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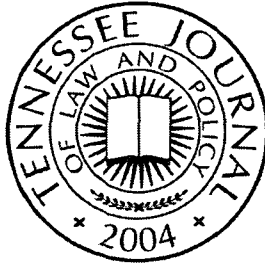
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Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 160



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COMMENTARY

HOW TO CREATE AMERICAN MANUFACTURING JOBS

John Dewar Gleissner

POLICY NOTE

STATES ARE MAKING THEIR OWN DECISIONS REGARDING
WHETHER MARIJUANA SHOULD BE ILLEGAL: HOW SHOULD
THE FEDERAL GOVERNMENT REACT?

Joseph Tutro

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U.S. SENATE PRIMARIES UNDER THE SEVENTEENTH
AMENDMENT

Megan Duthie

ARTICLE

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Tennessee Journal of Law and Policy

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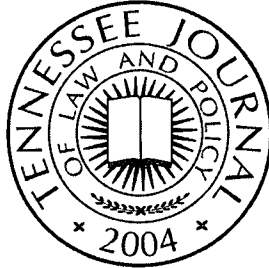
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CONTENTS

COMMENTARY

HOW TO CREATE AMERICAN MANUFACTURING JOBS

John Dewar Gleissner.....166

POLICY NOTE

STATES ARE MAKING THEIR OWN DECISIONS REGARDING WHETHER MARIJUANA SHOULD BE ILLEGAL: HOW SHOULD THE FEDERAL GOVERNMENT REACT?

Joseph Tutro.....233

THE CONSTITUTIONALITY OF ELIMINATING OR RESTRICTING U.S. SENATE PRIMARIES UNDER THE SEVENTEENTH AMENDMENT

Megan Duthie.....249

ARTICLE

GUT CHECK: WHY OBESITY IS NOT A DISABILITY UNDER TENNESSEE LAW AND HOW THE LEGISLATURE CAN ADDRESS THE OBESITY EPIDEMIC

Jennifer Vallor265

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COMMENTARY

HOW TO CREATE AMERICAN MANUFACTURING JOBS

By John Dewar Gleissner¹

In *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith wrote that a nation's prosperity depends upon "the skill, dexterity, and judgment with which its labour is generally applied," and upon the proportion of the population employed in useful labor.² Economists watch measures of productivity and employment closely. The unemployment rate is today the single most prominent measure of economic health. By these basic criteria, the incarcerated, approximately 2.24 million able-bodied Americans,³ more idle prisoners than any other nation, constitute a gigantic drain on the economy. Very few prisoners produce marketable goods or services.⁴ Most inmate labor is simply "prison housework"

¹ B.A. with honor, Auburn University, 1973 (Psychology); J.D., Vanderbilt Law School, 1977; Practicing attorney since 1977; Author, *PRISON & SLAVERY—A SURPRISING COMPARISON* (2010; 438 pages); *Prison Overcrowding Cure: Judicial Corporal Punishment of Adults*, 49 CRIM. L. BULL. (Summer 2013); Blog Host, Incarceration Reform Mega-Site. This piece represents the author's assessment of the U.S. prison population and economy, and opinions should be recognized as such. Uncited material may be found in the author's aforementioned book.

² ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* I (Edwin Cannan & George J. Stigler eds., Univ. of Chi. Press 1976) (1776).

³ LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2011, 8 (2012), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4537>.

⁴ OFFICE OF THE INSPECTOR GEN., AUDIT DIV., U.S. DEP'T OF JUSTICE, *FEDERAL PRISON INDUSTRIES, INC. ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2012*, 5 (2012) ("FPI has industrial and service operations

(i.e. helping operate the correctional institution) or the making of selected goods for the government; only a small fraction of prisoners work in factories or on farms, ranches, or roads. Very low employment and productivity in federal and state prisons is invariably proven by dividing total annual correctional industry revenue by the particular prison population. Prison industries often operate at a loss and inefficiently utilize prison labor.⁵ What prisoners might be earning under full employment in the private sector equals or exceeds the direct costs of maintaining more than two million prisoners.

Prison problems are not new. Prominent political leader and diplomat William Eden, Baron Auckland, wrote as follows in his 1771 treatise *Principles of Penal Law*: “Imprisonment, inflicted by law as a punishment, is not according to the principles of wise legislation. It sinks useful subjects into burdens on the community, and has always a bad effect on their morals: nor can it communicate the benefit of example, being in its nature secluded from the eye of the people.”⁶ When American prisons began, it was immediately recognized that prisoners should work.⁷ The vastly increased negative economic impacts brought about by massive incarceration are relatively new in

at 81 factories located at 63 prison facilities representing approximately 8% of the work eligible inmate population as of September 30, 2012.”
).

⁵ Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 890 n.144 (2008).

⁶ WILLIAM EDEN, *PRINCIPLES OF PENAL LAW* 44-45 (1771).

⁷ GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 23 (Francis Lieber trans., Carey, Lea & Blanchard 1833) (“Labour gives to the solitary cell an interest; it fatigues the body and relieves the soul.”).

historical terms and have not yet been adequately addressed by legislation.

A predicate for prison reform today is a thorough understanding of the economic and social costs caused by the current inefficient incarceration regime. No one has successfully computed all the various direct, indirect, social, and collateral costs of massive incarceration. The value of moving offenders back into the workforce, restoring manufacturing jobs, and reducing government expenses and recidivism cannot be denied.

Brief History of U.S. Prison Industries and Labor. “The earliest forms of prison industries work programs date back to the late 1700s. Interestingly, many of the dilemmas we face [t]oday, also challenged our predecessors: the elimination of inmate idleness, program self-sufficiency, the overall safety and security of our prison system, and productive inmate employment without undue impact upon private sector jobs.”⁸

In the 1800s, several state prison systems were self-supporting, ran at a profit, and informed their legislatures that further appropriations would not be necessary. Productive prison labor under the draconian Auburn System created profits during three generations of the remarkable Pilsbury family. Moses C. Pilsbury, Amos Pilsbury, and Louis D. Pilsbury successfully managed prisons and prison systems in New Hampshire, Connecticut, and New York. The Pilsbury System, a type of Auburn System, paid the cost of running a prison and, in addition, paid money to the state treasury. Prison labor made a profit to offset the costs of confinement, saving the taxpayers money. Zebulon R. Brockway, the father of

⁸ FED. PRISON INDUS., INC., FEDERAL PRISON INDUSTRIES, INC. ANNUAL REPORT 2008, 4 (2009), *available at* www.datachieve.com.php5-6.dfw1-1.websitetestlink.com/wp-content/uploads/2009/09/CATAR2008.pdf.

rehabilitative penology and an admirer of the Pilsburys and Andrew Maconochie, produced profits more than four times greater than the entire cost of running a penal institution.⁹ In 1888, the reformatory run by Brockway claimed that 78.5% of its parolees were living orderly and self-supporting lives.¹⁰

In his 1912 book *Fifty Years of Prison Service: An Autobiography*, Zebulon Brockway outlined an ideal prison system. Brockway said prisoners should support themselves in prison through industry in anticipation of supporting themselves outside prison; outside businesses and labor unions must not interfere; indeterminate sentences were required, making prisoners earn their release with constructive behavior, not just the passage of time; and education and a Christian culture should be imparted. Brockway opposed releasing prisoners who would clearly poison the outside world. Zebulon Brockway's ideal prison system followed the procedures of Wethersfield Prison in Connecticut when Amos Pilsbury was its warden. Brockway believed prisoners would work effectively to defray the expenses of their penal institutions if given a share of the profits. The profit motive makes people work much harder and smarter than if they are forced to work.

Everyone agreed prisoners would be better off if they worked usefully while in prison.¹¹ In 1886, the

⁹ REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941*, 177-79 (2008).

¹⁰ ZEBULON REED BROCKWAY, *FIFTY YEARS OF PRISON SERVICE: AN AUTOBIOGRAPHY* 297 (Patterson Smith 1969) (1912).

¹¹ This is still the case. MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* § 8:1 (4th ed. 2013) (“The value of productive prison work and its relationship to rehabilitation are widely accepted.”); Stefanie Evans, *Making More Effective Use of Our Prisons Through Regimented Labor*, 27 PEPP. L. REV. 521 (2000).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 170

Second Annual Report of the U.S. Commissioner of Labor stated that “[i]t is universally conceded that convicts should be employed at some useful labor.”¹² “Certainly no thoughtful, humane person, and most assuredly no trade unionist, wants the inmates of our prisons to remain idle,” labor leader Samuel Gompers wrote a century ago.¹³ American prison labor systems through the years have included lease, contract, piece-price, public account, state use, and public works labor systems, none of which were wholly private or agreed to by the convicts.¹⁴

From their inception, affected businesses and labor fought prison industries. Legislation and constitutional provisions were aimed at the discredited convict leasing and convict contract labor systems opposed by progressives.¹⁵ Private industries and labor feared low-cost prison labor and successfully pushed for debilitating legal restrictions upon private prison industries. State and federal laws began prohibiting and restricting the sale of prison-made goods. In 1890, for example, the State of Washington prohibited private employment of prison labor in its constitution and mandated such labor for the benefit of the state.¹⁶ Opponents of prison industries and labor

¹² BUREAU OF LABOR, U.S. DEP’T OF THE INTERIOR, SECOND ANNUAL REPORT OF THE U.S. COMMISSIONER OF LABOR, 1886: CONVICT LABOR (1887).

¹³ SAMUEL GOMPERS, LABOR AND THE COMMON WELFARE 110 (1919), quoted in Stephen P. Garvey, *Freeing Prisoners’ Labor*, 50 STAN. L. REV. 339, 369 (1998).

¹⁴ EDWIN H. SUTHERLAND ET AL., PRINCIPLES OF CRIMINOLOGY 503-07 (11th ed. 1992).

¹⁵ Wash. Water Jet Workers Ass’n v. Yarbrough, 90 P.3d 42, 61 (Wash. 2004).

¹⁶ *Id.* at 45, 58 (Even though “[t]he benefits of providing employment opportunities for convicts [were] not in dispute,” a state constitutional provision, article II, section 29 of the Washington state constitution, prohibited employment of prisoners by private enterprise.: “After [Jan. 1, 1890], the labor of convicts of this state shall not be let out by

made the valid point that government-supported industries are not fair competition. The U.S. Supreme Court agreed that “[f]ree labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison.”¹⁷

Private prison industries came to a screeching halt at the time of the Great Depression. The Hawes-Cooper Act of 1929, “[a]n Act to divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases,” took away the interstate commerce status of prison-made goods, allowing states to bar them from sale.

That all goods, wares, and merchandise, manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon

contract to any person, copartnership, company or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state.”).

¹⁷ *Whitfield v. Ohio*, 297 U.S. 431, 439 (1936).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 172

arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.¹⁸

Many states prohibited the sale of those goods. In *Whitfield v. Ohio*,¹⁹ the Supreme Court upheld the conviction of an Ohio seller of prison-made work shirts shipped to Ohio from an Alabama prison, noting that “the sale of convict-made goods in competition with the products of free labor is an evil” recognized by states and the federal government.²⁰ There was no discrimination because Ohio barred its own prisons from selling such goods on the open market.²¹ The Wisconsin Supreme Court invalidated a Wisconsin statute that discriminated

¹⁸ Hawes-Cooper Act of 1929, ch. 79, 45 Stat. 1084 . This provision is no longer explicitly codified as written to make the goods “subject to the operation and effect of the laws of such State” (words borrowed from the Wilson Act regarding liquor), but the general structure of discouraging interstate commerce remains in somewhat confusing structure.

¹⁹ 297 U.S. 431.

²⁰ *Whitfield*, 297 U.S. at 439.

²¹ *Whitfield*, 297 U.S. at 437.

against convict-made goods from out of state by not similarly barring sales of Wisconsin convict-made goods.²²

In this depressed era of super-high unemployment, Congress was in its damaging, protectionist Smoot-Hawley mood.²³ The Ashurst-Sumners Act of 1935, as amended in 1940, limited interstate shipment of prisoner-made goods.²⁴ In *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, the Supreme Court upheld the Ashurst-Sumners Act, saying that “[t]he Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor.”²⁵ In 1936, the Walsh-Healey Act banned convict labor on federal procurement contracts.²⁶ While these restrictive statutes were passed by perceiving evil, valid exercises of Congress’s power to regulate interstate commerce and were passed in a time of high unemployment, they were directly contrary to the letter and spirit of provisions mandating unencumbered interstate commerce in the U.S. Constitution,²⁷ nearly every other law Congress passed

²² State v. Whitfield, 257 N.W. 601 (Wis. 1934).

²³ The Tariff Act of 1930, the Smoot-Hawley Tariff, raised U.S. tariffs on imported goods, brought retaliatory tariffs, reduced American exports and imports, and infamously increased the severity of the Great Depression. See Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Monetary Policy and the Global Economy (Mar. 25, 2013) (transcript available at <http://www.federalreserve.gov/newsevents/speech/bernanke20130325a.htm>).

²⁴ 18 U.S.C. §§ 1761-62 (2006).

²⁵ 299 U.S. § 334 (1937).

²⁶ 41 U.S.C. § 6502 (2006) (“(3) INELIGIBLE EMPLOYEES.—No . . . incarcerated individual will be employed by the contractor in the manufacture or furnishing of materials, supplies, articles, or equipment under the contract, except that this section, or other law or executive order containing similar prohibitions against the purchase of goods by the Federal Government, does not apply to convict labor that satisfies the conditions of section 1761(c) of title 18.”).

²⁷ U.S. CONST. art. I, §§ 9-10.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 174

regarding the scope of interstate commerce, and free trade principles expressed in later treaties with foreign nations.

“Prison labor, once viewed as indispensable for restoring a healthy relationship between the criminal and society, was made literally a federal offense.”²⁸ These trade barriers in the form of criminal statutes are still codified, with changes through the years, in state and federal law. 18 U.S.C. § 1761(a) now states as follows:

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both.²⁹

In other words, manufacturing was limited to the prison; each state could bar private businesses from their prisons, which most did; and each state could ban the sale of prison-made goods, which many did. Congress also

²⁸ David Frum, *Working for the Man*, AM. SPECTATOR, Aug. 1995, at 49 (quoting Arizona Assistant Attorney General Andrew Peyton Thomas).

²⁹ 18 U.S.C. § 1761(a) (2006).

made it a crime to ship prisoner-made goods without obvious labeling and provided forfeiture as a penalty.

(a) All packages containing any goods, wares, or merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.³⁰

(b) Whoever violates this section shall be fined under this title, and any goods, wares, or merchandise transported in violation of this section or section 1761

³⁰ 18 U.S.C. § 1762(a) (2006).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 176

of this title shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.³¹

In 1934, at the time private businesses were effectively excluded from prison industries, Congress created a government-owned monopoly over the federal prison industries and labor, Federal Prison Industries, Inc. (FPI), which uses the trade name UNICOR. FPI's mission is to provide employment and training opportunities to inmates confined in federal correctional facilities and to provide market-priced, quality products and services to other federal agencies. By law, FPI minimizes competition with private industry and labor.

(a) Federal Prison Industries shall determine in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions for the production of commodities for consumption in such institutions or for sale to the departments or agencies of the United States, but not for sale to the public

³¹ 18 U.S.C. § 1762(b) (2006).

in competition with private enterprise.³²

Statutory passivity requires that FPI diversify its activities and avoid obtaining excessive market shares.³³

Many state-sponsored correctional industries live by the mandatory source preference requirements of their respective governments, which restrict the purchasing options of the sponsoring governments. When faced with a similar situation at the federal level, private businesses complained about the U.S. government's mandatory source preference requirement in favor of FPI. Congress took away FPI's status in several steps.³⁴ The procurement law was changed. Now federal agencies do not always have to buy from FPI.³⁵ But FPI can only sell to federal agencies,³⁶ which greatly limits the types of products it can make. As a result of losing its mandatory source preference, FPI is losing money and prison jobs. Meanwhile, FPI does not allow private companies to make goods in federal prisons, blocking the exceptions in 18 U.S.C. § 1761(a) and 18 U.S.C. § 1762(a).

In testimony before Congress, FPI claimed that it employed 25% of the federal prison population in 1998.³⁷ FPI said that it provided jobs to 17% of the eligible federal

³² 18 U.S.C. § 4122(a) (2006).

³³ 18 U.S.C. § 4122(b)(1)-(3) (2006).

³⁴ NATHAN JAMES, CONG. RESEARCH SERV., FEDERAL PRISON INDUSTRIES (2011).

³⁵ 10 U.S.C. § 2410n (2006).

³⁶ 18 U.S.C. § 4122(b) (2006).

³⁷ *Prison Industry Reform Legislation: Hearing on H.R. 4100 and H.R. 2758 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 58-66 (1998) (statement of Kathleen Hawk Sawyer, Director, Federal Bureau of Prisons, and Chief Executive Officer, Federal Prison Industries), available at http://commdocs.house.gov/committees/judiciary/hju57231.000/hju57231_0f.htm.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 178

prison population in 2008 and 8% in 2012.³⁸ Thus, as the prison population was skyrocketing, the percentage of federal prisoners working dropped markedly. The outsized, negative impact of the Great Recession on UNICOR reflects a connection between prison industries, government budgets, and, of course, the economy and general labor market.³⁹

UNICOR claims that “[s]ince 1934, [UNICOR] is *one* government program that *truly works* in every sense of the word.”⁴⁰ UNICOR’s very limited success under the legal and economic impediments it faces⁴¹ proves the enormous economic and social boost a fully employed prison force that operates freely in interstate and international commerce while making profits and paying taxes could provide. From 1934 to 2013, this federal government monopoly, in terms of potential workers under its control, grew exponentially.⁴² “The federal budget for

³⁸ FED. PRISON INDUS., INC., *supra* note 8, at 6, 16; OFFICE OF THE INSPECTOR GEN., *supra* note 4, at 5 (“FPI has industrial and service operations at 81 factories located at 63 prison facilities representing approximately 8% of the work eligible inmate population as of September 30, 2012.”).

³⁹ During major wars, prisoners generally are worked much harder and more often than in peacetime, and releases from prison are more common.

⁴⁰ FED. PRISON INDUS., INC., *supra* note 8, at ii.

⁴¹ 18 U.S.C § 4122 (2006); *Coal. for Gov’t Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435 (6th Cir. 2004) (detailing the limitations imposed on Federal Prison Industries and prison industries generally).

⁴² In 1934, the federal prison population was about 12,000; in 2013, it was 218,864. *Compare Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, www.bop.gov/news/quick.jsp (last visited Oct. 8, 2013), with *BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, PRISONERS IN STATE AND FEDERAL PRISONS AND REFORMATORIES 1934*, 3 (1934) (about 12,000); see also *A Brief History of the Bureau of Prisons*, FED. BUREAU OF PRISONS, www.bop.gov/about/history.jsp (last visited Oct. 8, 2013) (In 1930, there were “just over 13,000” federal prisoners.).

FY 2010 contained \$6 billion for the Bureau of Prisons, an increase of 1,712% since 1980.”⁴³ Since the 1970s, state prison populations have grown more than 700%.⁴⁴

In 1979, Congress authorized a limited exception through the Prison Industry Enhancement Certification Program (PIECP), a federally sponsored program to develop partnerships between private enterprise and prison labor. PIECP has proven successful in reducing recidivism.⁴⁵ Under the program, which was created in 1979 and continued in 1990, prisoners must receive “wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed.” Because PIECP participants must pay the prevailing wage in the area and meet seven other requirements, only a tiny handful of offenders are involved. However, this program merely “exchanges one debilitating limit on prison labor for another.”⁴⁶ PIECP inflexibly requires employers to pay prevailing wages to a workforce that, as a whole, is substandard in education, job skills,

⁴³ THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION (2011), asca.net/system/assets/attachments/2811/inc_FederalPrisonFactsheet_March20112.pdf?1304452236 (citing FED. BUREAU OF PRISONS, BUDGET AND PERFORMANCE SUMMARY—FEDERAL PRISON SYSTEM (2011), available at justice.gov/jmd/2011summary/html/fy11-bop-bud-summary.htm).

⁴⁴ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 2 (2012), http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf.

⁴⁵ Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison ‘Real Work’ Programs Work?*, NAT’L INST. JUST. J., June 2007, at 32, 32-36.

⁴⁶ Stephen P. Garvey, *Freeing Prisoners’ Labor*, 50 STAN. L. REV. 339, 373 (1998); see also *Coal. for Gov’t Procurement*, 365 F.3d 435 (dealing with multiple statutory restrictions on Federal Prison Industries (UNICOR)).

mental and physical health, sobriety, morality, human relationships, industriousness, intelligence, security risk, and general life experiences. “Paying prisoners the federal minimum wage is economically unrealistic.”⁴⁷ The prevailing wage requirement put on private businesses is particularly onerous compared to what FPI pays its workforce: “Inmates earn from \$0.23 per hour up to a maximum of \$1.15 per hour, depending on their proficiency and educational level, among other things.”⁴⁸

Historically, most prison authorities in America did not work prisoners efficiently at hard labor in the now-predominant “state-use” system. The state-use system employs a small fraction of all prisoners. The indeterminate sentence was effectively squashed because, at the time, there was little by which to encourage and judge the productivity or rehabilitation of prisoners. State ownership of prison industries invariably decreases burdens on the taxpayers. But those government industries do not *pay* taxes and usually require subsidies or preferences.

Modern reform efforts must address the unfairness issue caused by state-supported prison labor. The solution will be through the private sector, which more often creates social good, by avoiding, minimizing, or eliminating unfair competition with labor or businesses and by recognizing the more menacing threat of foreign competition.

Economic Costs of Massive Incarceration. The direct costs of massive incarceration include food, clothing, shelter, transportation to and from detention, health care—including mental health care, suicide watches, and medicines—and extra legal expenses for about 2.25 million people in or for the federal government and states, counties,

⁴⁷ Alexander B. Wellen, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage?*, 67 TEMP. L. REV. 295, 333 (1994).

⁴⁸ JAMES, *supra* note 34, at 3.

and cities. Managing this high-risk population twenty-four hours per day, every day, incurs enormous expenses for correctional salaries, training, equipment, health care, legal representation, real estate, insurance for high-risk environments, utilities, and escapes. Direct costs build and maintain a full-ride welfare state of 2.25 million prisoners and the correctional personnel and property to manage them. In fact, the direct costs encompass the largest group of full-ride welfare recipients in the world. The average prisoner costs the government about \$30,000 annually in direct costs. Direct costs may nominally be doubled to account for indirect, collateral, and social costs.

“Prison costs are blowing holes in state budgets but barely making a dent in recidivism rates.”⁴⁹ The total cost exceeded \$49 billion dollars in 2007, and in 2005 showed a national per prisoner operating cost of \$23,876.00 per year.⁵⁰ The Vera Institute of Justice calculated that the annual per prisoner cost to the American taxpayers in 2010 was \$31,286.51. One study pegged the total annual costs at more than \$60 billion.⁵² That figure is still rising, taking ever-larger shares of state general funds and crowding out other priorities.⁵³ The State of California paid \$49,000 per prisoner per year according to its governor at mid-year 2009, who also said the national average was then already

⁴⁹ THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, 3 (2008), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.

⁵⁰ *Id.* at 11.

⁵¹ HENRICHSON & DELANEY, *supra* note 44, at 10.

⁵² COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 1 (2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf.

⁵³ THE PEW CTR. ON THE STATES, *supra* note 49, at 11-16.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 182

\$32,000 per prisoner per year.⁵⁴ Incarceration costs continually increase due to rising health care expenses for older convicts. “[W]ith one in 100 adults looking out at this country from behind an expensive wall of bars, the potential for new approaches cannot be ignored.”⁵⁵ Forward-thinking criminologists, recognizing the lack of good answers in penology, actively seek new evidence-based techniques from other disciplines.⁵⁶ The nation may, at long last, *after taking on an additional 1,800,000 current prisoners since 1980*,⁵⁷ be hitting a bottom.

It is not just the prisons that are overcrowded and expensive. Officers supervising parole and probation often have more cases to handle than earlier thought optimal.⁵⁸ “At yearend 2011, there were about 4,814,200 adults under community supervision.”⁵⁹ Each of those probationers and parolees costs thousands of dollars per year to supervise. Direct expenditures on police and the judicial system increased by several hundred percent over the last thirty years.

Both Republicans and Democrats thought that the nation had ended “welfare as we knew it” when work was required of welfare recipients, but Americans forgot the

⁵⁴ Arnold Schwarzenegger, Office of the Governor, Speech (June 12, 2009), www.gov.ca.gov. Jails are even more expensive than prisons on a per prisoner basis.

⁵⁵ THE PEW CTR. ON THE STATES, *supra* note 49, at 21.

⁵⁶ MICHAEL DOW BURKHEAD, *THE TREATMENT OF CRIMINAL OFFENDERS: A HISTORY 173-75* (2007).

⁵⁷ WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, *PRISONERS IN 2006* (2007); JUSTICE POLICY INST., *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1* (2000). The total incarcerated population has declined slightly over the last two years.

⁵⁸ NAT’L RESEARCH COUNCIL, *PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION 35* (2008).

⁵⁹ LAURA MARUSCHAK & ERIKA PARKS, U.S. DEP’T OF JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES, 2011* (2012).

biggest group of unemployed welfare recipients.⁶⁰ The millions of what can be considered social parasites that the nation fully supports in prisons and jails went almost undetected during welfare reform. And their numbers have increased markedly. Very few prisoners pay for more than a tiny fraction of their upkeep, with most paying zero. In addition to the “welfare costs” of supporting idle prisoners, actual welfare payments outside prison increase when wage earners leave families.

Incarceration simultaneously creates more unemployment because prisoners are vastly underemployed. Foreign workers regularly fill labor shortages outside prison. Massive incarceration broadens widespread unhappiness and societal disruption. The 2010 Census arguably counted a couple of million prisoners “in the wrong place.” The blockage of normal human development and education are significant economic and social costs.

Contrary to what judgments in criminal cases recite, imprisonment “to hard labor” barely exists anymore. Most prisoners are sidelined from strenuous, productive work by restrictive legislation. While the Thirteenth Amendment⁶¹ means or implies that the state owns the value of the prisoners’ labor,⁶² Congress and most states do not allow

⁶⁰ ROBERT D. ATKINSON, PROGRESSIVE POLICY INST., PRISON LABOR: IT’S MORE THAN BREAKING ROCKS (2002), *available at* www.dlc.org/documents/prison_labor_502.pdf.

⁶¹ The Thirteenth Amendment to the United States Constitution states as follows: “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.”

⁶² *See Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (“Indeed, the Thirteenth Amendment’s specific exclusion of prisoner labor supports the idea that a prisoner performing required work for the prison is actually engaged in involuntary servitude, not employment.”);

themselves or private businesses to use the full value of that labor, despite the benefits of jobs for prisoners and all directly concerned interests.⁶³

Prison industries and labor achieve the pinnacle of imperfect economic competition. With rare exceptions, only the prison system can employ any of its inmates. There is only a single seller of any goods produced, the state. One type of buyer, a governmental entity, is the purchaser, but the state does not necessarily have to buy its goods from prison industries.⁶⁴ Criminal and correctional systems exclusively control entry into prison industries and all eligibility for work therein. The transportation across state lines and labeling of prison-made goods is restricted or prohibited. Governments control the supply of and demand for prison-made goods while holding all of their manufacturing workers hostage. This creates a double or triple monopoly over a system of punishment that has always failed in its original purpose of rehabilitation. These government monopolies—by no means simple ones—create substantial economic inefficiencies, an enormous deadweight loss. If the U.S. government and states were subject to antitrust laws, their monopolies over prison industries would clearly violate the Sherman Antitrust Act in multiple ways.⁶⁵ In the prison industry

Ali v. Johnson, 259 F.3d 317, 317 (5th Cir. 2001) (“[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work.”).

⁶³ Garvey, *supra* note 46, at 373.

⁶⁴ 18 U.S.C. § 4124 (2006).

⁶⁵ 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”); 15 U.S.C. § 2 (2006) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . .”).

context, the entire set of employment laws, including those passed without prisoners in mind, is precisely the type of social rigidities associated with the long-term decline of nations.⁶⁶

The American public would benefit if prisons produced lower-cost goods. “In every country it always is and must be the interest of the great body of the people to buy whatever they want of those who sell it cheapest.”⁶⁷ Instead of deriving economic benefit from prisoners, federal law constructs impediments and uses their resources without urgency. “The Attorney General may make available . . . the services of United States prisoners under terms, conditions, and rates mutually agreed upon, for constructing or repairing roads, clearing, maintaining and reforesting public lands, building levees, and constructing or repairing any other public ways or works”⁶⁸ Due to added security costs, low skill levels, and the importance of heavy equipment, using prisoners to work outside prison is the least efficient way to utilize their labor.

Prisoners, even if they work, enter a government-controlled organization, monopoly, and welfare state. The high unemployment and underemployment caused by incarceration reduces tax revenues and greatly increases government expenses. Economic disadvantages are greatly exacerbated by the demographic changes wrought by incarceration. Most of the 2.25 million prisoners in the

⁶⁶ See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS—ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982); see also Zatz, *supra* note 5 (discussing a litany of prison labor considerations under the Fair Labor Standards Act and other employment-related statutes). Some prisoners today work in inconspicuous prison-located call centers, a commercial service business not mentioned in the protectionist statutes.

⁶⁷ SMITH, *supra* note 2, at 493.

⁶⁸ 18 U.S.C. § 4125 (2006).

United States are able-bodied, and the majority of them enter prison as young people. As the number of productive workers shrinks in relation to retirees, the incarceration regime locks up two million workers and keeps them inactive most of the time. Workers that are not in prison then have to support this dependent population. In a nation of aging retirees, the subtraction from the labor force of this many workers has a harmful economic effect as it skews the labor force.

