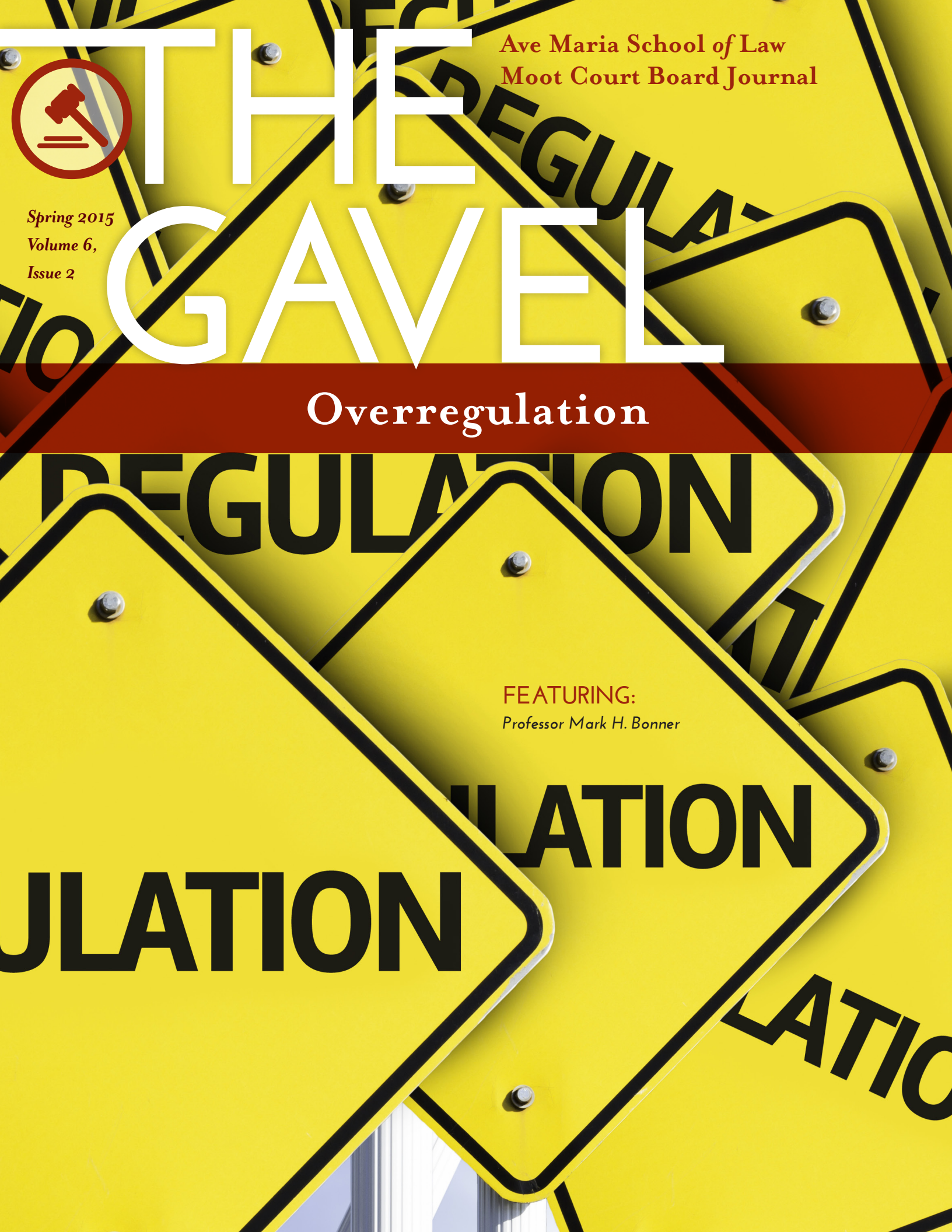

THE GAVEL

Ave Maria School *of* Law
Moot Court Board Journal

Spring 2015
Volume 6,
Issue 2

Overregulation

FEATURING:
Professor Mark H. Bonner

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Volunteer Opportunity to Serve as Judge

for the
Ave Maria School of Law
Moot Court Board
The Saint Thomas More Trial Competition
in
March 2015

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MOOT COURT BOARD PRESIDENT'S MESSAGE

The Ave Maria School of Law Moot Court Board attracts a special kind of student. Our board is comprised of those who have unique litigation skills and a desire to serve the law school through the application of those skills. The board's primary goal is one of service. We serve the law school by representing Ave Maria at local and national competitions. Our goal is to show our adversaries and judges in these competitions that Ave Maria School of Law puts forth students that exemplify oral advocacy and professionalism. Our members willingly take on exciting new work in preparation for these competitions. We believe that it is through this work and preparation that we can also instill in our own student body, a desire to work diligently and faithfully towards a legal vocation.

The Board has been hard at work this year. Many students sacrificed their winter breaks and worked straight through to the Spring semester preparing this edition of the Gavel and practicing for upcoming external competitions.

We had a very strong showing at the New York City Bar National Appellate competition. Jessica French, Monica Kelly and William Stallings represented Ave Maria School of Law. They ranked number one in oral advocacy after the preliminary rounds and their brief was ranked second overall for the region.

Joshua Schueneman and the internal competition committee hosted a very successful appellate competition at Ave Maria School of Law. The Judge H. Bork internal competition was judged by Ave Maria professors, local judges and attorneys and provided yet another opportunity for Ave Maria students to hone their litigation skills.

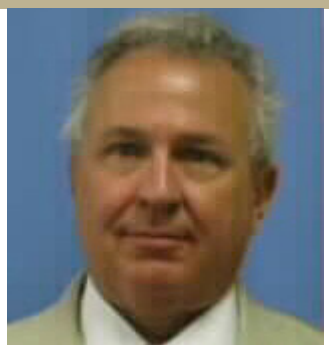
Our board looks forward to the internal and external competitions coming up this Spring and we thank you for your prayer and support as we seek to further a faithful and diligent learning environment at Ave Maria School of Law. I hope you enjoy this edition of the Gavel.

Sincerely,

Christopher Antonino
President, Moot Court Board, Ave Maria School of Law
mcp@avemarialaw.edu

INSIDE

AN OUNCE OF CHRISTIAN VIRTUE IS WORTH A TON OF GOVERNMENT REGULATION



By Mark H. Bonner
Professor of Law, Ave Maria School of Law

The multiplication of legislation and the increasing burden of administrative regulation are akin to a computer virus (or cancer, for that matter): they keep on expanding and expanding. The Heritage Foundation deals regularly with the issue of overcriminalization. Recently I presented a lecture here at Ave Maria School of Law, with Director John G. Malcolm of the Heritage Foundation, sponsored by the Federalist Society. It was entitled "The Criminalization of Almost Everything: Why Both Liberals and Conservatives Should be Alarmed." The Heritage website devoted to this issue is http://www.heritage.org/initiatives/rule-of-law.

God expelled from public schools. There are numerous factors contributing to this: the increasing complexity of social life being one, and the increasing areas of control asserted by the federal government being another. It seems to me that a prime reason for this phenomenon in the law, at least as it applies in the antisocial behavior context, is that our government-run "public" schools have been pushed, bullied, and driven to exclude discussion of God from their teaching and discourse. Now, 90% of America's youth attend and are formed by these schools. This has largely occurred during my lifetime, and has been aided and abetted by decisions of the Supreme Court stifling teaching and recognition of God in public life, and by a national media too timid for, or hostile to, public recognition of God. This has produced several generations of Americans many of whom are untethered from the foundations of our country, and possessing only rudimentary notions of right and wrong, if any at all. While those who believe in God (here I'm talking about the Judeo-Christian God) have a discernable concept of right and wrong, and of reward and punishment for their actions according to their deserts, those who do not, don't.

George Washington thought so. In his Farewell Address of 1796 he said:

"[W]here is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths? And let us with caution indulge in the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

Ambassador Michael Novak, in an address at the Gala Dinner for Ave Maria School of Law on December 5, 2014, quoted the above, and added:

"Given the horrors of the century just passed, who would wish to bet our republic's continuance on a people who have no inner policemen, no *inner conscience*? Where nearly all citizens live by inner policemen, official police forces can be small. Among peoples *without* inner policemen, no number of policemen on the street will suffice."

Ambassador Novak's analysis is also held by Professor Clayton Christensen of the Harvard Business School.[1] Refraining from murder, rape, robbery, arson, lying, cheating, stealing and the like because God commands it and will surely punish its default is a powerful motivator (and consistent with the Natural Law lurking in our consciences). In contrast, the raw ipse dixit of the national legislature or executive branch so commanding is a weak reed upon which to rely. And where legislation/regulation degenerates from requiring the at least morally-neutral to allowing and supporting the morally-obnoxious, it becomes less compelling of acceptance by the people.

Ruling society by means of laws divorced from God can lead to more and more laws seeking to plug every possible loophole or to address every conceivable circumstance, and to harsher and harsher punishment (consider the life sentences for recidivists, and the huge minimum mandatory

sentences for some offenses). This, in an effort to control a citizenry less and less inclined to exercise self-control. The prisons are already full of criminals whose actions warranted their imprisonment, but perhaps if they had been brought up right, taught the difference between right and wrong by their father and mother, supported by their schools and society, they would be free and happy, instead of incarcerated. Telling a person "don't do that because the elected officials say so" is one thing, but a person realizing "don't do that because God says so" is quite another.

The foreseeable effect of driving God from some of our schools and public discourse can be seen in classrooms where the (hopefully extra-curricular) practice of sodomy, fornication, and infanticide are considered to be acceptable behavior, but where no mention of God is tolerated. If 'anything goes" is the mantra taught, it can well be expected to be the lifestyle lived. No wonder our prisons are full, and our society is increasingly chained by burdensome government control.

