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CALIFORNIA LEGAL STUDIES JOURNAL

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We also encourage you to consider being a member of the Berkeley Legal Studies Association (BLSA).

Letter from the Editor-in-Chief

Dear Reader:

We are excited to be reintroducing the California Legal Studies Journal again this year. With its first publication since 2013, the Berkeley Legal Studies Association looks forward to showcasing what this campus has to offer for diverse and complex legal issues. UC Berkeley has often been at the center of compelling undergraduate research and writing, and this journal provides a glimpse into the work students pursue in an academic environment.

The Berkeley Legal Studies Association is a student-run academic club that works closely with the Legal Studies department and students to provide various academic and social resources. Our commitment to the Berkeley community to offer students pre-law resources parallels our commitment to showcase their research on legal issues. This year's publication showcases a diversity of topics and questions. We hope that you find the variety of topics refreshing and interesting, while also giving you a critical analysis of a range of contemporary legal issues.

I would like to thank my fellow BLSA members for their efforts in constructing this journal after its hiatus, and for their tireless efforts to serve the legal studies community this year. As a student-run club, rebuilding the journal and working to provide resources for students on campus has been enriching and rewarding. We encourage you to join us at our events throughout the semester and to submit for the next publication. Feel free to contact us if you have any questions about the journal itself or its topics.

Good reading,
Sarah Manthorpe

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Law on the Books vs. in Action
Fisher v. University of Texas, Austin (2013)

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Fisher v. University of Texas (2013) set the binding precedent that if a university wishes to use race as a factor in their admissions process, the court shall use the strict scrutiny standard to determine the constitutionality of the admission process. This paper shines light on the difference between what the justices intended to fix by implementing the strict scrutiny standard and the actual changes the ruling caused. This comparative analysis is then followed by a suggestion to how universities can be held accountable for ensuring that their admissions procedures continually have a compelling purpose and are narrowly tailored.

Background

The University of Texas, in an attempt to increase diversity on campus, initiated an affirmative action program—meaning that the university started implementing policies that would encourage equal opportunity for all applicants (UT News). Along with this, the state of Texas has a “Top 10 Percent Rule,” which guarantees admission to any state school in Texas if the student graduates in the top 10 percent of their class. The petitioner, Abigail Fisher, was not in the top 10 percent of her class and thus was

compared to others who were not guaranteed admission (Justia Law). When Fisher, a caucasian female, got denied admission to the University of Texas, she filed a lawsuit against the university claiming her admission was denied because the university's implementation of affirmative action policies gave her spot to a less-deserving minority student (The Washington Post). Fisher's claim was that the consideration of race in college admissions is a violation of the Equal Protection Clause¹ of the Fourteenth Amendment (Justia Law).

The Supreme Court upheld the constitutionality of using race as a factor in the college admissions process in *Regents of the University of California v. Bakke* (1978), but it was also ruled that racial quotas were prohibited. In the case *Fisher v. University of Texas* (2013), the Supreme Court ruled in a 7-1 majority that if a university wishes to use race as a factor in their admissions process, the court shall use the strict scrutiny standard to determine the constitutionality of the university's admission process (Strasser). Strict scrutiny is a standard judicial review that addresses two questions: Did the government pass this law under a compelling purpose and were the methods used to achieve this purpose narrowly tailored? (Strasser).

In cases regarding race-conscious college admissions processes, the first aspect that the courts will question is whether or not the interest of the procedure is constitutionally permissible. In affirmative action cases, "constitutionally permissible" means that the university's interests and goals do not violate constitutional clauses such as the Equal Protection Clause. Universities whose admission processes involve race-conscious factors typically claim that their intention is to achieve diversity, reasoning that diversity on college campuses enriches the educational opportunities of students. (*Fisher v. University of Texas*, 2016) Similarly, *Gratz v. Bollinger* (2003) set a compelling purpose for

¹ A clause that is part of the Fourteenth Amendment that states "nor shall any State [...] deny to any person within its jurisdiction the equal protection of the laws".

considering race in the undergraduate admissions process.

The respondents in *Gratz v. Bollinger* (2003), were able to prove that diversity on a college campus promotes many academic benefits (Justia Law). The same compelling purpose was accepted in *Fisher* (2013). Once the first aspect of the strict scrutiny test is achieved, the court asks the respondent to show evidence that “race-neutral” methods do not achieve the university’s expectation of educational benefits from diversity. If “race-neutral” methods do not suffice, then race may be considered— but it may not be the sole, deciding factor of a student’s acceptance or denial into the university (*Fisher I*).

The nature of the strict scrutiny standard set guidelines on how universities word their admissions policies. The University of Texas spent months analyzing their data and gave the court “statistical and anecdotal evidence” that proved that race-neutral programs were not enough to reach the university’s diversity goal (Barnes). Since The Supreme Court stated that race cannot be an individual reason as to why an applicant is accepted or denied, The University of Texas argued that they use a lawful process that uses a “race-conscious, holistic review” of the undergraduate applications (*Fisher II*). For example, The University of Texas uses what is called a Personal Achievement Index (PAI) to evaluate applicants (Barnes). The PAI is said to measure a student’s “leadership experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student’s background.”² The many factors that are said to affect an applicant’s PAI can be used in court to prove that a holistic review is used alongside the consideration of race as a factor. The wording of this policy is heavily influenced by the fact that if the procedure’s constitutionality is challenged once again, the uni-

² According to the UCLA Law Review, “Special circumstances” included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socio-economic condition of the student’s family.

iversity must be able to meet the strict scrutiny standard.

The implementation of the strict scrutiny standard leaves the courts with little discretion because they are limited to examining whether or not the issue at hand satisfies the predetermined two-pronged test. In fact, the Supreme Court remanded *Fisher I* (2013) because the Fifth Circuit Court of Appeals failed to use strict scrutiny when inspecting the University of Texas' admissions policy. It was the lower court that decided in *Fisher v. University of Texas* (2016) that the admissions process did not violate the Fourteenth Amendment because the university's process was narrowly tailored to serve a compelling state interest—meaning that the policy passed the strict scrutiny test.

The continuing rise of affirmative action provoked the argument that race-conscious admissions processes promotes “reverse discrimination.” Opponents of affirmative action argue that equal opportunity policies favor minorities and therefore discriminate against the majority (Rabold). In deciding that the consideration of race in college admissions can only be permitted under strict scrutiny, the hardest level of scrutiny, the Supreme Court intended to achieve a balancing act of upholding affirmative action— by approving diversity's compelling purpose of enriching college campuses— while recognizing the opposing side's concerns regarding reverse discrimination by requiring a narrowly tailored method.

This landmark court case was initiated by Edward Blum, an activist from a legal defense foundation called Project on Fair Representation— a not-for-profit that challenges race-related policies (Reilly). Along with Edward Blum and this organization, other supporters of Abigail Fisher includes groups that are against affirmative action or believe that race consciousness does not promote equality because they view equal opportunity policies as a method of “reverse racism/discrimination” (Rabold). These proponents— all of which have filed amicus briefs for

Fisher (2013)— include The Asian American Legal Foundation, The American Civil Rights Union, and current and former federal civil rights officials (Rabold).

The decision of Fisher (2013) was a huge win for supporters of affirmative action.

Therefore, supporters of affirmative action— such as the American Association for Affirmative Action and the American Bar Association and former student body presidents of the University of Texas— were opponents of this case and have written amicus briefs voicing their multiple concerns for the precedence this case would bring if decided against affirmative action (Rabold). For example, the Black Student Alliance of the University of Texas at Austin is an opponent of the case because they believe that a race-neutral admissions process prevents the university from achieving a diverse student body and therefore would “impair the university’s ability to carry out its educational mission” (SCOTUSBlog).

Evaluation

Historically, Whites have been the majority race in college environments.³ Consequently, the universities’ goals of diversifying their campuses indirectly leads to less Whites being admitted into these colleges (Note). Therefore, race-conscious admissions processes— and affirmative action in general— has been criticized and deemed as the cause of “reverse racism”⁴(Anderson). The results of colleges aspiring for diversity causes some Whites to feel threatened of having their seats in college campuses be taken by an applicant of a minority race (Barnes). Thus, a pattern

3 The University of Texas’ admissions statistics through the years has consistently shown that around half of the admitted students are white.

4 Reverse racism is the idea that because of affirmative action programs’ desire to help minorities, Whites are being discriminated against.

is evident in the list of petitioners of these types of cases; the petitioners are typically White applicants.

However, an ongoing court case may be signaling an era of a new pattern. Partially and arguably because of affirmative action, Asians have increased the spots they take up in college classrooms (Note). In fact, Harvard Law Review shows evidence that Asians make up almost half the population of some campuses.⁵ The Students for Fair Admissions filed a case against Harvard University claiming that statistical evidence shows that Asian Americans are held to a higher standard in the admissions process, in attempt to balance the proportionality of admissions in each race group⁶ (Students for Fair Admissions v. Harvard University, 2018). Now that a minority group has become a majority on college campuses, Asians are starting to feel like they have been put into the positions of Whites who were once the “victims” of the diversification of college campuses. SFFA v. Harvard University (2018) may mark the start of a pattern of Asian petitioners challenging the constitutionality of admissions processes.

