# THE ADVOCATE

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## Net Neutrality: Gold Standard or Fool's Gold?

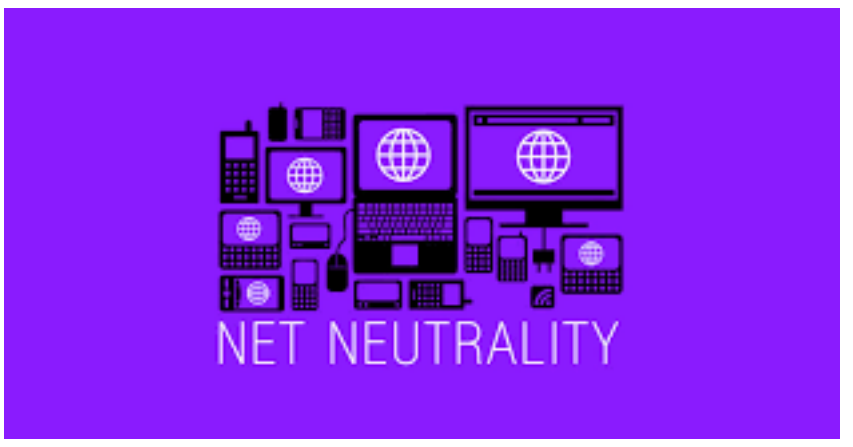
**By Josh Srago**
*Staff Writer*

It's been said that, "As California goes, so goes the nation." If that statement holds true, then Internet Services Providers (ISPs) may end up unhappy given S.B. 822 – the California net neutrality bill – was recently signed into law.

State Senator Scott Wiener put forth the bill. "The purpose of this bill is to protect net neutrality. Net neutrality is a very simple concept. It means that we as individuals get to decide where we go on the internet as opposed to being told by Internet Service Providers (ISPs) where we're allowed to go or not allowed to go," said Senator Wiener.

The Federal Communication Commission's (FCC's) 2015 Open Internet Order (OIO) attempted to accomplish this goal by preventing ISPs from blocking or throttling data from edge service providers (such as Netflix or Hulu). It also prevented the ISPs from charging edge service providers to prioritize their data transmission.

Senator Wiener's concern is, "We want to avoid the cable-ization of the internet because without net neutrality, that's where we're heading. We'll be in a situation

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where, unless you have a lot of money to buy a very expensive plan, you'll buy a plan that allows you only access to certain news websites, only to certain shopping websites, only to one search engine, only to certain social media websites, and we want to avoid that. The internet has always been open and that's what makes it so powerful whether you're doing political organizing, whether you're starting a new business, whether you just want to get information, and we are just trying to protect that."

Of course, not everyone views it in that light. The argument against a state enacting its own net neutrality regulation is that it violates the Interstate Commerce Clause in the Constitution. "The FCC has established a national federal policy with free market competition as the desirable federal policy end. That federal policy of a deregulatory market-oriented approach is something that's in conflict with state regulation," said Seth Cooper, Sr. Fellow with the Free State Foundation.

With the passage of 2018's Return to Internet Freedom Order (RIFO), which repealed the 2015 OIO, Cooper said, "The FCC made a straight forward determination that broadband internet access services meet the statutory

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## California Changes Felony Murder Rule

**By Robert Sisco**
*Staff Writer*

A drastic change to California's felony murder rule was signed into law in September by Governor Jerry Brown. Effective January 1, 2019, SB 1437 alters the criteria to convict a defendant for murder by eliminating second degree felony murder and restricting the application of the first degree felony murder to only three categories. Someone can be convicted of first degree felony murder if that person was the actual killer, if that person aided or abetted with intent to kill, or if that person was a major participant in the underlying felony acting with a reckless indifference to human life.

This new law is long overdue says Kate Chatfield, Policy Director for Re:store Justice, a nonprofit organization dedicated to reforming the criminal justice system that co-sponsored SB 1437. The current felony murder rule in California has remained unchanged since 1872. Amending the rule became a priority for Re:store Justice in 2015 when the director, Alex

Photo from KTLA

Mallick, encountered people serving life sentences as accomplices while working with the San Quentin State Prison.

Re:store Justice explained it was time "...to narrow the application to no longer prosecute and convict accomplices who were least culpable," said Chatfield. "For most people, it's shocking that somebody could be liable for a murder without committing the murder or having the intent to harm anybody."

Not everyone agrees this change will have a positive effect.

Stacey Capps, Assistant Santa Clara District Attorney, summed up the new felony murder rule in one word, "Disappointing." She says the District Attorney's office encouraged the legislature not to support the bill and further encouraged the governor not to enact it. Capps explained SB 1437 "dramatically changes the level of culpability for individuals who we believe are in fact culpable for a homicide."

Capps elaborated on how this change could lead to unwanted consequences by providing a few examples involving gang-related crimes. In one example, it could be the case where a "senior" gang member drives two "junior" gang members to rob and assault an opposing gang member. During the robbery and assault, one of the opposing gang members is killed by the junior members. Under the current felony murder rule, it was simpler to convict the senior gang member for murder under the natural and probable consequences doctrine, says Capps. To obtain a conviction under the new rule, prosecution will have to prove the senior gang member had the intent to kill the opposing gang members while driving them to their destination, she explained. In this particular example, prosecution would only be able to ascertain intent if one of

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definition of information services and the consequence of that is that broadband internet access services are to be non-regulated or lightly regulated and therefore not subject to utility-like regulation."

If S.B. 822 was designed to protect consumers, and RIFO was designed to encourage corporate investment in the network – which should take precedence? The issue may come down to examining the economic impact.

Per Cooper, "State-by-state regulation would create many of the same kinds of problems that imposing Title II regulation at the federal level would have presented in terms of discouraging investment of the network, in terms discouraging innovative services, and it might complicate things even worse by having third states regulate even more onerously and do so in ways that might conflict with one another that might pose real challenges to broadband services in terms of engineering and network management."

Ryan Singel, Fellow at the Center for Internet and Society at Stanford University Law School, disagrees, "States have wide police powers to protect their citizens." Singel continued, "There are data-breach notification laws in every state in the country and they are all different, and yet no company that I know have has gone out of business because they had to comply with different state rules."

However, Cooper argues that networks weren't designed around state boarders, "Interstate traffic will come and go across state borders in retrieving information that consumers need to access. It's a burdensome effort by the providers to reengineer their networks to conform to that if each state were to have its own policy regarding broadband internet access services."

Network infrastructure does cross state borders, but Singel points out that, "We are at a point, now, where networking equipment is quite smart. Every telecom [ISP] that we work with keeps a running total of how many packets we use every day…and with software defined network technology, it's not that hard for the telecoms [ISPs] to treat California customers differently."

A report from the United States Telecom Association released in October of 2018 stated that investment in network deployment and innovation increased $1.5 billion in 2017 over 2016. Many opponents to net neutrality are interpreting this to show that the OIO was a significant factor in decreased investment by ISPs.