Legislation and regulation can also mandate affirmative actions (such as filing tax returns, or presenting oneself for customs and immigration inspection upon entering the US), but they are a pale shadow of the Golden Rule, the Beatitudes, the parable of the Good Samaritan, and the Decalogue. The positive virtues of being charitable, kind, loving, brave, self-sacrificing, etc., are quite present in a Christian way of thinking, and almost entirely absent from the current legislative/regulatory regime.

Legislation: a product to sell. I also see a Madison Avenue aspect to over-criminalization. Members of Congress serve for 2-year terms, and in the current milieu of marketing candidates to the electorate, the production of legislation by the candidate is touted as a criterion of effectiveness. 535 Members of Congress (435 in the House, and 100 in the Senate) can produce a steady growth of legislation, above and beyond that necessary for the usual conduct of government. Introducing new legislation is a product to sell to voters; at least to those who benefit from it, or think they do.

Prosecutorial Indiscretion. A less overt area of rulemaking, or the morphing of or nullification of legislation, can be found in abuses in the exercising of executive branch "prosecutorial discretion". Consider:

- the current "amnesty" done by the President under this guise, without action or consent of Congress;
- the abuse of prosecutorial discretion in the Justice Department's fish case (United States v. Yates, 733 F.3d 1059 (11th Cir. 2013), cert. granted 2014 U.S. LEXIS 3064 (U.S. April 28, 2014) (No. 13-7451) (using the corporate-fraud Sarbanes-Oxley law to prosecute a fisherman for throwing some undersized groupers off his boat);
- or its use of RICO laws against pro-life activists (NOW v. Scheidler, 537 U.S. 393 (2003) (RICO violation not made out where abortion protesters did not obtain property from abortion clinics, thereby not committing extortion);
- using a chemical-weapons statute [18 U.S.C. § 229] against a jilted wife who sprinkled chemicals on her husband's mistress's mailbox and doorknob causing skin irritation - Bond v. United States, ___U.S. ___, No. 11-15643 decided June 2, 2014 (such not a chemical weapon under the statute);
- and from another perspective, using vagrancy laws to harry African-Americans. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

There is yet another aspect to consider: laws that remain laws but are not enforced. Congress has passed (and various Presidents have signed) legislation outlawing marijuana trafficking and possession. See, e.g., 21 U.S.C. § 841 (drug abuse prevention and control: prohibited acts). A later President and his Attorney General have unilaterally decided not to enforce those laws, but they're still on the books. This injects an element of chaos into the over-regulated society: some regulations (and laws) mean something, and some don't: all according to the imperial decree of the Executive. In an interesting case currently before the Supreme Court for its Original Jurisdiction docket, weed-smoking Colorado is being sued by its neighbors for the downwind trouble Colorado is causing: States of Nebraska and Oklahoma v. State of Colorado, No. _____, Original (December 2014). See Lyle Denniston, Two states sue to block Colorado marijuana markets, SCOTUSBLOG (Dec. 19, 2014, 8:31 AM), http://www.scotusblog.com/2014/12/two-states-sue-to-block-colorado-marijuana-markets/ ("Two of Colorado's neighboring states, argu[e] that the legalization of marijuana for Coloradans is causing crime problems across state borders… The target… is the part of [Colorado's] scheme that authorizes "the manufacture, possession, and distribution of marijuana." That, [Nebraska and Oklahoma say,] is what conflicts with federal drug law.") Stay tuned.

We need decent lawyers, legislators, jurists, and public officials with sound moral judgment with respect for our legal history and for the rule of law, informed by the Catholic intellectual tradition and the natural law. This is what AMSL seeks to provide.

[1] A brief video clip of Prof. Christensen making this point is available at: http://www.youtube.com/watch_popup?v=YjntXYDPw44&sns=em

COMMON CORE: Is this push for national standards in education good or bad for Florida?

By Mary Fowler

As a former teacher[1], the subject of education is very near and dear to my heart. Florida Statute 1003.42 provides for required courses and instruction to ensure that students meet State Board of Education adopted standards[2], and it is precisely changes to these adopted standards and the state's choice of assessment that every decade seemingly send parents of public school students into an uproar.

In Florida, The Florida Department of Education (FLDOE) is the state's education agency. Headquartered in Tallahassee, the FLDOE governs public education and manages funding and testing for local school boards. Overall, the department supports 2.6 million students, 3,800 public schools and 318,000 full-time staff and more than 180,000 teachers.

Back in the late 90's, Florida adopted the Sunshine State Standards, which began as part of Florida's overall plan to increase student achievement by implementing higher standards. The test selected by the state to be used to measure student achievement was the FCAT. The FCAT was administered to students in grades 3 to11 and consisted of criterion-referenced assessments in mathematics, reading, science, and writing, which measured student progress toward meeting the Sunshine State Standards (SSS) benchmarks. Then, during the 2010-11 school year, Florida began the transition from the FCAT to the FCAT 2.0 and Florida End-of-Course (EOC) Assessments.

In a March 2014 press release[3], Florida Department of Education Commissioner Pam Stewart announced that a new test, the FSA, had been selected to replace the FCAT 2.0 beginning with the 2014-15 school year. The FSA is aligned with the new Florida Standards, which are education standards modeled after the Common Core Standards that have been adopted in 45 states and the District of Columbia. The questions in the FSA are a mix of traditional multiple-choice items and lengthier paragraph responses designed to demonstrate critical thinking[4]. More reading will be required in all test subjects, and answers will have to prove that students understand the concepts behind what they are learning and are not just regurgitating facts.

These standards were launched by state officials and are backed by the federal government, which has offered grants to the states that have adopted them. Some political organizations have raised the concern that by intermeddling with a state's education standards, the federal government is attempting to overreach into the states' affairs. Perhaps to quiet those concerns, Florida changed the name of the standards to the "Florida Standards." Additionally, the State Board of Education has included 99 changes to the Common Core Standards. The board maintains that these changes in math and English language arts now include additional skills that Floridians have identified as important, while also ensuring that students are learning and absorbing the information they need to succeed at higher levels by improving critical thinking and analytical skills.[5]

The FLDOE website contains examples of what is expected of students under these standards. For instance, in English language arts, a student in the second grade should be able to understand key ideas and details in stories when reading literary text. When reading informational text, a student in the second grade should be able to integrate knowledge and ideas from the text. In Math, a student in first grade should be able to place value and have an understanding of operations (to add and subtract), and by the 12th grade a student should be able to use probability to make decisions.

From the beginning, Common Core has been received with complaints from parents, teachers, and other education officials directed at the standards themselves or at the choice of assessment. During a conversation with an old colleague over lunch, she complained that the new standards are written to avoid misinterpretation and misapplication by teachers, but because they reach so far and so deep into concepts they become overly broad, generally rendering them impossible to apply. During that same conversation she also said that the standards are flexible and can be adapted at a district or even a school level. I am not sure how being general and broad is necessarily a negative quality. I no longer work in the classroom, but I can say from experience that a student's success is largely dependent on the teacher and the strategies he or she uses to help the students achieve a particular class objective and meet the standards. In fact, as I remember, one of the most important competencies rated by an evaluator when observing a lesson was the teacher's ability to recognize students' learning differences and plan for them so that every student receives the benefit of the lesson. The standards are just that – standards. They are benchmarks against which students' learning is measured while the teacher in the classroom, together with parents at home, is what helps the students get there.

Sadly, U.S. students ranked average[6] or below average when tested against 65 other countries by the OECD[7] in 2012, which means that either our kids are not as smart as we thought or the rest of the world is getting smarter. In either case, a drastic change is warranted when it comes to education, and Common Core is definitely a drastic change.

Perhaps the real issue people opposing the standards have is the state's choice of assessment under these standards, the FSA. In an effort to prepare students for this radically different type of testing, the FLDOE has created a web-

site where students can go to take practice tests and to become familiar with the system's functionality and test item types. However, parents have complained that the wording of some of the sample problems are confusing. In my opinion, this may seem so mainly because traditionally each subject was its own universe, math was math and reading was reading. However, this new test blends math with reading comprehension, and students are required to actually understand a problem before they begin to solve it. It is not a mechanical function anymore; it requires analytical skills and problem solving skills. Kids need to show their work and often cannot just do the math in their heads. I don't understand how those skills are harmful or detrimental to our kids' education.

However, those skills and that shift in thinking does not happen overnight. It begins in the classroom, where kids are pushed by their teachers to explain their answers, to look for alternatives to the traditional way and to get to the root of a problem. Students do not just memorize the way to solve a problem. By articulating their thought process, kids actually internalize the process and are less likely to forget it later. I believe this is where parents become frustrated. Things are changing on them. Their kids are now required to not only know how to solve a problem but also to explain how they did it and why it is done that way.

My main concern (oddly enough) is the amount of technology that has been incorporated into these standards. For example, a problem on a seventh- and eighth-grade math exam may ask students to write a fact about an equation or rewrite a problem that has been written incorrectly. In doing this, students may be required to build graphs or models for their answers; my question is what will happen when students who don't have frequent exposure to computers are expected to take the exam online and create models or graphs using computer functions? The new Standards and the FSA are forcing school districts to introduce laptop and other electronic devices into the schools and make them part of their curriculums, but we are nowhere near capable of full utilization in the schools. To give you an example, just a couple of years ago when I was teaching, we had students rotate through computers to do benchmark testing because there just were not enough computers to go around. These students that took the tests first were able to sometimes share the questions or the answers with students who would take them later. I'll leave it to the reader to imagine just how reliable those tests results were. Secondly, there are still many students who do not have access to computers and/or internet at home; what are we supposed to do with those students when these tests are strictly available online?

