THE GAVEL

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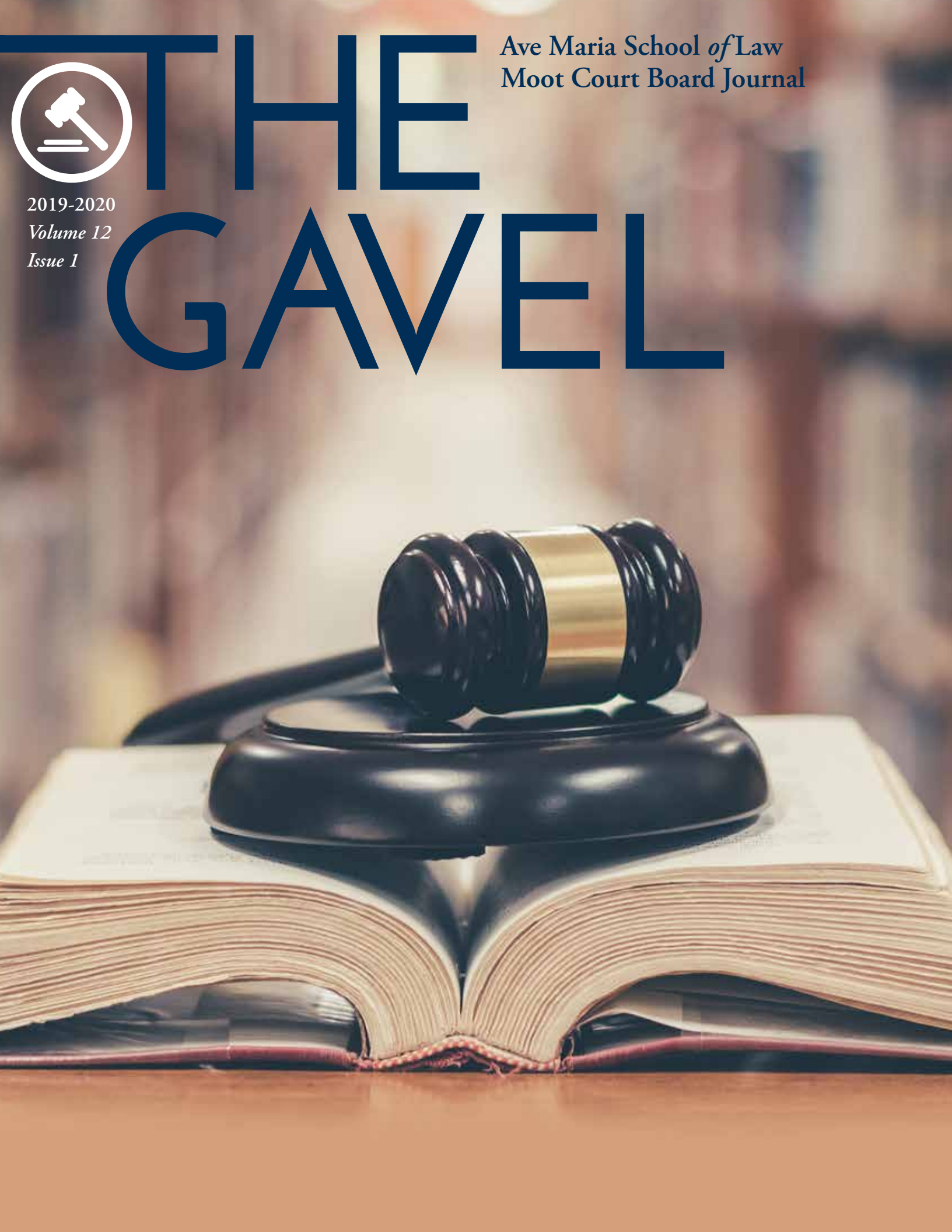

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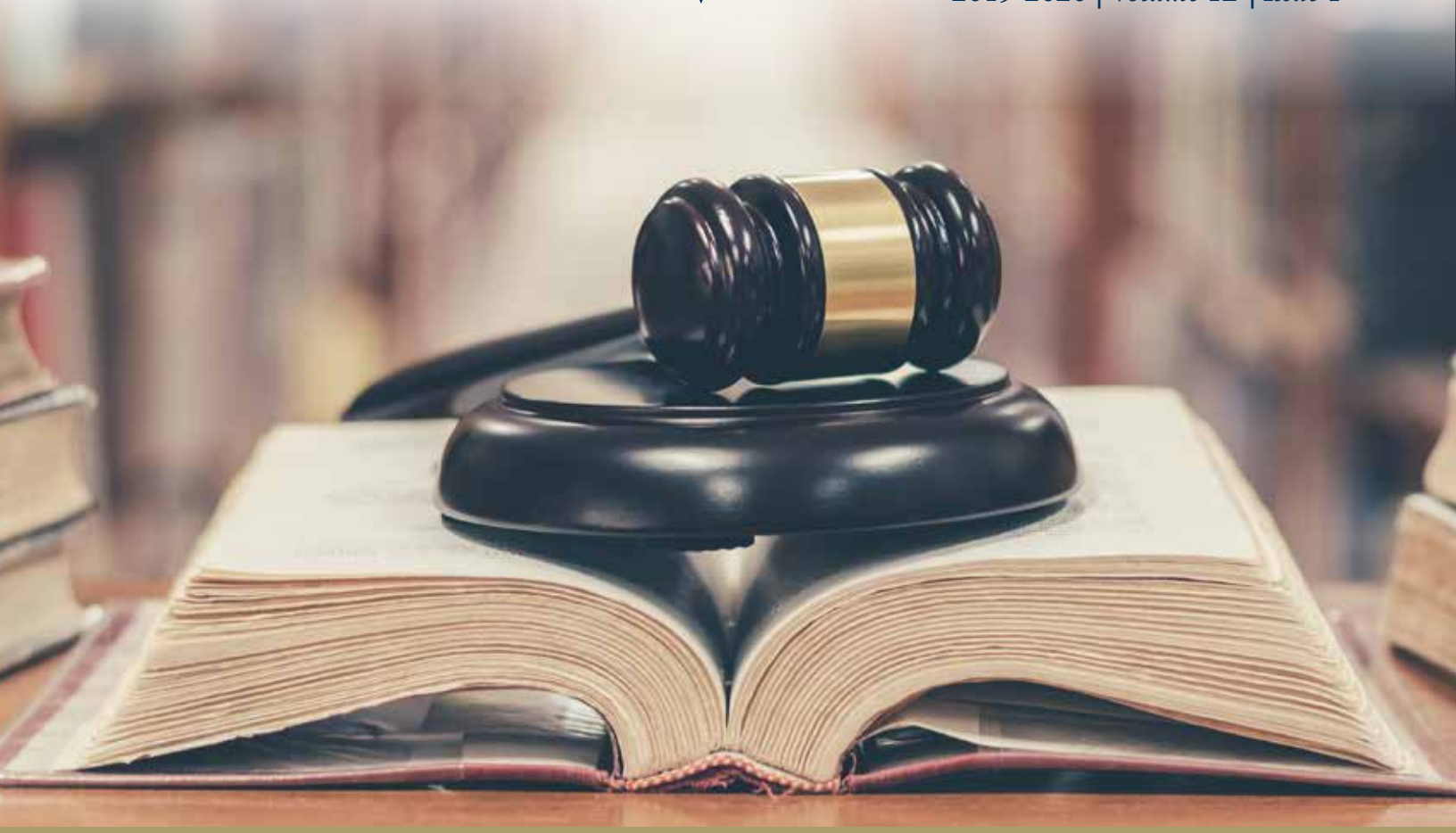

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LETTER FROM THE EDITOR

Dear Reader:

The 2019-2020 school year started off strong for the Moot Court Board. However, like the rest of the world, our lives were disrupted due to the Covid-19 pandemic. Like many, we were forced to adapt to remote learning and working. This also meant the Moot Court Board had to operate completely remote for the remainder of the school year. Many of our scheduled spring competitions were canceled at the last minute after countless hours were spent working on the problems. Additionally, production of *The Gavel* was also suspended.