The change in petitioners for these types of cases is important to note while analyzing the effectiveness of using the strict scrutiny standard. The university is given a lot of discretion in their standards to achieve their diversity goals. Strict scrutiny requires a compelling interest— in these types of cases, universities claim that educational benefits of diversity are a compelling interest— but the courts show no requirements of the universities to expand on those goals. This discretion has led to universities being able to use “holistic” admissions procedures that legally appear constitutional, but in action may be in violation of the Equal Protection clause.⁷ The claims of Students for Fair Admis-

5 Asians are currently 22.2% of the freshman class at Harvard, 21% at Stanford, 42% at Caltech, and 42.3% at Berkeley.

6 Each year, Harvard admits and enrolls roughly the same percentage of each race even though the application rates and qualifications for each racial group have significantly changed over time.

7 Students for Fair Admissions claims that statistics show that Harvard uses ‘holistic’

sions suggests that the court's implementation of the strict scrutiny standard is not enough because as opposed to achieving the diversity college campuses claim to aspire for, another problem is instead rising (Note). The burden of higher competition for college acceptances is shifting from one race to another. The new "majority," Asians, may now be the ones challenging admissions policies.

Interestingly, though, *SFFA v. Harvard University* (2018) was also initiated by Edward Blum, the same legal strategist who advocated for *Fisher I* (2013). Professor Sturm of Columbia Law expressed her fear that "institutions will treat the *Fisher II* decision as a legal reprieve," and thus undermine the importance of discussing "deeper structural issues that affect achievement of the diversity goals upheld by the Court" (Sturm). *SFFA* (2018) shows that there is still a discussion about fair admissions processes, even though it is not just Whites who feel disadvantaged. This may be an indication that there is a genuine public interest in developing admissions processes to ensure that these procedures are as fair as possible. However, several scholars question Edward Blum's intentions and disapprove of his, allegedly racist, political agenda. Boston Globes writer Alex Beam addresses a speculation that some scholars claim:

Blum is only addressing Asian-Americans because they are a "useful tool," to his anti-affirmative action agenda (Beam).

Conclusion

In *Fisher v. University of Texas* (2016), the Supreme Court orders that the University must regularly assess the results of

admissions to "disguise" the fact that it requires Asian Americans to achieve a higher standard than other students which forces Asian Americans to compete against each other for a seat in the university.

their race-conscious policy and identify its positive and negative effects to ensure that the process is continually constitutionally permissible (Fisher II). In other words, the admission process should be able to pass the strict scrutiny test at all times. The issue with this is that the Court is limited to only articulating the rules and the Court cannot predict or guarantee that the university will follow what is ordered.

The creation of an association dedicated to inspecting university admissions processes can be useful to ensure that universities are continually doing what the courts ask of them.

Universities whose admissions processes have been challenged in court should be required to provide some evidence of their algorithms or procedures to prove that the strict scrutiny test can still be applied, even after being tried by a court. This association would be similar to health inspectors. It may not have the formal authority of the Court to prohibit unconstitutional university practices, but it would intimidate universities to make sure that they follow court orders because this association's reports can be submitted as evidence if the university is tried again.

It is clear that in the battle of achieving equality in undergraduate admissions, race continues to be a problematic topic. It seems that there will always be a debate about whether affirmative action programs induce or prevent equality, but implementing this suggestion would symbolize taking a step further than simply listing out a list obligations for college admissions programs.

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Community Energy or Corporate Energy?: The Renewable Energy Sources Act of 2014

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The Renewable Energy Sources Act of 2014 represented a major shift for Germany's transition to clean energy. It called for a phase out of the feed-in tariff in favor of competitive bidding (Brunn & Sprenger, 2014). This was unfavorable to community-owned renewable energy, which in Germany usually takes the form of cooperatives (Borchert & Wettengel, 2018; Wierling et al., 2018). This paper sought to analyze the 2014 law, and to a lesser extent subsequent revisions, to determine the extent to which community-owned renewable energy was affected and how policymakers could make reforms so that the sector can thrive once more.

Intent of the Law

The Renewable Energy Sources Act of 2014 [abbreviated to REA in English] was a milestone in German energy law and policy. It was a major update to the original REA, which was approved in 2000 and revised in 2004, 2009, and 2012 ("Timeline: The past, present and future of Germany's Energiewende," 2016). These previous revisions kept the fundamentals of the law intact, but this had increasingly become untenable over time. As renewables became a larger part of the energy mix, consumers paid higher prices for electricity and utility companies faced costly

upgrades to their infrastructure (Brunn & Sprenger, 2014). The 2014 version of the REA was intended to reduce costs all around while still encouraging the use of renewables- all other goals were secondary.

Content of the Law

The REA as amended in 2014 was different in terms of what was left out just as much as what was introduced. Historically, the three major components of the REA were the feed-in tariff, the preference for renewable energy, and the surcharge (Appunn, 2014). The preference requires utilities to utilize renewable energy, the tariff is paid to renewable energy producers, and the surcharge is paid by consumers to finance the tariff (Appunn, 2014). The 2014 Act introduced direct marketing of electricity by producers coupled with a market premium, tendering to set government payment levels, and limits on new capacity (Brunn & Sprenger, 2014). Electricity producers must sell power on the open market, with future capacity to increase in a controlled manner and payments dependent on cost-effectiveness. With guaranteed returns a thing of the past, some renewable energy producers may not survive. Policymakers look upon the subsidy-fueled growth of the past as unsustainable, and want the sector to adapt to market forces. How well this adaptation is managed will vary according to resources and human capital- and both are distributed unevenly across the sector.

History of the Law

The REA of 2014 is part of a series of legislation and policies that seek to bring about the *Energiewende* [‘energy transition’], the ongoing effort of Germany to replace fossil fuels and nuclear power with renewable energy. Although the concept has

been championed by environmental and anti-nuclear activists since the 1980s -especially with growing public concern over manmade climate change- it was only in the wake of the 2011 Fukushima nuclear disaster that the Energiewende became official policy (“Timeline: The past, present and future of Germany’s Energiewende,” 2016). Fukushima was a highly visible event with high costs in terms of money, the environment, and human lives (Schneider et al., 2018). With nuclear power discredited, renewables had to take on a greater role in the energy mix moving forward. The 2014 REA sought to carry on the imperative of the Energiewende without burdening those who would have to shoulder the costs of the transition.

Proponents and Opponents of the Law

There is a complex interplay of interest groups that affects German energy law and policy, as seen with the 2014 law. The economic coalition -utilities, fossil fuel sector, and heavy industry- prioritizes economic sustainability and the environmental coalition -renewable energy sector, local governments, and activist groups- prioritizes environmental sustainability (Gründinger, 2015). Both coalitions see renewable energy as important, but have competing visions of the sector as either investor-owned or community-owned (Gründinger, 2015). The 2014 revision best reflected the interests of the economic coalition. The interests of the environmental coalition -and community-owned renewable energy- were an afterthought.

Implementation of the Law and Procedures of Enforcement

Implementing the 2014 Act is a federal responsibility as the Act is federal legislation. The federal government, through its ministries and agencies, has great latitude in determining how the 2014 act will look ‘in action.’ The task falls to the Federal Ministry of Economic Affairs and Energy, which oversees

the relevant agencies (Gründinger, 2015). The Federal Network Agency [Bundesnetzagentur or BNetzA in German] is responsible for the tendering/auctioning process (Renewable Energy Sources Act of 2014). Getting to set nationwide standards means that BNetzA's decisions can and will shape the future of the renewable energy sector.

The Bundesnetzagentur has clearly defined powers under the 2014 RESA. Even though the law only specifies auctions on a pilot basis, and only for solar projects, the agency's experience with these auctions would be important moving forward. Section 85 lays out general tasks, including those needed for auctions, which the agency must carry out under the law (Renewable Energy Sources Act of 2014). Section 88 grants the federal government the authority to issue ordinances determining how the auction process will look like (Renewable Energy Sources Act of 2014). Finally, Section 55 sets out the procedures and standards by which the agency will conduct the auctions, referring to Section 88 in doing so (Renewable Energy Sources Act of 2014). Together, these three sections form the legal framework through which auctions are to be conducted. They are vague in wording, giving the federal government a wide deal of latitude in creating specific policy.

As envisioned under the law, the federal government followed up the legislation with an ordinance that specified how auctions were to be carried out. Auctions are to be held three times a year with capacity up for auction that can carry over from previous years (Lang & Lang, 2015). These two provisions put together reflected an expectation that there will be high participation in the auctions. A variety of entities can participate, from everyday people to partnerships and legal persons- read: corporations, etc., all of whom must put up security and ready documents detailing the design of their facility and zoning considerations (Lang & Lang, 2015). The setup of the auctions and

the criteria used for determining participation reflected a desire for economic efficiency.