For decades, the economic effects of idle prisoners remained modest compared to the growing American population that supported those prisoners, the growing economy, and the growing technological achievements. During major wars, prisoners were more often released or put to work. Harmful economic effects increased as the American prison population multiplied, manufacturing jobs fled overseas, and demographic trends reduced the percentage of workers in the total population. Historically, society has not subjected the criminal justice system to cost-benefit analysis.⁶⁹

As a result of incarceration, commercial activity declines, but government expenses, inside and outside of prison, increase. The private sector spending continues to lose ground to public sector spending, with all the inefficiencies that public spending entails. Payment of child support, for example, declines as a result of incarceration. Therefore, public assistance to the families of those dependent prisoners increases. Transportation expenses to and from prison visitation increase. Homeless people commit crimes for the support advantages of incarceration. And even some homeless people try to commit federal crimes to enjoy the better conditions in federal prisons.

⁶⁹ Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 338-39 (2004).

Numerous monopolies inhibit prisons, including monopolies over prison industries, labor, labeling, and the transportation of prison-made goods, along with a failed monopoly over the process of rehabilitation. Instead of rehabilitating and producing goods or services, prison systems are an expensive way to make bad people worse. The only demonstrable economic benefit derived from incarceration is that the incapacitation of 2.25 million prisoners who cannot commit crimes outside the prisons and jails while incarcerated prevents injuries to others. However, crimes continue behind bars.

Government controls eligibility for work, hiring, firing, and all of the wages, terms, and conditions of employment. Security costs and risks, plus the low skill and literacy levels of prisoners, make prevailing wage requirements difficult to overcome. In addition, governments own and operate most prison industries and decide which private companies can operate a business or industry in prison or with prison labor. All purchases, sales, and transportation of raw materials and prison-made goods are made by or tightly controlled through the government.

Federal and state laws concerning prison labor are the strongest racially and gender-based discriminatory employment barriers in the country today, adversely impacting African-Americans and men. Each state is free to restrict the sale of prison-made items, and many do. Various private sector efforts showed promise in the later twentieth century, but none of them ever worked for more than a relative handful of prisoners.⁷⁰

Prisoners are not accurately reflected in unemployment statistics because the Bureau of Labor

⁷⁰ SUTHERLAND, *supra* note 14, at 305-07.

Statistics only counts non-institutionalized people.⁷¹ To be accurate, unemployment statistics should count about 90% of prison inmates as unemployed rather than subtracting them from the workforce. If the unemployment rate was so calculated, then the official unemployment rate would go up approximately one half of 1%.

While the United States harms its own economy with massive incarceration, Chinese prison-made goods enter the United States against federal law⁷² with impunity, often as components. Today, China incarcerates an estimated three to five million dissidents, slackers, and criminals in a vast network of reform-through-labor or Laogai camps.⁷³ Despite international agreements and U.S. statutes, products made by unpaid forced labor find their way to the United States, and they are not labeled as prison-made goods as called for under 18 U.S.C. § 1762. Product components made in Laogai camps pass undetected. Many internet sales that are conducted in English link to the Chinese Ministry of Commerce.⁷⁴ According to the Laogai Research Foundation, prisons produce large profits for the Chinese government.⁷⁵

“Making Bad People Worse.” Prisons are typically thought to house predatory societies populated with profoundly selfish people. Stress and fear of assault

⁷¹ *Labor Force Statistics from the Current Population Survey*, U.S. DEPT LAB. BUREAU LAB. STAT. (Apr. 5, 2013), <http://www.bls.gov/cps/lfcharacteristics.htm#laborforce> (“The labor force is the sum of employed and unemployed persons. The labor force participation rate is the labor force as a percent of the civilian noninstitutional population.”).

⁷² 19 U.S.C. § 1307 (2006).

⁷³ See LAOGAI MUSEUM, www.laogaimuseum.org (last visited Oct. 8, 2013).

⁷⁴ LAOGAI RESEARCH FOUND., NOT FOR SALE: ADVERTISING FORCED LABOR PRODUCTS FOR ILLEGAL EXPORT 10-11 (2010), laogai.org/sites/default/files/pdf/lrf_enterprise_ads_report.pdf.

⁷⁵ *Id.* at 16-17.

are common. Prisoners often feel threatened by their own cellmates. The best current method of controlling assaults in prison is to prosecute offenders, thereby lengthening their sentences. Mentally ill prisoners forget to take their medications; require complicated cell extractions using protective gear, force, and pepper spray; and end up in segregation.

Prisons daily affront human dignity. Prisoners suffer from violence, fear of violence, self-mutilation, gang influence, and racism. Many prison inmates suffer rape, sexual and physical assaults, or death while incarcerated. Congress passed the Prison Rape Elimination Act in 2003, which set up a Prison Rape Elimination Commission. Prisoners who complain about sexual assaults risk retaliation by their rapists or other prisoners and are then at much greater risk of future assaults for being known as both “punks” (rape victims) and “snitches” (informants).⁷⁶ Rape victims can contract sexually transmitted diseases. On July 31, 2008, the National Prison Rape Elimination Commission said, regarding juvenile correctional facilities, “It is particularly striking that fully 43 percent of those incidents were reported to involve misconduct or harassment by correctional staff—the very people who are responsible for protecting these most vulnerable inmates.”

Prisons readily breed infections, and diseases multiply in prison. The Commission on Safety and Abuse in America’s Prisons found

[h]igh rates of disease and
illness among prisoners,
coupled with inadequate
funding for correctional

⁷⁶ HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 20 (2009), <http://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf>.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 190

health care, endanger prisoners, staff and the public. Much of the public dismisses jails and prisons as sealed institutions, where what happens inside remains inside. In the context of disease and illness, which travel naturally from one environment to another, that view is clearly wrong.

The suicide rate for American prisoners is five to 15 times greater than it is for the general American population.⁷⁷ Possessions are removed, family excluded, and sexual desire frustrated. Gender segregation prohibits normal sex. Sexual deviancy increases. Life is unpleasant. Sanity depends upon mental toughness. Worries remain. Most prisoners are unhappy. Many are unhappy all of the time. Pagan, satanic, racist, and occult religious texts are more popular in prison than outside. Fewer programs for inmates exist than in prior years. Most prison cells are not air-conditioned, which can be a medical problem, especially in warmer climates.⁷⁸

The nation takes every prisoner away from his or her spouse, family, and friends. The free world isolates and abandons prisoners with long sentences. Many prisoners do not receive any visits from friends or family.⁷⁹ Solid

⁷⁷ ALISON LIEBLING, *SUICIDES IN PRISON* 24 (1992).

⁷⁸ Climate helps explain in part why (1) prisons began and were more common in the North, (2) northern states today have the highest incarceration rates of African-Americans, indicating hot Southern prisons might be a crime deterrent in the age of air-conditioning, and (3) Arabians disfavor incarceration over other punishments.

⁷⁹ GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 65 (1958).

barriers separate the prisoner and visitors during visits. Gangs successfully recruit members in prison, spreading their anti-social ideas and breeding virulent bigotry. By being in prison, prisoners take on the penitentiary's sick underclass values, codes, and dogma. The longer the prison sentence, the more the values and codes affect the prisoner. The closed environment of prison is kept from view because prisons severely restrict the media's access, routinely prohibit press interviews, and monitor and censor mail and telephone communications.⁸⁰ Dreadful things often do not receive investigation or publicity. Through the centuries, lack of communication between prison and the outside world allowed abuses to go undetected inside the closed prison environment. Prisons harm people in several ways but do not make enough of them penitent. Incarceration teaches depravity, affects minds adversely, and then releases prisoners into the free world on their mandatory release dates or on parole. Criminals learn better how to commit crimes but not how to be productive in the free world.

In the last twenty years, the use of segregation or solitary confinement has increased markedly, worsening outcomes and significantly increasing expenses for the prison system. Solitary confinement—known as isolation, punitive segregation, disciplinary segregation, segregated housing, and other names—causes psychiatric harm in manifold ways, especially to those with previous mental illnesses. Solitary confinement can cause psychotic disorganization, self-destructive behavior, delusions, panic attacks, paranoia, and an inability to adapt to the general prison population. Hypersensitivity, rage, aggression, memory problems, concentration problems, and impulse-control problems can also stem from segregated housing units. Intolerance of social interaction is one of the more

⁸⁰ HUMAN RIGHTS WATCH, *supra* note 76, at 44-45.

common results. With respect to the ill effects of solitary confinement, Harvard psychiatrist Stuart Grassian said, “The laws and practices that have established and perpetuated this tragedy deeply offend any sense of common human decency.”⁸¹ Prisoners requiring solitary confinement are more frequently those who cannot obey prison rules but are not usually the worst offenders in terms of criminal convictions. Solitary confinement is on the rise for disciplinary and security reasons and creates additional expenses.

Prisons are therefore on a different planet compared to employment-related legislation regulating free labor. Those advocating employment rights for prisoners ought to consider the employer’s potential regulatory and legal compliance costs. How many manufacturers would place their operations in a prison, employ problematic prison labor at prevailing wages, and then face numerous frivolous lawsuits? There is no general federal or state right to air-conditioning in the free world, but Southern prisoners would naturally love air-conditioning. Prisoners live in “sweatshops” as it is. There is no law for or against boredom either, but boredom naturally makes prisoners want real jobs. Federal and state legislation creates approximately a 90% unemployment rate, exclusive of prison housework, while bored prisoners stay overheated in the summer. Reforming incarceration requires an entirely new way of conducting business.

Recidivism. Prisons are revolving doors for recidivists. The number released is about equal to the number imprisoned. Every year, a large and poorly disciplined American army of released prisoners—about 700,000 ex-cons—goes back to the streets. Released convicts face many re-entry obstacles, most do not make

⁸¹ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 355 (2006).

the transition successfully, and huge numbers are returned to the prison system. Prisons are, as Jens Soering's 2004 book title reveals, *An Expensive Way to Make Bad People Worse*.⁸² In 2007, 725,000 prisoners were released from jail or prison. Their suicide risk is very high in the first few weeks and months after release. Carrying the "felon" or "ex-con" stigma, prisoners often leave without much job training, substance abuse counseling, or education. Released prisoners replicate the trauma of slave emancipation every day: they have trouble finding homes, work, and food. A huge percentage of convicted felons are unemployed when arrested and when released are often unemployed again, immediately and several years after release. Finding and keeping employment is one of the biggest barriers to re-entry.⁸³

Offenders usually lack job skills and work habits, and when they are released, they encounter a shrinking number of low-skill jobs. Offenders cannot easily comply with the terms of their probation or parole unless they hold a job. Many prisoners are illiterate or only semi-literate. One good thing that prisons often do is educate prisoners to the GED level, but the public opposes paying for college degrees. Some prisoners, especially young ones, have never held regular jobs. Collateral sanctions bar convicted felons from employment, positions, welfare, housing, student loans, food stamps, voting rights, the right to keep and bear arms, jury service, and other benefits. Their post-release status injects them into a New Jim Crow regime,

⁸² JENS SOERING, *AN EXPENSIVE WAY TO MAKE BAD PEOPLE WORSE: AN ESSAY ON PRISON REFORM FROM AN INSIDER'S PERSPECTIVE* (2004).

⁸³ LIOR GIDEON, *SUBSTANCE ABUSING INMATES: EXPERIENCES OF RECOVERING DRUG ADDICTS ON THEIR WAY BACK HOME* 68 (2010).

where they are second-class citizens by operation of law.⁸⁴
As Emma Goldman wrote years ago,

Year after year the gates of
prison hells return to the
world an emaciated,
deformed, will-less,
shipwrecked crew of
humanity, with the Cain mark
on their foreheads, their
hopes crushed, all their
natural inclinations thwarted.
With nothing but hunger and
inhumanity to greet them,
these victims soon sink back
into crime as the only
possibility of existence.⁸⁵

Danger increases even more when convicts
go from solitary confinement directly to the streets.

Certain categories of released prisoners have a
problem staying out of trouble in the first three years of
their new freedom; many do not make it six months.
Released inmates typically end up back in trouble, jail, or
prison, having been unable to cope in the free world. Every
year, approximately 300,000 parolees return to prison due
to parole violations alone, usually because they committed
new crimes.⁸⁶ In addition, the United States incarcerates
many thousands of probationers every year for violating the

⁸⁴ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

⁸⁵ Emma Goldman, *Prisons*, in *THE CRY FOR JUSTICE: AN ANTHOLOGY OF THE LITERATURE OF SOCIAL PROTEST* 147-48 (Upton Sinclair ed., 1915).

⁸⁶ NAT'L RESEARCH COUNCIL, *supra* note 58, at 10.

terms of their probations, for new offenses, or for other reasons.⁸⁷ Substantial recidivism keeps America's jails and prisons full.

Returning parolees increase crime rates in their neighborhoods.⁸⁸ Offenders on probation or parole commit a prodigious number of crimes, enough to turn the public against these "alternative sentences." A study by the Bureau of Justice Statistics of the U.S. Department of Justice found that in the year 1991, 162,000 probation violators were sent to prison and those violators—with almost half using illegal drugs daily—had committed 6,400 murders, 7,400 rapes, 10,400 aggravated assaults, and 17,000 robberies.⁸⁹ With statistics like these, states and the federal government eliminated or tightened the requirements for parole and "good time." Over half the states enacted truth-in-sentencing laws, which require completion of most of the original sentence. The very best modern treatment programs, cognitive behavioral therapies, have a small but statistically significant impact on recidivism rates, but these therapies cost money and are not commonly used.⁹⁰

Civil rights activists decry the New Age slavery of prison followed by a New Jim Crow regime that has

⁸⁷ LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 15-16 (2007).

⁸⁸ John R. Hipp & Daniel K. Yates, *Do Returning Parolees Affect Neighborhood Crime? A Case Study of Sacramento*, 47 CRIMINOLOGY 619 (2009).

⁸⁹ ROBYN L. COHEN, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991 (1995).

⁹⁰ BURKHEAD, *supra* note 56, at 165-73; Mark W. Lipsey et al., *Effects of Cognitive-Behavioral Programs for Criminal Offenders*, CAMPBELL COLLABORATION (Aug. 9, 2007), www.campbellcollaboration.org/lib/download/143/; Paul Gendreau & D.A. Andrews, *Tertiary Prevention: What the Meta-Analyses of the Offender Treatment Literature Tell Us About "What Works,"* 32 CANADIAN J. CRIMINOLOGY 173, 173-84 (1990).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 196

created a new pariah class in our supposedly color-blind society.⁹¹ While work is considered critical to rehabilitation and re-entry into society, most employers refuse to hire convicted felons or former prisoners. This dilemma forces many released prisoners back into a life of crime, continuing the cycle of recidivism. As a result, correctional populations are huge. “Adult correctional authorities supervised about 6,977,700 offenders at yearend 2011 . . . which includes probationers, parolees, local jail inmates, and prisoners in the custody of state and federal facilities.”⁹²

A large Bureau of Prisons study, Post-Release Employment Project (PREP), found job training programs in prison substantially reduce recidivism.⁹³ Another study indicates job training in prison may benefit minorities more than other prisoners.⁹⁴ Other studies found little significant effect,⁹⁵ but no studies find that prison labor and job training increase recidivism. Hard work in a position more closely approximating a real job in the competitive private sector, allowing prisoners to accumulate savings,

⁹¹ ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003) (using the term “New Age Slavery” for the first time); ALEXANDER, *supra* note 84 (coining and explaining “New Jim Crow Regime”).

⁹² GLAZE & PARKS, *supra* note 3.

⁹³ William G. Saylor & Gerald G. Gaes, *Training Inmates Through Industrial Work Participation and Vocational and Apprenticeship Instruction*, 1 CORRECTIONS MGMT. Q. 32 (1997).

⁹⁴ See WILLIAM G. SAYLOR & GERALD G. GAES, THE DIFFERENTIAL EFFECT OF INDUSTRIES AND VOCATIONAL TRAINING ON POST RELEASE OUTCOME FOR ETHNIC AND RACIAL GROUPS (1999), *available at* http://www.bop.gov/news/research_projects/published_reports/recidivism/orepreprep_s1.pdf.

⁹⁵ See WILLIAM G. SAYLOR & GERALD G. GAES, COMMENTARY ABOUT THE SCIENTIFIC MERIT OF THE POST RELEASE EMPLOYMENT PROJECT (PREP) (2002), *available at* http://www.bop.gov/news/research_projects/published_reports/edu_training/saylor_gaes_commentary.pdf.

conditioning prisoners to a long work week, and enforcing pro-social work environments under powerful management is bound to reduce recidivism more than existing government vocational training programs not focused on profitability. A prisoner conditioned to work sixty hours per week will easily work forty hours per week in the free world.

Social Consequences of Massive Incarceration.

Given the social consequences of massive incarceration, the questions become whether the United States deserves the developments brought on by massive incarceration and whether the country can benefit by putting its prison population to profitable work. Macroeconomic disadvantages, the expansion of big government, public debt, a huge increase in the welfare state, social costs, and the decline in personal liberty all prove that enormous incarceration is harmful to the nation as a whole.

The economic and social inefficiencies and disadvantages of incarceration are surpassed only by the ineffectiveness of the punishment itself. From the perspective of a behaviorist, prison is a poor form of learning because the punishment is delayed too long from the commission of the criminal behavior sought to be controlled. Further, the behavior most often taught in prison is to follow prison rules, not behavior for success on the outside.

Massive incarceration is a social disaster. Indirect and human costs of incarceration probably equal direct expenditures. Child support payments virtually stop once a prison sentence starts. Collateral social costs include increased welfare payments and social services for the children and families of the incarcerated. Increased suicide and mental illness among prisoners and the stunted development of human capital affect most prisoners. The majority of prisoners do not perform much useful labor,

and their earnings, job skills, education, and entrepreneurship opportunities suffer or disappear. The destruction of families and the imbalance in sex ratios outside prison, particularly in African-American communities, have long-term harmful social effects. Families of incarcerated persons frequently have to drive long distances for visitation. Overrepresentation of African-Americans in this new pariah class also increases the racial divide on economic, social, and educational dimensions. Lowered rates of fertility result. Incarceration breaks up families, marriages, and communities. The children of the incarcerated grow up without parents and are then more prone to criminal activity themselves. Marriage prospects decline, resulting in less opportunity for stable home environments that would otherwise decrease crime. Correctional expenses crowd education funding out of state and local budgets.⁹⁶ Barriers to geographic mobility are erected, not just for prisoners but for their families.

“Nothing Works:” The Failure of Government Regulation. *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* evaluated 231 different studies and found very little in the way of prisoner rehabilitation that had any positive impact on recidivism.⁹⁷ A simplistic summary of this survey arose: “Nothing works.” This sound bite sprung up based on a 1974 article by one of the co-authors of *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation*

⁹⁶ See NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE—EXCESSIVE SPENDING ON INCARCERATION UNDERMINES EDUCATIONAL OPPORTUNITY AND PUBLIC SAFETY IN COMMUNITIES (2d ed. 2011), available at http://naacp.3cdn.net/ecea56adeef3d84a28_azsm639.wz.pdf.

⁹⁷ See DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975).

Studies.⁹⁸ A decade later, Congress “recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed.”⁹⁹ The Sentencing Reform Act of 1984 abolished parole in the federal system, sought to eliminate huge sentencing disparities, basically made all federal sentences determinate, said “punishment should serve retributive, educational, deterrent, and incapacitative goals,” and found that “imprisonment is not an appropriate means of promoting correction and rehabilitation.”¹⁰⁰ From 34,263 federal prisoners in 1984, the federal prison population grew to 214,774 in 2011, over a six-fold increase,¹⁰¹ and this does not count growth in state prison systems and jails in all fifty states.

Congress and state legislatures effectively sabotaged rehabilitation in prison by eliminating the indeterminate sentence, destroying the market for prison-made goods and labor, and passing other ill-considered legislation. At the same time, Congress and state legislatures established state monopolies over prison industries and labor. Prisons became enormously expensive after the prison population proliferated. American incarceration represents in multiple dimensions the utter failure of over-regulation; it achieves the opposite of the intended goal. A system originally designed for rehabilitation actually makes prisoners worse over time. A losing War on Drugs creates casualties but returns POWs to the streets. Sentences to “hard labor” became sentences to forced inactivity. Prison gangs gained power. Sentences were lengthened through various means, though this had

⁹⁸ IAIN MURRAY, MAKING REHABILITATION WORK: AMERICAN EXPERIENCE OF REHABILITATING PRISONERS, *available at* <http://www.civitas.org.uk/pdf/Rehab.pdf>.

⁹⁹ *Mistretta v. United States*, 488 U.S. 361, 366 (1989).

¹⁰⁰ *Id.* at 367; *see generally* 18 U.S.C. § 3582(a).

¹⁰¹ *United States v. Diaz*, No. 11-CR-00821-2, 2013 WL 322243, at *10 (E.D.N.Y. Jan. 28, 2013) (citing DOJ statistics).

little effect on deterrence. Additional conduct was criminalized. Paradoxically, most of the law and order voices who favored tougher stances on crime, including the author, were also proponents of private enterprise and smaller government, yet the result ultimately achieved in corrections exponentially increased the size, power, intrusiveness, and expense of government. In 2010, Michelle Alexander expressed great exasperation with the failure of civil rights legislation and advocacy to prevent creation of “The New Jim Crow” in an age of supposed color-blindness. There is plenty of blame to go around in every direction of the political spectrum. The invention of the penitentiary and subsequent growth of incarceration prove the power of unintended consequences. Societies do not legislatively abolish all barbaric human traits because those characteristics always seem to return later in different, concealed, or unexpected places. They operate in a veneer of civilization and only within the tolerances permitted by human nature. Peace treaties can lead to war. Laws intended for good sometimes cause violence and disorder. It is thought that society sees the worst of human nature in criminals, who obviously require extraordinary handling.

The nation’s rejection of rehabilitation was made without reference to the corrective power of thriving prison industries, which teach work skills and discipline. Studies show the ineffectiveness of standard prison sentences compared to the value of work and some alternative sentencing arrangements.¹⁰² History proves prisons can be profitable. Private prison employment would likely be even more reformatory, especially if employers controlled

¹⁰² Kevin Marsh & Chris Fox, *The Benefit and Cost of Prison in the U.K.: The Results of a Model of Lifetime Re-Offending*, 4 J. EXPERIMENTAL CRIMINOLOGY 403, 403-23 (2008).

the entire prison environment as well as the work itself. Work and crime are opposites.

Incapacitation: The Value of Incarceration. The goal that prisons should be self-supporting has been forgotten. The four remaining purposes of prisons are usually said to be (1) punishment or retribution, (2) deterrence, (3) incapacitation or public protection while offenders are incarcerated, and (4) rehabilitation. Scientific research on criminal deterrence fails to find much deterrent value in incarceration.¹⁰³ Indefinite prison sentences in the future, to be served in places they may never have seen, are not foremost in criminals' minds when offending. With regard to imprisonment, "there is not a strong relationship between objective sanctions and perceived sanctions."¹⁰⁴ The "dirty little secrets" in crime deterrence research prove that the threat of confinement deters crime very little compared to the massive investment in this punishment; incarceration is simply not certain, severe, or swift.¹⁰⁵

Even though prisons fail in their goals of deterrence and rehabilitation, there is one way they succeed: incapacitation. When criminals are in prison, they cannot commit crimes in the free world. Studies show great value in temporarily preventing crime with incapacitation. Incapacitation now ranks as the primary justification for prison. A reputable study found that for each convict released due to prison overcrowding litigation, fifteen crimes are committed, at a cost of \$45,000 above the average cost of keeping a prisoner for one year.¹⁰⁶ Dr.

¹⁰³ Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010).

¹⁰⁴ *Id.* at 808.

¹⁰⁵ *See id.*

¹⁰⁶ *See* Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111-2 Q. J. ECON. 319, 319-51 (1996).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 202

Levitt found four reasons for the marked decrease in U.S. crime, starting in about 1991: the rising prison population, more police, the receding crack cocaine epidemic, and the legalization of abortion.¹⁰⁷ The National Institute of Justice published a widely cited 1987 statistical study by Dr. Edwin W. Zedlewski entitled *Making Confinement Decisions*. *Making Confinement Decisions* found that it costs more to release offenders than to keep them confined; the study computed annual costs of \$430,000 per prisoner released.¹⁰⁸ Dr. Zedlewski's findings utilized a Rand Corporation survey of inmates, which found the average inmate was committing 187 to 287 crimes per year before incarceration.¹⁰⁹

One advantage of prison is that it gives young men and women time to mature. After lengthy prison sentences, older, more mature offenders are less likely to re-offend violently than when they were younger. Some sober up in prison. The incapacitation effect literally keeps crimes from occurring. The early release of prisoners, brought on by budgetary and financial difficulties, causes crime to increase, especially in the large urban areas to which criminals usually return. While logic and data will instruct authorities as to the least threatening prisoners to release, given current recidivism rates, the early release of multiple prisoners inevitably causes an increase in crime. While incarceration itself is harmful and may increase the propensity of a criminal to recidivate, that increased likelihood is smaller than the decrease in crime brought about by the complete incapacitation of offenders while

¹⁰⁷ See Steven Levitt, *Understanding Why Crime Fell in the 1990's: Four Factors That Explain the Decline and Six That Do Not*, 18-1 J. ECON. PERSP. 163, 163-90 (2004).

¹⁰⁸ FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* 93 (Univ. Chi. Press 1991).

¹⁰⁹ *Id.*

incarcerated. Modern prisons do not rehabilitate or deter crime very well, but prisoners naturally do not deserve to be in the free world, where they would commit many more crimes than they do in prison. The revitalization of prison industries, including putting prisoners to work, is a prime way to reconcile the value of incapacitation with reductions in recidivism brought about by the aging or maturation process. Those serving life without parole and other long sentences make some of the best workers.

Past Calls for Freeing Prison Labor. Scholars and some leaders agree about the need to overthrow the protectionist regime. In 1985, professors J. Roger Lee and Laurin A. Wollan, Jr. proposed a “libertarian prison” in which prisoners were free to produce, run businesses, and move inside the walls of prison, subject of course to surveillance and normal legal restraints.¹¹⁰ The National Center for Policy Analysis in 1996 released *Factories Behind Bars* by economist Morgan O. Reynolds, advocating greater private sector involvement.¹¹¹ In 1998, law professor Stephen P. Garvey called for *Freeing Prisoners’ Labor* in a *Stanford Law Review* article with that title.¹¹² Professor Garvey outlined the strangulation of prison industries over the years and proposed opening the market for prison goods and labor, removing the “embargo.” U.S. Representative Bill McCollum of Florida introduced the Free Market Prison Industries Reform Act of 1998 and conducted hearings before that bill died in House

¹¹⁰ See J. Roger Lee & Laurin A. Wollan, Jr., *The Libertarian Prison: Principles of Laissez-Faire Incarceration*, 65-2 PRISON J. 108, 108-21 (1985).

¹¹¹ MORGAN O. REYNOLDS, NAT’L CTR. FOR POLICY ANALYSIS, NCPA POLICY REPORT NO. 206: FACTORIES BEHIND BARS (1996), available at <http://www.ncpa.org/pdfs/st206.pdf>.

¹¹² See Garvey, *supra* note 46.

committee.¹¹³ In 1999, economist Steven D. Levitt contended that inmate labor participation should increase by removing existing legal barriers.¹¹⁴ After all these writings and hearings, prison and jail populations rose sharply.

Difficulty of Change. Prisoners are the least popular segment of modern society considering that society keeps them hidden and concern for them is very low. Many Americans want prison to be worse than it is, and there is a prevailing myth that prisoners have it easy. Politicians lose elections if they appear “soft on crime.” It is possible to see prison as a failed social experiment of the last 200 years, but society now accepts it as the norm and is appalled at some alternatives. Correctional officials working in the civil service are not in a good position to strongly advocate major structural changes. Jails, where prisoners serve shorter sentences and extra space is not often available, are admittedly not typically suitable for industrial operations, but jail prisoners are more easily transported with less risk.

¹¹³ *Prison Industry Reform Legislation: Hearing on H.R. 4100 and H.R. 2758 Before the Subcomm. on Crime of the Comm. on the Judiciary*, 105th Cong. (1998), available at http://commdocs.house.gov/committees/judiciary/hju57231.000/hju57231_of.htm. Dr. Morgan O. Reynolds testified as follows: “Our current policy is the height of folly. To ban any part of the population from productive employment opportunities creates a string of economic losers. A new study of inmate labor from the American Bar Association’s subcommittee on correctional industries shows that the unemployment problem in prisons is getting worse rather than better. The nation’s inmate population is growing so rapidly that the share of state and federal prisoners with jobs has shrunk from 7.6% to 6.5% since 1990.” *Id.*

¹¹⁴ See Steven D. Levitt, *The Economics of Inmate Labor Participation* (May 26, 1999) (unpublished manuscript), available at <http://caselaw.org/Files/Levitt%20Paper.doc>.

Many who identify with the plight of prisoners stand in the way of revitalizing prison industries by complaining about the “exploitation” of prison labor or by insisting on rights and wages enjoyed in the free world. These anti-business advocates, known by their use of the term “prison-industrial complex,” do not fully realize that prisoners want to perform useful labor; such employment is good for everyone; prisoners first exploited society to earn their incarceration; big government and a massive legal structure has failed prisoners; private enterprise is the wellspring of economic progress; or the prison workforce necessarily contains many problematic workers. The hard truth is that it is better to be exploited than ignored or marginalized. At the height of exploitation, antebellum slaves were, on average, valued,¹¹⁵ happier, treated better, and were exponentially more productive¹¹⁶ than “New Age slaves” in prison.¹¹⁷

According to scholars, penal systems in stable nations change very slowly.¹¹⁸ The principle of less eligibility means that the public wants prison life to be

¹¹⁵ A top field hand in today’s money was worth up to \$45,000.