Lastly, parents and teachers have always been concerned that too much importance is placed on this one test (whether FCAT 2.0 or now the FSA), and it is only a one-day snapshot of what the students have learned. Teachers are especially concerned since the first bill Governor Rick Scott signed into law, SB 736, rewrote how teachers are paid and retained across the state[8]. Florida is a pioneer in the effort to base teacher salaries on student performance and give those teachers with the best results the highest raises. This is unpopularly referred to as "Merit pay" and is a reform pillar of former Florida Governor Jeb Bush and the Foundation for Excellence in Education that he founded. The idea is to reward teachers who get the best results or most improvement from their students. Under "Merit Pay," fifty percent of a teacher's evaluation is based on a formula called the Value Added Model, which predicts how students should score on the state's standardized exam, and rates teachers based on how well their students measured up to the predicted score. The other fifty percent of a teacher's evaluation comes from in-classroom observations by school principals. Already this year, teachers' evaluations will determine how much teachers get paid and whether they keep their jobs. Not surprisingly, teachers and their unions object to basing teacher pay on the results of these standardized exams.

However imperfect, and however much time it will take to work out all the bugs present in the implementation of the new Florida Standards and FSA, I feel common core is not necessarily a bad thing for Florida. Common Core asks students why they feel they need to learn and what are they learning. Common Core also focuses on blending subjects together the same way students will need to in the real world. Common Core is not about teaching to a test, it's about getting students to think for themselves. It allows teachers more flexibility in the classroom because it is designed to embrace each student's learning differences and design a class around them, so that every student can master the lesson's objectives. Additionally, it will put Florida on the map competitively when compared to other states, and it allows students to literally pick up where they left off if their parents move to a different county or state in the country. It does not represent another layer of regulation by the federal government, because it still affords each school district the ability to tailor the standards to the needs of the children enrolled in their schools and sometimes to reject testing altogether while maintaining the same level of performance that is expected of students across the country. And lastly, if we are going to keep high paying jobs in this country, if we want to stand a chance at competing on a global scale with countries like China and India, it's time for us as parents and educators to stop babying our kids. It's time for us to raise those expectations, and whether we call them Common Core or something else, I am sure that if we embrace these changes we will see our kids raise themselves right up to meet them.

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[1] I taught math and technology for two years in Collier County

[2] http://www.afloridapromise.org

[3] http://www.oecd.org/pisa/keyfindings/pisa-2012-results.htm (last visited Jan. 1, 2015) The Organisation for Economic Co-operation and Development

[4] http://www.fsassessments.org/training-tests (last visited Dec. 22, 2014)

[5] http://www.afloridapromise.org

[6] http://www.oecd.org/pisa/keyfindings/pisa-2012-results.htm (last visited Jan. 1, 2015)

[8] The Organisation for Economic Co-operation and Development

[7] http://www.flsenate.gov/Committees/BillSummaries/2011/html/0736ED

COMMON CORE: A Counterpoint

By Elizabeth Humann

Very few people deny the need for basic competency in a variety of educational subjects. But that is not all that Common Core requires. As pointed out by its proponents, Common Core standards involve the blending of skills, which is allegedly required in the "real world." The actual effect of this integrated approach is to drag down the performance of children who are exceptional in mathematics but struggle with English.

Take, for example, my nephew. He is on the autism spectrum, with his significant struggle being a speech delay. This is a child who thrives on the learning of facts. He can tell you the exact dates of every movie release for the next three years. He can identify the flag of every country in the world. He can recite the birthdates of every one of his numerous cousins. If you ask him how old he will be in a certain year, he can tell you. Instantly. Yet he struggles under Common Core mathematics because the problems are so language based; full of reading and analysis. So rather than struggling with English and excelling in math, he now struggles with both. He is being forced into mediocrity rather than having his gifts developed because his math success is dependent on his reading skills. The same applies to ESL students- their math scores suffer because they are so reliant on the ability to read English.

Granted, this is an extreme example, as the majority of us neither struggle so greatly with language nor are so gifted in fact retention. But don't we all have a strength? Shouldn't the goal of our educational system be to develop these strengths rather than to produce a homogenous mass of mediocre students?

Proponents of Common Core state that integration of subjects is necessary to thrive in society. I would propose the following question- why? Our society is comprised of jobs that require strength in one area and only basic competency, at most, in another. As an aspiring attorney, my greatest mathematical challenge will be billing hours, and even this will probably be automated. Conversely, an accountant needs to be able to do math, and maybe briefly explain why he performed a certain operation. He does not need to be able to complete an essay on his accounting practices.

The adoption of Common Core standards is going to give us exactly what its name suggests- common. Common kids who aren't allowed to excel if they think differently than the masses. Common college students who don't realize the potential of their unique strengths. What a waste of our greatest natural resource.

THE FDA'S REGULATION OF

By Anthony Cetrangelo

The FDA

Whenever people hear about the Food and Drug Administration, the first thing that pops into their minds is that it is a federal agency of the United States Department of Health and Human Services. Everyone understands that its duties are to protect and promote public health through regulation and supervision in areas such as food safety, dietary supplements, prescription drugs, over the counter drugs, tobacco and vaccines. The Food and Drug Administration also has jurisdiction over another area that most people are not familiar with; regulating mobile medical applications.

The FDA considers mobile medical applications to be medical devices, which are supposed to be regulated according to risk factors. However, due the broad definition of what qualifies as a "medical device," even low-risk applications fall under FDA jurisdiction. As a result, the FDA possesses too much power over many low-risk mobile applications, and their production has been stifled. The solution to this problem would be the passage of the PROTECT Act of 2014, which would narrow down which mobile medical applications should be regulated.

Mobile Medical Applications

Under current law, the Food and Drug Administration has broad powers over medical devices, as the FDA website shows, *"[t]he FDA's legal authority to regulate …medical devices… is the Federal Food Drug & Cosmetic Act (FD&C Act). The FD&C Act contains provisions, that is, regulatory requirements that define FDA's level of control over these products. To fulfill the provisions of the FD&C Act that apply to medical devices and radiation-emitting products, FDA develops, publishes and implements regulations."*[1]

Mobile medical applications fall under the FDA's broad power over medical devices according to the FDA website, as *"[m]obile apps are software programs that run on smartphones and other mobile communication devices. They can also be accessories that attach to a smartphone or other mobile communication devices, or a combination of accessories and software. Mobile medical apps are medical devices that are mobile apps, meet the definition of a medical device and are an accessory to a regulated medical device or transform a mobile platform into a regulated medical device."*[2]

The Food and Drug Administration's defines a "medical device" as,*"[a]n instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or*

MEDICAL INFORMATIONAL TECHNOLOGY

related article, including a component part, or accessory which is: recognized in the official National Formulary, or the United States Pharmacopoeia, or any supplement to them, intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its primary intended purposes."

[3]This vague definition gives the FDA too much discretion in deciding what may pose a risk to the public, and therefore allows it to exercise authority of apps that do not pose a threat.

The Issue

Applications falling under the FDA definition of "medical devices" encompass both low-risk and high-risk mobile medical applications, and therefore give the FDA broad "regulatory authority over a wide array of low-risk health technology."[4]

There are thousands of applications on the iTunes App Store and Google Play, with hundreds more being added every month. Due to the FDA's broad definition of medical devices, application developers who make regular Health and Wellness applications for mobile phones have to jump through the same regulatory hoops as the developers of high-risk medical informational technology devices. This makes it hard for low-risk application developers to be innovative and discourages their efforts to continue development of new technologies that improve healthcare.

The Solution

Two senators see the problem with the Food and Drug Administration's overregulating powers and therefore have proposed a bill that would reduce the regulatory burden in healthcare informational technology. They call it the PROTECT ACT of 2014, which stands for "The Preventing Regulatory Overreach To Enhance Care Technology."[5]

Since the Food and Drug Administration currently has wide authority over even low-risk informational technology, the bill intends to create a more specific regulatory framework that will promote job creation and innovation, instead of hindering the information technology sector and economy that needs to keep expanding. The PROTECT Act of 2014 can accomplish this by lessening the burden on developers of low-risk mobile medical applications and by creating a framework that focuses solely on products that create a legitimate risk to public health.

The PROTECT Act of 2014 would also create other benefits besides job creation. For instance, an FDA focus on applications involving the greatest health risks would improve patient safety through more efficient allocation of resources.