Court and Other Decisions that Affect Implementation

There are two major decisions that affect how the 2014 REA is implemented. In SA.38632, the European Commission found the legislation compliant with the Environmental and Energy Aid Guidelines (EEAG); one requirement was that competitive bidding be phased in through 2015-2016 before becoming mandatory in 2017 (European Commission, Spokesperson's Service, 2014; Almunia, 2014, p. 61). In *Mitteldeutsche Braunkohlengesellschaft and Others v Commission* (2016), the Court of Justice of the European Union (CJEU) upheld the Commission's decision, presumably looking to precedent that parties cannot challenge an E.U. decision that requires member states to take "implementing measures" and is not directly addressed to them (Limante, 2015). The parties to the case -two coal companies and a utility- lost in court but even so the law still benefited them by cementing the status of investor-owned renewable energy (*Mitteldeutsche Braunkohlengesellschaft and Others v Commission*, 2016; "MIBRAG", 2015; Gründinger, 2015). SA.38632 and the *Mitteldeutsche* case reveal the crucial yet limited role of the E.U. in German energy law.

Pattern of Enforcement

The pattern of enforcement of the law and associated regulatory decisions shows a focus on economic efficiency, to the detriment of smaller producers, including community-owned ones. The Bundesnetzagentur enforced the requirements as laid out by the 2014 legislation in an even-handed manner- but the auction results did not concern them. "Even if the majority of

the bids were submitted by limited liability companies, it was still possible for some of the bids that were submitted by cooperatives and private persons to be accepted” (Bongartz, Eul, Reifenberg & Wulff, 2016). This sentence speaks volumes of not just the 2015 auctions, but of the auction process as a whole. For-profit companies are more likely to thrive under an auction system than community-owned entities because they are more able to meet the bidding requirements (Tews, 2018). Even though the pattern of enforcement was not selective, there was a disproportionate impact on community-owned operators.

Evaluation of Effectiveness

The 2014 REA can be described as effective or ineffective depending on what factors are used to judge its effectiveness. If only looking at economic efficiency, the law was a clear success: there were more bidders than available capacity for auctions conducted in 2015 and 2016 (Monitoring Report 2015, 2015; Monitoring Report 2016, 2016). This is not the only factor that should be used though. Even with auctions, “...the diversity of players involved in generating electricity from renewable energy sources is to be retained,” and so the Federal Network Agency took this as another objective (Renewable Energy Sources Act of 2014; Bongartz, Eul, Reifenberg & Wulff, 2016). This emphasis on diversity clearly meant preserving a mix of small and large operators, and community-owned actors would definitely fall under the former category.

Community-owned renewable energy has a robust presence in the industry, with no one organization as dominant. Cooperatives, limited liability companies and/or LLC/limited partnerships hybrids are the most common structures for community ownership, with cooperatives being used for solar projects and the other structures being used for wind projects (Borchert &

Wettengel, 2018; Holstenkamp & Kahla, 2016). Cooperatives are the most common form of community-ownership, and hew closest to the ideal envisioned by the environmental coalition (Borchert & Wettengel, 2018; Gründinger, 2015). With their relatively open structure and democratic management, they are well-positioned for citizen involvement. Citizen involvement is still true to a lesser extent of LLCs and LLC/LPs, which are more profit-minded (Borchert & Wettengel, 2018; Holstenkamp & Kahla, 2016). Thus, the fundamental divide in community-owned renewable energy is between cooperatives on the one hand and LLCs or LLC/LPs on the other.

All forms of community-owned renewable energy are vulnerable to legislative changes outside of their control, but some are more adaptable than others. There was a decline in the number of new cooperatives following the 2014 revision to the REA, as with the 2012 revision, and existing cooperatives slowly shrank or stabilized their membership and assets (Wierling et al., 2018). This development is tied to an uptick in new wind projects and a dip in new solar projects, but this also raises the question of what it means for a project to be community-owned (Borchert & Wettengel, 2018; Holstenkamp & Kahla, 2016). Did the dip in new solar projects precede the decline in new cooperatives, or vice versa? If the latter, then the 2014 REA may be causing an irreversible shift in the renewable energy sector in which community-owned organizations closely resemble more traditional market participants, at the expense of the values which make them unique.

Ideas for Reform

The 2014 law did not explicitly mention community-owned renewable energy, but that changed in the most recent revision—for better and worse. The 2017 REA expanded upon the 2014

legislation by providing a definition for “citizen’s energy”, and providing benefits to bidders that met this definition (Renewable Energy Sources Act of 2017). There were also provisions promoting transparency and disqualifying bidders that collude or provide false information (Renewable Energy Sources Act of 2017). Unfortunately, the initial auctions were overwhelmingly won by professional developers which used “citizen’s energy” companies as fronts, and the German parliament immediately suspended benefits (Tews, 2018). If the 2014 legislation did little to help community-owned renewable energy, the 2017 legislation overcompensated. Perks like submitting bids without a construction permit attracted unscrupulous actors (Tews, 2018). The rise of large developers in the renewable energy sector shows that future legislation must consider the interests of both large and small bidders.

Legislators assumed they knew what community-owned renewable energy needed- which has been the problem all along. When crafting the next revision, they ought to hear from these groups to learn what they actually need. The benefits granted in the 2017 legislation were no doubt well-intentioned and well-received, but opened the door to fraud and abuse. Policymakers can best improve the REA through strengthening the definition of “citizen’s energy” by requiring organizations to be certified as such, with groups like the Federal Renewable Energy Association as certifiers. The Bundesnetzagentur can then use pre-existing provisions in the much-revised law to punish malicious actors and assist genuine participants in the tendering/auctioning process.

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Should We Rely on AI in the Courtroom?

How the use of Algorithms as tools for Risk Assessment in Sentencing May Result in Disparate Impact

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How many times have you been out on a run, you have the perfect feel-good, high-energy song blaring through your earbuds and blood is coursing through your veins. You are elated and you are not sure if it is because you just aced your final exams or if you have a runners high. Then bam - Pandora plays Robin Schultz' Prayer in C and it kills your vibe. You start to slow your pace and wonder if this is what you really want to hear. The beat is fast enough, but the energy is not there. You decide the song is not fitting, you stop running, and finally after a few thumbs down, you find a new track. Or, you run out of skips, curse the algorithm behind Pandora's decision and create a whole new station. Sound familiar?

Surely by now, in 2018, you are aware that algorithms are all around us and are used to predict things for us all the time. From the song you might (or might not) want to hear next, to the movie you might want to watch or the ad on social media that you are most likely to respond to - algorithms are the mathematical instructions behind the predicted decision. However, you may not be aware that Pandora does not solely rely on algorithms to

predict the music you might like. Pandora also relies on the human element to categorize your music before algorithms even get ahold of it. “That is the magic bullet for us,” Westergren says of the company’s human element. “I can’t overstate it. It’s been the most important part of Pandora. It defines us in so many ways.” (Gray, 2012). Knowing this, the next time you are on a run and you do not like a song Pandora has ‘carefully curated for you’, you cannot be so quick to blame math. In actuality, Pandora’s panel of musical experts who agreed that the musical structures in *Prayer in C* are categorically similar to *This Girl*, (and who then fed that data into their algorithm), are who you really disagree with. Not the algorithm itself. So why does this matter, and how does this relate to our criminal justice system?

Predictive algorithms, like the one used for Pandora, have been introduced into our U.S. courtrooms. The aim of these algorithms is to reduce bias in sentencing and risk assessment in the criminal justice system, by removing the subjective human element of decision making, and replacing it with an actuarial and more objective one. Although the algorithms used for predicting recidivism have been found by Berkeley professor Jennifer Skeem to be race-neutral and free of predictive bias, this paper argues that when algorithms are used for predictive risk assessment in front-end sentencing, the results may have a disparate impact on poor and minority groups (Skeem, Lowenkamp, 2016). I accept the research in (Skeem et al., 2016) which finds that there is no predictive bias in risk assessment. The aim of this paper is not to prove whether risk assessment tools that use algorithms pass test bias. Instead, in this essay I discuss why the use of algorithms in risk assessment and sentencing may result in disparate impact that is not morally fair. In the words of UC Berkeley professor Jennifer Skeem:

Risk assessment instruments used at sentencing—and the

risk factors they subsume—must be empirically examined for both predictive bias (moderation by race) and disparate impact (association with race). Simply put, risk assessment must be both empirically valid and perceived as morally fair across groups. (Skeem et al., 2016)

Because most of the current literature and empirical research focuses on White and Black offenders, this paper will focus on those two groups. To provide context, this essay will first provide a very brief overview of the criminal justice system's use of forecasting to predict recidivism rates and how it has evolved to using algorithms. Next, this paper will explain how algorithms are being used in the criminal justice system and the controversy surrounding their use. Finally, by examining Northpointe Inc.'s product (the author of the algorithm most commonly used in the in the U.S. criminal justice system), this paper will explore the psychological underpinnings of why the use of algorithms in predicting recidivism rates for sentencing may result in disparate impact.

Overview of Forecasting Risk

For over a hundred years, our criminal justice system has been using forecasting to predict recidivism rates and parole success (Borden, 1928). These early factors (most likely rooted in scientific racism), included race, age at parole, and intelligence and were used for decades until race became an impermissible factor in predicting risk. Nevertheless, even with race no longer being a factor, the racial disparities in our social justice system still existed due to the human subjectivity of judges and officers who used the forecasting tools and sentencing guidelines. Opponents of risk assessment searched for a more fair alternative and the advent of modern computers and big data seemed promis-

ing. AI companies quickly capitalized on the opportunity to use machine learning and algorithms to solve the problem of human subjectivity and bias in the criminal justice system. In an effort to mitigate bias, the government started to use actuarial tools created by AI companies, and now many states use algorithms at some point in their process to decide the fates of those accused of a crime.

