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The Advocate

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Racial Disparities Propagate Adverse COVID-19 Health Outcomes

by Felicia Hipps

by Prostock Studios Stock Imagery

Amid the novel coronavirus (COVID-19) pandemic, the California Pan-Ethnic Health Network (CPEHN), in partnership with other advocacy groups, is urging California Governor Gavin Newsom to declare racism a statewide public health crisis through an executive order.

> "We have to **call out and recommit to opposing anti-Black racism** —the most egregious and long-standing racism in our country" - Cary Sanders

This announcement comes as the Centers for Disease Control and Prevention's COVID-19- Associated Hospitalization Surveillance Network report that people of color and minorities make up a disproportionate share of COVID-19 hospitalizations relative to their population or total hospital visits.

Margalynne Armstrong, Associate Professor at Santa Clara University School of Law, suggests that present disparities could be attributable to clinical history. Armstrong said minorities and people of color have long endured medical mistreatment and neglect, which may have resulted in both skepticism and apprehension regarding clinical trials and the medical community generally.

Armstrong emphasized a recent example of mistreatment, the Tuskegee Syphilis Experiment, which was conducted by the United States Public Health Service until its condemnation in 1972. In this study, physicians observed symptom progression over 40 years among a cohort of 399 African American individuals with syphilis. They were altogether denied medical treatment and were not prevented from transmitting syphilis to their families. "Because of the historical situation and Black communities' knowledge, you have additional hesitation to be in relationships with medical professionals because they are not trusted," Armstrong said.

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CA Law to Correct Implicit Bias in Jury Selection

by Maxwell Nelson

by Prostock Studios Stock Imagery

Following the controversial removal of a juror from a 2016 Contra Costa murder trial for her support of Black Lives Matter, a new California law would require courts to consider unconscious bias when attorneys appear to exclude specific groups during jury selection.

The new law, AB 3070, will apply to jury selection for criminal trials beginning January 1, 2022, but will not apply to civil cases until January 1, 2026.

Under current California law, attorneys are prevented from removing jurors on the basis of sex, race, religion, or other immutable characteristics. However, under this law, the trial judge must find that the attorney intentionally removed the juror on this basis.

Alternatively, AB 3070 will require courts to consider . . .

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Staff List

Note from Editors

We would like to thank the staff of The Advocate for their hard work during the 2019-2020 academic year. Due to their dedication, The Advocate was awarded ABA's 2020 Law School Newspaper National Award of Excellence. We are excited to continue this great work during upcoming school year.

Emily Branan
&
Robby Sisco

California Moves to Close the Division of Juvenile Justice

by Matt Roby

Starting in July 2021, juvenile court judges will no longer have the option to sentence youth to serve time in one of California's juvenile prisons.

Within the 2020-2021 California State Budget enacted by Governor Gavin Newson this June, the executive announced the plan to phase out the Division of Juvenile Justice (DJJ), the department that has been in charge of California's youth prison systems for almost 20 years. Starting in July 2021, juvenile judges can no longer sentence youth to the DJJ, and the remaining state facilities are scheduled to be closed by 2023.

Newsom originally budgeted for the DJJ to be moved from the Department of Corrections and Rehabilitation to the Health and Human Services Agency to reform and better rehabilitate youth. When COVID-19 created state budget shortfalls, Newsom issued an amended budget proposal in May 2020, planning to eliminate the DJJ. This would redistribute the responsibilities of housing the state's incarcerated youths among the individual counties.

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DHS and DOL to Heighten Immigration Standards

by Alex Carter

On December 7, 2020, new Department of Homeland Security (DHS) and Department of Labor (DOL) guidelines are scheduled to take effect with the goal of reducing legal immigration to the United States. The new guidelines, released on October 8, 2020, raise the hiring standards and minimum wages for H-1B Visa holders.

H-1B Visas are a particular type of visa issued by U.S. Citizenship and Immigration Services (USCIS). USCIS reserves them for high-skilled workers whose job requires "a body of highly specialized knowledge." A maximum of 85,000 H-1B Visas are approved each year. These visas are granted through a lottery system since the number of applicants exceed the number of available visas. H-1B visas are typically granted for a three-year period with the option to reapply at the end of that period. Employers submit petitions on behalf of the potential H-1B recipient.

The new guidelines narrow the definition of a "specialty occupation" to require both specialty knowledge and a bachelor's degree or higher. This replaces a rule that potentially allowed either one qualification or the other, but not both. The new guidelines also expand USCIS's power to investigate workplaces for potential H-1B fraud, among other changes.

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Juvenile Justice

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Newsom's proposed budget was adopted into Senate Bill 823 and passed by the legislature.

"I think that this could be a good thing if handled well and implemented responsibly," Frankie Guzman, Director of the Youth Justice Initiative at the National Center for Youth Law, said. "But it also has the potential for becoming an absolute failure and causing a lot of pain to young people and their communities."

Guzman said he is concerned these decisions were made due to financial constraints rather than progressive policy rationale, opening the door for a variety of potential pitfalls and unintended consequences.

"I don't believe the counties are in a position to care in a responsible way for these young people," Guzman said. "I think they have already shown a disinclination to deal with young people with high levels of need, favoring either a transfer to the adult system or commitment to the state system of DJJ."

Stacey Capps, Santa Clara County Assistant District Attorney, said now that the system will completely stop accepting new inmates by next summer, youth offenders face a greater chance of serving their sentences in adult prisons. Without the option of DJJ, the smaller counties that already lack the funding and infrastructure to provide much-needed services will often find themselves opting for the adult system in order to relieve the burden.

"In a county where you have very few youthful offenders, there is no way you can create programs to address specific needs," Capps said. "Those individuals won't be afforded the opportunity to be rehabilitated in their own county, so the options are to send them to another county or to send them up to adult court."

One major concern is that the rigid dichotomy of both political and policing ideologies across the state will cause , youth offenders will themselves to become subject to the constraints of geographical justice.

W. David Ball, Professor of criminal law at Santa Clara University School of Law, expressed concern that judges and probation departments in more conservative jurisdictions will continue to prefer incarceration instead of more forward thinking, evidence-based practices, that involve community intervention and social services.

"I worry that other counties--and these tend to be counties that use the criminal legal system to solve their problems--will want to reproduce the state prison experience with even fewer resources and less space," Ball said. "And that would be a terrible outcome."

In order to combat this line of thinking, the DJJ will be replaced by the new Office of Youth Justice to provide oversight across the state. The new office will have the power to revoke funding from probation departments that do not meet the expected standards and to increase costs for counties that favor placing youths in the adult system.

However, some believe that the legislation was pushed through too fast and that many counties are unprepared for the challenges that lie ahead. Capps said she worries that Santa Clara County is not ready for the influx of youth found to commit serious offenses who require substantial amounts of treatment, intervention, and programming.

"We still need to decide where we are going to house them, what programs we need in order to rehabilitate them. We need to hire people to facilitate those programs, and we need to think about how we are going to integrate our most violent youthful offenders with the less violent offenders," Capps said.

Without anywhere to currently send youth with high levels of need, advocates are concerned that departments already lacking money and resources will be further hindered by the financial toll of sending a youth to adult prison, with the annual cost ranging from $12,000 to $36,000 depending on the facility.

Going forward, Guzman said he would like to see more investment in evidence-based practices that seek to enhance the environment and programs provided by probation departments that are conducive to rehabilitative success.

"The format has been adapted to allow for this realignment, but the substance has not even been invested upon," Guzman said. "Educators need to be at the table. Public health officials, social services, and community-based organizations all need to be at the table and have more skin in the game."

Ball said he believes that politics are perhaps the largest hindrance in putting these experts in the driver's seat and advancing positive change in the justice system. He said that a cultural, social, and political conversation is needed to change the public stigma that surrounds why young people commit crimes and how we should punish them.

"This is a political and social problem," Ball said. "What this depends on is an engaged electorate at the local level."

California Combats Youth Cigarette Use and Vaping

by Shyam Rajan

A 78-percent increase in the use of e-cigarettes by high school students between 2017 and 2018 was just one of the statistics that inspired one state senator to draft a bill to fine the sale of flavored tobacco and vaping products.

Now, State Senator Jerry Hill's Senate Bill 793 may take effect in January 2021, after being signed by Governor Gavin Newsom this fall. The new law will fine retailers $250 per sale, without criminalizing the sale or possession of the products. However, a referendum to delay enforcement of this new law is already in the works. The bill aims to prohibit the sale of several different kinds of tobacco products, including flavored e-cigarettes, vapes, menthol cigarettes and smokeless tobacco. Hookah, premium handmade cigars costing more than $12, and pipe tobacco are all exempt from the fine. Possession or use of tobacco products is not illegal under this new law.

