REGENT UNIVERSITY LAW REVIEW

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REGENT UNIVERSITY LAW REVIEW

Volume 31 **2018–2019** **Number 1**

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REGENT UNIVERSITY LAW REVIEW

Volume 31 **2018–2019** **Number 1**

CONTENTS

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REGENT UNIVERSITY LAW REVIEW

Volume 31 **2018–2019** **Number 1**

WHY LAWYER WELL-BEING IS IMPORTANT TO SOCIETY

Leonard C. Heath, Jr.[*]

In recent years we have invited law students to attend our Annual Meeting here in Virginia Beach. The law students are selected by their law school deans. I ask that all law students stand and be recognized. You will also notice that one law student is sitting up front. He is my son and a rising third-year law student. He is also responsible for much of the research that went into my talk tonight. These young lawyers-to-be are one of the many reasons for the selection of my topic. They are our messengers into the future; and they are the future of our profession. Please take a few minutes this evening to say hello to them, to get to know them, and to welcome them. As a lawyer, it is important that each of us takes time to mentor younger lawyers. Please welcome them.

Mentors are critical to our profession. I started practicing in 1986 with the law firm of Williams, Worrell, Kelly & Greer, PC in Norfolk. During the second year of my practice, I was assigned to a senior partner as his mentee. That partner, William T. Prince, sat down with me for about ninety minutes one Friday afternoon. Surprisingly, the vast majority of the time was not spent on a discussion of the law. Instead, Mr.

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[*] This excerpt from the Instillation of President Address was delivered on June 15, 2018, at the Virginia State Bar Annual Meeting. It has been adapted for publication. Heath is a partner at Heath, Overbey, Verser & Old PLC. He has served in numerous positions at the VSB since 1989. He currently serves on Bar Council, the Executive Committee, and the Budget and Finance, Better Annual Meeting, Bench-Bar Relations, and Lawyer Insurance committees, as well as the Professionalism Course faculty. He is the former president of the Newport News Bar Association and is a member of the Newport News Bar Association and the Williamsburg Bar Association. Since 2013, Heath has served as the chair of Christopher Newport University's Jazz for Justice program. Heath received his B.B.A from the College of William and Mary, and his J.D. from the Marshall-Wythe School of Law at the College of William and Mary. Heath focuses his practice in the area of civil litigation, including personal injury, business disputes, real estate litigation, and will/trust/estate litigation.

The author thanks his son, Jordan C. Heath, for his research into the topics covered in this speech and the numerous other speeches made and articles written during the author's term as President of the Virginia State Bar.

Prince got to know me. At the end of our meeting, he said "well the first thing we are going to do is get you involved in the Virginia State Bar." What I did not know at the time of our meeting was that in 1978, the year that I graduated from high school, Mr. Prince had served as the fortieth President of the Virginia State Bar.[1] I learned that later. What he did not know was that on that Friday afternoon he started me on a course to become the eightieth President of the Virginia State Bar.

Anyone who has been around me knows that I love being a lawyer. I cannot imagine doing anything else. That passion for the profession, along with my concern for my fellow attorneys, is why I believe that lawyer well-being must be addressed. The statistics for our profession are not impressive. They are as follows:

1. 21–36% of attorneys are problem drinkers;[2]
2. 28% suffer from some form of depression;[3]
3. 19% experience anxiety;[4]
4. 23% have elevated stress;[5]
5. 25% are clinically classified as having a work addiction;[6] and
6. Our profession has an unacceptably high suicide rate.[7]

Unfortunately, these statistics do not tell the whole story, at least not for me. Where you start your career as a lawyer goes a long way to molding who you ultimately become as a lawyer. Williams, Worrell, Kelly & Greer had some of the finest lawyers in Virginia and represented railroads, banks, utilities, insurance companies, and municipalities. If you took a snapshot of that firm in 1987, at the same time that I was having my first mentor/mentee meeting with Mr. Prince, the firm had about twenty-five attorneys. I left that firm in 1990 to become a named partner in another firm and Williams, Worrell, Kelly & Greer disbanded many years later. However, if you fast forward to today, of the approximately twenty-five attorneys that were in the firm in 1987, two have committed suicide. That is 8% of the firm. These two individuals were exceptional attorneys and

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[1] *Past Presidents of the Virginia State Bar*, VA. ST. B., https://www.vsb.org/site/about/past-presidents-of-virginia-state-bar (last visited Sept. 28, 2018).

[2] Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 51 (2016).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] NAT'L TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 32 (2017), www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf.

[7] *Id.* at 20–21. According to a 2012 Center for Disease Control study, suicide rates for males are higher than females across all occupational groups. However, the report lists suicide rates for women in the legal occupation at 13.9 per 100,000, making it the second highest suicide rate for women per occupational group. Wendy LiKamWa McIntosh et al., *Suicide Rates by Occupational Group — 17 States, 2012*, 65 MORBIDITY & MORTALITY WKLY. REP. 641, 644 (2016), https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm6525a1.pdf.

wonderful people. For me, more importantly, they were my friends. Simply stated, this outcome is unacceptable. This is why attorney well-being is important to me.

On August 14, 2017, the National Task Force for Lawyer Well-Being issued a landmark report illuminating the well-being crisis in our profession.[8] The report is a clarion call to our profession to perform a critical self-evaluation as to what is happening in our profession and how we can change our well-being for the better. The report has significant ties to the Commonwealth of Virginia. Our own Chief Justice, Donald W. Lemons, is a co-author of the report.[9] Chief Justice Lemons is an advocate for our profession and a true student of the law. He cares about the lawyers in our state; and for that, we are grateful. In addition to Chief Justice Lemons, Kathleen M. Uston, with our own Virginia State Bar, served as a peer reviewer for the report.[10] Finally, Chris Newbold, with the Attorneys Liability Protection Society Corporation ("ALPS"), also co-authored the report.[11] Chris is ALPS's liaison to the Virginia State Bar through our endorsed lawyer professional liability carrier program.[12] Virginia has a special relationship with ALPS in that we are their largest statewide market.[13] In addition, due to the hard work of past bar leaders, we have a Lawyers Insurance Committee that works closely with ALPS to discuss policy provisions and to conduct risk management programs across Virginia.[14] I have served on this committee with Chris for the past six years and consider him a friend.

I have spoken with Chief Justice Lemons about this report and we both had the same observation. That observation is that this report is more than a discussion of the "impaired lawyer." It goes much deeper than that. Many of the lawyers who will suffer from a mental health issue during their career will never get to the point of actually being impaired. But when you have mental health problems, you simply cannot be at your best professionally.

It is simply not enough to say that lawyers are suffering from stress, anxiety, or depression. We have to drill down to the root causes of these symptoms. Over the past year of studying the wellness initiative, I have

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[8] *See* NAT'L TASK FORCE ON LAWYER WELL-BEING, *supra* note 6, at 1 (reporting the current state of lawyer well-being and the importance of self-care in the legal profession).

[9] *Id.* at 66.

[10] *Id.* at 71–72.

[11] *Id.* at 1.

[12] David D. Hudgins, *Lawyer Insurance*, VA. ST. B., http://www.vsb.org/site/about/lawyer_insurance_2017 (last visited Sept. 28, 2018).

[13] Laura Churchman, *ALPS and Virginia State Bar Celebrate 15 Years of Partnership*, ALPS BLOG (Dec. 14, 2015), https://blog.alpsnet.com/alps-and-virginia-state-bar-celebrate-15-years-of-partnership.

[14] Hudgins, *supra* note 12.

started compiling a list of occupational risks associated with the profession that might lead to mental health issues. Currently, I have nineteen factors identified. We do not have enough time this evening to go over each of those risks, but I will provide you with a few by way of illustration. Generally, our jobs are sedentary, involve long hours, and are subject to client demands. Those are three easily identified factors. However, some lawyers suffer from something that I did not know about until this year— "vicarious trauma."[15] "Vicarious trauma" is experienced when lawyers are exposed to the worst things in our society.[16] For example, prosecutors, defense attorneys, and judges involved in gang-initiation-type crimes see horrific events, many of which are videotaped as part of the gang initiation process.[17] As lawyers, we are told to remain objective and emotionally-detached. However, we are all human beings, and as humans, we are like sponges, absorbing these examples of the darkest parts of the human soul. We have to understand these different occupational risks so that we can also learn how to minimize their effects.

As another example of an occupational risk, we work indoors. So that you do not come away thinking that I am only speaking about problems of others, I will tell you right now that I suffer from Seasonal Affective Disorder. For me, this means I become a big grump in January and February. However, for others, it can be debilitating.[18] Fortunately, I have

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[15] Other terms used to describe this phenomenon are compassion fatigue, secondary traumatic stress, and secondary victimization. AM. COUNSELING ASS'N, VICARIOUS TRAUMA FACT SHEET #9 (2011), https://www.counseling.org/docs/trauma-disaster/fact-sheet-9---vicarious-trauma.pdf.

[16] Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 246 (2003).

[17] *See* Andrew P. Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who are Victims of Domestic Violence and Abuse*, 9 A.B.A. COMM'N ON DOMESTIC VIOLENCE, ENEWSL. Winter 2008, https://www.americanbar.org/content/dam/aba/publishing/cdv_enewsletter/LevinWinter2008.authcheckdam.pdf [hereinafter *Secondary Trauma*] (discussing vicarious trauma experienced by lawyers and judges in the context of domestic violence cases); Deborah Wood Smith, *Secondary or Vicarious Trauma Among Judges and Court Personnel*, NAT'L CTR. FOR ST. CTS. (2017), https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/Secondary-or-Vicarious-Trauma-Among-Judges-and-Court-Personnel.aspx ("Today, evidence comes in many formats, including grisly photos and videos or frightening emails, voice mails, and text messages. . . . This repeated exposure to traumatic details that judges and other court personnel face daily can lead to secondary or vicarious trauma."). In one study comparing attorneys with mental health professionals and social service workers, "attorneys were consistently higher on both secondary trauma and burnout scales." *Secondary Trauma*, *supra.* In a follow up study that looked at third year law students working with trauma victims in a semester long clinical setting, the study found that while the students scored lower than practicing attorneys, with most not seriously affected, a small minority had significant responses. *Id.*

[18] Lizz Schumer, *How to Cope With Seasonal Affective Disorder*, N.Y. TIMES (Jan. 23, 2018), https://www.nytimes.com/2018/01/23/smarter-living/coping-with-seasonal-affective-disorder.html.

a wife who spotted the problem long before I did. One day, she had a treadmill and a full spectrum light box delivered to our house. When I asked what that was all about, she said it was for me. My first reaction to the treadmill was, "Sweetheart, what are you trying to say?" She quickly said, "it's not what you think, I have done some research, and I think that you have Seasonal Affective Disorder." Believe it or not, two of the ways to control Seasonal Affective Disorder are to get exercise and to be exposed to full spectrum light. Then my wife added, "oh, I also want you to be checked out by the doctor." Following her sage advice, I went to my family practice doctor and he quickly diagnosed me with Seasonal Affective Disorder. He confirmed that exercise and light therapy are important, particularly during the winter months. He also wrote out on a sheet of paper, "take vitamin D3 forever" and sent me a bill for my wife's diagnosis. The point is that Seasonal Affective Disorder causes anxiety and depression. However, understanding the source of the anxiety and depression, I discovered a treatment that did not involve the medications generally associated with those mental health issues. This is my point: before we can adequately protect lawyers from these well-being issues, we need to know what they are and how to treat them.

My father was a roofer. To this day, I have the great joy of having lunch with him and his older brother every Friday. They are part of my tribe and support system. When I was ten, my mother passed away from cancer. I do not tell you this to make you feel sorry for me. Instead, I tell you this to put this next story into context and to explain the closeness between my father and me. When I was twelve, my father was having a difficult time keeping an eye on me during the summer. The only way that he could make sure that I stayed out of trouble was to take me to work with him, which he did. I had to get up at 5:30 in the morning and we usually got home around 6:00 at night. I made five dollars a day. I basically swept up the shop, ran small errands, and did anything else that could be expected of a young lad. By the time I was fourteen, I asked to go up on the roof and work with one of his crews. It was a great education. I met some of the smartest people I have ever known on job sites. However, before I ever set foot on a construction site, my father taught me all of the risks involved. He made sure that I knew how to set up, climb, and get off of a ladder. He made sure that I had the proper work shoes, hard hat, clothing, and work gloves. Before I ever touched any machinery, I was trained extensively on how to use it and the dangers involved. Compare that with what we do with young lawyers. Basically, we give them a law degree, have them take the bar exam, and then set them loose to fend for themselves without telling them of the occupational risks.

Again, in comparison to roofers, the roofers are a pretty happy lot. I asked my father the other day, after forty-seven years of being in the industry, did he know of any roofers that committed suicide. After

thinking long and hard, he could only recall one. I can think of at least ten lawyers that have committed suicide. This makes no sense to me. Roofing is a hard, physically-demanding, and messy job. You have to work in the worst of weather and under the worst of conditions. In comparison, lawyers work inside, in a controlled environment, and without risk of falling twenty-five feet to our deaths. Now we are discovering the not-so-obvious, long-term risks of our profession. Studies show that young lawyers, and even law students, are particularly impacted by wellness issues.[19] We must properly equip them with the knowledge and the tools to protect them from the risks of our profession.

During my year as President of the Virginia State Bar, lawyer well-being will be my top agenda item. Keep in mind that wellness is not a "one size fits all" topic. What works for me, may not work for you. But for all of us, it is important. The topic reminds me of what we all hear when we are taxiing to the runway on an airliner. The flight attendants always tell us "if the masks deploy, please put yours on first before you tend to others." With this in mind, before lawyers can tend to others, we have to take care of ourselves. There is a great line in the National Task Force report that gets right to the point: "To be a good lawyer, one has to be a healthy lawyer."[20]

But why should lawyer well-being be important to anyone other than lawyers and their families? Because *good* lawyers are vital to a vibrant democracy. Our democracy was formed by individuals who were trained in the law.[21] Given their unique American experience, they became intimately aware of ideals that we today hold dear: revolutionary concepts like individual rights, government by the people, and the citizen-lawyer.[22] Lawyers' importance in the drafting of the Declaration of Independence and our Constitution are not in question. However, from very early on, lawyers played a deeper and more complex role in American society. Alexis de Tocqueville, the famous French observer of American life, wrote that the legal profession in America "is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion, or carried away by the impetuosity of their ideas, they are checked and stopped by the almost

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[19] NAT'L TASK FORCE ON LAWYER WELL-BEING, *supra* note 6, at 7.

[20] *Id*. at 1.

[21] *See, e.g.*, *Signers of the Declaration of Independence*, NAT'L ARCHIVES, https://www.archives.gov/files/founding-docs/declaration_signers_gallery_facts.pdf (listing the vocations of all seventy-seven signers of the Declaration, twenty-five of whom were trained as lawyers).

[22] *See* THE FEDERALIST NO. 1 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (addressing citizens of the colonies about the importance of establishing a government from individual reflection and choice for the people to obtain liberty and prosperity).

invisible influence of their legal counselors."[23] American lawyers play a unique role in protecting, promoting, and perfecting the great American experiment.

In addition, *good* lawyers assist every day in the orderly flow of business, the governance of human affairs, the fair and efficient operation of government, and the proper delivery of justice. *Good* lawyers are critical in protecting individual rights. I cannot put it more succinctly than Justice Hugo Black did in *Gideon v. Wainwright* in 1963:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[24]

As a profession, we are constantly being told that we need to adapt to the ways of others, particularly those in England and Australia.[25] However, American lawyers are different than other nation's lawyers. I recently met with my good friend, Paul Marcus, a professor at the William & Mary School of Law,[26] for lunch with two of his friends who were here from Australia to observe our legal system. During the lunch, they asked me about my normal routine during the day and the types of matters that I handled. Our lunch date came near the end of these two Australian lawyers observing our system for approximately a year. So, at the end of our lunch I asked them, "What have you found the most surprising about our system in the United States?" They did not pause or miss a beat. They said, "this idea of individual rights." I was shocked. I asked them what was to stop the government from taking away personal rights. Their response was "the next election."

Well my friends, our legal system is different. And for our great experiment in democracy that was started in 1776, we need *good* lawyers to protect the individual rights that we hold dear.

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[23] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 233 (Francis Bowen ed., Henry Reeve trans., Barnes & Noble 2003) (1862).

[24] 372 U.S. 335, 344 (1963).

[25] *See* Daniel Fisher, *The U.S. Legal System: Good at Some Things, Wretched at Others*, FORBES (Sept. 6, 2011), https://www.forbes.com/sites/danielfisher/2011/09/06/the-u-s-legal-system-good-at-some-things-wretched-at-others/#6421ee4f5b22 (discussing the United States' comparatively high number of lawyers per capita and divergent treatment of mass torts and class actions); *see also* Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J. L. ECON. & ORG. 143, 144 (1987) (discussing the trend towards the English rule to avoid excess costs and litigation).

[26] Paul Marcus Faculty Biography, WM. & MARY, https://law2.wm.edu/faculty/bios/fulltime/pxmarc.php (last visited Sept. 28, 2017).

Finally, *good* lawyers are important to the independence of our judiciary. I am going to say that again. *Good* lawyers are important to the independence of our judiciary. We are constantly reminded of the importance of an independent judiciary, but rarely do we focus on the lawyer's role in protecting that judicial independence. *Good* lawyers:

- Select the cases to be filed in court;
- Present evidence and create a record on which the court can render a decision;
- Submit arguments for the appropriate applicable laws, or how those laws should be changed;
- Publicly defend the judiciary when the judiciary is unfairly criticized;
- Serve as the defenders of the rule of law; and
- Ensure that access to justice is provided.

We sometimes forget how unique our democratic system in the United States is as compared to other civilized societies in the world. Among other unique characteristics, we have a concept of American judicial review.[27] Literally, the combination of one good client, one good lawyer, and one good legal argument can change society. Does the case of *Brown v. Board of Education*[28] ring a bell?

What we do every day is important. In preparing for my year as President of the Virginia State Bar, I studied extensively the larger importance of the Bar. And I have discovered that my son is a much better researcher than I am. He recently brought me a series of speeches by Professor Lawrence J. Fox, a visiting lecturer in law at Yale Law School, and a former Chair of the American Bar Association ("ABA") Ethics Committee.[29] My son pointed out that Mr. Fox and I had many of the same views of our profession, but that he had been advocating those views for decades. For example, in a speech to the ABA House of Delegates in 1999, a speech that he viewed as one of the most important in his career,[30] Mr. Fox eloquently summed up the critical responsibilities of lawyers. He stated:

> Each of us is an officer of the court, each of us is licensed with power to start law suits, subpoena witnesses, opine regarding transactions, stand between our clients and the awesome power of the state. It is we

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[27] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing the principle of judicial review in Supreme Court precedent).

[28] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954) (overturning Plessy v. Ferguson, 163 U.S. 537 (1896)).

[29] Lawrence J. Fox Faculty Biography, YALE L. SCH., https://law.yale.edu/lawrence-j-fox (last visited Sept. 28, 2018).

[30] Lawrence J. Fox, You've Got the Soul of the Profession in Your Hands, Address at ABA Commission on Multidisciplinary Practice Midyear Meeting (Feb. 4, 1999), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/fox1.html.

> who are charged with undertaking pro bono services, defending the independence of the judiciary, accepting court appointments, providing volunteer services for our bar associations, recommending discipline of our own, teaching continuing legal education courses, explaining our system to the public and working to improve the laws and legal institutions.[31]

It is for all of these reasons, my friends, which our society has to care about the well-being of lawyers. As we move forward this year, the "experts" on lawyer well-being are the attorneys across this great Commonwealth who, day in, day out, actually practice law. We are the ones who must participate in critical self-evaluation, not only for ourselves, but for our families, and for those attorneys yet to come. But, most importantly, we are compelled to do this for our clients, for our system of justice, and for the public trust.

Let's get started.

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[31] *Id.*

THOSE TEN COMMANDMENTS: WHY WON'T THEY JUST GO AWAY?

*John Eidsmoe**

Those Ten Commandments again! Just when we think they've been buried fully six feet under, the Decalogue springs up again. Some judge places the Commandments on the wall of his courtroom,[1] some county commission erects them on the courthouse lawn,[2] some city council allows them in a city park,[3] or some teacher displays them in his classroom.[4]

During the 2018 legislative session, the Alabama Legislature passed a constitutional amendment that will allow the placement of the Ten Commandments on public property.[5] The Alabama Amendment states:

> Every person shall be at liberty to worship God according to the dictates of his or her own conscience. No person shall be compelled to attend, or, against his or her consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel. Property belonging to the state may be used to display the Ten Commandments, and the right of a public school and public body to display the Ten Commandments on property owned or administrated by a public school or public body in this state is not restrained or abridged. The civil and political rights, privileges, and

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1 *See* Steven Lubet, *Alabama Judge is Determined to Post 10 Commandments,* CHI. TRIB. (July 6, 2000), http://articles.chicagotribune.com/2000-07-06/news/0007060197_1_judge-moore-courtroom-prayers (discussing Judge Roy Moore of Etowah County, Alabama, placing the Ten Commandments in his courtroom).

2 *See* Green v. Haskell Cty. Bd. of Comm'rs, 568 F.3d 784, 790 (10th Cir. 2009) (discussing the county commissioners' approval of placing the Ten Commandments on the courthouse lawn).

3 *See* Pleasant Grove City v. Summum, 555 U.S. 460, 464–65 (2009) (discussing the placement of the Ten Commandments in the city's park).

4 *See* Freshwater v. Mt. Vernon City Sch. Dist. Bd. of Educ., 1 N.E.3d 335, 343–44 (Ohio 2013) (alleging eighth-grade teacher supplemented science curriculum with religious materials and made in-class statements referring to the bible).

5 S. 181, 2018 Reg. Sess., 2018 Ala. Laws 389 (Ala. 2018), http://arc-sos.state.al.us/PAC/SOSACPDF.001/A0012633.PDF. On November 6, 2018, Alabama voters ratified the Amendment by a 71.66% margin, 1,091,181 to 431,568, http://www2.alabamavotes.gov/electionnight/statewideresultsbycontest.aspx?ecode=1001030 (hereinafter "Alabama Amendment").

> capacities of no person shall be diminished or enlarged on account of his or her religious belief. No public funds may be expended in defense of the constitutionality of this amendment.
>
> The Ten Commandments shall be displayed in a manner that complies with constitutional requirements, including, but not limited to, being intermingled with historical or educational items, or both, in a larger display within or on property owned or administrated by a public school or public body.[6]

Although the amendment is now officially part of the Alabama State Constitution, it will likely face a court challenge.[7] The challengers will argue that the Decalogue is a religious document that has no place in the public arena and further that this amendment singles out the Ten Commandments and no other documents for legal protection, thus preferring Ten Commandments over others.

I believe there are valid grounds for defending and upholding the Ten Commandments Alabama Amendment. First, the Ten Commandments do not belong to any single religion. Today they are sometimes identified with Christianity, but Moses received them on behalf of the Hebrews on Mt. Sinai, and Muslims and other religions accept them as well.[8] Martin Luther contended that the Ten Commandments summarize natural law principles that were written on the heart at the time of Creation: "[t]he Decalog[ue] is not of Moses, nor did God give it to him first. On the contrary, the Decalog[ue] belongs to the whole world; it was written and engraved in the minds of all human beings from the beginning of the world."[9]

Second, the Ten Commandments are not exclusively religious. Radical separationists simplistically assume that everything must be 100% religious or 100% secular and that the Ten Commandments must be 100% religious. But in fact, a document may have both religious and secular components. In *Van Orden v. Perry*, the Supreme Court approved a Ten Commandments display on the lawn of the

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[6] Alabama Amendment, *supra* note 5.

[7] For examples of successful challenges of public displays of the Ten Commandments see*, e.g.*, McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 850–51, 881 (2005) (determining that the county's purpose in displaying the Ten Commandments on its courthouse walls should be taken into account as part of the constitutional inquiry); Stone v. Graham, 449 U.S. 39, 39–41 (1980) (holding that a Kentucky state statute that required the Ten Commandments be posted inside public classrooms violates the Establishment Clause).

[8] *See, e.g.*, *Exodus* 19; Abbas J. Ali et al., *The Ten Commandments Perspective on Power and Authority in Organizations*, 26 J. BUS. ETHICS 351, 357, 359 (2000) (discussing implications of power and authority from the Ten Commandments in Islam); Abbas J. Ali & Manton Gibbs, *Foundation of Business Ethics in Contemporary Religious Thought: The Ten Commandment Perspective*, 25 INT'L J. SOC. ECON. 1552, 1553 (1998) (stating that the Ten Commandments in Islam are regulatory guidelines with a similar purpose implied in Christianity); Jamie Ducharme, *The Satanic Temple Protested a Ten Commandments Monument in Arkansas with Its Baphomet Statue*, TIME (Aug. 18, 2018), http://time.com/5370989/satanic-temple-arkansas/ (stating that Christian values are encouraged by the displaying of the Ten Commandments).

[9] EWALD M. PLASS, WHAT LUTHER SAYS: A Practical In-Home Anthology for the Active Christian 748 (1959).

Texas State Capitol.[10] In the plurality opinion Chief Justice Rehnquist wrote: "Of course, the Ten Commandments are religious . . . . But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning . . . ."[11] Additionally, Justice Breyer observed in a concurring opinion in the same case,

> In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.[12]

Ten years earlier, in *Oliverson v. West Valley City*, a federal district court made the same observation about the role of the Ten Commandments in governing social conduct:

> The codes are often referred to for their religious importance, however, in fact, in Hebraic history they were in part legal codes governing the social conduct of the societies to which they applied. The Biblical books are ancient legal codes and histories. It would be wrong to assume the Hebraic references are merely religious commands.[13]

The fact that the Ten Commandments have religious significance should not be a bar to their public display if they also have secular significance. Clearly, the Ten Commandments are a moral, civil, and criminal code as well as a religious document.[14]

Third, the Alabama Amendment requires that Ten Commandments displays conform to U.S. constitutional requirements.[15] Presumably, this includes considerations imposed by various court decisions. For example, the Commandments must be displayed in context with other historical documents such as the Declaration of Independence, the Bill of Rights, or the Mayflower Compact.[16]

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10 545 U.S. 677, 681 (2005).

11 *Id.* at 690.

12 *Id.* at 701 (Breyer, J., concurring).

13 875 F. Supp. 1465, 1473 n.5 (D. Utah 1995).

14 *See, e.g.*, Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973, 994 (Ind. 2005) (noting that a significant portion of the criminal code reflects model values from the Ten Commandments); Landry v. Himel, 176 So. 627, 628 (La. Ct. App. 1937) (recognizing that a civil code requiring that a child owes honor and respect to his parents is based on both civil and moral law as expressed in the Ten Commandments); Doll v. Bender, 47 S.E. 293, 300 (W. Va. 1904) (Dent, J., concurring) (stating the Eighth Commandment prohibits both criminal acts of larceny, and unjustified taking of anyone's "civil, religious, political, and personal rights of life, liberty, reputation, and property—even though done under the sanction of legal procedure").

15 Alabama Amendment, *supra* note 5.

16 *See* McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 856, 874 (2005) (describing how the Ten Commandments were displayed alongside a host of other historical documents including the Declaration of Independence, the Bill of Rights, and the

Fourth, the Alabama Amendment prohibits the use of public funds for the legal defense of Ten Commandments displays.[17] Finally, the Alabama Amendment does not prohibit other displays. It singles out the Ten Commandments for protection because the Ten Commandments have been singled out for attack.[18] The Decalogue is one of the most, if not the most censored document in America today.[19]

But most importantly, other documents are not on an equal footing with the Ten Commandments. Whatever merits there may be in the display of the Koran, the Bhagavad-Gita, the Laws of Manu, or

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Mayflower Compact, and how if done properly, such an integration can be constitutional).

[17] Alabama Amendment, *supra* note 5.

[18] In a different context, the Supreme Court in *Katzenbach* has recognized that a law is not invalid even though it does not go as far as it could in providing protections beyond base level constitutional rights. Katzenbach v. Morgan, 384 U.S. 641, 657–58 (1966). A New York statute required that voters must be literate in English, but the federal Voting Rights Act of 1965, Section 4(e), prohibited New York from enforcing that requirement against residents from Puerto Rico who were educated in American-flag schools. *Id.* at 643–44. New York argued that the Voting Rights Act, as applied, constituted invidious discrimination against those educated outside the territorial United States in a language other than English. *Id.* at 656. In the majority opinion, Justice Brennan wrote,

> [W]e need not decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools. We need only decide whether the challenged limitation on the relief effected in § 4(e) was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," that a legislature need not "strike at all evils at the same time," and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

Id. at 657 (citations omitted) (first quoting Roschen v. Ward, 279 U.S. 337, 339 (1929); then quoting Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 610 (1935); and then quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)).

Similarly, the Alabama Amendment is not invalid simply because it "might have gone farther than it did" in protecting a wide variety of monuments and symbols. *Roschen*, 279 U.S. at 339. Even though many kinds of monuments might be under attack, the Alabama legislators who passed this amendment and the voters who ratified it need not "strike at all evils at the same time," *Semler*, 294 U.S. at 610, because "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson*, 348 U.S. at 489.

[19] *See* Steven Wilf, *The Ten Commandments Cases: A View from Within*, 40 CONN. L. REV. 1329, 1332 (2008) (discussing the substantial controversy over displays of the Ten Commandments and stating that "[f]or many Evangelical Christians, court injunctions barring the posting of the Ten Commandments serve to censor the religious roots of United States culture").

the Analects of Confucius, none of these have influenced Western jurisprudence as the Ten Commandments have.[20]

And this is my basic thesis: the Ten Commandments deserve a place, even a special place, in America's public life because the Hebrew laws they represent played a formative role in the development of Western jurisprudence and Western culture. They represent the American political philosophy expressed in the Declaration of Independence and other founding documents, that our nation is established under the "Laws of Nature and of Nature's God,"[21] that God created us in a state of equality, and endowed us with unalienable rights. Let me illustrate this fact in several ways.

I. THE TEN COMMANDMENTS SUMMARIZE THE BASIC PRINCIPLES OF WESTERN LAW.

The Ten Commandments summarize the basic principles of Western law which include: (1) Respect for Life, as found in the Commandment "[t]hou shalt not kill"[22] and in the homicide laws of all states and nations; [23] (2) Respect for Property, as found in the Commandments "[t]hou shalt not steal" and "[t]hou shalt not covet"[24] and in the theft and property laws of all jurisdictions;[25] (3) Respect for Family, as found in the Commandments "[h]onor thy father and thy mother" and "[t]hou shalt not commit adultery"[26] and in the laws of various jurisdictions respecting the family as the basic unit of society;[27] (4) Respect for Truth, as found in the Commandments "[t]hou shalt not take the name of the Lord thy God in vain"[28] (which prohibits not only blasphemy but also perjury and all speech that places God's Name in disrespect)[29] and "[t]hou shalt not bear false witness,"[30] and in laws against perjury,[31] defamation,[32] and other false and misleading

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[20] *See* Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. L. & RELIGION 525, 525 (1999) (recognizing the Ten Commandments' influence on the Western legal system).

[21] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[22] *Exodus* 20:13 (King James).

[23] *E.g.,* ALA. CODE § 13A-6-4 (2018); VA. CODE ANN. § 18.2-33 (2018); Canada Criminal Code, R.S.C. 1985, C-46, § 222.1.

[24] *Exodus* 20:15, 17 (King James).

[25] *E.g.,* 18 U.S.C. § 2112 (2012); ALA. CODE § 13A-8-2 (2018); VA. CODE ANN. § 18.2-95 (2018).

[26] *Exodus* 20:12, 14 (King James).

[27] *E.g.,* ALA. CODE § 13A-13-2 (2018); VA. CODE ANN. § 18.2-366 (2018).

[28] *Exodus* 20:7 (King James).

[29] JOHANNES ALTHUSIUS, POLITICA 141 (Frederick S. Carney ed. & trans., Liberty Fund 1995) (1603); some states have statutes prohibiting blasphemy, though their constitutionality is questionable. MICH. COMP. LAWS ANN. § 750.102 (2018); OKLA. STAT. tit. 21, § 903 (2018).

[30] *Exodus* 20:16 (King James).

[31] *E.g.,* 18 U.S.C. § 1621 (2012); ALA. CODE § 45-40-244.06 (2018); VA. CODE ANN. § 18.2-434 (2018).

[32] *E.g.,* ALA. CODE § 13A-11-163 (2018); VA. CODE ANN. § 38.2-504 (2018).

statements; [33] (5) Respect for God as found in the first three Commandments,[34] in the fact that God is the Source of governmental authority as recognized in the Declaration of Independence[35] in the constitutions of nearly all fifty states,[36] and also in the fact that God is the Source of human rights as again found in the Declaration.[37]

In *Zorach v. Clauson*, Justice Douglas recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being."[38] And in *McGowan v. Maryland*, Justice Douglas stated in dissent: "[t]he institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect."[39]

This view of human rights did not derive from Greek philosophy or Roman jurisprudence.[40] It comes from the ancient Hebrews.[41] It was the political philosophy of most, if not all, of the Founding Fathers,[42] and it is the belief of a large segment of the American people today.[43]

The Ten Commandments belong in the public arena because they are the source of our fundamental principles of law.[44] In an era of ever-expanding government power, we need this public reminder that our rights are unalienable because they are the gift of God. As Jefferson asked, "[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?"[45]

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[33] *E.g.*, 15 U.S.C. § 6821(a) (2012); ALA. CODE § 17-5-16 (2018); VA. CODE ANN. § 38.2-1801 (2018).

[34] *Exodus* 20:3–7 (King James).

[35] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("the separate and equal station to which the Laws of Nature and of Nature's God entitle them").

[36] *See* Peter J. Smith & Robert W. Tuttle, *God and State Preambles*, 100 MARQ. L. REV. 757, 761–62 (2017) (noting the varying references to God in forty-five of the fifty current state constitutions).

[37] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("that all men are created equal, that they are endowed by their Creator with certain unalienable Rights").

[38] 343 U.S. 306, 313 (1952).

[39] 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

[40] E.C. Wines, Commentaries on the Laws of the Ancient Hebrews 117 (N.Y., Geo. P. Putnam & Co. 1853).

[41] *Id.*

[42] Michael Novak, On Two Wings 33 (2002).

[43] Green, *supra* note 20.

[44] *Id.*

[45] Thomas Jefferson, Notes on the State of Virginia 241 (Newark, Pennington & Gould 1801).

II. THE TEN COMMANDMENTS ARE OFTEN QUOTED AND CITED BY AMERICAN COURTS.

A Lexis search, as of 2018, reveals nearly 1,500 cases where courts discussed either the Ten Commandments or Decalogue generally or addressed individual commandments.[46]

As just one of many examples, a West Virginia public official was fired for having solicited a prostitute.[47] He argued that under state law he could be removed from office only if the crime constituted "gross immorality."[48] In *Moore v. Strickling*, the West Virginia Supreme Court concluded that his offense did indeed constitute moral turpitude,[49] citing the Decalogue's prohibition of adultery:

> These commandments, which, like a collection of diamonds, bear testimony to their own intrinsic worth, in themselves appeal to us as coming from a superhuman or divine source, and no conscientious or reasonable man has yet been able to find a flaw in them. Absolutely flawless, negative in terms, but positive in meaning, they easily stand at the head of our whole moral system, and no nation or people can long continue a happy existence in open violation of them.[50]

If the Ten Commandments are purely religious, why are they so often cited by the courts? If the Ten Commandments are of such legal and historical significance that courts frequently cite them as legal authority in judicial opinions, they certainly are of such legal and historical significance that they may be displayed in front of the halls of government.

III. THE TEN COMMANDMENTS ARE THE INSPIRATION AND MODEL FOR REPUBLICAN GOVERNMENT.

From whence come the roots of the American Republic? Many look to Greece and Rome.[51] But John Adams wrote: "as much as I love, esteem and admire the Greeks, I believe the Hebrews have done more to inlighten and civilize the world. Moses did more than all their legislators and philosophers."[52] Moses was a prophet,[53] but he was much more: he was a judge, military commander, statesman, and

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[46] John Eidsmoe, *The Use of the Ten Commandments in American Courts*, 3 LIBERTY U. L. REV. 15, 16 (2009); *see also* 1 JOHN EIDSMOE, HISTORICAL AND THEOLOGICAL FOUNDATIONS OF LAW 431–68 (2011) (providing a detailed description of case law found referencing the Ten Commandments, the Decalogue, and individual Commandments).

[47] Moore v. Strickling, 33 S.E. 274, 275 (W. Va. 1899).

[48] *Id.* at 276–77.

[49] *Id.* at 278–79.

[50] *Id.* at 277.

[51] Richard Vetterli & Gary Bryner, In Search of the Republic: Public Virtue and the Roots of American Government 10 (1987).

[52] John Adams, Marginal Annotations *upon* M. DE CONDORCET, OUTLINES OF AN HISTORICAL VIEW OF THE PROGRESS OF THE HUMAN MIND 68 (London, J. Johnson 1795), https://archive.org/details/outlinesofhistor00cond.

[53] *Deuteronomy* 34:10 (King James) ("And there arose not a prophet since in Israel like unto Moses . . . .").

lawgiver whose legal code has exerted great influence on the Western world.[54]

The Renaissance brought renewed interest in Greek and Roman thought, including the Roman concept of *imperium* (right to rule).[55] As feudalism faded, the modern absolutist state emerged with powerful kings like Henry VIII,[56] the Stuart kings with their belief in divine right to rule,[57] Louis XIV of France who allegedly declared "L'etat c'est moi" ("I am the state"),[58] and the proposed absolute monarch of Thomas Hobbes's *Leviathan*.[59] Western political philosophers sought to develop, as an alternative to absolute monarchy and the all-powerful State, the ideal of a republic.[60] But the Greek and Roman models proved unsatisfactory.[61] The Greek democracies had been unstable and short-lived,[62] and the Roman republic had degenerated into an empire.[63]

Western political philosophers turned for guidance to a governmental model more ancient and more republican than either Greece or Rome.[64] They looked a thousand years earlier to the Hebrew republic.[65]

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[54] *Exodus* 18:13–16 ("Moses said unto his father-in-law . . . the people come unto me to inquire of God: when they have a matter, they come unto me; and I judge between one and another, and I do make *them* know the statutes of God, and his laws."); S.H. Blondheim & Uri C. Cohen, *Signaling in Biblical Warfare and Moses' Role as Military Commander*, 40 JEWISH BIBLE Q. 77–78 (2012) (discussing the military aspects of Moses' leadership); WINES, *supra* note 40, at 107, 126.

[55] ALEXANDER B. HASKELL, FOR GOD, KING, & PEOPLE 5 (2017); *see* ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 96 (1999) (describing the various ways in which *imperium* was used in ancient Rome, as relating to the power to command or to act in a judicial capacity).

[56] *See* ROBERT LACEY, GREAT TALES FROM ENGLISH HISTORY 85–86 (2004) (highlighting the fact that Henry VIII and Parliament consolidated more power into the kingship by the Crown assuming the powers of the Church).

[57] *Id.* at 178.

[58] John Bartlett, Bartlett's Familiar Quotations 290 (Justin Kaplan ed., 17th ed. 2002).

[59] THOMAS HOBBES, LEVIATHAN 114 (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651).

[60] *See* BERTRAND RUSSELL, WISDOM OF THE WEST 193, 217 (Paul Foulkes ed., 1959) (discussing the evolution of political thinking evident from the absolutist Thomas Hobbes to the checks and balances of republican government thought out by John Locke).