Today, most news and even scholarly articles note how far forecasting has come since its inception in the nineteenth century. However, a quick comparison between factors used for predicting risk in 1928 and 2018, show that the factors considered to predict risk in 1928 seem eerily similar to those used today. Among the most obvious are questions about age, education or intelligence, employment or SES, and housing. An excerpt from (Borden, 1928) and the questionnaire used by Northpointe Inc. for predicting risk (used in Wisconsin in this case), are shown below:

Appendix A is the table of original data showing the factors used, which are as follows:

1. Age at parole.
2. Nativity; N. (Native White), F. P. (Foreign Parents), F. B. (Foreign Born), C (Colored).
3. Mental Age at parole.
4. Diagnosis of intelligence; F. (Feeble-minded), I. (Inferior), A. (Average), S. (Superior).
5. Number of days lost in the institution for infractions of discipline.
6. Nature of offenses committed in the institution; P. (Perfect); M. (Minor); O. (Occasional serious), C. (Chronic).

Risk Assessment

PERSON			
Name:	Offender #:	DOB:	
[REDACTED]	[REDACTED]	[REDACTED]	
Gender:	Marital Status:	Agency:	
Male	Single	DAJ	
ASSESSMENT INFORMATION			
Case Identifier:	Scale Set:	Screeners:	Screening Date:
[REDACTED]	Wisconsin Core - Community Language	[REDACTED]	[REDACTED]

7. Industrial rating when paroled—a five step rating with 5 at the upper end.
8. Training in the institution; M. (Assigned to maintenance), T1, T2, T3 (Trade course in the order of their difficulty, the easiest being T1), P. (Production work without training or clerical work).
9. Literacy at admission by grades.
10. Literacy at parole by grades.
11. Parole occupation recommended by the psychologist; U. (Unskilled), F. (Farm or factory), H. (Trade helper), A. (Trade apprentice), J. (Journeyman), C. (Clerk).
12. Temperamental traits as judged by the psychologist; A. (Amenable), A. (Active), T. (Trustworthy), S. (Stable), U. (Uncooperative), P. (Passive), U. (Untrustworthy), U. (Unstable), D. (Defective delinquent).
13. Judgment as shown by parole plans; G. (Good), F. (Fair), P. (Poor), L. (Plans lacking).
14. Psychologists' prognosis of success; G. (Good), F. (Fair), P. (Poor), R. (Recidivism probable).
15. Months employed before this arrest.
16. Months employable before this arrest.
17. Number of previous arrests.
18. Times on probation.
19. Number of previous commitments.
20. Times in State Home for Boys.
21. Times in this reformatory.
22. Months from reception to parole.
23. Approximate pay per week while on parole. Maintenance is counted as \$10 per week.

(Borden, 1928)

Family Criminality

The next few questions are about the family or caretakers that mainly raised you when growing up.

31. Which of the following best describes who principally raised you?
 Both Natural Parents
 Natural Mother Only
 Natural Father Only
 Relative(s)
 Adoptive Parent(s)
 Foster Parent(s)
 Other arrangement
32. If you lived with both parents and they later separated, how old were you at the time?
 Less than 5 5 to 10 11 to 14 15 or older Does Not Apply
33. Was your father (or father figure who principally raised you) ever arrested, that you know of?
 No Yes
34. Was your mother (or mother figure who principally raised you) ever arrested, that you know of?
 No Yes

Education

Think of your school experiences when you were growing up.

71. Did you complete your high school diploma or GED?
 No Yes
72. What was your final grade completed in school?
9
73. What were your usual grades in high school?
 A B C D E/F Did Not Attend
74. Were you ever suspended or expelled from school?
 No Yes
75. Did you fail or repeat a grade level?
 No Yes
76. How often did you have conflicts with teachers at school?
 Never Sometimes Often
77. How many times did you skip classes while in school?
 Never Sometimes Often
78. How strongly do you agree or disagree with the following: I always behaved myself in school?
 Strongly Disagree Disagree Not Sure Agree Strongly Agree
79. How often did you get in fights while at school?
 Never Sometimes Often

Vocation (Work)

Please think of your past work experiences, job experiences, and financial situation.

80. Do you have a job?
 No Yes
81. Do you currently have a skill, trade or profession at which you usually find work?
 No Yes
82. Can you verify your employer or school (if attending)?
 No Yes
83. How much have you worked or been enrolled in school in the last 12 months?
 12 Months Full-time 12 Months Part-time 6+ Months Full-time 0 to 6 Months PT/FT
84. Have you ever been fired from a job?
 No Yes
85. About how many times have you been fired from a job?
0

(Northpointe Inc.)

The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), a proprietary algorithm published by Northpointe Inc., uses the above questionnaire completed by the defendant as part of their input for their algorithm (Dieterich, Mendoza, Brennan, 2016). Similar to how Pandora uses human-categorized music for their algorithmic inputs, AI companies like Northpointe Inc. input human-categorized information into the algorithms that the criminal justice system uses. Northpointe, the company that is most commonly utilized for risk assessment in the U.S., uses a “black box” proprietary algorithm to predict recidivism rates. As made salient in *State v. Loomis*, this means that Northpointe Inc. has not disclosed its source code, but the output of its algorithm is made known in the form of a risk score which may be used by judges in conjunction with sentencing guidelines. In the case of *State v. Loomis*, the defendant argued in the Wisconsin Supreme Court that the use of the algorithm in his sentencing was unconstitutional because he did not know its content and how it predicted his recidivism rate (*State v. Loomis*, 2016). Drawing on an earlier supreme court decision, the court upheld that the algorithm did not violate Loomis’ due process to be sentenced since neither the defendant, nor the courts knew the source code (*State v. Loomis*, 2016). Because Loomis’ high risk score was allowed to be taken into account by the judge, the defendant was denied parole and given a six-year sentence.

The defendant in *State v. Loomis* essentially lost his case because he was trying to prove disparate treatment which would have required him to prove that Northpointe Inc. intended to discriminate with its racist algorithm. Indeed, a study conducted by Propublica, and others, have shown that COMPAS is no more accurate at predicting recidivism than the average layperson and that it predicts whites as having a lower recidivism risk

than they actually do and blacks as having a higher risk than they actually do (Angwin, Larson, Mattu, & Kirchner, 2016). However, Northpointe Inc. and peer reviews of the Propublica study have dismissed the empirical research conducted by (Angwin et al., 2016) on the basis it was biased and methodologically flawed. A study done by UC Berkeley professor Jennifer Skeem has also shown that risk assessments such as COMPAS pass test bias (Skeem et al., 2016). It is highly unlikely that a company would create a racist algorithm that intends to discriminate against Blacks and other minority groups. Instead of focusing on intent and demanding to see the source code (which would be nearly impossible to prove in court anyway) the defendant in *State v. Loomis* should have focused on the input and how the factors in his questionnaire were weighted to try to prove disparate impact (which still would have been difficult since the input is individualized), (Israni, 2017). Still, for example, if housing and zip codes were the most heavily weighted input from every single COMPAS questionnaire, this constitutionally permissible proxy for race may explain why Blacks are given higher risk assessments and the defendant may have had a case for disparate impact (Israni, 2017).

As mentioned above, the questionnaire used by COMPAS (see *supra* questionnaire) excludes race, but it does ask questions that could serve as a proxy for race - or at least factors which may be determined by implicit biases. These factors, as mentioned above, include the defendant's answers to questions about housing situations, parental marital status, whether one has a telephone in the house, whether one is employed, works at or above minimum wage, or has felt sad, as well as questions about prior criminal record. (Skeem et al., 2016) argues that criminal record is not a proxy for race and that the other factors merely overlap with race and therefore may still be used to offer a race-neutral risk assessment that fairly results in higher risk scores for Blacks.

Nevertheless, proxies or not, and although these factors may pass test bias, the history, the cultural meaning, and the implicit biases underpinning these factors do not pass as being morally fair across groups; and the implicit bias underpinning these factors used in the COMPAS questionnaire can be explained by empirical research in social psychology

Employment

Either barred from working certain jobs, forced into free labor, slavery, or segregation, racial minorities in the U.S. have historically been discriminated against in the employment sector. Although today it is unconstitutional to discriminate on the basis of race, the lasting effects of overt discrimination in the workplace are still apparent and come out through implicit biases. Not only is title VII jurisprudence inadequate to address discrimination that stems from implicit biases (Krieger,1995), studies have shown that résumé whitening results in more call backs (Kang, Decelles, Tilcsik, & Jun, 2016). Using interviews, a laboratory experiment, and a résumé audit study, (Kang et al., 2016) examined the attempts made by racial minorities to conceal their race in job applications in a practice known as “résumé whitening.” In their interviews with college students, (Kang et al., 2016) found that some minority students looking for a job felt that résumé whitening (i.e. “whitening” a last name, or omitting a revealing prestigious award given only to minorities) was imperative to getting a call back. Using empirical research, (Kang et al., 2016) conducted a lab study which showed that when minority job seekers felt comfortable about revealing their race due to the presence of EEO statements - and actually did so, they were discriminated against. Thus, (Kang et al., 2016) revealed a paradox, in which minorities who apply to diversity seeking companies are actually at a disadvantage and may be discrimi-

nated against despite the promise of a pro-diversity workplace.