¹¹⁶ ROBERT W. FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* (Univ. Press of Am. 1974), established that antebellum slavery was efficient and as profitable as industrial investments in the North. They found that slaves consumed 88% of their own economic production. *Id.* at 153. This work was and continues to be an eye-opener.

¹¹⁷ See JOHN DEWAR GLEISSNER, *PRISON & SLAVERY: A SURPRISING COMPARISON* (Outskirts Press, Inc. 2010). Except for educational opportunities, slaves lived better day-to-day and were far happier than modern prisoners; food, clothing, and immediate shelter were comparable; slaves enjoyed their families, co-workers, spouses, friends, festivities, churches, had greater freedom of movement, better health, community peace, worked with animals, pastoral environment, less sexual exploitation, etc.

¹¹⁸ JOHAN THORSTEN SELLIN, *SLAVERY AND THE PENAL SYSTEM* 132 (Elsevier Scientific Publ’g Co. 1976).

worse than the lifestyle enjoyed by the poorest law-abiding citizens. Because modern punishment is hidden, the public remains ignorant and apathetic in many ways. In other words, modern prison life is “out of sight, out of mind.” The public presumably likes to see prisoners picking up trash on the side of the road, but this masks widespread idleness inside jails and prisons. The public presumably does not care much, if at all, whether the lives of prisoners improve. The interplay between state and federal governments compounded the difficulty of remedying the protectionist regime. When the federal government gave the states power to ban the sale of prison-made goods, at a time when most states sought to do just that, the anti-free trade and pro-government monopolies took root and grew in their insidious yet anemic ways. The monopolistic regime was never wiped away, even though the Smoot-Hawley Tariff and similar laws were repealed in favor of international trade.

Prison labor law is now inextricably bound up with other restrictive or expensive legislation and tort law. This includes mandatory source preferences and the complications of federal and state procurement laws, international, interstate and intra-state transportation and sales barriers, labeling, required employee benefits, the Fair Labor Standards Act, Title VII, Prison Litigation Reform Act, and the Inmate Accident Compensation Act. Change in this area must also address the concerns of the public, political constituencies, and affected businesses and labor. Bureaucracies resist change.

The greatest drivers of prison reform today will be budgetary, economic, and financial problems, some of which bring on judicial denunciations and prisoner releases. Because elected officials presumably do not favor prisoners, unelected officials, namely federal judges, act

when conditions violate the Constitution, a debatable yet necessary standard.

In *Brown v. Plata*,¹¹⁹ the U.S. Supreme Court called California's severely overcrowded correctional system, exacerbated by "an unprecedented budgetary shortfall," unconscionable, unsafe, harsh, toxic, criminogenic, violent, unsanitary, chaotic, disease-ridden, violent, and suicide-inducing, all resulting in torture, lingering deaths, and a culture of cynicism, fear, and despair.¹²⁰ The federal courts over several years forced California to drastically lower its prison population. From December 31, 2010, to December 31, 2011, California's prison population decreased by 15,493, more than the U.S. prison population as a whole.¹²¹ Thus, forced prisoner releases in California fully and statistically explain the entire 2011 decline in the U.S. prison population, which is not a clear sign of progress, especially if, as predicted by some, it causes an increase in crime.

Legal and Structural Changes Needed. State-run correctional industries do not have one clearly defined goal; several missions are in their mission statements. Is their primary goal to help the prisoner train for work after prison and reduce recidivism, or do they intend to save the state money? Are they supposed to create peaceful prison conditions or provide goods to other divisions of government? Do they produce the highest quality at the lowest price? If they are really helping the taxpayer, why do they often lose money?

Most prisoners do not work, prison industries cannot usually sell goods in the private sector, and

¹¹⁹ *Brown v. Plata*, 131 S. Ct. 1910, 1927 (2011).

¹²⁰ *Id.*

¹²¹ E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, 3 tbl.2 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

prisoners generally do very little to offset the enormous costs of their own incarcerations. When prison systems made profits, they worked prisoners very hard under the Auburn System in the private industrial setting. Industrial work avoids the extra security costs and inefficiencies of roadwork and other tasks prisoners are allowed to do today but which chores are not nearly as productive as organized manufacturing work in secure facilities.

Changes in the legal and economic structures of prisons can be made without reducing the benefits of incapacitation. The primary vehicle for revitalizing prison industries and benefiting the American economy will be private prison industries operating in secure prison environments free of wage and hour laws and almost all employment-related legislation and tort claims, thereby imposing greater discipline on prisoners. The nation must get government-owned-and-operated prison industries out of the business of losing money and force them to transition to a market economy. Far from being exploitation of prison labor, prisoners would naturally welcome the paying jobs. Putting hundreds of thousands of people to work would help revitalize the American economy and bring manufacturing jobs back to the United States. To overcome the previously unfair competition presented by unpaid or poorly paid prison labor, prison industries might be restricted to making goods now made exclusively overseas.¹²² In this way, all Americans would benefit, even those in organized labor.

¹²² Federal Prison Industries, Inc. (UNICOR) is trying to jump on this bandwagon by taking advantage of a program designed for *private* businesses (“During fiscal year 2012, FPI received legislative authority to participate in the Prison Industries Enhancement Certification Program (PIECP) and to manufacture products that would otherwise be produced outside of the United States, as approved by FPI’s Board of Directors. With the passage of these authorities, FPI’s Board has approved 14 pilot programs for repatriated products. FPI anticipates

According to free market economists, prohibiting mutually beneficial exchanges harms the economy. Protective legislation at the federal and state levels greatly limits prison industries and labor. The modern prison regime suffers because it cannot participate freely in an open market. Prison-made goods are about the only legal products in the whole country not allowed to be sold freely in the market. Stifling economic production in prison drained the economy more as prison populations rose. It is time to repeal those protectionist statutes, the last relics of the Smoot-Hawley legislative era, to create a more open market for prison-made goods.

Society remembers labor exploitation by private enterprise during the Industrial Revolution, slavery, and serfdom, but none of those labor regimes were as bad as the current incarceration regime. The current prison regime oppresses the punishers along with the punished and helps foreign manufacturers. Private enterprise would create a better working environment without coercion. Prisoners would have to live and work without any sense of entitlement. The more exacting requirements of private employers under a competitive employment-at-will regime would impose upon inmates the discipline that has ever been associated with rehabilitation.

CREATING AMERICAN MANUFACTURING JOBS—8 STEPS

1. Repeal Restrictive Federal and State Trade Statutes. The federal government made a fundamental mistake when it allowed interstate commerce to be regulated in fifty-one different places, and that mistake can best be corrected by federal preemption now. Federal and

these pilot projects will assist in further reducing its losses.”). OFFICE OF THE INSPECTOR GEN., *supra* note 4, at 2. This action merely compounds bureaucratic impediments in an attempt to stop red ink.

state statutes prohibiting and limiting the manufacture, purchase, sale, and shipment of prisoner-made goods should be repealed or preempted. Prisoner-made goods should be allowed to move in interstate commerce to the same extent as any other product, without special labeling requirements. Mandatory source requirements could be eliminated on a government-by-government basis as state-run correctional industries competed with private businesses. Existing prison industries for the sake of efficiency would adapt to the market without existing preferences. Government agencies would be freed from purchasing restrictions.

Existing state protective trade legislation was passed to prevent the evils of convict leasing, prevent unfair competition, and preserve government control over prison labor and industries. To some extent, the states were retaliating with trade barriers in response to the barriers set up against them by other states. Any statute that protected the worker or public from harm should not be affected in any reformed system.

2. Limited Freedom of Contract. Freedom of contract should prevail between prison employers, prisoners, and federal and state correctional institutions. Prisoners and private businesses (or existing correctional industries) would negotiate on a *laissez-faire* basis, within the limitations imposed by ongoing sentences of imprisonment. Federal and state governments should encourage contracts between private and state businesses and prisoners regarding negotiated wages, hours, and conditions of employment. Private prison industries could be established within space rented from the prison or in separate secure facilities, forcing out state-sponsored businesses if it benefited the state. Transportation, food, clothing, and shelter might all be addressed in contracts if

industries chose to employ workers outside existing prison walls.

Instead of the prison system or state leasing its prisoners, as in the discredited convict leasing systems of the past, prisoners should contract directly with private employers. Involuntary convict leasing has a tragic record and should be avoided. The history of convict leasing provides guidance on how not to work prison labor: do *not* intermingle the determination of guilt with the desire for cheap labor; do *not* let the government lease convicts; do *not* eliminate wages or incentives for decent treatment; do *not* make most prison labor involuntary; do *not* send prisoners to the most dangerous jobs; and of course do *not* discriminate on the basis of race.

In practice, a tri-partite contractual relationship would arise because prisons would impose conditions on private employers and prisoner-employees. The primary condition would be that prisoners remain in prison or be securely confined in a comparable facility. While this may sound complicated, it would take on many attributes of existing tri-partite, dual-employer contracts between general employers (temporary service employers or agencies), special employers (companies needing work performed), and their shared employees. Although we need to get government-owned-and-operated prison industries out of their current business of losing money, the state will remain involved in a lesser but vital role. Private enterprises could submit bids to prisons regarding the renting of developed or undeveloped space, machinery, utilities, and other industrial needs. These concessions would reduce the costs of incarceration. State correctional industries could sell out to private concerns, partner with other businesses, transform themselves, or try to survive as they are.

Obviously, businesses will create contracts to ensure productivity, peaceful work environments, innovation, and hard work. Contracting parties can achieve these goals by agreement much better than any level of government regulation. Employers would surely prohibit gang activity, weapon production, violence, suspicious or preventable accidents, and other behavior prisons struggle to bar. For example, prisoners might be required to break up any fights as soon as possible on pain of losing their own jobs.

It is to some extent inconsistent to speak of a prisoner's freedom of contract when the prisoner loses his liberty and other freedoms upon incarceration or when the state intervenes in the market to support workers who are then enabled to work for lower wages than if they were required to provide their own food, clothing, shelter, and health care. Thus, freedom of contract in the context of prison labor is limited by the conditions of incarceration. With an imprisoned workforce supported at state expense, the market is never truly "free." All that can be done is to inject more freedom of action into prison industries and labor and try to benefit the public at large by getting repealed crippling laws. The unequal bargaining position of prisoners is inherent in their status as prisoners and in reality provides pro-social forces greater power to discipline them.

3. Immunity from Claims, Lawsuits, and Prosecution. "Corporate tax liability, employee benefits, tort litigation, [and] regulatory compliance . . . contribute to the cost differential confronting manufacturers in the United States."¹²³ Statutes, regulations, tort claims,

¹²³ MFG. INST., FACTS ABOUT MANUFACTURING 4, *available at* <http://www.themanufacturinginstitute.org/Research/Facts-About->

required employee benefits, lawsuits, hearings, investigations, government enforcement agencies, extra procedures, forms, compliance activities, delayed personnel decisions, and legal expenses drive up the cost of American labor and send manufacturing jobs to lower-wage countries.¹²⁴ “Structural costs in 2011 were 20 percent higher than for our major competitors, up from 17.6 percent in 2008. That cost differential excludes the cost of labor.”¹²⁵

To prevent expensive litigation and compliance costs, private and state prison industries should enjoy full immunity from almost all lawsuits and claims.¹²⁶ Employment laws, wage and hour legislation, insurance, employee benefits, tort claims, and restrictions protecting law-abiding workers should exempt prison labor industries, with the exception of OSHA and scaled-back workers’ compensation for permanent injury, something similar to

Manufacturing/~media/3EBE6A748B5B420E853B5216D4812847.ash
x.

¹²⁴ Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233 (1991); C.S. Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1 (2004).

¹²⁵ MFG. INST., FACTS ABOUT MANUFACTURING 3, available at <http://www.themanufacturinginstitute.org/Research/Facts-About-Manufacturing/~media/3EBE6A748B5B420E853B5216D4812847.ash>
x.

¹²⁶ See *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) (prisoner performing janitorial, kitchen helper and similar duties directly for Department of Corrections not entitled to minimum wage under Fair Labor Standards Act; different results in other cases); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008) (complexity of potential claims discussed).

the current federal Inmate Accident Compensation Act and its promulgated regulations.¹²⁷ American prison labor should be legally considered (1) part of the sentence imposed by the sentencing court, (2) required at the discretion of the state as “involuntary servitude” without compensation within the meaning of the Thirteenth Amendment, and (3) allowed gratuitously in the sole discretion of the state under the proposed legislation. For purposes of immunity from lawsuits, prisoners while incarcerated should legally be considered involuntary servants of the state.¹²⁸ Under the Thirteenth Amendment, the state is arguably entitled to 100% of the value of prisoners’ labor, a principle bolstered by the state paying for all of the prisoners’ food, clothing, shelter, and health care. That labor value belongs to all of the people and ought to be equally available to all manufacturers and service providers in the United States.

The Inmate Accident Compensation Act and its promulgated regulations impose significant limitations

¹²⁷ 18 U.S.C. § 4126 (West, Westlaw through P.L. 113-36 (excluding P.L. 113-34)). Under 28 C.F.R. § 301.318, “The Inmate Accident Compensation system is not obligated to comply with the provisions of any other system of worker’s compensation except where stated in this part.” Other reasonable limitations are imposed on the inmates’ recovery, including factors such as minimum wage.

¹²⁸ In 1977, Supreme Court Justice Thurgood Marshall cited a Virginia decision that “[f]or much of this country’s history, the prevailing view was that a prisoner was a mere slave of the State, [who] not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him.” *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 139 (1977) (quoting *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871)). Although antebellum slaveholders were not required to pay their slaves, they often did to increase production.

upon monetary recoveries for on-the-job injuries by federal inmates. “The Inmate Accident Compensation system is not obligated to comply with the provisions of any other system of worker’s compensation”¹²⁹ Imposed limitations include only calculating impairment at the time of release,¹³⁰ withholding payment until release,¹³¹ suspension of benefits if an inmate is re-incarcerated,¹³² and other limitations similar to those in most workers’ compensation laws. Prompt and simple determinations are facilitated: initial determination is made by a claims examiner,¹³³ with appeal to a committee.¹³⁴ Significantly, Federal Prison Industries—the employer—controls the accident compensation process.¹³⁵

After almost fifty years, U.S. circuit courts are still split on the question whether Title VII applies to convict labor.¹³⁶ Many other unresolved questions exist in prison labor law. The legal uncertainties add greatly to potential compliance costs, discouraging employment. The potential compliance costs of labor laws and tort claims cause more unemployment in prison than any good they could possibly

¹²⁹ 28 C.F.R. § 301.318 (LEXIS through 2013).

¹³⁰ 28 C.F.R. § 301.314(a) (LEXIS through 2013).

¹³¹ 28 C.F.R. § 301.301(a) (LEXIS through 2013).

¹³² 28 C.F.R. § 301.316 (LEXIS through 2013).

¹³³ 28 C.F.R. § 301.305 (LEXIS through 2013).

¹³⁴ 28 C.F.R. § 301.306 (LEXIS through 2013).

¹³⁵ See 28 C.F.R. §§ 301.302, -.313, -.317 (LEXIS through 2013).

¹³⁶ Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America’s Prisons*, 111 COLUM. L. REV. 1048, 1068 (2011).

do. Whether or not prisoners and prison industries are actually covered by specific labor laws, they must be exempted from and granted immunity regarding employment-related statutes and claims. Prisoners arguably do not deserve such protection, and many of their civil rights are already removed by virtue of their convictions and incarceration. Exemptions, even if not legally necessary, are desirable and will prevent claims and litigation regarding coverage and applicability. Immunity will make unskilled and uneducated prison labor more viable by reducing the labor burden. Across-the-board elimination of worker benefits and protection, with a few exceptions, would strengthen the hand of employers attempting to control problematic prison labor.

Prison labor and industries should be specifically exempted from and made immune from suit regarding the Fair Labor Standards Act, Age Discrimination in Employment Act, Equal Pay Act, Pregnancy Discrimination Act, Americans with Disabilities Act, Rehabilitation Act of 1973, National Labor Relations Act, Employee Retirement Income Security Act (ERISA), Labor-Management Reporting and Disclosure Act (LMRDA) of 1959, all Civil Rights Acts, Uniformed Services Employment and Reemployment Rights Act, Employee Polygraph Protection Act, Consumer Credit Protection Act (CPCA), Davis-Bacon Act, McNamara-O'Hara Service Contract Act, Uniformed Services Employment and Reemployment Rights Act, Walsh-Healey Public Contracts Act, Migrant and Seasonal Agricultural Worker Protection Act (MSPA), Immigration and Nationality Act (INA), Worker Adjustment and Retraining

Notification Act (WARN), Federal Employees' Compensation Act (FECA), Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA), Civil Rights of Institutionalized Persons Act (except for modified portions of the Prison Litigation Reform Act), Health Insurance Portability and Accountability Act (HIPAA), Patient Protection and Affordable Care Act (Obamacare), The Genetic Information Nondiscrimination Act of 2008 (GINA), and the Family and Medical Leave Act. Some legislation such as the Federal Mine Safety and Health Act of 1977, Longshore and Harbor Workers' Compensation Act (LHWCA), Railway Labor Act, Energy Employees Occupational Illness Compensation Program Act (EEOICPA), Radiation Exposure Compensation Act (RECA), and the Black Lung Benefits Act (BLBA) would not need changing, as those environments are not suitable for prison labor. To the long list above, immunity from tort claims, unemployment insurance requirements, and comparable state statutes should be added. Employers are already immune from tort claims by virtue of workers' compensation laws. A host of state laws need addressing, on a state-by-state basis or with federal preemption. Employers should not be required to provide benefits to inmates that they otherwise provide to their non-incarcerated employees.

The mere listing of the statutes above, and contemplation of additional state employment-related statutes and tort claims, ought to inform the nation how complex, cumbersome, and expensive employment and tort laws have become relative to the rest of the world. Difficulties of interpretation and the expenditures of time

and legal expenses are even more burdensome in the context of prison industries, where prisoners have a proven record of filing a mountain of frivolous lawsuits, regulation is spread across fifty-one jurisdictions, and the existing legal framework is complicated and confusing in multiple ways.

Few of these federal employment-related statutes help prisoners now, and their existence harms prison employment prospects. Given the public's historical disdain of prisoners, now is not the time to grant prisoners the rights afforded under these laws, let prisoners imagine they have such rights, or allow litigation over coverage. A chief error of the PIECP was trying to bring prisoners up to prevailing wage standards. The creation of a *laissez-faire* employment regime would bypass the huge layer of employment laws that make American labor substantially more expensive than unprotected labor in foreign countries. In the process, it would create an excellent laboratory to test the value of the employment laws against a *laissez-faire* employment environment, one more similar to foreign labor-management relations in developing nations. In the prison context, the re-setting of the American employment relationship back to employment-at-will ought to educate the nation more fully on the advantages and disadvantages of its employment regulations. Experience will determine what employment protection prisoners need far better than adapting generally inapplicable or unsuccessful legislation to the correctional context. Even without legal requirements, "employers already largely accept and

comply with their employment law obligations,”¹³⁷ and this would be true of most established corporations operating in the prison context. Federal laws have changed attitudes and norms in society, and their repeal in certain contexts will not cause wholesale relapse.

Immunity from lawsuits would permit religious organizations a greater role in establishing, funding, and managing prison industries and workplaces in accordance with their particular religious principles. Hiring and management practices based upon religious activity or beliefs should be allowed because religion possesses the power to transform lives and will inject morality into prison systems. Businesses affiliated with particular religions ought to be clothed with the same constitutional protection otherwise allowed churches, mosques, synagogues, and temples.

The power and authority of federal regulation of interstate commerce relating to prison-made goods has already been established by 18 U.S.C. §§ 1761 and 1762 and comparable federal legislation. Federal law needs to encourage and facilitate this interstate commerce instead of blocking it. The best way is for Congress to preemptively wipe the slate clean, admit the bankruptcy of its domestic Smoot-Hawley regime, prevent states from imposing restrictions on interstate commerce, and allow a fresh start.

If prison jobs that simply help run the prison or jail are not counted, the huge edifice of federal and state regulation of labor and industries, in and out of prison, causes a market-productive prisoner unemployment rate of about 90%. Because the existing legal structure has failed

¹³⁷ Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 945 (2008).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 220

prisoners and prison industries, contracts must take the place of the failed state and federal legislation. The reformed legal environment of a very few applicable employment-related laws and reliance upon contracts would still be better for all interests than the involuntary servitude contemplated and allowed by the first section of the Thirteenth Amendment.

Full and enforceable immunity is necessary given the volume of tort and statutory claims and suits that would be filed if prisoners were allowed the opportunity. Indeed, the primary reason for the Prison Litigation Reform Act¹³⁸ (PLRA) was the stupendous number of lawsuits filed by prisoners, almost all of them frivolous or unfounded. The PLRA succeeded in bringing a halt to the unprecedented volume of frivolous prison litigation and might be strengthened again to serve as a helpful vehicle to swiftly deal with and reduce “jailbird lawsuits.” Federal law already limits recoveries by injured Federal Prison Industries workers.¹³⁹ The Inmate Accident Compensation Act,¹⁴⁰ not the Federal Tort Claims Act (FTCA), is the exclusive remedy against the government by a federal prisoner with work-related injuries¹⁴¹ and might be retained and made available to private businesses.

Legislatures and Congress chose to regulate prison labor and industries with criminal statutes.¹⁴² The use of

¹³⁸ 42 U.S.C. § 1997e (West, Westlaw through P.L. 113-36 (excluding P.L. 113-34)).

¹³⁹ *Smith v. United States*, 561 F.3d 1090 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1142, 175 L.Ed.2d 973 (2010); 18 U.S.C. § 4126 (West, Westlaw through P.L. 113-36 (excluding P.L. 113-34)).

¹⁴⁰ 18 U.S.C. § 4126.

¹⁴¹ *United States v. Demko*, 385 U.S. 149 (1966); *Smith v. United States*, 561 F.3d 1090 (10th Cir. 2009), *cert. denied*, 558 U.S. 1148 (2010).

¹⁴² *See* 18 U.S.C. §§ 1761-62 (West, Westlaw through P.L. 113-36 (excluding P.L. 113-34)).

criminal laws to regulate this trade had and still has a chilling effect on anyone seeking to find any exceptions or legal pathways through this complex, changing, and confusing anti-competitive body of law and deters railroads and transportation companies, too. Obviously, those anti-competitive criminal laws should be repealed, revised, or federally preempted.

4. Mutual Rights of Return to General Prison Population. Subject to their contracts, private and state businesses should have the unfettered right to return offending workers to the general prison population. Likewise, prisoners could voluntarily return to the general prison population in the event employers did not provide a better working or living environment. Clearly, the draconian aspects of the Auburn System, such as enforced silence, lock-step marching, and masks, would not reappear because employers would seek to retain their workers. Many prisoners would naturally love to work in an air-conditioned environment, which is not something they enjoy in most prisons. Employment would be at-will, subject to whatever contracts the employers and prisoners made prior to the commencement of employment. Contracts might provide that prisoners have to return to the general prison population if they want to pursue a claim against their employers and that their legal damages stop accumulating once they leave their jobs.

5. Trust Accounts. Money earned by prisoners would be put into a trust account, pending good behavior and subject to claims for child support, victim restitution, court costs, fines, and their own room and board in prison. Deductions for federal, state, and local taxes, reasonable charges for room and board, child and family support, and victim restitution are already provided for and regulated in 18 U.S.C. § 1761(c)—TRANSPORTATION OR IMPORTATION [OF PRISON-MADE GOODS]. If prison work pilot projects pay

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 222

prevailing wages and are designated by the Director of the Bureau of Justice Assistance, then wages “subject to deductions . . . shall not, in the aggregate, exceed 80 per centum of gross wages.”¹⁴³

Misbehavior by prisoners under contracts might result in forfeiture of earnings on account of escape attempts, violence, theft, strikes, work slowdowns, or other violations of agreed rules and contacts. Prisoners would undoubtedly behave to assure their continued employment (and sometimes residence) in these better secure environments. Employers would more easily enforce discipline and rules with the absolute discretion allowed to employers in an employment-at-will relationship. Prisoners would then have an investment in their own good behavior, learn pro-social skills, and develop healthy work habits. Prisoners serving life without parole (or other long sentences) should be able to spend earned money, while the victims’ families receive regular checks from those earnings. Juries might determine the eligibility of victims’ families to receive these checks.

Deductions from the prisoner’s paycheck for family support, victim restitution, court costs, taxes, and the costs of confinement could vary from state to state. Optimum levels of deductions are yet to be determined. The states would be free to experiment with different deduction amounts and allocations. Something similar to the current overall federal limitation permitting no more than 80% of gross wages to be deducted seems wise; that overall limit on deductions might best be enforced by federal preemptive legislation.

6. Oversight. State and federal governments would provide administrative and judicial oversight of prison labor, industries, and contracts to assure prisoners received their agreed compensation, were not abused, and did not

¹⁴³ 18 U.S.C. § 1761(c)(2).

agree to unconscionable contractual provisions. U.S. magistrate judges already resolve lawsuits filed by federal prisoners. Existing federal mediation and arbitration services could settle or decide disputes in the federal prison system. States are increasingly encouraging alternative dispute resolution, an expedited procedure appropriate for disputes in the prison context.

7. Significantly Decrease Prison Population. A common concern of those who are suspicious of business is that, like in the convict leasing age, the legal system will provide cheap labor by finding more criminals guilty and increasing the length of prison sentences. This legitimate concern is based upon (1) evidence that criminal convictions fed the need for free or low-cost labor and convict leasing regimes after the Civil War and for decades thereafter;¹⁴⁴ (2) current prison privatization, which merely privatizes the warehouse function of incarceration and provides to special interests the financial incentives to increase prison populations; (3) the political strength of private correctional corporations and correctional officers' unions; and (4) the power of the courts to affect the supply and demand for prison labor. Therefore, the opening up of vibrant prison industries ought to include an increase in alternative sentences such as drug treatment, proposed judicial corporal punishment,¹⁴⁵ community service, parole, probation, and other sentences short of incarceration.

The revitalization of prison industries does not depend upon increasing the 2.25 million prisoners now

¹⁴⁴ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME—THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008). The history of convict leasing instructs us on what *not* to do.

¹⁴⁵ See J.D. Gleissner, *Prison Overcrowding Cure: Judicial Corporal Punishment of Adults*, 49-4 CRIM. L. BULL. (2013) (author suggests halving the U.S. incarcerated population with judicial corporal punishment).

behind American bars. The reduction of the American prison population and the freeing of prison labor can proceed simultaneously. Both would recognize that some people in prison do not necessarily have to be there for the betterment of society as a whole. Incarceration is not a vital feature of the nation's republic. Incarceration as it is now known did not exist when the U.S. Constitution was written. The Declaration of Independence redirected the most successful form of British punishment, transportation of convicts, away from the Thirteen Colonies and toward Australia.

8. Avoid Unfair Competition. Several steps can be taken to reduce or eliminate unfair competition from prison industries and labor. These options include one or more of the following: (1) Competing employers should have equal access to prison labor. This is one advantage of eliminating convict leasing (or contracting for groups of prisoners) by the prison system and allowing prisoners and employers to make individual employment decisions. (2) Prison industries could be limited to manufacturing goods now exclusively made overseas or to domestic industries under serious assault by foreign manufacturers and processors. If only one American manufacturer made a particular item in the United States, that manufacturer could be allowed to hire prison labor. (3) Prison industries might be required to prove that their prison employees support existing employment in the free sector or re-shore jobs to the United States. Union shops, for example, would benefit from prison labor if their prison industry suppliers sold goods and services to union shops at lower prices. (4) The transfer of prison laborers from one prison system to another can be facilitated, increasing industrial efficiency, permitting more flexibility in hiring and plant locations, and avoiding or lessening unfair competition on a regional or distance basis. (5) Prison industries might be required to

show that they were not displacing currently employed, free American workers.

With the diversification of the world economy and production methods, the off-shoring of manufacturing jobs, and the limitations of incarceration, competition with American labor and businesses outside prison will not be as great as many perceive. Prison jobs under a reformed regime will largely be low-skilled jobs, and the competition for these jobs would not be as intense as with skilled positions. Prisoners would not mix with free workers or leave secure facilities. Prison labor cannot compete with workers in mining, transportation, construction, power generation and transmission, highly sophisticated manufacturing, defense industries, or any dangerous industry. Anything that required work in changing locations would be out of consideration for prison labor. American jobs that have already moved overseas, including less skilled positions, would not be endangered and in fact might be brought back to the United States.

Today, work shirts, the subject of the Supreme Court's 1936 decision in *Whitfield v. State of Ohio*,¹⁴⁶ are almost all made overseas. Americans still make horse collars, harnesses, and straps, the contested products in *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*,¹⁴⁷ but the leather industry has changed radically since 1937.

Production and supply have gradually moved from industrialized to developing countries and emerging economies, which are now becoming major players in

¹⁴⁶ 297 U.S. 431 (1936).