Beyond net neutrality's economic interests, enforcement must also be considered. The OIO put regulatory enforcement solely under the FCC. The RIFO returned oversight to a split between the Federal Trade Commission (FTC) and the FCC, with the FTC having oversight of consumer protections and the FCC having oversight of the networks. Who, then, if RIFO and S.B 822 both win in their respective courts, would be responsible for enforcement in California?

Enforcement would be with the State Attorney General's office, per Senator Wiener. District attorneys and city attorneys in large cities would also have the ability to file suits against ISPs. If a citizen has an issue, they would file a complaint with these offices. The California Public Utilities Commission (CPUC), "is not part of this," per Senator Wiener.

There is an outstanding enforcement question. One term in S.B. 822 was undefined and has no clear, legal definition – nonharmful device. These are the bill's referenced devices that cannot be blocked, throttled, or forced into paid prioritization. When asked how we determine what a nonharmful device is, Senator Wiener said, "I can't comment on that, I'd have to go back and look at the bill."

Currently, California has agreed to hold off on enforcement of the bill until there are settlements of the pending lawsuits against the FCC's RIFO. Oral arguments in that case are scheduled for February 2019.

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the junior gang members testified against the senior gang member, which is unlikely according to Capps.

"Just cause it makes the prosecutor's job harder, doesn't make it a bad idea," says David Ball, Professor of Criminal Law at Santa Clara University. He says the change eliminates the less blameworthy from prosecution and agrees that a "person who doesn't want to kill anybody and had no part, shouldn't be prosecuted" as a murderer. The current felony murder rule essentially equates an accidental accomplice in a murder to someone who deliberately committed a premeditated killing by punishing them equally, he explained.

SB 1437 is retroactive as well, which means those currently imprisoned due to the current felony murder rule will be permitted to petition for a resentencing if they were convicted under this theory. Chatfield elaborated on this by saying this opportunity would not be available to prisoners convicted under felony murder if the person was the actual killer, aided or abetted the actual killer with the intent to kill, or was a major participant in the underlying felony and acted with reckless indifference to human life.

At this point in time, it is not possible to know the exact number of individuals who may be eligible for a resentencing petition. Chatfield estimates that the number would be around 800 for the entire state. This number was based on a 2002 nationwide study by the University of Chicago showing approximately 20% of prisoners convicted under first degree murder are due to the felony murder theory. California Department of Corrections and Rehabilitation lists 8,800 persons serving time for first degree murder, and since Chatfield believes California would be consistent with the nationwide study, approximately 1,600 of those were likely convicted due to the felony murder rule. Chatfield estimates only 800 of those prisoners would be eligible for release.

Capps has concerns regarding how these resentencing trials will affect the victims. Those who believe they received closure from someone being sentenced will be negatively impacted when the "case rips wide open again," she said. The victim will have to be recontacted to let them know of the individual's resentencing or possible release.

Chatfield responds to this by stating SB 1437 specifically allows for the prosecutor to rely on the record of conviction during the resentencing. Relying on the transcripts from the initial trial should prevent any victims or witnesses from having to return to court.

While four other states—Hawaii, Ohio, Kentucky, and Michigan—have abolished the felony murder rule entirely, Chatfield's response when asked whether this was an eventual goal of Re:store Justice, was "not necessarily."

"Eliminating the [felony murder] rule completely would be a good next step, but [it is] not next on our agenda," Chatfield said, adding that while a complete abolishment would be ideal, she doesn't think that it could pass. "We didn't believe we could get the support needed to completely eliminate the felony murder rule."

# Refuge in a Time of Heated Rhetoric

**By Ivan Muñoz**
*Staff Writer*

"Sanctuary cities is not the proper term," says Maria E. Love, Manager of the Office of Immigrant Relations for the County of Santa Clara. "Sanctuary cities" is a partisan term, she said, describing these jurisdictions as shelters that safeguard the constitutional rights of immigrants.

When a city or county establishes itself as a "sanctuary jurisdiction," it prohibits its law enforcement and government officials from cooperating with federal authorities in the detainment or deportation of undocumented people in their communities. California is home to twenty of these sanctuary jurisdictions, including Los Angeles, San Francisco, Oakland, Napa County and Santa Clara County.

Santa Clara County has an estimated 724,000 total immigrants, accounting for 37% of the County's population – per reports by the U.S. Census Bureau and California Immigrant Policy Center & Keen Research Center. One-hundred thirty-three thousand of these individuals are estimated to maintain unauthorized immigration status, per the Migration Policy Institute.

President Donald Trump opposes these jurisdictions and believes there is no room for them in the United States because they promote violence and violate immigration laws. Immigration and Constitutional law Professor Pratheepan Gulasekaram of Santa Clara University, School of Law, believes the claims by the Presidential administration have "no factual basis whatsoever."

"They are pedaling falsehoods because their claim is that sanctuary jurisdictions are more dangerous—they allow in more criminals—but all available, credible research, in fact suggests the opposite," Gulasekaram said. "What one can see from the available evidence from people who study it, is that sanctuary cities experience less crime—including violence and property crime—than non-sanctuary cities."

Bob Nuñez, Chair of the Santa Clara County Republican Party, agrees. "The statistics I see and those given to me by Police Chief Edgardo "Eddie" Garcia in San Jose and our Police Chief here in Milpitas, say that actually those persons that are dealing with that issue actually bring less crime," Nuñez said. "So, I believe—in sanctuary cities—those persons are more careful not to do things that are illegal; that are criminal in nature. So I think that persons that say that don't know what the figures are and are just branding falsehoods."

President Trump's approach toward sanctuary cities—at a local level—sows fear in undocumented immigrants as they hope to avoid an encounter with ICE agents out of fear of deportation, Love explained. She says the Trump administration vilifies immigrants, portraying them as criminals, and that this behavior discourages victims of crimes from reporting them to the proper authority.

The Presidential administration is engaging in reckless enforcement methods "so that everyone feels insecure about their time in the United States, in the hopes that people are going to self-deport—decide to leave themselves," Gulasekaram said.

Gulasekaram highlighted President Trump's use of enforcement resources as not being particularly efficient. "Now certainly those people might have violated immigration laws and technically, are they subject to deportation and removal?—sure—but I don't think any of us feel safer if someone who has absolutely no criminal background, has otherwise been a lawfully abiding citizen, who's only real violation is being unlawfully present in the country, that seems to be not a very smart use of enforcement resources."

Nuñez believes President Trump is incorrect in strong-arming governmental entities to enforce his immigration policies, referring to President Trump's attempt to withhold all federal funds from jurisdictions with sanctuary policies in place. "Anytime you try to strongarm an entity, whatever level of government, to abide by, to follow certain rules that are written out in a certain way that says 'if you don't do this this way, then we're going to withhold funds,' I think that is not something that should unilaterally be imposed," Nuñez commented.