When I took over as Editor-in-Chief for the 2020-21 academic school year, I made it one of my priorities to publish the articles that many of our Board members spent hours working on last year. Although we were and still are operating completely remotely, the Publications Committee and myself took on the challenge and were successfully able to get the job done. This would not have been possible without their help. This edition of *The Gavel* features articles on a wide range of topics. We hope you enjoy the 2019-2020 edition of *The Gavel*.

Olivia Lipnic
Editor In Chief of *The Gavel*

INSIDE

THE MONTREAL CONVENTION: INTERNATIONAL TRAVEL AND AIR CARRIER LIABILITY

By Regan Sieperda

In the everyday world of international travel, passengers are constantly faced with minor and major inconveniences: lost baggage, layovers, cancelled trips, and actual physical injury. Many travelers are unaware of the allowance of recovery the Montreal Convention provides.

To sum it up, the Montreal Convention holds air carriers strictly liable for injuries arising out of an accident that takes place on a Defendant carriers flight. Both the Warsaw Convention and the Montreal Convention provide that an air carrier may be liable for claims for bodily injury to a passenger of an international flight if "the accident which caused the injury took place on board the aircraft."[1] An "accident" has been defined in this context as the "unexpected or unusual event or happening that is external to the passenger."[2] As you are aware, an injured passenger is only required to prove that some link in the chain of causes was an unusual or unexpected event external to the passenger.[3]

This being said, the courts have refused to implement a bright-line test regarding the classification system of turbulence and its' categorization of whether such a classification makes it an "accident" or not. The Court has continued to interpret this notion broadly, finding in *Saks* that the test should be applied flexibly, taking into account an assessment of all the circumstances surrounding a passenger's injuries.[4]

The recovery of damages in instances of personal injury greatly differ from that of normal recovery in most jurisdictions. When attempting to recover under the Montreal Convention, a plaintiff is automatically entitled to recover 128,821 Special Drawing Rights (SDR's) under the strict liability theory which applies.[5] Any plaintiff wishing to recovery anything in excess of 128,821 SDR must satisfy the elements of prima facie negligence.[6]

Transitioning from personal injury recovery, airlines may also compensate international travelers for any lost baggage. Baggage is considered lost if it has not arrived within twenty-one days. Airlines may be liable up to 1,288 in Special Drawing Rights, anything more than this amount may be recovered by filing a special declaration, with an associated fee.[7]

Lastly, under the Montreal Convention, international travelers have a right to recover damages for flight delays as well. Though for delayed flights a traveler cannot recover punitive damages or other non-compensatory damages, passengers are able to recover up to 4,694 in Special Drawing Rights which may cover hotel, food and beverage expenses.[8] In conclusion, the Montreal Convention provides travelers with various options for recovery in travel related claims.

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1 Montreal Convention, Art. 17(1). Convention for the Unification of Certain Rules for International Carriage by Air - Montreal, 28 May 1999.
2 Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406 (6th DCA 2017).
3 *Id.*
4 Air France v. Saks, 470 U.S. 392 (1985).
5 Montreal Convention, Art. 21.
6 *Id.*
7 Montreal Convention, Art 22.
8 Montreal Convention, Art 19.

FLORIDA CONSTRUCTION LITIGATION: THIRD-PARTY NOTICE IMPLICATIONS OF CHAPTER 558

By Benjamin Johnson

Chapter 558 provides guidance for those looking to navigate the waters of construction law in the state of Florida. Unfortunately, these statutory waters are not always clear, especially when it comes to notice requirements. Chapter 558 requires claimants of construction defect actions to provide written notice to parties with whom they have contracted. Chapter 558 typically comes into play when a property owner hires a contractor to perform construction work. The statute expressly directs how construction defects should be handled with respect to this relationship.

However, construction defects cases often involve multiple sub-contractors who have been hired by the general contractor to assist in a project. Here, is where the unclear and problematic language of Chapter 558 leaves Florida in a state of uncertainty regarding the statutes requirements as they apply to "downstream" subcontractors. This predicament is especially concerning when considering that Florida construction defects cases have risen exponentially over the past decade, approaching annual averages of roughly one thousand cases per year.[1] Therefore, it is critical that the Florida judiciary use its power to clarify the ambiguous statutory language of Chapter 558 to protect the rights of property owners.

Section 558.003(1) provides that a claimant cannot file a construction defect action "without first complying with the requirements of this chapter."[2] Further, if a claimant initiates a suit without first complying with Chapter 558, upon timely motion, "the court shall stay the action, without prejudice, and the action may not proceed until the claimant has complied with such requirements."[3]

Section 558.004 provides: "If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant

contracted." However, courts may only allow an action to proceed to trial on alleged construction defects that were noticed and for which the claimant complied with Chapter 558.[4] Chapter 558 briefly addresses secondary or "downstream" subcontractors by advising that "the person served with notice under subsection (1) may serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim."[5] However, this nebulous language leaves much to be desired as it fails to provide construction defects claimants with true direction.

The statutory language of Chapter 558 appears to place a mandatory notice requirement only on those with whom the claimant directly contracted. In a construction defects case, this party would be the party with whom the claimant contracted and subsequently filed suit against for the alleged defects. However, an argument can be made that subcontractors share this right to notice under the language of Section 558.004(1)(a), which states that a "claimant shall … serve written notice of claim on the contractor, subcontractor, supplier, or design professional…."[6] It is generally accepted that this language applies to direct actions against any of the parties brought to suit by the homeowner, but it is unclear whether or not this language applies to non-parties.

Larry R. Leiby and Steven B. Lesser suggest that it is prudent for owners or claimants to serve notices of claim on all potential parties.[7] By providing such notice, a claimant can avoid a situation where a subcontractor, despite not being party to a suit between an owner and contractor, could potentially stay or abate the case for failing to adhere to Chapter 558.[8]

Although it is prudent to serve all "downstream" subcontractors, it is not expressly mandated by statute. Rather, this responsibility is unambiguously shifted to the contractor who enlisted the subcontractor's services for the project that gave rise to the construction defects claim. Section 558.004(3) states that a person who is served on such a claim, "may serve a copy of the notice of claim to each subcontractor … whom it reasonably believes is responsible for each defect specified in the notice of claim."[9] Thus, it appears that the responsibility to provide notice to "downstream" subcontractors rests on the contractors, although this duty is not expressly commanded.

The logic behind a mandatory requirement for contractors to provide "downstream" notice is sound. If a party is not bringing a claim against another party, there is no need to provide notice. A claimant who contracts a general contractor should not be met with the burden of having to provide notice to subcontractors whom they have never communicated or dealt with. The general contractor is the party that chooses to contract work out to subcontractors; therefore, it should be the contractor's responsibility to pass down notice in the event a construction defects claim arises from their collective work.

A fair reading of the statute should only require a construction defects claimant to provide notice to those parties that share contractual privity. This would protect a claimant from the unwarranted responsibility of providing notice to subcontractors enlisted by a contractor. Accordingly, this interpretation would prevent a third-party subcontractor from interfering with a Chapter 558 claim due to a lack of standing. Therefore, courts should not interpret Chapter 558 as requiring a claimant to provide notice to every possible party that has taken part in a construction job; to do so, would clearly run against Florida's policy of "protecting the rights of property owners."[10]

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2 Fla. Stat. § 558.003.
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4 Fla. Stat. § 558.004(11).
5 Fla. Stat. § 558.004(3).
6 Fla. Stat. § 558.004(1)(a).
7 See Leiby & Lesser, How to Comply with Chapter 558 Florida Statutes: Current Challenges and Future Challenges, 82 Fla. Bar J. 42 (2009).
8 Id.
9 Fla. Stat. § 558.004(3).
10 Fla. Stat. § 558.004(1).

