resulting in its meaning being vague and at the discretion of the people. Theoretically, any ceremony could qualify despite the lack of value it provides in regard to public recreation, entertainment, and education.

Agritourism's inclusion of weddings opens the door to "farms" in which the primary purpose is hosting weddings as opposed to actual farming; these farms utilize the rustic aesthetic, but hold none of the agricultural value. A prime example of this comes from Rhode Island. *Gerald P. Zarrella Trust v. Town of Exeter,* a property owner, Gerald Zarella, was hosting weddings on an agricultural property called "Gerald's Farm."[7] In 2011, the property was

[7] *Gerald P. Zarrella Trust v. Town of Exeter*, 176 A.3d 467 (R.I. 2018).

enjoined from using the property to host weddings unless it was superseded by statute. In 2014, Zarrella argued that hosting weddings on the property was an "agricultural operation" and thus fell under the states Right to Farm Act, which would protect Zarella's right to continue hosting weddings on the property by superseding the injunction. The Supreme Court of Rhode Island found that weddings were not a part of the definition for "agricultural operation." In Florida, Zarella would have been completely justified in using the farm as a wedding venue.

IV. Agritourism Abuse in Webster Twp. v. Waitz

Another example comes from Michigan. In *Webster Twp. v. Waitz*, a couple bought a residential property that had a barn on it and decided to start using the barn to host wedding receptions and other such events.[8] The township gave permission for this activity under the condition that the usage as an event venue came second to the primary usage as a residential dwelling. Ultimately, the property attracted a lot of attention due to frequent usage and the construction of a parking lot. This attention led the township to conclude that their agreement had been broken and that the property use had shifted from primarily residential to primarily commercial. The Court of Appeals agreed with the township. This is another case that would have gone the other way in Florida. Based on the statutes of other states, Florida should narrow down the purpose of agritourism and then narrow down the definition to reflect that change. A non-farming couple tried to take advantage of the law to gain personal benefit and were rightfully punished; in Florida, they would face no legal troubles because of how the Florida Legislature defines "farms."

The definition of a "bona fide farm" is "good faith commercial agricultural use of the land."[9] In the Florida Statutes, the status of a bona fide farm is completely left to the discretion of

[8] *Webster Twp. v. Waitz*, No. 325008 (Mich. Ct. App. 2016).
[9] Fla. Stat. § 193.461 (2002).

the property appraiser. The property appraiser is also the sole arbiter of whether or not a property qualifies as agricultural land. The wording of the statute details everything that the standing property appraiser *should* take into account. *However, with no hard criteria as to what truly defines a farm, the statute* leaves the sole decision up to the property appraiser; this means there is no standard parameter(s) that all farms must adhere to. Due to this, there are massive variations in what properties qualify and fail to qualify as agricultural land. Some states require properties to allocate a certain percentage or amount of land to agricultural activities or that agricultural property be a certain size. Florida has no such restriction which ultimately increases the risk of abuse in agritourism.

V. Conclusion

The Florida Legislature needs to place some restrictions on agritourism activities because of its unclear definition, vague parameters, and risk for abuse. Agritourism started as a way to give farmers an additional source of income to help combat against rising costs. The spirit of agritourism was to help give the general public a place of entertainment, recreation, or education. Some activities that fall under the current definition of agritourism provide none of the things mentioned above to the general public. The lack of clarity on some fronts opens the door to non-farmers potentially co-opting agritourism and taking revenue from those that actually need it. Small-medium sized farms already have to compete with their industrial counterparts, paving the way for more competitors, who do not meaningfully contribute agriculturally, is a complete disservice to the owners of those small-medium sized farms. Florida needs more guidelines and parameters that leave no room for interpretation. Florida needs to protect farmers.

The Redundancies of Legalese

Writer: Valiant Broussard

Editor: Dina Fakhar

I. Introduction

There are more than 40 million lawsuits filed every year within the US, and that number only continues to grow.[1] With this in mind, it is undeniable that legal text governs our everyday lives. Whether that be through a traffic ticket, lease agreement, or a call to jury duty, legal text has a deep effect on our lives. Thus, it has become exponentially more imperative that everyone is able to interpret and navigate the increasingly complex language and sentence structure which litters legalese. In this article, I explore the assertions that legalese *is* overly complex to the layman, and examine how legalese *can* be abbreviated, having its intricacies unwoven to the legally unstudied. We all live in a society governed by the law, and not everyone wishes to be burdened with the intricacies and complexities of analyzing and studying legal doctrines. However, losing this audience (i.e., the main group affected by the law) creates a paradox in which legal text is written to be read by those who study it, while still affecting those who must live with the consequences. This relationship creates harmful scenarios in which an artificial need for lawyers arises, simply to decipher the message encoded within these documents that have been lost to the unstudied person. For these reasons, it is imperative that legalese be simplified. Therefore, this article explores what makes legalese so complex, argues how it can be simplified and analyzes claims against the simplification of legalese.

For the sake of this article, "legalese" refers to the specialized terminology and complex sentence structure used by those in the legal profession. Moreover, "layperson" refers to

[1] U.S. Financial Education Foundation, *Frivolous Lawsuits*, *available at* http://ogdenpage.com/frivolous_lawsuits.htm.

someone who has little to no legal experience. Finally, “plain English” refers to the absence of legalese, and what it entails. Essentially, plain English is speech that is common to the layperson and does not need to be studied or analyzed for its meaning.

II. Complexity

To start, I would like to address what exactly makes legalese so complex. In James Hartley's article "Legal Ease and 'Legalese'," Hartley examines the conventions of legalese. In this article, he asserts that one of the main issues within legal literature is the vocabulary that it is littered with and its unfamiliarity to an unstudied reader. For instance, Hartley finds that 75% of the UK population has difficulties with the following phrases commonly found within legal writing: without prejudice notwithstanding, malice aforethought, aid and abet, executors, ultra vires, inter alia, ex-officio escrow, a priori, sui generis, and by virtue of.[2]

Personally, as someone leaning into future legal education and profession, I can define a few of these phrases, but the majority of them are still foreign to me. As noted, the vocabulary within legalese does not lend itself to the inexperienced reader. Surprisingly, the vocabulary is not complex due to it being particularly “legal-specific,” but rather due to what the vocabulary is replacing. For instance, often other professions will have jargon that describes words and concepts that are almost entirely exclusive to that profession. A financial advisor, for example, will often use terms such as fiduciary, open architecture, wirehouse, and more.[3]

To greatly simplify, a fiduciary refers to an individual or company legally bound to work in the best interest of a client and provide the highest standard of care. Additionally, open

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[2] James Hartley, *Legal Ease and ‘Legalese’* (2000).

[3] Karen Hube, *Financial Advisor Glossary: Terms You Should Know When Shopping for an Advisor* (2022), *available at* https://www.barrons.com/advisor/articles/financial-advisor-glossary-terms-you-should-know-when-shopping-for-an-advisor-51652381812

architecture refers to an investment platform that includes an advisor's in-house and third-party investment products.

Within the context of a financial advisor, and the economic space, these definitions are used to define *new* vocabulary that are exclusive to navigating the financial world. Defining these terms are necessary to label specific instances that commonly arise within a financial profession. This directly contrasts with the aforementioned vocabulary that is often found within legalese. For example, *inter alia*, essentially means "among other things,"[4] while *sui generis* means "unique."[5] As indicated, the legal vocabulary above does not lend itself to profession-specific *new* vocabulary, rather it replaces common vocabulary that would create the same effect. This vocabulary uses extremely expensive word choice. The vocabulary above is both difficult to understand, and when understood, fails to provide any extra clarity or introduce *new* concepts that are exclusive to the legal field. One not only has to clear the hurdle of defining the word but also must face the drab conclusion that a term they are already familiar with could've been used instead. Now, not to suggest that the legal field does not contain vocabulary that is exclusive to the law, but the specific words Hartley refers to, which over 75% of UK citizens fail to understand, often are "higher-brow" replacements for ordinary terms. Overall, complex word choices tend to clutter legalese, which can be easily resolved with a less studious word choice.

The complexity of legalese can be further explained by its intricate sentence structure, littered with clauses. Elmer A. Driedger, former deputy minister of the Canadian Department of Justice, articulates this better than I ever could:

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[4] Collins, "Inter Alia," Collins Online Dictionary (last accessed 2023), *available at* https://www.collinsdictionary.com/us/dictionary/english/inter-alia#:~:text=phrase%20%5BPHR%20with%20cl%5D,%5Bformal%5D.

[5] Merriam-Webster, "Sui Generis," Merriam-Webster.com Dictionary (last accessed 2023), *available at* https://www.merriam-webster.com/dictionary/sui%20generis

> My main criticism of common law legislation is that sentences are too long. This is a characteristic of English writing generally and not just of legislation. It seems to be thought to be a great intellectual achievement to write one sentence consisting of three or more main clauses, each modified by as many subordinate clauses as can be worked in grammatically.[6]

Often, legal writing is filled with clauses that, while containing context for the sentences, which technically add content to the sentences, leave the reader constantly, for the duration of the sentence, waiting for the sentence to end, thus making the longer sentences more harmful, and constantly making them re-define what the sentence means. This phenomenon occurs in the previous sentence. The mixture of clauses within lengthy sentences forces the reader to constantly change their understanding of the sentence as it progresses. Additionally, the plethora of sub-clauses and clauses causes the reader to lose the meaning of the sentence, while trying to decipher which clauses apply to which sentences. In my opinion, writing should never exist to serve itself. As Driedger puts it, we see it as an intellectual achievement to write these long complex sentences, and we lose what language is meant to do: to articulate a meaning. If the message becomes lost in the language, simply because one wishes to come across as formal or intellectual, the sentence becomes harmful to the message, and subverts from the very goal it is trying to achieve. One should not lose the meaning of their sentences, simply because they are trying to *sound* intellectual. The delivery service—the language—should never come superior to the meaning, but unfortunately, this is a plague throughout legal and English writing.

