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Letter from the Editor-in-Chief

Dear Readers,

Welcome to the seventh print edition of the *Claremont Journal of Law and Public Policy* (*CJLPP*). After reviewing a record number of submissions, the editorial team is delighted to feature five thought-provoking papers in addition to selected parts of our interview with Los Angeles County Superior Court Judge Halim Dhanidina (PO '94), whom the *CJLPP* hosted in February for a full day of events on campus. For articles from our blog as well as submissions from across the U.S. and overseas, please be sure to visit our website at www.5clpp.com.

First of all, I would like to share some exciting recent developments from us at the journal. We are particularly thrilled to announce that the *CJLPP*, working side by side with the *Penn Undergraduate Law Journal*, is currently spearheading collaboration projects with other undergraduate law journals from different parts of the country. We expect to launch an intercollegiate undergraduate law journal website in the coming months. This website will provide a fantastic platform for readers interested in law and public policy to readily access a wide variety of featured articles from all of our partner journals and join our mailing list to receive periodical updates. By forming this nationwide alliance, each individual group also seeks to actively communicate ideas and suggestions for each other and is eager to brainstorm creative ideas to do projects together.

Meanwhile, all three of the journal's former Editors-in-Chief—Byron Cohen (our founder), Henry Appel, and Martin Sicilian—and I have come together to create an EiC reflections booklet in which we will share our thoughts on the growth and evolution of the *CJLPP* in its first few years, as well as advice for future members. While the booklet is still a work in progress, we aim to release it in celebration of the journal's fifth birthday in the coming year: certainly something to look forward to for everyone who has been supporting our journal. Also a work in progress is our new alumni network, through which we hope to connect current *CJLPP* members with our alumni, many of whom have graciously offered to provide mentorship and guidance.

After we released Vol. 4, No. 2 in early February, the journal's ambitious staff set new goals for ourselves and accomplished them by working closely with each other and our partners. Congratulations and many thanks go to our diligent writers, who have chosen to embark on a journey of collaborative learning and met all the rigorous expectations successfully. Here, a huge thank-you, of course, goes to our extraordinarily dedicated editors for guiding our writers through the process along the way, often challenging their peers to realize their full potential and consider their work from different perspectives. It is always incredibly rewarding to read through outlines and multiple drafts filled with edits and comments, and to see how intelligent ideas turn into meticulously-crafted final "products" that incorporate thoughts from multiple students. Through in-person editing sessions, editorial meetings, and email chains, our editors and writers constantly engage in conversations that, I believe, have served as a valuable learning experience for everyone involved.

This semester, our two blog teams, led by editors Kyla Eastling and Kate Dolgenos, have consistently produced high-quality content on a range of fascinating topics in law and public policy. Updated almost on a daily basis, the *CJLPP* blog features timely analysis and commentaries on relevant law and public policy issues—domestic and international alike. Staff writers, in addition to writing original, research-based pieces for the journal, also interview legal and policy experts, contribute articles on relevant campus events or timely issues for our website, and brainstorm other projects that they would like to pursue. I am extremely grateful that our tireless and brilliant senior editors—Calla Cameron, Emily Zheng, Greer Levin, Jerry Yan, and Kate Dolgenos—consistently provide insightful feedback on our writers' work. Our proactive interview editor, Caroline Skinner, has obtained many wonderful interview opportunities with experts on diverse fields for our writers, who work with her to produce stimulating interview articles such as the one featured in this print edition.

My sincere gratitude also extends to the journal's business staff. Henry Head, our amazing Chief Operating Officer who heads the business team, and our energetic business directors Ali Kapadia, Franco Liu, and Kim Tran, have been very active in contributing to this action-packed semester with their thoughtful events agenda. In addition to playing a crucial role in facilitating all of our collaboration projects, the business team is excited to introduce our first ever staff writer panel event, where our talented writers share their insights on their chosen topics as well as their experience writing for the *CJLPP*. Additionally, we are looking forward to launching community outreach projects, for which the journal plans to organize law and public policy workshops at local community colleges and high schools. Alice Zhang and Jessica Azerad, our publisher and webmaster, have introduced new design elements to our products and revamped our website. I adore their creativity and cannot thank them enough for all their input.

Spring is a perfect time to celebrate all we have accomplished during another eventful semester together, but it is also that time of the year: yes, we must bid farewells to our graduating seniors from the Class of 2017. To our friends Martin Sicilian (our Editor-in-Chief Emeritus, who continues to serve as an inspiring mentor to our group), Henry Head, Calla Cameron, Kate Dolgenos, Caroline Skinner, Jessica Azerad, and Lindsey Mattila: we will miss you dearly here in Claremont; it is difficult to imagine a *CJLPP* without you. Meanwhile, we are also overjoyed to see that you will continue pursuing your dreams and aspirations wherever you go. Thank you so much for all the fond memories, joy, laughter, and inspiration, and for the strong legacy you have left with us. We will carry on your work with great energy.

Finally, I would like to thank our faculty advisor, Prof. Amanda Hollis-Brusky, for all her generous guidance and helpful recommendations. Our journal is certainly also indebted to all of our readers, partners, and supporters. If you enjoy reading our articles and would like to submit your own work, keep in mind that the *CJLPP* always welcomes submissions to our blog and future print editions. Please refer to the "Submissions" page on our website for details. For our Claremont readers, if you feel that you could be a valuable addition to our team, I invite you to visit our "Hiring" page for potential openings or email us at info.5clpp@gmail.com.

Happy Reading!

With Warm Regards,
April Xiaoyi Xu
Editor-in-Chief

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Supervised Injection Facilities: Combating an Epidemic

Gabe Magee PO '20

Currently an opioid epidemic is ravaging the Northeast and Midwest areas of the United States, taking almost 13,000 lives by overdose in 2015, an increase from 8,000 in 2013.[1,2] This increase in deaths is part of a rapid and troubling upward trend -- a 244 percent increase in deaths from 2007 to 2013.[3] On top of these sobering figures, authorities are likely to underreport deaths from heroin overdose due to variations in state reporting procedures, as well as the high likelihood of authorities misattributing heroin overdoses to morphine overdoses.[4] Federal agencies like the Drug Enforcement Administration (DEA) that recognize the serious threat posed by heroin in their 2015 annual report, and the American public in general, are taking notice of the troubling nature of increasing death tolls. The epidemic has been gaining prominence, even being fielded as a question during the 2016 election. While experts have produced a myriad of solutions, one of the most novel solutions holds a lot of promise -- Supervised Injection Facilities, or SIFs.

SIFs are sanctuaries for heroin addicts to legally and safely inject under the supervision of medical personnel. Theoretically, the environment not only provides safer needles and substance, but also has staff on site to educate addicts on safer techniques and to increase patients' access to resources that will eventually help them break free from their addiction. While this solution may seem hopeful for compassionate drug policy advocates, currently SIFs are illegal in the United States, and will likely be the source of a large legal battle between the federal and state government, as the federal government enforces its will through the regulation of commerce clause of the Constitution, and the states attempt to take care of the health and welfare of their citizens. Because of this shaky legal status, currently no facilities exist in the U.S., but as many as 74 exist in Switzerland, Germany, the Netherlands, Norway, Luxembourg, Spain, Denmark, Australia and Canada.[5] Existing facilities have shown great success in reducing the likelihood of overdose dramatically in the surrounding area, as well as eventually integrating addicts into drug treatment.[6] Among some of the more impressive results, due to staff supervision, there have been zero recorded fatal overdoses at SIFs around the globe.

States where the heroin epidemic is strongest should consider legalizing, implementing, and operating SIFs in areas that are the most affected by the crisis, using the legal precedent of marijuana as a way to circumvent the federal restriction of heroin in the United States.

The Success of SIFs Overseas

Since 1986, SIFs have shown to drastically reduce overdose rates and possibly lead to reduced rates of addicted individuals in the surrounding areas. Overdoses occurring at SIFs are extremely less likely to happen for a multitude of reasons. According to a report published by the European Monitoring Centre for Drugs and Drug Addiction, this is due to the combination of "trained personnel who are able to give advice on dosage and application technique, house rules that exclude high-risk drug combinations (especially alcohol consumption) and which allow for unhurried conditions of drug consumption, as well as the availability of emergency services on-site or on call" to reduce risk.[7] These practices create an environment where addicts are less likely to feel stressed or rushed and subsequently use unsafely.

While they themselves do not explicitly try to treat addiction, SIFs expose addicts to safe environments where they can get education and introduction to social services.[8] Many eventually do get help with their addiction, likely because SIFs "act as a link to the wider system of care, facilitating access to treatment." [9] Clients are often referred to drug treatment services such as social assistance service, detoxification, and therapy. In the SIF located in Sydney, Australia, staff provided 1,385 referrals to 577 clients over a 18-month period, with approximately one for every 41 client visits. In facilities in Germany, 54 percent of surveyed users reported that they had been referred, with an average of 1.5 referrals per patient. In the SIF located in Geneva, 276 referrals were reported among 736 registered service users. The study concluded that the availability of these services eventually served their purpose without creating pressure to use them, stating that "[o]nly a small proportion of clients use the facilities for drug consumption purposes only. The majority at some point make use of other medical, counselling and treatment services."

Critics of SIFs argue while these facilities may make heroin safer, they may work too well by removing all incentives to not use heroin. They argue that by creating a safety net around the drug, the government is coddling addicts or even reducing risk for potential users

1 Centers for Disease Control and Prevention. Centers for Disease Control and Prevention, 26 Jan. 2017. Web.07 Mar. 2017.

2 Drug Enforcement Administration. "National drug threat assessment summary." p25-39. (2015).

3 Ibid.

4 Ibid.

5 Dooling, K., and M. Rachlis. "Vancouver's Supervised Injection Facility Challenges Canada's Drug Laws." *Canadian Medical Association Journal* 182.13 (2010): 1440-444. Web.

6 Hedrich D. European report on drug consumption rooms. Lisbon: European Monitoring Centre for Drugs and Drug Addiction, p 79, 2004.

7 Hedrich D. European report on drug consumption rooms. Lisbon: European Monitoring Centre for Drugs and Drug Addiction,p50, 2004.

8 "The Case for SIFs." *SIF NYC*. SIF NYC, Web. 28 Feb. 2017.

9 Hedrich D. European report on drug consumption rooms. Lisbon: European Monitoring Centre for Drugs and Drug Addiction, p59, 2004.

through SIFs. Empirically however, according to a study of the over 70 SIFs across the globe, the presence of SIFs has no meaningful increase on the use of heroin because the distribution is heavily regulated.[10] The study cited no correlation in heroin-consumption trends in areas with SIFs, emphasizing the lack of evidence that "consumption rooms encourage increased drug use or initiate new users. There is little evidence that by providing better conditions for drug consumption they perpetuate drug use in clients who would otherwise discontinue consuming drugs such as heroin or cocaine, nor that they undermine treatment goals." There have been no studies concluding that SIFs perpetuate drug use in clients who would otherwise discontinue consuming drugs or that SIFs undermine treatment goals.

Implementation of SIFs in the United States

SIFs are a measured and reasonable response to the heroin epidemic in the United States. Such "compassionate" measures that seek to lift addicts out of the grip of addiction rather than impose punitive measures upon them are gaining ground after public perception of the war on drugs has shifted negatively. The idea of SIFs could not come at a more opportune time. As previously stated, currently an epidemic of heroin overdoses exists in the U.S. -- heroin-related deaths have quadrupled since 2010. 12,989 people died of heroin overdose in 2015. Overdose death rates rose by 20 percent from 2014 to 2015.[11] Not only is the public growing ever more wary of the meteoric threat that the heroin epidemic poses, but elected officials in affected areas are listening to their constituents. Svante Myrick, the mayor of Ithaca, New York, proposed the implementation of a SIF in his city in February 2016.[12] Myrick's initiative to help his city shows promise that politicians are beginning to open up to this controversial plan in areas hit hard by the epidemic.

While these facilities have shown at the minimum some moderate success, it can be argued that they are located in areas that are just too culturally different from, or not as sparsely populated as, the United States. The taboo that exists surrounding drug use is very real in the United States compared to Europe.

Since no SIFs exist in the United States, there are no true ways to evaluate the effectiveness of them in an American society with American demographics. However, just under 25 miles from the U.S. border, a successful SIF operates in Vancouver. The fatal overdose rate within the immediate vicinity of the facility dropped by 35 percent and dropped by nine percent in the broader Vancouver area at large. Additionally, 75 percent of patients changed their injection practices after using the facility. "Among these individuals, 80 percent indicated that the SIF had resulted in less rushed injecting, 71 percent indicated that the SIF had led to less outdoor injecting, and 56 percent reported less unsafe syringe disposal."[13] While it would be erroneous to assume that Canadian and American societies are identical, it cannot be discounted that they share many similarities. The only true way to determine whether SIFs would be effective in America is to implement them and compare to SIFs around the globe.

10 Hedrich D. European report on drug consumption rooms. Lisbon: European Monitoring Centre for Drugs and Drug Addiction, 2004.

11 "Today's Heroin Epidemic." Centers for Disease Control and Prevention. Centers for Disease Control and Prevention, 07 July 2015. Web. 07 Mar. 2017.

12 Derespina, Cody. "Mayor Wants to Open Supervised Injection Facility for Heroin in NY City." *Fox News U.S.* Fox News, 22 Feb. 2017. Web. 6 Mar. 2017.

13 "Supervised Injection Facilities." Drug Policy Alliance. Drug Policy Alliance, Feb. 2016. Web. 7 Mar. 2017.

