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A NONPARENT'S ABILITY TO INFRINGE ON THE FUNDAMENTAL RIGHT OF PARENTING: RECONCILING VIRGINIA'S NONPARENTAL CHILD CUSTODY AND VISITATION STANDARDS

David W. Lannetti[*]

> *[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.*[1]

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[*] Judge, Fourth Judicial Circuit of Virginia, and Adjunct Professor, Regent University Law School and William & Mary Law School. The views advanced in this Article represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach," and otherwise participate in extrajudicial efforts to improve the legal system). These views should not be mistaken for the official views of the Norfolk Circuit Court or my opinion as a circuit court judge in the context of any specific case. The author thanks Norfolk Circuit Court judicial law clerk Jessica Samms, Esquire, for her assistance in researching and editing this Article.

[1] Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (plurality opinion).

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INTRODUCTION

In the landmark decision of *Troxel v. Granville* in 2000, the United States Supreme Court recognized a parent's fundamental right to make decisions regarding the care, custody, and control of his or her children in the context of a nonparental child visitation determination.[2] Although the Court confirmed that the relationship between parents and their children is constitutionally protected by the Due Process Clause of the Fourteenth Amendment, it elected not to articulate the requisite standard of proof nonparents must satisfy in order to infringe on the fundamental parental right.[3] In the aftermath of *Troxel*—and in an effort to balance the primacy of the parent-child relationship with the state's interest in the welfare of children—jurisdictions determining nonparental child visitation and custody embraced one of two general approaches: (1) evaluating the best interests of the child under a heightened standard to overcome the presumption that a parent's decision is proper, or (2) analyzing whether

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[2] *See infra* Part I.A.

[3] *See infra* Part I.B.

the lack of nonparental participation would result in actual harm to the child.[4] The Court in *Troxel* intentionally left it to individual states to decide which nonparental involvement standard they would adopt, and justifications exist to support each approach.[5]

In Virginia, as in most jurisdictions, issues involving child custody and visitation between fit parents are resolved through judicial evaluation of the best interests of the child.[6] Nevertheless, under certain circumstances, nonparents with a legitimate interest in a child's wellbeing can be awarded visitation or custody via Virginia court orders.[7] Although Virginia's child custody and visitation statute specifically recognizes nonparents and meets *Troxel*'s constitutional requirements, it does not expressly establish the requisite standard permitting nonparents to infringe on parental autonomy.[8]

In Virginia nonparental child visitation cases where both parents object to the visitation, courts require the nonparent to prove that the child's health or welfare will be harmed without the requested visitation—in order to rebut the parental presumption—before they consider whether nonparental visitation is in the child's best interests.[9] With respect to Virginia nonparental child custody determinations, however, Virginia still clings to a pre-*Troxel* standard that arose independent of the recognized fundamental right of parents to raise their children.[10] Although Virginia expressly recognizes the primacy of the parent-child relationship and therefore presumes that parental custody is favored over nonparental custody, this presumption can be rebutted by clear and convincing evidence that, *inter alia*, there are special facts and circumstances that constitute an extraordinary reason to award custody to a nonparent.[11] This nonparental custody standard does not expressly require proof of actual harm to the child if the natural parent were granted custody and therefore appears to have a different—and arguably *lower*—standard of proof than Virginia's nonparental child visitation test, an incongruous result.[12] Although the Virginia Supreme Court was provided the ideal

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4 *See infra* Parts I.C.1 and I.C.2.

5 *Troxel*, 530 U.S. at 73.

6 VA. CODE ANN. § 20-124.2(B) (LexisNexis, LEXIS through 2017 Reg. Sess.); *see also infra* Part II.A.

7 *Id.* § 20-124.2(B) (LEXIS).

8 *See infra* Part II.A.

9 *See infra* Part II.B.

10 *See infra* Part II.C.

11 *See, e.g.*, Florio v. Clark, 674 S.E.2d 845, 847 (Va. 2009) (quoting Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986)).

12 *See infra* Part III.B.

opportunity to address this inconsistency when it decided *Florio v. Clark* in 2006, it opted not to do so.[13]

Troxel makes clear that a fit parent's child-rearing decisions must trump a judicial determination of the child's best interests,[14] and Virginia's tests for nonparental child visitation and custody determinations each appear to meet this standard on its own.[15] Because the custody standard must be at least as high as the visitation standard, action is required to reconcile the two.[16] Virginia courts should either conform interpretation of the child custody extraordinary-reason standard to an actual-harm standard—consistent with the well-defined and constitutionally sound Virginia nonparental child visitation test[17]—or establish new case law to expressly establish an actual-harm standard for nonparental child custody determinations.[18] Alternatively, the Virginia legislature could amend Virginia's current custody and visitation statute to impose a statutory actual-harm requirement that nonparents would be required to meet.[19]

Part I of this Article reviews *Troxel*, including its recognition of a parent's constitutional right to rear his or her children and its election not to establish a nonparental standard of proof for child visitation determinations, and explains how jurisdictions reacted to the United States Supreme Court decision.[20] Part II outlines Virginia's statutory framework regarding child custody and visitation, discusses the pre- and post-*Troxel* analyses of child custody and visitation determinations in Virginia, and discusses the Virginia Supreme Court's decision in *Florio v. Clark*.[21] Part III identifies the arguable inconsistency between Virginia's nonparental custody and visitation tests and opines that Virginia should impose an actual-harm standard for both custody and visitation determinations.[22] Finally, Part IV recommends several alternative ways to bring nonparental child custody law in line with nonparental child visitation law to properly support recognizing parents' rights to both raise their children and preclude interference with that right by the government.[23]

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13 *See infra* Part II.C.3.

14 *See infra* notes 59–62 and accompanying text.

15 *See infra* notes 312–14 and accompanying text.

16 *See infra* Part III.

17 *See infra* Part IV.A.

18 *See infra* Part IV.B.

19 *See infra* Part IV.C.

20 *See infra* Part I.

21 *See infra* Part II.

22 *See infra* Part III.

23 *See infra* Part IV.

I. THE UNITED STATES SUPREME COURT'S GUIDANCE—OR LACK THEREOF—IN *TROXEL V. GRANVILLE*

The United States Supreme Court first recognized the constitutionally protected right of parents to raise their children ninety-five years ago[24] and, more recently, proclaimed this right to be "perhaps the oldest of the fundamental liberty interests recognized by this Court."[25] The Court reiterated the fundamental right of parenting—and the corresponding right to privacy in precluding state interference—in case law several times over the years.[26] Those cases made clear that courts must balance the constitutional right of parental autonomy with state-mandated attempts to infringe on that right.[27] Most of the cases specifically considered whether the parents' decisions were—or could be—

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[24] *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (recognizing the right of parents to decide whether their children are taught the German language in school).

[25] Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

[26] *See id.* at 77 (Souter, J., concurring) (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Parham v. J.R., 442 U.S. 584, 602 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); *Meyer*, 262 U.S. at 399, 401) (reiterating the fundamental right of parenting and the right to privacy).

[27] *See, e.g.*, *Glucksberg*, 521 U.S. at 720 (recognizing, in a case in which the Court held that physician-assisted suicide is unconstitutional, the right "to direct the education and upbringing of one's children" as a "specific freedom[ ] protected by the Bill of Rights"); *Santosky*, 455 U.S. at 753 (recognizing, in a case in which the Court held that a clear and convincing standard is necessary to terminate parental rights, the Court's "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); *Parham*, 442 U.S. at 602 (noting, in a case in which the Court found constitutional a state statutory scheme for voluntary commitment of juveniles, that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations'" (alteration in original) (quoting *Pierce*, 268 U.S. at 535)); *Quilloin*, 434 U.S. at 255 (upholding the adoption of an illegitimate child by his stepfather over the father's objection despite the fact that "the relationship between parent and child is constitutionally protected"); *Yoder*, 406 U.S. at 232 (opining, in a case in which the Court upheld the right of Amish parents to withdraw their children from public school after the eighth grade in order to educate them according to Amish beliefs, that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Stanley*, 405 U.S. at 651 (recognizing, in a case in which the Court held that an unwed father has the right to a due process hearing on his fitness as part of a dependency proceeding, that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights'" and that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment" (omission in original) (citations omitted)); *Pierce*, 268 U.S. at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."); *Meyer*, 262 U.S. at 399 (recognizing, in holding that parents have the right to decide whether their children are instructed in the German language, that the liberty guaranteed by the Fourteenth Amendment includes the right "to marry, establish a home and bring up children").

harmful to their children.[28] They also recognized that the fundamental parenting right must be tempered with the doctrine of *parens patriae*, which obligates the state to protect defenseless children from harm when necessary.[29] The advent and rapid expansion of statutes in the last half of the twentieth century granting nonparents certain child visitation rights—often referred to as Grandparent Visitation Statutes[30]—made this potential infringement on parental rights ripe for judicial review as the century drew to a close.[31]

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[28] *See infra* notes 76–84 and accompanying text.

[29] *See Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that the term literally means "parent of his or her country" and defining it as, *inter alia*, "the state in its capacity as provider of protection to those unable to care for themselves"); *see also* BLACK'S LAW DICTIONARY (6th ed. 1990) (defining the term as, *inter alia*, "the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents").

[30] Jeffrey J. Trapani, Comment, *Grandparent Visitation Rights in Massachusetts After* Troxel*:* Blixt v. Blixt, 38 NEW ENG. L. REV. 759, 760–61 (2004); *see also* Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-*Troxel*?*, 43 ARIZ. L. REV. 751, 772 (2001) ("Judicial pressure, lobbying from various interest groups, and the changing structure of the family initiated these changes."). "By 1993, every state had passed legislation granting grandparents standing to seek visitation with their grandchildren over the parents' objections." Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 868 (2003) (citing state statutes). "The first statutes granting grandparents a right to seek visitation of their grandchildren were enacted in 1966 in New York." Tobie Tranchina, Article, *Nonparent Visitation Rights: A National Issue as Addressed in Louisiana*, 18 LOY. J. PUB. INT. L. 32, 36 (2017). These statutes rapidly spread because "powerful lobbying groups represent grandparents' interests and most people willingly presume that time spent with a grandparent is important for a child." Susan Tomaine, Comment, Troxel v. Granville*: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U.L. REV. 731, 732 (2001). "While some statutes are limited in application to petitioners who are natural grandparents of the child, some statutes are wide open, allowing any person to petition for visitation." Jennifer Kovalcik, Note, Troxel v. Granville*: In the Battle Between Grandparent Visitation Statutes and Parental Rights, "The Best Interest of the Child" Standard Needs Reform*, 40 BRANDEIS L.J. 803, 805 (2002).

[31] The Washington Supreme Court traced the origin of the Washington statute at issue in *Troxel* to 1973. Smith v. Stillwell (*In re* Smith), 969 P.2d 21, 25 (Wash. 1998), *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57 (2000); *see also* Tomaine, *supra* note 30, at 745 ("Due to their strength in numbers, wealth, and historical political activism, grandparents command the attention of legislators at the state and federal levels."). Recognizing that there was no common law right to nonparental visitation, an argument can be made that Grandparent Visitation Statutes represent

> a clash between parents, who have a traditionally protected autonomy to make decisions regarding the care, custody, and control of their children, and grandparents, who by political fiat may now enlist the power of the state to override parental autonomy and obtain and enforce court-ordered visitation rights with their grandchildren.

See Tracy C. Schofield, Comment, *All the Better to Eat You With, My Dear: The Need for a Heightened Harm Standard in Utah's Grandparent Visitation Statute*, 2006 BYU L. REV. 1669, 1670.

A. Recognition of the Fundamental Right of Parenting in Child Visitation Determinations

As of 1996, the state of Washington had a nonparental child visitation statute that allowed anyone to petition a court for visitation rights at any time and authorized courts to grant nonparental visitation over the objection of fit parents simply if it was in the best interests of the child.[32] Jenifer and Gary Troxel petitioned for increased visitation with their grandchildren over the objection of Tommie Granville, the children's mother.[33] The children had visited the Troxels regularly before their son—the children's father—died, and although the mother did not object to the Troxels having continued visitation, and in fact had agreed to limited visitation, the Troxels petitioned for additional court-ordered visitation.[34] The trial court granted the Troxels' petition.[35] The Washington Court of Appeals reversed, finding that the grandparents lacked standing under the applicable statute, and dismissed the Troxels' petition.[36]

The Troxels appealed to the Washington Supreme Court, which consolidated the case with two others and elected to address both the issue of standing and whether the statute unconstitutionally interfered with a parent's fundamental right of child rearing.[37] The court found that the Troxels had standing, relying on the unambiguous statutory language that granted standing to "[a]ny person."[38] The court went on to find the statute unconstitutional because it bestowed rights on nonparents that allowed them too easily to overrule the decisions of fit parents.[39] Specifically, it held that "state interference with parents' rights to raise

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[32] *Troxel*, 530 U.S. at 60 (plurality opinion). The Washington statute at issue provided as follows: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." *In re Smith*, 969 P.2d at 24 (quoting WASH. REV. CODE § 26.10.160(3) (1989)).

[33] *Troxel*, 530 U.S. at 60–61.

[34] *Id.* The parents had never wed and, at the time of the father's death, the parents were separated. *Id.* at 60.

[35] *Id.* at 61.

[36] *Id.* at 62. The court of appeals did this—in the context of a statute that the United States Supreme Court subsequently found "breathtakingly broad"—by opining that the current version of the statute could not have been reflective of the legislature's amendment of related statutes. *Id.* at 67. The Washington Supreme Court rejected this approach, finding the statute's language unambiguous. *In re Smith*, 969 P.2d at 27.

[37] *In re Smith*, 969 P.2d at 23.

[38] *Id.* at 25. As one commentator noted, "[u]nder the statute, a person who had known the child for 15 minutes could petition for visitation, even though no legal issue involving the child was then pending in the court." Mary E. O'Connell, Troxel v. Granville *and Its Implications for Families and Practice: A Multidisciplinary Symposium: The Riddle of* Troxel*: Is Grandma the State?*, 41 FAM. CT. REV. 77, 77 (2003).

[39] *In re Smith*, 969 P.2d at 31.

their children [is allowed] *only where the state seeks to prevent harm or a risk of harm to the child*."[40] The court opined that adherence to this standard would preclude courts from making "significant decisions concerning the custody of children merely because [they] could make a 'better' decision."[41]

The United States Supreme Court granted certiorari.[42] In a decision authored by Justice O'Connor, a plurality of the justices ultimately found that the Troxels had standing but that the statute was unconstitutional as applied.[43] Regarding standing, the Court described the Washington statute as "breathtakingly broad," as it "effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review."[44] On the issue of statutory constitutionality, the Court opined that the statute, as applied, was unconstitutional because "[t]he Washington Superior Court failed to accord the determination of [the children's mother], a fit custodial parent, any material weight."[45]

The *Troxel* decision is known today more for what it failed to address than what it actually decided, and its six opinions—with the noticeable absence of a majority opinion—unsurprisingly caused confusion for both courts and practitioners as they attempted to discern the Court's guidance, or lack thereof.[46]

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[40] *Id.* at 29 (emphasis added).

[41] *Id.* at 31.

[42] Troxel v. Granville, 527 U.S. 1069 (1999).

[43] *See generally* Troxel v. Granville, 530 U.S. 57, 60, 63, 76 n.1 (2000).

[44] *Id.* at 67.

[45] *Id.* at 72. As one academic put it, "Restated in rights terms, the Court seems to be holding that [the mother's] constitutional right was too easily displaced by the Troxels' statutory right. The trial court failed to give [the mother's] right the heft and significance to which the Constitution entitled it." O'Connell, *supra* note 38, at 82.

[46] *See, e.g.*, Alessia Bell, *Public and Private Child:* Troxel v. Granville *and the Constitutional Right of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 242 (2001) (referring to "the *Troxel* cacophony"); John DeWitt Gregory, *Defining the Family in the Millennium: The* Troxel *Follies*, 32 U. MEM. L. REV. 687, 719 (2002) ("The *Troxel* opinion obscures more than it illuminates the question of whether a given state's grandparent visitation statute, or any third-party visitation statute for that matter, will survive constitutional scrutiny. If one needs evidence beyond the six opinions of the Justices to support this proposition, one finds it in the conflicting state court decisions that purport to apply the teaching of *Troxel*."); O'Connell, *supra* note 38, at 77 ("Considering its significance and inflammatory potential, unraveling *Troxel* is a challenge. The case's six opinions and the absence of a majority only add to the confusion. And like much of the work of the Supreme Court, *Troxel* may be as important for what it omitted as for what it decided.").

B. The Failure to Establish the Requisite Standard of Proof for Nonparental Child Visitation Determinations

One thing that is clear from *Troxel* is that fit parents have a fundamental right to make decisions regarding the care, custody, and control of their children.[47] To put the parent and the nonparent on similar footing would impermissibly—and unconstitutionally—substitute the court's opinion of what was in the child's best interests for that of the fit parent.[48] As the United States Supreme Court declared, in the realm of child rearing decisions, courts "must accord at least some special weight to the parent's own determination."[49]

Although the Washington Supreme Court held that—in order to be awarded child visitation—a nonparent needed to prove that the absence of such visitation would cause actual harm to the child,[50] and the legal community fully expected the United States Supreme Court to articulate whether this standard—or some other standard—was required to safeguard the fundamental right of parenting,[51] the highest court in the land intentionally avoided the question.

> Because we rest our decision on the sweeping breadth of [the Washington statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect . . . the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and . . . the constitutional protections in this area are best "elaborated with

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[47] *Troxel*, 530 U.S. at 65–66 (plurality opinion).

[48] *See id.* at 72–73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."); *see also id.* at 79 (Souter, J., concurring) ("It would be anomalous . . . to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.").

[49] *Id.* at 70 (plurality opinion).

[50] Smith v. Stillwell (*In re* Smith), 969 P.2d 21, 29 (Wash. 1998), *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57 (2000).

[51] John DeWitt Gregory, Distinguished Professor of Family Law at Hofstra University, noted the following:

> One might have wished, in light of the slew of state grandparent visitation statutes in all fifty states, that the Court would have issued a decision under which the constitutionality or invalidity of such statutes would be clear and settled. Instead, the Court produced a plurality opinion and five separate and conflicting concurring or dissenting opinions . . . .

John Dewitt Gregory, *The Detritus of* Troxel, 40 FAM. L.Q. 133, 143 (2006).

> care." Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[52]

C. How States Reacted to Troxel

In light of *Troxel*'s failure to weigh in on whether a showing of harm to the child is required in nonparental visitation cases—as the Washington Supreme Court held was required—the various state courts had little direction on which to rely when confronted with nonparental custody and visitation petitions.[53] Unsurprisingly, courts in different jurisdictions continued to employ dissimilar approaches as they attempted to balance parental autonomy with the state interest in protecting children.[54] Although the United States Supreme Court plurality did not endorse an actual-harm test, it made clear that a simple best-interests-of-the-child analysis—*vis-à-vis* a fit parent and a nonparent—is constitutionally infirm.[55] A nonparent must satisfy some

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[52] *Troxel*, 530 U.S. at 73 (plurality opinion) (citations omitted).

[53] *See* Kovalcik, *supra* note 30, at 816 ("The plurality declined to specify the precise scope of parental rights, abstained from stating the appropriate standard to be applied in such cases, and declined to determine whether a showing of harm is always required."); Marrus, *supra* note 30, at 793 ("[T]he *Troxel* plurality's fact specific approach resulted in a strangling particularity that made the opinion largely irrelevant."); Tomaine, *supra* note 30, at 733 (opining that *Troxel* is "a fragmented opinion that failed to articulate the precise scope of the right to parental autonomy and neglected to specify when a state may intervene in a visitation dispute").

[54] Two years after *Troxel* was decided, Professor Gregory made the following observation:

> [S]tate courts have neither found agreement with respect to the teaching of *Troxel* nor have they applied it in any way that can be readily characterized. At this point, the most that one can say with any confidence is that *Troxel* has neither advanced nor reinforced long-standing principles of family autonomy and parental authority despite the plurality's citation of earlier cases that established those principles.

Gregory, *supra* note 46, at 725. Four years later, he opined as follows:

> Simply stated, *Troxel* has induced no startling or radical changes with respect to third-party visitation, and particularly grandparent visitation. Legislators in just a few states have amended their visitation statutes on the heels of *Troxel* in an apparent effort to make them compliant with the Supreme Court's pronouncements. But judicial approaches are remarkably similar to those taken in the earlier decisions . . . .

Gregory, *supra* note 51, at 143 (footnote omitted); *see also* Kovalcik, *supra* note 30, at 820–23 (discussing how states responded to *Troxel*); Schofield, *supra* note 31, at 1694–95 ("The Supreme Court's decision impacted grandparent visitation statutes in all fifty states, and many state statutes have been amended or judicially reinterpreted after *Troxel*."); Tomaine, *supra* note 30, at 732–33 (noting that, as of 2001, several states—including Tennessee, Georgia, North Dakota, and Washington—"have invalidated their grandparent visitation statutes, claiming that the provisions violate parents' constitutional rights of privacy and autonomy").

[55] Schofield, *supra* note 31, at 1702 ("*Troxel* clearly rejected state interference that amounts to little more than substituting a judge's visitation decision for a fit parent's visitation decision when there are no factors that rebut the parental presumption."); *see also supra* note 48 and accompanying text.

heightened burden to overcome the presumption that a fit parent acts in the best interests of his or her child.[56] Hence, a range of standards to rebut the parental presumption was deemed to be constitutionally permissible.[57] They can be grouped into two general categories: a heightened best-interests-of-the-child standard and an actual-harm standard.[58]

1. Heightened Best-Interests-of-the-Child Standard

According to *Troxel*, in order to survive constitutional scrutiny, courts must give some special weight to a parent's child-rearing decisions and therefore must do more than determine whether the child is better off with or without nonparental involvement.[59] One way to give weight to the parental decision is to impose—by statute, for example—a presumption that recognizes the primacy of the parent-child relationship.[60] Because the best-interests-of-the-child standard between two fit parents—each vested with a fundamental parenting right—requires proof by a preponderance of the evidence,[61] another way to heighten the standard is to require

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[56] *See* Tranchina, *supra* note 30, at 39 (commenting that the *Troxel* court required that a "visitation statute must provide a heightened burden of proof on the nonparent moving party, which considers the presumption that a fit parent acts in a child's best interest"). According to one commentator, "[t]he Court [also] hinted that a visitation statute would fail without language presuming that a fit parent acts in the best interests of the child." Trapani, *supra* note 30, at 766.

[57] The *Troxel* plurality, as well as some of the individual justices, discussed a variety of standards that might be acceptable based on the Constitution's silence regarding parental rights. *See infra* notes 59–62, 70–74, 86, 311 and accompanying text. Professor Maldonado classified the post-*Troxel* responses to rebut the parental presumption as follows: parental unfitness, harm to the child, limited standing, and extraordinary circumstances. Maldonado, *supra* note 30, at 883–88; *see also* Kovalcik, *supra* note 30, at 823 (pointing out that "there is considerable variance in . . . the court's application of the vague 'best interest of the child' standard").

[58] *See* Laurence C. Nolan, *Beyond* Troxel*: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 DRAKE L. REV. 267, 267–68 (2002) ("State courts have differed on whether the constitutionality of [Grandparent Visitation S]tatutes should be weighed against the harm standard for state intervention or merely against the 'best interest of the child' standard."). This assumes, of course, that the court gives "at least some special weight to the parent's own determination," which converts the best-interest standard to a heightened best-interest standard. Troxel v. Granville, 530 U.S. 57, 70 (2000) (plurality opinion). For purposes of this Article, any standard that meets constitutional muster under *Troxel*—one that accords at least some weight to a parent's decision—but does not expressly require a showing of potential harm to the child is referred to as a "heightened best-interests" standard.

[59] *Troxel*, 530 U.S. at 70 (plurality opinion).

[60] *Id.* at 69–70 (citing statutes reiterating "the traditional presumption that a fit parent will act in the best interest of his or her child"). "Courts have found that 'the best way' to satisfy *Troxel*'s special weight requirement 'is to apply a presumption that the parent's decision to decline visitation is in the best interest of the child . . . and to place the burden on the non-parent seeking visitation to rebut that presumption.'" Maldonado, *supra* note 30, at 883–84 (alteration in original) (quoting *In re* Tamara R., 764 A.2d 844, 853 (Md. Ct. Spec. App. 2000)).

[61] *See* Ohlen v. Shively, 430 S.E.2d 559, 561 (Va. Ct. App. 1993) (quoting Yohay v. Ryan, 359 S.E.2d 320, 324 (Va. Ct. App. 1987)) (noting that a parent seeking to modify an existing child custody order has "the burden of proving, by a preponderance of the evidence, a material change in

nonparents to prove best interests by clear and convincing evidence.[62] With this heightened standard in mind, courts can then consider the totality of the circumstances to determine whether the nonparents have met their burden.[63]

Providing courts the opportunity to weigh all available evidence when determining the best interests of the child makes sense in light of the Supreme Court's observation that "state-court adjudication in this context occurs on a case-by-case basis."[64] Courts arguably are better able to deal with unique family circumstances without being required to impose a strict rule, as the reasons a parent might object to nonparental visitation are myriad and not easily captured in a concise test.[65] For instance, a parent may disagree with the nonparent's religious beliefs, or with the child visiting the nonparent's high-crime neighborhood, or that the value of the time spent with the nonparent is worth the disruption in the child's schedule, or that the child benefits from seeing the dead parent's family, or that—in today's hectic world with working parents and almost no free time during the week—the child should spend his or her available weekend time with extended- or non-family members.[66] Alternatively, the parents may have no problem with nonparental visitation, but instead object to *court-ordered* visitation replacing their ability to decide when and

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circumstances justifying a modification of the decree"); Gallahan v. Flood, 2000 Va. App. LEXIS 586, at *6–7 (Aug. 8, 2000) (recognizing the same standard for modifying a visitation order). Additionally, "[a]s between the parents, there shall be no presumption or inference of law in favor of either." VA. CODE ANN. 20-124.2(B) (LexisNexis, LEXIS through 2017 Reg. Sess.).

[62] The Court in *Troxel* favorably cited a 1998 Utah statute that established a presumption in favor of the parent's visitation decision that could only be rebutted by clear and convincing evidence. *Troxel*, 530 U.S. at 70 (citing UTAH CODE ANN. § 30-5-2(2)(e) (LexisNexis, LEXIS through 2017 1st Spec. Sess.)). As the Virginia Court of Appeals noted, the requirement of "clear and convincing evidence . . . erects a 'more stringent standard' than a mere 'preponderance of the evidence.' Clear and convincing evidence involves 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" Griffin v. Griffin, 581 S.E.2d 899, 903 (Va. Ct. App. 2003) (citation omitted) (quoting Congdon v. Congdon, 578 S.E.2d 833, 837 (Va. Ct. App. 2003)).

[63] One commentator recommends a broader analysis by "balancing the competing interests": the child's interests, the parental interest, third-party interests, and the interest of society. Kovalcik, *supra* note 30, at 810–12.

[64] *Troxel*, 530 U.S. at 73 (plurality opinion).

[65] *See* Kovalcik, *supra* note 30, at 810 (arguing that "courts should consider all relevant factors and specific circumstances of the actual parties involved" when considering the best interests of the child).

[66] *See* Schofield, *supra* note 31, at 1669 & n.4; *see also* Nolan, *supra* note 58, at 282 (discussing how weekend nonparental visitation can be "disruptive to the parent, child, and the development of the parent-child relationship").

where such visitation will occur.[67] Of course, when considering all of the circumstances surrounding a given case, courts need to keep in mind—in light of any jurisdictional requirement to consider a parental presumption and to apply a heightened nonparental standard of proof—that the fundamental right of parenting demands that they not merely substitute their judgment for the parent's judgment.[68]

There is support for a heightened best-interests-of-the-child standard in two of the *Troxel* dissenting opinions, at least under certain circumstances.[69] Justice Stevens asserted that—while recognizing that "[t]he presumption that parental decisions generally serve the best interests of their children"—the best-interests standard alone is not necessarily unconstitutional, particularly when other individuals have an established relationship with the child that justifies limiting parental autonomy.[70] He further noted that the proposition that the "Constitution requires a showing of actual or potential 'harm' to the child before a court may order visitation continued over a parent's objections . . . finds no support in this Court's case law."[71] Justice Kennedy, in a separate dissenting opinion, also was unwilling to adopt a standard requiring proof of harm to the child instead of a best-interests test.[72] "Indeed, contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases, as the Washington court has done. The standard has been recognized for many years as a basic tool of domestic relations law in visitation proceedings."[73] That said, Justice Kennedy made it clear that he does "not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship."[74]

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67 *See* Schofield, *supra* note 31, at 1669 & n.4; *see also* Nolan, *supra* note 58, at 284 ("Court-ordered grandparent visitation could be used as a means for grandparents to continue to control the lives of their adult children, their spouses, former spouses, and partners of these adult children.").

68 *See supra* note 48 and accompanying text.

69 *See infra* notes 70–74 and accompanying text.

70 *See* Troxel v. Granville, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting). Justice Kennedy also suggested in his dissent that legitimate, established nonparental relationships—resembling parental relationships—should be protected even over parental objection. *See id.* at 98 (Kennedy, J., dissenting).

71 *See id.* at 85–86 (Stevens, J., dissenting). According to Justice Stevens, "It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child." *Id.* at 91 (Stevens, J., dissenting).

72 *See id.* at 99–100 (Kennedy, J., dissenting).

73 *Id.* at 99.

74 *Id.* at 101.

2. Actual-Harm Standard

An actual-harm standard is understood to be more difficult to satisfy than a best-interest standard, as the infliction of harm on a child certainly is contrary to the best interests of the child while the reverse is not necessarily true.[75] The argument that a nonparent should be required to prove that the child will suffer actual harm without the requested nonparental visitation is consistent with the limited role of the state under its *parens patriae* power[76] and is derived from the United States Supreme Court jurisprudence underlying the constitutional right of parents to raise

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[75] *See, e.g.*, Griffin v. Griffin, 581 S.E.2d 899, 902 (Va. Ct. App. 2003) ("Because it exists as a means of expressing the compelling state interests necessary to overcome the constitutional parental rights recognized in *Troxel*, the actual-harm standard must be understood as conceptually different from, and significantly weightier than, the best-interests test. . . . [T]he actual-harm test cannot be satisfied by a showing that 'it would be "better," "desirable," or "beneficial" for a child' to have visitation with a non-parent." (quoting Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997), *aff'd as modified*, 501 S.E.2d 417 (Va. 1998))); *cf.* Marrus, *supra* note 30, at 811 ("Harm is presumably a stricter requirement than best interests, although one might argue that if something is in the best interests of the child, failure to provide it would cause harm.").

[76] Professor Nolan summarized this limited role as follows:

> Although parental autonomy in raising a child free from state interference is protected as a fundamental right, the protections are not absolute. The state, under its parens patriae power, may intervene if the child is harmed. This protects the parent-child relationship unless the parents do not meet the minimum standards for caring for the child. The harm standard assumes that fit parents are proper decisionmakers for their children, and prevents the state from making what it considers to be a better decision. Similarly, the constitutional standard for determining whether the state is interfering with family autonomy requires the state to show a compelling state interest and to narrowly tailor the regulation to protect only the legitimate interest at stake. The harm standard would meet this constitutional standard.
>
> Thus, the state possesses authority to intervene and interfere with a fit parent's decision not to allow grandparent visitation under its parens patriae power only when the child may be harmed by the parent's decision.

Nolan, *supra* note 58, at 280 (footnotes omitted); *see also* Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 64 (1995) ("When a parent's care falls beneath minimally adequate standards or jeopardizes the well being [sic] of the child, deference to the family must yield to the state's interest in protecting its most vulnerable citizens."); Kovalcik, *supra* note 30, at 807 (pointing out that "in today's society, the state has an interest in the welfare of its children and may limit parental autonomy 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant societal burdens'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 234 (1972)); Brooke N. Silverthorn, *When Parental Rights and Children's Best Interests Collide: An Examination of* Troxel v. Granville *as It Relates to Gay and Lesbian Families*, 19 GA. ST. U. L. REV. 893, 896–97 (2003) ("[A]lthough parents do retain a fundamental constitutional right to make decisions concerning their children, courts have held that this right is not absolute because states ultimately retain the power to protect their citizens. The doctrine of *parens patriae* gives states the power to intervene into the parent-child relationship if a parent cannot adequately care for his or her child.") (footnotes omitted); *supra* note 29 and accompanying text.

their children.[77] Specifically, the Court has repeatedly held that state interference with the fundamental right of parental autonomy must be justified by a "compelling state interest," and it has focused on harm to the child to satisfy the associated constitutional strict scrutiny standard.[78]

In 1923, the Court in *Meyer v. Nebraska* recognized that parents have the right to decide whether their children are instructed in the German language because such instruction "is not injurious to the health, morals or understanding" of their children.[79] Two years later, the Court in *Pierce v. Society of Sisters* held that parents' decisions to send their children to private schools are "not inherently harmful."[80] In the 1944 case of *Prince v. Massachusetts*, the Court upheld the conviction of a parent who allowed her child to engage in "[s]treet preaching" and selling religious magazines in order to preclude "psychological or physical injury" to the child.[81] The Court in 1972, in *Stanley v. Illinois*, held that a court is unable to strip an unwed father of his parental rights unless it makes an individualized finding that an unwed father neglected his child by not providing suitable care.[82] Later in 1972, the Court in *Wisconsin v. Yoder* acknowledged that the fundamental parental right to nurture and raise children is "subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens"[83] and held that the parental decision to remove Amish children

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[77] *See Williams*, 485 S.E.2d at 654 ("The Supreme Court has clearly established that to constitute a compelling interest, state interference with a parent's right to raise his or her child must be for the purpose of protecting the child's health or welfare." (citing Wisconsin v. Yoder, 406 U.S. 205, 230 (1972); Prince v. Massachusetts, 321 U.S. 158, 170 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923)); *see also* Appell & Boyer, *supra* note 76, at 67 ("*Meyer* and its progeny consistently reflect the notion that the autonomy of the family should not be disturbed absent some showing that the parent's conduct places the child's health, safety, or welfare at significant risk of harm."); *cf.* Troxel v. Granville, 530 U.S. 57, 97 (2000) (Kennedy, J., dissenting) ("True, this Court has acknowledged that States have the authority to intervene to prevent harm to children, but that is not the same as saying that a heightened harm to the child standard must be satisfied in every case in which a third party seeks a visitation order." (citations omitted)). These assertions are dicta and not in the specific context of nonparental child visitation, making Justice Stevens's comment that the actual-harm standard "finds no support in this Court's case law" arguably true as well. *See supra* note 71 and accompanying text.

[78] *Williams*, 485 S.E.2d at 654 ("State interference with a fundamental right must be justified by a 'compelling state interest.'" (quoting Roe v. Wade, 410 U.S. 113, 155 (1973)); *see also* Silverthorn, *supra* note 76, at 897 (noting that when the state's interest and the parent's interest in the parent-child relationship are not congruent, "a court must defer to the parent's liberty interest unless it can find a compelling state interest to interfere in the parent-child relationship").

[79] 262 U.S. at 403.

[80] 268 U.S. at 534.

[81] 321 U.S. at 169–70.

[82] 405 U.S. 645, 658 (1972).

[83] 406 U.S. at 233–34.

from public schools after the eighth grade to allow them to receive an Amish education would not harm the children.[84]

Although the *Troxel* plurality elected not to rule on whether a showing of actual harm is required to rebut the presumption that biological parents are best positioned to make familial decisions, at least one justice appeared to support such a position.[85] Justice Thomas implied in his concurrence that a showing of harm to the child is needed to overcome the strict scrutiny requirement necessary to infringe on parents' "fundamental constitutional right to rear their children."[86]

Commentators have also advanced more generalized arguments to justify an actual-harm standard for nonparental visitation.[87] Nonparents, assuming they are not in a quasi-parental status, do not share the obligations and responsibilities toward children imposed by the state on parents and therefore do not share the constitutional right of parenting.[88] The actual-harm standard would properly balance the inevitable harms associated with nonparental visitation orders with the harms those orders might prevent.[89] To the extent input from children is required in a nonparental visitation proceeding, a harm standard would preclude children from undermining the parental authority intended to protect them.[90] For divorced parents, the higher standard would prevent misuse of nonparental visitation orders to indirectly favor the noncustodial parent and operate to secure more visitation than that authorized by the court pursuant to the parents' divorce decree.[91] Finally, a harm standard would prevent grandparents of children in intact families from improperly

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[84] *Id.* at 230 ("This case . . . is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.").

[85] *See* Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (noting that "a legitimate governmental interest" is required "in second-guessing a fit parent's decision").

[86] *Id.* On the other extreme, Justice Stevens expressly rejected an actual-harm standard. *See id.* at 81 (Stevens, J., dissenting).

[87] *See, e.g.*, Schofield, *supra* note 31, at 1726–28. "Requiring grandparents to make a heightened showing that a visitation order would prevent harm to the child is the most appropriate way to balance the competing needs and claims of children, parents, and grandparents." *Id.* at 1673. Admittedly, a cogent argument can be made that at least some of these concerns could be satisfied by a heightened best-interests standard if that standard were applied properly.

[88] *Id.* at 1726. As the Tennessee Supreme Court opined, "The requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process." Hawk v. Hawk, 855 S.W.2d 573, 580 (Tenn. 1993).

[89] Schofield, *supra* note 31, at 1727. This is the rationale used by the Virginia Supreme Court to justify the "detriment to the child" standard in termination-of-parental-rights cases. *See infra* note 329.

[90] Schofield, *supra* note 31, at 1727.

[91] *Id.* at 1727–28.

using state authority to interfere with the parental independence of the grandparents' adult children.[92]

II. NONPARENTAL CHILD VISITATION AND CUSTODY IN VIRGINIA

Virginia has a single statute that addresses both visitation and custody of children, and although it references nonparents, it does not expressly indicate the standard they must satisfy in order to be granted visitation or custody rights.[93] Virginia case law on the subject, however, is fairly well developed, with the fundamental right of parenting in the context of nonparental involvement with children having been recognized even before *Troxel*.[94]

A. Virginia's Statutory Framework for Nonparental Child Visitation and Custody

There is no common law right of nonparental visitation[95] or custody[96] in Virginia.[97] Statutory standing to seek child visitation or custody is relatively broad, however, as any "person with a legitimate interest" in the wellbeing of a minor child can come within the purview of the court.[98] The Code of Virginia specifies that the term "includes, but is not limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives[,] and family members."[99] The applicable statute further specifies that the term shall be "broadly construed" by courts in order to accommodate the best interests of the child.[100]

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[92] *Id.* at 1728.

[93] VA. CODE ANN. § 20-124.2(B) (LexisNexis, LEXIS through 2017 Reg. Sess.).

[94] *See, e.g.*, Denise v. Tencer, 617 S.E.2d 413, 421 (Va. Ct. App. 2005).

[95] Williams v. Williams, 485 S.E.2d 651, 652 (Va. Ct. App. 1997), *aff'd as modified*, 501 S.E.2d 417 (Va. 1998).

[96] *See Denise*, 617 S.E.2d at 421 (noting that grandparents' rights are limited compared to longstanding parental rights).

[97] Virginia is not unique in this regard.

> The common law neither countenanced nor contemplated intervention in parent-child relationships by persons who were not related to the child by blood. Even grandparents, who not only are blood relatives, but also are often considered to be members of the extended family, were considered legal strangers who enjoyed no rights under the common law with respect to their grandchildren.

Gregory, *supra* note 46, at 687–88.

[98] § 20-124.1 (LEXIS).

[99] *Id.*

[100] *Id.* Of note, compared to other states, Virginia liberally grants third-party child intervention rights. *See* Lindsy J. Rohlf, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 696 (2009) (describing "three basic types of third-party-visitation statutes": those that allow visitation "when a disruption to the nuclear family has occurred, such as divorce or death," those that award visitation "to grandparents when doing so is in the best interests of the child or when the court determines that it

Like virtually every other jurisdiction, child visitation and custody determinations *between fit parents* in Virginia are required by statute to be consistent with the best interests of the child,[101] and there is no presumption that one parent is favored over the other.[102] As of 1994, the Virginia legislature made it clear that "court[s] shall give due regard to the primacy of the parent-child relationship."[103] The court may, however, award visitation or custody *to a nonparent* upon proof, by clear and convincing evidence, that such an award would serve the best interests of the child.[104]

In determining the best interests of a child for purposes of visitation or custody arrangements, the applicable statute directs courts to consider (1) the child's age and physical and mental condition, (2) each parent's age and physical and mental condition, (3) the relationship between each parent and the child, (4) the needs of the child, (5) the role of each parent in the child's upbringing and care, (6) the propensity of each parent to actively support the child's contact and relationship with the other parent, (7) the willingness and ability of each parent to maintain a positive relationship with the child and the ability of each parent to cooperate in and resolve child-related disputes, (8) the reasonable preference of the child, if appropriate, (9) any history of family abuse, and (10) any other factors the court deems appropriate.[105] Although the construction of the

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is appropriate," and—the least common, including Virginia's—those that give visitation rights "to any third party who has a significant relationship with the child").

[101] § 20-124.2(B) (LEXIS) ("In determining custody, the court shall give primary consideration to the best interests of the child."). The full text of the Code section reads as follows:

> In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint custody or sole custody.

Id.

[102] *Id.* ("As between the parents, there shall be no presumption or inference of law in favor of either."). This statutory provision codified case law that had put an end to the "tender years doctrine," which "held that the mother should be given preference to the father in custody cases involving children of tender years." PETER NASH SWISHER ET AL., 9 FAMILY LAW: THEORY, PRACTICE, AND FORMS § 15:8 (2016 ed.).

[103] § 20-124.2(B) (LEXIS). Prior to the statutory change to include the primacy requirement expressly, Virginia courts long recognized a "natural parent presumption." SWISHER ET AL., *supra* note 102, § 15:8.

[104] § 20-124.2(B) (LEXIS).

[105] *Id.* § 20-124.3 (LEXIS). The statute actually provides additional details regarding how the court should evaluate some of the individual factors, and reads as follows:

statute clearly implies that the factors relate only to a dispute between two parents, Virginia courts apply these same factors when a visitation or custody determination is between a parent and a nonparent.[106]

B. Child Visitation in Virginia

1. Child Visitation Before *Troxel*

The rights of nonparents in Virginia visitation determinations were directly addressed in the seminal case of *Williams v. Williams*, a Virginia Supreme Court decision handed down in 1998, two years before *Troxel*.[107] In *Williams*, fit grandparents sought court-ordered visitation over the united objection of fit parents, who were part of an intact family.[108] The trial court awarded visitation to the nonparents, and the parents appealed.[109]

Citing United States Supreme Court precedent, the Virginia Court of Appeals held that parental autonomy in child rearing is a fundamental

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In determining best interests of a child for purposes of determining custody or visitation arrangements . . . , the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
9. Any history of family abuse[, and i]f the court finds such a history, [it] may disregard the factors in subdivision 6; and
10. Such other factors as the court deems necessary and proper to the determination.

Id.

[106] *See, e.g.*, Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997) (visitation), *aff'd as modified*, 501 S.E.2d 417 (Va. 1998); Florio v. Clark, 2007 Va. App. LEXIS 400, at *5–6 (Oct. 30, 2007) (custody), *aff'd*, 2008 Va. App. LEXIS 316 (May 13, 2008) (en banc), *aff'd*, 674 S.E.2d 845 (Va. 2009).

[107] *Williams*, 501 S.E.2d at 424.

[108] *Williams*, 485 S.E.2d at 652.