Nuñez's comment refers to a recent Presidential attempt to withhold all federal funds from jurisdictions with sanctuary policies. A Ninth-Circuit ruling in City & Cty. of San Francisco v. Trump in August found such Presidential action to be unconstitutional.

Despite a previous failed attempt to reach a solution on immigration issues, Nuñez, however, is optimistic President Trump and Congress will reach a compromise. "Congress had an opportunity when it had both houses to deal with something with regard to immigration and did not do so. I think in essence what they told the President is 'we don't agree with your stance'." He awaits to see what that compromise will be.

# California Leading in Higher Level Prison Education

**By Lauryn Bruton-Barbosa**
*Staff Writer*

According to a California Department of Corrections and Rehabilitation Report, there are over 120,000 adults in California prisons as of June 2018. Between legislative efforts and the work of private organizations, more and more of these incarcerated individuals are able to access higher education while serving their sentences. These combined efforts have made California a leader in higher education in prisons.

First, Senate Bill 1391, enacted in 2014, provided provisions for community colleges to receive funding for incarcerated students in the same way they would for the other members of the student body. Second, in 2016, the people of California voted to provide credits to incarcerated individuals who participate in education and rehabilitation programs and activities.

Prior to 2014, there were only two programs in the state that offered classroom instruction inside of a prison, Prison University Project at San Quentin and Chaffey College's degree program at the California Institute for Women. All other education programs consisted of correspondence courses, where incarcerated individuals completed coursework solely through the mail. Since the passage of SB 1391, the number of prisons offering higher education in a face-to-face classroom setting has increased over 30 times.

A partnership between Stanford Law School's Criminal Justice Center and Renewing Communities called Corrections to College California has been the driving force behind this increase. The privately funded project was designed as a five-year initiative to jumpstart California's dedication to providing high quality education to incarcerated individuals by laying a foundation that connects colleges and universities to prisons across the state.

"The goal of the initiative was to bring about systems change within California's public higher education system so that the public higher education system serves both incarcerated and formerly incarcerated students as part of the mission," said Rebecca Silbert, director of Renewing Communities.

"No doubt is it fantastic that the state is starting to turn its attention to the field and the need for programs in prison" said Jody Lewen, the director of Prison University Project. However, "the small handful of folks who are trying to be helpful are underestimating the complexity of actually building quality and sustainable programs."

"What they mostly are doing is trying to make money available and what they don't understand is not only is it not enough to just make money available for those programs, but if there are no quality standards or systems for quality control or accountability, you can actually do harm," Lewen said. "You can create a situation where sub-standard programs take root, somebody is generating revenue from it, and then you can't get rid of them and it is almost impossible to change them."

The community colleges who factor incarcerated students into their student body and receive funding accordingly, as Senate Bill 1391 intended, do not have a set of standards or curriculum individualized to prison education provided to them. In fact, "every community college gets to run operate each of their programs however they see fit", said Raul Arambula, Academic Dean of California Community Colleges.

"There are individual people within the community college system who are doing great work and are working so hard, but in many cases what happens with community colleges is that the schools are approaching the prison programs as a source of revenue," Lewen said.

This allows for schools who have low enrollment and revenue to boost those things with prison education programs without making a real commitment to ensuring quality programs tailored to the needs of incarcerated students.

California Community Colleges (CCC) has an advisory board that is working on the development of standards "to get everyone on some sort of the same page and adhering to some sort of guidelines," said Arambula. The colleges offering prison education programs do not necessarily have to adhere to these standards, "they will serve as suggestions," said Arambula. These standards and a report from CCC are set to be released in the spring.

# Office Hours Unwound

**Margalynne J. Armstrong**
*Associate Professor of Law*

Education:
J.D., Boalt Hall School of Law, University of California, Berkeley

B.A., Earlham College

Areas of Specialization:
Constitutional Law, Property, Race and Racism in the Law

Currently Teaching:
Property and Constitutional Law II

1) What is your top source (news/journal/legal blog/other) for staying up to date with the law?

I just started listening to Bloomberg Law Podcasts. US Law Week and the Law Week Blog, the New York Times and the California Lawyers Association Section websites other go-to sources.

2) What do you consider to be the most important development in your field or the legal profession in general over the last five years?

The onslaught against democracy. The Shelby County v. Holder case that eliminated the pre-clearance requirement for voting law changes in covered jurisdictions has resulted in massive disenfranchisement for poor and minority citizens in Alabama, Texas , Georgia, and Ohio, to name but a few of the impacted communities.

Voting rights languish in a vicious circle because Congress must become more bi-partisan to refashion the Voting Rights Act in a manner that satisfies the dictates of the Shelby County decision which won't happen until the people who benefit from the decision are voted out.

3) If you could go back in time, what advice would you give to yourself in law school?

Find a mentor, or better yet mentors, who can give you some perspective and insight into the profession so that you don't make uninformed decisions. Don't be embarrassed to ask advice from the attorneys you get to interact with in law school.

4) Who is someone you admire, and why?

The brilliant Charles Hamilton Houston, the law professor and attorney behind the legal strategy of the NAACP Legal Defense Fund that led to the Brown v. Board of Education decision. His work increased opportunities for many groups of Americans that had previously been excluded from pursuing their potential. I count myself as a beneficiary of his efforts.

5) Do you have any book recommendations?

If you have a pressing desire to see fee tails in literature read 'Price & Prejudice', 'Orlando' (Virginia Woolf) and 'To Kill a Mockingbird.' "A Mercy,' by Toni Morrison is one of my favorite books, but read it with Google at hand to understand the references to religious factionalism in reformation-era England.

6) Do you have a favorite sports team or particular athlete?

I'm a Giants fan, but my favorite athlete is Kevin Durant of the Warriors. He's the grown up of the whole NBA and is a righteous man.

7) What has been your most memorable concert experience?

That's hard because I went to my first concert before I was ten years old and still attend them pretty regularly. The best this year was Janelle Monae. The ones that I remember most were Prince at the Cow Palace in 1985 and Green Day's American Idiot tour kick off at the Bill Graham Civic Auditorium in 2004. The right band for a wrong time. I feel the same way about the Monae concert in June.

8) What is your favorite restaurant in the Bay Area?

The Village Pub in Woodside for the occasional splurge.

9) If you could have dinner with any person, alive or deceased, who would it be and why?

My dad. He was killed in 1985, so his loss was sudden. Now that I have some perspective there are so many things I wish we could talk about.

10) How do you unwind?

Listening to music can really lower my stress level. The dopamine flows. Also laughing with my friends and family, and hanging with Miss Molly Tonks, the canine diva also known as Lil' Chiefie or Ruth Biter Ginsberg.