Housing

The effects of implicit bias are also present in property law and housing, and the history of housing is just as grim for minority groups. Segregation and substandard housing for Blacks have been some of the lasting impacts that redlining Black neighborhoods have had. Social psychologists Michelle Anderson and Victoria Plaut have examined race and housing through the lens of social psychology, and have revealed implicit biases which have allowed these lasting effects of segregation and housing discrimination to prevail. One of the studies Anderson and Plaut notes, was a study conducted by Sampson and Raudenbusch which examined the raced associations of disorder and crime in Chicago neighborhoods. (Sampson and Raudenbusch., 2012; Anderson & Plaut, 2012) sent out a survey that asked how much respondents felt “physical disorder” (graffiti and trash) and “social disorder” (people drinking or fighting in public) was a problem in their neighborhood. These researchers then compared the respondents’ answers to the racial demographics of the neighborhoods and controlled for actual systemic disorder. They found that the racial and ethnic compositions neighborhoods “informed both Blacks and Whites perceptions of systemic disorder beyond the actual, systemic observation of the disorder” (Sampson et al., 1999). Furthermore, Anderson and Plaut cite that research in social psychology shows that dehumanization is linked with race and this can lead to moral exclusion of Black people and the placement of LULUS (locally unwanted land use) such chemical plants next to Black neighborhoods (Anderson et al, 2012).

Education

Studies on implicit bias in our education system have found similar results as the studies conducted on implicit bias in housing and education. Social psychologists Okonofua and Eberhardt conducted a study to find out whether racial disparities in school discipline, which contribute to school failure and incarceration for Black students, were due to implicit bias. Okonofua and Eberhardt had teachers read real students' infractions and manipulated the race by changing the names to be stereotypically White or Black. They then asked the teachers to rate how troubling they would find each student to be after a first infraction and then a second. Their results showed that there was no statistical difference in how teachers rated Black vs. White students' first infractions (Okonofua & Eberhardt, 2015). For the second infraction, however, the teachers rated Black students' infractions as being much more troubling, and the teachers also recommended suspension more often for Black students after their second infraction (Okonofua & Eberhardt, 2015). This study makes salient the fact that implicit biases held by teachers are driving the racial disparities in the U.S. education system. This puts Black students directly into the school to prison pipeline which leads to more Blacks being caught up in the juvenile system or, more likely, the adult prison system.

All of the factors listed above are affected by implicit bias which disproportionately affects minorities and Blacks. And all of the factors described above are questions on the COMPAS questionnaire used to predict a defendant's risk. The answers to these questions are used as the input that is fed to the COMPAS algorithm and the algorithm weighs these factors in an unknown way to predict a person's risk. When this risk assessment is used to sentence defendants on the front end, Black people are convicted more often and they typically face harsher sentences than

their White counterparts. Additionally, the blaming factors used to predict risk, are also the same factors that should mitigate risk. A child growing up homeless or in foster care can accurately be seen as a contributing risk factor, but at the same time a mitigating factor in blame. Just as Pandora's intelligent algorithm cannot predict what music I really want to hear based on the nuances of my mood, this the algorithm cannot discern. It lacks the wisdom. These racial groups would surely agree that this is not morally fair. Therefore, using algorithms and risk assessment in sentencing does not pass the test of moral fairness and results in disparate impact.

Although using algorithms in the courtroom can have devastating effects when used for blaming, they should not be outlawed completely. If the courts could instead focus on using risk assessments as a mitigating factor and rehabilitative suggestion, algorithms may reduce the exceptionally high amount of minorities caught up in our criminal justice and prison systems. Hopefully the courts can conduct a real assessment of how algorithms affect our criminal justice system soon.

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The Law and Economics of Religious Exemptions for Adoption Agencies in Cases of Same-Sex Fostering and Adoption

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Introduction: Clashes between Religious Freedom and LGBTQ Rights

Since the nationwide legalization of same-sex marriage, states have increasingly passed laws that allow private businesses to refuse to provide services that would violate their religious values. This paper compares religious exemptions in the marketplace of wedding cakes at issue in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, and the marketplace of foster and adoptive children. While neoclassical law and economics scholars assert that the free market will mitigate widespread discrimination, this analysis examines in-depth the concerns of behavioral economists that human biases and societal prejudices lead to the exclusion of prospective LGBTQ parents from the market without anti-discrimination protections.

In July 2012, David Mullins and Charlie Craig visited *Masterpiece Cakeshop* to request a wedding cake. The bakery owner, Jack C. Phillips, declined to design and sell the wedding cake to the couple on the basis that same-sex marriage is inconsistent with his religious beliefs as a Catholic, but that he could sell them

other baked goods. The Colorado Civil Rights Commission found that Masterpiece Cakeshop had violated the Colorado Anti-Discrimination Act (CADA) by refusing to provide public accommodations to Mullins and Craig on the basis of their sexual orientation, and ordered the bakery to sell wedding cakes to same-sex couples. The case reached the Supreme Court of the United States, which handed down its decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in June 2018. The Supreme Court ruled in favor of Masterpiece Cakeshop, arguing that the Colorado Civil Rights Commission's orders violated Phillips's freedom of religious expression (*Masterpiece Cakeshop v. Colorado*).

Masterpiece Cakeshop has ignited debate amongst law and economics (L&E) scholars in regards to this intensifying conflict between LGBT anti-discrimination laws and religious freedom. L&E scholars Sean Gates, Richard Epstein, and David Shaneyfelt submitted an amicus curiae brief in support of the petitioners Masterpiece Cakeshop, arguing that the free market will both mitigate discrimination and maximize efficiency and social welfare regardless of the presence of anti-discrimination laws:

In the absence of monopoly, competitive market forces have produced, and will continue to produce providers willing and eager to provide products and services for same-sex weddings. Indeed, the ordinary give-and-take of the market will lead to better provider-consumer matches, lower prices, and greater market coverage than any coercion regime [state anti-discrimination laws] (Brief for the Law & Economics Scholars).

The main goal of LGBT anti-discrimination laws is to ensure access to goods and services to LGBTQ individuals. This objective can be achieved without state coercion of businesses with sincere religious objections, especially small family-run businesses that are a slim portion of the entire market, because consumers can turn to alternative providers in the market that

are LGBT-friendly. The free market diminishes incentives to discriminate by allowing consumers, LGBT rights organizations, and other businesses to freely protest and pressure businesses that do not provide services to same-sex marriage ceremonies, without the need for state intervention. Only businesses with sincerely-held religious beliefs will choose to discriminate, preventing widespread discrimination.

In fact, these L&E scholars argue that when merchants are coerced by the state into providing services that conflict with their strongly-held religious beliefs, this diminishes social welfare distorting the market in two ways. By forcing businesses such as Masterpiece Cakeshop to concede to the demands of state anti-discrimination laws, these reluctant providers have less incentive to provide their best efforts, resulting in a “poor match of provider skill with consumer preferences” (Brief for the Law & Economics Scholars). Alternatively, businesses who do not receive religious exemptions from anti-discrimination laws could choose to leave the market, reducing the number and variety of providers and therefore lowering the amount of choices to the consumer.

However, a group of behavioral economists have argued against the views of these L&E scholars, and wrote an amicus curiae brief supporting the respondents, Craig and Mullins. In this brief, Adam Hofmann discusses flaws in the neoclassical assumptions of L&E scholars: namely, the assumption that all economic actors are perfectly rational and seek to maximize their self-interest. Behavioral economists have argued that because humans are not perfectly rational, “the market cannot always be counted on to self-correct and produce a welfare-maximizing outcome” - in this case, eliminating discrimination (Brief for the Scholars of Behavioral Science). Hofmann draws a comparison with the Jim Crow South, where L&E scholars struggle to explain why their prediction of a self-correcting market failed to

prevent widespread racial discrimination. L&E scholars argue that the Jim Crow South constituted a monopoly of discriminatory businesses, thereby preventing the market from functioning properly. But Hoffman contends that such a monopoly of pervasive homophobia today is the reason why LGBT consumers often rely on lists of gay-friendly businesses (similar to how African-American consumers in the Jim Crow South relied on the “Green Book” of Black-friendly businesses until the passage of the Civil Rights Act of 1964) and why it is necessary for the state to regulate the economic consequences of discrimination through public accommodations laws.