¹⁴⁷ 299 U.S. 334 (1937).

the trade. In fact, developing and emerging economies can now manage the whole supply chain on their own and are fast becoming the most important suppliers of value-added finished products. About 45% of footwear, for example, is made in China.¹⁴⁸

Competition between foreign and U.S. labor *dwarfs* any potential competition between free and incarcerated labor in the United States. America must work harder and smarter to remain the leading world power. All American manufacturing jobs create U.S. tax revenues and additional American employment, while manufacturing jobs lost to foreign countries generally subtract from the U.S. economy. Research, development, and engineering follow manufacturing. The nation needs a free trade agreement with itself. Clearly, jobs move overseas to lower-wage countries, indicating the relative economic advantages of lower wages. American prisoners would still be making more money than wages in Vietnam, India, China, or Pakistan . . . *and they would be making more money than they are making right now.*

Expected Results of Proposed Changes. Texas A&M economist Dr. Morgan O. Reynolds, former Chief Economist at the U.S. Department of Labor, predicted, “If

¹⁴⁸

Leather, INT’L TRADE CENTRE, <http://www.intracen.org/exporters/leather/> (last visited Jan. 1, 2013); see COMMODITIES & TRADE DIV., FOOD & AGRIC. ORG. OF THE UNITED NATIONS, WORLD STATISTICAL COMPENDIUM FOR RAW HIDES AND SKINS, LEATHER AND LEATHER FOOTWEAR 1992-2011 (2011) (unmistakable and growing dominance of developing countries over developed countries).

half of all prisoners worked in market-type jobs for five years, earning \$7 an hour in full-time employment, they could boost the nation's gross domestic product by \$20 billion. Prison-based industries would have a ripple effect in their communities, as they tap local suppliers and other services."¹⁴⁹ Additionally, tax receipts would rise. Prison laborers should pay taxes and be subject to Social Security because when they leave prison and grow old, they will be asking for Medicare or Social Security benefits.

If federal and state statutes restricting prison labor and private prison industries are swept away, freedom of contract would create jobs in a circle around prisons. "An increment to manufacturing production in the U.S. creates more economic activity both within and outside the sector than does a similar increment in any other major sector."¹⁵⁰ Manufacturing generates a larger economic multiplier effect than other sectors of the economy.¹⁵¹ If, for example, 100,000 manufacturing jobs in prison were generated, a manufacturing multiplier of 1.5 would create an additional 150,000 jobs, for a total of 250,000 jobs. Economists argue convincingly that the 1.5 manufacturing multiplier significantly understates the true multiplying

¹⁴⁹ Warren Richey, *Made in USA . . . But by Convicts*, CHRISTIAN SCI. MONITOR, Jan. 14, 1998, available at [http://www.csmonitor.com/1998/0114/011498.us.us.4.html/\(page\)/2](http://www.csmonitor.com/1998/0114/011498.us.us.4.html/(page)/2).

¹⁵⁰ JOEL POPKIN & KATHRYN KOBE, CO. FOR THE NAT'L ASS'N OF MFRS. & THE NAM COUNCIL OF MFG. ASS'NS, *MANUFACTURING RESURGENCE—A MUST FOR U.S. PROSPERITY* (2010), available at <http://www.nam.org/System/Capture-Download.aspx?id=f36ec9f5-7bff-4da4-aeba-faab4b009b92>.

¹⁵¹ MFG. INST., *FACTS ABOUT MANUFACTURING 3 fig.2*, available at http://www.themanufacturinginstitute.org/~media/1242121E7A4F45D68C2A4586540703A5/2012_Facts_About_Manufacturing___Full_Version___High_Res.pdf; Susan Helper et al., *Why Does Manufacturing Matter? Which Manufacturing Matters?*, BROOKINGS (Feb. 22, 2012), http://www.brookings.edu/papers/2012/0222_manufacturing_helper_krueger_wial.aspx.

effect of the manufacturing sector on the economy.¹⁵² Although prison labor would be unskilled at the outset, and relatively low wages would produce a smaller manufacturing multiplier, prisoners can boost productivity the old-fashioned way by working longer hours. Ambitious prisoners might, for example, work sixty hours per week at two dollars per hour and thereby bring manufacturing jobs back to the United States from lower-wage countries.¹⁵³ More convincing than mathematical projections is the historical record of profitability enjoyed by American prison systems in the nineteenth century.

Existing correctional industries owned by the state could expand their markets to make and sell many more different products or services to a greatly expanded base of potential purchasers, in and out of the government. This would undoubtedly boost their viability, make money for the prison systems, put more prisoners to work, and have more advantages in rehabilitation. Private businesses would provide stiff competition for state-run correctional facilities. Each government could best determine its preferred method of doing business.

Inevitably, private businesses would hire low-wage prison labor to make goods now made in lower-wage countries. The nation's competitive disadvantages relative to developing nations would shrink, and the danger to American manufacturing jobs would lessen. Consumer goods now made exclusively overseas would more

¹⁵² Michael Mandel & Diana G. Carew, *Manufacturing in the App Economy: How Many Jobs Should We Aim For?*, PROGRESSIVE POL'Y INST., May 2012, at 1, available at http://progressivepolicy.org/wp-content/uploads/2012/05/05.2012-Mandel_Carew_Manufacturing-in-the-App-Economy1.pdf.

¹⁵³ One five-hour shift, followed by a five-hour rest period for naps, would make the second daily five-hour shift much easier. Prisoners would not have to commute, nor do they consume much time with family, civic, or social matters.

commonly be produced in the United States. Prison businesses would retain workers by providing safer, more comfortable, and more remunerative environments than exist for prisoners today—and that would not often take much extra effort. Organized labor would benefit by increased economic activity, the circle of jobs created around manufacturing plants, and the need of prison industries to repair machines, transport goods, supply goods and services, and generally participate in a more vigorous economy.

A variety of business arrangements would arise. Most correctional facilities have behind their fences and walls unused land on which to build factories or are located in rural areas with available land. Some private industries might prefer to house, feed, and care for their own captive labor force off the premises of existing state prisons but still in secure facilities. Other industries would contract with the state to rent existing or unused prison space. Businesses might be required to lower the state's direct incarceration costs or guarantee no increase in those costs. Prisons could rent space or equipment and sell any items it produced to prison industries. Plenty of used manufacturing equipment is available or in storage.

Overall, prison overcrowding and its attendant problems would decrease. Prisoners would have a better chance to support themselves when released from prison. Prison violence would decrease. Prisoners serving life without parole actually make some of the best workers if they mature in prison. The American economy would improve.

Because separate plants, workhouses, and work communities of prisoners would provide a safer, better life for prisoners, the behavior of prison workers would improve. Behavior in the general prison population would also improve as prisoners vied for jobs. Religious activity

would increase, and religious organizations would play a greater role than they do currently.

A hard core of incorrigible, insane, disabled, dangerous, sick, and lazy prisoners and gang members would remain in the general prison population, death row, or solitary confinement. Employers would know whom to hire and whom to promptly send back. If they misbehaved, prisoners would instantly lose their jobs, some or all of their trust account savings, and get sent back to the general prison population. Today, there are not nearly enough jobs for prisoners, and the scarcity of jobs would likely continue for years even if the protectionist regime fell.

Recidivism would decline once prisoners learned to work very hard in a private business, saved money for their releases, controlled their behaviors better as required by their employment contracts and authoritative employers, and stayed away from the corroding influences of the worst criminals. Even a small drop in recidivism has a very positive effect on the general economy.¹⁵⁴ Rehabilitation prospects advance with hard work, contributions to the larger society, and recognition of the monetary rewards from hard work.¹⁵⁵ Crime victims would benefit by increased restitution payments, just as families would benefit by increased child and family support income. The economic and social costs of incarceration would decrease.

CONCLUSION

Nations do not prosper by putting millions of able-bodied workers in cages with nothing to do. This nation did not achieve its world position by discouraging hard work, letting foreign nations work harder and smarter, or by letting the government assume ever larger portions of its

¹⁵⁴ Levitt, *supra* note 114.

economy and daily lives. Freedom, mutually beneficial exchanges, hard work, innovation, and enormous resources made America what is considered the leading economy in the world. Each of the fifty-one governments has a valuable labor resource it does not fully employ. In the context of prison industries, the nation must re-affirm the importance of hard work, private enterprise, less government control, freedom of contract, and competition. Economic and social conditions, standing in the world, and the enormous growth in the nation's prison, jail, and correctional populations all urge the creation of manufacturing jobs.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 232

POLICY NOTE

**STATES ARE MAKING THEIR OWN DECISIONS
REGARDING WHETHER MARIJUANA SHOULD BE
ILLEGAL: HOW SHOULD THE FEDERAL GOVERNMENT
REACT?**

By Joseph Tutro

I. INTRODUCTION

On November 6, 2012,¹ three states proposed landmark legislation for a vote to the people of their respective states.² These landmark pieces of legislation allowed for the recreational use of marijuana.³ While the potential legislation failed in Oregon, the proposed legislation passed in Colorado and Washington.⁴ Washington's marijuana legislation went into effect on December 6, 2012,⁵ and Colorado Governor John Hickenlooper signed Colorado's marijuana legislation into law on December 10, 2012.⁶ The passage of recreational

¹ This date represents Election Day 2012.

² See *Colorado, Washington Pass Marijuana Legalization; Oregon Says No*, CNN (Nov. 7, 2012, 01:05 AM), <http://politicalticker.blogs.cnn.com/2012/11/07/colorado-washington-pass-marijuana-legalization-oregon-says-no/>.

³ *Id.*

⁴ *Id.*

⁵ Gene Johnson, *Legalizing Marijuana: Washington Law Goes into Effect, Allowing Recreational Use of Drug*, HUFFINGTON POST (Dec. 6, 2012, 03:42 PM), http://www.huffingtonpost.com/2012/12/06/legalizing-marijuana-washington-state_n_2249238.html.

⁶ Will C. Holden & Thomas Hendrick, *Governor Signs Amendment 64, Marijuana Officially Legal in Colorado*, KDVR (Dec. 10, 2012, 12:14 PM), <http://kdvr.com/2012/12/10/governor-signs-amendment-64-marijuana-officially-legal-in-colorado/>.

marijuana usage legislation in Colorado and Washington joins them with twenty states, plus the District of Columbia, which have legalized use of marijuana for medical purposes.⁷

While it has been legalized by the states, marijuana still remains illegal under federal law.⁸ Because of the Supremacy Clause of the United States Constitution,⁹ federal law remains binding on the states.¹⁰ Therefore, while the states have passed legislation legalizing the use of marijuana, whether for medical use or recreational use, these laws are essentially moot due to federal law. The issue now is whether the federal government will investigate and prosecute those who follow their state marijuana laws or will use investigatory and prosecutorial discretion to allow the laws to take effect.

This paper will discuss the ever-widening acceptance by state legislatures of marijuana, especially for medical purposes, and the refusal by the federal government to recognize these acceptances, thus resulting in a federalism fight. The federal government should use its investigatory and prosecutorial discretion to allow these state experiments with marijuana. The current arguments for keeping marijuana illegal can be examined by allowing the states to implement their new and existing marijuana laws.

⁷ See *20 Legal Medical Marijuana States and DC*, PROCON.ORG (Jan. 7, 2013, 01:42 PM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

⁸ 21 U.S.C. §§ 812(c)(c)(10), 844(a) (2006).

⁹ U.S. CONST. art. IV, cl. 2.

¹⁰ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”).

II. THE LEGISLATIVE HISTORY OF FEDERAL MARIJUANA LAWS

The first federal legislation that attempted to regulate drugs in interstate commerce came in 1906.¹¹ But the primary drug control law came in the form of the Harrison Narcotics Act of 1914.¹² This act attempted to control narcotics mainly by assessing taxes. Then the first real attempt by Congress to regulate marijuana occurred in 1937.¹³ The 1937 law “did not outlaw the possession or sale of marijuana outright.”¹⁴ However, the law imposed strict administrative requirements and high taxes on the trade of marijuana.¹⁵ Then, in 1969, “President Nixon declared a national ‘war on drugs.’”¹⁶ In response to this declaration, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 or Controlled Substances Act (CSA).¹⁷ The CSA repealed most of the previous antidrug laws.¹⁸

Under the CSA, narcotics are placed in one of five schedules.¹⁹ Congress placed marijuana in Schedule I.²⁰ Being classified as a Schedule I drug means that marijuana meets three criteria: (1) a “high potential for abuse”; (2) “lack of any accepted medical use”; and (3) an “absence of any accepted safety for use in medically supervised treatment.”²¹ By classifying marijuana as a Schedule I

¹¹ Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768, *repealed by* Act of June 25, 1938, ch. 675, § 902(a), 52 Stat. 1059.

¹² Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970).

¹³ Marihuana Tax Act of 1937, 50 Stat. 551 (repealed 1970).

¹⁴ *Raich*, 545 U.S. at 11.

¹⁵ *See id.*

¹⁶ *Id.* at 10.

¹⁷ 21 U.S.C. §§ 801-971 (2006).

¹⁸ *Raich*, 545 U.S. at 12.

¹⁹ 21 U.S.C. § 812(a) (2006).

²⁰ 21 U.S.C. § 812(c)(c)(10) (2006).

²¹ *Raich*, 545 U.S. at 14; *see also* 21 U.S.C. § 812(b)(1) (2006).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 236

drug, the only research that can be performed on the drug is through “a Food and Drug Administration pre-approved research study.”²²

Even with the CSA in place, eighteen states enacted legislation that attempts to legalize marijuana for medical purposes prior to the votes on recreational marijuana usage laws in 2012.²³ Then, in 2012, two states legalized marijuana for recreational use.²⁴ However, the CSA remains in place, and marijuana is still classified as a Schedule I drug.²⁵

III. CHALLENGING THE CSA

a. Challenges in Federal Courts

Because Colorado and Washington are the first states to legalize the recreational use of marijuana,²⁶ the majority of the development of the law has focused on the use of medical marijuana. The first challenge to the CSA came in the form of a medical necessity defense.²⁷ Without bringing criminal charges, the United States sought to enjoin certain medical marijuana dispensaries from manufacturing and distributing marijuana.²⁸ The Supreme

²² *Raich*, 545 U.S. at 14.

²³ See 20 *Legal Medical Marijuana States and DC*, PROCON.ORG (Jan. 7, 2013, 01:42 PM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

²⁴ See COLO. CONST. art. XVIII, § 16; WASH. REV. CODE § 69.50.325 (LEXIS through 2013 Regular Session); WASH. REV. CODE § 69.50.535 (LEXIS through 2013 Regular Session).

²⁵ 21 U.S.C. § 812(c)(10) (2006).

²⁶ See COLO. CONST. art. XVIII, § 16; WASH. REV. CODE § 69.50.325; WASH. REV. CODE § 69.50.535.

²⁷ *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

²⁸ See *id.* at 486-87.

Court narrowly held that the medical necessity defense does not apply to those who manufacture and distribute marijuana.²⁹ Therefore, the United States was successful in enjoining the medical marijuana dispensaries.

The seminal case regarding the legalization of marijuana by states is *Gonzales v. Raich*.³⁰ *Raich* deals specifically with the medical marijuana laws of California.³¹ The plaintiffs believed that the CSA, as applied to them, “would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity.”³² The district court denied their motion for a preliminary injunction.³³ The Court of Appeals for the Ninth Circuit reversed, agreeing with the plaintiffs that “the CSA is an unconstitutional exercise of Congress’ Commerce Clause authority.”³⁴

The Supreme Court reversed the decision of the Ninth Circuit, justifying the CSA as a “valid exercise of federal power” under the Commerce Clause.³⁵ The Court’s main justification was “the undisputed magnitude of the commercial market for marijuana.”³⁶ Therefore, the Court found that “Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.”³⁷ Thus, the Court remanded the case to the Ninth Circuit.

²⁹ *Id.* at 486.

³⁰ *Gonzales v. Raich*, 545 U.S. 1 (2005).

³¹ *See id.* at 5.

³² *Id.* at 8.

³³ *Id.*

³⁴ *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003).

³⁵ *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

³⁶ *Id.* at 33.

³⁷ *Id.* at 32.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 238

On remand, the Ninth Circuit rejected the other arguments put forth by the plaintiffs.³⁸ The court was uncertain whether the Supreme Court's previous decision regarding the medical necessity defense was binding on the case.³⁹ To avoid the question, the court stated that the question would better be resolved in a criminal proceeding.⁴⁰ The court also rejected the substantive due process argument because "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering" at the present time.⁴¹ Finally, the court rejected the Tenth Amendment argument because of the Supreme Court's decision regarding the Commerce Clause.⁴²

b. Administrative Challenges

Besides the traditional method of seeking to enjoin the enforcement of the CSA against the plaintiffs, an alternate option is to petition the Drug Enforcement Agency (DEA) to reschedule marijuana.⁴³ Congress has delegated its CSA rescheduling powers to the Attorney General.⁴⁴ The Attorney General, in turn, has delegated these powers to the DEA.⁴⁵ The DEA has recently denied petitions to reschedule marijuana⁴⁶ after seeking a "scientific and medical evaluation"⁴⁷ by the Department of

³⁸ See *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007).

³⁹ *Id.* at 860.

⁴⁰ *Id.* at 861.

⁴¹ *Id.* at 866.

⁴² *Id.* at 867.

⁴³ See 21 U.S.C. §§ 811, 812 (2006).

⁴⁴ 21 U.S.C. § 811(a) (2006).

⁴⁵ *Am. for Safe Access v. DEA*, 706 F.3d 438, 441 (D.C. Cir. 2013).

⁴⁶ See, e.g., *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, 76 Fed. Reg. 40,552 (July 8, 2011).

⁴⁷ 21 U.S.C. § 811(b) (2006).

Health and Human Services (DHHS).⁴⁸ The DHHS's recommendation to the DEA is that "research on the medical use of marijuana has not progressed to the point that marijuana can be considered to have a 'currently accepted medical use' or a 'currently accepted medical use with severe restrictions.'"⁴⁹ Therefore, while state legislatures have determined that marijuana has medical uses, the federal government has not been convinced by the current clinical research and further research is required.

IV. FEDERAL AND STATE POLICIES

a. Federal Policy on Medical Marijuana: The Ogden Memo

The most interesting document showing the federal government's policy regarding medical marijuana is the "Medical Marijuana Guidance" memorandum, which was prepared by then-Deputy Attorney General David Ogden (Ogden Memo).⁵⁰ The Ogden Memo was distributed from the United States Department of Justice to "SELECTED UNITED STATES ATTORNEYS."⁵¹ The goal of the memorandum was to give "clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana."⁵²

While the Ogden Memo did "not 'legalize' marijuana or provide a legal defense to a violation of

⁴⁸ *Am. for Safe Access*, 706 F.3d at 442.

⁴⁹ Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552, 40,562 (July 8, 2011).

⁵⁰ David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, U.S. DEP'T OF JUST. (Oct 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

⁵¹ *Id.* at 1.

⁵² *Id.*

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 240

federal law . . . [and] is intended solely as a guide to the exercise of investigative and prosecutorial discretion,”⁵³ the memorandum acknowledged that “[a]s a general matter, pursuit of [drug traffickers of illegal drugs] should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁵⁴ Thus, while acknowledging that the CSA is still federal law, the United States Attorneys should “mak[e] efficient and rational use of [the Department’s] limited investigative and prosecutorial resources,” and prosecuting those who comply with “existing state law . . . is unlikely to be an efficient use of limited federal resources.”⁵⁵

While the Ogden Memo focuses on prosecution of those following medical marijuana laws, it also points out the reasons that the United States Attorneys should still pursue illegal drug traffickers.⁵⁶ The memorandum states that “the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels.”⁵⁷ As a telling example, the Ogden Memo states that “marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.”⁵⁸ This reasoning is interesting because it would apply to both medical and recreational use of marijuana. Thus, the memorandum sheds some light on the federal government’s policy toward recreational use of marijuana.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 1-2.

⁵⁵ *Id.*

⁵⁶ *See id.* at 1.

⁵⁷ *Id.* at 1.

⁵⁸ *Id.*

b. State Purposes for Legalizing Recreational Marijuana

Colorado amended its own constitution to legalize marijuana.⁵⁹ The amendment starts by stating the purpose of the legalization:

In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.⁶⁰

The amendment states three very distinct reasons for legalizing marijuana. The rest of the amendment contains the restrictions and regulations regarding marijuana.⁶¹ These restrictions and regulations fairly mirror those that are placed on alcohol.⁶²

While Washington's marijuana legislation does not specifically state its purpose, the purpose can be fairly deduced from the statutory language. Washington's marijuana legislation states in pertinent part as follows:

⁵⁹ COLO. CONST. art. XVIII, § 16.

⁶⁰ COLO. CONST. art. XVIII, § 16(1)(a).

⁶¹ See COLO. CONST. art. XVIII, § 16.

⁶² COLO. CONST. art. XVIII, § 16(1)(b).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 242

There is levied and collected a marijuana excise tax equal to twenty-five percent of the selling price on each wholesale sale in this state of marijuana by a licensed marijuana producer to a licensed marijuana processor or another licensed marijuana producer. This tax is the obligation of the licensed marijuana producer.⁶³

The first purpose is to receive taxes on the sale of marijuana.⁶⁴ In fact, the legislation taxes marijuana three times before it reaches the consumer.⁶⁵ The other implied purpose is to control who can sell marijuana.⁶⁶

V. THE FUTURE OF THE FEDERALISM FIGHT
OVER MARIJUANA

The issue now becomes what stance the federal government will take with regard to the recreational use laws. The biggest problem is the fear that those who cultivate and distribute marijuana, even while following state law, will be subject to punishment by the federal government. The federal government must decide whether to investigate and prosecute those people.

The closest analogy to the current situation is the prohibition of alcohol in the 1920s and 1930s.⁶⁷ The

⁶³ WASH. REV. CODE § 69.50.535.

⁶⁴ See WASH. REV. CODE § 69.50.535.

⁶⁵ *Id.*

⁶⁶ See WASH. REV. CODE § 69.50.325.

⁶⁷ U.S. CONST. amend. XVIII (repealed 1933).

Eighteenth Amendment to the United States Constitution made “the manufacture, sale, or transportation of intoxicating liquors” illegal.⁶⁸ While the amendment had an initial positive effect, the long-term effect was an increase in not only crime but also organized crime.⁶⁹ Because the manufacture and sale of intoxicating liquors was illegal, those who participated in the organized crime were able to pocket the entirety of the profits without being taxed.⁷⁰ The negative effects ultimately led to the Twenty-First Amendment, which repealed the Eighteenth Amendment in its entirety.⁷¹

The biggest difference between the 1920s alcohol prohibition and the current marijuana initiative is that the alcohol prohibition was performed by amendment and subsequently repealed by amendment. The CSA, however, is a statute that has been held valid under the Commerce Clause.⁷² Congress’s inaction with respect to the CSA has caused states to reevaluate the goals of the CSA themselves. As Justice O’Connor astutely notes in her dissent in *Raich*, “[o]ne of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’”⁷³

⁶⁸ U.S. CONST. amend. XVIII, cl. 1 (repealed 1933).

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ U.S. CONST. amend. XXI.

⁷² *See Raich v. Gonzales*, 545 U.S. 1 (2005).

⁷³ *Raich*, 545 U.S. at 42 (O’Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 244

This situation is the ultimate “novel social and economic experiment[.]”⁷⁴ The economic element of the experiment is readily apparent. Both Washington and Colorado have explicitly or impliedly stated that a main goal of the legislation is to recover taxes on the sale of marijuana.⁷⁵ Further, Colorado has explicitly stated that this effort is “[i]n the interest of the efficient use of law enforcement resources.”⁷⁶ By legalizing the sale of marijuana, Colorado no longer has to focus as much of its policing efforts on marijuana law enforcement. Similarly, there is a beneficial economic impact on the judicial system that is not so apparent. For example, by lowering arrests on marijuana crimes, costs can be saved in the judicial system. Further, with fewer arrests there will be fewer convictions, which could save money in the prison system.

The reasoning in the Ogden Memo should provide guidance on which policy to follow in this situation. The fact that commercial marijuana distribution “provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels,” such as the Mexican drug cartel,⁷⁷ pushes for a policy allowing these states to experiment with their recreational use marijuana laws. If the sale of marijuana provides revenue to these groups, then it must follow that marijuana is being sold in the United States. By allowing the states to regulate the sale of marijuana, the states, and potentially the United States in the future, will receive at least a portion of this revenue that the criminal enterprises are currently collecting. The loss

⁷⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁷⁵ See COLO. CONST. art. XVIII, § 16(1)(a); WASH. REV. CODE § 69.50.527 (LEXIS through 2012 Second Special Session).

⁷⁶ COLO. CONST. art. XVIII, § 16(1)(a).

⁷⁷ Ogden, *supra* note 50, at 1.

of revenue for the criminal enterprises may even curtail their other criminal ventures.

It is important to emphasize that *at least a portion* of the revenue may be recovered and that these laws *may* curtail other criminal ventures. The reason that it is important to emphasize these points is because we do not know the exact effect that the recreational marijuana use laws will have. Until we have actual, tangible evidence on the effect of legalizing marijuana, we will not know. Therefore, the federal government should use investigatory and prosecutorial discretion to allow these laws to take effect until this evidence is compiled. After evidence is gathered regarding its effects on the criminal enterprises, then the policy can be revisited and changed if necessary.

Although recreational marijuana may only be legal in two states, the federal government remains interested because there is always potential for the legal marijuana to cross state borders.⁷⁸ As noted above, however, the fact that criminal enterprises are receiving revenue from the sale of marijuana means that these criminal enterprises are still selling marijuana in the United States. This begs the question of whether we as a country would rather have marijuana, which has been taxed and regulated, sold across state borders or whether we as a country would rather have the illegal sale of marijuana continue in those states. However, the argument may then be that the sale of the legal marijuana across state borders may create new criminal enterprises. But, again, we do not know the effect that these laws will have. Therefore, the effects of legalized marijuana should not be evaluated until we gather evidence either way.

Washington's Governor Inslee and Attorney General Ferguson met with United States Attorney General

⁷⁸ See U.S. CONST. art. I, § 8, cl. 3.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 246

Eric Holder on January 22, 2013.⁷⁹ The three did not discuss Holder's intentions regarding investigatory and prosecutorial discretion.⁸⁰ However, Governor Inslee decided to continue with implementation and rule-making for the law.⁸¹ While the federal government's policy was not explicitly stated, we can be sure that the policy is not to stop the implementation of the law at the outset.⁸²

VI. CONCLUSION

Although twenty states have legalized marijuana for medical use, two states have taken the bold initiative to legalize marijuana for recreational use. The legalization is directly contrary to the legislative decision made by the United States Congress in the CSA. The Supreme Court has upheld the CSA against constitutional challenges because it found that the CSA is a valid exercise of power by Congress under the Commerce Clause. Because the law is a valid exercise of federal power, the states are limited to implementing their new marijuana laws only if the United States Attorneys allow the laws to take effect by using their investigatory and prosecutorial discretion.

The United States Attorneys should use their discretion to allow the states to implement these laws until evidence can be gathered on the laws' economic effects and their effects on criminal enterprises. After gathering this evidence, both the states and federal government should convene and determine the next step, whether that step is to keep marijuana illegal or to push for legalizing marijuana

⁷⁹ See Bob Young, *Inslee Encouraged by Marijuana Talk with Attorney General Holder*, SEATTLE TIMES (Jan. 23, 2013, 04:04 PM), http://seattletimes.com/html/localnews/2020190301_insleeholderpotxm1.html.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *id.*

under the CSA. Therefore, this situation creates the perfect time to “try novel social and economic experiments without risk to the rest of the country,”⁸³ and the federal government should recognize the opportunity.

⁸³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 248

POLICY NOTE

**THE CONSTITUTIONALITY OF ELIMINATING OR
RESTRICTING U.S. SENATE PRIMARIES UNDER THE
SEVENTEENTH AMENDMENT**

By Megan Duthie

I. INTRODUCTION

A century ago, Tennessee lent her signature to the ratification of the Seventeenth Amendment, which altered how a United States senator was chosen from legislative appointment to popular choice.¹ Today, some political factions are calling for a complete repeal of the amendment,² while others are taking smaller steps toward entrenching more power within state legislatures at the expense of the power granted to the voting public under the Seventeenth Amendment.³

Tennessee is one state that has taken steps toward diminishing the role of the Seventeenth Amendment in the

¹ RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 217 (2001).

² See Charles C.W. Cooke, *Repeal the 17th Amendment!*, NAT'L REV. (Mar. 1, 2013), <http://www.nationalreview.com/articles/341894/repeal-17th-amendment-charles-c-w-cooke>.

³ New Hampshire lawmakers failed at altering the candidate selection process for senators in 2010. See John Celock, *Senate Elections: New Hampshire Lawmakers Propose Changes to Candidate Selection*, HUFFINGTON POST (Dec. 14, 2011), http://www.huffingtonpost.com/2011/12/14/new-hampshire-senate-elections_n_1149279.html; John Celock, *Frank Niceley, Tennessee State Senator, Proposes Partial End to Direct Election of U.S. Senators*, HUFFINGTON POST (Feb. 14, 2013), http://www.huffingtonpost.com/2013/02/04/frank-niceley-tennessee_n_2616266.html [hereinafter *Frank Niceley*].

selection of United States senators.⁴ As introduced earlier this year, Senate Bill 0471/House Bill 0475 would remove the primary election as the method for determining the candidates for the general election and would replace it with legislative nomination.⁵ Under the bill, the members of the state legislature belonging to each party would choose the candidate for their respective parties.⁶

Although there is little discernible case law directly addressing the constitutional protection of primary elections, it is likely that, by leaving the general election and the ultimate choice of United States senator in the hands of the public, the proposed Tennessee legislation will be valid under the Constitution. There is a chance, however, that the law will be struck down if submitted to judicial scrutiny, as it is in direct opposition to the underlying objectives of the Seventeenth Amendment and would remove a considerable amount of choice from the people by placing it in the hands of the state legislatures. While this would be considered desirable under the original text and intent of the Constitution, it would not uphold the spirit of the Seventeenth Amendment.

II. HISTORY OF CONSTITUTIONAL PROTECTION FOR PRIMARY ELECTIONS UNDER THE SEVENTEENTH AMENDMENT

On its face, the Constitution does little to address the protection of primary elections for United States senators, as the text itself omits any mention of the term.⁷

⁴ S.B. 0471, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 0415, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013).