"California has taken a giant step to protect its communities against the death and disease associated with flavored tobacco products," Andrew Twinamatsiko, Senior Staff Attorney of the Public Health Law Center, said. Jamie Morgan, Government Relations Regional Lead of the American Heart Association, said 15,000 different flavors of tobacco products are sold, including bubblegum, grape, and gummy bear. "We are concerned about how we're hooking a new generation of youth to nicotine. They have been heavily marketed to and targeted by the tobacco industry in terms of flavored products," Morgan said.

Twinamatsiko said this issue is especially pressing for young people since their brains are still developing, and this can create significant health risks. However, Alex Clark, CEO of the Consumer Advocates for Smoke-Free Alternative Association (CASAA), disagrees. "When people share stories of young people experiencing breathing problems, or behavior and attitude changes, their grades are falling," Clark said.

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Adverse COVID-19 Health Outcomes

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"The kinds of treatments that are given to Black patients are often less aggressive or less effective than others that are more readily used to treat white patients. That's something that's still going on."

Accordingly, programs such as the *All of Us* initiative aim to uplift marginalized communities that have been disproportionately impacted by clinical and socioeconomic disparities. Established by President Barack Obama in 2015, *All of Us* is currently recruiting 1 million volunteers from diverse demographics to contribute genetic data and health information to close the information gap. Recent efforts leveraging these data have focused on racial equity with regard to the COVID-19 pandemic and ongoing vaccine trials.

Dr. Esteban González Burchard, professor of lung biology and bioengineering at the University of California, San Francisco, currently serves as a clinical advisor for *All of Us*.

Within this capacity, he works to increase race, ethnicity, gender, geographic and socioeconomic diversity in clinical research. "If you don't have the data, you just don't know what genetic risk factors predispose one group to another group," Burchard said. "It's like driving without a gas gauge. You just don't know."

Burchard explained that genetic differences are overlooked as European Americans predominate pharmaceutical trials. Both he and Armstrong agree, disparities in representation limit the efficacy and future availability of a potential coronavirus vaccine and other drug therapies for Black and minority patients. Burchard said COVID-19 is being politicized and science is being disregarded, both of which are dangerous for public health. "The virus does not know Republican or Democrat, and the virus is ruthless," Burchard said.

Michelle Oberman, professor at Santa Clara University School of Law, said improvements must be made on a granular level to reestablish trust and confidence among underserved individuals.

"Most doctors haven't really sat with what drives and complicates and compromises the health status in their Black patients, or what role they individually might have in the past contributed to alienation and distrust," Oberman said.

She advised that the dynamic of the doctor-patient relationship should be reconsidered. "When you meet with a patient, you don't have them undress, you sit face-to-face with their clothes on. Here's the way that you ask open questions, rather than the yes and no," Oberman said.

Oberman said the legal community may hold the key to combating systemic racism in health care delivery and beyond, with policy and advocacy initiatives similar to All of Us.

"Start with a sense of what the whole looks like, and before you get totally devastated by how much is broken, find your little corner and start hammering," Oberman said. "Start local. Start small. Start by listening and set attainable goals, and you'll see changes in individual lives."

Youth Cigarette Use

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"I don't think we can lay that all at the feet of vapor products." He said he also disagrees that flavored products are targeted to youth and instead are driven by the preferences of former smokers distancing themselves from traditional tobacco flavor.

He said that banning sale of e-cigarette products will create a public health crisis forcing millions of former smokers back to cigarettes. The Progressive Policy Institute found that 70% of the decrease in cigarette smoking was due to switching to e-cigarettes. Banning or taxing e-cigarette products will indirectly increase sales of cigarettes, increasing big tobacco's coffers counterintuitively, Clark said.According to Clark, the bill has a negative effect on small businesses, including vape shops, gas stations, and grocery stores. Hundreds or thousands will lose their jobs as vape shops close and convenience store business will stagnate because menthol cigarettes account for 30%of sales.

Margalynne Armstrong, Associate Professor at Santa Clara University School of Law, said the fine on menthol cigarettes disproportionately affects the African American community. "Almost nine out of ten African American smokers smoke menthol cigarettes," she said. "That's a pretty important part of the tobacco market." But Armstrong does not think the new law will completely restrict people from smoking menthol cigarettes because it does not criminalize possession and could even lead to under-the-counter sales. "One of the problems is that the state's borders are porous, and so people will be able to go to Nevada and buy a lot of menthol cigarettes and then come in and there will be an underground market for it," Armstrong said.

Jamie Long, staff attorney at the Public Health Law Center, said three California residents are currently working on collecting signatures to get a referendum on the November 2022 ballot. If they get the required 623,212 signatures, California cannot enforce Senate Bill No. 793 until after voters have their say on the November 2022 ballot.

According to a report by the Campaign for Tobacco-Free Kids, the tobacco industry could lose $1.2 billion from the sale of menthol cigarettes if this law takes effect. It also reported about 40,000 more teenagers could start smoking during these two years if the referendum passes. "Unfortunately, 37,000 kids will start vaping in these two years if the referendum goes forward. So, there is a clear financial incentive, unfortunately, for the industry to delay moving forward with [Senate Bill No. 793]," Long said. Long said tobacco companies like Phillip Morris and RJ Reynolds have been the main supporters of this referendum effort. "The industry is likely to spend millions of dollars trying to gather those signatures," Long said.

Dr. H. Westley Clark, Professor of Public Health for Santa Clara University, said he sees a need for more police education about this law, so African Americans are not looked at with suspicion when smoking menthol cigarettes, especially since under this law, possession is not a crime.

"The people who are trying to help reduce the incidence of police violence should be very adamant about not having the ban on sales be another excuse for stopping Black people [and] racial profiling," Dr. Clark said. "I think that police need to be directed against trying to police people's possession of menthol cigarettes. I think police have to be told not to try to extrapolate from the possession of cigarettes any type of criminal activity." Both sides argue education is paramount. Dr. Clark noted that community organizations must be involved. CASAA and Alex Clark prefer social solutions over legal ones, recommending compassionate education and helping those in true need, while also preventing stigmatization. Altria, owner of Phillip Morris, and RJ Reynolds did not respond to our request for comment.

DHS and DOL to Heighten Immigration Standards

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The DHS guidelines were coupled with a new DOL rule, raising the required wages paid to H-1B employees. On its website, DOL said its purpose of this new rule is to ensure that immigrant and nonimmigrant workers admitted through programs, such as the H-1B visa, do not affect the job opportunities and wages of US workers.

The DOL mandates wage requirements based on the Occupational Employment Statistics survey conducted by the Bureau of Labor Statistics. The DOL identifies four skill levels that apply to every occupation within the U.S.: Entry, Qualified, Experienced, and Competent-Supervisory.

The new guidelines are expected to result in a higher rejection rate for H-1B visa applications. According to reporting by the Wall Street Journal, Ken Cuccinelli, Senior Official Performing the Duties of the Deputy Secretary for the Department of Homeland Security, expects about a third of applications to be rejected under these higher standards.

The economic impact of H-1B restrictions

The Trump administration's goal is to "make sure the American worker is put first," Chad Wolf, Acting Secretary of Homeland Security, said in a statement on the DHS website.

However, Britta Glennon, an economist specializing in immigration and innovation at Wharton, said it is not clear that these rules will serve this purpose.

"[Immigration restriction] is supposed to make it harder for [companies] to hire foreign workers and make it easier for them to hire American workers," Glennon said. "But what it's much more likely to do is offshore those jobs entirely. At a certain point, companies just get fed up with the process."

According to Glennon's research, a decline in H-1B visa approvals leads to an increase in offshoring. Large corporations can relatively easily offshore jobs in response to rule changes. Meanwhile, smaller firms may be unable to adapt and will choose to opt-out entirely.

"It takes a lot of money both to hire the lawyer and to file the application. So [small firms] will only do that if they really need that person," Glennon said.

	Old Minimum	New Minimum
Level 1 (Entry)	17th percentile	45th percentile
Level 2 (Qualified)	34th percentile	62nd percentile
Level 3 (Experienced)	50th percentile	78th percentile
Level 4 (Competent-Supervisor)	67th percentile	95th percentile

Data from the U.S. Dept. of Labor

"As it becomes more difficult, the only ones able to navigate the system are the larger firms."