Illegality of SIFs, and a path to legality

All of this being said, there has been little legal area for SIFs to operate. As it stands, the United States government currently outlaws the use, sale, distribution, and possession of heroin on a federal level through the Controlled Substances Act of 1970.[14] Heroin is classified as a schedule I substance, which means that it is considered to have not only "a high potential for abuse" but also "a lack of accepted safety for use of the drug or other substance under medical supervision."[15] Specifically, there are at minimum two sections that could be wielded to shut down SIFs authorized by any states -- Section 844, which prohibits drug possession, and Section 856, which makes it illegal for anyone to "knowingly open, lease, rent, use, or maintain any place... for the purpose of manufacturing, distributing, or using any controlled substance."[16] The most notable case is *United States v. Oakland Cannabis Buyers' Cooperative,* in which the Supreme Court ruled that the Buyers' Cooperative could not uphold the common-law medical necessity defense to their crime of the distribution of medicinal marijuana even though medicinal marijuana had been legal in California since 1996. In the majority opinion, Justice Thomas wrote that in regards to "marijuana (and other drugs that have been classified as "schedule I" controlled substances), there is but one express exception, and it is available only for Government-approved research projects, § 823(f). Not conducting such a project, the Cooperative cannot, and indeed does not, claim this statutory exemption."[17] Since heroin is also a schedule I substance, this spells bad news for SIF advocates.

Even though the Controlled Substances Act makes it incredibly hard for any states hoping to implement SIFs to combat the threat of a heroin addiction epidemic, an article in The American Journal of Public Health maps out a path for states that so wish to implement SIFs.[18] The article emphasizes that SIFs could be pursued on a pilot basis, requiring not only sustained political effort by state lawmakers, activists, and researchers but also at the bare minimum untroubled operation from the federal government -- functionally ignoring the Controlled Substances Act. While the article was published well before the recreational legalization of marijuana, there is precedent for the circumvention of this statute in the legalization of both medicinal and recreational marijuana. Much like SIFs, legal sale and use of cannabis on the state level are in direct contradiction of the Controlled Substances Act. Just like heroin, marijuana is a schedule I substance, and treated with the highest amount of restriction. However, despite this, 7 U.S. states and the District of Columbia have legalized recreational marijuana, and 36 further states, as well as Guam and Puerto Rico have legalized it medicinally in some form. Currently the legal battle between the federal government and the states seems headed toward a confrontation, especially after Attorney General Sessions expressing his disdain against marijuana.[19] Lawmakers who seek to implement SIFs should look to the bills and statutes of the states that have legalized recreational marijuana, such as those of Massachusetts -- coincidentally a

14 21, §§ 13 (1970). Print.

15 21, §§ 13-812 (1970). Print.

16 21, §§ 13-844-856 (1970). Print.

17 *United States v. OAKLAND CANNABIS BUYERS' COOPERATIVE*, 532 U.S. 490, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001).

18 Beletsky, Leo, Corey S. Davis, Evan Anderson, and Scott Burris. "The Law (and Politics) of Safe Injection Facilities in the United States." *American Journal of Public Health* 98.2 (2008): 231-37. Web.

19 Lee, Kurtis. "What Is the Future of Recreational Marijuana in Trump's America?" *Los Angeles Times*. Los Angeles Times, 7 Mar. 2017. Web. 7 Mar. 2017.

state also heavily affected by the heroin epidemic.[20] In the "Regulation and Taxation of Marijuana Act," Massachusetts lawmakers lay out the official stance of enforcement of federal law by the commonwealth: "A contract entered into by a licensee or its agents as permitted pursuant to a valid license issued by the commission, or by those who allow property to be used by a licensee or its agents as permitted pursuant to a valid license issued by the commission, shall not be unenforceable or void exclusively because the actions or conduct permitted pursuant to the license is prohibited by federal law."[21] This law is extremely recent, and has yet to have any legal challenges, but future challenges could serve as a precedent for granting SIFs some protection from federal law enforcement by the states.

Additionally, in the same case where the Supreme Court ruled that the necessity defense for medicinal use of marijuana does not supercede the federal statute of the Controlled Substances Act, the Court also noted that "as a policy matter, (whether) an exemption should be created is a question for legislative judgment, not judicial inference," noting that legalization matters would have better luck if they were taken to Capitol Hill instead.[22]

Even though the Controlled Substances Act gives authority to the federal government to prosecute marijuana users, recreational marijuana is still alive and well in states which have legalized it. The reason why authorities have not focused their efforts on these state-legal users can be attributed to a memorandum sent out by Deputy Attorney General David Ogden to select United States Attorneys in 2009, in which the Attorney General's office set the Department of Justice's priority away from "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[23] However, the memo also makes it clear that it "does not 'legalize' marijuana or provide a legal defense to a violation of federal law." This memo may prove as the best precedent for how the federal government treats the legalization of scheduled substances by the states. The success of legal cannabis, and by extension SIFs, may well end up at the discretion of the Attorney General and the Department of Justice as medicinal and recreational marijuana is for the time being.

Review

Heroin-ravaged states should try to implement SIFs on a pilot basis as a compassionate tool in the fight against heroin addiction in the United States. Through their implementation around the globe, they have shown to produce meaningful results in in health, in the reduction of overdose death rates in the surrounding area. Additionally, by introducing addicts to a social services net, SIFs lift those afflicted out of the cycle of addiction and back into productive society. While there may be cultural and demographic differences between the United States and European countries, nearby Canada implements the SIFs with similar amounts of success. Although SIFs would be deemed illegal through the Controlled Substances Act if implemented now, state lawmakers implementing SIFs may take a similar path as lawmakers who implemented marijuana.

While lawmakers should not consider one strategy to be a catch-all, end-all solution to the ever-more-dangerous threat that is the heroin epidemic, supervised injection facilities are certainly one of the most promising paths that state governments can take to fight against it. While currently federal law does explicitly prohibit the use of these facilities, the precedent set by state marijuana legalization allows a way for states to implement them. The empirical evidence gained from the dozens of locations around the world show that supervised injection facilities produce meaningful change -- something desperately needed to reverse the tragic trend in American communities. However, the ultimate fate of SIFs would lie in the hands of an administration currently hostile to looser drug laws, or courts whose opinions have not yet been heard on broader state-level legalization.

20 Feyerick, Deb, and Chris Boyette. "'The Meat and Potatoes' of Fighting Drugs." *CNN*. Cable News Network, 02 Sept. 2014. Web. 6 Mar. 2017.

21 "Regulation and Taxation of Marijuana Act," Section 10, Contracts pertaining to marijuana enforceable

22 United States v. OAKLAND CANNABIS BUYERS' COOPERATIVE, 532 U.S. 490, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001).

23 David W. Ogden, Deputy Attorney General, "MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS", October 19, 2009

The Case for (and Against) Sanctuary Jurisdictions

Isaac Cui PO '20

Introduction

On January 25, 2017, Donald Trump issued two sweeping executive orders which removed many of the previous administration's policies regarding immigration enforcement in favor of a stringent, restrictionist approach. More specifically, one[1] punishes so-called sanctuary policies for causing "immeasurable harm to the American people and to the very fabric of our Republic" and mandates that sanctuary jurisdictions shall not be eligible for federal grants. It also calls for the expansion of the Immigration and Customs Enforcement (ICE) by hiring 10,000 additional immigration officers. The other executive order,[2] focused on strengthening immigration enforcement along the U.S.-Mexico border, similarly demonstrates the Trump administration's pivot towards punitive policies meant to deter unauthorized migration. In implementing these policies, federal immigration officials have conducted raids in at least six states, using tactics such as random ID checks or going door-to-door in order to find residents without documentation.[3] In response, cities across the country[4] have willingly embraced the label of "sanctuary" and rallied against Trump's policies. Thus, the debate about sanctuary jurisdictions has perhaps never been more salient—nor as important to the lives of millions of Americans—as it is now.

This essay seeks to explore sanctuary policies: what they are, the scholarly debate over them, and the benefits (and drawbacks) of adopting such policies. In doing so, this paper contends that sanctuary policies are beneficial for a wide variety of reasons, and it attempts to debunk commonly-used justifications for opposing sanctuary policies. This article is split into three parts. First, it will explain what sanctuary jurisdictions are. Next, it will examine the legality of sanctuary policies. Finally, it will explore the justifications for opposing sanctuary policies.

I. Definitions

Sanctuary policies, as an umbrella term, refer to policies adopted by subfederal governments which, in some way, refuse to enforce federal immigration law. As of 2015, around 350 local jurisdictions, three states (California, Connecticut, and Rhode Island), and the District of Columbia have adopted sanctuary policies of some kind. Their policies are diverse and multifaceted: "Many restrict compliance with detainers,[5] others prohibit local law enforcement from inquiring about subjects' immigration status, and some restrict the use of local funding for immigration enforcement."[6] As such, it is difficult, exactly, to pin down what jurisdictions can or cannot be considered sanctuaries. This is especially true because *how* sanctuary policies are adopted varies greatly—some, such as the California TRUST Act,[7] function as a statewide policy regarding immigration non-enforcement, whereas others are simply local police policy (for example, if a local police department refuses to honor detainer requests).[8] It should be no surprise, then, that Trump's executive order punishing sanctuary jurisdictions provides a sweeping method for determining what constitutes a sanctuary.[9] In short, finding a precise, legalistic standard for defining sanctuary jurisdictions is difficult; therefore this article defines sanctuary policies to mean, generally, a form of non-enforcement of federal immigration law.

Before proceeding further, it is worth noting that the immigration debate is a long-standing and salient debate. The result is that the related terminology has become politicized. Similar to how fights over abortion have created "pro-life" and "pro-choice" camps, immigration ideologues can be differentiated simply by referring to their word choice. Restrictionists (that is, those who prefer more stringent immigration laws) will use terms such as "illegal immigrant" or "illegal alien" as a way to stress that these migrants are breaking the law. In doing so, they attempt to link the illegal presence of migrants to

1 Donald J. Trump, *Executive Order: Enhancing Public Safety in the Interior of the United States*, (The White House Office of the Press Secretary, 25 Jan 2017), online at: https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united (visited 27 Feb 2017).

2 Donald J. Trump, *Executive Order: Border Security and Immigration Enforcement Improvements*, (The White House Office of the Press Secretary, 25 Jan 2017), online at: https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements (visited 27 Feb 2017).

3 Lisa Rein, Abigail Hauslohner, and Sandhya Somashekhar, *Federal agents conduct immigration enforcement raids in at least six states*, (The Washington Post, 11 Feb 2017), online at: https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html (visited 27 Feb 2017).

4 For example, Los Angeles and Oakland have both reaffirmed their status as sanctuaries in the face of Trump's executive orders. See: Maura Dolan and James Queally, *Santa Clara County seeks to block Trump's order to defund sanctuary cities*, (Los Angeles Times, 23 Feb 2017), online at: http://www.latimes.com/local/lanow/la-me-ln-santa-clara-sanctuary-trump-lawsuit-20170223-story.html (visited 27 Feb 2017).

5 Detainers are requests that ICE sends to local or state law enforcement agencies to hold or transfer people into ICE's custody for deportation. For more information, see: Lazaro Zamora, *Sanctuary Cities and Immigration Detainers: A Primer* (Bipartisan Policy Center, 28 July 2015; updated 5 July 2016), online at: http://bipartisanpolicy.org/blog/sanctuary-cities-and-immigration-detainers-a-primer/ (visited 17 Nov 2016).

6 Muzaffar Chishti and Faye Hipsman, *Sanctuary Cities Come Under Scrutiny, As Does Federal-Local Immigration Relationship* (Migration Policy Institute, 20 Aug 2015), online at: http://www.migrationpolicy.org/article/sanctuary-cities-come-under-scrutiny-does-federal-local-immigration-relationship (visited 14 Feb 2017)

7 Allan Colbern and Karthick Ramakrishnan, *State Policies on Immigrant Integration: An Examination of Best Practices and Policy Diffusion* (UC Riverside School of Public Policy Working Paper Series, Feb 2016), online at: http://spp.ucr.edu/publications/pdf/state-best-practices-report.pdf (visited 18 Nov 2016).

8 Chishti and Hipsman, Id.

9 Note that the Secretary of Homeland Security "has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction." *Enhancing Public Safety…,* Id.

criminality—a trope that, as this paper will later explain, is extremely important as a rallying tool. Integrationists (those who are more open to immigration, authorized or not), in contrast, will use terms such as "undocumented residents," an implicit critique of the idea that human beings can be illegal. Each of these terms brings baggage with it and, so as to avoid those preconceptions, this paper, in the vein of Hiroshi Motomura,[10] a law professor at the University of California, Los Angeles, will use the term "unauthorized migrant" to refer to these groups. Secondly, because the scope of this paper is confined to sanctuary policies, this paper will always use the term "restrictionist" to refer to someone who opposes sanctuary policies. In other literature,[11] the term "restrictionist" refers to a diverse group of issue entrepreneurs who have varying policy beliefs that, overall, are opposed to immigration. However, for the question of sanctuary policies, those broader ideological commitments matter less, which is why this paper employs the term in a narrower sense. Now that our terminology is clearer, we can examine the question of whether or not sanctuary policies are legal.