[109] *Id.*

right protected by the Fourteenth Amendment.[110] The court went on to hold that state interference with this right must be justified by a compelling state interest, which it defined as one that is "for the purpose of protecting the child's health or welfare."[111] Applying this principle to Virginia's custody and visitation statute, the court acknowledged the statutory requirement to "give due regard to the primacy of the parent-child relationship" rather than simply evaluate the best interests of the child.[112] The court then held, despite the lack of any express language to this effect in the statute, that "[f]or the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an *actual harm to the child's health or welfare* without such visitation."[113]

In explaining what it meant by "actual harm to the child's health or welfare," the court opined that it is not sufficient for a court to find that visitation with a nonparent would be "'better,' 'desirable,' or 'beneficial' for a child."[114] Loss of the nonparental relationship in and of itself is not what is meant by actual harm.[115] The court ruled that an analysis of whether nonparental visitation is consistent with the best interests of the child is reserved until after the nonparent proves, by clear and convincing evidence, actual harm to the child without the requested visitation.[116] In short, the court held that nonparental visitation over the parents' unified objection can be granted only if (1) the nonparent proves by clear and convincing evidence that the lack of visitation would cause actual harm to the child's health or welfare, and (2) such visitation is in the best interests of the child.[117] The Court of Appeals ultimately remanded the case back to the trial court for further consideration of any alleged harm to the child.[118]

On appeal, the Virginia Supreme Court, in a plurality opinion, affirmed the lower court holdings.[119] Instead of remanding the case to the trial court, however, the Supreme Court found that there was "no allegation or proof that denial of grandparent visitation would be

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[110] *Id.* at 653 (citing Prince v. Massachusetts, 321 U.S. 158, 166; Moore v. City of E. Cleveland, 431 U.S. 494 (1977)).

[111] *Id.* at 654 (citing Wisconsin v. Yoder, 406 U.S. 205, 230; *Prince*, 321 U.S. at 170; Pierce v. Soc'y of Sisters, 268 U.S. 510, 534; Meyer v. Nebraska, 262 U.S. 390, 402–03).

[112] *Id.* (quoting VA. CODE ANN. § 20-124.2 (LexisNexis, LEXIS through 2017 Reg. Sess.)).

[113] *Id.* (emphasis added).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998). Three of the Court's seven justices joined in the plurality opinion.

detrimental to this child's welfare."[120] The court consequently denied the grandparents' visitation petition and dismissed the case.[121]

Justice Hassell, joined by another justice, dissented with respect to the constitutional issue.[122] The dissent disagreed with the court's affirmance of the Court of Appeals's holding that the Virginia custody and visitation statute "is constitutionally permissible because the statute *implicitly* requires a finding that a denial of visitation would be harmful or detrimental to the grandchild,"[123] a conclusion that relied on express statutory language pronouncing "the primacy of the parent-child relationship."[124] The dissent would have found the applicable statute "constitutionally deficient because it does not require that a court, in awarding visitation to the grandparents, make a determination that such visitation is necessary to protect the safety or health of the child."[125]

After *Williams*, courts further clarified the appropriate standard for nonparental visitation in Virginia. In *Dotson v. Hylton*, the Virginia Court of Appeals held that the best-interests-of-the-child standard—and not the *Williams* actual-harm standard—applied where one parent supported nonparental visitation and the other did not.[126] In *Dotson*, the parents had divorced when their child was four years old, and a few years later the father was sentenced to ten years in the state penitentiary.[127] The mother petitioned for sole custody.[128] The father did not contest custody, but requested reasonable visitation for both himself and his mother.[129] The child's mother objected, which resulted in the grandmother filing a visitation petition.[130] The trial court awarded nonparental visitation, finding that such visitation was in the best interests of the child.[131] The mother appealed, arguing that the trial court erred by not applying the *Williams* actual-harm standard.[132] The appellate court distinguished *Williams*, noting that in *Williams* "both parents objected to visitation by

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[120] *Id.*

[121] *Id.*

[122] *Id.* (Hassell, J., dissenting). Two other justices dissented on the ground that the grandparents lacked standing. *Id.* at 424 (Koontz, J., dissenting).

[123] *Id.* at 420 (Hassell, J., dissenting) (emphasis added).

[124] VA. CODE ANN. § 20-124.2 (LexisNexis, LEXIS through 2017 Reg. Sess.).

[125] *Williams*, 501 S.E.2d at 424 (Hassell, J., dissenting).

[126] 513 S.E.2d 901, 903 (Va. Ct. App. 1999).

[127] *Id.* at 902.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 903.

[132] *Id.*

the grandparents, and the family was intact."[133] The court then explained its holding in *Williams* as follows:

> To grant visitation to the grandparents, over both parents' objection, the trial court had to find that withholding visitation would be detrimental to the child before it applied the best interests standard. The [Virginia Supreme] Court [in *Williams*] stressed that "[t]he child's family is intact." The factual predicate in *Williams* was a unified family.[134]

The court went on to hold that "[w]hen only one parent objects to a grandparent's visitation and the other parent requests it, the trial court is not required to follow the standard enumerated in *Williams*."[135] The court ultimately decided that the actual-harm test does not apply when parents disagree about nonparental visitation, ostensibly because each parent has a separate and equal constitutional right to decide nonparental visitation; rather, the best-interests-of-the-child standard applies.[136]

Virginia nonparental child visitation law prior to *Troxel* tracked the United States Supreme Court's constitutional rationale regarding the fundamental right of parenting[137] and ultimately answered the question on which the *Troxel* court elected to remain silent—the standard of proof nonparents must satisfy, at least in Virginia, in order to be awarded visitation over the objection of fit parents.[138]

2. Child Visitation After *Troxel*

Because Virginia nonparental child visitation law prior to 2000 aligned with *Troxel*'s limited constitutional holdings, there was no need to alter the Commonwealth's custody and visitation statute or case law in light of the United States Supreme Court's decision.[139] Virginia appellate courts did, however, continue to refine nonparental child visitation law within the existing constitutional and statutory framework.

In 2003, the Virginia Court of Appeals decided *Griffin v. Griffin*, another case in which a nonparent sought visitation over the objection of only one parent.[140] The Griffins separated approximately one year after

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[133] *Id.*

[134] *Id.* (alteration in original) (quoting Williams v. Williams, 501 S.E.2d 417, 417 (Va. 1998)).

[135] *Id.* at 903.

[136] *Id.* The Virginia Court of Appeals in a later case better explained its rationale for the lower standard when one parent supports nonparental visitation and the other does not. *See infra* notes 140–58 and accompanying text (discussing Griffin v. Griffin, 581 S.E.2d 899, 902 (Va. Ct. App. 2003)).

[137] *See supra* Part I.A.

[138] *See supra* Part I.B.

[139] *Compare* Part II.B.1 *with* Part II.B.2 (discussing nonparent visitation rights in Virginia before and after *Troxel*).

[140] 581 S.E.2d 899, 900 (Va. Ct. App. 2003).

they married, and during the separation the wife continued to have sexual relations with her husband.[141] She also became sexually involved with another man.[142] The wife became pregnant and informed her husband he was the child's father.[143] The husband believed her and established a relationship with the child.[144] The wife and the child began living with the wife's mother when the child was fifteen months old, and the wife allowed the husband to visit her son—for approximately three months—until a paternity test established that the husband was not the child's biological father.[145] When the wife refused to allow her husband to visit the child, the husband sought court-ordered visitation.[146] The wife objected to the husband's request for visitation, but the child's biological father apparently did not take a position regarding the request.[147] The trial court granted the husband's visitation petition, finding that nonparental visitation was in the best interests of the child.[148]

On appeal, the Virginia Court of Appeals noted that—consistent with *Williams* and *Troxel*—although child visitation determinations between fit parents are based on the best interests of the child, nonparents are not vested with a fundamental parenting right arising out of the Fourteenth Amendment.[149] The court repeated *Troxel*'s proclamation that the "liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental

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141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.* at 902.

> *Troxel* expressly declined to rule that all "nonparental visitation statutes violate the Due Process Clause as a *per se* matter.". . . [A]s an example, *Troxel* pointed out that some state statutes have been interpreted to require a showing of actual harm as a precondition to awarding visitation to a non-parent over the objection of fit parents. In *Williams*, the Virginia Supreme Court agreed that "[f]or the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an *actual harm to the child's health or welfare* without such visitation." Thus, when fit parents object to non-parental visitation, a trial court should apply "the 'best interests' standard in determining visitation *only after* it finds harm if visitation is not ordered."

Id. at 902 (citation omitted) (first quoting Troxel v. Granville, 530 U.S. 57, 73 (2000) (plurality opinion)); then citing *id.* at 74; and then citing Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998). Similarly, according to *Griffin*, "when fit parents object to non-parental visitation, a trial court should apply 'the "best interests" standard in determining visitation *only after* it finds harm if visitation is not ordered.'" *Griffin*, 581 S.E.2d at 902 (quoting *Williams*, 501 S.E.2d at 418).

liberty interests recognized by this Court."[150] It then summarized as follows:

> As a result, the statutory best-interests test "unconstitutionally infringes on that fundamental parental right" if it authorizes a court to "disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests."[151]

The court also downplayed the role of an intact family, a seemingly relevant fact in *Williams*.[152] The *Griffin* court opined that "[n]othing in *Troxel* implies that the legal superiority of a fit parent's rights over those of a non-parent turns on whether the parent is married, separated, divorced, or widowed."[153]

The court distinguished *Dotson*, in which one parent supported the nonparent's request for visitation, with the case before it as follows:

> Custody and visitation disputes between two fit parents involve one parent's fundamental right pitted against the other parent's fundamental right. The discretion afforded trial courts under the best-interests test reflects a finely balanced judicial response to this parental deadlock. A very different kind of legal contest, however, exists in a dispute between a fit parent and a non-parent. In this latter situation, the best-interests test should be applied only if the trial court first finds "an actual harm to the child's health or welfare without such visitation." We disagree with husband that our reasoning conflicts with *Dotson v. Hylton*, which held: "When only one parent objects to a [non-parent's] visitation and the other parent requests it, the trial court is not required to follow the standard enumerated in *Williams*." Unlike *Dotson*, the "other parent" in our case . . . did not request that visitation be awarded to husband. Thus, the trial court was not asked to referee between one parent's request that visitation be granted to a non-parent

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[150] *Griffin*, 581 S.E.2d at 901 (quoting *Troxel*, 530 U.S. at 65) (plurality opinion)). Interestingly, in declining to rule that all "nonparental visitation statutes violate the Due Process Clause as a *per se* matter," the United State Supreme Court in *Troxel* cited *Williams*, 501 S.E.2d at 417, as an example of a state's interpretation that required a showing of actual harm to the child's health or welfare without nonparental visitation as a precondition to awarding visitation to a nonparent over the objection of fit parents. *Troxel*, 530 U.S. at 73–74 (plurality opinion).

[151] *Griffin*, 581 S.E.2d at 901–02 (quoting *Troxel*, 530 U.S. at 67).

[152] *See* Dotson v. Hylton, 513 S.E.2d 901, 903 (Va. Ct. App. 1999) (quoting *Williams*, 501 S.E.2d at 417).

[153] *Griffin*, 581 S.E.2d at 902. The Court continued as follows: "A single mother has no less constitutional right to parent her son than a married mother. 'We, therefore, reject any argument that single parents are entitled to less constitutional liberty in decisions concerning the care, custody, and control of their children.'" *Id.* (quoting Wickham v. Byrne, 769 N.E.2d 1, 6 (Ill. 2002)). The *Williams* court—as well as the *Dotson* court when explaining *Williams*—arguably should have emphasized the parents' *unified position* in *Williams* as opposed to the fact that they were part of an *intact family*.

> and the other parent's objection to it. The only contest here is between a parent and a non-parent.[154]

The court held that the *Williams* actual-harm test was appropriate when one parent objected to nonparental visitation and the other was present but did not take a position.[155] After noting that the actual-harm standard is "significantly weightier" than the best-interests-of-the-child standard, the court opined that it is insufficient that nonparental visitation would be "'better,' 'desirable,' or 'beneficial' for a child," or that the potential loss of the nonparental relationship might cause the child emotional grief or sadness.[156] In other words, forced nonparental visitation without the support of a parent "cannot be ordered absent compelling circumstances which suggest something near unfitness of custodial parents."[157] The court ultimately concluded, based on the facts presented, as follows:

> The evidence in this case, at its best, goes no further than supporting the inference that the child would grieve the loss of the emotional attachment he has for [the nonparent] and "could be" emotionally hurt if visitation with him ended. While that might satisfy a trial court's "subjective notions of 'best interest of the child,'" it falls far short of satisfying by clear and convincing evidence the actual-harm test.[158]

A subsequent Virginia Court of Appeals decision further clarified application of the child visitation analysis where the custodial parent objects to nonparental visitation and the other parent is absent or silent.[159] In *Surles v. Mayer*, the parties had a child together but never married.[160] They lived together for several years, and the nonparent acted as the primary father figure for the mother's other child from a prior relationship.[161] After the parties separated, in addition to custody disputes concerning their biological child, the nonparent also sought visitation with the non-biological child based on the parental role he had previously

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[154] *Id.* (alteration in original) (citations omitted); *see also* Hart v. Hart, 2012 Va. Ct. App. LEXIS 188, at *12 (June 5, 2012) ("[W]hen fit parents assert their constitutional rights against each other, neither parent is entitled to primacy over the other. Their conflicting rights settle into oppositional equipoise, leaving the traditional best-interests standard as the sole basis of distinction between them. 'Thus, faced with a contest in which one parent's fundamental rights were pitted against the other parent's fundamental rights,' a trial court does not err by deciding the case based solely on the best-interests standard." (quoting Yopp v. Hodges, 598 S.E.2d 760, 766 (Va. Ct. App. 2004))).

[155] *Griffin*, 581 S.E.2d at 902 (quoting Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997), *aff'd as modified*, 501 S.E.2d 417 (Va. 1998)).

[156] *Id.* (quoting *Williams*, 485 S.E.2d at 654).

[157] *Id.* at 903 (quoting Stacy v. Ross, 798 So. 2d 1275, 1280 (Miss. 2001)).

[158] *Id.* (quoting *Williams*, 485 S.E.2d at 654).

[159] Surles v. Mayer, 628 S.E.2d 563, 567 (Va. Ct. App. 2006).

[160] *Id.* at 568.

[161] *Id.*

played in the child's life.[162] The mother objected, and the child's biological father, although alive, had not been involved in the child's life and did not participate in the visitation proceedings.[163] The nonparent argued that the *Williams* test did not apply because his visitation was not over the objection of *both* parents.[164] In response, the Virginia Court of Appeals first noted that it previously had "held that the actual harm standard does not apply where one parent objects to the third party's request for visitation, but the other parent affirmatively requests that the third party be allowed visitation."[165] It then stated the following:

> We have never held, however, that, if a biological parent fails to voice an objection to visitation, that failure to object amounts to acquiescence in the third-party's petition for visitation. Indeed, in *Griffin*, we held that the "actual harm" standard was applicable where the biological father, who merely "appeared . . . ," did not actually "request that visitation be awarded to [the nonparent]." Similarly, here, [the] biological father did not "request that visitation be awarded to [the nonparent]." Although [the biological father] did not appear at the hearing and voice a formal objection to visitation, we decline to hold that a biological parent's silence is the functional equivalent of that parent's affirmative consent.[166]

Virginia courts also have clarified whether actual harm resulting from the lack of nonparental visitation is limited to physical harm to the child.[167] Although psychological harm to the child may be sufficient to satisfy the actual-harm standard—especially when established by clear and convincing evidence[168]—proof of some potential future harm to the child's welfare generally requires expert opinion testimony.[169] For example, in *O'Rourke v. Vuturo*, the Virginia Court of Appeals affirmed the trial court's finding of actual harm, which was based in part on the

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[162] *Id.*

[163] *Id.*

[164] *Id.* at 573.

[165] *Id.* at 574 (citing Yopp v. Hodges, 598 S.E.2d 760, 765 (Va. Ct. App. 2004); Dotson v. Hylton, 513 S.E.2d 901, 903 (Va. Ct. App. 1999)). The Court of Appeals also pointed out that "where the third party already possesses, through a valid consent order, joint legal custody of the child and sole physical custody of the child, the 'actual harm' standard is likewise inapplicable." *Id.*

[166] *Id.* (quoting Griffin v. Griffin, 581 S.E.2d 899, 900, 902 (Va. Ct. App. 2003)).

[167] *See infra* notes 168–76 and accompanying text.

[168] As the *Griffin* court noted, "[c]lear and convincing evidence involves 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" *Griffin*, 581 S.E.2d at 903 (quoting Congdon v. Congdon, 578 S.E.2d 833, 837 (Va. Ct. App. 2003)).

[169] *See, e.g.*, Bailes v. Sours, 340 S.E.2d 824, 826–27 (Va. 1986) (giving great weight to a psychologist's testimony regarding the harmful psychological effects to the child if the natural mother were granted custody).

testimony of five expert witnesses.[170] Following a divorce from the child's mother, the nonparent in *O'Rourke* sought visitation with the child because he had acted as the child's father, despite the fact that the child was the product of an extramarital affair.[171] The nonparent was listed as the child's father on her birth certificate and had represented to others that he was her father.[172] In short, he was the only father the child had ever known.[173] Two of the experts testified that the child had developed such a close bond with the nonparent that separation would harm the child's mental development.[174] The experts testified that the child would develop "aggressive behavior and [have] trouble forming attachments later in her life."[175] The trial court found the expert opinions credible and relied on them to find that the child would suffer actual harm if the nonparent was denied visitation.[176]

As is evident from the foregoing, Virginia nonparental child visitation law is well defined and consistent with the constitutional analysis in *Troxel*. Recognizing the fundamental right of child rearing and given the primacy of parental rights, nonparents seeking visitation rights over a unified parental objection—or the objection of one parent and the absence or silence of the other—face the most stringent standard.[177] Where one

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170 638 S.E.2d 124, 127–29 (Va. Ct. App. 2006).

171 *Id.* at 127.

172 *Id.* The Virginia Court of Appeals also rejected an argument that a nonparent could qualify as a de facto parent to avoid the *Williams* actual-harm standard. In *Stadter v. Siperko*, the nonparent was involved in a cohabitating lesbian relationship with the mother for over five years, was present for the birth of the child, and continued living with the mother for a year and a half after the child's birth. 661 S.E.2d 494, 496 (Va. Ct. App. 2008). The child initially was given a hyphenated version of the parties' last names. *Id.* The nonparent shared parenting responsibilities and provided substantial financial support while cohabitating with the mother and the child, and she continued to provide financial support and physical care for the child after the parties separated. *Id.* The nonparent, relying on numerous decisions from other jurisdictions, argued that "the trial court should have applied the more favorable [best-interests-of-the-child] standard in her petition for visitation because she had a parent-like relationship with [the] child" and argued that "where a biological parent actively has encouraged a parent-child relationship with a cohabiting partner who assumed parental responsibilities for a length of time sufficient to establish a bond with the child, the partner may assert the Fourteenth Amendment rights of a parent set forth in *Troxel* and *Williams* and is entitled to invoke the more favorable standard when seeking visitation." *Id.* at 498 (citation omitted). The court rejected this argument, holding that because "there already exists in Virginia a legal framework for the protection of the interests of a child who might suffer actual harm when separated from a person with a legitimate interest, as well as a mechanism to litigate fully the concerns of the person seeking visitation, we need not rewrite Virginia law to recognize the *de facto* parent doctrine in visitation." *Id.* at 499. For a discussion advocating that de facto parents should be treated like natural parents for visitation purposes, *see generally* Maldonado, *supra* note 30, at 911.

173 *O'Rourke*, 638 S.E.2d at 127.

174 *Id.* at 128–29.

175 *Id.*

176 *Id.* at 129.

177 *See supra* notes 107–58 and accompanying text.

parent supports the nonparent's visitation request, however, a lesser standard applies.[178] In summary, a statutorily interested nonparent is not entitled to child visitation unless (1) the nonparent proves, by clear and convincing evidence, that the lack of visitation would cause actual harm to the child *and*, if such actual harm is proven, that the requested visitation is in the best interests of the child; or (2) at least one parent affirmatively supports the requested visitation, and such visitation is in the best interests of the child.[179]

C. Child Custody in Virginia

Despite the fact that the fundamental right of parenting encompasses, *inter alia*, both custody and visitation of children—and that the applicable Virginia statute governs both custody and visitation rights—the evolution of nonparental child custody law has not tracked nonparental child visitation law in Virginia.[180] Additionally, it is difficult to discern a unified interpretation governing nonparental custody determinations between nonparents and fit parents.[181]

1. Child Custody Before *Troxel*

The right of nonparents in Virginia child custody disputes was directly addressed in the seminal case of *Bailes v. Sours*, which was decided in 1986, fourteen years before *Troxel*.[182] *Bailes* involved a custody dispute between the child's stepmother and natural mother.[183] The child's biological parents were married when the child was born; however, upon the parents' separation a year later, the child moved to a separate residence with his father.[184] Custody was awarded to the father, and the mother was granted visitation.[185] The father remarried shortly thereafter, and the child lived with his father and stepmother until his father died when the child was eleven years old.[186] His mother initially visited the child regularly after the separation, but the visitation diminished over

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[178] *See supra* notes 159–66 and accompanying text.

[179] Application of the *Williams* actual harm test also may be subject to parental waiver. *See, e.g.*, Albert v. Ramirez, 613 S.E.2d 865, 869–70 (Va. Ct. App. 2005) (holding that the *Williams* test was inappropriate where the mother sought to modify a consent custody/visitation order involving a nonparent).

[180] *See infra* Parts II.C.1, II.C.2, II.D.

[181] *See infra* Parts II.C.1, II.C.2, II.D.

[182] Bailes v. Sours, 340 S.E.2d 824, 825 (Va. 1986).

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

time.[187] Starting at the age of two years old, there was evidence that the child did not want to visit his mother, including "psychological problems" and bedwetting.[188] The mother testified that she did not want to force visitation on the child, so her visits with the child "diminished appreciably over the years."[189]

At the time of his father's death, the child had not seen his mother in approximately five years.[190] The mother then began talking to the child on the telephone and seeing him at her house every other weekend.[191] The child began to experience eczema, a recurrence of bedwetting, and "tension" when interacting with his mother, and a psychologist opined that these symptoms were a direct result of the child mourning the loss of his father, with whom he was very close; the stress of the custody dispute; and the possibility of having to live with his mother.[192] The psychologist concluded that granting custody to the mother would harm the child and, if forced to live with his mother, there was "a reasonable likelihood he would run away" or worse.[193] The Court also considered the wishes of the child, who indicated he wanted to remain with his stepmother, as "she was his life."[194] Both the mother and the stepmother were fit and capable of providing the child with a suitable home and environment.[195]

The court first pointed out that "[i]n all child custody cases, including those between a parent and a non-parent, 'the best interests of the child are paramount and form the lodestar for the guidance of the court in determining the dispute.'"[196] It then noted that "[i]t has been long recognized that 'as between a natural parent and a third party, the rights of the parent are, if at all possible, to be respected, such rights being founded upon natural justice and wisdom, and being essential to the peace, order, virtue and happiness of society.'"[197] After recognizing the strong presumption favoring parents over nonparents, which the court noted is "not easily overcome,"[198] the court pieced together prior case law precedents to construct the following test outlining how nonparents can rebut the parental presumption:

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187 *Id.* at 825–26.

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.* at 826.

192 *Id.*

193 *Id.* at 827.

194 *Id.*

195 *Id.* at 826.

196 *Id.* (quoting Walker v. Brooks, 124 S.E.2d 195, 198 (Va. 1962)).

197 *Id.* at 827 (quoting *Walker*, 124 S.E.2d at 198).

198 *Id.*

> Although the presumption favoring a parent over a non-parent is a strong one, it is rebutted when certain factors are established by clear and convincing evidence. We have held that such factors include: (1) parental unfitness; (2) a previous order of divestiture; (3) voluntary relinquishment; . . . (4) abandonment; [and (5)] a finding of "special facts and circumstances constituting an extraordinary reason for taking a child from its parent, or parents."[199]

Relying on the fifth factor and based primarily on the psychologist's conclusion that transferring custody from the stepmother to the mother would have a "significant, harmful, long-term impact" on the child, the court ultimately found that "the likelihood of inflicting serious harm to [the child] is so clearly established by the evidence that the presumption favoring the mother is repugnant to the child's best interest."[200]

The Virginia Supreme Court in *Bailes* unfortunately did not define what constitutes "an extraordinary reason"—or the "special facts and circumstances" that could support such a reason—so courts were provided little guidance regarding how to evaluate subsequent nonparental child custody disputes involving fit parents.[201] Read broadly, *Bailes* stands for the proposition that *any* extraordinary reason—including, but not limited to, harm to the child—can rebut the parental presumption.[202] Read narrowly, in light of the facts in *Bailes*, the court held that the requisite extraordinary reason must threaten harm to the child in order for the

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199 *Id.* (citations omitted) (quoting Wilkerson v. Wilkerson, 200 S.E.2d 581, 583 (Va. 1973)). As the court had noted in a prior case, once the parental presumption has been rebutted, the party seeking custody bears the burden of proving that such custody is in the best interests of the child. Shortridge v. Deel, 299 S.E.2d 500, 503 (Va. 1983); *see also* Walker v. Fagg, 400 S.E.2d 208, 211 (Va. Ct. App. 1990) ("Once the presumption favoring parental custody has been rebutted, the parental and non-parental parties stand equally before the court, with no presumption in favor of either, and the question is the determination of the best interests of the child according to the preponderance of the evidence.").

200 Bailes v. Sours, 340 S.E.2d 824, 827–28 (Va. 1986). The court also pointed out that "[t]he presumption in favor of a parent over a non-parent is a strong one, not easily overcome, and the result we reach here must not be construed to weaken it." *Id.* at 827.

201 *Id.* at 827. It is also not clear how this is any different than the direction provided in the Virginia child custody statute in effect at the time, which stated that courts shall consider, when determining child custody, *inter alia*, "[s]uch other factors as are necessary to consider the best interest of the child." VA. CODE ANN. § 20-107.2 (LexisNexis, LEXIS through 1992 Reg. Sess.), *amended by* VA. CODE ANN. § 20-124.3 (LexisNexis, LEXIS through 1994 Reg. Sess.). 1994 Va. Acts ch. 769. Of note, the current child custody statute provides the same guidance. *Id.* § 20-124.3 (LEXIS).

202 The potential harm to the child was one of several reasons the court considered, although it was characterized by the court as a "[m]ore important" reason. *Bailes*, 340 S.E.2d at 827. Other courts understood the Virginia Supreme Court's finding of an extraordinary reason in *Bailes* to be based on five separate factors, including harm to the child. *See, e.g.*, Brown v. Burch, 519 S.E.2d 403, 411 (Va. Ct. App. 1999) (summarizing *Bailes*).

nonparent to prevail.[203] Consequently, the post-*Bailes* custody decisions are highly fact specific and—unlike the Virginia nonparental visitation decisions—lack a coherent analysis methodology, instead adopting a heightened best-interests-of-the-child standard that considers the totality of the circumstances.[204]

Some unpublished post-*Bailes* decisions evaluated the extraordinary reason prong with no express mention of potential harm to the child if the nonparent were denied custody. For example, in *Weig v. Weig*, the Virginia Court of Appeals appeared to impose a heightened best-interests-of-the-child standard in finding that the nonparent ex-husband rebutted the parental presumption afforded to the natural mother.[205] The court found as follows:

> Evidence of [the child's] emotional problems [related to the parties' separation], which are being addressed by [the nonparent], combined with evidence of [the child's] complete dependence on [the nonparent] and [the mother's] lack of involvement with, or support of, [the child] for a period of more than two years[206] is sufficient to sustain the trial court's finding of special facts and circumstances.[207]

In *King v. King*, the same court found that the child's grandparents "did not prove by clear and convincing evidence that contact between the child and [the mother's romantic friend, who killed the child's natural father], in and of itself, constitutes an 'extraordinary reason' to deny the mother custody of her son."[208] In *Wadford v. Wadford*, the Virginia Court of Appeals found that the trial court record contained evidence from which the trial judge could have found "that special facts and circumstances establish that 'it is in the best interests of [the daughter] that she be placed in the custody of her natural mother and her natural father,'" as opposed to the man who thought he was the father and had been awarded custody more than two years ago.[209]

The most in-depth pre-*Troxel* analysis defining what constitutes an extraordinary reason to rebut the presumption that a parent should be

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[203] *See Bailes*, 340 S.E.2d at 827–28 (appearing to hold that, although the court considered factors such as the mother–child relationship and the child's preferences, it was the likelihood that the child would be seriously harmed that overcame the presumption favoring parental custody).

[204] *E.g.*, Florio v. Clark, 674 S.E.2d 845, 848 (Va. 2009); Bottoms v. Bottoms, 457 S.E.2d 102, 107–09 (Va. 1995); Murray v. Sensabaugh, No. 2100-12-2, 2014 Va. App. LEXIS 234, at *9–11 (June 10, 2014).

[205] No. 0756-96-2, 1997 Va. App. LEXIS 46, at *5–8 (Feb. 4, 1997).

[206] The record indicates that during this two-year period the mother visited the child, on average, two times a month, *id.* at *7, apparently eliminating abandonment as a ground for nonparental custody.

[207] *Id.* at *7–8.

[208] No. 2452-96-3, 1997 Va. App. LEXIS 596, at *5 (Oct. 7, 1997).

[209] No. 3011-97-2, 1998 Va. App. LEXIS 342, at *1–4, *12–13 (June 16, 1998).

granted custody was conducted by the Virginia Court of Appeals in *Brown v. Burch*,[210] a case decided a year *after* the Virginia Supreme Court affirmed the Court of Appeals's decision in *Williams* establishing the actual-harm test for nonparental visitation cases.[211] In *Burch*, the stepfather married the mother when the child was about three years old, although the stepfather and the child had regular contact for two years before that.[212] The mother, who was frequently intoxicated and used cocaine at least once with another man while the child was in the house, took the child and moved out three years into the marriage.[213] Three months later, suspecting that the mother had physically abused the child, the stepfather and father petitioned for and were awarded joint custody, with the stepfather given physical custody.[214] The mother timely appealed the decision, but took no further action for four years.[215] By the time the matter came before the trial court, the joint custody arrangement between the stepfather and the father had existed for six years, the child was twelve years old and was thriving, and the child expressed a desire to maintain the current arrangement.[216]

The court started its analysis of the evidence by referring to the applicable statutes:

> In determining the best interests of the child, the trial court must consider the statutory factors . . . . "The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest." A stepparent is considered a person with a legitimate interest.[217]

The court also opined that, in determining whether "special facts and circumstances" exist to support nonparental custody, courts in other jurisdictions had focused on facts similar to those relied on in *Bailes*.[218] It noted that some of the factors considered in a Maryland case included the following:

1. the age of the child when care was assumed by the non-parent;
2. the period of time elapsed between the parent's loss of custody and his or her attempt to regain custody;

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[210] 519 S.E.2d 403, 418 (Va. Ct. App. 1999).

[211] Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998).

[212] 519 S.E.2d at 409.

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.* at 408–09.

[217] *Id.* at 410 (citations omitted) (quoting VA. CODE ANN. § 20-124.2(B) (LexisNexis, LEXIS through 2016 Reg. Sess.)).

[218] *Id.* at 410–11 (quoting Wilkerson v. Wilkerson, 200 S.E.2d 581, 583 (Va. 1973)).

3. the intensity and genuineness of the parent's desire to obtain custody of the child; and
4. the stability and certainty of the child's future in the parent's custody.[219]

It further pointed out that a Nevada court included in the factors it considered whether "the child's well-being has been substantially enhanced under the care of the non-parent."[220] While discussing the relevant facts in the case before it, the Virginia Court of Appeals observed that the mother had attempted to prevent the nonparent stepfather from seeing the child, citing to one of the enumerated factors in the Virginia statute related to the best interests of the child in custody and visitation cases between fit parents.[221] In short, the court appeared to engage in a heightened best-interests-of-the-child analysis, recognizing the primacy of the parent-child relationship and incorporating a clear and convincing proof standard.[222] The court concluded that considering "*the totality of the circumstances* present in this case, we hold that the record contains clear and convincing evidence of special and unique circumstances that justified . . . denying [the mother] custody of [the child]."[223]

Other nonparental custody court decisions—like *Bailes* itself—clearly considered in their overall analysis issues that were potentially harmful to the child's safety or welfare if custody were granted to the parent. In *Smith v. Pond*, although the trial court found that "[m]edical history and treatment constitutes special facts and circumstances" sufficient to rebut the parental presumption, the Virginia Court of Appeals reversed; the appellate court held that although the medical conditions constitute extraordinary circumstances, these conditions would justify nonparental custody only if the natural parents were unable to provide adequate care, which was not the case.[224] In *Mason v. Moon*, the Virginia Court of Appeals, in denying custody to the child's grandmother, found that "[t]here is no credible evidence in the record which would

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219 *Id.* (citing Ross v. Hoffman, 372 A.2d 582, 593–94 (Md. 1977)).

220 *Id.* at 411–12 (quoting Locklin v. Duka, 929 P.2d 930, 935 (Nev. 1996)).

221 *Id.* at 412 (citing VA. CODE § 20-124.3(6) (LexisNexis, LEXIS through 1999 Reg. Sess.)). Of note, the statute does not reference nonparents, other than that the court should consider, *inter alia*, "[t]he needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members." *Id.* § 20-124.3(4) (LEXIS). If a court were to substitute "nonparent" for the second "parent" in the Virginia statute, all of the factors outlined in *Ross* arguably would be encompassed by the statute.

222 *See supra* notes 58–72 and accompanying text.

223 Brown v. Burch, 519 S.E.2d 403, 412 (Va. Ct. App. 1999) (emphasis added). Of note, *Burch* was decided after *Williams*, which applied the actual-harm test to child visitation cases, establishing a clear dichotomy between nonparental child custody and visitation cases. *See* Williams v. Williams, 501 S.E.2d 417 (Va. 1998).

224 360 S.E.2d 885, 887 (Va. Ct. App. 1987) (alteration in original).

indicate that granting custody of the child to [the grandmother] would harm the child psychologically."[225] Even though these cases involved potential harm to the child, there was no consistent evaluation of the *Bailes* extraordinary-reason prong by focusing on whether the lack of nonparental custody would inflict harm on the child.[226]

2. Child Custody After *Troxel*

Prior to *Troxel*, perhaps unsurprisingly there does not appear to be any mention of the constitutional right of parenting in the context of Virginia nonparental child custody cases.[227] After the United States Supreme Court decision, however, some Virginia courts began to reference the fundamental right of parenting when deciding such cases, although other courts simply continued with the pre-*Troxel* extraordinary-reason analysis with no mention of a fundamental parental right.[228]

A 2005 unpublished Virginia Court of Appeals decision[229] recognized the fundamental right of parenting and went on to apply the actual-harm nonparental *visitation* analysis in a nonparental *custody* case.[230] In *South v. South*, the paternal grandparents, who had cared for the child periodically before and during the parents' marriage, sought custody.[231] There, then-Judge McClanahan, writing on behalf of the court, opined that "the correct legal test in custody cases between a parent and non-parents must at a minimum satisfy the standards established for

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[225] 385 S.E.2d 242, 246 (Va. Ct. App. 1989) (citing Bailes v. Sours, 340 S.E.2d 824, 826 (Va. 1986)).

[226] Some cases evaluated potential harm to the child under the parental unfitness prong of the *Bailes* test. *See, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (finding the parent unfit because, *inter alia*, "there is proof . . . that the child has been harmed, at this young age, by the conditions under which he lives when with the mother for any extended period.").

[227] Of course, in the Virginia child visitation arena, the fundamental right of parenting was recognized by both the Virginia Court of Appeals and the Virginia Supreme Court in *Williams* in 1997 and 1998, respectively. *See supra* notes 105–23 and accompanying text.

[228] *See, e.g.*, Davidson v. Davidson, No. 0305-09-3, 2009 Va. App. LEXIS 381, at *5–8 (Sept. 1, 2009) (citing Troxel v. Granville, 530 U.S. 57, 66 (2000)); Cooner v. Cooner, No. 1570-03-4, 2004 Va. App. LEXIS 179, at *12–15 (Apr. 20, 2004).

[229] It is unclear why the case was not designated for publication, as it clearly represented a significant addition to Virginia law. *See Opinions*, VA.'S JUD. SYS., http://www.courts.state.va.us/opinions/home.html (last visited Dec. 31, 2017) (emphasis omitted) (noting that unpublished Virginia Court of Appeals decisions are "[o]pinions not designated by the Court as having precedential value or as otherwise having significance for the law or legal system"). The Virginia Supreme Court has directed that unpublished decisions may be cited but "shall not be received as binding authority." VA. SUP. CT. R. 5.1(f). Courts can, however, consider the rationale of an unpublished opinion to the extent they find it persuasive. *See* Fairfax Cty. Sch. Bd. v. Rose, 509 S.E.2d 525, 528 n.3 (Va. Ct. App. 1999).

[230] South v. South, No. 0700-04-2, 2005 Va. App. LEXIS 96, at *9–11 (Va. Ct. App. Mar. 8, 2005).

[231] *Id.* at *2–4.

visitation cases."[232] Relying on *Troxel*, *Williams*, and *Griffin*, the court outlined the nonparents' burden as follows: "(1) the grandparents must prove there will be 'actual harm' to the child if custody is placed with the mother; and (2) in meeting this burden, there is a presumption in 'favor of the parent,' not the grandparents."[233] If the nonparent rebuts the parental presumption by proving actual harm to the child, then the court evaluates the best interests of the child.[234] Of note, there is no mention of *Bailes* in the opinion.[235]

A year later, the Court of Appeals decided *Micus v. Mitchell* in another unpublished opinion.[236] In *Micus*, the child's paternal grandmother sought custody after the child's father was held in contempt twice for failing to allow the grandmother visitation, violated the visitation order by relocating the child out of state without proper advance notification, and acted violently toward the grandmother in the child's presence.[237] Additionally, an expert testified that the child was "very traumatized" when first seen for treatment.[238] Although the court outlined the *Bailes* custody test,[239] it also cited *Williams* and *Griffin* for the propositions that "for a non-parent to be awarded visitation (*custody*) over the objection of the custodial parent, 'a court must find an actual harm to the child's health or welfare without such visitation'"[240] and "[i]f the court finds that the child will be harmed if visitation (*custody*) is not ordered, then it must consider the best interests of the child."[241] The Court of Appeals pointed out that the trial court had stated that "although there is no case directly on point concerning an award of custody versus visitation, this Court finds that the statute requires the same analysis" and that the trial court enunciated the standard as a determination of "whether a denial of custody to [grandmother], would result in an actual harm to the

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[232] *Id.* at *10–11.

[233] *Id.* at *9–10.

[234] *Id.* at *11.

[235] Interestingly, the trial court appeared to be aware of the *Bailes* standard. *See id.* at *4–5 (quoting the trial court) ("The Court further finds that there have been presented no special facts and circumstances which would constitute an extraordinary reason for taking the child from the child's natural parent.").

[236] No. 0964-05-2, 2006 Va. App. LEXIS 81 (Mar. 7, 2006). Of note, the *South* appellate decision would not have been available at the time the trial court ruled in *Micus*.

[237] *Id.* at *3–5.

[238] *Id.* at *6–7.

[239] *Id.* at *10.

[240] *Id.* at *9 (emphasis added) (quoting Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997), *aff'd*, 501 S.E.2d 417 (Va. 1998)) (citing Griffin v. Griffin, 581 S.E.2d 899, 902–03 (Va. Ct. App. 2003); *Williams*, 485 S.E.2d at 654)).

[241] *Id.* (emphasis added) (citing *Williams*, 485 S.E.2d at 654).

Child's health or welfare."[242] The appellate court found "no error in the trial judge's legal analysis and its application to the facts of this case."[243] Noting that, *inter alia*, two experts opined that custody with the father "would have significant effects on child's health" and that the trial court had "found that there was 'actual harm' to [the] child when she was in [the] father's care," the appellate court found that the facts "constitute an 'extraordinary reason' to award custody to a non-parent" and affirmed the trial court's award of custody to the grandmother.[244]

3. The Virginia Supreme Court's Guidance—or Lack Thereof—in *Florio v. Clark*

The Virginia Supreme Court in 2009 decided *Florio v. Clark*, a case that provided the ideal opportunity to clarify the muddled state of Virginia's nonparental child custody law.[245] In *Florio*, a custody dispute arose between the child's biological father and a maternal aunt.[246] When the child was born, his parents had already separated; they agreed that the mother was to have custody of the child, with liberal visitation given to the father.[247] When the child was six months old, he and his mother moved in with the aunt, stayed there for approximately one year, and then relocated "just 'two cornfields' away."[248] Over the next four years, the aunt and her husband maintained regular contact with the child, seeing him two to three times each week and taking vacations together.[249] When the mother became ill, the aunt and her husband stepped in as day-to-day caretakers for the child.[250] Two months before his mother's death, the child moved back in with his aunt and her husband.[251] Prior to her death, the mother "executed a will in which she nominated her sister, [the aunt,] as [the child's] guardian."[252]

Since the initial agreement of custody, the father "showed little interest in [the child], visiting him very rarely."[253] The father never paid child support and had an extensive misdemeanor criminal record that

[242] *Id.* at *11 (alteration in original) (quoting the trial court).
[243] *Id.*
[244] *Id.* at *12–13.
[245] 674 S.E.2d 845 (Va. 2009).
[246] *Id.* at 846.
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.* at 846–47.

included offenses related to intoxication.[254] Although the father was in the process of building a home, it was not yet complete, and he was living with his parents.[255] The father dropped out of high school in the tenth grade, never obtained a G.E.D., did not provide any health insurance for the child, and did not demonstrate the "ability to deal with [the child's] emotional, educational and health needs."[256] The aunt and her husband had college degrees, had previously served in the military, and had been attentive to the child's needs, including by providing health insurance.[257] The child, now ten years old, "expressed a preference to live with his father, although he was fond of [his aunt and her husband] and was relaxed, happy, and comfortable in their home."[258]

The trial court awarded custody of the child to the aunt and her husband, finding—as required by *Bailes*—that they had proved by clear and convincing evidence special facts and circumstances to rebut the presumption in favor of the father being awarded custody and that such custody was in the child's best interests.[259] The Court of Appeals's analysis mirrored that in *Brown v. Burch*, the pre-*Troxel* case it had decided nine years earlier: pronouncing that the best interests of the child are paramount in matters of child custody; referencing the statutory best-interest factors; acknowledging the codified requirement to appropriately recognize the primacy of the parent-child relationship; and finding that the "extraordinary reason" prong of the *Bailes* test had been satisfied.[260] The court concluded with the following:

> Having considered the totality of the circumstances present in this case, we hold that the trial court did not err in finding clear and convincing evidence of special and unique circumstances rebutting the presumption in favor of awarding custody to [the father] and requiring denial of custody to him. We further hold that the trial court did not err in finding that the child's best interests would be served by granting custody to the [aunt and her husband] and in making that award.[261]

In a dissenting opinion, Judge Humphreys stated that he would have reversed the trial court's decision because "the evidence was insufficient as a matter of law for a finding of special facts and circumstances."[262] He

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254 *Id.* at 847.

255 *Id.*

256 *Id.*

257 *Id.* at 847–48.

258 *Id.* at 848.

259 Florio v. Clark, No. 2421-06-01, 2007 Va. App. LEXIS 400, at *5 (Oct. 30, 2007), *aff'd*, 2008 Va. App. LEXIS 316 (May 13, 2008) (en banc), *aff'd*, 674 S.E.2d 845 (Va. 2009).

260 *See id.* at *3–5.

261 *Id.* at *8–9. The decision was affirmed by the Court of Appeals after a rehearing en banc. Florio v. Clark, No. 2424-06-01, 2008 Va. App. LEXIS 316, *1 (May 13, 2008) (en banc).