PATENTING HUMAN DNA: THE ETHICAL & MORAL ISSUES INVOLVED IN DOING SO

By Pete Fernandes

The ethical debate concerning the patenting of human biological material is on the continuous rise, as researchers and scientists enhance their focus on the gathering and patenting of DNA samples obtained from indigenous masses across the globe.[1] The debate prompts several issues, ranging from matters concerning intellectual property to those concerning data usage revealing sensitive information concerning illnesses such as AIDS and leukemia, potential stigma or prejudice towards indigenous populations, such group's control of their genetic material, and collective tribal rights for those who wish to be part of such processes and those opposed to such testing.[2]

Since the discovery of the structure of human DNA in 1953, scientists and researchers have made significant progress in understanding its characteristics and functions.[3] In particular, present studies are focused on the identification of all genes contained in the human DNA as well as the determination of the order of the more than 3 billion chemical base pairs that form the structure of the human DNA.[4] The establishment and publication of approximately 30,000-40,000 human genomes have played an essential role in the study of human disorders and diseases, leading to the development of improved diagnostic tests and treatments,

and the expansion of the genomics field to enable the discovery of unknown biological function of specified proteins and genes in health and disease.[5]

However, increased involvement in scientific advances, particularly in the field of the human genome, has raised crucial ethical and moral issues concerning intellectual property and patent rights, and the use of collected genome data of specific species, necessitating the implementation of adequate measures that can ensure the resolution of the problem.

Studies of the sequences of the human DNA have historically been facilitated by the combined efforts of publicly funded organizations such as foundations and research institutes, universities, charities, and privately-funded industrial entities.[6] Along with other devices like confidentiality and trade secrecy, the patent system was established to protect knowledge concerning human genes.[7] A patent system refers to the exclusive right granted to an inventor for a specified period in order to prevent the exploitation of inventions such as new machines, medicine, and research intuitions.[8]

Over the past few years, the idea that individuals and either governmental or non-governmental organizations can have intellectual property rights to a DNA or gene sequence has prompted considerable criticism across the globe. An analysis of the moral issues affecting the research topic may provide more insights concerning the ethicality of patenting human DNA.

The moral issues concerning the patenting of human DNA are characterized by concerns for the need to preserve human sanctity.[9] For instance, most policymakers or researchers against gene patenting believe the practice is almost similar to the 'ownership' of something human.[10] According to these arguments, the human genome represents humanity, and so, patenting genetic materials violates the fundamental principles of humanity.[11] Patenting genetic materials fuels the perception that the human DNA structure is a collective property, facilitating the personalization and profitability of such inventions. For instance, the case *Moore v. Regents of Univ. of Cal.*, demonstrates the application of patents on a cell line derived from an individual named John Moore's T-Lymphocytes.[12] The manipulated gene was part of John Moore as an individual as the cancerous mutation was only specific to his genetic characteristics.[13] In this light, the court held that the issuance of patents on specific mutations of DNA strains violates the privacy of the participants' diaries.[14] While both articles may sound the same, the variations are unique to each author, and so neither the individual nor the school facility has the right to own such patents.[15]

Hence, by providing an individual with an exclusive right, and possession of an item, patent rights to genetic material promote individual or organizational ownership, which is unethical.

Additionally, patenting human DNA provides the potential for unethical or moral action at consumer levels.[16] Specifically, there is a need for a balance between granting a patentee intellectual property rights for an invention and the public's access to the advantages of the invention, particularly in the healthcare industry.[17] The Supreme Court, in *Myriad*, best described the balance dilemma. The Court recently upheld the patent rights of Myriad Genetics.[18] The organization is widely famous for having exclusive rights to the testing of BRCA1 and BRCA2 genes, responsible for determining a woman's susceptibility to ovarian and breast cancer.[19] Research indicates women with such genetic mutations have higher likelihoods, seven times more than others, of developing ovarian and breast cancer.[20] However, the Supreme Court held that "[a] naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated, but [if the DNA segment is not naturally occurring then it] is patent eligible."[21]

This has prompted views and perceptions that Myriad Genetics has implemented unethical policies.[22] Since Myriad Genetics has the exclusive rights of BRCA testing, women are left with only one option for testing their genetic vulnerability to ovarian and breast cancer.[23] As such, these women cannot only seek second opinions, but the monopoly forces them to pay unreasonably high prices for cancer detection and treatment.[24]

Keeping in mind that most organizations or individuals with such patent rights rarely promote equitable access to such inventions, the exploitation of patent holdings in order to prevent access to or use of inventions is morally unjust. Based on the existing studies, there exists no optimal solution for the ethical issues concerning the patenting of human DNA. In addition, the judicial handling of such cases is somehow ineffective due to the irregularities presented by patent rights and practices. This necessitates significant investments in research on the optimal solution for the ethical and moral issues concerning the patenting human DNA. ○

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14 *Id.* at 147.
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THE RELIGIOUS ORGANIZATION EXEMPTION

By Brandon Karas

The Civil Rights Act of 1964 prohibits organizations from discriminating on the basis of religion.[1] Evidently, because this prohibition had the effect of infringing on the Religion Clause, Congress added an exemption for religious organizations.[2] As a result, Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), "exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion."[3] Furthermore, Section 702 provides that Title VII "shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[4] Unfortunately, the statute does not explicitly define what a "religious corporation, association, educational institution, or society" is.[5] Thus, the courts are to interpret the meaning of the statute and devise a proper framework.[6] As a result, several *different* approaches have emerged and there has not been a consensus amongst the courts of which approach to uniformly apply. So, what would make up the proper framework?

Undoubtedly, the appropriate framework for defining a religious organization shall not infringe upon the First Amendment Religion Clauses but shall be in accordance with Congress' intent of eliminating religious discrimination.[7] Consequently, the Ninth Circuit decided to adopt a balancing approach that analyzes all "significant religious and secular characteristics" in order to determine whether the organization's "purpose and character are primarily religious."[8] More specifically, the court set forth a list of non-exhaustive factors to consider in deciding whether an organization is primarily religious.[9] Additionally, no one factor is dispositive; thus, the weight given to each factor can vary depending on the facts of the case.[10]

In *LeBoon*, the court declared that an entity shall not be deemed a religious organization "based on its conformity to some preconceived notion of what a religious organization should do."[11] Therefore, the *LeBoon* approach analyzes the relevant factors with an organization's identified religion in mind, while not infringing upon an organization's constitutionally protected freedom to determine, for itself, what constitutes its own particular religious identity. For instance, when analyzing whether an organization produces a secular product, the court must determine whether the product is secular in light of its sincerely held religious beliefs. Thus, this approach allows the court to abstain from giving a bright line rule of what products or services are religious and those that are not. Moreover, the *LeBoon* approach provides additional flexibility because it does not demand that all of its factors be applied in every case if the factor is irrelevant.[12] Further, each factor is to be weighed in light of the particular facts of each case.[13] For example, the court may give greater weight to the fact that an organization produces a religious product rather than the fact that it is also a for-profit organization. Conversely, if an organization produces a religious product, but has no religious purpose and operates solely for profit, the fact that the organization produces a religious product is irrelevant.

While the *LeBoon* approach provides flexibility, it does not overstep constitutional boundaries because several factors overlap with considerations seen in the Equal Employment Opportunity Commission ("EEOC") Manual. Specifically, the EEOC enforces "federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's … religion."[14] Additionally, the EEOC provides guidance on how to apply Title VII's religious organization exemption.[15] Remarkably, all of these considerations seen in the Compliance Manual are also accounted for in the *LeBoon* approach. Specifically, the EEOC instructs that the exception "applies only to those institutions whose 'purpose and character are primarily religious.'"[16] The manual states, that whether a religious organization is primarily religious depends on "[a]ll significant religious and secular characteristics."[17] Finally, it states that "no one factor is dispositive."[18]

In conclusion, the *LeBoon* approach is the one framework that undoubtedly accomplishes Congress' goal of eliminating religious discrimination. The *LeBoon* test shares an overwhelming amount of factors with the EEOC's Compliance Manual, and is narrow enough to avoid infringement upon the First Amendment Religion Clauses. Furthermore, this approach does not infringe upon an organization's freedom to identify with its own religion. Thus, this Court should adopt *LeBoon's* "primarily religious" test.