II. The Legality of Sanctuary Jurisdictions

Some argue that, statutorily, sanctuary jurisdictions are illegal. For example, one commentator argued that: "8 U.S.C. §1373[12] bans state and local governments from prohibiting or restricting law enforcement or other government officials from sending [information to] or receiving information from the federal government[13] on the 'citizenship or immigration status, lawful or unlawful, of any individual.'"[14] This means that there could be a *statutory* challenge to sanctuary policies for breaking federal law. Moreover, sanctuary policies may in other ways interfere with federal law, which would also justify a *constitutional* challenge because federal law overrides state or local laws according to the Supremacy Clause.[15] This idea—that federal courts can strike down subfederal laws because they are superseded by contrary federal law—relies on the doctrine of preemption,[16] which has a unique history regarding immigration law.

The text of the Constitution states that Congress has the power to "establish a uniform Rule of Naturalization"[17] which, in conjunction with the Supremacy Clause, has led the Supreme Court to conclude that the power "to regulate immigration is unquestionably exclusively a federal power."[18] This doctrine has led the judiciary to strike down local enforcement of immigration law, such as in *Arizona v. United States*.[19] In that case, the Supreme Court reviewed the constitutionality of Arizona's S.B. 1070, which made breaking various federal immigration regulations a state misdemeanor, allowed police officers to arrest people believed to be deportable, and required officers to verify peoples' documentation during specific routine activities. The Court struck down certain sections of that law, such as Section 5(C) which creates a criminal penalty for unauthorized migrants who seek work in Arizona, finding that these sections interfered with federal law.[20] Hence, there are both statutory and constitutional arguments that challenge the legality of sanctuary policies.

However, the statutory perspective misses important nuances relating to the diversity of sanctuary policies. For example, sanctuary policies which restrict local agents from gathering immigration data would certainly be permissible under 8 U.S.C. §1373.[21] Moreover, there are powerful constitutional protections for sanctuary jurisdictions. The so-called anti-commandeering doctrine, set forth in *Printz v. United States,*[22] states that the federal government does not have the power to force state law enforcement agents to do the federal government's bidding. This has been applied by the Second Circuit in *City of New York v. United States*[23] to immigration statutes specifically, with the conclusion that Congress cannot compel states to collect and share information. (*City of New York*, it should be noted, concluded that, per *Printz*, Congress cannot require states or localities "to enact or to administer policies or programs adopted by the federal government," but that Congress can prohibit subfederal policies which restrict local or state officials from *voluntarily exchanging* information regarding immigration. Thus, as applied by the Second Circuit, both 8 U.S.C. §1373 and sanctuary policies that prohibit gathering information would be constitutional under *Printz*.) Similarly, non-cooperation of local law enforcement with ICE—most commonly by refusing to honor detainers—has robust protections. The Third Circuit Court of Appeals, in *Galarza v. Szalczyk,*[24] has ruled that ICE cannot force local law enforcement agencies to comply with detainer requests, using similar logic to *City of New York*'s anti-commandeering analysis.

Viewed in this way, the argument that the federal government has exclusive authority over immigration is not a reason to strike down sanctuary policies—it is a reason to believe that sanctuary policies are constitutional. If *only* the federal government can enforce immigration law, then subfederal governments have no business in engaging with immigration law by enforcing it.[25] The case for the legality of sanctuary cities is therefore strong: immigration law, according to case law, is exclusively a federal issue, and protections under federalism mean that subfederal governments can refuse to enforce federal immi-

10 *Immigration Outside the Law* (Oxford University Press 2014).

11 For example, see Pratheepan Gulasekaram and S. Karthick Ramakrishnan, *The New Immigration Federalism* (Cambridge University Press 2015).

12 For reference, 8 U.S.C. §1373 (a) reads: "Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."

13 It is worth noting that 8 U.S.C. §1373 (a) and (b) forbid restricting information exchange between *any* levels of government. For example, it would also be illegal for a state to ban local governments from transferring among themselves information about the documentation status. *Supra* at 12.

14 Hans A. von Spakovsky, *America's Sanctuary City Nightmare* (The National Interest, 23 Aug 2015), online at: http://nationalinterest.org/feature/americas-sanctuary-city-nightmare-13667 (visited 14 Feb 2017).

15 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof […] shall be the supreme Law of the Land," U.S. Const Art VI, §2.

16 *The Supremacy Clause and the Doctrine of Preemption* (Findlaw n.d.), online at: http://litigation.findlaw.com/legal-system/the-supremacy-clause-and-the-doctrine-of-preemption.html (visited 18 Nov 2016).

17 U.S. Const Art I, §8, cl 4.

18 *De Canas v. Bica* 424 U.S. 351 (1976).

19 567 U.S. ___ (2012).

20 Id at 2-3.

21 Recall that U.S.C. §1373 only makes it illegal to restrict information *transfer* between government bodies, as well as, per U.S.C. §1373 (b), to restrict "Maintaining such information," which implies that refusing to collect such information would be statutorily permissible. *Supra* 12 and 13.

22 521 U.S. 898 (1997).

23 179 F.3d 29, (2nd Cir 1999).

24 No. 12-3991 (3rd Cir 2014).

25 Bridget Stubblefield, *Current Development: Development in the Executive Branch Sanctuary Cities: Balancing Between National Security Directives, Local Law Enforcement Autonomy, and Immigrants' Rights*, 29 *Georgetown Immigration Law Journal* 541 (Spring 2015).

gration law.

That being said, there are ways that the federal government can incentivize cooperation. Trump's policy of banning federal funding is exactly an example of this: either localities cooperate on immigration enforcement, or the federal government can refuse to give them grants. However, there are some protections under Court case law which prevent even such a strategy from being fully implemented. In *South Dakota v. Dole*,[26] the Court put forth a multipronged test for determining whether Congress' use of the spending power is constitutionally permissible. In their decision, they stated that the policy that the federal government is attempting to induce cannot be unconstitutional, that the conditioned funds must be germane to the induced behavior, and that the inducement must not be compulsory. While this was an empty threat for almost thirty years, in *NFIB v. Sebelius*,[27] one of the major challenges to the Affordable Care Act, the Roberts Court stated that certain uses of the spending power were too coercive. In regards to the Affordable Care Act's Medicaid expansion, the Court ruled that threatening states by withholding Medicaid funding was akin to "a gun to the head."[28] Currently, lawsuits from Santa Cruz county, as well as from the cities of Chelsea and Lawrence, in Massachusetts, are challenging Trump's policy of cutting federal funding on similar grounds,[29] though it is hard to know whether they will succeed due to the dearth of precedent on this matter.

However, aside from anti-coercion grounds, it is possible that there are other challenges to Trump's executive order. Increasingly, courts have expanded the due process rights of individuals, such as in *Miranda-Olivares v. Clackamas County*,[30] where a federal district court applied constitutional protections to detention without probable cause. Similarly, the American Civil Liberties Union (ACLU) has argued that ramping up immigration enforcement, as Trump has mandated, would necessarily require racial and ethnic profiling, violating the Fifth and Fourteenth Amendments.[31] Under *Dole*, the withholding of funds cannot attempt to induce an unconstitutional policy,[32] yet it is clear that there are potential constitutional challenges to the policies that Trump is incentivizing. In fact, some cities are grudgingly sanctuaries for this exact reason—they fear the massive amounts of litigation that could occur if they were to enforce federal immigration law.[33]

A case relating to sanctuary jurisdictions has never been directly heard by the Supreme Court, which means that the issue is certainly not resolved. However, because of the strong protections under federalism, it seems clear that—barring dramatic court backtracking—sanctuary jurisdictions are, indeed, legal.

III. Sanctuary Jurisdictions as Policy—in Response to Restrictionists

While restrictionists may offer a litany of different arguments to oppose sanctuary policies, this paper chooses to examine two arguments that are commonly made. In doing so, it does not mean to imply that all restrictionists necessarily oppose sanctuary policies for the same reason; rather, this paper highlights these arguments because they are salient within political debates. First, restrictionists often argue that unauthorized migrants are dangerous criminals. This is, perhaps, the most salient argument put forth by restrictionists, and it is oftentimes grounded in heart-wrenching anecdotes about violence committed by unauthorized migrants. Secondly, they argue that unauthorized migrants are detrimental to the economy.

A. The Criminality Argument

An example often bandied about in debates on sanctuary policies is the 2015 murder of Kathryn Steinle. Steinle was walking on a San Francisco pier when Juan Francisco Lopez-Sanchez, an unauthorized migrant from Mexico, shot her. Using the tragic story of Steinle's death, many lawmakers in Congress put forth policies to punish sanctuary jurisdictions.[34]

There are a few problems with using Steinle's story to justify restrictionist policies. For one, a single story does not define the behavior of a diverse group that includes over 11 million people.[35] That assumption—that Lopez-Sanchez is representative of unauthorized migrants at large—is both inherently problematic and statistically flawed, as this paper will subsequently show. Secondly, Lopez-Sanchez had *already been deported five times*, which implies that altering San Francisco's sanctuary policy may not have saved Steinle. However, as these sorts of stories are circulated more, they mesh the line between documentation status and violent criminality. This is a rhetorically powerful trope, but it is both logically and empirically dubious.

Instead, this paper contends, documentation status and violent criminality should be considered as orthogonal questions. From the perspective of crafting state and local policy, police forces will inevitably fight violent crime; sanctuary policies are therefore just a question of whether the police should *also* have to devote resources to enforcing immigration law. If one believes that the police are meant to protect people, then the documentation status of the perpetrator of a violent crime is wholly irrelevant. Instead, the only relevant issue is whether the police are able to stop that crime, and there is only a chance that the opportunity cost of enforcing immigration law will tradeoff with fighting violent crimes. The argument that unauthorized migrants should not be in the U.S. to commit crimes in the first place is also rather asinine because the U.S. does not deport other violent criminals—no matter how terrible they are. It seems profoundly unfair and ludicrous, therefore, to turn to enforcing immigration law as a key strategy for lowering crime rates.

From an empirical perspective, it is unlikely that immigration leads to crime. In a review of the academic literature since 2000, Matthew T. Lee, of the University of Akron, and Ramiro Martinez Jr., of Northeastern University, have found a scholarly consensus behind the proposition that immigration reduces crime. They remark that the widespread agreement on this "is astonishing giving the long-standing agreement (in theory at least) among scholars that the opposite was

26 483 U.S. 203 (1987).

27 567 U.S. ___ (2012).

28 Id at 51.

29 Dolan and Queally, Id.

30 No. 3:12-cv-02317-ST (US Dis Crt, D. Or, Portland Division, 2014).

31 Anthony D. Romero, *Donald Trump: A One-Man Constitutional Crisis* (American Civil Liberties Union 13 July 2016), online at: https://www.aclu.org/feature/donald-trump-one-man-constitutional-crisis (28 Feb 2017).

32 Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 *Harvard Journal of Law & Public Policy* 71 (2013).

33 Tim Henderson, *Will Small 'Sanctuary Cities' Defy a Trump Crackdown?* (The Pew Charitable Trusts 2016), online at: http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/01/will-small-sanctuary-cities-defy-a-trump-crackdown (visited 14 Feb 2017).

34 Chishti and Hipsman, Id.

35 Jie Zong and Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (Migration Policy Institute, 8 Mar 2017), online at: http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states/ (visited 8 Mar 2017).

true."[36] Notably, they found not only that a higher density of immigrants in a city makes the area overall less crime-ridden, but that this is also true for the *specific communities* that are home to migrants. This finding is important because people are likely more concerned with crime in specific neighborhoods than with city-wide trends.[37] While those studies are about immigrants writ large, and not unauthorized migration specifically, a study that analyzed the effects of Secure Communities—a program that focused on unauthorized migrants—found no statistical difference in terms of crime rates between the two groups.[38] Indeed, a study specific to sanctuary jurisdictions found that "the foreign-born population and the Hispanic foreign-born population had a significant negative relationship with crime."[39] When undertaking a literature review of the two most-commonly used methodologies to investigate criminality, Alex Nowrasteh of the Cato Institute has found that both methods come to that exact same conclusion: "the research is fairly one-sided" that "immigrants are less crime prone than natives or have no effect on crime rates."[40]

One restrictionist, Hans von Spakovsky, of the Heritage Foundation, has argued that unauthorized migrants are dangerous by citing a Government Accountability Office (GAO) study from 2011. He has alleged, for example, that unauthorized migrants who were studied by the GAO "had been arrested nearly 1.7 million times and committed three million offenses, averaging about seven arrests and 12 offenses per criminal alien."[41] However, there are a few problems with his argument. In citing the GAO's numbers, he used numbers on "criminal aliens," which, according to the GAO, are defined as "[n]oncitizens who are residing in the United States legally or illegally and are convicted of a crime."[42] In other words, those statistics are not only unauthorized migrants but would also include legal permanent residents, such as those who hold a green card. Moreover, the most common offenses, by far, are not important to the question of public safety; to quote the GAO again, "[o]f the nearly 3 million arrest offenses in our study population, we estimate that about 50 percent were related to immigration, drugs, or traffic violations."[43] Lastly, citing the GAO study runs into the problem of self-selection because it only studies prisoners, which oversimplifies the place that migrants have in American society at large. All of the scholarly studies that this paper has cited above are more holistic, and thus preferable, to the GAO's study, for the purposes of informing public policy.