[61] Yves Schemeil, *Democracy Before Democracy?* 21 INT'L POL. SCI. REV. 99, 100–01 (2000); Benedetto Fontana, *Tacitus on Empire and Republic*, 14 HIST. OF POL. THOUGHT 27, 27 (1993).

[62] Schemeil, *supra* note 61.

[63] Fontana, *supra* note 61, at 27–28.

[64] *See infra* note 65.

[65] Greco-Roman law was itself influenced by Hebrew jurisprudence. WINES, *supra* note 40, at 334. Clement of Alexandria (c. 150–215) stated that Moses was Plato's ideal philosopher-king. PHILO, II ON THE LIFE OF MOSES, *reprinted in* VI PHILO 289, at 481 (G.P. Goold ed., F.H. Colson trans. 1935). Hugo Grotius (1583–1645) wrote: "[T]he most an[c]ient *Attick* Laws, from whence the *Roman* were afterwards taken, owe their Original to the Law of *Moses*." HUGO GROTIUS, THE TRUTH OF THE CHRISTIAN RELIGION

They were not the first to do so. It may have been Flavius Josephus, the pro-Roman Jewish historian of the first century A.D., "who first suggested to Europeans that Israelite society could be regarded as a *politeia*—a political constitution of the sort familiar to Greek philosophy—and that Moses could be understood as its lawgiver *(nomothetes)*."[66] When St. Patrick (A.D. 5th century) evangelized Ireland, he left his converts with a writing called *Liber ex Lege Moisi* ("The Book of the Law of Moses").[67] When the High King of Ireland ordered Patrick to lead a commission to draft the Senchus Mor or written legal code of Ireland, his commission employed Druid law but only insofar as it was consistent with the Old and New Testaments.[68] When Alfred the Great drafted the Book of Dooms (A.D. 890), the first written legal code to govern all of England, he began with the Ten Commandments and integrated into the code Scriptural passages from the Old and New Testaments.[69]

Rabbi Moses ben Maimon (Maimonides) (A.D. 1135–1204) was a towering medieval intellect whose *Mishneh Torah* codified the Torah, the Talmud, and the writings of early medieval Jewish scholars.[70] Maimonides' works, which made Jewish law more readily available to Western scholars, formed the basis for the commercial codes in much of Europe.[71]

The Protestant Reformation fostered republican thinking, and many of its leaders were influenced by rabbinical Old Testament

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48 (Maria Rosa Antognazza & Knud Haakonssen eds. John Clarke trans., Liberty Fund, Inc. 2012) (1743) [hereinafter GROTIUS, THE TRUTH]. Grotius also wrote that:

> Nay on the contrary, is it not most evident, that since the Laws of *Moses*, with respect to criminal Matters, carry so visible a Character of the Divine Will, the other Nations would have done very well to take them for a Model? It is even probable, that the Greeks at least, and particularly the *Athenians*, did so: Whence proceeds so great an Agreement of the old *Attick* Law, and from thence of the *Roman* in the *Twelve Tables*, with the *Hebrew* Laws.

I HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 194 (Richard Tuck & Knud Haakonssen eds., J. Barbeyrac trans., Liberty Fund, Inc. 2005) (1738) [hereinafter GROTIUS, WAR AND PEACE]. Wines observed: "The similitude between the Grecian and Mosaic laws has been noticed by many learned men besides Grotius; as Josephus, Clemens Alexandrinus, Augustin, Selden, Gale, Cunaeus, Serranus, Sir Matthew Hale, and Archbishop Potter." WINES, *supra* note 40, at 335.

66 Eric Nelson, The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought 89 (2010).

67 D. James Kennedy & Jerry Newcombe, What if Jesus Had Never Been Born? 81 (rev. ed. 1994).

68 SEUMAS MACMANUS, THE STORY OF THE IRISH RACE 132–33 (4th rev. ed. 1921); *see also* 1 JOHN EIDSMOE, HISTORICAL AND THEOLOGICAL FOUNDATIONS OF LAW 410, 766–73 (2011) (providing an in-depth discussion on the role of St. Patrick played in writing modern law in Ireland, and the influence scripture had on the process).

69 ANCIENT LAWS AND INSTITUTES OF ENGLAND 20–27 (B. Thorpe, ed., The Lawbook Exchange, Ltd. 2003) (1840); *see also* EIDSMOE, *supra* note 46, at 825–28 (defending the authenticity of this portion of Alfred's *Dooms*).

70 Neil Weinstock Netanel, *Maharam of Padua V. Giustiniani: The Sixteenth-Century Origins of the Jewish Law of Copyright*, 44 Hous. L. Rev. 821, 826 (2007).

71 Rousas John Rushdoony, The Institutes of Biblical Law 789 (1973).

scholarship.[72] Martin Luther (1483–1546), who had studied law before becoming a priest, defended the old Teutonic Anglo-Saxon common law that emphasized decentralized government and was based upon natural law and natural rights.[73] Luther believed the Ten Commandments were the perfect expression of natural law:

> Natural Law is the Ten Commandments. It is written in the heart of every human being by creation. It was clearly and comprehensively put on Mount Sinai, finer indeed than any philosopher has stated it. Natural Law, then, is created and written in the heart; it does not come from men but is a [God-]created Law to which everyone who hears it cannot but consent.[74]

Carolus Sigonio (c. 1524–1584), an Italian Renaissance scholar of Roman and Greek political systems, wrote a treatise entitled *The Hebrew Republic*, which enjoyed wide circulation and profoundly influenced later writers.[75] Petrus Cunaeus (1586–1638) is remembered for *De Republica Hebraeorum* (*The Hebrew Republic*),[76] called "the most powerful public statement of republican theory in the early years of the Dutch republic."[77] Cunaeus described Moses as the great lawgiver who "was the first to write and publish laws so that the people might learn what was right and what was wrong, and which sanctions might steady the state Almighty God had ordered to be set up in Palestine."[78] He surveyed Hebrew agrarian laws, criminal statutes, and military policies, the role of judges and priests, and the service of the Temple—all with frequent citations to Maimonides, Josephus, Philo, Sigonius, and others.[79] In his preface he declared: "I ask you, illustrious Members of States, to study over and again the Hebrew Republic—the holiest and best of all—which I have described in this book. It contains ideas that kings, leaders, and the administrators of republics may adopt for their own use."[80]

Johannes Althusius (c. 1557–1638) was a professor of law and a scholar of theology and philosophy.[81] His classic work, *Politica*, offered a legal and theological justification for the Dutch secession from Spain and a grand design for federalism based on Scripture and natural law.[82] In the 1614 preface he stated:

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72 NELSON, *supra* note 66, at 7–8.

73 Brief for The Foundation for Moral Law as Amicus Curiae Supporting Petitioner at 12, City of Bloomfield v. Felix, 138 S. Ct. 357 (2017) (No. 17-60).

74 PLASS, *supra* note 9, at 772–73 (alteration in original).

75 Guido Bartolucci, *Introduction* to CARLO SIGONIO, THE HEBREW REPUBLIC, at xxxiii, xxxviii (Peter Wyetzner trans., Shalem Press, 2010) (1582).

76 PETRUS CUNAEUS, THE HEBREW REPUBLIC (Peter Wyetzner trans., Shalem Press, 2006) (1617).

77 Richard Tuck, Philosophy and Government 1572-1651, at 169 (1993).

78 CUNAEUS, supra note 76, at 12.

79 *Id.* at 11–12, 90–91.

80 *Id.* at 6.

81 Frederick S. Carney, *Introduction* to JOHANNES ALTHUSIUS, POLITICA, at xi (Frederick S. Carney ed. & trans., Liberty Fund 1995) (1603).

82 *Id.* at xxxv; ALTHUSIUS, *supra* note 81, at 106.

> The precepts of the Decalogue are included to the extent that they infuse a vital spirit into the association and symbiotic life that we teach, that they carry a torch before the social life that we seek, and that they prescribe and constitute a way, rule, guiding star, and boundary for human society. If anyone would take them out of politics, he would destroy it; indeed, he would destroy all symbiosis and social life among men. For what would human life be without the piety of the first table of the Decalogue, and without the justice of the second? What would a commonwealth be without communion and communication of things useful and necessary to human life? By means of these precepts, charity becomes effective in various good works.[83]

Explaining that the rule for the magistrate is "the Word of God alone," Althusius connected each commandment of the Decalogue to particular duties of the magistrate.[84] Stating that all governmental authority derives indirectly from the Commandment "Honor thy father and thy mother," he nonetheless argued that subjects and lesser magistrates have a right to resist and interpose against a tyrant.[85] Althusius believed that the Mosaic law, and the Ten Commandments in particular, were foundational to Western republicanism.[86]

Hugo Grotius (1583–1645) is often called the "father of international law,"[87] but along with his classic *The Rights of War and Peace*,[88] he also published a work of Christian apologetics, *The Truth of the Christian Religion*.[89] As noted earlier, in this latter work he argued that "the most antient *Attick* Laws, from whence the *Roman* were afterwards taken, owe their Original to the Law of *Moses*."[90] In *War and Peace*, he argued that international law could be binding on both Christian and non-Christian nations because of their common understanding of natural law.[91] The Mosaic Law can be useful in understanding natural law and international law because

> nothing is injoined there contrary to the Law of Nature; for since the Law of Nature . . . is perpetual and unchangeable, nothing could be commanded by GOD, who can never be unjust, contrary to this Law. Besides, the Law of *Moses* is called *pure* and *right*, Psalm xix. 8. and by the Apostle St. *Paul*, *holy, just, and good,* Rom: vii. 12.[92]

An English jurist who carried this idea forward was John Selden (1584–1654), described by John Milton as "the chief of learned men

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83 ALTHUSIUS, *supra* note 81, at 11–12.

84 *Id.* at 76, 141–43.

85 *Exodus* 20:12 (King James); ALTHUSIUS, *supra* note 81, at 195–96, 198.

86 Benjamin S. Walton, The Authoritativeness and Usefulness of the Principles of God's Old Covenant Law for the New Covenant Church and State, 5 LIBERTY U.L. REV. 419, 437 (2011).

87 Duvall v. United States, 50 Ct. Cl. 129, 146 (1915) (Howry, J., dissenting).

88 *See* GROTIUS, WAR AND PEACE, *supra* note 65.

89 *See* GROTIUS, THE TRUTH, *supra* note 65.

90 *Id.* at 48.

91 *See* GROTIUS, WAR AND PEACE, *supra* note 65, at 85–87, 93–94.

92 *Id*. at 175.

reputed in this land."[93] A member of Parliament, Selden was involved in drafting the Petition of Right in 1628 and is well known for his works on English legal history and constitutionalism.[94] But although he was a Christian, he was first and foremost a Hebrew scholar;[95] He concluded that the English common law reflected eternal principles of natural law.[96] In fact, King James I imprisoned Selden in the Tower of London for five weeks for arguing that the Parliament was an ancient institution descended from the Anglo-Saxon Witenagemot, and therefore, not dependent upon the king for its existence and authority.[97] Although he is not given enough attention today, John Selden's work was foundational for future republican theorists.[98] His Hebraic scholarship provided a foundation in Hebrew law upon which later jurists constructed republican models of government.[99]

Sir William Blackstone (1723–1780), whose *Commentaries on the Laws of England* (1765–1769) sold widely in America as well as in England,[100] saw the English common law as ancient, rooted in the Anglo-Saxon laws and much earlier, and having "in great measure weathered the rude shock of the Norman conquest."[101] He believed that human law, to be valid, had to conform to the higher law of God, which consisted of "the revealed or divine law, and they are to be found only in the holy scriptures."[102] He also recognized that the "law of nature [is] co-eval with mankind and dictated by God himself."[103] The revealed law and the law of nature, he said, are of "equal strength and perpetuity."[104]

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[93] JOHN MILTON, AREOPAGITICA AND OTHER PROSE WORKS 12 (Ernest Rhys ed., E.P. Dutton & Co. 1927) (1644).

[94] Paul Christianson, Discourse on History, Law, and Governance in the Public Career of John Selden, 1610–1635, at 87–88 (1996).

[95] Among John Selden's foundational works of Hebrew scholarship are JOHN SELDEN, DE SUCCESSIONIBUS IN BONA DEFUNCTI AD LEGES EBRAEORUM (London, Richard Bishop 1636); JOHN SELDEN, DE SUCCESSIONE IN PONTIFICATUM EBRAEORUM (London, Richard Bishop 1636); JOHN SELDEN, DE JURE NATURALI ET GENTIUM JUXTA DISCIPLINAM EBRAEORUM (Strasburg, 1640) (developing a theory of international law based upon the laws of Noah in Genesis); JOHN SELDEN, DE SYNEDRIIS ET PREFECTURUS JURIDICIS VETERUM EBRAEORUM (Amsterdam, Henry Boom, Theodore Boom, & Joannis à Someren 1679).

[96] *See* Harold T. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1698 (1994) (discussing John Selden's view that the English common law was based upon natural law with adaptations as necessary to fit societal realities).

[97] 9 West Group, West's Encyclopedia of American Law 183−84 (1998 ed. 1998).

[98] Fania Oz-Salzberger, The Political Thought of John Locke and the Significance of Political Hebraism, 1 HEBRAIC POL. STUD. 568, 569 (2006).

[99] *Cf.* Shlomo Pill, *Jewish Law Antecedents to American Constitutional Thought*, 85 MISS. L.J. 643, 645−47 (discussing the influential role political theorists, including John Selden, had on early American political thought).

[100] Schick v. United States, 195 U.S. 65, 69 (1904).

[101] 1 William Blackstone, Commentaries *17.

[102] *Id.* at *41–42.

[103] *Id.* at *41.

[104] *Id.* at *42.

> Yet undoubtedly the revealed law is (humanly speaking) of infinitely more authority than what we generally call the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.[105]

Blackstone emphasized that the revealed law and the law of nature are the foundation of law: "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[106]

A Westlaw search for citations to Blackstone's *Commentaries,* as of 2018, produces well over 5,000 cases that cite his work, and over 300 of those citations have been made since 2015.[107] Furthermore, the Supreme Court regularly cites Blackstone, having done so repeatedly in various opinions in 2018, demonstrating that Blackstone's view of law is highly relevant today.[108]

IV. MODERN SCHOLARS ARE REDISCOVERING THE HEBREW FOUNDATIONS OF WESTERN REPUBLICANISM.

Joshua Berman, Senior Lecturer at Bar-Ilan University, in his 2008 book *Created Equal: How the Bible Broke with Ancient Political Thought*, contends that the Pentateuch is the world's first model of a society in which politics and economics embrace egalitarian ideals.[109] Berman states flatly:

> If there was one truth the ancients held to be self-evident it was that all men were not created equal. If we maintain today that, in fact, they are endowed by their Creator with certain inalienable rights, then it is because we have inherited as part of our cultural heritage notions of equality that were deeply entrenched in the ancient passages of the Pentateuch.[110]

Berman notes that under the Mosaic Law "[t]he king is neither the source of the law nor even its adjudicator, as judicial powers are granted to others in the polity as laid out in Deuteronomy 16:18–22 and 17:8–13."[111] Berman continues:

> What is distinct in Deuteronomy is that the king must copy and read from "this Torah" about a wide range of issues, of which almost

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105 *Id.*

106 *Id.*

107 Westlaw search used the terms "Blackstone, *Commentaries*" to target only citations to the work.

108 *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018) (listing what Blackstone determined for offense against the law of nations); Trump v. Hawaii, 138 S. Ct. 2392, 2426 (2018) (Thomas, J. concurring) (showing how Blackstone influenced the Federalists' ideas of remedies in equity); Sessions v. Dimaya, 138 S. Ct. 1204, 1225 (2018) (exploring Blackstone's conceptions of common law criminal indictments).

109 Joshua A. Berman, Created Equal: How the Bible Broke with Ancient Political Thought 6–7 (2008).

110 *Id.* at 175.

111 *Id.* at 59.

> none pertains to kingship per se. In fact, the purpose of his study, "so that he may learn to revere the Lord his God to observe faithfully every word of this Torah as well as these laws," essentially places him on a par with the common citizen, whose responsibility in this regard is expressed elsewhere in Deuteronomy in identical terms. Indeed, unlike in Mesopotamia, where the king was issued responsibility for the law, in Israel the entire community is the recipient of the law. The upkeep of the laws in Deuteronomy is a responsibility shared by every member of the society.[112]

Berman further states: "Central to republican schemes—and Deuteronomy's is no exception—is the notion of a mixed government and a degree of separation of powers."[113] Deuteronomy, therefore, "illustrates notions of separation of powers that have usually been considered quite recent."[114]

Eric Nelson, Professor of Government at Harvard, in his ground-breaking book *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought*, surveys the Hebrew influence upon European political thought.[115] Nelson traces the development of European political thought based on the Hebrew model from Maimonides to the *Catalogus omnium praeceptorum legis Mosaicae (Catalogue of All of the Precepts and Laws of Moses)* (1533) through the works of Lively, Ainsworth, Lightfoot, Pococke, Colemen, Spencer, Selden, Bodin, Grotius, Bertram, Junius, Zepper, Stephani, Harrington, Spinoza, and Hobbes.[116] He explains that earlier jurists saw good and bad aspects in monarchy, oligarchy, and democracy, but "[i]n the middle of the seventeenth century, however, we find republican authors making a new and revolutionary argument: they now began to claim that monarchy per se is an illicit constitutional form and that all legitimate constitutions are republican."[117] "[T]his rupture," he states:

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[112] *Id.* at 63 (citation omitted) (quoting JEFFREY H. TIGAY, DEUTERONOMY 5, 168 (1996)).

[113] *Id.* at 78.

[114] *Id.*

[115] NELSON, *supra* note 66, at 22.

[116] *Id.* at 14–17, 19, 21. Because Harrington, Spinoza, and Hobbes are not usually regarded as Judeo-Christian thinkers, their study of the Hebrew republic is even more significant. *Id.* at 21–22. Volume II of Harrington's *The Art of Lawgiving* (1659) is entitled *The Commonwealth of the Hebrews.* 2 JAMES HARRINGTON, THE ART OF LAWGIVING: THE COMMONWEALTHS OF THE HEBREWS (1659), *reprinted in* THE OCEANA AND OTHER WORKS OF JAMES HARRINGTON (London, 1771). Part Three of Hobbes's *Leviathan* is entitled *Of a Christian Commonwealth*. THOMAS HOBBES, LEVIATHAN 247 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651). Chapter 35, *Of the Signification in Scripture of Kingdom of God, of Holy, Sacred, and Sacrament*, concludes that the New Testament phrase 'kingdom of God' refers to the Hebrew commonwealth. *Id.* at 271. Spinoza's *Tractatus Theologico-politicus* likewise discusses the *Republica Hebraeorum* at length. BENEDICT DE SPINOZA, THEOLOGICAL–POLITICAL TREATISE (Jonathan Israel ed., Michael Silverthorne & Jonathan Israel trans., Cambridge Univ. Press 2007) (1670).

[117] NELSON, *supra* note 66, at 3.

> [W]as provoked by the Protestant reception of a radical tradition of rabbinic Biblical exegesis, which understood the Israelite request for a king in I Samuel as an instance of the sin of idolatry. This embrace of 'republican exclusivism' . . . marks a crucial turning point in the history of European political thought.[118]

Nelson concludes:

> For roughly 100 years—from the time of Bertram until the time of Spinoza—European Protestants made the Hebrew Bible the measure of their politics. They believed that the same God who thundered from Sinai, and who later sent his son into the world, had revealed to Israel the form of a perfect republic. They labored with the help of their rabbinic authorities to interpret his design and attempted in their own societies to replicate it as closely as possible. In the process, they made crucial contributions to the political thought of the modern world. Republican exclusivism, redistribution, and toleration have all been defended on different grounds in the intervening centuries; but in the beginning, all were authorized by the divine will made manifest in the constitution of the Hebrew republic.[119]

The Ten Commandments, then, stand for a philosophy of law and government that is central to the American system. Popular support for the display of the Ten Commandments is consonant with this history.

V. THE HEBREW LAW SYMBOLIZED BY THE TEN COMMANDMENTS HAD A MAJOR FORMATIVE INFLUENCE IN EARLY AMERICA.

The early English colonists in America used the Mosaic Law as the basis of their legal codes.[120] Jamestown's *Articles, Lawes, and Orders, Divine, Politique, and Martial for the Colony in Virginia*, most likely the first English language legal code in the Western Hemisphere, contains all of the Ten Commandments except the prohibition of graven images.[121]

Rev. Nathaniel Ward (1578–1652), a clergyman who had legal training, compiled *The Massachusetts Body of Liberties* (1641)[122] which served as a model for legal codes throughout New England.[123] Numerous sections were taken directly from the Mosaic Law.[124] As

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118 *Id.*

119 *Id.* at 139.

120 Green, *supra* note 20, at 525.

121 For the Colony in Virginea Brittania: Lawes divine, Morall, and Martiall (1612), *reprinted in* Omohundro Inst. of Early Am. History & Culture, The Old Dominion in the Seventeenth Century 35–40 (Warren M. Billings ed., rev. ed. 2007).

122 The Massachusetts Body of Liberties (1641), *reprinted in* William H. Whitmore, Bibliographical Sketch of the Laws of the Massachusetts Colony from 1630 to 1686 (Boston, Rockwell & Churchill 1890); Jesús Fernández-Villaverde, *Magna Carta, the Rule of Law, and the Limits on Government*, 47 Int'l Rev. L. & Econ. S22, S25 (2016).

123 *See* George L. Haskins, *The Legal Heritage of Plymouth Colony*, 110 U. PA. L. REV. 847, 853, 856 (1962) (discussing the New England colonists' use of legal codes, including *The Massachusetts Body of Liberties*, which influenced the codes of other colonies).

124 THE MASSACHUSETTS BODY OF LIBERTIES, *supra* note 122.

John Winthrop recorded, when Indian nations sought the protection of the Massachusetts colony, the colony did not demand that they become Christians but did ask them to agree to follow the Ten Commandments, to which they assented.[125]

Dr. Eran Shalev of the University of Haifa demonstrates that early Americans believed America to be in some way a model of Israel.[126] Some compared the thirteen American colonies to the twelve (by some counts thirteen) tribes of Israel and saw those tribes, like the American colonies, as independent states joined into a confederate republic.[127] Puritans and other Calvinists strongly emphasized the Old Testament and the importance of the Mosaic Law.[128] As Shalev states:

> [The Puritans] introduced the "chosen people" doctrine into the New World and viewed themselves as the successors of the Children of Israel and the bearers of a renewed covenant with God. . . . [M]any European and Atlantic communities similarly felt themselves to be new Israels in the seventeenth century. . . . One of its lasting intellectual legacies was the central role that the Old Testament played in American public life. . . . And it was *after* the Bible's primacy began to corrode in Europe that Americans performed a last great act of political Hebraism, as the citizens of the young American republic witnessed a remarkable effort to construct their newly established polity as an Old Testament nation, an American Zion.[129]

In 1783, Yale President Ezra Stiles preached a sermon entitled "The United States Elevated to Glory and Honor" emphasizing that America's identification with Israel would bring God's blessing in prosperity and national splendor.[130] Other writers and speakers compared America's oppressors to villains of the Bible such as Haman, Antiochus Ephipanes, Eglon, and Nebuchadnezzar.[131] In turn, America's heroes were compared to Biblical deliverers such as Gideon, Deborah, Barak, and Judas Maccabeus.[132] Supporters of American independence such as Harvard President Samuel Langdon, Gad Hitchcock, Nathaniel Whitaker, James Dana, Samuel Cooper, Joseph Huntington, and others compared American independence to Israel's exodus from Egypt and believed God had chosen America as he had chosen Israel.[133] Shalev concludes:

> The fingerprints of the Old Testament were—still are—particularly evident in the language of chosenness, itself, of course, a Hebraic

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125 JOHN WINTHROP, THE JOURNAL OF JOHN WINTHROP 1630–1649, at 232–35 (Richard S. Dunn & Laetitia Yeandle eds., Harvard Univ. Press abr. ed. 1996) (1790).

126 Eran Shalev, American Zion 3 (2013).

127 *Id.* at 50–51.

128 *Id.* at 3.

129 *Id.* at 3–4.

130 Ezra Stiles, The United States Elevated to Glory and Honor 36 (New Haven, Thomas & Samuel Green 1783).

131 SHALEV, *supra* note 126, at 29–30, 40, 43–44, 61.

132 *Id.* at 40, 43–44.

133 *Id.* at 57–59, 61, 63.

> concept. What has widely become known as the American "mission," the idea that the United States is endowed with an errand to promote liberty, was formed closely related to the belief that the United States was the Israel of its time.[134]

Those who insist that the American republic was founded upon a Greco-Roman model rather than a Hebraic model would do well to study Michael Novak's *On Two Wings: Humble Faith and Common Sense at the American Founding*.[135] Novak dispassionately demonstrates that America's founders drew from both Judeo-Christian and Greco-Roman traditions and did not consider them incompatible.[136] Sermons of the founding era frequently quoted from the Bible and Greco-Roman sources in the same paragraph.[137]

VI. THE TEN COMMANDMENTS AND SIMILAR DISPLAYS REPRESENT A PHILOSOPHY OF GOVERNMENT BASED ON HIGHER LAW AND UNALIENABLE GOD-GIVEN RIGHTS.

The Alabama Amendment constitutes a recognition of the political philosophy upon which this nation was founded. Robert J. Barth, Associate Dean and Professor at the Oak Brook College of Law and Government Policy, explains:

> [I]f you combine the philosophy of government of our Founders with the form of government chosen, you create a republican form of government that presupposes a Creator as the source of unalienable rights and the definer of human dignity and equality. This form of government acknowledges the existence of the Creator as a self-evident truth and yet recognizes the distinct differences between the jurisdictions of the church and the civil government. . . . This jurisdictional separation between the acknowledgement of God as an essential presupposition of good government (unalienable rights, equal protection, due process) and matters of worship, faith,

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134 *Id.* at 189.

135 NOVAK, *supra* note 42.

136 *Id.* at 82, 84–86.

137 *Id.* at 32. There are many other valuable works on the Hebraic origin of modern legal doctrines. *See* H.B. CLARK, BIBLICAL LAW (1943) (dividing Biblical legal concepts into general subjects (political, civil, economic, penal, and procedural)); J.W. ERLICH, THE HOLY BIBLE AND THE LAW 14–15 (1962) (presenting specific legal topics in alphabetical order (Adoption, Agriculture, Aliens, Animals, Bailments, etc.) and the Biblical bases for each of them); WALTER J. HARRELSON, THE TEN COMMANDMENTS AND HUMAN RIGHTS (Mercer Univ. Press rev. ed. 1997) (1984) (demonstrating the relevance of the Decalogue to modern issues of human rights); HOWARD B. RAND, DIGEST OF THE DIVINE LAW (1959) (containing a detailed explanation of Old Testament law in theory and in practice); ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW (1973) (providing an extended commentary on Biblical law including the Ten Commandments); EDW. J. WHITE, THE LAW IN THE SCRIPTURES (WM. W. Gaunt & Sons, Inc. 1990) (1935) (surveying the Bible book by book and explaining the legal concepts therein); WINES, *supra* note 40 (stating that modern legislators "have but propagated and applied truths and principles, established by [Moses,] the first, the wisest, the ablest of legislators," *id.* at iv.). These and numerous other works demonstrate the relevance of the Ten Commandments and Old Testament law in general from the beginnings of American history to the current day.

> and religious practices, is the essence of the legitimate separation between church and state.[138]

The Ten Commandments, as an expression of Hebrew political philosophy, reflect the "Laws of Nature and of Nature's God," that "all men are created equal" and have unalienable God-given rights, and that government is to be by consent of the governed.[139] These principles find overt expression in the founding document of the American nation, the Declaration of Independence, which invokes "the Laws of Nature and of Nature's God" and states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .[140]

The Decalogue stands at the very heart of Western civilization. Therefore, their placement in public places is entirely consistent with the legal relationship of the Decalogue to the foundational principles of American government.

A CLOSING WORD…

In the original uncut version of the 1956 epic film, *The Ten Commandments*, producer Cecil B. DeMille stepped out on stage and addressed the cinema audience with these words:

> Ladies and Gentlemen, young and old. This may seem an unusual procedure . . . but we have an unusual subject: The story of the birth of freedom. The story of Moses. . . . The theme of this picture is whether men ought to be ruled by God's law or whether they are to be ruled by the whims of a dictator like Ramses. Are men the property of the State or are they free souls under God? This same battle continues throughout the world today.[141]

The Supreme Court recognized in *Van Orden v. Perry*, that the Ten Commandments have both religious and secular significance.[142] They symbolize an American philosophy of law and government: That civil governments are ordained by the "Laws of Nature and of Nature's God," that God has created us in a state of equality and has endowed us with unalienable rights, and that God has a special plan for America that includes blessing and prosperity, a plan that will be realized if we are faithful to Him and His Laws. These principles were

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[138] Robert J. Barth, *Philosophy of Government vs. Religion and the First Amendment*, 5 OAK BROOK C. J.L. & GOV'T POL'Y 71, 75–76 (2006).

[139] THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776); *see also* Philip Crane, *What the Constitution Was Meant to Be*, 10 HAMLINE L. REV. 93, 94 (1987) (arguing that the first commandment is the basis for the Declaration's proposition that humans possess God-given rights, which the government is meant to protect).

[140] The Declaration of Independence para. 2 (U.S. 1776).

[141] THE TEN COMMANDMENTS (Motion Picture Associates, Inc. 1956).

[142] 545 U.S. 677, 691–92 (2005).

embedded in the Declaration of Independence.[143] In arguing for ratification of the Constitution, James Madison in 1788 invoked "the transcendent law of nature and of nature's God" in *The Federalist No. 43*.[144]

The Alabama Amendment is a salutary reminder that American constitutional government owes much to its Hebraic origins in the laws of Moses. The Ten Commandments represent the laws of the Hebrew Republic which were instrumental in the development of Western republican thought and American constitutional government. In harmony with this history, courts have repeatedly cited the Ten Commandments as authoritative and illustrative of American legal principles.[145]

No wonder those Ten Commandments just won't go away! They stand at the foundation of Western law and Western civilization.

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143 *See supra* notes 139–41 and accompanying text.

144 THE FEDERALIST NO. 43, at 220 (James Madison) (Lawrence Goldman ed., 2008) (1788).

145 *See* cases cited *supra* note 14.

USING THE LICENSING POWER OF THE ADMINISTRATIVE STATE: MODEL RULE 8.4(G)

Distinguished Panelists[*]

Hon. Anderson: It's my privilege to moderate this panel. We have a distinguished panel of guests to discuss Rule 8.4(g) and the implications thereof. We've got a couple of housekeeping things to deal with. First, I want to say I'm grateful for this opportunity. I was told that the Federalist Society was looking for a moderator with great charisma, speaking style, entertaining, et cetera. That guy is not available. I'm here. We'll do the best we can with the circumstances that are presented.

I want to do three things. First, I want to present the topic for today's panel; second, I want to do a little discussion about how we're going to proceed; and third, I will introduce the panel. After that, I'm going to get out of the way since nobody here came to listen to me.

Let me first talk about the question posed as the topic of discussion for the panel. The topic is Professional Responsibility Rule 8.4(g): Using or Abusing the Licensing Power of the Administrative State. At its August 2016 meeting in San Francisco, the American Bar Association ("ABA") approved a major change to its Rules of Professional Conduct that will affect all lawyers if adopted by their licensing states.[1] New Rule 8.4(g) would make it professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status."[2]

The new rule applies to "conduct related to the practice of law,"[3] which represents an expansion from the previous comment applicable to

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[*] This panel was held on November 16, 2017, during the 2017 National Lawyers Convention in Washington, D.C. The panelists included: Ms. Paulette Brown, Partner, Locke Lorde LLP and Immediate Past President, American Bar Association; Prof. Stephen Gillers, Elihu Root Professor of Law, New York University School of Law; Prof. Ronald D. Rotunda, Professor, Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Dale E Fowler School of Law, Chapman University; Hon. Ken Paxton, Texas State Attorney General; moderated by Hon. G. Barry Anderson, Associate Justice, Minnesota Supreme Court.

[1] Peter Geraghty, *ABA Adopts New Anti-Discrimination Rule 8.4(g)*, ABA (Sept. 2016), https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html.

[2] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).

[3] *Id.*

conduct performed "in the course of representing a client."[4] New comment four defines conduct to include the "operating or managing a law firm or law practice."[5] The latter would include conduct at activities such as law firm dinners and events at which the lawyers were present because of their association with the law firm.[6]

The ABA rules are not self-executing. States must first adopt the rules pursuant to their established procedures.[7] While the Vermont Supreme Court adopted the rule[8] and the New Jersey Bar Association recommended adopting the rule,[9] the Montana Legislature rejected the proposal[10] and so has the Supreme Court of South Carolina.[11] Texas Attorney General, Ken Paxton, also wrote an opinion that was harshly critical of the proposal.[12] Our panel of experts will discuss the rule and its possible effects on the legal community.

Second, each member of the panel will have six to eight minutes or so to make a presentation about their view on these issues. The panel will then have an exchange for fifteen minutes or so. Then, finally, we'll get to questions.

I just want to remind everyone about the work of the Federalist Society, that we are "providing a forum for legal experts of opposing views

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[4] MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2013); *see* Geraghty, *supra* note 1 (discussing the change from the old comment to the broader new black letter rule).

[5] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2018).

[6] *See id.* (stating that "[c]onduct related to the practice of law includes . . . participating in bar association, business or social activities in connection with the practice of law").

[7] *See* Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" but Not Diversity of Thought*, 191 HERITAGE FOUND. 1, 2 (, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf (indicating that the model rules become binding law once adopted by state courts).

[8] Andrew Strickler, *Vermont's Anti-Bias Rule Vote an Outlier in Heated Debate*, LAW360 (Aug. 14, 2017, 9:30 PM), https://www.law360.com/articles/953530/vermont-s-anti-bias-rule-vote-an-outlier-in-heated-debate.

[9] Letter from Thomas H. Prol, President, N.J. State Bar Ass'n, to Hon. Stuart Rabner, Chief Justice, N.J. Supreme Court 1 (May 16, 2017) http://pdfserver.amlaw.com/nlj/Prol_letter.pdf (indicating the New Jersey State Bar Association's recommendation that the New Jersey Supreme Court adopt Model Rule 8.4(g)).

[10] Matthew Perlman, *Mont. Lawmakers Say ABA Anti-Bias Rule is Unconstitutional*, LAW360 (Apr. 14, 2017, 2:18 PM), https://www.law360.com/articles/913579.

[11] Supreme Court of S.C., Order on Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct, App. Case No. 2017-000498 (S.C. 2017).

[12] Whether Adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) Would Constitute a Violation of an Attorney's Statutory or Constitutional Rights (RQ-0128-KP), Tex. Op. Att'y Gen. KP-0123, 2016 WL 7433186 (Dec. 20, 2016) [hereinafter Tex. Op. Att'y Gen.].

to interact with members of the legal profession, the judiciary, law students, academics, and the architects of public policy."[13]

This event is an opportunity for us to have a civil discussion about these issues. I'd like to move now to the introduction of our distinguished panel of guests. I'm going to introduce all four, and then, I'm going to get out of the way. I begin with introducing this guest first because she has been heavily involved in this process and knows a great deal of the backstory.

Our first panelist will be Paulette Brown, who is a member of the Labor and Employment Practice Group of Locke Lord LLP, and relevant to our proceedings today, is a former president of the American Bar Association.[14] She litigates in both federal and state courts. She has held a number of responsible positions including in-house counsel to Fortune 500 companies, and also as a municipal court judge.[15]

She has defended employers in cases involving discrimination on the basis of age, sex, marital status, and other protected classifications. She received her Bachelor of Arts from Howard University and her J.D. from Seton Hall University School of Law.[16] She's won a number of awards. The Defense Research Institute, the New Jersey State Bar Association, and the American Bar Association Commission on Women in the Profession have all honored her.[17] We're delighted to have former President Brown of the ABA with us today.

Also, joining us is Ronald Rotunda who serves as the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University School of Law.[18] He has clerked for Judge Mansfield of the United States Court of Appeals for the Second Circuit.[19] He was, interestingly enough, assistant majority counsel for the Watergate Committee.[20] Some of you are old enough to remember; those of you who aren't, go look it up. It was an interesting story.

He has co-authored several works, including the most widely used course on legal ethics, *Professional Responsibility, Problems and*

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[13] *Our Background,* FEDERALIST SOC'Y, https://fedsoc.org/our-background (last visited Aug. 23, 2018).

[14] *Paulette Brown Biography*, LOCKE LORD LLP, https://www.lockelord.com/professionals/b/brown-paulette (last visited Aug. 21, 2018).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Professor Ronald Rotunda Biography*, CHAP. U., https://www.chapman.edu/our-faculty/ronald-rotunda-memoriam.aspx (last visited Aug. 23, 2018). Prior to the publication of this article, Professor Rotunda passed away. We, along with many others, mourn the passing of Professor Rotunda. We are thankful to Professor Rotunda's family and the trustee of his estate for allowing us to honor Professor Rotunda's memory by publishing his remarks.

[19] *Id.*

[20] *Id.*

Materials.[21] His work has been cited over 2,000 times by courts in this country and by foreign trial courts around the world.[22] He's consulted with various new democracies in Eastern Europe and the former Soviet Union, and he too has a substantial background in the ABA, having chaired a subcommittee and participated in other committees.[23] He is a graduate of Harvard College and Harvard Law School.[24]

Stephen Gillers is a professor at New York University School of Law.[25] He holds the Elihu Root chair.[26] His research and writing focuses on the regulation of the legal profession. He's written extensively on legal and judicial ethics in law reviews and the popular press.[27] He clerked for the United States District Court for the District of Oregon in the Portland District and practiced law for nine years in New York City before joining the New York University Law School faculty.[28]

He, too, has been active in ABA affairs as a member of the Multi-Jurisdictional Practice Commission, and the American Bar Foundation honored him with its Outstanding Scholar Award in 2015.[29] His B.A. was from Brooklyn College, and his J.D. was from the New York University School of Law in 1968.[30]

Finally, last, but certainly not least, we're thrilled that Ken Paxton, the current Attorney General of the State of Texas, can join us today for this panel. As you know, the State of Texas has been involved in some litigation in recent years. His office has had at least five cases that have gone to the United States Supreme Court.[31] They handle, of course, like all State Attorney General Offices, a wide variety of matters.

Prior to being Attorney General, he was a state senator representing Texas' District 8;[32] he served ten years in the Texas House of Representatives for District 70;[33] and he graduated from Baylor University earning both a Bachelor of Arts and a MBA there.[34] Finally, he

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Stephen Gillers Biography*, N.Y.U., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=19943 (last visited Aug. 23, 2018).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Stephen Gillers Biography,* N.Y.U., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=19943 (last visited Aug. 23, 2018).

[31] *About the Attorney General*, TEX. ATT'Y GEN., https://www.texasattorneygeneral.gov/about-office (last visited Aug. 23, 2018).

[32] *Id.*

[33] *Id.*

[34] *Id.*

went on to earn his law degree from the University of Virginia School of Law.[35] He was an attorney at Strasburg & Price for many years, and then, in law practice himself.[36]

This is a distinguished panel. I'm thrilled that they are with us here today, and I begin our presentation by inviting President Brown to step forward and share with us her remarks.