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6 Smiley v. Kansas, 196 U.S. 447, 455 (1905).
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8 LeBoon, 503 F.3d at 226. (quoting *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)).
9 *Id.* at 227.
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13 *Id.*
14 U.S. Equal Emp. Opportunity Comm'n, *Section 12: Religious Discrimination, EEOC Compliance Manual* (July 22, 2008).
15 *Id.*
16 *Id.* (quoting *Townley*, 859 F.2d at 618).
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18 *Id.*

THE INCREASE OF TECHNOLOGY LEADS TO GREATER PRIVACY INTRUSION BY THE GOVERNMENT

By Michael Zivik

According to the Fourth Amendment of the United States Constitution, the people have the right "to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, [which] shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] As we will see, the traditional protections under Fourth Amendment have changed due to the increase of technology used, especially for travelling.

In the Supreme Court case of *Chambers v. Maroney*, the Court "insist[ed] upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."[2] Probable Cause as defined by Black's Law Dictionary requires that an officer has knowledge of such facts as would lead a reasonable person to believe that a particular individual is committing, has committed or is about to commit a criminal act.[3] This requirement has been abandoned by the Supreme Court in cases involving searches at the border. The reason for this stems from the historical idea of the United States as a sovereign.[4] The Court in *United States v. Ramsey* reasoned that, "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now require no extended demonstration."[5]

These cases balance the protection of individual rights and the security of the nation; however, this balance is tipping towards the latter. This can also be seen in the case of *United States v. Arnold* where the Court held, "the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."[6] The Court further held that a "reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border."[7]

This broad power of the government made sense during the early 2000s, but times have changed as well as the means by which information is stored. In today's world, our lives are extensively documented our phones, laptops, and other electronic devices that we carry. Because of how much information can be stored on a cell phone or a laptop; the balancing of interests must tip towards the rights of the individual.

In response to this rise in technology, especially regarding technology used for travel, the U.S. Customs and Border Protection Agency (CBP) issued new directives which provide protections to individuals when their devices are searched. For example, the search and detention of the device must be completed as expeditiously as possible.[8] Further, once the contents of the device are searched and there is no probable cause to seize the device or the information contained therein, any copies of the information held by CBP must be destroyed, and any electronic device must be returned.[9] With these initiatives, the Government has realized that there needs to be safeguards put into place to protect the endless amount of data on individuals' cellphones and laptops.

On April 11, 2017, the CPB released statistics on searches of electronic devices at the border. These statistics showed that during the first six months of 2017, CBP searched the electronic devices of 14,993 arriving international travelers, affecting 0.008 percent of the approximately 189.6 million travelers arriving to the United States.[10] It is interesting to note that the primary reason for these searches is to assist law enforcement in combating terrorist activity, child pornography, violations of expert controls, intellectual property rights violations and visa fraud.[11] The Government's interest in protecting its citizens and borders is still prominent, but the focus has shifted more towards a technological basis because of the increased storage capabilities of cellphone and laptops.

Where does this leave us in 2019? The idea of having the contents of your cellphone or laptop searched is worrisome for many reasons. It has sparked a conversation about how to travel in today's world.[12] Our devices do not only store text messages and phone numbers, but also family photos, medical documents, banking information and much more.[13] It has come to the point where an individual must think about the devices he or she is bringing with them before going on a trip.

Since it seems that the fight for individual rights is getting absorbed by the ever more increasing rate of technology, companies such as the Electronic Frontier Foundation are leading the charge in bringing this issue to the forefront. The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world.[14] They have provided suggestions on how individuals should travel, such as traveling with a separate cellphone or laptop strictly for business.[15] In addition, it is recommended that individuals delete certain information from their devices before traveling.[16]

In conclusion, we still see today how strong the Government's powers are at the border. As we head into the future, this balancing interest of protecting the border versus the individual will only get stricter as technology grows in our society. The roots of the Fourth Amendment must not be forgotten today. Because of this it will only become more evident for our courts to uphold the rights of the citizens in the future when technology becomes even more intertwined with privacy. O

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2 Chambers v. Maroney, 399 U.S. 42, 51 (1970).

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WHEN MERCY SEASONS JUSTICE: THE COMPATIBILITY OF MERCY AND JUSTICE

By Carl Sergeant

Mercy, a compassionate and benevolent virtue, seems incompatible with the cold and calculating quality of justice. Justice demands a proscribed payment for crimes committed by an individual. Mercy contradicts the idea of a deserved punishment and operates to lessen the punishment required for that same crime. The merciful cannot be just and the just cannot be merciful. If mercy and justice are both ideals to strive for, why do they seem contradictory?

First, a proper understanding of what mercy is not will help relieve the perceived tension between mercy and justice. Mercy in the judicial system cannot be based on an emotional response. The Supreme Court stated in *Johnson*, that a defendant's fate should not be decided on the emotional whims of the jury.[1] In this case, the Court held that the jury must not "dispense mercy on the basis of a sympathetic response to the defendant."[2] The court noted that basing verdicts on the sympathy of jurors would produce unreliable and arbitrary results. Thus, if mercy is to play a role at all in the judicial system, it must be something other than an emotional response.

Secondly, while Black's Law Dictionary links the two,[3] clemency cannot be a form of judicial mercy. Throughout court proceedings, the possibility of clemency from the President or Governors is not considered.[4] Clemency has been exercised by many presidents but typically serves only as an antidote to a faulty judgment or excessive punishment. Thus, while the availability of clemency is an important and necessary fixture in the judicial system, it presumes a faulty judgment where the proper sentence was not applied. Judicial mercy is not an antidote to improper application of sentences applied after the fact as clemency granted by a third party. Thus, clemency cannot be a proper substitute for mercy.

Finally, John Locke's definition of mercy also fails to adequately describe judicial mercy. Locke stated that mercy is the "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."[5] Mercy according to this definition is not compatible with the judicial system because it erodes the underpinnings of just deserts and supremacy of the law. By stating that mercy is the power to overrule the prescriptions of law, Locke implies that sometimes, mercy is not compatible with legal justice. If mercy is to have any place in the American judicial system, it cannot be the power to overrule the very framework it seeks to enter.

A study of the linguistic origin of mercy begins to show the relationship between mercy and justice. The word mercy comes from the medieval Latin word *merces*, meaning a salary, wages, or reward.[6] A historical understanding of mercy has its roots in just deserts, similar to the retributivist idea of justice. Thus, mercy according to medieval Latin and justice according the retributivists are one in the same.

A better definition of judicial mercy is found in Pope John Paul II's encyclical, *Dives In Misericordia*, (rich in mercy).[7] In his encyclical, the Pope states that mercy is "manifested in its true and proper aspect when it restores to value, promotes and draws good from all the forms of evil existing in the world and in man." This form of mercy is not a brushing aside of punishment, nor is it an emotional response, or form of clemency. Instead, it elevates the person to a proper dignity as a human being. It does not obviate the requirement of proscribed punishment, but seeks to draw good out of evil actions. Evil actions still merit punishment but mercy humanizes the individual and restores his dignity. Thus, it is compatible with the dictates of justice while recognizing the criminal as a human being with inherent dignity and ability to do good.

As Portia in *The Merchant of Venice* states, "The quality of mercy is not strained . . . It is an attribute to God himself; And earthly power doth then show likest God's When mercy seasons justice."[8] In this, Shakespeare is giving an example of proper judicial mercy. Mercy is the proper application of justice that recognizes and restores human dignity. Justice must be done with mercy. Without mercy, a judicial system becomes like a machine, dispensing with punishment as easily as it dispenses with human dignity.