Moreover, there is reason to believe that sanctuary policies can be beneficial for fighting crime *regardless* of whether unauthorized migrants are more crime-prone. This is due to the chilling effect, the idea that if unauthorized migrants are worried that going to the police will result in deportation, they will be less active in reporting crimes or cooperating with law enforcement. According to many qualified people, this is a serious concern. For example, as Nowrasteh writes, "Former New York and Los Angeles police chief William Bratton — as accomplished a crime fighter as you can get — opposes local enforcement of immigration laws, 'because immigrants living and working in our communities are afraid to have any contact with the police ... [officers] can't prevent or solve crimes if victims or witnesses are unwilling to talk to us for fear of being deported.'"[44] Similarly to Bratton, the Police Executive Research Forum, the LA County Sheriff's Department, the Arizona Association of Chiefs of Police, the Major Cities Chief's Association, and the Police Foundation all are opposed to, or skeptical of, local enforcement of immigration law.[45] Community cooperation is vital to help police do their job because they often lack the intelligence capabilities to safely protect against, for example, terrorism.[46]

Thus, from a statistical and logical perspective, it does not make sense to think about the issue of unauthorized migration as an issue of crime. In fact, most evidence would point to sanctuary jurisdictions as creating *safer* communities.

B. The Economic Argument

Another common argument is that unauthorized migration, in the aggregate, has a negative impact on the economy overall. However, a report from the Center for American Progress casts doubt on the veracity of that claim. In it, Tom Wong writes that "economies are stronger in sanctuary counties—from higher median household income, less poverty, and less reliance on public assistance to higher labor force participation, higher employment-to-population ratios, and lower unemployment."[47] That study, importantly, compared sanctuary jurisdictions to jurisdictions which cooperate with federal immigration law. Therefore, it is a more direct indication of the effects of sanctuary policies, whereas studies that rely on, for example, the density of unauthorized migrants would have to rely on the assumption that sanctuary policies increase the number of unauthorized migrants—an empirically dubious claim.[48] Thus, this study is more conclusive than others. The fact that these findings are statistically significant—and that they are true for so many economic indicators—strongly supports the idea that sanctuary policies are good policy.

In regards to the net effect of unauthorized migration on the economy, the literature is less conclusive. One economist has argued

36 Matthew T. Lee and Ramiro Martinez Jr., *Immigration Reduces Crime: An Emerging Scholarly Consensus*, 13 *Sociology of Crime, Law and Deviance* 3 (2009), online at: http://www.umass.edu/preferen/You%20Must%20Read%20This/Lee%20Immigration%20and%20Crime.pdf (visited 26 Jan 2017) at 5.

37 Id.

38 Elina Treyger, Aaron Chalfin, and Charles Loeffler, *Immigration Enforcement, Policing, and Crime*, 13 *Criminology & Public Policy* 285 (2014), online at: http://criminology.fsu.edu/wp-content/uploads/Volume-13-Issue-2.pdf#page=101 (visited 15 Feb 2017).

39 Daniel J. Hummel, *Immigrant-Friendly and Unfriendly Cities: Impacts on the Presence of a Foreign-Born Population and City Crime*, 17 Journal of International Migration and Integration 1211 (November 2016).

40 Alex Nowrasteh, *Immigration and Crime – What the Research Says* (Cato Institute 2015), online at: https://www.cato.org/blog/immigration-crime-what-research-says (visited 15 Feb 2017)

41 Von Spakovsky, Id.

42 Government Accountability Office, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs* (GAO 2011), 6, online at: http://www.gao.gov/assets/320/316959.pdf (visited 14 Feb 2017).

43 GAO, Id at 21.

44 Alex Nowrasteh, *Texas' Sanctuary City Law a Solution in Search of a Problem* (Competitive Enterprise Institute 2011), online at: https://cei.org/op-eds-articles/texas-sanctuary-city-law-solution-search-problem (visited 17 Nov 2016).

45 Nowrasteh, *Texas'…*, Id.

46 Vanda Felbab-Brown, *Trump's counterproductive attack on sanctuary cities* (Brookings 2017), online at: https://www.brookings.edu/blog/order-from-chaos/2017/01/31/trumps-counterproductive-attack-on-sanctuary-cities/ (visited 14 Feb 2017).

47 Tim K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy* (Center for American Progress 2017), online at: https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/ (visited 14 Feb 2017).

48 Hummel, Id at 23 ("Based on the results it can be concluded that local immigration policy may have had no relationship to the decision to live and/or relocate to a community for the foreign-born population in general and the Hispanic foreign-born population in general […] Certainly the continued existence of immigrants in some of these anti-immigrant cities is a clear indication that these policies have failed if their goal was to chase them out of there").

that unauthorized migrants tend to move in relation to the overall state of the U.S. economy, which means that they naturally fill in gaps in the economy more effectively than documented immigrants.[49] This effect makes unauthorized migration a "fast, flexible source of workers, which benefits the US economy by reducing bottlenecks and fostering economic growth."[50] Indeed, unauthorized migration is extremely important for jobs in agriculture, construction, and other so-called low-skilled industries, something important given that native-born people who would take those jobs are growing increasingly scarce.[51]

However, some argue that unauthorized migration depresses wages, creating a counter-balancing effect to those benefits. The general idea is simple: the influx of unauthorized migrants, who oftentimes work low-wage jobs, will compete with native-born workers. This depresses wages among those groups and creates competition among jobs which are done by some of the poorest workers in the American economy. This functions as a form of income redistribution, allowing more wealth to accumulate to those who hire unauthorized migrant labor, while those who work in the same industry as those unauthorized migrants will suffer lower wages or unemployment.[52] However, one study, assessing data from Georgia, demonstrates that this is not necessarily true. That study found that, on the contrary, the influx of unauthorized migrant workers actually *increased* the wages for documented workers. Their primary explanation for this is that unauthorized migrants help to create specialization among workers, because documented workers are presumably more proficient in English and thus can engage in higher productivity tasks which require good English skills. This effect is greatest among low skill workers, which exactly rebuts the redistribution of wealth argument.[53] That being said, most of the academic literature concludes that there is no long-term correlation, in either direction, between migration and wages (though this finding is about migration at large, not unauthorized migration).[54]

On the whole, it is difficult to know exactly whether unauthorized migration is beneficial or harmful to the economy. However, the effect that unauthorized migration has on the economy is small. For one, low-skilled labor is not a large sector of the U.S. labor force, which means the aggregate effect of unauthorized migration is inherently minimal. Thus, when evaluating the so-called immigration surplus—the effect that migration has on the economic situation of native persons—Gordon Hanson of the University of California, San Diego, has found that unauthorized migration generates a national income surplus of .03 percent[55] of U.S. GDP, an anticlimactic amount given the salience of unauthorized migration as a political issue.[56] Therefore, even though there is no dispositive evidence on the effects that unauthorized migration has on the U.S. economy, it is clear that the *magnitude* of those effects is quite small.

IV. Conclusion

Immigration is a complex and difficult issue, and it is at the core of the cultural, social, and political fabric of the United States; its effects are, as such, widespread. This essay, therefore, did not seek to answer every question relating to sanctuary policies and their desirability. What it did do, however, is focus on some of the most salient points raised against sanctuary policies: their legal, and their effects on the economy and crime. And while it contested many of those qualms, there is a larger forest which we should not miss by focusing too much on individual trees. Sanctuary policies might have ambivalent effects on crime and the economy, however, their effect on migrants is clear-cut. Moreover, it is migrants, more than anyone else, who are most vulnerable and affected by such policies. Debates that solely focus on statistics about crime or economic growth are therefore deeply flawed because they leave out the migrant from debates on migration. If public policy is to be determined by rational cost-benefit analysis, then the most important cost—the effect on migrant lives—cannot be left out of consideration.

49 Gordon H. Hanson, *The Economic Logic of Illegal Immigration* (Council on Foreign Relations 2007), online at: https://gps.ucsd.edu/_files/faculty/hanson/hanson_publication_immigration_illegal.pdf (visited 15 Feb 2017).

50 Pia Orrenius and Madeline Zavodny, *Unauthorized Mexican Workers in the United States: Recent Inflows and Possible Future Scenarios* (Center for Global Development, September 2016), online at: https://www.cgdev.org/sites/default/files/unauthorized-mexican-workers-united-states-inflows.pdf (visited 10 Mar 2017), at 13.

51 Gordon H. Hanson, *The Economics and Policy of Illegal Immigration in the United States* (Migration Policy Institute, Dec 2009), online at: http://www.bollettinoadapt.it/old/files/document/4564IMMIGRAZIONE_09.pdf (visited 10 Mar 2017).

52 George Borjas, *Immigration and the American Worker* (Center for Immigration Studies 2013), online at: http://cis.org/immigration-and-the-american-worker-review-academic-literature (visited 15 Feb 2017).

53 Julie L. Hotchkiss et al, *The Wage Impact of Undocumented Workers: Evidence from Administrative Data*, 81 *Southern Economic Journal* 874 (2015), online at: http://onlinelibrary.wiley.com/doi/10.1002/soej.12020/epdf

54 Mike Konczal, *The effects of immigration on wages* (The Washington Post, 5 May 2010), online at: http://voices.washingtonpost.com/ezra-klein/2010/05/the_effects_of_immigration_on.html (visited 10 Mar 2017).

55 This number is derived from the net productivity that employers gain from unauthorized migration. The motivation behind this calculation is to evaluate the effects of unauthorized migration on native persons and, hence, excludes how much income is paid to the migrants themselves. This number, therefore, is not reflective of *gains* in the U.S. economy, but rather, how much *native persons* gain from immigration. The U.S. economy expands significantly more than .03 percent due to unauthorized migration, but most of the new wealth goes to the migrants, leaving a rather negligible effect on U.S. native income.

56 Hanson, *The Economics and Policy…*, Id.

A Call for a New Affirmative Action

James McIntyre PO '19

On June 23, 2016, for the first time in his judicial career, Justice Anthony Kennedy voted to uphold racial preferences in university admissions. His liberal shift provided the swing vote for the 4-3 decision, thereby cementing the legal basis for countless college admissions policies around the country intended to correct the effects of discrimination—otherwise known as the affirmative action policy.[1] Pronouncements of victory in newspaper headlines and social media newsfeeds tempt some to close the debate surrounding the policy. But as Justice Kennedy emphasized in his majority opinion, Americans must continue to scrutinize the "approach in light of changing circumstances, ensuring that race plays no greater role than is necessary."[2] While racial preferences have now found robust legal precedent, lawfulness demonstrates little regarding the policy's efficacy and fairness. Furthermore, it is not unthinkable that a future court might reverse on this issue. With this in mind, public colleges ought to re-consider their affirmative action protocols.

This article examines the original purpose of affirmative action, highlights some of the problems of the current program in colleges that employ the policy, and concludes with an alternative to the current system.

I. The Purpose and Discourse of Affirmative Action

In 1961, President Kennedy issued Executive Order 10925, declaring that "it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government" and that "it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower."[3] In this order, President Kennedy asserts his intention to promote opportunity equality. The order proceeds to outline non-discrimination policies concerning government employment. Numerous companies, government agencies, and colleges across the country have adopted similar policies intending to level the playing field with respect to gender and race. While arguments abound regarding all of these policies, this article will only focus on race-based affirmative action implemented by public colleges as permitted by state and federal laws.

Education has long been a realm rendered inaccessible to racial minorities by various forms of discrimination and inequality. Given this history, proponents of the current affirmative action program contend that racial minorities must be granted admissions preferences. Without them, so the argument goes, minority applicants start from a disadvantaged position. Racial preferences are therefore necessary in the name of *fairness*.

Proponents of racial preferences point to the mountains of empirical evidence demonstrating that racial minorities are still unfairly subject to discrimination in modern times. For an example in the professional realm, a study from the University of Chicago found that individuals calling employers who used "white names" were 50 percent more likely to receive callbacks than those who gave "black names."[4] The U.S. Department of Housing and Urban Development estimates that two million instances of housing discrimination occur each year, with over 99 percent going unreported.[5] Many of these instances are believed to be due to racial discrimination. Countless examples of modern racial discrimination exist today. Well-documented psychological and social phenomena tell us that inequality penetrates deep into our society through cracks in the legal system; *de jure* equality is not necessarily synonymous with equal opportunity. Racial preferences attempt to rectify this injustice.

Despite the strong empirical evidence of modern racial discrimination, modern discourse surrounding this topic has focused on *diversity* rather than fairness. Academic administrators contend that racial preferences are necessary to achieve racially diverse student bodies. They often argue that a variety of viewpoints is essential to impart an adequate education to students, as was argued in *Fisher v. University of Texas*.[6] This assertion has proven far more controversial than the notion that racial discrimination must be countered. Critics of affirmative action express frustration that universities are willing to engage in what they perceive as "reverse discrimination" so that students might hear a viewpoint from a peer with a different skin color. This sort of end is, for many, less persuasive than the goal of counteracting discrimination. However, upon closer examination, the justifications of diversity and fairness both face challenges. The following section will explain some problems with the current program's philosophy and implementation.

II. Critique of the Current System

Diversity and fairness arguments in favor of racial preferences are frequently charged as discriminatory and unfair themselves. Critics, like Abigail Fisher, the plaintiff of the 2016 Supreme Court case, maintain that any use of race in admissions standards is discriminatory. They argue that admissions ought to be colorblind, and that racial preferences undermine the tenet of equality. Such critics frequently refer to racial preferences as "reverse discrimination." Proponents respond by highlighting discrimination's debilitating effects on minority communities, and argue that systemic racism renders colorblind admission a fantasy. They believe that an earnest pursuit of admissions equality requires the consideration of race.

Even if, theoretically, modern society is currently free from discrimination in all its forms – as some affirmative action critics contend – minority applicants still suffer from the effects of generations of dis-

1 Feinberg, Walter. "Affirmative Action." *Oxford Handbooks - Scholarly Research Reviews*. The Oxford Handbook of Practical Ethics, 14 Apr. 2015. Web. 19 Feb. 2017.

