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Letter from the Editor-in-Chief

Dear Readers,

Welcome to the sixth print edition of the *Claremont Journal of Law and Public Policy* (CJLPP). After reviewing a record number of submissions, we are delighted to feature five especially stimulating papers and two blog articles in this issue. To access articles from our blog and other thought-provoking submissions from across the country, please be sure to visit our website at www.5clpp.com.

Fall 2016 proved to be another highly productive and rewarding semester for us at the Journal. With outgoing Editor-in-Chief Martin J. Sicilian as our fearless and tireless leader for the third consecutive semester, we accomplished ambitious goals and aimed even higher for the future of our organization. Shortly after introducing our first ever Fall print edition, our dedicated team of editors and writers began working diligently together, from the topic brainstorming stage to the final round of edits. A big thank-you goes to all of our talented staff writers and senior editors last semester. Joining them this year are 17 new colleagues who share their passion for law and public policy and are thrilled to embark on this journey of collaborative learning and exploration. Meanwhile, with our newly-assembled second blog team ready to start contributing insightful analyses, I am equally optimistic about our web presence in 2017 and beyond.

A special congratulations goes to our inaugural blog team for producing consistently high-quality content and to the business team, which increased the number and diversity of events hosted by the Journal significantly. We are particularly pleased to invite you to a series of events on February 15th, when the CJLPP will be hosting LA County Superior Court Judge Halim Dhanidina (PO '94). I am confident that Henry Head, our highly-competent Chief Operating Officer, will continue to expand the scope of intellectually-engaging events with our amazing business team this year.

I am deeply grateful for all the invaluable advice from Henry Head, Andrew Marino, Calla Cameron, Greer Levin, Kate Dolgenos, and of course, Jessica Azerad (one of the Journal's founding members who continues to inspire us all with her wisdom and humor). We are thrilled to work together again this year, having treasured all the joy and laughter we have shared from weekly board meetings, countless group chats, emails, mealtime conversations, etc. While we will miss three of our editors, Anna Balderston, John Nikolaou, and Celia Eydeland, during their semester abroad, we are very glad to welcome Emily Zheng, Jerry Yan, Kyla Eastling, Ali Kapadia, Franco Liu, and Kim Tran to the executive board.

It is an immense honor to serve as Editor-in-Chief. Martin Sicilian, my predecessor, has set an extremely high standard that I will strive hard to meet together with our team. I cannot thank Martin enough for everything, and look forward to continuing having him as an advisor. Please read his farewell letter on the last page of this issue, where Martin shares much about the growth and evolution of the Journal. I will be forever indebted to our founders for establishing such a wonderful organization with which I had fallen in love since my first month of college; family, friends, and professors for their gracious support; our faculty advisor Prof. Hollis-Brusky for her continuous guidance; current and future staff for continuing our excellent work; and *you*, our readers, for your interest in the CJLPP. If you feel that you could be a valuable addition to our team, please visit our "Hiring" page for potential openings or email us at info.5clpp@gmail.com.

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

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Exiting Europe: Brexit and the UK's Future

Emily Zheng, PO '19

"World War III." "A crippled economy." "Chaos." Ominous predictions circled through the UK in the days, weeks, and months preceding June 23, 2016. On that fateful Thursday, citizens of the UK voted in the referendum on the United Kingdom's membership in the European Union. Coined "Brexit," shorthand for "British exit," this referendum drew more than 30 million ballots. The ballot asked, "Should the United Kingdom remain a member of the European Union or leave the European Union?" In a 52% to a 48% result, the UK decided to leave the EU.[1]

The EU represents a political and economic partnership between 28 member countries. Its purposes include fostering economic cooperation and growing a "single market" that allows goods and people to move freely throughout most of the continent. Around 2013, anti-EU rhetoric started gaining more support as the UK Independence Party (UKIP) started growing.[2] Ex-Prime Minister David Cameron promised to renegotiate membership in the EU if his Conservative Party won a majority in the general election, and since then, the debate over Brexit has been called "one of the most divisive and bitter political campaigns ever waged."[3]

Among the high-profile supporters of Remain were *Harry Potter* author J.K. Rowling and many top government officials such as David Cameron. The Remain campaign claimed that the UK's current "special status" in the reformed EU–including the continued use of the pound, British-specific border controls, and limits on EU migrants' access to the UK welfare system–gave the UK "the best of both worlds."[4] In return, the UK would have access to the single market while playing a "leading role" in determining the rules that govern it, eventually creating "opportunities, jobs, and greater economic security for the people of the UK."[5] On the other hand, the "Leave" campaign had the support of many MPs such as Conservative former Mayor of London Boris Johnson and businessmen such as Reebok founder Joe Foster. A poll of 12,369 voters after the referendum found that the biggest motivation for Leave voters was "the principle that decisions about the UK should be taken in the UK," followed closely by their belief that Brexit "offered the best chance for the UK to regain control over immigration and its own borders."[6]

The vote was unsurprisingly divided along geographic lines, with England and Wales voting to Leave by margins of 6% and 4%, respectively, and Scotland and Northern Ireland voting to Remain by margins of 24% and 12%.

Shortly after the referendum, leadership in the UK dramatically shifted. Remain leader David Cameron was replaced by Theresa May as prime minister, and the Brexit and UKIP leader Nigel Farage similarly stepped down in early July. Though May supported the Remain campaign, she has affirmed that she will respect the will of the people, stating that "Brexit means Brexit." She also said she "want[ed] to be clear … that we are not walking away from our European friends."[7] England now faces the looming responsibility of enforcing the referendum. Amidst the confusion in these troubling times, it is time to examine Brexit's implications on the world and if the grim predictions before the vote will come to fruition.

1 Hunt, Alex and Brian Wheeler, "Brexit: All you need to know about the UK leaving the EU," *BBC*, 11/10/16

2 Pruitt, Sarah, "The History Behind Brexit," *History*, 6/24/16

3 Elgot, Jessica, "JK Rowling condemns 'ugly' rhetoric of EU referendum campaign," *The Guardian,* 6/20/16

4 "EU Referendum," *The National Archives*

5 Ibid.

6 Bennett, Asa, "Did Britain really vote Brexit to cut immigration?," *The Telegraph,* 6/29/16

7 Sculthorpe, Tim, "Theresa May vows 'Brexit means Brexit but we're not walking away,'" *Daily Mail*, 7/20/16.

Economy: the pound drops, but not all is lost

Many of the negative consequences predicted were economic ones. For example, the EU used to purchase nearly half of Britain's exports, and leaving the single market would put the UK's trade balance in danger. The day after the vote, the pound tumbled to 30-year lows, which *The Economist* cited as simply "a taste of what is to come."[8] Among other possibilities, if confidence in the country continues to be dampened, investors would be more likely to place their assets elsewhere, which could possibly dip the UK into a recession. *The Economist* affirmed this: "A permanently less vibrant economy means fewer jobs, lower tax receipts and, eventually, extra austerity. The result will also shake a fragile world economy."[9]

Yet, all is not lost. Contrary to its previous stance, the International Monetary Fund declared in July 2016 that "Brexit likely would not put an additional major dent into the already slowing global growth picture."[10] In fact, Industry tracker Preqin reports that 16 percent of new hedge funds opened in the second quarter were focused on the region, with the norm being just 1 percent.[11] This would deliver value to key business sectors by increasing investments in UK companies, but in the long run, these hedge funds may end up shorting the UK economy since their goal is to maximize return on investment, which carries more risk than the overall market. In addition, the FTSE 100, a gauge of prosperity for businesses regulated by UK law, has been closing at all-time highs due to the decline of the sterling.[12] It is still too soon to tell whether this gain will provide the necessary opportunities to create lively markets.

It is interesting to note the relatively small direct effect of Brexit on consumers. Incomes are rising since Brexit and employment is at "an all-time high of 74.4[%]," both of which support consumption.[13] Though the weaker sterling will increase the prices of imported goods, a month after the referendum a majority of the British still supported the referendum. Those who did not still remained in a "decent financial state," so they were not too adversely affected, at least immediately.[14] BBC reports that the UK's services sector grew 0.4% in July, indicating that consumers continued spending as usual after the vote.[15] By September, consumer spending returned to pre-referendum levels after a small dip.

However, these growth statistics do not imply that the UK economy is doing significantly better after Brexit on the whole. A recent one percent jump in inflation due to the depreciation of the sterling—the highest in almost two years—will, according to the Institute for Fiscal Studies, "cost poorer households an extra £100 each per year." The cost of imports and raw materials has risen as well, which the UK government estimates will cost each household an average of £360 per year.[16]

Despite the recent jump, inflation is still relatively low in the UK, which can explain the steady rate of consumption post-referendum. Nonetheless, even small increases in the price level can have a serious impact on poorer people, so this inflationary effect is not insignificant.

Another important indicator of Brexit's effect on the UK economy is the potential movement of large multinational corporations, particularly financial services companies, out of London to elsewhere in Europe. "For access to the EU, London will no longer be the natural choice," says Nicolas Mackel, CEO of Luxembourg for Finance.[17] Many banks and fund managers have been looking to establish roots in Luxembourg after Britain decided to leave the EU, though entire teams moving out of London seems unlikely. London is and will remain a major global financial center, especially for companies that have a history with the city, but Mackel predicts that new European financial companies will be less likely to choose the UK as their company base, and investment banks such as Morgan Stanley are reconsidering whether

8 "A Tragic Split: How to minimize the damage of Britain's senseless, self-inflicted blow," 6/11/16, Page 11.

9 Ibid.

10 Cox, Jeff, "The Brexit recession no longer looks so certain," *CNBC,* 7/21/16

11 Ibid.

12 Cunningham, Tara, Szu Ping Chan, and Marion Dakers, "FTSE 100 hits new record high but pound drops below $1.21 as Brexit hard-landing fears rattle City," *The Telegraph*, 10/11/16

13 Heath, Allister, "So far, so good for the post-Brexit economy," *The Telegraph,* 7/21/16

14 Ibid.

15 "Brexit Britain: What has actually happened so far?," *BBC,* 11/10/16

16 Rodionova, Zlata, "Higher inflation rise will cost poor families extra £100 a year, warns IFS," *Independent,* 10/18/16

17 Ibid.

it is in their best interests to invest further in the UK.[18]

There has also been a decline in confidence among small businesses. The Federation of Small Businesses conducted a survey of 1,035 firms that revealed small and medium-sized businesses were more "pessimistic about the future than positive for the first time in four years."[19] This is the second largest fall in confidence in the history of this index and the third consecutive quarter that confidence has fallen.[20]

Furthermore, the referendum brought about higher borrowing costs, which Deloitte expects to hinder economic growth; however, the pound's decline in value, combined with the resilience of UK institutions, may actually help propel activity in the future.[21] Andy Wilson, a U.S. head of Deloitte, expects at least a reasonable 10 to 20 percent real growth.[22] To further boost the UK economy, the Bank of England cut interest rates to a record low from 0.5% to 0.25% in August, with another possible cut in November.[23] This is significant because lowering interest rates stimulate growth by encouraging borrowing and spending.