Senator Fischer said it best in his statement about the Food and Drug Administration's overregulating powers:

"Federal overregulation is one of the key challenges holding back entrepreneurs and job creators in Nebraska and across the country. While economic growth remains sluggish, it's critical we prevent these costly and time-consuming bureaucratic hurdles from hurting one of the fastest growing sectors of our economy – technology. The PROTECT Act increases regulatory efficiency over health IT to promote innovation, expand consumer access to information, and improve patient safety."[6]

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1 U.S. Food and Drug Administration, Code of Federal Regulations, (October 31, 2014), http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ucm134499.htm

2 U.S. Food and Drug Administration, Code of Federal Regulations, (October 31, 2014), http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ucm134499.htm

2 U.S. Food and Drug Administration, Mobile Medical Applications, (June 14, 2014), http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ConnectedHealth/MobileMdicalApplications/

3 U.S. Food and Drug Administration, Is the Product a Medical Device? (September 23, 2014), http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ClassifyYourDevice/ucm051512.htm

4 Id.

5 Id.

6 Nita Farahany, The Washington Post, Reining in FDA Regulation of Mobile Health Apps, (March, 25, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/25/reining-in-fda-regulation-of-mobile-health-apps/

7 Mike Milliard, Healthcare IT News, New Bill Takes Aim at FDA Overregulation, (February 11, 2014), http://www.healthcareitnews.com/news/new-bill-takes-aim-fda-overregulation

EMANCIPATING COLLEGE ATHLETES:
Why Overregulating the Student-Athlete is Unjust

By Jovanni Fiallo

Imagine being an 18 year old athlete, fresh out of high school, getting ready to make the biggest decision of your life: choosing which college you will call home for the next four years of your young life. Let's go further: imagine also that you are the only member of your family who has ever finished high school, and you are now essentially your family's last hope of escaping financial ruin. Lastly, now imagine that by choosing a university and signing a scholarship, you are dedicating your life to that school and sport while also giving up your right to work. Modern day indentured servitude? Maybe, just maybe.

Colleges, more specifically, college sports, are encumbered with an excessive amount of burdensome rules and regulations. Among those regulations are bylaws that prohibit student-athletes from receiving pay. For example, a student-athlete will not be eligible to play in a sport if "[h]e has ever accepted money, transportation, or other benefits from an agent or agreed to have management market [his] athletic ability or reputation in that sport."[1] Also, the rules state "[y]ou are not eligible for participation in a sport if after full-time enrollment you have ever taken pay, or the promise of pay, for competing in that sport."

The overregulation of student-athletes by the universities they attend is unfair. "The college sports industry generates 11 billion dollars in annual revenue, nevertheless, the NCAA member colleges continue to vote to forbid the sharing of revenues with student-athletes." [2] Colleges maintain the position that students are given scholarships to attend the school, an opportunity that the student would not have had to begin with. But most college scholarships do not cover the full cost of tuition, and the ones that do usually do not include room and board or meals. Also, all scholarships can be revoked, even if the student-athlete has good grades and has never been in trouble. A 2011 report entitled "The Price of Poverty in Big Time College Sport" confirms that 85 percent of college athletes on scholarship live below the poverty line.[3] How is that legal? Well, more than likely, it's not. Section 1 of the Sherman Antitrust Act states, "[e]very contract, combination…or conspiracy, in restraint of trade or commerce…is declared to be illegal."

Recently, a former college athlete by the name of Ed O'Bannon sued the NCAA for violation of antitrust laws after his image and likeness were used in a videogame and broadcasting, for which he received no compensation.[4] In a surprising 99 page opinion, Judge Claudia Wilken of the United States District Court in Oakland, California, issued an injunction against current rules that prohibit athletes from earning money from the use of their names and images in video games and television broadcasts.[5] Now players will get a chance to share in the billions of dollars of revenues in the form of trust funds that can be tapped into after the student-athlete graduates from his respective university.

As a former division 1 student-athlete, I wholeheartedly agree with and support the payment of student-athletes. From the outside looking in, student-athletes may look spoiled or greedy when asking for money. But those critics probably never played a sport. They wouldn't understand the sweat, blood, and dedication that athletes like me pour into our sport. It is disheartening to see that the athletes are being used like cattle. It is also frustrating when towards the end of class or practice, a football player at the University of Alabama is racking his mind to figure out if he can afford to eat dinner tonight, when his head coach, Nick Saban, is making 7 million dollars a year off of his success. It's wrong, and it is unjust.

Although the chains have been removed, there are still many hurdles ahead before we can cheer proudly at the emancipation of the student-athlete. Justice Wilken has helped win a battle, but the war is not over, and sadly it will not end until each and every student-athlete can participate in revenue sharing. Until that day comes, former and current student-athletes will continue to feel that we are today's indentured servants.

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OVER-REGULATION OF FINANCIAL MARKETS

By Ira Combs

Congress loves to respond to a financial crisis with more bureaucratic red tape that no one seems to understand and does not solve the problem. After Wall Street crashed in 1929, Washington reformed the financial system with the Glass-Steagall Act, which was 23 times shorter than Dodd-Frank — the reform that followed the 2008 financial crisis. Some argue that more regulation is needed to protect small investors and our economy from another financial meltdown caused by greed on Wall Street. Others believe that more regulation only creates more confusion with the government adding rules on top of rules to attempt to prevent and ban every conceivable trick any investment banker or financier can possibly come up with.

Those who argue that more regulation is needed point to the 2008 financial crisis as an example for why it is needed. They believe that more regulation would prevent another financial meltdown by anticipating and blocking predatorial scams that pad the pockets of banks and investment firms, but leave small investors and the government on the hook when they fail. The securitization of subprime mortgages, which allowed lenders to sell off mortgages as they were being made, is believed to be the leading cause of the 2008 financial collapse,.[1] This practice, known as the originate-to-distribute model, created an environment where lenders did not have to deal with the "credit consequences of their loans" and lowered loan origination standards.[2] Supporters of more regulation argue that legislation such as Dodd-Frank addresses these issues by forcing lenders to retain some risk of loss and making the lending industry more disciplined.[3]

On the other hand, those against more regulation argue that it only creates additional rules, few of which are rescinded, making the laws too complex and increasing the cost of doing business. For example, it has been four years since Dodd-Frank passed and the SEC is only half-way through the rule making process.[4] Critics argue that Dodd-Frank is too broad and does not prevent investment and financial firms from growing "too big to fail."[5] In addition, it creates obstacles for agency regulation; it is too vague; it will cost the government billions of dollars and federal agencies will need more employees to implement the new regulation.[6] Dodd-Frank will create more burdens for regulatory agencies to implement their duties.[7] Overregulation restricts industry growth and leads to litigation when the regulation is inconsistent.[8]

Finally, SEC commissioner Dan Gallagher estimates that it will take at least another five years to implement all of the Dodd-Frank regulations.[9] That means it will have taken ten years from its passage for Dodd-Frank to be in full effect. Congress has instructed the SEC that whenever it engages in rulemaking "it shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[10] What America needs is a smarter more efficient approach to regulation of the financial markets. Congress should apply a cost-benefit analysis to creating simple rules for regulation and leave the regulators to enforce them.[11]

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2 Id. at 594

3 Id. at 598

4 Bob Pisani, SEC'S Gallagher: Market Regulation Overhaul Needed, CNBC (Oct. 1, 2014), http://www.cnbc.com/id/102050921#.

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7 Id.

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THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

By John Manni

On February 12, 2013 President Obama gave his State of the Union address. In this speech he relayed the goals and aspirations the United States (U.S.) wished to achieve; among these was the announcement of the planned launch of negotiations on a Transatlantic Trade and Investment Partnership (TTIP) in collaboration with the European Union (EU).[1]

Trade regulation has been of issue since the time of the Great Depression of the 1930's.[2] Once worldwide economic failures were felt, the idea of exportation became stronger than ever. Countries attempted to export as much as possible while simultaneously establishing more restrictions on the inflow of foreign goods. This system led to unbearable tariff rates and other barriers that eventually collapsed international trade. The result was a push to change the way the world economy functioned.

High tariffs severely restricted trade and were ultimately universally destructive. For this reason, the General Agreement on Trade and Tariffs (GATT) and later the World Trade Organization (WTO) were created to help facilitate trade. *Id.* The WTO replaced GATT with the goal of the regulation and liberation of international trade between the 159 signing member states. The WTO offers a means for negotiating trade agreements, dealing with disputes, and pushing for a free trade world.

The mission to achieve a free trade zone between the U.S. and the EU has progressed to the development of the TTIP.[3] If fully adopted, the TTIP will establish a free trade area between the U.S. and the EU together with equality in investment rights. While economic barriers are relatively low, a 2011 study from the European Center for International Political Economy projected a $156 billion gain in trade and a 30% increase in total foreign direct investment if the TTIP is realized.

There are many policies that the U.S. intends to address during negotiations. The most significant of these is the trade of goods with the main focus on the general reduction of tariffs and non-tariff barriers.[4] Specifically, the elimination of all tariffs on agricultural, industrial, and consumer products and equal access to the EU market for US textile and apparel products constitute major policy objectives. Further, the U.S. seeks elimination or reduction of the non-tariff barriers that negatively affect its exports. Id. In order to create a level playing field, these barriers must be removed or reduced so that market opportunities can increase while the competitive advantage that the EU currently holds is decreased. These barriers include such things as nonscientific sanitary restriction, unjustified technical barriers to trade, and other "behind-the-border" barriers such as permit and licensing barriers that place an unnecessary cost burden on and limit competitive opportunities.

Joseph Francois from the Centre for Economic Policy Research published a study entitled "Reducing Transatlantic Barriers to Trade and Investment." In this study, he and his team explored the possibilities of a free trade zone between the U.S. and the EU. The report found that if an ambitious plan involving the removal of 25% of non-tariff barriers and 100% of tariffs was adopted, the translated gain would result in a family of four receiving an extra $850 per year in the EU and $700 in the U.S. Although the individual gain appears modest, the cumulative gain of the $156 billion is substantial.

While this optimistic point of view is comforting, there are obstacles. Besides the thousands of hours that will go into writing, editing, and approving this policy by the numerous entities involved, a few areas such as agriculture have been deemed highly sensitive. Although a relatively small percentage of trade, agriculture commands considerable attention within the U.S. and the EU.[5] Specific concerns such as the restrictions of genetically engineered crops in the EU and its ban of hormone treated beef represent significant impacts from the U.S. perspective.