2 Fisher v. University of Texas. Supreme Court of the United States. 23 June 2016. Supreme Court of the United States. Web. 19 Feb. 2017.

3 Exec. Order No. 10925, 3 C.F.R. (1961). Print.

4 Bertrand, Marianne, and Sendhil Mullainathan. "Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination." *SSRN Electronic Journal* (n.d.): n. pag. 18 Nov. 2002. Web. 19 Feb. 2017.

5 "What Is Housing Discrimination?" *The Leadership Conference on Civil and Human Rights*. The Leadership Conference, n.d. Web. 19 Feb. 2017.

6 Liptak, Adam. "Supreme Court Upholds Affirmative Action Program at University of Texas. "*The New York Times*. The New York Times, 23 June 2016. Web. 19 Feb. 2017.

crimination. According to research, minority students are more likely to live in poverty, suffer from obesity, and have a parent who experiences more severe stress than their white peers.[7, 8, 9] Consequently, the argument goes, even if white individuals are not directly responsible for the plight that many minorities face, they still benefit from historically oppressive systems. If nothing is done, in effect, whites receive special treatment. This logic leads to the conclusion that some form of remedy is sensible, if not required, in the spirit of fairness.

This argument for fairness implies that reparations are what matter. It asserts that those who have been historically oppressed ought to receive a boost at the expense of those who benefit from that oppression. In this case, the reparations come in the form of preferential treatment for minorities. But reparations, while theoretically sensible, raise a variety of practical questions. For instance: Who should receive them? Who should make them? How far should they extend?

Answering the first question of who should receive reparations requires knowledge of precisely who is disadvantaged. How should one judge the disadvantage, for example, of a student with a white father and black mother? It is probable that this descendant has endured some discrimination as a result of his complexion or heritage. However, he has also benefited from much of the discrimination for which affirmative action purports to atone, given the fact that his paternal ancestors were white. In another difficult case, imagine a fair-skinned black applicant whose parents are self-made millionaires. Clearly, ingenuity and possibly luck on the part of this individual's parents played a role in ameliorating past detriments. This individual's lighter complexion might also allow him to face less discrimination. However, racial identity is more complex than skin tone. This makes it especially difficult to determine whether this person should be entitled to a racial preference. These examples pose problems concerning who ought to receive reparations by muddying the waters of what constitutes race-based disadvantage.

The second question that reparations pose, regarding at whose expense they should be made, is perhaps the most provocative and brings about claims of reverse discrimination. Since racial preferences directly benefit minority admissions at the expense of other groups' admissions chances, opponents of affirmative action conclude that non-minorities are in effect "paying for reparations." This probably explains why, according to public opinion polls, only 22 percent of whites support "preferential treatment" for minorities (while 58 percent of blacks and 53 percent of Hispanics do).[10] Many whites question why they should pay for injustice that they did not themselves personally impose. They remain unpersuaded by the argument that they benefit from systemic oppression or implicit racial bias. Given this reality, a large portion of the country will continue to vehemently oppose racial preferences.

How far should reparations extend? This question brings up many others: For how long should they last? How much of a preference is justified? The appropriate ways to determine any kind of answers to these questions are highly contentious, and beyond the scope of this article. However, the fact remains that admissions officers can only guess as to how much discrimination an applicant has faced. No statistic or piece of information in an application can convey to an admissions officer the experiences that an applicant has lived as a result of race. There is much potential for admissions officers to falsely equate two applicants' stories on the basis of reported race rather than an accurate understanding of their lives.

Even if one accepts that racial preferences promote fairness in theory, current programs still suffer from the charge that racial preferences fail to improve the admissions chances for disadvantaged minorities. Racial preferences *de facto* benefit those who in fact need the least help out of their demographic group in gaining admissions to college, as well-off minority students receive the same cushion as disadvantaged minority students in the admissions process from racial preferences. Georgetown University Law Professor Sheryll Cashin goes as far as to claim that universities "create optical blackness but little socioeconomic diversity" and that today's affirmative action policies allow "high-income advantaged blacks to claim the legacy of American apartheid."[11] Cashin herself is black, and her children would benefit from the current affirmative action program, but not from her proposed reforms.

There is no reliable data regarding the extent to which wealthy minority individuals or their families benefit from affirmative action. However, the larger idea at stake—that racial preferences inaccurately trawl the academic pool for disadvantaged individuals—is valid. A wealthy minority student receives benefits from the current program. Even if these benefits are just, racial preferences are not the most accurate way to gauge disadvantage. It seems wrong that a minority student with millionaire parents should receive an admissions preference while a poor student, regardless of race, does not. The current program could actually encourage colleges to accept well-off minorities with superior academic credentials rather than low-income minorities who might have just as much academic potential. According to the *Harvard Crimson*, a disproportionate number of black students at Harvard are children of immigrants rather than descendants of slaves.[12] These individuals frequently come from more privileged backgrounds, and, according to *Journal for Blacks in Higher Education*, they predominantly benefit from diversity expansion programs at Ivy League schools, along with other relatively wealthy minority students.[13] This poses a problem, especially for a program that is implemented explicitly for the sake of promoting educational opportunity. Furthermore, "optical blackness" only promotes one kind of diversity—racial. Since racial preferences disproportionately target wealthier minorities, they do not give rise to as much socioeconomic diversity as they may at first seem to.

The last significant issue of the current program that this article will address is that it fails to acknowledge disadvantages that whites and Asians might face. This point proves to be particularly devastating to the fairness argument put forth by affirmative action proponents. Racial preferences were instated ostensibly to rectify past and current discrimination against minorities in the name of "fairness." But Chinese Americans also experienced oppressive discrimination in the form of the Chinese Exclusion Act of 1882, which prohibited Chi-

7 Lin, Ann, and David Harris. "Policy Brief #16." *National Poverty Center*. National Poverty Center, Jan. 2009. Web. 19 Feb. 2017.

8 Caprio, Sonia, Stephen R. Daniels, Adam Drewnowski, Francine R. Kaufman, Lawrence A. Palinkas, Arlan L. Rosenbloom, Jeffrey B. Schwimmer, and M. Sue Kirkman. "Influence of Race, Ethnicity, and Culture on Childhood Obesity: Implications for Prevention and Treatment." *Obesity* 16.12 (2008): 2566-577. Web. 19 Feb. 2017.

9 Nomaguchi, Kei, and Amanda N. House. "Racial-Ethnic Disparities in Maternal Parenting Stress." *Journal of Health and Social Behavior* 54.3 (2013): 386-404. Web. 19 Feb. 2017.

10 Rosentiel, Tom. "Public Backs Affirmative Action, But Not Minority Preferences." *Pew Research Center*. Pew Research Center, 01 June 2009. Web. 19 Feb. 2017.

11 Cashin, Sheryll. *Place, Not Race: A New Vision of Opportunity in America*. Boston: Beacon, 2015. Print.

12 Balakrishna, Aditi. "Many Blacks at Ivies Not From U.S." *The Harvard Crimson*. The Harvard Crimson, 9 Mar. 2007. Web. 20 Feb. 2017.

13 "Most Black Students at Harvard Are From High-Income Families." *Journal for Blacks in Higher Education*. Journal for Blacks in Higher Education, n.d. Web. 20 Feb. 2017.

nese laborers from immigrating to the United States.[14] Following Pearl Harbor, Franklin Roosevelt issued an executive order permitting the incarceration of any person of Japanese ancestry from the west coast, 62 percent of whom were United States citizens.[15] While instances of racial discrimination are unique and perhaps incomparable, proponents of racial preferences in the name of fairness must also consider experiences of discrimination for people of all racial identities.

It seems that preferences for Asian Americans, for example, do not exist because Asian Americans, on average, perform extremely well academically. According to the U.S. Department of Education, Asians attained an average GPA of 3.26 in 2009, higher than that of all other demographics listed.[16] A Princeton study reveals that Asian Americans are penalized 50 points on the SAT in admissions.[17] Clearly, racial preferences are not based on rectifying past discrimination for all historically disadvantaged groups. It is true that these groups did not experience the same kinds of discrimination as underrepresented minorities, but according to the fairness arguments' logic, these students should surely not be *penalized*. The dichotomy between affirmative action's treatment of Asians compared to that of underrepresented minorities demonstrates that its objective is not to attempt at rectification for past injustice, but rather to guarantee some sort of representation on campuses. The current program's fundamental goal is to promote racial diversity on campus, regardless of whether that diversity is accurately representative of discrimination or disadvantage. In a sense, giving Chinese or Japanese applicants groups a boost through affirmative action would rectify past discrimination, but doing so would also result in majority Asian colleges in many cases. This disregard for groups that have also faced discrimination makes colleges look as though they peddle the fairness argument in order to support their own agendas. As a result, low-income whites and Asians receive no admissions benefits despite their own demonstrable disadvantages. A system which professes to pursue fairness ought to account for them as well, or abolish that sort of rhetoric altogether. If fairness is dismissed as an end of affirmative action, then diversity becomes the main premise of racial preferences. But this ought to include all forms of diversity, not just racial. Our current system does not achieve the levels of socioeconomic diversity that it could, and thereby alienates an enormous portion of the college-aged population. The following proposal, outlined in section III, not only rectifies this problem, but also increases racial diversity more effectively and in a less controversial manner than the current system does.

III. A New Affirmative Action

Proponents of the status quo worry that eliminating racial preferences would send minority admissions into precipitous decline. After Proposition 209 took effect in 1998, thereby prohibiting public educational institutions from considering race in admissions, minority enrollment at the University of California system dropped significantly from 1997 figures. Black, Chicano, and Latino admissions rates dropped by 12.5, 9.8, and 5.8 percent, respectively. These reductions were even more drastic at UC Berkley, where the drops in admissions rates were 59.1, 60.3, and 24.5 percent. Clearly, colleges should not abandon the current program without an adequate replacement that prevents this decline in minority admission rates.[18]

The University of Colorado Boulder designed a unique approach to affirmative action. The university's approach evaluates applicants' grades and test scores in relation to expectations, given their socioeconomic conditions. This structure employs a "disadvantage index" to measure the likelihood that the applicant will enroll in college at all, as well as an "overachievement index" to measure whether an applicant's qualifications surpass expectations for students in similar socioeconomic situations.[19] Public universities could design such indices to account for income bracket and low-income school districts among other economic considerations. They could also take familial situations into account, such as single parent household status, first generation status, or the incarceration or death of a family member.

The university performed an experiment with 2,000 borderline applications. Half were evaluated using the disadvantage method, and half using race alone. The results were overwhelmingly beneficial for poor students—the new approach increased acceptance rates among the poorest students by 13 percent. Most notably, taking race *and* class into account increased underrepresented minority admissions by 17 percentage points. Lowest-income minorities saw the most benefit, with a 32 percent admissions rate increase.[20] While this approach uses race directly as an admissions factor, it demonstrates that taking class into account can also increase minority admissions.

In theory, this sort of system is perfect. It accounts for all pertinent forms of disadvantage befalling applicants, including racial discrimination, while eschewing catch-all policies which benefit specific demographics in inconsistent manners, such as racial preferences. If an applicant is severely hindered by demonstrable racial discrimination, such concerns can be factored into the indices. Schools could tailor their indices to the specific challenges addressing their institutions and local communities, possibly including factors not included in Boulder's index. Of course, the issues with this proposal present themselves in the details. How could an admissions officer possibly quantify the many different kinds of discrimination? Or determine what impactful life events or circumstances are more debilitating than others? Some might argue that these questions are impossible to answer. Critics are right to question the validity of a system that attempts to quantify such qualitative issues. However, statistically based indices likely will prove more accurate in identifying disadvantage than the current program. While the index calculus could never be perfect, it would prevent admissions from overlooking truly disadvantaged applicants of any race. The new system considers all kinds of disadvantages faced by all kinds of applicants.

14 "Chinese Exclusion Act." *Wikipedia*. Wikimedia Foundation, n.d. Web. 19 Feb. 2017.

15 "Executive Order 9066." *Wikipedia*. Wikimedia Foundation, n.d. Web. 19 Feb. 2017.

16 "Race/Ethnicity: Grade Point Average." *The Nation's Report Card*. The National Assessment of Educational Progress, n.d. Web. 19 Feb. 2017.

17 Shyong, Frank. "For Asian Americans, a Changing Landscape on College Admissions." *Los Angeles Times*. Los Angeles Times, 21 Feb. 2015. Web. 19 Feb. 2017.

18 University of California Office of the President. "University of California, Application, Admissions and Enrollment of California Resident Freshman for Fall 1995 through 2014." University of California, n.d. Web. 5 Mar. 2017.

19 Jaschik, Scott. "Study Suggests Class-based Affirmative Action Could Increase Racial Diversity." *Inside Higher Ed*. Inside Higher Ed, 15 May 2013. Web. 19 Feb. 2017.

20 Quinton, Sophie. "What If Colleges Embraced Affirmative Action for Class Instead of Race?" *The Atlantic*. Atlantic Media Company, 21 Oct. 2013. Web. 19 Feb. 2017.