# California's Debate Over Senate Bill 320

**By Emily Ashley**
*Staff Writer*

Should colleges be required to provide abortion services for their students? Senate Bill 320 (SB 320) passed on Nov. 6 and beginning January 2022, will require all public colleges and universities to provide these services as a part of their healthcare offerings for students

For people outside of California, this idea may seem like an impossibility because of the moral and political connotations surrounding abortion. But Professor Michelle Oberman said, "What makes it thinkable in California and not the South is whether you think of it as a healthcare procedure or a moral decision… if you think about it in numbers, it's a pretty common healthcare procedure."
The Guttmacher Institute reports that 19.5% of pregnancies ended in abortion in California in 2014.

In bigger cities, Planned Parenthood may be a viable alternative. In more remote areas, however, clinics aren't so readily available for students— they may have to travel several hours by car or bus to find the help they want. University of California Student Association President Caroline Siegel-Singh, who worked to pass the bill, also sees it from a healthcare perspective.

"I can go to my University clinic for X-Rays or eye exams, so I don't see any reason why reproductive healthcare shouldn't be included," Siegel-Singh said.

Matt Lamb, a representative for Students for Life, feels differently. He explained the group's concerns from a healthcare perspective- they're worried about safety. While proponents of the bill claim that schools will provide the same service as Planned Parenthood, Lamb does not believe school health centers are equipped to safely administer the abortion drugs.

"Student health centers don't have the proper technology to detect how far along a woman is in her pregnancy," Lamb said.

Lamb is also concerned about excessive bleeding that can occur as a result of the service, and often the education about the side effects is poor. "You can take the drugs and it won't happen right away. You could be in class and all of a sudden, it would turn into an ordeal," said Lamb.

A college student may choose abortion for a variety of reasons. Usually, it's because she lacks the support or resources, like time or money. Students for Life is working to make sure students have access to those resources so that continuing their pregnancies through college will feel more like a realistic option.

In addition to raising scholarship money for parenting students, Students for Life works with different groups to provide an array of services, from diaper bags to Title 9 issues. They're also working to establish on-campus childcare at some institutions.

They'll help students rearrange exam schedules, guide students on how to work with school administration so they won't be at risk of losing their scholarships due to missing class, and will even work with female faculty who struggle to achieve tenure due to parental priorities.

Governor Jerry Brown vetoed the bill this fall, but Senator Connie Levya reintroduced it in the next session and it subsequently passed. When asked if Students for Life will continue working with college students against the bill, Lamb said, "We'll definitely continue to be on campus. We have over 90 groups in California."

Siegel-Singh, however, isn't worried about another veto. She believes that the Nov. 6 election "definitely played a role in the bill's initial veto." Siegel-Singh said that politicians in very "purple" areas of the state were hesitant about supporting a bill like this one that could be used against them in an election.

Now that the election has passed, attitudes may change. She added, "Gavin Newsome has expressed that he would sign it into law."
Siegel-Singh further said the University of California system is against SB 320. Its passage poses a threat to its constitutional autonomy, which Governor Brown has always respected. "I think that with a new governor, we could definitely get it passed," Siegel-Singh said.

If it becomes law, California will be the first state to include abortion as a mainstream healthcare service in this capacity.

# Rumor Mill - Graduating Students Survey

**By Susan Erwin**
*Senior Assistant Dean*

Dear Rumor Mill,

This issue of the Rumor Mill will be dedicated to answering some of the more concerning responses to the Graduating Students Survey.

We sent the survey out during the summer to our graduating students, about 150 folks responded. We asked their opinions on classes, schedules, services, and facilities.

Setting aside the negative responses about Heafey and Bannan, I'm happy to note that the numerical scores reflected that the grads were overwhelmingly positive about SCU Law. About 7,000 student responses were either Satisfied or Very Satisfied.

About 700 times students were Dissatisfied with some aspect of their experience. The deans and directors are reviewing the responses with their departments.

Here are my responses to a few of the comments:

1. We need more/less IP courses.

For every person who complained that we had too many IP courses, there was a person who complained that we didn't have enough IP courses. At the end of the day, a lot of our decision making on electives is based on how you all register. If we end up with waiting lists, we offer more classes in that area. If we end up having to cancel classes due to low enrollment, we offer less in that area. BUT . . . please feel free to let me know your opinions on the course offerings. We are listening.

2. "I think Santa Clara should consider introducing the [Professional Responsibility] class in the first year of law school to impress upon students the importance of Professional Responsibility in our profession. Many students are applying to in-house internships, especially for their first summer, and sometimes, especially with startups, there may not be a full-time attorney on staff. It may be wise to teach professional responsibility at the beginning of the law school to alert students of the pitfalls if inadvertently engaging in unauthorized practice of law and again, just to impress upon students the importance of Professional Responsibility."

I have three responses to this comment. First, we added Critical Skills to the first year curriculum precisely to prepare students for externships, legal work, and managing their own professional identities. Second, if you sign up for an externship through the ExPro office, Professor Pina personally vets each placement to ensure that you do have an appropriate person to supervise you. And third, you all should pay attention to this very wise graduate – your professional identity is of utmost importance!

3. "As an evening student, I feel like I was rarely notified about activities that occurred while I was on campus. I took the ALW: Bar Exam class and emailed OABS a few times during my bar prep, but I otherwise didn't use any APD services of participate in their activities."

This is a huge mistake! Always be sure to read the Mini-Newsletter for Students from the Office of Academic and Bar Success! There is so much information packed into those emails AND they always contain links to recordings of their programs for those of you who can't attend. AND they stay open until 6:00 pm on Mondays and Thursdays for part time students. AND they are very smart people and they are awesome!

4. "The administration should actually look at course titles when scheduling exams. How absurd is it that Trademark and Copyright final exams were on the same day????" Actually . . . . . when we are creating the exam schedule, we do look at the classes. We schedule bar and required courses first and then schedule the exams for the electives. The goal is always to create an exam schedule with no conflicts that gives students ample time to study between exams. If we see a potential conflict and can't find a way to avoid it, we will actually purposely put the exams on the same day. That way, if anyone is actually enrolled in both classes, they can request an automatic reschedule. We could create an exam schedule that is easier for us to administer (because reschedules are a pain), but we choose to set up scenarios that will allow you to reschedule if you need to and don't force you to take exams on consecutive days.

5. "Maybe more of a stricter warning about consequences of breaking the honor code on take home exams and how to report issues if they come up."

We do have an honor code, we do have an Oath of Professionalism, and we do want to be able to trust everyone to follow the rules. If you suspect that someone is not following the rules, shoot me an email and I will follow up. If someone in an exam room appears to be doing something wrong, please walk out of the room to the Head Proctor table and let the Head Proctor know. We will follow up.

To read the Academic Integrity Policy and see the consequences involved with breaking the rules, go to https://law.scu.edu/bulletin/academic-integrity-policy/

Heard a good rumor lately?? Tell me about it. – serwin@scu.edu.

# NCAA Announces New Rule Changes a Year After Federal Investigation

**By Kevin Carroll**
*For The Advocate*

Around college sports, there is a recurring debate whether college athletes should be paid. Currently, these athletes are called "Student Athlete," originally coined in order to prevent paying them worker compensation. Students are relatively limited with this amateur status and could risk losing their scholarship or facing suspension if they do not comply with the established rules, hurting their chances to later go professional. While it is unlikely that there will be any major changes in the near future, the National College Athletic Association (NCAA) has adopted a few strategies to prevent a legal battle.