Despite the economic troubles that occurred post-Brexit, it is encouraging to see that the possibility of a crushing recession is not as close on the horizon as experts thought it to be. To Remain and Leave supporters alike, this news is a relief.

Political stability: Brexit brings about uncertainty

Instability and uncertainty have percolated from Parliament to the people. Before the vote, then-Prime Minister Cameron agreed that he would immediately invoke Article 50 of the Lisbon treaty, which is the only legal method to set Brexit in motion. However, his swift left the actual invocation of Article 50 to the current Prime Minister, Theresa May. Article 50 has still not been invoked.

May has met with some EU leaders, but there have been no formal negotiations because EU leaders insist that Article 50 must be triggered before actual negotiations can begin. Because Article 50 provides the terms on which Britain leaves without a British vote, many Brexiteers have argued against invoking it because the terms would not be in the best interests of the United Kingdom, so they instead have proposed negotiating informally with the diplomats in Brussels.[24] Thus, Europe is currently in a stalemate: the EU will not negotiate until the UK enforces Article 50, while the UK will not invoke Article 50 until the EU negotiates with them. This power struggle has pushed the future of Brexit into even more uncertainty than before. Prime Minister Theresa May announced in early October that Article 50 will be triggered before the end of March 2017, so the UK should be out of the EU by the summer of 2019.[25] However, further ambiguities arose in early November that will prevent May from enforcing her plan. The UK's High Court ruled that Parliament must give its approval before the process of Britain leaving the European Union can begin. This weakens May's hold on the negotiating process, so lawmakers could pressure May into making more compromises on post-Brexit UK policies since they are now forced to work together. Though this court ruling will not stop Brexit, the process will now take significantly longer.

Another complication brought about by Brexit was the lack of unity within the United Kingdom in terms of vote distribution. Only two years ago, Scotland held a similar referendum on independence from the UK, which asked, "Should Scotland be an independent country?" By a small margin of 55% "No" and 45% "Yes," with a total of over two million votes, the country decided to stay in the UK, and the United Kingdom remained united. The paradox of this decision is that one of the primary reasons Scotland leaned towards remaining in the UK was for the economic benefits, certainty, and stability that the UK—and consequently its involvement in the EU—offered to the country, all of which would not be attainable for Scotland as an independent country.[26] One independent source of revenue Scotland could potentially rely on is its oil and

18 "Brexit Britain: What has actually happened so far?," *BBC*, 11/10/16

19 Ibid.

20 Ibid.

21 Cox, Jeff, "The Brexit recession no longer looks so certain," *CNBC*, 7/21/16

22 Ibid.

23 "Brexit Britain: What has actually happened so far?," *BBC*, 11/10/16

24 Ibid.

25 "Brexit Britain: What has actually happened so far?," *BBC*, 11/10/16

26 Stone, Jon, "Scottish independence could bypass the 'instability and uncertainty' of Brexit, Nicola Sturgeon says," *Independent*, 10/14/16

gas reserves; however, those revenues stagnate once those resources are depleted, and the volatility of oil prices makes any unhedged reliance on energy exports extremely risky. In addition to diversifying its economy as an independent nation, Scotland would also have had to increase taxes and "make more spending cuts [...] to ensure long-run fiscal sustainability," according to the Institute for Fiscal Studies.[27] Therefore, when the UK referendum was held, it came as no surprise that most Scots voted to remain. Now at odds with the rest of the Kingdom on the EU question, excepting Northern Ireland who also voted in favor of Remain, Scotland may reconsider another bid for independence.

Declaring independence could help escape the "instability and uncertainty" post-Brexit, suggests Nicola Sturgeon, First Minister of Scotland. "If Scotland is in the position against our democratic wishes of being taken out of not just the EU but the single market, knowing that that is going to seriously damage our economy, our place and reputation in the world I think I would have a duty to give Scotland the ability to decide whether it wanted that or whatever it wanted to provide a different path." Sturgeon warned May that she would "trigger a second referendum if Scotland's interests were threatened."[28]

In mid-October, Scotland's Constitution Secretary Derek Mackay unveiled a draft Referendum Bill.[29] Although this bill does not guarantee another referendum, Sturgeon wants the country to be ready to hold a vote before the UK formally leaves the EU if necessary. Thus, not only is the UK's relationship to the rest of Europe at stake, but its very own unity could be at stake as well.

What Brexit means for the United States and the world

Fears that the European Union will split apart has been—and should be—a key global concern post-Brexit. For instance, French right-wing leader Marine Le Pen called for a referendum vote in France, and concerns about referendums have been raised in Italy and the Netherlands as well.[30] If enough countries leave the EU, the entire union would collapse. France's departure alone would probably be enough to bring about the dissolution of the EU. Because the European Union has such a big influence on trade, especially as a major trade partner with the United States and China, its unraveling could set the global economy into limbo as trade deals are negotiated and business relationships between countries are reevaluated.

The fall in the pound has had the most direct impact on British citizens and the rest of the world. Raw materials imported by UK manufacturers were 7.6% more expensive, which is a sharp rise compared to the 4.1% rise during the year up to July.[31] Britain has been running a trade deficit for a number of years, which means that it imports more than it exports. This is not necessarily unhealthy for the economy, because it means that there was also high foreign investment in UK assets. Thus, recent trends have been helping exporters. British tourism has decreased in foreign countries. On the other hand, the cheaper pound has boosted UK's own tourism, according to the travel analytics firm ForwardKeys, which found that "flight bookings to the UK rose 7.1% after the vote."[32]

A strong U.S. dollar relative to the pound makes U.S. companies' products more expensive to foreign buyers, which hurts US sales, especially for tech giants like Apple, equipment makers like Deere and Caterpillar, and global brands like Coca-Cola and Nike.[33] Consumer confidence within the States has deteriorated, and this is important because this confidence determines how much American consumers are spending, which affects if and by how much the economy grows. "The keys to whether the U.S. economy is affected significantly will be whether equities tumble enough to have a major impact on business and consumer confidence," says Jim O'Sullivan, chief U.S. economist at High Frequency Economics, a research firm.[34] Because Brexit has shaken up the global stock markets, this uncertainty could

27 Monaghan, Angela, "Scottish independence: economic implications," *The Guardian*, 2/7/14

28 Stone, Jon, "Scottish independence could bypass the 'instability and uncertainty' of Brexit, Nicola Sturgeon says," *Independent*, 10/14/16

29 "New Scottish independence bill published," *BBC*, 10/20/16

30 Gillespie, Patrick, "How Brexit impacts the US Economy," *CNN*, 6/24/16

31 "Brexit Britain: What has actually happened so far?," *BBC*, 11/10/16

32 Ibid.

33 Gillespie, Patrick, "How Brexit impacts the US Economy," *CNN*, 6/24/16

34 Ibid.

cause American business owners and consumers to reconsider consuming and instead opt to save. This could potentially offset the country's economic progress post-recession.

However, it has been predicted that Brexit will not overall have a large impact on the US, since the Federal Reserve will likely only raise interest rates very gradually, letting a more "gradual path of monetary policy normalization" offset the downfalls, and because a decline in confidence and stronger US dollar.[35] Stock averages in the US have reached record highs. Andy Wilson, a U.S. head at Deloitte, believes this is the case because the post-Brexit uncertainty remains as "just another uncertainty in the market," without precedence over the others.[36] However, the US should definitely still pay attention to issues concerning Brexit, because we are not immune to what happens in Europe.

Previously, America was able to communicate its economic and political agenda in Europe primarily through Britain. Britain's exit from this stage has made America's stronghold in the continent much weaker.[37] President Obama and Vice President Joe Biden both emphasized that this "special relationship" between the US and the UK will endure after the vote, but changes are bound to occur to better America's interests in Europe.[38] In April, Obama said that if Brexit passes, Britain would be moved to the "back of the queue" when it came to trade deals with the United States.[39] This will put stress on their special relationship, and America is starting to negotiate trade deals and further their relationships with the rest of Europe in the meantime to be able to exert more influence in the EU. Richard Haass, the president of the Council on Foreign Relations, believes that "references to the U.S.-UK 'Special Relationship' will be increasingly rare and hollow, as the United States turns to partner with other countries in other regions."[40]

35 Cox, Jeff, "The Brexit recession no longer looks so certain," *CNBC,* 7/21/16

36 Ibid.

37 Foroohar, Rana, "Why Brexit Really is a Big Deal for the US Economy," *Time,* 6/27/16

38 Criss, Doug, "5 reasons why Americans should care about Brexit," *CNN*, 6/24/16

39 Ibid.

40 "How Brexit will Change the World," *Politico Magazine,* 6/25/16

What Next?

Now that the vote has passed, what will happen from the coming months to the next decade is incredibly uncertain. In the near future (from now until when Brexit should be completed), there are two likely possibilities for what will happen:

1. Maximum Brexit

This would mean that UK becomes a completely separate country. Thus, it becomes a fully independent nation that can create its own trade deals, laws, immigration policies, and more. Its relationship to the EU would be based on World Trade Organization rules, like Japan's or Chile's or China's relationship to the EU—fully independent and without a vote, as if it were any other country outside of Europe.[41]

2. "Soft" Brexit

This scenario, which involves the United Kingdom leaving the Union but remaining in the European Economic Area, is most likely to occur. The European Economic Area consists of EU Member States and Europe Free Trade Association States, which currently include Iceland, Liechtenstein, and Norway. This internal market covers four freedoms—the free movement of goods, services, persons, and capital—in all of its States.[42] This is often referred to as the Norway model, because Norway has full access to the single market, but must make financial contributions, accept the majority of EU laws, and allow free movement. Economists disagree whether or not this would be beneficial for the UK.