> **"But what it's much more likely to do is offshore those jobs entirely" - Britta Glennon**

Glennon criticized DHS's premise that H-1B visas trade-off directly with domestic employment. "There have been hundreds of papers studying this exact question - 'Do H-1B visas take American jobs?' There are a handful that have found small negative effects. The vast majority of them find nothing," Glennon said.

Immigration restrictions based on COVID-19 concerns

The new guidelines are part of a series of changes to the U.S. immigration system since the beginning of the COVID-19 pandemic. President Trump signed an executive order on April 22, 2020, blocking most visa holders from entering the United States for 60 days, citing the COVID-19 crisis.

On June 22, 2020, President Trump signed Presidential Proclamation 10052, halting the entry of all H-1B, L1, and J1 visa holders to the United States through the end of the year on public health grounds.

Evangeline Abriel, a clinical professor at Santa Clara University School of Law who focuses on immigration, said she thinks the public health rationale for immigration restrictions is in bad faith.

"There are so many other ways that you could protect against [COVID-19] that wouldn't go the full length of precluding people from entering," Abriel said.

COVID-19 has affected the immigration system beyond providing a basis for new rules. Da'Niel Rowan, a lawyer at Fragomen, a firm specializing in immigration law, said that the June restrictions were less meaningful in the pandemic context.

"It's got a lot more bark than it does bite," Rowan said. "At that point [when the June restrictions were passed], we were already knee-deep in COVID, we already had travel from country to country restricted. That impacted a lot of people," Rowan said.

> **"There are so many other ways that you could protect against [COVID-19] that wouldn't go the full length of precluding people from entering" - Evangeline Abriel**

Since the U.S. consulates in many countries are closed, it is difficult for potential immigrants to receive their necessary visa stamp. Decisions to close U.S. consulates are made on a case-by-case basis, but important consulates, like the consulate in India, are closed.

"If you can't get a consular appointment and you can't get a stamp, you can't enter the U.S. anyway," Rowan said.

Legal Challenges

Several of the Trump administration's immigration policies have been successfully challenged in the court system. On August 12, 2020, Proclamation 10052 was partially rolled back by creating additional exemptions to the ban based on national interest.

On October 2, 2020, a federal judge issued a partial injunction that blocked the executive order, but only for the companies which challenged the ruling. The most recent DHS regulations are also expected to be challenged in court, possibly resulting in an injunction before they can take effect.

Rowan said that future legal challenges to the rules would depend largely on who wins the election. "Particularly after the election, depending on the result, that might determine people's decision to drive forward," Rowan said.

Correcting Implicit Bias in Jury Selection

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unconscious bias against "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups" when determining unlawful removal of a juror.

When signing AB 3070 into effect, Governor Gavin Newsom said, "[a]s a nation, we can only truly thrive when every one of us has the opportunity to thrive. Our painful history of slavery has evolved into structural racism and bias built into and permeating throughout our democratic and economic institutions."

In California civil and criminal trials, attorneys may raise a limited number of peremptory challenges to remove jurors who may not be impartial. Peremptory challenges are different from "for-cause" challenges because an attorney does not need a particular reason, or "cause," to remove a given juror. However, if it is believed that an attorney has removed a juror due to their race, opposing counsel can challenge that removal.

California's current procedure for determining racially-motivated peremptory challenges derives from the state Supreme Court decision in People v. Wheeler.

Objecting attorneys are first required to make a prima facie showing of purposeful discrimination by opposing counsel. If the trial judge finds that a prima facie showing is successfully made, the burden then shifts to opposing counsel to produce evidence that the peremptory challenge was made for a race-neutral reason. The trial judge must then determine the validity of that reason.

Under the new law's procedure, attorneys will be required to state the reasons for their peremptory challenge and the trial judge will determine whether there is a "substantial likelihood that an objectively reasonable person" would view unconscious bias as a factor in the peremptory challenge.

Professor Elisabeth Semel of Berkeley Law's Death Penalty Clinic worked with lawmakers on drafting AB 3070 and describes the new law as a major change from California's current law.

"The reasons [attorneys] are giving are not necessarily intentionally discriminatory, but they are very often related to racial stereotypes or ethnic stereotypes, and at the very least, are the product of implicit bias," Semel said. Semel said that while the neighborhood a juror lives in or their demeanor are common, "race-neutral" reasons attorneys give for removing jurors, attorneys are often motivated by implicit bias. Such reasons are what Semel refers to as proxies for race because they tend to reflect typical racial differences.

Semel said a peremptory challenge on the basis of supporting Black Lives Matter would likely be presumptively invalid under AB 3070. Among other reasons, the new law presumes bias when a juror is removed for expressing concerns or opinions about racially motivated conduct by law enforcement or the criminal legal system.

As a pure statistical matter, if you are African American you will have a much higher likelihood of being stopped or being arrested or being prosecuted or having someone in your family who's had that experience. So these reasons are not [race] neutral," Semel said.

Daniel Okonkwo, Santa Clara County Supervising Deputy District Attorney, said he hopes removal of a juror for their support of Black Lives Matter would not occur in Santa Clara County.

"To challenge a juror that they can't be fair because they say that Black Lives Matter is, from my vantage point, and not just because I'm an African American, absurd," Okonkwo said. "I think it comes down to an office's philosophy and the individual prosecutor's philosophy."

As for AB 3070, Okonkwo said he was not familiar enough with the new law to comment on it, but thinks these kinds of issues can be difficult to regulate.

"Legislating implicit bias seems a little tricky, as to how it can be determined, and whether the challenge was made with implicit bias," Okonkwo said.

However, Okonkwo does believe that removing a juror for supporting Black Lives Matter may indicate bias.

"The [district attorney] that says that the term Black Lives Matter means that you can't be fair to police is probably coming in with a significant amount of bias already," Okonkwo said.

Ellen Kreitzberg, Professor at Santa Clara University School of Law, supports AB 3070 and believes there needs to be a heightened check on the unconscious biases of attorneys during jury selection than what the current law provides.
"Even a well-intentioned, well-meaning, thoughtful prosecutor may exercise his or her peremptory challenges in a discriminatory manner without that intent. And then the outcome would be one that the courts and our society can't really condone," Kreitzberg said. "We are all vulnerable to our implicit biases. And we're all vulnerable to making assumptions or presumptions about people, often without even realizing it."

Both Kreitzberg and Semel agree that AB 3070 will make it easier on trial judges who rule on whether a peremptory challenge is racially-motivated. Semel said this is because the purposeful discrimination standard, as opposed to the unconscious bias standard, creates the perception that judges are ruling on whether or not the prosecutor is racist.

Kreitzberg also said she sees AB 3070 as correcting two violations that derive from improperly using peremptory challenges to remove potential jurors for race-based or race-related reasons.

"One, we have a criminal defendant who's being deprived of a jury that represents that fair cross section of the community. But we also have a violation against that potential juror, that person has been removed from the courtroom, and has not been allowed to participate in the jury process," Kreitzberg said.

For her part, Semel said she sees AB 3070 as a step toward wider changes needed to address systemic racism.

"We're in a political moment," Semel said. "We're in a cultural moment. I don't want to say awakening, but hopefully reawakening to the profound inequities in so many aspects of our system. So to do something that is meaningful and systematic to change the way in which strikes are exercised seems to be a move that the legislature should have made."

Voting Concerns Before the Election

Due to the pandemic, many states are getting creative to ensure their voters still have access to their ballots for the upcoming election. This has primarily taken two forms: online and mail-in ballots.

Online Voting Introduces Security Concerns

by Tracie Ehrlich

Today, Americans can buy a car, apply for a mortgage, make a will, and even get married entirely online. This November, at least three states--Delaware, West Virginia, and New Jersey-- will add to this ever-growing list by implementing online voting in several forms.

For its proponents, online voting brings the prospect of engaging a new generation of voters and increasing accessibility to the ballot booth. Voatz, a Massachusetts based company providing mobile voting via an application downloaded to a voter's smartphone, is one such proponent.

Voatz implemented small pilot programs with jurisdictions across the United States, targeting voters who commonly face difficulties casting a ballot, including those with disabilities and military personnel deployed overseas.

Jesse Andrews, Voatz Director of Business Development, said that online voting is all about giving voters another channel to cast their ballot. "That's really our mindset," Andrews said. "How do we help these voters? How do we allow election workers to protect their voters?"