Ms. Brown: Thank you. Good morning. Thank you, Justice Anderson. It is really a privilege for me to be here this morning to speak to you about model Rule 8.4(g), about what it means, how it came to be, and how it would affect lawyers as we engage in the practice of law.

What I want to do is give you a little background on how we got to Rule 8.4(g). There are some things that I think are important to know right as we start. A lot of people have said that freedom of speech is violated or could be violated by 8.4. I want you to know that freedom of speech remains intact; freedom of religion remains intact; freedom to join organizations remains intact; freedom to represent our clients in the most zealous manner remains intact; and importantly, the studies have indicated that there will not be an influx in new litigation as a result of this rule.[37]

All of us sometimes have blind spots; sometimes we only see what we expect to see. Sometimes, when new things are promulgated, we automatically default, and I'm guilty of this, too. We automatically default to what we think should be there, and anything else may not be the right approach.

I'm asking you, to the extent possible, to recognize that we all have blind spots and that we try to remove some of them right now. We know that 8.4 is already dedicated to misconduct.[38] And we already know that rules currently exist that talk about what attorneys can and cannot do

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[35] *Id.*

[36] *Id.*

[37] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (indicating that this rule does not limit a lawyer's ability to accept, decline, or withdraw from representation or preclude legitimate advocacy); Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 198–99 (2017) (indicating that although twenty-four states have already adopted anti-bias rules governing attorney practice, judicial decisions involving attorney harassment have not been pervasive); *Amending Rule 8.4 of the Model Rules of Professional Conduct*, VOICE OF EXPERIENCE (AM. BAR ASS'N, Chicago, Ill.), July 21, 2016, https://www.americanbar.org/publications/voice_of_experience/20160/july-2016/amending-rule-8-4-of-the-model-rules-of-professional-conduct/ (indicating that states that have adopted anti-discrimination or anti-harassment provisions have not experienced an increase in "spurious complaints against attorneys").

[38] MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2018) (indicating that the rule concerns attorney professional misconduct).

with respect to their conduct as lawyers.[39] But, we're not really here to talk about that today. We're here to talk about amendment 8.4(g).

I want to highlight the fact that lawyers are not prohibited in any way from effectively representing their clients.[40] If a client has an opposing view from you, if they believe in something that you don't believe in, you are not required to represent them, and that does not initiate a cause of action with regard to harassment or discrimination.[41]

We also have to remember that when we talk about harassment and discrimination, we are talking about when one person harasses another person. We are not talking about engaging in public discourse or debate where we're talking about various issues and offering opinions. It is when we intentionally or knowingly say something bad about somebody or continuously bother them, maybe in a sexual way or something like that. And certainly there has been no shortage of news with regard to the harassment, particularly of women, these days.[42] I think that this rule becomes even more critically important.

I want to talk to you a little bit about how we got to rule 8.4(g). There have been attempts in the past to modify 8.4, but they were not successful.[43] However, there was great interest in providing an amendment to it, so a formal request for an amendment was made in 2014.[44] There was a lot of discussion concerning how 8.4 did not facially

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[39] *See, e.g.*, *id.* r. 1.5 (attorney fee restrictions); *id.* r. 1.7 (conflicts of interest); *id.* r. 1.16 (declining or terminating representation); *id.* r. 7.3 (solicitation of clients).

[40] *See id.* r. 8.4(g) ("This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.").

[41] *See id.* (stating that this rule "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16"); *id.* r. 1.16(b)(4) (indicating that an attorney may withdraw from representing a client who "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

[42] *See* Elizabeth Blair, *Women Are Speaking up About Harassment and Abuse, but Why Now?*, NPR (Oct. 27, 2017, 4:40 PM), https://www.npr.org/2017/10/27/560231232/women-are-speaking-up-about-harassment-and-abuse-but-why-now (discussing the increasing willingness of women to publically discuss past incidents of sexual harassment); Jacey Fortin, *The Women Who Have Accused Harvey Weinstein*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/us/harvey-weinstein-accusations.html (discussing the recent allegations of sexual harassment that numerous women have made against Harvey Weinstein).

[43] *See, e.g.*, AM. BAR ASS'N STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY ET AL., REPORT TO THE HOUSE OF DELEGATES: REVISED RESOLUTION 109, 2 (2016) [hereinafter REVISED RESOLUTION] (referencing a failed attempt in 1994 to add a paragraph (g) to Rule 8.4 identifying bias and prejudice as types of professional misconduct).

[44] *See id.* at 3 (discussing the process by which various ABA committees requested that the Standing Committee on Ethics and Professional Responsibility develop a proposal to amend the Model Rules of Professional Conduct).

discuss discrimination, the impact of discrimination, how discrimination impacts our profession, and how we want to be perceived by the public.[45]

Unfortunately, the public does not view us in the highest light;[46] although, I believe we are the noblest of all professions. What do we do about that? Supporters of amending Rule 8.4 went to a real expert who is the head of the Disciplinary Council of the State of Georgia, and in 2015, a determination was made that a serious look be given to whether to amend 8.4, to add a provision into the black letter law providing that lawyers should not harass and discriminate.[47] It was not willy-nilly. A decision was made, numerous public hearings were held,[48] there was solicitation of written comments, and a lot of people commented on it.[49]

Constituent groups expressed concerns based on religious grounds.[50] These concerns, and a host of other things,[51] were all considered. There was ultimately a desire for a better understanding of what it is that we want to be as a profession, and how we think lawyers should conduct themselves while engaged in the practice of law. What began as a

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[45] *See id.* at 3–4 (explaining that the previous rules were insufficient because they inadequately addressed discrimination or harassment, and that the Committee advocated to adopt Model Rule 8.4(g) to make an important statement to the legal profession and the public that prejudice is not tolerated).

[46] *See Honesty/Ethics in Professions*, GALLUP, https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx (last visited Oct. 21, 2018) (reporting pooling data from December 4–11, 2017, that 81% percent of the public believes that lawyers have only average to very low honesty and ethical standards, only slightly higher than the same statistic for members of Congress (89%) and car salespeople (87%)).

[47] REVISED RESOLUTION, *supra* note 43, at 3.

[48] *See, e.g.*, *id.* at 4 (discussing the Standing Committee on Ethics and Professional Responsibility hosting an open invitation roundtable discussion at the annual meeting in July 2015, and also hosting a Public Hearing at the midyear meeting in February 2016).

[49] *See Comments to Model Rule of Professional Conduct 8.4*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html (last visited Aug. 23, 2018) (compiling the comments of several hundred attorneys who expressed their concern or support for the proposed model rule).

[50] *See, e.g.*, Letter from David Nammo, CEO & Exec. Dir., Christian Legal Soc'y, to Am. Bar Ass'n Ethics Comm. (Mar. 10, 2016) https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.pdf (opposing adoption of Model Rule 8.4(g) on the grounds that the rule may subject attorneys to discipline for membership in religious organizations or for holding particular religious beliefs and that the rule would have "a chilling effect on attorneys' ability to continue to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square").

[51] *See, e.g.*, Letter from 52 ABA Member Attorneys to the Am. Bar Ass'n Standing Comm. on Ethics and Prof'l Responsibility 8, 13 (July 16, 2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf (opposing adoption of Model Rule 8.4(g) on the grounds that attorneys will be forced to take clients that they formerly would have declined to represent and that the rule invades the free speech rights of attorneys).

discrimination and harassment issue broadened to address the issues of equal access to justice and public perception of lawyers. We want to make sure that we are held to a standard the public believes that we should be held to.

There are a number of things that are not affected by the rule. As I mentioned before, lawyers can represent whoever they want to represent.[52] They don't have to represent anyone they don't want to represent. I think the rule provides more of a protective edge than anything. Instead of infringing religious freedom, it *protects* people who want to exercise their freedom of religion. For example, a lawyer cannot harass somebody because that person practices a particular religion.[53]

There's no limit to the ability to advocate on behalf of our clients.[54] There's no limit upon one's ability to engage in effective debate.[55] The burden of proof remains on the disciplinary prosecutor, and even beyond that, the disciplinary prosecutor has to determine that a claim should be brought.[56]

There are still a number of protections that exist, and we should not, under any circumstances, be afraid of 8.4(g).[57] We want all rules to be interpreted and applied equally to everyone. It's really critical to ensure not only that there is access to justice but that the public *perceives* that there is access to justice. The rule is really important to the profession, and I think, for the most part, none of us harass or discriminate so there is really nothing to fear in this regard. Thank you very much.

Hon. Anderson: Thank you, President Brown. Professor Rotunda, you're up next.

Prof. Rotunda: All right. We're talking about this new ABA rule, and I think former ABA President Brown gave a very nice justification for a rule that the ABA did not pass. They passed another one, just look at the language.

We live in a politically correct world. This is a verified complaint. Iowa State University, a state university, says that when you are

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[52] *See supra* note 41 and accompanying text.

[53] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (making it professional misconduct for a lawyer to harass or discriminate knowingly against individuals on the basis of religion, among other reasons).

[54] *See supra* note 40 and accompanying text.

[55] *See generally* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (prohibiting discriminatory conduct toward protected classes without prohibiting the discussion of issues between attorneys).

[56] *See* MODEL RULES OF LAWYER DISCIPLINARY ENF'T r. 18 (AM. BAR ASS'N 2002) ("The burden of proof in proceedings seeking discipline or transfer to disability inactive status is on disciplinary counsel."); *id.* r. 4(b) (indicating that disciplinary counsel performs all prosecutorial functions and has the power to investigate, prosecute, and dismiss claims).

[57] *See supra* notes 41, 53–56 and accompanying text (explaining the protection for lawyers in rule 8.4(g) and its comments).

admitted to the university you have to give up your First Amendment rights. Expressing opposition to same-sex marriage could be construed as harassment according to their policy.[58] You can object to the Second Amendment, of course, but not to gay marriage.[59] They ended up settling.[60] For those of you who aren't teaching in a university, I live with this every day. Can the ABA be far behind? Of course, we have to be very politically correct.

Prior to the change, there was a vague comment that said you shouldn't knowingly manifest bias if it's prejudicial to the administration of justice.[61] They say it wasn't a black letter rule.[62] It was particularly vague. Then, the rule says that a trial court's finding that you dismissed a juror with a peremptory challenge because you're racist, that's not enough to violate the rule.[63] I think that's a hoot, you see. The judge finds out you're racist, and the ABA says, "no no, don't worry; that's not enough."

Then, a whole litany of protected groups are covered by the rule.[64] In addition, they added a couple of other categories to the rule including ethnicity, gender identity, and marital status.[65] Height is not one of them though, so you can always make fun of me because of my height.

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[58] *See* Verified Complaint for Declaratory and Injunctive Relief at 14, 23, Dunn v. Leath, No. 4:16-CV-00553 (S.D. Iowa filed Oct. 17, 2016) (discussing the Iowa State University's policies, which could construe opposition to same-sex marriage as harassment, but failing to construe language opposing the Second Amendment as harassment); Settlement Agreement and Release at 2, Dunn v. Leath, No. 4:16-CV-00553 (S.D. Iowa 2017).

[59] *Cf. id.* at 8, 14, 23 (discussing the Iowa State University's policies, which could construe opposition to same-sex marriage as harassment but not language opposing the Second Amendment).

[60] Settlement Agreement and Release, *supra* note 58, at 2 (detailing the parties' settlement agreement in which Iowa State University agreed to change its discrimination policy).

[61] MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2013) (indicating that comment three to Model Rule 8.4 previously stated, "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice").

[62] *See* REVISED RESOLUTION, *supra* note 43, at 2–3 (discussing the limitations of the former comment 3 to Model Rule 8.4(g) and advocating formally adopting a black letter rule to better protect clients from discrimination).

[63] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS'N 2018) ("A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).").

[64] *Id*. r. 8.4(g) (prohibiting discriminatory conduct against the following protected classes: "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status").

[65] *See* REVISED RESOLUTION, *supra* note 43, at 1–2 (stating that the categories of ethnicity, gender identity, and marital status were added in Model Rule 8.4(g) and were not included in the previous comment).

Then it says it doesn't limit the ability of the lawyer to decline representation under Rule 1.16.[66] I think, frankly, that is a misleading statement because 1.16 does not give you any right to decline. It prescribes when lawyers must decline or may withdraw, not when they can exercise discretion to decline in the first place, for reasons like, the client's failure to pay or because continuing would involve you in a crime. [67] Then, it says that it does not preclude legitimate advocacy consistent with the rule.[68] It doesn't say that it doesn't preclude *advocacy* consistent with the rules or advice consistent with the rules.[69] It says *legitimate advocacy*. What's illegitimate? Ask the Bar disciplinary people. You won't find it in the rule.

Then, the comments say that discrimination includes "harmful verbal or physical conduct."[70] I think that's an oxymoron. I don't know what verbal conduct is. We're talking about all the news of people groping somebody. That's a crime.[71] Go lock them up. That's an assault and battery.[72] But verbal conduct? When people make their homophobic jokes and sexist comments and so on, we don't laugh at their jokes, we don't invite them to our house for dinner. We can shun them. With this rule, however, we're talking about taking away their ability to practice law.[73]

The substantive law of anti-discrimination may guide, and from the legislative history, it is very clear what they are saying. What if you file the lawsuit and the judge threw your case out because you didn't have a good faith basis for filing? That doesn't mean the Bar is precluded from disciplining you.[74] You are still going to be disciplined. What if the judge

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[66] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) ("This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.").

[67] *See id.* r. 1.16 (providing circumstances in which attorneys must decline from representing a client or must withdraw if the representation has begun); *see also id.* r. 1.16 cmts. 1, 7 (explaining that an attorney may withdraw if the client persists in taking action which the attorney considers repugnant or with which the attorney fundamentally disagrees, and providing that one must withdraw from representation if the attorney cannot represent a client "competently, promptly, without improper conduct of interest, and to completion").

[68] *Id.* at 8.4(g) ("This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.").

[69] *Id.*

[70] *Id.* r. 8.4(g) cmt. 3.

[71] *See* Joanna L. Grossman, *Groping is a Crime: In Many States Unwanted Touching Isn't Just Boorish; It's Illegal*, VOX (Jan. 2, 2018, 10:00 AM), https://www.vox.com/the-big-idea/2018/1/2/16840294/groping-sexual-assault-franken-law-punishment (explaining that criminal laws typically consider groping as an unwanted touching of a person's body and classify such behavior as a misdemeanor).

[72] *Id.*

[73] MODEL RULES OF LAWYER DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2018) (listing disbarment as one of several appropriate sanctions for lawyer misconduct).

[74] MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2018) (prohibiting an attorney from bringing a suit without a "basis in law and fact"); *see id.* r. 9(a) (stating that violation of the Rules of Professional Conduct is grounds for discipline).

decided you exercise a peremptory challenge for racist reasons? Oh, well, that's different.[75]

The rule applies not just to representing clients, but also interacting with witnesses, managing a law firm, participating in a Bar Association of social activities, but it's our right to engage in reverse discrimination, that is, recruiting and hiring attorneys to get diverse employees.[76] That's all right.

Now, is the purpose of this rule to protect the client? You think that would be the purpose of a disciplinary rule. Instead, supporters of the rule say that they want "a cultural shift in understanding."[77] We're supposed to think differently. That's what the purpose of this rule is.[78] Does it limit the ability of the lawyer to accept, decline, or withdraw? Rule 1.16 only governs when you may or must withdraw.[79] There is no rule in the ABA model rules that says you can dismiss a prospective client for any particular reason.[80]

A lawyer says, "I won't represent a man drafting a palimony agreement for quasi-wife number four. I think you're demeaning to women." That's discrimination based on marital status. You're refusing to take the case because you don't like the way he lives his life. Under the old rules, nothing banned that, but under the new rules, it seems to be unclear.[81]

A New York opinion just came out; it says a lawyer won't accept a client bringing a sex abuse claim against the religious institution to which the lawyer belongs.[82] The New York opinion says that lawyers don't have

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[75] *See supra* note 63 and accompanying text (identifying the different disciplinary standards for race based peremptory challenges in jury selection and the new standards for discrimination under rule 8.4(g)).

[76] MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N 2018) (allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule").

[77] AM. BAR ASS'N OR. NEW LAWYERS DIV. ET AL., RECOMMENDATION AND REPORT TO THE ASSEMBLY OF THE YOUNG LAWYERS DIVISION 2 (2015).

[78] *Id*.

[79] *See supra* notes 66–67 and accompanying text.

[80] *See* MODEL RULES OF PROF'L CONDUCT r. 1.16, cmts. 1–3, 7–8 (AM. BAR ASS'N 2018) (defining specific instances in which a lawyer "must" or "may" withdraw from representing a client without explicitly granting a lawyer the general right to decline client representation); *see also* N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 1111 ¶ 4 (2017) (explaining that the language of the former Code of Professional Responsibility provided that an attorney has no obligation to represent every potential client "was not carried over to the current Rules of Professional Conduct").

[81] *See* Rotunda, *supra* note 7, at 5 (discussing the freedom that attorneys possessed under the previous rule to decline representation of a client on a palimony suit on numerous grounds and explaining that under the new rules an attorney may not have the ability to decline representation of this potential client because of the prohibition against discriminating on the basis of marital status).

[82] N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 1111 ¶ 1 (2017).

an unlimited right to refuse to represent people and that refusing to represent someone can be a violation of the rules if it violates discrimination laws, implying that this lawyer *may have* violated the rules.[83]

It gets better. You won't represent a religious couple who objects to being forced to cater a gay wedding. The couple says, "I don't mind selling them a biscuit or a cupcake if they come into my bakery. I don't want to cater their wedding. I don't want to participate in it." Well, that's not nice of you, and the ABA says that would be a violation. If you refuse to represent the religious couple? That would not be a violation under the wording of comment five.[84] But, if you engage in racial discrimination in jury selection? That's not necessarily a violation.[85] You won't hire the heterosexual messenger because he's heterosexual and does not promote diversity? That's not a violation.[86] So you're clear on all of that.

But, what about all the vagueness? Deborah Rhode said that disciplinary agencies don't have the resources to go after people for expressing religious views about sexual orientation and fearing the fact that the Bar could go after people, under the rule, is "wildly out of touch with the realities."[87] Ms. Brown said that the disciplinary people are not going to do this too actively, that they will be careful.[88] You do not get

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[83] *See id.* at ¶¶ 4, 6, 8–9 (discussing that an attorney generally does not have an obligation to represent a person who desires to become a client but may not decline representation on the basis of "unlawful discrimination").

[84] MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2018) (explaining that "[a] lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice"); *cf.* Tex. Op. Att'y Gen., *supra* note 12, at 4 (expressing concerns that attorneys may violate Model Rule 8.4(g) by representing those who are sued for acting on their sincerely-held religious beliefs).

[85] MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2018) ("A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).").

[86] *See id.* r. 8.4 cmt. 4 ("Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."); *see also* Rotunda, *supra* note 7, at 7 (discussing that comment 4 to Model Rule 8.4 "specifically approves of reverse discrimination" on the basis of sexual orientation because lawyers may consider diversity in hiring and recruiting).

[87] Deborah Rhode, *Hostile Environment Law and the First Amendment*, FEDERALIST SOC'Y, 00:52:10 (Nov. 19, 2016), https://fedsoc.org/commentary/videos/ninth-annual-rosenkranz-debate-hostile-environment-law-and-the-first-amendment-event-audio-video ("From what I know about bar disciplinary agencies, you know, they don't have enough resources to go after the people who steal from their clients' trust fund accounts, and the notion that they are going to start policing social conferences and go after people who make claims about their own views about the religious status of sexual orientation seems to me just wildly out of touch with the realities.").

[88] *Cf. supra* notes 54–57 and accompanying text (explaining the safeguards that would hinder a disciplinary prosecutor from over enforcing rule 8.4(g)).

nearly as many protections as is usual in a disciplinary hearing.[89] You are judged by your peers, that is other lawyers, but unlike your peers, they tend to be very liberal.[90]

You're worried about them going after you because of your political beliefs. With what happened in the 1950s and 60s with the war protesters,[91] why do we think that's not going to happen again today? You are standing on a water cooler and say, "I hate the idle rich." You're expressing discrimination based on socioeconomic status.

Now, I know, we all should be able to attack the upper 1%, but the ABA didn't write the rule that way.[92] They said any socioeconomic status. You would think that lawyers would be good at drafting legislation and that they would be particularly good at drafting legislation about the practice of law. This is what they came up with: "you're just a short fat hillbilly Nazi." That's okay. That's always in good taste.

In an ABA report, they went through a bunch of cases and noted that there are already similar rules of discipline in many other jurisdictions, implying that this new rule isn't going to change much.[93] I thought their list of cases were, let's say, not candid. One of the examples—physical contact.[94] Well, physical contact, like an unconsented pinching, pinching, or groping, has always been banned. It isn't just vile; it's a crime.[95]

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[89] *See, e.g.*, Jane J. Whang, *Improving Attorney Discipline*, 6 GEO. J. LEGAL ETHICS 1039, 1042–43 (1993) ("Strict rules of evidence are not necessarily followed in disciplinary proceedings.").

[90] *Attorney Disciplinary Board*, IOWA JUD. BRANCH, https://www.iowacourts.gov/opr/about-opr/attorney-disciplinary-board (last visited Oct. 25, 2018) (listing the eight attorney members and three lay members of the Iowa Attorney Discipline Board); *Disciplinary Board*, VA. ST. B., http://www.vsb.org/site/about/disciplinary (last visited Oct. 25, 2018) ("The twenty-member [Disciplinary] [B]oard appointed by the Supreme Court of Virginia is composed of sixteen attorneys and four lay members."); Debra Cassens Weiss, *Lawyers Are More Liberal Than General Population, Study Finds; What About Judges?*, A.B.A. J. (Feb. 2, 2015, 7:56 AM), http://www.abajournal.com/news/article/lawyers_are_more_liberal_than_general_population_study_finds_what_about_jud.

[91] *See* James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U.L. REV. Q. 725, 736–39, 750 (2005) (describing the impact that "McCarthyism" and feelings toward the Vietnam War had on the American legal profession and lawyer discipline by the American Bar Association).

[92] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (failing to provide specific protection for political beliefs).

[93] *See* REVISED RESOLUTION, *supra* note 43, at 6 n.15 (citing cases from various jurisdictions which already adhere to rules against lawyer discrimination and harassment).

[94] *Id.* (citing *In re* Griffith, 838 N.W.2d 792, 792 (Minn. 2013) ("[T]he referee found that respondent . . . engaged in unwelcome physical contact of a sexual nature with the student . . . .")).

[95] *See Battery*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining battery as a "nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact" and designating it as a criminal offense).

Then, you have some other cases about what happens right in the courtroom.[96] Well, the judge has a lot of authority over what happens in the courtroom. This authority goes far beyond verbal conduct. A United Parcel Service ("UPS") worker wore a hat that said, "Don't tread on me."[97] The Equal Employment Opportunity Commission ("EEOC") said that can be race discrimination.[98]

Supreme Court precedent from 1999 disagrees. The Court said that a harassment claim has to be based on conduct that is "severe, pervasive, and objectively offensive."[99] The EEOC, in 2016, just ignores that case and decides that a party's subjective interpretation of conduct as harassment is enough for the claim to move forward.[100] The guy just wore a hat probably thinking that it has something to do with the Revolutionary War.[101] Nope. No. It turns out that it may *actually* be racist, and they have their hearing for that.[102]

Saying, "Black Lives Matter" is okay, right? But all lives matter? Many people think that's racist.[103] "Blue Lives Matter?" Many people think that's racist.[104] "Black olives matter for martinis?" Many people say, "No. No. No." That's making light of something. That's wrong.[105] Imagine you're a member of the St. Thomas More Society, a Catholic non-profit public interest firm. You could have an ethics opinion from the local bar

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[96] AM. BAR ASS'N, *supra* note 43, at 6 n.15 (first citing *In re* Campiti, 937 N.E.2d 340, 340 (Ind. 2009) (disciplining an attorney for making disparaging remarks about opposing party's lack of citizenship); then citing *In re* Thomsen, 837 N.E.2d 1011, 1012 (Ind. 2005) (disciplining an attorney for racist remarks made during hearings)).

[97] Shelton D., Appeal No. 0120141334, 2016 WL 3361228, at *1 (EEOC June 3, 2016).

[98] *Id.* at *2.

[99] *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) ("[A]n action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.").

[100] *See* Shelton D., 2016 WL 3361228 at *2 (requiring an investigation for a harassment claim because of the subjective view of the Complainant that the Gadsden flag is racist).

[101] *Id.* at *1 (asserting that the flag was not historically a symbol of racism rather a symbol dating to the revolutionary time period).

[102] *Id.* at *2.

[103] *See* Jesse Damiani, *Every Time You Say "All Lives Matter" You Are Being an Accidental Racist*, HUFFINGTON POST (July 15, 2016, 1:18 PM), www.huffingtonpost.com/jesse-damiani/every-time-you-say-all-li_1_b_11004780.html (noting the phrase "All Lives Matter" perpetuates the racial injustice still prevalent in society).

[104] *See* Jonathan Russell, *Here's What's Wrong With #BlueLivesMatter*, HUFFINGTON POST (July 9, 2016, 2:56 PM), https://www.huffingtonpost.com/jonathan-russell2/heres-whats-wrong-with-bl_b_10906348.html (noting the offensiveness of the phrase "Blue Lives Matter" and its ability to perpetuate racism).

[105] Lindsey Bever, "*Black Olives Matter" Billboard Sparks Outrage—and Pizza Sales*, WASH. POST (July 19, 2016), https://www.washingtonpost.com/news/food/wp/2016/07/19/black-olives-matter-billboard-sparks-outrage-and-pizza-sales/?noredirect=on&utm_term=.30e87b042f55.

that says that the group is discriminatory and non-inclusive because they'd like you to be a Catholic before you join.[106]

The Bar can say that is disciplinable. More significantly, a bunch of lawyers will say, "Why should I test that? I better not join the St. Thomas More Society." It's just a lot safer because we have these ethics opinions all the time that say that various things are improper.

Consider the Great Wall of China. It is an architectural masterpiece. It's a part of history that is over a thousand years old.[107] There is a California case in which the individual said they had built "Chinese Walls" as a barrier between the conflicted lawyer and the rest of the firm, and one judge on the majority said that the term was linguistic discrimination.[108] Well, we know that now. Those of you involved with securities law know that lawyers talk about "Chinese Walls" all the time.[109] For conflicts, we talk about screens because we don't want to say wall.

Some people like me might think it's a term honoring the engineering ability of a civilization that was constructing the world's largest wall, while Western Europe was full of barbarians running around in bearskins.[110] But, now it's not enough. The judge says not to say it before him. Thanks to 8.4(g), anybody can now report someone who says "Chinese Wall" to the bar and you can be disciplined for it.[111]

Hon. Anderson: Thank you, Professor Rotunda. Professor Gillers, the floor is yours.

Mr. Gillers: Thank you. Thank you for inviting me to address this important issue for our profession. It always has been and, perhaps, it is especially so today. Everything I say today can be footnoted. It is footnoted

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[106] *About the Thomas More Society*, THOMAS MORE SOC'Y, https://www.thomasmoresociety.org/about/ (last visited Aug. 21, 2018). Although the national organization does not require members to be Catholic, some local chapters require members to be Catholic. *Society Membership Classes*, SAINT THOMAS MORE SOC'Y OF CENT. PA., http://www.saintthomasmoresociety.com/classes.html (last visited Aug. 21, 2018) (stating that membership is open to practicing Catholics).

[107] Brook Larmer, *The Great Wall of China is Under Siege*, SMITHSONIAN MAG. (Aug. 2008), https://www.smithsonianmag.com/travel/the-great-wall-of-china-is-under-siege-825452/.

[108] Peat v. Superior Court, 245 Cal. Rptr. 873, 887 (Cal. Ct. App. 1988) (Low, J., concurring).

[109] Martin Lipton & Robert B. Mazur, *The Chinese Wall Solution to the Conflict Problems of Securities Firms*, 50 N.Y.U. L. REV. 459, 462 (1975) (noting the widely-used "Chinese Wall" technique in securities law).

[110] Larmer, *supra* note 107 (noting the Great Wall was built over a period of 2,000 years); Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, 2010 WIS. L. REV. 535, 539–40 (2010) (commenting on the savagery of the Middle Ages).

[111] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (prohibiting discrimination based on race, ethnicity, or national origin).

in an article I wrote that is among your materials, and if you're interested in pursuing the legal issues and the legal history and the case authority, it's free.[112]

I can add to Justice Anderson's list of states that have addressed this issue. Earlier this week, the Tennessee Bar Association, in a joint petition with the Tennessee Disciplinary Council, asked the Supreme Court of the state to adopt 8.4(g), as written.[113] There were proposals to add a few words to the comments to ensure that the First Amendment rights of lawyers are honored, but the proposal was to adopt the rule as written.[114]

Now, I'm going to pose a series of questions, which I would encourage you to try to answer in your own minds, and then, if you answer them one way, you don't have to go on to the next question.

Jason S. called his female opponent a bitch.[115] Told her to go home and have babies.[116] Referred to her with below the waist anatomical references.[117] You are a C, you are an A.[118] Thomas M. mimicked and ridiculed the accent of an African-American woman opponent.[119] Judge Michael Mukasey, later the Attorney General, a member of your Board of Directors, called his conduct raced-based abuse, called it outrageous, and fined him.[120] Later, the New York state courts disciplined him after making an independent review of his conduct.[121] Robert Kahn would offer female lawyers "peppermint-ball candies" and asked, "[d]o you want to suck one of my balls?"[122] If they took offense, he would say, "[i]f you're so damned refined then why do you understand?"[123] Henry M. leveled "verbal assaults and sexist racial and ethnic insults"[124] against his Hispanic female opponent, told her to "go back to Puerto Rico,"[125] and said that law

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[112] Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017).

[113] Brief for Petitioner at 1, *In re* Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), 2018 Tenn. LEXIS 208 (Tenn. Nov. 15, 2017) (No. ADM2017-02244), http://www.tba.org/sites/default/files/filed_tsc_rule_8_rpc_8.4_g_0.pdf.

[114] *Id.* at 6–7.

[115] *In re* Schiff, 190 A.D.2d 293, 294 (N.Y. App. Div. 1993); *see also* Gillers, *supra* note 112, at 216 n.80 (referencing Jason S.'s direct statements to the opposing female lawyer).

[116] *In re* Schiff, 190 A.D.2d at 294; *see also* Gillers, *supra* note 112, at 216 n.80 (referencing Jason S.'s direct statements to the opposing female lawyer).

[117] *In re* Schiff, 190 A.D.2d at 294.

[118] *Id.*; *see also* Gillers, *supra* note 112, at 216 n.80 (referencing Jason S.'s direct statements to the opposing female lawyer).

[119] *In re* Monaghan, 295 A.D.2d 38, 39 (N.Y. App. Div. 2002).

[120] *Id.*

[121] *Id.* at 41.

[122] *In re* Kahn, 16 A.D.3d 7, 9 (N.Y. App. Div. 2005).

[123] *Id.*

[124] Florida Bar v. Martocci, 791 So. 2d 1074, 1077 (Fla. 2001).

[125] *Id.* at 1075.

is not practiced under "girl's rules."[126] All of these lawyers were disciplined.[127]

Now, the first question I would ask you to answer is, was that discipline wrong? Did these lawyers have a First Amendment right to say what they said? If you think they did, then you need not go any further, and we could have a separate discussion about that. If you think they did not have a First Amendment right to say what they said, then the next question is, do you think we should have a rule that forbids it? That is, you may think they do not have a right to say what they said and yet, you may say we should not have a rule.

If you believe we should have a rule that could lead to the discipline of these lawyers, then you must agree of course that that rule should give notice of what is forbidden. That is a due process obligation.[128] Then, if you've come this far, as a matter of responsibility, if you think this conduct can be disciplined, and that, as a matter of due process, we need a rule that could impose discipline based on notice, the next question is, what should that rule say?

There are twenty-five American jurisdictions whose black letter rules have prohibitions against bias or discrimination and harassment.[129] Among those jurisdictions are Minnesota and Texas.[130] Each state is "represented" on the panel. If you look at all of the jurisdictional rules together, you'll see that some are more demanding, and some are less demanding.[131] In my own research, Indiana is the most demanding.[132] That is, its rule closely duplicates Rule 8.4(g), while going even further than the Model Rule in some respects.[133] If you look at the code of judicial conduct adopted in every American jurisdiction, judges are instructed to prevent lawyers from engaging in certain harassing or biased conduct based on a list of characteristics that is longer than the one in 8.4(g).[134]

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[126] *Id.* at 1076.

[127] *Id.* at 1078; *In re* Kahn, 16 A.D.3d at 10; *In re* Monaghan, 295 A.D.2d 38, 41 (N.Y. App. Div. 2002); *In re* Schiff, 190 A.D.2d 293, 294 (N.Y. App. Div. 1993).

[128] FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

[129] Gillers, *supra* note 112, at 198.

[130] *Id.* at 198 n.11.

[131] *Id.* at 208.

[132] *Id.* at 209.

[133] *See id.* (stating that Indiana's rule also "reaches conduct that occurs within a law firm or at a professional event" while adding a catch all provision to the list of protected categories to cover other unnamed categories).

[134] *Compare* MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (AM. BAR ASS'N 2007) (protecting categories including "race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or *political affiliation*" (emphasis added)), *with* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (protecting categories including "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status").

It's a non-exclusive list, including, but not limited to the identified characteristics.[135] Now, the Judicial Code applies in matters before a tribunal,[136] but are we to say that this conduct is forbidden in matters before a tribunal but is allowed for transactional lawyers? They may call their opposing client a bitch and use anatomical references.

You may think that 8.4(g) doesn't get it quite right. It can be improved. I have suggestions about how to improve it in my article. I think the Minnesota rule is an improvement. Instead of referring to socioeconomic status, it refers to being on "public assistance."[137] I think that's an improvement. I wish I had known about that a year and a half ago. Socioeconomic status is nonetheless present in state rules and in the Code of Judicial Conduct.[138]

What about the First Amendment? Is it possible that someone will be charged with a disciplinary violation and will have an "as-applied" defense to that charge? Yes, it is possible.[139] But, other rules also limit speech and are subject to an "as-applied" challenge.[140] We have today a rule limiting what you may say about a judge's integrity.[141] That's a pure speech rule. On occasion, courts have said that a lawyer who has criticized a judge's integrity and was cited under this rule did have an as-applied defense under the First Amendment.[142] But, the rule has not therefore been found facially invalid.[143] Indeed, none of the twenty-five rules now in American jurisdictions has been found facially invalid.[144]

Indeed, I would go further and say that it is impossible to call 8.4(g) facially invalid without calling all twenty-five American jurisdictional rules facially invalid, as well. Now, you may say, "Well, I can imagine situations in which the rule could not be applied." Yes, you can and so can I because we are lawyers and that's what we are paid to do, but courts,

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[135] MODEL CODE OF JUDICIAL CONDUCT r. 2.3(C) (AM. BAR ASS'N 2007).

[136] *Id.*

[137] MINN. RULES OF PROF'L CONDUCT r. 8.4(g) (MINN. ST. BAR ASS'N 2018).

[138] Gillers, *supra* note 112, at 229 n.117.

[139] *Id.* at 230–31.

[140] *See id.* at 230 (noting the use of the First Amendment as a defense for violating the advertising rule).

[141] MODEL RULES OF PROF'L CONDUCT r. 8.2(a) (AM. BAR ASS'N 2018).

[142] Standing Comm. on Discipline of the U.S. Dist. Court v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995) ("Attorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context.").

[143] *See id.* at 1437 ("A substantially overbroad restriction on protected speech will be declared facially invalid unless it is 'fairly subject to a limiting construction.' To save the 'impugn the integrity' portion of Rule 2.5.2, the district court read into it an 'objective' version of the malice standard . . . .").

[144] *See* Gillers, *supra* note 112, at 198 (noting that the anti-bias rules in twenty-five jurisdictions are still in effect and, therefore, not invalidated for overbreadth).

including in Texas, have said that "a statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications."[145]

You can imagine that the rule will be challenged not only for overbreadth, but also for vagueness. A Fifth Circuit decision confronted a challenge to a Texas rule forbidding "conduct that is prejudicial to the administration of justice."[146] That rule is pervasive in American jurisdictions.[147] It certainly gives less notice than does 8.4(g). The court said that there was enough guidance because the rule applies only to lawyers, who "have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'"[148]

Now, I want to shift to a different point. People who are the victims of this conduct, the diversity committees of the ABA, the committees concerned with sexual orientation bias, with racism, with the rights of women, and with disability rights, have said, "We need this."[149] In my observation, the opponents of 8.4(g), except for the free exercise opponents, have by contrast been overwhelmingly white men.

Opponents have two choices. They could try to take potshots at 8.4(g) by saying, factually and legally incorrectly, that it is a speech code for lawyers, which it is not.[150] Or they can be constructive, listen to the pain of the people who say, "This hurts me. This hurts me every day I go to work. I have been the victim of this behavior, and I need the courts to protect me." Our profession can constructively try to improve the rule or it can challenge it in ways that are remote and hyperbolic. Thank you.

Hon. Anderson: Thank you, Professor. Mr. Paxton.

AG Paxton: It's great to be here. This is my first opportunity ever to speak to a panel at the Federalist Society.

I think we have an interesting topic today to talk about. For me, I came into this issue a little differently. I have a job as Attorney General. We issue opinions that are requested by legislators, typically committee chairs in the Senate and House or state agency heads.[151] I was asked by one of my legislators, Senator Perry to issue an opinion on a subject of

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145 Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 436 (Tex. 1998).

146 Howell v. State Bar, 843 F.2d 205, 206 (5th Cir. 1988) (quoting MODEL CODE OF PROF'L RESPONSIBILITY DR 1–102(A)(5) (AM. BAR ASS'N 1980)).

147 *Id.*

148 *Id.* at 208 (quoting *In re* Snyder, 472 U.S. 634, 645 (1985)).

149 REVISED RESOLUTION, *supra* note 43, at 4.

150 *See* Gillers, *supra* note 112, at 222–23 (noting that Rule 8.4(g) is not a pure speech code because even if the targeted individual suffers no harm, harassment and discrimination cause harm to the justice system).

151 *Duties & Responsibilities of the Office of the Attorney General*, TEX. ATT'Y GEN., https://texasattorneygeneral.gov/agency/duties-responsibilities-of-the-office-of-the-attorney-general (last visited Sept. 8, 2018).

concern to him.[152] He was worried that if Rule 8.4(g) were adopted by the Texas Bar, lawyers could lose their licenses for being part of bar associations or other legal organizations that oppose same-sex marriage or fight federal guidance on transgender bathrooms.[153]

In a letter, the Senator expressed worry about the rule change and that it means that religious lawyers may be "targeted for elimination from the legal profession."[154] We are required by the Texas Constitution to respond to questions that are asked of us like this one.[155] The general goal of our response is to help avoid litigation. Obviously, the opinion is not binding on any court, but it is our best effort at trying to help people understand what the law is.[156]

In my advisory opinion, we wrote that if the State of Texas adopted 8.4(g), a court would likely strike it down as unconstitutional for being overbroad and vague.[157] That provision could restrict an attorney's religious liberty and prevent him or her from wholeheartedly representing faith-based groups, which was one of our concerns.[158] The amendments to the ABA Rule 8.4 subject attorneys to professional discipline if they "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status"—and these are the keywords—"in conduct related to the practice of law."[159]

In fact, the Texas Bar already has rules,[160] so we've already addressed this issue. We addressed it very closely, and I stated in my opinion that the change to Rule 8.4 opens the door to punish lawyers who express views contrary to the State Bar with regard to religion, sexual orientation, and gender identity.[161] We concluded that a court would likely hold that the

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[152] Letter from Hon. Charles Perry, Tex. State Senator, to Hon. Ken Paxton, Tex. Att'y Gen. (Sept. 19, 2016), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2016/pdf/RQ0128KP.pdf.