Further, there are broad complications to be considered. Among them rests the dozens of trade policies that are already set with individual members states of the EU. Technically, as of 2009, those policies do not conform to EU law and could arguably be inconsequential. Even so, until something replaces those policies they should be followed and conformed with so as to facilitate current trade and maintain affable relations.

Lastly is the issue of national sovereignty.[6] By signing a policy as comprehensive as this, the U.S. will be held accountable to many new standards and legislative requirements. This is always an issue when entering a multinational agreement but in this case the degree of seriousness is drastic because of the depth this policy aims to accomplish.

Though obstacles are a reality and tend to cast some doubt on the possibility of the Partnership occurring, the Under Secretary for Economic Growth, Robert Hormat, seemed confident as he relayed his remarks on the Transatlantic Trade and Investment Policy on April 23, 2013.[7] Although a "mammoth undertaking," Hormat is convinced that it can become a reality because of the Obama Administration's demonstration of competence while negotiating an array of agreements and enforcing those commitments. Though Hormat praises the current administration, his faith in the success of the Partnership rests on the American Spirit. Innovation is the American way and continues to push for better and cheaper products. In turn, our economy continues to be highly successful and competitive.

Currently the U.S. and EU continue onto their 8th round of negotiations and push forward towards a free economic world.[8] This bilateral agreement will be the largest and most

significant in history, accounting for over half the world's GDP and almost a third of all global trade. In addition, the comprehensiveness of the Transatlantic Trade and Investment Policy far exceeds any other agreement seen so far. TTIP's reach includes issues such as tariffs, services, investments, government procurement, sanitary issues, intellectual property rights, trade facilitation, competition policy, labor, and the environment. Through these ambitions the relationship between the U.S. and EU will be strengthened and global benefits will be realized.

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HAVE SOCIETAL ADVANCES RESULTED IN TRAFFIC LAWS BEING OVER REGULATED?

By Matthew McConnell

As our society has evolved from horse carriages and dirt roads to automobiles and paved streets, rules of the road have been forced to evolve as well. Many scenarios have led to regulations and laws being put in place for citizen protection. Traffic safety is one of these scenarios. Have these rules gone too far? Are these rules of the road and regulations that tag along with them excessive and unfair?

Traffic enforcement cameras were approved and funded by the NHTSA[1] to assist with the enforcement of red light, speed limit, and other violations that occur in everyday driving. These cameras are put into action by the law enforcement agencies that elect to utilize them. For example, they can be found in police vehicles or on traffic lights, and some are linked to an ALPR[2] system. These cameras capture the image of the license plate of a vehicle, and through the ALPR system, compare it to a database that helps link the license plate to the person to whom the car is registered, formally known as the owner. In some jurisdictions, tickets for speeding and red light violations are then automatically sent to the address of the owner, which he or she is then required by law to pay.[3] Initially, the views were split on whether ALPR systems should be regulated and used or done away with all together, but as of 2012, roughly 71% of all United States police departments were using a form of this technology in everyday activity.[4]

These systems do not account for the possibility of someone other than the owner driving the car. In modern day society it is extremely common for children to drive their parents' car and for friends to share cars. Thus arises the scenario where your child or friend utilizes a car that is registered in your name and commits a traffic violation. Although you were not driving the car or even present in the automobile, you will be ticketed for that violation and obligated to pay for it. This is a disadvantage that tags along with the use of these systems and cannot be fully avoided.

Further, a conflict of interest surfaces when private contractors of these machines and systems are paid a commission based on the number of tickets their machine issues. This conflict may incentivize the contractors to issue tickets when no violations occurred.

Conversely, the counterargument is that ALPR systems are used to save lives and deter future violations from occurring. If a driver knows that a certain traffic light or intersection has cameras, he or she is less inclined to speed through trying to make the light, or violate other traffic laws. Further, the system helps in catching those who are actually violating traffic laws. Law enforcement cannot be everywhere, therefore at times ALPR systems are where police officers cannot be, which ensures citizens get ticketed for their traffic violations.

Although these systems help save lives, the ticketing process is unfair and controversial. Thus, the use of the systems is a form of government over regulation; but with the majority of United Stated police departments on board I do not believe that anything will change.

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MEDIA DRIVEN GUN CONTROL LAWS DO NOT STOP CRIMINALS

By Andrew Riordan

"A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."[1]

The foundation for gun control law in the United States is The Gun Control Act (GCA) of 1968-Title 18, United State Code, Chapter 44. In summary, this Act calls for better control of interstate traffic of firearms, sets the minimum ages for firearms purchasers, establishes the requirement that all firearms (domestic and imported) be affixed with a serial number, and expands the categories of prohibited purchasers.[2] In 1986, Congress passed The National Firearms Act (NFA) as part of the Internal Revenue Code-Title 26, United States Code, Chapter 53. The NFA was essentially an amendment to the GCA and liberalized many of the restrictions on sellers of firearms, particularly the sale of firearms at gun shows outside of the state where dealer is licensed to sell. The NFA also implemented stricter gun laws by prohibiting felons from owning or possessing guns or ammunition.[3]

For nearly half a century, the United States has had efficient and effective gun control laws in place to regulate the industry while, more importantly, being consistent with the Constitutional Rights granted to American citizens by our forefathers. Yet, there have been several instances in which the media has force-fed the American people with propaganda in an attempt to fuel political agendas. In terms of gun control laws this is most commonly done in instances of mass shootings. On December 14, 2012, a twenty year-old man walked into Sandy Hook Elementary School in Newtown, Connecticut, and fatally shot twenty children and six adult staff members. This tragedy marked the second-deadliest mass shooting by a single person in U.S. history and has subsequently prompted the most heavily media driven political campaign for increased gun control to date.[4]

The perpetrator, Adam Lanza, legally purchased the firearms used in the shooting. In response, on January 16, 2013, President Barack Obama signed twenty-three executive orders and proposed twelve congressional actions regarding gun control. Consequently, lawmakers battled on the House floor over the sale of assault weapons, high capacity magazines, and the expansion of background checks.[5]

The laws that were proposed in Congress failed, and further federal restrictions on gun control were left to the States. Currently, federal law requires that federally licensed firearm dealers must initiate a background check on the purchaser prior to the sale of a firearm. Federal law provides states with the option of serving as a state "point of contact" and conducting their own background checks using state, as well as federal, records and databases, or having the checks performed by the FBI using only the National Instant Criminal Background Check System ("NICS") database.[6] Florida is a point of contact state for the NICS. As a result, firearm dealers in Florida must initiate the background check required by federal law by contacting the Florida Department of Law Enforcement (FDLE). Florida law also prohibits a licensed dealer from selling or delivering a firearm from his inventory at his licensed premises to anyone, except a licensed dealer, importer, or manufacturer, without:

1) Obtaining a completed form from the buyer or transferee, and inspecting proper photographic identification;
2) Calling the FDLE and requesting a check of "the information as reported and reflected in the Florida Crime Information Center and National Crime Information Center systems as of the date of the request;" and
3) Receiving a unique approval number from FDLE and recording that number and the date on the form.[7]

Local governments in Florida generally lack authority to regulate firearms and/or ammunition. The state also requires the Department of Agriculture and Consumer Services to issue a license to carry a concealed weapon to any applicant who meets certain basic qualifications. In 2010, Florida had the 21st highest number of gun deaths per capita, among the states. That year, Florida was also a net importer of crime guns, which are guns originally purchased in another state that were recovered after the intended crime.[8] In attempt to combat these statistics, the Florida laws prohibit any person from purchasing a firearm if he has been convicted of a felony, a misdemeanor crime of domestic violence, "adjudicated mentally defective" or "committed to a mental institution" by a court.[9]

The U.S. has an estimated 283 million guns in civilian hands and each year about 4.5 million firearms, including approximately 2 million handguns, are sold in the U.S.[10] Homicides involving the use of firearms average between 12,000 and 13,000 annually. From 2006-2013, there were 934 deaths caused by mass shootings, which accounts for less than 1% of gun related homicides over that span.[11]

Only 1% of gun dealers account for almost 60% of crime guns that are recovered by police and later traced. According to the ATF, almost all of the guns recovered at crime scenes were originally sold at retail stores that are federally licensed firearms dealers (FFLs). The 1% of FFLs that make up the 60% of traced guns are called "crooked gun dealers." The majority of guns that are not obtained from a crooked gun dealer are guns that divert into the hands of criminals through theft; "straw purchasing," where a legal gun buyer is paid to purchase a gun for a gun trafficker or criminal; and

at private sales at gun shows and online, where sellers are not required by federal law to conduct background checks or keep paperwork on the gun transfer.

The media rallies behind gun control laws when there are instances of mass shootings because in many cases the guns used in the shootings are obtained by perfectly legal means. Unfortunately, what the media portrays is far from the truth. The vast majority of criminals who commit murder do not purchase their guns directly from gun dealers (1% of dealers partake in illegal sales) and as a result there are no background checks or mental diagnoses. Gun control laws have no bearing on how the majority of criminals obtain their guns, as illustrated through the statistics of illegally obtained guns involved in killings when compared to those involved in the widely publicized school shootings. This shows that the use of legally obtained guns is but a miniscule portion of gun related homicides.

In conclusion, the foundations of gun control laws in The Gun Control Act of 1968 and The National Firearms Act of 1986 are sufficient to govern the firearm industry today. Tragedies that are on the forefront of gun control propaganda, such as mass shootings, are recklessly exploited, and the proposed regulations that follow from the media driven legislation are statistically proven to be ineffective on the majority of criminals and their ability to obtain firearms.