To avoid conjecture, there is a myriad of evidence to suggest the measurable, harmful effects of legalese. For instance, Robert P. Charrow of the Columbia Law Review conducted an extensive experiment testing the comprehensibility of Columbia jury instructions. To briefly summarize, the experiment consisted of a series of tests in which jury instructions were orally

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[6] Elmer A. Driedger, *A Manual of Instructions for Legislative and Legal Writing* (1982).

read to a collection of jurors. The jurors were then tasked to paraphrase the instructions as a measure of comprehensibility, with varying results. The runners of the experiment then compared the comprehensibility of the unaltered jury instructions to the altered jury instructions. The altered jury instructions removed a series of grammatical variables that theoretically harmed comprehension. Within the text of the jury instructions, the most relevant variables in this article are the "lexical items"(i.e., technical vocabulary), "embeddings" (i.e., use of numerous subordinate clauses), and "negatives" (i.e., words that negate the meaning of other verbiage).[7] Out of the thirty-two instances of lexical items, the average correct comprehension was thirty-two percent; however, when the lexical items were removed, there was a forty-seven percent increase in correct paraphrasing. Only thirty-seven percent of negatives were paraphrased correctly, while double and triple negatives harmed comprehension even more. Finally, embeddings had a correlation between comprehension and the number of subclauses. The average correct comprehension was twenty-two percent. Notably, these jury instructions had phrases with up to *nine* sub-clauses, which were harming subject memory.[8] Overall, this experiment, and many others, indicate statistically significant harm caused specifically by legalese.

III. Why Legalese Must Remain Complex

The academic discourse on this topic is divided between the idea that legalese must be simplified for the layperson's comprehension, and that legalese cannot be simplified due to the clarity it provides within legal discourse. In other words, advocates of legalese argue that legal language preserves accuracy and clarity through its complex rhetoric. However, as the debate has

[7] Robert P. Charrow and Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 1324-1328 (1979).
[8] *Id.*

evolved, academics rarely argue for the necessity of complex legal language. Thus, this section serves to briefly summarize and answer this old discussion, and analyze more unique perspectives on the issue.

To start, many argue that complexity in legalese is necessary to preserve the clarity found among complex topics within legal language. Much of this discussion revolves around the idea of *stare decisis*—the idea that legislation builds upon one another, and often looks back at previous precedents set by legislation in the past.[9] Not only are legal topics marked by their extreme complexity and use of specific language, but the layers of legal concepts created as a result of *stare decisis* often accentuate this complexity. Thus, complex language is considered necessary to navigate the layers of complexity.

While I find that sophisticated language can be necessary, the language commonly found within legal texts goes beyond sophistication for clarity. The language is so *extremely* complex that studies have found that even attorneys not only have trouble understanding legalese but that they prefer simple English.[10] This extends further into weighing the harms of legalese against the benefits. For instance, both businesses[11] and laypersons are often found trapped within the complexities of legalese that hiring an attorney becomes *necessary*. Finally, as aforementioned, much of the complexity found within legalese does not reference new language, rather it uses more unique, harder-to-understand verbiage to reference common concepts. For these reasons, I would assert that legalese does not need to lose *all* of its complexity, but rather the over-complexity that leads to more confusion for its readers.

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[9] Legal Information Institute, *Stare Decisis*, *available at* https://www.law.cornell.edu/wex/stare_decisis

[10] Jesse Greenspan, *Even Lawyers Don't Understand Legalese, New Study Shows* (2023), *available at* https://www.scientificamerican.com/article/even-lawyers-dont-understand-legalese-new-study-shows/.

[11] Shawn Burton, *The Case for Plain-Language Contracts* (2018), *available at* https://hbr.org/2018/01/the-case-for-plain-language-contracts.

Over the previous years, the discussion on legalese has moved to analyzing the effects of legal language's simplification and determining whether this simplification will truly make a difference in understanding the law. For instance, Rabeea Assy from the Journal of Law and Society claims that the use of plain English cannot make the law sufficiently intelligible to its subjects and that they will still need legal assistance from an attorney or lawyer.[12] In other words, even if the *language* is readable, the reader will still not be able to navigate the legal space or *use* the knowledge they gain from the language in any meaningful way. This refers to the concept of "pragmatism" in the simplification of legal language. In October 2019, Zsolt Zodi published an article in the International Journal of Law in Context that discusses the limited pragmatism found within simplifying legal language. Zodi claims there are at least two main non-linguistic issues that plague the practicality of only simplifying legal language. The first claim is that the systemic logic of the law's organization is not structured to solve everyday problems. Laypersons often have the misconception that the law is a comprehensive collection of solutions to everyday problems and that they can simply find a provision within a list of legal code that will offer a solution (i.e., it is just a matter of locating it). However, this is not the case. Legal texts are broken into different logical structures that may not reveal all of the answers or details within a single text. For instance, if one is found in a traffic accident, rules of the traffic code, penal law, party insurance, etc. are all found in different locations.[13] Additionally, even if the relevant information is located, the information may raise the question to the reader on what exactly the next steps are: Who should they call? What should they fill out? Where do they submit articles? It is important to note that these circumstances are not concrete either. Different variables within

[12] Assy Rabeea, *Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language*, 38 Journal of Law and Society 3, 8 (2011).
[13] Zsolt Ződi, *The Limits of Plain Legal Language: Understanding the Comprehensible Style in Law*, 15 International Journal of Law in Context 246, 251-259 (2019).

an accident lead to different outcomes in legal procedure. The concept of the structural uniqueness of the law's documents extends throughout the profession and literature.

Additionally, there are interpretive issues that arise within the law as well, with common language being redefined in a legal context. Words like 'accident,' 'consumer,' and 'damage' all have unique meanings and definitions that do not call for simplification, but call for a person to re-contextualize these meanings within the legal world–something that cannot be revealed by changing the language.[14] Finally, similar to the language found in the legal space, the law also follows specific rules that Zodi claims are difficult to summarize in plain English due to their sheer complexity. To summarize, most of Zodi's claims are in reference to the idea that the law is in its own contained bubble. In the law's bubble, ordinary logic and rules are so drastically different from what the layperson is used to that it calls for someone—an attorney—to interpret and navigate this space through years of study.

This is a common answer to movements whose goals are to simplify legal language. These movements, such as the Plain English movement, assert that the law is often too complex and follows its own rules to the extent that it takes a studied individual to be able to interpret those rules. Based on this claim, individuals like Zodi often claim that simplifying the *language* alone will not be enough to make any noticeable difference in the comprehensibility of legal language to the layperson.

IV. How to Simplify Legalese

In the previous section, I identified some of the claims that are opposed to the simplification of legal language. These claims are mostly centered on the discussion that simplifying the language will not have the profound effect that those who perpetuate the

[14] *Id.*

conversation think it will on the comprehensibility of the law. To this extent, I agree. The Plain English Movement—a movement stemming between 1975 to the present that aims to rewrite legal documentation for understandability—is flawed in its elucidation that only simplifying the documentation will create a significant effect. However, to claim that changing the language has self-contained effects would be sophomoric. See, I find that the Plain English Movement and the simplification of legal language is not an ineffable solution, but rather a representation of a movement that holds the goal to slowly increase the approachability of the law to the layperson in general. Ironically, Zodi and others on the opposing side of this discussion often claim that the Plain English movement is too short-sighted, finding that members believe fixing the language will not fix the overarching comprehensive issues. Ironically, to ignore the *effects* of simplifying the language would be equally as short-sighted.

While the effects of simplifying legalese are limited, optimistically, they represent a start in an ideological shift to make the law more accessible to the layperson. The overarching goal is not to make the law more *readable* (i.e, just make the *documents* themselves more understandable), but rather to make understanding and approaching the law more accessible to those who are unstudied. Thus, that brings me to the practicality of simplifying legalese. I agree with Zodi that simplifying the language is not enough, but one must start simplifying the language to enact an ideological shift both within the law and within the people. From my own experiences, the law seems to have a general air of "pretentiousness" within public opinion, and the language within legal documentation suggests this. As Zodi has asserted, the legal space has carved out its own bubble with convoluted word choice and literally abides by its own rules of logic. As aforementioned, this makes legal text incredibly difficult to approach as someone who has not studied law. By starting to simplify legal language, we demonstrate to the public that the

law is making an ideological shift towards allowing the layperson into that bubble. In a perfect world, this would allow more laypeople into the legal world, which would change to suit their needs.

Changing the legal space needs to happen both within the literature and within the ideology surrounding the law. Zodi himself concedes that it would be outlandish to try to assert that simplifying the language would harm the comprehensibility of the law. In other words, one cannot understand the meaning of the sentence if they don't understand the meaning of the words. Thus, we open the gate to understanding the entirety of the document by simplifying the verbiage.[15] By starting here, and simplifying documentation like the Plain English Movement, the gates to understanding the law gradually begin to open. Simplifying the documentation is a bottom-up approach, which makes what documentation is already present and affecting people's lives more approachable and understandable. With more people wanting to understand the rules which govern their lives, a top-down approach is launched parallel to the bottom-up one. Ideally, this will create an ideological shift to appeal more to those who are newly approaching the law. These are the effects that are stemming from simplifying legal language. I agree that it is not enough to just change the verbiage of the literature, but I believe it is a start in a long journey of popping the bubble in which the law sits in, and making it more accessible to the people it serves.

V. Conclusion

The simplification of legal language has been thoroughly discussed within the overarching academic context. For a myriad of reasons, including unnecessary complex vocabulary, convoluted sentence structure, and a plethora of poor grammatical choices, legal text

[15] *Id.*

has been rendered inaccessible to the layperson. As established, legal texts, and the law in general, determine the rules by which society, and the people within it, operate. The revelation that the people in which the rules govern are unable to understand them makes this issue increasingly more critical. Throughout this article, I established the academic context in which simplifying legalese stands, and how many assert that due to the structure in which legal text follows, simplifying the language will not be a pragmatic solution in helping the unstudied person use the knowledge the text contains. I sympathize with this claim and agree that untangling the prose is not the solution to every legal text issue. Regardless, the simplification of legal language is the gateway to a society that can comprehend the rules by which it is governed. Simplifying legalese is not the catch-all solution to understanding the law, but it represents a start to the necessary ideological shift that will allow the layperson to further their legal comprehension.