[153] *Id.* at 2.

[154] *Id.*

[155] TEX. CONST. art. IV, § 22.

[156] Robert L. Larson, *The Importance and Value of Attorney General Opinions*, 41 IOWA L. REV. 351, 363–65 (1956).

[157] Letter from Hon. Ken Paxton, Tex. Att'y Gen., to Hon. Charles Perry, Tex. State Senator 5–6 (Dec. 20, 2016), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[158] *Id.* at 4.

[159] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).

[160] TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 5.08(a) (TEX. ST. BAR ASS'N. 2018).

[161] Paxton, *supra* note 157, at 4–5.

ABA ethics rule would infringe on a state board members' free speech, free exercise of religion, and freedom of association.[162]

The rule could be broadly enforced against lawyers participating in continuing legal education panels, discussions, or even just informal conversations at bar association events.[163] As I wrote in my opinion,

> [i]n the same way, candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation, and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline, and it will therefore suppress thoughtful and complete exchanges about these complex issues.[164]

Another concern I voiced in my opinion, is that application of Rule 8.4(g) in Texas would discourage attorneys who hold certain religious beliefs from taking on cases for fear of being disciplined.[165] The Supreme Court has ruled that attorneys' free speech rights are somewhat restricted inside and outside the courtroom when speaking about a pending case, but the change to Rule 8.4 "extends far beyond the context of a judicial proceeding to restrict speech or conduct in any instance when it is 'related to the practice of law.'"[166] In other words, the rule could extend to attorneys' association with certain groups, including certain faith-based legal organizations.[167]

I think it is interesting and maybe instructive that the ABA stepped into and filed a brief in a case in Florida where the state restricted doctors' speech by limiting discussions related to gun ownership with patients to circumstances in which it is medically necessary.[168] Let me read you the last paragraph before the conclusion of the ABA's brief.

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[162] *Id.* at 8.

[163] *Id.* at 3.

[164] *Id.* at 4.

[165] *Id.*

[166] Gentile v. State Bar, 501 U.S. 1030, 1071 (1991); Paxton, *supra* note 157, at 3 (quoting MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR. ASS'N 2016)).

[167] Paxton, *supra* note 157, at 4–5.

[168] Brief of the Am. Bar Ass'n as Amicus Curiae in Support of Appellees at 1, Wollschlaeger v. Governor of Fla., 760 F.3d 1195 (11th Cir. 2014) (No. 1:11-cv-22026-MGC).

> Indeed, if the State were permitted to do what it has done here, the consequences would be far-reaching. With only the most tenuous pretext, the government could intervene into any professional-client relationship and manipulate that relationship to further the government's agenda and suppress opposing viewpoints. That would not only constitute a gross infringement on the professional's right to speak and the client's right to listen—damaging the professional's ability to effectively serve the client's needs—but would also impermissibly distort the broader marketplace of ideas. This Court should hold States cannot engage in such viewpoint discrimination simply because the speaker is a doctor talking to his patient or a lawyer talking to her client.[169]

I think this argument by the ABA is very applicable to their own Rule 8.4(g).

Hon. Anderson: All right. We're going to take a few minutes here and have a little exchange between our members about their various comments that have been made. Who would like to go first? President Brown.

Ms. Brown: There were a couple of examples cited by Professor Rotunda and Attorney General Paxton that I think are not good examples. For instance, Attorney General Paxton indicated that if a person is at a bar association meeting and there is some discussion about a particular issue, then that attorney could be found in violation of 8.4(g).[170] The rule just doesn't apply to those hypotheticals. The rule talks about harassing individuals or people who are, generally, in a legally protected group.[171] It does not apply to debate about a particular subject matter.[172] The rule is very clear in that regard.

Also, the evidence has shown that discipline cases are not brought for the particular reasons mentioned by Professor Rotunda and Attorney General Paxton.[173] They're brought for reasons such as those cited by Professor Gillers, when a person engages in conduct against another person, not when people voice their opinion in a discussion about a particular group or a particular organization.[174] In addition, the rule is really clear about representation. You don't take on the opinion or position

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[169] *Id.* at 19.

[170] *See supra* text accompanying note 163.

[171] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).

[172] *See generally id.* (listing race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status as grounds for discrimination, but refraining from applying the rule to any particular subject matter).

[173] *See supra* notes 70, 83–92, 101–106, 161–167 and accompanying text; REVISED RESOLUTION, *supra* note 43, at 7 ("[Comment 3] makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g).").

[174] *See supra* notes 115–127 and accompanying text; REVISED RESOLUTION, *supra* note 43, at 8 ("[B]oth 'harassment' and 'discrimination' are defined to include verbal and physical conduct against others.").

of your client because you choose to represent that client.[175] There's nothing in the rule that interferes with your ability to engage in legitimate zealous advocacy on behalf of your client. The rule is really clear.

Unfortunately, I think the examples that have been given are made to invoke fear in some people, fear that you won't be able to do things that you would normally do or engage in the type of free speech and offer opinions that you usually do. That is not what this rule does, and I think that if we really read it carefully, we will come to understand that. I also think that we can't compare someone who owns a bakery with lawyers. Just because some people who own bakeries are prohibited from doing certain things does not make their circumstances a useful example. They're not lawyers. When we start to compare apples and oranges, as opposed to giving real-life examples of legitimate discipline of lawyer, it could cause the waters to be muddied and take us down a rabbit hole that we may not necessarily want to go down.

Hon. Anderson: Professor Rotunda, and then, I think Attorney General Paxton.

Prof. Rotunda: A couple of things. Steve said it's basically white males that opposes this rule.[176] It makes me feel deplorable when he says something like that.

He also said that there's already twenty-five states that have rules similar to 8.4(g).[177] I think that's not a fair review of the law. In every example that Steve gave, the lawyers were disciplined for conduct either in court or in a deposition.[178] What you do in deposition is like being in a court. Judges can make you wear a tie if they want, and maybe that's too much power, but it's not part of 8.4(g). That's already covered by current the law. In fact, since all these people were disciplined, why do we need this vague rule?

Paulette says that this is a face-to-face type encounter, but we saw from the example of the "Don't Tread On Me" hat that the guy just wore a hat. He didn't wear it to shove it at somebody. He just wore it, and somebody else said that they thought it was racist.[179] He didn't know that. Then, the EEOC opened up a full-fledged investigation, and the employer had to defend that question.[180] There is a difference; you get a lot more

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[175] MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2018) ("A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities.").

[176] *See supra* text accompanying notes 149–150.

[177] *See supra* note 129 and accompanying text.

[178] *See supra* notes 115–127 and accompanying text.

[179] Shelton D., Appeal No. 0120141334, 2016 WL 3361228, at *1 (EEOC June 3, 2016).

[180] *Id.* at *2.

due process before the EEOC than you ever will get before a bar disciplinary committee.[181]

Then, we're told that, if there are objections, have an as-applied challenge to the First Amendment. Like Debra Rhode said, any fear that the bar could abuse the rule is "wildly out of touch with the realities."[182] We are just supposed to trust them. Ms. Brown said that the bar has too many things to do to go after an unpopular lawyer if they want to pin something on them.[183] It reminds me of the three jokes of the 20th Century and the three jokes of the 21st. In the 20th Century, the jokes are, "I'll love you just as much in the morning, the check is in the mail, and I'm from the government and here to help you." The three jokes of the 21st Century are, "this is just a cold sore, my Maserati is paid for, and I'm from the government and here to help you."

You see, some things never change. Some things never change, and what we are told to do is rely on the goodwill of the bar administrator and, if necessary, we can always make a First Amendment challenge. If the local bar says, for example, that it is discriminatory to join the St. Thomas More Society, we can always fight that, *or* we can take the easier way out and not join. That is what this rule invites. I think when lawyers draft rules governing the practice of law, they should be a lot clearer than what we've got here.

Hon. Anderson: Attorney General Paxton.

AG Paxton: Let me read the language again: "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[184] In my opinion, this is very vague. We know that, if this is passed across the country, we're not going to be talking about this rule much. We're going to be talking about the cases that it's affecting. For example, in my state, we filed amicus brief in *Masterpiece Cakeshop*, a case involving a cake shop owner who refused to bake a cake for a same-sex wedding, something in

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[181] *Compare* 29 C.F.R. §§ 1614.109–1614.110 (2018) (providing the procedural guidelines for EEOC hearings and acknowledging a complainant's right to appeal to the EEOC or "file a civil action in federal district court" upon receipt of a final order issued by the agency), *with* MODEL RULES FOR LAWYER DISCIPLINARY ENF'T r. 18 (AM. BAR ASS'N 2018) (establishing the procedural guidelines for disciplinary committee hearings and stating that an attorney's "right of appeal" under Rule 11 includes "the right to seek review of the decision by a three member panel of the board, which shall either adopt the decision of the single adjudicator or make written findings").

[182] Rhode, *supra* note 87.

[183] *Cf. supra* text accompanying notes 54–57, 170–173; *infra* text accompanying note 232.

[184] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).

which he didn't want to participate. [185] Now they've been punished, and the case is going all the way to the United States Supreme Court.[186] Or consider the *Arlene's Flowers* case in which we've also filed an amicus brief.[187]

Those rules are anti-discrimination statutes similar to Rule 8.4(g). I'm sure that when those statutes were passed, people were told that the statutes wouldn't affect free speech, but clearly, in both of those cases going to the Supreme Court, they did.[188] It's nice to say that this wouldn't affect people's speech or their religious viewpoints, but we all know that it ultimately would. We would be talking about and signing onto cases going to the U.S. Supreme Court just like the *Arlen Flowers* and *Masterpiece cases*.

Hon. Anderson: Professor, anything?

Mr. Gillers: Professor Rotunda talked about notice[189] and notice is important. Rule 8.4(g) gives more notice than many of the rules now present in American states.[190] There was a California rule that said that

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[185] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018); Brief for the State of Texas et al. as Amici Curiae Supporting Petitioners, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111).

[186] Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290, 2290 (2017). When this panel was conducted, the case was still pending before the Supreme Court.

[187] State v. Arlene's Flowers, Inc., 389 P.3d 543, 554 (Wash. 2017) (holding that Arlene's Flowers's refusal to provide same-sex wedding services to Plaintiff constituted discrimination on the basis of sexual orientation, thus violating the Washington statute's public accommodation provision), *vacated*, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671–72 (2018) (remanding the case to the Washington Supreme Court for further consideration in light of *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018)); Brief for the State of Texas et al. as Amici Curiae Supporting Petitioners, *Arlene's Flowers*, 138 S. Ct. 2671 (2018) (No. 17-108).

[188] *See Masterpiece Cakeshop*, 138 S. Ct. at 1726 (acknowledging Phillips's constitutional claim that the Colorado Anti-Discrimination Act (CADA) violated "his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed"); *Arlene's Flowers*, 389 P.3d at 556 (acknowledging Stutzman's free speech argument that "her floral arrangements [were] artistic expressions protected by the state and federal constitutions and that the [Washington Law Against Discrimination] impermissibly compel[led] her to speak in favor of same-sex marriage").

[189] *See supra* text accompanying notes 81–92.

[190] *See* Gillers, *supra* note 112, at 198 ("Today, twenty-four states and Washington, D.C., have such a rule, but none is as broad as the new ABA rule."); *id.* at 198 n.11 (listing specific state rules that are "considerably narrower" than Rule 8.4(g)); *id.* at 208–09 (discussing "anti-bias and anti-harassment provisions in state professional conduct rules" and comparing Indiana's rule—"one of the broadest"—and Maryland's rule—"from the middle of the pack"—with Model Rule 8.4(g)).

Indiana's rule provides that "it is professional misconduct for a lawyer to engage in conduct in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors," and, although it does not contain a "mens rea requirement," "it [does] reach[] conduct that occurs within a law firm or at a professional event." *Id.* at 209

a lawyer shall not engage in offensive personality.[191] Does that rule give adequate notice? The Ninth Circuit thought not.[192] The court said that a lawyer could not be disciplined for what it described as sexist conduct, based on a rule forbidding offensive personality.[193] There is Fifth Circuit Court of Appeals precedent that says the standard changes depending upon the party that is being given notice.[194] Isn't Rule 8.4(g) clearer than "conduct prejudicial to the administration of justice?"[195]

Hon. Anderson: We can begin lining up if you have questions. I do have one question that I'd like to direct to Professor Rotunda or Mr. Paxton, two speakers who are skeptical of this rule. First, should there be such a rule in the first place? Second, if there should be such a rule, would you favor language that is different than the ABA's?

Prof. Rotunda: I think there should be a rule because proper discrimination and harassment rules have a functional relationship to the practice of law. On the one hand, we have cases saying that failure to file income tax doesn't mean you're disciplined.[196] On the other hand, filing

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(quoting IND. RULES OF PROF'L CONDUCT r. 8.4(g) (IND. ST. BAR ASS'N 2018)). Maryland's rule, by contrast, provides that it is professional misconduct for a lawyer to

> knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph.

Id. at 209 (quoting MD. RULES OF PROF'L CONDUCT r. 8.4(e) (MD. ST. BAR ASS'N 2017)). While this rule does contain a "mens rea requirement," unlike Indiana's Rule 8.4(g), it contains no variation of the word "harassment," and "most limiting, [it] applies only 'when such action is prejudicial to the administration of justice.'" *Id.* (quoting MD. RULES OF PROF'L CONDUCT r. 8.4(e)).

[191] United States v. Wunsch, 84 F.3d 1110, 1114 & n.6 (9th Cir. 1996) (citing California's Business and Professions Code Section 6068(f), which read, "It is the duty of an attorney . . . to abstain from all offensive personality."). The California statute was amended to delete the language "offensive personality" in 2001. CAL. BUS. & PROF. CODE § 6068(f) (West 2018) (amended 2001).

[192] *Wunsch*, 84 F.3d at 1119 (holding that "offensive personality" was an "unconstitutionally vague term in the context of [the California] statute").

[193] *Id.*

[194] *See* Howell v. State Bar., 843 F.2d 205, 208 (5th Cir. 1988) ("The regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'"); *see also* Gillers, *supra* note 112, at 215 n.76 (highlighting that the rule was directed to lawyers who have access to legal authority).

[195] MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2018) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."); s*ee also* Gillers, *supra* note 112, at 205–07 (providing "a short history of the ABA's failed efforts to adopt an anti-bias rule," focusing primarily on the ambiguous language of Rule 8.4(d)).

[196] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 2 (AM. BAR ASS'N 2018) (providing that only a lawyer's "*willful* failure to file an income tax return" demonstrates

false income tax statement would subject the lawyer to discipline because that is misleading, and if somebody engages in fraud or misleading conduct, that relates to the function of law.[197] The ABA rules previously used the phrase "moral turpitude," but now they don't anymore.[198] There are a lot of bad things you can do as a human being. Adultery is one of them, but things like adultery don't have a functional relationship to the practice of law.[199] However, committing adultery with a client involved in a divorce would have such a relationship, and you'd get disciplined for that.[200]

I think, first of all, the rule should have a functional relationship to the practice of law. The purpose of this rule, the reporter's notes say, is to change our way of thinking about things.[201] Frankly, that sounds very Stalinistic to me. We want to create the new Soviet man that thinks about things differently. I think we should change our views about a lot of things, but I think we should use persuasion to do that, not discipline. We just educate people.

If we were to have such a rule, I would make it a lot clearer. I would explain, for example, why it is that you get a free pass on a racist peremptory challenge. That's not important enough for the ABA. That actually is right there in court and does have a functional relationship to the practice of law.

Paulette said it covers more face-to-face conduct. Well, then the rule ought to say that. Instead, it says that it covers "bar association, business or social activities in connection with the practice of law."[202] I'm dubious about this rule. If we think that it's necessary, it ought to be drafted a lot

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indifference to his or her legal obligation and reflects negatively on his or her fitness to practice law) (emphasis added).

197 *Id.* r. 8.4 (b)–(c); *id.* r. 8.4 cmt. 2.

198 MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102 (AM. BAR ASS'N 1980) ("A lawyer shall not . . . engage in illegal conduct involving moral turpitude.").

199 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 2 (AM. BAR ASS'N 2018) (indicating that certain moral offenses, i.e., adultery, have no specific connection to a lawyer's fitness to practice law).

200 *See id.* r. 1.8(j) (stating that "[a] lawyer shall not have sexual relations with a client unless a consensual relationship existed between them when the client-lawyer relationship commenced"); *id.* r. 1.8, cmts. 17–19 (discussing the significance of the client-lawyer relationship and the "significant danger of harm" to the client's interests as a result of engaging in such a relationship).

201 *See* AM. BAR ASS'N STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY, MEMORANDUM: DRAFT PROPOSAL TO AMEND MODEL RULE 8.4, 1–2 (Dec. 22, 2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf ("There is a need for a cultural shift in understanding the inherent integrity of people regardless of their [protected classification] to be captured in the rules of professional conduct."); *supra* notes 77–78 and accompanying text.

202 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N 2018).

clearer, and we ought to explain why lawyers get a free pass for racist use of peremptory challenges.

Hon. Anderson: Mr. Paxton, any thoughts?

AG Paxton: I actually agree with the professor. He hit it on the head. Our rule is narrowly defined and more related to practice of law. It says, "A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b) manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity."[203] It hits exactly his point. It ought to be based on the practice of law.

Hon. Anderson: Professor Gillers or President Brown, any thoughts on that or should we move to questions?

Ms. Brown: No. I have a couple of thoughts. First, I want to correct the record. I did not say that it had to be face-to-face conduct. That's a mischaracterization.

Prof. Rotunda: Misunderstood. Sorry.

Ms. Brown: What I said was that the conduct is directed to individuals. I think that we have to be really clear about peremptory challenges. It's not that it can't be deemed a violation; it is just that a finding of discriminatory use of peremptory challenges is not a *per se* violation. [204] You look at the totality of the situation. I think that we have to be really careful about taking things out of context. We also have to think about what it means when we talk about being engaged in the practice of law. Think about those holiday parties that lawyers are known to have. Even though it's not a judicial proceeding, is it okay for people to engage in sexually harassing conduct at a law firm sponsored party?

I would submit that most right-thinking people would say no, that is not okay, and there should be some disciplinary action available to handle that.

Hon. Anderson: Professor, anything further or move to questions?

Mr. Gillers: Just one final point on the overbreadth doctrine.[205] I'm surprised at the suggestion that this could be struck down as overbroad. I think we would have to change First Amendment jurisprudence to do that. Consider this quote, "There comes a point in which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law, particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful,

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[203] TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 5.08(a) (TEX. ST. BAR ASS'N 2018).

[204] MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2018) ("A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).").

[205] *See* Virginia v. Hicks, 539 U.S. 113, 119–20 (2003) (defining the overbreadth doctrine).

constitutionally unprotected conduct.'"[206] That is from a unanimous Supreme Court opinion written by Justice Scalia.[207]

Hon. Anderson: Let's start here. Please tell us your name and your question.

Audience Member 1: I was wondering if you all could comment on the difference between the prior comment to 8.4 that used "knowing" standard versus the new rule that uses a "reasonably should know" standard.[208] It seems like 8.4 is taken from an intentional conduct standard to a negligence standard, and negligent discrimination seems like an oxymoron because discrimination is intentional. The "reasonably should know" language makes it sound like the disciplinary board would only need to show that somebody else would think that it's offensive, not that it was intended to be offensive.[209]

Prof. Rotunda: I think that was the purpose of the change in the language, to make it easier to bring these charges and prove them.

Ms. Brown: Originally, the knowingly part was not there.

Prof. Rotunda: No. It was there.

Ms. Brown: No.

Audience Member 1: It was in the comment. It said "knowingly."[210]

Ms. Brown: Right. But, the language of the proposed rule was modified several times over the course of all of the discussions.[211] There was language that made it a little less difficult for a prosecuting agency or disciplinary prosecutor to prove the language, and so, stronger language was put in as somewhat of a protection to lawyers regarding the level of knowledge that they had to have in order to be charged with an ethics violation.[212]

Prof. Rotunda: Here's the actual language, and this is before 2016. This is in the comment: "In the course of representing the client, a lawyer

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[206] *Id.* at 119 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

[207] *Id.* at 115.

[208] *Compare* MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2002) ("A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon [a protected classification], violates paragraph (d) when such actions are prejudicial to the administration of justice."), *with* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) ("It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of [a protected classification].").

[209] *See* REVISED RESOLUTION, *supra* note 43, at 7–8 (distinguishing between the subjective "knows" standard and the objective "reasonably should know" standard).

[210] MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2002). Although "knowingly" was included in the comments of former Rule 8.4, it was not included in the text of the Rule. *Id.*

[211] REVISED RESOLUTION, *supra* note 43, at 2–4.

[212] *Id.* at 8 ("The addition of 'knows or reasonably should know' as a part of the standard for the lawyer supports the rule's focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer.").

should not knowingly manifest bias." They changed "knowingly" to "reasonably know" to make it easier to prove the case.

Hon. Anderson: Over here, a question.

Audience Member 2: Good afternoon. Here's my question. I teach Torts. We have, in tort law, a standard that conduct and statements, at some point, rise to the level that tort liability is imposed: intentional infliction of emotional distress ("IIED").

It seems to me that what Professor Gillers was describing with those comments is outrageousness and should not be tolerated in a decent society.[213] However, how should we square that with the fact that our society has become coarser?

When our society has become as course as it is, why not just say, look, we're not going to measure statements and conduct by what somebody at any given moment finds offensive, but instead, using the emotional distress standard, identify conduct or language that becomes outrageous and allow judges, bar councils, and disciplinary committees to punish these attorneys without having new rules that are somewhat vague and potentially limit people's ability to join law-related organizations?

Hon. Anderson: Professor Gillers.

Mr. Gillers: Do you prefer, as adequate notice, "prejudicial to the administration of justice" or "offensive personality?"[214]

Audience Member 2: I think, ultimately, if the standard corresponds to something like IIED, it is no longer an issue of how the rule is phrased. It is an issue of how the rule is enforced. Just like IIED is not really a clear standard, but we know what it means.[215]

Prof. Rotunda: "Prejudicial to the administration of justice" is way too vague as a basis to take away somebody's livelihood. But, if you look at the cases where lawyers are actually disciplined under that language, you find out, often, they did something else bad that was within the rule,[216] and the bar disciplinary authorities used a kitchen sink approach and

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[213] *See supra* notes 115–128, 134–138 and accompanying text.

[214] *Compare* MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2018) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."), *with* United States v. Wunsch, 84 F.3d 1110, 1114 n.6 (9th Cir. 1995) (quoting California's Business and Professions Code § 6068(f)) ("It is the duty of an attorney . . . to abstain from all offensive personality."). The California statute was amended to delete the language "offensive personality" in 2001. CAL. BUS. & PROF. CODE § 6068(f) (West 2018) (amended 2001).

[215] *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 51–52 (1982) (explaining that the tort of intentional infliction of emotional distress provides no clear-cut definition of outrageous conduct).

[216] *See* REVISED RESOLUTION, *supra* note 43, at 5, 6 n.15 (providing numerous examples of cases in which lawyers were disciplined for harassment and discrimination prior to the enactment of revised Rule 8.4(g)).

threw in a claim under that part of the rule as well. I never found a case decided only on the basis of being prejudicial to the administration of justice, other than maybe bribing a juror.[217] But, in any event, to the extent these rules are vague, they should be made clearer, not more vague.

Audience Member 3: We're all lawyers here, or almost all of us are, so we like to solve problems with rules. The problem with rules in this kind of situation is the more specific they get, the more interstices you create. The examples that Professor Gillers cited are real, they're serious, and they cause actual injury and hurt. I don't mean to minimize them, but would we be better off turning 180 degrees in the other direction by adopting a rule that says simply "lawyers shall treat all participants in the legal process with dignity, courtesy, and respect?"

Prof. Rotunda: If you like to give all this power to disciplinary people, then that would be what you do. If you'd like to disbar lawyers or refuse to admit them because they engage in unpopular activities, that's what you do. We saw all these unfortunate examples in the 1950s and 60s, both with the McCarthy era followed by the Vietnam War protests, where the ABA, sadly, was not in the vanguard in protecting free speech.[218] It seems like every generation has to learn and relearn what the prior generation learns. Everyone says, "Oh, this time it's different."

I think when lawyers engage in racist or sexist conduct, we should shun them or make fun of them. Most people would not want to patronize lawyers like that. In that sense, I think the general market can take care of the issue. I think it is fine to publicize what they've done. But once you have a vague rule, you're asking for trouble. The tort of intentional infliction emotional distress has all kinds of safeguards built into it because the courts were worried when they created it that it would be excessive.[219]

This has none of the safeguards you get in ordinary tort law in which all you could lose is some money. Here you could lose your license to practice law.[220] You lose your livelihood.

Hon. Anderson: Professor Gillers.

Mr. Gillers: About twenty-five years ago, the profession was all about writing codes of civility and codes of professionalism, and many

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[217] *See In re* Keenan, 50 N.E.2d 785, 787 (Mass. 1943) ("It is difficult to conceive of any offense that could strike a more direct and deadly blow at the administration of justice than the bribing of jurymen.").

[218] *See* Moliterno, *supra* note 91, at 736–39, 750 (describing the impact that McCarthyism and the Vietnam War protests had on the American legal profession, specifically lawyer discipline by the American Bar Association).

[219] *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW INST. 2012) (explaining that the limits imposed by the specific elements of the tort are "essential" to prevent its application from becoming overbroad).

[220] MODEL RULES FOR LAWYER DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2018) (listing disbarment as one of several appropriate sanctions for lawyer misconduct).

state bars generated codes of civility.[221] The ones I'm familiar with always began by saying, "Nothing in this code shall be a basis for discipline or civil liability and cannot be cited in any forum."[222] They had language like "dignity" and "respect."[223] Personally, I'd rather have 8.4(g). I think if we had a requirement of dignity and respect, we would generate a jurisprudence that mimicked 8.4(g) anyway. The reason I want 8.4(g) is that it is a statement about what the American legal profession stands for. It is a statement we are making to the public. It is a statement we are making to ourselves and to our law students. And it gives clear notice. Having it there is important apart from its use.

Hon. Anderson: Yes, sir.

Audience Member 4: President Brown, my question is for you: suppose that I am the managing partner of a very large law firm that recruits from only the top law schools and only the law review members from those top law schools, as a result, my entering class of new associates every year has the look of two typical big law entering class of associates every year.

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[221] Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 101 (2011). While the first state civility code was enacted in 1986, *id.* at 101 n.17, many states' Professionalism and Civility Codes are still in force today. *See Professionalism Codes*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/, (last updated Mar. 2017) (providing the titles for state and sub-jurisdictional professionalism and civility codes).

[222] *See* MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (AM. BAR ASS'N 1980) ("The Model Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct."); VOLUNTARY STANDARDS OF CIVILITY pmbl. (D.C. BAR BD. OF GOVERNORS 1997) ("[T]hese standards are voluntary and are not intended by the D.C. Bar Board of Governors to be used as a basis for litigation or sanctions . . . ."); CODE OF PROF'L COURTESY (ALA. ST. BAR ASS'N 1992) ("The following Code of Professional Courtesy is intended as a guideline for lawyers . . . . This code is not intended as a disciplinary code nor is it to be construed as a legal standard of care in providing professional services."); GUIDELINES FOR PROF'L COURTESY AND CIVILITY FOR HI. LAWYERS (JUDICIARY STATE OF HI. 2004) ("The Guidelines are not mandatory rules of professional conduct, nor standards of care, and are not to be used as an independent basis for either disciplinary charges by the Office of Disciplinary Counsel or claims of professional negligence.").

[223] *See* MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (AM. BAR ASS'N 1980) ("The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government.").

In that context, what is the difference between the negligent discrimination standard of rule 8.4(g)[224] and the disparate impact standard of hiring cases under employment laws, if any?[225]

Ms. Brown: The rule says that you cannot harass or discriminate,[226] and I think that we should focus on those two words. Limiting the schools from which you choose to recruit does not constitute harassment. If you choose to recruit only from certain places, that is okay. The rule does not prohibit law firms from doing that.[227] That is not discrimination on its face or otherwise. It's the same notion as choosing to go to Mount Holyoke Baptist Church as opposed to Thomas More's Catholic Church. That is not discriminatory conduct under 8.4.

Audience Member 4: You would support, for example, a comment that said, "This does not adopt disparate impact model proof for negligent discrimination?"

Ms. Brown: I think that it's bad for your law firm for you to do that, but it is not discriminatory conduct for you to recruit only at certain schools.

Prof. Rotunda: Comment four says this covers an operator managing a law firm, so it would cover the decision of who you hire and who you fire.[228] Then, it says that in making these decisions of who to hire and fire, you can do things to promote diversity and inclusion without violating the rule.[229] I guess no one has ever thought that recruiting only

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[224] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018); Letter from David Nammo, CEO & Exec. Dir., Christian Legal Soc'y, to Richard P. Lemmler, Jr., Ethics Counsel, Rules of Prof'l Conduct Comm. (Aug. 14, 2017) (on file with the author) (opposing the "adoption of ABA Model Rule 8.4(g), as well as the language proposed by the Subcommittee for a new Louisiana Rule 8.4(h)" on the grounds that the new rule "adopts a negligence standard rather than a knowledge/intent standard").

[225] In employment discrimination cases, disparate impact occurs when an employer implements a practice or policy that "disproportionately affect[s] a protected group." Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 98–99 (2006). The employer need not have intended his actions to be discriminatory; it is enough that the mere impact of his actions had that effect. *Id.* In this way, disparate impact discrimination is similar to a negligence theory of discrimination in that it does not require actual intent. *Id.* Moreover, the federal code sets forth a three-part test a plaintiff must establish in order to bring a case of disparate impact. *Id.* at 102–03 (citing 42 U.S.C. § 2000e-2(k)(l)(A) (2000)); *see also* Ricci v. DeStefano, 557 U.S. 557, 578 (2009) (providing the legal history, definition, and statutory basis for disparate impact).

[226] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).

[227] *See id.* r. 8.4(g) cmt. 4 (permitting law firms to "implement[] initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations" but making no mention of a law firm's inability to recruit from a specific place).

[228] *Id.*

[229] *Id.*

from the top law schools is being inclusive and diverse. It can raise an issue.

Then, the rule says "know or reasonably should know." Well, in all the other law, we do look at disparate impact.[230] Think of the messenger who you don't hire. He sues you and says you didn't hire him because he's transgender. That's not why I did it. It's not against the law in my state anyway. But, he thinks it is. Now you've got a cause of action as well as a complaint before the Bar. Then, you hope that the Bar will exercise discretion not to prosecute you. If you're a big white-shoe law firm, they won't, and if you're little bit of a prickly dingle who represents clients that other people don't like, they can always open up a charge.

Ms. Brown: I think that we can find a ghost in every closet.

Audience Member 5: I have a question about how harassment is defined and how the putative harmed person can define harassment. Consider a hypothetical law student who goes in for an interview with a law firm, and the law student is dressed like I am, but the student goes in and says, "I prefer to be called G and to be referred to with non-binary gender pronouns." If the partner conducting the interview uses the pronoun he or she, does that violate Rule 8.4(g)?

Prof. Rotunda: Comment three tells us that the fact that it does not violate a substantive anti-discrimination or anti-harassment statute doesn't mean that it does not violate this rule.[231] I can create all kinds of hypothetical complaints that would cause some bad publicity and money issues, even if the lawyer is ultimately vindicated. That's one of the real harms.

Ms. Brown: It also depends on whether the chief disciplinary officer of the state brings any claims against an attorney. They have a lot of discretion as to what kind of claims they will actually bring.[232]

AG Paxton: I just want to say quickly, those are exactly the types of issues that are going to get litigated if we have this rule.

Ms. Brown: I disagree. There's no evidence that shows that there's an increase in litigation.

Hon. Anderson: Next question. Yes, sir.

Audience Member 6: I very recently read Justice Sotomayor's autobiography, and she talked about a case where she thought that she

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[230] *See supra* note 225.

[231] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2018) ("The substantive law of antidiscrimination and anti-harassment statutes and case law *may guide* application of paragraph (g).") (emphasis added).

[232] *See* MODEL RULES FOR LAWYER DISCIPLINARY ENF'T r. 4(B)(1)–(3) (AM. BAR ASS'N 2018) (granting the disciplinary counsel the power to evaluate and investigate "all information coming to the attention of the agency" and the ability "to dismiss or recommend probation, informal admonition, a stay, the filing of formal charges, or the petitioning for transfer to disability inactive status with respect to each matter brought to the attention of the agency").

had been racially harassed in law school.[233] I was aware of that case because I was working at the law firm with the partner who supposedly harassed her. He was asking questions at a dinner with many people where he said something like, "look, our law firm is being encouraged to diversify and to engage in affirmative action, but one of the things we found is that we've hired several minority people with lower grades and LSAT scores with the hope of diversifying, and then, we had to let them go after two years. Isn't it better perhaps not to engage in affirmative action?"

She filed a complaint with the law school, my law firm and his partner were required to formally apologize to Yale Law School.[234] She wrote about this in her autobiography.[235] I gather that the point of this rule is to give increased protections and move the bar a little bit on the issue of harassment of protected groups. I'd be curious as to what you would think about a law school interviewer at a dinner with a number of people asking questions of that sort whether that violates a rule.

Prof. Gillers: I think it's a fine question, and it can create a great conversation. I encourage discussion about these issues, and I think it's beneficial to law students and to the interviewer to have that discussion. On the other hand, there are some related circumstances that would violate the rule. For example, I think it would violate the rule if a law firm decided that they are not going to hire any more Hispanic associates because their retention rate as a class is bad. Or if the firm decided to reject any application from a Hispanic male or female, not because of anything about that person, but because he or she is a member of a group with which the firm has had bad experience in hiring. I think that would also violate the rule.

Audience Member 6: To clarify, this partner had invited Sotomayor to a dinner because he thought she was an excellent applicant and was asking this question. [236] Her complaint was not that she was not hired, but rather that you shouldn't ask questions like this.[237]

Prof. Gillers: Right. Well, none of us were at that dinner, and I haven't read the book. I can think of situations in which I would think that conversation would be beneficial. Maybe this was such a situation and

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[233] SONIA SOTOMAYOR, MY BELOVED WORLD 239–44 (2013).

[234] *Id.* at 242–43; Stuart Auerbach, *Law Firm Apologizes to Yale Law Student*, WASH. POST (Dec. 16, 1978), https://www.washingtonpost.com/archive/local/1978/12/16/law-firm-apologizes-to-yale-student/476c0d94-63b8-44d5-a990-a4dfc446abc7/?noredirect=on&utm_term=.c72e8a8a0df9.

[235] SOTOMAYOR, *supra* note 233, at 240–44.

[236] *Id.* at 242–43 ("[Sotomayor] decided to address a formal complaint to the firm through the university's career office and challenge Shaw, Pittman's right to recruit on campus in light of that partner's disregard for Yale's antidiscrimination policy.").

[237] *Id.* at 241–42.

she's overreacting, or on the other hand, maybe it's not and she acted appropriately. Obviously, the content of the discussion is important. I might disagree with her, and if I did, I would not ban that law firm from interviewing at my law school.

Hon. Anderson: Next question. Over here.

Audience Member 7: Good afternoon. My question is about admission to the bar. We all had a life prior to practicing law. I find it unrealistic to believe that this rule would not be used in determinations of character and fitness assessments prior to admission. My first question is, what prevents a character and fitness committee from using this rule to assess students' previous lives against them in determinations of character and fitness?

Then, secondly, does that not also create a chilling effect on entry into the legal profession for people who may have engaged in speech or conduct prior to entering law school that may violate 8.4?

Prof. Rotunda: That is a risk. There's no doubt about it. While the cases say that the standard for not admitting you is the same as the standard for excluding you,[238] in practice, it is a lot easier to exclude. It is a lot harder for the applicant to get admitted if they decided under character and fitness that there's a problem.[239] Sometimes it goes back years. We live in an interesting world.

Ms. Brown: The character and fitness assessment does not just assess conduct violating 8.4. It addresses any type of issue that affects the potential lawyer's character.[240]

Audience Member 7: So, does this not give the character and fitness committees extra ammunition against applicants who arguably violated Rule 8.4?

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[238] *E.g.*, Bd. of Law Examiners v. Stevens, 868 S.W.2d 773, 776–77 (Tex. 1994) (applying a singular standard to bar applicants and practicing attorneys through the moral character and fitness requirement).

[239] *Compare* NAT'L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS'N SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2017 at viii (2017) [hereinafter NAT'L CONFERENCE OF BAR EXAMINERS] (explaining that an applicant's "denial of admission to the bar in another jurisdiction on character and fitness grounds" or "disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction" "should be treated as cause for further inquiry before the bar examining authority decides whether the applicant possesses the character and fitness to practice law"), *with* MODEL RULES FOR LAWYER DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2018) (providing four specific factors and an extensive list of mitigating factors that the court or board may consider when imposing sanctions after a finding of lawyer misconduct).

[240] *See* NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 239 at viii (listing of areas that "should be treated as cause for further inquiry before the bar examining authority decides whether the applicant possesses the character and fitness to practice law," including unlawful conduct, neglect of financial responsibilities or professional obligations, and evidence of mental or emotional instability).

Prof. Rotunda: Oh, yeah.

Ms. Brown: I wouldn't characterize it as *ammunition*. I would characterize it as compliance and not engaging in inappropriate conduct, not ammunition.

Hon. Anderson: Next question. Over here.

Audience Member 8: Good afternoon. This question is directed primarily to Attorney General Paxton, but I'd also love to hear input from anyone else on the panel. Attorney General Paxton, we actually covered your opinion on this matter recently in my legal profession course at the University of Alabama, and we discussed how many proponents of 8.4(g) consider it reflective of an aspiration that lawyers should be beyond reproach especially regarding harassment of what the ABA would consider protected groups, as Ms. Brown mentioned.[241]

Would the problem of the chill against free speech and free expression that's presented by the rule that you mentioned, possibly be abridged by adopting 8.4(g)'s language as a comment to the rules as opposed to an actual rule? As the comments are considered generally more aspirational and clarifying of the actual rules, rather than binding language. Would that be an acceptable compromise between the two positions?

AG Paxton: That would still concern me because it would use the same language, it would be used in the same way, and these cases that I've talked about would still exist with lawyers around the country.[242] We'd be battling this for years, and you'd have panel discussions about each case. I don't think it would change anything.

Hon. Anderson: Anything else? Next question.

Audience Member 9: Hi, good afternoon. I understand the concerns about religious liberty with the rule. Is there a comment or something that makes it clear that a religious lawyer is free to not take certain cases?

Ms. Brown: The comment very clearly states that a lawyer is not prohibited from accepting or declining a particular case.[243]

Prof. Rotunda: Yeah. The rule says you retain your rights under Rule 1.16 to decline a case.[244] Rule 1.16 doesn't give you a *right* to decline.[245] The old model code, which goes back to 1970, said we're not like taxi cabs. You don't *have* to take the next client that comes through the

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[241] *See supra* text accompanying notes 51–52.