⁵ *Id.*

⁶ *Id.*

⁷ *See* U.S. CONST.

The Seventeenth Amendment, which requires the popular election of senators, reads in its relevant part as follows:

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.⁸

Due to the absence of direct protection for the primary,⁹ it has been the province of the courts to determine whether, and to what extent, the primary is constitutionally protected.

In 1921, the Supreme Court heard *Newberry v. United States*.¹⁰ There, the Court addressed an issue of campaign spending in a Michigan primary.¹¹ The Court, in preserving the Elections Clause as the congressional source of electoral authority,¹² determined that the primary election, in determining the candidates for the general election, “is in no real sense part of the manner of holding the election.”¹³ This narrow interpretation of the term “manner of holding the election” led the Court to continue as follows: “We cannot conclude that authority to control

⁸ U.S. CONST. amend. XVII.

⁹ See U.S. CONST.

¹⁰ *Newberry v. United States*, 256 U.S. 232 (1921).

¹¹ *Id.* at 244-46.

¹² *Id.* at 248.

¹³ *Id.* at 257.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 252

party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections.”¹⁴ This interpretation of the term has recently been questioned, and recent decisions have suggested that the modern Supreme Court agrees with a broader understanding of the term “manner of holding elections” as those procedural elements of holding elections.¹⁵

In the landmark 1941 case *United States v. Classic*, the Supreme Court established the extension of equal protection to the right to vote in a primary election.¹⁶ It reads as follows:

Where the state law has made the primary an integral part of the procedure of choice, *or where in fact the primary effectively controls the choice*, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, *where the primary is by law made an integral part of the election machinery*, whether the voter exercises his right

¹⁴ *Id.* at 258.

¹⁵ Zachary M. Ista, Comment, *No Vacancy: Why Congress Can Regulate Senate Vacancy-Filling Elections Without Amending (or Offending) the Constitution*, 61 AM. U. L. REV. 327, 336 (2011).

¹⁶ *United States v. Classic*, 313 U.S. 299, 318 (1941).

in a party primary which invariably, sometimes or never determines the ultimate choice of the representative.¹⁷

Currently, primaries are unequivocally a part of the procedure of choice in Tennessee, and thus, the right to vote in the primary is equally protected under Article I of the United States Constitution.¹⁸ What this case does not do, however, is establish the primary election as the necessary model of choice for nominations for electing a United States senator. The opinion is careful to recognize the protection of the right to vote in a primary only where the primary either effectively controls the choice of senator or where it is by law made a part of the “election machinery.”¹⁹ Both the Constitution and the federal government have long deferred to the states to determine the method by which the states will elect their senators;²⁰ however, the final draft of the Seventeenth Amendment does not modify the congressional power to regulate “the [t]imes, [p]laces and [m]anner of holding [e]lections for Senators and Representatives.”²¹

Twenty-five years after the *Classic* decision, the Supreme Court heard *Tashjian v. Republican Party*.²² The Court found Connecticut’s closed primary law, which required voters in primary elections to be registered members of the party, unconstitutional because it unreasonably burdened a political party’s free association

¹⁷ *Id.* (emphasis added).

¹⁸ *See id.*

¹⁹ *Id.*

²⁰ U.S. CONST. art. I, § 4.

²¹ *Id.*; *see also* *Newberry v. United States*, 256 U.S. 232, 252 (1921) (quoting U.S. CONST. amend. XVII).

²² *Tashjian v. Republican Party*, 479 U.S. 208 (1986).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 254

rights without a compelling government interest.²³ The Republican Party rule, which allowed independent voters the ability to vote in party primaries, was thus constitutional.²⁴

While not directly addressing the protection of primary elections generally, the Court did discuss more broadly the rationale of constitutional protections. The Court said, “The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every state in the selection process.”²⁵ The Court ultimately held that “the Qualifications Clauses of Article I, § 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections.”²⁶ Therefore, because the Republican Party rule did not disenfranchise voters that would otherwise be able to vote “for the more numerous house of the state legislature,” it did not run afoul of the Qualifications Clause.²⁷ This holding was adopted in the framework developed by *Classic* in that it is applied “[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice.”²⁸

The Third Circuit addressed the practical effect of both *Classic* and *Tashjian* in *Trinsey v. Pennsylvania*.²⁹ The court, in interpreting *Classic* and *Tashjian*, held primary elections were not required under the Constitution

²³ *Id.* at 229.

²⁴ *Id.*

²⁵ *Id.* at 227.

²⁶ *Id.*

²⁷ *Id.* at 229.

²⁸ *United States v. Classic*, 313 U.S. 299, 318 (1941).

²⁹ *See Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991), *cert. denied*, 502 U.S. 1014 (1991).

when filling a vacant senate seat mid-term.³⁰ While the *Trinsey* court was reluctant to issue a broad holding on the constitutional protection of primary elections generally,³¹ it did address the history of the Seventeenth Amendment and the intent of those who ultimately passed the amendment into law. According to the court, “[the author of the Senate Report] made clear that he believed that the precise mode of senatorial nomination and election was to be a purely local question and that establishment of a primary system was to be left to the states.”³² The court further determined that “there is no firm evidence [the authors of the amendment] believed that they were tackling the political machines by mandating primaries as well as direct election of Senators.”³³ Whether the Sixth Circuit will follow suit is yet to be determined.

III. POLICY ISSUES SURROUNDING THE DIRECT ELECTION OF SENATORS

A. The Seventeenth Amendment

The Seventeenth Amendment was passed at a time in which several political concerns outweighed the Framers’ intent of entrenching federalism within the national legislative framework by delegating United States senators to act as representatives of, and chosen by, state legislatures.³⁴ At the time the Seventeenth Amendment was passed, there were no primaries as exist today.³⁵ These concerns have been addressed in the years following the

³⁰ *Id.* at 234.

³¹ *Id.* at 231.

³² *Id.* at 230.

³³ *Id.*

³⁴ *See* THE FEDERALIST NO. 10 (James Madison).

³⁵ *Newberry v. United States*, 256 U.S. 232, 250 (1921).

Seventeenth Amendment and still rightly exist as legitimate concerns today.

One of the concerns the Seventeenth Amendment aimed to address was the problem of legislative deadlock within state legislatures.³⁶ The difficulty came about due to a variety of factors involving the power vested in the states to conduct their own affairs and the balanced two-party system.³⁷ This deadlock resulted in the failure of many states to elect senators over a period of years leading up to the ratification of the Seventeenth Amendment.³⁸

A second concern included bribery of legislators and corruption of senate elections.³⁹ While the number of senators investigated on bribery charges was relatively few in comparison to the number of senators appointed, the cases were heavily publicized, leading to a demand of populist reform.⁴⁰

B. The “Activist” Supreme Court

Beyond the history and intent of the framers, the proponents of increased (or absolute) state power in appointing senators argue that as a result of the decline of federalism and inherent protection for state powers, an “activist” Supreme Court has been required to step in to protect state interests.⁴¹ Since the ratification of the Seventeenth Amendment,⁴² the Supreme Court has made a series of increasingly “pro-state” decisions in order to

³⁶ ROSSUM, *supra* note 1, at 183.

³⁷ *See id.* at 184-87.

³⁸ A table of legislative deadlocks in the appointment of U.S. senators can be found at ROSSUM, *supra* note 1, at 187-90.

³⁹ ROSSUM, *supra* note 1, at 190-91.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

maintain the federalist structure that was undermined by the enactment of the Seventeenth Amendment.⁴³

These decisions include: *Hammer v. Dagenhart*, which held the Federal Child Labor Act invalid under the commerce clause,⁴⁴ and *Bailey v. Drexel Furniture Company*, in which the Court found that Congress was improperly penalizing employers using child labor.⁴⁵ *Bailey* was decided in the same year as *Hill v. Wallace*, which invalidated the Future Trading Act of 1921 as an unconstitutional tax levied by Congress.⁴⁶ These decisions evidenced the Court's determination that Congress was overstepping its bounds in enacting legislation that ought to be the province of the states.⁴⁷ These decisions have been described as

⁴³ *Id.*

⁴⁴ *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918), amended on public policy grounds by *U.S. v. Darby*, 312 U.S. 100 (1941); ROSSUM, *supra* note 1, at 236.

⁴⁵ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36, 44 (1922); ROSSUM, *supra* note 1, at 238.

⁴⁶ *Hill v. Wallace*, 259 U.S. 44, 66-68 (1922); ROSSUM, *supra* note 1, at 238.

⁴⁷ ROSSUM, *supra* note 1, at 236-38.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 258

“unfortunate”⁴⁸ and
“imprudent”⁴⁹ by some,
coupled with stark criticism
of the actions of the Supreme
Court Justice Day. In writing
for the majority in *Hammer*,
Justice Day seemed wholly
unaware that there is simply
no historical evidence to
suggest that the people who
ratified the Seventeenth
Amendment intended to
transfer the power to protect
that original federal design
from the indirectly elected
Senate to an appointed Court
so that it might invalidate the
very measures now passed by
their democratically elected
Senate.⁵⁰

Yet the Supreme Court continued to pass increasingly pro-state decisions, invalidating laws supported by the legislative and executive branches of the federal government.⁵¹ The role of the Supreme Court in supporting the original design of federalism and the protection of states continues to this day.⁵²

A second school of thought insists that the ramifications of the Seventeenth Amendment are concerned primarily with not a loss or decline in federalism but with

⁴⁸ See *id.* at 238.

⁴⁹ *Id.*

⁵⁰ *Id.* at 241.

⁵¹ See *id.*

⁵² See ROSSUM, *supra* note 1, at 284-85.

the relationships among the branches of the government.⁵³ While the relationships surely have changed, they require more understanding and deliberation than what is currently afforded.⁵⁴

IV. ANALYSIS OF THE CONSTITUTIONALITY AND POLITICAL WISDOM OF THE STATE LEGISLATURE CHOOSING CANDIDATES FOR THE GENERAL ELECTION OF U.S. SENATORS

Of course, the proposed Tennessee legislation falls short of calling for an absolute repeal of the Seventeenth Amendment. By removing a step of the process in which the voting public can choose, however, the law would prove to be ultimately undesirable, bringing with it many more problems than solutions.

The first is the question of constitutionality. At first glance, the proposed law is constitutional, as there is no mention within the Constitution itself of primary elections.⁵⁵ However, the Supreme Court in *Classic* and in later cases maintained that rights were protected when the primary was included as a part of the “election machinery” and as a part of the choice of the people, with deference given to the choice of the states.⁵⁶ Supreme Court precedent suggests the pivotal issue, therefore, is whether this law would remove the primary as a part of this procedure of choice. If it does, then the law will remain constitutional and the Seventeenth Amendment will not be offended, as the public will make the final selection of a

⁵³ Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1349-50 (1996).

⁵⁴ See *id.* at 1405.

⁵⁵ See U.S. CONST.

⁵⁶ See *United States v. Classic*, 313 U.S. 299, 318 (1941).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 260

United States senator in a general election. If the proposed law falls short of removing the selection of candidates from the procedure of choice, it may be found invalid under the Seventeenth Amendment under this reading of the *Classic* holding.⁵⁷

Assuming the constitutionality of the proposed bill withstands judicial scrutiny, there remains a question of policy. By removing the selection of candidates from the public domain and admitting it to the legislature, proponents of the law suggest its benefits echo those of the individuals who would repeal the Seventeenth Amendment altogether.⁵⁸ Those who would see it repealed cite an increased need for reins on the powers of the federal government, which, they argue, have been increasing at the expense of the powers of the states, thereby undermining federalism.⁵⁹ The Framers, in borrowing from the British the model of the bicameral legislature, with the House of Representatives and Senate resonant of the House of Commons and the House of Lords, did not intend for both chambers to be elected by popular vote.⁶⁰ Rather, they intended the House of Representatives to act as agents of the people and the Senate to act with the voices of the several states.⁶¹

Indeed, removing the public vote is a small step toward the original intent of the Framers. According to the bill's sponsor, "We've tried it this way for 100 years. It's

⁵⁷ *Id.*

⁵⁸ See Frank Niceley, *supra* note 3.

⁵⁹ John W. Dean, *The Seventeenth Amendment: Should It Be Repealed? Why the Direct Election of Senators May Have Been a Serious Mistake, and One That Helps Explain the Supreme Court's States' Rights Views*, FIND L. (Sept. 13, 2002), <http://www.writ.corporate.findlaw.com/dean/20020913.htm>.

⁶⁰ *Id.*

⁶¹ *Id.*

time to try something different.”⁶² This would further allow the State of Tennessee a greater part in the choice of senator and allow the senator to act in the interest of the state as an independent political entity.

There may also be fiscal benefits to eliminating senatorial primaries. Elections for United States senators can cost millions of dollars for the state to administer.⁶³ Saving that money that pays for the primaries could allow the state to direct it elsewhere; the time saved by those voting in the primaries could be put to another use. There would also be the reduction of costs for those wishing to be considered for the general ballot, with proponents suggesting that by avoiding a primary altogether, primary consideration would be open to a greater number of people.⁶⁴

Finally, it would allow state legislatures a larger role in choosing senate candidates without the difficulty of repealing a constitutional amendment. To amend the United States Constitution, Article V requires an affirmative vote of two-thirds of both the House of Representatives and the Senate, followed by a ratification of three-quarters of state legislatures.⁶⁵

Unfortunately, these benefits do not outweigh the negative repercussions of implementing such a plan. First, allowing the legislature to select the primary candidates for a general election will do very little to reestablish

⁶² *Frank Nicely, supra* note 3.

⁶³ For example, the upcoming New Jersey special primary and special election to fill the vacant seat of Senator Frank Lautenberg is estimated to cost taxpayers about \$24 million. John Celock, *Objection to Christie's \$24 Million Senate Special Election Spreads Across State*, HUFFINGTON POST (June 20, 2013), http://www.huffingtonpost.com/2013/06/20/new-jersey-senate-special-election_n_3474790.html.

⁶⁴ *Frank Nicely, supra* note 3.

⁶⁵ U.S. CONST. art. V.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 262

federalism as the ultimate choice of senator will be left to the people of Tennessee.⁶⁶ While the choice of candidates would be determined by the legislature, there is little guarantee that the candidates, if elected, would work to promote the state's interest beyond what they currently do, short of an additional mandate requiring them to do so. This in turn would fail to remedy the actions of the "activist" Supreme Court given their decisions supporting and defending states' interests would continue to be required.

Second, it would give legislators an additional responsibility above and beyond those they currently have. Tennessee legislators are in session a short amount of time. Session begins each year on the second Tuesday in January at noon and usually adjourns in late April or early May for a total of ninety session days over a two-year period.⁶⁷ The addition of such a potentially time-consuming task would take time away from their primary mandate—to make laws.

The additional task could then make the process of selecting candidates much more politicized. In addition to appealing to public sentiment to win the general election, those wishing to become the candidate would undoubtedly be required to be well-connected to state politics, the politicians, and the party itself. This may result in better-qualified individuals being placed on the ballot, as the sponsor of the proposed Tennessee law has insisted.⁶⁸ However, it could also be argued that a primary in itself results in more electable candidates on the final ballot, having already been chosen by the voting public above other party candidates. Additionally, the increased political

⁶⁶ S.B. 0471, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 0415, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013).

⁶⁷ *About the Tennessee Legislature*, TENN. GEN. ASSEMBLY, <http://www.capitol.tn.gov/about/> (last visited July 27, 2013).

⁶⁸ See *Frank Niceley*, *supra* note 3.

pressure could also narrow the field of potential candidates running under Democratic or Republican banners and to enter the general election as Independents.⁶⁹

Finally, the proposed law would run afoul of the spirit of the Seventeenth Amendment—to give the voters of the several states a dominant voice in the election of their U.S. senators and to ensure a more democratic system of election.⁷⁰ Proponents will still argue that the intent of the original Constitution validates their stance on the matter.⁷¹ Ratified by the states, the proposed bill will, the author submits, potentially violate the Seventeenth Amendment under the principles of *Classic*.⁷²

Ultimately, taking away the ability of the public to vote in primaries for their choice of party candidate in the general election would leave voters feeling ostracized. In this time of low voter turnout and general public apathy toward elections,⁷³ enacting legislation that would push individuals away from the electoral process and leave them feeling like their input is neither required nor desired would be ill-advised. It should be the democratic goal of all branches of government to engage the population in political life, rather than shun them. For this reason, the proposed Tennessee legislation should not pass.

⁶⁹ The proposed legislation allows for minor parties to nominate a person in accordance with the rules of the minor parties or by holding a primary election. S.B. 0471, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013); H.B. 0415, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013).

⁷⁰ Amar, *supra* note 53, at 1354.

⁷¹ Dean, *supra* note 59.

⁷² *United States v. Classic*, 313 U.S. 299, 318 (1941).

⁷³ See *Voter Turnout*, FAIRVOTE.ORG, <http://www.fairvote.org/voter-turnout> (last visited July 16, 2013).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 264

ARTICLE

**GUT CHECK: WHY OBESITY IS NOT A DISABILITY UNDER
TENNESSEE LAW AND HOW THE LEGISLATURE CAN
ADDRESS THE OBESITY EPIDEMIC**

*By Jennifer Vallor**

Table of Contents

| | |
|--|-----|
| I. Introduction | 267 |
| II. Background on Federal and Tennessee Disability Law ... 271 | |
| A. Defining “Disability” | 272 |
| i. Federal Disability Law | 272 |
| ii. Tennessee Disability Law | 276 |
| B. The Obesity Epidemic and Disability Law | 279 |
| i. Medical Definitions of Obesity and Its Causes | 280 |
| ii. Federal Law on Obesity as a Disability | 283 |
| iii. Other States’ Laws on Obesity as a Disability | 288 |
| iv. Tennessee Law on Obesity as a Disability | 291 |
| III. Tennessee Should Not Include Obesity as a Disability Protected by the Tennessee Human Rights Act | 292 |
| A. Inherent Differences Exist Between Obesity and Other Disabilities | 293 |
| B. Obesity Need Not Be Protected Absent an Underlying Condition | 301 |
| C. Labeling Obesity as a Disability Does Not Further the Purposes Set Forth in the Human Rights Act | 305 |
| IV. The Proposal and Its Benefits | 312 |
| A. Proposal: The Legislature Should Exclude Obesity from Protection under the THRA and TDA | 313 |
| B. Benefits of this Proposal | 315 |

| | | |
|------|---|-----|
| i. | Prevents the Tennessee Court System from Being Muddled with Varying Decisions Regarding Whether Obesity Is a Disability | 315 |
| ii. | Combats the Obesity Epidemic in Tennessee .. | 317 |
| iii. | Reduces Burdens on Employers..... | 323 |
| V. | Closing Remarks | 325 |

“A lean compromise is better than a fat lawsuit.”

- English Proverb¹

I. INTRODUCTION

“Bigger is better.” This old adage rings true for paychecks and televisions but not pant size. Now, some lawmakers and courts seek to protect obesity under disability law. Obesity currently plagues 35.7% of Americans² and 29.2% of Tennesseans,³ and it is growing at epidemic rates.⁴ However, the “bigger-is-better” argument rings false in this instance considering obesity’s severe complications and side effects. In the same vein, more people are also considering the consequences of obesity in the workforce, in health care, and in the medical profession. Indeed, tackling the issue of obesity demands sympathy because of the stigma and stereotypes associated with the condition, including the thoughts that obese people

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¹ KATHRYN ZULLO, *THE NEW LAWYER’S WIT AND WISDOM* 184 (Bruce Nash & Allan Zullo eds., Running Press 2d ed. 2001).

² *Adult Obesity Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/data/adult.html> (last reviewed Aug. 16, 2013). As of 2011, the CDC has made changes to its formula for calculating obesity. *Id.* The CDC has stated that because of these changes, estimates of obesity prevalence from 2011 forward cannot be compared to previous years. *Id.*

³ *Id.*

⁴ *The Obesity Epidemic*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/cdctv/ObesityEpidemic/> (last reviewed Nov. 22, 2013).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 268

are lazy, unintelligent, or lacking in self-respect.⁵ In a society that is highly focused on appearance, the outlook for combating these stereotypes seems gloomy.⁶ However, while compassion is a must, legal protection under disability law is not.

More and more courts are having to decide complex legal issues regarding obesity as a disability. Consider the plaintiff Toni, a 5-foot, 4-inch woman who weighs 305 pounds, whom the defendant declined to hire chiefly based on a concern about her weight.⁷ Toni's scenario is one of

⁵ Michael L. Klassen et al., *The Role of Physical Appearance in Managerial Decisions*, 8 J. BUS. & PSYCHOL. 181 (1993); see also Michelle R. Hebl et al., *Perceptions of Obesity across the Lifespan*, 16 OBESITY 46, 46 (2008) (concluding that "this research shows prevalent and consistent patterns of obesity stereotyping across the lifespan"). Hebl's study viewed the extent to which individuals ages 18-77 stereotyped obese people in 20-, 40-, and 60-year olds. *Id.* Women weighing more were more negatively rated on all criteria examined in the study. *Id.* Interestingly enough, the CDC has found no significant relationship between obesity and education among men. *Adult Obesity Facts*, *supra* note 2. However, among women there is a correlation—those with college degrees are less likely to be obese than women with less education. *Id.*

⁶ See M. Neil Browne et al., *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. U. J. MED. & L. 1, 8 (2010).

⁷ *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143 (Cal. 1993). In *Cassista v. Community Foods, Inc.*, Toni Cassista sued an employer, a health food store, which denied her a job because of her weight. *Id.* at 1143. The job duties included many physical activities such as standing long hours to run the cash register, stocking thirty- to fifty-pound bags of grain, carrying fifty-pound boxes of produce, retrieving groceries from the warehouse, and carrying large crates of milk. *Id.* The Supreme Court of California ultimately found that medical evidence must be shown that excessive weight was the result of a physiological condition affecting one or more basic bodily systems and limiting a major life activity. *Id.* at 1149. Here, the plaintiff's weight discrimination claim was denied because she was unable to produce medical evidence. *Id.* at 1154.

the most common among “weight discrimination” claims in courts today,⁸ and about one-third of Tennesseans could theoretically share Toni’s plight.⁹ At first glance, one likely feels sympathetic for Toni, as is appropriate. However, whether the law should afford her a remedy under a disability statute requires a different analysis. In deciding weight discrimination cases, where clear statutory guidance is often lacking, the court must balance the state’s interests, the plaintiff’s interests, and the employer’s interests. In doing so, the court must look at other disabled plaintiffs and compare Toni—which is where the problem lies. Is Toni’s obesity a disability similar to other disabilities, like blindness or deafness? Is obesity preventable unlike other qualified disabilities? How do we determine who suffers from this nebulous condition? Different jurisdictions employ different methods when considering whether obesity should be a disability.¹⁰ Often, judicial instinct directs a court as to whether the obese merit protection under disability law.¹¹ However, in some instances, explicit statutory language guides the court.¹²

The State of Tennessee has yet to make a clear determination on whether Toni would prevail on a disability claim under the Tennessee Human Rights Act or the Tennessee Disability Act, which are very similar to the

⁸ Jane Korn, *Too Fat*, 17 VA. J. SOC. POL’Y & L. 209, 225–26 (2010).

⁹ *Adult Obesity Facts*, *supra* note 2. Nearly all lawsuits based on weight discrimination are filed in the context of employment discrimination. Browne, *supra* note 6, at 10–11; Perla Trevizo, *Tennessee Human Rights Commission Battling New Biases*, CHATTANOOGA TIMES FREE PRESS (Feb. 22, 2012), <http://www.timesfreepress.com/news/2012/feb/22/human-rights-commission-battling-new-biases/>.

¹⁰ Milena O’Hara, Note and Comment, “Please Weight to Be Seated”: Recognizing Obesity as a Disability to Prevent Discrimination in Public Accommodations, 17 WHITTIER L. REV. 895, 926 (1996).

¹¹ *Id.*

¹² *Id.*

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 270

Americans with Disabilities Act. However, with the alarming obesity statistics in Tennessee, the state's legislature and the courts will inevitably be compelled to answer this single question for the first time: should Tennessee consider obesity a disability? If Tennessee courts ultimately decide that obesity is a disability, Toni's claim prevails. Superficially, Toni's victory in court would appear to be promising for Toni and other plaintiffs similarly situated; however, this result leaves other aspects of the obesity epidemic legally unaddressed and quickly dismissed at an unfairly high cost to Toni's employer, health care provider, and other truly disabled plaintiffs.

Various state approaches to disability law focus on different elements, definitions, symptoms, and causes of obesity when considering whether obesity is a disability.¹³ Some states even focus on the same variables but reach different conclusions.¹⁴ For the most part, disability statutes seem to echo each other with one main purpose: to protect disabled persons from discrimination. While this is a noble goal indeed, it is one that requires courts to do more than simply study relevant statutory law. In each case, the court adopts an attitude of willingness or unwillingness to expand the protections offered by disability statutes.¹⁵ This is not unlike traditional areas of disability law and other protected areas such as race and gender.¹⁶ However, because most statutes do not explicitly mention obesity,

¹³ *Id.* at 926 (explaining how some courts rely on different methods of proof for weight discrimination claims, such as requiring proof of the diagnosis of an underlying condition, and some do not, possibly allowing recovery on the perceived disability theory or focusing on whether the plaintiff's obesity was voluntary or mutable).

¹⁴ *Id.*

¹⁵ *See id.*

¹⁶ *Id.*

courts decide each case on a very fact-specific basis, leading to an uncertain future for this issue.¹⁷

A national debate has ensued as to whether courts and legislatures should consider obesity a disability. Currently, neither Tennessee statutory law nor case law has specified whether obesity is a disability under the Tennessee Human Rights Act or the Tennessee Disability Act. In this Note, I argue that obesity does not qualify as a disability in Tennessee. To show why, this Note will show how obesity is inherently different from other protected disabilities. The nature of obesity, however, requires the legislature to use its influence to combat obesity in areas where legislation can be effective. Part II provides background on federal and state law regarding disability law generally and how it currently affects weight discrimination law specifically. Part III explains the legal argument for excluding obesity as a disability under Tennessee state law. Part IV offers a proposal for the legislature to address obesity outside of disability statutes. Part IV also describes several of the benefits of adopting this proposal. Part V offers brief closing remarks.

II. BACKGROUND ON FEDERAL AND TENNESSEE DISABILITY LAW

Perhaps the most problematic shortcoming of this area of disability law is the amorphous definition of “disability.” Since the inception of the Americans with Disabilities Acts in 1990, courts have struggled to pinpoint what constitutes a protected “disability.” Further, the nebulous definition of “disability” adds confusion when determining whether the definition of “obesity” fits within that definition. Understanding the legal landscape upon which these definitions developed is important to

¹⁷ *Id.*

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 272

understanding why obesity simply does not render an individual disabled, namely under the Tennessee Human Rights Act or the Tennessee Disability Act.

A. Defining “Disability”

i. Federal Disability Law

Before the landmark Americans with Disabilities Act (ADA) was passed, several laws existed—most importantly, the Rehabilitation Act of 1973.¹⁸ Section 504 of the Rehabilitation Act served as a “major conceptual foundation for the ADA.”¹⁹ Even with the Rehabilitation Act and other federal laws designed to protect disabled citizens, discrimination unfortunately continued.²⁰

In the decades between the civil rights era and the enactment of the Americans with Disabilities Act in 1990, complainants, legislators, and the public battled back and forth on whether the Civil Rights Act (CRA) should cover disabilities.²¹ Riding on the coattails of the civil rights era, the concept of protection for the disabled gained regard.²² The ongoing discrimination demanded protection for individuals with disabilities, and a Congress-appointed council drafted what would eventually become the ADA.²³

¹⁸ 29 U.S.C. § 701 (2006).

¹⁹ BUREAU OF NAT’L AFFAIRS, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 9-11 (1990) [hereinafter PRACTICAL AND LEGAL GUIDE].

²⁰ U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983).

²¹ See O’Hara, *supra* note 10, at 926.

²² PRACTICAL AND LEGAL GUIDE, *supra* note 19, at 9-11 (explaining that the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, or national origin, “was a major inspiration for the concept of protection for people with disabilities”).

²³ *Id.* at 28-30.

Signed by President Bush in 1990, the ADA became the first major response to disability discrimination.²⁴ The ADA responded to decades of attempts to end discrimination against disabled individuals.²⁵

The ADA's passage was prompted by a statistic of forty-three million disabled Americans.²⁶ Ultimately, the ADA adopted most of the Rehabilitation Act's definitions, including "disability."²⁷ While the ADA covers millions and, thus, a variety of conditions, Congress never provided an exhaustive list of what it considered a "disability."²⁸ Congress did, however, provide the following language for what constituted a protected "disability": "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairment; or (c) being regarded as having such an impairment."²⁹ The ambiguity in this definition is clear, and the task of interpreting it was left to courts.³⁰

Congress passed the ADA to provide a "comprehensive mandate for the elimination of discrimination against individuals with disabilities."³¹

²⁴ See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006); see also 1 BERNARD D. REAMS ET AL., *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990*, PUBLIC LAW 101-336, at vii (1992).

²⁵ 42 U.S.C. §§ 12101-12213 (2006); see also PRACTICAL AND LEGAL GUIDE, *supra* note 19, at 9-11.

²⁶ Browne, *supra* note 6, at 30.

²⁷ *Id.* at 63. Compare §§ 12101-12213 with 29 U.S.C. § 701 (2006). The ADA uses the term "disabled," as opposed to the Rehabilitation Act's "handicap," because the former is less stigmatizing. S. REP. NO. 101-116, at 35 (1989).

²⁸ See §§ 12101-12213.

²⁹ *Id.* § 12102(1).

³⁰ Browne, *supra* note 6, at 31.

³¹ 42 U.S.C. § 12101(b)(1). The ADA spans five titles, including employment, public entities, public accommodations, telecommunications, and miscellaneous. *Id.* §§ 12101-12213.