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THE BACKWARD JUDICIARY: CONGRESS AND THE CITIZEN HAVE THE LAST SAY, NOT THE SUPREME COURT

By Matthew Stauffer

The Founders guaranteed a republican form of government to all the states.[1] A republican form of government does not include an unelected judiciary that creates law with the power to bind the nation. As such, all Supreme Court decisions should be binding only on the parties involved, unless ratified within a specific timeframe by the states. This ratification process could act as a check on the "*nine-headed Caesar*" that Justice Scalia warned about in his dissent in *Dickerson*.[2] A republican form of government does not include decisions made by an unelected few that bind the rest of the country.

Additionally, the Constitution provides: "[t]his Constitution, and the laws of the United States . . . shall be the supreme law of the land," even in spite of laws to the contrary.[3] This shows that Congressional law supersedes Supreme Court decisions. Why? Because the framers did not want a "*nine-headed* [unelected] *Caesar*" dictating laws to the people.[4] That is not a republican form of government, nor is it check on the power of another branch.

This problem was made clear in *Dickerson*.[5] Most would agree that Miranda was judicially created and is not constitutionally based. The Court said as much. Yet, *Miranda* survived with the ruling in *Dickerson*. A ruling made by an unelected few, superseded a law created by Congress. Why? For *stare decisis*? A wrong is still wrong no matter how many times it is executed. The Founders likely did not envision the Court taking such a profound step away from the Constitution by ruling directly against an express law created by Congress. Sure, there is some interpretive room at the edges of a decision, but that room is not the size of a continent.

To the argument that decisions happen all the time by unelected bureaucrats, the answer is this: one, most of those decisions are promulgated through comment and approval; two, those decisions are made subject to an accountable executive; and three, they are amendable through executive discretion. This is not so with the Court because its decisions are final and binding. Even if Congress wanted to change the law, as has been shown, the Court's power overrides Congress's authority.

If the Court stayed within its constitutional box, this commentary would not be necessary. This action is needed because the Court has failed to adhere to the privilege it assumed in *Marbury*.[6] The idea that the Court did it in *Marbury* means that it can continue to do it, doesn't make it right. It is not the justices' fault. Supreme Court Justices have the best of intentions. But the "*nine-headed Caesar*" takes a life of its own. History shows through numerous decisions that the Court has strayed too far away from the Constitution. Since it is impossible to point to a particular person or event to analyze and then correct, there must be some other way to correct this oversight.

The solution is using the system itself as a mechanism to check the power of the Court. Because the Court was created in Article III, the only plausible mechanism is a constitutional amendment. The 28th Amendment could simply read: "laws created by Congress and authorized by the Constitution are presumed controlling, and the decisions of the Supreme Court are not binding on the states unless ratified by concurrence within one year by three fifths of the several states." Whatever the particular wording, it should be a clear check on the Court's power.

The 28th Amendment could serve several purposes that give power back to the American people. First, it would reduce the number of cases heard by the Court to only the most important. Second, this check would reinforce federalism and reinsert the states back to their constitutional position as the second sovereign. Third, the Court would know that its decision would have to be approved by the citizenry through concurrence by the States. And finally, the Justices would realize their decisions would have to be acceptable to the people which should serve to reduce the number of incredibly controversial decisions that the Court has promulgated over the years.

When the Court gets it right, those decisions would easily be ratified by the states, and when the Court gets it wrong, they would not. However, even the wrong decisions, once ratified, would be right because the American people decided to ratify the decision. *This is the key ingredient that is currently missing.* Any gap left by the Court's reservation to grant certiorari to only the most important cases, would be filled by the states which further reinforces federalism and brings the states and federal government back in line with the framework created by the founders.

Thankfully, the founders created Article V to correct such problems as they arise from time to time.[7] Article V allows Congress or the states to amend the Constitution. Amendments are not made for frivolous or trivial things. The high bar required to pass an amendment is evidence of this great power and responsibility. But, an amendment to give power back to the American people that has been misused by the entity that assumed it, is just such an occasion for the Constitution to be amended.

Failure to create this amendment equates to acquiescence or ignorant malaise because it allows the Court to continue to dictate its interpretation to the country with unchecked power. With this amendment there would at least be a check on the Court's power by the citizens who are bound to it. Requiring concurrence by the states would bring the system back in line with what the founders intended and guaranteed in the Constitution. ○

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A DISASTER BREWING: PACKING THE SUPREME COURT

By David Merrill

Another election season brings ideas for both political parties to debate. Recently, threats to "pack" the Supreme Court have been made by the Democratic Party. Specifically, Mayor Peter Buttigieg believes, "we definitely need to do structural reform on the Supreme Court."[1] Alternatively, Republican Marco Rubio plans "to prevent the delegitimizing of the Supreme Court, [and] introduce a constitutional amendment to keep the number of seats at nine."[2] Before a conclusion is reached, let's examine the historical changes of the Supreme Court first and then potential issues associated with "packing."

In 1789, the Judiciary Act established the first Supreme Court with one Chief Justice and five other justices.[3] In an effort to limit Thomas Jefferson's incoming appointments, the Judiciary Act of 1801 was passed, limiting the Supreme Court to five justices.[4] Shortly thereafter, the Judiciary Act of 1801 was repealed allowing six Supreme Court justices. Between 1807 and 1869, the number of the Supreme Court continued to change until the 1869 Judiciary Act set the number at nine.[5] From 1869 to 1935, no changes to the Supreme Court makeup occurred. Upset after the 1935 decision in *Schechter Poultry Co. v. United States*, then President Roosevelt threatened to add more Justices to the Supreme Court.[6] From this historical context, it is evident that packing the Supreme Court, or even making adjustments, has a historical basis.

The first issue that arises when considering "packing" the Supreme Court is the highly partisan debate that results from one party suggesting a change to the number of Justices. Historically, after one party voted to alter the Supreme Court makeup, the opposing party adjusted the Supreme Court as soon as they retook the presidency. Which is why the first issue with packing the Supreme Court is the instability caused with each election cycle. A Supreme Court that is adjusted every four to eight years would result in a confused jurisprudential history. Furthermore, how many justices would be allowed? Seemingly the party in power could place as many as it takes to encourage conservative or liberal rulings on the Court. The Supreme Court needs to be consistent. The threat of adding more justices, or a change to the number of justices every four years would serve as a detriment not only to those serving on the Supreme Court, but also the American people.

The second issue that results from packing the Supreme Court is that it overwhelmingly politicizes the Court. The Framers intended the Judiciary to be a separate branch so that the political nature of the other two branches did not overwhelm the independent judgement needed for the cases that arise before the Court. If every four years, the political party seeking power has on their platform changing the Supreme Court, it inserts politics into the Court. Chief Justice Roberts recently pushed back on the claim of the Court being politicized when he stated, "when you live in a polarized political environment, people tend to see everything in those terms."7 However, it would be difficult to remove politics if it's a party platform every election cycle.

Ever since the threat by then President Roosevelt in 1937, the Supreme Court has had 9 justices that has served the Supreme Court with great nobility. While some of the decisions have drawn severe political lines, society has thrived and adjusted to the decisions of the Court. As evident by the historical summation of the changes the Supreme Court, politics has tried to insert itself into the Court. We must demand that this remain separate and allow the Court as seated to decide the cases before it. If the Democrats gain control and move towards "packing" the Supreme Court, it would be a disaster for this Country. ○

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NONDISCLOSURE AGREEMENTS = SILENCE #METOO

By Mary Clare Kelleher

In 2016, Gretchen Carlson brought a sexual misconduct claim against her Fox News employer, Roger Ailes.[1]

In lieu of trial, Carlson decided to settle her claim with Fox News.[2] The settlement agreement included a nondisclosure clause, silencing her from ever telling the full story.[3] Although Carlson is still unable to tell her full story to the public, her brave

initiative led to multiple women coming forward with other sexual misconduct claims against Fox News.[4] Unfortunately, many of the other women were also forced to sign nondisclosure agreements, leaving their stories untold.[5]