Photo from www.NJ.com

In August, the NCAA announced two major changes in regards to athletic benefits. First, students that are considered "Elite NBA Talent" can now hire agents. Previously, it was rumored that plenty of players had already obtained agents through under the table dealing. This change makes the process more legitimate with the ability to regulate. Last year, a federal investigation concluded that acts of fraud, bribery, and corruption related to the student agency relationship resulted in a vacated national championship and University of Louisville firing its head coach.

Second, the NCAA will now allow NBA undergraduate undrafted prospects to return to their school. Prior to this change, many basketball players would declare for the NBA draft, go undrafted, and have few options to turn. Part of the reason they were declaring for the draft was related to not having proper agency advice, so the two changes will hopefully have positive effects on NBA prospects.

Why would these changes help the NCAA in a future case? They are giving students more control of their career paths. The rules would only apply if the NBA changed its drafting policy and allowed high school seniors to declare for the draft. In that case, individuals would have the option to immediately go to the NBA, but the rule change would give a beneficial alternative.

The NCAA will likely do all that it can to prevent paying student-athletes. These changes, however, show that the organization is aware that it must adjust to future changes. Up until 2014, giving a recruit a bagel with cream cheese constituted a recruiting violation versus a plain bagel. It is encouraging to see the NCAA acknowledge that the past ways will no longer work.

# Legal Favoritism for the Rich, Liu

**By Wanying Li**
*Staff Writer*

On the evening of August 30, 2018, billionaire Richard Liu hosted a luxurious dinner party in Minneapolis while attending the University of Minnesota's business program. As the CEO of JD.com, one of China's largest online retailers, Liu is listed on the Forbes Billionaire List with a net worth of $5.9 billion. His group of about two dozen people incurred a bill of $2,200, which included wines, beers, and sake. When the party ended, Liu left with a female student in his hired car. On August 31, 2018, the student reported to the police alleging Liu raped her after the dinner while she was drunk. After being arrested, Liu was kept in the Hennepin County Jail for around 16 hours, and was later released without posting bail. Once released, Liu immediately flew back to China, which does not have an extradition treaty with the United States—meaning that the Chinese government is not obliged to surrender Liu, even if he's proven guilty.

Billionaire Richard Liu, photo taken from SupChina

Releasing people without posting bail is not a rare practice. However, unlike Liu, people who are released without bail are usually charged with less severe misdemeanors, such as drinking in public. Being charged with a felony, like rape, will almost always result in a bail being set. Unless you're rich. The national median for bail for a felony arrest is around $10,000, but here, billionaire Liu didn't have to pay a dime.

Our money bail system fails the impoverished while serving the wealthy. It results in presumptively innocent people, who are eligible for release, remaining incarcerated simply because they don't have the money to afford the cash bond. Across our country today, around 450,000 inmates—approximately 70 percent of all people in jail—sit in jail though they remain innocent in the eyes of the law, according to a 2017 American Civil Liberties Union (ACLU) study on bail.

When a person is arrested, the court first determines whether they should be released, conditionally or unconditionally, or held in jail during the pretrial process. If the court decides the person can be released, then the person is bailable, with the amount varying depending on the alleged crime. On the other hand, if the court determines the person is not bailable, that person will be held until the trial day—which could be weeks, months, or years. Unfortunately, our money bail system is rigged in favor of the wealthy.

The court looks at two questions when assessing whether a person is bailable: (1) are they likely to appear for the trial, and (2) will they likely cause harm to the community during their pretrial release? When assessing two suspects charged with the same crime, courts have considered people with a higher income as being more stable and predictable than the suspect who can barely survive on minimum wage. Courts tend to find wealthier people to be more trustworthy, and thus feel justified in checking them off as bailable. Under this system, a fast-food worker or janitor accused of rape would be treated less fairly than a billionaire. This erodes one of our most fundamental principles, fairness. Justice must be blind, but here, justice favors the wealthy.

Passing the "bailable test" doesn't necessarily guarantee release. Many arrested people simply cannot afford their cash bail. As a result, presumptively innocent unconvicted people are kept behind bars. Most inmates in jails are usually pretrial detainees, national ACLU data shows that 60 percent of jail inmates were pretrial detainees in 2011. Nationwide, 34 percent of defendants are kept in jail pretrial because they are unable to pay a cash bond, according to the ACLU's 2017 study on bail. Most of these people are among the poorest third of Americans. In New York City for example, more than 50 percent of jail inmates held until case disposition remained in jail because they couldn't afford the bail of $2,500 of less, according to a 2013 study by the Vera Institute of Justice. Most of these inmates committed misdemeanors. In 2009, even though bail had been set for them, 90 percent of people awaited the resolution of their felony charges in jail, according to the ACLU's study.

Our money bail system essentially punishes people for being poor. A county attorney in Arizona conceded that "most low-risk people who can't pay their bail are being held by a city or town for failing to appear for a traffic ticket," according to the ACLU's study. The money bail system detains the people most impacted by disparities in wealth, income, and even economic opportunity. The Prison Policy Initiative found that Black men and women held in local jails earned a median income of only $900 and $568, respectively, in the month prior to their detention. Those who can't afford to post bond or languish in jail while awaiting trial are thus incentivized to plead guilty to charges, even if they're innocent.

Far too many people who cannot afford the bail turn to bail bond corporations that typically charge a nonrefundable fee of 10 percent of the bail amount. As a result, people are trapped in a cycle of debt and fees arising from the current bail system. Even if they're proven innocent, their financial losses and related problems won't be compensated.

Some argue that the wealthy bear more obligations to society, which means keeping them in jail before trial causes more social cost than benefit. These arguments may seem plausible at first glance, but, when scrutinizing them under the light of fairness and equality, they are diverging from the core values of our constitution. We have been taught that there is equal justice under the law—this sentiment is literally engraved on the United States Supreme Court building. In reality, ordinary people's lives suffer significantly more from the pretrial detention than wealthy people like Liu. Being kept in jail for an uncertain period of time can make an ordinary person lose his or her job, and a family might consequently lose their only income source. Wealthy billionaires like Liu, however, can still live a high-quality life even without their current job. When the opportunity cost of detention is weighed on an individual basis, the result confirms that the current bail system places a heavier burden on people with lower incomes—people are punished more severely because they are not rich.