262 *Florio*, 2007 Va. App. LEXIS 400, at *9 (Humphreys, J., dissenting).

asserted that the majority engaged in a simple best-interests-of-the-child analysis, effectively bypassing the *Bailes* requirement that the court first find "special facts and circumstances [that] constitute extraordinary reasons to take the child from the parent."[263] He distinguished between the factors the *Burch* court stated Maryland uses to evaluate "extraordinary reason" circumstances[264] and the best-interests-of-the-child factors listed in the Virginia custody and visitation statute.[265] He opined that although certain facts the trial court considered might be applicable to a best-interests determination, they were irrelevant to an extraordinary-reason analysis.[266] After noting that *Bailes* and *Burch* appeared to rely on facts that included harm to the child,[267] he argued that the facts present in *Florio* were insufficient "to overcome the presumption favoring placement with the natural parent by clear and convincing evidence."[268]

The Virginia Supreme Court affirmed the Court of Appeals's decision.[269] The court recognized the statutory requirement to "give due regard to the primacy of the parent-child relationship," as well as the express nonparental burden to prove "by clear and convincing evidence that the best interest of the child would be served" by awarding custody to the nonparent.[270] It then proceeded to follow the same analysis as the Court of Appeals's majority opinion, citing the *Bailes* test and concluding with the following:

> Even if we assume, without deciding, that no single factor outlined above would be sufficient to rebut the presumption in favor of the natural father, the totality of the record is sufficient to support, by clear and convincing evidence, the trial court's holding that the presumption

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[263] *Id.* at *9–10 (Humphreys, J., dissenting). According to Judge Humphreys, the majority "effectively eliminates the two-step analysis . . . and substitutes a 'bootstrap' rationale where the child's best interest will necessarily supply the special circumstances sufficient to deprive a natural parent of the custody of his child." *Id.* at *15–16; *see also id.* at *23–24 ("The trial court improperly substituted a 'best interests of the child' analysis for a finding of special facts and circumstances.").

[264] *See supra* note 219 and accompanying text.

[265] *See Florio*, 2007 Va. App. LEXIS 400, at *10–15.

[266] *Id.* at *15–18 (Humphreys, J., dissenting). According to Judge Humphreys, facts considered by the trial court that were irrelevant to the extraordinary-reason analysis include "the testamentary wishes of the child's mother," "the counseling services and other arrangements made by the [nonparents] for the benefit of the child," and the "parent's income level and the availability of health insurance." *Id.* at *15–16.

[267] *Id.* at *22–24 ("In contrast to the children in both *Burch* and *Bailes*, [the child here] desires to live with him, and the home studies indicate that [the father] is an appropriate and suitable custodian for his son, namely, that no harm would result from a change in custody.").

[268] *Id.* at *24.

[269] Florio v. Clark, 674 S.E.2d 845, 847 (Va. 2009) (quoting VA. CODE ANN. § 20-124.2(B) (LexisNexis, LEXIS through 2016 Reg. Sess.)).

[270] *Id.*

was rebutted by "special facts and circumstances . . . constituting an extraordinary reason for taking a child away from its parent."[271]

Like *Troxel*, *Florio* is perhaps more revealing for what it fails to articulate than its actual holding. In *Florio*, there is no mention of *Troxel* or a fundamental right to parenting, no reference to any of the Virginia "actual harm" visitation cases—including *Williams* and *Griffin*—and no focus on the harm to the child were the parent, as opposed to the nonparent, awarded custody.[272] The Virginia Supreme Court appeared steadfast on treating nonparental child visitation and custody cases differently, using an actual-harm test for the former and an extraordinary-reason test—which it treated as a heightened best-interests-of-the-child test—for the latter.[273]

Virginia appellate decisions after *Florio* continued to exhibit inconsistency regarding how to evaluate the appropriate standard in nonparental custody cases and what role, if any, harm to the child without nonparental custody plays in the calculus. A year after *Florio*, then-Judge McClanahan—the judge who decided *South v. South* by applying an actual-harm test in a nonparental custody case[274]—wrote the opinion on behalf of the Virginia Court of Appeals in *Barbour v. Graves*, an unpublished decision in which a father appealed a trial court ruling that he had voluntarily relinquished his parental rights.[275] In *Barbour*, the child lived fulltime with Doris Graves, a nonparent, who essentially took on all parental responsibilities associated with raising the child.[276] The trial court found that, based on the circumstances, the father had voluntarily relinquished his rights as a parent.[277] The court cited *Troxel*, *Williams*, and *Griffin* in support of the fundamental right of parenting and the primacy of the parent-child relationship and then outlined the *Bailes* test.[278] Finding that the father had not voluntarily relinquished his parental rights—because he engaged in regular visitation and appeared to have a good parent-child relationship—the court ultimately reversed the trial court's decision and remanded the case for reconsideration of

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[271] *Id.* at 848 (alteration in original) (quoting Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986)).

[272] The aunt arguably could have satisfied an actual harm test, as the trial court found that the child had special needs and the father lacked the necessary income and health insurance to suitably address those needs. *Id.* at 847 (noting that the father had shown no ability to address the "emotional, educational and health needs" of a child with attention deficit hyperactivity disorder and a learning disorder).

[273] *Compare* Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998), *with Florio*, 674 S.E.2d at 848.

[274] *See supra* notes 231–35 and accompanying text.

[275] No. 2776-08-2, 2010 Va. App. LEXIS 192, at *1–2 (May 11, 2010).

[276] *Id.* at *1, *6–7.

[277] *Id.* at *10–11.

[278] *Id.* at *8–10.

whether the parental presumption had been rebutted in some other way.[279] In sending the case back to the trial court, the appellate court included the following footnote:

> We further note for purposes of remand that [the father] also argues the circuit court erred in rejecting application of an "actual harm" standard when considering whether [the non-parent] had rebutted the parental presumption under [Virginia's custody and visitation statute]—the same standard that applies under the statute when a nonparent's request for visitation is considered. This "actual harm" test in a visitation context under [the statute] has not been specifically addressed by a Virginia appellate court in a custody dispute. However, when the Virginia Supreme Court recently addressed the parental presumption in *Florio*, in the context of a parent/non-parent dispute over custody of a minor child, the Court reaffirmed the principles established earlier in *Bailes* without application of the actual harm standard, as discussed above.[280]

Other post-*Florio* unpublished appellate decisions similarly recognized the primacy of the parent-child relationship but made no reference to a fundamental right of parenting, and Virginia appellate courts affirmed trial court decisions that essentially conducted a heightened best-interests analysis—sometimes in light of potential harm to the child—in finding that there were special facts and circumstances to rebut the parental presumption.[281] One unpublished Virginia Court of Appeals decision inexplicably used the *Bailes* test in a nonparental child visitation case.[282] At the same time, as referenced by then-Judge McClanahan, termination of parental rights cases continued to require a

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[279] *Id.* at *11.

[280] *Id.* at *11 n.5 (citations omitted). "We interpret [Code § 20-124.2(B)] to evidence the legislature's intent that the court make the necessary finding that a denial of visitation would be harmful or detrimental to the welfare of the child, before interfering with the constitutionally protected parental right of the child involved [through application of the best interests of the child standard]." Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997). "[W]e conclude that a trial court must make a detriment to the child [i.e., actual harm] determination, regardless of the language of [Virginia's adoption statutes], before entering an adoption order, in order to protect the Fourteenth Amendment rights of a nonconsenting biological parent." Todd v. Copeland, 689 S.E.2d 784, 792 (Va. Ct. App. 2010).

[281] *See, e.g.*, Smith v. Smith, No. 0695-15-2, 2015 Va. App. LEXIS 297, at *2, *5–6 (Oct. 27, 2015) (affirming a trial court's decision to award custody to the non-biological father instead of the mother with no analysis of harm to the child if placed with the mother); Gibson v. Kappel, No. 0180-11-4, 2011 Va. App. LEXIS 352, at *10, *12 (Nov. 15, 2011) (affirming a trial court's decision to award custody to the grandparents instead of the mother because, *inter alia*, "the parents have caused harm to the child and she would suffer further harm if placed in the custody of either parent"); Buffington v. Bates, No. 0771-11-4, 2011 Va. App. LEXIS 270, at *1–2, *9 (Aug. 16, 2011) (affirming a trial court's decision to award custody to the grandparents instead of the mother based on the fact, *inter alia*, that the "[m]other is unable to adequately care for the child").

[282] *See* Murray v. Sensabaugh, No. 2100-12-2, 2014 Va. App. LEXIS 234, at *1, *7–8 (Va. Ct. App. June 10, 2014).

showing of "detriment to the child," i.e., actual harm.[283] In one unpublished case, then-Judge Kelsey, writing on behalf of the Virginia Court of Appeals in 2012, decided a parental visitation case but implied that the Virginia nonparental custody and visitation standards were identical.[284] In *Hart v. Hart*, the court opined as follows, relying in part on the court's ruling in *Griffin*:

> The higher actual-harm standard, articulated in *Troxel*, governs child *custody and visitation* disputes between a fit parent and a third-party nonparent—not between two fit parents fighting among themselves. "Custody and visitation disputes between two fit parents involve one parent's fundamental right pitted against the other parent's fundamental right. The discretion afforded trial courts under the best-interests test reflects a finely balanced judicial response to this parental deadlock."[285]

Hence, even after *Florio*, there is uncertainty regarding how Virginia courts should determine nonparental custodial rights in light of the fundamental right of parents to raise their children.

III. THE NEED FOR CLARITY IN NONPARENTAL VIRGINIA CHILD CUSTODY DETERMINATIONS

The current state of Virginia nonparental child custody and visitation law is both confusing[286] and problematic.[287] Despite a single statute

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[283] *See supra* note 273 and accompanying text. Of note, the Virginia Court of Appeals in *Todd v. Copeland* acknowledged *Troxel*, *Williams*, and *Griffin* in its detrimental-harm analysis. *See* 689 S.E.2d 784, 791–92 (Va. Ct. App. 2010), *aff'd in part, rev'd in part*, 715 S.E.2d 11 (Va. 2011).

[284] Hart v. Hart, No. 1724-11-1, 2012 Va. App. LEXIS 188, at *2, *11–12 (June 5, 2012).

[285] *Id.* at *11–12 (emphasis added) (citation omitted) (quoting Griffin v. Griffin, 581 S.E.2d 899, 902 (Va. Ct. App. 2003)).

[286] As an indication of the confusion, Maine's highest court erroneously ascribed an actual-harm requirement to *Florio*. *See* Pitts v. Moore, 90 A.3d 1169, 1191 & n.22 (Me. 2014). In a 2014 decision, the Maine Supreme Court stated that "[n]umerous other jurisdictions also require *a showing of harm or the threat of harm to the child* before a court may award contact or parental rights over the objection of a fit parent," citing, *inter alia*, *Florio* for the proposition that "the law's presumption in favor of awarding custody to a parent may be rebutted by a showing of an 'extraordinary reason' for taking a child from the child's parent, among other factors." *Id.* (emphasis added).

[287] Perhaps most troubling, the current guidance provided to trial court judges erroneously states that a nonparent seeking either child *visitation or custody* over the objection of both parents must satisfy an actual-harm standard, something unsupported by the current statute or published case law. *See* VIRGINIA CIVIL BENCHBOOK FOR JUDGES AND LAWYERS § 7.09[1][g][viii] (2017–18 ed. Matthew Bender) (emphasis added) ("Before *custody or visitation* may be awarded to a person with a legitimate interest over the objection of both of the child's parents, the court must find that *actual harm* to the child's health or welfare will result without such an award. The court uses the best interest standard in determining *custody or visitation* only after it finds actual harm will result if *custody or visitation* is not awarded." (emphasis added) (citing Troxel v. Granville, 530 U.S. 57 (2000); Williams v. Williams, 501 S.E.2d 417 (Va. 1998); Albert v. Ramirez, 613 S.E.2d 865 (Va. Ct. App. 2005); Griffin v. Griffin, 581 S.E.2d 899 (Va. Ct. App. 2003))). The *Benchbook* is a reference text—

governing court-ordered custody and visitation determinations, including the statutory rights of nonparents in that arena,[288] Virginia courts have developed separate standards for nonparental custody and visitation.[289] Additionally, the visitation actual-harm standard arguably is *higher* than the custody extraordinary-reason standard expressed in published appellate decisions,[290] which is nonsensical.[291] In light of how these standards developed in Virginia, an actual-harm standard is most appropriate for *both* custody and visitation determinations involving nonparents.[292]

A. It Is Unclear Why Virginia's Nonparental Child Custody and Visitation Standards Evolved Differently

As an initial matter, it is difficult to understand why the standards for custody and visitation determinations developed along different paths. They arose from a single statute, so one would have thought that the Virginia Supreme Court's rationale interpreting the constitutional requirements regarding nonparental visitation in *Williams*—which affirmed and relied heavily on the Virginia Court of Appeals's analysis—would have been applied equally in the court's subsequent post-*Troxel* ruling regarding nonparental custody in *Florio*.[293] In fact, the Virginia Court of Appeals implied equal constitutional underpinnings; in *Griffin v. Griffin*—a published decision—it stated that "*[c]ustody and visitation* disputes between two fit parents involve one parent's fundamental right pitted against the other parent's fundamental right,"[294] and in *Hart v. Hart*—an unpublished decision—it opined that "[t]he higher actual-harm standard, articulated in *Troxel*, governs child *custody and visitation* disputes between a fit parent and a third-party nonparent."[295] Of course, the unpublished appellate court opinions that expressly applied the

produced by Virginia circuit court (i.e., trial court) judges at the direction of the Virginia Supreme Court—that is provided to Virginia circuit court judges as a resource. *Id.* at v–vii.

[288] *See* VA. CODE ANN. § 20-124.2 (LexisNexis, LEXIS through 2016 Reg. Sess.).

[289] *See supra* Part II.

[290] *See infra* Part III.

[291] *See* Kovalcik, *supra* note 30, at 808 (pointing out that "[g]enerally, the right of visitation is derived from the right of custody" and that "most jurisdictions view visitation as less intrusive than custody" and therefore apply a lower standard). Surely it should be at least as difficult, if not more difficult, to divest a natural parent of *custody* of his or her child to a nonparent than to require that the child merely *visit* that nonparent. *See also infra* Part III.

[292] *See infra* Part III.

[293] *Id.* § 20-124.2 (LEXIS) (failing to differentiate between visitation and custody standards).

[294] 581 S.E.2d 899, 902 (Va. Ct. App. 2003) (emphasis added); *see also supra* notes 138–56 and accompanying text.

[295] No. 1724-11-1, 2012 Va. App. LEXIS 188, at *11–12 (June 5, 2012) (emphasis added); *see also supra* notes 284–85 and accompanying text.

Williams visitation actual-harm test in custody cases—*South v. South* and *Micus v. Mitchell*—also conflated the nonparental custody and visitation constitutional analyses.[296]

When interpreting the appropriate standard for nonparental visitation, the Court of Appeals in *Williams* used the following reasoning, which the Supreme Court affirmed: "the right of the parents in raising their child is a fundamental right protected by the Fourteenth Amendment"; "[s]tate interference with a fundamental right must be justified by a 'compelling state interest'"; "[the United States] Supreme Court has clearly established that to constitute a compelling interest, state interference with a parent's right to raise his or her child must be for the purpose of protecting the child's health or welfare"; "[the Virginia custody and visitation statute] permits the state to interfere with the right of parents to raise their children by allowing a court, 'upon a showing by clear and convincing evidence that the best interests of the child would be served,' to order non-parent visitation [and] specifically indicates that 'the court shall give due regard to the primacy of the parent-child relationship'"; and the court "interpret[s] this language to evidence the legislature's intent that the court make the necessary finding that a denial of visitation would be harmful or detrimental to the welfare of the child, before interfering with the constitutionally protected parental rights of the child involved."[297]

There can be no doubt that this reasoning applies equally to nonparental custody determinations, as the referenced statute and constitutional principles apply to *both* visitation and custody cases.[298] Replacing "visitation" with "custody" in the Court of Appeals's conclusion in *Williams* illustrates this proposition:

> We interpret [the Virginia custody and visitation statute] to evidence the legislature's intent that the court make the necessary finding that

[296] *See supra* notes 231–44 and accompanying text.

[297] Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997), *aff'd as modified*, 501 S.E.2d 417 (Va. 1998). The Virginia Supreme Court summarized—and expressly agreed with—the Court of Appeals's analysis. *Williams*, 501 S.E.2d at 418 ("We agree with the Court of Appeals'[s] discussion holding there is no constitutional infirmity in the applicable statutes and with that court's interpretation, as we have summarized it, placed upon the statutes."). This reasoning is consistent with that used in *Griffin*, a subsequent decision that relied heavily on *Troxel*. Griffin v. Griffin, 581 S.E.2d 899, 901–02 (Va. Ct. App. 2003). According to a leading Virginia treatise on family law, "[t]he key holdings of [*Griffin*] have far-reaching implications not only with respect to visitation, but also with respect to custody litigation between a parent and a non-parent." SWISHER ET AL., *supra* note 100, § 15:9.

[298] The referenced portion of the Virginia visitation and custody statute reads as follows: "The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award *custody or visitation* to any other person with a legitimate interest." *Id.* § 20-124.2(B) (LEXIS) (emphasis added).

> a denial of [nonparental *custody*] would be harmful or detrimental to the welfare of the child, before interfering with the constitutionally protected parental right of the child involved.
>
> . . . .
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> The "best interests" standard is considered in determining [*custody*] only after a finding of harm if [nonparental *custody*] is not ordered.[299]

B. Virginia's Nonparental Child Custody Standard Must Be at Least as Stringent as Virginia's Nonparental Visitation Standard

The current tests for nonparental custody and visitation determinations in Virginia are different, at least based on how they have been applied in published appellate decisions.[300] Application of the *Bailes* extraordinary-reason standard without a concomitant requirement that the nonparent prove harm to the child results in a custody test that is almost certainly *easier* for a nonparent to satisfy than Virginia's well-defined nonparental child visitation test.[301] This is problematic, as then-Judge McClanahan surely was correct when she opined that "the correct legal test in custody cases between a parent and non-parents must at a minimum satisfy the standards established for visitation cases."[302]

Although common sense dictates that a nonparental child custody standard should not be *easier* to satisfy than a nonparental visitation standard,[303] a cogent argument can be made that the standards for both custody and visitation involving nonparents in fact should be identical because they stem from the same statutory language[304] and infringe on the same fundamental right of parental autonomy.[305] Maryland's highest court explained the justification as follows:

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[299] *Williams*, 485 S.E.2d at 654 (replacing "visitation" with "custody").

[300] *See supra* notes 199–217 and accompanying text.

[301] *See supra* note 75 and accompanying text.

[302] South v. South, No. 0700-04-2, 2005 Va. App. LEXIS 96, at *10–11 (Mar. 8, 2005); *see also supra* note 232 and accompanying text. As one commentator noted, "Because 'most jurisdictions view visitation as less intrusive than custody,' the best interests standard appeared more appropriate for determining visitation rights than the 'proof of harm' standard used to determine custody rights." Trapani, *supra* note 30, at 785 (quoting Kovalcik, *supra* note 30, at 808). Additionally, although every state provides grandparents a statutory right of visitation, *see supra* note 30, grandparents only "carry slightly more weight than others in third party custody litigation." Tara Nielson & Robin Bucaria, Study Note, *Grandparent Custody Disputes and Visitation Rights: Balancing the Interests of the Child, Parents, and Grandparents*, 11 J.L. & FAM. STUD. 521, 525 (2009).

[303] *See* Kovalcik, *supra* note 30, at 808 (noting that "such a determination is more difficult regarding grandparent visitation because the ramifications of allowing or prohibiting visitation are less extreme"); *see also infra* Part III.

[304] *See* VA. CODE ANN § 20-124.2(B) (LexisNexis, LEXIS through 2016 Reg. Sess.).

[305] *See supra* notes 286–89 and accompanying text.

> There is no dispute that the grant or modification of visitation involves a lesser *degree* of intrusion on the fundamental right to parent than the assignment of custody. We except from this notion, however, that, because of this conceptualization, visitation somehow ranks lower on the "scale of values" such that its determination does not require the application of stringent tests as is the case with custody. In other words, although there may be a difference in the degree of intrusion, it is not a difference of constitutional magnitude. Visitation, like custody, intrudes on the fundamental right of parents to direct the "care, custody, and control" of their children. Though visitation decisions granting such privileges to third parties may tread more lightly into the protected grove of parental rights, they tread nonetheless.[306]

The burden facing a nonparent in a Virginia child custody determination must be either higher or identical to the standard of proof he or she is confronted with in a Virginia nonparental determination.

C. Based on How the Standards Were Developed, Virginia Should Use an Actual-Harm Standard for Both Child Custody and Child Visitation Determinations Involving Nonparents

Based on the plain language of the Virginia custody and visitation statute, it is not clear what the Virginia legislature intended regarding the standard of proof for nonparents seeking child custody or visitation.[307] The statute provides that, with respect to petitioning for custody or visitation, a nonparent can overcome the parental presumption by proving, by clear and convincing evidence, that "the best interest of the child would be served thereby."[308] The statutory language has no express requirement to prove actual harm to the child without the requested nonparental intervention; all that is required is proof that—giving "due

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[306] Koshko v. Haining, 921 A.2d 171, 186 (Md. 2007) (citation omitted); *see also* Roth v. Weston, 789 A.2d 431, 447 n.13 (Conn. 2002) ("We recognize that the burden of harm that the statute imposes may be deemed unusually harsh in light of the fact that visitation, as opposed to custody, is at issue. We draw no distinction, however, for purposes of this discussion. Visitation is 'a limited form of custody during the time the visitation rights are being exercised.'" (quoting *In re* Marriage of Gayden, 280 Cal. Rptr. 862, 865 (Cal. Ct. App. 1991))). The most recent draft of the Uniform Nonparental Child Custody and Visitation Act incorporates a single standard for both nonparental custody and nonparental visitation determinations. *See* DRAFT UNIF. NONPARENTAL CHILD CUSTODY AND VISITATION ACT, § 112(a)(2) (UNIF. LAW COMM'N 2017), http://www.uniformlaws.org/shared/docs/Non-Parental%20Rights%20to%20Child%20Custody%20and%20Visitation/2017oct_NCCVA_Comparison%20draft_Annual%20Mtg%20and%20Current%20Draft.pdf (last visited Dec. 31, 2017). Of note, the draft Act provides a "detriment" or "harm" test for both custody and visitation. *See id.* § 112(a)(2) & legis. note.

[307] The statute merely states that "[t]he court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest." *Id.* § 20-124.2(B) (LEXIS).

[308] *Id.*

regard to the primacy of the parent-child relationship"—the best interests of the child are served, i.e., satisfaction of something more than a simple best-interests-of-the-child standard.[309] Read narrowly, a showing of actual harm[310] is not required. However, applying an *implicit* constitutional mandate—as Justice Hassell asserted the plurality did in *Williams*—proof of actual harm is required.[311] Because the statute includes both a requirement that courts consider the primacy of the parent-child relationship and a clear and convincing burden of proof for nonparents, the statute—with or without an actual-harm requirement—clearly meets *Troxel*'s constitutional requirement to accord some special weight to the parent's decision.[312]

By avoiding the question of whether actual harm is required to be proved in nonparental visitation cases and deferring to the states to evaluate such disputes on a case-by-case basis, the United States Supreme Court in *Troxel* communicated that Virginia—like any other state—is free to adopt its own standard, as long as that standard somehow recognizes the constitutional right of parenting by "accord[ing] at least some special weight to the parent's own determination."[313] Virginia, therefore, was free to choose either a heightened best-interests test, which somehow

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[309] *Id.*

[310] The term "harm" is not mentioned at all in the statute. *Id.*

[311] *See supra* notes 120–23 and accompanying text.

[312] *See* Troxel v. Granville, 530 U.S. 57, 72–75 (2000) (plurality opinion). In leaving the ultimate determination of the appropriate nonparental visitation standard to the states, the United States Supreme Court implicitly approved of states using either a heightened best-interest test or an actual harm test. *See id.* (citing Fairbanks v. McCarter, 622 A.2d 121, 126–27 (Md. 1993), *rev'd*, Koshko v. Haining, 921 A.2d 171 (Md. 2007)), as an example of a state—Maryland—that uses a best-interest test and Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998), as an example of a state—Virginia—that uses an actual-harm test). Ironically, *Fairbanks* subsequently was overturned in favor of adopting an actual-harm test—requiring either proof of parental unfitness or that "the lack of grandparental visitation has a significant deleterious effect upon the children"—in order to align Maryland's nonparental visitation and custody standards. *Koshko*, 921 A.2d at 193; *see also supra* notes 58–61 and accompanying text.

[313] *Troxel*, 530 U.S. at 70 (plurality opinion). Of course, it could be argued that disputes in domestic relations matters are better resolved by individual states, lest family law—which historically has been left to the states—become federalized. *Id.* at 73; *see also id.* at 90 (Stevens, J., dissenting) ("It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this."); *id.* at 93 (Scalia, J., dissenting) ("If we embrace this un-enumerated right [of parenting], I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law."); *id.* at 94 (Kennedy, J., dissenting) ("The protection the Constitution requires, then, must be elaborated with care, [and w]e must keep in mind that family courts in the 50 States . . . are best situated to consider the unpredictable, yet inevitable, issues that arise."). As one commentator noted, "Traditionally, family law issues have been left to the states, evidenced by the scarcity of United States Supreme Court cases discussing family law issues." Kovalcik, *supra* note 30, at 820.

recognizes the primacy of the parent-child relationship, or an actual-harm test.[314]

Virginia has a very clear, well-defined, and constitutionally based review standard for nonparental visitation cases.[315] Its central requirement—that the lack of nonparental visitation would harm the child—has existed since before *Troxel* and is consistent with the Supreme Court's constitutional guidance provided therein.[316] Virginia law regarding the appropriate analysis of nonparental child custody, by contrast, is not so clear. *Bailes*, which was decided before *Troxel*, articulated a test that is largely nondescript, permitting nonparental custody if, *inter alia*, the nonparent proves facts and circumstances constituting an extraordinary reason to make such a custody award, which might not include infliction of harm on the child.[317] The court did not define "extraordinary reason" or provide any substantive guidance regarding what "special facts and circumstances" might satisfy the test, however.[318] Furthermore, looking at the facts and circumstances of a case in the context of a totality of the circumstances test runs the risk of confusion and possible devolution into a simple—and unconstitutional—best-interests test, as Judge Humphreys perceived the Virginia Court of Appeals plurality did in *Florio*.[319]

The United States Supreme Court in *Troxel* confirmed the fundamental right of parental autonomy with a rationale similar to that used by the Virginia Supreme Court in *Williams* two years earlier.[320] In fact, the United States Supreme Court enunciated the constitutional liberty interest as "the fundamental right of parents to make decisions concerning the care, *custody*, and control of their children."[321] It is unclear why—nine years after *Troxel* and with some Virginia Court of Appeals decisions echoing the language and rationale of *Williams*—Virginia's

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[314] *See supra* notes 53–57 and accompanying text.

[315] *See supra* Part II.

[316] *See supra* notes 107–25 and accompanying text (discussing Williams v. Williams, 501 S.E.2d 651, 654 (Va. Ct. App. 1997), *aff'd as modified*, 501 S.E.2d 417 (Va. 1998)). As noted previously, the *Troxel* plurality cited *Williams* as an example of a decision that applied an actual-harm standard in nonparental child visitation cases. *See also* Griffin v. Griffin, 581 S.E.2d 899, 902 (Va. Ct. App. 2003) (discussing the constitutional guidance in *Troxel*).

[317] *See supra* notes 180–99 and accompanying text.

[318] *See supra* notes 200–23 and accompanying text.

[319] Florio v. Clark, No. 2424-06-1, 2007 Va. App. LEXIS 400, at *9–10 (Oct. 30, 2007) (Humphreys, J., dissenting); *see also supra* notes 259–68 and accompanying text.

[320] *Compare supra* notes 46–48 and accompanying text *with supra* notes 108–09 and accompanying text.

[321] Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion) (emphasis added).

highest court in *Florio* made no mention of *Troxel*, *Williams*, or the fundamental right of parenting.[322]

Instead of the constitutionally mandated strict scrutiny and narrow tailoring requirements that led to the actual-harm test in *Williams*, the Virginia Supreme Court in *Florio* cleaved to its pre-*Troxel* analysis, as expressed in *Bailes*.[323] This resulted in the current nonparental custody test, which was created independent of any expressed acknowledgement of a fundamental parenting right and prior to the 1994 change in Virginia's custody statute, which mandated recognition of the primacy of the parent-child relationship.[324]

In light of these considerations, Virginia should use an actual-harm standard for both child custody and child visitation determinations between parents and nonparents.

IV. RECOMMENDATIONS REGARDING HOW TO RECONCILE VIRGINIA NONPARENTAL CHILD CUSTODY AND VISITATION DETERMINATIONS

Reconciling the Virginia nonparental child custody and visitation standards can be done in one of several ways: (1) by trial courts judicially interpreting case law—using current Virginia appellate precedent—to require actual harm in order to satisfy the extraordinary-reason prong of the custody analysis, (2) by the Virginia Supreme Court—when presented with the appropriate case—affirmatively establishing a judicial precedent requiring such a showing, or (3) by the Virginia legislature amending the current Virginia custody and visitation statute to add an express actual-harm requirement applicable to both custody and visitation determinations involving nonparents.

A. More Consistent Interpretation of Virginia Nonparental Child Custody Case Law

One option to address the current inconsistency is for Virginia trial courts to conform the *Bailes* test to Virginia's well-defined nonparental visitation case law, which clearly requires a nonparent to first prove, by clear and convincing evidence, that the absence of the requested intervention will result in harm to the child and to then prove that such intervention is in the best interests of the child.[325] To properly recognize

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[322] *See* Florio v. Clark, 674 S.E.2d 845, 848 (Va. 2009); *see also supra* notes 272–73 and accompanying text.

[323] *Florio*, 674 S.E.2d at 848 (quoting Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986)); *see also supra* notes 269–71 and accompanying text.

[324] *See supra* Part II.C.2. Admittedly, the statute codified the well-established Virginia presumption that parents should have custody of their children. SWISHER ET AL., *supra* note 102, § 15:8(b)(4).

[325] *See supra* Part II.B.

the fundamental right of parenting in nonparental custody cases, courts would interpret the "other facts and circumstances" element of the "extraordinary reason" prong to require that the nonparent prove actual harm without nonparental custody.[326] Courts appear to have done this—at least implicitly—in many Virginia cases already.[327] This would effectively create a single nonparental intervention standard and thereby eliminate having a nonparental visitation standard that is more difficult to satisfy than a nonparental custody standard.[328]

Requiring a showing of actual harm before child custodial rights can be taken from a parent and awarded to a nonparent makes sense, as "the primary, paramount, and controlling consideration" of courts determining custody traditionally has been the *welfare* of the child.[329] A parent's loss of custody of his or her child to a nonparent is one of the most severe intrusions on the fundamental right of parenting and is analogous to a termination of parental rights, which under Virginia law requires a demonstration of detriment or harm to the child if custody were awarded to the parent.[330] As the Virginia Supreme Court noted in *Bailes*, "[i]t has been long recognized that 'as between a natural parent and a third party, the rights of the parent are, *if at all possible*, to be respected, such rights being founded upon natural justice and wisdom, and being essential to the peace, order, virtue and happiness of society.'"[331] Equating an "extraordinary reason" with actual harm is also consistent with the other

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[326] *See, e.g.*, Brown v. Hawkins, No. CJ17-0130-010, 2017 Va. Cir. LEXIS 337, *13–14 (Dec. 12, 2017). As discussed earlier, harm to the child was a consideration in many of the cases interpreting the "extraordinary reason" prong of the *Bailes* test. *See supra* note 218–20 and accompanying text. Additionally, two unpublished Virginia Court of Appeals decisions applied the established nonparental visitation actual-harm standard to nonparental custody cases. *See supra* notes 227–44 and accompanying text.

[327] *See supra* notes 225–27, 231–42 and accompanying text.

[328] *See supra* note 75 and accompanying text.

[329] SWISHER ET AL., *supra* note 102, § 15:8 (quoting Mullen v. Mullen, 49 S.E.2d 349, 354 (Va. 1948)) ("Time and again, the courts of this Commonwealth have stated that 'the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate.'").

[330] *See* Copeland v. Todd, 715 S.E.2d 11, 19 (Va. 2011). As the Virginia Supreme Court explained:

> While in *both adoption and custody cases* the primary consideration is the welfare and best interest of the child, it does not necessarily follow that the natural bond between parent and child should be ignored or lightly severed. On the contrary, this bond should be accorded great weight. We should apply neither the fitness test nor the best interest test to the exclusion of the other. We must determine *whether the consequences of harm to the child of allowing the parent-child relationship to continue are more severe than the consequences of its termination.*

Id. (emphasis added) (quoting Doe v. Doe, 284 S.E.2d 799, 805 (Va. 1981)).

[331] Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986) (emphasis added) (quoting Walker v. Brooks, 124 S.E.2d 195, 198 (Va. 1962)).

prongs of the *Bailes* test: "parental unfitness," "a previous order of divestiture," "voluntary relinquishment," and "abandonment."[332] A parent could lose custody of his or her child to a nonparent only if the parent voluntarily relinquished the parental right of custody—via voluntary relinquishment or abandonment—or if parental custody would harm the child—because either the parent is unfit, a previous order of divestiture was entered by a court because the parent had been found to be unsuitable, or an "extraordinary reason" exists that would cause harm to the child.[333]

Of note, then-Judge McClanahan in *Barbour v. Graves* appeared to leave open the possibility that an actual harm test ultimately might apply to nonparental custody cases, as *Florio* technically only determined that the trial court had abused its discretion and the "'actual harm' test in a visitation context under [the statute] has not been specifically addressed by a Virginia appellate court in a custody dispute."[334] With that understanding, Virginia courts—*under current law*—are free to equate the *Bailes* extraordinary reason with actual harm.[335] Trial courts need to be diligent in requiring a showing of harm, however, as the failure to do so risks an inadvertent reduction of the *Bailes* extraordinary-reason test to an unconstitutional best-interests test that infringes on the fundamental right of parenting.[336]

B. A New Test for Virginia Nonparental Child Custody Determinations

A second approach is for the Virginia Supreme Court—when presented with the appropriate case—to expressly adopt an actual-harm test for nonparental custody determinations consistent with the

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[332] *Id.*

[333] A finding of parental unfitness is a determination that the parent is unable to care for the child and implies that the child's health or welfare would be in danger if the parent were to retain custody. *See* Forbes v. Haney, 133 S.E.2d 533, 536 (Va. 1963) (cited by the Virginia Supreme Court in *Bailes* for the proposition that parental unfitness can justify nonparental custody over the parent's objection) ("[T]he *welfare of the child* is to be regarded more highly than the technical legal rights of the parent. Where the interest of the child demands it, the rights of the father and mother may be disregarded." (emphasis added)); *see also* Nolan, *supra* note 58, at 291 (defining parental unfitness as "the potential to make harmful decisions" with respect to custodial children); *supra* note 219. Further, nonparental *visitation* without the support of a parent "cannot be ordered absent compelling circumstances which suggest something near unfitness of custodial parents," Griffin v. Griffin, 581 S.E.2d 899, 903 (Va. Ct. App. 2003), so the standard for awarding nonparental *custody* should be at least as high a standard.

[334] No. 2776-08-2, 2010 Va. App. LEXIS 192, at *11 n.5 (Va. Ct. App. May 11, 2010); *see also supra* note 274–75 and accompanying text.

[335] *See supra* Part III.

[336] *See supra* notes 259–65 and accompanying text. Updating the *Benchbook* to clarify the *Bailes* extraordinary-reason analysis would be an excellent first step. *See supra* note 287.

established standard in nonparental visitation cases.[337] Such a judicial opinion would simply state that the "special facts and circumstances" sufficient to satisfy the "extraordinary reason" prong must risk actual harm to the child if custody were awarded to the natural parent instead of the nonparent,[338] similar to what the Virginia Court of Appeals did in its unpublished opinion in *Micus v. Mitchell*.[339] The remaining factors of the *Bailes* test available to rebut the parental presumption—parental unfitness, a previous order divesting the parent of custody, voluntary relinquishment of parental custody rights, and parental abandonment—would remain, as they are valid independent bases for rebuttal.[340]

One difference from the standard in nonparental child visitation cases, however, would be that there would not be a reduced standard of proof for custody cases in which one parent affirmatively supports nonparental custody.[341] In visitation cases, the reduced best-interests-of-the-child test is appropriate under such circumstances because one parent's fundamental parental right—to determine whether visitation with the nonparent is appropriate—is equipoised with the other parent's identical fundamental right.[342] In the custody context, however, the fundamental right of the parent seeking custody and opposing nonparental custody—which is for that parent to *actually have custody* of the child—is compared with the fundamental right of the other parent advocating for nonparental custody—which is for the other parent to *decide who will have custody* of the child without personally seeking custody.[343] As the Court of Appeals opined in *Brown v. Burch*, a parent's

[337] *See supra* Part I.C.

[338] *See supra* notes 224–25 and accompanying text.

[339] *See supra* notes 236–44.

[340] Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986) (citing Forbes v. Haney, 133 S.E.2d 533, 535–36 (Va. 1963) (unfitness); McEntire v. Redfearn, 227 S.E.2d 741, 743 (Va. 1976) (previous order of divestiture); Shortridge v. Deel, 299 S.E.2d 500, 503 (Va. 1983) (voluntary relinquishment); Patrick v. Byerley, 325 S.E.2d 99, 101 (Va. 1985) (abandonment)).

[341] *See supra* notes 140–58 and accompanying text (discussing Griffin v. Griffin, 581 S.E.2d 899, 902 (Va. Ct. App. 2003)).

[342] *Id.*

[343] Admittedly, this sounds like an implausible scenario, as one would think that the parent supporting the nonparent's custody request would seek custody himself or herself. In *Brown v. Burch*, however, the supporting parent sought joint legal custody with the nonparent but not physical custody. 519 S.E.2d 403, 406 (Va. Ct. App. 1999); *see also* Wilkerson v. Wilkerson, 200 S.E.2d 581, 582–83 (Va. 1973) (opining that, despite the mother's at least tacit agreement with nonparental custody, the court held that this was a contest between a parent and non-parents); Brooks v. Carson, 390 S.E.2d 859, 865 (Ga. Ct. App. 1990) ("If a third party obtains custody from one parent, it gives her no right and no advantage against the other parent, for one parent cannot contract away custody of the child to a third party in avoidance of the other parent's rights."). Additionally, similar facts existed in a custody dispute decided by the author—an out-of-state mother supporting the maternal grandmother's custody petition against the mother—which was the impetus for this Article. *See* Brown v. Hawkins, CJ17-0130-00, 2017 Va. Cir. LEXIS 337, at *3 (Norfolk Dec. 12, 2017).

involvement in supporting a nonparent's petition for custody of the child "does not allow [the nonparent] to transcend his status as a non-parent."[344]

Of note, the Virginia Supreme Court may be more inclined to take up this issue in the near future, as Virginia's nonparental visitation law is now well-established and well-defined,[345] making the contrast with the Commonwealth's nonparental custody law and the need for change more apparent.[346] Additionally, although the *Florio* decision is only eight years old, only two of the justices involved in that decision are still serving on the court,[347] and justices who have joined the court since then include Justice McClanahan—author of *South v. South*, which applied an actual-harm test to a nonparental custody case,[348] and *Barbour v. Graves*, which held out the possibility of an actual-harm standard in nonparental custody cases[349]—and Justice Kelsey—author of *Hart v. Hart*, which conflated nonparental visitation and custody cases when indicating that an actual-harm standard was appropriate.[350]

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[344] 519 S.E.2d at 411.

[345] *See supra* Part II.A.

[346] After discussing Virginia's nonparental custody law as expressed in *Bailes* and *Troxel*, a leading Virginia treatise on family law states the following:

> While the foregoing analysis accurately recites the history and changes of specific natural parent contests with third parties and the evolution of Va. Code Ann. § 20-124.2, the practitioner should be aware that the entire issue of custody and visitation contests between a parent and a third party has been radically affected by what is now a well-defined, constitutionally protected liberty interest supporting the right of a parent to raise the child free of state interference from third parties. The U.S. Supreme Court decision in *Troxel v. Granville*, 530 U.S. 57 (2000), the Virginia Supreme Court decision in *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998), and the Virginia Court of Appeals decision *Griffin v. Griffin*, 581 S.E.2d 899 (Va. [Ct.] App. 2003) dramatically affect the ability of third parties to obtain custody or visitation over the objection of a parent. As a result, the foregoing historical decisions pertaining to the natural parent presumption from the Supreme Court of Virginia and Virginia Court of Appeals decided prior to these cases must be construed in the context of these important decisions, which, in some instances, implicitly overrule the basis for these prior decisions.

SWISHER ET AL., *supra* note 102, § 15:8(b)(4).

[347] As of the publication of this Article, the only currently active Virginia Supreme Court justices who were also on the court when *Florio* was decided in 2009 are Justices Lemons and Goodwyn. *See Judges of the Supreme Court of Virginia*, ENCYCLOPEDIA VA., https://www.encyclopediavirginia.org/Judges_of_the_Supreme_Court_of_Virginia (last visited Jan. 31, 2018) (listing periods of service for judicial members of the Supreme Court of Virginia).

[348] *See supra* notes 223–27 and accompanying text; *see also Judges of the Supreme Court of Virginia*, *supra* note 347 (noting that Justice McClanahan joined the court in 2011).

[349] *See supra* notes 267–72 and accompanying text.

[350] *See supra* notes 276–77 and accompanying text; *see also Judges of the Supreme Court of Virginia*, *supra* note 347 (noting that Justice Kelsey joined the court in 2015).

C. A Revised Virginia Child Custody and Visitation Statute

A third option is for the Virginia legislature to modify Virginia's custody and visitation statute to expressly require nonparents to prove, by clear and convincing evidence, actual harm to the child if custody were granted to the parent in order to overcome the primacy of the parent-child relationship. This would address the concern expressed by Justice Hassell in his dissent in *Williams v. Williams*, where he opined that the statute was unconstitutional as applied because it relied on an *implicit* requirement of harm.[351]

A relatively minor adjustment to the statutory text—by adding the highlighted wording indicated—would more clearly identify the requisite nonparental burden:

> In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the *child would suffer actual harm without the requested custody or visitation and that the* best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. *The actual harm requirement in custody cases can also be met by demonstrating that the parent opposing the custody is unfit, a previous order divesting the parent of custody has been entered, the parent voluntarily relinquished custody, or the parent has abandoned the child.* The court may award joint custody or sole custody.[352]

Although such an amended statute would overrule *Bailes* in part, it essentially would simply replace the "special facts and circumstances . . . constituting an extraordinary reason" prong with an actual-harm requirement.[353]

CONCLUSION

In light of United States Supreme Court guidance in *Troxel v. Granville*, it is clear that parents have a fundamental right to raise their children—including making independent decisions about custody and visitation—and that nonparents seeking to infringe on that right do not

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[351] Williams v. Williams, 501 S.E.2d 417, 418, 420 (Va. 1998) (Hassell, J., dissenting); *see also supra* notes 120–23 and accompanying text.

[352] VA. CODE ANN. § 20-124.2(B) (LexisNexis, LEXIS through 2017 Reg. Sess.) (emphasis in the proposed additional language).