CS/SB 102: How the "Live Local Act" plans to address the affordable housing crisis in Florida

Writer: Nicolas Miro

Editor: Seth Williams

I. The Housing Climate in Florida

The warm subtropical climate of Florida is a very compelling attraction to many of the new Floridians flooding into the state. It is no surprise to see then that the median price for a new home in the state has nearly quadrupled in price,[1] going from $179,427 in March of 2015 to $392,922 in September of 2023. Historically, the State of Florida had experienced a steady stream of positive net migration, but it remained consistently within the State's capacity to manage and expand.[2] However, with the acceleration in popularity for remote-work jobs due to the COVID-19 pandemic, the State's aforementioned climate became prime real estate for some of the nation's brightest young professionals and aging retirees. As a result of a shared want for familiar suburban environments, the price of single-family homes has also increased dramatically, skyrocketing from a respectable $187,668 in June of 2015 to $409,487 in September of 2023 and, as a result, forced the state to rapidly begin developing in an unsustainable manner.[3]

A rapid onslaught of new developments was approved across several Florida cities in an attempt to provide the housing necessary to accommodate the state's increasing population. Bills such as HB 671 and SB 682 were drafted in an attempt to streamline the development process for single family homes across the state, creating smaller time frames for local governments to

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[1] Zillow, *Florida Home Values* (2023), *available at* https://www.zillow.com/home-values/14/fl/.
[2] Population Reference Bureau (2020), *available at* https://www.prb.org/usdata/indicator/migration/table/Florida/counties/.
[3] Zillow, Florida Home Values.

overlook and approve of future projects, for example, requiring local governments to act upon proposals within 120 days—both bills died before making it to the governor's desk[4].

II. Housing Crisis

The United States faces a development problem that has reared its ugly head after too many years following unsustainable development practices. From the 1950s "Suburban Boom," caused by bills such as the Interstate Highway Act of 1956, The Servicemen's Readjustment Act in 1944, and others, U.S. states have prioritized the development and maintenance of highways and car-centric roads over costlier forms of transportation. Many U.S. states have seen large increases in development in terms of properties built, but a stark stagnation or even decrease when it comes to population density.[5] Many of the new developments that have been constructed since then have been large single-family homes for families looking to have their own space[6]. An abundance of these developments, however, has caused an extreme shortage of affordable housing options for those that cannot afford to buy a single-family home. According to a report by the Shimberg Center for Housing Studies at the University of Florida using U.S. Census Bureau data, there were approximately 4,785,925 "single-family" or 1-unit homes in the State of Florida, amounting to 64% of the total housing supply in the state in 2015.[7] As of 2022, that number increased to approximately 5,681,098 single-unit homes in the state, once again accounting for 64% of the total homes in use in the state.[8] The state's conservative land use plan along with private developer interests in generating as large a profit as possible have led major

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[4] Residential Building Permits, S.B. 682, 118th Cong (2023).
[5] Kyle D. Fee & Daniel A. Hartley, *Urban Growth and Decline: The Role of Population Density at the City Core* (2011), *available at* https://www.clevelandfed.org/publications/economic-commentary/2011/ec-201127-urban-growth-and-decline-the-role-of-population-density-at-the-city-core.
[6] U.S. Census Bureau, *Structure Type by Occupancy Status for 2022* (2023), *available at* https://data.census.gov/table/ACSDT1Y2022.B25136?q=housing+in+florida+structure+type.
[7] Anne L. Ray, *Shimberg Center for Housing Studies at the University of Florida* (2017).
[8] U.S. Census Bureau, *Structure Type by Occupancy Status for 2022*.

cities in Florida, such as Jacksonville, to become some of the most sprawling in the nation. As a result, rent prices have increased at astounding rates and priced out many people from historically affordable neighborhoods. It is also increasingly difficult to survive off a single salary when living in a home that is above a person's pay grade.

This lack of housing alternatives and monopolization of the housing market by single-family housing units has had trickle down effects that have hurt the wallets of nearly every American. The State of Florida especially fell victim to the consequences of urban sprawl caused by the car-centric design of infrastructure projects from the 50s to the late 2000s.[9] The State's limited land availability, given the protected nature of many of Florida's famous wetlands and other lush natural environments, has caused the state to set itself on track to run out of usable land for development as early as 2070.[10] Areas surrounding major cities like Tampa and Miami have built suburbs as far out as possible before encroaching onto the Everglades wetlands. A study conducted by the University of Florida in partnership showed that at the current rate of development and with the current patterns of land use, the State of Florida is expected to use another 5 million acres of land for new developments within the next 50 years.

III. Zoning Laws

This shift in development patterns is one that is a long time coming. CS/SB 102 is another bill in a line of many that have been passed over the last 10 years in an attempt to make Floridian developments more efficient in their use of land. This pattern can be identified as beginning in 2014 when the Florida Department of Transportation (FDOT) adopted the states first policy oriented at accommodating alternate modes of transportation than cars, the Complete

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[9] Jenny Staletovich, *Sprawl could gobble up another 5 million acres in Florida by 2070* (2018), *available at* https://www.covb.org/DocumentCenter/View/1393/Sprawl-could-gobble-up-another-5-million-acres-in-Florida-by-2070.

[10] *Id.*

Streets policy. This policy is aimed at solving car oriented transport, allowing for denser infill developments across various cities, indirectly promoting walking and other alternative forms of transportation, and the issues that come along with that, as well as promoting more sustainable development patterns.[11] Further laws were passed over this time period, such as s. 163.3177, which aimed at giving local governments and the state government greater oversight ability for comprehensive plans as they develop and take up land that grows in value by the day.[12] All of these bills are part of combined efforts to address urban sprawl, the growing unaffordability of many new housing projects in the state and simply to try and accommodate the state's growing population while ensuring the security of some of the state's protected environments and parks.

IV. Florida's Approach

The Florida Legislature is attempting to address the current housing issue in the state by offering tax incentives for private development companies to continue to invest in communities.[13] CS/SB 102 is a housing bill designed to address the lack of affordable housing that many growing cities in the state are dealing with.[14] It is a wide and encompassing bill providing hundreds of millions of dollars to the two largest statewide affordable housing programs, the State Apartment Incentive Loan (SAIL) and the State Housing Initiatives Partnership (SHIP). The State Apartment Incentive Loan (SAIL) program will receive an increase in funding, specifically meant to create urban infill projects and develop the land surrounding military bases in the state.[15] The bill also increases funding opportunities for the State Housing Initiatives Partnership (SHIP), Florida's prime program aimed at offering funding

[11] Florida Department of Transportation & Smart Growth America, *Complete Streets Implementation Plan* (2015).
[12] Fla. Stat. § 163.3177 (1) (2023).
[13] Fla. SB 102 (2023).
[14] *Id.*
[15] Fla. CS for SB 102 § 32 (2023) (Proposed Fla. Stat. § 420.50871).

for affordable housing opportunities for low-income families and seniors.[16] The bill itself also promotes walkable and affordable housing projects by removing and streamlining the building process for future developers. One example of this is the removal of local governments abilities to impose rent control or enforce any powers that might be similar to rent control as was allowed in the initial draft of SB 102.[17] The state is also providing ad valorem tax exemptions for new developments that dedicate units to affordable housing for households that earn 60 percent or less of the area's median income (AMI).[18] The bill also establishes the Florida Hometown Hero down payment assistance program, aimed at assisting first-time homebuyers that make 150 percent or less of the AMI and are employed by a Florida-based company or corporation.[19] By lowering the barriers necessary to creating new housing projects and tearing down outdated ones, the State of Florida is reinvigorating its housing market and allowing itself to maximize the efficiency of its land use to provide the necessary housing for new Floridians.

[16] Fla. CS for SB 102 § 45 (2023) (Proposed amendment to Fla. Stat. § 125.0103).
[17] Fla. CS for SB 102 § 2(6) (2023) (Proposed amendment to Fla. Stat. § 125.0103).
[18] Fla. CS for SB 102 § 9 (2023) (Proposed Fla. Stat. § 196.1979).
[19] Fla. CS for SB 102 § 35 (2023) (Proposed Fla. Stat. § 420.5096).

The Social Implications of Predictive Policing

Writer: Sydney Whitt

Editor: Madelyn Luther

In a country that is still reconciling the remnants of its racist past, the justice system has been a key player in perpetuating this discrimination. In particular, law enforcement and policing have been condemned for using unnecessary force and prejudiced practices, resulting in harm and slow progress for people of color.[1] Predictive policing, a controversial approach to law enforcement, "is the collection and analysis of data about previous crimes for identification and statistical prediction of individuals or geospatial areas with an increased probability of criminal activity to help develop policing intervention and prevention strategies and tactics."[2] Since these algorithms draw on a limited pool of information, they not only have the possibility of enforcing discriminatory policing but also may produce information that can be used to violate the rights of citizens.[3] As these algorithms delve into the complexities of human behavior, a critical question looms: Are we paving the way for a safer society, or are we unwittingly laying the groundwork for a new era of bias, discrimination, and civil liberties infringement?

AI's pattern recognition capabilities make it a helpful tool, replacing costly and laborious human manpower. One significant place that AI has found itself is within the justice system. In policing specifically, many departments have adopted predictive policing technology. This technology aims to use data of the past to guide policing actions, which is intended to maximize

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[1] Robert O. Motley and Sean Joe, *Police use of force by ethnicity, sex, and socioeconomic class*, 49–67 (2018).
[2] Beth Pearsall, *Predictive Policing: The Future of Law Enforcement?*, 266 (2010), *available at* https://www.ojp.gov/pdffiles1/nij/230414.pdf.
[3] Albert Meijer and Martijn Wessels, *Predictive Policing: Review of Benefits and Drawbacks* (2019), *available at* https://www.tandfonline.com/doi/full/10.1080/01900692.2019.1575664?scroll=top&needAccess=true.

efficiency and better allow for crime prevention. Despite its intentions, however, this form of policing has been criticized as inaccurate and discriminatory.

Usually, a law enforcement department relies on a technology firm to handle the algorithm and its information base, before developing a specific policy and method based on the needs of the department. There is a limited number of predictive policing firms, which means that their systems are based on a finite network of foundations. There has been limited study on this form of policing, and the developing and novel nature of predictive policing coupled with various definitions of what it even entails has presented complications to the law.[4]

As of October 2023, there are no federal laws specifically addressing predictive policing and its legality. However, some have taken steps to address and regulate its presence in their local communities. One example of this is the total ban on predictive policing and facial recognition initiated by the city of Santa Cruz. This ban is the first of its kind and was instituted following a six-month investigation and study of its usage within the Santa Cruz police department. The city cited concerns of racial bias and inaccuracy as reasoning for this decision and they have received mixed reactions from the national political community.