The unjustified inequalities created by our money bail system are mirrored by Liu's case. Although he was arrested for felony allegations, the court still released him on his own recognizance (ROR), which means it is unnecessary to post a bail, and that the court believes Liu will reappear for scheduled trials. Even if Liu was not released under ROR, as one of the richest people in the world, he could still make the release by simply paying the bail. Moreover, this "wealthy privilege" further extends to the following trial stage. By purchasing high-priced, effective legal services, Liu can easily boost his"legal immune systems" through the power of money. In contrast, people who cannot afford these high-quality legal boosters tend to be more vulnerable when being attacked by the same legal "viruses." A public defender will not fight as hard for a client compared to a multi-million dollar law firm. Public defenders are overburdened with cases, and 90 to 95 percent of their clients end up pleading guilty, according to the ACLU.

Various reforms have been proposed by scholars to correct this legal injustice. Some advocate replacing the current money bail system with an individualized assessing system based on various factors like "potential public threats," when determining if a suspect should be released before the trial. Another proposal is the monetary compensation system, which can be an effective solution to alleviate the current bail system's discriminatory nature. Under this system, instead of paying the bail in exchange for freedom, the suspect who cannot pay his bail will be compensated based on the length of their detention, which, at least, helps to diminish the damages suffered by the suspect from the detention.

By releasing Liu under ROR, the Minnesota court is essentially giving Liu the option of not returning to the United States for his trial, thus allowing him to cheat our legal system. This demonstrates exactly what Senator Elizabeth Warren meant when she said "There are two legal systems: one for the rich and powerful, and one for everyone else."

# Thank you for Juuling: Regulating the New Craze

**By Evan Gordon**
*Staff Writer*

Although you might not be familiar with it by name, you have probably encountered one in passing without realizing what it is. This sleek device resembles a USB drive, and is being sold in gas stations and 7-Eleven stores across the country. Although it is a relatively new e-cigarette product, Juul is now dominating 75 percent of the market, according to recently released Neilson data. While the San Francisco-based startup company has caught the eyes of teens, young adults, and smokers alike, it has also caught the attention of government regulators, who are closely monitoring the company and its practices.

The United States Food and Drug Administration (FDA) announced plans to restrict the sale of flavored e-cigarettes, excluding mint and menthol flavors, on November 13th. While certain cities and counties in the Bay Area, including Santa Clara County, have already taken measures to limit access to flavored vaping products, the FDA's specific nationwide plan will be unveiled during the second half of November. This flavored e-cigarette ban doesn't require new regulation, and could happen immediately. Age verification requirements will also be strengthened for online e-cigarette sales, according to the FDA.

In anticipation of the FDA's plan to curb teenage vaping, Juul announced on November 13th that it will suspend sales of most of its flavored e-cigarette pods in retail stores—paralleling tobacco giant Altria Group's October 25th move to discontinue the sale of flavored pods. Juul will continue selling mint, tobacco and menthol flavored pods in retail stores, while removing flavors like mango, fruit, and crème. The discontinued flavors account for about 45 percent of retail sales for the $16 billion company, according to estimates obtained by the New York Times.

While these flavors will still be sold online, Juul is taking several steps to prevent adolescents from purchasing them. This includes adding a real-time photo requirement online that will match uploaded government-issued IDs with the buyer's face, and will prevent bulk shipments to people distributing to minors by restricting customers to two devices and 15 pod packages per month.

Juul is also shutting down its Facebook and Instagram accounts, while asking major social media companies, like Twitter and Snapchat, to help monitor posts promoting the use of e-cigarettes by underage users.

The Warning and the Raid

The FDA began pressuring Juul when it sent an initial warning letter to them on September 12th, requesting a written response within 60 days outlining how it plans on addressing and mitigating use by minors. This was followed shortly after by an unannounced visit at Juul's headquarters, where the FDA seized thousands of documents pertaining to Juul's marketing and sales practices for regulatory compliance verification purposes.

Due to the variety of inviting flavors, regulators and community members alike have expressed concerns that flavored Electronic Nicotine Delivery Systems (ENDS) are appealing to adolescents and are creating nicotine addictions with youth who might otherwise have not picked up smoking combustible tobacco products. Nonetheless, Juul insists that flavors play an important role in helping adult smokers transition to a safer alternative, saying in a press release, "we believe restricting access to flavors will negatively impact current adult smokers in their journey to switch from combustible cigarettes. Appropriate flavors help adult smokers who do not want to be reminded of the tobacco-taste of a cigarette."

Speaking on the condition of anonymity, a Santa Clara University law student credited the product with helping him transition away from cigarettes, saying "I like that it's compact and has a sleek design. It's pretty handy, doesn't make too much noise, and it's a pretty good working device." Now, with Juul pulling his favorite flavors from retail stores, he says he will have to switch to whatever will be available, since he is unwilling to put in the effort to buy them online.

Despite helping adults transition from their cigarette addictions, there is ample research available indicating that youth are primarily drawn to ENDS products because of the availability of flavors. Vaping among high schoolers has increased by 75 percent since 2017, according to the FDA. Research results published in a Tobacco Regulatory Science study from April 2017 revealed that 89% of youths surveyed who used e-cigarette and tobacco products had used flavored products, with approximately 84% reporting they would


Photo from www.juul.com

no longer use these products if flavored options were not available.

Curbing Underage Use

Even before their announcement earlier this month, Juul had already taken steps to curb underage use. This past June, for example, Juul announced a shift in its marketing practices, steering away from the use of models in social media posts, and instead focusing on adult smokers who have transitioned to Juul devices. Juul also announced in July that it would begin offering pods containing 3% nicotine strength in addition to its standard 5% nicotine strength pods, which contains the same amount of nicotine as an entire pack of cigarettes. Additionally, Juul announced in this past April that it would be investing $30 million over the next three years towards independent research, youth and parent education, as well as community engagement efforts.

However, organizations such as the Center for Disease Control actually recommend that educators reject youth tobacco prevention programs that are sponsored by the tobacco industry, finding such programs ineffective at preventing youth tobacco use. Program themes such as "Kids Don't Smoke," "Smoking Isn't Cool," and "Wait Until You're Older" have been used by big tobacco in the past as a way to gain credibility with educators, while simultaneously undermining campaigns and maintaining access to youths. However, educational and outreach programs aren't the only investments Juul has made recently. According to its most recent Lobbying Disclosure form submitted with the U.S. House of Representatives Office of the Clerk, Juul spent $560,000 on lobbying-related activities during the third quarter of 2018, up from $210,000 spent during the second quarter.

Popcorn Lung

With regards to health risks posed by ENDS usage, Nicole Coxe, the Tobacco-Free Communities Program Manager with the Santa Clara County Public Health Department, says researchers are encountering obstacles in attempting to study ENDS products due to the rapidly-evolving nature of products on the market. Coxe further indicated that even though scientists are still in the early stages of studying the long-term effects of vaporizing flavored liquids, "many of the flavors that are used in these products… do contain chemicals that are harmful when heated and inhaled."