[353] Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986); *see also supra* note 200 and accompanying text.

come before the court on equal footing with parents.[354] In order to satisfy the constitutional strict scrutiny standard that accompanies this fundamental right, it is not enough that a nonparent prove that the requested custody or visitation is in the child's best interests.[355] Establishing a higher proof requirement for the nonparent can be done by recognizing the primacy of the parent-child relationship and holding the nonparent to a clear-and-convincing standard of proof, as Virginia's custody and visitation statute does.[356] This simply demonstrates that the Virginia statute is constitutional, however.[357]

The next step is understanding exactly what comprises this higher proof standard in order to defend parents' constitutional right to raise their children as they deem appropriate while ensuring the state protects vulnerable children.[358] In attempting to do this, some jurisdictions employ a heightened best-interests-of-the-child analysis and others have adopted an actual-harm test.[359] Virginia arguably has incorporated both standards—actual harm for nonparental visitation petitions and heightened best interests of the child for custody petitions.[360] The evolution of Virginia nonparental visitation law evolved in a manner consistent with *Troxel*'s constitutional reasoning and has been refined over the years such that courts—and litigants—know precisely how to interpret it.[361] By contrast, it is unclear exactly what is required to demonstrate special facts and circumstances constituting an extraordinary reason for taking a child from his or her parent to satisfy the nonparental custody standard of proof.[362] Worse yet, it appears that Virginia courts sometimes have applied a custody standard that is more lenient than the related visitation standard, which clearly is improper.[363] Clarity is required to ensure consistent application of standards by the courts, to provide a certain level of predictability to litigating parties, and to conform the custody standard with the visitation standard.[364]

Reconciling the current nonparental custody and visitation standards and clarifying the nonparental custody standard can be achieved by applying the current nonparental custody test—as established by the

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[354] *See supra* Part I.A.

[355] *See id.*

[356] *See supra* notes 58–61 and accompanying text.

[357] *See supra* notes 305–06 and accompanying text.

[358] *See supra* Part I.B.

[359] *See supra* Part I.C.

[360] *See supra* Part II.

[361] *See supra* Part II.B.

[362] *See supra* Part II.C.

[363] *See supra* Part III.B.

[364] *See supra* Part III.

Virginia Supreme Court in *Bailes v. Sours* and reiterated in *Florio v Clark*—in a manner consistent with the well-defined nonparental visitation test.[365] Trial courts analyzing the "special facts and circumstances" necessary to establish the requisite "extraordinary reason" would require that nonparents prove, by clear and convincing evidence, that the child would suffer actual harm if custody were granted to the natural parent.[366] Alternatively, the Virginia Supreme Court could formally hold—through an appropriate decision—that the *Bailes* test is to be interpreted in this fashion.[367] Finally, the Virginia legislature could amend Virginia's custody and visitation statute to incorporate an express actual-harm standard in nonparental custody and visitation determinations.[368] Adopting any one of these alternatives would ensure proper recognition of the fundamental right of parental autonomy, ensure the state protects its most vulnerable citizens in the context of related disputes, and reconcile Virginia's current nonparental child custody and visitation standards.[369]

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[365] *See supra* Part III.C.

[366] *See supra* Part IV.A.

[367] *See supra* Part IV.B.

[368] *See supra* Part IV.C.

[369] *See supra* Part IV.

RICHARD A. POSNER, CIRCUIT JUDGE, SITTING BY DESIGNATION IN THE DISTRICT COURTS

Jordan T. Smith[*]

INTRODUCTION

Judge Richard A. Posner's recent retirement ends an era for one of the most prolific and controversial legal minds ever to sit on the federal bench. During his thirty-five year tenure with the Seventh Circuit Court of Appeals, and in his equally impressive academic career, Posner recommended many ways (in his view) to improve the courts, advocacy, and judging.[1] It's no secret that Posner was, and is, not shy about offering his judicial reforms through scathing critiques, blunt criticism, or mockery.[2] Indeed, he seems to relish his self-described "reputation as a

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1 *See generally* RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY (2016) (Judge Posner calls on law schools to help remedy perceived deficiencies in federal judicial decision-making.); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996) (Judge Posner discusses subjective problems with the judiciary, as well as objective challenges that should be addressed); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985) (Judge Posner assesses the federal court system at the time, 1985, and advocates certain changes); RICHARD A. POSNER, HOW JUDGES THINK (2008) (Judge Posner analyzes various factors that influence judicial behavior and judicial decision making.); RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013) (Judge Posner evaluates his time on the federal bench and suggests a proposed path forward.); RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS (2017) (Judge Posner calls for a revamped staff attorney program and televised oral arguments.); Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable: Part I*, GREEN BAG 2D 187 (2016) [hereinafter *What is Obviously Wrong Part I*] (Judge Posner suggests ways to improve the trial and appellate processes.); Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable: Part II*, 19 GREEN BAG 2D 257 (2016) (Judge Posner suggests ways to improve the United States Supreme Court.).

2 Claire Bushey, *Judge Richard Posner is Not Going Away Quietly*, CRAIN'S CHI. BUS. (Jan. 29, 2018, 2:53 PM), http://www.chicagobusiness.com/article/20170927/ISSUE03/170929887/judge-richard-posner-is-not-going-away-quietly?X-IgnoreUserAgent=1 (Acknowledging his "acerbic manner," Judge Posner quips his "tartness of tongue . . . is a deeply engraved personality trait."); *see also* Jonathan H. Adler, *Richard Posner's "Bats---- Crazy" New Book*, WASH. POST (Jan. 29, 2018, 2:50 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/21/richard-posners-bats-crazy-new-book/?utm_term=.ad2a6e88eb5f (The author discusses Judge Posner's newest book and comments, "[i]t's almost as if Posner decided he should go out of his way to confirm his critics' harshest assessments of his character and fitness for the bench."); Josh Blackman, *Posner v. Scalia – The Final Round 'I Regard the Posthumous Encomia for Scalia Absurd,'* JOSHBLACKMAN.COM (Feb. 1, 2018, 7:06 PM), http://joshblackman.com/blog/2016/06/24/posner-v-scalia-the-final-round-i-regard-the-posthumous-encomia-for-scalia-as-absurd/ (describing "the long-running series of battles between Scalia and Posner, which finished at Round XXVI back in September of 2014" and Posner's latest unwarranted swipe after Scalia's passing).

maverick, naysayer, scoffer, gadfly, [and] faultfinder."[3] Posner's suggestions—often repeated and repackaged in each new book or article—range from ambitious structural overhauls, shocking jurisprudential paradigm shifts, and helpful practice pointers to pedantic stylistic preferences.[4] With so many targets for potential change, some of Posner's good ideas unfortunately get lost amid his more provocative proposals.

Among Posner's overlooked suggestions to improve judging is his call for "every newly appointed circuit judge who had not served as a district judge (or equivalent in a state court system) to spend his first six months sitting in the district court rather than the court of appeals."[5] Posner recommended this idea as early as 1985, just a few years after taking the bench.[6] More than three decades later, Posner remains steadfast that it is not only a good idea, but should be a requirement, "to assign every newly appointed federal appellate judge who lacks trial experience to the *local district court* for the first six months of his judgeship."[7] Perhaps because he lacked trial experience when he assumed the bench,[8] Posner acknowledges that district court familiarity is not necessarily a prerequisite, or even essential, to an appellate judge's effective performance.[9] But according to Posner, the lack of trial perspective may handicap an appellate judge when reviewing district court rulings.[10] Posner contends that without some trial experience, an appellate judge may give lower court rulings too little (or too much) weight. [11] "How can

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3 *What is Obviously Wrong: Part I*, *supra* note 1, at 187 (emphasis added) ("I realize I've gotten *a not entirely welcome—though not entirely undeserved*—reputation as a maverick, naysayer, scoffer, gadfly, faultfinder—in short a committed candid critic of the American legal system . . . . My just-published book *Divergent Paths: The Academy and the Judiciary* (2016) will cement that reputation.").

4 *See generally supra* note 1 and accompanying text.

5 CRISIS AND REFORM, *supra* note 1, at 45 n.35.

6 *See id.* at 44–45 (discussing the appointment of trial judges over non-judges to the courts of appeals in a book authored in 1985); *see also* CHALLENGE AND REFORM, *supra* note 1, at xii (referencing his earlier work and statements for the first edition of the book, *The Federal Courts: Crisis and Reform*, written three years after he took the bench, Posner echoed the benefits of serving as a volunteer judge in the District Courts).

7 DIVERGENT PATHS, *supra* note 1, at 146 (emphasis added); *see also* Richard A. Posner, *Legal Research and Practical Experience*, 84 U. CHI. L. REV. 239, 244 (2017) ("One thing I've learned is that *all* appellate judges who like me had not been a trial judge or a trial lawyer before becoming a judge should conduct trials . . . .").

8 REFLECTIONS ON JUDGING, *supra* note 1, at 247.

9 CRISIS AND REFORM, *supra* note 1, at 44. *But see* Richard A. Posner, *Michael C. Dorf's "Review" of Richard A. Posner,* Divergent Paths: The Academy and the Judiciary*: A Response by the Book's Author*, 66 J. LEGAL EDUC. 203, 207 (2016) (listing perceived deficiencies of the Supreme Court, including that it is "virtually bereft of trial experience"). The Author agrees that, while helpful, trial experience is not a prerequisite for appellate judges.

10 REFLECTIONS ON JUDGING, *supra* note 1, at 127.

11 *Id.*

an appellate judge review a trial," Posner asks, "when he has never seen one, except perhaps in a movie?" [12]

Throughout his tenure, Posner often volunteered to sit by designation in the district courts and he based many of his other recommended judicial reforms on his experiences.[13] Posner's retirement announcement boasted that he "presided over many trials as a volunteer judge in the district court."[14] He has reflected elsewhere that, during his frolics in the lower courts,

> I committed errors, occasionally reversible ones, in my early trials. But I don't think I did major harm and I learned a lot that was and is valuable to me as a court of appeals judge and that enables me to tender suggestions regarding the trial process in the federal courts.[15]

This Article evaluates Posner's record as a district court judge and considers whether it supports Posner's suggestion that the federal judiciary require new appellate judges to sit by designation in their *own* circuit.

Ultimately, Posner's record as a sitting district court judge, and his other writings about judicial behavior, counsel against the suggestion in its current form. Posner has written about district court judges' unsurprising dislike for reversal, called "reversal aversion," and appellate judges' distaste for dissents—called "dissent aversion."[16] Posner has also described episodes where appellate judges may switch votes or refrain from writing separately to preserve collegiality.[17] Appellate review of a fellow circuit court judge's trial rulings entails the worst of both reversal aversion and dissent aversion. It's easy to imagine—as early Supreme Court Justices did—that appellate judges may feel reluctant to reverse a colleague who they like and with whom they will have to work tomorrow. On the other hand, if a particular appellate judge doesn't get along with his colleagues, court members may be tempted to knock the quarrelsome judge down a peg by reversing him. It's likewise foreseeable that an appellate court judge may harbor a grudge against any contemporaries that criticize or reverse his lower court rulings—especially a judge as prickly as Posner. Even if these scenarios do not play out in practice,

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[12] DIVERGENT PATHS, *supra* note 1, at 146.

[13] *See, e.g.*, CRISIS AND REFORM, *supra* note 1, at 45 n.35; REFLECTIONS ON JUDGING, *supra* note 1, at 287.

[14] Press Release, U.S. Court of Appeals for the Seventh Circuit, U.S. Court of Appeals Judge Richard A. Posner Announces His Retirement (Sept. 1, 2017).

[15] REFLECTIONS ON JUDGING, *supra* note 1, at 287.

[16] *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 12 (2013) (discussing how reversal aversion may impact judicial decision-making); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and when) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 102, 118–20 (2011) [hereinafter *Why Judges Dissent*] (analyzing dissent aversion).

[17] *Why Judges Dissent*, *supra* note 16, at 103.

litigants may think their case's outcome hinged on personal relationships between the judges rather than on the merits. To avoid the appearance of impropriety, Posner should modify his suggestion to permit appellate judges to sit by designation in district courts *outside* their circuit. Under such a system, new appellate judges can gain any needed trial experience without the risk of fraying collegiality or the temptation to (dis)courtesy affirm or reverse.

I. BRIEF HISTORY OF APPELLATE JUDGES SITTING BY DESIGNATION IN THE LOWER COURTS

Since the Founding, there has been a tradition of appellate judges sitting by designation in the lower courts.[18] The Judiciary Act of 1789 divided the original northern, middle, and southern parts of the United States into three circuits encompassing various district courts.[19] The district courts possessed trial jurisdiction over minor criminal matters, admiralty disputes, and other limited classes of cases.[20] Circuit courts heard appeals from the district courts and had original trial jurisdiction over certain other criminal matters, diversity cases, and larger cases involving the United States as a party.[21] At first, two Supreme Court Justices and one district court judge sat on the circuit courts.[22] Later, in 1793, Congress enacted a law excusing one Supreme Court Justice and allowing a single Justice to sit on a circuit court with one district court judge.[23] The practice of sending Supreme Court Justices around the country to sit on the circuit courts became known as "riding circuit."[24] Circuit-riding directly involved Supreme Court Justices in many of the early federal trials.[25]

Congressional acts in 1789 and 1793 precluded district court judges from reviewing their own decisions when sitting in an appellate capacity on the circuit courts.[26] The Judiciary Act of 1789 provided that "no district judge shall give a vote in any case of appeal or error from his own

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[18] Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1754, 1754 n.4 (2003).

[19] Ch. 20, § 2, 1 Stat. 73, 73.

[20] § 9, 1 Stat. at 76–77; 13 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3503 (3d. ed. 2017).

[21] § 11, 1 Stat. at 78–79; WRIGHT & MILLER, *supra* note 20, § 3503.

[22] § 4, 1 Stat. at 74–75.

[23] Act of March 2, 1793, § 3, 1 Stat. 333, 334; Glick, *supra* note 18, at 1776 ("The Judiciary Act of 1789 decreased the justices' circuit riding duties by requiring only one member of the Court to sit on each circuit . . . .").

[24] Glick, *supra* note 18, at 1753.

[25] *Id.* at 1758.

[26] Act of March 2, 1793, § 1, 1 Stat. 333, 334; Judiciary Act of 1789, Ch. 20, § 4, 1 Stat. 73, 75.

decision."[27] The 1793 Act mandated that, if the district court judge was "concerned in interest in any cause," the Supreme Court Justice presided alone.[28] Or, if the Supreme Court Justice and the district court judge disagreed on the disposition, the circuit court held the case over until the next year when a new Supreme Court Justice visited.[29] But no similar prohibition prevented Supreme Court Justices from reviewing their own decisions or the decisions of their co-Justices when a case arrived at the Supreme Court. For example, during the drafting of the Judiciary Act of 1789, the Senate made two efforts to amend the Act to exclude any Justice who sat on the circuit court from presiding in the Supreme Court on the same case.[30] These efforts were at first successful but subsequently defeated.[31] "This was problematic because the justices sitting together as the Supreme Court heard on appeal the same cases that they had heard on the circuit bench . . . hence, the justices could be, in effect, trial and appellate judges in identical controversies."[32]

After the very first season of riding circuit—in addition to complaints about the physical and financial hardships that they endured wandering the countryside for nearly six months every year—the Justices expressed concerns about the propriety of reviewing other Supreme Court Justices' lower court decisions.[33] John Jay, the first Chief Justice of the Supreme Court, doubted that the Supreme Court should sit in judgment of its own members' rulings on the inferior courts.[34] He wrote:

> We are aware of the Distinction between a Court and it's [sic] Judges; and are far from thinking it illegal or unconstitutional, however it may be inexpedient to employ them for other Purposes, provided the latter Purposes be consistent and compatible with the former_ [sic] But from this Distinction it cannot, in our Opinions, be inferred, that the Judges of the Supreme Court may also be Judges of inferior and

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27 Judiciary Act of 1789, Ch. 20, § 4, 1 Stat. 73, 75.

28 Act of March 2, 1793, § 1, 1 Stat. 333, 334.

29 *Id.* § 2.

30 Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 95, 95 n.101 (1923); *see also* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1504–05 (1989) (discussing how Senators sought to include language prohibiting Supreme Court Justices from hearing appeals on their own decision, but that the final legislation lacked such language and two motions seeking to amend the act in this manner failed).

31 Warren, *supra* note 30, at 95–96.

32 Glick, *supra* note 18, at 1762 (footnotes omitted).

33 Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1390–93 (2006).

34 *Id.* at 1390–92.

> subordinate Courts, and be at the same Time both the Controllers and the controled [sic].[35]

Jay worried that the public would lose faith in the nascent Federal Supreme Court "every time the Justices affirmed the opinion of one of their own."[36] The Justices believed that, because of their roles on the inferior courts, there was a "[p]resumption" that their Supreme Court duties "cannot be executed with Impartiality and Honesty."[37] The Justices tried to adopt an informal recusal practice for cases in which they participated below, but it was sometimes necessary that all available Justices preside to form a quorum.[38] For example, in *Georgia v. Brailsford*, Justice Iredell wrote in his Supreme Court capacity, "I sat in the Circuit court, when the judgment was rendered in the case of Brailsford and others versus Spalding; but I shall give my opinion."[39] He claimed that he was "detached from every previous consideration of the merits of the cause."[40] Justice Blair did the same in *Penhallow v. Doane's Administrators*.[41] No doubt putting some implicit pressure on his colleagues, Justice Blair said, "it will give me pleasure to have any errors I may have committed [on the lower court], corrected in this court."[42] He explained that he "attended as diligently, and as impartially as [he] could, to the arguments of the gentlemen, upon the present occasion, . . . but as the impressions which my mind first received, continue uneffaced."[43] Justice Blair stood by his circuit court opinion, but he confessed that he was wrong on the damages issue with one caveat: he had "no remembrance of having had this point brought to my view at the Circuit Court."[44]

The Justices received a temporary reprieve from reviewing each other's lower court rulings when Congress passed the Judiciary Act of 1801.[45] The Act was a controversial political move by the outgoing Federalist Congress to restructure the judiciary and (as an added "benefit") stymie the incoming (Democratic-) Republicans.[46] The Act of

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[35] *Id.* (quoting Letter from the Justices of the Supreme Court to George Washington (ca. Sept. 13, 1790), *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 89 (Maeva Marcus ed., 1988) [hereinafter Letter from the Justices]).

[36] *Id.* at 1393.

[37] *Id.* (quoting Letter from the Justices, *supra* note 35, at 91).

[38] Glick, *supra* note 18, at 1762–63.

[39] 2 U.S. (2 Dall.) 402, 405–06 (1792) (emphasis omitted).

[40] *Id.* at 406.

[41] 3 U.S. (3 Dall.) 54, 108–09 (1795).

[42] *Id.* at 108.

[43] *Id.* at 108–09.

[44] *Id.* at 108–09, 115–16.

[45] Johnny C. Burris, *Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review*, 12 OKLA. CITY U. L. REV. 585, 610–11 (1987).

[46] *Id.* at 611–13.

1801 reduced to five the number of Supreme Court Justices, established six new circuit courts, expanded federal court jurisdiction, abolished circuit riding, and created sixteen new judgeships—the so-called "midnight judges."[47] The end of circuit-riding "eliminate[d] the embarrassment and apparent impropriety of Justices reviewing their own lower court decisions."[48] But the new Republican President, Thomas Jefferson, saw the Judiciary Act of 1801 as just a dirty political maneuver designed to pack the judiciary with judges eager to frustrate Republican policies.[49] Congress quickly repealed the Act of 1801 and the Justices begrudgingly returned to riding circuit.[50] A constitutional challenge to circuit-riding eventually arose, but the Supreme Court upheld the practice.[51]

Decades elapsed before Congress took another significant step to end circuit-riding and to prevent Supreme Court review of its members' lower court rulings.[52] In 1891, Congress enacted the Court of Appeals Act, commonly called the Evarts Act, and created another level of appellate review with a new court called the "circuit courts of appeals."[53] Each circuit court of appeals consisted of three judges with appellate jurisdiction.[54] The three members included two circuit judges and one Supreme Court Justice or one district court judge from within the circuit.[55] The Act revoked the old circuit courts' appellate jurisdiction and vested jurisdiction over district court appeals in the new circuit courts of appeals or, in some cases, directly in the Supreme Court.[56] Appeals from the old circuit courts also went to the circuit courts of appeals or the Supreme Court, as appropriate.[57] The Act did not disband the old circuit courts but, much to the confusion of litigants, permitted them to retain only limited trial jurisdiction that essentially overlapped with the district courts'

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47 *See* Judiciary Act of 1801, Ch. 4, §§ 2–4, 6, 8, 10, 2 Stat. 88, 89–92; *see also* Burris, *supra* note 45, at 612 n.114; Glick, *supra* note 18, at 1782.

48 Burris, *supra* note 45, at 611.

49 *Id.* at 612–13.

50 § 1, 2 Stat. at 132; *see also* Glick, *supra* note 18, at 1786–87.

51 Stuart v. Laird, 5 U.S. 299, 306 (1803); Glick, *supra* note 18, at 1795–96 (discussing *Stuart* and saying "[t]hus, the Court upheld circuit riding in the face of a constitutional challenge"). Chief Justice Marshall heard the challenge while riding circuit and voluntarily recused himself from reviewing his earlier decision when it reached the Supreme Court. *Id.* at 1794.

52 Felix Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 39 HARV. L. REV. 325, 325 (1926).

53 Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826, 826 [hereinafter Evarts Act].

54 *Id.*

55 WRIGHT & MILLER, *supra* note 20 § 3504.

56 Evarts Act, § 5, 26 Stat. at 827–28.

57 *Id.* at 827–28.

jurisdiction.[58] The Act also introduced the concept of the Supreme Court's discretionary certiorari review of appeals from the circuit courts of appeals.[59]

The Evarts Act did not completely eliminate the Supreme Court Justices' circuit-riding responsibilities, nor did it require them to sit on either the old or the new circuit courts.[60] Instead, the Justices, circuit judges, and district court judges could sit by designation on the circuit court of appeals with an important limitation: "That no justice or judge before whom a cause or question[s] may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals."[61] However, "[u]nder the Circuit Courts of Appeals Act, circuit judges, particularly on the less busy courts of appeals, were available for *nisi prius* work on circuit courts."[62] Therefore, when a court of appeals judge sat in the lower circuit courts, his court of appeals colleagues reviewed his rulings and his decisions were exposed to the same impartiality concerns that the Supreme Court Justices identified with circuit riding.

Supreme Court Justice circuit-riding formally ended in 1911 when Congress passed the Judicial Code.[63] "The significant feature of the Judicial Code was the elimination of the circuit courts and the vesting of all original jurisdiction in the district courts."[64] The Code established the federal court system's now-familiar three levels, consisting of the Supreme Court, intermediate circuit courts of appeal, and lower district courts (without circuit court duplication).[65] According to Felix Frankfurter, another important change in the Judicial Code of 1911 was the authorization of circuit court of appeals judges to sit by designation in the district courts.[66] The Act provided that

> [w]henever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge

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[58] Glick, *supra* note 18, at 1827–28.

[59] Evarts Act, § 6, 26 Stat. at 828.

[60] Glick, *supra* note 18, at 1828.

[61] Evarts Act, § 3, 26 Stat. at 827; *see also* 28 U.S.C. § 47 (2012) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him.").

[62] Frankfurter, *supra* note 52, at 357.

[63] Judiciary Act of 1911, Pub. L. No. 61-475, §§ 1, 13, 36 Stat. 1087, 1088–89; Glick, *supra* note 18, at 1755, 1829–30.

[64] Frankfurter, *supra* note 52, at 355; *see also* § 289, 36 Stat. at 1167 (abolishing existing circuit courts).

[65] Judiciary Act of 1911, §§ 1, 14–15, 36 Stat. at 1087, 1089; Frankfurter, *supra* note 52, at 350–51, 355–56.

[66] *Id.* at 366 n.174.

> [or Justice] shall designate and appoint any circuit judge of the circuit to hold said district court.[67]

This provision memorialized the earlier assistance that courts of appeals judges provided to circuit courts under the Circuit Courts of Appeals Act.[68] Thus, even though "[t]he Code took effect on January 1, 1912, and finally eliminated the circuit courts . . . a whiff of them remained in that circuit court of appeals judges could hold district court."[69]

As the Supreme Court described in 1933, this "provision was intended to establish a liberal and flexible plan under which Circuit Judges could sit in the District Courts."[70] Circuit court of appeals judges

> could be assigned to hold a District Court within his circuit whenever occasion therefor might arise, whether from a pressure of business in a District Court, from the presence therein of particular cases of special importance, from an absence of business in the Circuit Court of Appeals, or from any other situation . . . [as long as an appropriate judge] deemed the assignment to be in the public interest.[71]

Under the Judicial Code, senior circuit judges not only assigned other judges to the district courts, but also themselves whenever they considered it appropriate.[72] The Second Circuit's senior circuit judge was the first to assign himself to a lower court in 1912, and all other circuits' senior judges followed his lead, except in the Eighth Circuit.[73] There, Senior Circuit Judge Walter H. Sanborn refused to assign himself to the district courts "because such an assignment would have a personal side approaching impropriety."[74] He preferred his assignment come from the Supreme Court's Chief Justice or Circuit Justice.[75] With those conditions, Judge Sanborn sat in the district courts twelve times between 1912 and 1923.[76]

The Judicial Code permitted the designation of circuit judges to a specific case, a specific district, or a specific division within a district.[77] All circuits engaged in this practice[78] and courts rejected early challenges to

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[67] Judiciary Act of 1911, §18, 36 Stat. at 1089–90.

[68] Frankfurter, *supra* note 52, at 357.

[69] Calabresi & Presser, *supra* note 33, at 1402 n.78 (citation omitted).

[70] Johnson v. Manhattan Ry. Co., 289 U.S. 479, 498 (1933).

[71] *Id.*

[72] *Id.*

[73] *Id.* at 498–500.

[74] *Id.* at 498–99 n.10.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 498–99.

[78] *Id.*

senior judges' self-assignments and case-specific designations.[79] In 1933, the Supreme Court held "the decision as to requiring public interest [for the designation] is left to the one having the power to assign . . . . His decision that there is a requiring public interest is not open to a collateral attack."[80] But the Court cautioned that a senior circuit judge's power to self-appoint "should be sparingly exercised, and then only in special exigencies and with commensurate care and discretion. The occasions are rare in which the matter cannot be referred to the Chief Justice or the Circuit Justice and committed to his consideration and judgment."[81] A mere disagreement between the court of appeals judge and the district court judge on a legal issue was not a sufficient reason to substitute the appellate judge's opinion for that of the lower court judge.[82] It was understood that "[a]s member of an appellate court, a judge cannot sit on a review (in whatever form) of his own order."[83]

Throughout the years, Congress re-enacted or amended laws related to the designation of appellate judges to lower courts.[84] Today, 28 U.S.C. § 291(b) governs circuit court of appeal judge designation to inferior courts.[85] It states that "[t]he chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit."[86] Like earlier analogues, the current statute allows chief circuit judges to assign themselves, or other circuit judges, and to make selective designations to specific cases, classes of cases, or specific divisions in a district court.[87] Chief circuit judges also have authority to designate a

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[79] *Id.* at 499–500; *see also In re* Chicago, Rock Island & Pac. Ry. Co., 162 F.2d 606, 611–12 (7th Cir. 1947) (explaining Congress' expansion of senior circuit judges' authority to appoint district or circuit judges to other district or circuit courts as the courts' need for judicial assistance increased, the Circuit Court of Appeals for the Seventh Circuit accepted broad appointment discretion during times of need—such as when courts were over-crowded with work—and only recognized an appointment limitation when senior circuit judges tried to replace a judge already engaged in trial or disposition of pending cases).

[80] *Johnson*, 289 U.S. at 501.

[81] *Id.* at 504.

[82] *Id.* at 505.

[83] Pennsylvania Steel Co. v. New York City Ry. Co., 221 F. 440, 442 (S.D.N.Y. 1915).

[84] *See Johnson*, 289 U.S. at 500 (footnote omitted) ("In 1922 . . . the provision was reenacted by the Congress as part of an act dealing with other assignments of judges to the District Courts. The reenactment was without any change indicative of a disapproval of the prior construction by the Senior Circuit Judges."); *see also* 28 U.S.C. § 291(b) (2012), Historical and Revision Notes (describing statutory evolution).

[85] 28 U.S.C. § 291(b) (2012).

[86] *Id.*

[87] *Id.*; 8 FED. PROC., L. ED. § 20:29 (2017).

circuit judge to preside over just one district court hearing in a pending case.[88]

Although there may be outlier cases, the text of 28 U.S.C. § 291(b) largely limits circuit judges to sitting in their own circuit's district courts.[89] The language focuses on designation to "any district [court] *within the circuit*."[90] The statute suggests that the way for an appellate judge to sit as a district court judge outside his circuit is to first visit another circuit court before being designated by *that* circuit's chief judge to *its* district courts.[91] Chief circuit judges can designate judges "assigned to temporary duty" in the circuit.[92] "[An] assignment of a visiting judge in active service must receive the consent of both the chief circuit judge and the chief judge of the lending court."[93]

Examples of appellate judges sitting by designation in the district courts—especially outside their own circuit—seem rare when compared to the reverse scenario: district court judges sitting by designation on a court of appeals.[94] For example, between 2006 and 2016, judges of the United States Court of Appeals for the Federal Circuit—which hears appeals from all federal district courts in certain cases as well as from the Court of

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88 United States v. Girolamo, 23 F.3d 320, 323 (10th Cir. 1994).

89 28 U.S.C. § 291(b) (2012).

90 *Id.* (emphasis added).

91 *Id.*; *see also* Int'l Longshoremen's & Warehousemen's Union v. Ackerman, 82 F. Supp. 65, 94 (D. Haw. 1948) (Portions of revised Title 28 are identical to old Judicial Code and allow a visiting circuit judge to be assigned to a district court where that judge was designated to sit in the Ninth Circuit by the Chief Justice and subsequently assigned by a senior circuit judge of Ninth Circuit to serve temporarily in the District of Hawaii. "[B]y virtue of the two assignments and designations referred to [the judge was] qualified to sit in and to determine the cases at bar as a judge sitting in the District Court for the District of Hawaii."), *rev'd on other grounds*, 187 F.2d 860 (9th Cir. 1951); Reinecke v. Loper, 77 F. Supp. 333, 335 n.2 (D. Haw. 1948) ("Circuit Judge Biggs was designated to the Ninth Circuit by order of Mr. Chief Justice Vinson and subsequently designated to the District Court of Hawaii by Senior United States Circuit Judge Garrecht.").

92 28 U.S.C. § 291(b).

93 JENNIFER EVANS MARSH, FED. JUD. CTR., THE USE OF VISITING JUDGES IN THE FEDERAL DISTRICT COURTS: A GUIDE FOR JUDGES & COURT PERSONNEL 1 (last updated 2003) (citing 28 U.S.C. § 295 (1993)), https://www.fjc.gov/sites/default/files/2012/VisiJud2.pdf.

94 28 U.S.C. § 292(d) (2012); *see also* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 363 (1995) ("In recent years, the use of district judges sitting by designation has become frequent in some circuits . . . .").

Federal Claims—sat by designation in other circuits fifty-five times.[95] Of that amount, Federal Circuit judges only sat in non-Court of Federal Claims district courts four times.[96] In contrast, "[a]ccording to government figures, about three hundred district judges are designated to sit on circuit courts annually, and many of these assignments are intra-circuit—i.e., involving assignment of a district judge to a panel of the regional court of appeals that generally reviews the district judge's opinions."[97] It is however harder "to gather comparative data on how many times the different circuit judges sit by designation on the district courts. But, anecdotally, [the] sense is that most circuit judges rarely sit as district court judges."[98] Posner's impression is that few appellate judges take advantage of sitting by designation within their own circuit.[99] The number of appellate judges who sit in district courts outside their normal circuit is likely even smaller.[100]

If the judiciary adopts Posner's mandatory district court service suggestion, all circuit court judges will sit in the lower courts within their circuit and have their rulings reviewed by their own appellate colleagues. This system invites the possibility that the reviewing judges will be unable to evaluate impartially their co-judges' rulings because of their interpersonal relationships. And even if the appellate judges *do* act impartially, litigants and the public may look askance every time the court of appeals affirms or reverses the rulings of one of its own—just as Chief Justice John Jay feared over a hundred years ago.[101]

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[95] *Judges Sitting by Designation with Other Circuits*, U.S. CT. APPEALS FOR FED. CIR. (Jan. 30, 2018, 9:13 PM) (publishing yearly tables listing Federal Circuit judges sitting by designation with other federal circuit and district courts from 2006 through 2016),http://www.cafc.uscourts.gov/sites/default/files/judicial-reports/cafc_judges_sitting_by_designation_2006_to_2016.pdf; *Court Jurisdiction*, U.S. CT. APPEALS FOR FED. CIR. (Feb. 14, 2018, 10:10 PM), http://www.cafc.uscourts.gov/the-court/court-jurisdiction; *Judges of the Federal Circuit Sitting by Designation, 2006 to Present*, U.S. CT. APPEALS FOR FED. CIR. (Feb. 14, 2018, 9:52 PM), http://www.cafc.uscourts.gov/judicial-reports/judges-federal-circuit-sitting-designation-2006-present-1.

[96] *Judges Sitting by Designation with Other Circuits*, *supra* note 95.

[97] John M. Golden, *Too Human? Personal Relationships and Appellate Review*, 94 TEX. L. REV. *SEE ALSO* 70, 73–74 (online ed. 2016).

[98] Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19, 26 n.23 (2005); *see also* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1470 (2012) (emphasis added) ("Federal Circuit judges do *sometimes* sit by designation in district courts, but these visits seem to focus on gaining exposure to patent litigation at the trial level rather than gaining a broader understanding of federal law.").

[99] *Id.* at 146.

[100] *See, e.g.*, *Judges Sitting by Designation with Other Circuits*, *supra* note 95 (reflecting federal circuit judges sat by designation in district courts only four times over a decade, while federal circuit judges sat by designation fifty-five times in other circuit courts within the same timeframe).

[101] Calabresi & Presser, *supra* note 33, at 1392–93.

II. JUDGE POSNER IN DISTRICT COURT

Posner joined the Seventh Circuit bench in December 1981 at the age of forty-two.[102] He had no trial experience (except as an expert witness) before becoming a federal appellate judge.[103] His only judicial experience was a clerkship with Justice Brennan in the Supreme Court's 1962 term.[104] Posner's former Seventh Circuit colleague, Judge Harlington Wood, Jr., recalled his surprise when learning from another judge that President Reagan nominated "some professor" without trial experience to fill a vacancy on the court.[105]

> "Who?", I quickly inquired, as I had not [heard]. "It's some professor from the University of Chicago named Posner," he responded. In disbelief, matching his, I asked, "Did you say a professor of some sort?" "Yes," he said, "that's the word from Washington." Our conversation continued. "What for?", was my next question, adding before he answered, "The good professor has probably never tried a jury case in his life, so what good will he be to us? He really ought to go work in the real world of law for a while and then maybe come here later."[106]

Posner confesses that, at first, it didn't occur to him to ask his new colleagues for advice about how to be a federal appellate judge.[107] Judge Wood, Jr. remembers that William Bauer, another former Seventh Circuit Chief Judge, U.S. attorney, and district court judge, helped give Posner a "real life legal education."[108] Later, maybe to compensate for his lack of trial court experience,[109] Posner "accepted the advice of one of the judges of [his] court to conduct trials in the district courts of the circuit and [he] ha[s] been doing so ever since."[110] Sitting by designation in the district courts was, in Posner's words, "an eye-opening experience! I consider it invaluable."[111]

But according to Professors Stephen J. Choi and G. Mitu Gulati, other sources tell slightly different versions about Posner's motivation for accepting district court cases.[112] Allegedly, Posner completed his appellate

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[102] DIVERGENT PATHS, *supra* note 1, at ix.

[103] DIVERGENT PATHS, *supra* note 1, at 146 ("I had no trial experience when I became a federal appellate judge"); REFLECTIONS ON JUDGING, *supra* note 1, at 287.

[104] DIVERGENT PATHS, *supra* note 1, at ix.

[105] Harlington Wood, Jr., *Leader of the Seventh*, 17 J. CONTEMP. HEALTH L. & POL'Y xxi, xxi (2000).

[106] *Id.*

[107] DIVERGENT PATHS, *supra* note 1, at ix.

[108] Wood, *supra* note 105, at xxi.

[109] *Id.* ("Judge Posner endeavored to make up for any imagined 'deficiencies' in his judicial education by bravely volunteering and serving as a trial judge in the U.S. District Courts.").

[110] DIVERGENT PATHS, *supra* note 1, at 146.

[111] *Id.*

[112] Choi & Gulati, *supra* note 98, at 25–27.

caseload so quickly that he became bored and went to then-Chief Judge Cummings asking for more cases.[113]

> At this point, [Choi and Gulati relate,] the stories start to diverge. Some versions say that Posner began taking cases from his colleagues and writing opinions for them. . . . [O]ther versions say that his colleagues were outraged and annoyed, felt that he was trying to show them up and, while ostracizing him from their social gatherings, began to work harder themselves.[114]

Choi and Gulati say the "real story" is that Cummings told Posner that all active circuit judges receive the same number of cases and "[t]he only way that Posner could be assigned additional cases was to do cases at the district court level."[115]

Whatever his original motivation for spending time in district court at the beginning of his career,[116] Posner was strictly interested in trying cases, so he cherry-picked matters that were on the eve of trial.[117] And he only presided over civil cases,[118] both jury and bench trials.[119] Posner admits that he had no interest in guiding cases through what he called, the "lengthy pretrial stage."[120] His approach changed later in his tenure. "I have now begun taking cases much earlier," Posner explained, "realizing belatedly that the pretrial stage of litigation not only is vital but is often managed inefficiently."[121] Eventually, Posner grew accustomed to "supervising discovery, settlement negotiations, and other pretrial phases of civil cases."[122] He even started presiding over criminal jury cases.[123]

Posner tried to conduct at least one trial every year, but he complains that he was "sometimes thwarted by the parties' decision to settle."[124] Some cases settled on the weekend before or on the day of trial.[125] His inability to more often conduct trials was likely hampered, at least in part,

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113 *Id.* at 25–26.

114 *Id.* at 26.

115 *Id.*

116 *See* Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850, 852 (N.D. Ill. 1990) (Posner stated that this lawsuit "had bounced from judge to judge over the years until it fell into my lap when I volunteered to assist the Northern District of Illinois in clearing its growing backlog of civil jury cases.").

117 REFLECTIONS ON JUDGING, *supra* note 1, at 297.

118 CRISIS AND REFORM, *supra* note 1, at 44 n.34 (stating in 1985 that "I have conducted no criminal trials").

119 *Legal Research and Practical Experience*, *supra* note 7, at 244.

120 REFLECTIONS ON JUDGING, *supra* note 1, at 297.

121 *Id.*

122 *Legal Research and Practical Experience*, *supra* note 7.

123 *Id.*

124 REFLECTIONS ON JUDGING, *supra* note 1, at 35.

125 *Id.* at 297.

by the disappearance of trials generally.[126] District court judges these days spend more time deciding dispositive, discovery, and other pretrial motions than they do in trial.[127] Other times, Posner would receive a case for trial but, after reviewing it, he would issue a dispositive ruling and prevent himself from going to trial.[128] Despite all his efforts to spend time in the district courts over his career, Posner still characterizes his trial experience as "rather limited."[129]

As for his record as a district court judge, Posner claims that "I don't think I did major harm."[130] But he acknowledges that he "committed errors, occasionally reversible ones, in [his] early trials."[131] According to the latest information available on Westlaw's Judicial Reversal Report, from 2007 through 2017, Posner was affirmed only two out of the seven times that an appeal identified him as the trial court judge.[132] These statistics do not provide a full picture because appellate opinions for all of Posner's district court rulings are difficult to locate, especially his earlier cases. And, of course, some orders were not appealed.[133] Overall, research reveals that Posner's lower court decisions had a mix of affirmances[134] and reversals.[135] Judge Wood, Jr., commenting on Posner's reversals, said: "It

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[126] *Id.* at 287–88 ("The number of trials, especially civil trials, in the federal judicial system has been declining for many years.").

[127] *Id.*

[128] *See, e.g.*, Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996) ("The case was transferred for trial to Chief Judge Posner, sitting by designation. He took the case off the calendar and granted summary judgment for defendants"); Pinpoint, Inc. v. Amazon.com, Inc., 347 F. Supp. 2d 579, 581, 586 (N.D. Ill. 2004) ("When the case was reassigned to me last month for trial, Amazon.com's challenge to Pinpoint's standing to bring this suit had not yet been resolved, and I set it for an evidentiary hearing on December 3, 2004." Posner then granted defendant's motion to dismiss.).

[129] REFLECTIONS ON JUDGING, *supra* note 1, at 35, 301.

[130] *Id.* at 287.

[131] *Id.*

[132] Westlaw Jud. Reversal Rep. (on file with author).

[133] *See generally, e.g.*, Dominion Nutrition, Inc. v. Cesca, 467 F. Supp. 2d 870 (N.D. Ill. 2006); Midland Mgmt. Corp. v. Computer Consoles Inc., 837 F. Supp. 886 (N.D. Ill. 1993); Torco Oil Co. v. Innovative Thermal Corp., 763 F. Supp. 1445 (N.D. Ill. 1991); Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs., 731 F. Supp. 850 (N.D. Ill. 1990).

[134] *See generally, e.g.*, Abbott Labs. v. TorPharm, Inc., 309 F. Supp. 2d 1043 (N.D. Ill. 2004), *aff'd*, 122 F. App'x 511 (Fed. Cir. 2005); Price v. Highland Cmty. Bank, 722 F. Supp. 454 (N.D. Ill. 1989), *aff'd*, 932 F.2d 601 (7th Cir. 1991); Grimes v. Smith, 585 F. Supp. 1084 (N.D. Ind. 1984), *aff'd*, 776 F.2d 1359 (7th Cir. 1985).

[135] *See generally, e.g.*, United States v. El-Bey, 873 F.3d 1015 (7th Cir. 2017); Merk v. Jewel Food Stores, Div. of Jewel Companies, Inc., 734 F. Supp. 330 (N.D. Ill. 1990), *rev'd*, 945 F.2d 889 (7th Cir. 1991); Deltak, Inc. v. Advanced Sys., Inc., 574 F. Supp. 400 (N.D. Ill. 1983), *vacated*, 767 F.2d 357 (7th Cir. 1985).

is probably only fair to admit reluctantly that the rest of us who have been trial judges have also had our share of reversals."[136]

On the other hand, Posner may have had a higher reversal rate as a result of his approach to trial court judging. Posner recognizes that district court judges have more decisional freedom than other judges.[137] He says that "personal factors—including the kind of intellectual laziness that consists of acting prematurely on intuition rather than (also) on analysis and evidence, and even the delights of tormenting the lawyers who appear before the judge—are likely to play a larger role . . . . Perhaps *especially* tormenting the lawyers."[138] Posner has similarly described his trial judging style. He has revealed that "much of what I do in a trial is a result of hunch, guesswork, or speculation rather than solid judgment."[139] Two district court opinions from the bookends of Posner's career provide examples.

In December 1984, shortly after Posner's appointment to the bench, then-Chief Judge Cummings designated Posner to preside over a jury trial in *Art Press Ltd. v. Western Printing Machine Co.*, a diversity contract action[140] where the plaintiff sought damages from its purchase of a paper cutting machine.[141] Before trial, counsel for both the plaintiff and defendant requested that Posner ask each potential juror about their occupation and education level.[142] Defense counsel also asked Posner to find out the jurors' mechanical aptitude, hobbies, interests, and other background information.[143] Posner suggested that the sides stipulate to a "minimum education level requirement for the jurors," but plaintiff's counsel objected.[144] Posner then asked plaintiff's counsel why he was interested in the juror's level of education, to which counsel responded:

> [I]t helps me when I'm addressing the juror if I have some idea of who that juror is. It's just a question-and perhaps [defendant's counsel] will share my view here-of my understanding of what I need to do as a lawyer to relate to that particular juror, and if I have some idea of the educational background or the occupation of that juror, it allows me, I think, to do a better job of lawyering.[145]

Defendant's counsel added:

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[136] Wood, *supra* note 105, at xxv.

[137] HOW JUDGES THINK, *supra* note 1, at 142.

[138] *Id.* at 142–43.

[139] *Legal Research and Practical Experience*, *supra* note 7, at 244.

[140] No. 82 C 0116, 1985 WL 1838 (N.D. Ill. June 12, 1985).