A paper circulated at a meeting of Theresa May's Brexit cabinet committee claimed that adopting a Norway-style model would force the UK to "grow trade with its 10 largest partners outside the EU by 37% by 2030" to counteract any negative impacts on trade.[43] One of these negative impacts would be EU import tariffs that would now be enforced, which would, for example, add

41 "Brexit: What are the options?," *BBC*, 10/10/16

42 "EEA Agreement," European Free Trade Association

43 Pasha-Robinson, Lucy, "Brexit: Theresa May warned Britain could lose 4.5% of its GDP if it leaves EU customs union," *Independent,* 10/19/16

10% to the price of a UK-produced car.[44]

The Economist disagrees. It argues that adopting this deal would be in the best interest of the UK because it "gives full access to the world's biggest single market," maximizing prosperity.[45] A trade-off would be that the principle of the free movement of people would still have to be maintained, which goes against the Leave campaign's promise to control immigration. However, European migrants have been proven to "more than pay their way for their use of health and education services" and are a necessary part of the labor force, so having free movement may actually be beneficial. But this was true before the referendum, too.

Because the future of the United Kingdom and the European Union is still uncertain, the best we can do now is wait and see how events will unfold starting in March 2017. Either method of exiting the EU includes both costs and benefits for the UK, so it is up to the nation to determine its priorities and pick the option that will work best for its future.

44 "Brexit Britain: What has actually happened so far?," *BBC*, 11/10/16

45 "A Tragic Split: How to minimize the damage of Britain's senseless, self-inflicted blow," 6/11/16, Page 11.

Male Captus, Bene Detentus
Israel's Trial of Adolf Eichmann

Calla Cameron, CMC '17

When Israel's intelligence service captured Otto Adolf Eichmann (known as Adolf Eichmann), a Nazi Holocaust perpetrator, in Argentina and Prime Minister Ben-Gurion subsequently announced the capture, Argentina formally protested that Israel had encroached upon Argentina's sovereignty as a nation.[1] After the almost immediate failure of mediation, Argentina brought its claim against Israel to the United Nations and called for a meeting of the UN Security Council (UNSC), which took place in an emergency session on June 22, 1960.[2] During the session, Argentinean President Frondizi declared the Israeli ambassador to Argentina a *persona non grata*, meaning that the Israeli ambassador was not welcome in Argentina.[3] After the UNSC condemned Israel's actions, Argentina agreed to allow Israel to keep Eichmann in custody, rather than return him to Argentina, and a joint resolution was published declaring reconciliation between the two nations.[4] After the UN declared that Israel had the right to keep Eichmann pending reconciliation and reparations to the Argentine government (which were made up of a long winded apology by Prime Minister Ben-Gurion), the diplomatic crisis promptly ended.[5] There was still no international consensus, however, about Israel's right to try the accused, and it became a subject of much debate in the year between Israel's capture of Eichmann and the trial. Ben-Gurion was determined to make the trial an international showcase for the strength of the Israeli people and their government, as well as for the importance of the Holocaust in world history.

Reporters, journalists, government officials, UN representatives, and a huge number of private citizens around the globe debated whether or not Israel had the legal authority to try a Nazi war criminal. The public questioned Israel's prosecution of Eichmann in two separate ways: first, did Israel have jurisdiction to try a German man who committed crimes on European soil against people who were not citizens of Israel? Second, did Eichmann's kidnapping invalidate any prosecution of Eichmann by the state of Israel?

Initially, upon announcing the decision to try Eichmann in Jerusalem, Israel used the principle of universal jurisdiction to argue that it could try Eichmann. Universal jurisdiction is a precept that allows "the courts of any state [to] exercise jurisdiction without regard to the territory where the crime occurred or the nationality of perpetrators or victims."[6] This principle was accepted before the Nuremberg Trials took place via an international military tribunal, and universal jurisdiction has been used dozens of times by judicial organizations like the International Criminal Court and the International Court of Justice.[7]

Though widely accepted by practitioners and scholars of international law, at the time, universal jurisdiction had only been used to try war criminals in international courts, or by the nations within whose borders or against whose citizens the serious crimes under international law had been committed.[8] Many argued that the

1 Ra'anan Rein, "The Eichmann Kidnapping and its Effects on Argentine-Israeli Relations and the Local Jewish Community", *Jewish Social Studies* (Vol.7, Iss.3, 2001), 101-130.

2 Ibid.

3 Sachar, 555.

4 Ra'anan Rein.

5 Ibid. See also Brecher, 241.

6 Madeline H. Morris, "Universal Jurisdiction in a Divided World: Conference Remarks", *New England Law Review* (Vol. 35, Iss. 2), 339.

7 "International Military Tribunal at Nuremberg", *US Holocaust Museum: Holocaust Encyclopedia,* http://www.ushmm.org/wlc/en/article.php?ModuleId=10007069. See Also "UN Documentation: The International Court of Justice", *Dag Hammarskjold Library Research Guides,* http://research.un.org/c.php?g=98280.

8 "THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION: THE REPORT OF THE SIXTH COMMITTEE A/64/452-RES 64/117", *Inter-*

Nuremberg and Eichmann decisions were not legitimate because the crimes were not necessarily committed against Allied or Israeli nationals, respectively.[9] Israel defended its right to apply universal jurisdiction to the Eichmann case by citing the UNSC decision in June of 1960 not to force Israel to return Eichmann to Argentina. Furthermore, Ben-Gurion argued that Israel was the only nation that had the right to try Eichmann because the Holocaust and Eichmann's crimes specifically had so affected Israel that the young country had more interest in finding justice than any European nation did.[10] Ben-Gurion's justifications were based on acceptance of the Allied Powers' acknowledgement of Israel as both the legal inheritor of the British Mandate Palestine and the heir to "murdered Jewry," an idea that the Israeli District Court supported once the trial actually began.[11] The acceptance of this idea by the international community at large, and especially by the United Nations and the International Court of Justice, as demonstrated by their lack of action against the trial (past the debate over Eichmann's extradition), allowed the Eichmann trial to change the concept of universal jurisdiction for the international community forever. Previously, universal jurisdiction had only been applied by international tribunals, the International Military Tribunal that presided over the Nuremberg trials, and by nations prosecuting an individual for a crime committed on their soil or against their citizens.[12]

Before the Eichmann trial, the terms set by the Universal Declaration of Human Rights in 1948 had not been put into practice. Universal jurisdiction consisted of only two principles. First, there is the *protective principle*, which permits a nation to try criminals for crimes committed outside of the state's borders against the security, stability, and political independence of the state. Secondly, there is what George R. Parsons Jr. argued in 1960 was the only possibly appropriate reason for Israel to claim universal jurisdiction: the *passive personality principle*.[13] This principle allows a state to assume jurisdiction if the victim of a crime is a citizen of that state. Parsons argued that because Jewish victims during the Holocaust were not Israeli citizens when they were being victimized, Israel cannot use the *passive personality principle*. Conversely, American scholar L.C. Green agreed with Parsons that Israel did not have right to try Eichmann through *universal jurisdiction*, but represents another argument. Green asserts that the Universal Declaration of Human Rights allows that any "state is entitled to exercise its [territorial] jurisdiction over any person, alien or national, who has offended against its criminal law" when the accused is accused of "serious crimes under international law."[14] Parsons and Green are just two of the dozens of international scholars jumping to publish both scathing and supportive articles in law journals and newspapers around the world. The Eichmann trial, from the moment of Ben-Gurion's announcement of Eichmann's capture, was set to draw attention from around the world to the changing international law, changing relationships between sovereign nations, and to the truth of the Holocaust.

Israel's Nazi and Nazi Collaborators (Punishment) Law (NNCL) had multiple functions. First and most clearly, it made all of the various persecutory and violent actions the Nazis imposed upon the Jewish people crimes under Israeli domestic law.[15] Secondly, the NNCL created a

national Criminal Court Kenya Conference, http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf, 1.

9 "Eichmann Supreme Court Judgment: 50 Years on, Its Significance Today", *Amnesty International Publications,*http://www.amnesty.org/pt-br/library/asset/IOR53/013/2012/en/52ae5e58-9511-4215-a61a-51e1c56df25d/ior530132012en.pdf, 6-9. Here we see that the Nuremberg Trials and their International military Tribunal opened the door metaphorically for Israel to prosecute Eichmann. Furthermore, Amnesty argues that Israel wound up with de facto jurisdiction since no nation officially protested Israel's very public intention to try Eichmann.

10 For Ben-Gurion's statements on this issue, see Becher, 241. This argument that Ben-Gurion makes is separate from the arguments Gideon Hausner makes in response to objections in court; Hausner's response is legal, while Ben-Gurion's is political.

11 Sachar, 557.

12 Itamar Mann, "The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the 'Court of Critique'", *Yale Law School Legal Scholarship Repository* (January 1, 2010), 496-498.

13 George R. Parsons, Jr., "Israel's Right to Try Eichmann", *The New Republic*, Washington, D.C., March 20th, 1961, 13-15. When presented with this argument in both Eichmann's trial and his appeal to the Israeli Supreme Court, the Court twice asserted that the acknowledgment of the Allied Powers during the Nuremberg Trials as well as the United Nations Security Council that Israel had the right to extradite Eichmann, and that Israel was the heir to the Jews who were killed during the Holocaust, meant that Israel had the right to try Eichmann for his crimes committed elsewhere.

14 L.C. Green, "The Eichmann Case", *Modern Law Review,* (Vol. 23, Iss.5), September 1960, 511. Also, for definition of "serious crimes under international law", see:
"THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION: THE
REPORT OF THE SIXTH COMMITTEE A/64/452-RES 64/117", 1-2.

15 Bazyler and Scheppach, 424. See also Israel Ministry of For-

system to deal with the existence of Israelis who were an undefinable combination of perpetrator of crimes against the Jewish people and victim of the Holocaust.[16] It provided a forum-- a trial-- in which a past kapo could explain his actions, prove his moral innocence, or face the consequences of his alleged overzealous collaboration with camp SS officers. Thirdly, the law articulated a disgust felt by many Israelis and members of the Israeli government who were not survivors toward the Jewish survivor community. The majority of Israelis at this time were not Holocaust survivors, and many expressed a scorn for European Jews because of the lack of large scale resistance against the Nazis; the debates over passing the NNCL showed that non-survivor Israelis were suspicious of those who survived because of possible collaboration, like acting as a kapo or joining the Judenrat.[17] Finally, one of the law's most intriguing aspects was one of its inactions-- the law did not clearly define "collaborator."[18] The difficulty of defining a Nazi collaborator is one the entire world struggled with for the final half of the 20th century, and to some extent, continues to struggle with. The Knesset's inability to agree on a strict interpretation of where necessary attempts at survival end and where collaboration begins is representative of an international struggle for justice and also for progress after one of history's greatest tragedies.