One such chemical is diacetyl, a commonly used chemical in food flavorings, which has been known to contribute to a condition called 'popcorn lung' and causes damage to the lungs, coughing, and shortness of breath. As Coxe explained, "these chemicals have been approved by the FDA for food, but they haven't been studied, nor approved, for being heated and then inhaled into the body, and so obviously there's potentially different effects that can happen with that, even if there's no nicotine in these e-liquids; the long-term effects are unknown, but some of the initial studies on the acute impacts are a concern." Additional health concerns from ENDS include harming adolescent brain development, causing nicotine addiction, as well as increasing the likelihood of cigarette and tobacco use.

"We do understand that there might be adult users that use flavored products, but our concern is the history of intentionally marketing flavored products from the industry's own perspective, who has used that strategy to attract young people," said Coxe. "We have seen, through 80% of young people starting with a flavored product, a high percentage of them also think the reason they're using it is because it's flavored. That's the concern for us."

For now, it remains unknown exactly how the FDA will address ENDS-related concerns and issues. Although the effectiveness of educational initiatives and other campaigns by Juul to prevent use amongst youth are inconclusive, Coxe has noted that there are a number of actions that can be taken at the local level in Santa Clara County which could have a lasting impact on ENDS use with adolescents.

Such measures, according to Coxe, entail restricting the sale of flavored tobacco and vaping products, de-normalizing ENDS use with young adults through community educational and engagement efforts, and applying the same framework to vaping products that have been utilized with tobacco products.

"Part of what has made tobacco control so successful is denormalizing it in communities, protecting people who aren't using the products, and reducing the marketing so that young people are not growing up thinking that these are the norm," said Coxe.

# Charney Hall Hot Takes

**By Sarah Gregory**
*Staff Writer*

*The Advocate* asked Santa Clara Law students: "What value do you wish modern day politicians embodied more?"

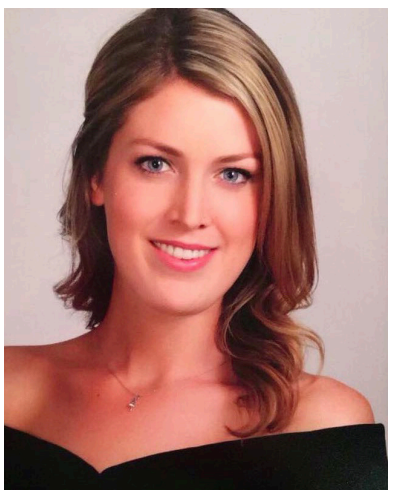
Cathleen Rivera, 1L
Value: Transparency

"When an issue comes up, instead of trying to make it less clear, they just come out with their mistakes. For example, George Bush Jr., who is not aligned with what I believe in. But when he ran for president, it came out that he had a sordid past of partying. He directly held himself accountable for it. Even though he wasn't the best president, at least he showed he had grown as a person."

Katherine Blake, 1L
Value: Humanity

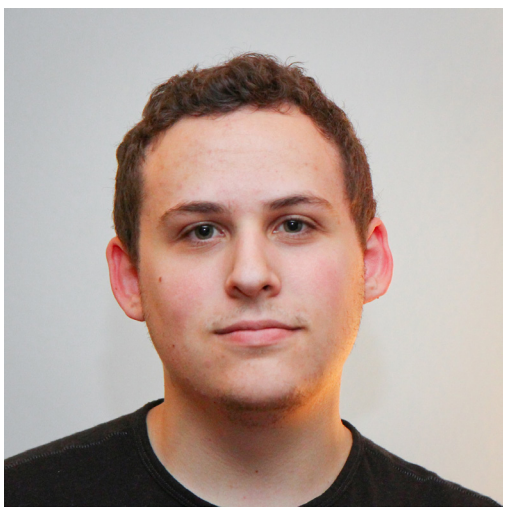
"Sorry if this is not a specific thing pertaining to politics. But I wish politicians acted more human and I wish they were able to look at the other side more. I feel like we are so divided in politics right now. We're so divided that we are not willing to talk to the other side and we're not willing to hear other people's stories. We question their stories because they are not what we want them to be or they paint someone who we side with in a different light than what we see them as. For me, it is difficult to see these politicians going back and forth, not willing to listen to each other at all. It feels like more of a power move than thinking about humans in general. They have constituents who they are supposed to represent, and they are not. I feel like they are just enacting a big power move."

Photo from www.law.scu.edu



Darra Lanigan, 2L
Value: Integrity

-"More of a backbone to stand up for issues that they believe in, rather than just where money is pushing them to go. I get that politicians want to retain their job as long as they can, and sometimes that means voting against their own moral values or moral inclination for the sake of retaining their job: keeping the voters satisfied."



Evan Miller, 3L
Value: Responsibility

"Responsibility. I think that there are too many politicians today that lack a sense of moral responsibility. So many of them get elected to important positions and have the ability to effect change, but they just do the bare minimum. They're quick to embrace an image of themselves as an important and public person, yet they do not do the work that is expected of someone who is that important. For them, asking them to do anything would be asking too much. Even the lowest elected officer has a moral obligation to go above and beyond the duties entrusted to them."

# I Exist: Trans-Rights in the Trump Era

**By Kirby Nguyen**
*Staff Writer*

I tried sheltering myself from politics for the last few years. Somehow I convinced myself that I could dodge the fray, focus on my medical transition, and finally live quietly as a regular guy. But recent events have rendered me unable to ignore the protector in me, my love for people, and the fact that I am not a regular guy in the traditional sense. Last month, I learned that I could be defined out of existence.

The Department of Health and Human Services (HHS) began an effort across several departments to establish a legal definition of sex under Title IX—the federal civil rights law banning discrimination on the basis of sex. This effort was detailed in a memo, which has been interpreted to mean that trans people will effectively be erased out of existence. A draft of the HHS memo, obtained by the New York Times, says gender should be determined "on a biological basis that is clear, grounded in science, objective and administrable." The department argued that key government agencies need to adopt a uniform definition of gender, determined by the genitals that a person is born with. The memo reads, "sex means a person's status as male or female based on immutable biological traits identifiable by or before birth." Under this new definition, disputes about one's sex would have to be clarified using genetic testing. Under this definition, 1.4 million trans-people—Americans—would be federally unrecognized.

Denial of transness is not a new stance I have encountered. I could better understand being misgendered before hormone therapy, but, "I don't believe it's real," I still do not grasp. What is there to believe or not believe? That thinking might provide some insulation and comfort from the unfamiliar, but not much else in terms of altering the reality of a population's existence. Similarly, asserting a narrow legal definition of sex and gender does not erase people out of existence.

Under the Obama administration, the Office for Civil Rights—a branch of the health department—would investigate complaints of gender discrimination, and in some cases forced doctors, insurers, and hospitals to change how they treat trans people. For example, the agency made a wellness program in Colorado cover mammograms for transwomen, and made LabCorp refer to a trans person by their preferred name and gender. Now, this level of protection is under attack. This new definition will impact Section 1557 of the Affordable Care Act, which prohibits any health program or entity that receives federal funding from discriminating against people on the basis of race, color, national origin, disability, age, or sex. Under Obama, "sex" included gender identity, but now this definition is being challenged by the Trump administration.