[242] *See* Paxton, *supra* note 157, at 3–5; *supra* notes 185–88 and accompanying text.

[243] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) ("This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.").

[244] *Id.*

[245] *See id.* r. 1.16 (listing several circumstances in which a lawyer "shall not represent" or "may withdraw from representing" a client); *id.* r. 1.16 cmts. 1–3, 7–8 (defining specific instances in which a lawyer "must" or "may" withdraw from representing a client).

door.[246] There is no such provision under the present rules.[247] Additionally, there's the New York opinion that says the ability to deny representation is limited by anti-discrimination laws, but they refrain from saying whether it is discrimination to refuse to represent someone suing your own religious institution.[248] That's a problem.

I gave the example of the lawyer that says, "I think you demean women by having four or five wives."[249] But, you could have a religious thing. I don't want to take your case and sue my pastor or sue my church because of their stance on gay marriage. That's become an issue now.[250]

Under rule 8.4, you have the right to reject in accordance with Rule 1.16.[251] Rule 1.16 says that you can withdraw if the client doesn't pay.[252] Lawyers are good about that. You must withdraw if continuing representation will involve you in violation of the law, but nothing says you don't have to take a case because you don't feel like taking the case.[253]

Hon. Anderson: We have ten seconds left. Anybody else want to respond further to that question? If not, thank you all very much. Please thank our panelists.

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[246] *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 2–26 (AM. BAR ASS'N 1980) ("A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client.").

[247] *See* N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 1111 ¶ 4 (2017) (stating that the language of the former Code of Professional Responsibility "was not carried over to the current Rules of Professional Conduct", but "the principle remains sound").

[248] *Id.* ¶ 8.

[249] *See supra* notes 80–81 and accompanying text.

[250] *See* N.Y. State Bar Ass'n Comm'n on Prof'l Ethics, Op. 1111 ¶ 8 (declining to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" while recognizing "that anti-discrimination statutes may limit a lawyer's freedom to decline representation"); Rotunda, *supra* note 7, at 4–5 (explaining that a lawyer's beliefs about gay marriage may be considered discriminatory in light of the "vaguely worded Rule 8.4(g)").

[251] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) ("This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.").

[252] *Id.* r. 1.16 cmt. 8 ("A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs . . . .").

[253] *See id.* r. 1.16(a)(1) ("[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law."); *id.* r. 1.16 cmts. 2, 7–8.

REVITALIZING THE ENGLISH NOTION OF SPECIALLY QUALIFIED JURIES: AN APPROACH TO SUPPORTING THE RIGHT TO TRIAL BY JURY FOR COMPLEX CIVIL LITIGATION IN VIRGINIA

INTRODUCTION

In a 1980 antitrust action, *In re Japanese Electronic Products Antitrust Litigation,* the Third Circuit Court of Appeals reviewed an interlocutory appeal regarding the District Court of New Jersey's denial of a motion to strike the opposing party's demand for a trial by jury.[1] The party bringing the motion to strike argued that the trial was too burdensome and complicated for a jury.[2] The nine-year discovery period produced "millions of documents and over 100,000 pages of depositions," and the trial was anticipated to last a full year.[3] The party bringing the motion also raised four general sources of complexity: "proof of the Antidumping Act claims, proof of the alleged conspiracy, resolution of a number of financial issues, and understanding of several conceptually difficult legal and factual issues."[4] Among the tasks required of the jurors were: (1) analyzing thirty years of Japanese market conditions and business practices, and (2) making price comparisons of thousands of electronic products based upon their marketability, performance, and cost of production.[5] The Third Circuit ultimately held that the case was too complex for a jury and that a "jury [would] not be able to perform its task of rational decision-making with a reasonable understanding of the evidence and the relevant legal standards."[6] This court's holding is known as the complexity exception to the Seventh Amendment and has only been accepted by the Third Circuit.[7] The Ninth Circuit has rejected the complexity exception, resulting in a split between the circuits.[8] The Supreme Court has never addressed the issue, but "the overall trend in federal courts has been to expand—not limit—the right to a jury trial."[9]

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1 631 F.2d 1069, 1071, 1073 (3d Cir. 1980).

2 *Id.* at 1073.

3 *Id.*

4 *Id.*

5 *Id.* at 1074.

6 *Id.* at 1086.

7 *Id.* at 1080, 1086.

8 *See In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979) ("Not only do we refuse to read a complexity exception into the Seventh Amendment, but we also express grave reservations about whether a meaningful test could be developed were we to find such an exception."). *Contra In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d at 1086.

9 Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: An Anachronism?*, 40 AM. J. TRIAL ADVOC. 1, 3 (2016).

In the absence of a complexity exception, courts grapple with how to secure jurors who can meaningfully and competently decide complex civil cases.[10] One solution to this dilemma is to empanel jurors of special skill or qualification in certain complex cases.[11] This solution originates from English jury procedures, which were carried over to the American colonies and adopted by many states, including Virginia, after the Revolutionary War.[12] This Note addresses how Virginia can adopt special jury procedures to empanel jurors capable of reaching informed decisions in complex civil cases by incorporating the historical procedures used in England and several of the American states, and the current procedures used in Delaware, for empaneling specialized juries.[13] Part I traces England's development of specialized juries and the procedures employed prior to the American Revolution.[14] Part II explains the American concept of trial by jury and evaluates different states' approaches to specialized juries, both currently and historically.[15] Finally, Part III recommends how Virginia may implement a specialized jury system to ensure that jurors can meaningfully comprehend and decide complex litigation.[16]

I. ENGLISH HISTORICAL SUPPORT FOR SPECIALIZED JURIES

At the time of the United States' independence from England, Virginia adopted Virginia Code § 1-200,[17] which states that "[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."[18] It, therefore, is necessary to review the adopted English common law when analyzing the applicability of specialized juries to modern Virginia jury trials. In order to overrule the English common law, Virginia "legislative intent to change the common law must be 'clear,' or 'plainly manifested;'"[19] otherwise, the English common law will continue intact.[20]

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10 *See, e.g.*, *U.S. Fin. Sec. Litig.*, 609 F.2d at 426–27.

11 *See infra* Part III.

12 *See infra* note 64 and accompanying text.

13 *See infra* Conclusion.

14 *See infra* Part I.

15 *See infra* Part II.

16 *See infra* Part III.

17 VA. CODE ANN. § 1-200 (2018) (originally enacted as VA. CODE, Ch. 38 (1819)).

18 *Id.*

19 Chandler v. Nat'l R.R. Passenger Corp., 882 F. Supp. 533, 534 (E.D. Va. 1995) (first citing Hill v. Nicodemus, 979 F.2d 987, 990 (4th Cir. 1992); then citing Griffith v. Raven Red Ash Coal Co., 20 S.E.2d 530, 533 (Va. 1942)).

20 *Id.*

A. Origin of Juries in England

According to Blackstone, "we may find traces of juries in the laws of all those nations which adopted the fe[u]dal system, as in Germany, France and Italy . . . [all of] who[m] had . . . tribunal[s] composed of twelve good men and true."[21] These twelve good men were generally the "equals or peers of the parties litigant: and, as the lord's vassals judged each other in the lord's court, so the king's vassals, or the lords themselves, judged each other in the king's court."[22] Modern historians theorize that the jury tradition was adopted after the Norman Conquest and used solely in civil cases—primarily in land disputes.[23]

Although the jury did not have formal recognition until the signing of the Magna Carta,[24] the earliest statutory iteration of the trial by jury dates back to a 1000 A.D. law of King Ethelred.[25] This statute called for "the Gemot (i.e., a local meeting) of every Wapentake (i.e., a township of 100 households), the reeve and [twelve] senior thegns . . . to 'go out and present on oath all whom they believed to have committed any crime.'"[26] The guilt or innocence of the rounded up individuals could be decided by "compurgation (i.e., oath helpers)"—meaning trial by battle.[27] By 1179 A.D., King Henry created the "Grand Assize," which gave civil litigants the opportunity to settle their dispute through either "wager of battle or appearance before twelve sworn knights of the district [therein]."[28] Trial by battle, however, was effectively ended in 1215 A.D. by the Fourth Lateran Council, leaving the framework for the modern jury system.[29]

Knights were also historically empaneled for possessory assizes and in cases where a recalcitrant defendant refused to plead how he wished to be tried.[30] In such cases, twenty-four knights, known as a "strong jury," would use force to get the defendant to plead.[31] It was the Magna Carta

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[21] 3 WILLIAM BLACKSTONE, COMMENTARIES *349, *349 (archaic spelling updated).

[22] *Id.* (archaic spelling updated).

[23] *See* N.T. Nemetz, *The Jury*, 43 ADVOC. 353, 355 (1985) ("I prefer the view of most modern historians that the jury directly emanated from customs brought to England after the Norman Conquest.").

[24] *See id.* ("[The] Magna Carta gave first, formal recognition to the jury trial in English common law.").

[25] *See* 38 Ethelred 2 c. 3 (Eng.) (depicting King Ethelred's law on trial by jury); BLACKSTONE, *supra* note 21.

[26] Nemetz, *supra* note 23 (quoting 38 Ethelred 2 c. 3).

[27] *Id.*

[28] *Id.*; *see* Thomas Glyn Watkin, *Feudal Theory, Survival Needs and the Rise of the Heritable Fee*, 10 CAMBRIAN L. REV. 39, 41 (1979) (explaining how creation of the assize was instituted in 1179 A.D.).

[29] Nemetz, *supra* note 23.

[30] JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 133 (New York University Press 2006).

[31] *Id.*; *see* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 3 (1978) (explaining how courts permitted physical force against criminal suspects).

which ultimately enshrined the right to trial by jury as "the principal bulwark of [British] liberties," being of the highest and most beneficial right of the British people.[32]

B. Formation of Specialized Juries

Specialized juries for civil litigation were first employed by the English common law during the fourteenth-century, but the first significant statute concerning special juries did not appear until 1730.[33] The term "special jury" has taken on three distinct meanings throughout the course of English history: (1) juries of higher-than-ordinary social standing, (2) juries of persons with special knowledge or expertise, and (3) the struck jury.[34]

The first category, juries of higher-than-ordinary social standing, came about due to statutes and rules of court that set qualifications for who could serve as a juror.[35] These statutes and rules were intended to empanel able, intelligent men that were immune from bribery.[36] The common medieval thinking was that:

> [T]he likelihood of corruption varied in inverse proportion to wealth, and so the root cause of perjury in jurors was considered to be the impaneling of men of insufficient substance . . . [a] typical fifteenth-century reaction to the prevalence of corruption was to make the qualification[s] [for jurors] even more exclusive.[37]

The main method of attaining juries likely to resist bribery was to require jurors to have a certain amount of money as set by statute, or the equivalent value in their leasehold or personal property.[38]

In lawsuits of national importance, "men of quality and substance," typically knights, esquires, or gentlemen, were empaneled to decide the case; these juries were known as substantial juries.[39] In grand jury proceedings, members of the grand jury were generally men of "Great Worth"[40] and considered "ingenious and learned."[41] Blackstone also notes

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[32] BLACKSTONE, *supra* note 21, at *350.

[33] OLDHAM, *supra* note 30, at 127–28.

[34] *Id.* at 127.

[35] *Id.*

[36] *Id.*

[37] 2 THE REPORTS OF SIR JOHN SPELMAN 107 (J.H. Baker ed., Selden Soc'y 1978).

[38] OLDHAM, *supra* note 30, at 130–31.

[39] *Id.* at 133.

[40] Letter from J.M. to Thomas Cockerill (Dec. 29, 1681), *in* A GUIDE TO ENGLISH JURIES: SETTING FORTH THEIR ANTIQUITY, POWER, AND DUTY, FROM THE COMMON-LAW AND STATUTES 135, 142–43 (printed for Thomas Cockerill, London 1682).

[41] THE OFFICE OF THE CLERK OF THE ASSIZE: CONTAINING THE FORM AND METHOD OF THE PROCEEDINGS AT THE ASSIZES, AND GENERAL GOAL-DELIVERY, AS ALSO ON THE CROWN 30 (printed for H.T., folded by W. Freeman, 2nd ed. London 1694).

that grand jurors were "usually gentlemen of the best figure in the county."[42]

The second category, juries of special knowledge or expertise, also known as juries of experts, first appeared in two fourteenth-century statutes, which called for "Next Neighbors," those who "have best Knowledge of the Truth, and be nearest."[43] Jurors themselves were considered witnesses and "were expected to know or to find out the facts of the event . . . in dispute and ordinarily would decide without the help of any documentary or testimonial evidence given in court."[44] Jurors instead:

> [B]ased their verdicts on information they actively gathered in anticipation of trial or which they learned by living in small, tight-knit communities where rumor, gossip, and local courts kept everyone informed about their neighbors' affairs. Interested parties might also approach jurors out of court to relate their side of the case.[45]

Although such jurors did not necessarily need to be eyewitnesses to the crime committed, in many instances they were.[46] For example, in a 1332 contempt case involving the assault of a man ascending a stairwell outside of the door to the hall of pleas and states, the assembled jury was composed of "twenty-four from among those who were present at the time outside and inside the hall."[47] In another 1330s case involving the origin of a letter supposedly delivered to the Castle of York, a jury of twenty four "knights [and] others etc. from among those who were in the castle on [that] day" were empaneled.[48] During the fourteenth-century, evidence presented in court began replacing the self-informed jury, and by the fifteenth-century, evidence by the court, rather than by jurors, was commonplace.[49]

Gathering an entire panel of next neighbors ultimately became unworkable, leading courts to empanel a hybrid jury containing common individuals and a certain number of hundredors (i.e. next neighbors).[50] Hundredors were those men "fit to be empaneled [upon] a Jury [for] any controversy, and dwelling within the hundred where the Land lieth, which is in question . . . whereby they . . . may have Notice *de rei veritate*, or

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42 4 WILLIAM BLACKSTONE, COMMENTARIES *298, *299 (archaic spelling updated).

43 42 Edw. 3, c. 11 (1368) (Eng.); 28 Edw. 1, c. 9 (1300) (Eng.) ("[T]hey shall put in those Inquests and Juries such as be next Neighbors, most sufficient, and least suspicious.") (archaic spelling updated).

44 OLDHAM, *supra* note 30, at 115.

45 Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 123 (2003).

46 *See infra* notes 47–49 and accompanying text.

47 *Introduction* to III SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD I lxxxii (G.O. Sayles ed., B. Quaritch 1939) (Eng.).

48 *Plea 47*, *in* V SELECT CASES IN THE COURT OF KING'S BENCH UNDER EDWARD III 93, 94–95 (G.O. Sayles ed., B. Quaritch 1958) (Eng.).

49 Klerman, *supra* note 45, at 124–25.

50 OLDHAM, *supra* note 30, at 137.

better knowledge of the cause."[51] Throughout the sixteenth and seventeenth-centuries, the ratio of hundredors to common folk on the jury varied. Statutes called for as many as six, or as few as two hundredors on the panel.[52] But, by 1705, Parliament altogether eliminated the requirement of empaneling hundredors in civil cases.[53]

Beyond the next neighbor form of expert jurors, English courts often empaneled men of the same trade as one, or both, of the parties to the dispute.[54] One such form of jury was the merchant jury.[55] Many examples of merchant juries, as well as juries composed of merchants and next neighbors, appear in the thirteenth-century records of the Fair Court of St. Ives.[56] In the Middle Ages, in the Courts of Piepowder,[57] the trials were entirely heard by merchants.[58] Blackstone refers to the Courts of Piepowder as "the lowest, and at the same time the most expeditious, court[s] of justice known to the law of England;"[59] these courts moved quickly because of the nomadic nature of merchants.[60] By the sixteenth and seventeenth-centuries, merchants were regularly empaneled to decide an ever-increasing number of legal questions of mercantile importance.[61] Matthew Hale, a seventeenth-century jurist, wrote that when questions of *lex merchantoria* appeared before the common law courts, "if it be a question touching the custom of merchants[,] merchants are usually jurors at the request of either party."[62]

In one 1646 King's Bench decision, the court granted a motion for a jury of merchants "'to try an issue between two Merchants, touching Merchant affairs,' because 'they might have better knowledge of matters in difference which was to be tried, than others could who were not of that

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[51] MICHAEL DALTON, THE OFFICE AND AUTHORITY OF SHERIFS 399 (London 1662) (archaic spelling updated).

[52] BLACKSTONE, *supra* note 21, at *360.

[53] OLDHAM, *supra* note 30, at 138.

[54] *See infra* notes 55–65 and accompanying text.

[55] OLDHAM, *supra* note 31, at 141.

[56] *Id.* at 140–41.

[57] *See* HENRY FINCH, LAW, OR, A DISCOURSE THEREOF; IN FOUR BOOKS 246, 412 (printed by Henry Lintot, folded by D. Browne 1759) (archaic spelling updated) (explaining the Courts of Pypowder were special tribunals that administered justice for wrongs committed at a fair or market).

[58] OLDHAM, *supra* note 30, at 140.

[59] BLACKSTONE, *supra* note 21, at *32 (archaic spelling updated).

[60] *Id.*

[61] *Id.*; *see* James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 173 (1983) (explaining that special merchant juries were introduced in the sixteenth and seventeenth centuries).

[62] J.H. Baker, *Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861*, 28 INT'L & COMP. L.Q. 141, 144 (1979) (quoting Matthew Hale, *A Disquisition Touching the Jurisdiction of the Common Law and Courts of Admiralty in Relation to Things Done Upon or Beyond the Sea, and Touching Maritime and Merchants Contracts*, *in* HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION 4, 57 (1993)).

profession.'"[63] When Lord Mansfield ascended to the King's Bench in 1756, he popularized the use of special juries of merchants, causing their use to become prevalent throughout England and also throughout the American colonies.[64] Lord Mansfield regarded the law of merchants as a part of the law of nations and found such juries necessary to advise the court of the prevailing custom in merchant law.[65]

Prior to the American Revolution, many other types of juries of special qualification were used throughout England—including juries of attorneys, priests, foreigners, cooks, and fishmongers.[66] One such jury of special qualification was the all-female jury, known as a "jury of matrons."[67] Prior to the twentieth-century, juries in both England and America exclusively empaneled male jurors; however, for cases of "female special-purpose," all-female juries were composed.[68] This "special purpose" was to determine whether a female litigant was quick with child, and the jury was composed of matrons—women regarded as experts in pregnancy and childbirth.[69] Such findings were relevant in civil matters regarding inheritance—whether the widow was with child by her late husband—and in criminal cases in order to stay a plea of execution.[70] In either case, for the inquiry to take place, the female litigant would "plead her belly" and the jury of matrons would render a verdict stating whether the woman was quick with child.[71] Advancing medical technology ultimately rendered juries of matrons obsolete and made such inquiries the province of medical expertise.[72] Other inquiries, such as insanity and muteness, were also rendered the province of medical expertise due to advancing medical technology.[73]

The third category, the struck jury, was a procedure that allowed the parties to select jurors from a large panel of men gathered by the sheriff and alternately "strike" names off of the list until the panel was narrowed to the appropriate number of jurors.[74] Blackstone explains that struck juries were empaneled for "causes [] of too great nicety for the discussion of ordinary freeholders," or in cases "where the sheriff was suspected of partiality, though not upon such apparent cause, as to warrant an

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63 OLDHAM, *supra* note 30, at 141 (quoting WILLIAM STYLE, REGESTRUM PRACTICALE 161 (1657) (archaic spelling updated)).

64 Lochlan F. Shelfer, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 214 (2013).

65 *Id.* at 214–15.

66 OLDHAM, *supra* note 30, at 128, 138, 140–41; Oldham, *supra* note 61, at 169.

67 *Id.* at 80, 128.

68 *Id.* at 80.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 113–14.

73 *Id.* at 112.

74 BLACKSTONE, *supra* note 21, at *358.

exception to him."[75] Struck juries first expressly appeared in a 1696 English statute which specified the size and number of jury panels for civil cases at the York assizes, "except [only] where Special Juries are directed to be returned by Rule of Court."[76]

In that same year, two King's Bench rulings provided a framework for striking jurors.[77] One of the King's Bench rulings held that if both parties received proper notice and only one side appeared, "he that appears shall, according to the ancient course, strike out twelve; and the Master shall strike out the other twelve for him that is absent."[78] A second King's Bench ruling held that the master is to "strike [out] forty-eight, and each of the parties shall strike out twelve," otherwise "the Master is to strike twenty-four, and the parties have no liberty to strike out any."[79] Generally, struck juries, as opposed to common juries, were ordered by party request, when "good cause existed, even over the objection of one or both parties."[80]

By 1730, the struck jury procedure was fully established.[81] The 1730 statute, "An Act for the Better Regulation of Juries,"[82] clarified that consent of both parties was not necessary for a struck jury to be ordered and that the requesting party was to pay for the cost of striking the jury.[83] The jurors empaneled through the struck jury procedure were paid a fee for their time, sometimes higher than the fees paid to common jurors, though no rule ever set the sum to be paid to the struck jurors.[84] The American colonies largely adopted the 1730 statute, and though neither the original statute nor the American colonies' adaptation of the statute ever explicitly stated that the struck jury was used to empanel men of certain rank or expertise, the struck jury procedure often resulted in filling the jury box with upper-class gentlemen.[85]

II. THE AMERICAN RIGHT TO A TRIAL BY JURY

Although the United States Constitution guarantees citizens the right to a trial by jury, nowhere in the document is there actual mention of the right to a jury *of one's peers*.[86] At most, the Sixth Amendment

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75 *Id.* at *357–58.

76 7 Will. 3 c. 32 (Eng.) (archaic spelling updated).

77 *See infra* notes 78–80 and accompanying text.

78 91 Eng. Rep. 352, 352; 1 Salkeld 406, 406.

79 *Id.*

80 OLDHAM, *supra* note 31, at 148–49.

81 *Id.* at 128.

82 6 Geo. 4 c. 50 (1825) (Eng.).

83 3 Geo. 2 c. 25 (1730) (Eng.).

84 OLDHAM, *supra* note 30, at 149.

85 *Id.* at 179.

86 *See* U.S. CONST. art. III, § 2, cl. 3; *id.* amends. V, VI, VII (lacking any mention of a right to a jury of one's peers).

protects the right of the accused in criminal prosecutions to have a trial "by an impartial jury of the State and district wherein the crime shall have been committed."[87] The Sixth Amendment guarantee, due in large part to the civil rights movement, has been interpreted to mean that an individual charged with a crime has the right to be tried by an impartial jury drawn from a fair cross-section of his community[88]—specifically regarding his community's racial and gender composition.[89] Significantly, the Sixth Amendment does not guarantee that the venire will contain an accurate representation of the community's racial and gender break down.[90] The Sixth Amendment "merely prohibits deliberate *exclusion* of an identifiable . . . group from the juror selection process,"[91] including exclusion based on "account of race, color, religion, sex, national origin, or economic status."[92] The court may, however, exclude based on criminal history, residency, lack of comprehension or literacy of the English language, and mental or physical infirmity.[93]

For there to be a violation of the fair cross-section requirement of the Sixth Amendment, there must be evidence:

> 1. That the group alleged to be excluded is a 'distinctive' group in the community;
>
> 2. That the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> 3. That this under-representation is due to systematic exclusion of the group in the jury-selection process.[94]

Beyond the fair cross-section requirement of the Sixth Amendment, there is no requirement that the venire be composed of individuals of similar background to the defendant.[95] The federal courts have declined to recognize groups—such as blue-collar workers, less educated

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87 U.S. CONST. amend. VI.

88 *See* 28 U.S.C. § 1861 (1970) ("[A]ll litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.").

89 Taylor v. Louisiana, 419 U.S. 522, 526–27, 531 (1975) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

90 *See* United States v. Jefferson, 725 F.3d 829, 835 (8th Cir. 2013) (quoting United States v. Jones, 687 F.2d 1265, 1269 (8th Cir. 1982)) ("The Constitution does not guarantee a defendant a proportionate number of his racial group on the jury panel or the jury which tries him; it merely prohibits deliberate exclusion of an identifiable racial group from the juror selection process.").

91 *Id.* (emphasis added) (quoting *Jones*, 687 F.2d at 1269).

92 28 U.S.C. § 1862 (1970).

93 *Id.* § 1865.

94 United States v. Sanchez, 156 F.3d 875, 879 (8th Cir. 1998) (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979).

95 *See infra* notes 96–98 and accompanying text.

individuals,[96] members of the youth-oriented rap culture,[97] persons who do not have phones, and persons who are not home during the day[98]—as constitutionally protected groups that should be represented in the jury box. This reflects a strict interpretation of the third factor—under-representation due to systematic exclusion in the jury-selection process.

The idea of a jury of one's peers is preserved in the American system by "ensur[ing] that members of all significant, or 'cognizable,' segments of the community *have the opportunity to be jurors*."[99] This egalitarian notion, preserved and furthered by the Fourteenth Amendment, clashes with the traditional idea of a specialized jury by preferring proportionate representation of the community over a jury of similar likeness to the defendant.[100] The court, in *Taylor v. Louisiana*, effectively determined that the "only 'representative' juries are 'impartial' juries.[101] This clashes with the classical common law belief that an impartial jury is simply one unencumbered by any personal agenda.[102] America has diverged from the classical model of impartiality due to historical systematic underrepresentation of women and minorities; this underrepresentation necessitated laws mandating equal representation in several realms of civic life including jury service.[103] Due to America's need to overcome discrimination, the Fourteenth Amendment of the United States was adopted, which made several of the Bill of Rights Amendments applicable to the states—including the Sixth Amendment, and therefore, the Federal

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[96] *See* Anaya v. Hansen, 781 F.2d 1, 2 (1st Cir. 1986) (holding that blue-collar workers and less educated individuals are not a cognizable group such that a mere showing of statistical underrepresentation is sufficient to find a violation of the fair cross-section requirement).

[97] *See* United States v. Jefferson, 725 F.3d 829, 835 (8th Cir. 2013) (denying defendant's Sixth Amendment allegation that he was denied a jury of his peers who would understand the youth-oriented rap music culture because there was a lack of evidence that the jury was not chosen from an impartial cross-section of the community).

[98] *See* Singleton v. Lockhart, 871 F.2d 1395, 1399 (8th Cir. 1989) (refusing to decide whether persons who do not have phones or are away from home during the day are distinctive groups for establishing systematic exclusion when Singleton failed to establish a prima facie case of discrimination).

[99] OLDHAM, *supra* note 31, at 177 (emphasis added).

[100] *See supra* notes 94–97 and accompanying text.

[101] *See* Taylor v. Louisiana, 419 U.S. 522, 526, 538 (1975) (requiring states to empanel jurors that are representative of the community.); JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 100 (Harvard University Press, 1994) (interpreting *Taylor*, 419 U.S. 522).

[102] *See* OLDHAM, *supra* note 30, at 204–05 (explaining that the classical model of jury selection was shaped such that unbiased jurors were empaneled who could decide cases unencumbered by any personal agenda).

[103] *See generally* 28 U.S.C. § 1862 (2012) (prohibiting discrimination in jury selection); 42 U.S.C. § 1981 (2012) (prohibiting discrimination in the guarantee of equal rights under federal law in all states).

Court's fair cross-section requirement as well.[104] The Seventh Amendment right to a trial by jury in civil cases, however, has not been incorporated to the states and is, therefore, not binding on the states.[105] However, many state constitutions, including Virginia's, provide for jury trials in civil cases.[106]

The Fifth Amendment's due process clause has been incorporated to the states[107] and has been interpreted to ensure that litigants, in both criminal and civil cases, can present their case to "a jury capable and willing to decide the case solely on the evidence before it."[108] This, however, can be a difficult feat when jurors are tasked with evaluating evidence that requires capabilities far beyond the abilities of the average juror.[109] For example, in one trial, jurors were tasked with analyzing evidence that spanned more than 19,000 pages of transcript and over 2,300 exhibits regarding advanced computer technology and complex economic analysis.[110] After deliberating for nineteen days, the jury found itself hopelessly deadlocked, leading to a mistrial and the potential for another jury to consider the matter on some future date.[111] Cases like this one have led to the proposal of a complexity exception to the Seventh Amendment's right to trial by jury.[112] The complexity exception would give the courts discretion to hold bench trials, as opposed to jury trials, when a civil case goes beyond the "practical abilities and limitations of juries."[113]

The main motivation behind the proposal for a complexity exception is the Fifth Amendment's due process guarantee that the jury be "capable

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[104] U.S. CONST. amends. VI, XIV; *see also* Duren v. Missouri, 439 U.S. 357, 358–59 (1979) (*citing* Taylor v. Louisiana, 419 U.S. 522, 526–31, 538 (1975)) (stating that an unreasonable representation of the denies rights under the Sixth and Fourteenth Amendments); Duncan v. Louisiana, 391 U.S. 145 (1968) (explaining the incorporation of the Sixth Amendment to the states through the Fourteenth Amendment); *see also* Brown v. Allen, 344 U.S. 443, 474 (1953) (discussing the fair cross-section test and its application to the States).

[105] Osborne v. Haley, 549 U.S. 225, 252 (2007).

[106] VA. CONST. art. I, § 11.

[107] *See* McDonald v. Chicago, 561 U.S. 742, 764, n.12 (2010) (noting that the Fifth Amendment has been incorporated against the states in Benton v. Maryland, 395 U.S. 784 (1969), Malloy v. Hogan, 378 U.S. 1 (1964), and Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897)).

[108] Smith v. Phillips, 455 U.S. 209, 217 (1982); Colgrove v. Battin, 413 U.S. 149, 155–56, 159–60 (1973).

[109] ILC Peripherals Leasing Corp. v. Int'l Bus. Machs. Corp., 458 F. Supp. 423, 446 (N.D. Cal. 1978) (quoting *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99, 104 (W.D. Wash. 1976)).

[110] *Id.* at 444.

[111] *Id.*

[112] *Id.* at 445–46, 448 (quoting *In re Boise*, 420 F. Supp. at 104)).

[113] Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

and willing to decide the case" upon the evidence presented.[114] The United States Court of Appeals for the Ninth Circuit, however, wholly rejected the argument that there should be a complexity exception stating, "[W]e . . . express grave reservations about whether a meaningful test could be developed were we to find such an exception. Where would the courts draw the line between those cases which are, and those which are not, too complex for a jury?"[115] This ruling has been followed by numerous federal district and appellate courts—with the one exception of the Third Circuit's ruling in favor of a complexity exception—therefore, even in highly complex civil litigation, the right to a trial by jury cannot be abridged in the majority of federal courts.[116] The lack of a complexity exception to the Seventh Amendment begs alternate solutions to ensure that jurors are capable of understanding highly complex litigation.

A. Virginia's Current Jury Procedure

Although the Seventh Amendment right to a trial by jury in civil cases has not been incorporated to the states, the Virginia Constitution provides an identical guarantee[117]—that "[a]ll parties to [civil] litigation are entitled to a fair and impartial trial by a jury of persons who 'stand indifferent in the cause.'"[118]

Section eight of the Virginia Bill of Rights encompasses the protections provided in the Sixth Amendment of the United States Constitution by protecting the right of a criminal defendant to be tried "by an impartial jury of his vicinage."[119] This language reflects the Sixth Amendment's guarantee of an "impartial jury of the State and district wherein the crime shall have been committed."[120] Vicinage is understood to mean "the territorial jurisdiction of the court in which the venue of the crime is laid,"[121] such that a defendant is entitled to a jury consisting of individuals who reside within the jurisdiction in which the criminal act

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[114] *See generally* Smith v. Phillips, 455 U.S. 209, 217 (1982); *ILC Peripherals Leasing Corp.*, 458 F. Supp. at 446 (quoting *In re Boise*, 420 F. Supp. at 104)) (suggesting that complex cases impede the jury's ability to assess evidence and decide cases).

[115] In re U.S. Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979).

[116] *See generally* SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1127–29 (Fed. Cir. 1985); Kian v. Mirro Aluminum Co., 88 F.R.D. 351, 355 (E.D. Mich. 1980) (rejecting the idea that a case can be too complex for a jury); *but see In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1079, 1084, 1086 (3d Cir. 1980) (outlining the complexity exception to the guarantee of a trial by jury).

[117] *Compare* U.S. CONST. amend. VII (outlining the guarantee of a trial by jury in federal courts where the value in controversy exceeds twenty dollars), *with* VA. CONST. art. I, § 11 (setting forth Virginia's comparable jury trial standard).

[118] Edlow v. Arnold, 415 S.E.2d 436, 437 (Va. 1992) (alteration in original) (quoting Commercial Union Ins. Co. v. Moorefield, 343 S.E.2d 329, 332 (Va. 1986)).

[119] VA. CONST. art. I, § 8.

[120] U.S. CONST. amend. VI.

[121] Karnes v. Commonwealth, 99 S.E. 562, 563 (Va. 1919).

was committed.[122] The Virginia Bill of Rights potentially surpasses the protections provided in the Sixth Amendment by stating that a criminal defendant "shall not be deprived of life or liberty, except by the law of the land or the judgment *of his peers*."[123] Unlike the United States Constitution's more general guarantee of a right to trial by jury, the Virginia Constitution actually specifies that the right to a jury is a right to a jury of one's peers.[124] Virginia law, however, is eerily silent regarding the definition of peers and has only used the term "jury of one's peers" to refer to the protections provided by the fair cross-section requirement of the Sixth Amendment.[125]

Regardless of Virginia's understanding of peers, the need for jurors capable of understanding complex civil litigation remains. Since 1849, Virginia has sought to secure jurors capable of understanding complex litigation by providing for the formation of "Special Juries" through a struck jury procedure.[126] The original Virginia statute, like the struck jury statutes in many other states,[127] mirrored the 1730 King George statute.[128] The procedure came from the English idea that, in cases of great consequence, starting with an unusually large venire would allow parties to best choose "qualified individuals who would apprehend the importance of the case and would behave responsibly."[129]

In 1950, Virginia enacted provisions creating smaller jury panels for most civil cases and adopted the struck jury procedure in every case.[130] These procedures on their face do not necessarily produce juries of special qualification or skill—they simply affect the size of the venire, and allow the parties to choose individuals from the venire who have the least bias toward either side. Virginia's struck jury statute says nothing about special qualifications for jurors, yet at the time the statute was enacted, it was customary to bring forward venires composed of upper-class

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[122] The Virginia Code provides an exception to the vicinage requirement of article I, § 8 of the Virginia Constitution by allowing for a change of venue in cases where one of the parties files a motion for a change of venue or where a change of venue is necessary to secure a safe and impartial trial of the accused. VA. CODE ANN. § 19.2-251 (2018). In such cases, the jury will not be pulled from the jurisdiction where the act occurred, but rather from the jurisdiction where the case will proceed. *Id*.

[123] VA. CONST. art. I, § 8 (emphasis added).

[124] *Compare* U.S. CONST. amends. VI, VII (guaranteeing a jury trial), *with* VA. CONST. art. I, § 8 (guaranteeing a jury of one's peers).

[125] *See, e.g.*, Winston v. Commonwealth, 604 S.E.2d 21, 35 (Va. 2004); Gray v. Commonwealth, 356 S.E.2d 157, 169 (Va. 1987) (discussing the requirements of a jury panel to meet the fair cross-section test in accordance with the Constitution).

[126] VA. CODE, ch. 162, § 8, 49 Stat. 627, 628–29 (1849) (current version at VA. CODE ANN. § 8.01-362 (2018).

[127] OLDHAM, *supra* note 31, at 179–80.

[128] *Id.* at 179.

[129] *Id.* at 143.

[130] *Id.* at 181.

gentleman. Thus, issues in comprehending complex cases were significantly less commonplace. Attorneys today may use their peremptory strikes to remove veniremen who do not have requisite qualifications; however, the jury pool is more disparate than ever before. Often even large jury pools do not contain enough people who have the special qualifications or skills necessary to adequately decide complex cases.[131]

The Virginia Code does, with the consent of both parties, provide for an alternate type of jury in civil cases.[132] Under Virginia Code § 8.01-359(D), the plaintiff and the defendant may each select one person who is eligible as a juror, and "the two so selected . . . select a third of like qualifications, and the three . . . shall constitute a jury in the case. They shall take the oath required of jurors, []hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as" an ordinary civil jury.[133] The trial judge may not force a three-panel jury on the parties; it must be by the consent of all parties, and such consent may be withdrawn up to thirty days before trial.[134] The special three-member jury is "special" in that it is formed by a special procedure; however, neither the statute nor the accompanying cases indicate that these jurors are chosen because of any special skill or qualification.[135] In actuality, such three-member juries most resemble alternate arbitration techniques.[136]

In one area of the law—eminent domain—the Virginia Code does provide for jurors of special qualification.[137] In such cases, the jury panel must consist of "freeholders of property within the jurisdiction,"[138] ostensibly to provide for jurors who can relate to a plaintiff whose property is being taken by the government. Such a requirement suggests that the Virginia legislature may be willing to provide specialty jurors in certain other cases—such as antitrust, securities, and intellectual property cases.

B. Historical Applications of Special Juries Throughout the American States

Reviving the English notion of juries of special skill or qualification by enacting legislation to empanel specially qualified jurors in Virginia,

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131 *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1493–94, n.21 (1997).

132 VA. CODE ANN. § 8.01-359(D) (2018).

133 *Id.*

134 Painter v. Fred Whitaker Co., 369 S.E.2d 191, 193 (Va. 1988).

135 OLDHAM, *supra* note 30, at 181.

136 James Oldham, *The History of the Special (Struck) Jury in the United States and its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 635 (1998).

137 VA. CODE ANN. § 25.1-228 (2018).

138 *Id.* § 25.1-228(b).

would satisfy both the Virginia Constitution's guarantee of a right to a trial by jury in civil litigation[139] and the Fifth Amendment's right to a jury capable of deciding a case with only the evidence before it.[140] When looking for practical ways to implement such a system, Virginia may look to other states that do or historically did, allow for special types of juries.

Like England, South Carolina and New York historically empaneled merchant juries for commercial law cases.[141] Since the colonial period, South Carolina has had statutes authorizing merchant juries.[142] The first of these acts was the 1769 colonial statute authorizing special juries, with the consent of both parties, in cases "concerning trade, and disputes with merchants," or where the value in dispute was over fifty pounds sterling.[143] This act was updated by a 1791 statute allowing the trial court, by its own motion, to empanel a struck jury.[144] Most notably, this led to the empaneling of merchant juries in commercial law disputes.[145] Merchant juries had a significant effect on the development of South Carolina's commercial law, with many complex commercial cases from 1789 through 1795 resolved by merchant juries.[146] Merchant juries dwindled after the 1797 statutory change, which required both parties to consent to the use of a struck jury—the legislature cited the use of special juries as the cause of "delay and chicanery" in the courts.[147] This statutory change effectively ended the use of special juries in South Carolina.[148]

New York, similarly, had a well-documented history of empaneling merchant juries.[149] In 1741, the New York colony adopted the 1730 King George statute regulating the selection of juries "in such Manner as

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[139] *See generally* VA. CONST. art. I, § 11 (outlining the guarantee of a right to a jury trial in civil cases).

[140] *See* U.S. CONST. amend. V (explaining the constitutional right to a jury trial); *see also* Smith v. Phillips, 455 U.S. 209, 217 (1982) (stating that a jury is capable to decide a case solely on the evidence before it under a watchful trial judge).

[141] OLDHAM, *supra* note 30, at 179, 182.

[142] *Id.* at 182.