The language of the NNCL is distinct from the laws against genocide and crimes against humanity set out by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, but is notably similar in places.[19] Though Israel was not a member nation of the United Nations until 1949, it signed the Convention almost immediately upon the start of its participation in the UN.[20] Israel then proceeded to use the Convention's definition of genocide when writing the NNCL in 1950, but replaced the words "national, ethnical, racial, or religious group" with "the Jewish people" when considering the possible victims of a genocide.[21] In changing the type of people genocide could be perpetrated against, Israel did not intend to suggest that genocide is only perpetrated against Jews, but rather that the "crimes against the Jewish people" section of the NNCL (Article 1, Section A, Subsection 1) could only be used to prosecute perpetrators involved in the genocide of the Jews, referring to the Holocaust.[22] The prosecution used the NNCL in its full capacity against Eichmann; Israel accused him of every one of the crimes illustrated in the law, owing either to his direct responsibility or his indirect administrative responsibility in the commission of that crime, either during peacetime in the Nazi regime (1933-1939), or during the Second World War (1939-1945).[23]

The prosecution of Eichmann for crimes against humanity during peacetime was the first time a law (the NNCL) had distinguished between war crimes (crimes against civilians *not justified by military necessity*) and crimes against humanity.[24] Although most of the legal theory and precedent cited in Israeli law and Hausner's arguments in the trial came from Western courts and the Nuremberg trials, Israel stepped away from traditional international law in the NNCL. This trial laid the precedent for post-Nuremberg war crimes trials of Nazis and other war criminals alike. The trial of Eichmann also served as a collection of oral history and a fuller record of the events of the Shoah. Eichmann's trial continues to inspire debate among historians, world leaders, and specialists in international law.

eign Affairs, *Nazi and Nazi Collaborators (Punishment) Law,* August 1st, 1950.

16 Bazyler and Scheppach, 425. See also Israel Ministry of Foreign Affairs.

17 Bazyler and Scheppach, 425-426. See also Bergen, 210 for full description of Judenrat.

18 Bazyler and Scheppach, 426. The NNCL did, regardless of its boundaries about what a collaborator *could be,* in fact define Judenrat and kapos as collaborators.

19 For background information on the Convention's treaty, see General Assmebluy of the United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide: Adopted by the General Assembly of the United Nations on 9 December 1948*, available at https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf.

20 William Schabas, "The Contribution of the Eichmann Trial to International Law", *Leiden Journal of International Law* (Vol. 26, Iss. 1, 2013), 671.

21 Ibid., 670.

22 Bazyler and Scheppach.

23 Stephan Landsman, "Criminal Case 40-61, the Trial of Adolf Eichmann: An Eyewitness Account (review)", *Human Rights Quarterly* (Vol. 28, Iss. 4, November 2006), 1074-1078.

24 Schabas, 676.

Proposition 57: A Step Forward in Criminal Justice Reform

Helen Guo, PO '20

On the upcoming November 2016 general election ballot, Proposition 57 will give California voters the opportunity to approve a new model for criminal justice reform. California's modern reform process began when the United States Supreme Court ruled in *Brown V. Plata* (2011) that the state of overcrowding in state prisons at the time constituted cruel and unusual punishment due to the lack of adequate medical and mental health care available, violating the Eighth Amendment. In response, Governor Jerry Brown took drastic measures to bring state prison populations down to the mandated level of 137.5% of design capacity.[1] The California legislature first passed the Public Safety Realignment Initiative in 2011, which shifted state prison populations to county jails in hopes of fulfilling the mandate requirement.[2] The legislature then passed Proposition 47 in 2014, which reduced most non-serious, nonviolent crimes to misdemeanors and, as a result, reduced incarceration rates.[3]

Now, by placing Proposition 57 on the ballot this November, the state government is trying to reform the criminal justice system further. The hope is that the proposition would prevent drastic increases in state prison populations and keep the number under the court-mandated level by loosening parole consideration requirements, encouraging inmates to seek rehabilitative services, and disallowing prosecutors to decide whether a juvenile should be tried in the adult court system. Granted, the initial costs of implementing these changes and the increase in urban crime rates following the passage of Prop 57's predecessor, Proposition 47, may deter voters from checking yes. However, if passed, Proposition 57 would continue paving the path for positive criminal justice reform, creating a more just and cost-efficient system while enhancing public safety.

Forming a More Just System

The first objective of Proposition 57 is to draw equitable standards of early release on parole in response to the current state of overcrowding in California prisons. Jail capacity restraints led to early releases without set legal standards after the Public Safety Realignment Initiative was passed in 2011. The initiative shifted huge numbers of prisoners from state to local centers, which caused overcrowding in county jails. County jail populations rose 15% on average from September 2011 to September 2014, forcing counties to release 8,292 pre-sentenced inmates and 5,914 sentenced inmates, increases of 18 percent and 39 percent, respectively. [4] In effect, the realignment shifted the burden, but the root of the problem remained, resulting in the early release of prisoners. The lack of set legal standards for early release on parole constitutes a major flaw in the criminal justice system. Overcrowding created a need to delineate just standards for release, starting at the state prison level so that county jails could be spared the burden in the first place.

To address the need for standards of release on parole, Prop 57 would allow "any person convicted of a non-violent felony offense and sentenced to time in state prison [to] be eligible for parole consideration after completing the full term for his or her primary offense," primary offense being "the longest term of imprisonment

1 *Brown v. Plata*, 563 U.S. ___ (2011)

2 Magnus Lofstrom and Brandon Martin, *Public Safety Realignment: Impacts So Far*, Public Policy Institute of California (2015), online at http://www.ppic.org/main/publication_quick.asp?i=1164 (visited November 2, 2016).

3 Mike Males, *Is Proposition 47 to Blame for California's 2015 Increase in Urban Crime?*, Center on Juvenile and Criminal Justice (2016), online at http://www.cjcj.org/uploads/cjcj/documents/is_prop_47__to_blame_for_ca_2015_urban_crime_increase.pdf (visited November 2, 2016).

4 Lofstrom and Martin 2015

imposed by the court for any offense, excluding the imposition of enhancement, consecutive sentence, or alternative sentence."[5] For example, a person sentenced to 6 months for one offense and 12 for another, including enhancements, would serve only 12 months, unless the judge explicitly implements a consecutive sentence, whereby the person would serve 18 months. Alternative sentences would release the defendant back into the community under restrictions such as home detention. By limiting the time required for a prisoner to serve before parole to the full term of one offense in most cases, state prisons would be able to release prisoners on parole quicker. Of course, one can argue that those with multiple sentences may reoffend upon an earlier release. However, the possibility of parole is only available to those who have not committed violent felony offenses. These are people who pose relatively little threat to the public upon release.

Prop 57 also serves to negate direct filing of juveniles, which will make the criminal justice system safer and more productive for juveniles. The proposition would allow only judges to transfer juveniles to adult court,[6] while direct filing currently allows the prosecutor to try a juvenile age 14 or older in adult court without a hearing with a judge. Judges currently have the power to waive juveniles into adult court as well, but there is reason to believe prosecutors may implement direct file more often than a judge would, rendering direct file a harmful practice. The Young Adult Court of the Superior Court of California notes that "the prefrontal cortex of the brain — responsible for our cognitive processing and impulse control — does not fully develop until the early to mid-20s. [As] young adults are going through [a] critical developmental phase, many find themselves facing adulthood without supportive family, housing, education, [and] employment...Our traditional justice system is not designed to address cases involving these individuals."[7] Direct file is an injustice to juveniles in the court system. By limiting transfers of juveniles to adult court, Proposition 57 fixes yet another flaw in the criminal justice system.

Critics of Prop 57 may believe that youth who are directly filed by prosecutors have usually committed more serious crimes and therefore should be tried in adult court. Yet, in 2014, according to statistics from the California Department of Justice, there was a 55% drop in serious juvenile arrests but a 23% increase in direct filings from 2003.[8] While juvenile crimes are becoming less serious, direct filings are increasing. These statistics reveal a negative correlation between direct filing and severity of crime.

Though the system of direct filing poses a threat to a fair criminal justice system for all youth, juvenile minorities are affected most by the practice. In 2014 and 2015, minorities accounted for about 90% of directly filed youth in California, but only 70% of overall youth in California (between ages 14-17).[9] Not only does direct filing fail to distinguish between youth who commit severe crimes and those who do not, it also encourages prejudice against youth of color. Prop 57 would attempt to mitigate this defect in the criminal justice system, assuming that judges, appointed by the state governor or legislature, will prove less biased than prosecutors in targeting minorities.

Rehabilitation Versus Retribution: Promoting Public Safety and Cost-Avoidance

Along with reforming parole standards and youth transfers, Proposition 57 emphasizes rehabilitation over retribution. The proposition gives the Department of Corrections "the authority to award credits earned for good behavior and approved rehabilitative or educational achievements."[10] This would quicken parole eligibility for rehabilitated prisoners and reduce recidivism rates by incentivizing rehabilitation in the first place.

5 *Proposition 57*, Legislative Analyst's Office of the California Legislature's Nonpartisan Fiscal and Policy Advisor (2016), online at http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop57 (visited November 2, 2016).

6 id

7 Judge Bruce Chan, *Young Adult Court*, The Superior Court of California – County of San Francisco (2016), online at http://www.sfsuperiorcourt.org/divisions/collaborative/yac (visited November 2, 2016).

8 Laura Ridolfi, Maureen Washburn, and Frankie Guzman, *The Prosecution of Youth As Adults*, Youth Law (2016), online at http://youthlaw.org/wp-content/uploads/2016/06/The-Prosecution-of-Youth-as-Adults.pdf (visited November 2, 2016).

9 id

10 *Proposition 57*, Legislative Analyst's Office of the California Legislature's Nonpartisan Fiscal and Policy Advisor (2016), online at http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop57 (visited November 2, 2016).

Within the Superior Court of California, the County of San Francisco's Drug Court provides rehabilitative treatment to drug offenders and provides resources to further offenders' educational and vocational abilities. Over a 5-year period, new drug-related active felony cases decreased by 69% in comparison to a 44% decrease in the monthly average of all felonies.[11] There is little doubt that treatment reduces recidivism. And while this court provides treatment to drug offenders already on probation rather than those in prison, the results of rehabilitative treatment are promising for in-prison treatment as well. Incentivizing successful treatment by making early probation contingent on it seems a promising approach, and this is exactly what Prop 57 will accomplish.