During the ADA bill hearings, cancer patients, blind persons, and quadriplegics—persons traditionally considered disabled—gave personal testimony to exemplify the bill’s merit to Congress.³² Building upon these initial purposes, Congress enacted amendments to the ADA in 2009, the Americans with Disabilities Act As Amended (ADAAA), to offer courts more discretion when deciding disability claims.³³ Congress instructed courts to use the definition of “handicapped individual” under the broader definition that appears in the Rehabilitation Act of 1973³⁴ when deciding what constituted a disability under the ADA.³⁵ Congress further urged courts to broaden the scope of what was included under “substantially limits” and “major life activities,” effectively making it easier for plaintiffs to prove their disabilities.³⁶ Although Congress broadened the scope of these phrases, it never provided a definition for “substantially limits.”

In drafting the ADAAA, Congress replaced the Supreme Court’s narrow interpretation of the definition of “disability” and “substantially limits,” finding the Court’s

³² See, e.g., *Hearing on H.R. 2273 Before the H. Comm. on Educ. and Labor and the S. Comm. on Labor and Human Res.*, 100th Cong. 74–75 (1988) (statement of Judith Heumann, World Institute on Disability). Heumann explained how her handicap placed many obstacles in her life, including a denial of admission to a local public school because her wheelchair made her a “fire hazard” and an attempt by her high school principal to prevent her from going on stage to accept an award at graduation because she was in a wheelchair.

³³ 42 U.S.C. §§ 12101-12213 (2011) (amended 2008).

³⁴ 29 U.S.C. § 705(9)(A) (2006). Note that because the ADA’s definition of disability is identical to the Rehabilitation Act’s definition, cases arising under either statute generally follow the same precedent. See 29 U.S.C. § 701.

³⁵ 154 CONG. REC. S9626-01 (daily ed. Sept. 26, 2008) (statement of Sen. Reid).

³⁶ *Id.*

standard too high.³⁷ Accordingly, the ADA provides a non-exhaustive list of what constitutes a major life activity, including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”³⁸

However, Congress did not provide a comprehensive list of “disabilities,” and federal courts take a variety of approaches when determining what constitutes a “disability.” Some courts require a medically diagnosable condition to be shown before calling a condition a “disability.”³⁹ Still, other courts have found that mutable characteristics cannot constitute a disability.⁴⁰ Further, courts have also found that when the plaintiff’s

³⁷ *Lowe v. Am. Eurocopter, LLC*, No. 1:10CV24-A-D, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010).

³⁸ 42 U.S.C. § 12102(2)(A) (2006).

³⁹ *See, e.g., EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006) (holding that obesity, absent a physiological condition, was simply a physical characteristic and not a physiological disorder in itself).

⁴⁰ *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984) (finding that a bodybuilder’s condition was self-inflicted, which rendered his claim for weight discrimination unsuccessful); *Dale v. Wynne*, 497 F. Supp. 2d 1337, 1342 (M.D. Ala. 2007) (holding that obesity is a voluntary condition and thus not a disability under Alabama law); *Greene v. Union Pac. R.R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981) (holding that because obesity “was not an immutable condition such as blindness or lameness,” it is not a disability). Several state courts have also found that federal interpretation of the ADA precluded plaintiffs from recovering when the condition was mutable. *See, e.g., Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1152 (Cal. 1993) (finding that obesity was a voluntary condition and thus not a disability under California disability law); *Mo. Comm’n on Human Rights v. Sw. Bell Tel. Co.*, 699 S.W.2d 75, 79 (Mo. Ct. App. 1985) (holding that because plaintiff failed to take advantage of treatment for her known hypertension and obesity, she could not get the benefit of disability law).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 276

inability to work is of “limited duration,” she is not disabled under the ADA.⁴¹ In the same vein, “intermittent, episodic impairments” are not disabilities.⁴² Unique facts and circumstances in each case have led to a variety of court holdings without any cohesive jurisprudence.⁴³ Federal interpretation of disability law often guides state courts’ decisions. Therefore, this lack of cohesion in federal courts renders many difficulties for state courts and legislatures in determining what qualifies as a “disability” in their respective states.

ii. Tennessee Disability Law

In 1978,⁴⁴ the Tennessee General Assembly enacted the Tennessee Human Rights Act⁴⁵ (THRA) to provide protection for various forms of discrimination, including race, creed, color, religion, sex, age, or national origin. Shortly after the enactment of the THRA, the disabled became a protected category when the legislature enacted the Tennessee Disability Act⁴⁶ (TDA)

⁴¹ See, e.g., *McDonald v. Pennsylvania*, 62 F.3d 92, 96 (3d Cir. 1995).

⁴² *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995).

⁴³ O’Hara, *supra* note 10, at 929-30.

⁴⁴ TENN. CODE ANN. § 8-50-103 (2012); Trevizo, *supra* note 9.

⁴⁵ TENN. CODE ANN. §§ 4-21-101 to -1004 (2012).

⁴⁶ Formally known as the Tennessee Handicap Act. Effective April 7, 2008, the Tennessee Handicap Act was renamed the Tennessee Disability Act. See TENN. CODE ANN. § 8-50-103(a) (2012). Notably, this change was made after the Americans with Disabilities Act was amended in 2008. Unlike the changes made to the ADA that included amendments in the statute’s language, the Tennessee Disability Act was not substantively changed. This is evidence that shows the Tennessee General Assembly was updating the name of the statute but did not mean to change the language of the statute in accord with the meanings found in the ADA.

(collectively, “Acts”).⁴⁷ Although the THRA prohibits discrimination based on “race, color, creed, religion, sex, age, disability, familial status and national origin,” the TDA provides a mechanism for plaintiffs facing discrimination based on a disability.⁴⁸ That is, a plaintiff bringing a disability discrimination claim will sue under the TDA. However, the TDA relies on the principles and purposes set forth in the THRA.⁴⁹ The legislature listed its purposes for creating the Acts explicitly in the THRA itself: from the purpose of safeguarding individuals from discrimination based on race, creed, and sex to the purpose of making available to the state a citizen’s full productive capacity in employment.⁵⁰ More generally, the Acts seek to preserve the “public safety, health and general welfare” of the state.⁵¹

Generally, discrimination claims under the TDA are comparable to ADA claims, and courts *may* evaluate them using federal cases interpreting the ADA as guidance.⁵² However, the TDA is not identical to the ADA.⁵³ Although

⁴⁷ The TDA prohibits discrimination “against any applicant for employment based solely upon any physical, mental or visual handicap of the applicant, unless such handicap to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved.” § 8-50-103.

⁴⁸ *Id.*; *Forbes v. Wilson Cnty. Emergency Dist.* 911 Bd., 966 S.W.2d 417, 420 (Tenn. 1998) (finding that the TDA embodies the principles and definitions of the THRA).

⁴⁹ *Forbes*, 966 S.W.2d at 420.

⁵⁰ TENN. CODE ANN. § 4-21-101(3), (5).

⁵¹ *Id.* § 4-21-101(a)(7).

⁵² *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000).

⁵³ *See* 42 U.S.C. § 12112(b)(5)(A) (2006); *Roberson v. Cendant Travel Servs., Inc.*, 252 F. Supp. 2d 573, 583 (M.D. Tenn. 2002) (noting that the TDA elements are very similar to the ADA’s but do not require employers to make “reasonable accommodations” for disabled employees).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 278

the TDA prohibits discrimination in the employment context based solely on any physical, mental, or visual disability (unless the condition prevents the applicant from performing the duties required by the position), the TDA does not require the employer to furnish a “reasonable accommodation” like the ADA does.⁵⁴ The Tennessee Court of Appeals has repeatedly noted—albeit in unpublished opinions⁵⁵—that the TDA lacks the “reasonable accommodation” element. However, the Tennessee General Assembly has yet to amend the statute and thus make Tennessee statutory law more similar to the ADA.⁵⁶

Identical to the ADA, the TDA defines “disability” as: “(i) a physical or mental impairment which substantially limits one (1) or more of such person’s major life activities; (ii) a record of having such impairment; or (iii) being regarded as having such impairment.”⁵⁷ The Tennessee Supreme Court has found that “an impairment that may disqualify one from working at a job of choice does not limit a major life activity.”⁵⁸ For example, the court found that the plaintiff in *Barnes v. Goodyear Tire & Rubber Co.* did not prove that his Bell’s Palsy “substantially limited a major life activity” even though it prevented him from

⁵⁴ 42 U.S.C. §§ 12101-12102.

⁵⁵ See, e.g., *Anderson v. Ajax Turner Co.*, No. 01A01-9807-CH-00396, 1999 WL 976517, at *3 (Tenn. Ct. App. Oct. 28, 1999) (finding that the TDA does not require an employer to provide disabled employees with a “reasonable accommodation”).

⁵⁶ TENN. CODE ANN. § 8-50-103 (2012).

⁵⁷ *Id.* § 4-21-102(3)(A)(i)-(iii) (2012); see also 42 U.S.C. § 12102 (2006).

⁵⁸ *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000).

working at Goodyear because he was still able to work at a broader class of jobs.⁵⁹

Even though the ADA and Tennessee disability statutes are not identical, courts have consistently found that the Acts require them to at least consider federal law when reaching a decision.⁶⁰ In doing so, these courts have relied solely on the first purpose listed in the THRA: to “[p]rovide for execution within Tennessee of the policies embodied in the federal Civil Rights Act[s] . . . , the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967.”⁶¹ Notably, none of the federal legislation mentioned in this purpose covers disabilities. Thus, the courts are using federal law to decide state disability issues without explicit—or even implicit—direction to do so. At least one court has declined to follow federal law when doing so would thwart the purposes of the THRA.⁶²

B. The Obesity Epidemic and Disability Law

Like the term “disability,” pinpointing a single definition, cause, or treatment for “obesity” proves difficult. This section discusses general medical definitions and then moves to federal law and state disability law regarding obesity. Offering little guidance, a dictionary defines “obesity” as “very fat.”⁶³ In trying to understand

⁵⁹ *Id.* at 704. However, the court still found defendant-employer liable based on other grounds unrelated to the scope of this Note.

⁶⁰ *Booker v. Boeing Co.*, 188 S.W.3d 639, 647 (Tenn. 2006); *Barnes*, 48 S.W.3d at 707; *Spicer v. Beaman Bottling Co.*, 937 S.W.2d 884, 888 (Tenn. 1996).

⁶¹ TENN. CODE ANN. § 4-21-101(a)(1).

⁶² *Booker*, 188 S.W.3d at 647.

⁶³ OXFORD AMERICAN DESK DICTIONARY AND THESAURUS 567 (2d ed. 2001).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 280

this amorphous condition, the medical community and courts have offered guidance as well.

i. Medical Definitions of Obesity and Its Causes

A more precise indication used by experts is the Body Mass Index (BMI), which indicates overweightness and obesity more precisely.⁶⁴ The BMI considers many facets of a person's body, including health, weight, and frame size, to produce a number. This number allows a person to see where he or she falls on a scale indicating if the person is overweight, normal, or underweight. A BMI ranging from 25–29.9 is considered overweight, and a BMI of 30 or greater is considered obese.⁶⁵

Still, other medical professionals use percentages of ideal body weight⁶⁶ to create three categories of obesity.⁶⁷ A person is “mildly obese” if he weighs twenty to forty percent over the ideal body weight.⁶⁸ A person is “moderately obese” if he weighs forty to one hundred percent over his ideal body weight. Finally, a person who weighs more than one hundred percent over his ideal body weight suffers from “morbid” or “severe obesity.”⁶⁹

⁶⁴ MERCK MANUAL OF DIAGNOSIS AND THERAPY 950 (Robert Berkow et al. eds., 15th ed. 1987) [hereinafter MERCK MANUAL 15TH ED.].

⁶⁵ U.S. DEP'T OF HEALTH & HUMAN SERVS., OVERWEIGHT AND OBESITY STATISTICS 1 (2012), <http://win.niddk.nih.gov/publications/PDFs/stat904z.pd>.

⁶⁶ Ideal body weight is a BMI of 18-24.9. MERCK MANUAL HOME HEALTH HANDBOOK, OBESITY (2008), http://www.merckmanuals.com/home/disorders_of_nutrition/obesity_and_the_metabolic_syndrome/obesity.html.

⁶⁷ MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (Robert Berkow et al. eds., 16th ed. 1992) [hereinafter MERCK MANUAL 16TH ED.].

⁶⁸ *Id.*

⁶⁹ *Id.*

On an individual level, obesity is directly and indirectly associated with a plethora of other health risks. Obesity-related conditions include heart disease, stroke, Type II diabetes, and certain types of cancer.⁷⁰ Of these conditions, Type II diabetes is most directly linked to obesity.⁷¹ Ninety to ninety-five percent of Type II diabetes cases result from the individual being overweight.⁷² Moreover, obesity is often associated with a variety of other health issues as well, including hypertension, osteoarthritis, sleep apnea, and respiratory problems.⁷³

Morbid obesity is outside of the realm of this Note; however, knowing what constitutes morbid obesity is helpful for understanding what normal obesity is. The Equal Employment Opportunity Commission (EEOC) defined severe, or “morbid,” obesity as 100% over the normal weight for that specific person.⁷⁴ The EEOC

⁷⁰ *Adult Obesity Facts*, *supra* note 2.

⁷¹ *The Coming Diabetic Epidemic*, FOOD MGMT., Dec. 2000, at 18.

⁷² Tara Parker-Pope, *Diabetes: Underrated, Insidious and Deadly*, N.Y. TIMES (July 1, 2008), http://www.nytimes.com/2008/07/01/health/01well.html?_r=0&pagewanted=print. Notably, the Tennessee Court of Appeals in *Davis v. Computer Maintenance Service, Inc.* decided that diabetes was not considered a disability when the plaintiff took insulin or other medication to regulate blood sugar levels. No. 01A01-9809-CV00459, 1999 WL 767597 (Tenn. Ct. App. Sept. 29, 1999). However, the court relied on the United States Supreme Court’s decision in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), which has been preempted by the ADA. *Id.* at *1.

⁷³ NAT’L HEART, LUNG, & BLOOD INST., CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS: THE EVIDENCE REPORT (1998), http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf, <http://www.cdc.gov/Other/disclaimer.html> [hereinafter CLINICAL GUIDELINES]. Notably, the CDC mentioned that these obesity-related conditions were “some of the leading causes of preventable death.”

⁷⁴ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 441 (6th Cir. 2006).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 282

considers morbid obesity to be a physiological impairment, i.e. a “disability.” However, prior regulations state that “[b]eing overweight, in and of itself, generally is not an impairment.”⁷⁵ For this premise, the EEOC offered examples of bodybuilding and mild cases of being overweight.⁷⁶

Obesity is generally preventable and mutable, but once an individual becomes *morbidly* obese, complications and treatment are much more rigorous.⁷⁷ Researchers suspect that morbid obesity, unlike normal obesity, may be linked to a recessive gene.⁷⁸ Morbid obesity is very rare, affecting only 0.1% of the population.⁷⁹ Although morbid obesity shares some of the physiological characteristics of regular obesity, the consequences are much more severe.⁸⁰ Additionally, a change in diet and physical activity is usually ineffective at battling morbid obesity, forcing the individual to often resort to surgery.⁸¹

Some courts find that once an individual becomes morbidly obese, his metabolism is permanently dysfunctional, creating a physical impairment.⁸² Individuals who are morbidly obese are more susceptible to hypoventilation, carbon dioxide retention, blood circulatory dysfunctions, hypertension, and endocrine and metabolic complications.⁸³ Unfortunately, even morbidly obese

⁷⁵ See Equal Employment Opportunity Commission Compliance Manual, 2009 WL 4782107 (2009).

⁷⁶ *Id.*

⁷⁷ MERCK MANUAL 16TH ED., *supra* note 67, at 981.

⁷⁸ CLINICAL GUIDELINES, *supra* note 73, at 28.

⁷⁹ MERCK MANUAL 16TH ED., *supra* note 67, at 981.

⁸⁰ *Id.*

⁸¹ *Id.* at 984.

⁸² See, e.g., *Cook v. R.I., Dep’t of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 18 (1st Cir. 1993).

⁸³ TEXTBOOK OF MEDICINE 1378-79 (Paul B. Beeson & Walsh McDermott eds., 15th ed. 1979).

individuals who eventually do return to a normal weight still suffer from the increased risk of premature death and morbidity.⁸⁴ Therefore, regardless of morbid obesity's cause, an individual who is or was morbidly obese bears a permanent physiological impairment sufficient to render his condition a "disability."⁸⁵ Due to the nature of morbid obesity, it is outside the scope of this Note's argument, which only contemplates whether regular obesity is a disability under Tennessee law.

ii. Federal Law on Obesity as a Disability

Prior to the passage of the ADA, federal courts uniformly rejected the idea that obesity was a qualified disability under the ADA.⁸⁶ However, with the passage of the ADA, some federal courts have started to recognize obesity as a disability because the ADA generally includes a broader definition of "disability" than what the ADA originally included.⁸⁷ Absent any federal legislation or a Supreme Court case providing guidance on whether obesity is a disability under the ADA, this area of law is quite unsettled. Some of the more recent federal case law, however, tends to find that obesity is not a disability.⁸⁸

⁸⁴ Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans with Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 563, 597-98 (1996).

⁸⁵ *Id.* at 595.

⁸⁶ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440-43 (6th Cir. 2006); *Andrews v. Ohio*, 104 F.3d 803, 809-10 (6th Cir. 1997); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d. Cir. 1997).

⁸⁷ *See, e.g., EEOC v. Res. for Human Dev.*, 827 F. Supp. 2d 688 (E.D. La. 2011) (holding that the EEOC's interpretation of the new language in the ADA permitted plaintiff to claim obesity as a disability).

⁸⁸ *Watkins Motor Lines, Inc.*, 463 F.3d at 440-43.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 284

Additionally, a plaintiff may also sue under other statutes, such as the Rehabilitation Act of 1973,⁸⁹ which was used by the plaintiff in *Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*.⁹⁰ *Cook* was the first case allowing a plaintiff to win an obesity discrimination claim.⁹¹ Although the court did not rule that obesity was an immutable condition, the court did find the plaintiff's claim valid based on her employer perceiving her as being disabled.⁹²

Regardless, the question still remains as to whether obesity is a disability under federal law. The EEOC has publicly stated that "the law protects morbidly obese employees and applicants from being subjected to discrimination because of their obesity."⁹³ The EEOC,

⁸⁹ 29 U.S.C. § 701 (2006).

⁹⁰ 10 F.3d 17, 28 (1st Cir. 1993). The plaintiff applied for a position with the state's Department of Mental Health, Retardation, and Hospitals (MHRH) but was denied employment after a pre-employment physical found her to be morbidly obese. *Id.* at 20-21. The defendant, MHRH, argued that her obesity would prevent her from helping patients evacuate in an emergency situation and would cause her to miss work. *Id.* at 21. Further, MHRH feared the possibility of Cook filing a workers' compensation claim that would be higher than for employees of a normal weight. *Id.*

⁹¹ The plaintiff, Cook, brought the claim under the Rehabilitation Act because the claim arose from facts taking place before the enactment of the ADA. *Id.* at 20-21. However, because the Rehabilitation Act and the ADA definition for "disability" are identical, the two statutes follow the same precedent. *See* 29 U.S.C. § 701.

⁹² *Cook*, 10 F.3d at 23-24. *Contra Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984). In *Tudyman*, a bodybuilder was denied employment as a flight attendant by defendant United Airlines and brought suit based on weight discrimination. *Id.* However, because the plaintiff's weight was found to be voluntary and self-inflicted, the court reasoned that his condition did not fit the definition of "disability" or the purposes of disability statutes. *Id.*

⁹³ Press Release, U.S. Equal Emp't. Opportunity Comm'n, BAE Systems Subsidiary to Pay \$55,000 to Settle EEOC Disability Discrimination Suit (July 24, 2012),

however, did not state whether this also applied to those who are simply obese or overweight as opposed to those who are morbidly obese. However, applying the concept of *expressio unius est exclusio alterius*—the specific inclusion of an item suggests the exclusion of the rest—dictates that the EEOC intentionally excluded obesity, especially considering the alarming statistics on obesity.⁹⁴

Moreover, a trend in federal disability law involving weight discrimination seems to be emerging—that of personal responsibility.⁹⁵ Proponents of greater legal protection for victims of weight discrimination celebrated the *Cook* decision.⁹⁶ However, the area of obesity discrimination is still fresh and undeveloped, leaving room for more interpretation by courts.⁹⁷ A recent case from the Sixth Circuit confirming this trend, *EEOC v. Watkins Motor Lines, Inc.*,⁹⁸ held that an employee’s obesity was not a “physical impairment” and not a disability under the ADA because discrimination based on weight is only

<http://www.eeoc.gov/eeoc/newsroom/release/7-24-12c.cfm>. Where the plaintiff is morbidly obese, he need not prove an underlying condition is the cause of his obesity to be considered “disabled.” *EEOC v. Res. for Human Dev.*, 827 F. Supp. 2d 688 (E.D. La. 2011).

⁹⁴ See *Doukas v. Metro. Life Ins. Co.*, No. CIV-4-478-SD, 1997 WL 833134, at *3 (D.N.H. Oct. 21, 1997); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992).

⁹⁵ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440-43 (6th Cir. 2006); *Andrews v. Ohio*, 104 F.3d 803, 809-10 (6th Cir. 1997); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997). See generally Matthew A. Glover, *Employment & Disability Law—Americans with Disabilities Act of 1990—The Weight of Personal Responsibility: Obesity, Causation, and Protected Physical Impairments*, 30 U. ARK. LITTLE ROCK L. REV. 381 (2008) (examining recent case law, including *Watkins Motor Lines, Inc.*, and finding that obesity stems from personal responsibility and, thus, is not a protected disability).

⁹⁶ Glover, *supra* note 95.

⁹⁷ *Id.*

⁹⁸ See *Watkins Motor Lines, Inc.*, 463 F.3d at 436.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 286

actionable if the plaintiff proves an underlying medical condition.⁹⁹

More law is emerging based on the premise that obesity is largely preventable.¹⁰⁰ Put very simply, obesity is caused by an excessive consumption of food, i.e. by taking in more calories than one burns during physical activity.¹⁰¹ Americans' "ever-increasing sedentary lifestyles [] make [] for an environment anathema to a healthy lifestyle."¹⁰² Congress has even gone so far as to introduce legislation like the Personal Responsibility in Food Consumption Act, better known as the "Cheeseburger Bill," that seeks to limit fast food restaurants' liability in response to the growing number of lawsuits concerning health issues arising from their products.¹⁰³ Although not the best way to address the problem of obesity, just the presence alone of the federal and state "Cheeseburger Bills" lends credence to the consensus that obesity, largely caused by overconsumption, is preventable.

⁹⁹ *Id.* at 443; *see also Andrews*, 104 F.3d at 810 (holding that the purpose of the ADA would be distorted if obesity was considered a disability); *Francis*, 129 F.3d at 286 (holding that the floodgates of litigation would open if obesity was considered a disability).

¹⁰⁰ Browne, *supra* note 6, at 1; Stephen A. McGuinness, *Time to Cut the Fat: The Case for Government Anti-Obesity Legislation*, 25 J.L. & HEALTH 41, 46 (2012).

¹⁰¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 65, at 1.

¹⁰² McGuinness, *supra* note 100, at 46; *see also* U.S. DEP'T OF AGRIC., PROFILING FOOD CONSUMPTION IN AMERICA 14 (2002), www.usda.gov/documents/usda-factbook-2001-2002.pdf.

¹⁰³ H.R. 339, 108th Cong. (2004) <http://www.gpo.gov/fdsys/pkg/BILLS-108hr3390pcs/pdf/BILLS-108hr339pcs.pdf>. Ultimately, this bill did not pass, but many state legislatures enacted their own versions of the Cheeseburger Bill, including Tennessee's Commonsense Consumption Act. TENN. CODE ANN. § 29-34-205 (2012). The Commonsense Consumption Act limits liability for restaurants based on claims of weight gain or obesity brought by individuals. *Id.*

A federal circuit split currently exists as to whether obesity is a disability absent a cognizant physiological condition, such as a glandular issue. Courts' main fear in permitting obese plaintiffs to sue for discrimination is that it will open the floodgates of litigation, distorting the purpose of the ADA to protect those with a genuine handicap.¹⁰⁴ However, when an underlying physiological condition is present, most courts will permit the plaintiff to claim he is disabled.¹⁰⁵ Still, some courts have held that obesity alone is a disability and should be protected.¹⁰⁶

¹⁰⁴ See, e.g., *Andrews*, 104 F.3d 803 (finding that to consider obesity a disability would distort the purpose of the ADA and allow a very large group of people to pursue litigation); *Francis*, 129 F.3d 281 (finding that considering obesity as a disability would open the floodgates of litigation and distort the purpose of the ADA to protect those with a legitimate handicap); *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (fear-of-heights case where the court refers to several obesity cases, holding that protecting acrophobia would debase the high purpose of the statute in allowing minor or widely shared impairments to qualify as disabilities). An interesting case of how weight discrimination may be reversed is *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984). In *Tudyman*, the court reasoned that because the bodybuilder-plaintiff's weight and low-fat content were self-imposed, he could not claim he was disabled. *Id.* at 746. The court opined that it "refused to make the term handicapped a meaningless phrase." *Id.*

¹⁰⁵ "[S]uch an impairment" within the meaning of subsection (C) plainly refers to a "physical or mental impairment" within the meaning of subsection (A). *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 172 (4th Cir. 1997) ("The 'such an impairment' language incorporates by reference subsection (A)'s description of the sort of impairment that qualifies as a disability."); *Francis*, 129 F.3d at 286 (finding that obesity must be a symptom of an underlying physiological condition to constitute a disability); *Andrews*, 104 F.3d 803 (holding that a disability must be accompanied by a physiological impairment); *Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 23 (1st Cir. 1993) (holding that a plaintiff who was obese because of an underlying physiological condition was disabled). *Contra EEOC v. Res. for Human Dev.*, 827 F. Supp. 2d 688 (E.D. La. 2011) (holding

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 288

iii. Other States' Laws on Obesity as a
Disability

At the state level, the law is beginning to mirror the unsettled federal law with conflicting state court decisions. Only Michigan's Civil Rights Act¹⁰⁷ explicitly prohibits employment discrimination on the basis of weight. In the same vein, Washington D.C.'s Human Rights Law¹⁰⁸ prohibits discrimination on the basis of "personal appearance," which arguably includes weight. In states lacking an explicit statute, most courts' interpretations attempt to resemble federal law because most state disability statutes are strikingly similar to the ADA.¹⁰⁹

that morbid obesity was a disability regardless of the existence of an underlying physiological condition).

¹⁰⁶ *Res. for Human Dev.*, 827 F. Supp. 2d 688 (denying defendant's motion to dismiss because the EEOC's current guidelines permitted severely obese plaintiffs to state a claim, even without an underlying physiological condition); *Frank v. Lawrence Union Free Sch. Dist.*, 688 F. Supp. 2d 160 (E.D.N.Y. 2010) (finding that an obese teacher who was fired by the superintendent because his "size and weight were not conducive to learning" suffered from discrimination based on a disability under the New York Human Rights Law); *Lowe v. Am. Eurocopter, LLC*, No. 1:10CV24-A-D, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010); *Rouse v. Mich. Dep't of State Police*, No. 1:08-CV-982, 2010 WL 882821 (W.D. Mich. March 8, 2010) (holding that obese plaintiff suffered a disability upon finding that the police department had fired him, stating that if he "had lost a significant amount of weight he could have the potential ability to perform those essential functions").

¹⁰⁷ MICH. COMP. LAWS § 37.2202(1)(a) (2012).

¹⁰⁸ D.C. CODE ANN. § 2-1401.01 (2012).

¹⁰⁹ O'Hara, *supra* note 10, at 930-33. See, e.g., *BNSF Ry. Co. v. Feit*, 281 P.3d 225 (Mont. 2012) (interpreting the Montana Human Rights statute in accordance with the ADA and various EEOC interpretations to find that obesity absent an underlying physiological disorder could constitute a disability as long as the individual's weight was outside the "normal range" and affected one or more "body

Disability decisions under state law regarding obesity differ as well. In 1981, the United States District Court for the Western District of Washington first examined obesity discrimination in employment under Washington state law in *Greene v. Union Pacific Railroad*.¹¹⁰ Ultimately, the court held that obesity was not a disability because it was “not an immutable condition such as blindness or lameness.”¹¹¹ The court found that the employer’s decision to deny Greene a transfer to a fireman position was justified because a morbidly obese person “would be less apt to be an efficient, safe, illness-free, and claims-free employee than one not having those conditions.”¹¹² Thus, the plaintiff was not discriminated against because of his weight but due to the “bona fide occupational requirements of being a fireman,” just as any other job has requirements.¹¹³

After the *Greene* decision, state-law discrimination cases based on obesity have contained different lines of analysis leading to different outcomes. In Pennsylvania, an obese woman brought suit¹¹⁴ against her employer under the Pennsylvania Human Rights Act,¹¹⁵ which defines

systems” as explained in 29 C.F.R. § 1630.2(h)(1)); *Res. for Human Dev.*, 827 F. Supp. 2d 688; *Lowe*, 2010 WL 5232523.

¹¹⁰ 548 F. Supp. 3, 3 (W.D. Wash. 1981).

¹¹¹ *Id.* at 5.

¹¹² *Id.* Similar to the Washington state statute at issue here, the Tennessee Disability Act disallows discrimination “unless such disability to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved.” TENN. CODE ANN. § 8-50-103.

¹¹³ *Greene*, 548 F. Supp. at 5.