[143] Act for Establishing Courts, Building Gaols, and Appointing Sheriffs, and Other Officers for the More Convenient Administration of Justice in this Province, July 29, 1769, Pub. L. No. 1095 § 23, 1769 S.C. Acts 272 (archaic spelling updated).

[144] Act of December 20, 1791, 1791 S.C. Acts 9.

[145] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 158 (1977).

[146] *See, e.g.*, Winthrop v. Pepoon, Otis & Co., 1 S.C.L. (1 Bay) 468, 462–63 (1795) (outlining that a new trial was ordered to bring in a jury of merchants); Ash's Adm'rs v. Brewton's Ex'rs, 1 S.C.L. (1 Bay) 243, 241 (1792) (showing a case that was tried before a special jury); Davis v. Ex'rs of Richardson, 1 S.C.L. (1 Bay) 105, 102 (1790) (showing a case that was tried before a special jury); Bay v. Freazer, 1 S.C.L. (1 Bay) 66, 63 (1789) (showing a case that was tried before a special jury of merchants).

[147] HORWITZ, *supra* note 145, at 159.

[148] *Id.*

[149] *See* OLDHAM, *supra* note 30, at 179 (explaining New York's history of merchant juries and their statutory establishment).

special Juries have by Law heretofore been struck, for Trials at Bar."[150] The struck jury procedure established a system for handling "disputes among mercantile interests;" its "primary purpose" was "to assemble jurors familiar with the intricacies of commercial practice," in order to render better-informed judgments in commercial law cases.[151] By 1801, the legislature gave discretion to the judge regarding whether to permit special juries, if the judge deemed it necessary "by reason of the importance or intricacy of the case," thus removing litigants' attainment of a struck jury as a matter of right.[152] Due to a series of cases in the State's highest court, the struck jury practice for mercantile cases was effectively ended by 1807, though the struck jury procedure is still on the books today.[153]

In both South Carolina and New York, the breakdown of the use of special juries in commercial litigation reflects the breakdown of the homogeneity of mercantile interest.[154] No longer does the legislature, in either state, subscribe to the idea that the homogeneous mercantile class could provide uniform rules of commercial practice.[155] The breakdown of the struck jury system also potentially reflects a pattern of judicial hostility to competing sources of legal authority.[156]

Louisiana, also, historically provided for specially qualified juries, most notably, merchant juries.[157] An 1807 statute allowed trial judges to appoint special jurors, being those "of the occupation, profession or trade," with which the case is concerned.[158] Studies of the juries summoned in Louisiana's Commercial Court after the enactment of the 1807 act showed that a large percentage of the jurors empaneled were merchants.[159] Ultimately, the use of merchant juries in Louisiana dwindled due to the elimination of the state's Commercial Court in 1846.[160] Prior to its demise, however, the Louisiana merchant juries, compared to other merchant juries in the United States, most closely resembled the merchant juries

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[150] HORWITZ, *supra* note 145, at 155 (quoting Ch. 720, § 10 [1741], 20th G.A., 3d Sess., Laws of N.Y. 216, 220 (H. Gaine, ed. 1774)).

[151] *Id.*

[152] An Act for Regulating Trials of Issues and for Returning Able and Sufficient Jurors, ch. 98, 1801 N.Y. Laws 222 (March 31, 1801).

[153] *See* HORWITZ, *supra* note 145, at 157–58 (discussing the de facto end of struck juries in New York).

[154] *Id.* at 159.

[155] *Id.* at 158.

[156] *Id.* at 159.

[157] OLDHAM, *supra* note 30, at 197.

[158] Act to Authorize a Special Jury in Certain Cases, 1807 La. Acts 170, ch. 23 (1807) (archaic spelling updated).

[159] RICHARD KILBOURNE, JR., LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD 101–05 (Baton Rouge: Paul M. Herbert Law Center, 1980).

[160] OLDHAM, *supra* note 30, at 198.

used in England.[161] Louisiana merchant juries, "like merchant juries in England . . . made factual findings and determined commercial customs in a wide range of transactions."[162] Ultimately, the state rejected the use of merchant juries because "[p]ermitting juries of merchants . . . to generate their own laws with a stamp of approval on trade practices had important economic repercussions" for the state.[163]

The development of commercial law and the use of merchant juries developed in response to the business demands of each state.[164] The ultimate decision to discontinue the use of merchant juries shows that states wanted to move away from regulating the rules of an industry by empaneling jurors who work in that field, and instead, move toward a system regulated more completely by the legislature and the common law. This trend indicates that states would be less likely to return to a jury system that allowed regulation of industry as a byproduct of empaneling jurors of the same expertise as the parties.

C. Modern Application of Special Juries: Delaware

In Delaware, the specially qualified jury remains an option for parties in complex litigation.[165] Due to a 1987 statute, Delaware Code Title 10 § 4506, individuals in complex civil cases may request specially qualified jurors.[166] This statute simply reads, "The Court may order a special jury upon the application of any party in a complex civil case. The party applying for a special jury shall pay the expense incurred by having a special jury, which may be allowed as part of the costs of the case."[167] This code section was upheld in *In re Asbestos Litigation*.[168] In this case, the Delaware Superior Court held, "The providing of challenges and regulation of juror qualifications has been exercised by the legislative or judicial branches without constitutional constraint. Therefore, [we] find no constitutional infirmity."[169] This means that it is within the right of the legislative branch to provide for specialized juries.[170] The procedure for special juries is also laid out in the Delaware Superior Court's Civil Rules.[171] Rule 40(b) states that the application for a special jury "shall be made at or before the marking of the case for trial. A party who has applied

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161 *Id.*

162 Shael Herman, *Louisiana Commercial Law: The Antebellum Period*, 56 TUL. L. REV. 804, 809 (1982) (book review).

163 Kilbourne, *supra* note 159, at 102–04.

164 Herman, *supra* note 162, at 809.

165 DEL. CODE ANN. tit. 10, § 4506 (2018).

166 *Id.*

167 *Id.*

168 *In re* Asbestos Litig., 551 A.2d 1296, 1300 (Del. Super. Ct. 1988).

169 *Id.*

170 *Id.* at 1298, 1300.

171 DEL. SUPER. CT. C.P.R. 40 (2016).

for a special jury may withdraw such application . . . provided that the granting of such withdrawal will not unduly prejudice or inconvenience an opposing party."[172] The rule goes on to state that "[s]pecial juries shall be selected in accordance with the plan for the selection of special juries, which shall be filed and available for inspection in the offices of the prothonotaries for each county;"[173] indicating that each county is responsible for determining the procedure for selecting special juries.[174]

Beyond each county's procedure, the Delaware Superior Courts have provided guidance for implementing the selection of special jurors.[175] In *Ramada Inns, Inc. v. Dow Jones & Co., Inc.,* the court published, by slip opinion, the agreed-upon procedure for selection of the special jury in that case.[176] The agreed procedure in *Ramada Inns* is as follows:

> 1. The parties shall submit to the Court a list of witnesses likely to be called at trial . . . for . . . furnishing notice to jurors.
>
> 2. The Prothonotary shall promptly identify potential special jurors and shall send the appropriate special jury questionnaire to those persons identified.
>
> 3. After receiving the responses . . . , the [jury commissioner] shall select one hundred persons who are qualified as special jurors.
>
> 4. Prothonotary shall provide the Court and counsel with (a) a list of the names of the special jurors selected and (b) a copy of the responses by those individuals to the special jury questionnaire.
>
> 5. [T]he parties shall file any written challenges for cause on the ground that individual jurors selected . . . do not qualify as special jurors . . .
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> 6. The Court shall conduct a hearing in the Court or over the telephone . . . At that time the Court will consider the written challenges

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[172] *Id.* 40(b).

[173] *Id.*

[174] Although individual counties' plans for special juries were not available for public viewing, the prothonotary's office directed me to the statewide order amending the plan for special jurors. This order indicates that the prothonotaries should:

> [s]elect from juror qualification forms of persons who have completed their service as regular jurors those who appear qualified for special jury service by reason of education, training or experience. The composition of the special jury panel shall be similar in distribution of race, sex, age, religion, national origin, and other legally significant characteristics to the composition of the population of the county, as shown by the last decennial census, insofar as practicable.

Order Amending Plan for the Selection of Special Juries (Aug. 22, 1994).

[175] *See generally* Ison v. E.I. DuPont De Nemours & Co., No. Civ.A. 97C-06-193CHT, 2004 WL 2827934, at *5 (Del. Super. Ct. Apr. 27, 2004) (exhibiting a case where a special jury was determined to be in the parties best interest); Noramco, Inc. v. Carew Assocs., Inc., No. 85C–MY–54, 1990 WL 199509, at *1 (Del. Super. Ct. Oct. 22, 1990) (listing circumstances that constitute complexity in civil cases); Ramada Inns, Inc. v. Dow Jones & Co., 1987 WL 28311, at *1 (Del. Super. Ct. Oct. 22, 1987) (explaining circumstances where special juries are allowable and how to comply with proper special jury procedure).

[176] *Ramada Inns, Inc.*, 1987 WL 28311, at *1 (Del. Super. Ct. Oct. 22, 1987).

> and any . . . opposition to those challenges. The Court will rule on each challenge at that hearing.
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> 7. The parties will have the right to exercise peremptory challenges at a date to be determined during the pretrial conference . . . Each side may exercise up to, and including, six peremptory challenges. After the exercise of the peremptory challenges the Prothonotary shall promptly summon the remaining jurors to appear at the first day of trial . . . .
>
> 8. The jury and alternates in this case will be selected from the remaining array in the same manner as juries are selected in non-special jury cases.[177]

This type of selection system puts emphasis on the Prothonotary, the clerk of court, to develop a system to identify specially qualified jurors while maintaining significant control among the parties to identify jurors that best suit the unique needs of the case. The agreed-upon methods between the parties in *Ramada Inn* provide helpful insight into how the counties, court, and parties could practically implement a system of specialized jurors.

In a more recent case, *Ison v. E.I. DuPont De Nemours & Co.*, the Delaware Superior Court granted a special jury in a consolidated product defect action that resulted in personal injury to each of the three plaintiffs.[178] The case required the jury to review evidence that the drug used by each of the plaintiffs' mothers was a teratogen—a type of drug causing malformation of embryos.[179] The court held that "it would be in everyone's best interests to empanel a 'special jury,' given the subject matter of the case and the technical information that will be presented."[180] The court provided similar guidelines, as used in *Ramada Inn*, for special jury selection, stating that a panel of prospective jurors would be summoned and that the "summons would include a jury questionnaire which would be prepared by the Court . . . upon submissions from the parties . . . . The Court will review the submissions and meet with counsel . . . for or purposes of completing the questionnaire."[181] The court also broke from the general rule, provided in the Delaware statute, and determined that the costs of the special jury would be divided evenly among the parties, likely because the parties agreed that a special jury would be beneficial to the case.[182] Beyond the aforementioned cases, no subsequent case law elaborates upon Delaware's special jury procedure.

Ison and several other Delaware Superior Court cases, however, provide guidance on how to determine if a case is *complex*, as defined by

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[177] *Id.* Black's Law Dictionary defines Prothonotary as "[a] chief clerk in certain courts of law." *Prothonotary*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[178] 2004 WL 2827934, at *1, *5–6.

[179] *Id.* at *1.

[180] *Id.* at *5.

[181] *Id.*

[182] *Id.* at *1, *5.

the 1987 statute.[183] In 1987, following the implementation of the special jury statute, the Delaware Superior Court in *Amoroso v. Joy Manufacturing Co.,* denied a motion for a special jury in a breach of warranty, strict liability, and wrongful death case.[184] The court held that the case was not one of "undue complexity," as the issues of the case were "not complex and [therefore] a special jury [was] . . . not appropriate."[185]

In the 1990 case of *Noramco, Inc. v. Carew Associates, Inc.*, the court denied a motion for a special jury, holding that a two-week trial involving a "battle of the experts" was not beyond the capabilities of an ordinary jury.[186] The court explained that "regular jurors in complex matters often hear experts who disagree. The better experts have learned [how] to speak understandably to lay people . . . . That the expertise may be complex does not necessarily mean that the case is a 'complex civil case.'"[187] The court then identifies three categories that might result in a case being considered complex civil litigation, including, "complexity in terms of (1) trial duration, (2) volume of evidence, or (3) complexity of legal issues."[188] The Special Jury statute remains an active part of civil litigation in Delaware.[189] The statute, court rule, and common law provide guidelines that Virginia can pull from in implementing its own special jury system.

III. IMPLEMENTING A SPECIALIZED JURY PROCEDURE IN VIRGINIA

Virginia can implement the English notion of jurors of special qualification by adopting the procedures used in Delaware. Delaware Code Title 10 § 4506 provides a workable structure that Virginia could adopt in order to provide for specialized jurors for certain Virginia complex civil litigation. The Delaware code section is broad and outlines only that special juries are allowed upon application of the parties in a complex civil case and designates how costs are to be paid.[190] Questions regarding what the appropriate procedure is for empaneling Special Jurors and what is considered complex civil litigation are left to the courts.[191] A Virginia version of the Delaware Code Title 10 § 4506 could either mirror the broad language in the Delaware code, or it could provide more concrete

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[183] *Id.* at *5; No. 85C–MY–54, 1990 WL 199509, at *1–2 (Del. Super. Ct. Oct. 22, 1990). *See infra* notes 185–89 and accompanying text.

[184] 1987 WL 26911, at *1, *3 (Del. Super. Ct. Dec. 4, 1987).

[185] *Id.* at *3.

[186] No. 85C–MY–54, 1990 WL 199509, at *1–2 (Del. Super. Ct. Oct. 22, 1990).

[187] *Id.* at *1 (quoting *In re* Asbestos Litig., 551 A.2d 1296, 1297 (Del. Super. Ct. 1988)).

[188] *Id.*

[189] *See* DEL. CODE ANN. tit. 10, § 4506 (2018) (exhibiting that a struck jury statute is still valid in Delaware and struck juries are still available for use).

[190] *Id.*

[191] *See generally* DEL. CODE ANN. tit. 10, § 4506 (2018); VA. CODE ANN. § 8.01-359 (2018); VA. CODE ANN. § 8.01-362 (2018) (outlining current Virginia and Delaware procedure for special jury selection).

guidelines regarding the appropriate procedure for empaneling special jurors and defining complex civil litigation.

In determining a workable procedure for empaneling specially qualified jurors, Virginia may turn to the procedure set out by Delaware Superior Court Rule 40(b), which places the burden on the prothonotaries in each county to create a plan for selection of special juries.[192] This rule mirrors the procedure used in England prior to the American Revolution.[193] Blackstone explained that when a motion for a special jury was granted, the sheriff was then "to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty eight of the principal freeholders in the presence of the attorneys on both sides."[194] Although Blackstone explained this procedure for the struck jury, it is quite likely that the courts employed a similar procedure when empaneling men of particular qualification or skill. The emphasis was not on the parties or the judge to secure suitable veniremen, but rather on the person who ordinarily would handle jury service within that court's jurisdiction.[195]

In a 1994 Order Amending the Plan for the Selection of Special Juries, the Delaware Superior Court provided more specific guidelines for the prothonotaries to follow when determining how to select specially qualified individuals.[196] This plan provides that the number of jurors impaneled for the particular case is to be determined by the number of parties, estimated length of the trial, and other pertinent information.[197] The order also provides a method for obtaining specially qualified individuals; the prothonotary is to look through jury qualification forms of jurors who have previously served and find jurors qualified "by reason of education, training, or experience."[198] In the order, the court goes on to ensure that the special jury selection will not result in an issue with the Sixth Amendment's fair cross-section requirement by stating that the composition of the special jury panel "shall be similar in distribution of race, sex, age, religion, national origin, and other legally significant characteristics to the composition of the population of the county, as shown by the last decennial census, insofar as practicable."[199]

This order provides essential building blocks that Virginia should consider adopting in order to create a plan that adequately provides for specialized jurors while avoiding any Sixth Amendment issues. Virginia

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[192] *See generally* Del. Super. Ct. C.P.R. 40.

[193] OLDHAM, *supra* note 30, at 178–79.

[194] BLACKSTONE, *supra* note 21, at *358 (archaic spelling updated).

[195] *See id.* (explaining the duty of the prothonotary to gather jurors and the process of striking jurors); Order Amending Plan for the Selection of Special Juries, *supra* note 174.

[196] Order Amending Plan for the Selection of Special Juries, *supra* note 174.

[197] *Id.*

[198] *Id.*

[199] *Id.*

may also look to the procedures used in the *Ramada Inn* and *Ison* cases,[200] which provides ways for the court and parties to choose from the venire those individuals best qualified to hear that particular matter.

Virginia must also determine a standard for deciding which cases should qualify for special juries. Virginia may look to the Delaware courts' interpretation of complex—a case of "undue complexity"[201] is one that is complex "in terms of (1) trial duration, (2) volume of evidence, or (3) complexity of legal issues."[202] In actuality, such a determination should probably also be left to the Virginia Supreme Court, rather than the legislative process, as judges are better equipped to decide what cases would be best decided with the help of more qualified jurors.

Virginia should adopt a similar version of the Delaware special jury statute. Decisions regarding procedure and determining when litigants have a right to trial by specialized jury, however, should be left to the Virginia Supreme Court to decide, as the Court is in the best position to determine how to proceed in complex civil litigation.

CONCLUSION

The concept of juries of special skill or qualification was an idea brought to America through the English common law.[203] It remains a viable option in Virginia, as the state legislature has never expressly overruled the use of jurors of special skill or qualification.[204] The English common law concept of jurors of special qualification remains in full force and effect in Virginia and should be revived as an alternative to stripping litigants of the right to trial by jury in those cases that the court deems too complex. Instead of complexity resulting in the denial of the right to a trial by jury, complexity should result in the right to a trial by a specially qualified jury.

Kambria T. Lannetti[*]

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[200] *See supra* note 176, at *1; *supra* note 178, at *5.

[201] Amoroso v. Joy Mfg. Co., 1987 WL 26911, at *3 (Del. Super. Ct. Dec. 4. 1987).

[202] Noramco, Inc. v. Carew Associates, Inc., C.A. No. 85C–MY–54, 1990 WL 199509, at *1 (Del. Super. Ct. Oct. 22, 1990).

[203] *See supra* notes 17–18 and accompanying text.

[204] *See* VA. CODE ANN. § 8.01-362 (2018) (allowing for special juries); *see also* VA. CODE ANN. § 8.01-359 (2018) (stating Virginia procedure for special jury selection).

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LET'S (NOT) MAKE THIS WORK! WHY STARE DECISIS WORKABILITY SHOULD BE A SWORD BUT NOT A SHIELD

INTRODUCTION

Anyone who has studied the modern doctrine of stare decisis is probably familiar with the term *workability*. A factor of the United States Supreme Court's stare decisis test, workability differentiates precedential rules that have proven easy for lower courts to apply in a consistent and fair manner from those that have not.[1] The former are said to be *workable*, the latter, *unworkable*. Because one of the principal justifications for stare decisis is that it "promotes the evenhanded, predictable, and consistent development of legal principles,"[2] workability seems like a perfunctory consideration; surely if the goal is to have a smooth-functioning system, it makes sense to retain workable rules and purge those that turn out Gordian. But, this seemingly innocuous principle may be quite sinister if applied incautiously, threatening the structural integrity of the very system it is meant to support.

This Note was inspired by a decision rendered by the Supreme Court of Georgia during the summer of 2017.[3] The case was quite tame on the surface—no crime, no intrigue, just a dispute with a city over a zoning map, the resolution of which had been temporarily delayed by an unplanned trip to the High Court regarding a matter of appellate procedure.[4] Hardly the stuff of legend. But, within the context of this rather prosaic local dispute there lurked a question of far more dramatic and wide-ranging consequence: just whose responsibility is it to make sure law works? When a court comes to understand that applicable precedent is wrong because it misinterprets a statute, (or for that matter, a constitution), but the more faithful interpretation is deficient, this problem causes headaches for the judicial system, nightmares for litigants and attorneys, inefficiencies, dismissals without decisions on the merits, and other undesirable outcomes. Should the court preserve the erroneous

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[1] David L. Berland, Note, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception*, 2011 U. ILL. L. REV. 695, 701–02 (2011) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)) ("[T]he workability factor considers the ability of lower courts to apply the holding of a previous decision. An unworkable rule causes 'inherent confusion' or 'poses a direct obstacle to the realization of important objectives embodied in other laws.'").

[2] Payne v. Tennessee, 501 U.S. 808, 827 (1991).

[3] Schumacher v. City of Roswell, 803 S.E.2d 66, 67–68 (Ga. 2017).

[4] *See id.* at 68 (describing the facts of the case regarding the dispute over a zoning map).

but essentially better rule under stare decisis? In short, *is the workability of precedent a legitimate reason for retaining it?*

This question would seem to be one that experts in jurisprudence would have resolved centuries ago, but apparently, very few authors have discussed it.[5] There is, of course, no shortage of discourse on the doctrine of stare decisis in general, or even on workability as a stare decisis consideration.[6] But, owing perhaps to the lack of a clear signal from the United States Supreme Court (as discussed below), authors almost universally overlook the functional distinction between the use of *un*workability as a reason for discarding precedent and the use of workability as a reason for retaining it.[7] The distinction, however, is vital.

This Note begins by explaining the case that gave rise to it.[8] This provides readers with a concrete example of what this Note sometimes refers to as the "preservative use" of workability. The Note then lays out the history of workability as a consideration of stare decisis and describe how the workability factor has changed in recent decades.[9] In so doing, its focus is on workability in the context of statutory interpretation. In order to explain the background and development of the factor, however, it is necessary to discuss specific cases in which the Supreme Court has applied workability in the context of constitutional interpretation.[10] The two contexts must be differentiated for purposes of this Note because the thesis of this Note—that preserving an incorrect interpretation of a statute because of its relative workability violates separation of powers—has no parallel when a court interprets a constitution because in that case there is no inherent infringement on legislative power. This Note then explains why the change toward using workability to preserve erroneous precedent is not required logically, contravenes the basic purposes of stare decisis, and is constitutionally invalid as a violation of separation of powers.[11] Finally, this Note proposes a new way to articulate the stare

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[5] *See infra* notes 52, 57, 81–82, 87 and accompanying text.

[6] *See, e.g.*, Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012, 1018–19 (2003); William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 76 (2002); William A. Edmundson, *Schauer on Precedent in the U.S. Supreme Court*, 24 GA. ST. U. L. REV. 403, 403 (2007); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723–24 (1988).

[7] *See, e.g.*, Steven J. Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication*, 35 CARDOZO L. REV. 1687, 1712–13 (concluding that unworkability is a valid reason for overturning precedent without distinguishing workability as a reason for retaining precedent).

[8] *See infra* notes 13–20 and accompanying text.

[9] *See infra* notes 32–58 and accompanying text.

[10] *See infra* notes 32–58 and accompanying text.

[11] *See infra* notes 85–105 and accompanying text.

decisis test that does not discard workability as a consideration, but precludes the preservative use criticized by this Note.[12]

I. BACKGROUND

A. Inspiration and Illustration

Schumacher v. City of Roswell involved a facial challenge to a new zoning map the City recently had drawn up.[13] The invalidity of the ordinance under the Constitution of the State of Georgia was the sole claim presented.[14] Because their claim was that the ordinance violated the State's constitution, the plaintiffs took their case directly to a state superior (trial) court.[15] No aspect of the plaintiff's case was ever reviewed by the City or any administrative body.[16] The trial court ruled against the plaintiffs on the merits.[17] The plaintiffs then filed a "direct appeal" with the Court of Appeals of Georgia,[18] the intermediate appellate court. That court dismissed the appeal for lack of jurisdiction, believing that the appellants were, under the circumstances, required by law to comply with the application procedures for discretionary appeals.[19] The Georgia

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[12] *See infra* notes 113–115 and accompanying text.

[13] 803 S.E.2d 66, 67–68 (Ga. 2017).

[14] *Id.* at 68.

[15] *Id.*

[16] *Id.* at 69 ("There was no individualized determination by any level of city government.").

[17] *Id.* at 68.

[18] *Id.*

[19] *Id.* There are two types of appeals that may be filed under Georgia law: direct appeals and appeals by application (otherwise known as discretionary appeals). Georgia Code §§ 5-6-34 and 5-6-35 specify the types of rulings to which each procedure applies. Section 5-6-34, providing for direct appeals, applies in pertinent part to "[a]ll judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions" and "[a]ll final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35." GA. CODE ANN. § 5-6-34(a)(1), (4) (2018). When a direct appeal is properly filed, "all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court . . . ." § 5-6-34(d). In contrast, § 5-6-35, which covers appeals by application, allows for a more expeditious appeals process in certain cases. § 5-6-35. This section was ostensibly designed to ease appellate courts' case load. *See* Scruggs v. Ga. Dep't of Human Res., 408 S.E.2d 103, 104 (Ga. 1991) ("The discretionary-application statute, [Georgia Code] § 5-6-35, was enacted to ameliorate the appellate courts' massive case loads."); Tri-State Bldg. & Supply, Inc. v. Reid, 302 S.E.2d 566, 567–68 (Ga. 1983) (referring to "the clear purpose of [Georgia Code] § 5-6-35 . . . to permit the appellate courts to expeditiously review decisions of the superior courts reviewing decisions of administrative agencies without issuing an opinion in every such case"). It requires only that the reviewing court "issue an order granting or denying such an appeal within thirty days of the date on which the application was filed." § 5-6-35(f). As it pertains to *Schumacher v. City of Roswell*, Section 5-6-35 provides that "[a]ppeals from decisions of the superior courts reviewing decisions of . . . state and local administrative agencies" must be by application. 803 S.E.2d 66, 68–69 (quoting § 5-6-35(a)(1)).

Supreme Court granted certiorari on this issue.[20]

Relevant precedent required that "all zoning cases" be appealed via the discretionary route, rather than by direct appeal.[21] While the majority ultimately concluded that precedent was simply inapplicable and reversed the Court of Appeals,[22] the dissent believed relevant case law was on point and, regardless of whether it represented the most accurate interpretation of the applicable statutes, should apply because of stare decisis considerations.[23] Foremost among these considerations was *workability*.[24] Ostensibly, the "all zoning cases" rule was straightforward and easy to apply.[25] If the underlying subject matter is zoning, appellants must use the discretionary appeals process.[26] The applicable statutes, however, said nothing about "zoning cases," but instead mandated that the discretionary process be employed for any appeal taken from "decisions of . . . administrative agencies."[27] Nevertheless, the dissent was adamant that "the doctrine of stare decisis strongly counsels adherence to our . . . *workable* precedents."[28]

The dissent's argument that an erroneous but "eminently workable"[29] interpretation should be retained for the sake of judicial convenience gives rise to a serious separation of powers concern.[30] Not only would this infringe the domain of the legislature, but it would also circumvent the legislative process entirely by removing the legislature's most meaningful incentive to act. This Note focuses on exploring this concern. It must first be recognized, however, that the dissent's argument draws on a line of decisions by the Supreme Court of the United States for its support.[31] For proper context, therefore, this Note turns initially to that history.

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[20] *Schumacher*, 803 S.E.2d at 68.

[21] *See id.* at 69 (explaining that two cases announcing this rule were inapplicable).

[22] *Id.* at 69–71.

[23] *See id.* at 74, 76–77 (Hines, C.J., dissenting) (discussing the soundness of precedential reasoning, the reliance interests, the age of the precedent, and the workability of the precedent "in light of the policy of stare decisis").

[24] *Id.* at 77 ("[M]ost importantly in this situation is the factor of workability.").

[25] *See id.* ("There can be little dispute that the bright line rule . . . has provided needed clarity and direction to the bench and bar in the all-too-often quagmire of appellate procedure.").

[26] *Id.* at 74 (citing Trend Dev. Corp. v. Douglas Cty., 383 S.E.2d 123, 123 (Ga. 1989)).

[27] *Id.* at 68–69 (majority opinion) (quoting GA. CODE. ANN. § 5-6-35(a)(1) (2017)).

[28] *Id.* at 78 (Hines, C.J., dissenting).

[29] *Id.* at 77.

[30] *See id.* at 76–77 (contending that the bright-line rule should have been retained because it "promot[ed] judicial management and economy" and removed all "doubt for trial courts, practitioners, and indeed, litigants as to the proper procedure for an appellate challenge of a zoning issue").

[31] *See infra* notes 97–98 and accompanying text.

B. The Rise of Workability as a Stare Decisis Consideration

Compared to the doctrine of stare decisis, workability is a fledgling concept.[32] Federal courts did not speak of precedent in terms of workability until the United States Supreme Court did so in 1965 in *Swift & Co. v. Wickham*.[33] State courts had begun to incorporate the workability factor a few years earlier.[34] In *Swift*, the Court reconsidered its interpretation of a federal statute, 28 U.S.C. § 2281, which mandated empanelment of a three-judge panel whenever a litigant in federal court sought to enjoin enforcement of a state statute "upon the ground of the unconstitutionality of such statute."[35] According to the Court, early decisions treated Supremacy Clause cases as falling outside the purview of § 2281, reasoning that such cases involve no claim that the state law inherently violates the Constitution of the United States.[36] Instead, these cases involve only a claim that the state law conflicts with a federal statute and therefore, according to the Constitution, is preempted.[37] Contrastingly, in a case decided three years before *Swift*, *Kesler v. Department of Public Safety*, the Court held that a claim of statutory preemption under the Supremacy Clause was a "constitutional question" within the meaning of § 2281, rather than a question of statutory interpretation that could be addressed by a single judge.[38] Yet, "[a]fter what can only be characterized as extensive statutory analysis the majority [in *Kesler*] concluded that there had in fact been no pre-

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[32] *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 36 (1959) (describing how the doctrine of stare decisis began to develop in the United States in the early to mid-nineteenth century).

[33] 382 U.S. 111, 116 (1965).

[34] *See, e.g.*, Conrad v. Conrad, 153 So. 2d 635, 639 (Ala. 1963) (Harwood, J., concurring specially) ("The writer does not adhere to the view that stare decisis envisions the perpetrations of erroneous and unworkable legal ipse dixits . . . ."); Williams v. City of Detroit, 111 N.W.2d 1, 23 (Mich. 1961) (Edwards, J., dissenting) ("But stare decisis in its most rigorous form does not prevent the courts from correcting their own errors, or from establishing new rules of case law when facts and circumstances of modern life have rendered an old rule unworkable and unjust."); Landgraver v. Emanuel Lutheran Charity Bd., Inc., 280 P.2d 301, 317 (Or. 1955) (Brand, J., dissenting) ("The recent decisions convincingly demonstrate that the immunity doctrine is unsound and unworkable.").

[35] 382 U.S. at 114 (quoting 28 U.S.C. § 2281 (1958)).

[36] *Id.* at 121–22.

[37] *Id.* at 120 (citing Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1, 30 (1824)).

[38] 369 U.S. 153, 156–58 (1962). The Court was emphatic on this point:

> Here, no question of statutory construction, either of a state or a federal enactment, is in controversy. We are confronted at once with the constitutional question whether [a State police power is preempted]. . . . This case presents a sole, immediate constitutional question, differing from [previous cases] which presented issues of statutory construction even though perhaps eventually leading to a constitutional question.

Id.

emption."[39] To summarize, the Court in *Kesler* performed some seventeen reporter pages of statutory analysis leading to the conclusion that the state statute was not in conflict with the federal statute,[40] yet pronounced that the case did not involve a question of statutory construction amenable to adjudication by a single judge.[41]

Thus, when the lower court in *Swift* had been faced with the question of whether New York's poultry labelling law was pre-empted by the federal Poultry Products Inspection Act of 1957,[42] it was understandably confused.[43] Was there a "question of statutory construction, either of a state or a federal enactment . . . in controversy,"[44] or was this a "constitutional question" of the sort in *Kesler*?[45] The *Kesler* rule was *unworkable*, the Supreme Court concluded, and therefore stare decisis did not compel the Court to retain it:

> Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.[46]

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[39] *Swift*, 382 U.S. at 123 (citing *Kesler*, 369 U.S. at 158–74) (citations omitted).

[40] *Kesler*, 369 U.S. at 158–74.

[41] *Id.* at 157. This conclusion is not inherently unreasonable. It is certainly true that preemption cases involve a "constitutional question" and the Court could have construed § 2281 to include all preemption cases. *Id.* at 158. Instead, the Court appeared to hold that *some* preemption cases could fall outside the scope of § 2281, leading to confusion. *See infra* note 45.

[42] *Swift*, 382 U.S. at 112, 120 (citing 21 U.S.C. §§ 451–69 (1964)).

[43] *Id.* at 114–15.

[44] *Kesler*, 369 U.S. at 157.

[45] *See generally Kesler*, 369 U.S. at 158. The *Kesler* rule left it unclear when, if ever, a preemption case could be adjudicated by a single judge. *Swift*, 382 U.S. at 115–16. The Court in *Swift* appeared to understand the *Kesler* rule to mean that whether three judges must be empaneled depended on whether a determination would require more or less statutory construction than had occurred in *Kesler*:

> [T]he District Court was quite right in concluding that the question of a three-judge court turned on the proper application of our 1962 decision in *Kesler v. Department of Public Safety*, 369 U.S. 153. There we decided that in suits to restrain the enforcement of a state statute allegedly in conflict with or in a field pre-empted by a federal statute, § 2281 comes into play only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated. Finding itself unable to say with assurance whether its resolution of the merits of this case involved *less* statutory construction than had taken place in *Kesler*, the District Court was left with the puzzling question how much *more* statutory construction than occurred in *Kesler* is necessary to deprive three judges of their jurisdiction.

Swift, 382 U.S. at 115.

[46] *Swift*, 382 U.S. at 116.

Throughout the five decades since *Swift*, members of the Court have regularly argued for reexamining statutory decisions on grounds that they had proven unworkable.[47] The Court has expressed no second thoughts about using the workability factor as a weapon against pernicious precedent, but rather has standardized such usage: "[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it."[48] "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"[49] Indeed, the Court did not confine this inquiry to statutory cases, but integrated the workability inquiry into constitutional jurisprudence as well; the inquiry was central to the Court's decision to overturn precedent in prominent cases such as *Arizona v. Gant*[50] and *Garcia v. San Antonio Metropolitan Transit Authority*.[51] In many other constitutional cases, as well, the Court has given considerable weight[52] to arguments that prior rulings had

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[47] *See, e.g.*, Johnson v. United States, 135 S. Ct. 2551, 2562 (2015) ("The doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable. . . . Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause."); Altria Grp., Inc. v. Good, 555 U.S. 70, 92, 96–98 (2008) (Thomas, J., dissenting) (arguing that the Court should have rejected an "ill-conceived" and "unworkable" approach to deciding Labelling Act pre-emption cases in favor of a "far more workable and textually sound" test); Clark v. Martinez, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting) (quoting Holder v. Hall, 512 U.S. 874, 936 (1994)) ("[W]e should not hesitate to allow our precedent to yield to the true meaning of an Act of Congress when our statutory precedent is 'unworkable' or 'badly reasoned.'"); *Holder*, 512 U.S. at 936 (Thomas, J., concurring) ("[Our errors] have produced an 'inherent tension' between our interpretation of [the Act] and the text of the Act and have yielded a construction of the statute that . . . is so unworkable in practice and destructive in its effects that it must be repudiated."); United States v. Johnson, 481 U.S. 681, 701–03 (1987) (Scalia, J., dissenting) (opining that stare decisis did not compel the Court to extend an unworkable and incorrect interpretation of the Federal Tort Claims Act); Moragne v. States Marine Lines, 398 U.S. 375, 404–09 (1970) (rejecting, in light of modern statutory remedies, a common-law maritime rule providing no cause of action for wrongful death on the high seas when the death resulted from a vessel's unseaworthiness as producing "litigation-spawning confusion in an area that should be easily susceptible of more workable solutions").

[48] Montejo v. Louisiana, 556 U.S. 778, 792 (2009) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

[49] *Payne*, 501 U.S. at 827 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

[50] Arizona v. Gant, 556 U.S. 332, 338–40 (2009) (quoting New York v. Belton, 453 U.S. 454, 460 (1981)) (revisiting the rule in New York v. Belton because "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile").

[51] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'").

[52] It is not unusual for the Court to provide several reasons for overruling precedent: "Indeed, in one form or another, most Justices throughout history have favored overruling precedents on the grounds of erroneous reasoning and some other serious flaw justifying

turned out to be unworkable.[53] The rationale that unworkable precedent should be rejected has been treated as particularly apt in constitutional cases, "because in such cases 'correction through legislative action is practically impossible.'"[54]

Since *Swift*, application of the workability factor has transcended personal judicial philosophy and legal context.[55] While members of the Court have not always agreed on whether challenged rules or interpretations had, in fact, produced "mischievous consequences,"[56] there appears to be a well-established consensus that "precedents that have proved cumbersome and unpredictable . . . [and that] create byproducts of uncertainty, cost, and opacity that all judges can recognize as

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overruling, including unworkability and inconsistencies with case law." Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 145 (1991).

[53] *See, e.g.*, *Montejo*, 556 U.S. at 792, 797 (overruling Michigan v. Jackson, 475 U.S. 625 (1986), in part as "unworkable in more than half the States of the Union"); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 500–04 (2007) (Scalia, J., concurring) (discussing the Court's decision to overrule decisions on the grounds of constitutionality); United States v. Dixon, 509 U.S. 688, 709–12 (1993) (overruling the double jeopardy test of Grady v. Corbin, 495 U.S. 508 (1990), as "wrong in principle" and "unstable in application"); Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (quoting *Garcia*, 469 U.S. at 546) (citations omitted) ("We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' . . . We think the *Roe* trimester framework falls into that category."); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting) ("[The *Roe* trimester] framework is clearly an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated.").

[54] *Payne*, 501 U.S. at 828 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting)).

[55] *Compare Burnet*, 285 U.S. at 410–11 (discussing the workability factor in terms of judicial philosophy and legal context), *with* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) (discussing whether precedent is "unworkable in practice"), *and* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 783 (1992) (discussing the workability factor in terms of practical applicability).

[56] *Swift*, 382 U.S. at 116. *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 360–61 (2009) (Alito, J., dissenting) (opining that the Court's new rule would be considerably more problematic than the rule in New York v. Belton, 453 U.S. 454, 460 (1981)); Wis. Right to Life, 551 U.S. at 535 (Souter, J., dissenting) (quoting *Allied*, 504 U.S. at 768 (contending that, contrary to the majority's analysis, no "serious argument [can] be made that [applicable precedent] has been 'unworkable in practice.'")); *Dixon*, 509 U.S. at 759–60 (Souter, J., dissenting) (disagreeing with the majority's stare decisis analysis of the rule in Grady v. Corbin, 495 U.S. 508 (1990), believing that rule was "straightforward"); *see also* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey*,* Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 76 (2002) ("Workability['s] . . . inclusion in the Court's stare decisis framework has met with little resistance. . . . Although the Justices often disagree intensely about whether a particular rule is workable . . . , no Justice of the current Court has disputed the relevance of workability to the stare decisis analysis").

undesirable,"[57] may be attacked as unworkable. Nevertheless, toward the turn of the century, the workability inquiry began to take on a new function: that of supporting *workable* precedent.[58]

C. Casey and Recent Approaches

In two opinions issued in the 1980s, *Arizona v. Rumsey*[59] and *Patterson v. McLean Credit Union*,[60] the Court began to speak of "special justification[s]" for overruling precedent.[61] Without special justification such as an "intervening development of the law" or "inherent confusion created by an unworkable decision," a prior decision should stand.[62] This aggregation of conventional justifications for overruling precedent into one standardized test subtly altered the unworkability inquiry.[63] Previously, unworkability was a condition implying that precedent should be overruled, a status in which the law could not remain.[64] The Court's articulation was almost syllogistic—if a questionable decision has proven unworkable, then it should be overruled.[65] The demonstrated

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[57] Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CAL. L. REV. 1139, 1162 (2015).