Critics may wonder if quicker parole eligibility would raise urban crime rates, endangering the public. This critique, however, seem less concerning in light of data collected by the Center on Juvenile and Criminal Justice, which showed that after Proposition 47 was passed in 2014, reducing non-violent, non-serious crimes to misdemeanors, cities in California with the largest reductions in jail populations did not show higher increases in crime than those with fewer reductions.[12] This suggests that the recent surge in urban crime rates should not be attributed to the early release of non-violent, non-serious offenders.

All this being said, California voters are likely to vote based partially on whether the proposition is a beneficial economic choice, especially considering the current state debt of $443 billion. In order to implement Proposition 57, more rehabilitation and corrections staff, as well as parole officers, would have to be hired. In addition, counties would have to pay for expanded youth housing in state juvenile facilities. Making sure that the proposition is implemented in a manner that promotes public safety would certainly be costly.

Over time, however, the economic benefits of lowering prison and jail populations outweigh the costs of implementing Proposition 57. The Legislative Analyst's Office of California estimates that Proposition 57 will generate tens of millions of dollars in net savings per year for California due to reductions in the prison populations, facility construction and maintenance costs, and staffing costs. Prop 57 will increase total annual net costs for counties by only a few million dollars.[13] Proposition 47, which paved the way for Prop 57, generated about $62.7 million in savings, while resulting in only about $33.4 million in costs.[14]

Review and Implications

Overall, Proposition 57 looks to be a promising new model for reform. The new parole standards it proffers suit the current system's need to keep prison populations beneath the quota set by *Brown V. Plata* in 2011. Eliminating direct filing would begin to mend the judicial injustices all too often experienced by juveniles, especially minority youth. Moreover, the credit system for rehabilitation success and subsequent early parole enhances public safety and lowers prison populations by reducing recidivism. And although the implementation of Prop 57 has costs, it is estimated to generate net savings of tens of millions of dollars every year by cost-avoidance.

Altogether, the proposition is a smart choice both politically and economically for the California state government. As it is not historically unheard of for other state governments, or even the federal government, to model their legislation after that of the Golden State, Proposition 57, if it is passed, may well spearhead criminal justice reform in the United States. For the time being, however, the choice lies in the hands of California voters.

11 Jennifer Pasinosky, *Annual Report 2012*, Superior Court of California, County of San Francisco, Collaborative Courts Division (2013), online at http://www.sfsuperiorcourt.org/sites/default/files/images/Drug%20Court%20Annual%20Report%202012_FINAL_0.pdf (visited November 2, 2016).

12 Males 2016

13 *Proposition 57*, Legislative Analyst's Office of the California Legislature's Nonpartisan Fiscal and Policy Advisor (2016), online at http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop57 (visited November 2, 2016).

14 Mac Taylor, *The 2016-17 Budget: Fiscal Impacts of Proposition 47*, Legislative Analyst's Office (2016), online at http://www.lao.ca.gov/Reports/2016/3352/fiscal-impacts-prop47-021216.pdf (visited November 2, 2016).

Whole Woman's Health v. Hellerstedt: the Defining Abortion Case of the 21st Century

Desiree Santos, SC '19

Abortion is perhaps the most divisive issue within the United States. Its deep roots in personal ideology and religious morality make it a fighting cause for many. The 2016 Supreme Court case *Whole Woman's Health v. Hellerstedt*, the most significant US abortion case in over twenty years, pushed the issue of abortion even further to the forefront of the nation's political battleground. In this case, the petitioner, Whole Woman's Health (a coalition consisting of Planned Parenthood and other Texas abortion providers) sued the respondent, John Hellerstedt, the Commissioner of the Texas Department of State Health Services. The constitutional issue involves the passage of Texas State Legislature's House Bill 2 (commonly known as "HB2"), which would require that all abortion facilities have an on-staff doctor who retains admitting privileges at a local hospital and that all abortion facilities abide by the same regulations as Ambulatory Surgical Centers (ASCs). While this bill was championed by some as a giant leap forward in improving health and safety for Texas women, some alternately dubbed it as a conniving tactic to reduce abortion access, striking a blow to both women's health and reproductive freedom. The fundamental issue in this constitutional argument was whether or not HB2's restrictions amassed to create an "undue burden" to women seeking to uphold their right to terminate a pregnancy.

In its 5-3 decision, the Supreme Court found in June 2016 that seemingly arbitrary abortion restrictions that have no clear, positive impact on women's health are unconstitutional.[1] This decision was widely celebrated by pro-choice advocates, touting *Whole Woman's Health* as the *Roe v. Wade* (1973) of this generation. However, such a comparison is not necessarily all positive. Though *Roe* certainly was the landmark case in establishing a woman's right to terminate a pregnancy, it has still allowed for countless legislative restrictions that have effectively minimized that right. *Roe* is important, but the struggle for the right it supposedly established still continues forty-four years past its ruling. *Whole Woman's Health* is similar. Though it expands women's freedom to receive abortions without excessive State interference, the battle for female bodily autonomy is likely not over, as lawmakers still have room to pass laws severely restricting females' right to seek an abortion.

The bill in question, Texas State Legislature's House Bill 2, was not proposed at random - rather, it was drafted in response to the Kermit Gosnell catastrophe which horrified the nation in 2011. In this scandal, the FBI discovered that Gosnell, a Pennsylvania doctor not qualified to perform abortions, had been illegally running a clinic for over thirty years.[2] This clinic was in noncompliance with any and all abortion regulations in Pennsylvania at the time; Gosnell used corroded suction tubes to perform abortions, covered sedated patients in blood-stained blankets, allowed cats to freely roam and defecate throughout the clinic, and used scissors to sever the spinal cords of newborns. He displayed a complete disregard for the safety of the women in his clinic – he hired unqualified staff, re-used unsanitary equipment leading to patients contracting STDs, performed abortions on women nearly seven months pregnant, and allowed one patient to die under his care because he refused to send her to a hospital. Many believe that the reason why Gosnell was able to perform such atrocities for over three decades is because Pennsylvania lacked

1 "Whole Woman's Health v. Hellerstedt." SCOTUSblog. Supreme Court of the United States. 27 June 2016. Web. 06 May 2016.

2 Kliff, Sarah. "The Gosnell Case: Here's What You Need to Know." *Washington Post*. The Washington Post, n.d. Web. 06 May 2016.

strict abortion facility protocols. The state legislators of Texas attempted to use their power to prevent such an incident from ever happening again, which prompted them to draft HB2 "in the wake of the Kermit Gosnell scandal … to provide abortion patients with the 'highest standard of health care.'"[3] They listened to the advice of the Gosnell Grand Jury Report and the National Abortion Federation's guidelines, which advised that "Abortion clinics … should be explicitly regulated as ambulatory surgical facilities" and "abortion patients should make sure that their doctor 'in the case of emergency' can 'admit patients to a nearby hospital no more than 20 miles away.'"[4] Such abortion facility restrictions, if put into place, would be some of the most prohibitive in the entire country.

By these standards, the Texas Legislature was lenient in drafting the regulations. For the restriction on admitting privileges, rather than requiring that doctors have such privileges at a hospital no more than 20 miles away (as the National Abortion Federation suggested), the bill read that "Abortion practitioners must 'have active admitting privileges at a hospital that is … located not further than 30 miles from the location at which the abortion is performed.'"[5] Likewise, when requiring that abortion facilities conform to ambulatory surgical center standards, the bill required that the facilities only meet the lowest tier of regulations for ASCs. This includes:

> (1) operating requirements, which cover topics such as staffing, nursing, training, patient safety, and sterilization procedures, (2) fire prevention and general safety requirements, such as having a fire-extinguishing system and evacuation plan and properly inflammable materials), and (3) physical-plant requirements regulating, for example, room size, floor coverings, and soap dispensers.[6]

HB2 also allowed for a grace period, allowing for abortion facilities to have extra time after the bill's passage in order to conform to the requirements. Clinics had 100 days to adhere to the admitting privileges requirement and thirteen months to perform any necessary renovations to be in compliance with the ASC requirement. Although the bill was completely passed by the Texas State Legislature, the ASC grace period allowed for the bill to be argued in court before that restriction fully came into effect. Therefore, HB2 was only partially implemented before it was struck down by the Supreme Court.

Whole Woman's Health argued that the ASC and admitting privilege requirements would have placed an undue burden on Texas women because these requirements were expected to lead to widespread closures of abortion facilities, which would have severely restricted abortion access throughout the state. The petitioner referenced a map provided to the Supreme Court to show that prior to HB2, forty-one clinics and ASCs in the state of Texas were licensed to perform abortions. If all the regulations in HB2 were enacted, all the clinics would have been shut down, leaving nine ASCs as the only abortion providers in Texas. Their brief stated that "the resulting shortage of such facilities means that women will have long waits to get an appointment with an abortion provider, [and] … many women will have to travel far from home to reach an abortion facility."[7] Requiring women to travel over 100 miles to reach an abortion facility is not merely a temporal burden – it is also costly and adds even more stress to an already invasive procedure. The petitioner claimed that the woman may be pressed to find a car, have enough money for gas, be able to take time off work, or find someone willing to babysit any children she may already have. These various burdens caused by widespread closures would have likely led many women to either wait longer to have their abortion (which increases the risks) or seek out illegal methods of abortion. The petitioners believed that these negative effects outweigh any benefits posed by the increased abortion regulations, thus creating burdens "so grossly disproportionate to any possible health benefit that they are plainly 'undue.'"[8]

The petitioner stated that the true intention of HB2 was to close down Texas' abortion clinics, as it had already done through the implementation

3 Whole Woman's Health, et al. *Brief for the Petitioners*. 579 U.S. Supreme Court. 2015. 1-2. Print.

4 See 3.

5 Whole Woman's Health, et al. *Brief for the Petitioners*. 579 U.S. Supreme Court. 2015. 3. Print.

6 See 5.

7 Whole Woman's Health, et al. *Brief for the Petitioners*. 579 U.S. Supreme Court. 2015. 32. Print.

8 See 7.

of the admitting privileges requirement. They cited that "after the admitting privileges requirement took effect on October 31, 2013, many abortion facilities throughout Texas were forced to close."[9] Additionally, if the entirety of HB2 was adopted as is, it would have shut down every single abortion clinic in Texas. The evidence that the petitioner offered that HB2 was the sole factor to blame for clinic closures is the correlation between the date of passage of the bill and the period of time when the majority of the clinics closed. Numerous clinics closed in anticipation of the admitting privileges requirement, and numerous more closed on the exact day that this requirement came into effect. Given that the respondent, the Commissioner of the Texas Department of State Health Services, offered no other reasonable explanation for why these closures occurred en masse, the petitioner's claim appeared valid. The petitioner used the effect of HB2's partial implementation to suggest its true purpose: to eradicate Texas' abortion clinics, making it exceedingly difficult for women to receive abortions, thus reducing the rate of these procedures performed. The 1993 case *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) established that "the effect of a law in its real operation is strong evidence of its object."[10] Within the scope of *Whole Woman's Health v. Hellerstedt*, the most prominent effect of HB2 was that abortion clinics closed down. This, along with the negative impact on women's health that results from decreased access to abortion clinics, solidified the petitioner's claim that HB2 was drafted with an impermissible purpose that creates an undue burden for women seeking abortions.