Death by Drones

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If you do something for long enough, the world will accept it...International law progresses through violations.
—Daniel Reisner, IDF head consul

On May 25, 2011, Wikileaks released footage entitled "Collateral Murder," which depicted the Baghdadi battlefield from an American Apache helicopter in 2007—the peak of the Iraq War. The grim video displays American servicemen engaging a caravan of men, killing 11 total, including a Reuters reporter and his civilian driver. American forces clearly emerged as the "hostile" force in this incident.[1] "Collateral Murder" drew attention to American military operations overseas, and in turn thrust covert drone warfare in the Middle East into the American public limelight—illuminating the extent of United States counterterrorism efforts abroad. Although the United States drone program commenced in the late 1990s, wherein it functioned merely as a surveillance program, the Obama Administration accelerated the program to the form it assumes today—a program that has largely replaced conventional military operations, like the manned air-assault depicted in "Collateral Murder," in counterterrorism efforts abroad. President Obama authorized an average of one strike every four days, compared with one every 40 days under President Bush.[2] American government officials evidently prefer that the American populace is largely ignorant of the drones patrolling foreign lands in their name: the locations in which drones patrol, the targeting protocols used, and the legal reasoning that legitimates American drone strikes were all held classified for most of the program's existence. In contrast, the Obama Administration hailed the drone program as a successful counterterrorism project, a justified military program that minimizes costs to human life and the taxpayer's purse while simultaneously maximizing American security and tranquility. In this political moment, it is clear that the Obama Administration's expansive use of covert and unsanctioned warfare-by-drone enables President Trump to continue carrying out phantom wars in the Middle East—threatening geopolitical stability and pushing the legal boundary of what constitutes just warfare.

The frequency of drone strikes under Obama indicates that typical democratic institutions and the international political arena are insufficient constraints on the expansion of covert, undeclared war carried out via drone—a mode of warfare that will likely change the laws and nature of war in the years to come. For centuries, nation-states have abided by the Augustinian principle that wars must be fought in accord with ethical rules—rules that determine the necessity and proportionality of military intervention.[3] The Obama Administration's drone policy sharply disregards Augustinian[4] principles of just warfare, in that war-by-drone dissolves the clear line between the battlefield (where people can justly be killed) and civilian spaces (where people cannot be justly killed)—a line affirmed in the Hague Convention, of which the United States is a signatory member.[5]

Critics of war-by-drone worry that drones enable presidents to act unilaterally and without transparency or accountability, as illustrated by Atlantic Council fellow James Joyner:

> *Currently, we're letting whomever is in the Oval Office pick and choose from among the existing rules, applying, and redefining them based on his own judgment and that of his advisors.*[6]

In response to such skepticism expressed among academics and the general public, President Obama legitimated the widespread military use of drones by appealing to utilitarian considerations, saying that:

> *Conventional airpower or missiles are far less precise than drones, and are likely to cause more civilian casualties and more local outrage. And invasions of these territories...unleash a torrent of unintended consequences.*[7]

Furthermore, Obama mounted an appeal to the law, arguing that for a drone strike to be conducted, "there must be near certainty that no civilians will be killed or injured—the highest standard we can set".[8] This narrative—wherein drone strikes abide by just war theory and international law—has consistently been supported by official government casualty estimates, including a remarkable claim made by CIA director John Brennan, which stated that U.S. drone strikes were so precise that they had not caused a single civilian death.[9] Government claims about the number of drone-strike victims are often ambiguous and misleading by virtue of the fact that government casualty estimation protocol "counts all military-age males in a strike zone as combatants...unless there is explicit intelligence posthumously proving them innocent."[10] In contrast, a joint study conducted by human rights lawyers from Stanford and NYU determined that:

1 Wikileaks, "Collateral Murder", YouTube, April 03, 2010.

2 Bergen, Peter, and Katherine Tiedemann. "Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan." *Foreign Affairs* 90, no. 4 (2011): 12-18.

3 Gusterson, Hugh. "Casualties." *Drone: Remote Control Warfare*, 83-116. 2016.

4 Once war has begun, Augustinian just war theory prescribes how combatants are to act. The three critical principles governing military conduct are distinction, proportionality, and necessity. Distinction states that just military conduct can only be directed towards actively engaged enemy combatants; proportionality prescribes that the damage to civilians must not be excessive in relation to damage of the intended military target; necessity governs constrains all military conduct within the principle of military necessity, thus, limiting unnecessary death and destruction and mandating that aggression is aimed at militarily expedient targets.

5 Hague V, note 23.

6 Gusterson, Hugh. "Arsenal of Democracy?" In *Drone: Remote Control Warfare*, 129. 2016.

7 Ibid, 121.

8 Ibid, 122

9 Ibid, 85.

10 Ibid 87.

> *The dominant narrative [about drones]…is of a surgically precise and effective tool that makes the U.S. safer by enabling 'targeted killing' of terrorists, with minimal downsides or collateral impacts. This narrative is false.*[11]

Although leaders in the Obama administration attempted to legitimate the use of drones by appealing to their "minimal downsides and collateral impacts," multiple external inquiries suggest that this narrative is misleading. Even the *Long War Journal*—funded by the neoconservative, hawkish Foundation for the Defense of Democracies and closely tied to the Department of Defense—concedes that 156 civilians were killed in Pakistan out of 2,903 (by their estimates) total deaths.[12] More startling: Larry Lewis, of the Center for Naval Analysis, argues in a recently declassified study that Afghanistan drone strikes were ten times more likely to kill civilians than manned fighter jet operations.[13] On the basis of these studies, it is clear that the United States government has misled the public about the efficacy and ethicality of drones.

Furthermore, the widespread use of targeted drone strikes in Pakistan—a nation against which the United States has not declared war—introduces numerous legal questions, specifically vis-a-vis violations of the U.S. War Powers Act and the Constitution. According to the War Powers Act of 1973, the president must notify Congress when sending U.S. forces into combat; further, congressional approval must be obtained to legitimize combat operations last for longer than sixty days. The Obama Administration has argued to the contrary, claiming that drone usage outside of Iraq and Afghanistan does not constitute war, and, even if so, such use of force was authorized by Congress in the Authorization for Use of Military Force (AUMF) of 2001. Firstly, it is incomprehensible to claim that thousands of airstrikes—killing 2,903 people according to the most conservative estimates and effecting regime change in Libya—does not constitute an activity of war.[14] Furthermore, on the Obama Administration's second claim, it is obvious that the AUMF authorizes military force *only* against those responsible for facilitating the 9/11 attacks: militants and the complicit nations that abetted them.[15] Thus, it is incoherent to claim that drone attacks against ISIS or the Ghaddafi regime were justified by the AUMF: ISIS came into existence as a splinter group in opposition to Al-Qaeda, and the Libyan regime under Ghaddafi was actively involved in the coalition efforts to fight Al-Qaeda. The Obama Administration's legal justification of drone strikes relies on a decade-old statute, intended to apply exclusively to groups responsible for facilitating the 9/11 attacks---this reasoning, as has been demonstrated, is severely flawed and insufficient for legitimating drone strikes.

Furthermore, the killing of U.S. citizen Anwar al-Awlaki in 2011 serves as an instance wherein targeted drone strikes disregarded constitutional liberties. Although it is evident that al-Awklaki committed his allegiance to al-Qaeda, serving as the organization's chief propagandist and recruiter, the details surrounding his killing are problematic—al-Awlaki did not receive the fair judicial process entitled to him by the Constitution. The Obama Administration defended the assassination, claiming that al-Awlaki posed an immediate threat to national security: in such circumstances, legal precedent dictates that security concerns override constitutional considerations. However, it is hard to take this "immediacy" argument seriously, by virtue of the gap between the authorization and the strike itself, as Professor Cole of Georgetown Law School demonstrates, "[could he have] posed an immediate threat for the entire fifteen months between the time that memo was written and his killing?"[16] Thus, it seems like the Administration's "immediacy" justification is entirely vapid and meaningless; instead, the Obama Administration violated fundamental principles of the Constitution by issuing an American citizen a death warrant without the guarantee of judicial processes. Drones subvert the constraints of congressional approval and constitutional guarantees of liberty, thereby enabling American leaders to unilaterally conduct warfare without approval, accountability, or legal oversight.

As evidenced by the explosion in drone usage under Obama, drones facilitate the killing of state enemies with reduced financial cost and loss of human life compared to traditional modes of warfare. Thus, because drone programs are largely ignored in the public eye and protected against governmental oversight, military and civil leaders are unconstrained, allowing them to interpret legal limitations on warfare loosely and to their interest. The uncostly and readily-available nature of drones could likely lead to eternally-drawn out applications of force, with little temporal or geographical limitation—unlike battles of past, war will be conducted on vast swaths of land, battles without defined beginnings or ends. Although these wars will be less intense than traditional ground invasions, they will be more sinister—by virtue of the fact that they are undeclared and concealed from the public eye—and inarguably more enduring. Thus, war in the years to come will be permanent—although invisible and unheard—without demarcated battlegrounds. Democratic polities are largely indifferent to the use of drones, by virtue of the fact that official narratives on drones conceal the true costs of drone warfare, as has been discussed earlier. Drones are substantially preferable to other uses of force—they are silent, invisible, and easily justified. Thus, because drones are convenient and carry little political risk, the political and moral threshold for legitimating military action is lowered—as observed in the unsanctioned shadow war conducted in Pakistan during the entirety of Obama's tenure. Like President Obama, President Trump will likely abuse drones in pursuing politically-convenient warfare. Trump—the most unpopular president in American history at this point in his tenure— will be unrestricted in his capacity to conduct warfare-by-drone, without congressional constraint. And considering the various ethical dilemmas surrounding the new Administration, it is likely that Trump will fail to abide by legal constraints on military action; as with his tax returns, transparency and accountability for civilian drone deaths will become all-the-more unattainable under his Administration. The very instruments of destruction that were intended to quench Middle Eastern terrorism will ensure that extrajudicial war and state-assassinations persist without end in the years to come. The wanton use of drones comes with an unacknowledged loss of human life—a blight on our democratic values that is likely to continue wreaking havoc under the policies of President Trump.

11 Ibid 90.

12 Ibid 89.

13 Ibid 90.

14 Ibid 88.

15 AUMF, Sec. 2 (A): That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

16 Ibid, 133.

"One Dollar, One Dollar!" — Legalizing Street Vending in Los Angeles

Audrey Younsook Jang PO '19

Until this year, out of the ten largest metropolitan areas in the United States, Los Angeles was the only city where selling food or merchandise on the streets could still be charged with a criminal misdemeanor.[1] Under the current LA Municipal Code, the use of sidewalks for vending anything other than items protected under the First Amendment is banned.[2] The Trump administration's crackdown on immigrant law enforcement has spurred the City Council to change this law; claiming a time-sensitive need to decriminalize the livelihood of many Angeleno immigrants, Councilmembers Joe Buscaino and Curren Price submitted a proposal last year delineating a sidewalk vendor permit system for Los Angeles. After a period of public comment, the full Council adopted the amended proposal on January 31, 2017.[3]

On February 21, the Department of Homeland Security released its memo prioritizing the deportation of undocumented immigrants who "have been convicted of *any* criminal offense," "have been *charged* with any criminal offense that has not been resolved," or "have committed acts which constitute a *chargeable* criminal offense."[4] Two days later, the LA City Council passed an ordinance – with an urgency clause that makes it "effective upon publication"— to de-escalate the enforcement of this ordinance; violators of the ban can now only be penalized under the Administrative Citation Enforcement Program.[5] Although street vending is still technically illegal until the details of the permit system are formalized, this ordinance dissolves the threat of jail time and a lasting criminal record, replacing criminal charges with administrative citations that can be resolved by paying a fine. In order to further protect undocumented immigrants who have already been charged for street vending, advocates have also requested an amnesty clause expunging previously charged vendors. While the City Attorney's office responded that such a clause was not under the jurisdiction of the Council, it did refer to the ability of individuals to petition to have their criminal charges removed from the record.[6]

A Brief Look at the Proposed System

The licensing system to be implemented will issue permits for stationary vending between 9am and 5pm in commercial and industrial zones, with a maximum of two vendors per block. This model was adopted over a district-based system, which would allow vending only in specific, pre-designated vending districts. Neighborhood councils in opposition to the proposal have argued that districts should affirmatively opt into the system. Northridge East, for instance, has requested that "before any such district can be formed, [each neighborhood council's] approval shall be required."[7]

Yet such a model has already been tested in Los Angeles. In 1994, LA tried unsuccessfully to create Special Vending Districts in commercial zones. The process of establishing a special vending district proved to be "too cumbersome," and the only such district created – the MacArthur Park Special Vending District – is no longer in existence.[8] The proposal adopted in January is a blanket ordinance over all commercial and industrial sidewalks in Los Angeles, but includes a provision for the Council to create special districts for enhanced or reduced regulations. Other areas exempt from vending include alleys, city-owned property, and sidewalks that are too narrow to accommodate vendors without violating ADA regulations. Vendors in residential areas are limited to mobile carts, and must stay 500 feet away from schools unless they exclusively sell healthy foods.

The Business Interest

During the public comment period, 23 neighborhood councils submitted Community Impact Statements. The most fre-

1 "Street Food Vending Fact Sheet," *Occidental College,* online at https://www.oxy.edu/sites/default/files/assets/UEPI/Street-Food-Vending-Factsheet-English-Version.pdf (visited 5 March 2017).

2 Los Angeles, California, Municipal Code § 42.00b (amended 2017).

3 *File No. 13-1493 Public Works and Gang Reductions Committee Report relative to creating a sidewalk vending permit system,* Los Angeles City Council, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_rpt_pwgr_01-18-2017.pdf (visited 5 March 2017)

4 "Enforcement of the Immigration Laws to Serve the National Interest," Memorandum to US Customs and Border Protection, *US Department of Homeland Security,* 20 February 2017, online at https://www.nytimes.com/interactive/2017/02/21/us/politics/document-Trump-Immigration-Enforcement-Policies.html (visited 5 March 2017).