For many, however, the security and privacy risks of implementing an online voting system outweigh any perceived benefits. "Given that online voting isn't really secure by any mechanism we know of, we're unprepared," Eugene Spafford, a Computer Science professor at Purdue University and computer security expert, said. "The fact that people still think of it as a possibility indicates that we're not prepared."

Spafford said the United States has only begun to scratch the surface of online voting and that there are problems associated with it that don't have solutions yet. "In general, our cyber security posture is terrible, as businesses, private individuals, [and] governments all fall prey to this," Spafford said. "Anybody talking about 'well we can make it secure' just doesn't understand the reality of how people are using computing now, and how weak it really is."

He said he believes the core values of American elections cannot co-exist with online voting. "Voting as we do it is not possible online," Spafford said.For example, he explains that people are concerned whether others know how we voted. If we moved away from such concerns, then online voting may be possible, but would allow for the possibility of voter fraud and coercion.

Mike Shapiro, Chief Privacy Officer for the County of Santa Clara, said accurate information and voter empowerment are the most pressing issues and should be prioritized first. For Shapiro, online voting holds future promise. However, he said, putting such a tool into practice remains a distant goal, given outstanding security concerns.

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California to Vote by Mail Amidst the Pandemic

by Kaitlyn Fontaine

All voters in California will be able to vote by mail in the November 3rd election following Executive Order N-64-20 issued by Governor Gavin Newsom.

The executive order was created in response to the COVID-19 pandemic and orders voting packets to be mailed to each registered voter in California. The packets include materials needed to cast a ballot by mail.

Evelyn Mendez, Manager of Public and Legislative Affairs at the Santa Clara County Registrar of Voters, said that Santa Clara was already a Voter's Choice Act county. Counties that conduct elections under the Voter's Choice Act previously mail every registered voter a ballot. "It is something that we did in March, and the majority of the county was already vote-by-mail before that. I think in March, we had 87 percent of our county vote-by-mail," Mendez said.

Concerns have been raised throughout the country about the effect mail-in ballots will have on the election. Specifically, there have been claims that vote-by-mail will threaten personal privacy, disproportionately impact one party over another, and increase voter fraud.

Mike Shapiro, the Chief Privacy Officer of Santa Clara County, said one of the concerns is that mail-in ballots are a threat to personal privacy, but said those same privacy concerns could exist while voting in person.

"With mail-in voting, that is something you can do in the privacy of your own home. When you are actually writing what your choices are in the ballot, you can have a little bit more privacy in that respect and be able to cast your ballot in a very safe way," Shapiro said.

Jennifer Wu, a PhD student at Stanford University, co-authored The Neutral Partisan Effects of Vote-by-Mail:Evidence from County-Level Roll-Outs. The article discusses changes in terms of voter turnout and partisan rates of voting. In the study, counties in Utah, Washington, and California were examined to determine what effects mail-in voting had on partisan participation.

"The change in Democratic and Republican vote share is negligible when counties implement their vote-by-mail programs. There is no real difference and no real partisan advantage when these programs are implemented," Wu said. "We do see an increase in two points in overall turnout, but no advantage for either party."

In a more recent study, Wu and her team analyzed the 2020 primary elections in Texas. They looked to see if the option for any person over the age of 65 to vote absentee without needing to supply an excuse led to an advantage for one political party over another.

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Online Voting Introduces Increased Access With Security Concerns

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"I think for now, considering all the efforts that are going on to try to infiltrate, I would consider a mail-in paper ballot to be the viable option. That's not to say that I'm against the technology in particular," Shapiro said. "I think it's just going to be a matter of time before it advances enough to where it is going to be a safe and secure way to vote."

Shapiro said the irony of skirting new voting technology is not lost on him, given the constituency he serves, Silicon Valley, still votes by paper.

> **"There's going to be a time where we're going to get there, but that's going to be a little bit into the future" - Mike Shapiro**

Despite security concerns, Andrews says Voatz's benefits are too great to ignore, citing the opportunities Voatz gives disabled, military, and elderly voters to cast their ballot. "There's risk inherent in every channel, and every manner of voting and, again, election administrators, they're risk mitigators," he said, stating that while it is important to consider safety and security, it is also crucial to consider "who are the voters getting left out or left behind that can't participate?" In other words, "a vote lost is its own form of lack of security," Andrews said.

Andrews said he also envisions ways for online voting to enhance election security. "If you've been hit by a hurricane or wildfire, and your polling locations are down, what do you have as back up? What is your resiliency in this system? That's how we think about this. We want to strengthen this election system across the US," Andrews said. "We want to make this another option. We think a lot of different channels can flourish."

Andrews said he encourages those skeptical of online voting to work with its proponents to address potential security issues. "This is a decades-long process that's going to happen here," Andrews said. To the detractors and people who are even slightly hesitant about the future of online voting, he urges, "come fight the good fight with us."

Spafford said the most critical issues facing voters don't hinge on technology. "If one looks at the electoral system, there are some common problems that are not necessarily associated with technology," Spafford said. "And, it's not clear that technology provides the solutions. For instance, a minority of voters are the ones who go to vote. How do we get the others to vote? Even more importantly, how do we get the majority of voters to cast informed ballots? That's tough."

Spafford said it is essential to have people who care and are educated at every level of the election system. "A good government, a democracy, does not maintain itself," Spafford said. "It is maintained by the people who care enough to participate. We can't defer this to technology."

California to vote by mail amidst the Pandemic

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"We see voters who are more aware of COVID-19 substituting into vote-by-mail, so there is not really a fact where vote-by-mail is benefiting one party more than another," Wu said.

Mendez said there is a fear of mail-in ballots creating an issue of voting fraud. "Across the United States, any election official will say that it is hard to have a fraudulent vote-by-mail ballot. There are so many checks, there are so many Logic and Accuracy tests. A lot of people are saying that [fraud will occur], but there is no proof of it actually happening," Wu said.

Logic and Accuracy tests are measures counties take to verify the validity of the ballot counting process. Voters can track their ballots online from the moment it is mailed to them at home to every step of the process.

Mendez said that once the ballot reaches the office of the Registrar of Voters, it will be reviewed by an automatic and manual process. If there is a discrepancy discovered, the ballot's owner will be contacted and have a chance to correct the mistake. "Our numbers are really low for ballots that get rejected because we are making every attempt to reach out to those voters," Mendez said.

Shapiro said he's not worried about mail-in voter fraud. "I think more of our concerns are how voter fraud occurs with fraud of the mind, with fraud of people's perception of what is the truth," Shapiro said. He said that both misinformation—the passive spreading of false information—and disinformation—the active spreading of false information—are playing an active role leading up to the November election.

"Both passive and active actors are contributing to a problem," Shapiro said. "The disinformation part of it is very concerning because these are people that are actively trying to disrupt elections. They are trying to give false information, influence people to vote one way or another, and instigate a sense of loss of integrity. That no matter what the results are, if it doesn't go your way then it's fraud."

Shapiro said self-education might be a potential solution for this issue.

"Make sure that you are a well-rounded voter, that you are a well-informed voter, and that you are not just hearing from one or two sources that tend to reinforce your current thought process. Go out there and look for other information, information that challenges you and your current mindset. [This] will allow people to make better informed choices whether it is with voting, or anything else," Shapiro said.

Voters in Santa Clara County have options to vote in the general election: vote-by-mail and return your ballot by mail or in a local drop box, or vote in person at any vote center in the county. Mendez said mail-in ballots need to be postmarked by November 3rd and arrive at the Registrar of Voters office within 17 days of the election.

Technology

Covering legal news out of Silicon Valley

Artificial Intelligence to Fight California Wildfires

by Shirin Mirdamadi-Tehrani

After a record year for wildfires in California, technology may soon change how the state fights fires. According to the California Department of Forestry and Fire Protection, over four million acres in California have been burned by wildfires in 2020.

Now, Chooch AI, a Silicon Valley startup, is looking to artificial intelligence (AI) imaging solutions to prevent more years of record wildfires in the state. Jeffrey Goldsmith, Vice President of Marketing at Chooch, said their technology has the potential to identify and report fires in about 15 minutes.

"In a few minutes you don't have a big task—you have a small fire to put out. In eight hours, you might have ten acres to put out," Goldsmith said.

The Chooch technology can be configured to multiple camera devices. Through these cameras, the system can directly monitor for smoke and fire—otherwise invisible to human detection. When the system detects smoke or fire, an image or video is captured and sent as a timely report to a specified contact number or email address.