The respondent took a completely different approach from the petitioner, using hyper-technical legal interpretations of precedent-setting cases and demanding that the petitioner provide credible, linked facts to adequately prove their claims of an undue burden posed by HB2. From the outset, the respondent attempted to dispel the petitioner's allegations that HB2 was written and passed with an ulterior motive. The very first line of their brief to the Supreme Court reads: "Like other States, Texas responded to the Kermit Gosnell scandal by enacting laws to improve the standard of care for abortion patients."[11] To structure their argument, the respondent posed three questions slightly altered from the petitioner's brief. The first challenged whether or not the Court should overturn the cases *Planned Parenthood v. Casey* (1992) and *Gonzales v. Carhart* (2007) by allowing courts to "override legislative determinations about disputed medical evidence, rather than adhering to the doctrine that abortion regulation is valid if it has a rational basis and does not impose a substantial obstacle to abortion access."[12] The second question asked if HB2 was unconstitutional in its totality or as-applied to a single El Paso abortion clinic. The final question the respondent presented was whether or not *Whole Woman's Health* should be blocked from arguing this case due to the fact that selective components of HB2 had already been found constitutional by a lower court in the past.

The respondent asserted that the petitioner's brief floundered in attempting to prove that HB2 was written with unconstitutional purpose, as the clearly stated effect and purpose of the bill was always the promotion of women's health, a valid government interest. The petitioner's first argument of HB2's unconstitutional purpose was that "no purpose other than creating a substantial obstacle could exist because the challenged provisions 'utterly fail' to advance any beneficial end."[13] The respondent urged the Court to believe that this was utterly untrue, as "the petitioner ignores evidence admitted at trial that admitting privileges and ASC requirements would increase patient health and safety and promote physician professionalism."[14] Specific to the admitting privileges requirement, the respondent cited valid reasons as to how it will promote women's health, highlighting that "without admitting privileges, other physicians are left to take care of an abortion provider's most serious complications."[15] In regards to the ASC standards, the respondent recalled that the petitioner never questioned the constitutionality of the

9 Whole Woman's Health, et al. *Brief for the Petitioners*. 579 U.S. Supreme Court. 2015. 11. Print.

10 Whole Woman's Health, et al. *Brief for the Petitioners*. 579 U.S. Supreme Court. 2015. 40-41. Print.

11 John Hellerstedt, M.D., Commissioner of the Texas Department of State Health Services, et al. *Brief for the Respondents*. 579 U.S. Supreme Court. 2015. i. Print.

12 See 11.

13 John Hellerstedt, M.D., Commissioner of the Texas Department of State Health Services, et al. *Brief for the Respondents*. 579 U.S. Supreme Court. 2015. 40. Print.

14 See 13.

15 John Hellerstedt, M.D., Commissioner of the Texas Department of State Health Services, et al. *Brief for the Respondents*. 579 U.S. Supreme Court. 2015. 34. Print.

preexisting Texas requirement that abortions performed after fifteen weeks must be done in an ASC-compliant facility. The respondent even found that prior case law was on their side, as established in their reference to *Stimopoulos v. Virginia* (1983), which held that – even under the strict scrutiny framework from *Roe* – "[The] ASC requirement was a valid means of 'furthering the State's compelling interest in 'protecting the woman's own health and safety.'"[16] The petitioner's second attempt to prove unconstitutional purpose was rooted in the belief that HB2's undisputed and predictable effect is to close abortion clinics. The respondent claimed that this is a false assumption and that if the State's aim was to close down clinics, then they wouldn't have provided a 13-month grace period for the operating clinics to conform to ASC standards before the requirement was to come into effect. *Hellerstedt* argued that it was also illogical and improper for the petitioner to presume that effect equates to intent, as *Mazurek v. Armstrong* (1997) established that "In all events, this court 'does not assume unconstitutional legislative intent even when states produce harmful results … an awareness of the consequences is not sufficient to demonstrate unconstitutional purpose."[17] The final prong of the petitioner's attack of unconstitutional purpose was the fact that Texas was attempting to regulate abortion differently from other medical procedures. The claim that trying to specifically regulate abortion is unconstitutional is pure conjecture, as "the constitution does not require a state to reform all of its medical regulations or none at all."[18] The respondent urged that singling out abortion for legislation without any unique aspects is indeed permissible, as abortion was a topic of particular public attention after the Gosnell investigation. In essence, the respondent heavily cited precedent and the presumptuous claims of the petitioner in order to argue that there is no evidence nor legal basis proving that HB2 had an unconstitutional purpose.

However, despite the respondent's arguments, the Supreme Court struck down Texas State Legislature's HB2. In Justice Breyer's majority opinion, he notes the Court being unmoved by HB2's motive to protect women's health, as the ASC and admitting privilege requirements only tangentially related to the abortion procedure.[19] The opinion cites that the possibility of having a mere seven or eight abortion facilities to serve the entire state of Texas under HB2's full enactment would pose an undue burden in and of itself. Since abortions are already considered one of the safest medical procedures, additional facility requirements that would ultimately restrict access are unacceptable.

Though in *Whole Woman's Health v. Hellerstedt* the Supreme Court reveals that it will not buy the bluff of women's health activists wanting to restrict access to abortion, it upholds the "undue burden" standard, which remains ambiguous. The totality of circumstances that would equate to an "undue burden" certainly varies from person to person, especially from different ends of the political spectrum. The Court's ruling certainly provides decisive clarity to the specific constitutional issues of Texas' HB2, but it still allows leeway for lawmakers and voters to pass legislation reducing the constitutional right to terminate a pregnancy. Despite the Court's ruling, abortion laws are still permitted to create burdens on a woman's right to terminate a pregnancy, as long as these burdens are justified and not excessive; this upholds a vague legal standard open to individuals' widely varying interpretations. As with *Roe v. Wade*, the symbolic legal significance of the *Whole Woman's Health v. Hellerstedt* decision is huge, but the future of women's constitutional freedom remains uncertain.

16 John Hellerstedt, M.D., Commissioner of the Texas Department of State Health Services, et al. *Brief for the Respondents*. 579 U.S. Supreme Court. 2015. 37. Print.

17 John Hellerstedt, M.D., Commissioner of the Texas Department of State Health Services, et al. *Brief for the Respondents*. 579 U.S. Supreme Court. 2015. 42. Print.

18 John Hellerstedt, M.D., Commissioner of the Texas Department of State Health Services, et al. *Brief for the Respondents*. 579 U.S. Supreme Court. 2015. 53. Print.

19 Whole Woman's Health et al. v. Hellerstedt, Commissionner, Texas Department of State Health Services, et al. 579 U.S. Supreme Court. 2016. Print.

Harvey Milk and Proposition T: Milk's Success and Populist Movements in San Francisco during the 1970s

Anna Shepard, CMC '19

Harvey Milk is a martyr of gay rights, and has, in many liberal circles, transcended to the level of an idol. Harvey Milk as a politician has a sublunary, mixed career. In 1973, Harvey Milk garnered 16,911 votes throughout the city.[1] He came in 10th out of 30 candidates.[2]In 1975, he garnered 52,996 votes throughout the city. [3] This time, he came in 7th.[4] In 1977, with voting by district, he won 5,925 votes, but that was 30.5% of the votes cast; he became the Supervisor for the newly created District 5. [5] He won by a 12-point margin, in a supervisorial race of 17 candidates.[6] Behind Dianne Feinstein and Quentin Kopp, Milk garnered the most votes out of any other supervisorial candidate. [7] The data alone cannot explain why Harvey Milk, after losing twice, suddenly became such a political stand out. There are three possible reasons that rocketed Milk to victory in 1977: ethnic and political demographic shifts, Milk's campaign strategy and rhetoric, and, finally, the move to district elections with the passing of Proposition T. In 1960s through the 1970s in San Francisco, Irish and catholic political influence was eroding, while liberal and gay political influence was growing. Throughout his three campaigns, Harvey Milk's rhetoric was anti-establishment and his campaign strategy exploited existing political groups. Proposition T, however, was decisive in winning Milk a seat at the board of Supervisors in 1977: Proposition T, a populist initiative, drove Milk's large victory because it created District 5 out of three liberal neighborhoods.

I: Ethnic and Political Demographic Shifts

Milk was running for Supervisor when older, conservative Irish influence in San Francisco politics was giving way to more liberal tendencies. Although demographic shifts are dramatic, shifts in political and ethnic demographics happen over a decade or more. While a shifting demographic was necessary to carry Milk to a supervisor seat, it did not decide the 1977 Supervisor elections. Contrary to popular belief, San Francisco has not always been a fortress of liberal progress. In fact, "San Francisco politics beginning in the 1890s was directly influenced by the deliberate attempts of the Catholic Church and devout Catholic men and women to influence the terms of debate about the common good and to shape public policy according to their faith-based values."[8] Most poignantly, the Irish preferred religiously affiliated candidates "and a strong concern for worker's rights."[9] Earlier in the century, Irish Catholics dominated San Franciscan politics. In the election year 1909-11, Irish supervisors seat in 50% of the seats. In the election year between 1963-71, the Irish occupied 25% of supervisor seats.[10] As the declining percentages of representation allude to, the Irish, and therefore Catholic, political dominance in city government was eroding.

1960s marked the beginning of more noticeable

1 Special State and Municipal Election, § Supervisors (1973).

2 Ringer, Jeffrey. R. *Queer Words, Queer Images: Communication and the Construction of Homosexuality* (New York: New York University Press, 1994), 63.

3 City and County of San Francisco General Election, § Supervisors (1975).

4 Ringer, *Queer Words*, 65

5 San Francisco General Municipal Election, § Supervisors (1977). Summary Report

6 *Ibid*

7 *Ibid*

8 *Ibid*

9 Issel, William. *Church and State in the City: Catholics and Politics in Twentieth-century San Francisco*. (Philadelphia: Temple University Press, 2013), 2.