[141] Art Press, Ltd. v. W. Printing Mach. Co., 791 F.2d 616, 617 (7th Cir. 1986).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

> I guess there are a number of things to look for in trying to decide what is a good juror for this case or any case, although you want to tailor it to the ability to hear and understand the kinds of issues that are presented in this particular case. Certainly, we want to try to ferret out any bias that a witness may have, but on top of that, I think we also want to try to familiarize ourselves with the chemical background of the jurors, because each of these jurors is asked to bring to bear their background, experience and common judgments, common experiences, in deciding these issues, and in connection with trying to make a decision whether or not to exercise a peremptory challenge, I know myself, and I suspect [plaintiff's counsel], too, would like to know as much as we possibly can about each of these potential jurors. I agree with [plaintiff's counsel] that I don't think we can set any qualifications for eligibility here.[146]

Posner remained unconvinced. He "stated that he had 'grave doubts' about asking questions concerning education" after observing in another case that

> one of the lawyers used his peremptory challenges to get rid of the only jurors who seemed by their background to be equipped to understand the case. That's why if you want to stipulate that you were looking for some minimum education, that would be fine, but I don't want you using-one of you using your peremptory challenges to get rid of a person who has some business background or some education and end up with a jury of people who don't know what's going on.[147]

Posner also stressed that he didn't "want to make the voir dire a big deal in a case that's only going to last a couple of days."[148] When voir dire started, Posner first asked the jury panel about their citizenship, age, and other prerequisites for jury service.[149] Next, Posner asked only these questions:

1. the venireperson's name, address, and prior jury service;
2. the venireperson's employer or occupation;
3. the venireperson's familiarity with either party or their counsel;
4. if the venireperson (or immediate family or friends) had been employed in the printing or machinery business; [and]
5. if the venireperson felt he could be impartial in the case.[150]

Posner refused to inquire into the prospective jurors' education to avoid "drag[ing] out in public the deficiencies of their education."[151] He reasoned that "a peremptory challenge against someone who had a deficient education . . . might be a little embarrassing."[152] Posner thought

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[146] *Id.* at 617–18.
[147] *Id.* at 618.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

the lawyers could "infer from [the jurors'] occupation and their accent what kind of education [they] have."[153]

The defendant lost at trial and appealed, arguing that Posner "so limited the voir dire of the potential jurors that it was prevented from intelligently exercising its peremptory challenges and from eliciting information which could have led to challenges for cause."[154] Posner's Seventh Circuit colleagues agreed with the defendant and reversed.[155] Judge Bauer, writing for Judges Coffey and Ripple, held "that the voir dire conducted in this case was so limited as to preclude the parties from adequately discovering whether the jurors were biased or prejudiced and did not permit sufficient inquiry to allow the parties to intelligently exercise their peremptory challenges."[156] The court faulted Posner for failing to ask more than a few "stock questions" while refusing to inquire about the jurors' education level, itself a stock question.[157] "The trial judge permitted no inquiry designed to elicit the venirepersons' attitudes toward the general nature or particular facts of the case. This severe limitation undermined voir dire's purpose of eliciting information that shows the biases of a venireperson or provides counsel with a basis for exercising peremptory challenges."[158] The court remanded for a new trial.[159]

Posner (but not the defendant) fared a little better at the second *Art Press* trial. Following remand and a jury selection process "more to the seller's liking,"[160] the jury doubled the previous verdict.[161] The defendant appealed again but, this time, the plaintiff cross-appealed from Posner's denial of pre-judgment interest on the award.[162] The defendant advanced several arguments related to the jury instructions and the evidence, "so many arguments that none [were] developed adequately."[163] Two-thirds of the appellate panel were the same as the first appeal, except Judge Easterbrook replaced Judge Coffey.[164] Judge Easterbrook authored the opinion and the court upheld Posner's jury instructions and evidentiary

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[153] *Id.*

[154] *Id.*

[155] *Id.* at 618–19.

[156] *Id.*

[157] *Id.* at 619.

[158] *Id.* (internal citation omitted).

[159] *Id.*

[160] Art Press Ltd. v. W. Printing Mach. Co., 852 F.2d 276, 276 (7th Cir. 1988).

[161] *Id.*

[162] *Id.*

[163] *Id.* at 277.

[164] *See* Art Press, Ltd. v. W. Printing Mach. Co., 791 F.2d 616, 616 (7th Cir. 1986), *overruled by Art Press, Ltd.*, 852 F.2d at 276.

rulings, but reversed him again on the plaintiff's cross-appeal for prejudgment interest.[165]

In retrospect, Judge Wood, Jr. remembers that Posner's voir dire error in *Art Press* was the type of error that his Seventh Circuit colleagues expected Posner to make because he lacked district court experience.[166] Coincidentally, restricting voir dire remains a primary reform that Posner stresses to improve trial practice.[167] Posner contends that he "mak[es] trial more intelligible for jurors" by "conducting the voir dire (the questioning of prospective jurors to determine their suitability to participate as jurors in the case) [him]self and limiting the number of voir dire questions."[168] No doubt the jurors appreciate Posner's efforts to speed up the trial process but the lawyers and litigants—with money or freedom on the line—probably prefer the unobstructed chance to pick the "best" and most impartial jury possible. Many experienced trial lawyers believe that jury selection is the single most important part of trial where litigants win or lose cases.[169] *Art Press* was not the last time Posner was reversed or vacated for one of his championed trial court improvements.[170]

Jury instructions are another example. In Posner's view, "[t]he most obvious and most readily corrigible defect of the federal trial process is the use of 'pattern jury instructions.'"[171] Posner describes most pattern jury instructions as "largely unintelligible to jurors" so, when he has a jury trial, he drafts the instructions himself "writing on a level that a person with no legal training can understand."[172] Simplifying jury instructions is part of his larger crusade against jargon in legal writing.[173] Removing jargon from the legal vocabulary and making jury instructions (and overall legal writing) more comprehensible are laudable goals. But when rewording or rephrasing a jury instruction, a judge must take care not to sacrifice a required legal element in pursuit of understandability. One of Posner's few criminal cases was vacated in part and remanded for this reason just days before his retirement.

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[165] *Id.* at 276–80.

[166] Wood, *supra* note 105, at xxiv ("On appeal the only issue was whether he had permitted adequate *voir dire* during jury selection, the type of problem we had anticipated.").

[167] *What Is Obviously Wrong Part I*, *supra* note 1, at 189.

[168] *Id.*

[169] Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 575–76 (1985).

[170] *See, e.g.*, Apple, Inc. v. Motorola, Inc., No. 1:11-CV-08540, 2012 WL 1959560 (N.D. Ill. May 22, 2012), *rev'd*, 757 F.3d 1286 (Fed. Cir. 2014).

[171] REFLECTIONS ON JUDGING, *supra* note 1, at 307; *What Is Obviously Wrong Part I*, *supra* note 1, at 189.

[172] *What Is Obviously Wrong Part I*, *supra* note 1, at 189.

[173] DIVERGENT PATHS, *supra* note 1, at 121–24; REFLECTIONS ON JUDGING, *supra* note 1, at 255, 307; *What Is Obviously Wrong Part I*, *supra* note 1, at 197.

In August 2017, following a criminal trial before Judge Posner, the Seventh Circuit reversed the conviction in *United States v. Edwards* for instructional error.[174] There, the jury convicted the defendant for witness tampering and making false statements on an official federal employment questionnaire.[175] Posner refused to give either sides' proposed witness tampering jury instruction, including the government's pattern instruction.[176] Posner rejected the instructions because

> they contained too much "legal jargon." With respect to the term "corruptly," [Posner] told the lawyers: "no one knows what 'corruptly' means. Then there's a definition, a person acts corruptly if he or she acts with the purpose of wrongfully impeding the due administration of justice. Well, that doesn't help. You don't need 'corruptly.'"[177]

To Posner, the "technical terms" in the proposed instructions were "superfluous" unless the defense was "counting on obscurantism in leading [the jury] to acquit."[178] Posner's lower court opinion explained that he rewrote the instructions in a way that was "more understandable to the jury."[179] But the Seventh Circuit held that, while the "contours of the corruption persuasion element" may have been imprecise, it was still a necessary element and its omission was not a harmless error.[180] The appellate court reminded Posner that "whether the judge uses a pattern instruction verbatim, adapts a pattern instruction to the specifics of the case, or drafts an instruction from scratch, the judge must ensure that the instructions convey each element of the charged crime."[181]

III. APPELLATE JUDGES SITTING BY DESIGNATION WITHIN THEIR CIRCUIT IS PROBLEMATIC

Posner has written extensively about judges' judicial behavior.[182] Two behavioral phenomena that he has analyzed are "dissent aversion" and "reversal aversion."[183] Both aversions stem from the natural human tendency (equally applicable to judges) to avoid criticism.[184] Dissent

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[174] 184 F. Supp. 3d 635, 636 (N.D. Ill. 2016), *aff'd* in part, *vacated* in part, 869 F.3d 490, 505 (7th Cir. 2017).

[175] *Id.* at 636.

[176] *Edwards*, 869 F.3d at 492, 497.

[177] *Id.* at 497.

[178] *Id.*

[179] *Id.* at 505.

[180] *Id.* at 499–501.

[181] *Id.* at 500.

[182] *See, e.g.*, HOW JUDGES THINK, *supra* note 1 (discussing judicial behavior, mindsets, and the constraints that lead to the methodology); REFLECTIONS ON JUDGING, *supra* note 1 (discussing the challenges judges face and how they reach conclusions).

[183] HOW JUDGES THINK, *supra* note 1, at 32–34, 70–71.

[184] *Id.* at 32, 141.

aversion is the idea that appellate judges do not like when other judges dissent from their opinions and do not like writing dissents from other judges' opinions.[185] Because judges do not like dissents, dissents tend to "fray collegiality."[186] Dissents often criticize or reproach the majority author, force the majority author to revise a draft opinion to respond to the dissent, and sometimes cause the majority to lose votes.[187] Likewise, writing a dissent requires more time and effort from the would-be dissenter with little chance, in Posner's estimation, to influence the development of the law.[188] As a consequence, Posner observes that judges, consciously or subconsciously, alter their behavior to avoid writing or prompting dissents.[189] Posner provides the following illustration:

> Suppose . . . one member of the panel feels strongly that the case should be decided one way, while the other two judges, though inclined to vote the other way, do not feel strongly. One of these two may decide to go along with the third, the dissentient judge (especially if the case is unlikely to have much significance as a precedent), either treating intensity as compelling evidence of a correct belief or to avoid conflict, perhaps in the conscious or unconscious hope of reciprocal consideration in some future case in which *he* has a strong feeling and the other judges do not. Once one judge swings over to the view of the dissentient judge, the remaining judge is likely to do so as well, for similar reasons or because of dissent aversion.[190]

The option to dissent, Posner explains, threatens to impose costs on the other judges "(the costs arising from their dissent aversion)" if they do not give in to the dissenter's preference.[191] If the perceived costs of a dissent outweigh the "benefits" of maintaining their original vote, the other judges in the example will switch and join the dissenter.[192] If Posner is correct, then another scenario is also likely: if a judge is thinking about writing separately, but does not feel too strongly about his views, he may relent and join the majority opinion.[193] Posner posits that, except at the Supreme Court, the costs of dissenting or writing separately in an

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[185] *Id.* at 32.

[186] *Id.*

[187] *Id.*

[188] *See* HOW JUDGES THINK, *supra* note 1 (explaining why most judges do not like to write dissents). *But see* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), *available at* http://nymag.com/news/features/antonin-scalia-2013-10/index6.html (Justice Scalia explaining that he writes his dissents for law students and thereby influences the law.).

[189] *See* HOW JUDGES THINK, *supra* note 1, at 132 (explaining why most judges choose not to write dissents).

[190] *Id.*

[191] *Id.* at 33.

[192] *Id.*

[193] *See id.* at 32–33 (explaining reasons a judge may opt not to write a dissent).

appellate court usually outweigh the benefits.[194] Thus, "[d]issent aversion," Posner reasons, "reflects the simultaneous difficulty and importance of collegiality. Appellate judging is a cooperative enterprise. It does not work well when the judges' relations with one another become tinged with animosity."[195] To maintain collegiality, Posner advises that judges must make continuous efforts to reduce sources of irritation, like dissents.[196]

Just as appellate judges dislike criticism through dissents, district court judges dislike criticism through reversals.[197] Appellate court reversals "imply criticism rather than merely disagreement," and even Posner recognizes that "no one likes a public rebuke."[198] Posner deduces that a high reversal rate is embarrassing "[e]ven though a reversal has no tangible effect on a judge's career if he is unlikely to be promoted to the court of appeals . . . and little effect even then."[199] "Reversal aversion" therefore drives district court judges to make "correct" decisions that appellate courts are less likely to reverse thereby avoiding criticism and public embarrassment.[200] The threat of reversal keeps a district court judge working carefully.[201] By contrast, intermediate appellate judges have a lower reversal aversion because the Supreme Court reviews few court of appeals decisions and the threat of reversal is much lower.[202] But even then, Posner characterizes many Supreme Court reversals as reflective of "ideological differences, rather than error correction and therefore implicit criticism. That is less true of reversals of district court decisions."[203]

When an appellate judge sits by designation within his own circuit, reversal aversion is layered on top of dissent aversion. The appellate judge sitting by designation is as averse to reversal as a district court judge, perhaps even more so because appellate judges are reversed infrequently

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194 *Id.* at 51. Posner believes that dissent aversion is weaker on the Supreme Court because it has a lighter caseload and the stakes are generally higher so Justices perceive that the costs of dissent are lower than the benefits. *Id.*

195 HOW JUDGES THINK, *supra* note 1, at 33; Saphire & Solimine, *supra* note 94, at 375 ("Conventional wisdom holds that multi-member appellate courts must operate in an atmosphere of collegiality in order to perform properly.").

196 HOW JUDGES THINK, *supra* note 1, at 33.

197 *Id.* at 70–71, 141.

198 *Id.* at 141.

199 *Id.*

200 *Id.* at 70–71.

201 *Id.* at 141.

202 *Id.* at 143.

203 *Id.*

by the Supreme Court.[204] And a designated appellate judge has the same desire to make a "right" decision that his appellate coworkers will not reverse. But if reversed, a designated appellate judge may feel that his colleagues criticized his lower court judicial performance just like he may feel criticized when another judge dissents from his appellate decisions. The bruised egos and frayed collegiality effects may be even worse for a designated appellate judge because district court rulings are more individualized (and more personal) and because he interacts more often with the other judges who reversed him. Reversals of a co-judge's trial rulings are thus another potential source of irritation between appellate judges and the accompanying interpersonal tension could hinder the collaborative exercise of appellate judging.

The designated judge's court of appeals colleagues may also feel the same dissent aversion pressures.[205] To avoid animosity between each other, appellate judges may feel reluctant to reverse a colleague's district court rulings, especially if the reviewing judges do not feel strongly about the issue. Appellate judges might "courtesy affirm" just as they might avoid a dissent by joining an opinion with which they may have otherwise disagreed, as in Posner's example above.[206] The opposite may happen too. Appellate judges may be tempted to take advantage of a cantankerous colleague's reversal and dissent aversions and "discourtesy reverse" his lower court rulings as a way to publicly scold him.[207] Accordingly, any mandate requiring appellate judges to sit by designation within their own circuit's district courts risks altering the behavior and dynamics of appellate judging.

There is some evidence that the personal relationships formed when judges sit by designation affect case outcomes.[208] In one study, Mark A. Lemley and Shawn P. Miller statistically analyzed whether sitting by designation on the Federal Circuit influences a district court judge's reversal rate in patent claim construction cases.[209] They found that "one single act—a district judge spending a few days sitting by designation on the Federal Circuit as an appellate judge—is associated with a dramatic reduction in that judge's claim construction reversal rate."[210]

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[204] *See id.* (explaining that the Supreme Court currently reviews less than one percent of appeals, thus reversal does not impact decision making).

[205] *Id.* at 32.

[206] *Id.* at 32–33.

[207] *Id.* at 33.

[208] Mark A. Lemley & Shawn P. Miller, *If You Can't Beat 'Em, Join 'Em? How Sitting by Designation Affects Judicial Behavior*, 94 TEX. L. REV. 451, 452–53 (2016).

[209] *Id.*

[210] *Id.* at 452.

Lemley and Miller considered three possible explanations for the post-designation decline in reversal rates. First, the district court judges might learn from their appellate experience and subsequently render better substantive decisions.[211] Second, the Federal Circuit judges might "come to know and respect that district judge and are thereafter less likely to reverse her decisions, either because of subconscious favoritism or because the judges are informally deferring to the decisions of a district judge whose opinions they give substantial weight."[212] Third, district court judges who sit by designation might learn the "tricks" of writing a claim construction decision that appellate judges will affirm.[213] Lemley and Miller ran statistical tests to examine these three hypotheses and concluded that "neither substantive learning about claim construction nor even learning what Federal Circuit judges like to read in a claim construction opinion are at work, giving further credence to the personal-relationship explanation."[214] All available evidence suggested that the most likely explanation for the drop in district court reversal rates is "the personal relationships district judges develop with appellate judges while sitting at the court."[215]

Lemley and Miller identified several implications from their study that seem to apply equally when court of appeals judges review the lower court decisions of an appellate colleague with whom they are familiar. Lemley and Miller find that the data reinforces the notion that there is an "informal deference regime" between appellate judges and district court judges who know and trust each other.[216] The idea is that appellate judges are more likely to defer to the decisions of district court judges who they know and with whom they have worked even if the standard of review is *de novo*.[217] If, in fact, informal deference exists, Lemley and Miller argue that "society should care about how those relationships form and under what circumstances. . . . Lawyers might reasonably worry that their chances on appeal will be influenced by whether or not the Federal Circuit judges know and trust the work of the district court judge."[218] The authors note that "informal deference" is not necessarily a bad thing; judges—like

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[211] *Id.* at 470.

[212] *Id.* at 470–71.

[213] *Id.* at 471.

[214] *Id.* at 471, 473.

[215] *Id.* at 477.

[216] *Id.* at 477–78.

[217] *See id.* (explaining the deference between judges based on personal relationships of knowledge and trust).

[218] *Id.* at 478.

all people—are inclined "to give more credence to people and decisions they believe are smart and trustworthy."[219]

Informal deference may be even stronger when court of appeals judges review their appellate colleagues' lower court decisions. Court of appeals judges will interact more often with each other than they do with their circuit's district court judges and, as a result, appellate judges will be more familiar with a colleague that sits by designation in the lower courts.[220] The increased familiarity will give appellate judges more (or less) reason to trust (or distrust) a colleague's district court rulings.[221] Increased interactions may also make appellate judges more reluctant to reverse and criticize a designated colleague to avoid fraying collegiality.

There are hints of informal deference or, at least, sensitivity to personal relationships in the Seventh Circuit opinions evaluating Posner's trial court rulings. The language used by the court is one indicator.[222] The Seventh Circuit's opinions sometimes include language that is overly deferential or excessively complimentary to Posner.[223] For instance, in the *Art Press* case (discussed earlier) when the Seventh Circuit reversed Posner for unduly restricting voir dire, the court dropped a footnote perhaps to soften the blow.[224] It said:

> [a]lthough *this court is sympathetic* with trial judges who wish to avoid lengthy voir dire, a trial judge's desire not "to make the voir dire a big deal in a case that's only going to last a couple of days" is clearly subsidiary to his duty to impanel an impartial jury.[225]

In context, the footnote appears to be a veiled apology to Posner for the reversal. Similar language and footnotes appear in other Seventh Circuit opinions reviewing Posner's lower court rulings.

In *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, the case was reassigned to Posner after a jury awarded $7.8 million to the plaintiff for breach of contract and RICO violations.[226] Posner threw out the verdict based on errors at the first trial and ordered a new trial, at

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219 *Id.*

220 James J. Brudney & Corey Ditslear, *Designated Diffidence*, 35 LAW & SOC'Y REV. 565, 566, 57–75 (2001).

221 Lemley & Miller, *supra* note 208, at 451, 478, 481.

222 *See* Saphire & Solimine, *supra* note 94, at 380 ("Some of the interplay between circuit and district judges can be illustrated by a glance at the appellate opinions themselves. For example, one sometimes finds deferential language in a district judge's dissent, perhaps more so than the ritual language of collegiality one finds in circuit judge dissents.").

223 Bankcard Am., Inc. v. Universal Bancard Sys., Inc., 203 F.3d 477, 479 n.1, 486 (7th Cir. 2000); Art Press, Ltd. v. W. Printing Mach. Co., 791 F.2d 616, 619 n.1 (7th Cir. 1986).

224 *Art Press*, 791 F.2d at 619 n.1.

225 *Id.* (emphasis added) (citation omitted).

226 *Bankcard Am., Inc.*, 203 F.3d at 479.

which he presided.[227] At the second trial, the jury rejected the RICO claims but awarded $4.1 million for breach of contract.[228] Posner wiped out the second verdict too for insufficient evidence of damages and awarded the plaintiff nothing.[229] The plaintiff appealed.[230]

On appeal, the Seventh Circuit analogized its review to football referees and instant replay.[231] The court acknowledged that Posner was "the circuit's chief judge who in this case was wearing, by designation, the robe of a district judge" and was the "referee" that called back "two big touchdowns."[232] The court found that Posner was wrong to order a complete new trial that included breach of contract but emphasized that he "*certainly* made the right call when he ordered the RICO claims to be retried."[233] When rebuffing the plaintiff's claim that Posner erred at the second trial, the court praised Posner and said he was "*absolutely right* in whittling [the plaintiff's] blunderbuss approach down to something that was much more understandable for the jury. . . . In short, after reviewing the record, we conclude that Judge Posner conducted an error-free second trial and that [the plaintiff's] bag of alleged errors is without substance."[234] In the end, the court reversed Posner's grant of a new trial on the breach of contract claim, reinstated the first contract damage verdict, and affirmed the second jury verdict on the RICO claim.[235]

Again, the court dropped a long and flattering footnote:

> It is a testament to the dedication of Chief Judge Posner that he volunteered to sit in the district court and hear this case which, at the time, needed the guiding hand of a new judge. Judge Posner, of course, carries a full load of cases on this court. He also discharges a multitude of administrative duties as the circuit's chief judge. But that's only part of what he does. He has written more books than many people read in a lifetime. On top of all this, in his spare time he is working as a court-appointed special mediator in the government's blockbuster antitrust suit against Microsoft. Obviously, Judge Posner has more on his plate than a long-haul trucker working an "all you can eat" buffet line. It is a tribute to Judge Posner's talent that he handles his many roles with such vigor, brilliance, and panache.[236]

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[227] *Id.*

[228] *Id.* at 480.

[229] *Id.*

[230] *Id.*

[231] *Id.* at 479.

[232] *Id.*

[233] *Id.* 484–85 (emphasis added).

[234] *Id.* at 486 (emphasis added).

[235] *Id.* at 487.

[236] *Id.* at 479 n.1.

Commentators have highlighted the court's gratuitous footnote and noted (perhaps tongue in cheek) that "[r]eversal of one's Chief Judge is more delicate than reversal of the typical trial court."[237]

The extent to which Posner's personal relationships with his fellow appellate judges actually affected the results of his district court appeals is uncertain. Posner had his share of affirmances and reversals.[238] Even in the Federal Circuit, where he sometimes sat by designation as an appellate judge,[239] the outcomes of Posner's reviewed lower court rulings were fairly divided.[240] Nevertheless, Professor John M. Golden, building on the Lemley and Miller study of designated district court judges, finds "there is cause to ask whether appellate co-sitters should recuse themselves from panels reviewing decisions of the relevant trial judge."[241] Even if the informal deference effect and personal relationships between judges do not rise to a level warranting recusal, "its haphazard reduction of the prospects for certain individual appeals could harm dignitary or other process-centered values that rights to appeal are meant to serve."[242] Unlike an adversary's legal arguments, a litigant cannot counterbalance an appellate judge's personal, or unconscious, feelings toward a trial judge, or designated appellate judge, with whom they work.[243]

To minimize judges' reversal and dissent aversions—and to avoid at least the *appearance* that relationships between judges on the same appellate court might sway the outcome—courts of appeal should not review their own judges' lower court rulings. New appellate judges who need district court experience should sit by designation in lower courts *outside* their circuit. Permitting inter-circuit district court designation will lessen the negative collegiality effects associated with reversal aversion and dissent aversion while affording appellate judges the opportunity to conduct trials. Outside circuit judges who do not work or

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[237] James C. Ho, *Green Bag Digests*, 3 Green Bag 2d 341, 344 (2000).

[238] *See, e.g.*, Abbott Labs. v. TorPharm, Inc., 309 F. Supp. 2d 1043 (N.D. Ill. 2004), *aff'd*, 122 F. App'x 511 (Fed. Cir. 2005); Price v. Highland Cmty. Bank, 722 F. Supp. 454 (N.D. Ill. 1989), *aff'd*, 932 F.2d 601 (7th Cir. 1991); Grimes v. Smith, 585 F. Supp. 1084 (N.D. Ind. 1984), *aff'd*, 776 F.2d 1359 (7th Cir. 1985); *see also* United States v. El-Bey, 873 F.3d 1015 (7th Cir. 2017); Merk v. Jewel Food Stores, Div. of Jewel Companies, Inc., 734 F. Supp. 330 (N.D. Ill. 1990), *rev'd*, 945 F.2d 889 (7th Cir. 1991); Deltak, Inc. v. Advanced Sys., Inc., 574 F. Supp. 400 (N.D. Ill. 1983), *vacated*, 767 F.2d 357 (7th Cir. 1985).

[239] *See, e.g.*, Ritchie v. Vast Res., Inc., 563 F.3d 1334 (Fed. Cir. 2009); Agilent Techs., Inc. v. Affymetrix, Inc., 567 F.3d 1366 (Fed. Cir. 2009); Tip Top Const., Inc. v. United States, 563 F.3d 1338 (Fed. Cir. 2009).

[240] *Apple, Inc. v. Motorola, Inc.*, No. 1:11-CV-08540, 2012 WL 1959560 (N.D. Ill. May 22, 2012), *rev'd*, 757 F.3d 1286 (Fed. Cir. 2014); *Abbott Labs.*, 309 F. Supp. 2d at 1043; SmithKline Beecham Corp. v. Apotex Corp., 247 F. Supp. 2d 1011 (N.D. Ill. 2003), *aff'd* on other grounds, 403 F.3d 1331 (Fed. Cir. 2005).

[241] Golden, *supra* note 97, at 72–73.

[242] *Id.* at 79.

[243] *Id.*

collaborate daily with the designated appellate judge will be less likely to courtesy affirm or discourtesy reverse based on their infrequent interaction. And reversal by outside court of appeals judges will lead to less irritation and embarrassment for the designated judge thus removing unnecessary friction from the collaborative exercise of appellate judging. Most significantly, litigants and the public will have more confidence that the court of appeals reviewed the designated appellate judge's trial ruling on the merits rather than on interpersonal relationships.

CONCLUSION

Posner's admirable efforts as a volunteer district court judge, and his scholarly writings about judicial behavior, weigh in favor of adopting—with a modification—his suggestion to require new appellate judges to serve a tour in the trial courts. But rather than require appellate judges to sit by designation in their *own* circuit's district courts, appellate judges (new and old) should sit by designation in the district courts *outside* their circuit. Intra-circuit designation of appellate judges exacerbates reversal aversion and dissent aversion and leads to the appearance that courts might decide appeals based on interpersonal relationships instead of the merits. Inter-circuit designation of appellate judges reduces each of these concerns while affording judges the opportunity to gain any needed trial experience.

THE DISAPPEARING CIVIL TRIAL: IMPLICATIONS FOR THE FUTURE OF LAW PRACTICE

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This Article addresses a concerning but accepted trend in contemporary litigation practice: the widespread disappearance of traditional civil trials from state and federal courts across America. Based on data from the Administrative Office of the United States Courts, the American Bar Association's Vanishing Trial Project, and our own original research on Virginia's circuit court caseloads, this Article argues that although civil trials are undoubtedly on the decline, traditional explanations for the trend to date are inadequate to account for how new variables have begun to affect the practice of law in the twenty-first century. First, this Article reviews civil trial statistics at the federal and state levels to identify the scale of the decline. It then undertakes a critique of the widely accepted historical account of the decline, suggesting that although widespread adoption of codified civil procedure systems explains the trend's origin, it has little explanatory value for how the trend functions at present, both nationally and in Virginia. This Article next reviews how the decline in civil trials will affect contemporary law practice, focusing on its implications for several distinct constituencies who have a stake in the future of law practice: the courts, newer attorneys, clients, and the public. Finally, drawing conclusions from those implications, this Article proposes that as a result of the decline in civil trials, the American legal profession is entering an unprecedented period of legal uncertainty to which it must adapt in order to thrive.

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INTRODUCTION

The American legal landscape is in a period of unprecedented upheaval. Law students go into debt to gain entry into a respected profession, only to find that "[a] law degree isn't necessarily a license to print money these days."[1] A recent study reports that the demand for legal services from law firms was "essentially flat in 2015," continuing "a pattern seen over the last six years" in "what is rapidly becoming the 'new normal'" for the legal sector.[2] New technologies, particularly recent developments in artificial intelligence, stand to replace at least some attorneys in large law firms, with adoption by smaller practices looming on the horizon.[3] All the while, many clients are increasingly turning to alternative business structures, non-traditional legal services providers, technological start-ups, and in-house counsel to reduce costs.[4] But even as corporate clients reduce their reliance on traditional law firms, the justice gap has continued to widen. In 2017, eighty-six percent of civil legal problems reported by low-income Americans received inadequate or no professional assistance.[5]

Today's lawyers face fundamental changes in the work they are asked to do and rightly wonder whether the work they once did will continue to be done by lawyers at all.[6] As one observer put it, "[t]he world that many lawyers decry and others fear, in short, may in fact be the world in which they and other lawyers are destined to live."[7]

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[1] Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J. (Sept. 24, 2007), https://www.wsj.com/articles/SB119040786780835602; *see also The 2017 ATL Top 50 Law School Rankings*, ABOVE LAW, https://abovethelaw.com/law-school-rankings/top-law-schools/ (last visited Feb. 27, 2018) (reporting that thirty-eight percent of 2016 law graduates did not secure employment in the legal sector).

[2] GEO. L., 2016 REPORT ON THE STATE OF THE LEGAL MARKET 3 (2016), https://www.law.georgetown.edu/news/upload/2016_PM_GT_Final-Report.pdf.

[3] Julie Sobowale, *How Artificial Intelligence Is Transforming the Legal Profession*, ABA J. (Apr. 2016), http://www.abajournal.com/magazine/Article/how_artificial_intelligence_is_transforming_the_legal_profession.

[4] *See, e.g.*, ALTMAN WEIL, INC., LAW FIRMS IN TRANSITION 2016 1, 5 (2016), http://www.altmanweil.com/LFiT2016 (last visited Feb. 27, 2018).

[5] LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (June 2017), http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.

[6] THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 3 (2010).

[7] *Id.*

Institutions like the American Bar Association, as well as numerous state bars, have established committees to study trends affecting modern law practice and report on how they will impact the profession into the future.[8] Among these organizations taking proactive action is the Virginia State Bar, which in September of 2014 created a Study Committee on the Future of Law Practice charged with "evaluating current developments and assessing how these changes will impact the practice of law."[9] The work of these groups and others like them is helping attorneys become aware of changes they will likely see in the near future—or are already experiencing—and enabling them to adapt their practices for that future.

Committees evaluating what the future holds for attorneys tend to focus on cutting-edge developments like artificial intelligence in legal applications and technology-driven alternative legal service providers.[10] But other areas of study, like the justice gap for low-income populations,[11] are not recent developments—they have existed for decades. These more established areas of concern, too, will have an outsized impact on lawyers' role in the twenty-first century.

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[8] *See, e.g.*, ABA COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 1 (2016), http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEBpdf. For instance, the National Task Force on Lawyer Well-Being released a report on August 14, 2017 assessing the state of lawyer health generally and recommending specific actions that states can take in order "to construct a profession built on greater well-being, increased competence, and greater public trust." NAT'L TASK FORCE ON LAW. WELL-BEING, THE PATH TO LAWYER WELL-BEING (2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf. Similarly, to address the changes that have so disrupted traditional law practice, the Oregon State Bar has established a Futures Task Force charged with examining how the bar can "best . . . support lawyers' professional development in the face of the rapid evolution of the manner in which legal services are obtained and delivered." OSB FUTURES TASK FORCE, THE FUTURE OF LEGAL SERVICES IN OREGON 6 (June 2017), http://www.osbar.org/_docs/resources/taskforces/futures/FuturesTF_Summary.pdf.

[9] VSB STUDY COMMITTEE ON THE FUTURE OF L. PRAC., REPORT: THE STUDY COMMITTEE ON THE FUTURE OF LAW PRACTICE 1, 2 (Sept. 14, 2016), http://m.vsb.org/docs/FINAL_Report_of_the_Study_Committee.pdf [hereinafter VSB COMMITTEE REPORT]; *see* Sharon D. Nelson, *Future of Law*, VA. ST. B., http://www.vsb.org/site/about/future_of_law_2017 (last visited Mar. 21, 2018) (discussing the committee's purpose).

[10] *See, e.g.*, VSB COMMITTEE REPORT, *supra* note 9, at 2 (noting the establishment of the "Technology and the Practice of Law" and the "Alternative Business Structures" subcommittees).

[11] *See, e.g.*, VSB COMMITTEE REPORT, *supra* note 9, at 2 (noting the establishment of the "Access to Justice" subcommittee).

Much like the justice gap, attorneys have long been aware that traditional civil trials are on the decline.[12] Although legal academics and practitioners alike have thoroughly discussed the reasons for the decline,[13] less attention has been given to the implications this trend has for the future of the legal profession. Inspired by the recent efforts to inquire into sources of disruption of the legal profession and to advise the bar about their effects on the legal profession going forward, this Article sets out to examine a well-established but concerning trend and discuss its implications for the future of law practice: the disappearance of the American civil trial.

In Part I, this Article reviews civil trial data from the Administrative Office of the United States Courts, from the American Bar Association Vanishing Trial Project's research into state courts of general jurisdiction, and from our own original research on Virginia's circuit court caseloads. From these data at the federal and state levels, the scale of the decline in civil trials is strikingly apparent. In Part II, this Article considers common explanations for the trend, undertaking a critique of the most widely accepted historical account of the decline. It suggests that although the widespread adoption of codified civil procedure systems explains how civil trials began to decline, that narrative has little explanatory value for why that trend continues. This Article next reviews, in Part III, ways in which the decline in civil trials will affect contemporary law practice, focusing on several distinct constituencies: the courts, newer attorneys, clients, and the public. It addresses how the effects of the disappearing civil trial intersect with other issues affecting the future of law practice, including emerging technologies and access to justice. Finally, drawing conclusions from those implications, this Article proposes in Part IV that as a result of the decline in civil trials, American civil litigation practice is entering an unprecedented period of legal uncertainty to which all lawyers must adapt in order to thrive.

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[12] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004) (articulating the decline in civil trials from 1962 to 2002).

[13] *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 525–26 (2012) (explaining that the Federal Rules of Civil Procedure are one reason for this decline); *see also, e.g.*, D. Brock Hornby, *The Decline* in *Federal Civil Trials*, 100 JUDICATURE 37, 39 (2016); Stephen Susman, *Civil Jury Trials Are Fast Becoming Extinct*, HARV. L. REC. (Apr. 25, 2016), http://hlrecord.org/2016/04/civil-jury-trials-are-fast-becoming-extinct/.

I. THE DECLINE OF THE AMERICAN CIVIL TRIAL

The contemporary study of the disappearing civil trial has its roots in the American Bar Association's 2003 Vanishing Trial Project.[14] The goal of the initiative was to "document, and then to analyze, what many of us knew anecdotally from our own practices—that old-fashioned trials are an increasingly rare beast."[15] Professor Marc Galanter's original analysis of decades of federal and state court data revealed new insights into the direction of civil trials into the twenty-first century, with the most notable finding being that civil trials have experienced an across-the-board decline among all courts he considered.[16] His study formed the lead article in the *Journal of Empirical Legal Studies*' symposium issue on the results of the ABA's Vanishing Trial Project and initiated a national conversation on the future of civil trials in America.[17]

Galanter's groundbreaking study debuted in 2004, and its core data sets covered a period ending in 2002.[18] Since then, he and other authors have periodically updated the data sets as additional data became available.[19] This Part joins that tradition by using Galanter's research as a launching point for a new analysis of federal trends. It supplements the original federal data set by reference to the latest statistics, then compares the trends in that data set to those of data from other states. Finally, it analyzes our original research into civil trial trends in Virginia circuit courts and compares those trends to the other state and federal data.

A. A Sharp and Recent Trend Among Federal Courts

Although Galanter's original Vanishing Trial Project data set ends in 2002,[20] the Administrative Office of the United States Courts publishes an

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[14] *See* Patricia Lee Refo, *The Vanishing Trial*, LITIG. ONLINE, Winter 2004, at 2, https://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf (discussing the large role that the Vanishing Trial Project has played in documenting the disappearing civil trial).

[15] *Id.*

[16] *See* John Lande, *Introduction to Vanishing Trial Symposium*, 2006 J. DISP. RESOL. 1, 1 (2006).

[17] *See, e.g.*, *id.*; Jennie Berry, *Introduction to the Symposium*, 57 STAN. L. REV. 1251, 1251 (2005); Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean*, DISP. RESOL. MAG., Summer 2004, at 3.

[18] Galanter, *supra* note 12, at 532–70.

[19] *See, e.g.*, Marc Galanter, *The Decline of Trials in a Legalizing Society*, 51 VAL. U. L. REV. 559, 568 (2017); Herbert M. Kritzer, *The Trials and Tribulations of Counting "Trials"*, 62 DEPAUL L. REV. 415, 418–420 (2013).

[20] Galanter, *supra* note 12, at 532.

annual report addressing federal court workloads.[21] We reviewed these reports to prepare an updated data set of civil trial trends among U.S. district courts.[22]

The most significant observation from our analysis of civil trial trends among U.S. district courts is that the absolute number of civil trials has not dropped steadily—instead, the decline is sudden and sharp. As demonstrated in the graph labeled Figure 1, the absolute number of federal civil trials actually increased for much of the study period. When the data set began in 1962, there were only 5802 trials. A trend of growth peaked in 1985, with 12,529 total trials, before beginning a remarkable decline that continued until the data ends in 2016.[23] At that point, the absolute number of trials was only 2781—over 3000 *fewer* trials than in 1962 when the data began.

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[21] *Judicial Business of the United States Courts*, ADMIN. OFF. U.S. CTS., http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts (last visited Jan. 26, 2018).

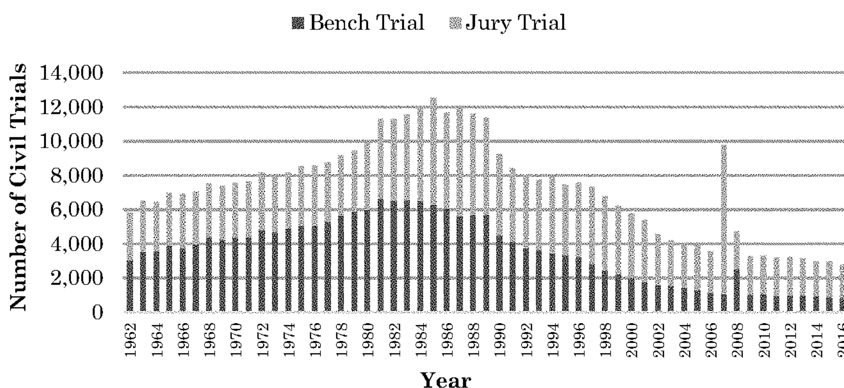
[22] The graphs presented in this section are derived from the data set contained in Table A-1 of Galanter's study, Galanter, *supra* note 12, at 532, as augmented by data contained in Table C-4, titled "Civil Cases Terminated, by Nature of Suit and Action Taken," of the Administrative Office's annual judicial business report, ADMIN. OFF. U.S. CTS., *supra* note 21. The data set used in this section is included as Appendix A, *infra*.

[23] The data reflects two unusual spikes in the number of reported trials for the years 2007 and 2008. These are outliers and do not accurately represent the trend of decline. Another author reviewing the same data has provided the following explanation:

> [T]here were unusual spikes in the number of cases disposed of by civil jury trials in 2007 and the number of cases disposed of by civil bench trials in 2008, both involving the middle district of Louisiana; that district has been running fifteen or fewer jury trials and five or fewer bench trials in recent years, but reported 6,353 cases disposed by jury trials in 2007 and 1,432 cases disposed by bench trials in 2008. The spikes appear to represent dispositions in one or two large multi-district litigation matters in that district, but it is not clear whether coding these dispositions as during or after trial is correct.

Kritzer, *supra* note 19, at 419 n.21. Although Kritzer resolved the outliers by inserting an average of the middle district of Louisiana's trial figures, we have elected to present the data as recorded by the Administrative Office of the U.S. Courts, albeit with this caveat.

Figure 1. Total Number of U.S. District Court Civil Bench and Jury Trials over Time



To put these absolute numbers in context, however, they must be seen as a proportion of all civil actions pending in the federal district courts. When viewed through this lens, a steady decline in the percentage of cases that culminated in trial becomes apparent.

In 1962, there were only 50,320 civil cases that reached a disposition in all United States district courts.[24] Unlike the absolute number of trials, this total number of dispositions per year rose steadily throughout the study period, breaking 100,000 in 1975, 200,000 in 1983, and reaching the mid-200,000s by 1985.[25] From 1985 until the data ends in 2016, the total disposition figure generally hovered around the mid-200,000s, although it did briefly top 300,000 in 2010 and 2011.[26] The disposition total when the data set ended in 2016 was 271,293—on the upper end of totals to date in the new millennium.[27]

By comparing the absolute number of civil trials per year with the total dispositions per year, we can chart what percentage of all federal civil cases went to trial. At the outset, 11.5% of all cases were resolved at trial.[28] As detailed in Figure 2, this figure steadily declined as the study continued, permanently dropping below 10% in 1971, 5% in 1988, 3% in

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[24] *See infra* Appendix A.

[25] *See infra* Appendix A.

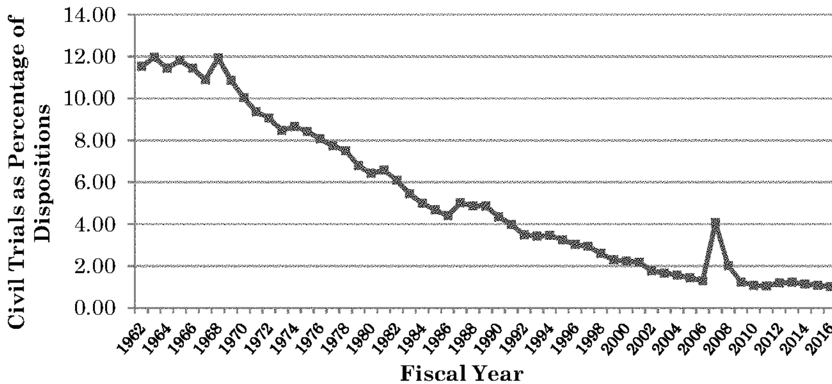
[26] *See infra* Appendix A.

[27] *See infra* Appendix A.

[28] *See infra* Appendix A.

1997, and 2% in 2001.[29] When the data set ended in 2016, the percentage reached its nadir to date: a mere 1.03%.[30]

Figure 2. Civil Trials as Percentage of U.S. District Court Dispositions over Time



Although the data set begins only in 1962, this pattern of decline in percentage of civil trials as a percentage of all civil dispositions appears to be part of a much larger historical trend that predates World War II.[31] Litigants have been moving away from trial as a method of dispute resolution for nearly a century.