In 2017, *The New York Times* ran a story that Hollywood media mogul Harvey Weinstein was paying off victims of sexual harassment and assault in settlement agreements for over three decades.[6] The Weinstein Company used nondisclosure clauses in these agreements to cover up the underlying allegations.[7] The nondisclosure clauses were key tools that Weinstein used to silence his victims so he could continue his sexual misconduct.[8]As a result, there are now eighty-seven women who have formally accused Weinstein of sexual misconduct.[9]

In 2018, *The Wall Street Journal* reported that numerous employees at Wynn Resorts had brought claims of sexual misconduct against founder and CEO, Steven Wynn.[10] Wynn entered into settlement agreements regarding these claims rather than risk the details coming out in contested litigation.[11] All of these settlement agreements had one thing in common—they included nondisclosure clauses.[12] The Massachusetts Gaming Committee released a report stating that powerful executives of Wynn Resorts forced women into these nondisclosure agreements to protect the reputation of the hotel and casino, along with the reputation of the perpetrator himself.[13] Because the nondisclosure agreements silenced the victims, the public was once again not allowed to learn the identity of a dangerous predator, allowing more and more employees to be subjected to sexual misconduct.[14]

In the wake of the Fox News and Harvey Weinstein scandals, Actress Alyssa Milano tweeted, "if you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[15] Since Milano's tweet, the hashtag "#MeToo" has been used millions of times on social media.[16] Milano's tweet, in combination with activist Tarana Burkes initiatives, led to what is known today as the "Me Too Movement."[17]

The "Me Too Movement" has provided a platform for victims of sexual misconduct to come forward with their stories without the fear that they are alone. Since the onset of the "Me Too Movement," countless numbers of victims have come forward with claims of sexual misconduct by their employers.[18] As a result, nearly two-hundred men in powerful positions have been fired or forced to resign because of sexual misconduct allegations.[19]

Additionally, the "Me Too Movement" has educated the American people on the prevalence of sexual misconduct and the importance of preventing future sexual misconduct in employment situations.[20] Prior to the "Me Too Movement," many individuals were unaware that there was a pervasive epidemic of sexual misconduct in the workplace. Notably, in 1998, a CNN study found that only 34% of the American people considered sexual harassment to be a "very important issue."[21] However, in 2017, the same CNN study showed that nearly 70% of the American people found sexual harassment to be a very important issue—nearly doubling in nine years.[22] These results prove that the "Me Too Movement" has had an unveiling effect on sexual misconduct, which has led to a shift in the American peoples' perspective about the importance this issue. The American people are now intolerant of sexual misconduct and desire it to end.

Although the American people realize that the victims of sexual misconduct need to be protected, the victims still face the possibility that they could be silenced by their perpetrator. While attempting to achieve justice, a victim could still be forced to sign a nondisclosure clause as a requirement to settle their claim. The perpetrator, having the power to force a victim into signing a nondisclosure agreement, allows the perpetrator to victimize their victim once again. The power to silence a victim should not be placed in the hands of the perpetrator, but rather the victim should have the choice of confidentiality or disclosure.

Despite the American people demanding change, Congress has failed to pass legislation that would make nondisclosure clauses in settlement agreements void or voidable by the victim. Fortunately, Congress did salute the "Me Too Movement" while passing the Tax Cuts and Jobs Act (TCJA).[23] A provision in the TCJA forbids employers from deducting expenses paid in sexual harassment settlement agreements that require confidentiality.[24] The provision encourages employers to allow disclosure of sexual harassment settlement agreements so that the employer can then deduct these expenses from taxable income.

Although the TCJA provision is a step in the right direction, Congress must do more. It is imperative that Congress pass a bill that would completely ban employers from *requiring* a victim to sign a nondisclosure agreement. Notably, the House and the Senate both have proposed bills before them that would allow a victim the option to *choose* disclosure or confidentiality in a settlement agreement, rather than the perpetrator having the power to require nondisclosure.[25] These bills would make it unlawful for an employer to preemptively include a nondisclosure clause for sexual misconduct claims in an employment agreement at the time of hiring. The bills would also prohibit an employer from including a nondisclosure clause in a settlement agreement for a claim of sexual misconduct unless the confidentiality is *mutually beneficial* to the employer *and* the employee. The House and the Senate have both referred these bills to Committee. Until Congress decides to take initiative and pass these bills, victims of sexual misconduct will continue to face silence at the hands of their perpetrator.

In the wise words of Oprah Winfrey, "For too long women have not been heard or believed if they dare to speak their truth to the power of those men. But their time is up."[26] Hopefully, Congress will agree that the perpetrators time in power is up and will pass legislation that forbids a requirement of silence in a sexual misconduct settlement agreement.

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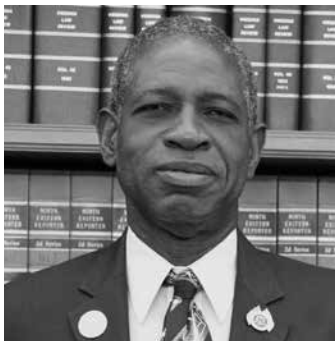
MANDATORY GUN BUY BACK AND CONFISCATION

By Frantz Michel



One of the most divisive issues in the United States today is the subject of private ownership of firearms. This topic has remained in the arena of public discourse since the 1960s. Federal and state legislatures often react to acts of violence committed using guns by promoting legislation restricting the ownership of firearms. Some have even proposed "mandatory buyback programs." What are the Constitutional limits on restricting ownership of firearms and confiscation of firearms?

A series of high-profile shootings promoted the passage of the Gun Control Act of 1968 that added new regulations relating to the interstate and foreign commerce in firearms, including provisions banning the importation of assault rifles, ownership of weapons by "prohibited persons," and licensing regulations.[1]

Another significant shooting prompted a substantial change in legislation. The wounding of President Reagan and three others, included Press Secretary James Brady, prompted Congress to pass the Brady Handgun Violence Prevention Act on November 30, 1993. It amended the Gun Control Act of 1968, implementing a waiting period of five days before a licensed importer, manufacturer, or dealer could sell, deliver, or transfer a handgun to an unlicensed individual.[2]

This article will examine two recent cases where the Supreme Court further articulated the reach and limits of the Second Amendment and the scope of gun rights in regard to the states. These cases are *Heller*, and *McDonald*.

The issue in *Heller*, pertained to the extent by which a state can regulate a citizen's possession of a handgun within the home for traditionally lawful purposes, such as self-defense.[3] The Supreme Court held that the District of Columbia's statutory ban on handgun possession in the home and the requirement to keep lawful firearms in the home unloaded and dissembled or bound by a trigger lock or similar device making it unavailable for immediate self-defense violates the Second Amendment.[4] In reaching this conclusion, the Supreme Court looked at state constitutions with arms bearing provisions before and after the Second Amendment, the drafting history of the Second Amendment, the history of the interpretation of the Second Amendment. This decision recognizes the individual right to keep and bear arms for lawful purposes such as self-defense unrelated to a militia.[5] The Court recognized that Second Amendment rights are not unlimited and that state governments can regulate legal ownership of firearms. The Court did not make any decisions regarding the issue of licensing requirements.

The majority opinion in *Heller* did not expressly state that the right to handgun ownership for lawful purposes was a fundamental

right. If it were a fundamental right, any mandatory handgun buyback programs would be unconstitutional based on the Second Amendment without any need to examine the due process clause of the Fifth or Fourteenth Amendment. The Supreme Court did not rule that the Second Amendment was incorporated through the Fourteenth Amendment because the *Heller* case was challenging a District of Columbia statute and therefore, only the federal courts had jurisdiction. Therefore, in the wake of *Heller*, the Second Amendment did not necessarily apply to the several states through the Fourteenth Amendment. The constitutionality of mandatory handgun buyback programs, which would allow the state to seize formerly legal firearms that were outlawed by statute, were still unclear. The only questions left are the confiscations from certain classes of individuals.