In this paper, I will apply this controversy within law and economics over the wedding cake market to another arena dominated by discussions of religious freedom and LGBTQ rights: the marketplace of fostering and adoption. Since the nationwide legalization of same-sex marriage with *Obergefell v. Hodges* (2015), several states have passed laws that allow private foster care and adoption agencies to decline placing children in homes that would “violate the agency’s religious or moral convictions or policies” (Senate Bill 1140). LGBTQ rights organizations have argued against these laws, claiming that the main intent of these laws is to prevent foster placements and adoptions by LGBTQ individuals and couples. However, private religious agencies and the states that have passed these laws argue a similar point as the L&E scholars in the amicus curiae for *Masterpiece Cakeshop*: that if agencies are required to place children in LGBTQ households, these agencies would prefer to leave the market and many more children would be left without options for foster and adoptive homes. I will first discuss the market for adoptive and foster children in the United States, and the increasing privatization of these markets. I will then focus on the history of limitations on LGBTQ fostering and adoption, and the new challenges to prospective LGBTQ parents with these statewide religious exemp-

tions for private agencies.

Finally, I will summarize the main L&E arguments on both sides of the conflict and conclude that the economic and social consequences of restricting the marketplace of options for prospective LGBTQ parents are too high to justify the implementation of these recent religious freedom laws.

The Marketplace of Fostering and Adoption

The decision to become a parent is already in part economic; when a family decides to foster or adopt, this decision becomes arguably even more economic with the inclusion of explicit markets. Adoption can be framed as a “kinship marketplace where prospective adoptive parents often have a set of minimum requirements regarding the race, age, and health of their future child” (Raleigh, 2016). In *From Contract to Covenant*, Margaret Brinig discusses the factors impacting the supply and demand of foster and adoptive children. The demand for children has risen dramatically since the mid-1970’s because of declining fertility, but the supply of available children has decreased. These factors that impact supply and demand also shape adoption patterns, including the different costs and waiting times associated with various types of fostering or adoption, the demographics of children available for placement, and the choices of prospective parents (Brinig, 46-47). There are generally three different routes of adopting children: foster care, private domestic, and international adoption; for the purpose of this paper, I will exclude international adoption.

First, I will discuss the factors impacting foster care and adoption from the state’s child welfare system. About three million children per year are referred to the state’s child welfare system to investigate cases of child abuse and neglect, and if deemed necessary, are removed from their biological family and placed into

foster care. The preferred outcome for about half of the 400,000 children in foster care is reunification with the biological family (Raleigh, 2016). It has become increasingly difficult to provide enough evidence of permanent parental unfitness to terminate parental rights, so more children either return to their biological family or languish in foster care for years, which has decreased the supply of children available for adoption. In fact, for only about a quarter of children in foster care, the end goal is adoption (Raleigh, 2016).⁹ Foster care itself is seen as a temporary, “second best” solution that is not expected to build a permanent relationship between foster parent and child and is subject to higher state regulation: this expectation was actually used by the state of Florida in Lofton to justify why the state allowed LGBTQ individuals to foster but not to permanently adopt. The supply of children in foster care exceeds the demand of prospective parents seeking to adopt these children, because of their history of neglect, abuse, and behavioral issues; children in foster care often wait years for a permanent home (Raleigh, 2016). To incentivize greater demand for foster adoptions, the state provides monthly adoption subsidies to offset costs; out-of-pocket fees can therefore vary between \$0 to \$2500 (Lynch, 7).

Now, I will turn to private domestic adoption, or the private adoption of children (mostly infants) who were not part of the foster system any time prior to their adoption. Important factors that have decreased the supply of children for the adoption market include the greater availability of abortion and societal acceptance of unwed or single motherhood (Brinig, 47). Prospective parents seek out the services of adoption agencies to assist them with the legal process of becoming licensed adoptive parents, help search for potential birthmothers, and provide post-adoption counseling (Raleigh, 2016). Agency fees can therefore vary from \$5000 to \$40,000 for private domestic adoptions (Lynch, 7). As a result of these high costs, generally it is wealthier pro-

spective parents who decide to pursue private domestic adoption rather than foster care adoptions. It is important to discuss the increasing privatization of foster care and adoption markets. States privatize adoption and foster care by using federal, state, and local funds to contract out services, such as locating and monitoring parents, to private agencies, in order to boost efficiency (Kirk). In Kansas, for example, private agencies provide services for half of the state's foster children (Lynch, 7). The adoption market in many states is dominated by private agencies directly affiliated with religious groups, especially the Catholic Church, as was the case in Massachusetts until 2006, which I will discuss in this paper.

How do these factors impact the market of children for prospective LGBTQ parents? Overall, a 2007 report estimated that 65,000 adopted children and 14,100 foster children are living with a lesbian or gay parent (Brodzinsky, 2011). Past studies have noted that gay and lesbian couples are often more willing - or sometimes only able - to adopt children that are not in high demand by heterosexual couples, including older children, sibling groups, and children with physical and mental health needs from the foster care system.¹⁸ In the next section of this paper, I will discuss the history of discrimination in LGBTQ fostering and adoption.

History of Same-Sex Fostering and Adoption in the United States

Lesbian, gay, bisexual, and transgender individuals and couples have been raising children long before these families were recognized under the law. Prior to the 1980s, however, much of the literature on LGBTQ families focused on LGBTQ individuals who had come out after having children in a heterosexual union. The 1980s signalled the beginning of the “gayby boom,”

as an increasing number of openly LGBTQ individuals had children outside of the context of prior heterosexual unions, through planned adoption, surrogacy, and assisted reproductive technologies (ART) (Lynch, 5-7). For the purpose of this paper, I will be focusing on LGBTQ individuals and couples who are seeking to jointly foster or adopt children in the United States, thereby excluding those who go the route of second parent adoption (most often in the case of becoming a step-parent with the same legal rights as the current legal parent), international adoption, and artificial insemination.

In the past, several states expressly prohibited gays from adopting. Several justifications have been used historically to deny adoption and fostering to LGBTQ individuals: first, on the grounds that gays are inherently immoral and criminal, especially in states with sodomy statutes. For example, the Missouri Department of Social Services denied a lesbian woman a foster care license because she was not deemed to be “a person of reputable character,” though this argument was overturned by the Circuit Court (*Johnston v. Missouri*). Second, courts would sometimes rely on inaccurate stereotypes about LGBTQ individuals, such as the belief that gay men are more likely to prey on young children and spread AIDS, in determinations of the best interests of the child. The third major justification for excluding LGBTQ individuals from adoption was used by the state of Florida used to defend their 1977 legislative ban: the argument that gay parents are not as suitable to be “role models” for children. In *Lofton v. Secretary of the Department of Children and Social Services* (2004), the state of Florida successfully argued that the adoption ban is “rationally related to Florida’s interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers,” asserting that dual-gender parenting provide greater stability through marriage, and provide both male and female role models for optimal childhood

development and socialization (*Lofton v. Secretary of the Department of Children*). Florida's ban was eventually overturned in the case *In re: Matter of Adoption of X.X.G.* (2010), where the court ruled against the "role model" argument in determining the best interests of the child (*In re: Matter of Adoption of X.X.G. and N.R.G.*).

States and agencies utilized other types of legal prohibitions and policies to limit LGBTQ fostering and adoption. States without legal same-sex marriage sought to limit the foster and adoptive markets only to married couples, excluding both same-sex and opposite-sex cohabiting couples. In *Arkansas Department of Human Services v. Sheila Cole* (2011), the Arkansas Supreme Court weakened a law that forbade cohabiting couples from adopting or serving as foster parents, on the basis of privacy rights (*Arkansas Department of Human Services*). Aside from statutory limitations, biases amongst judges who preside over hearings to determine the best interests of the child can make adoption difficult, especially for transgender individuals.

Recent legal, political, social, and cultural advancements for the LGBTQ community have lessened barriers for adoption and fostering. According to the 2010 census, of the approximately 594,000 same-sex partner households in the US, 19.3% (115,000) reported having children. The number of gay and lesbian households with children continues to increase, from 5% of male-male partnerships and 22% of female-female partnerships in 2000 to 13.9% and 26.5% respectively in 2008 (Mezey, 2015). The increasing visibility of LGBTQ families has helped normalize these households in American culture. Whereas only 28% of Americans were in support of adoption by same-sex couples in 1994, this approval number had risen to 63% by 2014 (Lynch, 7). The nationwide legalization of same-sex marriage with *Obergefell v. Hodges* (2015) allowed same-sex couples, who had previously been barred from adopting because of their cohabiting status,

to jointly adopt as a married couple. In 2016, Mississippi's law prohibiting adoption for same-sex couples was declared unconstitutional, making Mississippi the final state to grant adoption rights to same-sex couples.

Nonetheless, social, cultural, and legal barriers still remain for LGBTQ individuals seeking to foster or adopt. Many LGBTQ individuals or couples seeking to adopt infants through private domestic adoption face a decreased likelihood of being chosen by birth-mothers (Raleigh, 2016). From a legal standpoint, Obergefell provided the full scope of rights to married same-sex couples, raising questions as to the rights of unmarried same-sex couples; Utah, for example, prohibits unmarried couples from fostering. This paper focuses on the L&E implications of state laws that allow private adoption and foster care agencies to deny placing children in households, specifically those headed by LGBTQ individuals, that violate their religious beliefs.