A critical year in the history of civil litigation is 1938, when the Federal Rules of Civil Procedure first took effect.[32] In the fiscal year immediately preceding the advent of the Rules, civil trials made up 19.9% of all case dispositions.[33] Considering that figure hovered around 12% during the 1960s, the negative trend seems to go back at least to the 1930s.[34]

The data additionally show, perhaps surprisingly, a trend toward more jury trials than bench trials among federal civil cases. As indicated in Figure 1, the number of federal civil bench and jury trials remained

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29 *See infra* Appendix A. Also visible in Figure 2 is a spike caused by the outlier reports from the Middle District of Louisiana discussed in note 23, *supra*. We maintain that 2001 was the date the percentage irretrievably dropped below 2% for the reasons discussed in that footnote.

30 *See infra* Appendix A.

31 Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633.

32 Galanter, *supra* note 12, at 464; *see also infra* Part II.A.

33 Yeazell, *supra* note 31, at 633 n.3.

34 *See* Yeazell, *supra* note 31, at 633 n.3 (indicating the length of the declining civil trial trend); *see also* Appendix A (illustrating the data trend from the 1960s).

largely even throughout much of the period for which data exists.[35] In fact, bench trials slightly outweighed jury trials, and the penchant toward bench trials continued to grow through the early 1980s.[36] In 1990, however, a sudden drop in the number of bench trials began.[37] By 2002, jury trials outnumbered bench trials by nearly a 2:1 ratio.[38] And in 2016, there were 2.5 jury trials for every bench trial.[39]

These figures take on new meaning when one recalls that the total number of trials had decreased by the end of the data, despite the over 500% increase in total cases.[40] Thus, even though jury trials became a larger percentage of all trials by the end of the study, the absolute number of jury trials when the data ended in 2016 was lower than that in 1962 by 800 total trials.[41]

Bench trials fared even worse: by the end of the data, there were fewer than 1000 bench trials across the entire federal court system—only 816 bench trials took place in 2016.[42] That figure is significantly lower than the over 3000 bench trials that took place each year in the early 1960s.[43]

In sum, all civil trials are decreasing at the federal level. The trial by jury, however, has become well over twice as common as the bench trial among the few remaining civil trials.

B. A Similar Decline in State Courts

Of course, the vast majority of all civil trials occur in state courts.[44] Data for state trial rates, however, is far more difficult to obtain and compare, largely due to differences between state judicial systems and inconsistent methods of reporting, in contrast to the centralized federal statistical reports.[45]

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35 *See infra* Appendix A.

36 *See infra* Appendix A.

37 *See infra* Appendix A.

38 *See infra* Appendix A.

39 *See infra* Appendix A.

40 *See infra* Appendix A.

41 *See infra* Appendix A.

42 *See infra* Appendix A.

43 *See infra* Appendix A.

44 Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 757 (2004).

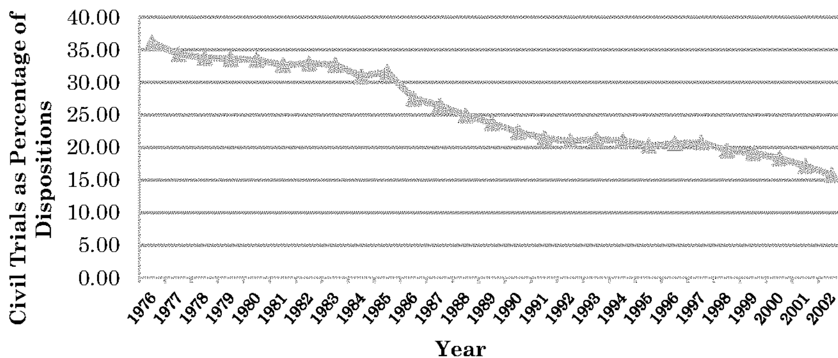
45 *See* Galanter, *supra* note 12, at 506.

1. General State Court Civil Trial Trends

One of the most widely used data sets on state court civil trial trends was assembled in 2004 by the National Center for State Courts.[46] This data set contains information from 21 states and the District of Columbia that together comprised 58% of the U.S. population from 1976–2002, the period the data set covers.[47] Despite its age, the comprehensive scope of this data set has enabled it to remain a cornerstone in analyses of civil trial trends.[48] Because of its reliability and widespread reliance, the graphs in this section are derived from this data set.[49]

Figure 3 reveals a trend of declining civil trials similar to that of the federal trial courts.[50]

Figure 3. Civil Trials as Percentage of Dispositions in 22 State Courts of General Jurisdiction over Time



The percentage of federal civil cases resolved at trial declined from 11.5% in 1962 to 1.03% in 2016.[51] The state court data reveal that the decline in civil trials is not limited to the federal system: the percentage

[46] Ostrom et al., *supra* note 44, at 756.

[47] Ostrom et al., *supra* note 44, at 759–60.

[48] *See, e.g.*, MARC GALANTER & ANGELA FROZENA, THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS 5 (2011), http://www.poundinstitute.org/sites/default/files/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf (citing Ostrom et al., *supra* note 44); *see also* Galanter, *supra* note 19, at 566 (citing Ostrom et al., *supra* note 44, and observing that a less comprehensive data set ending in 2009 indicates that the declining trend among state courts revealed in the Ostrom et al. data set continues into 2009).

[49] The data set from Ostrom et al., *supra* note 44, at 776 is reproduced as Appendix B, *infra*.

[50] *See infra* Appendix A.

[51] *See infra* Appendix A.

of civil cases resolved by trial begins at just over 36% in 1976 and declines steadily to just under 16% in 2002.[52] Beyond this general similarity, however, there are some noticeable differences between the state and federal trends that are not apparent from Figure 3.

Jury trials are a distinct minority of civil case resolutions in state courts, never approaching the number of civil bench trials.[53] They formed only 1.8% of all case resolutions in 1976, and gradually declined by about two-thirds over the study period to make up only 0.6% of case resolutions by 2002.[54] In contrast, bench trials make up the vast majority of civil trials in state courts.[55] From 34.3% of all resolutions in 1976, they still make up a healthy 15.2% of civil case dispositions by 2002.[56] The absolute number of bench trials over this period dropped only 6.6%.[57]

Overall, the predominance of bench trials in state court can likely be attributed to differences in the nature of civil issues before state and federal courts.[58] As a recent caseload study conducted by the National Center for State Courts noted, state courts handle domestic relations and probate cases that are outside federal jurisdiction, as well as myriad debt collection, landlord-tenant, foreclosure, and personal injury cases that never reach the federal court system.[59]

2. Civil Trial Trends in Virginia

To our knowledge, there have been no large-scale studies of civil trial trends in Virginia's circuit courts. Fortunately, a great deal of raw data is publicly available on the Virginia Judicial System website.[60] From the annual statistical reports published there, we were able to compile a data set covering Virginia circuit court civil caseloads for the period of 1992–2013.[61] Analyzing this information yielded some interesting findings in light of the national trends discussed earlier.

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[52] *See infra* Appendix B.

[53] Galanter, *supra* note 12, at 507–08.

[54] Galanter, *supra* note 12, at 507–08.

[55] Galanter, *supra* note 12, at 507–08.

[56] Galanter, *supra* note 12, at 507–08.

[57] Galanter, *supra* note 12, at 507–08.

[58] PAULA HANNAFORD-AGOR ET AL., NCSC, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 19–20 (2015), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.

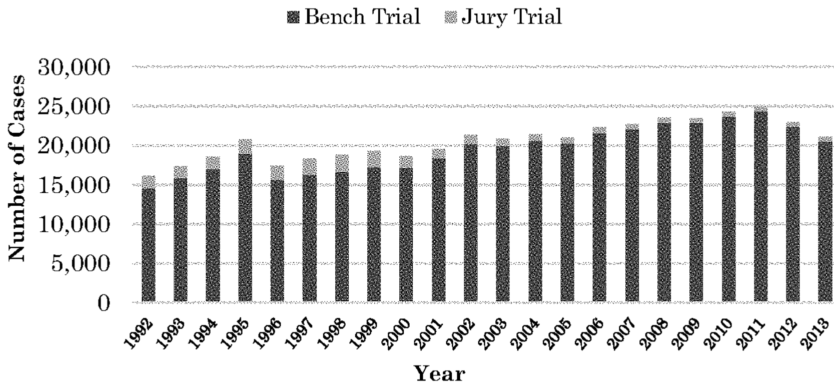
[59] *Id.*

[60] *Caseload Statistical Information*, VA.'S JUD. SYS., http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/home.html (last visited Jan. 26, 2018).

[61] This data set is reproduced as Appendix C, *infra*.

As Figure 4 reveals, the absolute number of civil trials in Virginia has remained remarkably steady over the past twenty years. To the extent a trend emerges, it is a gradual upward trend in the number of total cases—a departure from the national trend.

Figure 4. Total Number of Virginia Circuit Court Civil Bench and Jury Trials over Time



In 1992, Virginia's circuit courts collectively conducted 16,081 civil trials.[62] That number steadily rose throughout the period for which data is available until it peaked in 2011 with 24,916 total trials.[63] Although that number began to drop off in the following years, concluding in 2013 with 21,036 trials, the overall trend was one of growth.[64]

The trend suggested by our Virginia circuit court data set largely comports with that seen among other state courts—bench trials are the preferred tool for state court civil litigators. The same reasons noted in the National Center for State Courts caseload study likely explain why the same trend is apparent in Virginia: the overwhelming amount of low-value contract and small claims cases are best resolved via bench trials, with the relatively few high-dollar cases being left for jury resolution.[65]

Just as with the U.S. district court data set, this absolute number of Virginia circuit court civil trials must be viewed in the context of all Virginia civil filings to fully interpret it.[66] When the data set began in

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62 *See infra* Appendix C.

63 *See infra* Appendix C.

64 *See infra* Appendix C.

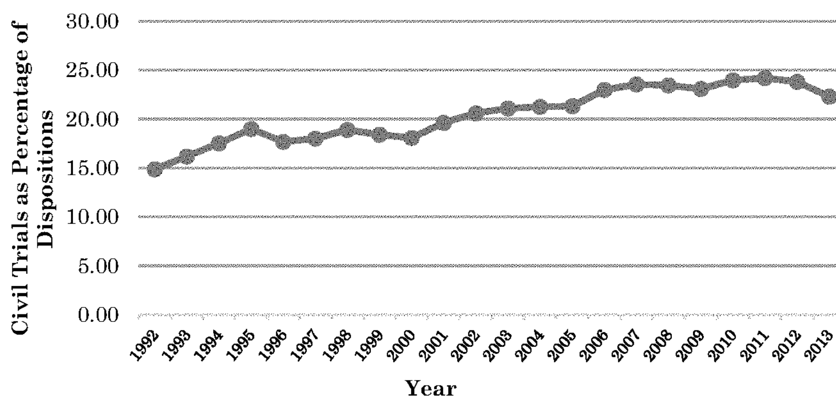
65 *See* HANNAFORD-AGOR ET AL., *supra* note 58, at 35 (stating how lower-value contract and civil cases are adjudicated as bench trials).

66 *See supra* notes 24–29 and accompanying text and figure.

1992, there were 108,107 civil cases disposed of in the Virginia circuit courts.[67] In contrast to the dramatic growth in dispositions shown in the federal data, the number of dispositions in Virginia remained fairly consistent over the period the data set covers.[68] For any given year, the total number of case dispositions remained within a few thousand of 100,000 per year.[69] The highest number of dispositions, 109,032, occurred in 1995, and the lowest number was 94,403 in 2013.[70]

We charted the percentage of Virginia civil cases decided at trial against the total number of civil dispositions over time to determine whether the proportion of trials in Virginia experienced the same precipitous drop seen in Figures 1 and 3 above.[71] As Figure 5 reveals, it did not.[72] On the contrary, civil trials actually appear to be on the rise in the Commonwealth.[73]

Figure 5. Civil Trials as Percentage of Virginia Circuit Court Dispositions over Time



When the data began in 1992, 14.88% of all Virginia cases were decided at trial.[74] In a marked contrast to the declining trend in the federal courts, and even among other states, the percentage of Virginia circuit court dispositions at trial *increased* throughout the period the data set

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[67] *See infra* Appendix C.
[68] *See infra* Appendix C.
[69] *See infra* Appendix C.
[70] *See infra* Appendix C.
[71] *See infra* Appendix C.
[72] *See infra* Appendix C.
[73] *See infra* Appendix C.
[74] *See infra* Appendix C.

covers.[75] By 2002, a solid fifth of all civil matters in the Virginia circuit courts were resolved through trial.[76] That percentage hovered in the low 20% range until it peaked in 2011 with 24.19% of cases being decided at trial.[77] When the data ended in 2013, the percentage had dropped off somewhat to 22.28%, but still remained far higher than the federal percentage of 1.03% during the last year of the study.[78]

The results reflected in Figure 5 are most striking when charted alongside the same measure for the U.S. District Courts recorded in Figure 2 and for twenty-two other state trial courts of general jurisdiction recorded in Figure 3.[79] Recall that Figure 2 reported that from 1962 to 2016, federal trials dropped from 11.5% of all dispositions to just 1.03%.[80] Figure 3 reported that from 1976 to 2002, the amount of civil trials as a percentage of all civil dispositions in the state data set dropped from just over 36% to under 16%.[81] The degree to which Virginia contradicts that trend is apparent in Figure 6, which charts the Virginia percentage in Figure 5 alongside the data from Figure 2 and Figure 3:[82]

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75 *See infra* Appendix C.

76 *See infra* Appendix C.

77 *See infra* Appendix C.

78 *Compare infra* Appendix C, *with infra* Appendix A.

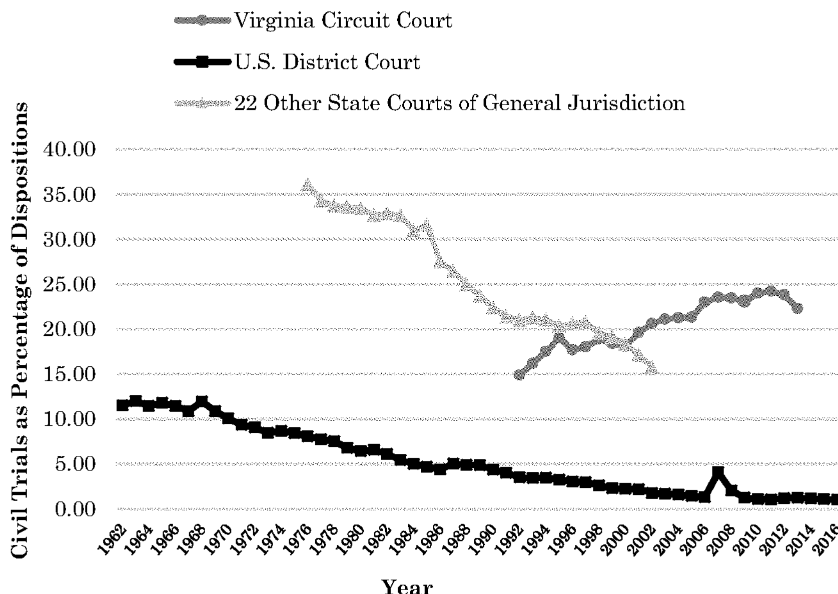
79 *Compare infra* Appendix C, *with infra* Appendix B.

80 *See infra* Appendix A.

81 *See infra* Appendix B.

82 *See infra* Figure 6.

Figure 6. Civil Trials as Percentage of Dispositions in U.S. District, Virginia Circuit, and 22 State Courts over Time



Although the national trend is one of decreasing civil trials, the Virginia circuit court data set tells a different story. In the next Part, we attempt to place these trends into a wider historical context to explain why the data show an overall decline in federal civil trials, but not in Virginia civil trials.

II. AN EXPLANATION FOR THE DECLINE—AND ITS LIMITATIONS

Commentators have offered countless theories as to what has caused, or at least contributed to, the overall decline in civil trials nationwide.[83]

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[83] *See, e.g.*, Robert P. Burns, *What Will We Lose if the Trial Vanishes*, 37 OHIO N.U. L. REV. 575, 583–87 (2011) (laying the blame on an increasing focus on judges as case managers, lawyers' financial incentives to pursue pretrial discovery without continuing to trial, the relative ease of obtaining summary judgment, and the overall increasingly bureaucratic nature of the legal profession); Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445, 1466–77 (2016) (suggesting that the declining caseloads and changes in perception toward the civil justice system explain the decline in trials); Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1493 (2016) (arguing that a systemic shift away from the historical model favoring court litigation and toward

Although many of these commonly cited reasons have contributed to the drop, most—if not all—of them actually flow from a fundamental paradigm shift in the way the common law system handles civil matters that occurred almost a century ago.[84] This Part first explores a fundamental shift in how the legal system views trials and considers important consequences of that change. It then takes up the question raised above regarding Virginia's apparent outlier status, offering some thoughts as to why Virginia's trends appear to be in conflict with national trends. Finally, this Part concludes by positing that accepted explanations for the decline are inadequate to explain how its second- and third-order effects are beginning to disrupt contemporary law practice.

A. How Discovery Doomed the Civil Trial

During the last century, the entire legal system seems to have departed from the popular view of the trial as a hallowed hallmark of the common law system.[85] As two authors have put it: "Our culture portrays trial—especially trial by jury—as the quintessential dramatic instrument of justice. Our judicial system operates on a different premise: [t]rial is a disease, not generally fatal, but serious enough to be avoided at any reasonable cost."[86]

In a convincing account, the eminent legal historian John Langbein lays the legal system's present opinion of civil trials squarely at the feet of the Federal Rules of Civil Procedure.[87] His premise is simple: any system of civil procedure has two essential purposes—determining a case's facts, and adjudicating issues of law or fact that remain disputed.[88] Of course, "the better a civil procedure system is at investigating and clarifying the facts, the less it will need to take cases to adjudication."[89] Once parties had a ready means of discovering the facts and their respective positions under the Federal Rules, they no longer had need of the adjudicative role of courts—their cases could be resolved without trial through settlement or other forms of pretrial adjudication.

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alternative dispute resolution and pretrial resolution of cases is the reason fewer civil trials occur).

[84] *See infra* Part II.A.

[85] *See* Freer, *supra* note 83, at 1511 ("The focus on conciliation and consensus is so dominant that, stunningly, going to trial is seen as pathological—as a 'failure' of the system.").

[86] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 3 (1996).

[87] *See* Langbein, *supra* note 13, at 524–25.

[88] Langbein, *supra* note 13, at 525.

[89] Langbein, *supra* note 13, at 525.

The legal system's present view of trial is far removed from its common law origins, where the trial was essential to almost every case.[90] Where the parties agreed on the facts but disputed a question of law, a judge could decide the case on the pleadings without recourse to trial or jury.[91] But where fact finding was necessary—and it almost always was—so also was a jury trial.[92] The jury, then, was the investigative engine of the common law.

The problem was that even though their essential role was to determine facts, juries were not very good at doing so.[93] Much like today's civil justice system, parties' lawyers dominated the process of investigating and presenting facts.[94] But their means of discovery at common law were functionally nonexistent: unless he or she had a claim of ownership, a litigant could not force an opponent or third party to disclose any documents in their possession regardless of their importance, and no proto-deposition or other means for oral examination of non-consenting witnesses were available.[95] These essential investigation tools were only available at trial.[96]

This fundamental weakness persisted for centuries in England and crossed the Atlantic to form part of early American civil procedure.[97] Even into the twentieth century in America, "trial was often the only real way to do discovery, and some of the trials in this earlier era can be seen as in-court efforts to seek information."[98] By the 1930s, many American legal minds had concluded that pleading—the closest thing to pretrial discovery at the time—simply did not do its job of providing notice and disclosure to opposing parties in order to prevent surprises at trial.[99] American attorneys, even into the Depression Era, faced the same burden as that of

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[90] Langbein, *supra* note 13, at 526.

[91] Langbein, *supra* note 13, at 527.

[92] Langbein, *supra* note 13, at 527.

[93] Langbein, *supra* note 13, at 528.

[94] Langbein, *supra* note 13, at 536–37.

[95] Langbein, *supra* note 13, at 531–32.

[96] Langbein, *supra* note 13, at 531. Incidentally, the nonsuit arose as a consequence of this limited discovery, as litigants who overestimated the persuasive value of their evidence only to be outmatched at trial, sought a means of withdrawing the case without prejudice. Langbein, *supra* note 13, at 532.

[97] *See* Langbein, *supra* note 13, at 532 ("This impoverishment of the investigative function was perhaps the greatest weakness of common law civil procedure in the age before fusion of law and equity.").

[98] Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 951 (2004). Of course, even before the promulgation of the Federal Rules of Civil Procedure in 1938, many states had introduced some limited forms of pretrial discovery. *See* Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 869–70 (1933).

[99] Yeazell, *supra* note 98, at 951.

their English forebears—they must hazard unknown cases and take nonsuits if overmatched:

> If a lawyer undertakes so to prepare his case as to meet all the possible items of proof which his adversary may bring out at the trial, or to meet all the assertions and denials which his adversary has spread upon the record, much of his effort will inevitably be misdirected and will result only in futile expense. If, on the other hand, he restricts his preparation to such matters as he thinks his adversary will be likely to rely upon, he will run the risk of being a victim of surprise.[100]

Having had enough of trial-and-error trials, the civil procedure reformers of the 1930s sought to formulate a system of pretrial procedure that would take the guesswork out of trial preparation by improving trial attorneys' ability to investigate facts prior to trial.[101] Their innovation resulted in the modern American system of discovery, which proved so successful in its improvement of investigation that it had the effect of eventually eliminating the need for civil trials.[102]

The key event in creating this system was the 1938 promulgation of the Federal Rules of Civil Procedure.[103] This sea change in federal civil procedure and pretrial practice led the vast majority of states to adopt similar pretrial procedures by emulating the Federal Rules in state procedural codes and statutes.[104] The Federal Rules, of course, in no way contemplate that civil trials should cease to exist. Rule 38(a) expressly states that the right to civil trial by jury protected by the Seventh Amendment remains, and Title VI provides for trial procedures.[105] Instead, the Rules have "create[d] conditions in which litigants have found it not in their interests to exercise" their right to trial.[106]

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[100] Sunderland, *supra* note 98, at 864; *see also* Langbein, *supra* note 13, at 532 (discussing development of the nonsuit).

[101] For instance, Edson R. Sunderland, a civil procedure scholar and member of the advisory committee that formulated the original Federal Rules of Civil Procedure, wrote extensively on discovery's role in American civil procedure and how it, more than any other innovation, stood to "increas[e] the efficiency of the administration of justice." *Edson R. Sunderland*, MICH. L., https://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/EdsonRSunderland.aspx (last visited Feb. 27, 2018).

[102] Obviously, civil trials still occur. *See supra* Part I. But when compared with the need for trial as an investigative tool, it is not far-fetched to describe the current American system of pretrial procedure, in which only a minute fraction of cases go to trial, as a system of "nontrial procedure." Langbein, *supra* note 13, at 542.

[103] Langbein, *supra* note 13, at 542.

[104] *See generally* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 354 (2002/2003) (describing studies showing the trend of the states to adopt the Federal Rules); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 693 (1998) (noting that states frequently based their procedural codes on the Federal Rules).

[105] FED. R. CIV. P. 16(a)(5) (2016); *id.* at 38–53.

[106] Langbein, *supra* note 13, at 542.

The discovery procedures set forth in the Federal Rules allowed for an entirely new era of factual investigation outside of trial. Nothing like the system of litigant-conducted investigation existed at common law.[107] The oral deposition, in particular, was almost entirely an invention of the Federal Rules.[108] If the Federal Rules were a death warrant for civil trials, then the deposition might be considered their executioner.[109]

B. Key Consequences of the Federal Rules

From Langbein's account, the trends reflected in Part I make a great deal of sense. As the Federal Rules and their state corollaries caught on, litigants found that civil trials were no longer necessary to the resolution of their disputes, even though there were more disputes brought to the courts overall.[110] The adoption of the Federal Rules was the catalyst for a variety of consequences that continue to reverberate in the field of civil litigation. This section examines two of the most significant changes in litigation practice following the advent of the Federal Rules.

1. Discovery Increases Litigation Costs

Perhaps the most readily recognizable—and bemoaned—consequence of the Federal Rules was its corresponding upsurge in litigation expenses, largely due to the new and expansive discovery regime.[111] Fifth Circuit Judge Patrick Higginbotham thus characterized the ripple effects of the pretrial discovery system:

> Discovery has now become the main event—the endgame—in pretrial civil litigation proceedings. With less and less expectation of trial, the role for discovery envisioned by the 1938 reform has been greatly expanded. Despite the virtues of discovery—indeed, its necessity in many cases—its excesses have made the formal trial

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[107] Langbein, *supra* note 13, at 525–26.

[108] Langbein, *supra* note 13, at 545.

[109] Langbein, *supra* note 13, at 551 ("[T]he deposition has in important respects replaced the trial as the primary occasion for probing sworn testimony about matters of fact. In combination with what the litigants learn from discovery of documents and from disclosures in response to interrogatories, deposition testimony provides the litigants a detailed advance view of what the issues and the evidence would be (on both or all sides) were the case to go to trial. In this way the discovery system has transferred into the pretrial process much of the work of eliciting facts and refining legal issues that had formerly been the function of trial. Having seen the dress rehearsal, today's litigants often find that they can dispense with the scheduled performance.").

[110] *See supra* text accompanying notes 24–28 and 46–48.

[111] *See infra* text accompanying notes 114–17.

process less attractive than almost any alternative, including arbitration.[112]

Because most discovery rules permit broad discovery, "an unfocused, and often disproportionate, approach to discovery in which lawyers fail to identify key issues and spend time and effort investigating tangential issues" is the frequent result.[113]

The Federal Rules have provided attorneys with a well-stocked toolbox, full of procedural devices ostensibly designed to enable both parties to gather all the information needed to bring the case to trial without surprise.[114] In practice, however, "[t]hese devices impose a multi[-]tiered matrix of burdens that are ripe for attorneys to exploit."[115] For instance, depositions are easily initiated, but costly to oppose.[116] The exploitable nature of modern discovery is largely because American litigation uses the rule of shared litigation costs rather than a winner-take-all approach. The American cost sharing rule's interaction with the exploitable nature of modern discovery has become "a main shortcoming of our new discovery-based civil procedure."[117] Ultimately, the "traditional law firm business model (based on the billable hour) and the lack of disciplinary action in response to excessive discovery filings

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[112] Patrick E. Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REV. (Summer 2004), https://www.rand.org/pubs/periodicals/rand-review/issues/summer2004/28.html.

[113] HANNAFORD-AGOR ET AL., *supra* note 58, at 2. A 2015 amendment to Rule 26 changed the federal standard for what material is discoverable. Prior to the change, the Rules permitted discovery of all information "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1) (2014). Since then, the standard has hinged on the proportionality of discovery to a given case:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

FED. R. CIV. P. 26(b)(1) (2015) (emphasis added). Despite the amendment's goal of changing the tendency toward using discovery as a sword that pervades discovery practice, the amendment does not seem likely to reduce discovery abuses in any significant manner. *See* Michael J. Miles, *Proportionality Under Amended Rule 26(b)(1): A New Mindset*, PRETRIAL PRAC. & DISCOVERY (May 18, 2016), http://apps.americanbar.org/litigation/committees/pretrial/Articles/spring2016-0516-proportionality-amended-rule-26b1-new-mindset.html.

[114] *See* Sunderland, *supra* note 98, at 869–70.

[115] Andrew S. Pollis, *Busting up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2102 (2017).

[116] *Id.* at 2103 (noting that a party cannot avoid a deposition by objecting, but must instead either attend or apply for a protective order, and, in the case of entity depositions, take on the added cost of preparing the attending agent).

[117] Langbein, *supra* note 13, at 572.

encourages lawyers to do more discovery rather than smart discovery."[118] The result of such expansive discovery and its accompanying delays is an increase in litigation costs—often to the point where discovery costs far outweigh the value of the case.[119]

2. Alternative Dispute Resolution is Ascendant

These increased litigation costs, largely caused by broad pretrial discovery, have led litigants to seek methods of resolving their disputes outside the courtroom.[120] This "exodus," as some have described it,[121] from traditional civil litigation in courts and toward extrajudicial dispute resolution, has transformed the very fabric of our legal system.[122] The sheer scope of this metamorphosis is apparent from the fact that the legal profession treats trials as something to be avoided and views settlement as the goal.[123]

Litigants typically reach settlement outside of court through various forms of alternative dispute resolution (ADR).[124] Predominant among them are arbitration, which involves submission of a dispute to one or more neutral arbiters for decision following a pseudo-judicial proceeding,[125] and mediation, in which parties work with a neutral mediator who endeavors to help them reach a mutually acceptable settlement through holistic consideration of the case.[126] Another form of

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[118] HANNAFORD-AGOR ET AL., *supra* note 58, at 2.

[119] HANNAFORD-AGOR ET AL., *supra* note 58, at 2; *see also* Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1656–57 (2016) ("Financially, discovery is unmatched among the major sources of litigation costs; it generates more legal fees and expenses than any other round of court proceedings. According to various estimates, discovery can consume from fifty to as much as ninety percent of total legal costs in some cases.").

[120] *See generally* Marrero, *supra* note 119, at 1656–57 (discussing the extensive costs of discovery).

[121] *See* Freer, *supra* note 83, at 1492.

[122] *See* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 144–45 (2000) (describing "remarkable growth" in the ADR field since the 1960s, including structural changes by the courts incorporating ADR processes into their operation).

[123] *See supra* notes 85–86 and accompanying text.

[124] *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 8–9 (2010).

[125] *Id.* at 8–11.

[126] Leonard L. Riskin & Nancy A. Welsh, *Is that All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 869–70 (2008). Riskin and Welsh observe that, unlike court litigation, mediation "can empower the parties to work together in a respectful and productive manner; allow a focus on the parties' real needs and interests, in addition to their legal claims; offer a flexible process customized to fit the parties' situation, emotions, and interests; and encourage the development of a range of creative and responsive outcomes." *Id.* at 869.

ADR called collaborative law has also become prevalent, particularly in the domestic relations context.[127] Unlike arbitration or mediation, collaborative law is nonadversarial—the lawyers involved represent the parties only for the purpose of negotiating agreements and are foreclosed from representing either party in litigation.[128] Thus freed from the shadow of an impending courtroom duel, collaborative lawyers are able to—in theory—"resolve disputes cheaper, faster, and fairer than the litigation alternative."[129]

These and other forms of ADR have resulted in a secondary legal industry devoted to litigation without setting foot in court, and that industry is growing rapidly.[130] The predominance of ADR is fueled in part by the fact that the traditional legal system, including the courts, has incorporated ADR into the standard operating procedures of litigation.[131] In fact, Federal Rule 16 expressly notes that "facilitating settlement" is an objective of pretrial conferences.[132]

For better or worse, ADR is no longer necessarily optional.[133] Many courts use some form of ADR as a mandatory part of pretrial procedure.[134]

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[127] *See* Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 73 (2005) ("While touted as the tool of the future for all civil disputes, collaborative law remains largely relegated to the family law world.").

[128] *Id.*; *see also Uniform Collaborative Law Act*, 38 HOFSTRA L. REV. 421, 425 (2009) (noting that parties must "agree in advance that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement").

[129] Fairman, *supra* note 127, at 73.

[130] *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO. ST. L.J. 1315, 1325–26 (noting the rapid rise of collaborative law as a significant form of ADR).

[131] *See* KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 34 (2000) ("Some courts have adopted local rules requiring parties to attempt to mediate certain categories of disputes before they can have their dispute placed on a trial calendar. Also, some states have enacted laws requiring that all disputes of a certain type be mediated before they can be heard in court."); *see also* Riskin & Welsh, *supra* note 126, at 870 ("In recent years, many state and federal trial and appellate courts have begun to order or proffer mediation in large numbers of civil non-family cases.").

[132] FED. R. CIV. P. 16(a)(5) (2016).

[133] *Compare* Amy J. Schmitz, *Nonconsensual + Nonbinding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587, 588 (2009) (suggesting that rather than achieving traditional ADR goals of efficiency and fairness, mandatory arbitration programs increase litigation costs and are inefficient), *with* Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 592, 643 (2001) (arguing that court-ordered ADR promotes settlement rates and advances efficient, creative dispute resolution as long as the parties participate in good faith).

[134] *See* HANNAFORD-AGOR ET AL., *supra* note 58, at 3; Weston, *supra* note 133, at 599 ("State and federal courts increasingly order parties to utilize ADR processes, including

Judges are often actively involved in pretrial ADR, as is perhaps most apparent from the role played by federal magistrate judges at settlement conferences. That role follows naturally from the judicial role in other case management activities, which expose the judge to the merits of the case as they become apparent during discovery.[135] With this knowledge, the judge can help identify unreasonable resistance to settlement and work with parties to realistically assess the merits of the case.[136]

C. Is Virginia an Outlier?

The rise of discovery—and its accompanying increases in litigation costs—created an incentive for litigants to seek resolution of civil cases through means other than trial. That trend toward fewer civil trials is reflected in the data for U.S. district courts and other state courts of general jurisdiction presented in Part I. Presumably, the same incentive applies to Virginia civil litigation practice, where pretrial discovery—like everywhere else—plays an essential role in civil litigation. Why, then, do the figures for Virginia indicate a rise in the number of civil trials?

Perhaps the best answer is that the number of what one might consider "traditional" civil trials *is* decreasing. For cases involving substantial discovery and for which there is significant potential for financial loss at trial, the systemic factors discussed in Part I certainly favor settlement outside of judicial process.[137] But because Virginia's circuit courts are state courts, there are many types of civil cases brought in them that simply do not factor into much of the literature on disappearing civil trials, which focuses more on federal court.

As the state court caseload study conducted by the National Center for State Courts concluded, "[s]tate court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial and tort cases. Only one in four cases has attorneys representing both the plaintiff and the defendant."[138] The authors continued:

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arbitration, mediation, summary jury trial, and neutral third-party case evaluation, as a prerequisite to trial or even appellate review.").

[135] *See infra* text accompanying notes 148 and 151.

[136] *See* Langbein, *supra* note 13, at 559 (explaining the role of judicial processes in the identification of settlement resistance).

[137] *See supra* text accompanying notes 59 and 65.

[138] HANNAFORD-AGOR ET AL., *supra* note 58, at 35. The National Center for State Courts' 2015 "Landscape" study is ongoing, and a recent update distributed to state court leaders indicated that the findings and trends discussed in the 2015 report remain accurate. *See* Paula Hannaford-Agor, *Trends: Close Up*, NCSC, Dec. 2017, http://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Close%20Up/civil-litigation.ashx (observing that data from the Landscape study continues to show that "[l]itigants represented themselves in more than three-quarters" of the lower-value contract,

> With rare exceptions, the monetary value of cases disposed in state courts is quite modest. Seventy-five percent (75%) of judgments greater than zero were less than $5,200. Only judgments in real property cases exceeded $100,000 more than 25 percent of the time. At the 75th percentile, judgments in small claims cases were actually greater than judgments in contract cases ($6,000 compared to $4,981). This is particularly striking given recent estimates of the costs of civil litigation. In the vast majority of cases, deciding to litigate a typical civil case in state courts is economically unsound unless the litigant is prepared to do so on a self-represented basis, which appears to be the case for most defendants.[139]

The Virginia Court System's publicly available data set provides only limited information as to the nature of the cases reaching disposition through trial.[140] Even so, we think the results of our analysis of that information are consistent with the National Center for State Courts' observations about typical state court civil trials.

Our analysis of the Virginia data suggests the rise in civil trials likely comprises similar low-value contract and small claims cases. In such cases, which usually involve at least one unrepresented party, pretrial discovery—and its accompanying costs—are minimal. The parties usually know each other's positions and are largely aware of the facts. Likewise, ADR is cost-prohibitive in these cases.[141] For these litigants, state trial court *is* the most efficient fact-finder and adjudicative body.[142]

D. The Decline as Part of a Period of Disruption

Langbein's theory explains how the rise of pretrial discovery brought about the decline of civil trials.[143] It provides a theoretical roadmap of how the Federal Rules prompted landmark changes in American civil practice that transformed both the courts and the legal profession.[144] The thesis, however, only explains how the legal system arrived in its present posture

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debt-collection, landlord-tenant, and small claims cases that make up the majority of state court civil caseloads).

139 HANNAFORD-AGOR ET AL., *supra* note 58, at 35; *see* Hannaford-Agor, *supra* note 138 (showing that plaintiffs were represented in 98% of debt collection cases, 80% of landlord-tenant cases, 80% of small claims cases, and 98% of other contract cases, whereas defendants were represented in only 16%, 16%, 13%, and 28%, respectively).

140 *Caseload Statistical Information*, *supra* note 60.

141 *See* Schmitz, *supra* note 133, at 589 (observing that "costs and burdens of layered dispute resolution processes often fall hardest on those who have the least power or litigation resources").

142 Hannaford-Agor, *supra* note 138 (recording data showing that small claims cases are the least likely to settle, with only 2% of such cases reaching settlement, while 86% have some form of court involved resolution).

143 Langbein, *supra* note 13, at 524.

144 Langbein, *supra* note 13, at 524.

of disfavoring trial.[145] It does not suggest what that posture means for the future of law practice.

The second- and third-order consequences of modern pretrial discovery are beginning to exercise an independent influence on the direction of the legal profession, and their manifestation coincides with a period of unprecedented disruption to the legal profession. Far from an isolated anomaly of the law, the disappearing civil trial interacts with, and frequently exacerbates, the other disruptive forces affecting practice today. As the ramifications of decades of civil trial decline become increasingly apparent, lawyers and courts alike will have to continuously adapt to a changing legal environment. In short, the decline of civil trials is not an end result—it marks the beginning of a new period in American law. The remainder of this Article considers what the widespread disappearance of civil trials and its consequences mean for the future of law practice.

III. IMPLICATIONS FOR ESSENTIAL LEGAL CONSTITUENCIES

As suggested above, the decline in civil trials has already had a dramatic effect on the practice of law. This Part explores how specific second- and third-order effects of the decline have begun to manifest themselves to four constituencies inextricably associated with the legal profession: the courts, attorneys beginning their legal careers, lawyers' clients, and the general public. In doing so, this Part reveals how the decline in civil trials is intimately related to other contemporary issues implicating the future of law practice, such as emerging technologies and the justice gap.[146] Although there are positive and negative aspects of the trend away from civil trials and toward more ADR, overall, these trends present opportunities to adapt and improve the legal profession and the services it provides to clients and the public.

A. The Courts

Perhaps the most obvious actors in the American legal system to be affected by a downturn in civil trials are the courts themselves. This section examines how a decrease in civil trials is changing the nature of trial courts, appellate courts, and members of the judiciary.

1. Trial Courts

Trial courts, of course, are directly affected by the drop in civil trials because they are the bodies responsible for carrying out those trials. Whereas the essential role of a trial court was once that of the adjudicator—deciding controversies through the application of law to

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[145] Langbein, *supra* note 13, at 525–26.

[146] *See supra* notes 3–12 and accompanying text.

facts—trial courts now serve primarily as dispute administrators that use their discretion and modern processes to resolve cases. This shift to what has widely become known as "managerial judging" is the most significant consequence of the trend away from civil trials.[147]

Jonathan Molot attributes the rise of managerial judging to the dominant role of pretrial procedure in modern civil litigation:

> In a system dominated by pretrial litigation tactics, and settlements based on expense and uncertainty, the trial judge's locus of power has shifted. Many trial judges have transformed their role from that of a passive arbiter resolving legal disputes based on legal principle into that of an active case manager who influences outcomes by controlling discovery and participating in settlement conferences.[148]

Langbein likewise observes that "[n]ontrial procedure has transformed the judicial role from courtroom umpire to office-bound caseload manager."[149] This shift to managerial judging has been complemented by contemporary technological advances that make administration even more efficient.[150] As one judicial training manual has put it, "[c]aseflow management starts at the courthouse door, the virtual courthouse door."[151]

As noted earlier, there is great institutional pressure on trial judges to manage their dockets efficiently.[152] In fact, judicial performance evaluations consistently include caseload control and disposition rate as part of their measurements.[153] The entire system of civil procedure has changed such that the trial judge is strongly incentivized to act as a mediator, actively encouraging settlements through the case management process.

This view is most obviously reflected in the text of Federal Rule 16, which states that essential purposes of pretrial conferences are to "expedit[e] disposition of the action" and "facilitat[e] settlement."[154] The advisory committee's notes to that rule observe that the purpose of the

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[147] *See* Galanter, *supra* note 12, at 519.

[148] Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1003–04 (1998).

[149] Langbein, *supra* note 13, at 571.

[150] *See* William F. Dressel, *Court Organization and Effective Caseflow Management: Time to Redefine*, NAT'L JUD. C. 20–22 (2010), https://www.judges.org/wp-content/uploads/Time-to-Redefine.pdf.

[151] *Id.* at 20.

[152] *See supra* notes 131–36 and accompanying text.

[153] *See* Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 917–18 (2006) (discussing judges' "[i]nstitutional accountability," which deals with the judiciary's responsibility for maintaining a reasonable budget and hearing and deciding cases with appropriate efficiency in light of the court's resources).

[154] FED. R. CIV. P. 16(a)(1), (5) (2016).

rule is to "shift[] the emphasis away from a conference focused solely on the trial and toward a process . . . that embraces the entire pretrial phase," and in doing so "explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed."[155]

2. Appellate Courts: Doctrine Independent of Court Adjudication

The most obvious—and most important—consequence of fewer civil trials on appellate courts is that there are fewer appeals.[156] The decline in appeals has a major consequence for the entire legal system: a decrease in the amount of binding authority being produced.

In a time where new technologies are challenging old legal principles, the need for cases interpreting those principles in modern settings is on the rise.[157] The incentives to avoid trial, however, have resulted in fewer appellate cases reaching the reporters:

> Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of law governing civil cases. Fewer common law precedents will leave future litigants without clear standards for negotiating civil transactions or conforming their conduct in a responsible manner. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to developing societal circumstances that become apparent through claims filed in state courts.[158]

This trend occurs as the amount of law and legal discourse has dramatically increased; statutes and regulations proliferate[159] just as the number of law journals and published academic content continues to

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[155] FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

[156] *See, e.g.*, Catherine R. Connors, *2017 Statistics*, ME. APPEALS (Sept. 20, 2017), http://www.maineappeals.com/2017-statistics/ ("The 2017 numbers reflect a continuation of the trend we commented upon in our discussion of the 2012-16 period: the total number of appeals are declining, with a big drop in civil commercial appeals. . . . The same trends seem to be on the horizon, if you look at the Superior and District Court statistics."); *Federal Judicial Caseload Statistics 2017*, Admin. Off. U.S. Cts., http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017 (last visited Feb. 26, 2018) (observing that civil appeals in the U.S. circuit courts of appeal "remained nearly unchanged" following a seven percent drop in 2016); *2015 Ohio Courts Statistical Summary*, SUP. CT. OHIO, 17 (Aug. 2016), https://www.supremecourt.ohio.gov/Publications/annrep/15OCSR/summary/2015OCS.pdf ("The overall number of appeals filed in Ohio's court of appeals has been declining steadily for the last ten years.").

[157] *See, e.g.*, John Shinal, *When Technology and Society Outpace the Law*, USA TODAY (Mar. 3, 2016, 10:47 AM), https://www.usatoday.com/story/tech/columnist/shinal/2016/03/01/when-technology-and-society-outpace-law/81167076/.

[158] HANNAFORD-AGOR ET AL., *supra* note 58, at 38.