1 U.S. Constitution 2nd Amendment

2 U.S. Department of Justice-Alcohol Tobacco and Firearms; Federal Firearms Regulations Reference Guide (2005) pg. 4

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4 CNN—*25 Deadliest Mass Shootings in U.S. History* (2014)

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6 Law Center to Prevent Gun Violence, *Federal Laws on Background Checks* (2012)

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DR. FRANKENSTEIN'S NEW MONSTER: THE FOURTH BRANCH

How the Democrats of the 111th Congress and Senate along with the President conceived a grotesque, and unholy piece of legislation that spawned an ominous force now looming over the country.

By Jorge W. Rodriguez-Sierra

Supporters of "the bill" have provided more sound bites, one-liners, and punch lines than a Monty Python film. Some of the classics we have grown and known to love are "If you like your health care plan,[1] you can keep your health care plan." My personal favorite, and the glittering jewel of idiocy was; "We have to pass the bill to find out what is in it."[2] This was not made by a seven year old on a scavenger hunt, but rather the Speaker of the House concerning legislation that affects over 17% of our national economy.[3] Heaven forbid some actual thought or – gasp – some discussion be had about the particulars of the bill, but for all the weaknesses easily perceivable from the exterior of the bill the real sinister, and baleful effects lie below the surface. The bill attempts to establish a massive regulatory bureaucracy that would make Stalin blush.

Now I have not read the entire 11,588,500 words of the 2009 H.R. 3590 bill, which is more widely recognized by its various aliases; "*The Affordable Care Act*" or "*Obama Care*". Sadly that fact places me on equal footing with the members of the 111th Congress and the 2009 U.S. Senate who voted on the bill, and if reading the bill wasn't required to vote and enact the law, then not reading the bill over-qualifies anyone from commenting on it. Here we are, five years later, and it is important to note why these legislators deserve the credit for hoisting one of the most disastrous monstrosities, a flaming codswallop which has rightly claimed the top position at the very summit of the most foul of legislative rubbish heaps. By enacting this bill into controlling law, the 111th Congress and Senate[4] have lowered the bar for what qualifies as law to subterranean levels. The tactics used in drafting the legislation have been admitted, and re-admitted ad nauseam, as nothing short of gleeful deceit by the legislation's "key architect" Dr. Jonathan Gruber.[5] While the Supreme Court has sought to find the legislative intent of the bill, the Congress seemingly not only lacked the *mens reas*, they were totally devoid of even the *mens*.

The bill has a far-reach that stretches from regulations pertaining to major businesses and corporations via the employer mandate[6] to caloric content descriptions on vending machines.[7] While the bill is well over 2,000 pages long dozens of the regulations are still unwritten.[8] The regulations pertaining to the employer mandate will substantially disrupt operations for businesses with more than fifty employees who have not offered health insurance in their compensation packages. The companies negatively affected include industries such as restaurants, big box stores, and grocery store chains.

This fundamental change that forces companies to provide health insurance is a dramatic departure from the initial concept of health insurance. While employer-sponsored health insurance offerings have become ubiquitous they continue to be considered as a 'fringe' benefit, like sick days, vacation/ PTO, and 401k matching programs. Many low-wage jobs, and industries were not designed for hourly workers to receive such benefit packages because of the nature of their business, chiefly slimmer profit margins. These jobs were not intended for workers who have reached a final or permanent career position, rather they are the type of positions that the worker picks up as a second job, or they provide part-time employment for high school or college students while they pursue furthering their education.

As the Supreme Court held in 2012, the enforcement aspect of the law, the "individualized shared responsibility payment," could really be abridged to three letters T-A-X.[9] While some may argue the IRS has been performing fiscal proctologic procedures on the American tax-payer for the better part of the last century, the ACA now grants the IRS jurisdiction to police you and your family's health insurance policy.

How about signing up for "Obamacare"? That process is controlled by a brand new flock of federal government employees who have been given the inaccurate title of "navigator". These individuals, who have been found to be comprised of high school dropouts, felons, and ex-cons,[10] guide the unfortunate souls through a process that the average middle school student could accomplish on the internet in a matter of minutes. So why would the government create this position? That would be the result of making a slapdash, substandard website that has been plagued with technical glitches since the embarrassment that was the "roll-out". To be more exact, it was not so much of a "roll out" as it was more of a drunken stumble.

What are the new health care programs under Obamacare? Those programs are supposed to be set up by the states. These are called the state exchanges. Basically state exchanges are similar to private health insurance benefit packages in theory, similar to the concept of getting a discount

for buying in bulk. For instance, imagine a large corporation that seeks to offer health insurance packages for its employees. The corporation would contact a health insurance carrier, tell the carrier how many premiums they need, and would receive a discounted rate based on the number of employees (the bulk) that are purchasing premiums.

The state exchanges attempt to do that with everyone who is uninsured in each state. The problem is the states are not health insurance brokers; they are unequipped to perform this task. The task of creating the state exchanges becomes infinitely more difficult based on the sheer magnitude of uninsured people, especially in densely populated states. Furthermore, the federal government failed to survey the states to inquire whether they were willing or, more importantly, able to undertake this type of momentous of task.

The bill addressed this fact by employing a carrot and stick approach. The carrot constituted an additional round of federal funding for health care, the stick was a revocation of all federal funds for non-compliance. Fortunately the Supreme Court swooped in and took away the stick. As a result, benefit-loving states have bellied up to the government trough and begun gorging on the government largess while other states have exercised temperance and prudence respecting the source of those federal funds.[11]

To summarize, the regulations spawned by the ACA include those pertaining to how businesses operate including how they compensate their employees, and what many food producers must include on their packaging and labels. The bill expands the federal government's employment and welfare rolls with tens of thousands of additional IRS agents, navigators, MIT professors and other marketing agents commanding shocking salaries and fees, and of course, benefit recipients. Finally the ACA expands the size of the state and local governments through the state exchanges. All of these expansions and salaries are charged to the American tax-payer, but at least this is probably worth it, right? Certainly we are going to insure all the uninsured… not quite.

Pre-Obamacare there were nearly 30 million Americans without health insurance, and the CBO projects that in 2020, after Obamacare has been fully implemented, we will get that number down to, err – well, actually it's going to stay at 30 million people.[12] After $1 trillion the American people will have purchased the right to say they *tried* to fix the healthcare system, we will have death panels, and not to mention the added costs and hassles faced by doctors and healthcare providers. Let us welcome our newest branch (sound the trumpets) the regulatory branch – it doesn't legislate, execute, or adjudicate the laws; the regulatory branch serves as a reminder to us all that left to their own devices the bureaucrats in government will use their power to exercise total and complete futility over almost anything.

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TAXPAYERS LEFT WITH SMOLDERING RUBBLE:

Are Heavy Regulations on Live Burn Donations for Purposes of Charitable Deductions Appropriate or Just an Overregulated Area of Law?

By Sara Schmidt

The term "over-regulated" probably takes you to a negative state of mind. This mindset leads you to automatically assume excessive burdening by rules and/or regulation. But, what if the heavy regulation isn't overregulation at all, but rather an adequate parameter implemented to prevent abuse of the tax system? What if the regulations that we are wired to assume are "too much" are actually essential to its success? Is it possible that overregulation you assume could actually constitute economical, practical, and reasonable regulation? This article is designed to assist readers in understanding the background of the regulations which disallow a charitable deduction for live burn donations, as well as suggestions for the future.

What is a Charitable Deduction?

The phrase 'charitable deduction' arises when a taxpayer decides to make a contribution to a charitable organization or cause. Codified in section 170 of the Internal Revenue Code (I.R.C), commonly and hereinafter referred to as "The Code", the charitable deduction arises when a donor-taxpayer is allowed to deduct charitable contributions or gifts made to a qualified charitable organization.[1]

What constitutes a "Qualified Organization"?

A "qualified organization" per the Code §170(c) includes states and their political subdivisions but "only if such a gift is made exclusively for public purposes".[2] If the taxpayer expects and receives a return benefit, this exchange is now considered a quid pro quo donation and thus is likely non-deductible as a charitable deduction. In Hernandez v. Commissioner, the Court found that "external features of the transaction" must be examined without regard to the subjective motivations of the taxpayer in order to determine whether the alleged charitable contribution is made with an expectation of a return benefit that would then render it a quid pro quo arrangement.[3]

What are Live Burn Donations?

Live Burn Donations arise when a taxpayer donates a structure on real property to his local fire department to utilize in live training exercises (this has given rise to the "live burn" namesake). This donated structure is typically one that the donor-taxpayer has planned to or desires to demolish, whether due to the need for significant renovations or simply for the desire of a new home, et cetera. After the donation has been made, the fire department demolishes the structure as a part of its live training drills which simulate a real life fire situation, allowing its members to practice in a real life environment similar to that which they may encounter on a call. This then leaves the donor-taxpayer with the result that he desired all along, because the structure that he sought to eliminate has been demolished. The donor-taxpayer will typically argue that he made a charitable contribution by "donating" his structure for live training purposes of the local fire department and that this benefits not only the fire department but the public as a whole. Thus, these taxpayers argue, their donations should qualify as charitable deductions that would provide them with the additional ability to deduct the value of the structure, be it a home or otherwise, for a tax benefit.