To fully understand the legal and social implications of predictive policing, it is imperative to explore the recent cases that have addressed it. One related ongoing case is Taylor v. Nocco,[5] currently taking place in Pasco County, FL. The plaintiffs of this case state that the predictive policing system used by the Pasco County Police Department created a list of individuals that it deemed likely to commit future crimes. Allegedly, some of the individuals on this list are minors, and a number of their parents are a part of the plaintiff group. The plaintiffs

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[4] P. Jeffrey Brantingham, Matthew Valasik, and George O. Mohler, *Does Predictive Policing Lead to Biased Arrests? Results From a Randomized Controlled Trial* (2018), *available at* https://www.tandfonline.com/doi/full/10.1080/2330443X.2018.1438940.

[5] Taylor, Heilmann, Deegan, and Jones v. Nocco, No. 8:21-cv-00555, (M.D. Fla.) (2021).

have sued on the basis that the actions taken by the Pasco County Police based upon the predictive policing system have infringed upon their constitutional rights, including the Fourth Amendment right to assembly and the right to protection against unreasonable searches and seizures.[6] Deputies repeatedly came to the plaintiffs' homes, demanding to search their property, and threatening them with arrest if they refused. During discovery, attorneys found that the predictive policing algorithm was using criminal records—irregardless of whether they had been suspected of a crime, witnessed a crime, or had been a victim of a crime—to determine targets. Deputies were then instructed by Sheriff Chris Nocco to continuously monitor and investigate these citizens in their families in the hope of preventing them from committing crimes.

This case demonstrates two things. Firstly, it shows how predictive policing algorithms can produce information that lacks context. Though the algorithm was using criminal records, it was also using factors outside of the citizen's control, such as them being suspected of a crime. Secondly, it shows how the use of predictive policing may indirectly lead to unjust actions by the police. Even if the predictive policing algorithm provides information in an unbiased way, the police may use the information in a way that enforces unfair biases or unlawful searches.

Another case where predictive policing ultimately led to violations of the Fourth Amendment is United States v Curry. In this case, four police officers responded to shots fired in a nearby housing complex. Predictive policing data showed the officers that six shootings and two homicides had occurred in the area in recent months. When the officers arrived, there were multiple people walking away from the area. This group of people included Bill Curry, who was reported to be walking with his hands visible at a normal pace. Curry pointed to where the gunshots came from, attempting to aid officers. Officers instructed him to show his hands, and he

[6] U.S. Const. Amend. IV.

was searched and arrested for possession of a firearm as a felon.[7] Curry filed a motion to suppress the weapon on the grounds that it was found during an unlawful detention. The Fourth Circuit determined that, when it comes to suspicionless detention, both their court and other related circuits have typically required that law enforcement officers possess knowledge about a particular suspect as well as specific details about a crime before conducting detentions and searches. This precedent led the majority to determine that the search was unlawful and was not covered under exigent circumstances.

Following this, the Fourth Circuit then established a new guideline: "The exception of exigent circumstances might justify suspicionless detentions if officers can precisely focus their actions based on specific information about a known crime within a controlled geographic area."[8]

The dissident opinion of the court, represented by Judge Wilkinson, characterized the stop as lawful under exigent circumstances, stating that the data provided by the predictive policing algorithm showed that the complex was “beset by repeated violence,”[9] and that officers were acting quickly and reasonably given this data. Further, Wilkinson criticized the majority decision, stating that “police officers on the scene of an unfolding emergency must [now] sit and wait for identifying information, rather than use discretion and judgment to get control of a possibly deadly event, lest the prevention of a homicide violate the Constitution.”[10] Not only is this exactly what police officers have done for decades, this is also a protocol that helps prevent

[7] U.S. v. Curry, No. 18-4233, 4th Cir. E.D. Va. (2020).
[8] *Id.*
[9] U.S. v. Curry, No. 18-4233, 4th Cir. E.D. Va. (2020) (Wilkinson, J., dissenting).
[10] *Id.*

the bias of police officers from affecting their arrests.[11] The discretion and judgment of police is not a reliable source, and this case demonstrates that fact.

The dissenting opinion by Judge Wilkinson demonstrates the slippery slope that comes with predictive policing. In Curry's case specifically, not only did the predictive policing data not assist in finding the shooter, it also made officers feel justified in conducting a suspicionless search of multiple innocent civilians, just as it did in Taylor v. Nocco. Not only was Curry's search unnecessary but it ignored his attempt to aid the police in locating the shooter, ultimately devoting community resources away from the ongoing homicide. In a world where this data does qualify as exigent circumstances, then those with proximity to crime are ultimately afforded a lesser provision of their Fourth Amendment rights.

As demonstrated by the aforementioned cases, a major drawback of predictive policing stems from the possibility of the inclusion of unreliable and biased data in the system. The algorithms often rely on information indicating previous criminal incidents to forecast potential future criminal activities. One flaw in the system lies in the fact that not all criminal activities are documented—certain communities exhibit a higher likelihood of reporting crimes than others, specific types of crimes may go unreported, and law enforcement officers exercise discretion in determining whether to make an arrest.

Furthermore, historical racial and class biases play into these reporting and sentencing decisions. Over-policing of Black and minority communities in the United States is a deeply ingrained phenomenon that dates back to the country's early history. For centuries, Black communities have endured disproportionate levels of law enforcement scrutiny, often stemming from the legacies of slavery, segregation, and systemic racism. The post-Civil War era saw the

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[11] Seth W. Stoughton, *Policing Suspicion: Qualified Immunity and 'Clearly Established' Standards of Proof* (1973).

rise of "Black Codes" and Jim Crow laws, which were used to control and criminalize Black individuals for minor infractions. During the 20th century, the War on Drugs led to a surge in aggressive policing practices in urban neighborhoods, particularly impacting Black communities, resulting in mass incarceration.[12] The profiling and targeting of Black individuals by law enforcement has created a cycle of mistrust, fear, and unequal treatment, contributing to the ongoing tension between Black communities and the criminal justice system. Predictive policing operates using data derived from historical and ongoing over-policing, causing departments to continue the cycle.

Another common source for predictive policing algorithms is gang databases, which are also unreliable.[13] In these, data comes from observations by officers and can place someone in the database for something as minor as a clothing choice in a specific neighborhood. Predictive policing only considers reported crimes, leading to a concentration of policing efforts in those specific communities. Consequently, this concentration increases the likelihood of uncovering additional crimes, resulting in a feedback loop that transforms predictive policing into a self-fulfilling prophecy.

This issue is further exacerbated when these programs produce lists of people deemed likely to commit crimes. The algorithm cannot accurately say that these people will actually commit crimes, but people of color and low-income people are more likely to have proximity to crime.[14] This proximity may lead to them being continuously targeted by police, such as in the

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[12] Ronnie B. Tucker, *The color of mass incarceration*, Explorations in Ethnic Studies 135–149 (2017).
[13] John Villasenor, *Data-driven policing's threat to our constitutional rights* (2021), *available at* https://www.brookings.edu/articles/data-driven-policings-threat-to-our-constitutional-rights/.
[14] Matthew Guariglia, *Technology Can't Predict Crime, It Can Only Weaponize Proximity to Policing* (2020), *available at* https://www.eff.org/deeplinks/2020/09/technology-cant-predict-crime-it-can-only-weaponize-proximity-policing.

Pasco County case, and may lead to arrests for minor offenses other people are getting away with.

One possible solution to this issue may be regulating the sources that these algorithms are drawing from. This solution may help improve accuracy, however, technology firms purposely avoid transparency about their data sources and algorithm inclusions, in an attempt to preserve their income source. In the intricate intersection of technology, law enforcement, and civil liberties, the discussion on predictive policing raises profound concerns about the perpetuation of bias, discrimination, and violations of individual rights. Recent cases, such as Taylor v. Nocco and U.S. v. Curry, vividly illustrate the pitfalls of these algorithms, showcasing how they can lack context and lead to unjust actions by law enforcement. The absence of federal laws addressing predictive policing as of October 2023 further underscores the urgency of a critical examination. The ethical implications are profound, as historical racial and class biases embedded in policing practices contribute to the perpetuation of systemic inequalities. The reliance on unreliable data sources, such as gang databases, further exacerbates the problem, creating a cycle that disproportionately targets marginalized communities. As society grapples with the ethical challenges posed by predictive policing, there is a pressing need for transparency, regulation of data sources, and a comprehensive reassessment of the balance between public safety and civil liberties in the quest for a just legal system.

Legal Buzzer Beater: Assessing Legal Issues in Sports Betting

Writer: Simmi Purohit

Editor: Madison Tilton

I. Introduction

After the passing of the Professional and Amateur Sports Protection Act of 1992 (PASPA), sports betting was federally banned. However, in 2018, the U.S. Supreme Court ruled in *Murphy v. NCAA* that PASPA was a violation of the Tenth Amendment right because it banned sports betting federally. After the consideration of constitutional issues, moral and economic consequences, and the introduction of online betting, PASPA was repealed. This allowed for states to individually set their own legal frameworks surrounding sports betting. Following this court decision, thirty-five states have now legalized sports betting. As a result, the formerly unregulated bootleg market has now become a fruitful free enterprise that is constantly evolving, bringing new legal and ethical challenges along with it.

II. Historical Emergence and Prohibition

Sports betting can be traced back to the Bronze Age. During the first Olympic Games in Ancient Greece, bets would be placed on the results of events like gladiator battles and races.[1] Betting prospered in Roman culture as well; civilians often gambled on head and tails, checkers, and dice games. The concept of betting traveled to England in the 18th century in the form of horse racing, a market that is still in demand today.[2] The earliest form of gambling in the United States traces back to the Thirteen Colonies using lotteries for revenue.[3] A notorious sports

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[1] Kiko Badillo, *History of Sports Betting and its Evolution* (June 18, 2023), *available at* https://playtoday.co/blog/history-of-sports-betting/.

[2] Vanessa DeJesús, *Sports Betting: Its Origins And How It Evolved* (Nov. 10, 2022), *available at* https://fordhamram.com/2022/11/10/sports-betting-its-origins-and-how-it-evolved/.