Religious Freedom Objections to Same-Sex Fostering and Adoption

Many private agencies, especially those affiliated with the Catholic Church, have had policies of denying prospective LGBTQ parents for decades. A survey of 30 public and 277 private adoption agencies conducted by the Donaldson Institute found that 40% of agencies were not willing to accept applications for gay and lesbian applicants (Brodzinsky, 2011). However, these policies have recently under conflict with the rise of statewide anti-discrimination laws protecting sexual orientation and gender identity in the provision of adoption and foster care services. According to the Movement Advancement Project, 10 states have laws or policies that permit state-licensed agencies to refuse to place children in households that conflict with the agency's religious beliefs: North Dakota, South Dakota, Kansas,

Oklahoma, Texas, Mississippi, Alabama, Virginia, Michigan, and South Carolina (Foster and Adoption Laws).

Neoclassical L&E scholars such as those in the *amicus curiae* brief for Masterpiece Cakeshop argue that these religious exemptions are necessary to prevent provider/consumer mismatch and the exit of private adoption agencies from the market. One major example of this concern occurred after Massachusetts became the first state in the nation to legalize same-sex marriage in 2004. In response to the state's anti-discrimination protections for prospective LGBTQ parents, the Catholic Charities of the Boston Archdiocese chose to stop providing foster care and adoption services to avoid having to place children in LGBTQ households (Catholic Charities Pulls out of Adoptions). Catholic Charities had been contracted by the Massachusetts Department of Social Services for 20 years and had overseen over one-third of all private adoptions in the Boston area, even with over two dozen other licensed adoption agencies tasked with domestic adoption in the same area (Rutledge, 2008).³⁰ Colleen Rutledge argues that when state power to enforce LGBTQ anti-discrimination laws conflicts with religious organizations' free exercise, "the power of the state will change depending on the zone in which the religious exemption is claimed" - and that "the state's regulatory power is strongest in the zone of commercial affairs (Rutledge, 2008)." But while adoption is a commercial state service, Rutledge contends that state interference must be more sensitive in its oversight than in other zones of commercial regulation because Catholic Charities' adoption services are part of the organization's religious expression as well.

Since *Obergefell*, other private agencies have vowed to either end adoption and foster care services rather than be coerced by the state into placing children in same-sex households. In Texas, where faith-based operations make up 25% of foster care and adoption agencies, the legislature passed a law protecting the

right of these Christian agencies to refuse services to same-sex couples after many of these agencies stopped taking any cases from the state's foster care system (Aaon, 2017). Neoclassical L&E scholars would argue that the free market eliminates or at least diminishes discrimination because prospective LGBTQ parents as well as supporters of the LGBTQ community can choose to protest agencies that deny services to LGBTQ households, and seek services at gay friendly agencies instead. Bergstrom-Lynch's survey of LGBTQ adoptive parents details how prospective parents rely on formal and informal methods of searching for agencies that will allow them to be openly LGBTQ in the adoption process, including asking LGBTQ friends who have successfully adopted for gay friendly agencies (Lynch, 2016). Prospective LGBTQ parents will still be able to access these services even with religious exemptions because free market forces will ensure that only agencies with very sincere religious objections to same-sex fostering or adoption will utilize exemptions, lest they face protests and loss of consumers.

Behavioral economics scholars, on the other hand, emphasize the economic as well as social consequences of allowing discrimination against prospective LGBTQ parents. Firstly, these scholars emphasize how significant prospective LGBTQ parents are in the market of foster care and adoption. By refusing to provide services to LGBTQ households, private agencies narrow the pool of prospective parents needed for the more than 100,000 children eligible for adoption (Whelan, 2017). The demand for foster care and adoption is generally higher amongst LGBTQ couples relative to heterosexual couples: for example, 5.7% of lesbians try to adopt versus 3.3% of heterosexual women (Mezey, 2015). Same-sex couples are six times more likely to be raising foster children than heterosexual couples, and four times more likely than heterosexual couples to be raising an adopted child (Mezey, 2015). LGBTQ individuals and couples are also more likely to

adopt “hard to place children,” often from the foster care system: over 50% of lesbian and gay parents adopted foster children, who generally face lower demand because of their age, potential behavioral issues, history of abuse and neglect, and disabilities (Mezey, 2015). The Donaldson Adoption Institute analyzed data from 300 agencies to conclude that over half of children adopted by gay and lesbian couples had special needs (Mezey, 2015). Allowing private agencies to discriminate against same-sex households would disincentivize LGBTQ individuals and couples from seeking out foster care and adoption. In addition, since many prospective LGBTQ parents seek children through foster care, restricting access to this market would increase the time foster children spend waiting for a permanent home and increase the amount of state funds allocated to monitoring foster children.

Behavioral economics scholars also criticize the argument that the free market will eliminate or diminish discrimination and other negative externalities. Sepper analyzes how courts in the United States have increasingly relied on the market as a baseline for granting religious exemptions to corporations: so long as consumers are able to access other goods and services in the free market, “moralized” corporations are allowed to discriminate and the government’s interest in non-discrimination is overshadowed (Sepper, 2015). But anti-discrimination laws serve an economic purpose in reducing “search costs” for goods and services for groups who face widespread exclusion from the market, such as how the Civil Rights Act of 1964 lowered the search costs of African-Americans seeking Black-friendly businesses in the Jim Crow South. Many LGBTQ couples face higher costs searching for gay-friendly agencies in states that provide exemptions to religious private agencies, particularly in states such as Texas where these agencies constitute a relatively high percentage of the market. These higher search costs can disincentivize LGBTQ couples from seeking out adoption as an option for

obtaining children.

Conclusion

With the success of same-sex marriage, the movement for LGBTQ rights now increasingly confronts laws that seek to protect religious freedom by allowing for discrimination against LGBTQ individuals. Masterpiece Cakeshop led to a debate amongst law and economics scholars concerning the need for anti-discrimination laws in a free market that ideally eliminates or diminishes discrimination. While both are marketplaces, I argue that these L&E arguments regarding the market for wedding cakes cannot be easily applied to the market for foster and adoptive children without also considering the human biases and societal prejudices that can create monopolies of discrimination within “free” markets. It is important to consider the contributions of behavioral economists, who argue that anti-discrimination laws are still necessary to prevent the exclusion of disfavored groups from the market.

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Physical Attractiveness in the Courts
The “What is Beautiful is Good” Theory as Bias in Juries

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Physical attractiveness has always been seen as a good thing to the general public. However, the dangerous assumptions about its metrics and meanings translate to the courts and compromise the integrity of a fair trial. By seen as “unattractive,” a person fares far worse in court, receiving longer sentences, less rewards as a plaintiff or verdicts with shorter sentences for their attackers. By not protecting this bias under the law, people have struggled through the very means that are to provide them justice. It is important to recognize the avenues under which this bias has been perpetrated and can be addressed.

The courts are meant to serve as the ultimate, objective judgement before the law. They are the opportunity for disputes to be settled in an unbiased manner, by your peers, with laws that are meant to provide justice. However, bias easily impacts court decisions, rule-making, and most importantly, the lives of the people who come before it. The U.S. legal system has made efforts to remedy unfair laws or systems by passing new laws and protections throughout the government. Attempts to tackle racial biases are seen in laws like the 13th and 14th amendments and the Batson Challenge. Gender and sexual orientation biases have been addressed by the 19th amendment and in cases like

Obergefell v Hodges. Physical attractiveness is a bias that affects court decisions on guilt, punishment, and damages, too. The “what is beautiful is good theory” manifests itself as a form of appearance bias in the courtroom that as of now lacks any current sufficient recognition or protection within the law.

It is often being presumed that “pretty” people are granted amenities in life that others are not. They are associated with being more friendly, outgoing, and successful. These perceptions of beauty and their impacts are both heavily influenced by mediums such as the media as well as evolutionary tendencies. Such perceptions often lead back to the “what is beautiful is good” theory. The “what is beautiful is good” theory stems from the idea that “beautiful” people, a term that is partially rooted in static terms of physical attractiveness as well as cultural norms, are more commonly seen as inherently good natured, intelligent, innocent, and successful individuals (Ingriselli 2015). People regularly see their attractive peers as more intelligent and healthier. In fact, when controlling for physical attractiveness, people are better at identifying true features such as health from the face alone. This suggests that physical attractiveness skews the accurate perception of other traits in physically attractive individuals, being potentially problematic in the courtroom when juries often base those qualities on inherent biases that may not reflect who those people actually are, similar to many stereotypes (Talamas, Mavor, Perrett, 2016). Some of this bias stems from the way humans have evolved, but also from the perpetuation of certain “beauty” norms in society. Research shows that the “what is beautiful is good theory” is perpetuated in Disney movies, where the “attractiveness of the character was a predictor of the character’s portrayal,” reaching a wide audience (Bazzini, Curtin, Joslin, Regan, Martz, 2010).