The Court's Perspective

Tax Courts have looked at a number of live burn deduction cases that have arisen from this common thread of circumstances – that being the desire to have a structure demolished to make way for new construction. These cases include the Scharf, Rolfs, and Patel cases, all of which have determined the deduction to be disallowed under §170 of the Code.[4] It has also been determined by the court that when a taxpayer contributes a partial interest in a structure that is defined as part of the land under state law, but the donor-taxpayer still retains all title to an interest in the remaining land on which the structure is/was located, then the taxpayer is deemed to have donated less than his or her entire interest in the land as required by §170 of the Code.[5] This clearly falls within the prohibitions of §170(f)(3).[6] The court has then considered whether the donated structure satisfies any of the three exceptions under §170(f)(3)(B),which could potentially provide for an deduction as an exception to the general rule of disallowance. Those exceptions include: 1) contribution of a remainder interest in a personal residence or farm, 2) contribution of an undivided portion of the taxpayer's entire interest in the property, or 3) a qualified conservation contribution.[7] Courts have ultimately determined that by granting the fire department the right to destroy a structure on land in which you retain interest does not in fact convey ownership, title, or property interest, but rather merely provides it a license to utilize the property for a specific purpose. Given these evaluations and subsequent determinations by the court, the deduction has been disallowed.

Conversely, it seems that scholarly response to the disallowance of the deduction has been largely negative, based on the assumption and argument that permitting this deduction would provide both direct and indirect benefits to all parties involved. However, it would appear that disallowance of such a deduction, in combination with a more narrowly tailored and strict regulation of the standard by which a donor-taxpayer may obtain such deductions, actually provides the

consistency and stability that the Tax Code is designed to provide. By limiting the amount of permitted charitable deductions based on live burn donations, this regulation prevents taxpayers from abusing the system by getting the double benefit of eliminating a structure they did not want to begin with while taking a tax deduction for it.

The Great Debate and Possible Remedies

The disallowance of live burn donations as charitable deductions remains undeniably heavily regulated to prevent abuse, but is that a positive thing? Under the Code §170(a) there appears to be nothing to render these live burn donations as patently invalid, nor are there any structural or technical executions of the contribution thus far that declare it invalid under that same provision.[8] Rather, the issues appear to be rooted in the donor-taxpayer's methodology of implementation for tax benefit purposes. The first issue lies in the donor-taxpayer's receipt of a return benefit in exchange for their alleged "charitable" donation. It further appears that the failure to provide adequate substantiation by the donor-taxpayer has caused the court rightful concern. The court has not determined the required substantiation with specificity, but has stated that documentation by the donor needs to show that the value of the donated property exceeds the value of the benefit received; i.e. demolition services of the structure.[9] Lastly, that it would appear that donor-taxpayers, in the cases presented to the court, have relied on the recommendations for donations and subsequent deductions in all the wrong places. In *Scharf*, the recommendation came from municipal authorities.[10] In *Rolfs*, the suggestion came from a family member.[11] In *Patel*, the recommendation came from a real estate agent.[12] All of the ideas to donate structures in such a way stemmed from a lay person rather than a tax professional or expert. Thus, the disallowance of such a deduction has resulted from the previously stated issues.

In order to remedy these issues, the donor must first show substantiation proving that the contributed structure's value exceeds the value of the demolition service. The Seventh Circuit in *Rolfs* ultimately held that the fair market value of such a deduction is zero, suggesting that the fair market value of the demolition is approximately equal to the fire department cost of renting burn towers for live burn drills. Therefore, it is likely that a successful argument for deduction will entail convincing a court that the rental of a burn tower typically used for training exercises costs significantly more than demolishing a structure, because only then has the taxpayer donated a benefit of greater value than that which he has received.[13] Next, the donor-taxpayer must not receive a substantial benefit in return for this donation. In the *Rolf* and *American Bar Endowment* cases, the court seemed to deem that $10,000 in demolition services as a return benefit for a donation is substantial.[14] While this alone does not render the deduction as disallowed, the court looked to expand that by looking at *Rolfs* in combination with *American Bar Endowment*. The court decided that the $10,000 amount as the threshold limitation cap for deductibility instead is to be read as "only if and to the extent" the donor-taxpayer's contribution amount exceeded the $10,000 cap would a deduction be permitted.[15] However, both courts determined the fair market value of the structures to be nominal at best, rendering the deduction disallowed. Although this alone will not render the deduction invalid, this does indicates that the court's determination on the line of substantial and nominal is subjective; so one must be prepared to face the argument in either direction. Lastly, common sense dictates that even if an idea is produced by someone who the donor-taxpayer trusts, he should still seek competent counsel for advice on such matters. In this case, that would be the advice of a tax expert. Also, not to be overlooked, the donor-taxpayer should follow the requirements for technical compliance in order to make a charitable deduction under the Code §170.

One may want to consider other paths to give the fire department the structure such as by deed that includes as many rights as possible, or by deeding the entire property. Be explicit in your drafting and as always, consult a competent counsel for advice.[16] Overall, such requirements are in place to prevent against abuse and unfairness of our tax system, and although strictly regulated, they appear to be consistent with traditional tax notions and principals on which the system was based.

Conclusion

All of the courts' holdings have left open what appears to be an avenue that may lead to a charitable deduction for future live burn donations, as long as the proper requirements to correct previously identified issues have been accomplished. This provides that the disallowance, with which the Tax Court has dealt, is not an absolute bar, and although the regulations of such donations may be strict and vast if they are evaluated on a grander scale, they are neither excessive nor overbearing but rather necessary for the success of our tax system. It is important to note that charitable deductions for live burn donations are not overregulated, but rather structured and monitored in such a way that has been designed to protect against fraud, abuse, and unfairness. These regulations are essential to the adequate performance of our tax system and thus should remain in place by way of heavy and strict regulation in order to preserve the purpose and design of our system.

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1 I.R.C. § 170.
2 I.R.C. § 170(c)(1).
3 *Hernandez v. Commissioner*, 490 U.S. 680, 690 (1989).
4 I.R.C. § 170; see also *Scharf v. Commissioner*, 32 T.C.M. (CCH) 1247 (1973); *Rolfs v. Commissioner*, 135 T.C. 471 (2010); *Patel v. Commissioner*, 138 T.C. 395 (2012).
5 I.R.C. § 170(f)(3).
6 *Id.*
7 I.R.C. § 170(f)(3)(B).
8 I.R.C. § 170(a).
9 *Id.*
10 *Scharf v. Commissioner*, 32 T.C.M. (CCH) 1247 (1973).
11 *Rolfs v. Commissioner*, 135 T.C. 471, 474 (2010).
12 *Patel v. Commissioner*, 138 T.C. 395, 397 (2012).
13 *Id.*
14 *Id.* at 486
15 *United States v. American Bar Endowment*, 477 U.S. 105 (1986).
16 I am in no way, nor do I hold myself out to be an expert of any type. This article is intended to be merely informative and should not be used or interpreted as legal advice, or advice of any sort.

PETE ROSE: THE PUNISHMENT DOES NOT FIT THE CRIME, *Today*

By Matthew A. Catania, Esq. (Alumnus, Class of 2013)

Living baseball legend, Peter Edward Rose, continues to polarize the fans of America's beloved pastime. No sports enthusiast can deny Rose's ability. Rose is the outspoken and self-proclaimed "Hit King" because he has collected more hits (4,256) than any other player in the history of major league baseball.[1] He holds the records for most games-played (3,562), at-bats (14,053), singles (3,315), winning games (1,972), total bases by a switch-hitter (5,752), and five-hit games (10).[2] He is the only major league player to have played in five hundred games at five different positions, earning all-star status at each.[3] Rose was crowned Rookie of the Year in 1963, the National League's Most Valuable Player in 1973, and the World Series Most Valuable Player in 1975.[4] He won two World Series championships with the Cincinnati Reds in 1975 and 1976, and one with the Philadelphia Phillies in 1980.[5] And, believe it or not, the list of records, awards, and titles continue.[6]

Any player with Rose-like accomplishments would make him an obvious first-ballot selection into the Baseball Hall Fame. Unfortunately for Rose, however, the Hall of Fame's criteria for selection is not limited to a "player's ability and playing record."[7] Voters are required to take into account a player's "integrity, sportsmanship, and character" as well.[8] It is in this category that Rose fails. Instead, Rose's legacy will live only in baseball's hall of shame because he committed baseball's capital crime—gambling. In the case of any defendant convicted of a capital crime, justice is served with capital punishment. In society, that punishment is death or life imprisonment; in baseball, that punishment is permanent suspension. Consequently, Rose's name will never appear in Cooperstown.

Rose signed away his baseball life in 1989 in an agreement he made with the Baseball Commissioner at the time, Bart Giamatti. Does the punishment fit the crime? No, absolutely not. Well, actually, the punishment does not fit the crime in baseball today. All should agree that such a hard-and-fast rule is simply outdated. Rules are broken and suspensions are warranted, but expulsion is too harsh. To have a zero tolerance policy for gambling and not one for a player who tests positive for performance enhancing drugs (PEDs) discredits the commissioner's unlimited power under the "best interests of baseball" clause and the arguments against reinstating Rose.

Set to retire this month, baseball Commissioner Bud Selig set PED precedent over the course of his tenure with suspension versus expulsion. Even when faced with the most egregious PED offenses, those which have defiled baseball statistics, destroyed records, and tarnished the legacies of some of baseball's all-time greats, Selig embraced suspension versus expulsion. Therefore, I challenge Commissioner-Elect, Rob Manfred, to revisit Major League Baseball's gambling policy because its treatment of Rose is inconsistent with baseball's standards today.