[159] *See* Galanter, *supra* note 19, at 562–64 (observing the dramatic increase in legal materials and specifically charting a rise in the number of federal regulations issued each year).

rise.[160] Much of this secondary literature analyzes material generated without court adjudication, such as by critiquing other writers' theories of how cases should be decided under certain circumstances.[161] And even when appellate courts issue published decisions, they do not limit their citation of authorities to sources tested through the crucible of in-court adjudication.[162]

This trend is particularly concerning in light of the special role courts play in maintaining the legitimacy of the American common law legal system.[163] The "adversarial crucible" of public in-court litigation subject to plenary review by an appellate court "ensur[es] fidelity to the rule of law."[164] Public court proceedings "carry important symbolic value: at their best, they are emblematic of fair, swift, and transparent justice. The strengths and weaknesses of a party's case, the credibility of evidence, the skill of attorneys, and the demeanor of the judge are all on display in the open courtroom."[165]

This exalted role of courts flows from one critical fact about our common law system: the authoritative interpretation of all governing documents—statutes, regulations, and even constitutions—comes from case law.[166] Court adjudication, particularly as developed through published appellate opinions, "limns and develops the law itself."[167] Through case law, citizens learn exactly what is and is not appropriate, and legislatures identify areas to clarify through statutes.[168] Court adjudication is thus so much more than simply doing justice in individual cases: it makes social life possible.[169]

In the disappearing civil trial, one can see how institutional pressures have incentivized litigants to seek more efficient, generally private, justice

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[160] Galanter, *supra* note 12, at 529–30.

[161] Galanter, *supra* note 12, at 530.

[162] *See* Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 502–08 (2000) (observing a dramatic increase in citation of nonlegal sources by the United States Supreme Court and many lower courts since 1990 and attributing that rise to technological advances permitting more efficient access to nonlegal information).

[163] *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 593–94 (2001) (observing that "political legitimacy" of the judicial system is among the "foundational goals" of in-court litigation).

[164] Freer, *supra* note 83, at 1494–95.

[165] William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55, 76–77 (2013).

[166] Freer, *supra* note 83, at 1495.

[167] Freer, *supra* note 83, at 1495.

[168] Freer, *supra* note 83, at 1495–96.

[169] James R. Maxeiner, *The Federal Rules at 75: Dispute Resolution, Private Enforcement or Decisions According to Law?*, 30 GA. ST. U. L. REV. 983, 1015 (2014).

in individual cases at the cost of diminishing courts' role in society. The resulting situation, one that is already beginning to manifest itself, should give all attorneys pause: the binding case law that does exist is increasingly removed from its basis in fact.[170]

> In a realm of ever-proliferating legal doctrine, the opportunities for arguments and decisions about the law are multiplied, while arguments and decisions become more detached from the texture of facts—at least from facts that have weathered the testing of trial. The general effects of judicial activity are derived less from a fabric of examples of contested facts and more from an admixture of doctrinal exegesis, discretionary rulings of trial judges, and the strategic calculations of the parties. Contests of interpretation replace contests of proof. *Paradoxically, as legal doctrine becomes more voluminous and more elaborate, it becomes less determinative of the outcomes produced by legal institutions.*[171]

In short, as court adjudication has become less accessible or desirable for litigants, the other forums replacing it have failed to fulfill the essential societal role played by courts.[172] The resulting proliferation of legal doctrine, untried through the common law crucible of court adjudication and removed from an accurate factual basis, will be ill-suited to the task of addressing an impending tide of novel scenarios.[173]

3. Judges

The judiciary is, ultimately, a human endeavor and the decline in civil trials has affected the judges themselves. The decline has two primary consequences for judges.

a. Judicial Inexperience

As fewer and fewer practicing attorneys develop civil trial experience, there will be fewer potential experienced trial judges. Some commentators fear that, as these trends continue, "the growing lack of jury trial experience within the bar and increasingly the state court trial bench [will become apparent]. This may further feed the decline in civil jury trials as lawyers and judges discourage their use due to unfamiliarity with trial practices."[174] The same trend is likely at work among the federal bench, as the ratio of trials-to-judges has decreased over time.[175] Whereas from 1962 to 1989 there were between twenty and twenty-five civil trials per year for

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[170] *See infra* Part III.D.3.

[171] Galanter, *supra* note 12, at 530 (emphasis added) (footnotes omitted).

[172] Galanter, *supra* note 12, at 530

[173] *See supra* note 157 and accompanying text.

[174] HANNAFORD-AGOR ET AL., *supra* note 58, at 38.

[175] GALANTER & FROZENA, *supra* note 48, at 25.

each sitting federal judge, that number dropped to around five civil trials per year for each judge by the mid-2000s.[176]

b. The Lure of Private Judging

As ADR has become the primary method for adjudicating high-value civil disputes, the demand for experienced mediators has increased. Unsurprisingly, many well-qualified judges have found the financial incentive of becoming an ADR specialist sufficiently tempting to justify leaving the bench, which has implications for the quality of decisions:

> There is anecdotal evidence that, in some areas, the siren song of private arbitration is affecting the bench because judges, underpaid almost everywhere, can earn so much more by leaving the bench to open their own practice as a "neutral." Moreover, the private judge has none of the protections of an independent judiciary and is therefore subject to pressures from which a judge with life tenure is immune. And in my experience, the private neutrals selected in significant commercial matters do not reflect the same diversity as the judiciary.[177]

This trend is certainly at work in Virginia, where announcements of newly retired judges joining mediation practices appear on an almost weekly basis.[178] The flight of experienced judges, combined with increasingly inexperienced new judges, will likely accelerate the move away from civil trials.

B. New Attorneys

The most notable consequence of the disappearing trial for new attorneys is a shift from gaining hands-on trial experience early in their careers to learning litigation skills through alternative methods. Traditional methods of lawyer education and training will become increasingly important to provide new lawyers with the knowledge and skills needed to succeed at trial. At the same time, the shift away from the trial as the sole or preferred method of dispute resolution may present opportunities for new attorneys to develop different skills and practices that could better serve clients and the legal profession.

1. Fewer Opportunities for Trial Experience

With fewer trials, it comes as no surprise that there are fewer opportunities for young lawyers to gain trial experience. Clients may also be reluctant to entrust young lawyers with the high-stakes matters that

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[176] GALANTER & FROZENA, *supra* note 48, at 25.

[177] Refo, *supra* note 14, at 4.

[178] *See, e.g.*, *ADR: 2015 Alternative Dispute Resolution Survey*, VA. LAW. WKLY., Aug. 24, 2015, at B-5 (surveying former Virginia judges now working in mediation practices).

progress to trial.[179] If fewer attorneys gain trial experience early in their careers, they may develop a long-term reluctance or even aversion to taking cases to trial. This reluctance on the part of attorneys could exacerbate judicial reluctance to hold trials, as both the bench and the bar become increasingly less familiar with actual trials.[180] Without conscious action by the bench and bar, the limited opportunities for newer attorneys to bring cases to trial may create a self-fulfilling prophecy dooming civil trials.

Aside from fewer opportunities to gain direct trial experience, young lawyers—and litigators generally—will have "fewer jury verdicts upon which [they] can form a solid basis for predicting the outcome of a particular dispute in the community, thereby making it exceedingly more difficult for [attorneys] to evaluate a case and to properly advise [their] client[s]."[181] As noted below, however, young attorneys can gain trial experience while providing meaningful representation through pro bono service.[182]

2. An Increased Role for Law Schools, Mentors, Judges, and Bar Associations

Young attorneys still need to understand how trials work and to develop effective litigation techniques and strategies. Law schools are responding to this need by increasing practical training and skills development programs, such as traditional mock trial and moot court competitions, as well as new experiential learning programs, like legal clinics, skills immersion programs, and apprenticeships.[183] Some law schools have recently increased their clinical and practical offerings up to tenfold to meet the demands of students and employers.[184] Practicum courses and clinics offer law students an in-depth, experience-based approach to legal education that gives them a practical understanding of

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[179] Symposium, *Commercial Law Developments and Doctrine: Part I. Developments in the Field: Litigation in the 21st Century*, 56 ADVOC. 8, 8 (2011) [hereinafter *Commercial Law Developments*].

[180] *See* HANNAFORD-AGOR ET AL., *supra* note 58, at 38 (explaining that there is a growing lack of jury trial experience within the legal community and that precedent becomes threatened by the decline in formal adjudication).

[181] *Commercial Law Developments*, *supra* note 179, at 10; *see also supra* Part III.A.2 (discussing the wider consequence of legal doctrine developing without a sound basis in factual dispute).

[182] *Commercial Law Developments*, *supra* note 179, at 10.

[183] *Commercial Law Developments*, *supra* note 179, at 10.

[184] Delece Smith-Barrow, *Consider Practicums when Deciding on a Law School*, U.S. NEWS (May 7, 2015, 9:00 AM), https://www.usnews.com/education/best-graduate-schools/top-law-schools/Articles/2015/05/07/consider-practicum-offerings-when-deciding-on-a-law-school.

effective litigation tactics and strategies under the supervision of experienced attorneys.[185]

Judicial internships and judicial participation in law school programs teach students what attorneys can do to help judges manage cases and reach timely, correct decisions.[186] Feedback from judges in these settings will help young lawyers understand their role as trial advocates and hone their skills so they are prepared when they bring a client's case to trial.

Young attorneys can look for guidance from other traditional sources. Local bar associations provide information about how particular judges manage trials and other practice in their courtrooms. Mentorship relationships with more experienced attorneys, whether or not within the same firm, remain an important way to develop and train new attorneys in the practical aspects of trials. More senior attorneys also serve as examples of the oath sworn by Virginia attorneys to "faithfully, honestly, professionally, and courteously demean [themselves] in the practice of law and execute [their] office of attorney at law to the best of [their] ability."[187] These seasoned lawyers demonstrate and encourage civility in the profession, which is an important part of improving lawyer well-being.[188]

Experienced attorneys and local and specialty bar associations can also provide valuable insight into the ADR process. Because by its nature ADR is not as public as traditional litigation, attorneys may have limited opportunities to research how a particular arbitrator (or arbitration tribunal) operates in practice, and, more importantly, how similar cases have been resolved by that arbitrator (or tribunal). These fundamental aspects of procedure and precedent are crucial for attorneys in traditional litigation, and they are similarly essential for an effective attorney in arbitration or another ADR system. Young attorneys can learn these important pieces of "inside information" through their relationships with more experienced practitioners and from the educational resources provided by local and specialty bar associations.

3. Opportunities to Build Different Types of Practice

Having entered the profession either during or just after the Great Recession, young attorneys have come to expect a legal market that is less stable and predictable than before.[189] They have seen how technology has already shaped the practice of law, and they are prepared to embrace creative problem-solving both for their clients and for their own

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[185] *Id.*

[186] *Commercial Law Developments*, *supra* note 179, at 9.

[187] VA. SUP. CT. R. 1A, Form 2 .

[188] *See* THE PATH TO LAWYER WELL-BEING, *supra* note 8, at 15.

[189] *See, e.g.*, Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051–52 (2010).

practices.[190] The good news for this generation of attorneys is that this disruptive period is the only legal environment they have ever known. While the rest of the profession struggles to orient itself, new attorneys already embrace adaptation and new dispute resolution mechanisms without fear of abandoning comfortably familiar processes whose utility may have waned.

In light of their experiences, young attorneys may view ADR as an opportunity to develop a different type of practice, perhaps one that is more versatile and employs a wider range of ADR techniques alongside traditional litigation. Young lawyers with knowledge of and experience with ADR can offer their clients options to better tailor dispute resolution processes to particular situations and budgets.[191]

ADR also presents an opportunity for young attorneys to find a dispute resolution process that best fits their personality and practice area interests. For example, a young attorney interested in family law may find that such a practice benefits from increased use of ADR to resolve not only legal disputes, but also personal, financial, and other disputes. ADR, particularly collaborative law, allows for the involvement of other professionals with diverse areas of expertise, such as counselors and financial advisors, in ways that traditional litigation does not.[192] In this regard, ADR may provide for a more complete resolution of a client's issues than a court order.

Attorneys who are able to provide a more holistic approach to a client's problems may be able to build a practice that is more personally satisfying and better serves their clients than those who ignore other available dispute resolution processes. "At its core, law is a helping profession," but that noble aim can be overshadowed by practice models that "emphasize competitive, self-serving goals."[193] New attorneys may look to other practice models as part of the effort to increase lawyer well-being, as other ADR practice models offer more control over schedules, processes, and outcomes than traditional litigation.[194]

Even within a traditional firm, young lawyers can impress both partners and clients by mastering ADR, such as suggesting and drafting

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[190] One law firm consultant observed that the "seismic shift in the legal market means law firms must do things differently." Joe Forward, *Post-Recession Gives Rise to New Law Firm Models*, INSIDETRACK (Sept. 18, 2013), http://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=5&Issue=18&ArticleID=11045.

[191] *See* Jay Welsh, *How to Use ADR to Further Your Career*, ABA YLD, https://www.americanbar.org/publications/young_lawyer_home/young_lawyer_archive/how_to_use_adr_to_further_your_career.html (last visited Feb. 26, 2018).

[192] PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 3–5 (2001).

[193] THE PATH TO LAWYER WELL-BEING, *supra* note 8, at 33.

[194] THE PATH TO LAWYER WELL-BEING, *supra* note 8, at 16–17.

appropriate ADR clauses for contracts and explaining ADR options to clients.[195] Young lawyers may even help more experienced practitioners in their firms by presenting informed proposals recommending when and how disputes should be selected for ADR rather than traditional litigation, particularly as clients have grown more sensitive to the cost and time associated with litigation.

C. Clients

The shift toward ADR has affected how attorneys advise their clients, both in transactional and litigation practice. The Virginia Rules of Professional Conduct state that, as an advisor, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[196] A lawyer's duty to provide "competent representation" includes "determining what kind of legal problems a situation may involve" and "inquiry into and analysis of the factual and legal elements of the problem."[197] Lawyers also provide practical advice that "may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances."[198]

Lawyers, therefore, have an ethical duty to understand the options of ADR and litigation in order to competently advise clients about which course to pursue. This duty requires that they understand their client's interests beyond those implicated in a particular transaction or dispute. Although the methods and processes are relatively new, ADR presents a variation on a familiar theme: how to deliver the result a client wants, or at least a result that the client can accept, given the factual situation and the client's interests and resources.

1. Advising Clients when Structuring a Transaction

As reflected in Rule 2.1 of the Rules of Professional Conduct, a lawyer's advice considers the particular factors relevant to a client's situation.[199] This includes advice about how to design and select a dispute resolution mechanism when a client is structuring a transaction. The individual factors will vary, but there are some common, broad factors that can help a lawyer and his or her client decide whether to select courts, arbitration, or a hybrid "multi-tiered" dispute resolution mechanism. In

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[195] Welsh, *supra* note 191.

[196] VA. SUP. CT. R. pt. 6, § II, 2.1 cmt. 2.

[197] *Id.* 1.1 cmts. 2, 5.

[198] *Id.* 2.1 cmt. 2.

[199] MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2007).

any event, the selection of a dispute resolution mechanism in a contract should be the deliberate result of careful evaluation.

For example, industry practice may help determine which dispute resolution mechanism to employ.[200] If arbitration is uncommon in the client's industry or geographic area, customers and employees may balk at attempts to include mandatory arbitration in the client's agreements. On the other hand, if customers or employees have been dissatisfied with a court-based approach in the past, they may be more open to try other methods.

Other factors may lead a client to choose arbitration when drafting a contract. Arbitration allows the parties to control and design the dispute resolution process.[201] Arbitration can be faster than litigation, which can reduce costs compared to traditional litigation.[202] It leads to a final result, rather than allowing appeals associated with traditional litigation, which can reduce costs and uncertainty for the parties involved.[203] Arbitration also offers clients confidentiality and the ability to select the arbitrators who will decide the case, which may allow a client to choose an arbitrator familiar with industry-specific practices and issues.[204]

Mediation or a collaborative approach may be more conducive to maintaining a relationship than a traditionally adversarial process like litigation. For example, mediation can help parties resolve disputes as they arise in the context of an ongoing relationship, such as a construction project, and allow them to efficiently address conflicts without jeopardizing their larger shared goals and interests.[205]

Lawyers should be prepared to advise their clients when a hybrid dispute resolution approach is best suited to a transaction. Particularly when the parties plan to have multiple interactions or an ongoing relationship, multi-tiered dispute resolution can offer options to resolve

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[200] *See, e.g.*, Leonard M. Kessler, *Using Mediation to Resolve Construction Disputes*, LEXIS PRAC. ADVISOR J. (Sept. 27, 2017), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2017/09/27/using-mediation-to-resolve-construction-disputes.aspx (explaining that many construction industry standard contracts require the parties to mediate disputes prior to instituting litigation).

[201] *See* ABA SECTION OF DISPUTE RESOLUTION, BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES 2, 4, https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Feb. 26, 2018).

[202] *Id.* at 3.

[203] *Id.* at 7.

[204] *Id.* at 5.

[205] *See* Kessler, *supra* note 200 (discussing the utility of mediation in the context of construction disputes).

smaller disputes quickly and at low cost without the adversarial nature of litigation, while also allowing the parties to litigate major conflicts.[206]

For example, multi-tiered dispute resolution can begin with the simple step of notifying the other party that a problem exists.[207] In many cases, this may be enough to resolve the dispute. If not, the parties can provide for escalating dispute resolution—perhaps through meetings between increasingly senior representatives from both parties, and then to mediation.[208] Failing that, the parties can still turn to the courts; however, at least by that stage, the nature of the dispute and the relevant facts should be well-established, and litigation may be able to proceed more quickly than if the parties had attempted to resolve the dispute by litigation first.[209]

It is also important to advise clients about what mediation and arbitration actually mean in the context of the transaction at issue. For example, clients should know that, although arbitration awards can be appealed to a court, the grounds for such an appeal are narrow. Only fraud, "evident partiality" or "corruption," refusal to hear material evidence, the lack of an arbitration agreement, and the arbitrator exceeding his powers will serve to vacate an arbitral award.[210] In addition, although arbitrators can control discovery, they may be more willing to admit a wide range of evidence in order to defeat a potential claim that they failed to hear material evidence.[211] In this situation, the potential advantages in speed and cost of arbitration compared to traditional litigation may be significantly reduced.

Clients must also understand that reviewing courts are unlikely to disturb an arbitral award.[212] An arbitral award will not be disturbed, for example, when it is based on hearsay evidence, when the arbitrator misinterpreted the contract, or even when the arbitrator committed an error of law.[213]

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[206] Kessler, *supra* note 200.

[207] *See, e.g.*, Dominion Transmission, Inc. v. Precision Pipeline, Inc., No. 3:13cv442-JAG, 2013 U.S. Dist. LEXIS 159164, at *2 (E.D. Va. Nov. 5, 2013).

[208] *Id.* at *3.

[209] *Id.*

[210] 9 U.S.C. § 10 (2017); VA. CODE ANN. § 8.01-581.010 (2017).

[211] *See, e.g.*, Farkas v. Receivable Fin. Corp., 806 F. Supp. 84, 87 (E.D. Va. 1992) (stating that "[a]rbitrators do not exceed their powers by admitting or considering hearsay evidence").

[212] *See* Va. Beach Bd. of Realtors, Inc. v. Goodman Segar Hogan, Inc., 299 S.E.2d 360, 362 (Va. 1983) ("It is well settled in Virginia that '[a]wards are to be liberally construed to the end that they may be upheld if possible.'").

[213] *Farkas*, 806 F. Supp. at 87.

2. Advising Clients when Disputes Occur

Lawyers must also be prepared to advise their clients when disputes arise, including the "advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances."[214]

The first stage in this analysis is to determine whether a contract governs a client's dispute and, if so, what kind of dispute resolution mechanism is provided in the contract. Failure to follow the contractual dispute resolution procedure before filing a lawsuit may result in the dismissal of the case.[215]

If the dispute resolution procedure is not established by an applicable contract, a lawyer must be prepared to discuss the range of available dispute resolution tools with his or her client. "[L]awyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests," and the ethical duty of "diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties."[216]

Some of the same factors that influence the choice of a dispute resolution mechanism when planning a transaction apply in this stage as well. For instance, if the parties want to maintain a good relationship, whether commercial or familial, it may be helpful to begin with mediation. If the parties are especially concerned with confidentiality, or want more control over the process, arbitration may be a viable alternative to litigation. Although arbitration often arises from a pre-dispute contract, parties may agree to arbitrate after a dispute arises.[217]

In addition to these factors, the attorney should also consider the client's situation, the underlying facts of the dispute, and the personalities involved on all sides of the dispute. Mediation and collaborative law can present significant advantages relative to traditional litigation, but they depend on the parties' ability to address their dispute in a productive, understanding posture. If any of the parties resists those processes, their potential advantages are quickly overshadowed by frustration and delay.

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[214] VA. SUP. CT. R. pt. 6, § II, 2.1 cmt. 2.

[215] *See* Dominion Transmission, Inc. v. Precision Pipeline, Inc., No. 3:13cv442-JAG, 2013 U.S. Dist. LEXIS 159164, at *7–9 (E.D. Va. Nov. 5, 2013) (noting that the court declined to hear litigation on the parties' contract because Dominion failed to comply with the mandatory mediation requirement in the contract prior to filing the case).

[216] Va. Sup. Ct. R. pt. 6, § II, 1.3 cmt. 2.

[217] VA. CODE ANN. § 8.01-577(A) (2017) ("Persons desiring to end any controversy, whether there is a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any circuit court or entered by order of any general district court.").

Choice is therefore the blessing and curse of the proliferation of ADR. With so many dispute resolution options to choose from, the lawyer plays a critical role by providing informed advice to match a particular client's problem with a particular dispute resolution process. For clients, the decline of civil trials and the rise of ADR may mean that they can resolve their disputes faster and more economically by selecting an appropriate process. Clients will stand to benefit the most when that selection is based on candid, knowledgeable advice from attorneys who understand the client's business and interests as well as the dispute at hand. Once again, the shift away from traditional trials and toward ADR presents a variation on the theme that highlights the role of the attorney as counselor, advisor, and negotiator.[218]

D. The Public

Finally, the disappearance of the civil trial directly affects the public's perception of the legal profession, which is essential for the legal system's legitimacy. This section reviews how the trend toward fewer traditional trials contributes to low-income Americans' inability to access legal services and exacerbates the problem of inadequate legal precedent discussed earlier.[219]

1. Access to Justice Concerns and Pro Bono Opportunities

As we have seen, state court trials often involve lower-value contract and small claims cases, and in only about a quarter of such cases are both parties represented by counsel.[220] These cases may not result in complex trials, but they are nonetheless of great importance to the parties, who may be facing eviction, monetary judgments, loss of custody, or other serious consequences. It is hopefully not surprising that whether a party is represented in such cases has a significant effect on the outcome.

For example, a 2012 Boston study revealed that unrepresented tenants facing eviction retained possession of their homes in approximately 33% of cases, whereas represented tenants retained possession in approximately 66% of cases.[221] Although other factors were no doubt involved in the outcome of these cases, and there is no guarantee

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[218] *See* MODEL RULES OF PROF'L CONDUCT pmbl. para. 2 (AM. BAR ASS'N 2017) (explaining the lawyer's role as an advisor, advocate, and negotiator); *id.* r. 2.1 (explaining the lawyer's role as an advisor).

[219] *See supra* Part III.A.2.

[220] HANNAFORD-AGOR ET AL., *supra* note 58, at 35.

[221] John E. Whitfield, Address at the Virginia State Bar Annual Meeting: How Attorneys Can Promote and Advance Access to Justice (June 16, 2017) (citing BOS. BAR ASS'N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION 9 n.16 (Mar. 2012)).

that attorney involvement alone would equalize these results, it also appears that attorney representation can have a significant effect on the outcomes of such cases across a variety of jurisdictions.[222] Attorney representation also plays a significant role in custody disputes. For instance, a Maryland study found that mothers obtain sole custody of their children in approximately 75% of cases where neither party is represented, 90% of cases where only the mother is represented, and 45% of cases where only the father is represented.[223]

These examples reveal the critical role that attorneys can play in the types of trials that occur every day in state courts. Although attorney representation may not be decisive in every case, the results of these studies indicate that, overall, effective attorney representation for both parties has a meaningful effect on cases that have serious and long-term consequences.

These studies also reveal a potential win-win situation for young attorneys and the public: the opportunity for young lawyers to develop practical trial experience through pro bono service that directly addresses an important component of the justice gap by representing the parties in such cases. Although the other pressures facing young attorneys, such as billable hours, may discourage pro bono pursuits, young attorneys and their employers should recognize that pro bono service provides an important opportunity for attorneys to gain valuable experience in court while also serving a critical need. This perspective provides one example of a way to "transform[] legal culture/expectations" regarding pro bono service and to "inculcate a culture of pro bono service among Virginia's newest lawyers."[224]

2. Consumer and Employee Rights May Not be Adequately Protected by ADR

Increased reliance on private, confidential ADR may limit the effectiveness of the courts' guidance in crucial areas such as consumer rights and employment. In these contexts, the choice of a dispute resolution mechanism can have a significant impact on the ability of litigants to effectively protect their rights and hold powerful institutions accountable.

For example, the Consumer Financial Protection Bureau (CFPB) announced a rule to ban the use of mandatory arbitration clauses and to

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222 *See id.* (collecting studies from eight other jurisdictions demonstrating the same trend in landlord-tenant matters).

223 THE WOMEN'S LAW CENTER OF MD., INC., FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND (2006).

224 Order Establishing the Virginia Access to Justice Commission, Va. (Sept. 13, 2013), http://www.courts.state.va.us/programs/vajc/resources/order.pdf.

restore consumers' right to file or join class action lawsuits.[225] Based on its 2015 study, the CFPB noted that "[o]nly about 2 percent of consumers with credit cards surveyed said they would consult an attorney or consider formal legal action to resolve a small-dollar dispute," and so concluded that "the real effect of mandatory arbitration clauses is to insulate companies from most legal proceedings altogether."[226]

Without class action lawsuits, the CFPB opined that "private citizens have almost no way, on their own, to stop companies from pursuing profitable practices that may violate the law."[227] With few private citizen class actions, courts lose an important tool to enforce and interpret the law, and the public loses an important check on abusive practices.[228] However, after the Vice President cast a tie-breaking vote, the Senate voted to overturn the CFPB's rule, which would have gone into effect in 2019.[229] The CFPB director noted that the Senate vote meant that companies "remain free to break the law without fear of legal blowback from their customers."[230]

Similar trends and consequences appear in the employment context, as employees are increasingly bound by arbitration clauses that prevent them from pursuing a wide range of labor issues in the courts, such as nonpayment of wages and employment discrimination.[231] As in the consumer context, many of these employment arbitration clauses are coupled with a prohibition against class actions. This combination can limit the ability of employees to find counsel willing to accept their case on a contingency fee basis, because the recovery in arbitration is approximately 16% of that obtained in federal court and 7% of that obtained in state court, and the litigation costs cannot be spread among a class of plaintiffs.[232]

Some of these negative outcomes are less prevalent in unionized workplaces, where the relative advantages of arbitration in cost and speed

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[225] *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CFPB (July 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/.

[226] *Id.*

[227] *Id.*

[228] *See id.*.

[229] Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html.

[230] *Id.*

[231] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), http://www.epi.org/publication/the-arbitration-epidemic/.

[232] *Id.* at 21–22.

are balanced by the "institutional role" of the union "as the bilateral partner to the employer."[233] Nonetheless, it is important to recognize the potential for illegal acts to continue without scrutiny or consequence due to the barriers imposed by ADR to enforce certain types of rights.[234] As attorneys and lawmakers choose enforcement mechanisms, they must consider the potential challenges and advantages for the parties that will be involved in disputes and recognize that the selection of a particular enforcement mechanism has consequences for individual litigants as well as broader society.

3. Loss of Precedent and Public Participation in the Justice System

Although referenced above in our discussion of the judiciary, the fact that the decreasing number of trials, and thus appellate court decisions, may leave some areas of law with relatively sparse precedent, or at least with precedent that becomes obsolete in the face of rapid technological change, bears further mention in our consideration of effects on the public.[235] Our common law tradition has relied on courts not to make laws but to "say what the law is" and to provide guidance in the interstices of the statutes and contracts that govern our daily lives.[236]

One of the hallmarks of our common law system, and a bedrock principle in the rule of law generally, is the role of precedent in creating predictability and stability in the law.[237] The decline in civil trials and the rise of ADR both reduce the opportunities for courts to develop precedent, which may reduce the public's access to current interpretations of the law. Arbitration may create precedent in some forms, such as individual arbitrators' attempts to maintain consistency among their own decisions, citation to other arbitral awards as "normative authority," and parties shaping their arguments and conduct in light of past decisions.[238] However, the confidentiality of arbitration—and other forms of ADR—means that whatever type of precedent they produce is unlikely to be publicly available in the way that precedent from court cases is publicly available.[239]

The decreasing role of the jury trial poses a particular concern for the public because it creates the potential for "the law" as understood and

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[233] *Id.* at 14–15, 18–19.

[234] *See id.* at 4 (illustrating how mandatory arbitration has affected employment rights).

[235] *See supra* Part III.A.2.

[236] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[237] *See, e.g.*, Gibson v. Commonwealth, 756 S.E.2d 460, 465 n.2 (Va. 2014).

[238] W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1899–1902 (2010).

[239] *Id.* at 1899.

applied by courts—let alone by arbitrators and other alternative tribunals—to become insulated from public sentiment. As William Blackstone commented: "Law is the embodiment of the moral sentiment of the people."[240] Indeed, the jury trial is enshrined in the Constitution of Virginia: "[I]n controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."[241]

Thus, the jury serves an important role in keeping lawyers and judges connected to the "moral sentiment of the people," and helps ensure that those responsible for interpreting and applying the law understand the breadth and diversity of the communities they serve.[242] A jury is not only a fact-finding instrument in a discrete case; "in many respects, [juries] provide a barometer of the community's mores and ethics—a reality check, if you will, on the sometimes narrow perspective that lawyers as well as judges can develop after years of legal training and experience have, to some extent, caused them to focus on the trees instead of the forest."[243]

The rule of law depends on citizens' agreement to obey the law.[244] The jury trial helps to ensure not only that the court understands the public's moral sentiment, but also that the government obeys its own laws.[245] As Thomas Jefferson observed: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[246] If the jury trial continues to decline, and the public no longer feels that the law aligns with their morality and sense of fairness because it has become too disconnected from public input, there may be a decrease in respect for the rule of law and an increase in public distrust of legal institutions. The future of the legal profession and the justice system depend on continued public investment and belief in the courts. Whatever the future holds for civil trials and ADR, attorneys bear a solemn responsibility to protect the rule of law and ensure that justice remains rooted in the service of the people.

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[240] State v. Kinney Bldg. Drug Stores, Inc., 151 A.2d 430, 432 (N.J. Sup. Ct. 1959).

[241] VA. CONST. art. I, § 11.

[242] *Kinney*, 151 A.2d at 240; R. Johan Conrod, Jr., *The Young Lawyer's Dilemma*, FED. LAW., July 2009, at 10, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2009/The%20Federal%20Lawyer%20-%20July%202009/Columns/At-Sidebar-The-Young-Lawyers-Dilemma.aspx?FT=.pdf.

[243] Conrod, *supra* note 242, at 10.

[244] *About Us*, CTR. FOR TEACHING RULE L., http://www.thecenterforruleoflaw.org/vision.html (last visited Mar. 2, 2018).

[245] John Paul Ryan, *The American Trial Jury: Current Issues and Controversies*, NAT'L COUNCIL SOC. STUD. (1999), http://www.socialstudies.org/sites/default/files/publications/se/6307/630711.html.

[246] NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 16 (2007).

IV. THE NEW ERA OF LEGAL UNCERTAINTY

Several conclusions can be drawn from the foregoing discussion. The disappearing civil trial is but one of several disruptive influences on the traditional practice of law, which, taken together, have brought the legal profession into an unprecedented period of upheaval.[247] The courts, lawyers, their clients, and the general public are all adapting to a world where trials, and even traditional approaches to litigation, are becoming outliers rather than the norm.[248] But do these changes mean the end of court adjudication? In short, no.

In this Part, we argue that the second- and third-order consequences of the decline in civil trials have already begun to outstrip the effects of the decline itself. It first reexamines the historical explanation of the decline in light of these consequences, concluding that they have inverted Langbein's thesis: whereas once factual uncertainty drove litigation, the same forces driving the civil trial decline are making the law itself more uncertain. This Part concludes by proposing several ways the legal profession can proactively adapt to the dawning era of legal uncertainty.

A. A Flaw in the Narrative of Civil Trial Decline

Langbein's historical thesis follows a simple formula:

1. Law and facts are necessary for courts to adjudicate disputes.
2. Pretrial discovery improved the investigation of facts.
3. With facts known, parties could apply the law to their own disputes without recourse to the courts.[249]

Under his paradigm, the Federal Rules of Civil Procedure instituted a novel system of pretrial discovery, which shifted the focus of litigation from the courtroom to the conference room.[250] Investigatory weakness was the driving force of court adjudication in Langbein's view. Once the parties learned all the necessary facts through discovery, they had no need for the inefficiencies of trial—they could apply the law to the discovered facts themselves.[251] Or, as he put it: "Having seen the dress rehearsal, today's litigants often find that they can dispense with the scheduled performance."[252]

Although a powerful explanation for how the decline in civil trials *began*, Langbein's thesis does not account for why the decline should *continue*. Crucially, Langbein's argument contains an assumption without

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[247] *See supra* notes 1–13 and accompanying text.

[248] *See supra* Part III.

[249] Langbein, *supra* note 13, at 524–26.

[250] Langbein, *supra* note 13, at 542; *see also supra* Part II.A.

[251] Langbein, *supra* note 13, at 551.

[252] Langbein, *supra* note 13, at 551.

which its explanatory power fails: it presupposes that the law itself is known.

Our analysis of the disappearing civil trial's second- and third-order consequences indicates that the decline itself directly undermines the clarity of law, thereby drawing the continuing application of Langbein's thesis into question.[253] For today's litigants, the factual contours of disputes are more readily ascertainable than ever before in our common law system. The law, however, is becoming murkier.

1. The Essential Structure of Legal Problems

To better understand why Langbein's thesis works and how negation of its assumption of legal clarity undermines it, consider the essential structure of every legal question. Systems of civil procedure have a twofold purpose: (1) to determine the facts, and (2) to apply the law to those facts in order to reach a conclusion.[254] This statement seems so fundamental as to be intuitive, largely because it mirrors how we think and reason in everyday life. Arguments of all stripes naturally fall into this structure: application of a governing principle to the specific variables in question to reach a result.[255]

This form of reasoning—really, the essential form of all reasoning—is syllogistic logic.[256] A syllogism consists of a major premise, which is a broad statement of general applicability; a minor premise, which is a narrower statement of only particular applicability and is related to the major premise; and the conclusion, which is the logical result of application of the major premise to the minor premise.[257] Perhaps the most ubiquitous example of a syllogism is the following, which has been studied by students of logic for centuries:

Major Premise: "All men are mortal."

Minor Premise: "Socrates is a man."

Conclusion: "Therefore, Socrates is mortal."[258]

Here, the major premise states a governing principle—it describes the relationship of all men to mortality at all times.[259] The minor premise states a single fact—that Socrates has the quality of being a man. It is

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253 *See supra* Part II.D.

254 *See supra* text accompanying note 88.

255 *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 41–42 (2008).

256 *Id.*; *see also* JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY 3–5 (1993).

257 GARDNER, *supra* note 256, at 5.

258 GARDNER, *supra* note 256, at 5.

259 GARDNER, *supra* note 256, at 5.

narrow, but related to the major premise.[260] The conclusion follows naturally and inevitably from the premises. If both premises are true, then the conclusion must necessarily follow.[261]

All legal arguments ultimately take syllogistic form.[262] For legal argument, the major premise is a statement of the governing law, typically derived from what attorneys would recognize as sources of law—constitutions, statutes, regulations, or binding precedent—but also can be provided by policy consequences or documents like contracts that are binding in particular situations.[263] The minor premise in legal argument comprises the facts to which the governing law is to be applied, and the conclusion, of course, is the result of that application.[264] The advocate's role is to "infer an advantageous governing rule and provide a coordinate factual portrayal—thereby creating favorable syllogistic premises—to ensure the court reaches [the] desired conclusion."[265]

Thus, legal advocacy and judicial decision-making both require identification of a governing rule and application of that rule to the specific facts of the case. Where either the law or the facts are unclear or unknown, any process of adjudication that reaches a conclusion must necessarily be flawed. With these principles in mind, consider the development of the American common law system of civil procedure.

2. The Federal Rules Shifted the Common Law Paradigm

Prior to the enactment of the Federal Rules, American civil procedure largely remained in the era of common law pleading.[266] In this period, the great weakness of civil procedure was an inability of parties to investigate efficiently the facts of a case.[267] In this environment, as Blackstone described from his experience, "above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of."[268] Litigants and courts alike could discern the governing law with ease; it was the facts—the minor premise of the legal syllogism—that proved elusive. In a system in which "legal reasoning revolves mainly around the establishment of the

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[260] GARDNER, *supra* note 256, at 5.

[261] FRANCES HOWARD-SNYDER ET AL., THE POWER OF LOGIC 4 (4th ed. 2009).

[262] *See* Graham K. Bryant, *Revealing the Logic of Legal Writing*, OPENING STATEMENT (VA. BAR ASS'N, Richmond, Va.) (forthcoming Summer 2018) (manuscript at 2–4), https://papers.ssrn.com/abstract=3057481 (dissecting judicial opinion to reveal polysyllogistic chain of reasoning underlying the court's analysis).

[263] GARDNER, *supra* note 256, at 7; SCALIA & GARNER, *supra* note 255, at 42.

[264] GARDNER, *supra* note 256, at 8.

[265] Bryant, *supra* note 262, at 3.

[266] *See* Maxeiner, *supra* note 169, at 1008–09 (stating that the first era of civil procedure was the common law pleading, followed by the code pleading era).

[267] *See supra* text accompanying notes 92–98.

[268] 3 WILLIAM BLACKSTONE, COMMENTARIES *330.

minor premise,"[269] the investigatory failures of the pre-codification common law system of civil procedure created an environment where adjudication was flawed.[270]

The advent of the Federal Rules of Civil Procedure sought to correct this weakness by establishing a novel system of pretrial discovery.[271] The Rules' success in improving litigants' investigatory abilities is unquestionable. Through the new discovery methods, particularly depositions,[272] parties and courts alike on average gained a more thorough understanding of the disputed facts in a given case than ever before in the common law system. Discovery under the Federal Rules empowered parties to determine, without court assistance, both the governing law and the facts to which it must be applied.[273] With both the major and minor premises of the legal question complete and at hand, parties no longer felt a need to resort to courtroom adjudication to reach a conclusion—they could apply the law to the facts themselves.

Thus begins the decline of the American civil trial, according to Langbein's narrative. But the story continues, becoming the tale of a century-long process of over-correction.

3. The Paradigm, Inverted

The Federal Rules' pretrial discovery regime created incentives for litigants that led to a decline in the number of civil trials.[274] These incentives, particularly those regarding cost, time, and efficiency, continue to affect litigant behavior.[275]

Certainly, efficiency remains a concern: if both parties knew the facts and the law were apparent, then so also was the logical conclusion—so why waste time and money taking the case to trial? Secondary consequences also contribute to the trial decline. Foremost among them is the sheer cost of discovery that disincentivized litigants from bringing cases in the first place.[276] The decline in the number of civil trials has

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[269] O.C. JENSEN, THE NATURE OF LEGAL ARGUMENT 20 (1957).

[270] *See* Langbein, *supra* note 13, at 532 (discussing the invention of the nonsuit substantially in response to plaintiffs being surprised by unknown facts at trial).

[271] *See supra* text accompanying notes 101–08.

[272] *See supra* text accompanying note 109.

[273] *See* Langbein, *supra* note 13, at 547, 551 (explaining how the discovery system has allowed litigants to elicit facts and refine legal issues prior to trial without involving the court).

[274] *See generally* FED. R. CIV. P. 26.

[275] *See* ABA SECTION OF DISPUTE RESOLUTION, *supra* note 201 at 3.

[276] Maxeiner, *supra* note 169, at 1009 ("Yet, when most litigating lawyers acknowledge cases with amounts in dispute under $100,000 are not viable, it is hard for defenders of the third era to seriously assert that the Federal Rules achieve their mission of securing the just, inexpensive, and expeditious resolution of every case.").

created a corresponding decline in the number of appeals—after all, if there is no lower court decision to challenge, there is nothing for an appellate court to decide.[277] Many of the same factors driving the decline in civil trials also discourage appeals. Given the time and expense involved in an appeal and a relatively low success rate, a party may decide that a case is not worthy of an appeal even if it was worth taking to trial.

Simultaneously, ADR continues its meteoric rise to the center of modern civil litigation.[278] Rather than undergo the expense and emotional hardship of taking a dispute all the way through trial, parties increasingly seek to settle their disputes more amicably, through mediation or collaborative law, or at least more economically, through methods like binding arbitration. These forms of private adjudication, for better or worse, keep disputes out of the public eye and create few public records.[279]

Finally, increased litigation costs and the shift to often mandatory ADR have a side effect of functionally barring some litigants from accessing justice, through court adjudication or otherwise.[280] Even when low-income litigants are able to bring a case to court, they frequently do so without representation and in courts not of record.[281]

The net effect of these second- and third-order consequences of the decline in civil trials is that the law itself is becoming less certain.[282] This is so even though there is undoubtedly more "law" in existence now than there was at the enactment of the Federal Rules.[283] After all, "[a]s regulation proliferates, so do discretion and pockets of uncertainty."[284] That is, as the amount of raw statutory law and administrative regulation that has not yet been subject to judicial review by a precedent-generating court continues to grow, so also will the discretion of lower courts, administrative tribunals, and ADR neutrals to apply it in their discretion, according to their beliefs, predispositions, or worse—whims. Litigants and adjudicators alike might have only academic discussion in a law review or simply their own prior experiences from which to draw guidance in handling a novel case. And, as lawyers and adjudicators have fewer

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[277] *See supra* Part III.A.2.

[278] *See supra* Part II.B.2.

[279] HANNAFORD-AGOR ET AL., *supra* note 59, at 38; *see also* Parts III.A.2 and III.D.3.

[280] *See supra* Parts III.D.1 and III.D.2 (discussing the justice gap and how mandatory ADR, such as arbitration clauses common in consumer contracts, functionally bars access to justice).

[281] HANNAFORD-AGOR ET AL., *supra* note 59, at 35; Hannaford-Agor, *supra* note 138.

[282] *See supra* Parts III.A.2 and III.D.3.

[283] *See* Schmitz, *supra* note 133, at 589 (arguing that nonbinding arbitration adds an "inefficient layer to the litigation process"); *see also supra* notes 162–64 and accompanying text.

[284] Galanter, *supra* note 19, at 577.

opportunities to develop trial experience over time, the tendency to avoid the uncertainty of trial will only grow.[285] As discussed above, this trend to avoid trial may disproportionately impact some legal issues, such as consumer and employee protection.[286]

The decline of the civil trial has created a self-enforcing norm of court avoidance: as disputes are increasingly resolved without resort to court adjudication, adjudicators have less guidance with which to decide new cases, which further incentivizes risk-averse litigants to pursue the certainty of settlement over the uncertainty of trial. [287]

The increasing lack of legal certainty is exacerbated by the unprecedented period of disruption faced by the legal profession today. Whereas the law office of the 1960s attorney was not so different from that of a lawyer in Blackstone's day, the technological revolution of the late twentieth century heralded a new era of law practice:

> This long period of technological calm ended abruptly with an unbroken and mushrooming succession of innovations—photocopying, facsimile machines, office computers, CD-ROMs, online data services, overnight delivery, e-mail, cell phones, laptops, smart phones, access to the World Wide Web, "the Cloud"—bringing changes in the legal practice, like electronic filing and electronic discovery, as well as nationwide and worldwide firms.[288]

Just as the practice of law is changing, the issues facing twenty-first century lawyers are often the result of new technologies and have no easy analog in the corpus of common law precedent.[289] One of the major impacts

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[285] Galanter, *supra* note 19, at 577 ("For claims remaining in the courts, the prospects for trial are on a downward spiral, as lawyers, unaccustomed to its demands and risks, prefer the safety of settlement with the added attraction of being able to tell the client when a good outcome was achieved.").