[3] John T. Wolohan, *Sports Betting in the United States* (2009).

betting scandal occurred in the 1919 World Series of Baseball with the Chicago White Sox.[4] The renowned team was accused of plotting with gamblers, purposely losing the game for money. Eddie Cicotte, pitcher for the White Sox, was unhappy with his low salary and fixed the game by hitting a batter in the first inning for $10,000. A series of suspicious errors and poor plays in critical moments led to an investigation and eventually a trial. Because of this, the MLB Office of the Commissioner and team owners urged Judge Kennesaw Mountain Landis to end all betting in baseball; instead, he banned eight of the participating White Sox players for life.

In 1931, Nevada became the first state in America to legalize casino gambling with the "Wide Open Gambling Bill". Eventually, Nevada began to regulate formal sports betting and released the Nevada Gaming Control Board to monitor activity. A system of licensing for sport books was established, legitimizing the whole sports betting industry in the state. This bill laid the foundation for Las Vegas becoming the national hotspot for gambling. As sports betting globalized and expanded, the United States legalized parimutuel betting in 1930, a pooling system that gathers all the bets, reserving a percentage for the house. In the 1950s, the Kefauver Committee was formed by the U.S. Senate to investigate interstate organized crime, specifically illegal gambling and drug trafficking. The investigations uncovered thirty-two players and seven universities involved in fixing basketball matches. This was classified as a violation of Section 382 of the New York penal code, which criminalizes bribing a sports participant, and led to the conviction of three gamblers for bribery and conspiring.[5]

As unregulated betting developed rampantly and organized crime and racketeering increased, the Kefauver Committee recommended anti-betting bills, leading to the passage of the

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[4] Evan Andrews, *What Was the 1919 'Black Sox' Baseball Scandal?* (Oct. 9, 2014), *available at* https://www.history.com/news/black-sox-baseball-scandal-1919-world-series-chicago.
[5] Joe Goldstein, *Explosion: 1951 scandals threaten college hoops* (Nov. 19, 2003), *available at* https://www.espn.com/classic/s/basketball_scandals_explosion.html.

Federal Wire Act.[6] This 1961 act was a federal law passed to prohibit wire communications for placing bets and sporting events. This hampered cross-state betting and gang betting but led to a prosperous black market for sports betting. This was later reintroduced in 2011 under the Restoration of America's Wire Act (RAWA); however, it specifically pertained to sports betting only. Alternatively, the United Kingdom passed the Betting and Gaming Act of 1960, laying legal foundations for licensing and regulation, taxation, and restrictions, and overall halting any concerns with illegal gambling and gang involvement.[7] In 1964, the Sports Bribery Act was passed, prohibiting sports bribery to influence the result of a game. A number of anti-gambling laws were passed shortly after, supporting the Racketeer Influenced and Corrupt Organizations Act (RICO) with hopes to dissolve gambling within organized crime. Soon after, the Illegal Gambling Business Act (IGBA) targeted individuals who participated in illegal gambling operations and supported only legal gambling services. As a federal law, these acts had federal jurisdiction, allowing interstate investigations.[8]

III. The Professional and Amateur Sports Protection Act of 1992

As more corruption was revealed in national sports leagues, sports agencies urged lawmakers to regulate the industry more. The Professional and Amateur Sports Protection Act of 1992 was passed as a federal law in the United States, banning all sports betting, exempting states that had already legalized betting, like Delaware, Montana, Nevada, and Oregon. This provided national leagues like the NCAA, NHL, NFL, and MLB with the opportunity to seek legal injunctions to stop other states from legalizing sports wagering. Because states with

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[6] C. Estes Kefauver & Herbert O'Conor, *Special Committee on Organized Crime in Interstate Commerce* (May 2, 1950), *available at* https://www.senate.gov/about/powers-procedures/investigations/kefauver.htm.
[7] Rachael Dixey, *Bingo, the 1960 Betting and Gaming Act, the culture industry and... revolution*, 301-313 (1987).
[8] John Holden, *The Sports Bribery Act: A Look Back At Attempts To Aid Integrity* (May 30, 2018), *available at* https://www.legalsportsreport.com/20813/sports-integrity-in-the-us-history/.

developed regulations on sports betting were exempt, they gained a monopoly over sports betting, specifically in Nevada. Following this act, the illegal operations expanded and, with new technology emerging, online black-market betting materialized.[9] Congress shifted their focus to internet gambling and passed the Unlawful Internet Gambling Enforcement Act (UIGEA), targeting financial affairs related to online gambling. Although they outlawed internet gambling, the bulk of the responsibility was placed on banking companies to find and block internet betting transactions. However, the UIGEA exempted fantasy sports, leading to an emphasis on fantasy betting.[10]

IV. *NFL v. Governor of Delaware*

In August 1977, Governor Jack Markell was planning on establishing a sports lottery in Delaware. Since PASPA gave national leagues the right to take legal action against states regarding sports betting, NFL's commissioner, Roger Goodell, wrote a letter to the governor, urging him to stop advances to maintain their integrity. Four months later, all the major national sports leagues sued Governor Markell for violating PASPA.[11] The NFL argued that, if Delaware sponsored sports betting, people would think the NFL did as well, thus challenging the NFL's public image and rectitude. The U.S. District Court of Delaware ruled in favor of Delaware, stating that their sports betting plans did not violate PASPA. However, in July 2009, the MLB sued Delaware again for violating PASPA.[12] After a long period of decisions and appeals, the U.S. Court of Appeals for the 3rd Circuit reversed their decision and concluded that, since

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[9] Jill R. Dorson, *What Is PASPA, The Federal Ban on Sports Betting?* (July 1, 2020), *available at* https://sportshandle.com/what-is-paspa-sports-betting-ban-professional-amateur-sports/.
[10] Steve Ruddock, *The UIGEA Explained And How It Impacts US Online Betting* (2023), *available at* https://www.bettingusa.com/laws/uigea/.
[11] Ryan Rodenberg, *The Leagues Vs. Delaware on Sports Betting: Goodwill, Goodell And The NFL's Fury* (March 28, 2018), *available at* https://sportshandle.com/delaware-sports-betting-lottery-nfl-2009-goodell-markell/.
[12] *Nat'l Collegiate Athletic Ass'n v. Christie*, (D.N.J. 2013).

Delaware wanted to expand their sports betting operations, it was a violation of PASPA.[13] Following suit, New Jersey attempted to introduce their own intrastate gambling operation. However, the *MLB v. Delaware* decision held precedent and PASPA halted any advances New Jersey made.[14]

V. *NCAA v. Governor of New Jersey*

New Jersey was also determined to legalize and regulate sports betting, causing U.S. sports leagues to take legal action in response. The NCAA was determined to make a public stand against sports betting because of how rampant it ran within the league. Corruption and gambling in the NCAA are no unknown feats. Before strict regulations and memorable consequences, players would often throw games to aid gamblers and make money.[15] There are two forms of corruption within teams in the sports field: when an organization sponsors a team with the hidden expectation of raising large amounts of money, and when the final score is orchestrated by players to favor the highest bidder.[16] Governor Chris Christie of New Jersey fought back, claiming that PASPA itself was unconstitutional and should be repealed. Although the U.S. District Court of New Jersey stated that PASPA was constitutional because of Congress's right to regulate interstate commerce, this case was the first step in repealing PASPA. Unhappy with the outcome of the case, the New Jersey legislature passed a bill repealing "regulations prohibiting sports wagering."[17] U.S. sports leagues sued New Jersey again and PASPA granted the leagues a permanent injunction against New Jersey and their sports betting laws.

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[13] *Nat'l Collegiate Athletic Ass'n*.
[14] Rodenberg, *The Leagues Vs. Delaware on Sports Betting* (2018).
[15] Chris Vannini, *College sports gambling scandals: A brief history from the Brooklyn Five to Brad Bohannon* (May 9, 2023), *available at* https://theathletic.com/4499369/2023/05/09/college-sports-gambling-scandals-history-rules/.
[16] Al Figone, *The Dirty College Game* (2019).
[17] *Nat'l Collegiate Athletic Ass'n*.

VI. *Murphy v. NCAA*

New Jersey continued its efforts to legalize sports betting even after Governor Christie was replaced with Governor Phil Murphy. Determined, the state of New Jersey petitioned a writ of certiorari for the U.S. Supreme Court.[18] The NCAA strongly opposed this act and all past actions to legalize sports betting that New Jersey had made. On May 14, 2018, in a 6-3 decision, the U.S. Supreme Court announced PAPSA unconstitutional. Justice Sam Alito declared that PASPA violated the Tenth Amendment by making states enforce federal law. This allowed states to decide individually if they wanted to legalize betting.[19] Following the repeal of PASPA, over twenty states legalized some form of sports betting, adding taxes and claiming revenue.

VII. Sports Betting Now

Now, five years after the repeal of the federal ban, thirty-five states have legalized sports betting and most are planning to legalize online operations as well. Betting has become prevalent in all types of sports, including eSports. Forms of online and mobile betting act as a more accessible way to gamble and make live and in-play bets. Global betting allows people from all over the world to participate in international sporting competitions. Online currency has expanded and become an alternative payment method for gambling. Bitcoin is an efficient and fast way to make transactions in sports books. Overall, the Professional and Amauteur Sports Protection Act and its aftermath created a complex legal foundation for sports betting. As the legal framework evolves, changes regarding integrity, revenue, and the general sports industry continue.

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[18] Samuel A. Alito, Jr., *Murphy v. National Collegiate Athletic Association* (Dec. 4, 2017), *available at* https://www.oyez.org/cases/2017/16-476.
[19] *Id.*

Issues with Child Advertising Laws

Writer: Kendall Harris

Editor: Madelyn Luther

Countries around the world have increased regulations and censored certain kinds of advertising to the public, especially to children. One example is Britain, which banned advertisers from targeting young children in their movies and television shows. Compared to many other countries, the United States irresponsibly allows for undeveloped minds to be taken advantage of by advertisers. The laws regulating advertisements targeted towards children do not adequately ensure their safety or mitigate psychological coercion.