¹¹⁴ *Phila. Elec. Co. v. Pennsylvania*, 448 A.2d 701 (Pa. Commw. Ct. 1982).

¹¹⁵ See Pennsylvania Human Relations Act of 1955, Pub. L. No. 744, as amended by 43 PA. CONS. STAT. §§ 951-963 (1994); see also *Phila. Elec. Co.*, 448 A.2d at 702-03.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 290

disability virtually the same as the ADA.¹¹⁶ The employer-defendant, Philadelphia Electric, found that the plaintiff was “unsuitable for work . . . because of her abnormal weight.”¹¹⁷ Despite this finding, the court concluded that the plaintiff had no job-related or non-job-related disability because she was “perfectly able to . . . work at all times.”¹¹⁸ The majority of courts finding obesity to not be a disability focus on the lack of plaintiffs’ medical proof that their condition is “disabling” and not merely inconvenient.¹¹⁹ Absent such proof, courts are reluctant to accept obesity as a disability rather than a result of mere overeating.¹²⁰

Conversely, some states have found that obesity is a disability, beginning with *McDermott v. Xerox* in 1985.¹²¹ The defendant-employer denied McDermott a job because of her obesity.¹²² Because, under New York law, McDermott was clinically diagnosed as obese and considered unsuitable for the position (which is a lawful reason for an employer to not hire her), her obesity constituted an actual disability according to the court.¹²³ Additionally, the court rejected the defendant’s argument that the New York statute only applied to involuntary or immutable conditions, stating that the “statute protects all persons with disabilities and not just those with hopeless conditions”¹²⁴—a drastic departure from previous state case law.

¹¹⁶ *Phila. Elec. Co.*, 448 A.2d at 703-04; *see also* 16 PA. CODE § 44.4 (2012).

¹¹⁷ *Phila. Elec. Co.*, 448 A.2d at 703.

¹¹⁸ *Id.* at 707.

¹¹⁹ *See* O’Hara, *supra* note 10, at 896.

¹²⁰ *Id.*

¹²¹ 480 N.E.2d 695 (N.Y. 1985).

¹²² *Id.* at 695-96.

¹²³ *Id.* at 698.

¹²⁴ *Id.*

In the same vein, New Jersey has also permitted obese plaintiffs to recover where the plaintiff can demonstrate that his obesity is caused by or causes a physical impairment proven through “accepted clinical or laboratory diagnostic techniques.”¹²⁵ Under this statute, the plaintiff in *Gimello v. Agency Rent-a-Car*¹²⁶ sued his former employer for terminating his job because of his obesity.¹²⁷ The court found that because Gimello faced discrimination under this broadly worded statute based on his obese condition, proven through medical evidence, he suffered from an actual disability.¹²⁸ It is important to note, however, that the court never specified what would qualify as sufficient medical evidence.

iv. Tennessee Law on Obesity as a Disability

Tennessee courts have not yet considered whether obesity is a disability under state law. Speaking about disability law generally, Tennessee courts have often stated that “it is clear that the Tennessee General Assembly envisioned the Tennessee Disability Act would be coextensive with federal law,” which is a hefty assumption.¹²⁹ These courts, however, also noted that the

¹²⁵ N.J. STAT. ANN. § 10-5-5(q) (West 2011).

¹²⁶ 594 A.2d 264 (N.J. 1991).

¹²⁷ *Id.* at 265, 273.

¹²⁸ *Id.* at 268, 278. Specifically, Gimello’s weight-loss specialist testified that Gimello had been obese for most of his life. *Id.* at 268.

¹²⁹ *Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170, 172 (Tenn. 1999) (finding that the policy of “interpreting the THRA coextensively with Title VII is predicated upon a desire to maintain continuity between state and federal law”); *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 834 (Tenn. 1997), *overruled on different grounds by Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999); *Bennett v. Steiner-Liff Iron & Metal Co.*, 826 S.W.2d 119, 121 (Tenn. 1992). The Tennessee Supreme Court has found that federal law may guide interpretation in the state’s “own anti-discrimination laws.” *Barnes v. Goodyear Tire &*

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 292

federal precedents do not bind or limit Tennessee’s courts in giving the “fullest possible effect to Tennessee’s own human rights legislation”—that is, the courts are not limited to interpreting the state disability statutes identically to their federal counterparts.¹³⁰ Without further legislative direction, a court analyzing an obesity discrimination claim under Tennessee law may find that obesity constitutes a disability by following recent federal case law development. Because federal law is unsettled on this point, there is no absolute guidance available to Tennessee courts for deciding that obesity is not a disability, which is another reason for the legislature to make a decision. It is only a matter of time before a plaintiff brings this claim, and Tennessee is not prepared to decide this issue based on the legislature’s lack of thought given to the issue.

III. TENNESSEE SHOULD NOT INCLUDE OBESITY AS A DISABILITY PROTECTED BY THE TENNESSEE HUMAN RIGHTS ACT

Barbeque, sweet tea, and a laid-back lifestyle are hallmarks in Tennessee. However, what seem like innocent pleasures contribute to some alarming statistics: 67.8% of adult Tennesseans are overweight¹³¹ and 31.7% are

Rubber Co., 48 S.W.3d 698, 705 (Tenn. 2000) (finding that that court “may look to federal law for guidance”) (emphasis added).

¹³⁰ Carr v. United Parcel Serv., 955 S.W.2d 832, 835 (Tenn. 1997); Weber v. Moses, 938 S.W.2d 387, 390 (Tenn. 1996); Bennett v. Steiner-Liff Iron & Metal Co., 826 S.W.2d 119, 121 (Tenn. 1992).

¹³¹ “Overweight” includes individuals with a BMI of twenty-five or greater. CDC, BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM: PREVALENCE AND TREND DATA—OVERWEIGHT AND OBESITY, U.S. OBESITY TRENDS, TRENDS BY STATE, 2010, available at <http://www.cdc.gov/brfss/> [hereinafter PREVALENCE AND TREND DATA].

obese.¹³² While these statistics certainly indicate a public health crisis and an obesity epidemic, no court or legislative action can combat obesity merely by affording the obese protection under disability statutes.

In light of the 2008 amendments to the ADA and the increasing number of obese persons in Tennessee, this Note argues that Tennessee should not consider obesity a disability, regardless of how the federal courts hold in the future. More specifically, Tennessee should not classify obesity as a disability absent an underlying condition. To support this point, this Note first shows how obesity is inherently different from other protected disabilities. Second, this Note asserts that there is no need to expand the definition of “disability” to include obesity because the medically diagnosable conditions associated with obesity are already generally protected by disability statutes. Lastly, the purposes of the THRA show that the legislative intent of the Tennessee General Assembly when enacting the THRA and TDA was not to follow the ADA or create such an expansive definition of disability but rather to provide a comprehensive list of ideals that should guide the courts when applying disability statutes.

A. Inherent Differences Exist Between Obesity and Other Disabilities

Obesity is generally mutable.¹³³ This lends credence to the argument that obesity is often only temporary.¹³⁴ The characteristics of “mutable” and

¹³² *Id.* “Obese” includes individuals with a BMI of thirty or greater.

¹³³ See generally Browne, *supra* note 6 (arguing that obesity is largely caused and fixed by habits of overconsumption and physical activity).

¹³⁴ Although most instances of obesity are from high caloric intake and lack of exercise, this Note leaves room for protecting obese persons whose condition is the result or cause of an underlying condition.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 294

“temporary,” the courts argue, lead to the conclusion that Congress and the EEOC never intended obesity to be protected as a disability in the first place.¹³⁵ Building on this distinction, even after the ADAAA was enacted, the EEOC has not deviated from its declaration that physical personal characteristics are not covered by the ADA, including “eye color, hair color, left-handedness, or height, weight or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder.”¹³⁶

Medical studies have found that behavioral techniques derived largely from experiments in psychology provide the means to show that many obese people are able to learn new behavior patterns, including how to control certain eating habits that have contributed to their conditions.¹³⁷ Further, at reasonable prices¹³⁸ and perhaps even covered by insurance plans, medication (such as appetite suppressants) or counseling can treat obesity.¹³⁹ Once weaned off of the medication, individuals show high success rates for weight loss and increased health after seeing how a person with a healthy, balanced diet eats.¹⁴⁰

The theory behind that medication is that obesity can be changed through a personal habit (here, eating properly). This fact alone could constitute a showing that

¹³⁵ Browne, *supra* note 6, at 23; see Cook v. Rhode Island, 783 F. Supp. 1569 (D.R.I. 1992).

¹³⁶ ADA Guidelines § 1630.2(h) (1995) (emphasis added).

¹³⁷ Kyoung Kon Kim et. al, *Effects on Weight Reduction and Safety of Short-Term Phentermine Administration in Korean Obese People*, 47 YONSEI MED. J. 614 (2006).

¹³⁸ In Shelby County, Tennessee, a month’s supply of Phentermine, a well-known appetite suppressant, costs approximately \$50-\$75 (around \$25 for the office visit and \$40 for the prescription). *E.g.*, CORDOVA MEDICAL CLINIC, <http://www.cordovamedical.com/> (last visited Dec. 22, 2012). This price includes nutrition and physical exercise counseling by either a medical doctor or a nurse practitioner.

¹³⁹ 23 AM. JUR. 2D *Proof of Facts* § 6 (2012).

¹⁴⁰ *Id.*

obesity is self-imposed, unlike the disabilities listed by the EEOC Guidelines, which are as follows:

These impairments and activities limited include: [D]eafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 296

major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.¹⁴¹

Of course, many of the items on this list are preventable—for example, when a conscious decision is made by a drug user to share an HIV-infected needle—but for the most part, they are not mutable, unlike obesity.

In fact, many courts have agreed with this idea, finding that obesity is a voluntary and mutable condition.¹⁴² For example, the court in *Andrews v. Ohio*¹⁴³ repeatedly

¹⁴¹ See 29 C.F.R. § 1630.2(j)(3)(iii) (2011).

¹⁴² See, e.g., *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 443 (6th Cir. 2006) (holding that obesity, absent a physiological condition, was simply a physical characteristic and not a physiological disorder in itself); *Dale v. Wynne*, 497 F. Supp. 2d 1337, 1342 (M.D. Ala. 2007) (holding that obesity is a voluntary condition and thus not a disability under Alabama law); *Greene v. Union Pac. R.R.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981) (holding that because obesity “was not an immutable condition such as blindness or lameness,” it is not a disability); *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1152 (Cal. 1993) (finding that obesity was a voluntary condition and thus not a disability under California disability law); *Mo. Comm’n on Human Rights v. Sw. Bell Tel. Co.*, 699 S.W.2d 75, 79 (Mo. Ct. App. 1985) (holding that because plaintiff failed to take advantage of treatment for her known hypertension and obesity, she could not get the benefit of disability law).

¹⁴³ *Andrews v. Ohio*, 104 F.3d 803, 808-09 (6th Cir. 1997). In *Andrews*, seventy-six law enforcement officers sued the State of Ohio, the Department of Highway Safety, and the state highway patrol under the ADA claiming weight discrimination. *Id.* at 805. The court found that the officers were not disabled because “they have not alleged a weight or fitness status other than a mere, indeed possibility transitory, physical characteristic.” *Id.* at 810.

stated that a physical characteristic must relate to a physiological disorder in order to qualify as an ADA impairment.¹⁴⁴ This reasoning arose from the Code of Federal Regulations' definition of an impairment: any "physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of [various] body systems."¹⁴⁵ Consequently, the *Andrews* court found that "physical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for purposes of determining either actual or perceived disability."¹⁴⁶ In deciding *Andrews*, the court reasoned that a disability is one that is physiologically caused and immutable.¹⁴⁷

Tennessee, too, has recognized that obesity is mutable in its other legislation, such as the Commonsense Consumption Act,¹⁴⁸ which supports the argument that obesity is not a disability. Obesity is inherently different from other already-recognized disabilities in that it is largely controllable.¹⁴⁹ When there is no underlying physical condition, obesity is comparable to a person's conscious decision to gain muscle by weightlifting because "mere physical characteristics [do] not, without more, equal a physiological disorder."¹⁵⁰ The Tennessee Commonsense Consumption Act, modeled after the federal Cheeseburger

¹⁴⁴ *Id.*

¹⁴⁵ 29 C.F.R. § 1630.2(h)(1).

¹⁴⁶ *Andrews*, 104 F.3d at 808 (emphasis added).

¹⁴⁷ *Id.* at 809. See, e.g., *Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17 (1st Cir. 1993) (holding that where a physiological condition caused the plaintiff's obesity, the court would find an impairment).

¹⁴⁸ TENN. CODE ANN. § 29-34-205 (2012).

¹⁴⁹ See generally *Browne*, *supra* note 6 (explaining how the condition of obesity may be controlled by developing healthy habits).

¹⁵⁰ *Andrews*, 104 F.3d at 810.

Bill,¹⁵¹ denies plaintiffs the ability to sue restaurants merely because the plaintiff, in eating the restaurant's food, became overweight or obese.¹⁵² The statute is not without support either. Groups including the American Bakers Association, the National Association of Wheat Growers, and the American Frozen Food Institute urged Senate Majority Leader Bill Frist of Tennessee to cosponsor the bill at the federal level.¹⁵³ Further, a 2003 Gallup Poll revealed that 89% of Americans agreed that restaurants should not be responsible for their customers' eating habits and weight gains.¹⁵⁴ The purpose of disability statutes is to protect a vulnerable group—here, the disabled. Arguably, with legislation such as the Cheeseburger Bill and the results of the Gallup Poll, obesity is a condition that people agree does not need to be protected like true disabilities, such as cancer, cerebral palsy, or depression.

Obesity is also inherently different from other disabilities because it affects a huge amount of the population. Expanding the definition of obesity in Tennessee creates room for more plaintiffs to be able to sue. The possibility of the “floodgate” effect is arguably the most looming concern in the debate.¹⁵⁵ If Tennessee finds that obesity is a disability, nearly one-third of the state's population qualifies as “disabled” and, if obesity is further declared a protected condition, could potentially be protected under disability statutes.¹⁵⁶ If an obese plaintiff

¹⁵¹ See *supra* p. 286.

¹⁵² TENN. CODE ANN. § 29-34-205.

¹⁵³ *Congressional 'Cheeseburger Bill' Gains Support*, HEARTLANDER MAG. (Nov. 1, 2005), <http://news.heartland.org/newspaper-article/2005/11/01/congressional-cheeseburger-bill-gains-support>.

¹⁵⁴ *Id.*

¹⁵⁵ *Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17 (1st Cir. 1993).

¹⁵⁶ *Adult Obesity Facts*, *supra* note 2.

can sue without proving an underlying physiological condition, more plaintiffs would be able bring other claims based solely on physical characteristics that pose some limitation on their daily lives. As one author noted, “if anyone can bring a suit alleging discrimination based on a physical characteristic, then virtually every employment dispute . . . can turn into a vehicle for a discrimination suit.”¹⁵⁷ When rejecting the claim that mere overweightness was a disability, the First Circuit warned that allowing claims based on physical characteristics would encourage a “catch-all cause of action for discrimination . . . far removed from the reasons the [ADA] was passed”—to protect true disabilities.¹⁵⁸

In May 2011, the EEOC amended its regulations to reflect the new ADAAA, stating that an impairment is a “disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.”¹⁵⁹ At the time of

¹⁵⁷ Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 713 (1999).

¹⁵⁸ *Francis v. City of Meriden*, 129 F.3d 281, 287 (2d Cir. 1997).

¹⁵⁹ 29 C.F.R. § 1630(j)(1)(ii) (2011). Further, the EEOC Manual and Code of Federal Regulations provide a list of physical impairments. Obesity is not included. See 29 C.F.R. § 1630.2(j)(3)(iii). These impairments and activities include: “deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function” *Id.* Because this Note argues

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 300

enactment of the ADA, obesity was a severe epidemic in the United States.¹⁶⁰ With that in mind and the increasing number of obese persons in the United States, Congress could have easily included obesity in the ADA but chose not to.¹⁶¹ The EEOC estimated that out of a total workforce of approximately 142 million,

that obesity absent an accompanying physiological condition is not a disability, obesity will be considered a disability when paired with a condition from this list. Thus, an individual who is obese and must result to using a wheelchair is disabled because she has a physiological impairment that substantially limits her ability to walk. In the same vein, if she becomes obese because she is confined to a wheelchair, this also qualifies as a disability for the same reason.

In the list provided by the EEOC, all of the conditions listed are virtually non-controllable or occur because of an accident of sorts. Further, these conditions also all stem from an underlying physiological condition or result in one. On the other hand, obesity, which is not listed, often results from an individual's conscious decisions to engage in behavior that leads to obesity.

¹⁶⁰ In 2008, the Centers for Disease Control and Prevention estimated that 25.6% of the population was obese, an increase of 1.7% from the previous two years. Press Release, Centers for Disease Control and Prevention, Latest CDC Data Show More Americans Report Being Obese (July 17, 2008), <http://www.cdc.gov/media/pressrel/2008/r080717.htm>. In this press release, Dr. William Dietz, the Director of the Division of Nutrition, Physical Activity, and Obesity, stated that to curb the problem of obesity, people need to be encouraged to eat better and exercise. *Id.* In his analysis of the problem, Dr. Dietz never mentioned that obesity was a condition that could not be controlled. *See id.*

¹⁶¹ *See* 154 CONG. REC. S9626-01 (daily ed. Sept. 26, 2008) (statement of Sen. Reid). Senator Reid stated that the Americans with Disabilities Act needed an amendment due to the strict application of what constituted a disability by the Supreme Court. He states as follows: "As a result, the lower courts have now gone so far as to rule that people with amputation, muscular dystrophy, epilepsy, diabetes, multiple sclerosis, cancer, and even intellectual disabilities are not disabled." However, several weight discrimination cases under the ADA had already occurred when Mr. Reid spoke, but Mr. Reid did not mention obesity or weight discrimination in his proposal.

8,229,000 workers were *disabled*¹⁶² when the ADAAA was enacted.¹⁶³ However, with the EEOC's estimation that 25.6% of adults are obese, the EEOC's number for *disabled* workers would have been much higher had the EEOC chosen to consider obese persons as disabled as well. Turning to the general population for guidance would show that obese people share this condition with many others.

B. Obesity Need Not Be Protected Absent an Underlying Condition

Because Tennessee law protects many of the underlying physiological causes and effects of obesity, there is no need to expand disability protection to obese plaintiffs. Statutory protections do not extend to all abnormal physical characteristics of a person.¹⁶⁴ To the extent a person is obese without a medically diagnosable cause or side effect, obesity is merely a physical trait of that person—not a disability. Obesity either causes or is correlated with the following conditions, complications, and diseases:

¹⁶² The indicator of “disability” depended on six categories: a severe vision or hearing impairment; a condition that “substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying; a physical, mental, or emotional condition lasting 6 months or more that results in difficulty learning, remembering, or concentrating; or a severe disability that results in difficulty dressing, bathing, getting around inside the home, going outside the home alone to shop or visit a doctor’s office, or working at a job or business.”

¹⁶³ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended; Final Rule, 76 Fed. Reg. 16,977 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/html/2011-6056.htm>.

¹⁶⁴ *E.g.*, *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 302

Multiple cancers (kidney, breast, colon, endometrial, gallbladder), diabetes and related complications (blindness, kidney failure, amputation), impaired glucose tolerance, cardiovascular disease, hypertension, stroke, birth defects (spina bifida, anencephaly), premature death, asthma and impaired air flow, decreased lung capacity, sleep apnea, degenerative osteoarthritis and joint stress (spine, hip, knee, etc.), increased surgical risk and complications, fertility problems (decreased sperm count and abnormal menstruation), sexual dysfunction (linked to diabetes), adverse perinatal outcomes, increased likelihood of depression, suicidal thoughts, and suicide attempts, psychological difficulties due to social stigmatization, acanthosis nigricans (dark skin disorder linked to obesity), hirsutism (excess body and facial hair), stress incontinence (urine

leakage caused by weak pelvic floor muscles).¹⁶⁵

Tennessee recognizes most of the conditions on the list above as “disabilities.”¹⁶⁶ According to the Tennessee Employment Law Letter, conditions such as diabetes and depression (two that are often associated with obesity) certainly qualify as “disabilities” under Tennessee law.¹⁶⁷ The problem facing some plaintiffs, however, is that they cannot demonstrate that the condition substantially limits a life activity.¹⁶⁸ The Tennessee Supreme Court has already held that the inability to “work[] at a job of choice” does not constitute a major life activity.¹⁶⁹ Thus, Tennessee law provides relief for obese plaintiffs but only when they can show a physiological cause of the condition. Until then, the condition is merely a physical characteristic.

Because Tennessee could choose to follow federal law, data from ADA claims is helpful in proving that obese plaintiffs still have a cause of action if they can prove an underlying physiological condition that is diagnosable either caused the obesity or resulted from the obesity. Under the ADA, the ten most common disabilities to which the ADA is applied include: back/spinal injuries, psychiatric/mental impairments, neurological impairments, extremity impairments, heart impairments, former

¹⁶⁵ OFFICE OF RESEARCH & EDUC. ACCOUNTABILITY, WEIGHING THE COSTS OF OBESITY IN TENNESSEE 15 (2006), *available at* http://hit.state.tn.us/Reports/Final_Obesity_Report.pdf.

¹⁶⁶ Martin Miller, *What’s an ADA Disability?*, 18 No. 8 TENN. EMP. L. LETTER 5 (2003).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing *Gourgy v. Metro Nashville Airport Auth.*, 61 Fed. Appx. 958 (6th Cir. 2003)).

¹⁶⁹ *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 706 (Tenn. 2000).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 304

substance abuse,¹⁷⁰ diabetes, hearing impairments, vision impairments, and blood disorders.¹⁷¹ From this sampling of ten ADA disabilities, one notices that at least four of those listed are side effects of obesity and overweightness. Thus, a merely obese plaintiff suffers only from stigma discrimination or discrimination based on a mutable physical attribute. Once the plaintiff's condition develops into a diagnosable physical impairment, however, the plaintiff can be considered disabled but not until then.¹⁷²

¹⁷⁰ U.S. COMM'N ON CIVIL RIGHTS, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? (2000), available at <http://permanent.access.gpo.gov/LPS13245/mail.htm>. The ADA provides that an individual "currently engaging" in the illegal use of drugs is not a "qualified individual" with a disability. 42 U.S.C. § 12114(a) (2011); 29 C.F.R. § 1630.3(a) (2011); see also Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274 (4th Cir. 1997) (holding that *current* substance abuse is not covered by the ADA). A former drug addict (not a casual user) may be protected under the ADA as having an impairment. *But see* EEOC, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITY ACTS § 8.5 (1992).

¹⁷¹ Norman H. Kirshman & Roger L. Grandgenett II, *ADA: The 10 Most Common Disabilities and How to Accommodate*, 2 LEGALBRIEF L. J. 3 (1997), available at <http://legalbrief.com/kirshman.html>.

¹⁷² See TENN. CODE ANN. § 4-21-102(3)(A) (2012). *But see* Cassista v. Cmty. Foods, Inc., 856 P.2d 1143 (Cal. 1993). The defendant, Community Foods, refused to hire Cassista, a 5-foot, 4-inch, 305-pound woman (BMI of approximately 52) based mainly on her weight. The California Fair Employment and Housing Act (under which the plaintiff brought suit) contained a definition of disability modeled after the ADA definition. Although California modeled the statute after the ADA, the court found that obesity was not a disability absent medical proof of an underlying physiological cause.

C. Labeling Obesity as a Disability Does Not Further the Purposes Set Forth in the Human Rights Act

Considering obesity as a disability does not serve the purposes laid forth in the Tennessee Human Rights Act (THRA) and Tennessee Disability Act (TDA). In the THRA, the Tennessee legislature stated that its goals were as follows:

(1) Provide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968, and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967 [...]

(2) Assure that Tennessee has appropriate legislation prohibiting discrimination in employment . . . sufficient to justify the deferral of cases by the federal [EEOC] . . .;

(3) Safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age or national origin in connection with employment . . .;

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 306

- (4) Protect their interest in personal dignity and freedom from humiliation;
- (5) Make available to the state their full productive capacity in employment;
- (6) Secure the state against domestic strife and unrest that would menace its democratic institutions;
- (7) Preserve the public safety, health and general welfare; and
- (8) Further the interest, rights, opportunities and privileges of individuals within the state.¹⁷³

Although the Tennessee General Assembly explicitly listed these eight purposes for the creation and carrying out of the THRA (and thus the TDA as well), courts analyzing these claims tend to focus only on the first purpose: “to provide for execution within Tennessee of the policies embodied in the [federal acts].”¹⁷⁴ Although consistency between state and federal law is an understandable concern,¹⁷⁵ courts ignore the purpose of

¹⁷³ TENN. CODE ANN. § 4-21-101(a)(1)-(8) (2012).

¹⁷⁴ *Id.*; see, e.g., *Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170, 172 (Tenn. 1999) (finding that the policies of the THRA were to be interpreted in light of federal interpretation). The Tennessee Supreme Court has found that federal law may guide interpretation of the state’s “own anti-discrimination laws.” *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000) (finding that that court “*may* look to federal law for guidance”) (emphasis added).

¹⁷⁵ See, e.g., *Parker*, 2 S.W.3d at 172 (finding that the policy of “interpreting the THRA coextensively with Title VII is predicated upon

“preserv[ing] the public safety, health and general welfare.”¹⁷⁶ A court should look at all the purposes for guidance but also weigh other concerns, such as whether a potential rule would “preserve the public safety, health and general welfare”¹⁷⁷ of the state’s citizens.

Indeed, the Tennessee Supreme Court has previously exercised its authority to make decisions free of the confines of relevant federal interpretation.¹⁷⁸ In *Booker v. Boeing Co.*, the court noted that one of the purposes of the THRA was to “[p]rovide for execution within Tennessee of the policies embodied” in federal law.¹⁷⁹ Courts faced with the question of whether to follow federal law typically quote a popular phrase in Tennessee disability jurisprudence: that the court is “neither bound by nor restricted by the federal law when interpreting our own anti-discrimination laws.”¹⁸⁰ The court in *Booker* further opined that it would decline to apply the reasoning and

a desire to maintain continuity between state and federal law”); see also *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 834 (Tenn. 1997), *overruled on different grounds by Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999); *Bennett v. Steiner-Liff Iron & Metal Co.*, 826 S.W.2d 119, 121 (Tenn. 1992). At least one Tennessee Supreme Court opinion has found that federal law may guide interpretation of the state’s “own anti-discrimination laws.” *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000) (finding that that court “may look to federal law for guidance”) (emphasis added).

¹⁷⁶ (Currently, Tennessee has the twelfth highest percentage of obese adults when compared to other states at 29.2%. *Adult Obesity Facts*, *supra* note 2. The lowest percentage of obese persons by state is Colorado with 20.7%. *Id.* The highest percentage belongs to Mississippi at 34.9%. *Id.* However, the South has the highest prevalence of obesity at 29.5%. *Id.*)

¹⁷⁷ TENN. CODE ANN. § 4-21-101(a)(7) (2012).

¹⁷⁸ *Booker v. Boeing Co.*, 188 S.W.3d 639, 647 (Tenn. 2006).

¹⁷⁹ *Id.*

¹⁸⁰ *Barnes*, 48 S.W.3d at 705; *Phillips v. Interstate Hotels Corp.* No L07, 974 S.W.2d 680, 683-84 (Tenn. 1998).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 308

conclusions found in federal law because doing so conflicted with the THRA's purposes.¹⁸¹

Some states have relied on federal law for guidance in disability cases, but the statutes do not include a lengthy list of purposes like Tennessee's. Other states have considered obesity a disability, but those states' statutes are different than Tennessee's. In *Feit v. BNSF Railway*, the Montana Supreme Court, in a 4-3 decision, held that obesity was a disability and covered by the Montana Human Rights Act (MHRA).¹⁸² BNSF Railway gave the plaintiff, Feit, a conditional offer of employment to work as a conductor trainee.¹⁸³ Feit's "employment was conditioned upon successful completion of a physical examination" and other customary items.¹⁸⁴ BNSF informed Feit that he was not qualified for the "safety sensitive position" due to the "significant health and safety risks associated with extreme obesity."¹⁸⁵ BNSF further informed Feit that he would not be considered for the position unless he "lost 10% of his body weight, or successfully completed other physical examinations at his own expense."¹⁸⁶ However, after passing several of the physical examinations, Feit could not afford the final sleep study test at a cost of \$1,800.¹⁸⁷ Accordingly, Feit attempted to lose 10% of his body weight.¹⁸⁸ Shortly

¹⁸¹ *Booker*, 188 S.W.3d at 647.

¹⁸² *BNSF Ry. Co. v. Feit*, 281 P.3d 225 (Mont. 2012); *see also* MONT. CODE ANN. § 49-2-202 (2012).

¹⁸³ *Feit*, 281 P.3d at 227.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (However, BNSF informed Feit that regardless of the outcome of the results, it could still not guarantee him a job.)

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (A genuine dispute of whether BNSF ever received documentation of the weight loss existed at trial.)

thereafter, Feit filed a complaint against BNSF, charging it with discrimination based on a disability.¹⁸⁹

The Montana Supreme Court found that if a person is obese, even absent another condition, and the obesity affects at least one body system, the condition may constitute a disability per the MHRA.¹⁹⁰ The court based its decision on the fact that the Montana legislature had indicated clear intent that the MHRA be interpreted with federal discrimination law, statutory and case law, and the Montana Supreme Court's interpretation of federal law was that federal law does protect obesity.¹⁹¹ The court relied on the legislature's actions in making the MHRA more like the ADA.¹⁹²

However, the MHRA differs from the THRA in that the MHRA never spells out its purpose like the THRA does.¹⁹³ The Montana Supreme Court relied on the legislature's actions in following federal law and legislative history.¹⁹⁴ The similarity in the language of the statutes left the Montana Supreme Court with only two ways to shape its ruling: either analogous to federal law or not. Unlike the Montana legislature, the Tennessee legislature has provided eight reasons for courts interpreting the THRA

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 231.