The agreement between Rose and baseball commissioner at the time, Bart Giamatti, grew out of controversial Rule 21(d). Rule 21 is posted in all major and minor league clubhouses. Rule 21(d) states:

> Any player, umpire or club or league official or employee who shall bet any sum whatsoever upon any baseball game in which connection the bettor has no duty to perform shall be declared ineligible for one year.
>
> Any player, umpire or club or league official or employee who shall bet any sum whatsoever on any baseball game in which the bettor has a duty to perform shall be declared permanently ineligible.[9]

Rumor of Rose's gambling made its way around baseball circles. Before Giamatti could even get comfortable in the Commissioner's throne, he requested Rose come meet with him. He asked Rose to explain the rumors of his gambling.[10] Rose denied that he had bet on baseball. In response, Giamatti planned an investigation. Giamatti charged his top assistant, Fay Vincent, to search for a competent investigator. Vincent immediately suggested John Dowd.

Dowd, a prosecutor who gained nationwide attention after taking down the mafia, headed to Cincinnati, accompanied by a team of investigators.[11] Dowd built a case and Giamatti disclosed all of the evidence. However, Rose was too stubborn, and perhaps too confident, that he never compromised his original position. Therefore, Giamatti acted on Dowd's report, which detailed Rose's gambling activity, and scheduled a hearing. Rose filed for a temporary restraining order and preliminary injunction.[12]

Rose's grounds were couched in the fact that he was denied the right to a fair hearing, as it was heard by a biased and partial decision maker—Giamatti.[13] In other words, Rose averred a denial of due process. Nevertheless, on August 23, 1989, Rose and Giamatti signed an agreement in which Rose "recognize[d], agree[d] and submit[ted] to the sole and exclusive jurisdiction of the Commissioner" to investigate and determine what action was appropriate for acts "not in the best interests of the national game of baseball."[14] The agreement stated that nothing should be deemed either an admission or a denial by Rose, which did not stop Giamatti from saying, "[i]n the absence of a hearing . . . and in the absence of evidence to the contrary… I've concluded

that Rose bet on baseball" and on the Reds.[15] It is safe to assume that Commissioner Giamatti would have invoked Rule 21(d)(2) to declare Rose "permanently ineligible" even without his compliance.

The Dowd Report never suggested that Rose deliberately tried to lose any games, but did indicate a pattern of steady gambling activity over a longer period of time. Rose reportedly used friends close to him to place his bets with a New York bookie.[16] According to the report, Rose usually bet $2,000 on each game.[17] From April 7 to July 4, 1987, Rose allegedly gambled $852,600 on 390 games, 52 games involving the Reds.[18] The strongest documented evidence against Rose included betting sheets with his fingerprints, and the records and notebooks kept by his bettors, which detailed Rose's bets on baseball and basketball between April and May 1987.[19]

Commissioner Fay Vincent, Giamatti's protégé, described the similarities between due process and baseball's "best interest clauses" by saying:

The best interests of the game … It's like "due process" or any other of the wonderful statements that govern our lives. I mean, what does due process mean? The fourteenth amendment has a huge effect on our daily life. And the same thing is true with phrases like "the best interests." The wonderful thing about the "best interests" is that it is not susceptible to easy definition, and it was written by Landis, to generate authority for his ability to make rulings that he thought were.[20]

It is unlikely one will ever find a commissioner's commentary on a rule that gives him unlimited power as sole arbiter for virtually any baseball issue or dispute, free from any kind of check or balance, doubting the due process it affords. Therefore, a change in the process or standard is unlikely; the only individual with the authority to change or modify the rule is the commissioner himself.

Just this year, Fay Vincent stands by his position that Rose will never enter the Hall of Fame. Vincent calls gambling the "capital crime of baseball, [as] it is well absorbed into the baseball DNA, … [and] the issues with performance enhancing drugs should not be confused with the gambling process."[21] According to Vincent, the deterrent-effect of Giamatti's decision is "too valuable."[22] Others describe Giamatti's decision as "an assault on the democratic process" and a "direct rebuff to the spirit and intentions of the Hall of Fame's founders."[23]

In 1991, the Hall of Fame changed its rules to prohibit induction of anyone on the permanently ineligible list. President Edward Stack stated, "[t]he rule change was not aimed at Pete Rose."[24] However, a player like Ty Cobb, whose hit record Rose broke, is in the Hall of Fame despite having allegedly fixed games and gambled on them as a player. Meanwhile, Rose is expelled for betting on games, regardless of whether he actually intentionally *influenced* the game's result.[25]

Since Rose, commissioners have had more than their share of conduct concerns, both on-the-field and off-the-field. Hall of Fame caliber players like Alex Rodriguez openly admit to using PEDs and are greeted with a suspension. Unequivocally, using PEDs should be considered a deliberate attempt to unfairly influence the outcome of a game and should be penalized to the fullest extent of the "best interests clause." On December 13, 2007, a scathing report dubbed the "Mitchell Report," indicated that PED use pervades the sport.[26] However, it must not be up to Commissioner Selig's "best interests of baseball" standard; otherwise, it would have been dealt with as swiftly and quickly as the Black Sox scandal. Meanwhile, as gambling remains the feared cancer of baseball, the malignant tumor of PED use has spread uncontrollably and is unmanageable under even the free-wielding "best interests of baseball" standard. Some say had Rose admitted to his gambling immediately, he would still be a part of baseball today. While later admitting to betting on Reds games, Rose attempted to rationalize his actions by never betting on the Reds to lose.[27] According to Rose, his bets never gave an additional "motivation" with regard to those games. Regardless, Rule 21 is clear—permanent ineligibility is the consequence for "bet[ting] any sum . . . upon any game in connection with which the better has a duty to perform." ○

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[1] http://www.baseball-reference.com/players/r/rosepe01.shtml

[2] Id.

[3] Id. (2B, LF, RF, 3B, & 1B).

[4] Id.

[5] Id.

[6] Ronald J. Rychlak, *Pete Rose, Bart Giamatti, and the Dowd Report*, 68 Miss. L.J. 889, 902 (1999) (Gold Glove Award Winner (2x), Roberto Clemente Award, All-Century Team, and Sporting News named Rose Player of the Decade for the 1970's).

[7] Id., quoting Howard Cosell, *What's Wrong with Sports*, at 133 (1991).

[8] Id.

[9] Major League Rule 15(c) provides in relevant part:
INELIGIBLE LIST.
(1) A PLAYER OR OTHER PERSON found guilty of misconduct or other acts mentioned in Professional Baseball Rule 21, or convicted of a crime involving moral turpitude, may be placed on the 'Ineligible List' by the Commissioner . . . A player or other person on the Ineligible List shall not be eligible to play or associate with any Major League or National Association Club until reinstated . . .
(2) NO MAJOR LEAGUE or National Association player shall knowingly play with or against a team with which, during the current season, any ineligible player or person has had any connection. Should a player knowingly play with or against any such team he shall thereupon be placed upon the Disqualified List;
See also, *Rose v. Giamatti*, 721 F. Supp. 906, 921 n.13 (S.D. Ohio 1989).

[10] Ronald J. Rychlak, *Pete Rose, Bart Giamatti, and the Dowd Report*, 68 Miss. L.J. 889, 902 (1999).

[11] Ronald J. Rychlak, *Pete Rose, Bart Giamatti, and the Dowd Report*, 68 Miss. L.J. 889, 902 (1999), citing Tim Sullivan, *Rose should cut his losses and confess*, Cincinnati Enquirer, June 21, 1997, at D1 (Kevin Hallinan, baseball's chief investigator, worked closely with the Dowd investigation stating, "It was the easiest case I ever worked on. He didn't cover his tracks.")

[12] Id.

[13] Id., See *Rose v. Giamatti*, 721 F. Supp. 906, 915 (S.D. Ohio 1989) (Paragraph 61 of the complaint provides: In light of Giamatti's actual displayed bias and outrageous conduct in this cause, his service as an investigator, a prosecutor and a prospective judge, his written prejudgment on the case before even hearing from Pete Rose and all of the evidence to be offered, and his denial of the procedural rights guaranteed to Pete Rose under the Rules of Procedure and the various contracts herein involved, Pete Rose will suffer irreparable injury if Giamatti is allowed to conduct the hearing. To submit to such a fatally flawed process would guarantee that Pete Rose would not receive a fair hearing, and he would be irrevocably tainted by Giamatti's continuing to pursue his various roles in this proceeding and his prejudging of the case).

[14] Michael W. Klein, *Rose Is in Red, Black Sox Are Blue: A Comparison of Rose v. Giamatti and the 1921 Black Sox Trial*, 13 Hastings Comm. & Ent L.J. 551, 576-77 (1991).

[15] Id.

[16] Michael W. Klein, *Rose Is in Red, Black Sox Are Blue: A Comparison of Rose v. Giamatti and the 1921 Black Sox Trial*, 13 Hastings Comm. & Ent L.J. 551, 570 (1991) (Paul Janszen, Rose's weight trainer, and Steve Chevashore placed bets with a Staten Island bookie named "Val.")

[1] Id.

[18] Id. citing *Dowd Excerpts*

[19] Id.

[20] Aaron S.J. Zelinsky, The Supreme Court (of Baseball), 121 Yale L.J. Online 143, 164-65 (2011)

[21] Fay Vincent, *Once again: No way Rose should get in baseball's Hall of Fame*, Naples Daily News (January 8, 2014).

[22] Id.

[23] Edward Achorn, *Secondhand Rose: Will he, won't he, should he be in the Hall of Fame?*, The Weekly Standard (April 21, 2014).

[24] Matthew A. Foote, *Three Strikes and You're (Not Necessarily) Out: How Baseball's Erratic Approach to Conduct Violations Is Not in the Best Interest of the Game*, 6 DePaul J. Sports L. & Contemp. Probs. 1, 13-15 (2009).

[25] Id.

[26] Id.

[27] Id.

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