In a recent court case, YouTube was accused of targeting children with ads that violated the Federal Privacy Law.[1] This law was enacted by The Privacy Act of 1974, which states that the individual has control over how their information should be handled online. The Federal Trade Commission ordered that Google and YouTube pay a lump sum of about $170 million due to their violations, which included collecting children's data without parental consent, which violates the Children's Online Privacy Protection (COPPA).[2] This data is ultimately given to profit-driven advertisers to have better targeted marketing plans. In addition, YouTube decided to tell kid companies such as Mattel and Hasbro that they have a young audience on "lock." YouTube has been quick to say that the company "is today's leader in reaching children ages 6-

[1] Sarah Schwartz, *YouTube Accused of Targeting Children With Ads, Violating Federal Privacy Law* (2018), *available at* https://www.edweek.org/technology/youtube-accused-of-targeting-children-with-ads-violating-federal-privacy-law/2018/04.

[2] The Privacy Act of 1974 § 552(a), Pub Law No. 93-579, (Dec. 31, 1974).

11 against top TV channels" (FTC).[3] These social platforms want to make a profit and are divulging children's information to others without consumer knowledge or consent.

Furthermore, there has been backlash against the advertising of e-cigarettes, which has allegedly been marketed to kids, particularly in the United States. In other countries, there are laws and rules against tobacco advertising due to the health implications of smoking. This pertains to children especially because they are easily influenced. Recently, Juul was ordered to pay $462 million due to its marketing to underage users, which manipulated these young users into believing it was okay and has become popularized for teens across the globe.[4] Advertisers understand the adverse consequences of nicotine and continue to advertise and manipulate the underdeveloped minds of children. This idea that advertisers can easily influence a child's mind is concerning and needs to be evaluated by our government. Children have developing minds, which indicates that they cannot make a rational and informed decision about what is inherently bad or good for their physical and mental well-being. Advertising tobacco to children is not a new issue and in United States v. Philip Morris USA Inc., which occurred in 2006 shows how easy it is for markets to advertise to children. United States v. Philip Morris was a case against 11 defendants and it concluded that they had been lying about cigarettes to promote "new smokers" to try tobacco.[5] The problem here is that "new smokers" are the new generations and without governmental intervention these corporations will continue to do so. In the United States, there are stringent laws in place such as no one under the age of 12 years old is allowed to

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[3] Press Release, FTC, *Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law* (Sept. 4, 2019), *available at* https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law

[4] Erik Larson and Malathi Nayak, *Juul to Pay $462 Million to Six States Over Marketing to Kids* (2023), *available at* https://time.com/6271149/juul-settlement-marketing-kids/.

[5] *United States v. Philip Morris USA Inc.*, 436 F. Supp. 3d 1 (2019).

be advertised to. However, it seems that these laws are not being enforced enough. For example, there were about 70 brand placements in the "Lorax." The "Lorax" is a children's movie and it should be concerning to parents and lawmakers that consumerism is flooding the market of children's products and media.

To be specific, a product highlighted in the "Lorax" was IHOP.[6] which partnered with the movie to highlight new, on-theme pancakes. This is targeted towards children, and increasingly, as technology develops and becomes more user-friendly, children have greater access to the internet or technology to see advertisements. IHOP's flavored pancakes are not healthy, and therefore it seems unethical to target advertisements towards children so heavily. "The average child in the United States views 13 food ads on television each day and food advertising represents approximately 30% of all paid television viewed by children."[7] A barrier to governmental action is the constitutional speech doctrine that allows for commercialism. The courts have yet to take a precedence in relation to protecting children against commercialism in relation to the doctrine. The FTC has the potential to shape this gray area that many advertisers abuse to create this view that eating unhealthy is okay. It has been proven that children lack the proper components to being able to resist these advertisements. The National Library of Science states that even eleven and twelve year olds need cues or to be reminded of to be aware of advertisements which shows that there should be further limitations of advertising towards

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[6] Michael Bennett Cohn, *Biggering And Biggering: The Real Problem With The Lorax Movie Tie-Ins or Business Is Business, And Business Must Grow* (2016), *available at* https://medium.com/@miconian/biggering-and-biggering-the-real-problem-with-the-lorax-movie-tie-ins-639d906140fb.

[7] Jennifer L. Harris and Samantha K. Graff, *Protecting Young People From Junk Food Advertising: Implications of Psychological Research for First Amendment Law*, 102 (2012), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483979/.

younger ages.[8] Another issue with this recurring advertisement of unhealthy products is it allows for the promotion to have normalcy. Harmful products such as e-cigarettes and alcohol have been promoted online. This lack of regulation is causing issues that will be everlasting. Advertisers and media allow for young children to be influenced and this could be eliminated with more laws regarding alcohol placement in television shows and movies that target younger audiences.

To summarize, the need to have a greater understanding of how children are being strongly influenced by the advertising industry is necessary and important for Americans to grasp. Every single day when a child watches YouTube, television, or a movie, there are small cues that will change how they possibly make a decision. The U.S. can implement change by increasing our stringency on child advertising laws. The United States has a responsibility to young citizens and to their parents to help them understand the implications of advertisements and to continue pushing for limitations of actions by advertisers. The United States ultimately needs to be worried about key issues such as how advertisements cause physical harms, financial harms, privacy harms, and cultural effects on children.

[8] *Id.*

The Great American Feast: Dismantling State Street, Vanguard, and Blackrock

Writer: Quinn Summerville

Editor: Kayla Mathai

I. Introduction

The dominance of asset management firms BlackRock, Vanguard, and State Street over the American market has spurred questions over antitrust concerns and possible regulations that might lessen the burden that the control of the firms have on the domestic and global marketplace. This note seeks to unearth the specific concerns, investigate the extent of the power held by the "Big Three," explore the legal framework relating to antitrust laws and other regulatory precedent. This note will then apply antitrust laws and other proposed solutions to the firms and deliver a final analysis on the practicality and justification for dismantling the three firms.

II. Literature Review

Antitrust statutes begin with the Sherman antitrust law, which makes collusion, price-fixing, and anti-competitive agreements between companies illegal, prohibits monopolization, and prohibits attempts to monopolize a market. It is designed to prevent single companies or entities from gaining excessive control over an industry to the detriment of competition. Passed in 1890, it is the foundation of many antitrust statutes and assumptions.[1] It is succeeded in value by the Clayton Act, which prohibits mergers or acquisitions whose effect may be to substantially lessen competition. The Clayton Act also prohibits business practices that may harm competition such as exclusive contracts, requirements ties that require a customer to buy additional products or services from a seller, or serving as a director for a competitor. The Clayton Act seeks to

[1] 15 U.S.C. §§ 1–7 (2020).

capture anticompetitive practices in their incipiency by prohibiting particular types of conduct, not deemed in the best interest of a competitive market.[2] The third main act that enumerated the main tenets of antitrust laws is the federal trade commission act.

The primary law governing the Federal Trade Commission is the Federal Trade Commission Act. This Act, as modified, grants the Commission several key powers, including the authority to prevent unfair methods of competition and practices that are unfair or deceptive and affect commerce, pursue financial remedies and other forms of relief for actions that harm consumers. It also was made to establish precise rules that define unfair or deceptive actions and impose requirements to prevent such actions, collect information, conduct investigations, and compile data about the structure, activities, practices, and management of commerce-related entities, create and deliver reports and legislative suggestions to Congress and the general public. The Federal Trade Commision has an administration-determined role. The position of the US president usually has some say over how the FTC conducts itself, but the prosecution of violations investigated under all of these three acts fall to the justice department to undertake.[3]

To qualify under these restrictions however, an accused company must have engaged in monopolistic acts. The first is price fixing, which occurs when competitors agree to set prices at a certain level, often an artificially high one, rather than letting market forces determine prices. This harms consumers by limiting their choices and raising prices.[4] The next is market allocation. Market allocation involves competitors dividing markets or territories among themselves to eliminate competing with each other in specific areas, limiting consumer choices.[5]

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[2] 15 U.S.C. §§ 12–27 (2020).
[3] *Id.*
[4] 15 U.S.C. § 1, Precedent: United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
[5] 15 U.S.C. § 1 Precedent: United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

Tying and bundling, another monopolistic practice, forces customers to purchase one product or service under a condition of buying another product or service, thereby limiting consumer choice.[6]

Predatory pricing is a monopolistic practice wherein a company sells products or services at prices far below their costs in an attempt to drive competitors out of the market, not necessarily with the intention of raising prices once competition is reduced.[7] The last monopolistic practice is exclusion. Exclusion is designed to exclude competitors from the market unfairly, making it difficult for competitors to access distribution channels or engage in business.[8]

However, antitrust laws aren't the only laws that regulate competition. The Communications act of 1934 establishes national and local caps as well as cross-media ownership restrictions.[9] The national caps limit the percentage of television households in the United States that a single entity can reach through the ownership or control of television stations, set at a level that effectively prevents any one entity from owning television stations that reach more than 39% of U.S. television households. Smaller markets typically have comparatively greater permissive ownership limits compared to bigger markets. These rules are designed to prevent undue concentration of media power at the local level. The Communications Act restricts cross-media ownership, preventing any single entity from owning or controlling multiple types of media outlets within the same market.[10]

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[6] 15 U.S.C. § 1, Precedent: United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[7] 15 U.S.C. § 2, Precedent: Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[8] 15 U.S.C. § 2, Precedent: United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000).
[9] 47 U.S.C. § 251 (2020).
[10] *Id.*

Additionally, the Telecommunications Act of 1996 changed the media ownership rules in the United States. It relaxed restrictions on cross-media ownership, and allowed for more media ownership consolidation. The cross-ownership ban was lifted in certain markets. It also required the Federal Communications Commision to periodically review rules.[11]

There are also significant banking and financial laws that regulate ownership, such as the Dodd-Frank Wall Street Reform Protection Act. The Dodd-Frank Act aimed to prevent institutions from becoming "too big to fail." It doesn't exactly restrict ownership, but it enhances regulatory powers to have oversight and control over financial institutions, particularly those considered systemically important as determined by the Financial Stability Oversight Council (FSOC), which can designate non-banking financial institutions as systemically important. If determined systemically important, the institution is subject to more scrutiny. In 2018, President Trump exempted dozens of U.S. banks under a $250 billion asset threshold from the Dodd–Frank Act's banking regulations.[12]

III. The Dominance of BlackRock, Vanguard, and State Street:

a. The Impact of the Big Three

After the crash of 2008, there was a market rise in passive index funds as an alternative to active funds. After investors were stung by the crash of the housing market, investors opened their eyes to the far cheaper index fund. To put money in a passive fund, investors pay an average of about 10 cents a year per $100 of assets, while active fund investors pay 70 cents. Active funds and passive funds employ different strategies; while active funds buy and sell based on a company or market's short term performance, passive funds seek value in equity-based

[11] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).
[12] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

control, and seldom have portfolio turnover. As a result, in 2023, passive funds outperformed their active counterparts in 58% of cases.[13]

Some concerns over the stability of passive index funds have been raised by prominent experts in the field. Michael Burry, the investor and founder of Scion Capital who correctly called America's subprime mortgage crisis in 2008, is also concerned. He warns that inflows into passive funds are starting to look frothy and akin to the pre-2008 bubble in collateralized debt obligations, a complex structured finance product that is backed by a pool of loans and other assets.