¹⁹¹ *Id.* at 228. The Montana Supreme Court relied on EEOC definitions. The court ignored federal case law finding obesity not to be a disability.

¹⁹² At least one state representative commented in her opening statement regarding the MHRA that "[t]he purpose of [the law] is to update terminology used in the Americans with Disabilities Act (ADA)." *Id.* at 234 (Rice, J., dissenting) (citing *Hearing on H.B. 496 Before the Mont. S. Comm. on the Judiciary*, 53rd Leg., Reg. Sess. 2 (1993)).

¹⁹³ Compare TENN. CODE ANN. § 4-21-101(a) (2012), with MONT. CODE ANN. § 49-2-501 (2011), and MONT. CODE ANN. § 49-1-102 (2011).

¹⁹⁴ *Feit*, 281 P.3d at 227.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 310

and TDA to shape a rule that serves Tennesseans.¹⁹⁵ The statute has multiple purposes, and when a court decides to value only one, there is a conflict with the others (here, the “health and safety” purpose), which is especially true if the court decides to consider obesity a disability. At no place in the THRA or TDA does the legislature indicate that any purpose listed in § 4-21-101(a) weighs more than the others listed.¹⁹⁶

Further, none of the purposes listed in the THRA appear anywhere in the ADA,¹⁹⁷ indicating the Tennessee legislature’s willingness to guide courts’ interpretation down a different path. There are several methods of statutory construction in which the courts may give effect to the purposes listed in the THRA. Although courts typically rely on the purpose of remaining consistent with federal law, the court would be ignoring other purposes explicit in the statute. First (and simplest), using the plain meaning of the THRA, courts should apply the statute as it appears including the purposes listed. To this end, another basic principle of statutory interpretation given effect to the oft-neglected other purposes in the THRA is that courts should presume the legislature intended each word to be given full effect.¹⁹⁸ In doing so, the court would find that several of the purposes in the THRA require that obesity not be protected as a disability.¹⁹⁹

¹⁹⁵ TENN. CODE ANN. § 4-21-101(a)(1)-(8) (2012).

¹⁹⁶ See TENN. CODE ANN. § 4-21-101(a) (2012).

¹⁹⁷ Compare *id.* with Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2011).

¹⁹⁸ *In re Hogue*, 286 S.W.3d 890 (Tenn. 2009) (citing *Lanier v. Rains*, 229 S.W.3d 656, 661 (Tenn. 2007)).

¹⁹⁹ For a discussion of how the interests of employers would be compromised, see *infra* page 323. This directly conflicts with the THRA purpose of furthering the interests, rights, and privileges of individuals in TENN. CODE ANN. § 4-21-101(a)(8) because it places an undue burden on employers taking on costs by hiring obese employees.

The modern implementation of this principle renders life to all clauses in a statute “so as to avoid rendering superfluous” any language within the statute.²⁰⁰ In interpreting the THRA’s list of purposes, courts have only been relying upon the first purpose listed: to interpret the THRA along with federal law. Notably, however, the ADA is not included in the list of federal laws that the Tennessee legislature intended to imitate.²⁰¹ A negative inference may be drawn here—*expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others).²⁰² The list given by the legislature, including “the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, and the Discrimination in Employment Act of 1967, as amended,”²⁰³ are arguably the

²⁰⁰ See generally *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991). Another view of this principle offered by the Supreme Court states that two overlapping statutes may be given effect so long as there is no “positive repugnance” between them. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (finding that overlapping statutes still addressed matters that the other did not address). This may be helpful here to view the ADA and THRA/TDA as “overlapping statutes.” While the ADA and THRA/TDA represent two distinct areas of the law, the current trend to interpret them as one practically creates liability under both for a defendant facing an alleged violation. Further, although the two statutes are nearly identical, the purposes listed in the THRA should not be rendered superfluous merely because they do not appear in the ADA. Thus, the purposes should be given effect.

²⁰¹ See TENN. CODE ANN. § 4-21-101(a)(1) (2012). *But see, e.g., Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000) (finding that courts may look to federal law when interpreting Tennessee disability statutes). The TDA was amended slightly in 2008; however, the Tennessee legislature did not add the Americans with Disabilities Act to the list of federal laws to be used as guidance. However, whether this was oversight or blatant is unknown.

²⁰² See YULE KIM, CRS REPORT FOR CONGRESS, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 16-17 (2008), <http://www.fas.org/sgp/crs/misc/97-589.pdf>.

²⁰³ TENN. CODE ANN. § 4-21-101.

only pieces of federal legislation that the courts may use for guidance in disability claims. The Tennessee Supreme Court opined that the primary rule of statutory construction is to give effect to the legislative intent.²⁰⁴ Although the THRA and TDA were created before the enactment of the ADA, the Tennessee legislature amended the statutes after the passage of the ADA—and still did not add the ADA to its list of model purposes.²⁰⁵ Although obesity is not a “disability,” it is a public health crisis.

Medical professionals have also found that declaring a condition a “disability” sets up a “resentful atmosphere” against the condition.²⁰⁶ Legally labeling obesity a “disability” heightens the stigma already associated with obesity.²⁰⁷ The THRA’s goal of “protecting [one’s] interest in personal dignity and freedom from humiliation” is rendered meaningless if obesity is considered a disability because it affixes a label with a negative connotation on the individual—“disabled.” Stigmatization alone is insufficient to prove an actual disability exists.²⁰⁸

IV. THE PROPOSAL AND ITS BENEFITS

The essence of this section is to offer an alternative way of thinking about obesity from a legal standpoint. In this section, this Note shows how the legislature can act to create a holistic statutory scheme that combats obesity but does so in a way that complements purposes set forth in other legislation, such as the THRA and TDA. In doing so, this Note proposes that the legislature has several options in

²⁰⁴ *In re Hogue*, 286 S.W.3d 890 (Tenn. 2009).

²⁰⁵ See TENN. CODE ANN. § 4-21-101 (2012).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *EEOC v. Gen. Elec. Co.*, 17 F. Supp. 2d 824 (N.D. Ind. 1998).

combating obesity. These options can be seen as a compromise.

A. Proposal: The Legislature Should Exclude Obesity from Protection under the THRA and TDA

Certainly, obesity is a growing epidemic in Tennessee, and its victims require sympathy and action from the legislature. Cancer, contagious diseases, war, and terrorism are crises in which the government has responded in full force; however, the government has done relatively little to battle obesity, “the silent killer.”²⁰⁹

Rather than weakening the disability statutes by including the large number of obese persons, the Tennessee legislature should enact other mechanisms to help combat obesity. In doing so, the Tennessee legislature should first act to exclude obesity from protection under the Tennessee Human Rights Act. On a national level, this has already been done for several conditions such as for addiction to controlled substances or vision impairments that are fixable with prescription lenses.²¹⁰ Likewise, the Tennessee legislature can either exclude obesity wholly or draft a list of protected disabilities and exclude obesity.

Building on the exclusion of obesity from disability statutes, the Tennessee legislature should then create laws that encourage a healthier citizenry. Using policy initiatives from other state legislatures as guidance, the Tennessee

²⁰⁹ McGuinness, *supra* note 100, at 49.

²¹⁰ James E. Kellett, *An Employee with a Drug Addiction Who Is Not Currently Using the Drug Is Protected by the ADA as Disabled If the Drug Addiction Constitutes an Actual or Perceived Disability That Motivated an Adverse Employment Action*, PRAC. INSIGHTS EMP. 0159 (2013) (explaining how current substance abuse is not a disability); Charles S. Plumb, *Individuals with Correctable Vision Problems Are Not Disabled*, 6 No. 2 OKLA. EMP. L. LETTER 1 (1998).

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 314

legislature has eight broad areas in which to create legislation to assist the obese in a legal sense.²¹¹ These eight areas include: (1) commemorative or advisory regulations; (2) advisory commissions and studies; (3) insurance regulation; (4) school food programs; (5) nutrition education; (6) physical education and physical activity of children; (7) adult physical activity; and (8) other policies.²¹² For example, one author has suggested imposing a “sin tax” on unhealthy foods and beverages—a tax modeled on those already placed on alcohol and cigarettes.²¹³ Another author suggests five legal mechanisms that could be effective, including “full disclosure laws” requiring increased dissemination of nutritional value; restrictions on the advertising of certain low-nutritional value foods; requiring warnings on unhealthy products; providing subsidies to growers and manufacturers of healthy foods; imposing a tax on especially unhealthy foods; banning certain ingredients; and enacting special foods policies to help particular sub-groups, such as children and those living in economically disadvantaged areas.²¹⁴

Although precise statutory models for each relevant area are outside the scope of this Note, it is important for lawmakers to respect individual freedom of choice—a hallmark of American society.²¹⁵ However, a counterbalancing policy arises when considering the

²¹¹ KAN. HEALTH INST., OBESITY AND PUBLIC POLICY: LEGISLATION PASSED BY STATES, 1999 TO 2003, 5 (2004), <http://media.khi.org/resources/Other/50-0402ObesityLegislation.pdf>.

²¹² *Id.*

²¹³ Alexander Copp, *The Ethics and Efficacy of a “Fat Tax” in the Form of an Insurance Surcharge on Obese State Employees*, 15 QUINNIPIAC HEALTH L.J. 1, 1 (2011).

²¹⁴ McGuinness, *supra* note 100, at 49.

²¹⁵ *Id.* at 5; see KAN. HEALTH INST., *supra* note 211 (discussing other states’ initiatives and responses to the obesity epidemic).

expense that employers and insurance companies incur regarding obesity.

B. Benefits of this Proposal

After the Tennessee General Assembly enacts this proposal, the state will reap several major benefits from its enactment. First, Tennessee litigants will be able to avoid relying on a conflicting body of law that often occurs when the court of appeals releases incompatible opinions. Second, the obesity epidemic will be more effectively combated in the state because the legislature is taking a proactive role to do so. Finally, the proposal gives the state's employers freedom in their businesses.

i. Prevents the Tennessee Court System from Being Muddled with Varying Decisions Regarding Whether Obesity is a Disability

The Tennessee Court of Appeals is divided among three sections: the Western Section, the Middle Section, and the Eastern Section.²¹⁶ Tennessee Code Annotated section 16-4-101 states that “[t]here shall be an appellate court of twelve (12) judges, styled ‘the court of appeals.’” Although the court of appeals is regarded as one court, the ruling of one section of the court of appeals is merely persuasive, not binding, authority for the other two sections.²¹⁷ Thus, while a decision rendered by one section of the court is considered a decision of the court of appeals

²¹⁶ *Court of Appeals Judges*, TENN. ST. CTS., <http://www.tncourts.gov/courts/court-appeals/judges> (last visited Nov. 26, 2013).

²¹⁷ *Court of Appeals Precedent*, Tenn. Op. Att’y Gen. 07-98 (July 3, 2007).

as a whole, the precedential value of the decision is binding only upon the section it was made in.²¹⁸

The different sections of the Tennessee Court of Appeals have often rendered contradictory decisions, leaving litigants unable to decipher what the law in the state is.²¹⁹ By excluding obesity from THRA coverage, the legislature can circumvent needless and conflicting case law in the court of appeals. In the absence of any direction by the Tennessee legislature or the Tennessee Supreme Court, any split of opinion between the courts of appeal in Tennessee “results in a lack of clear authority to assist the trial courts, with the ostensibly finality of Courts of Appeals decisions undermined and confused by contradictory appellate holdings.”²²⁰ In 1998, the Tennessee Court of Appeals affirmed the trial court in only 59% of the cases for which it wrote opinions.²²¹ This left 41% of appealed cases for the Tennessee Court of Appeals’

²¹⁸ *Id.*

²¹⁹ *E.g., compare* *Hermosa Holdings, Inc. v. Mid-Tenn. Bone & Joint Clinic, PC*, No. M2008-00597-COA-R3-CV, 2009 WL 711125 (Tenn. Ct. App. Mar. 16, 2009) (finding that Tennessee jurisprudence required the plausibility standard in court pleadings), *with* *Ind. State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237 (Tenn. Ct. App. Feb. 19, 2009) (finding that Tennessee jurisprudence did *not* require the plausibility standard in court pleadings). Two years after *Hermosa* and *Brukardt*, the Tennessee Supreme Court held that Tennessee would not adopt the plausibility standard for court pleadings. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 424 (Tenn. 2011) (en banc).

²²⁰ Meehan Rasch, *California’s Dueling Harmless Error Standards: Approaches to Federal Constitutional Error in Civil Proceedings and Establishing the Proper Test for Dependency*, 35 W. ST. U. L. REV. 433, 435 n.7 (2008).

²²¹ Daniel J. Foley, *The Tennessee Court of Appeals: How Often It Corrects the Trial Courts—And Why*, 68 TENN. L. REV. 557, 562 (2001).

sections to come up with varying holdings for.²²² Because it is not uncommon for the life of one case to span months or years, it is important that the Tennessee legislature act soon, before plaintiffs bringing weight discrimination suits under the THRA are left to an unpredictable precedent in the court system.

ii. Combats the Obesity Epidemic in Tennessee

Many Tennesseans struggle with obesity, and the Tennessee legislature can address this concern outside of disability statutes. In Tennessee, 67.2% of the adult population is overweight, and 30.8% of the population is obese.²²³ Among Tennessee's adolescents in grades 9-12, 15.8% are obese and 16.1% are overweight.²²⁴ The CDC estimates that the national obesity rate sits at around 17%.²²⁵ The number of obese residents in Shelby County, Tennessee, where the city of Memphis is located, nearly doubles the national average at more than 30%.²²⁶

The Tennessee State Nutrition, Physical Activity, and Obesity Profile provided by the CDC indicates that

²²² *Id.*

²²³ CDC, TENNESSEE STATE NUTRITION, PHYSICAL ACTIVITY, AND OBESITY PROFILE 2 (2012), <http://www.cdc.gov/obesity/stateprograms/fundedstates/pdf/Tennessee-State-Profile.pdf> [hereinafter TENNESSEE STATE NUTRITION].

²²⁴ DIV. OF ADOLESCENT & SCH. HEALTH, CDC, THE 2009 YOUTH RISK BEHAVIOR SURVEY, <http://www.cdc.gov/HealthyYouth/yrbs/index.htm>. The number of obese and overweight Tennessee youth is provided because it evidences the importance of the necessity to begin combating obesity at a young age. *See id.* Children who are obese have an 80% chance of becoming obese adults. *Id.*

²²⁵ *Adult Obesity Facts*, *supra* note 2.

²²⁶ Ed Arnold, *Nation's Growing Girth Costs Business, Government, Insurers*, MEMPHIS BUS. J. (Aug. 10, 2012), <http://www.bizjournals.com/memphis/print-edition/2012/8/10/nations-growing-girth-costs.html>.

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 318

Tennesseans' dietary and exercise habits leave much to be desired.²²⁷ To illustrate, less than one-third of Tennessee adults achieved at least 300 minutes of physical activity per week.²²⁸ Even more alarming is that 31% of Tennessee adults reported that in the last month, they had not participated in any physical activity.²²⁹ In addition to the scarce number of Tennesseans participating in physical activity, only about one in every four adults reported consuming the recommended level of fruits per day.²³⁰ In like manner, only one-third of adults reported consuming the recommended level of vegetables per day.²³¹

Because overweight and obese children are more likely to become obese in adulthood,²³² statistics concerning their age groups are increasingly important in establishing legislation and preventative measures to combat obesity. Currently 16.1% of Tennessee *adolescents*

²²⁷ See TENNESSEE STATE NUTRITION, *supra* note 223, at 2.

²²⁸ *Id.*

²²⁹ *Id.* In comparison, Colorado obtained the lowest obesity percentage out of all the states: 7.1%. CDC, COLORADO STATE NUTRITION, PHYSICAL ACTIVITY, AND OBESITY PROFILE (2012), <http://www.cdc.gov/obesity/stateprograms/fundedstates/pdf/Colorado-State-Profile.pdf>. (Accordingly, over one-half of adults achieved at least 300 minutes of physical activity per week. Further, only 17% of Colorado adults reported no physical activity for the last month.)

²³⁰ TENNESSEE STATE NUTRITION, *supra* note 223, at 2.

²³¹ *Id.*

²³² Kuss, *supra* note 84, at 572-73. See generally Laura Blue, *Do Obese Kids Become Obese Adults?*, TIME (Apr. 28, 2008), <http://www.time.com/time/health/article/0,8599,1735638,00.html>.

Although it depends slightly on the definitions of "overweight" and "obese" used and the age of the child, overweight and obese children are more likely to be obese—and sick—as adults. *Id.* Although an overweight infant has a lesser risk than an overweight adolescent, Dr. David Freeman from the CDC stated that "even down to the youngest ages that I've worked with, age five, overweight five-year-olds maybe have a tenfold risk of becoming obese adults compared to relatively thin five-year-olds." *Id.*

are overweight,²³³ and 15.8% are obese.²³⁴ The unhealthy dietary behaviors contributing to adolescent obesity are alarming. Around 88% reported that they had not eaten vegetables at least three times a day in the week before the survey.²³⁵ In addition, 41.3% drank at least one soda or pop in each of the seven days before being surveyed.²³⁶ Of equal importance, only 24.2% reported being physically active for at least an hour per day the seven days before being surveyed.²³⁷ Well over one-third of adolescents reported watching three or more hours of television per day on an average school day.²³⁸

Perhaps the most logical place to begin combating obesity is where it can have the biggest effect on its often-young victims—in schools. Fortunately, well over half of Tennessee high schools did not sell less nutritious foods and beverages anywhere outside the school food service program.²³⁹ However, only 22.9% of adolescents in Tennessee report attending daily physical education classes in an average week.²⁴⁰ The 2010 Tennessee School Health Profiles assessed the school environment, indicating that among high schools only 9.9% always offered fruits or non-fried vegetables on school grounds.²⁴¹

²³³ TENNESSEE STATE NUTRITION, *supra* note 223, at 3. “Overweight” is considered to be between the eighty-fifth and ninety-fifth percentiles for BMI by age and sex.

²³⁴ *Id.* “Obese” means in or above the ninety-fifth percentile for BMI by age and sex.

²³⁵ *Id.* at 2.

²³⁶ *Id.*

²³⁷ *Id.* at 3.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ DIV. OF ADOLESCENT & SCH. HEALTH, CDC, PROFILES 2010-CHRONIC DISEASE PREVENTION, TENNESSEE SECONDARY SCHOOLS I (2010),

The lack of effective preventative measures contributes to the alarming number of obese adults and children today. Superficially, it appears that an obese person chooses to either disregard healthy food choices or exercise. But in low-income areas, especially in Memphis, Tennessee's most populous city, that might not be true. One argument proving an obese person's lack of control of his condition is that many Americans live in communities with limited access to supermarkets and grocery stores that sell healthy foods.²⁴² These "food deserts," which tend to sell cheaper, processed goods, play a significant role in poor dietary decisions.²⁴³ A 2010 Gallup Poll ranked Memphis first for hunger in the country with 26% of Memphians reporting they could not afford enough food for their families.²⁴⁴ Another survey done by the Mid-South Food Bank found that 83% of those it served had to choose between buying food and paying utilities.²⁴⁵

Other legislatures have also taken matters into their own hands by regulating government nutrition programs, such as the food stamp program. In 2010, New York City and State asked the USDA to prohibit recipients of food stamps from buying food with no nutritional value.²⁴⁶

http://www.cdc.gov/healthyyouth/profiles/pdf/facts/tn_chronic_profiles.pdf.

²⁴² WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION (2010).

²⁴³ *Id.*

²⁴⁴ *America's Worst 9 Urban Food Deserts*, NEWSONE (Sept. 22, 2011), <http://newsone.com/1540235/americas-worst-9-urban-food-deserts/>.

²⁴⁵ *Id.*

²⁴⁶ Anemona Hartocollis, *New York Asks to Bar Use of Food Stamps to Buy Sodas*, N.Y. TIMES (Oct. 6, 2010), http://www.nytimes.com/2010/10/07/nyregion/07stamps.html?_r=2&hp&.

While some argue that this type of legislation unfairly targets the poor,²⁴⁷ the food stamp program is a nutritional program, not a food program.²⁴⁸ Providing a solid nutritional diet to these vulnerable groups would combat their higher levels of obesity.²⁴⁹ While strict prohibitions on junk food might not be the answer, even in this circumstance, government is attempting to make strides toward more education for those on these types of assistance programs.²⁵⁰

Preventative measures geared toward children seem to be more effective²⁵¹ in combating a growing obesity rate but are still ineffective as they stand today. Students who have disabilities or other chronic health problems are often discouraged from participating in their physical education classes and other physical activities taking place in public schools.²⁵² For example, 59% of schools with disabled students permit these students to be exempt from enrolling

²⁴⁷ *Id.*

²⁴⁸ *See id.*

²⁴⁹ ROBERT WOOD JOHNSON FOUND., ISSUE REPORT: F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE (2011).

²⁵⁰ "Food vouchers and stamps are not accepted by some merchants who sell fresh fruits and vegetables," reports the *Commercial Appeal*, Memphis's main newspaper. *Health Memphis: 'Food Deserts' Tied to Obesity, Unhealthy Community*, COM. APPEAL (May 14, 2012), <http://www.commercialappeal.com/news/2012/may/14/food-deserts-tied-to-obesity-unhealthy-community/>.

²⁵¹ INST. OF MED., EARLY CHILDHOOD OBESITY PREVENTION POLICIES 3 (2011), <http://www.iom.edu/~media/Files/Report%20Files/2011/Early-Childhood-Obesity-Prevention-Policies/Young%20Child%20Obesity%202011%20Report%20Brief.pdf>.

²⁵² S.M. Lee et al., CDC, *Physical Education and Physical Activity: Results from the School Health Policies and Programs Study 2006*, 77 J. SCH. HEALTH 435, 435-463 (2007), <http://www.ncbi.nlm.nih.gov/pubmed/17908102>.

in physical education.²⁵³ This does little for the stigma of obesity²⁵⁴ and even less for the well-being of these children.

Tennessee's attempt to battle obesity has led to the implementation of several programs geared toward encouraging citizens to become more active and more educated on nutrition. Obesity Mini-Grants, given by the Tennessee Department of Health in cooperation with the Tennessee Obesity Task Force, help to support local communities to implement the objectives of the state nutrition, physical activity, and obesity plan—the “Eat Well, Play More Tennessee” plan.²⁵⁵ Acting as a “statewide call to action,” the plan gathers assistance from “scientists, clinicians, city planners, school officials, state agencies, policymakers, transportation experts, nutritionists, and parents” to better address more susceptible populations in the state.²⁵⁶

Various entities in Tennessee have also taken the initiative to combat the obesity epidemic in Tennessee. In 2010, then-Governor Phil Bredesen signed Executive Order No. 69,²⁵⁷ endorsing healthier foods and beverages to be sold at vending facilities on properties within Tennessee's executive branch.²⁵⁸ Another program, the Gold Sneaker Initiative, designates child care centers as “Gold Sneaker”

²⁵³ *Id.* at 442.

²⁵⁴ Sharon McDonald of the National Association to Advance Fat Acceptance stated that the obese would rather not be classified as disabled. O'Hara, *supra* note 10, at 896 (citing Telephone Interview with Sharon McDonald, Program Dir., Nat'l Ass'n to Advance Fat Acceptance (Mar. 2, 1995)).

²⁵⁵ TENNESSEE STATE NUTRITION, *supra* note 223, at 3.

²⁵⁶ *Id.*

²⁵⁷ Tenn. Exec. Order No. 69 (Aug. 6, 2010),

<https://news.tn.gov/system/files/Executive%20Order%20%252369.pdf>.

²⁵⁸ Press Release, Bredesen Signs Executive Order Promoting Healthy Options for State Vending Machines (Aug. 6, 2010), <http://news.tn.gov/node/5694>.

facilities upon the facilities successfully implementing nutritional and physical activity-related objectives.²⁵⁹ The YMCA of Middle Tennessee has also joined the fight against obesity, hosting Nashville on the Move, a free lunchtime walking event, on the first Friday of every month.²⁶⁰ Utilizing Tennessee's landscape, the state's "Connect with Tennessee" campaign encourages individuals and families to utilize the abundance of trails and greenways throughout the state, including by activities such as walking, running, biking, hiking, and horseback riding.²⁶¹

iii. Reduces Burdens on Employers

Employers are beginning to consider obesity as a disability and a potential threat to business. Absenteeism, lowered productivity, and higher health care costs are several items that employers struggle with due to heightened numbers of obese workers.²⁶² Health care costs to individuals and employers are at risk of increase with the

²⁵⁹ TENNESSEE STATE NUTRITION, *supra* note 223, at 4. Currently, 240 child care centers in the state have received the designation. *Id.*

²⁶⁰ NASHVILLE ON THE MOVE, <http://www.nashvillemoves.org/> (last visited Dec. 19, 2012).

²⁶¹ CONNECT WITH TENNESSEE, www.connectwithtn.com (last visited Dec. 19, 2012). Interestingly, one author has noted that the "suburban sprawl" contributes to obesity because it encourages suburbanites to drive into the city often. Paul Boudreaux, *The Impact Xat: A New Approach to Charging for Growth*, 43 U. MEM. L. REV. 35, 80 (2012). In the same vein, Connect with Tennessee recognizes this problem and attempts to provide people outside bigger Tennessee cities with opportunities for physical activity.

²⁶² *Id.* "It impacts cost, it impacts productivity, it impacts absenteeism and disability," says Russell Robbins, principal and senior consultant for Mercer Consulting, a global HR adviser. *Id.* Robbins also suggests that "[d]epending on the job type, obesity could definitely impact worker's comp claims." *Id.*

Fall 2013 | Volume 9 | Issue 2
Tennessee Journal of Law and Policy 324

rising rates of obesity. Obesity has contributed to health care spending that has tripled in the last twelve years, rocketing past inflation rates.²⁶³ One human resources adviser suggests that obesity attributes for approximately 20%-25% of health care costs either directly or indirectly.²⁶⁴ The CDC estimated that the direct cost of treating obesity and its related illnesses was \$147 billion in 2011.²⁶⁵ Moreover, obesity forces businesses to bear another \$75 million in costs from absenteeism and lost productivity.²⁶⁶ To put this in perspective with other governmental expenditures, the total spent on obesity adds up to more than the budgets of the federal government's Departments of Transportation, Education, and Homeland Security combined.²⁶⁷

Because of the mutable and voluntary nature of obesity, protecting the obese under Tennessee law puts unfair burdens on employers based on lessened productivity and increased cost.²⁶⁸ Some studies indicate that obesity costs American businesses around \$12.7 billion annually.²⁶⁹ Health care costs businesses 36% more for obese workers than normal weight workers, and medications cost 77% more.²⁷⁰ Perhaps even more

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Robert J. Grossman, *Countering a Weight Crisis: America's Growing Weight Problem Raises Serious HR Issues Relating to Health Care Costs, Wellness, Recruiting, and Employee Relations*, HR MAG., Mar. 1, 2004, available at <http://www.shrm.org/Publications/hrmagazine/EditorialContent/Pages/0304covstory.aspx>.

²⁷⁰ *Id.*

alarming is the indirect costs to businesses, such as decreased productivity or absenteeism at work.²⁷¹

Employers' reluctance to invest in curbing this epidemic thwarts the purposes of the THRA even further. In Tennessee, particularly among state employees, the top two health risks in 2003 and 2004 were a high BMI and a low level of physical activity.²⁷² These statistics evidence the need for legislative action. However, while some employers seek to improve their employees' health through increasing health and wellness programs, many employers are "reluctant to commit to these programs for fear that they will fail to recoup their investment from short-term employees."²⁷³ A study done at Vanderbilt University found that employers remained hesitant to provide health and wellness programming to employees based on a lack of awareness, lack of awareness of intervention options, an assumption that the issue is one of personal choice, and a reluctance to invest in programs without clear evidence that the programs provide a worthwhile return.²⁷⁴

V. CLOSING REMARKS

Currently, the muddled jurisprudence stemming from whether obesity is a disability does little for public health, employers, and hope for a healthier future. Though there are substantial policy concerns in battling discrimination based on appearance, using disability law to do so is inappropriate in this context. Disability statutes need to remain limited in scope and to serve those who are

²⁷¹ *Id.*

²⁷² OFFICE OF RESEARCH & EDUC. ACCOUNTABILITY, WEIGHING THE COSTS OF OBESITY IN TENNESSEE ii (2006), http://hit.state.tn.us/Reports/Final_Obesity_Report.pdf.

²⁷³ *Id.* at 13.

²⁷⁴ *Id.*

truly disabled and those who have no control over the harsh treatment they receive every day at their jobs and in their communities.

The Tennessee General Assembly retains the power to use other avenues, such as legislation geared toward preventative programs and helping those in “food deserts,” before the courts should take action in this context. While obesity does not qualify under the THRA and TDA as a disability, Tennessee needs to take greater legal initiatives to prevent obesity at a young age, starting in the school system and educational programs. With respect to the THRA and the TDA, the Tennessee legislature needs to set forth clearer guidelines so that courts are not left to blindly follow the interpretations of the federal disability statutes. Rather than hastily deeming obesity a disability, the legislature needs to enact various laws to further the policies of the disability statutes first, such as requiring an increase in nutritional information provided to consumers or imposing a tax on foods especially low in nutrition.²⁷⁵ In doing so, Tennessee can promote the health and welfare of its citizens while following the original purpose of the THRA and TDA—to protect the truly disabled.

²⁷⁵ McGuinness, *supra* note 100, at 48-49.