10 Wirt, Frederick M. *Power in the City: Decision Making in San Francisco*. (University of California, by the University of California Press, 1974), 225.

demographic shifts that stretched into the early 70s. By the late 60s and early 70s, "a distinctive era of San Francisco history was coming to an end—an era that witnessed high degrees of influence of the Catholic notions that the common good derived from and must operate within the bounds of a God-given moral order."[11] Now 2nd generation Irish, and traditionally Catholic, San Franciscans, were "declining, [as] the successful ones [moved] to the suburbs."[12] The Irish that stayed were "becoming increasingly conservative on new social issues as their party and church bespeak now liberal trends, disappearing from elective office and civil service as other groups claim[ed] those rewards."[13]The Irish were decreasing in number but increasing in conservatism. Simultaneously, the gay presence in the city began to grow. In 1973, "The politically conscious men of the Castro did not mince or step delicately down the street; they strutted defiantly. A sour look from a crusty Irish widow was the most valuable form of flattery."[14] Clearly, by the early 70s, gay men displayed confidence in their neighborhoods and chaffed against the existing Irish Catholic presence. Still representing a strong conservative presence, San Francisco politics did not welcome gays. Again contrary to popular belief, "[i]n the early 1970s, the record on gays and lesbians in politics in San Francisco looked no different from most cities in its reluctance to grant a formal voice to this community."[15] Conservative Irish Catholic presence in city politics was still strong, but it was decreasing, making way for a more liberal wave. While more liberal influence was on the rise in San Francisco politics, it did not prove strong enough to win Milk a seat as supervisor.

II: Campaign Strategy and Rhetoric

Milk's rhetoric and campaign strategy was consistent between his failed campaigns in 1973-5, and his successful campaign in 1977, pointing to the conclusion that his rhetoric and campaign strategy did not secure his victory in 1977. Political life thrived on active participation in community groups. "'Clubs' is used here as a rubric to cover not only the city's 27 clubs chartered with the Democratic Country Committee, but also another 750 politically active clubs, caucuses, committees, associations, organizations, groups, councils, unions, societies, taskforces, collectives, projects, campaigns and mobilizations."[16] Throughout Milk's three campaigns, Milk's strategy consisted of building coalitions between the various neighborhood and political clubs, which peppered San Francisco's political landscape. Despite his theatrical and populist rhetoric, he consistently garnered mixed success in endorsements from these clubs.

In 1973, Milk's campaign strategy was to target established community groups and his rhetoric carried populist sentiments. In 1973, to the Democratic Council, "Milk went on to deliver a theatrical hellfire and brimstone populist speech."[17] Although his eccentric, anti-establishment campaign behavior won him name recognition, his speech ended up rubbing the Council the wrong way and lost him the Council's endorsement. [18] Due to his alienation of Democratic Council, it is unclear if he was able to secure enough core democratic votes. In addition to targeting existing community associations, Milk began to promote anti-elitist reforms. Proving Milk's commitment to populism, in 1973, Milk argued for "an amendment to the city charter that require city officials to ride Muni to work everyday."[19] Although Milk rode a political up swing from successful campaigning, gaining momentum, he could not secure key endorsements.

In 1975, Milk continued to promote populist ideas and rely on established clubs' networks. In 1975, as president of the Castro Village Association (CVA), "Milk took to promoting his new theories through the CVA with all the flair he had once demonstrated in pushing Broadway shows."[20] Building on his 1973 methods, he continued to reach out to community associations. Mirroring his populist positions in 1973, Milk's 1975-rhetoric capitalized on populist impulses. Milk was a political outsider, and used that status to his advantage, running an anti-establishment campaign:

11 *Ibi*d, 335.

12 Issel, *Church and State*, 4

13 Wirt, *Power in the City,* 224

14 *Ibid*, 226

15 Shilts, Randy. *The Mayor of Castro Street: The Life and times of Harvey Milk*. (New York: St. Martin's Press, 1982), 24

16 Ringer, *Queer Words*, 68.

17 DeLeon, Richard Edward. *Left Coast City: Progressive Politics in San Francisco, 1975-1991*. (Lawrence, Kan.: University Press of Kansas, 1992), 25

18 Ringer, *Queer Words*, 62

19 *Ibid*

20 *Ibid*

Because, "Milk was gay, … and ran for office at a time when the gay and lesbian community, even in San Francisco, was not a political force, created a rhetorical situation that was far from ordinary."[21] His position as a non-elite resonated with the non-gay population. As one auto-shop owner mentions, Milk stuck up for gays because they were minorities, the same reason he advocated for Asians, Blacks, and the poor.[22] While this comment glosses over Milk's personal ties to the gay community, it points to Milk's political persona as populist.

Milk's 1977 campaign strategy and rhetoric did not deviate from his previous tactics. In 1977, Milk's organizing with groups so different from his own identity remained impressive, it is unclear, however, due his mixed endorsements, whether they translated politically. Besides galvanizing groups in his neighborhood, Milk's reached out to groups that were traditionally not considered allies to gay men. Surprisingly, Milk gained significant popularity among union workers. Ultimately earning him the endorsement of many small businesses, "Milk was successful at organizing gays to boycott Coors beer in gay bars as a part of a Teamster's action against beer distributors who would not sign a union contract."[23] Milk's commitment to small businesses and the middle class drew the attention of union workers. Milk's status as a gay man, connoting femininity and weakness, made unions, strongholds of masculinity, unlikely allies. Although union members often thought highly of him, despite his sexuality, Milk did not receive the Labor Council's endorsement.[24] Milk's rhetorical style was unique. Far from being a stern and hardhearted politician, "Using laughter, reversal, transcendence, and his insider/outsider status, Milk helped create a climate in which dialogue on issues became possible." [25] This ultimately enabled him to provide "a means to integrate disparate voices of his various constituencies."[26] This strategy and rhetoric bolstered his political momentum, but not without mixed results.

All and all, "Milk's political campaigns appear to be the usual moves of a candidate who becomes increasingly astute about the political process; they suggest typical adaptions in terms of language, dress, and decorum to the political arena." [27] It seems unlikely that a consistently fringe candidate in 1973 and 1975 would suddenly dominate the race in 1977 due to 'usual moves' of a more seasoned campaigner. Mixed results receiving endorsements from powerful political clubs and his predicable rhetorical and strategic development weren't enough to win him the election in 1977. A sudden jump from seventh to first between 1975 and 1977 makes it seem as though other factors greatly contributed to his success. Although Milk's theatrical rhetoric and alignment with local businesses garnered him local attention, it would take an external political change in San Francisco's political landscape to propel Milk to political victory.

III: District Elections and Proposition T

Prior to the passing of Proposition T, which changed the electoral process, in November 1976, supervisors were elected city-wide, so conservative neighborhoods canceled out the liberal leanings of other neighborhoods. In the mid 70s, in the area soon to be called District 5, was known as the Haight, Buena Vista Park and Noe / Eureka neighborhoods. Voters in these neighborhoods exhibited high levels of liberalism, populism, and progressivism. Liberal voting is directly linked to "low socioeconomic status, renter status, gay sexual orientation, African race, and Hispanic Race."[28] The neighborhoods, like the Haight, Buena Vista and Noe/Eureka, which, in 1977, would be District 5, had a political orientation that is favorable to a populist, liberal candidate, like Milk.[29] Other neighborhoods did not have a tendency to vote liberal, like West of Peaks or Parkside. Although the liberal attitudes in a few neighborhoods seemed auspicious, Milk was competing throughout the city before the passing of Proposition T. Supervisor elections that were voted on citywide, and not by neighborhood, canceled out the vast differences in political leanings, making it difficult for a populist liberal like Milk to be elected.

21 Shilts, *The Mayor of Castro Street,* 89

22 Ringer, *Queer Words*, 63

23 *The Times of Harvey Milk*. Dir. Rob Epstein. Perf. Harvey Milk. A TeleCulture Release, 1984. DVD

24 Shilts, *The Mayor of Castro Street,* 122

25 *Ibid*, 128

26 Ringer, *Queer Words*, 64

27 Ibid, 63

28 Deleon, *Left Coast City*, 34

29 Ringer, *Queer Words*, 62

Neighborhood	Populism	Progressivism	Liberalism
Haight	68.65	81.11	91.6
Buena Vista	60.23	74.70	81.17
Noe/Eureka	57.58	67.91	70.18
Parkside	58.87	44.33	24.48
West of Peaks	42.46	37.38	18.73

The passing of Proposition T in November of 1976 allowed Milk to capitalize on liberal neighborhood's voting trends. Ultimately, Proposition T allowed Milk to win a supervisor seat by a large margin. Because Milk was running in a citywide election, his campaign could not capitalize on liberal voting trends; conservative blocks of the city undermined his citywide popularity. In 1973, "He was the top vote-getter in the precincts around San Francisco State University and swept 'brown rice belt' of hippie voters…On a precinct-by-precinct basis, Harvey either won big or lost big."[30] These big losses and victories canceled each other out, undercutting Milk's electoral success. The large differences in progressivism, populism and liberalism between neighborhoods made it difficult for Milk to win in citywide elections. Again, in 1975, the localized "the liberal voting trend[in selected neighborhoods], however, did not extend to the races for supervisor… Harvey finish[ed] the race in seventh place, just one slot from victory."[31] Because supervisor elections were held citywide, conservative block neighborhoods diminished the political realization of increasing liberal attitudes. Changing the electoral process was key in deciding the election in 1977: "Had the district election plans been in effect for the 1973 race, Harvey Milk would have been elected a member of the Board of Supervisors from the Castro district."[32]

In 1977, however, Proposition T re-organized supervisor elections, so that each newly created voting district elected a supervisor. District 5 encompassed Haight, Noe/ Eureka and Buena Vista, all neighborhoods with residents that favor liberal, progressive, and populist candidates, and excluded conservative neighborhoods like West of Peaks and Parkside. Proposition T "would have the Board of Supervisors elected by districts, beginning with the city election in 1977. The city would be divided into eleven supervisorial districts. Each district would elect one supervisor who would have to live in that district."[33] Proposition T's new election process changed the old system, where the city as whole elected supervisors, making the election processes beholden to "large financial interests because huge sums of money are usually needed to win city-wide elections."[34] Proposition T was fundamentally a populist initiative. It served to ameliorate the city-wide problem that "essential services suffer from lack of attention while concerns of downtown corporations absorb too much energy and too many tax dollars."[35] In electing a supervisor, who had to live in the district they represented, "Proposition T will make supervisors directly accountable to city resident, instead of those who pay for expensive campaigns."[36] Reflecting Milk's commitment to populist ideals and his political ambition to be elected, Milk endorsed the Proposition: his name appears four names from the bottom on the list of endorsements.