Burry claims that passive index funds have removed accurate price discovery from equity markets. Such funds, by allowing investors to invest in a collection of stocks, do not require analysis at the individual security level.[14]

Due to the investment strategy of passive funds being based in retaining long-term equity and control, the gigantic consolidation of assets in asset management firms is inevitable- however, the scale with which passive management firms have grown since 2008 is staggering, especially within what is colloquially known as "The Big Three."

The Big Three, Black Rock, State Street, and Vanguard, constitute the largest shareholder in at least 40 percent of all U.S. listed companies and 88 percent of the S&P 500 firms. They also own eachother- Vanguard and Blackrock are each other's largest shareholder, and both own a controlling percentage of State Street. The power this wields is enormous: the asset managers can participate directly in the decision making process through the (proxy) votes attached to their investments, and emphasize that they often do. Blockholders with at least five percent of the

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[13] Harvard Business Law Review, "How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It"

[14] Thomas Barrabi. "Michael Burry flags passive investing 'bubble' as market risk." *New York Post,* 3 October 2022.

shares are generally considered highly influential, and shareholders that hold more than 10 percent are already considered "insiders" to the firm under U.S. law.[15]

BlackRock manages nearly $10 trillion in investments. Vanguard has $8 trillion. State Street has $4 trillion. Their combined $22 trillion in managed assets is the equivalent of more than half of the combined value of all shares for companies in the S&P 500. Their success as passive index funds compounds- the bigger they are, the more they can afford to cut fees. BlackRock, Vanguard and State Streets index funds have lowered costs and improved returns for millions of people.

Their market share among passive asset management firms dwarfs any competitor: together they manage over 90 percent of all Assets under Management in passive equity funds. The share of Assets under Management in passive funds over 80 percent for BlackRock, Vanguard, and State Street.[16]

[15] Business and Politics (Cambridge University Press), "The Hidden Power of the Big Three: Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk."
[16] *Id.*

Name	Total AuM (Equity)	AuM in Passive Index Funds (Equity)	Share of Passive Index Funds (Equity)
BlackRock	2,644	2,166	81.3%
Vanguard	2,270	1,839	81.1%
State Street	1,377	1,275	96.9%
Fidelity	1,004	170	16.9%
Invesco	377	85	22.5%
T. Rowe Price	337	30	8.9%
BNY Mellon	247	14	6.9%
Capital Group	838	0	0%
Wellington Mgmt.	476	0	0%
JP Morgan Chase	342	0	0%
Affiliated Managers	336	0	0%
Franklin Templeton	297	0	0%
Goldman Sachs	254	0	0%
Dimensional F. Adv.	245	0	0%
Legg Mason	204	0	0%

Table 1 shows the percentage share of passive index funds shared by the largest passive index funds on the market.[17]

The size and impact of these funds is speeding on a track without end- the momentum isn't stopping on its own. John C. Bogle, founder of the Vanguard Group and former CEO and Chairman, wrote in an op-ed in 2018 that the extreme corporate power is "anti-competitive" in not allowing new funds to enter the passive index fund industry, and found that the voting power controlled by the "Big Three" does not serve the national interest.[18]

b. The Housing Hurdle

2023 has been the worst year since 1984 for home affordability. "The Big Three" firms, with their substantial financial resources, are making significant inroads into the American housing market. Reports suggest that these firms are acquiring homes at a rapid pace, and there are claims that by 2030, institutional investors like these could control a significant portion of the

[17] *Id.*
[18] Bogle, Wall Street Journal, "Bogle Sounds a Warning on Index Funds"

U.S. single-family rental homes market—potentially as much as 40% according to MetLife Investment Management.

For instance, BlackRock has been particularly noted for its involvement in the housing market, focusing on building single-family rental housing that can be managed similarly to multifamily properties, with dedicated property management, leasing, and amenities. This trend raises concerns about the impact on home affordability and availability for individual homebuyers. There was a report of an investment firm, not specifically named as BlackRock by the Wall Street Journal, purchasing an entire neighborhood's worth of single-family homes in Conroe, Texas, indicating the scale of investment activity in this space.

Black Rock has outright denied claims that they are participating in the buy-up of family homes, reporting that "BlackRock is an active investor in the U.S. real estate market, but we are not among the institutional investors buying single-family homes."[19]

Robert Kennedy Jr., a candidate for the 2024 Presidential race, has made the housing buy-up an issue of his campaign. Robert F. Kennedy Jr. has warned that these corporations are buying a large number of homes in the USA and could potentially own 60% of the single-family homes by 2030. Such dominance in the housing market by a few corporate entities could have serious implications for the average American's ability to own a home, as these firms have the financial capability to outbid individual homebuyers.[20]

c. Media ownership

For individuals or entities that own a passive stake in a company that exceeds 5%, which the SEC deems a significant amount, annual reports of 13G filings are routine. These grant

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[19] BlackRock. "Facts on BlackRock Buying Houses." BlackRock.

[20] Pan, Jing. "'They Can Outbid Your Children': RFK Jr. Warns That Corporations Are 'Trying To Buy Every Single-Family Home' In America — And They Are On Track To Own 60% Of Homes By 2030." *Yahoo Finance,* 9 October 2023.

transparency to the investigation into their ownership, showing that the collective owns an insider stake in the 6 media companies that dominate 90% of the media share: BlackRock and Vanguard own 18% of Fox, 16% of CBS, 13% of Comcast, 12% of Disney, and 12% of News Corp. The firms also filed 13G filings for Netflix, Microsoft, Comcast, Meta, Alphabet (Google), Amazon, Fox, Disney, Lionsgate, Roku, Paramount, AMC Networks, Warner Bros. Discovery, Nexstar, and Live Nation. BlackRock is also the largest shareholder in Sinclair Broadcast Group, the owner of 223 television stations across the United States and the Graham Media Group, which owns 40 television stations and several popular magazines.[21]

The big three also owns a controlling interest in the companies that make up the top advertisers on those media platforms- the companies that the media companies are beholden to for revenue. They are oftentimes the top shareholder of the firms or own the top shareholder of the firm.

IV. Implications for Competition and Antitrust Laws

A common misconception about the American financial market is that monopolies are illegal. This is untrue; monopolies are perfectly legal unless paired with anti-competitive conduct. Black Rock, Vanguard, and State Street have not been charged with antitrust violations ever.

The Big Three face significant regulatory oversight through the FTC, SEC, the Dodds-Frank Act, and the FSOC. Despite having the largest position in a vast amount of companies across nearly all industries, they hold a passive position. However, they do have voting rights. The "Big Three" investment firms—BlackRock, Vanguard, and State Street—exhibit varying degrees of support for management decisions in the companies they invest in. According to a

[21] Jennifer Maas, Heidi Chung, Variety Magazine "Who Owns What? Top Investors Shuffle Their Securities Holdings in the Media and Entertainment Sector."

study of 100 key resolutions, BlackRock supported 55% of them, while State Street supported 60%. Vanguard showed comparatively lower support, backing only 28% of these resolutions. The firms made unanimous decisions on 31% of the resolutions, with a 2-to-1 split on 57% of them. State Street was often in the minority, disagreeing with the other two on 27 resolutions, followed by Vanguard on 23 resolutions, and BlackRock being the least likely to dissent.[22]

This leads to criticism from those in congress. The House Judiciary Committee , under the leadership of Representatives Jim Jordan (R-OH), Thomas Massie (R-KY), and Dan Bishop (R-NC), has initiated an investigation into Vanguard, BlackRock, and State Street, along with other entities, for potential antitrust violations related to their promotion of net-zero products and adherence to ESG goals. The investigation is scrutinizing whether their actions to "decarbonize" assets under management and push for net-zero emissions may constitute a violation of U.S. antitrust laws. The concern is that these firms' agreements and collaborations might negatively impact economic freedom and well-being in the U.S.. BlackRock and Vanguard are specifically mentioned for their participation in initiatives like Climate Action 100+ and the Net Zero Asset Managers initiative, which involve collaboration to achieve net-zero emissions.[23]

The ESG advocacy has also drawn criticism from GOP Presidential Candidate Vivek Ramaswamy, who, prior to running for president, started Strive asset management, a firm that directly opposes the push for investment firms towards ESG initiatives. Ramaswamy calls The Big Three “the most powerful cartel in human history.” His proposed solution is to address the

[22] Harvard Law School Forum on Corporate Governance, "Proxy Voting Insights: How Differently Do the Big Three Vote on ESG Resolutions?"
[23] Wall Street Journal, "Break Up the ESG Investing Giants: State Street, BlackRock, Vanguard."

government's role in the ESG movement, suggesting that the invisible hand of the free market has been replaced by an "invisible fist of government" that needs to be restrained.[24]

Robert Kennedy Jr.'s solution to countering the impact of the Big Three is from the housing angle previously outlined. Kennedy Jr. focuses his critique on the housing buy-up making it increasingly difficult for younger Americans to purchase homes. He claims that BlackRock, State Street, and Vanguard are on path to own a significant portion of single-family homes in the U.S., which he ties to a broader agenda known as the Great Reset, advocated by the World Economic Forum. The Great Reset a vision of the global future where private property ownership is significantly reduced, and individuals "will own nothing and be happy."