Additional research shows that this “halo effect” (where one positive trait influences the perception of other traits) is seen in

situations where attractive elementary schoolers got into altercations with other students (Halo Effect, 2009) (Dion, 1972). The elementary school study revealed that teachers viewed physical aggression from more attractive young students as “less naughty” than in other altercations (Dion 1972). Again, the rewards of the halo effect manifest at an early age, becoming deeply embedded in not only the people that exhibit this bias but also those who benefit from it. When attractive defendants are deemed automatically as more intelligent, kind and most importantly, innocent, and their less attractive counterparts as less intelligent, healthy, and successful, than it can compromise the integrity of the justice system as well as their sixth amendment right to a fair trial and fourteenth amendment right to equal protection under the law (Madison, 1991). Biases are perpetuated in all corners of society and through many mediums. It is vital to recognize how and where these biases begin when considering how to change the perceptions and stereotypes around them. Although seemingly harmless in Disney movies or elementary school students, these biases translate over to very serious decision-making. It is important to recognize the legitimate research that highlights these very problematic stereotypes that can then manifest in the courtroom and within the jury. The amount of research that highlights this problem is beginning to be comparable to other well known inherent biases that are perpetuated and thus requires the same amount of attention in addressing it.

Although we like to think that the courtroom provides us the objective and ultimate path to justice, research proves otherwise, showing that physical attractiveness is a significant point of discrimination regarding guilt, legitimacy, and negligence. It is expected that the biases of society are put aside in jury deliberation and verdicts. However, much research reflects an alternative story, that rather implicit biases take a big role at the table of jury deliberation, including physical attractiveness. In

a study done by the York and Bath Spa University team, jurors were less likely to find attractive defendants guilty. Additionally, this study found that race and unattractiveness coupled together could combine to even more discriminatory sentencing, as shown with “unattractive” Black defendants (“Attractiveness “affects” jurors”, 2007). Not only were “unattractive” defendants found more likely to receive guilty verdicts, they also received harsher sentences, with longer terms (Kutys, 2013). This “beauty bias” aggravates the original race bias, becoming even more problematic. It is already difficult to ensure the jury is bias-free regarding race and sex, but appearance discrimination exacerbates all of these biases in the courtroom. In a study done by Justin J. Gunnell and Stephen J. Ceci at Cornell University, they found that unattractive defendants received 22 extra months in prison compared to attractive defendants (Gunnell, Ceci, 2010). They also found that jurors that based their reasoning through experiential processing, using emotion and personal experience, would show this bias to a higher degree, awarding more monetary compensation to attractive plaintiffs (Gunnell et al. 2010). Experiential processing became more prominent in vague cases, where they would use their emotions to decide verdicts, in which inherent biases are likely to emerge. This type of reasoning often allows a pathway of biases to be reflected in verdict and jury deliberation. By using experiential processing, jury members can use their inherent bias to allow guilty people to go free, and/or innocent defendants to be sentenced to serious prison terms. In one study regarding rape, when women were deemed “unattractive,” men were less likely to receive guilty verdicts and when men who were physically unattractive were paired with women who were more physically “attractive”, they were seen as more likely to receive guilty verdicts for the rape (Jacobson, Popovich, 1983). These biases affect not only the rates of guilty to non-guilty verdicts but also the perception of already contro-

versial report rates for serious crimes such as rape. In negligence cases, more attractive defendants received almost twice as much in compensation compared to their counterparts. This shows the differing expectations for attractive defendants, their presumed innocence, and need for assistance (Kulka & Kessler, 1978). Although certain protections are in place for especially problematic biases such as sex and race, there are still many avenues for biases to surface through and affect the impartiality of the justice system. These inherent biases affect both the favoring of physically attractive plaintiffs and defendants, but also the harsher perception of physically unattractive plaintiffs and defendants, causing a problem that extends to both extremes.

Appearance-based bias is not addressed or protected against in the trial process at any point, and surmising from countless research on the presence of this bias, this could compromise the defendant's sixth amendment right to an impartial jury and fourteenth amendment right to equal protection under the law (Madison, 1991). Implementing or considering legal protections towards beauty standards and physical attractiveness becomes extremely difficult when they are not covered as a protected class in ways other features such as race and sex at least partially are. The Civil Rights Act of 1964 prevents discrimination in employment based on sex and race and the Civil Rights Act of 1968 prevents discrimination in housing based on sex and race ("Fair Housing Act," 1968; "Civil Rights Act," 1964). However, there are no federal laws at this time that prevent discrimination based on physical appearance. To combat biases at the beginning of the court process, "voir dire" is meant to screen potential jurors as a safeguard to protecting the impartiality of a jury. However, this process has been problematic and by some considered even ineffective in recognizing biases such as race (Lee, n.d.). Voir dire can screen for explicit biases; however, often fails to capture the implicit biases of potential jurors (Exum, 1992). In a study done

by Sommers and Ellsworth, race-relevant questions reduced the rate at which Black defendants were sentenced (Sommers, Ellsworth, 2003). This suggests that voir dire does not use bias-relevant questions at this time, preventing proper screening of implicit biases. Additionally, voir dire cannot capture appearance bias if attorneys are not attempting to screen for it in the first place. Not placing appearance-based discrimination under some type of protection possibly means attorneys are not looking for this bias and thus do not ask any questions screening for it.

By bringing awareness to implicit biases, at least jurors can make more conscious and weighed decisions. The next safeguard for biases is in within jury instructions. In the “Federal Civil Jury Instructions of the Seventh Circuit” jurors are instructed to not be influenced by any person’s race, color, religion, national ancestry, or sex (Federal Civil Jury, 2017). It is important to note that the jury instructions here do not recognize any bias against physical attractiveness. By not considering attractiveness as a protected class under Title VII, which extends to race, color, gender, weight, and height, the “beauty bias” can manifest itself as a bias in the courtroom, especially when attorneys are not aware of this issue. In California’s Criminal Jury Instructions, there are only mentions of putting prejudice and bias aside when deliberating and deciding verdicts (Kriegler, 2017). These vague expectations do not allow for the jury to be properly informed of their inherent biases. In a study done by Elizabeth Ingriselli on mitigating juror bias, pre-trial instructions reduced the number of guilty verdicts for Black defendants (Ingriselli, 2015). This study is vital in understanding the essential role of how pretrial instructions could reduce or at least bring cognizance to such a permeant problem. By presuming a “jury of your peers” will represent your perspective, you are entrusting the legal process to understand you and judge you fairly. In both *Batson v Kentucky* and *J.E.B. v Alabama*, race and gender discrimination were

prohibited in the jury selection process to hopefully preserve a jury of peers to fairly examine evidence (Baston, 1986) (J.E.B., 1994). However, as we've seen, implicit biases or discriminatory jury selection processes are often dodged through various aversive strategies, and thus are not enough. Additionally, there are no cases specifically protecting appearance bias within the jury, preventing the conversation for change in the current legal process to begin. Although some argue that by somehow classifying the unattractive but otherwise physically healthy as a protected class is the only viable way to halt discrimination, whether it be the workplace, school, or the courtroom, there is dispute on how to tackle this problem. In the "Beauty Bias," Deborah Rhodes argues that with no legal protection that covers physical attractiveness, and that unfair bias and discrimination is displayed based on the physical attractiveness of people (Rhodes, 2011). Legal protections for vulnerable groups of people attempt to preserve this constitutional right; although overwhelming research is beginning to reflect the harms and difficulty in pinning down and eradicating these biases within juries. Only a handful jurisdictions, including but not limited to the District of Columbia, California, and Michigan, have specified their protections for appearance-based discrimination and they all only apply to housing and/or employment (Rhodes, 2011). It can be difficult to classify or protect against appearance-based biases since they did not follow the same processes of jury discrimination as did gender and race. However, it is difficult to pin down attractiveness and what it encompasses, as well as the reluctance people may experience in classifying themselves as officially "unattractive" to receive the benefits, not to mention the problematic ways that is to be measured. In order to establish a jury of peers, or to classify appearance-based discrimination as a protected class, we need to be able to classify what is and is not attractive, working with blurred lines between cultural and

evolutionary norms. We cannot truly guarantee a bias-free jury; however, by putting safe-guards in place in any way possible to protect those vulnerable, the effects of the bias can be reduced in an attempt for a fairer trial.

The “what is beautiful is good” theory affects various parts of our society. The under-recognized bias emerges throughout society as an implicit bias. Juries have been shown to favor the physically “attractive”, or “beautiful,” as well as disadvantage the physically “unattractive.” There are thus a wide range of consequences of this bias, that extend even beyond the courtroom. Appearance-based biases are often implicit and less recognized, and thus fall through the cracks of the voir dire process. Since attractiveness is not protected under any class, nor are there any specific cases handling and securing some sort of protection for the appearance-based discrimination in juries specifically, the “what is beautiful is good” theory will manifest itself as a form of bias in the courtroom. Research shows that this bias is prevalent, and more importantly that becoming aware of this bias helps control for it within verdicts. It is also important to consider the difficulties in implementing such a move to protect from the “beauty bias” and the “what is beautiful is good” theory. The integrity of the Constitution and its rights are a cornerstone to the U.S. legal system, and so it is imperative to do whatever possible to protect them. The potential that reforming the voir dire process and jury instructions may provide what is necessary to not only combat biases regarding race and sex, but also appearance.

Although there are implications and difficulties with the currently proposed solutions to this bias within the courtroom, it is important to begin considering the ways in which this bias compromises the sixth and fourteenth amendments, and what can be done to change this.

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