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Epic Games Claims Apple's Policies are Anticompetitive

by William Bliss

Epic Games, Inc. is challenging Apple Inc. in court over its business practices.

The complaint alleges that Apple violated the Sherman Antitrust Act when it removed Fortnite from its app store. This came after Epic implemented an in-app purchase method, circumventing Apple's store payment system and resulting in Apple losing 30% of the fees from in-game digital purchases.

The Sherman Antitrust Act prohibits companies from maintaining monopolistic market power through anticompetitive business practices. Epic argued in its complaint that Apple violated the Act by holding monopoly power over iOS app distribution, and that it unlawfully maintains this control through anticompetitive acts.

Epic argued that the iOS app distribution market is valid for the purposes of the Sherman Act analysis.

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CPRA could Transform Consumer Protections and Business Obligations

by Isabella Schrammel

In May of this year, TikTok was sued for violating the California Consumer Privacy Act (CCPA), but if the California Privacy Rights Act is passed in November, this lawsuit, and others similarly situated, may become moot.

As an initial sponsor of the CCPA, the Californians for Consumer Privacy proposed the California Privacy Rights Act (CPRA), which received enough signatures to appear on the November ballot as Proposition 24. The CPRA could expand consumer rights, including the right to know what data is collected and shared, the right to request data deletion, and the right to request that data remain confidential and not be sold.

The existing CCPA empowers consumers with several rights, including the right to know what data is collected and shared, the right to request data deletion, and the right to request that data remain confidential and not be sold. If approved, the CPRA will add to the CCPA, and experts predict that this addition will significantly impact the privacy landscape in California.

"What really needs to be thought through," Brandon Reilly, Partner at Manatt, Phelps, & Phillips, LLP said, "is should we have a privacy law that is essentially inalterable and immovable for an area of industry that is… technology-driven and changing every day or every month or every year?"

In addition to its efforts to make privacy legislation in California more permanent, the CPRA introduces a new right known as the "right to correction." This right provides consumers with the right to correct erroneous data a company might possess.

"Organizations can and do make decisions based on the information that they have. If that information is inaccurate, it could have consequences for individuals in terms of whether they are offered opportunities or not—I'm glad that it is in CPRA," Lydia De La Torre, Professor of Comparative Privacy Law at Santa Clara University School of Law and Counsel at Squire Patton Boggs, said.

The CPRA would also increase public spending by $10 million annually through the creation of the California Privacy Protection Agency, a state agency dedicated to privacy education and regulation. Currently under the CCPA, the California Attorney General handles most privacy-related issues.

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AI Fights CA Wildfires

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By the end of November, the company intends to deploy this technology for small-scale testing, with statewide plans for next year.

However, according to the National Park Service, the majority of California wildfires are caused by humans. In addition to the nature of AI data collection, this reality raises privacy concerns in applying the Chooch technology.

Lourdes Turrecha, Privacy Tech and Law Fellow at Santa Clara University School of Law, said that privacy is a complicated but integral topic.

According to Turrecha, privacy concerns are inherent to AI, which must be acknowledged and addressed throughout the implementation process.

She said there are several key considerations, such as data accuracy, provision of notice, and long-term data retention.

Goldsmith said Chooch has also considered privacy questions in applying their AI technology to wildfire monitoring and detection. He said he sees Chooch not as a data collector, but as an "alert distributor."

"Chooch will only detect things based on the AI models it has loaded onto it. We don't do facial recognition… so there is no privacy concern about people or license plate detection. If all we are distributing is smoke and fire detection the cameras can't detect anything else. So it really is about the AI models that you deploy that allow Chooch to understand anything in the world," Goldsmith said.

Turrecha noted that a major pillar of privacy is transparency—interpreted as user notice and consent, and she underscored the importance of weighing public interest against individual rights.

"If you have a legal basis for collecting [data] and you've made the assessment that this legitimate interest trumps any individual rights, there are exceptions to our rights," Turrecha said. Here, the public interest is wide-scale wildfire monitoring and prevention.

Accordingly, the California Department of Forestry and Fire Protection (CalFire) is a proponent of integrating new technologies, such as Chooch, in their wildfire solutions. Geoff Marshall, CalFire's Chief of Predictive Services, said that CalFire has already installed a state-wide network of cameras to monitor wildfires. However, AI capabilities have not yet been incorporated.

In 2019, California Governor Gavin Newson signed an executive order, titled Request for Innovative Ideas, to encourage innovative collaborations and problem solving in addressing the state's wildfire crisis. With this directive, CalFire has since vetted predictive wildfire technology for wide-scale use, according to Marshall. Thus, while CalFire has not yet interfaced with Chooch, the stage has been set for AI to become part of California's wildfire solution.

CPRA

cont'd from p.09

"[The agency would like to] have a way to fund themselves, but also the freedom to distribute … and an agency that has that kind of power should think about how to educate rather than how to punish," De La Torre said.

Mike Shapiro, Chief Privacy Officer for the County of Santa Clara, said there still remains some uncertainty regarding the California Privacy Protection Agency's local privacy regulation role.

"How [the California Privacy Protection Agency] will interact with other localities, we'll have to see how that plays out. We'll work to understand better what that relationship is going to be like," Shapiro said.

The fines for non-compliance are expected to be higher under the CPRA, especially pertaining to violations involving minors, which would amount to $7,500 per violation.

Reilly said for many businesses, compliance with a new set of regulations is overwhelming.

"Businesses are very much still trying to figure out what the CCPA means for their data operations," Reilly said. "What the CPRA does is it really confuses a lot of issues, and it's going to be tricky for companies to really come to terms and fully understand what they need to do–even if they have a robust CCPA readiness program in place already."

The CPRA increases the threshold for compliance, thereby lowering the likelihood of brushing up against the law. Under the CPRA, businesses that buy, sell or share the data of 100,000 or more consumers are required to comply, instead of the 50,000 consumer requirements under the California Consumer Privacy Act.

De La Torre said compliance is recommended even if a company falls below the new threshold.

"Startups should just from the get-go have the mentality that these requirements will apply to them, because they will eventually apply to them, and it's much easier to just build your structure on that assumption than to re-architecture it afterwards," De La Torre said.

For small companies, questions additional questions arise unrelated to the burden of restructuring.

"As a company, you don't necessarily want to be in the position of having to explain why you do not have to comply with a data subject request," Reilly said. "The provisions of the CCPA and the CPRA are incredibly burdensome. To expect small businesses to comply with it, I think is an unrealistic expectation, and it shouldn't be necessarily a cost that they have to deal with when they're a small company."

While it is unclear how precisely the CPRA will impact privacy legislation outside of California, privacy professionals agree that the CPRA may serve as a basis for other states' privacy laws.

Epic v. Apple

cont'd from p. 09

Epic sought injunctive relief to bar Apple from removing Fortnite from the iOS app store.

"It's no crime to be a monopolist. There has to be anticompetitive conduct," Donald Polden, professor of law at Santa Clara University School of Law, said.

Polden said whether a company possesses sufficient market power is a question of consumer preference and whether there are any close substitutes for the product. However, having a dominant product is not enough. Only when the product is dominant as a result of illegal business practices is it an issue under the Sherman Act.

"Their behavior has to be characterized by anticompetitive behavior. Steps to maintain or increase their market power through anticompetitive devices. It's not a crime to be a monopolist. But if you use anticompetitive conduct to achieve or to maintain your monopoly, then that could constitute a section 2 monopolization case," Polden said.

The iOS market may be considered its own self-contained market, or it may be considered to be a part of broader markets like mobile apps or video games. Polden explained that this market context is a critical point in the antitrust litigation.

"The general notion is that there's really no such thing as a one-product market. That'd be saying that there's absolutely no substitute for that Apple phone, and we know that's just not true. I think that it's not an exclusive monopoly, I think that there are other sources you can get apps. It's just not as robust a market as Apple," Polden said.

"It's not a crime to be a monopolist. But if you use anticompetitive conduct to achieve or to maintain your monopoly, then that could constitute a section 2 monopolization case" - Donald Polden

On the same day of their complaint, Epic launched an advertisement, titled "Nineteen Eighty-Fortnite," which parodies Apple's commercial, based on George Orwell's 1984. It depicts a spokesperson shaped as an apple speaking about "harvesting profits" and "unifying platforms" while brainwashing an apparently captive audience. A Fortnite character then rushes in to destroy the brainwashing TV with a unicorn pickaxe. The ad was followed by a social media and press campaign condemning Apple's business practices with the tagline #freefortnite.