Robert F. Kennedy Jr. has proposed a solution to the issue of large investment firms buying up single-family homes. The government offers a guaranteed 3% mortgage rate, funded by the sale of tax-free bonds. This proposal aims to make it easier for Americans to purchase homes, with the first 500,000 of these mortgages reserved for teachers. He aims to make millennials and members of Generation Z to be able compete against the Big Three in purchasing residential property.

However, it is unclear how the mortgage offering would affect the mortgage market. While a government-guaranteed low mortgage rate could boost homeownership in the short term, creating the boom that Kennedy jr. is advocating for, it also runs the risk of inflating a housing bubble. If the bubble bursts due to a correction in the market or a default surge, it could lead to a housing market crash similar to the one experienced in 2008.

V. Conclusion

[24] New York Times, "Vanguard Power: BlackRock, State Street, and the Oligopolistic Effects of Passive Investing," (May 12, 2022).

As this note has explored, the unprecedented consolidation of market power by BlackRock, Vanguard, and State Street poses anti-competitive challenges under the current antitrust regulatory framework. While these asset management firms have not been charged with explicit antitrust violations, their vast influence across industries, including media, and housing, raises substantive concerns about market competition and consumer choice.

The goal should be to preserve the dynamism of American markets while ensuring that the concentration of economic power does not impede fair competition, economic freedom, or broader social welfare. While many solution-propositioners are correct in finding a problem, they seem unable to inspire clarity and trust in their proposed solutions, especially within capital markets.

Therapeutic Jurisprudence and Problem-Solving Courts

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I. Therapeutic Jurisprudence

Therapeutic jurisprudence, in essence, allowed for the creation of the problem-solving courts. The authors of the doctrine, David Wexler, Professor of Law at the University of Puerto Rico, and the late Bruce Winick, viewed the role of law as one that could play a therapeutic role, and the consequences produced by such to act as a therapeutic or anti-therapeutic.[1] The aim of therapeutic jurisprudence is to allow for the rehabilitation of offenders without compromising the key cornerstones of the criminal legal system.

In the late 1980s when this doctrine was authored, the "War on Drugs," a piece of public policy that not only treated crack and cocaine as different substances but also prescribed different levels of "danger" to them, notwithstanding the fact that the only difference between the two was sodium bicarbonate. There were unintended, or intended, consequences of the policy, mainly the disproportionate effects on racial and indigent populations. One could assume that two substances that are uber similar would have, at least, similar restrictions regarding the possession of such—but this couldn't be further from reality. An individual was able to have 100 grams of cocaine and be sentenced to the same sentence imposed on someone who possessed only a singular gram of crack.[2] This has since been corrected to 18:1; however, that disparity is still quite large.[3]

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[1] Barbara A. Babb & David B. Wexler, *Therapeutic Jurisprudence* (2014), *available at* https://scholarworks.law.ubalt.edu/all_fac/80/.

[2] *Pub. L. 98-473, title II, ch. II* (Sec. 211 et seq.), Oct. 12, 1984, 98 Stat. 1987

[3] Julia Vitale, *Why the 18:1 Powder to Crack Cocaine is Still Unfair* (2021), *available at* https://interrogatingjustice.org/ending-mass-incarceration/powder-to-crack-ratio-still-unfair/.

This type of policy reiterates the retributive nature that has been ever so common in legislation preceding the civil rights era. At the time, Wexler would have viewed the "War on Drugs" to be such an anti-therapeutic agent that it would inhibit justice for those populations who are vulnerable to mental illness (i.e., addiction, bipolar, schizophrenia) and the pressures that come with a capitalist society (i.e., the poor and homeless populations).[4]

Furthermore, as society progresses, there have been greater developments from legal scholars and the law. For example, *United States v. Booker* established that federal judiciaries need not abide strictly by mandatory minimums, but rather use them as an advisor in making their decision.[5] In *Booker*, the main point of contention was that the judges were using evidence in sentencing that the jury was not privy to, stating it "violated the Sixth Amendment right to trial by jury."[6] This decision no doubt changed the way the law in action worked.

The law on the books is different from that which is practiced—on paper, the *Booker* decision could have sought to become "softer" (or therapeutic) on some crime and "hard" (anti-therapeutic) on more serious crimes, but according to the Department of Justice, below-range sentencing has increased for sexual abuse of a minor and child pornography (trafficking, production, and possession).[7] Another study claimed that a way for sentencing disparities to diminish, or cease to exist, is to limit the unfettered power of the prosecutor that is seen throughout the multiple stages of the criminal legal system (i.e., case selection, grand jury, initial appearance, etc).[8]

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[4] Babb & Wexler, *Therapeutic Jurisprudence*.
[5] Id. citing *Booker*, 543 U.S. at 264 (opinion of Justice Breyer).
[6] *United States v. Booker* (2005), Oyez, *available at* https://www.oyez.org/cases/2004/04-104 (last visited Nov 13, 2023).
[7] Department of Justice, *Fact Sheet: The Impact of* United States v. Booker *on Federal Sentencing* (2006), *available at* https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf.
[8] Mona Lynch & Marisa Omori, *Legal Change and Sentencing Reform in Federal Court: An Examination of the Impact of the* Booker*,* Gall*, and* Kimbrough *Decisions* (2013), no. 243254, *available at* https://www.ojp.gov/pdffiles1/nij/grants/243254.pdf.

The *Booker* decision has the capability to bring about the expansion of problem-solving courts to the federal judiciary. It would stand as a precedent to allow justices to use their discretion under the current indeterminate sentencing model to divert offenders away from the "standard" sentencing model to a more rehabilitative mode; however, this sort of model might not be able to come to fruition, even if the need arose.

Thus, the therapeutic or anti-therapeutic nature of a piece of policy, legislation, or precedent cannot simply be determined by the creation of such—rather, its application and the study of such application as it is used in the broader criminal legal system is required. As mentioned earlier, the law on the books, more likely than not, contradicts the law in action, leading to discrepancies and disparities throughout the dual-court system that is currently utilized.

II. Problem-Solving Courts

Problem-solving courts, also known as specialty courts, are a new phenomenon that emerged in the late 1980s in Miami-Dade County, Florida. This new type of court relies on the foundational research provided by Wexler, as mentioned earlier. There are a variety of different problem-solving courts (e.g., domestic violence, drug, treatment, mental health, etc.), which differ from the widespread traditional application of the criminal justice system—involving the use of a non-adversarial model and sentencing that focuses on rehabilitation rather than incapacitation, retribution, and incapacitation. In Florida, specifically, there is a combined total of 150 specialty courts, mainly consisting of drug (54) and mental health courts (34).

Instead of perpetuating the retributive nature that is associated with the traditional criminal justice system, problem-solving courts allow for offenders to seek help, psychologically or socially, to prevent recidivism (i.e., re-offenders) and, more importantly, to perpetuate a

smooth transition into society. A key distinction in the functioning of the problem-solving courts, compared to traditional courts, is that there is no dispute of guilt that occurs during court proceedings. Instead it tailors to the needs of the offender utilizing professionals, when necessary, in order to develop an individual treatment plan for the offender.

While eligibility isn't uniform across every specialty court, most of them prohibit the offender from being convicted of a felony, regardless of the statute violated. In Florida, drug court eligibility is governed by Section 948.08(6a), Florida Statutes (2023).[9] In layman's terms, an offender must have not been convicted of a violent felony nor been admitted to a felony pretrial program in order to receive eligibility. Additionally, an offender is immediately disqualified if they are being charged with a first degree felony, in accordance with chapter 834.[10] Eligibility is also at the discretion of the prosecuting attorney overseeing the case. There needs to be a formal request to participate in the specialty court along with the offender demonstrating the want to be rehabilitated due to the voluntary participation in the courts.

III. The Efficacy of the Courts

The two major types of specialty courts (drug and mental health) have the most available data in regards to discussing the efficacy of the courts and will be the target of analysis.

Since their inception in 1989, Florida drug courts have been put through rigorous empirical research. The research suggests that the overall impact of the courts is positive on offenders. Proponents of drug courts are often in favor of their reduction in recidivism, their cost-effectiveness (in relation to traditional strategies), and the individualistic treatment an offender is afforded. A study conducted by an independent source concluded, "drug court graduates in the Florida First Judicial District Drug Court had one-half the arrests as their

[9] Fla. Stat. §948.08 (2023).
[10] Ch. 843, Fla. Stat. (2023).

matched comparisons thirty months after participation in the drug court program" (Meyer and Ritter, 2001, p. 1). Thus, these strategies, at least in the First Judicial District, are producing outcomes that align with the goal and overarching doctrine employed by the courts and their judicial officers.

Before evaluating the efficacy of mental health courts, it is important to discuss the psychological health of the incarcerated population. In 2006, the Bureau of Justice published statistics stating that 61% have been convicted of a violent offense, 74% have substance dependency issues, and 63% used drugs within a month of being arrested. Those numbers have stayed relatively the same over the course of the decade that followed. Unfortunately, when analyzing the data, according to Florida statutes, about half of the incarcerated population would have immediately been ineligible for participation in specialty courts. Furthermore, those who suffer from mental illness and substance abuse alike are more likely on average to recidivate if not afforded proper care.

The efficacy of a court generally will be dependent on that court's circumstance and who they seek to help as there is no uniform system for specialty courts. However, it has mainly been reported in broad academia to provide positive results for the offender and allow for cost-effective treatment, as local correctional facilities might not be able to properly care for severely mentally ill offenders. Additionally, graduates of mental health courts have substantially lower recidivism rates, compared to those who did not participate.

IV. Possible Expansion

Although there have been positive effects associated with the creation of problem-solving courts, their expansion is, unfortunately, hyper limited. The limits are placed on the economic constraints of a locality, as well as the social activism and political ideology that encompasses a

locality. The economic constraints mainly come in the form of the additional actors that are required to participate in the process, as well as the localities' economic feasibility due to the courts needing local funding to operate. States do receive federal grants for the continuing operation of a specialty court; however, that funding would, more likely than not, be insufficient if expansion was considered. Additionally, the political ideology of a state can dictate whether the courts could see an expansion in participants. The expansion would likely be bound by the aforementioned statute limiting eligibility and would require the opportunity for previous or violent offenders to gain eligibility. There is a possibility for the specialty courts to serve a broader subset of individuals and allow them to become more productive members of society, while diminishing the monetary burden of incarceration, albeit subject to monetary costs and public opinion.