[58] *See Payne*, 501 U.S. at 827 ("*Stare decisis* is the preferred course . . . .").

[59] 467 U.S. 203 (1984).

[60] 491 U.S. 164 (1989).

[61] *Id.* at 173; *Rumsey*, 467 U.S at 212.

[62] *See Patterson*, 491 U.S. at 172–73 (noting further that "[t]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction").

[63] *Compare id.* at 173 (discussing the "special justification[s]" for overruling precedent as a standardized test), *with* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) (noting that a "principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice").

[64] *Swift*, 382 U.S. at 116.

[65] There is some disagreement about when stare decisis is implicated. Some jurists believe that stare decisis becomes relevant only when a decision is wrong in the first place. *E.g.*, George v. Hercules Real Estate Servs., Inc., 795 S.E.2d 81, 90 (Ga. Ct. App. 2016) (Peterson, J., concurring) ("[T]he principle of stare decisis does not even begin to apply until we have already concluded that a prior decision was wrong."). Sometimes courts look to stare decisis, even though they believe precedent is correct, as additional support for their refusal to overrule that precedent, or without even reaching an initial determination via other interpretative means. *See, e.g.*, Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 590 (2008) ("[T]raditional tools of statutory construction and considerations of *stare decisis* compel the conclusion [in this case] . . . ."); *Patterson*, 491 U.S. at 171–72 (affirming, by reason of stare decisis, the Court's prior ruling that 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of private contracts without attempting to resolve the Court's previous split as to that interpretation). A court may look to stare decisis whenever precedent is challenged. *See* State v. Fremgen, 914 P.2d 1244, 1245 (Alaska 1996) ("When a common law court is asked to overrule one of its prior decisions, the principle of stare decisis is implicated."). The stare decisis analysis can also be used as evidence that precedent was incorrect to start with, as in *Swift*. *Swift*, 382 U.S. at 124. In any event, all cases in which stare decisis arises are cases in which the soundness of a rule or interpretation has been called into question. *See, e.g.*, *George*, 795 S.E.2d at 90 (discussing the soundness of a rule);

unworkability of a ruling was like a warning flag, and accordingly the Court paid attention to it only if it was present.[66] Now, unworkability became a box to be checked, a consideration to be addressed whenever stare decisis is implicated.[67] Suddenly, as a consequence, the Court began upholding decisions as *not unworkable*.[68] The first few decisions to do so, however, included very little discussion of workability, and in only one of them was there any serious contention that the underlying rule was wrong.[69] Thus, they are not particularly strong authority for any proposition related to stare decisis. They did, however, set the stage for the Court's next explication of stare decisis in *Planned Parenthood v. Casey*.[70]

Richlin, 553 U.S. at 589 (discussing that the interpretation of a statute was called into question); *Patterson*, 491 U.S. at 171–72 (discussing whether precedent was correctly decided). Whether the decision is questionable because it is unworkable or whether it was initially questioned for some other reason makes no difference for purposes of the above analysis.

[66] *See Swift*, 382 U.S. at 115–16 (finding the "*Kesler* rule" to be "elusive," and that this elusiveness presented an "opportunity to take a fresh look at the problem").

[67] *See* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 783 (1992) (citations omitted) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)) ("[O]ne relevant consideration is whether the decision is . . . 'unworkable in practice.'").

[68] *See id.* at 785 ("Our precedents are workable in practice . . . ."); California v. FERC, 495 U.S. 490, 499 (1990) ("There has been no sufficient . . . indication that [applicable precedent] has proved unworkable or has fostered confusion and inconsistency in the law, that warrants our departure from established precedent."); *Patterson*, 491 U.S. at 173 ("[W]e do not find [applicable precedent] to be unworkable or confusing.").

[69] In *Patterson*, the Court mentioned that some members of the Court believed the challenged precedent was wrongly decided, but gave no opinion on whether it was so, opting instead to uphold it in the name of stare decisis. 491 U.S. at 171–75. The dissent believed that the applicable precedent had been correctly decided and that Congress had since ratified it. *Id.* at 191 (Brennan, J., dissenting). In *California v. FERC*, although the Court opined that the challenged precedent was not unworkable, its decision not to overrule its previous interpretation appeared to rest primarily on other grounds, including reliance interests and Congressional ratification. 495 U.S. at 499–500. Finally, in *Allied-Signal*, the State did not contend that the underlying rule (the "unitary business principle," which at the time was a nearly one-hundred-year-old doctrine circumscribing a state's power to tax interstate corporations) was wrong as a matter of constitutional law, but only that it did not "reflect economic realities" and should be abandoned. 504 U.S. at 778–79, 783–84.

[70] 505 U.S. 833 (1992). It should be noted that *Casey* and *Allied-Signal* were decided the same year, only two years after *California v. FERC* and only three years after *Patterson*. *See supra* notes 67, 68. Justice Kennedy delivered the opinion of the Court in *Patterson*; Chief Justice Rehnquist and Justices White, O'Connor, and Scalia joined his opinion. *Patterson*, 491 U.S. at 167. In *California v. FERC*, Justice O'Connor delivered the unanimous opinion. 495 U.S. at 493. Justice Kennedy delivered the majority opinion in *Allied-Signal*, and was again joined by Justices White and Scalia; Justices Steven and Souter joined to create a majority of five. *Allied-Signal*, 504 U.S. at 770. In *Casey*, Justices O'Connor, Kennedy, and Souter announced the opinion as to Part III (concerning stare decisis and workability); Justices Blackmun and Stevens joined as to that portion. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 841 (1992).

In *Casey*, a majority of the Court fully embraced this new discrete-inquiry approach to workability.[71] The Court cited *Swift* and *Payne*, but departed from their reasoning—namely, that when precedent has proven unworkable it should be rejected—by interpreting them as suggesting a "prudential and pragmatic" approach to stare decisis:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, *we may ask whether the rule has proven to be intolerable simply in defying practical workability* . . . .[72]

It hardly requires mentioning that in *Casey* the question of whether the underlying rule (from *Roe v. Wade*)[73] was correct as a matter of law was strongly contested by the parties and sharply divided the Court.[74] Because of the "weight of the arguments made on behalf of the State . . . which in their ultimate formulation conclude that *Roe* should be overruled,"[75] the outcome would depend in large part on whether stare decisis mandated retention of that precedent.[76] Looking first to workability, the majority concluded that "[a]lthough *Roe* has engendered opposition, *it has in no sense proven 'unworkable,'* representing as it does a simple limitation beyond which a state law is unenforceable."[77] This conclusion ultimately supported the Court's decision to retain the basic holding of *Roe*.[78]

Since *Casey*, the Court has used workability both as a sword and a shield.[79] The Court has continued to strike down pernicious precedent under the rationale of *Swift* and *Payne*, but by now, shielding precedent as "not unworkable" per *Casey's* discrete-inquiry approach seems almost

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[71] *Casey*, 505 U.S. at 854–55. Five justices joined this part of the opinion. *Id.* at 841.

[72] *Id.* at 854 (emphasis added). This question reflects the discretized search for special justifications described *supra* in text accompanying notes 59–67.

[73] 410 U.S. 113, 166 (1973).

[74] *See Casey*, 505 U.S. at 853 (discussing divisions of the Court over the correctness of the rule).

[75] *Id.*

[76] *Id.* at 853, 870, 912, 923–24 (various opinions stating that the decision depended largely on stare decisis). An alternative and substantive rationale was based on concepts of individual liberty. *Id.* at 846–53.

[77] *Id.* at 855 (emphasis added) (citations omitted).

[78] *Id.* at 870–71.

[79] *Compare* Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2411 (2015) (concluding that precedent should be upheld since it was not "unworkable"), *with* Payne v. Tennessee, 501 U.S. 808, 830 (1991) (concluding that precedent was "wrongly decided and should be . . . overruled").

instinctive.[80] The ambiguities introduced into the stare decisis analysis by *Casey* have been widely criticized.[81] For one thing,

> [t]he workability inquiry, which asks whether a line of decisions supplies reasonably clear criteria susceptible of principled, predictable judicial application, itself fails to do so, but instead has degenerated into an ad hoc gestalt judicial inquiry, capable of being applied in either direction depending on the Court's preferences. That is precisely what the doctrine, as formulated, says is not the objective.[82]

Nevertheless, workability in one form or another appears to have some staying power, having now been a favorite tool of the nation's most eminent jurists for over five decades.[83] Such favor tends to indicate that the concept has some merit. Yet, criticisms, such as that above, have gone unanswered. Perhaps that is because the essential nature of the problem has gone almost wholly unidentified.[84]

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[80] *See, e.g.*, *Kimble*, 135 S. Ct. at 2411 ("[N]othing about [our prior decision] has proved unworkable."); Boumediene v. Bush, 553 U.S. 723, 842 (2008) (Scalia, J., dissenting) ("The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice . . . ."); United States v. Balsys, 524 U.S. 666, 712 (1998) (Breyer, J., dissenting) (quoting *Casey*, 505 U.S. at 854) ("What is more, there is no suggestion that *Murphy's* rule, applied to state and federal prosecutions, 'has proven to be intolerable simply in defying practical workability.'"); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 284 (1995) (O'Connor, J., concurring) ("Though wrong, [our previous interpretation of the Federal Arbitration Act] has not proved unworkable . . . ."); United States v. Dixon, 509 U.S. 688, 741 (1993) (Blackmun, J., concurring in the judgment in part and dissenting in part) ("I also share both [Justice Souter] and Justice White's dismay that the Court so cavalierly has overruled a precedent that is barely three years old and that has proved neither unworkable nor unsound.").

[81] *See, e.g.*, Consovoy, *supra* note 56, at 84 ("One of the justifications for granting certiorari to *Casey* in the first place was the confusing and inconsistent application of *Roe* in the nineteen years since its announcement. Moreover, it remains unclear why such a workable doctrine mandated an abandonment of the very framework underlying its holding."); Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1167 (2008) ("[T]he Court's doctrine about precedent fails its own test(s) of when precedents should be adhered to. Indeed, the doctrine fails all of the doctrine's own tests: It is embarrassingly unworkable."); John Wallace, Comment, Stare Decisis *and the Rehnquist Court: The Collision of Activism, Passivism and Politics in* Casey, 42 BUFFALO L. REV. 187, 236 (1994) (explaining the inconsistency of *Casey* and *Garcia v. San Antonio Metropolitan Transit Authority* with respect to workability).

[82] Paulsen, *supra* note 81, at 1201.

[83] *See supra* notes 47–58 and accompanying text (providing a general description of the discussions of workability by eminent jurists since the *Swift* 1965 decision). *See also* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965) (discussing the importance of overruling unworkable rules).

[84] For the sole exception that it has been possible to locate, see *infra* note 87 and accompanying text.

II. THE RIGHT AND WRONG WAY TO APPLY WORKABILITY

In this section, this Note discusses what the author believes is the central flaw in *Casey's* transformation of the workability factor.[85] Once this flaw is identified and explained, it becomes apparent that using workability to uphold erroneous precedent is unnecessary as a matter of law and unwise as a matter of practice.

A. The Casey Fallacy

As mentioned above, *Swift* stands for the proposition that *if erroneous precedent has proven unworkable, then it should be discarded*.[86] Purporting to apply this rule, the Court in *Casey* actually committed a textbook example of the formal fallacy of denying the antecedent: *Roe* had not proven unworkable; therefore, it should be retained.[87] In other words,

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[85] Throughout this Note, the author has endeavored to avoid injecting any judgment, favorable or unfavorable, regarding the substance or merits of any of the cases cited because the purpose of this Note is not to argue for a test that produces particular outcomes, but rather for a test that is not itself seriously flawed from a jurisprudential standpoint. Furthermore, the author recognizes that many of these cases involve complex and controversial moral and cultural matters of pressing importance. By declining to comment on these considerations or to explore how they may have influenced the outcome of any particular case, this Note does not suggest that such inquiries are unmeritorious in the context of stare decisis or any other sense. But, the scope of this Note is necessarily quite limited. Thus, when any of the author's own analysis indicates that a case is flawed or rightly reasoned, such suggestion is directed solely toward the proposition for which the case has been invoked. Furthermore, the author has not selected critical analyses from other sources based on the viewpoint they express, but based solely on their analysis of the issue at hand.

[86] For purposes of this Note, that is. *See supra* note 64. Of course, other factors such as reliance interests, the age of the precedent, changed circumstances, and whether the precedent is statutory or constitutional, procedural or substantive, and so forth, may also be considered. *See* Citizens United v. FEC, 558 U.S. 310, 362–63 (2010) (discussing an example of the Court considering factors of reliance interests and age of precedent in deciding whether to overturn precedent); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (discussing an example of procedural, constitutional, and evidentiary factors that were considered by the Court). *See supra* note 76 (discussing an example of a substantive factor that was considered by the Court); *see also supra* note 62 (discussing an example of a statutory factor considered by the Court).

[87] Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1552 (2000). Professor Michael Stokes Paulsen has previously recognized the presence of this fallacy in *Casey*:

> The inquiry into "workability," as framed by the Court, is essentially a question of whether the Court believes itself able to continue working within a framework established by a prior decision. The unworkability of precedent provides additional incentive for the judiciary to overrule it.
>
> But the converse does not necessarily follow: The mere fact of workability is not a strong argument in favor of retaining a precedent. There may exist multiple "workable" interpretations of a text, but some of them are clearly wrong. A rule that says police may search homes whenever they like, without limitation, is readily judicially administrable ("the government always wins"), as is a rule that the police may never conduct searches ("the government always loses"). But

Casey stands for an entirely different proposition than does *Swift*, namely, that *if precedent is not unworkable, then it should not be discarded*.[88]

Of course, the Court was entitled to adopt this new, preservative use of workability if it wanted to do so.[89] But, by implying that its analysis was faithful to the long line of decisions stemming from *Swift*, the Court gave the new usage a misleading appearance of legitimacy and historical acceptance. As argued below, the Court's mistake of reasoning represented, ironically, a regrettably imprudent departure from well-settled law.[90] It created a rule that is exceptionally dangerous to the structural integrity of government.

B. The Dangerous Consequence

For the sake of simplicity, this Note has largely ignored other stare decisis considerations addressed in *Casey* and other cited decisions. For example, the majority in *Casey* leaned rather heavily on the suppositions that for twenty years, American culture had been shaped by reliance on the availability of abortion and that neither the law nor other circumstances had changed in a way that rendered *Roe* obsolete, among other arguments.[91] Thus, in *Casey*, workability was one of many defensive weapons employed by the Court to preserve *Roe*;[92] it could be argued that it was not even the most important one. Nevertheless, a shield is a shield, and the Court made no attempt to limit its new defensive tactic to constitutional cases or cases where other factors weighed strongly in favor of retaining the precedent.[93]

For these reasons, it is not hard to see how courts could take the next natural step of utilizing workability as the primary shield for precedent of any sort. The dissent in *Schumacher* is illustrative. The practical superiority of the bright-line interpretation (i.e., the rule directing that appeals in "all zoning cases" were to be discretionary)[94] was, in the

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> neither one is a sound interpretation of the Fourth Amendment. Workability alone should not validate either one; if a court had lapsed into either error, the fact that the erroneous ruling made for a nice, crisp, bright-line rule surely would not be a sufficient reason to adhere to it.

Id.

88 Again, disregarding other factors for the sake of simplicity. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (discussing whether to discard a rule based on unworkability).

89 In the constitutional context, that is. As this Note argues, the Court should not adopt such a usage in the context of statutory interpretation because of the threat to separation of powers. *See infra* notes 102–104 and accompanying text.

90 *See infra* notes 97–99 and accompanying text.

91 *Casey*, 505 U.S. at 855–59.

92 *Id.* at 854–55.

93 *Id.*

94 *Supra* note 27 and accompanying text.

dissent's view, the single most important reason for retaining that interpretation, despite that interpretation's marked conflict with the plain meaning of the statute:[95] "[M]ost importantly [sic] in this situation is the factor of workability. . . . The workability of [the bright-line rule] cannot credibly be questioned."[96] The dissent was not going out on its own limb by taking this approach. It supported its rationale by pointing to the eminent authority of the United States Supreme Court:

> Contrary to any claim that the workability of a precedent is not a reason for retaining it, the United States Supreme Court and this Court have held otherwise. In *Kimble v. Marvel Entm't, LLC*, the Supreme Court stated that nothing about the precedent under consideration had proved unworkable; that the decision was "simplicity itself to apply"; that its "ease of use" appeared "in still sharper relief when compared to [the] proposed alternative"; and that the more "elaborate inquiry" would produce higher litigation costs and unpredictable results. The Court determined that it should not trade in a decision which was eminently workable for one with perhaps better legal reasoning but which was not as workable. It concluded that "[o]nce again, then, the case for sticking with long-settled precedent grows stronger. Even the most usual reasons for abandoning stare decisis cut the other way here."[97]

Contrary, however, to the dissent's own claim, its argument does not effectively answer the central argument against applying workability this way precisely because the authority the dissent cites is itself flawed. The point is not to criticize the dissent's analysis. On the surface, there was nothing wrong with the application of *Kimble* here. But, there was something wrong with *Kimble*. That decision was one of the Court's latest statutory cases in the *Patterson-Casey* workability mold, and thus included the hidden fallacy emanating from those cases.[98]

Having shown above why *Swift* does not necessitate a preservative use of workability, it remains to show why such a use is inappropriate in the statutory context. As the Supreme Court of Michigan has cogently explained,

> Although . . . the doctrine of stare decisis constitutes "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process," so also are these values promoted by the separation of powers doctrine, which holds that it is the responsibility of the judiciary to

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[95] Schumacher v. City of Roswell, 803 S.E.2d 66, 77 (Ga. 2017) (Hines, C.J., dissenting).

[96] *Id.*

[97] *Id.* at 77–78 (citation omitted) (quoting Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2411 (2015)).

[98] *See Kimble*, 135 S. Ct. at 2411 (citing Patterson v. McClean Credit Union, 491 U.S. 164, 173 (1989)) (discussing that precedent should not be overturned because it was not unworkable).

> respect the intentions of the Legislature by giving faithful meaning to the words of the law. . . . Not only, in our judgment, are laws generally made more "evenhanded, predictable and consistent" when their words mean what they plainly say, and when all litigants are subject to the equal application of such words, but laws are also made more accessible to the people when each of them is able to read the law and thereby understand his or her rights and responsibilities. When the words of the law bear little or no relationship to what courts say the law means . . . , then the law increasingly becomes the exclusive province of lawyers and judges.[99]

It must not be forgotten that although, as a practical matter, courts and legislatures benefit from stare decisis, the people are the ultimate and intended beneficiaries.[100] The power of stare decisis to make the law *knowable* is one of the doctrine's primary justifications.[101] Maintaining interpretations that fly in the face of statutes' plain text makes the statutes incomprehensible and contravenes the basic purpose of stare decisis—or at least suggests that only judge-made law need be knowable.

In the context of statutory interpretation, the saving grace of stare decisis is that the legislature can change the language of the law if it disapproves of the judiciary's interpretation.[102] This line of thinking, however, cannot justify preservative use of the workability factor. The reason is simple: using workability to shield incorrect interpretations destroys the legislature's incentive to act. It is one thing for a court to retain a questionable interpretation that has engendered such heavy reliance that overturning it should be left to the legislature as the body better able to weigh the costs and benefits of such action, or to continue applying a well-known rule that is so old the legislature has effectively ratified it. It is quite another to fix a rule prescribed by statute and then expect the legislature to respond. Consider the legislature's options in such a case: it can enact legislation attempting to reinstate the original meaning of the statute; it can change the statute to conform to the

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[99] Garg v. Macomb Cty. Cmty. Mental Health Servs., 696 N.W.2d 646, 659 n.10 (Mich. 2005) (citations omitted).

[100] *See* Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924) (explaining who benefits from stare decisis and how).

[101] Indeed,

> [f]rom the very nature of law and its function in society, the elements of certainty, stability, equality, and knowability are necessary to its success, but reason and the power to advance justice must always be its chief essentials; and the principal cause for standing by precedent is not to be found in the inherent probable virtue of a judicial decision, it "is to be drawn from a consideration of the nature and object of law itself, considered as a system or a science."

Id. at 414 (citation omitted).

[102] *See Patterson*, 491 U.S. at 172–73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

judiciary's interpretation; or it can do nothing. In the latter two scenarios, the affront to separation of powers is clear: the legislative will, as expressed by the plain language of the statute, succumbs to the will of the judiciary. The first option seems promising—in fact, it seems to reflect that healthy competition that designedly characterizes the relationship between the branches.[103] But, think what the legislature is being asked to do, and it will become apparent that the promise of this solution is illusory. Where is the incentive for the legislature to change a "workable" rule?

"The mere fact that Congress can overturn our cases by statute is no excuse for failing to overrule a statutory precedent of ours that is clearly wrong, for realities of the legislative process often preclude readopting the original meaning of a statute that [the courts] have upset."[104] These realities are numerous and formidable.[105] For starters, is it realistic to expect that the legislature will be so zealous of its rights that it will attempt to vindicate them by reinstating a law that influential constituents (i.e., lawyers) disfavor? The political opportunity that existed at the time the law was initially passed may have been lost. Testimony, studies, and circumstances that supported the law's adoption may have passed out of memory. And what will bring the matter to the legislature's attention? At least in theory, the frustrations experienced by judges and practitioners as they sincerely attempt to apply a functionally defective law would serve to attract the attention of legislators (many of whom typically are attorneys themselves). But, these have been wiped away by the judicial fix. Thus, the preservative use of workability shields the erroneous interpretation not only from elimination by the courts, but at least somewhat from the eyes of the legislature. This may even forestall discovery of a better solution and leave the judiciary feeling obligated constantly to reevaluate the practical effects of its decisions. Finally, even if all these problems and others there is not space to address were avoided, it makes little sense for a legislature to enact clear language, have courts invent a supposedly better solution, and then compel the legislature to rethink its previous decision. The potential for abuse is quite clear here.

CONCLUSION

This Note has described the genesis and metamorphosis of workability, and highlighted the defect that arose as a result of its

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[103] *See* THE FEDERALIST NO. 51, at 317–19 (James Madison) (Clinton Rossiter ed., 1961) (describing the competing ambitions of the members of each branch as the "great security against a gradual concentration of the several powers in the same department").

[104] Clark v. Martinez, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting).

[105] *See id.* at 403–04 (discussing why reinstating precedent would be a formidable option for Congress).

transformation.[106] Born of a procedural quagmire, the workability inquiry began its career serving as a weapon to eliminate functionally obnoxious precedent.[107] Initially, courts wielded it only when the occasion called for it.[108] Gradually, courts worked it into their standard arsenal, and it became a regular part of an increasingly discretized stare decisis test.[109] Toward the turn of the millennium, an error of reasoning refashioned workability into a defensive weapon.[110] As such, workability may be uniquely effective, but it is also uniquely dangerous, critically compromising the legislative will and burdening courts with a task they were not meant to bear in a way that no other stare decisis factor appears to do.[111] To compound matters, courts' handling of workability has been anything but deft. Decisions applying it in recent decades have lacked clarity, precision, and consistency.[112] They have suffered from flawed logic. This inexpert management imperils the greater good.

Nevertheless, it goes without saying that unworkable rules are a bad thing.[113] The following formulation could allow workability to remain part of the stare decisis test and continue to fight the good fight while precluding its misapplication:

Definition: A rule or interpretation is unworkable if it is insusceptible of principled, consistent, and predictable application.[114]

1. If it is contended that an interpretation is unworkable and the court agrees, the court should treat the interpretation's unworkability as evidence that the interpretation is wrong. The court should proceed to

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[106] *See supra* notes 32–58 and accompanying text; *see supra* notes 85–90 and accompanying text.

[107] *See supra* notes 46–49 and accompanying text.

[108] *See supra* note 46 and accompanying text.

[109] *See supra* notes 47–49 and accompanying text.

[110] *See supra* notes 58–68 and accompanying text.

[111] *See supra* notes 101–102 and accompanying text.

[112] *See supra* notes 91–102 and accompanying text.

[113] Professor Randy Kozel has contended that workability is not an essential part of stare decisis analysis and has criticized application of the factor for creating "intractable disagreements over whether a precedent really is unworkable." Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 421–25 (2010). But, he goes on to point out,

> Of course, all else being equal, it is preferable for the Court to choose a workable rule of decision rather than an unworkable one. Unworkable rules are clumsy and unpredictable, creating needless costs and diluting the benefits of a stable society governed by the rule of law. But the reason for favoring workable doctrines is because that is a sensible approach to selecting the rule of decision to govern an area of law. The choice does not reflect any inherent link between a precedent's workability and its claim to deference.

Id. at 423.

[114] This is consistent with the approach in *Swift*. *See* Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89, 133–34 (1999) (describing other ways the Court has defined workability).

reconsider the interpretation. If it is determined that the interpretation is correct based on a principled application of interpretive methods (beginning with examination of the plain language of the statute), the interpretation should be maintained unless by reason of its unworkability the statute is void for vagueness or other reason.[115]

2. If it is contended that an interpretation is unworkable but the court disagrees, the effect of such disagreement should be limited to rejecting the contention. The court's belief that the interpretation is workable should be given no weight as against other considerations that may recommend rejecting the interpretation, nor any weight in addition to other considerations that may recommend retaining the interpretation.

3. If an interpretation is challenged on some other basis but not on grounds that it is unworkable, a court should not inquire *sua sponte* whether the interpretation is workable. The court should proceed as called upon to consider whether the interpretation is sound and whether other factors weigh in favor of retaining the interpretation in the interests of justice.

It may be contended that this formulation suggests a distinction without a difference. After all, there seem to be only two possibilities: precedent is either workable or it is not. If a reviewing court does not reject precedent as unworkable, then it retains it as workable, right? Not exactly. Workability is not, in fact, a binary characteristic. One rule might be more

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[115] In such a case, courts would simply have to do their best to apply the law in fair and consistent manner. Notably, even in *Swift & Co. v. Wickham*, where the rule represented the very prototype of unworkability, the Court noted that it could have disposed of the issue without overruling *Kesler* simply by making a decision regarding the relative amount of statutory interpretation involved. *See* Swift & Co. v. Wickham, 382 U.S. 111, 115 (1965) (discussing the amount of statutory construction involved in *Kelser* in comparison with *Swift* as a reasonable basis to avoid overruling *Kelser*). Nevertheless, it would be prudent for courts frequently faced with applying a confusing statute to express their dissatisfaction with the law in writing and attempt to provide clear guidance for litigants. The concurrence in *Schumacher v. City of Roswell* provides an example of this:

> What, for example, is a "decision"? Or an "administrative agency"? And what is the answer when a case raises claims regarding legislative, executive, and adjudicative decisions by a government entity acting in different capacities with respect to each of the "decisions"? The statute invites rather than answers these questions, and we can only do so much to simplify while also remaining faithful to its text.
>
> Accordingly, the General Assembly may wish to clarify the scope of the matters that are subject to the discretionary appeal process. Until then, the best path forward . . . may well be to follow the advice of two leading Georgia appellate treatises and file a discretionary application in every instance where there is any doubt.

803 S.E.2d 66, 72–73 (Ga. 2017) (Grant, J., concurring). Between this approach and the availability of measures such as declaring a law void for vagueness, courts should be able to fulfill their "institutional responsibility to ensure a workable and just litigation system," Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 612 (2010) (Kennedy, J., dissenting), insofar as it lies within their power and authority to do so.

workable than another, but both might have some "mischievous consequences." Similarly, one rule might be "eminently workable," but that does not mean every alternative is dysfunctional. In a sense, characterizing a rule as "not unworkable" is to characterize it as anything other than intractable—such as mediocre, for instance. Is a thing's mediocrity a reason for keeping it? Similarly, to characterize a rule as "eminently workable" is to say that there may remain reasonably workable—even completely satisfactory—alternative rules. The formulation suggested above contemplates all these possibilities and would enable courts to undo errors of their own making while limiting the good-faith bases for retaining questionable interpretations to those that do not have a natural tendency to undermine separation of powers.

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SPECIAL EDUCATION ROADBLOCK: UNILATERAL PARENTAL CONSENT UNDERMINES VIRGINIA'S STATUTORY SCHEME

INTRODUCTION

Education is of longstanding importance throughout American history, and it is particularly important in Virginia.[1] The Supreme Court in *Brown v. Board of Education* wrote:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.[2]

At the time of the *Brown* decision, segregation in schools was not limited to racial minorities but also extended to children with disabilities.[3] Many children with disabilities were being excluded from public schools.[4] After *Brown*, parents of special needs children began to address this discrimination by bringing lawsuits against their school districts.[5] This movement significantly changed the approach to education for disabled children; it led to a federal mandate that provided a "free and appropriate public education" to special needs children.[6]

Virginia statutes also require this "free and appropriate education" be afforded to special needs students.[7] While education is important in

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1 *See, e.g.*, Green v. Cty. Sch. Bd., 391 U.S. 430, 441–42 (1968) (holding that a Virginia School Board's education plan did not adequately address racial segregation); Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 486–87 n.1 (1954) (addressing segregation in public schools in four states, including Virginia).

2 *Brown I*, 347 U.S. at 493.

3 PETER W.D. WRIGHT & PAMELA DARR WRIGHT, WRIGHTSLAW: SPECIAL EDUCATION LAW 13 (2d ed. 2007); *see also* Mills v. Bd. of Educ., 348 F. Supp. 866, 868 (D.D.C. 1972) (discussing the practice of suspending and excluding children with disabilities from public schools); Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1258–59 (E.D. Pa. 1971) (discussing the exclusion of children with mental retardation from public schools).

4 *See* cases cited *supra* note 3.

5 WRIGHT, *supra* note 3, at 13.

6 Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2012).

7 VA. CODE ANN. § 22.1-214 (2016).

Virginia, parental rights are of equal importance. In fact, Virginia has taken extra steps to protect parental rights.[8] The Virginia Administrative Code on Special Needs Education, however, requires parental consent in the application of this law, presenting a conflict between two important constitutional objectives: protecting parental rights and providing for a child's educational needs.[9] As it stands in Virginia, the current unilateral parental consent requirement undermines Virginia's special education laws when a parent refuses to reinstate his or her child into the least restrictive learning environment.

This Article discusses the conflicting nature of unilateral parental consent laws in Virginia and the right to a free appropriate public education within the least restrictive learning environment. Part I of this Article explains federal regulations, mandates, and case law regarding special education and individualized education programs.[10] Part II specifically discusses Virginia's approach to parental consent with respect to individualized education programs and placement of the child in the least restrictive learning environment.[11] Part III addresses other states' approaches to parental consent.[12] Part IV argues that Virginia should adopt a combination of approaches including: (1) the approach taken by Kansas regarding the level of parental consent required based on the percent of change in the restrictiveness of the child's learning environment, and (2) an approach taken by a number of other states, that provides procedural safeguards to protect the interests and rights of parents.[13] Virginia's current unilateral parental consent requirement undermines Virginia's special education statutory laws when a parent refuses to reinstate his or her child into the least restrictive learning environment.

I. FEDERAL REGULATIONS AND CASE LAW

A. Background of Special Education Programs

The Elementary and Secondary Education Act of 1965 (ESEA)[14] was the first piece of legislation aimed toward narrowing the gap in educational quality for children with special needs.[15] This Act increased

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[8] Virginia has recently protected parental rights through legislative enactments. *See* VA. CODE ANN. § 1-240.1 (2017) ("A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child.").

[9] 8 VA. ADMIN. CODE § 20-81-170 (2014).

[10] *See infra* Part I.

[11] *See infra* Part II.

[12] *See infra* Part III.

[13] *See infra* Part IV.

[14] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.).

[15] *Id.* §§ 201, 303(b)(7).

the resources available to special needs students by providing more federal funding to schools that service children from low-income families.[16] Additional resources were provided to schools in order to promote educational equality for diverse groups of students.[17] After the enactment of the ESEA, two landmark court cases addressed the separation of special needs students.[18]

In 1971, the United States District Court for the Eastern District of Pennsylvania held that the state could not deny any child with mental disabilities the right to a free and appropriate public program of education.[19] This case discussed the need for parental involvement in determining the educational environment and other decisions regarding a special needs child's educational program.[20] Therefore, the need for parental involvement when making education placement decisions for children with special needs has been apparent and accepted from a fairly early point within the legal discussion of what should be required by federal law regarding special education.[21]

The very next year, *Mills v. Board of Education* also addressed the issue of public school exclusion of children with special needs.[22] The United States District Court for the District of Columbia held that the Board of Education had to provide "publicly supported education to all of the children of the District, including these 'exceptional children.'"[23] Not providing these "exceptional children with free and appropriate education was a violation of their due process rights[24] because "[d]ue process of law requires a hearing prior to exclusion."[25] The court emphasized that the requirement applied regardless of the financial burden it imposed.[26]

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[16] *Id.* §§ 201, 203(a)(2), (c)–(d), 303(b).

[17] *Id.* §§ 201, 303(b).

[18] Mills v. Bd. of Educ., 348 F. Supp. 866, 870 (D.D.C. 1972); Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971) (per curiam).

[19] *Pa. Ass'n*, 334 F. Supp. at 1267 ("[D]efendants shall formulate and submit to the Masters for their approval a plan . . . to commence or recommence a free public program of education and training for all mentally retarded persons . . . aged between four and twenty-one years as of the date of this Order.").

[20] *Id.* at 1261–62, 1267.

[21] *Id.*

[22] 348 F. Supp. at 868.

[23] *Id.* at 871.

[24] *Id.* at 871, 875.

[25] *Id.* at 875.

[26] *Id.* at 876. High cost burdens of educating special needs children on the school system is a primary defense in special education cases which appear before the United States Supreme Court. WRIGHT & WRIGHT, *supra* note 3, at 13 n.19.

In 1973, the Rehabilitation Act was amended by Section 504 to protect students with disabilities.[27] This Act, now referred to as the Nondiscrimination Under Federal Grants and Programs Act, provided:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[28]

Educational protection is ensured because "Section 504 regulations require a school district to provide a 'free appropriate public education' (FAPE) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability."[29] This section is intended to provide an education that meets the needs of a disabled child just as sufficiently as his or her nondisabled peers' educational needs are met.[30]

Just two years later, Congress enacted The Education for All Handicapped Children Act of 1975.[31] At that time, across the nation, less than half of the children with special needs were being given an appropriate level of public education.[32] Additionally, upwards of one million children were being excluded from public schools altogether.[33] These children did not have appropriate educational services offered to them, were excluded from learning in the same environment as their peers, were prevented from learning because of undiagnosed disabilities, and were forced to find educational services outside of their public schools due to a lack of resources.[34] This Act established accountability of states through distributing federal funding for appropriately educating children with special needs at the state and local levels.[35] These cases and legislation significantly brought to light the discrimination of individuals with disabilities and opened the door to progressive action taken by both

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[27] 29 U.S.C. § 794 (2012).

[28] *Id.*

[29] Office for Civil Rights, *Protecting Students with Disabilities*, U.S. DEPT. OF EDUC. (Sept. 25, 2018), https://www2.ed.gov/about/offices/list/ocr/504faq.html.

[30] *Id.*

[31] Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (codified at 20 U.S.C. § 1401 (2012)).

[32] WRIGHT & WRIGHT, *supra* note 3, at 20.

[33] *Id.*

[34] Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(2) (2012).

[35] *See* Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1411 (2012) (discussing the allotment of funds to the States).

parents and legislators through lawsuits and enacting further legislation in order to provide special needs children with their right to a free appropriate public education.

B. Development of Statutory Laws and Regulations

The Education of the Handicapped Act was updated to reflect these progressive changes and renamed The Individuals with Disabilities Education Improvement Act of 2004 (IDEA).[36] IDEA establishes: (1) appropriate learning standards for mentally disabled children in public schools, and (2) qualifications for special education teachers.[37] IDEA accomplishes these requirements by providing federal funding to states that meet the educational needs of children with disabilities in order to "prepare them for further education, employment, and independent living."[38] This Act explicitly establishes the requirement of a free appropriate public education (FAPE requirement) in order to "improv[e] educational results for children with disabilities."[39] IDEA also states that the education of special needs students can be improved by "strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."[40]

IDEA allots federal funding to states that agree to be held accountable for providing children with disabilities the free appropriate public education they are entitled to under the Act.[41] This funding is distributed to states on an individual basis, determined mainly by how many special needs students the state is educating.[42]

Placement, according to IDEA, should be in the child's least restrictive learning environment.[43] The least restrictive learning environment would be "as close to home as possible, and unless the [Individualized Education Program] requires to the contrary, the child should be placed in the school where he or she would be placed were he or

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36 20 U.S.C. § 1400(d).

37 *See id.* (setting forth the purposes of the chapter, which include ensuring provision of necessary resources for teachers and assistance to educational agencies for the education of children with disabilities).

38 *Id.*; *see id.* § 1411(a)(1) (authorizing the issuance of such funding).

39 *Id.* § 1400(c)(3).

40 *Id.* § 1400(c)(5)(B).

41 *Id.* § 1412(a).

42 *Id.* § 1411(a)(2).

43 *Id.* § 1412(a)(5)(A).

she not disabled."[44] This least restrictive environment is determined for each child on an individual basis.[45]

To accomplish this learning environment, an "individualized education program" (IEP) is developed with the help of parents and an educational placement is decided.[46] Generally, the IEP is reviewed each year, and the child is re-evaluated at least every three years under the Act.[47] An IEP consists of eight things: (1) it must contain a statement of the child's present level of educational performance; (2) it must contain a statement of the annual educational goals as well as short-term objectives related to those goals; (3) it must contain an explanation of how the child's progress in meeting those goals will be measured and reported; (4) the IEP must contain a statement of the specific educational and related services to be provided, as well as a statement of any program modifications that will be provided; (5) it must contain an explanation of the extent that the child will not be serviced in regular educational programs; (6) it must contain a statement of necessary accommodations to gauge the child's performance; (7) the IEP must contain the date the services will begin as well as the expected duration, location, and frequency of the services; and (8) the IEP must be in effect by the time the child is sixteen and updated yearly.[48]

Under IDEA, the local education agency (LEA) is required to give parents notice, giving them a reasonable amount of time before the initial evaluation takes place and telling them what to expect when they plan to evaluate the child.[49] Parental consent is required prior to this evaluation, but it is not required for the repeated evaluations that will come after the initial evaluation.[50]

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[44] THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 103 (1993); *see also* 20 U.S.C. § 1412(a)(5)(A) (2012) (requiring children to be placed in the least restrictive environment); 34 C.F.R. § 104.34 (2018) (indicating that a handicapped individual should be educated with their non-handicapped peers to the extent appropriate).

[45] 20 U.S.C. § 1412(a)(5)(A);

> To the *maximum extent appropriate*, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id. (emphasis added).

[46] *Id.* § 1414(a)(1)(D), (d)(1), (d)(3).

[47] *Id.* § 1414(a)(2)(B), (c)(4)(A).

[48] *Id.* § 1414(d)(1).

[49] 34 C.F.R. §§ 300.322, 303.421(a) (2018).

[50] *Id.* §§ 300.300(a), 300.324(a)(4)(i).