In its response, Apple stated, "Epic should not be entitled to their desired relief because they seek an injunction for 'self-inflicted injuries.'" The response points out that Epic previously agreed to Apple's terms, which are consistent throughout the entire mobile market, and Epic breached the terms of their contract by circumventing the iOS payment method.

Apple responded not only by removing Fortnite from its store, but also cancelling development with all developers using Epic's proprietary software, The Unreal Engine.

Epic CEO Tim Sweeny said at Game Developers Conference 2019 that The Unreal Engine 4 is one of the most popular development engines and is used by 7.5 million developers. In response, Epic moved to enjoin Apple from taking this course of action.

Just days after the hearing, Congress weighed in on the issue as well by releasing a 449-page report. After a year of investigation, the House of Representatives explained why they now consider Google, Apple, Facebook, and Amazon to be monopolistic entities that must be regulated.

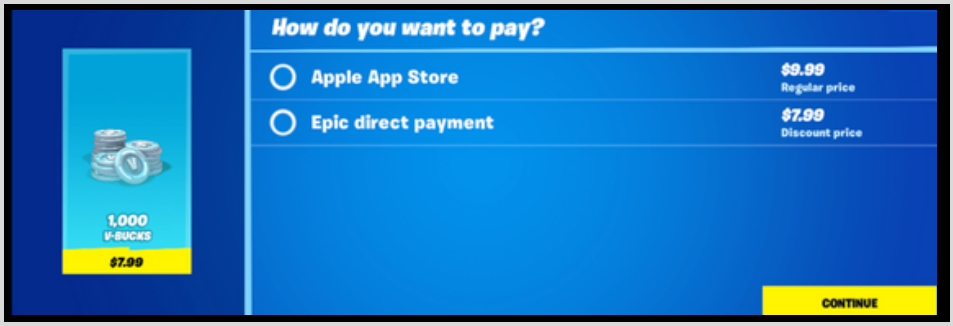
The report stated, "[w]hat were once scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons."

The report further identified Apple as possessing monopolistic control over its own iOS market. The report states, "[Apple] creates barriers to competition, excludes rivals, and charges 'supra-competitive prices' within the app store, or pricing which could not be sustained in a competitive market."

On August 24, Judge Yvonne Gonzales Rogers partially granted and partially denied Epic's motion for preliminary injunction. The order forbids Apple from taking actions against Unreal Engine developers, but permits Apple to keep Fortnite off their store. Judge Gonzalez recommended the dispute should go before a jury.

Judge Gonzalez focused on the novelty of the business practices and of the issues at play. She wrote, "[t]his matter presents questions at the frontier edges of antitrust law in the United States . . . Expert reports reflect fundamental disagreements from luminaries in the field as to the foundational questions of this matter. While ultimately one view will likely prevail, the Court concludes that reasonable minds differ."

Instead of taking Judge Gonzalez's recommendation for a jury trial, Epic and Apple have agreed to a bench trial to be heard on May 3, 2021.



This screenshot shows purchase options for in-game Fortnite currency, "v-bucks," as seen on Epic's online marketplace.

Opinion

Views expressed in this section are exclusively those of the authors and do not necessarily represent the views of The Advocate and its staff as a whole

Systemic Racism in Higher Education

by Jenai Howard

Throughout my education, I was often the only Black student in my classes. I watched my Black peers dropped out and accepted defeat. I used to believe that they were lazy. That they did not try hard enough and gave up too soon, that they equated education with exclusivity, that they did not feel like they belonged.

I later realized they were right. The education system is exclusive. It was designed to perpetuate white success. Black students who dropped out of school did not indicate the system was broken. It meant the system was working.

The education system was first constructed to exclude, then modified to integrate, but was never meant to ensure the retention and success of Black students. White supremacy and education formed a symbiotic relationship that flourished at the expense of Black students--especially in higher education. To adapt to a changing society, universities implemented inclusivity agendas. The acceptance of Black students into these institutions became evidence that systemic racism is a myth. This is simply not true. The higher education system was modified to integrate with a caveat: there is a cap on the number of Black students it can hold. And those of us who were selected somehow should be grateful. We pay these institutions. They admit us, expect us to be thankful, but because they operate within the confines of a racist system, we should not expect them to ensure our collective success as Black students. This structure provides fertile grounds for self-doubt.

It has been fervently denied, but systemic racism permeates the higher education system. This is apparent when you look at the calculated actions universities take. They are quick to address racism defensively (when they are exposed) but are reluctant to act proactively. They repeatedly refuse to delve deeper to combat structural inequities but will use Black students to promote surface level "inclusivity" agendas. Universities are notorious for claiming the few Black alumni as prime (but notably limited) examples of Black success. It is all about optics. They are not anti-racist simply because they release promotional videos or brochures with a few Black students. The facade that depicts higher education as inclusive is meant to divert attention from a larger issue.

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The Obsession with Well-Being

by Saagari Coleman

In recent years, a host of new technologies have arisen to care for the holistic person. A single search of the App Store can reveal applications dedicated to water consumption, meditation, digital detox, diet, exercise, and brain challenges. In our school, there has been a growing trend towards stressing such a notion of well-being. The significant agent in these conversations is the individual. It is my sole responsibility to drink more water, exercise regularly or digitally detox. However, collectives also have agency in fostering well-being through care for their constituents. A student who is vastly indebted to their institution, struggling with poor access to mental health resources due to inferior health insurance, and subject to poorly-handled racialized incidents in the classroom can hardly meditate away such stress. These are sites for institutional and collective agency. In this piece, I argue that in the absence of substantive structural changes, conversations and suggestions to master the body become part of a viewpoint that the self is a form of human capital.

In his seminal 1904 book, The Protestant Ethic and the Spirit of Capitalism, Max Weber traces the relationship between Protestantism and the spirit of modern capitalism. Importantly, he connects the belief "waste of time is the first and in principle the deadliest of sins," to the ethos of his time. Nearly a hundred years later, this work is more salient than ever. Even in our leisure time, there is a sense of "correct" vs. "incorrect" ways to spend this time. For example, meditation is favourable to a movie and exercising better than napping. I am frequently beset with guilt I have not used my scarce leisure time productively. In this schematic, I am the sole agent responsible for my well-being. When I squander leisure time, I am also responsible for squandering an opportunity to "invest" in myself.

All of these patterns are consistent with what social theorist Wendy Brown calls homo oeconomicus, a form of subjectification under neoliberalism where even the human is a unit of capital. Rather than being a human being with specific needs and intuition, I become a unit of productivity, a brand that supports the profits of employers. I should drink water, eat well, or practise meditation not for its inherent positive qualities but so that I am able to labour more efficiently for my client. Brown argues that a neoliberal homo oeconomicus seeks to strengthen its competitive positioning and appreciate its value. She traces this logic to a capitalist entrepreneurial spirit which encourages us to increase our portfolios in all areas of life. Much as you would position your company and assets for competitive positioning, so too do we place our personhood. When I exercise regularly, I am fit. When I eat well, I am healthy. These categories appreciate my value.

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Opinion

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Systemic Racism

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This begs the question: are we (Black students) here to corroborate a false narrative or are we here because we are qualified? It can be debilitating having these internal debates. And this is not to suggest imposter syndrome is limited to Black students. But when you look around and realize you are the only Black student in most, if not all, of your classes, these negative thoughts inevitably surface. Universities need to acknowledge that admitting Black students does not mean they are anti-racist. It is like people who claim they are not racist because they "have a Black friend." Addressing structural racial inequities in the higher education system requires administrations to be actively, not performatively, anti-racist. The burden should not fall on Black students to hold the school accountable. This system was not designed to ensure Black success. Thus, it is up to each university to address issues with retention by implementing new (and meaningful) policies. While this may not be an overhaul of systemic racism in the education system, these actions will help chip away at the fundamentally flawed foundation.

I hope all Black students (from kindergarten to graduate students alike) understand that a system rooted in white supremacy planted, and intentionally continues to nurture self-doubt in our minds. Abolishing that toxic mindset is a critical step to first expose then dismantle systemic racism in the education system. This, however, is not meant to absolve Black students from responsibility. Our absence does not fix a system designed to keep us out.

Universities need to acknowledge that admitting Black students does not mean they are anti-racist. It is like people who claim they are not racist because they "have a Black friend."