Proposition T changed the composition of the Board of Supervisors, pointing to its passing as a pivotal electoral change that realized the ethnic and political demographic shifts in San Francisco. While Harvey Milk had been gaining political momentum, it was the shift to district supervisor elections that propelled Milk from a theatrical fringe candidate to a dominant politician who won 30% of the vote out of a race of 17 candidates. Proposition T's significance is clear because its passing collectively changed ethnic composition the Board of Supervisors. Just a few years after its passing, the Board of Supervisors became "more demographically representative of the city's population: five women, six men; three gay or lesbian persons; two African Americans, one Chinese American, and one Latino."[37] Just in the election year of 1977, a woman who ran on feminist platform, the first black woman, first Asian man, as well as the first openly gay man, Harvey Milk,

30 *Ibid*

31 DeLeon, *Left Coast City,* 31-32

32 Shilts, *The Mayor of Castro Street,* 80

33 *Ibid,* 107-8

34 *Ibid*, 80

35 San Francisco Voter's Information Pamphlet, § Proposition T: District Election of Supervisors (1976). General Election. Tuesday November 2, 1976.

36 *Ibid*

37 DeLeon, *Left Coast City,* 23

were elected.[38] Proposition T realized San Francisco's populist movement in the 1970s: the inclusion of previous politically underrepresented groups in the Board of Supervisors contextualizes Milk's success in a larger anti-establishment movement. Proposition T represents a decentralization of the electoral process meant to magnify the voices of minorities.

Milk was a populist candidate: he fought big companies like Coors, argued for elected officials to take public transportation, and most notably, was an outsider as a gay man. He won through populist means: Proposition T decentralized supervisorial elections to neighborhoods, combatting the influence of large companies and elitist money in municipal elections. Milk's success is coached in a larger populist, anti-establishment movement in California. In the 1970s, Watergate and Watts Riots at Berkeley hung over the nation's head. In the 1970s, distrust of government and a sense of unease permeated towns and neighborhoods. Milk's rise to political prominence further indicates the rise of populism in California politics in the 1970s.

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Net Neutrality and the AT&T, Time Warner Merger

Kyla Eastling, CMC '18

In late October 2016, telecommunication companies AT&T and Time Warner announced agreement on a deal for AT&T to buy Time Warner for $85 billion. The immediate public reaction has been negative, with many concerned that the merger will create a media company so large that it will distort market competition and violate anti-trust law. Significantly, this deal also raises new questions in the debate over net neutrality.

Put into effect in 2015, the FCC's Open Internet Rules were the first enforceable rules concerning online content specifically. The rules work to ensure that consumers have access to open internet, meaning internet access providers cannot "block, impair, or establish fast/slow lanes to lawful content."[1] These rules played a large role in the 2011 Comcast and NBCUniversal merger, which many are comparing to the AT&T deal. Mergers between large telecommunications companies threaten to restrict consumers' access to online content as the internet provider (AT&T) could control the distribution of content from the content provider (Time Warner). For example, before the merger, NBC would pay Comcast to stream its content online. After the announcement of the merger, however, there were questions as to whether Comcast could prevent NBC from making external streaming deals with other internet providers. The FCC ruled that Comcast could not restrict NBC's content distribution, and, if they did, it would be in violation of net neutrality law.[2]

The AT&T and Time Warner deal poses a new challenge to the FCC and net neutrality law due to the use of zero-rating. Zero-rating is a practice in which wireless providers allow users to stream selected content without contributing to their monthly data limits. Though the FCC made it clear in the Comcast and NBC deal that companies cannot restrict content distribution, zero rating is a way for companies to encourage consumption of selective content. Many see a potential conflict of interest for AT&T as a wireless provider considering they would now own a major content provider (Time Warner). Some argue that Time Warner could have an unfair advantage in gaining access to AT&T's zero rating service by nature of being owned by AT&T. The FCC is already focusing on AT&T's concrete plans to implement zero-rating with another content provider it recently acquired: DirectTV.[3] Its upcoming introduction of DirecTV Now would offer a service where customers can stream unlimited shows through the DirecTV app without worrying about their data caps. It seems likely that AT&T would extend this trend to incorporate zero-rating services into the Time Warner deal.

As of now, zero-rating is not subject to any specific government regulations or laws. The FCC's Open Internet Rules do not specifically address zero-rating, but the agency be monitoring the practice. The AT&T and Time Warner case might be the time to argue that zero-rating violates the Open Internet Rules clause of no paid prioritization. This rule asserts that "broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind." Today, this rule's scope is limited to when wireless providers throttle the speeds of certain content to disadvantage it over other non-throttled content. However, there is a chance that AT&T and Time Warner's plans to expand further into streaming services may give the FCC cause to broaden the rule's application to zero-rating as well. If the FCC were to move in this direction, its actions would affect not only this merger, but the future of content streaming in general.

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The Excelsior Scholarships Program: Tuition Free College in New York

James Dail, CMC '20

Student loan debt is crushing the newest members of the U.S. workforce. In 2014, the average amount of student loan debt held in the United States was $28,950.[1] With this consideration, it is not a surprise that Senator Bernie Sanders gained widespread support in the Democratic primary by placing this issue at the forefront during the campaign. However, it caused a sharp divide in the party between Sanders' supportive social democrats and Clinton's old guard, who were worried about the plan's massive cost.

In the wake of the Democratic defeat in the presidential election, New York Governor Andrew Cuomo is attempting to bring Sanders' brainchild into the mainstream. He has two primary goals in mind. The first is to show the country what progressive policies can accomplish by providing a stark contrast to the Trump administration. The second is to provide community college to all students free of cost and expand community college programs, using the examples set by Tennessee and Oregon. The plan itself is a replica of the one that Secretary Clinton co-authored with Senator Sanders after the latter's defeat in the presidential campaign.[2] In putting it forth, Cuomo is able to keep the spirit of Sanders' idealism in the plan while throwing a bone to Clinton's supporters by offering a tuition-free education only to those most in need. Though it does not fully correspond to his original vision, Sanders ensured the support of his base by providing the plan with an euphoric endorsement.

The plan, deemed the Excelsior Scholarships Program, provides free tuition for students of families earning less than $125,000 a year at any City or State University at New York. Students coming from families earning at or above this threshold will pay full in-state tuition. Additionally, it also provides free tuition at any New York community college.[3] The plan will raise the maximum qualifying income threshold every year so as to ease the strain placed upon state finances. It will begin in the fall of 2017, when families making less than $100,000 per year will be eligible. The threshold will be raised to $110,000 in 2018, followed by the final increase to $125,000 in 2019.[4] This slow phasing in will provide both Cuomo and the New York State Legislature time to consider the burden placed upon state finances, and whether the $125,000 qualifying threshold may be too high. The governor placed the program's estimated cost at $163 million, a number that several state legislators believe is too low.[3]

Though it is lauded for providing needed relief to students at a time when college costs are soaring, the plan is not without its critics. Universities that are part of the CUNY and SUNY systems are worried that the plan may cause an enrollment increase due to an increase in demand.[5] This has the potential to lead to far tougher admissions standards in order to limit enrollment - which is concerning given that CUNY especially prides itself on providing social mobility for its students.[6] Another criticism of the plan is that while it helps many middle class students, it ends up failing the poor because it fails to cover room and board. The combined cost of room and board, fees, and the average rate of books and supplies is $15,520 at SUNY. At CUNY, the cost is $12,225.[7] Though middle-class students would still face these costs, they are in a much better financial position to endure them. Poor students will have a far-harder time covering these expenses.

With student loan debt being such a pressing issue at the forefront of the minds of young Americans, something needs to be done. Cuomo's plan provides a solid start. Though it does more for the middle class than for the poor, the plan provides aid for everyone who could have trouble affording a college-education without a loan. Furthermore, annually raising the maximum qualifying income threshold will allow New York to test how much aid it can afford to give. If it works, other states will have a clear example to follow. The nation will be watching.

**This piece was originally published on the CJLPP Blog on Feb. 2nd, 2017.*

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Letter from the Editor-in-Chief Emeritus

Dear Students of the Claremont Colleges,

I am sure you enjoyed reading the sixth print edition of the *Claremont Journal of Law and Public Policy*, and I hope you are looking forward to the seventh as much as I am.

Reflecting on the last few years, I conclude quickly and confidently that my work with the CJLPP and its people has been one of the most fulfilling experiences of my college career. I am eternally indebted to Byron Cohen (CMC '16) and the others who founded this journal, for bringing me into it as much as for founding it. Working on the business side taught me the extraordinary value of punctuality, organization, and general professionalism. The hardworking writers and editors, as well as past Editors-in-Chief, have continually challenged me to improve not just my writing and editing but my thinking as well.

In our second year of operation, our online content attracted 3,148 views. In 2016, that number was 11,153 views. This Journal, which just over three years ago was planning its expansion from CMC to the other Claremont Colleges, now routinely receives submissions from places like Chicago, New York, Ohio, Kentucky, and India. We have published 68 pieces of original content from a variety of authors. Most of those were the product of intensive writer-editor collaboration over the course of multiple drafts. As I write this letter, six more articles are in the later stages of production, not to mention the ones we are expecting from 25 staff writers who have just begun this exciting process. One of our greatest successes last semester, the blog team, will be duplicated this semester.

It is our writing process, not the readership statistics or quantity of submissions, that has made me so proud to be a part of the CJLPP. It has always been my view that our Journal's most valuable contribution is to our own writers and editors, who, through our Journal, achieve the kind of sustained, long-term collaboration on academic research and writing that one rarely finds in classes. I have seen writers become mini-experts in fields as varied as U.S. Supreme Court cases, public policy proposals for China, and the Pomona College Student Code.

As Editor-in-Chief, I felt my primary responsibility was to facilitate the long-term survival of the Journal. There is nothing I have done or seen that has made me more optimistic in that regard than the leadership April Xiaoyi Xu, our new Editor-in-Chief, has displayed. Her effectiveness and remarkable reliability make her an extremely valuable asset, and her unflinching dedication to the Journal is simply not up for debate. She is a goal-oriented realist who knows how, and on what, to work. Perhaps most importantly, April is genuinely supportive of her peers. I know of no one more capable of leading our Journal to future success and sustainability, and I leave with complete confidence that the wonderful journey initiated by our Journal's founders will continue long after their graduations and my own.

With Love,
Martin J. Sicilian
Editor-in-Chief Emeritus