We may find some answers in *McDonald*, where Justice Alito delivered the opinion of the Court.[6] The Court held that the Fourteenth Amendment applies the Second Amendment right to keep and bear arms for self-defense to the states.[7] "The recognition of the right must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner."[8]

This case reinforces the fact that the Second Amendment is an individual right to own and keep firearms for lawful purposes as applied to the federal government and the States. Accordingly, mandatory gun confiscation would not survive a challenge based on the Second Amendment.

Proponents of a mandatory gun buyback program often look at Australia for an example of a compulsory national gun buyback program. Australia's National Agreement on Firearms was responsible for removing 650,000 assault rifles from Australian citizens.[9] The law made ownership more difficult by "requiring citizens to demonstrate a genuine need."[10] The main problem in looking at Australia as a model for a mandatory Gun buyback program is that Australia does not have a constitutional right to bear arms.

No jurisdiction in the United States has ever attempted a mandatory gun buyback program in the United States. The 1994 assault weapons ban grandfathered those who legally owned these weapons before the ban.[11] The grandfathering provisions are likely because legislation making a legally owned firearm illegal would first have to survive Second Amendment challenges, but also survive challenges under the due process clause of the Fifth Amendment or the Fourteenth Amendment, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."[12] Even if there are enough procedures in place to satisfy the procedural due process component, it will unlikely meet substantial due process since the right to bear arms under the Second Amendment has been established as a fundamental right. Local, state, and federal legislatures may be able to enforce some restrictions on gun ownership like licensing requirement, prohibiting ownership from certain classes of individuals like convicted felons and persons with mental health issues, and may be able to regulate the possession of firearms by specific categories of individuals, but mandatory gun buyback programs will not survive a constitutional challenge.

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THE LIABILITY OF RELIGIOUS ORGANIZATIONS IN EMPLOYMENT DISCRIMINATION SUITS

By Madeleine Gantzer

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] Moreover, the Establishment Clause "prevents the Government from appointing ministers," while the Free Exercise Clause prevents the Government "from interfering with the freedom of religious groups to select their own."[2] In other words, a qualifying religious organization is permitted to freely select its personnel and those who will administer the faith.[3] However, if the organization is ever to be involved in an employment discrimination suit, it may be exempt from suit if it can prove the "ministerial exception" applies.[4] The ministerial exception allows the organization to "to select and control who will minister to the faithful" without interference, provided that (1) the claim is asserted against a qualifying ministerial entity and (2) the position in question qualifies as a minister.[5] This article will focus on the latter prong and how to determine if the position is a qualified minister.

The United States Supreme Court acknowledged the ministerial exception, in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, decided in 2012. There, the Court unanimously held that the respondent qualified as a minister, and therefore the employer was entitled to fire the employee as it saw fit.[6] While the Court refused to adopt a "rigid formula" to determine if a position qualifies as a minister, the Court did set forth a number of factors

to consider. These factors include: (1) "whether the employer held the employee out as a minister; (2) whether the employee's title reflected ministerial substance and training; (3) whether the employee held herself out as a minister; and (4) whether the employee's job duties included important religious functions."[7] However, none of these factors, *alone*, are dispositive and rather all are to be considered by a totality of the circumstances standard.[8]

1. Whether the Employer Held the Employee Out as a Minister

In *Hosanna-Tabor*, the Court held that the employee was held out as a minister because she had a role "distinct from most of the other members."[9] Additionally, the Court acknowledged that the employee's title had a religious connotation, specifically "Minister of Religion, Commissioned."[10] However, the Court did note that the ministerial exception is "not limited to the head of a religious congregation"[11]. In other words, one factor courts are to consider is the employee's title and determine whether it has a religious or secular suggestion. Additionally, a court should also consider if the employee has a role that is significantly different than others and determine if that qualifies him or her as a minister.

2. Whether the Employee's Title Reflected Ministerial Substance and Training

To determine if one's title reflects a substantial degree of religious training, the court must consider factors such as an employee's education, qualifications, and his or her employment arrangement.[12] However, the United States Supreme Court has not given a bright line of what constitutes a substantial amount, but the Court has determined that requiring an employee to complete extensive religious training that took the employee six years to complete was substantial.[13]

3. Whether the Employee Held Himself or Herself Out as a Minister

The third consideration analyzes whether the employee considers himself a minister and outwardly presents himself as one. The United States Supreme Court determined that an individual holds himself out as a minister by accepting a formal call to religious service and repetitively suggesting to the community that he is a minister.[14]

4. Whether the Employee's Job Duties Include Important Religious Functions

Lastly, the Court noted the importance of also considering the functions an employee engages in on a day-to-day basis. While the religious function of a position is one of the more important factors to be considered, it is still a part of the totality-of-the-circumstances approach and thus is not determinative. Moreover, this functional factor can often include more than those individuals in ordained or commission positions, but nonetheless the position's primary function must serve a religious purpose and further a religious mission.[15]

For example, in *Fratello*, the court found the job duties performed by the principal of a Catholic school to weigh in favor of her being a minister.[16] These duties contained religious functions such as managing the teachers to ensure execution of the school's religious mission, leading daily prayer, supervising the various aspects of putting together mass, and supervising teachers' integration of Catholic lessons into the classrooms.[17]

In conclusion, the ministerial exception serves as a valuable affirmative defense for a religious organization that is facing liability in an employment discrimination suit. However, the ministerial exception is not overly broad because it requires the organization to be a religious entity and that the employee qualify as a minister. Therefore, if an employee is to be deemed a minister, the position must satisfy a majority of the considerations as set out by the United States Supreme Court. If both preliminary questions are satisfied the Government is not permitted to interfere with the religious group's right to freely select its personnel. In fact, to do otherwise and thus impose an unwanted minister upon a religious entity, is exactly what the First Amendment seeks to prevent. ○

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CAN A LAWYER'S ETHICAL OBLIGATION OF CONFIDENTIALITY BECOME A BARRIER IN THE PATH TO ACHIEVING JUSTICE?

By Jeffrey Bunnett

Picture a scenario in which you are an attorney who has been following a local murder case within your jurisdiction. The man charged with the crime is likely to be found guilty of the murder. A few days before the trial ends you are approached by your own client, who in confidence confesses to the murder in the case you had been following. Do you disclose this information and prevent an innocent man from going to jail, or remain silent and honor your "ethical duties" of confidentiality? This

article attempts to illustrate how the Model Rule of Professional Conduct regarding confidentiality may act as a barrier to achieving and upholding justice, and that such a rule needs to be amended to remove such a barrier.

In the scenario described above, Rule 1.6 of the Model Rules of Professional Conduct would require the attorney to maintain his client's confidential disclosure or suffer an ethics violation and possible punishment from his respective Bar.[1] Under this rule, titled "Confidentiality of Information," "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by …" the exceptions outlined within this rule.[2] These allotted exceptions are extremely specific, and only one may allow you to actually disclose while remaining within the ethical boundary of the rule. These exceptions state that:

> [a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.[3]

The only exception that could allow for a disclosure within the rules, would be if the man in our scenario who was being charged with murder was charged within a state that practices capital punishment. In such a variation of the scenario one could use exception number (1) if the lawyer believed his disclosure could prevent "reasonably certain death or substantial bodily harm."[4] However, even this is a stretch and could land our lawyer in hot water. Thus, this rule places the lawyer in a moral and ethical bind. On the one hand, the rule prevents the attorney from actually allowing justice to unfold by disclosing the identity of the true murderer. On the other hand, the policy behind the rule is still furthered as it fosters an environment where full disclosure of the essential facts is made between client and attorney without fear of reprisal, as well as the rule "serves the public interest by encouraging people to seek legal counsel."[5] Thus, "[t]he attorney cast within this paradox will find no saving language to reconcile these conflicting ideologies and is forced to decide based on her own sense of right and wrong, subject to the legal, moral, and personal ramifications of the ultimate decision."[6]

Such a scenario actually played out in the tragic case of *Frank v. Mangum*, where a man by the name of Leo Frank was convicted of murder, by both the trial court and the appellate division.[7] "While Frank was serving a life sentence for the crime, a client of attorney Arthur Powell revealed to Powell that he, and not Frank, was responsible for the murder."[8] The attorney chose not to reveal the information, and reasoned that he:

> could not have revealed the information the client had given [him] in the confidential relationship, without violating [his] oath as an attorney and subjecting [himself] to the penalty of possible disbarment . . . . Such is the law; I did not make the law; but it is my duty and the court's duty to obey the law, so long as it stands. I would be strongly tempted to break my oath before I would let an innocent man hang, but would know that I was violating the law and my oath if I did so.[9]

What is the true moral and ethical choice in this situation? Is it more ethical to uphold your oath and not breach confidentiality, while allowing an innocent man to suffer? Or is it more ethical to breach your oath and disclose the information in order to save the life of an innocent man so that justice may be achieved? "Regardless of which path the attorney chooses, any decision forces a compromise of either the attorney's moral or ethical integrity that may have catastrophic ramifications on her ability to continue the practice of law."[10] Therefore, because such ethical conundrums are possible and have actually occurred, in the interests of justice the rule needs to be revised in order for the ethical barrier to be removed, so that attorneys are no longer placed in this ethical paradox. ○

References:

1 MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).
2 *Id.*
3 *Id.*
4 *Id.*
5 David Rosenthal, *The Criminal Defense Attorney, Ethics and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 Of the Model Rules of Professional Conduct,* 6 St. Thomas L. Rev. 153, 160 (1993).
6 *Id.* at 161.
7 Frank v. Mangum, 35 S. Ct. 582 (1915).
8 Rosenthal, *supra* note 5, at 162.
9 Arthur G. Powell, *Privilege of Counsel and Confidential Communications*, 6 Ga. Bar J. 333, 333-34 (1943).
10 Rosenthal, *supra* note 5, at 161.

ABANDONING AFFIRMATIVE ACTION IN HIGHER EDUCATION

By Kaitlin Coyle

Affirmative action in higher education has long been a controversial topic in American Jurisprudence. The U.S. Supreme Court has addressed the conflicting policy in a few cases including *Bakke, Gratz, Grutter, Fisher* and most recently *Students for Fair Admissions* (SFFA).[1] Ultimately, the Supreme Court has upheld many of these race-based admissions policies as long as they pass constitutional muster in the form of strict scrutiny.[2] Every higher education affirmative action case that has made it to the Supreme Court has included a petitioner of a majority race, until now.[3]

On November 17, 2014, Students for Fair Admissions (SFFA) filed a complaint alleging that Harvard's admissions process violated Title VI of the Civil Rights Act of 1964.[4] The petitioners alleged that Harvard employed racially discriminatory admissions policies against Asian-American applicants.[5] This is the first affirmative action case to assert that a race-based admissions policy discriminates against a minority group of individuals.

After almost eight months, Federal Judge Allison Burrough upheld Harvard's "personal rating" admissions policy as constitutional. The court found that while Harvard was subject to strict scrutiny, the college had a substantial and compelling interest in student body diversity.[6] The court further held that Harvard's policy was narrowly tailored[7] because the school did not engage in "impermissible racial balancing,"[8] nor did it "impermissibly use race as [a] mechanical plus factor."[9] Moreover, Judge Burrough found that Harvard effectively considered "race-neutral alternatives"[10] and the evidence that SFFA provided was insufficient to show that Harvard "intentionally discriminated against Asian American applicants."[11]

While Harvard might have won the battle, the war is far from over. On October 11, 2019, SFFA filed their notice to appeal with the First Circuit.[12] Their appeal is not without merit, while Judge Burrough ultimately upheld Harvard's admissions process, she still expressed some concerns with Harvard's "personal rating" policy. In the years leading up to this lawsuit, "Asian Americans were admitted to Harvard at slightly lower rates than white applicants."[13] The court acknowledged that "Asian Americans would likely be admitted at a higher rate than white applicants if admissions decisions were made . . . solely on the academic and extracurricular ratings."[14] While Asian Americans, on average, receive the highest scores for academic and extracurricular activities, they receive the lowest scores during their personal ratings.[15] Personal ratings are interviews conducted by Harvard admissions officers. Judge Burrough acknowledged that Asian Americans might have a harder time getting into Harvard. She suggests that "it is possible, although unsupported by any direct evidence, . . . that part of the statistical disparity resulted from admissions officers' implicit biases[16] that disadvantaged Asian American applicants."[17] The disparity in personal rating scores "suggests that at least some admissions officers might have subconsciously provided tips in the personal rating, particularly to African American and Hispanic applicants."[18] Thus, if SFFA can establish Harvard admission officers intentionally or subconsciously gave Asian American applicants a lower personal rating score on account of their race, the ruling could likely be overturned.

There is no doubt that this case is aimed at the Supreme Court. The Justice Department has expressed that "the government has a 'substantial interest' in the suit."[19] With the current administrations "race-neutral" policy and the recent appointment and confirmation of Supreme Court Justice Brett Kavanaugh, the administration may have the swing vote it needs to overturn affirmative action precedent.[20] Only time will tell if race-conscious admissions policies in higher education have reached there logical end. ○

References:

1 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306, 390 (2003); Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016); Students for Fair Admis., Inc. v. Harvard College, No. 14-cv-14176-ADB, 2019 WL 4786210, (D. Mass. Oct. 1, 2019).

2 Bakke, 438 U.S. at 265.

3 *See* generally, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306, 390 (2003); Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016); Students for Fair Admis., Inc. v. Harvard College, No. 14-cv-14176-ADB, 2019 WL 4786210, (D. Mass. Oct. 1, 2019). (Referencing the majority race as Caucasian.)

4 Students for Fair Admis., Inc. v. Harvard College, No. 14-cv-14176-ADB, 2019 WL 4786210, at *1-2 (D. Mass. Sep. 30, 2019).

5 Complaint at 1-4, Students for Fair Admis., Inc. v. Harvard College, No. 14-cv-14176-ADB, 2019 WL 4786210, at *1-2 (D. Mass. Sep. 30, 2019).

6 *Id.* at 106.

7 *Id.* at 107.

8 *Id.* at 83.

9 *Id.* at 119.

10 *Id.* at 81.

11 *Id.* at 122.

12 *Appeal filed*, Students for Fair Admis., Inc. v. Harvard College, No. 14-cv-14176-ADB, 2019 WL 4786210, (D. Mass. Sep. 30, 2019).

13 *Id.* at 53. It's important to note that this trend in admissions changed in 2019 when "admission rates favored Asian American Applicants."

14 *Id.* at 55. ("Among Expanded Dataset applicants, more than 60% of Asian American applicants received academic ratings of 1 or 2, compared to 46% of white applicants, 9% of African American applicants, and 17% of Hispanic applicants.") (28% of Expanded Dataset Asian American applicants receive an extracurricular rating of 1 or 2, compared to 25% of white applicants, 16% of African American applicants, and 17% of Hispanic applicants.")

15 *Id.* ("Among Expanded Dataset applicants, 22.6% of white applicants receive a personal rating of 1 or 2, compared to 18% of Asian Americans, 19.4% of African Americans, and 19.1% of Hispanics.")

16 A question that arises from this is, isn't affirmative action meant to address just that, implicit biases? So the question remains if implicit biases are already working in favor of what the school considers a minority (blacks and Hispanics) has the time come to end affirmative action?

17 *Id.* at 72.

18 *Id.*

19 Hudson Wal, *Harvard's Asian American Problem: 35 Diverse Issues in Higher Education*; FAIRFAX15–16 (2018), https://search.proquest.com/openview/1101ce91ac628813c1f73401059545df/1?pq-origsite=gscholar&cbl=27805.

20 Marina N. Bolotnicova, *Harvard's Admissions Process Upheld*, HARVARD MAGAZINE (2019) ("Many legal analysts expect that the makeup of the current Supreme Court would mean that the use of race in college admissions could be struck down or significantly curtailed if *SFFA v. Harvard* were heard before the court.").

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