You need to show up. You need to put in the work. But schools need to do their part to ensure our efforts are not futile. For those of us in higher education, we are here because we are qualified. But we cannot continue to settle for surface level solutions that equate inclusivity with anti-racism. It is deeper than that.

Well-Being Obsession

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Wellness is one form of a discursive tradition that companies and schools use to address inequality within the profession without addressing the root causes. In the absence of substantive action towards collective wellness, the placement of individual responsibility upon our wellbeing feels hollow. Such rhetoric is reminiscent of past corporate ventures to re-allocate institutional responsibility onto the individual. NPR's Throughline recently addressed such an issue in the prolific anti-littering campaigns of the 2000s. Rather than addressing the fundamental unsustainability in their products, plastics companies created anti-littering campaigns to make the individual responsible for widespread environmental degradation.

The root causes of our lack of well-being are staggering amounts of debt, artificially created grade curves, racism and sexism in the workplace. I want to see Santa Clara Law advocate for the eradication of our student loan debt in measurable and compassionate terms. At a time when conversations about the student loan crisis are on the national radar, the institutional silence is noticeable. A great body of empirical research exists on student debt and its detrimental psychological effects. For example, a study by Melanie Lockert showed that one in twelve Californians have considered suicide due to their student loan debt. In the past two years, the school was advised of several acts of racism against students of colour and one notable instance of sexism but failed to take serious disciplinary action. Such failures weaken senses of community and institutional trust for marginalized students.

At a time when conversations about the student loan crisis are on the national radar, the institutional silence is noticeable. A great body of empirical research exists on student debt and its detrimental psychological effects.

In the 2018-2019 school year, the broader Santa Clara institution had a severe shortage of counsellors. In the months of this absence, little action was taken to create a stopgap measure for distressed law students. During a global pandemic, the law school only ceased the use of the grade curve for a single semester. Meanwhile, I saw my peers evacuated from their homes in one of the worst wildfire seasons in California history. My good friend worried ceaselessly about her family who were in the path of a hurricane. As climate change intensifies, as global inequity intensifies, these problems will only get worse.

These are just a few examples of enormous structural barriers to well-being. The individualization of well-being feels glib and convenient. It allows lip-service to an illness which is endemic, but fails to take concrete action to address such problems. Entreaties to drink water, or practice mindfulness are hearteningly humanizing. However the structures perpetuated by the institution are dehumanizing. This is my entreaty to professionals and institutions: before you tout well-being in its individuated capacity, ask yourself what you are doing to diminish structural barriers to well-being.

... in the absence of substantive structural changes, conversations and suggestions to master the body become part of a viewpoint that the self is a form of human capital.

Q &A : Professor Margaret Russell on Justice Ruth Bader Ginsburg

Professor Margaret Russell has been teaching Constitutional Law at Santa Clara University School of Law since 1990 and has followed Justice Ruth Bader Ginsburg's impactful legacy while on the Supreme Court.

by Colan Mackenzie

Q:Would you tell me about Ruth Bader Ginsburg, her legacy, and her legal career?

A: When Ruth Bader Ginsburg was a lawyer in the 70s and working with the ACLU, she developed a couple of cases that have to do with the role of gender/sex in the equal protection clause of the 14th and 5th amendments. It's incredibly important because the language of the 14th and 5th amendment just says "person." It doesn't say woman. But the history of the 14th Amendment, the Civil War, meant that the original construction and history of it was to afford equal protection and due process to the newly freed slaves, which obviously has not yet happened fully. But what Ruth Bader Ginsburg did in her arguments was to say that the word "person" means women as well and that treating women in a way different from men without a very, very strong justification by the government is simply wrong. Whether you're patronizing women by putting them on a pedestal and saying they could, they can't work more than men do, or whether you're degrading them by taking away their rights to be on juries and not affording them a right to vote. Either way, it's discrimination that is fully covered under the equal protection and due process clauses. She did that in a couple of cases, Frontiero v. Richardson and Craig v. Boren, that finally resulted in what's called a mid-level or intermediate level of scrutiny in terms of judicial review.

When she was on the Court, one of her first big decisions was about the all-male policy at the Virginia Military Institute, and just as she had as an advocate, as the justice writing the lead opinion saying that the Virginia Military Institute had to get rid of its all-male policy. She developed, very forcefully, the argument that one cannot, and certainly the government cannot, present that women are so different from men that they should be treated differently in military education as well as in a host of other contexts. So I think she really flipped the perception in away from the perception from when she was going to school that "oh, you treat women differently from men" to now I think the perception under laws that you do not, unless you have a very strong justification.

Q: So would you say that Frontiero v. Richardson and Craig v. Boren are the two most important cases she was involved in? What are some others?

A: Well when she was litigating before the Supreme Court, I would say Frontiero was a very important one because she argued for the highest level of scrutiny as an advocate in that case. And Craig v. Boren was the case that ultimately settled on the so-called intermediate scrutiny. Then when she went to the Supreme Court, The US v. Virginia opinion that she actually authored and had so much of her voice was, to me, the most important case. She also had a very strong voice as a dissenter and a lot of her reputation in high profile cases like Citizens United about campaign finance and the Lilly Ledbetter case she dissented in and then there wound up being a law Congress passed afterwards to correct the decision in that case. Those really show the uniqueness of her view. Mostly on gender equality, which is her greatest contribution as a lawyer and as a woman and as a Supreme Court Justice.

Q: Did Ruth Bader Ginsburg have any other significant impact on the legal profession?

A: It is the fact that she acquired this rockstar, Notorious R.B.G. following. I just had this nerdy, law professor way of admiring her and for me to see a whole younger generation give her that nickname. Someone just sent me her workout calendar as a present. Because apparently her trainer who trained her all the time, until pretty much the end of her life and now I have a desk calendar that has all her workouts. So she has this whole persona now that is in popular culture which I love. You know, movies made about her. Perfect!

Q: There are a significant number of people who feel like Justice Ginsburg needed to retire when the Democrats controlled both houses of Congress under President Obama and that, by not retiring, she inadvertently put her legacy and the rights and lives of millions of people at risk. What's your take on that?

A: What those critics are saying may very well be true, factually, but I do not fault her for that. I think that age is one indication of how long someone is going to last but you know, disease isn't. And cancer isn't. And heart attacks aren't, and so the fact that people think "Oh well, you know she should have recognized that. No, she should just stop this career where she's like working really hard all the time and enjoying it and inspiring people." That's a little harsh to judge her for that. Even though it's factually true that if she had resigned, let's hope you know Obama would have gotten another nominee in the court.

Q: With the election soon and the significant amount of criticism for their views and qualifications. What do you think about this about this nomination process being so fast paced?

A: It's appalling and the main reason why that is so has to do with the Republican's own actions when Merrick Garland was nominated. I don't think there is sort of one ironclad rule of when or if in an election year the sitting president gets to nominate somebody. I mean, there are differences of opinion, but they were so clear in their argents, that is Mitch McConnell and the Republican leadership, about why they wouldn't even meet with Merrick Garland. And for somebody who teaches checks and balances and the constitution, for me to see how that was just cast aside as a political ploy is appalling. Because I think it does shake the foundations of a belief in checks and balances, when you see people behaving that cynically. So that's really my main objection. Now, as far as nominating her, it's not a surprise and it is very political. I was just out of law school when the Federalist Society started, so I remember it from the beginning and I remember that goals were to have an influence eventually on who sat on the federal courts that is sort of the list and the place that made sure that she was positioned to get this nomination. There's no secret about that. The hearings, to me, almost didn't matter because it's been a long time since any nominee has really been very forthcoming in hearings. But for anybody to doubt what her ideological predispositions are is naive.

Q & A about Ruth Bader Ginsburg

with Margaret Russell

The fact that it's you know not only is it late, but it's October! Here comes the vote, you know, I just think it increases the shock value of it.

Q: With the election soon and the significant amount of criticism for their views and qualifications. What do you think about this about this nomination process being so fast paced?