5 *Final Ordinance No. 184765*, Los Angeles City Council (2017), online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_ORD_184765_2-21-17.pdf (visited 5 March 2017).

6 *Report No. R17-0045*, Los Angeles City Attorney Office, 10 February 2017, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_rpt_ATTY_02-10-2017.pdf (visited 5 March 2017).

7 *Community Impact Statement from Northridge East Neighborhood Council*, 19 August 2015, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_cis_8-23-15.pdf (visited 5 March 2017).

8 Leslie Berestein Rojas, "Los Angeles outlines 3 possible approaches to legal street vending program," *Southern California Public Radio,* 26 October 2015, online at http://www.scpr.org/news/2015/10/26/55201/los-angeles-outlines-possible-choices-for-legal-st/ (visited 5 March 2017).

quently cited concern was the fear of negative impact on adjacent brick-and-mortar businesses. Westwood Neighborhood Council stated in its Community Impact Statement that because "sales taxes are not necessarily collected" from street vendors, brick-and-mortar establishments that do pay business taxes face unfair competition from adjacent sidewalk vendors – especially if those vendors are selling the same goods.[9] Some neighborhood councils argued for the exclusion of Business Improvement Districts (BIDs), where property owners and businesses owners have to pay extra taxes according to the value of their property – fearing a situation where "BID's have to pay for services and sidewalk vendors pay nothing."[10] Street vendors operating in BIDs have had contentious relationships with these business lobbies in the past; in 2015, a coalition of vendors and advocates sued the Fashion District BID for coalescing with the LAPD to seize and destroy their carts.

The adopted proposal calls for a process by which BIDs would collect fees from street vendors. It also requires permit applicants to provide the address of their proposed vending location, a list of merchandise or food to be sold, and the written consent of the immediately adjacent business-owner. To spatially restrict vendor sprawl, each vendor is limited to three vending locations, and mobile vendors provide their exact vending route. The fourth recommendation in Amendment 30-A to the initial proposal included "economic" as an allowable reason to petition for special opt-out districts, along with public health, safety, and welfare concerns.[11]

Concerns of Street Vendor Advocates

These restrictions have come under the scrutiny of street vendor advocates. In New York City, the Food Vendors' Union and the Street Vendors Project claim that the Street Vendor Review Panel, created in 1995 to determine which streets would be closed to vending, have become mere agents who carry out "the bidding of powerful business interests."[12] In 9 years, the Review Panel closed more than 130 blocks and opened zero streets to vending; vendor advocates fear that the same will happen if too many accommodations are given to the BIDs in LA.

Moreover, vendor advocates point to preliminary economic analyses that portray street vending positively. According to the 2015 Economic Roundtable report "Sidewalk Stimulus," there are approximately 50,000 micro-businesses on the streets of Los Angeles every year, comprising an informal economy worth $504 million. Vendors make about $75 a day selling goods that they purchase from legal suppliers, and use that income on groceries, retail, and clothing, directly contributing back to the local economy (*see Figure 1*). Based on three case studies of Boyle Heights, Downtown, and Hollywood, the nonprofit research organization estimates that street vending creates 5,234 jobs by this reverberating multiplier effect (*see Figure 2*).[13]

Advocates also frown at the limit of two vendors per block, arguing that the concentration of vendors provide them with community solidarity as well as safety in numbers. For instance, in the Piñata district, there are easily 100 vendors lining East Olympic Boulevard on the long block between Kohler and Merchant streets.[14] In cities that have implemented hard numerical caps on permits, the disparity between supply and demand have often created black markets. In New York, 70-80 percent of official holders of vehicle vending permits – of which there are only 2,800 available –simply keep renewing their permits to lease them out for $15,000 to $25,000 in a secondary black market.[15] Vendors pay 30-40 percent of their daily pay, which may be as low as $100 in certain areas, to the legal permit holders.[16] The waiting time for a new vehicle permit is now up to ten years – so long that the city rarely adds new names to the list.

In contrast, Portland's cart vendors have naturally clustered around parking lot perimeters, unregulated by the city's zoning laws. This has led to Farmer's Market-style food cart pods, with each vendor paying a modest rent for a vending slot and infrastructure for electricity, waste disposal, and running water. The tight competition arising from the concentration of vendors drove down prices and improved the quality of the food, earning Portland the nickname of "cart-topia."[17] Several councils, including the Empowerment Congress of Southwest Area, have endorsed this kind of organically occurring street vending zones.[18]

Enforcement Concerns

But not everybody endorses such conglomeration. The Harbor Gateway North Neighborhood Council has cited the "creation of a blighted look to neighborhoods by the display of goods on fences" as one of its many reasons for opposing legalization, a concern echoed by several other councils.[19] To address this issue, the proposal calls for seven-day enforcement task force that will provide immediate and same-day response to complaint-driven reports about blight, noise, safety and health complaints. It also advises data collection for proactive enforcement in "re-occurring areas of concern,"[20] and suggests that vendors be trained to use City apps to report blight and crime.[21]

9 *Community Impact Statement from Westwood Neighborhood Council*, 11 February 2015, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_cis_3-2-15.pdf (visited 5 March 2017).

10 i.d.

11 *Amending Motion 30-A to CF 13-1493,* Los Angeles City Council, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_mot_1-31-2017.pdf (visited 5 March 2017).

12 "Street Vendors Unite! Recommendations for Improving the Regulations on Street Vending in New York City," Food Vendor's Union and Street Vendor Project, pg 2, online at http://www.issuelab.org/resources/14908/14908.pdf (visited 5 March 2017).

13 Yvonne Yen Liu, Patrick Burns, and Daniel Flaming, "Sidewalk Stimulus, Economic and Geographic Impact of Los Angeles Street Vendors," *Economic Roundtable,* 2015, online at https://economicrt.org/wp-content/uploads/2015/12/LA-Street-Vendor-Report-final-12-16-2015.pdf (visited 5 March 2017).

14 Abbie Fentreses Swanson, "LA's Moves To Protect Immigrant Street-Food Vendors Come With A Catch," *National Public Radio*, 16 February 2017, online at http://www.npr.org/sections/thesalt/2017/02/16/515257761/las-moves-to-protect-immigrant-street-food-vendors-come-with-a-catch (visited 5 March 2017).

15 Jose Peralta and Elise Goldin, "It's time to act on street-vendor crisis," *Crain's New York Business,* online at http://www.crainsnewyork.com/article/20150810/OPINION/150819994/its-time-to-act-on-street-vendor-crisis (visited 5 March 2017).

16 i.d.

17 Rida Qadri, "Vending the City: Mapping the Policy, Policing and Positioning of Street Vending in New York City," Dissertation, Massachusetts Institute of Technology, 2016, online at http://www.dlanc.org/sites/dlancd7.localhost/files/4.1%20Sidewalk%20Vending.pdf (visited 5 March 2017).

18 *Community Impact Statement from Empowerment Congress Southwest Area Neighborhood Development Council*, 6 February 2017, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_cis_2-15-17.pdf (visited 5 March 2017).

19 *Community Impact Statement from Harbor Gateway Neighborhood Council*, 6 February 2017, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_cis_7-15-14.pdf (visited 5 March 2017).

20 *Amending Motion 30-A to CF 13-1493,* Los Angeles City Council, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_mot_1-31-2017.pdf (visited 5 March 2017).

21 Joe Buscaino and Curren Price, Letter to City Council, 22 November 2016, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_misc_v_11-22-16.pdf

Across cities, the responsibility of enforcing the street vending rules has usually been consolidated in one agency, aided with licensing by different departments. In Seattle, the Department of Transportation receives complaints by email or phone through its Street Use reception line, which is staffed during regular business hours "by a live person."[22] Inspectors are in the streets for the majority of the day, ready to respond to complaints. First-time infractions are issued written warnings; each subsequent violation is charged with a monetary citation, with accumulating fines. Inspectors can also revoke permits or confiscate equipment for more serious and repeated violations. Along with this progressive enforcement structure, the city has also experimented with random nighttime inspections which has increased regulation compliance; Los Angeles' enforcement structure can be informed by these examples. Vendors in Portland, a city praised for having seamlessly incorporated vendors into its landscape, must display all these licenses, along with proof of a contract with a licensed disposal service[23] – an additional requirement that may assuage concerns that street vending creates "an unhealthy environment by generating trash, food and beverage residue... all in the public right-of-way."[24]

The Devil in the Details

The adopted proposal for Los Angeles recommends a health permit, business tax registration certificate, liability insurance, and ADA clearance to accommodate disabled pedestrians. During the permitting process, vendors must provide photos of their proposed vending locations for review, to ensure there are no obstacles such as fire hydrants or telephone poles.

But overly stringent requirements or prohibitive fees can backfire, encouraging vendors to find loopholes or continue vending without a permit. In Portland, strict requirements on gas canisters have led vendors to heavily favor push-carts over vehicles, limiting the range of foods that vendors can sell to heavily processed pre-packaged items. More directly, Chicago restricts food cart vendors to selling raw, uncut produce or frozen desserts, limiting their entrepreneurial potential of street vendors.[25]

In New York, complicated rules governing where and when licensed vendors can operate have effectively closed off most of Manhattan to street vending (*see Figure 3*), creating "a strange hierarchy" of competition among the vendors. Vendors cannot sell within 20 feet of entrances or on sidewalks less than 12 feet wide, and have been ticketed for being inches off of the regulations; inspectors are given significant discretion in applying the strict numerical standards, leading to inconsistent application of the law. Vendors fear that the LA proposal's time limits – Monday to Friday from 7am to 9pm with "no vending allowed one hour before, during, and one hour after special events" – may become just as complicated as those in New York over time. In Manhattan, one cannot vend between E. 46th Street and E. 55th Street from 9am to 6pm on weekdays, but can sell anytime on the weekends, while on the adjacent streets from the 55th to the 59th Street, the no-vending times are from 10am to 7pm. Such un-intuitive requirements have given the areas with the most stringent requirements the nickname of "midtown gridlock."[26]

Advocates of street vendors argue that these prohibitive fees for business and other licensing go against the spirit of the legislation to encourage micro-business, and expound upon the need to protect diversity and fairness of entry into market. This concern about over-regulation is reflected in some of the Community Impact Statements. Downtown Neighborhood Council's position states that the purpose of the permit system should be to provide "an entry point for unsophisticated micro-entrepreneurs, should not be overly burdensome, and encourage participation from vendors of various economic backgrounds and capabilities so that they have a fair opportunity to become licensed and legitimate business operators."[27]

The Arlington Heights Neighborhood Council stated that its constituents have "no faith in new rules and regulations being enforced" due to the lack of current enforcement of the present ban on sidewalk vending.[28] According to the City Attorney, of the estimated 50,000 vendors in Los Angeles, just 35 charges were ultimately filed in 2016.[29] Currently, the Street Vending Compliance Program of the LA County Department of Health has been in charge of inspecting and issuing public health permits to unlicensed vendors, as well as responding to reports of unlicensed vendors. But the program is run by a meager team of ten inspectors tasked with answering reports from the entire county, and its website apologizes that "[d]ue to limited resources, the size of county, and the number of complaints received each day, it may take some time to address each complaint."[30] From the other side, street vending advocates argue that creating a permit system would digitize records of the sites of mobile food vendors, facilitating the enforcement of the new regulations.

Implementing the System

The Council admitted that the full permit system could take "months" to establish. Licensing vendors and policing the new regulations will require training new or existing administrative officials. The proposal aims for a self-sustaining system that will "require minimal assistance from General Fund;" the proposal suggests that the costs of enforcement should be paid for by a single fund sourced by the permit fees and penalty fines, which will then be used to pay enforcement officials. The Council also needs to determine whether the General Fund will subsidize permit fees for certain groups of people, and how

(visited 5 March 2017).

22 Peter Hahn, "Street Food Vending Enforcement," Seattle Department of Transportation, online at http://clerk.seattle.gov/~public/meetingrecords/2011/co-be20110713_4c.pdf (visited 5 March 2017).

23 Regan Koch, Licensing, Popular Practices and Public Spaces: An Inquiry via the Geographies of Street Food Vending," *International Journal of Urban and Regional Research,* November 2015, online at http://onlinelibrary.wiley.com.ccl.idm.oclc.org/doi/10.1111/1468-2427.12316/full (visited 5 March 2017).

24 *Community Impact Statement from Studio City Neighborhood Council*, 22 September 2014, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_cis_9-22-14.pdf&sa=D&ust=1488749319194000&usg=AFQjCNFbf9XSDYoCTKfrZpcIpzi2ff-gNbA (visited 5 March 2017).

25 "National Street Vending Initiative: Chicago Food Carts," *Institute for Injustice,* online at http://ij.org/issues/economic-liberty/vending/chicago-food-carts/

26 "Vending the City: Mapping the Policy, Policing and Positioning of Street Vending in New York City."

27 *Community Impact Statement from Downtown Neighborhood Council*, 9 September 2014, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_cis_9-9-14.pdf (visited 5 March 2017).

28 *Community Impact Statement from Downtown Neighborhood Council*, 20 August 2015, online at http://clkrep.lacity.org/onlinedocs/2013/13-1493_cis_8-20-15.pdf (visited 5 March 2017).

29 *Report No. R17-0045*, Los Angeles City Attorney Office.