Campuses across our country are procedurally and culturally grappling with how to handle gender-based violence. Trans survivors have additional stigmas to overcome throughout the process, from recognizing they have been assaulted or raped to proving credibility when reporting the incident. The majority of people first ask whether we are real before considering whether our experiences are true. This has been the case even when the definition of sex in Title IX was loosened to include us under the Obama Administration. Recognition of our existence under Title IX is a "low hanging fruit" in combating gender-based violence on college campuses, and yet the Trump administration is out to squash that small effort. Erasing trans people from Title IX protections signals to our educational institutions that trans voices do not matter in shaping procedural policies, that civil rights protections should not be extended to these survivors.

This administration is transphobic and embraces it. This is yet another example of this administration's lack of empathy in their efforts to define who is deserving of a place in our country, of recognition, and of dignity. This is a clear attempt to erase trans identity and protections, and it is driven by abstract fears and territorial motivations. The Trump administration unsuccessfully tried banning trans people from military service, and rescinded guidance to public schools recommending that trans students be allowed to use the bathroom of their choice. Furthermore, the Trump administration has said it might not investigate health-care discrimination claims involving trans people. Several agencies have already withdrawn Obama-era policies that recognized gender identity in schools, prisons and homeless shelters, and this administration has even tried removing questions about gender identity from a 2020 census survey and a national survey of elderly citizens.

Trans people will face more discrimination and difficulties in the medical system if this new definition is established. Under the new definition, providers could, with impunity, continually misgender their trans patients or give them a roommate of an inappropriate gender when they're in the hospital. Doctors could even refuse to treat a trans patient, which is especially concerning given that about 30 states don't have separate, state-level anti-discrimination protections for trans patients. A study by the Endocrine Society found that 70 percent of trans people have been mistreated by medical providers. The Center for American Progress found that trans people were treated worse, more broadly, because of their gender. If this new definition is enacted, trans people will likely face even more discrimination, as this administration is signalling to all Americans that it is okay to not accept trans people.

This new way of defining gender could also have disastrous consequences with respect to the mental-health of trans people. It could force people to have to conform to their gender assigned at birth. Forty-one percent of trans people have attempted suicide compared with 4.6 percent of the general public, according to the American Foundation for Suicide Prevention. I have tried to live my life as someone I am not, and I did not realize how poorly it impacted every aspect of my life. I could not maintain interactions with people or be in public. I was so detached. I barely talked, barely had a life. I was always so angry and lost, and I did not know why. The recognition of transness gave me an understanding of myself and provided me with the language to articulate it to others. It led me to opening another chapter in my life and allowed me to begin discovering other parts of myself that I could not before. My relationships with the people in my life have improved and deepened. I can finally be mentally engaged in school and present when I meet new people. Before hormone therapy, I did not think it was possible for me to have a full and meaningful life. This was all possible because gender identity is legally recognized, giving me access to health care and medical interventions as options for my transition.

This new definition is integral to two proposed rules currently pending review at the White House. The first is from the Education Department and deals with complaints of sex discrimination at schools and colleges receiving federal financial assistance. The second is from Health and Human services and deals with health programs and activities that receive federal funds or subsidies. Both are expected to be released this fall and both could include the new gender definition. This new gender definition, if applied, would essentially have these agencies ignore trans people.

This administration has painted a big red target on the backs of trans people—they're signaling that America is great when we're not a part of it. Defining trans people out of existence will not make America great again. What makes America great is legal recognition and protections for our most vulnerable populations. Erasing people from existence does not simplify matters. It does not change the tide of history. Countless trans activists, particularly trans women of color, have given their lives for my right to exist. They've been lynched, murdered, beaten, sexually assaulted, raped, and discriminated against, just for being themselves. What this administration is doing amounts to spitting on their graves. We cannot let their sacrifices go to waste, we cannot backpedal, we cannot acquiesce.

# Modernizing the Military: Reforming the Uniform Code

**By Jordan Nuñes**
*Staff Writer*

The United States Navy Judge Advocate General Corps' insignia is a mill rinde surrounded by oak leaves. "In the milling of grains, the mill rinde was used to keep the stone-grinding wheels an equal distance apart to provide consistency in the milling process. Thus, it symbolizes the wheels of justice that must grind exceedingly fine and exceptionally even."

The Judge Advocate General Corps acts as the mill rinde depicted on the collar of Navy lawyers, keeping the United States Armed Forces in place and able to do its job.

Each branch of the Armed Forces has their own Judge Advocate Corps. These Corps' make sure that justice is done within the military. The military lawyers rely on the rule of law in order to maintain that system of justice. The Uniform Code of Military Justice (UCMJ) serves as a textual representation of the rule of law in the military justice system, a sort of penal code for enlisted and commissioned soldiers, sailors, airmen, and marines.

Photo from www.washingtontimes.com

The Military Justice Act of 2016 will come into effect on January 1, 2019. When filing the Conference Report regarding the bill, the late Senator John McCain, former Chairman of the Senate Armed Services Committee, released a statement that, "Taken together, the provisions contained in the conference report constitute the most significant reforms to the Uniform Code of Military Justice since it was enacted six decades ago."

Senator McCain's statement highlights some of the bills most important components, including that it "strengthens the structure of the military justice system, enhances fairness and efficiency in pretrial and trial procedures, reforms sentencing, guilty pleas, and plea agreements, streamlines the post-trial process, modernizes military appellate practice, increases transparency and independent review of the military justice system, improves the functionality of punitive articles and proscribes additional acts, [and] incorporates best practices from federal criminal proceedings where applicable."

The Department of Defense's General Counsel, at the direction of the Secretary of Defense, established a Military Justice Review Group. The Group was tasked with conducting a "holistic review of the UCMJ in order to ensure that it effectively and efficiently achieves justice consistent with due process and good order and discipline."

The Group suggested several modifications to the UCMJ, perhaps the most significant being the changes to Article 120. Article 120 of the UCMJ addresses "rape and sexual assault charges." The new UCMJ will update the definitions of "sexual acts" and "incapable of consenting" to better reflect the definitions under federal civilian law.

Specifically, Section 1030 of the Military Justice Act of 2016 would "amend the definition of 'sexual act' in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of 'sexual act' under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D))."

Additionally, there will be an Article 128b added to the UCMJ. This Article will directly address domestic violence for the first time in the history of the UCMJ. Article 128 addresses assault, but Article 128b will include "assault, intimidation, violation of a protective order, and damaging property or injuring animals in a domestic assault situation."

While there may be some growing pains within the military as they adjust to the new changes, this update provides an honest reflection of the issues facing the military and tackles the needed modernization of the military justice system.

The men and women serving our country deserve modern laws that will effectively promote good order and discipline amongst the ranks. These changes provide our military lawyers with the tools necessary to better protect victims and prosecute offenders.

These changes to the UCMJ will ensure that the mission of achieving equal justice under the law will be accomplished.