A: It's appalling and the main reason why that is so has to do with the Republican's own actions when Merrick Garland was nominated. I don't think there is sort of one ironclad rule of when or if in an election year the sitting president gets to nominate somebody. I mean, there are differences of opinion, but they were so clear in their argents, that is Mitch McConnell and the Republican leadership, about why they wouldn't even meet with Merrick Garland. And for somebody who teaches checks and balances and the constitution, for me to see how that was just cast aside as a political ploy is appalling. Because I think it does shake the foundations of a belief in checks and balances, when you see people behaving that cynically. So that's really my main objection. Now, as far as nominating her, it's not a surprise and it is very political. I was just out of law school when the Federalist Society started, so I remember it from the beginning and I remember that goals were to have an influence eventually on who sat on the federal courts that is sort of the list and the place that made sure that she was positioned to get this nomination. There's no secret about that. The hearings, to me, almost didn't matter because it's been a long time since any nominee has really been very forthcoming in hearings. But for anybody to doubt what her ideological predispositions are is naive.

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Q: One of the arguments that Republicans have made is that this is a particularly contentious election and the possibility that there's a legal challenge to the results of whatever happens in November is one of the reasons why they want to have a full Supreme Court. What are your thoughts on that?

A: It's very troubling, as I said before, you know, in terms of the ones faith being shaken in terms of just belief in sort of principles of constitutional structure and checks and balances. It is very concerning that, during the hearings, Judge Barrett would not really comment or or commit in any way to recuse herself or to say anything about whether or not it would be appropriate for her to be judging the results of the election. And, you know, as I said, I guess it's not surprising given how nominees really try to skate. But I think you can look at President Trump and see that he said that that's what he hopes. So there's no secret about that, and that's very disheartening.

It's interesting, I was just doing an interview about the army of poll watchers that Trump has said go to the polls and watch and what I said there, which also applies here, is that we don't really have to guess what the motivations are. I mean, the reason why Trump wants an army of poll watchers to show up is to increase his chance of winning, not to be transparent about having a fair election. And I think the same is true that you know he's already sort of almost crowing about it. Like, "Oh, I hope that the courts get to decide it!"

That's so ignorant of the role of the judiciary, first of all, but also to just basically tilt his hand and say, "Oh I'm going to have one more justice that I really hope is going to make sure I win the election." Let's just say that people like me, constitutional law professors who have loved teaching this topic for a long time, I think a lot of us are kind of shaking our heads, each other thinking "This does not look good, it just does not look good for the rule of law." I'm sorry, I hate to sound so depressing! Yeah, it's serious, but you know the one big benefit is that there's a younger generation that's going to clean this up.

Q: One of the big concerns regarding Amy Coney Barrett being on the bench as Ruth Bader Ginsburg's replacement in particular, but just in the bench in general is her publicly stated disdain for abortion and Roe v. Wade. So how soon could the Supreme Court hear another abortion case?

A: There are cases working their way through the courts that, as previous cases did about abortion restrictions, they don't directly ask the court to overrule Roe necessarily, but what they do is put before the court restrictions that, under the Planned Parenthood v. Casey case, are thought by pro-choice advocates to be undue burdens on the right to privacy and the right to choose an abortion. Then the argument becomes "is this enough of a restriction? Is it too much of a restriction? How do you balance it against the right of the woman and a right to privacy?" And so what I think could happen very soon actually is, is that the underpinning of Roe v. Wade, the notion that there's a right to privacy that is not by its words in the original text of the Bill of Rights, is nevertheless being challenged here. And I think that Amy Coney Barrett's originalism like others on the court, and like Scalia's, will get directly at that.

They will just say the reason why is not because of "abortion," it's be cause the right the right to privacy is a made up constitutional right. I think that's the originalist approach to getting rid of Roe.

Q: If there is a significant challenge to a right to privacy, what other other consequences do you think that could have?

A: Well, I think in terms of what it would directly affect, you would trace it back to the Griswold contraception decision, and abortion, and, you know, I really think the question that a woman chooses her destiny, essentially chooses her life rather than the government doing it, so that's big. But in terms of this originalism debate I think that the approach used to really interpret this penumbral right to privacy will be manifested in other areas. So take marriage equality, right? So that's not the right to privacy, but it involved what the court majority said was an irrational distinction in the government's role in marriage to deny same gender couples the right to marry. I think the court could just as easily say, "oh, marriage is a historical institution and it was just sort of making up new rights, I think the majority would say, to create marriage equality." And the right to privacy, you know was at issue in the gay rights cases that you know had to do with striking down sodomy laws.

Q: Because of her originalist viewpoint, Judge Barrett is likely to strike down any sort of judicially created laws, but one of these is qualified immunity for the police. So how do you think a new court with her on the bench would rule on a case regarding qualified immunity?

Q & A about Ruth Bader Ginsburg

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A: I'm going to sound like her because she shall say "I can't answer based on just a hypothetical set of facts." But I think that, in terms of originalism, it's interesting. Scalia's originalist approach was actually kind of quite defendant respectful in the 6th amendment or right to confrontation. So it may be that Amy Coney Barrett and others would think it's an originalist approach to chip away at qualified immunity. But because the historical pedigree of it is so great there are the originalists on the court that really bow deeply to historical pedigree in what they do accept that's not in the text of the constitution. That's quite possible.

Q: If Judge Barrett was to be appointed to the supreme court, who do you think would be the new swing justice?

A: It's like musical chairs, like move to the left, to the left. In some cases, Roberts perhaps. Gorsuch has been a surprise in some cases, but I think that it would be Roberts, who has a reputation for wanting to preserve the legitimacy of the court, such as it is. So he probably would be. And a court in which Roberts is the swing justice, that's moved. That's moved to the right.

Q: A lot of people, I think, who aren't even familiar with the court and or have time to read opinions, people who are not the legal community, understand what originalism is. It gets discussed a lot in public circles.

A: Well the first reason I think that I question originalism is simply because the constitution was a document with important principles but limited by the worldviews of the white male property owners at the time. And what that means, I think, is that instead of seeing it as Judicial legislating, which I think Scalia and originalists would call a more liberal court, instead of seeing it that I think it has to involve that institutions, there's nothing set in stone in the sense that we understand what the framers would have meant if they lived today. I think it's important to take into account the evolution of law overtime. So I think that's one big reason. Why don't I understand the excessive respect I think is given to originalism. And then the second reason is even originalism could take you in very different directions.

So it doesn't answer the question and the case that I think most exemplifies that is the DC v. Heller Second Amendment case. In which, if you read the majority and the dissent, they both rely on originalism and interpretation, but they are diametrically opposed interpretations of the language of the 2nd amendment. So you know it's not as though, "oh well, let's just put it in the original is the originalism machine and will get the right answer." It's just a tool, it's just one of other judicial interpretive techniques.

Q: How does one justify an originalist reading when you know a lot of the mechanisms set in place to amend the constitution imply that it is supposed to evolve and change?

A: I think the originalist answer is: "If things are meant to evolve and change, then you amend the constitution. But you don't, for example, infer a right to privacy. If you want a right to privacy, you amend the constitution." And in fact California did have a voter passed amendment to its constitution, and so there is a right to privacy. So I think the originalists' argument would be "well see, don't don't read things into it that we don't think are there. Amend the constitution."

Q: Do you think it will be possible for Judge Barrett to carry out the duties of a Supreme Court Justice separate from her religious beliefs? Beliefs framed by what some have described as fundamentalist Catholic cult, the "People of Praise."

A: You mean, do I subscribe to the view that her religious beliefs are going to just drive everything? I think that when she says, or when she said at the hearings, that she understands the role of precedent and that certain things are called super precedent and that her religious beliefs will not be the reason why she would overrule a case I think she's telling the truth. But here's where I think the mode of judicial interpretation comes in and questions that she really did not answer satisfactorily. So OK, so let's say she says I respect precedent: Roe or Casey. My religious beliefs are going to be over here and here I am deciding this case. I think it's entirely possible and consistent with the Federalist Society approach that she would look at the law and she'd say Roe defined a liberty interest and a right to privacy from this language of the 14th amendment, 9th amendment. And she would say that's wrong. She wouldn't say, "oh, God's telling me to overrule this case." I think she would actually say, "well, this is wrong." And the reason why she is such a powerful nominee to the people who put her name forward, you know not just Trump, but all the money and the influence behind her, is because she's a convergence of those two. She has the training and intelligence to justify overruling precedent simply by talking about the law. But she also has the belief system that would help lead her in that direction.

Q: Is there anything you feel like we didn't go over but you would like to mention?

A: I really want to acknowledge the difficulty of the era in which we live right now for people to be studying law and commit to pursuing using the law for good. For lots of reasons, like COVID and the rise of white supremacy--it's shocking where this country is. And this is really just such a decline of real human empathy and compassion, but it will get better. So I do want to say that you know there is a light at the end of the tunnel and you know you can be part of the change. It's a noble thing to do.