30 "Street Vending Compliance Program," County of Los Angeles Public Health, online at http://publichealth.lacounty.gov/eh/SSE/StreetVending/strVending.htm (visited 5 March 2017).

Angeleno vendors, many of whom are monolingual Spanish speakers, will be informed about the details of the new permit system.

The city of Los Angeles is home to the largest Latino population in the nation.[31] Many are undocumented Mexican and Central American immigrants who continue to sell on the sidewalks despite regular harassment; they do not have much other choice, barred from most jobs due to lack of education or discrimination. These street vendors' bacon-wrapped hot dogs, Mexican-style corn and tacos, discounted clothing, and seasonal trinkets have been a hallmark attribute of the Los Angeles streetscape for many decades, but in order to finally incorporate them into the official economy, regulations must be clear, concise, and consistently enforced. Late in the game of licensing street vending, Los Angeles has the fortuitous opportunity to create an efficient, effective sidewalk vending permit system informed by the mistakes and successes of previously implemented models in other cities.

Figures taken from Rida Qadri's MIT Master of Urban Planning dissertation, "Vending the City: Mapping the Policy, Policing and Positioning of Street Vending in New York City."

Figure 1: Direct Purchases by Los Angeles Street Vendors, 2012

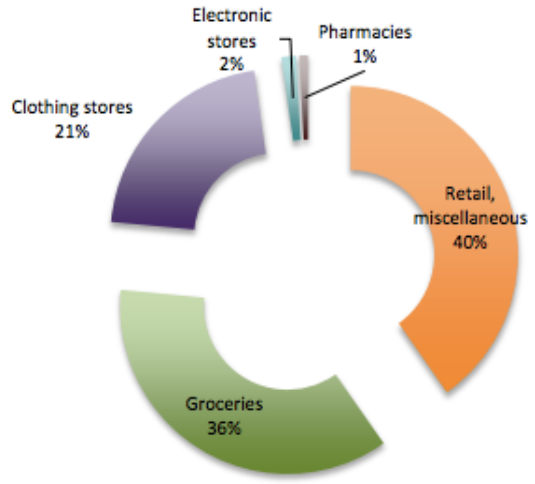

Figure 2: Jobs Directly Created by Los Angeles Street Vendors, 2012

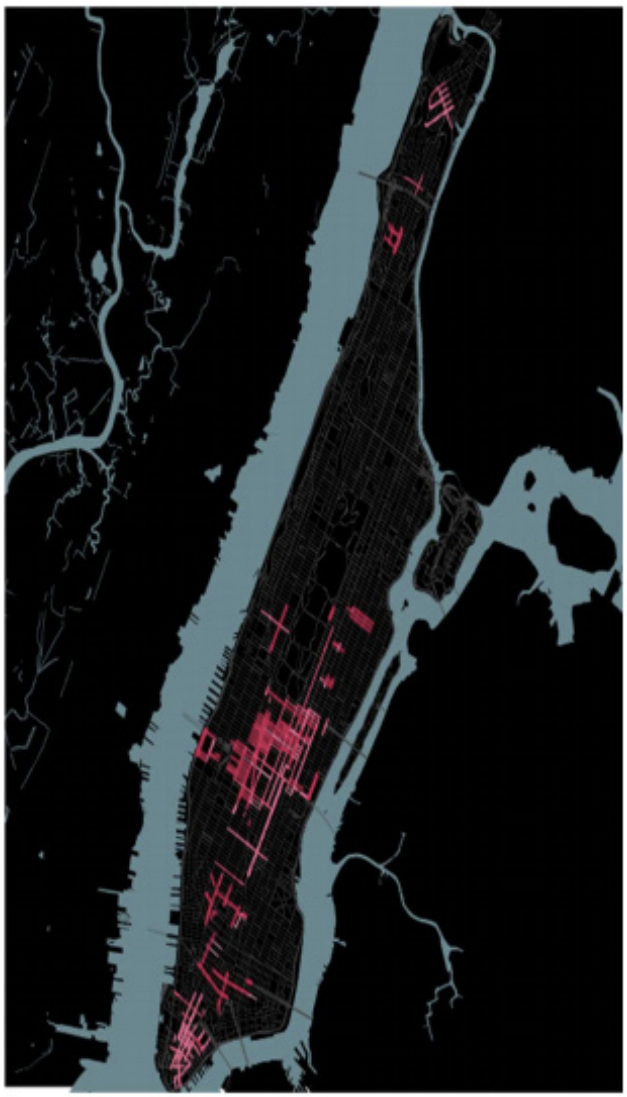

Figure 3 Time-Based Vending Restrictions

Figure 3 shows time-based street restrictions in Manhattan with the darker color indicating the strictest regulations and pale pink indicating least strict regulations. The plain grey streets have no special restrictions on them (Qadi 30).

31 The Latino population in Los Angeles County outnumbers the white population as of 2015.

Javier Panzar, "It's Official: Latinos Now Outnumber Whites in California," *Los Angeles Times,* 8 July 2015, online at http://www.latimes.com/local/california/la-me-census-latinos-20150708-story.html (visited 5 March 2017).

Dissent and Diversity in the California Courtroom: Interview with Judge Dhanidina

Audrey Younsook Jang PO '19
Claire Li CMC '19

The Honorable Halim Dhanidina is a Los Angeles County Superior Court Judge, currently assigned to hear criminal cases in the Long Beach Superior Court. A Pomona College and UCLA School of Law graduate, Judge Dhanidina is the first Muslim judge appointed in California. As a Judge, he is known for promoting diversity in the court system and criticizing the sting operations by the LBPD that targeted the LGBTQ community in April 2016. Prior to his position as a Judge, Dhanidina had served as a deputy district attorney in the Los Angeles County District Attorney's Office since 1998 and had prosecuted cases for the elite Hardcore Gang and Major Crimes Divisions.

On February 15th, the *Claremont Journal of Law and Public Policy* hosted Judge Dhanidina for an exclusive interview with the *CJLPP* and a series of events, including a talk at the Marian Miner Cook Athenaeum titled "Dissent in Democracy." At the talk, Judge Dhanidina offered insights on how dissents are an integral part of democracy and how they help to improve the credibility of our political system.

CJLPP: *"Your talk today is about "the crucial role that dissent plays in all aspects of democratic life." Do you think that many people recognize this crucial role, or do you think it is an issue that is underestimated and under-discussed today?"*
Dhanidina: "Well, I think sometimes people take it for granted. You don't realize how important it is until you start to lose that ability and that right. I think part of the problem is that people tend to see dissent as symptomatic of something that is going wrong in society, but I think it is probably the opposite. To me, I feel that when people feel free to express themselves, that's when you know that things are working. But most people think it's the opposite."

CJLPP: *"Do you think all forms of dissents are equally important, or do you think there are certain types of dissent that are more important than others?"*
Dhanidina: "I think there are two main functions that dissent can play. One is a persuasive function, and one is an expressive function. Both are equally valid and important to a healthy society. So, when you talk about persuasion, the form of dissent matters because you can be a lot more persuasive based on the methods that you choose to express yourself and to get people onboard with your point of view. Therefore, I believe there are definitely ways that you can be more constructive, and civil discourse is never a bad thing regardless of what you are trying to express. But I think it's easier to be more persuasive when your message is delivered in a way that is more easily digestible. Now, that's easier said and done. Sometimes in a polarized society, you can't always persuade someone if they are closed off to what you are thinking. So it is sort of a two-way street there. As far as being able to express yourself, I think there are few limitations on what types of dissent should be allowed. It won't matter if you are turning off your audience, because it is really not about your audience. It's about yourself."

CJLPP: *"Where do you see dissent in the judicial making process? How have you encountered dissent throughout your career as a judge?"*
Dhanidina: "The role of dissent is actually baked into the judicial decision-making process. Everything happening in court will have two sides represented, so you will always hear arguments and counterarguments. There will always be a winner and a loser. What's crucial in the judicial process is that both sides have an equal chance to be heard, to make their case, and to persuade. Whether that's in front of a jury or the judge, both sides have the opportunity to express themselves or disagree with each other, and even with the judge. That's what's considered part of due process. If that were ever removed, we wouldn't have a judicial system like the one that we do. That is what lends credibility to the system. You want people to feel that even though they don't get what they want—and half the people don't get what they want in court—the system is still credible because it is still listening and still considering your ideas and your point of view, even it is not eventually adopted. That's at the trial level.

At the appellate level, it's more interesting because there is the dissent that we talked about, [and then there is] the dissent among judges. So you could have a panel of judges where they are not always unanimous, and that's not uncommon at the various levels of the appellate process. At these levels, the form of dissent is actually formalized in terms of the way it gets expressed. So, if I am a judge on the panel with other judges, and the majority find one way, I have the ability and the right—and, some would say, even a duty—to express my dissenting opinion in a written form. If some of you are going to law school, when you are reading a case, you are going to be reading an opinion from the majority. But, you could also oftentimes read [the opinions] from the judges who disagree with the majority. That, I think, also lends credibility to the judicial process, because it doesn't give the false impression that there is a consensus on a particular issue. And, therefore, for people who are subject to judicial decisions and for

people who are reading the decisions, they will know that even if [they] disagree with the majority, there is a voice for [them] being expressed by one or more members of the court."

CJLPP: *"If I am understanding you correctly, you are suggesting that dissent is what makes the judicial process credible?"*
Dhanidina: "I think so. In a democracy, so much of our institutions rely on public confidence. Once we start to lose the credibility [in the eyes of] the public, then institutions don't mean anything any more. It's like, if we have free elections, that's great. But if nobody is voting, then [we will question] how democratic this society [actually is]. It's kind of the same thing. The judicial process requires a certain amount of confidence by members of the public and by the people who use those institutions."

CJLPP*: "You said that a lot of the bias that occurs today is subconscious. I am wondering if there are strategies you employ in your home courtroom to check your own biases? And if biases come into play, how do you deal with that?"*
Dhanidina: "That's a really good question, because you have to ask yourself, 'how do I handle something that I am not aware of?' Being a judge in California, I feel very fortunate because a lot of the training that we get when we first become judges focuses on this very issue. Even in the continuing education of judges, we are constantly taking courses on bias. In fact, it is required on an ongoing basis to help us to at least be aware of this issue. As far as what [judges like me] can actively do, there are few different tools that can be used.

One is that, when there is a fact pattern in front of you, and you are thinking of yourself leaning towards one decision over the other, imagining [and asking yourself], 'how would I make this decision if the identities of the parties were different? Is that relevant for some reason? Am I thinking the sentence should be more severe or less severe because of identity issues versus something else?' Part of what helps that is that I am in a very high-volume court, and so I might see a lot of very similar fact patterns, all in a row, involving people from different backgrounds. Little [warning] flashes will start to go [off] inside my head if I start to see one case as different from the previous one. I have to ask myself why [that is occurring]. The courtroom setting also helps to keep me in check, because the parties in the public courtroom can see how I make my decisions, and whether there is any arbitrariness to it.

One of the things that I also force myself to do is a funny trick that I don't think a lot of people do. I have a difficult name for some people to say. Oftentimes, we avoid [using] someone's name when it is difficult to say. There is a lot of shorthand used to avoid saying names that we don't feel comfortable saying—but that matters in a courtroom. When I was a prosecutor, judges were notorious [for avoiding saying my name and instead] using shorthand to refer to me as 'counsel', or 'counsel for the people', so that they never had to say it. With the parties standing in front of you [as a judge], you could use the shorthand [as well]: the witnesses, the defendant. I could do that, but I don't allow myself to do that because I think part of what dignifies people in the process is some acknowledgement of their individuality and their own diversity. Long Beach, where I sit, is a very diverse community. I will always give my best effort to say a name, even [if] it looks like it is going to be hard. To me this is a very conscious effort, because I want everyone to feel that that they are welcomed in the courtroom, and that this is not a courtroom just for people who are from one background. If a judge doesn't pay much effort in learning your name, it doesn't seem like that judge would pay the appropriate amount of time focusing on your case. So I never want to send out that message."

CJLPP: *"What advice do you have for students and young professionals seeking to become a legal professional or judge? What do you think would be the best solution(s) to solving the legal field's diversity problem?"*
Dhanidina: "One of the ways I think students can make their way through the process is to make conscious choices when they get involved in some of these professions—law being one of them—where they could learn that some of the voices might not be heard and represented. The reason for lack of diversity in legal professions is oftentimes double-sided. It would have to do with the gatekeepers: people who are letting people into the profession. But it would also have to do with the decision of the people who work to avoid the profession altogether. When I was growing up, if you were a South-Asian, like I am, and from an immigrant family, you probably were raised to do really, really well in school so that you could go into a career in medicine or engineering. Sometimes, those decisions were made for us by our families, and there is a lot of pressure to do that based on what value system is at play. That will prevent a lot of people, similarly situated, from going into law, because it's something that is never introduced to them. Part of that has also to do with who has gone on before you. There was a time when I was growing up that I couldn't identity one lawyer that my family knew of, so it was hard for me to see myself in that profession. Still, I think my parents did a good job of instilling in me this idea that I really could do whatever I wanted. But I think it's a harder sell when you can't see anyone who is like you or relates to you doing the things you want to do. So finding either a mentor who is active in your decision-making process or even a role-model whom you really want to become one day is what students can do for themselves to make a conscious decision when choosing a career. These people would also provide guidance or leadership once the student arrives in that profession."

Note: This piece features selected parts of the interview with Judge Dhanidina. To read the interview article in its entirety, please visit our website at www.5clpp.com.

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