Expanded explanations are helpful here. Change in placement may only occur when consistent with a child's IEP.[51] It is important to note that under IDEA, parental consent is *not* required before there is a reevaluation of services or change in placement.[52] Parental consent is only required before the pre-placement evaluation and before the first placement of the child.[53] Although giving notice to parents of any change in a child's placement is required, parental consent is not.[54] However, states may require parental consent in more situations than required by federal law.[55]

Under IDEA, parents still retain the option to place their child in a private institution despite the free appropriate public education offered to them within their school district.[56] When a child is placed into a private program, the school system is still required to provide services that give "comparable benefits to private school children, including quality, scope, and opportunity for participation."[57] This requirement of comparability does not include the provision of convenience, as in the convenience of a public school system.[58]

The assistance offered under the IDEA aims:

> [1.] to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> [2.] to ensure that the rights of children with disabilities and parents of such children are protected; and
>
> [3.] to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities . . .
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> . . . .

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[51] *See* 20 U.S.C. § 1412(a)(5)(B)(i) (2012) (prohibiting States from using funds in a way that results in placements that violate the Act ,but requiring states to use funds in a way that fulfills the needs of the child as described in the IEP).

[52] *Id.* § 1414(a)(2)(A).

[53] *Id.* § 1414(a)(2)(D)(i).

[54] *See id.* § 1414(b)(1) (requiring notice to parents and describing evaluation procedures).

[55] *See id.* § 1407(a)(2) (stating that a State must notify local education agencies of any rule, regulation, or policy the State imposes in addition to the Federal regulations).

[56] *Id.* § 1412(a)(10)(A)(i).

[57] GUERNSEY, *supra* note 44, at 113; *see also* 20 U.S.C § 1412(A)(i) (indicating that provisions are made for children to participate in assistance programs subject to requirements in the subsection).

[58] *See* 20 U.S.C. § 1412(a)(10)(A)(i) (failing to mention the convenience of public schools).

> [4.] to assess, and ensure the effectiveness of, efforts to educate children with disabilities.[59]

Additionally, IEPs are defined as "a written statement for a child with a disability that is developed, reviewed, and revised in a meeting in accordance with sections 300.320 through 300.324."[60] These IEPs are essential to maintaining accountability and educational improvement because they keep track of the child's educational progress and placements on a regular basis.[61]

The No Child Left Behind Act of 2001[62] was intended to provide all children significant opportunity to receive a fair, equitable, and high-quality education and to close educational achievement gaps.[63] The Act further mandated higher qualification requirements for special education teachers.[64] To achieve the purpose of this Act, there was an increase in parental rights, "affording parents substantial and meaningful opportunities to participate in the education of their children."[65] For example, this Act required "states and school districts to give parents easy-to-read, detailed report cards on schools and districts, telling them which ones were succeeding and why."[66] Parents were also given objective data about their own child so they could better understand the child's academic achievement level.[67] Additionally, if a school needed improvement or a child felt unsafe, parents could choose to send their child to a public school other than where they were zoned to attend.[68] Other influential factors were the requirements for state assessments and public reporting.[69] These requirements helped enforce accountability of the public school systems.[70]

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[59] *Id.* § 1400(d).

[60] 34 C.F.R. § 300.22 (2018).

[61] *See id.* § 300.350 (requiring States to make a good faith effort to meet the goals stated on the child's IEP). The Family Educational and Privacy Rights Act (FERPA) addresses parental involvement and access to: (1) their children's educational records, (2) their children's privacy, (3) their children's confidentiality, (4) parent amendment of records, and (5) destruction of records. 20 U.S.C. § 1232(g). The intent of this act is to protect the privacy of both parents and students and is applicable to all agencies or institutions that receive deferral funds including elementary school, secondary schools, colleges, and universities. *Id.*

[62] Pub. L. No. 107–110, 115 Stat. 1425 (2001) (repealed 2015).

[63] *Id.* § 1001.

[64] *See id.* (aiming to ensure that teachers are adequately trained and assessed).

[65] *Id.*

[66] U.S. DEPT. OF EDUC., NO CHILD LEFT BEHIND A PARENTS GUIDE 2 (2003), https://www2.ed.gov/parents/academic/involve/nclbguide/parentsguide.pdf.

[67] *Id.* at 1.

[68] *NCLB Choices for Parents*, U.S. DEPT. OF EDUC., (Feb. 08, 2013) https://www2.ed.gov/nclb/choice/index.html.

[69] 20 U.S.C. § 6311(b)(3), (h) (2012).

[70] *Id.* § 6311(b)(2).

C. Special Education Case Law

The right to a free appropriate public education is not only a substantive right, but a procedural right as well, and if both are not present, there has been a violation of IDEA.[71] Many cases shed light on issues concerning special education throughout America. *Rowley v. Board of Education* addressed the free appropriate public education requirement.[72] The plaintiff was a deaf child whose testing indicated that her education was limited by communication issues in the classroom.[73] The court ordered that a sign language interpreter be placed in class with the child.[74] This case discussed two guidelines set forth in IDEA.[75] First, the court discussed the Act's requirement of an individualized education program that is created collaboratively with the child's parents and teachers.[76] Second, the court discussed the requirement that handicapped students "are to be educated with non-handicapped children to the 'maximum extent appropriate.'"[77]

In doing so, the Court set out a two-part inquiry for determining whether a school district has satisfied the FAPE mandate: (1) the state must have "complied with the procedures set forth in the Act;" and (2) the IEP developed through the Act's procedures must be reasonably calculated to enable the child to receive educational benefits.[78]

Rowley was appealed to the Supreme Court in *Board of Education v. Rowley*.[79] On appeal, the Supreme Court reversed the decision below that stated the plaintiff had a right to an interpreter in the classroom under the FAPE mandate.[80] Because the child was "perform[ing] better than the average child in her class and [was] advancing easily from grade to grade" without the interpreter, the Court found that the school had been compliant with the Act.[81] An interpreter was not needed to afford the child an "appropriate" education.[82]

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71 *See* 20 U.S.C. §§ 1414–1415 (2012) (§ 1414 discussing substantive rights and § 1415 discussing procedural safeguards).

72 483 F. Supp. 528, 529 (S.D.N.Y. 1980), *rev'd*, 458 U.S. 176 (1982).

73 *Id.* at 532.

74 *Id.* at 529.

75 *Id.* at 533. At the time of this case, IDEA was referred to as "The Education for All Handicapped Children Act of 1975." *Id.* at 529.

76 *Id.* at 533.

77 *Id.*

78 *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982) (restating the two-part inquiry from the district court's analysis as the necessary requirements for state compliance).

79 *Id.* at 176.

80 *Id.* at 182, 210.

81 *Id.* at 210.

82 *Id.*

In *Irving School District v. Tatro*, the Supreme Court further clarified the FAPE mandate.[83] Specifically, the Court held that medical procedures that were a part of a child's individualized education program had to be provided for the child by the school district in compliance with IDEA.[84]

School Community of Burlington v. Department of Education dealt with parents who unilaterally placed their handicapped child into a private institution.[85] The issue of the case dealt with funding and whether there was a requirement of reimbursement for transportation costs and tuition under IDEA.[86] The Court stated:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.[87]

However, the Court explained that if a parent decides to place a child in a private institution that is not consistent with the child's IEP, and upon judicial review it is determined to be inappropriate, the parents will not be reimbursed because the public is not required to pay for a child's private education if an appropriate education can be offered in public school.[88]

Cochran v. District of Columbia addressed unilateral parental placement into a private educational environment when there is no other education enrollment option.[89] Because, in this case, there was no other enrollment option, the court held that the costs of tuition and related expenses were to be paid by the school system.[90]

This case is distinct from *Barnett v. Fairfax County School Board*, in which the court held that the "school system is not required to duplicate the Cued Speech program for Michael alone merely because there exists a high school that is slightly closer to his house or one he would rather attend."[91] *Barnett* fleshed out what is deemed an "appropriate" education

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[83] *See* 468 U.S. 883, 885, 891 (1984) (discussing requirements for a child to access a meaningful education).

[84] *Id.* at 893–94. Notably, the Court held in *Honig v. Doe*, that a suspension of ten days or more constitutes a "change in placement." 484 U.S. 305, 328–29 (1988) (quoting 20 U.S.C. § 1415(e)(3) (1980)). This opinion rested heavily on Congress's intent to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students." *Id.* at 323. Again, an emphasis on parental involvement with special needs children's educational placement is apparent. *Id.* at 324.

[85] 471 U.S. 359, 362 (1985).

[86] *Id.* at 364, 366–67.

[87] *Id.* at 370.

[88] *Id.* at 373–74.

[89] 660 F. Supp. 314, 315–16, 318 (D.D.C. 1987).

[90] *Id.* at 318–19.

[91] 927 F.2d 146, 151 (4th Cir. 1991).

in compliance with the Education of the Handicapped Act.[92] Because the student had access to the needed program, although it was at another school, the school system was still deemed to have provided that student with an appropriate education.[93] This set of facts differs from *Cochran* because, in this case, the school district provided the child with a free appropriate public education. It was just not at the closest school to his home.[94]

The Supreme Court, in *Florence County School District Four v. Carter*, once again held that reimbursement is appropriate for parents who unilaterally place their child in a private institution when he or she is not being afforded a free appropriate public education through the public school system.[95] However, parents who,

> unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. They are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.[96]

II. VIRGINIA'S APPROACH TO PARENTAL CONSENT AND CHANGES IN THE LEARNING ENVIRONMENT

"Virginia's parent consent provisions exceed federal regulations and may hinder serving students with disabilities in the least restrictive environment."[97] In Virginia, there is a scale of educational placement options for special needs students, which ranges from the least to the most restrictive learning environments.[98] The potential learning environments for Virginia students are: (1) a regular class for 80% or more of the day; (2) a regular class for more than forty but less than 80% of the day; (3) a regular class for less than 40% of the day; or (4) a separate public school, private special education day school, public residential school, private residential school, hospital, correctional facility, or home-based school.[99]

The appropriate learning environment for a child must be determined by what is the least restrictive learning environment where the child will

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92 *Id.* at 152–54.

93 *Id.* at 153.

94 *Id.*

95 510 U.S. 7, 9–10, 15–16 (1993).

96 *Id.* at 15 (citations omitted) (quoting Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359, 373–74 (1st Cir. 1985)).

97 VA. COMM'N ON YOUTH, (HJR 196, 2014), HOUSE DOCUMENT NO. 14: THE USE OF FEDERAL, STATE, AND LOCAL FUNDS FOR PRIVATE EDUCATIONAL PLACEMENTS OF STUDENTS WITH DISABILITIES—YEAR TWO, 4 (2015).

98 *Id.* at 10–11.

99 *Id.* at 11.

receive a free appropriate public education, on an individual basis.[100] The Virginia Department of Education took a survey in 2008 that fleshed out the factors used to determine whether a special needs student would be placed in a public or a private learning environment.[101] These factors include: (1) the availability of appropriate services in Virginia's public schools; (2) limitations on the local education agency (LEA) staff in serving children; and (3) parent preference.[102]

Although the total number of children with special needs has decreased, the number of special needs students with a high level of need being serviced in Virginia has recently increased.[103] From 2009 to 2013, the total number of special needs students in Virginia decreased.[104] However, the number of students suffering from more severe health impairments, such as autism, increased by 23%.[105]In those years, there were 46,865 students within the high impairment level, but by the 2014–2015 school year this number rose to 48,576.[106]

The Virginia Commission on Youth summarizes the least restrictive learning environment set forth in IDEA:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[107]

The Virginia Board of Education sets the standards, termed Standards of Quality (SOQ), for Virginia's public schools.[108] A major issue with placing children in a private school to service their needs is that

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[100] 8 VA. ADMIN. CODE § 20-81-130 (2014); VA. COMM'N ON YOUTH, *supra* note 98, at 10–11.

[101] VA. COMM'N ON YOUTH, STUDY ON THE USE OF FEDERAL, STATE, AND LOCAL FUNDS FOR PRIVATE EDUCATIONAL PLACEMENTS OF STUDENTS WITH DISABILITIES—YEAR TWO, 11 (2015), [hereinafter STUDY] (republishing the original data from the Virginia Department of Education survey in 2008).

[102] *Id.*

[103] VA. COMM'N ON YOUTH, *supra* note 97, at 12.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] 20 U.S.C. § 1412(a)(5)(A) (2012) (setting forth the least restrictive learning environment standard); VA. COMM'N ON YOUTH, *supra* note 97, at 13 (quoting the statutory standard).

[108] *See* VA. CODE ANN. § 22.1-321 (2016) (authorizing the Board of Education to make regulations concerning schools); *see also* VA. COMM'N ON YOUTH, *supra* note 97, at 15 (explaining that standards for public schools are known as "Standards of Quality").

private schools are not "formally held accountable for student progress."[109] This lack of accountability is problematic in determining if the placement effectively services its students.[110] Additionally, the assessment scores of students placed in private institutions are not reported to the child's home school but rather just to the local education agency.[111] In order to get a better idea of how these children are being serviced and how they compare with their peers, these private schools should be formally held accountable. Standards of Learning (SOL) tests determine public school accreditation and promote consistency of learning throughout the state.[112] It would benefit the state to require that these scores be reported to private placed students' home schools.

Once a child is placed in a private school, the locality is no longer required to maintain an active case management of students that were referred by a Family Assessment Planning Team (FAPT).[113] This lack of requirement is a drawback because students who are referred by the FAPT may need help in areas other than strictly education.[114] Maintaining active case management, although not required once placed in a private program, would give students better assistance with behavioral issues or problems in the student's home life by determining and providing proper services to the child.[115]

In 2015, the Virginia Commission on Youth conducted a study on the use of federal, state, and local funds for private educational placements of students with disabilities.[116] The most striking finding from the study is

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[109] STUDY, *supra* note 101, at 11.

[110] *See id.* (discussing the benefit of compiling information on a student's age, disability classification, services, and environment with achievement indicators and transition outcomes to assess the effectiveness of services).

[111] *Id.*

[112] *See id.* (describing the connection between accreditation ratings and approved assessments).

[113] *Id.* at 7–8. The Comprehensive Services Act created the Family Assessment and Planning team as an outreach to troubled youth and their families. *Family Assessment and Planning Team* (FAPT), CITY OF VA. BEACH, https://www.vbgov.com/government/departments/human-services/about/Pages/fapt.aspx. (last visited Aug. 21, 2018). The team consists of parents, state and local agencies, and private service providers. *Id.* They meet weekly to discuss how to better serve the youth and their families. *Id.* The programs offered include "psychological assessments, therapy, medical treatment, intensive in home treatment, therapeutic and residential care." *Id.* A management team looks at the FAPT assessment and decides how to allot funding to provide the determined appropriate services. *Id.*

[114] *See* STUDY, *supra* note 101, at 8 (discussing how the FAPT can help identify non-educational issues, such as home difficulties, other behavioral or mental health issues, and troubles involving the juvenile justice system).

[115] *See id.* at 7–8 (discussing how the FAPT can help identify non-educational issues and develop a strategy through an Individual Family Services Plan that would assist the child and the family at home).

[116] VA. COMM'N ON YOUTH, *supra* note 97, at 5–6.

that "Virginia's parent consent provisions exceed federal regulations and may hinder serving students with disabilities in the least restrictive [learning] environment."[117] The Virginia Board of Education can set its own rules and regulations that it deems appropriate to fulfill its duties.[118] Although Virginia, to receive federal funding for its special education programs, must follow requirements at least as stringent as those set forth by IDEA and its implementing regulations, the Commonwealth's *Regulations Governing Special Education Programs for Children with Disabilities* greatly adds to the federal requirements.[119]

Parental consent is mandated under IDEA (1) when the student has his or her first assessment to determine if he or she is eligible to receive special education services; (2) when the child is first determined to be eligible for these services; (3) when the student is reassessed using formal tests; (4) when the school system decides there is no longer a need for the child to be receiving special education services and therefore stops providing these services; (5) and in cases where the school system suggests an Individual Family Services Plan be used as opposed to an IEP because the child is between three and five years old. [120]

Special education private placements are funded by the Children's Services Act (CSA).[121] Recently, the amount of funding for private school placements has greatly increased for Virginia's special education students, despite the decrease, overall, in special needs students.[122] Between 2012 and 2015, funding for private day educational placements under the CSA went up by 32%, with a 13% increase between 2014 and 2015 alone.[123] The Commonwealth is expending a large amount of money, even though the overall number of special needs students has decreased, suggesting that there may be a more cost effective and appropriate way to service the needs of these children.

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[117] STUDY, *supra* note 101, at 12.

[118] VA. CODE ANN. § 22.1-16 (2016).

[119] STUDY, *supra* note 101, at 12.

[120] *Id.* at 12–13.

[121] VA. CODE ANN. § 2.2-5211(B)(1) (2017); *see also* STUDY, *supra* note 101, at 2–3. The average amount it costs to place a child in a special needs placement was over $40,000 per child. *Id.* It cost, on average, $37,821 for a child to be placed in a private day institution. *Id.* Virginia also has eleven regional schools which provide special education programs which administer to the students in their home school, a nearby district school, or in a separate school which costs $29,097 per student enrolled. *Id.* These numbers can be compared to the average funding of a student not placed in a special education program, which costs Virginia $13,497. *Id.*

[122] STUDY, *supra* note 101, at 7.

[123] *Id.* Funding changes when a student is placed in private day educational programs. *Id.* The cost burden shifts from the local education agency to the locality's budget. *Id.* This causes the local education agency to lose the SOQ funding, but it is not a substantial monetary loss. *Id.*

Unilateral parental consent can be an issue when it is appropriate to move a child from a private educational placement back into his or her public school.[124] A parent may refuse to allow their child to be placed back into the public school setting, despite assessments and documentation that show the student would be appropriately educated in the public school setting.[125]

This situation is possible because Virginia's parental consent regulations are much stricter than the federal mandates.[126] In Virginia, parental consent is required when any change is made to a student's individualized education program.[127] Although this requirement is beneficial with regards to the relationship between parents and the school system, it actually conflicts with the student having a right to a free appropriate public education in the *least restrictive learning environment*.[128] When a parent does not consent to a proposed change in his or her child's IEP, the placement will remain the same, and services rendered will be consistent with the last agreed upon program.[129] This course of action has been termed "stay put."[130]

The Virginia Commission on Youth explains:

> Virginia's parental consent provisions may prevent school divisions from modifying services when the child no longer requires them, even when the school division can show that the best interest of the child is being served pursuant to federal law. This can make it particularly challenging to transition students back to their home school even when the school can provide services which will enable the child to advance towards attaining their annual goals, be involved and make progress in the general education curriculum, participate in extracurricular and other nonacademic activities, and be educated and participate with other children with and without disabilities in those activities. While case law may support the school's desire to transition the child back to the home school, most schools do not wish to pursue costly and time-consuming dispute resolution procedures while further alienating the child/family. This can hinder a school division's ability to serve the child in the least restrictive environment.[131]

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124 *Id.* at 8.

125 *Id.*

126 *Id.* at 12–13. *Compare* 8 VA. ADMIN. CODE § 20-40-55(A) (2014) (stating that provision of services requires written consent from parents and legal guardians), *with* 34 C.F.R. § 300.300 (2018) (showing that parental consent is not required each time that new services are provided).

127 8 VA. ADMIN. CODE § 20-40-55(A)(3) (2014).

128 STUDY, *supra* note 101, at 13.

129 *Id.*

130 *Id.*

131 *Id.*

The FAPE requirement is to take place in the least restrictive learning environment.[132] As mentioned above, there are many benefits in addition to an appropriate education afforded to students in public schools.[133] Students with special needs benefit from the opportunity to participate in extracurricular activities and interact with their nondisabled peers.[134] The public-school atmosphere is more reflective of what most special education students will face upon graduation. Therefore, completing education in the least restrictive learning environment will better prepare students for life outside of the school setting.

III. OTHER STATE APPROACHES

Many states do not have more stringent parental consent requirements than what is required by federal law.[135] For example, California does not add stricter parental consent requirements for determining educational placement to the existing federal regulations.[136]

Connecticut's regulations regarding individualized education programs adopt the federal regulations from IDEA.[137] Instead of requiring parental consent throughout every step of the IEP process, parents must be merely able to "participate meaningfully" in the process.[138] Georgia only requires parental consent for initial evaluation, initial placement of the child, and re-evaluation.[139] These consent requirements comply but do not exceed the federal regulations set forth in IDEA.[140] Hawaii does not

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[132] VA. COMM'N ON YOUTH, *supra* note 97, at 12–13.

[133] *See* STUDY, *supra* note 101, at 13 (discussing additional school services that help children advance, such as involvement in the general education curriculum, participation in nonacademic activities, and interaction with children who may or may not have disabilities).

[134] *See id.* (discussing the merits of transitioning children back to their home school to promote greater integration of children with and without disabilities).

[135] *See infra* notes 136–151 and accompanying text.

[136] CAL. CODE REGS. tit. 5, § 3042(a) (2018). California provides a regulation specific to parent counseling and training in order to "assist[ ] parents in understanding the special needs of their child, and . . . provid[e] parents with information about child development." *Id.* § 3051.11. Other states have provided for this option, but California has taken it a step further by providing an explicit regulation. *Id.* Although California does not require parental consent throughout every step of the placement process, this regulation seems to foster a good relationship between the school system and parents of "exceptional" students. *Id.*

[137] CONN. AGENCIES REGS. § 10-76d-17(a)(1) (2018).

[138] *See id.* § 10-76d-17(c)(11) (requiring private special education programs to institute "policies and procedures" to facilitate such participation by parents).

[139] GA. COMP. R. & REGS. 160-4-7.09(6)(b) (2018).

[140] *See id.* 160-4-7.09(6)(a) (requiring parental consent for only the services that IDEA predicates on parental consent: initial evaluation, re-evaluation, provision of initial special education, information disclosure, and access to benefits or insurance).

exceed these requirements, either.[141] Additionally, Illinois has strictly adopted the federal regulations.[142] There is no additional requirement to obtain parental consent when changing the restrictiveness of an "exceptional" child's learning environment.[143]

Nevada, New Hampshire, New Mexico, New York, North Carolina, and Oregon have adopted the standard set forth by the federal regulations for parental consent and provide for parental notice even when their consent is not required.[144] Written notice to a parent concerning the potential change in educational placement is enough to satisfy the requirements in New Jersey.[145]

Ohio has also adopted the federal standard for parental consent.[146] If a change is made to a child's IEP, a copy of the amended child's IEP must be sent to the parent within thirty days.[147] Rhode Island and South Carolina have also not added any additional requirements on when parental consent is required.[148] Tennessee adopted all general regulations by adoption of 34 C.F.R. Sections 300 and 301.[149] Therefore, there are no additional requirements for parental consent when there is a change proposed in a child's learning environment in Tennessee.[150] Texas, Utah, Vermont, and Wyoming also have not added any parental consent

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[141] *See* HAW. CODE R. § 8-60-46 (2018) (setting forth the standards for parent participation, but not requiring explicit parental consent for every part of the process).

[142] *See* ILL. ADMIN. CODE tit. 23, § 226.540 (2018) (providing that consent shall be obtained in accordance with the federal regulations and providing additional requirements for revocation of consent, but not obtaining it).

[143] *See id.* (providing additional requirements for revoking consent but not for any instance requiring consent to be obtained).

[144] *See* NEV. ADMIN. CODE § 388.300(1) (2018) (requiring informed written consent for initial evaluation, reevaluation, and initial provision of services); N.H. CODE ADMIN. R. ANN. EDUC. 1103.02(a), (e) (2018) (requiring written notice to parents before an IEP meeting and integrating parental participation in accordance with federal regulations); N.M. CODE R. §§ 6.31.2.10(D)(1)(b), (D)(2)(d)(i) (2018) (incorporating by reference the federal regulations covering consent and notice requirements); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(a) (2018) (requiring parental consent for initial evaluation); 16 N.C. ADMIN. CODE 6H.0107(d)(2) (2018) (inquiring by reference the federal regulation governing parental notice requirements); OR. ADMIN. R. 581-015-2195(1)–(2) (2018) (requiring parental notice so that parents can participate in the IEP process).

[145] N.J. ADMIN. CODE § 6A:14-2.3(f) (2018).

[146] *Compare* OHIO ADMIN. CODE 3301-51-05(C) (2018), *with* 34 C.F.R. § 300.300 (2018) (showing that the language in the Ohio Administrative Code paraphrases the parental consent provisions of the Code of Federal Regulations).

[147] OHIO ADMIN. CODE 3301-51-07(L)(1)(f).

[148] *See* 08-020 R.I. CODE R. § 005(I)(J) (2018) (indicating the same parental notice and consent requirements as the federal standard); *see also* S.C. CODE ANN. REGS. 43-243(II) (2018) (referencing the federal regulations and implementing the federal requirements).

[149] TENN. COMP. R. & REGS. 0520-01-09.01 (2018).

[150] *See id.* (adopting by reference 34 C.F.R. §§ 300 and 301 in their entirety without any additional requirements).

requirements to those required by federal regulations.[151] Alabama requires parental consent prior to the application of the individualized education program, although unilateral private educational placement is not specifically discussed in its regulations.[152]

Alaska, however, does provide a specific course of action for unilateral parental placement.[153] In Alaska, if a parent places his or her child in a private educational placement or elects to keep his or her child in the private placement after it has been determined by the IEP team that the public school system can provide a free, appropriate public education for that child, the parents assume the financial responsibility of keeping their child in the private placement.[154] If the child's parents truly believe private placement is the only option, believing that their child would not be receiving FAPE through the public school system, they have a right to a due process hearing, which would determine what truly satisfies the least restrictive, appropriate learning environment for the child and, therefore, who is required to pay tuition.[155] As opposed to requiring parental consent during each phase of the IEP process, Alaska simply requires that each "parent has an opportunity to participate in meetings pertaining to the identification, evaluation, and placement of, and provision of FAPE to, that parent's child."[156] This standard requires less than Virginia's standard but still complies with federal requirements.[157]

In addition to complying with IDEA, in Idaho, if a parent does not agree with their child's IEP proposed change in education placement, he or she may file a written objection.[158] If this written objection is either postmarked or delivered within ten days of when the parent received

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[151] *See* 19 TEX. ADMIN. CODE § 89.1001(a) (2018) (incorporating, by reference, all applicable federal regulations); *Id.* § 89.1011(c), (e) (stating the timing and procedure for completion of services after receipt of written parental consent); UTAH ADMIN. CODE r. 277-750 (2018) (incorporating, by reference, the implementation of the federal program and IDEA); 22-000-006 VT. CODE R. § 2363.8 (2018) (referring to 34 C.F.R. § 300.300 and not imposing additional consent requirements); 206-7 WYO. CODE R. § 6 (2018) (incorporating by reference the parental consent and parental notice provisions of the federal regulation and not requiring additional consent requirements).

[152] ALA. ADMIN. CODE r. 290-8-9-.04(4) (2018).

[153] ALASKA ADMIN. CODE tit. 4, § 52.155 (Oct. 2018).

[154] *Id.*

[155] *Id.*

[156] *Id.* § 52.210.

[157] *Compare id.* (requiring the opportunity for parent participation in the identification, evaluation, and placement processes and incorporating by reference the notice requirements of the federal regulation), *with* 34 C.F.R. § 300.300 (2018) (requiring parental consent in the identification, evaluation, and placement processes), 34 C.F.R. § 300.501 (2018) (requiring parent participation in meetings involving identification, evaluation, and placement), *and* 8 VA. ADMIN. CODE § 20-40-55(A) (2014) (requiring notice and consent for assessment, announcement, and provision of services).

[158] IDAHO ADMIN. CODE r. 08.02.03.109(.05)(a) (2018).

notice of the proposed change, the change cannot be enacted immediately.[159] A meeting would then transpire in hopes of coming to some sort of agreement between the child's IEP team and parent but may ultimately result in a due process hearing.[160] Instead of requiring parental consent when changing a child's learning environment in Indiana, there are procedural safeguards in place for parents, such as the ability to request a meeting with an official of the public agency, mediation, or a due process hearing.[161]

In Maine, parents who choose to unilaterally place or keep their child in a private education facility, therefore disagreeing with what has been determined as providing the child with FAPE by the school system, are entitled to a due process hearing.[162] This hearing determines if the parents have a right to be reimbursed because the parents' placement of their child in a private environment may be deemed the appropriate education for that child.[163]

Maryland, Minnesota, Mississippi, Missouri, and Montana have adopted the parental consent requirements as set forth in IDEA.[164] However, there are many due process safeguards in place to preserve parental rights such as notice.[165] Michigan has also adopted the federal parental consent requirements.[166] Additionally, Michigan provides parents with the right to an independent educational evaluation if the parent disagrees with the public agency's evaluation.[167] This private evaluation is done at public expense and is allowed once, whenever the public agency completes an evaluation of the child, if the parent disagrees.[168]

Kansas takes a unique approach as to when parental consent is required.[169] Kansas requires parental consent when there is an initial

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[159] *Id.*

[160] *Id.* A due process hearing is "conducted pursuant to IDAPA 04.11.01, 'Idaho Rules of Administrative Procedure of the Attorney General,' Individuals with Disabilities Education Act [IDEA] requirements, and the Idaho Special Education Manual." *Id.*

[161] 511 IND. ADMIN. CODE 7-42-7(f), (j) (2018).

[162] 05-071-101 ME. CODE R. § IV(4)(G)((3))(b) (2018).

[163] *Id.* § IV(4)(G)((3))(c).

[164] MD. CODE REGS. 13A.05.01.13(A)(1) (2018); MINN. R. 3525.2710(1), (3)(A) (2018); 7-4 MISS. CODE R. § 1:300.327 (2018); MO. CODE REGS. ANN. tit. 5, § 20-300.110 (2018); MONT. ADMIN. R. 10.16.3505 (2018).

[165] *See* MD. CODE REGS. 13A.05.01.07(D) (2018) (requiring written notice of IEP meetings to be given to parents to afford them an opportunity to attend and participate); 07-34 MISS. CODE R. § 300.503 (2018) (requiring written notice be given to parents prior to starting or changing an IEP, or for the refusal thereof).

[166] MICH. ADMIN. CODE r. 340.1721 (2018).

[167] *Id.* r. 340.1723(c)(2).

[168] *Id.*

[169] *See* KAN. ADMIN. REGS. § 91-40-27(a)(3) (2018) (requiring parental consent for material changes in services or substantial changes in placement).

evaluation or reevaluation of a child, when special education services are first provided, and whenever there is a *material* or *substantial* change in the learning environment placement.[170] A substantial change in placement or material change in services consists of a 25% or more change in the child's school day or of any service being provided to the child.[171] In other words, if a change of less than 25% is being made to a child's learning environment, Kansas is not required to obtain parental consent for that change.[172]

Other states have implemented much more stringent parental consent requirements than required by federal law.[173] Once a child is placed in a private educational facility in Arkansas, any review or changes made to his or her IEP must involve the parent in the decision making process and requires parental consent before enacting any of the proposed changes.[174]

Delaware requires parental consent, not only for the child's initial evaluation, but for reevaluations as well.[175] However, if reasonable efforts were made by the public agency to obtain parental consent for reevaluation, but it is not obtained, the state agency may use override procedures to continue with the reevaluation.[176] In Iowa, parents must agree to the services provided before any changes can be made.[177] In Massachusetts, there must always be parental consent to a child's educational placement, subject to additional procedures if such consent cannot be obtained or is withdrawn.[178]

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[170] *Id.* § 91-40-27(a)(1)–(3). Parental consent is not required when there is a material or substantial change to a child's educational placement due to graduation or for disciplinary actions. *Id.* § 91-40-27(a)(3); *see also id.* § 91-40-33 (defining a disciplinary change in placement).

[171] KAN. STATE DEP'T OF EDUC., KANSAS SPECIAL EDUCATION PROCESS HANDBOOK 8–9 (2015).

[172] *Id.*

[173] *See infra* notes 175**Error! Bookmark not defined.**–182 and accompanying text (enumerating various state regulations that contain provision that are more stringent than the federal standards).

[174] 005-18-008 ARK. CODE R. § 8.10 (2018).

[175] 22-4-14 DEL. ADMIN. CODE §§ 925 (1.1), (1.3) (2018).

[176] *Id.* There are procedural safeguards to ensure due process while allowing children to be serviced by a free appropriate public education in the least restrictive learning environment. *Id.* § 926(1.0).

[177] IOWA ADMIN. CODE r. 281-41.324(5)(b) (2018).

[178] *See* 603 MASS. CODE REGS. 28.05(1), (2)(b) (2018) (providing that written parental consent triggers school district evaluation and placement proposal); *see also id.* 28.07(1) (providing that the school district shall obtain parental consent before making initial placement and providing dispute resolution procedures in case the parents refuse or revoke consent).

South Dakota specifies that amendments may be made to a child's IEP, and parents may have a copy of the new program when they ask.[179] The opinions and wishes of parents are taken into consideration when developing or revising the child's individualized education program, but their consent is not the determining factor on what constitutes a FAPE.[180] South Dakota also provides for an IEP team override.[181] This is used in cases where the child may not meet the formal "special education" requirements, but the IEP team still largely determines the child should be determined eligible in order to provide them with a free appropriate public education.[182]

IV. VIRGINIA SHOULD CONSIDER THE PERCENT CHANGE IN LEARNING ENVIRONMENT

Virginia should alter its current approach of requiring parental consent whenever there is a change in the learning environment of a child. The current requirement is too stringent because unilateral parental consent undermines Virginia's statutory intent to provide children with a free appropriate public education in the least restrictive learning environment.

There are many positives to having parents play a prominent role in the decision making process of their child's educational placement. It could be well argued that a parent knows his or her child better than any team put together to determine the best interest or way to service the child. However, the way placement is currently decided in Virginia does not always allow the educational agency enough power to provide children an education in the least restrictive learning environment.

The purpose of providing children an education within the least restrictive learning environment is to allow them to "participate in extracurricular and other nonacademic activities, and be educated and participate with other children with and without disabilities in those activities."[183] This exposure is beneficial for students because it places them in an environment that will be more reflective of the environment they will be a part of upon graduation. Students gain more than simply an education when attending a public school. "[P]ublic schools represent a crucial opportunity for the development of social cohesion in American

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[179] S.D. ADMIN. R. 24:05:27:08.02 (2018).

[180] *See id.* R. 24:05:27:01.02 (providing that parents' concerns are taken into consideration when developing the IEP); *see also id.* R. 24:05:25:22 (providing that as long as a child is determined to be in need of special education, the IEP shall develop an appropriate program for the child).

[181] *Id.* R. 24:05:24.01:31.

[182] *Id.*

[183] STUDY, *supra* note 101, at 13.

communities, especially between diverse groups."[184] The importance of placing a child in the least restrictive learning environment should be taken very seriously in placement decisions. The social capital gained from a public educational placement is very valuable.

The way the law stands, a parent may refuse to have his or her child, who is currently being serviced at a private educational facility, be reinstated in public school, even though it has been determined that the public school is able to provide the child with an appropriate education.[185] Additionally, the state would have to continue to fund the tuition for this private educational placement.[186]

As noted above, many states do not require any additional parental consent regulations other than those set forth in the federal regulations.[187] While this would give considerably more discretion to the school systems, there is a better option. The Commonwealth should amend Virginia's Regulations Governing Special Education Programs for Children with Disabilities to mirror that of Kansas with additional procedural safeguards.

To better ensure that a child is placed in the least restrictive learning environment possible, where he or she is still provided FAPE, it is reasonable to only require parental consent when a substantial or material change to the learning environment is being implemented. This procedure would allow the school system to provide the child with the beneficial social capital that comes with more interaction with the child's peers in the learning environment, while still protecting parents' rights. Consent would still be required before a substantial or material change. In Kansas, a substantial or material change consists of any change that is 25% or greater.[188]

This change should be coupled with an approach similar to many state approaches, including Indiana, Maine, Maryland, Minnesota, Mississippi, Missouri, and Montana, which provide procedural safeguards, such as due process hearings, when parents disagree with a proposed change.[189]

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[184] DANA MITRA, PENNSYLVANIA'S BEST INVESTMENT: THE SOCIAL AND ECONOMIC BENEFITS OF PUBLIC EDUCATION 25 (2011).

[185] STUDY, *supra* note 101, at 13. *See generally* 8 VA. ADMIN. CODE § 20-81-70(G) (2014) (requiring parental consent for evaluation and each reevaluation).

[186] 8 VA. ADMIN. CODE §§ 20-81-100 (A)(1), (D), (M)(1)–(3) (2014).

[187] *See supra* notes 136–151 and accompanying text (enumerating various state regulations that adopt the federal standards, contain provisions mirroring those standards, or contain provisions providing for less than the federal standard).

[188] *See generally* KAN. STATE DEP'T OF EDUC., *supra* note 172, at 8–9.

[189] *See supra* notes 161–165 and accompanying text (referring to various state regulations that either comply with the procedural safeguards under IDEA or provide parents an avenue to voice their concerns when changes in services are made).

Implementing these changes would allow a school system to make a change in a child's learning environment, as long as it is not material or substantial and still allow parents to contest the change if they truly do not believe it is in the best interest of their child or that their child is not receiving FAPE. A due process hearing would also allow for the possibility of state reimbursement to the parents if the private institution were found to be the most appropriate, least restrictive learning environment for that individual child. This approach seems much more consistent with the Commonwealth's obligation to provide all students with a free appropriate public education within the least restrictive learning environment. This change would support Virginia's preference for strong parental rights while still implementing the legal goal of educating children in the least restrictive environment.

Implementing this approach would also increase the chance of benefitting the most "exceptional students" because the funding that is currently being poured into private educational placements could be put toward regional programs or other services that would reach a greater number of students. Unfortunately, not all "exceptional children" have great advocates, and the resources that are currently being spent on only a select number of these children could be put back into the public setting, reaching a greater number of students. While the total number of special needs children has decreased, those with the most severe disabilities has increased.[190] It seems Virginia could be servicing these students more effectively across the board if funds spent on select students were redistributed into regional programs from which all of these children could reasonably access and benefit.

CONCLUSION

Receiving a quality education is of the utmost importance in this country. But, as it stands in Virginia, the current unilateral parental consent requirement undermines Virginia's special education laws when a parent refuses to reinstate his or her child into the least restrictive learning environment.[191] A change should be made to reconcile the importance and protection of parental rights while carrying out the intent of education laws in America, regulations set forth in IDEA, and the FAPE mandate.[192]

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[190] VA. COMM'N ON YOUTH, *supra* note 97, at 12.

[191] *See* STUDY, *supra* note 101, at 13 ("Virginia's parental consent provisions may prevent school divisions from modifying services when the child no longer requires them, even when the school division can show that the best interest of the child is being served pursuant to federal law."); *see generally* 8 VA. ADMIN. CODE § 20-81-70(G) (2018) (requiring parental consent for evaluation and each reevaluation).

[192] *See* 20 U.S.C. § 1400(d) (2012) (providing federal funding to states to ensure the educational needs of children with disabilities are met in order to prepare them for further

The United States Supreme Court heard a case regarding the FAPE mandate in January 2017.[193] The Court's clarification of what level of education satisfies the FAPE mandate will make it easier to implement these proposed changes.[194] With a more concrete idea of what FAPE entails, it will be easier to ensure that "exceptional children" are receiving a free appropriate public education and that it occurs within the least restrictive learning environment specific to each individual child.

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education, future employment, and independent living); *see also* § 1400(c) (requiring free appropriate public education to improve education for students with disabilities).

[193] Endrew v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 993 (2017).

[194] *Id.* at 999–1000.

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