[286] *See supra* Part III.D.2.

[287] *See supra* Part III.

[288] Galanter, *supra* note 19, at 4; *see also* sources cited *supra* notes 1–15.

[289] *See, e.g.*, Nathan A. Greenblatt, *Self-Driving Cars Will Be Ready Before Our Laws Are*, IEEE SPECTRUM (Jan. 19, 2016), https://spectrum.ieee.org/transportation/advanced-cars/selfdriving-cars-will-be-ready-before-our-laws-are (discussing uncertainty in which liability principles would apply in accidents involving autonomous cars); Matt Gregory, *Online Rent Payments to Va. Beach Landlord Held up by Bankruptcy*, WAVY.COM (Oct. 25, 2017, 6:35 PM), http://wavy.com/2017/10/25/online-rent-payments-to-va-beach-landlord-held-up-by-bankruptcy/ (discussing issue of determining ownership of rent funds when tenant submitted payment through online collection service, the transaction processed online, but collection service subsequently went bankrupt); Brett Max Kaufman, *Will Apple's FaceID Affect Your Rights?*, ACLU (Sept. 22, 2017, 12:45 PM), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/will-apples-faceid-affect-your-rights (addressing Fifth Amendment implications of facial recognition technology in light of *Riley v. California*); Claire Lampen, *If Your Vibrator Is Hacked, Is It a Sex Crime?*, GIZMODO (Oct. 31, 2017, 2:22 PM), https://gizmodo.com/if-your-vibrator-is-hacked-is-it-a-sex-crime-1820007951 (addressing question of consent for unauthorized access and activation of a Bluetooth-enabled sexual device).

of technology for legal precedent is that technology can put issues in a new light, both in quality and degree, relative to prior fact patterns.[290] Technology can therefore implicate potentially dispositive considerations, such as privacy, that were simply not at issue in prior cases. With technological innovation—and the inevitable tide of novel legal issues it entails—unlikely to abate, and access to precedent-generating court adjudication continuing to decline, uncertainty will be a dominant force in litigation decisions in the future.

Thus has the decline of the civil trial inverted the common law civil procedure paradigm: whereas once adjudication was flawed because of a failure of factual investigation, adjudication in the new era of legal uncertainty is flawed because of a failure to know what the governing law is. Adjudicators will increasingly have to decide cases without knowing what governing principle to apply to the now clearly defined facts, or at least without close precedential parallels to apply to those facts.

B. Reaching Certainty in an Uncertain World

The courts, lawyers, their clients, and the public are all now beginning to grapple with this new paradigm, which will only continue to manifest itself as the consequences of the disappearing civil trial continue to affect the legal system. This disruptive period in the practice of law should not, however, be seen as cause for alarm. Instead, all constituents of the American legal system should see it as an opportunity. For the remainder of this Part, we offer a few suggestions for how the legal profession can adapt its practices to thrive despite relentless change and, perhaps, bring some certainty into this uncertain world.

First, lawyers—especially those who are newly licensed or less experienced—should take on more pro bono litigation cases regardless of their state bar's regulations concerning pro bono participation.[291] Aside from the obvious benefits to the indigent client, who is thus empowered to bridge the justice gap, pro bono work is one of the best ways to gain substantive litigation, and trial, experience. After all, a remarkable number of trials appear to involve unrepresented clients, and in Virginia at least, such trials seem to explain the *increasing* number of civil trials.[292]

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[290] *See, e.g.*, Kaufman, *supra* note 289 (addressing legal implications of facial recognition technology using settled Fifth Amendment principles).

[291] *See, e.g.*, VA. SUP. CT. R. pt. 6, § II, 6.1 (recommending that Virginia attorneys devote at least two percent per year of the lawyer's professional time to pro bono service); Peter Vieth, *Mandatory Pro Bono Reporting Rejected*, 32 VA. LAW. WKLY. 1 (Oct. 9, 2017).

[292] *See* HANNAFORD-AGOR ET AL., *supra* note 59, at 35 (noting that "[o]nly one in four cases has attorneys representing both the plaintiff and the defendant."); Hannaford-Agor, *supra* note 138 (stating that "[t]he majority of state court civil cases are . . . defended by self-represented litigants" of civil cases); *see also supra* Parts I and II.C.

Moreover, state bars and law firms or supervising partners should encourage pro bono participation because it ultimately improves lawyers' standing in society. Increasing the legal profession's reputation for community service and serving underprivileged citizens reinforces the legitimacy of the legal system as a whole.[293] Perhaps more practically, encouraging new attorneys to take pro bono cases through trial allows them to gain trial experience, making them more valuable to an employer and their clients, and, as their careers progress, helps mitigate the problem of trial-averse attorneys ascending to the bench.[294]

Second, courts and legislatures can help combat the rise of legal uncertainty by making institutional changes enabling production of more binding precedent. Increasing the availability of appellate review by, for instance, making additional types of cases subject to appeal by right or expanding the jurisdiction of courts with limited jurisdiction would enable more factual scenarios to receive authoritative rulings.[295] These additional rulings would supplement the guidance available to both lower courts and ADR neutrals, the first-instance adjudicators who will face more cases of first impression than the appellate courts.

Courts and legislatures can also take steps to address some of the factors that have discouraged traditional litigation and made ADR so attractive. For example, expanding the availability of electronic filing and ensuring that courts are adequately staffed at all levels, including judges, can reduce the time needed for a court to decide a case and make the litigation process more efficient. Judicial pay and other incentives should also be addressed to help gain and retain experienced judges on the bench rather than losing them to the lucrative lure of becoming ADR neutrals.[296]

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[293] *See* Ben W. Heineman, Jr. et al., *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, HARV. L. SCH., 37–39, 47 (Nov. 20, 2014), https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf (arguing that lawyers need to make long-term investments in serving their broader community in order to combat widespread public mistrust of lawyers).

[294] *See supra* Parts III.A.3.b and III.D.1.

[295] We do not, however, suggest relaxing procedural default rules, which are commonly thought to be legal technicalities that exist to stifle access to appellate justice and arbitrarily defeat good faith efforts at trial. Although procedural default rules should be applied fairly and with the benefit of the doubt in close cases, such rules advance a core principle of our common law system by placing the scope of a case in the parties' hands rather than those of an inquisitorial judge. For a more thorough defense of appellate procedural default rules, see D. Arthur Kelsey, *Procedural Defaults: Balancing Systemic & Individual Justice*, 1 VTLAPPEAL 1, 1–3 (2012), http://www.vtla.us/2012/Appellate/Issue1/KELSEY-Procedural.pdf.

[296] *See* Peter Vieth, *Retirement Numbers Discourage Potential Judges*, 32 VA. LAW. WKLY. 3 (Nov. 20, 2017) (explaining that Virginia's retirement plan for judges provides little incentive for successful lawyers to leave their practice and join the bench).

Finally, law schools and bar associations should place renewed focus on incorporating legal history into their curricula and CLE offerings. In a period where new statutes and regulations are passed at a rate with which the courts simply cannot keep up, lawyers who have a nuanced understanding of the American common law system's origins and development are better prepared to contextualize new issues within the common law fabric that underpins the entire legal system. New Jersey Supreme Court Chief Justice Arthur Vanderbilt wrote that "[t]he great virtue of history . . . is that it gives us perspective."[297] For lawyers, history's "great utility is in the light it sheds on our own age," while for the law student, legal history "gives a third dimension to subjects which would otherwise be flat."[298]

For decades, however, legal history has occupied a subordinate position in legal education—a trend unlikely to change given the renewed focus on preparing students to graduate as practice-ready lawyers.[299] But legal history provides those who are conversant with common law materials a potent advocacy tool shared by few of their adversaries—for how is someone untrained in navigating English cases or colonial-era treatises to respond to an argument premised on those materials? This is not a hypothetical concern, as the nation's highest court[300] and many state appellate courts[301] often apply legal history in their decisions. Virginia has even codified the continuing applicability of the common law of England prior to 1607,[302] and this codification has been determinative in recent cases.[303] Thus, by equipping new attorneys with a thorough understanding of their legal heritage, alongside their ability to compare precedent to discern the proper rule to be applied in a particular case, they will be better prepared to address first-impression cases brought about by emerging technologies.

CONCLUSION

The common law system of civil procedure had a problem: although they knew the law, litigants were unable to investigate the facts underlying their disputes except at trial. The Federal Rules of Civil

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[297] Edward D. Re, *Legal History Courses in American Law Schools*, 13 AM. U. L. REV. 45, 45 (1963).

[298] *Id.*

[299] *See id.* at 64–65 (discussing why law schools generally are not providing courses on legal history).

[300] *See generally* District of Colombia v. Heller, 554 U.S. 570 (2008) (using legal history to interpret the Second Amendment).

[301] *See, e.g.*, Cline v. Dunlora S., LLC, 726 S.E.2d 14, 16–18 (Va. 2012) (interpreting common law duty owed by landowner regarding natural conditions).

[302] VA. CODE ANN. § 1-200 (2017).

[303] *See, e.g.*, Commonwealth v. Morris, 705 S.E.2d 503, 508 (Va. 2011); Taylor v. Commonwealth, 710 S.E.2d 518, 522 (Va. Ct. App. 2011).

Procedure sought to fix this problem by providing litigants an expansive set of pretrial discovery tools. They were successful—so successful, in fact, that the American civil procedure system is entering a period of overcorrection. Whereas once litigants did not know the facts in dispute, the decline in civil trials caused by the Federal Rules has led to the dawn of a new era of legal uncertainty in which litigants are increasingly unsure of what the law is. The legal profession must be prepared to adapt to this new and disruptive environment in order to thrive and to safeguard the essential function of civil trial courts in publicly upholding the rules of our society.

Appendix A: U.S. District Court Trial Trends

The following is the data set used in our analysis of federal civil trial trends. It is derived in part from Galanter's 2004 study, and in part from our independent analysis of the annual judicial business report produced by the Administrative Office of the U.S. Courts.[304]

Year	Bench Trial	Jury Trial	Total Trials	Total Dispositions	Percent Trial
1962	3037	2765	5802	50320	11.53
1963	3505	3017	6522	54513	11.96
1964	3559	2886	6445	56332	11.44
1965	3885	3087	6972	59063	11.80
1966	3752	3158	6910	60449	11.43
1967	3955	3074	7029	64556	10.89
1968	4388	3148	7536	63165	11.93
1969	4238	3147	7385	67914	10.87
1970	4364	3183	7547	75101	10.05
1971	4381	3240	7621	81478	9.35
1972	4807	3361	8168	90177	9.06
1973	4684	3264	7948	93917	8.46
1974	4903	3250	8153	94188	8.66
1975	5051	3462	8513	101089	8.42
1976	5055	3501	8556	106103	8.06
1977	5290	3462	8752	113093	7.74
1978	5653	3505	9158	121955	7.51
1979	5857	3576	9433	138874	6.79
1980	5980	3894	9874	153950	6.41
1981	6623	4679	11302	172126	6.57
1982	6509	4771	11280	184835	6.10
1983	6540	5036	11576	212979	5.44
1984	6508	5510	12018	240750	4.99
1985	6276	6253	12529	268070	4.67
1986	6045	5621	11666	265082	4.40
1987	5611	6279	11890	236937	5.02

[304] *See supra* note 22.

1988	5691	5907	11598	237634	4.88
1989	5690	5666	11356	233971	4.85
1990	4476	4781	9257	213020	4.35
1991	4127	4280	8407	210410	4.00
1992	3750	4279	8029	230171	3.49
1993	3619	4109	7728	225278	3.43
1994	3456	4444	7900	227448	3.47
1995	3316	4122	7438	229051	3.25
1996	3206	4359	7565	249832	3.03
1997	2801	4551	7352	249118	2.95
1998	2452	4330	6782	261669	2.59
1999	2225	4000	6225	271936	2.29
2000	2001	3778	5779	259046	2.23
2001	1768	3632	5400	247433	2.18
2002	1563	3006	4569	258876	1.76
2003	1532	2674	4206	252125	1.67
2004	1422	2529	3951	251974	1.57
2005	1289	2610	3899	270924	1.44
2006	1140	2415	3555	272617	1.30
2007	1039	8739[305]	9778	239274	4.09
2008	2510[254]	2213	4723	233761	2.02
2009	997	2274	3271	263045	1.24
2010	1058	2251	3309	309357	1.07
2011	940	2254	3194	302922	1.05
2012	993	2219	3212	271383	1.18
2013	977	2152	3129	255069	1.23
2014	926	2028	2954	258275	1.14
2015	877	2091	2968	274354	1.08
2016	816	1965	2781	271293	1.03

[305] For an explanation of these outliers, see *supra* note 23.

Appendix B: Trial Trends in 22 State Courts of General Jurisdiction

The following is the raw data we used in our analysis of civil trial trends in state courts of general jurisdiction. It is derived from the National Center for State Court's data set compiled for the ABA's Vanishing Trial Project.[306]

Year	Bench Trial	Jury Trial	Total Trials	Total Dispositions	Percent Trial
1976	502549	26018	528567	1464258	36.10
1977	499392	25462	524854	1529250	34.32
1978	543893	24103	567996	1682323	33.76
1979	571126	23239	594365	1769757	33.58
1980	603471	23073	626544	1873462	33.44
1981	626188	23555	649743	1991291	32.63
1982	654760	23849	678609	2064635	32.87
1983	667282	23671	690953	2114228	32.68
1984	629572	24124	653696	2112185	30.95
1985	615029	22663	637692	2019391	31.58
1986	604333	23316	627649	2280859	27.52
1987	593130	24428	617558	2336662	26.43
1988	590416	23182	613598	2460803	24.93
1989	612983	22618	635601	2682534	23.69
1990	610741	22387	633128	2828182	22.39
1991	623199	23089	646288	3015817	21.43
1992	688517	24159	712676	3395382	20.99
1993	667480	24109	691589	3257366	21.23
1994	634692	24055	658747	3128551	21.06
1995	613981	23453	637434	3138796	20.31
1996	616557	23649	640206	3107930	20.60

[306] *See supra* notes 49–52 and accompanying text.

1997	641667	24565	666232	3208712	20.76
1998	627451	25201	652652	3338543	19.55
1999	568954	24299	593253	3097209	19.15
2000	528104	21937	550041	2999012	18.34
2001	508035	19190	527225	3073153	17.16
2002	469547	17617	487164	3087857	15.78

Appendix C: Virginia Circuit Court Civil Trial Trends

The following is the data set used in our analysis of Virginia civil trial trends. It is derived from publicly available Virginia circuit court caseload reports.[307]

Year	Bench Trial	Jury Trial	Total Trials	Total Dispositions	Percent Trial
1992	14553	1528	16081	108107	14.88
1993	15827	1503	17330	107174	16.17
1994	17011	1520	18531	105907	17.50
1995	18946	1764	20710	109032	18.99
1996	15604	1813	17417	98516	17.68
1997	16288	2004	18292	101604	18.00
1998	16642	2185	18827	99596	18.90
1999	17259	2042	19301	104857	18.41
2000	17156	1514	18670	103402	18.06
2001	18415	1145	19560	99790	19.60
2002	20157	1165	21322	103525	20.60
2003	19922	932	20854	98911	21.08
2004	20554	837	21391	100620	21.26
2005	20258	719	20977	98486	21.30
2006	21595	684	22279	96911	22.99
2007	22019	666	22685	96410	23.53
2008	22887	618	23505	100271	23.44
2009	22851	592	23443	101542	23.09
2010	23678	576	24254	101172	23.97
2011	24303	613	24916	103010	24.19
2012	22368	543	22911	96284	23.80
2013	20524	512	21036	94403	22.28

[307] *See supra* notes 60–61 and accompanying text.

DUE PROCESS: A CASUALTY OF THE WAR ON TERROR?

Nicholas Hunt[*]

INTRODUCTION

"[T]he Constitution [itself] empowers the President to protect the nation from any imminent threat of violent attack."[1] Eric Holder, then-acting Attorney General, made the foregoing statement in defense of President Obama's targeted killing of American citizen Anwar Al-Aulaqi by a militarized drone strike in Yemen.[2] In his defense of the President, Holder argued that President Obama correctly ordered the strike because Al-Aulaqi was acting as a terrorist militant.[3]

In the wake of Al-Aulaqi's killing, public outrage regarding his due process rights led to a heated debate. Calling in a drone strike to kill an enemy combatant is common in modern warfare.[4] But do the circumstances change when an American citizen becomes a target? Drones are multi-purpose machines, serving as spies and trained killers for militaries across the world.[5] Militarized drone usage leads to concerns regarding privacy and due process rights, which are coveted by all Americans.

This Article focuses on a hypothetical event involving due process rights closer to home. Does a presidential order for a militarized drone strike against an American citizen acting as a terrorist on U.S. soil deprive the citizen of his due process rights? Part I focuses on the development of drones and their use in the U.S. military. Part II surveys the applicable case law and congressional acts available for interpretation in these situations. Part III discusses the Department of Justice White Paper. Part

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[1] *Attorney General Eric Holder Speaks at Northwestern University School of Law*, U.S. DEP'T OF JUST. (Mar. 5, 2012), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.

[2] *Id.*

[3] *Id.*

[4] Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 285–86 (2011).

[5] *Id.* at 325.

IV analogizes the materials discussed in Part III to a hypothetical made for this Article. This Article concludes by determining whether a targeted killing of an American citizen deprives the citizen of his due process rights.

I. WHAT ARE DRONES?

It would be remiss to discuss the ramifications of drone attacks upon American citizens without first explaining the function, usage, and capabilities of a drone. Drones are also referred to as unmanned aerial vehicles ("UAV").[6] A UAV "is a pilotless aircraft . . . flown without a pilot-in-command on-board and is either remotely and fully controlled from another place (ground, another aircraft, space) or programmed and fully autonomous."[7] Initially, drones were designed and constructed for military use, and the sole purpose of the drone was for reconnaissance and surveillance missions.[8] Due to this, the drone was only equipped with surveillance electronics.[9] Now, due to an ongoing technological race across the globe, countries are making a push to continually make weaponized advancements to drones.[10]

A. Types of Drones and Their Capabilities

Today, a militarized drone is a fully equipped weapon which, through its stealth capabilities, the armed forces may deploy at any time.[11] A drone is capable of continuous use for up to seventeen hours, while used in its flight mode or stationary orbit.[12] Its myriad of attachments makes it a lethal weapon that is seldom detectable. Attachments for a militarized drone include: (1) fly-by control; (2) G.P.S. routing; (3) hover capability; (4) "follow me" capability, which enables the drone to sync to and follow a cellular device; (5) cameras; (6) sensors; (7) guided missiles, explosives, and ammunition; (8) microphones; and (9) multi-spectral targeting

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[6] Troy A. Rule, *Drone Zoning*, 95 N.C. L. REV. 133, 138 (2016).

[7] *Unmanned Aircraft Systems*, INT'L CIV. AVIATION ORG. 12 (2011), https://www.icao.int/Meetings/UAS/Documents/Circular%20328_en.pdf.

[8] Timothy T. Takahashi, *Drones and Privacy,* 14 COLUM. SCI. & TECH. L. REV. 72, 83 (2012).

[9] *Id.*

[10] William Wan & Peter Finn, *Global Race on to Match U.S. Drone Capabilities*, WASH. POST (July 4, 2011), https://www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html?utm_term=.c6fe27b804ee.

[11] *Drones: What Are They and How Do They Work?*, BBC NEWS (Jan. 31, 2012), http://www.bbc.com/news/world-south-asia-10713898 [hereinafter *Drones*].

[12] *Id.*

systems.[13] Along with an array of attachments, drones are capable of flying speeds of 135 to 230 miles per hour.[14]

The U.S. military and its equipment contractors continually produce technological developments for a variety of drones, each having different shapes, sizes, and capabilities.[15] The MQ-1B Predator and MQ-9 Reaper are two models primarily used by the military.[16] These models are fully equipped with laser-guided missiles, infra-red imaging for low-light conditions, and lasers for targeting.[17] Specifically, the MQ-9 Reaper is equipped to be a "hunter-killer" weapon, carrying four Hellfire missiles and laser-guided bombs.[18]

B. Drone Use in the Military

Weaponized drones are not a new weapon in the U.S. military arsenal. Such drones emerged into view in the 1990s.[19] The military found drones to be an effective weapon in battle due to their ability to minimize casualties and maximize attacks.[20] In 2001, "the Predator became the first weapon in history whose operators could use it to stalk and kill a single individual on the other side of the planet much the way a sniper does, and with total invulnerability."[21] The CIA utilized the Predator in 2002, making it the first UAV used for a targeted killing in U.S. history.[22]

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[13] *See, e.g.*, *id.* (displaying an MQ-9 Reaper and labelling some of its features); *see* Neve Gordon, *Drones and the New Ethics of War*, COMMON DREAMS (Jan. 23, 2015), https://www.commondreams.org/views/2015/01/23/drones-and-new-ethics-war (noting a drone's GPS and cellular tracking features).

[14] *Drones*, *supra* note 11.

[15] *Id.*

[16] Gregg Zoroya, *Pentagon Report Justifies Deployment of Military Spy Drones Over the U.S.*, USA TODAY (Mar. 9, 2016, 9:24 AM), https://www.usatoday.com/story/news/nation/2016/03/09/pentagon-admits-has-deployed-military-spy-drones-over-us/81474702/.

[17] *Drones*, *supra* note 11.

[18] *Id.*

[19] Lexi Krock, *Spies that Fly: Timeline of UAV's*, PBS (Nov. 2002), http://www.pbs.org/wgbh/nova/spiesfly/uavs.html.

[20] Daniel Terdiman, *The History of the Predator, the Drone that Changed the World (Q&A)*, CNET (Sept. 20, 2014, 4:00 AM), https://www.cnet.com/news/the-history-of-the-predator-the-drone-that-changed-the-world-q-a/; William Saletan, *Don't Blame Drones*, SLATE (Apr. 24, 2015, 6:36 PM), http://www.slate.com/articles/news_and_politics/foreigners/2015/04/u_s_drone_strikes_civilian_casualties_would_be_much_higher_without_them.html.

[21] Terdiman, *supra* note 20; *see generally* RICHARD WHITTLE, PREDATOR: THE SECRET ORIGINS OF THE DRONE REVOLUTION 5–6 (Henry Holt & Co., LLC ed., 1st ed. 2014) (explaining how the Predator's unique capabilities changed attitudes toward UAVs).

[22] John Sifton, *A Brief History of Drones*, NATION (Feb. 7, 2012), https://www.thenation.com/article/brief-history-drones/.

Drones have become the go-to weapon for the United States—their deployment is common against targets in the Middle East and other U.S. targets overseas.[23] In Pakistan alone, U.S. drone strikes have accounted for over 3,000 militant kills from over 400 attacks between 2004 and 2015.[24] The use of UAVs and their technology is overtaking the global military theater, causing a major shift in modern warfare for the future.

II. LIMITATIONS OF DUE PROCESS

The Fifth Amendment to the U.S. Constitution guarantees that no person shall be "deprived of life, liberty, or property, without due process of law."[25] This statement assures that any person in the United States is protected against the deprivation of these fundamental rights. However, there are circumstances under which exceptions to these constitutional protections can apply.[26] The interpretation of the limitations of due process for American citizens engaging in terrorist activity against their country on domestic soil is paramount to its application. However, the issue has yet to be fully resolved, and interpretation is deeply divided.

A. *Mathews v. Eldridge*

Mathews v. Eldridge developed the well-known balancing test for deprivation of due process rights.[27] The Social Security Administration terminated Eldridge's benefits without providing a pre-termination hearing where he could argue for the continuation of his social security benefits.[28] The District Court ruled that the Social Security Administration violated Eldridge's procedural due process rights; however, the Supreme Court found that the Social Security Administration was not required to hold a pre-termination evidentiary hearing.[29] Thus, the balancing test for due process was conceived. This test involves the balance among (1) the importance of the private interest at stake; (2) the risk of an erroneous deprivation of the interest because of the procedures used and the probable value of additional procedural

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[23] Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/targeted-killings (last updated May 23, 2013).

[24] Jack Serle & Jessica Purkiss, *Drone Wars: The Full Data,* BUREAU OF INVESTIGATIVE JOURNALISM (Jan. 1, 2017), https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data.

[25] U.S. CONST. amend. V.

[26] *New York State Constitutional Decisions: 1996 Compilation*, 13 TOURO L. REV. 769, 770 (1997).

[27] 424 U.S. 319, 334–35 (1976).

[28] *Id.* at 323–25.

[29] *Id.* at 325–26, 349.

safeguards; and (3) the government's interest.[30] The *Eldridge* test is applied to due process deprivation. The Court must determine the risk of the deprivation and the government interest.[31]

B. Hamdi v. Rumsfeld

The plurality in *Hamdi v. Rumsfeld* establishes pertinence when considering actions of enemy combatants, and the test which stemmed from this case is pivotal in determining whether a citizen's due process rights can be extinguished.[32] After the tragic events of September 11, 2001, Congress passed the Authorization for Use of Military Force Act ("AUMF").[33] AUMF empowered the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determined aided in the attack against the United States.[34] President Bush ordered the military to subdue al-Qa'ida and quash the Taliban regime.[35]

Hamdi is known as the leading case regarding the deprivation of enemy combatant rights. In *Hamdi*, the government classified Yaser Hamdi, who was an American citizen, as an enemy combatant.[36] The government alleged that Hamdi was taking up arms with the Taliban.[37] The military eventually captured him in Afghanistan.[38] The military detained Hamdi in a naval brig located in Charleston, South Carolina.[39] Hamdi's father filed a habeas petition on his behalf under 28 U.S.C. § 2241.[40] His father stated that the Government violated his son's Fifth Amendment rights, which were inherent to Hamdi as an American citizen.[41]

The Government filed a response to the petition, defending its actions.[42] The response contained a declaration from Michael Mobbs, a defense department official. Mobbs stated that Hamdi's trip to

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30 *Id.* at 334–35.

31 *Id.*

32 542 U.S. 507, 518 (2004) (plurality opinion).

33 Authorization for Use of Military Force Act, Pub L. No. 107–40, 115 Stat. 224 (2001).

34 *Id.*

35 *Hamdi*, 542 U.S. at 518 (plurality opinion).

36 *Id.* at 522 n.1.

37 *Id.* at 549 (Souter, J., concurring).

38 *Id.* at 510 (plurality opinion).

39 *Id.*

40 *Id.* at 511. *See generally* 28 U.S.C. § 2241 (2012) (explaining when the Supreme Court has the power to grant a writ of habeas corpus on behalf of a prisoner of the United States).

41 *Hamdi*, 542 U.S. at 511 (plurality opinion).

42 *Id.* at 512.

Afghanistan, coupled with his affiliation with the Taliban unit, and surrendering of an assault rifle, allowed for arrest.[43]

The District Court ruled that Mobbs's statements did not support Hamdi's arrest and ordered the government to turn over evidence for an in camera review.[44] The Fourth Circuit Court of Appeals reversed the decision because the Government apprehended Hamdi in active combat; therefore, no hearing was necessary or appropriate.[45] Further, upon appeal, the express congressional authorization of detention required by 18 U.S.C. § 4001(a)[46] and the AUMF's necessary and appropriate force language provided for the authorization of Hamdi's detention.[47] However, the AUMF entitled Hamdi to a limited judicial inquiry under the war powers of the political branches, but not to a review of the factual determinations underlying his seizure.[48]

The plurality in *Hamdi* reasoned that Congress was authorized to detain enemy combatants; however, due process demands that an American citizen held as an enemy combatant must be given a meaningful opportunity to contest the factual basis for his detention in front of a neutral decision maker.[49] Further, based on this reasoning, the Court implemented a test involving the "weighing [of] 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."[50] It is through the application of this three-part test that a determination can be made as to whether an individual has received his constitutional rights to due process.

In addition, the plurality allowed for the AUMF to authorize the President to exercise all necessary and proper force to combat terrorist activity.[51] However, Justice Souter's concurrence in *Hamdi* suggested that Congress overreached by granting the President general war powers.[52] He opined that the power to make determinations affecting citizen-detainees'

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[43] *Id.* at 512–13.

[44] *Id.* at 513–14.

[45] *Id.* at 514.

[46] 18 U.S.C. § 4001(a) (2012) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

[47] *Hamdi*, 542 U.S. at 515 (plurality opinion).

[48] *Id.* at 516.

[49] *Id.* at 535.

[50] *Id.* at 529; *see also* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (discussing how the Court balances private interests and the risk of erroneous deprivation against the governmental interests at stake).

[51] *Hamdi*, 542 U.S. at 510 (plurality opinion).

[52] *Id.* at 551–52 (Souter, J., concurring).

liberty interests is inappropriate for the President since the President is entrusted with protecting national security interests.[53] He further added that liberty and security interests are necessarily at odds with one another, creating a conflict of interest.[54]

C. Ex Parte Quirin

The petitioners in *Ex parte Quirin* were Richard Quirin, Herbert Hans Haupt, Edward John Kerling, Ernest Peter Burger, Heinrich Heinck, Werner Thiel, and Herman Neubauer.[55] All of the petitioners were born in Germany, and all had lived in the United States.[56] Haupt was an American citizen because of the naturalization of his parents.[57] All eight petitioners returned to Germany between 1933 and 1941.[58]

When World War II erupted between the United States and Germany, the "petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing."[59] An officer of the German High Command instructed them to destroy war industries and war facilities in the United States.[60] After their training, Burger, Heinck, Quirin, and Dasch, a German citizen, boarded a German submarine, which proceeded across the Atlantic to Amagansett Beach on Long Island, New York.[61] The submarine carried explosives, fuses, incendiary devices, and timing devices.[62] The four men landed on U.S. soil on June 13, 1942.[63] Arriving in German military uniforms, the petitioners buried the uniforms and proceeded to New York City in civilian garb.[64] The remaining four petitioners boarded another German submarine, which carried them to Ponte Vedra Beach, Florida, landing on June 17, 1942.[65] Thereafter, all went to various points throughout the United States.

All of the petitioners were apprehended and taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation.[66]

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[53] *Id.* at 545.
[54] *Id.*
[55] *Ex parte* Quirin, 317 U.S. 1, 1, nn.1–2 (1942).
[56] *Id.* at 20.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 21.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

The petitioners were then tried and convicted by a military tribunal.[67] They were convicted of: (1) violation of the law of war; (2) violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy; (3) violation of Article 82, defining the offense of spying; and (4) conspiracy to commit the offenses alleged in charges 1, 2, and 3.[68] They then petitioned the Supreme Court for a writ of habeas corpus, demanding a trial by jury guaranteed by their Fifth and Sixth Amendment rights.[69]

The Supreme Court heard the case and ruled against the petitioners.[70] The Court found the men to be enemy belligerents, even though they were not in the theatre or zone of active military operations.[71] In regard to Haupt's American citizenship claim, the Court ruled that, "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."[72] Further, the Court ordered against the petitioners' claims that they had certain rights under the U.S. Constitution, ruling on the basis that those rights were never intended to protect enemy belligerents who violated the laws of war.[73] Haupt was sentenced to death and executed.[74]

D. In Re Territo

In *In re Territo*, Gaetano Territo, the petitioner, was born in West Virginia. In 1920, his father took him to Italy, where he resided until September 5, 1943.[75] Territo enlisted and served in the Italian Army in 1936 and again in 1940.[76] In 1943, the U.S. Army captured Territo in Sicily and held him as a prisoner of war.[77] Territo petitioned for a writ of habeas corpus on the ground that he was an American citizen and was not legally a prisoner of war.[78] The district court rejected his argument; subsequently,

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67 *Id.* at 23, 25.

68 *Id.*

69 *Id.* at 24.

70 *Id.* at 24–25.

71 *Id.* at 37–38.

72 *Id.*

73 *Id.* at 44–45.

74 *8 August 1942 – Herbert Hans Haupt*, EXECUTION DAY, http://eotd.wordpress.com/2008/08/08/8-august-1942-herbert-hans-haupt/ (last visited Feb. 11, 2018).

75 *In re* Territo, 156 F.2d 142, 143 (9th Cir. 1946).

76 *Id.*

77 *Id.*

78 *Id.* at 142.

he appealed to the Court of Appeals for the Ninth Circuit.[79] The Ninth Circuit affirmed the district court and opined,

> [a] neutral, or a citizen of the United States, domiciled in the enemy country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation.[80]

The Ninth Circuit denied Territo's writ of habeas corpus, and he was eventually deported.[81]

E. Colepaugh v. Looney

William Colepaugh was an American citizen.[82] In 1944, he defected to Nazi Germany and acted for the German Reich against America.[83] Colepaugh, "acting for the German Reich, secretly passed through in civilian dress, contrary to the law of war, the military and naval lines of the United States for the purpose of committing espionage, sabotage, and other hostile acts."[84] U.S. officials found Colepaugh and an accomplice lurking and acting as spies in U.S. military encampments.[85]

After capture, the President charged Colepaugh with violation of the law of war, and ordered him to a trial by military commission.[86] The military commission convicted him of all charges.[87] Colepaugh then petitioned for a writ of habeas corpus, which challenged the legality of his confinement under the judgment and sentence of the military commission.[88] The district court denied his petition, and he appealed to the United States Court of Appeals for the Tenth Circuit.[89] The Tenth Circuit rejected his claim for the applicability of his Fifth and Sixth Amendment rights.[90] As in *Ex parte Quirin*, the court held that the "petitioner's citizenship in the United States does not divest the Commission of jurisdiction over him, or confer upon him any

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[79] *Id.* at 144–45.

[80] *Id.* at 145, 148 (quoting WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES: MILITARY ARRESTS, RECONSTRUCTION, & MILITARY GOVERNMENT 342–43 (Lee & Shepard ed., 2d ed. 1871)).

[81] *In re Territo: U.S. Law Case [1946]*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/In-re-Territo (last visited Feb. 3, 2018).

[82] Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956).

[83] *Id.* at 431.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 429, 430.

[89] *Id.* at 429–31.

[90] *Id.* at 433.

constitutional rights not accorded any other belligerent under the laws of war."[91]

F. Tennessee v. Garner

On October 3, 1974, Memphis Police Officers were dispatched to answer a "prowler inside call."[92] At the scene, the officers saw a woman standing on her porch and gesturing toward an adjacent house.[93] She told the officers that she heard someone breaking into the house.[94] One officer radioed a dispatcher, while the other went to the rear of the house. The officer at the rear of the house heard a door slam and saw someone run across the backyard.[95] Edward Garner, the fleeing suspect, stopped at a fence at the edge of the yard.[96] The officer shined a flashlight on Garner, seeing his face and hands but no sign of a weapon. Although the officer was not certain, he was "reasonably sure" that Garner was unarmed.[97] He identified himself as a police officer and ordered Garner to halt.[98] Garner responded by climbing the fence in an attempt to evade arrest.[99] The officer was convinced that if Garner made it over the fence he would elude capture, so the officer shot him.[100] The bullet hit Garner in the back of the head, and he died while being operated on at the local hospital.[101]

The officer acted under the authority of a Tennessee statute and under Police Department policy in his use of deadly force.[102] Garner's father brought action under 42 U.S.C. § 1983 for violations of Garner's constitutional rights, and the case eventually made its way to the Supreme Court of the United States.[103] In its ruling, the Court held, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[104] Pertaining to the officer in Garner, the Court held the use of deadly force

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[91] *Id.* at 432.
[92] Tennessee v. Garner, 471 U.S. 1, 3 (1985).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 4.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 4–5.
[103] *Id.* at 5.
[104] *Id.* at 11.

was unreasonable because there was no perceived danger to the officer or public.[105] Later, the Court revisited *Garner* in *Scott v. Harris*.[106]

G. Graham v. Connor

Dethorne Graham suffered from diabetes.[107] One night, Graham asked his friend to drive him to the convenience store so Graham could buy some orange juice, which he planned to use to counteract an insulin reaction he was having.[108] Upon seeing the large crowd in the store, Graham rushed out and asked his friend to drive him to another friend's house.[109] Officer Connor became suspicious after seeing Graham hastily leave the store.[110] He followed Graham and his friend, made an investigative stop, and ordered the pair to wait while he found out what happened in the store.[111] Respondent back-up police officers arrived on the scene, handcuffed Graham, and ignored or rebuffed attempts to explain and treat Graham's condition.[112] During the encounter, Graham sustained multiple injuries, including a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.[113] Graham was released only after Officer Connor discovered nothing occurred at the store.[114]

Graham brought suit against Connor and the other officers under 42 U.S.C. § 1983.[115] Graham alleged the officers engaged in excessive force while making the stop, depriving him of his secured rights under the Fourth Amendment and 42 U.S.C. § 1983.[116] The case made its way to the Supreme Court of the United States.[117] The Court rejected the notion that all excessive force claims brought under § 1983 are governed by a single generic standard.[118] Chief Justice Rehnquist opined that the Court made the ruling of *Garner* explicit, holding that "[*a*]*ll* claims that law enforcement officials have used excessive force—deadly or not—in the

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[105] *Id.* at 21.

[106] *See* Scott v. Harris, 550 U.S. 372, 382 (2007) The Court clarified *Garner*, in that there is no magical on/off switch that triggers preconditions for when deadly force may be used. The Court further explained the necessity of the requirement for the subject to pose a serious risk of harm to others.

[107] Graham v. Connor, 490 U.S. 386, 388 (1989).

[108] *Id.*

[109] *Id.* at 388–89.

[110] *Id.* at 389.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 390.

[114] *Id.* at 389.

[115] *Id.* at 390.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 393.

course of an arrest, investigatory stop, or other 'seizure' of a free citizen are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard . . . ."[119] Chief Justice Rehnquist further opined that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[120]

H. Al-Aulaqi v. Panetta

In 2010, the United States designated Anwar Al–Aulaqi, a dual citizen of the United States and Yemen, a terrorist, citing that he was "a leader of al-Qa'ida in the Arab Peninsula ("AQAP"), a Yemen-based terrorist group."[121] The U.S. Joint Special Operations Command placed Al-Aulaqi on a military kill list and unsuccessfully tried to kill him.[122]

On September 30, 2011, Al-Aulaqi and Samir Khan were riding in a vehicle in the Yemeni province of al-Jawf, when missiles were fired at them from militarized UAVs.[123] The missiles hit the vehicle, killing Al-Aulaqi, Khan, and two others.[124] Abdulrahman Al-Aulaqi, Anwar's son, was amongst those killed in a second drone attack two weeks later.[125]

The Obama Administration's actions are still being debated, primarily as to whether the use of force was proper under international and domestic constitutional law.[126] It is hard not to analogize Al-Aulaqi's case to the issue at hand. If an American citizen is suspected of causing imminent harm on U.S. soil, should the government go through constitutional channels and the fundamental right guarantee against deprivation of life without due process for the individual? Or like the case of Al-Aulaqi, is immediate force necessary?

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[119] *Id.* at 395 (emphasis added).

[120] *Id.* at 397; *see* Scott v. United States, 436 U.S. 128, 137–39 (1978) (discussing the case history of reasonableness under the Fourth Amendment).

[121] Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 61 (D.D.C. 2014).

[122] *Id.* at 59.

[123] *Id.* at 60.

[124] *Id.*

[125] *Id.* at 58–59.

[126] *See* Joshua Sylla, Note, *Eye in the Sky: U.S. Citizen Casualties in the Shadow War*, 46 SUFFOLK U. L. REV. 1187, 1189 (2013) (examining the evolution of the international law and the laws of war to determine if the United States acted lawfully in carrying out drone strikes in the war against terror).

III. THE DEPARTMENT OF JUSTICE WHITE PAPER

The Department of Justice ("DOJ") White Paper[127] focuses on whether the United States can act lawfully regarding national self-defense.[128] It outlines the circumstances in which the U.S. government can use lethal force against an American citizen who is a senior operational leader of al-Qa'ida or associated with al-Qa'ida outside of U.S. soil.[129] The DOJ concluded that in order to use lethal force, three conditions must be met:

> (1) an informed, high-level official of the United States government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable war principles.[130]

The White Paper analyzes the targeted individual's due process rights and whether those inherent rights shield him from a lethal strike.[131] The balancing test from *Eldridge* is used to determine if the individual's private interest is properly balanced with the government's interests in waging war, protecting its citizens, and removing the threat posed by enemy forces.[132] While depriving a person of his life is obviously a compelling interest, it must be balanced with "the realities of combat," uses of "necessary and appropriate" force, and an imminent threat of a violent attack against the United States.[133]

The first factor the White Paper establishes is the imminent threat of violence.[134] This does not require the United States to have clear evidence that an attack on the United States will take place in the immediate future, because, like 9/11, it would leave the United States

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[127] Jameel Jaffer, *The Justice Department's White Paper on Targeted Killing*, ACLU (Feb. 4, 2013), https://www.aclu.org/blog/justice-departments-white-paper-targeted-killing The White Paper is a memorandum written in 2010 by the Department of Justice to President Obama, which justified the governmental authority to carry out the extrajudicial killing of an American citizen if a high-level governmental official deems that person to be a threat to the country. While the White Paper holds no legal authority in United States courts, it is seen as containing legal steps and guidelines to take in applicable situations.

[128] DEPARTMENT OF JUSTICE WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE [hereinafter WHITE PAPER], http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

[129] *Id.* at 1.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 6.

[133] *Id.*

[134] *Id.* at 1.

with no time to defend itself.[135] Additionally, al-Qa'ida leaders are continually planning attacks on the United States, which limits the window of opportunity to defend Americans.[136] The reality of a terrorist war is that this type of war is patient, drawn out, and often sporadic.[137] Thus, U.S. leaders must take into account the al-Qa'ida members involved in the attack, the ability of enemies to carry out the attack, and the limited window of opportunity.[138]

Second, if the window of opportunity is small, then one could argue the chances of apprehending an enemy would be slim, as well.[139] The President must balance other factors as well such as the undue risk to U.S. personnel.[140] This situation is a highly sensitive inquiry.[141]

Third, the United States must comply with the fundamental law of war principles including: distinction, proportionality, and avoidance of unnecessary human suffering.[142]

The White Paper concludes by stating it would be lawful for the United States to conduct a lethal operation outside of the United States against an American citizen who is with al-Qa'ida, assuming that the noted factors are satisfied.[143]

IV. THE CASE OF MATTHEW WILLIAMS

While the above case law, congressional acts, and government departmental memorandum shed light on an analysis regarding an American citizen outside of the United States, it still leaves open the question: Do American citizens need to receive due process rights when they are aligned with the enemy *and* within U.S. borders?

A. Hypothetical

The hypothetical below will guide us through the discussion of militarized drone strikes against American citizens on U.S. soil. Please assume all facts below:

> The target is twenty-two-year-old Matthew Williams from Cincinnati, Ohio. In 2015, Williams attempted to murder U.S. officials and employees in a terror plot to attack the Potter Stewart Courthouse in Cincinnati. At that time, Williams evaded capture and was still at large. Upon further

[135] *Id.* at 7.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* at 8.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.* at 9.

investigation, law enforcement discovered correspondence between Williams and known al-Qa'ida leadership. The messages revealed a plan to remotely detonate several bombs strategically placed throughout Great American Ballpark during Cincinnati Reds's Opening Day. By the time this information was learned, Opening Day had arrived. Cincinnati Reds's Opening Day typically draws 43,000 people each year. This creates a heightened risk of a massive death toll. Furthermore, two days before Opening Day, Williams posted on his Twitter account. In his post, he claimed sole responsibility for the attempted assassination of U.S. federal officials at the Potter Stewart Courthouse and boasted that "a day of reckoning is coming to the United States."

Understanding the potential for thousands of civilian casualties, the FBI alerted the Department of Homeland Security ("DHS"). Upon notification, DHS notified President Donald Trump. The FBI locked in the geographical placement of Williams with the assistance of an anonymous phone call in which the caller identified Williams and placed him on location at his family's restaurant in Cincinnati. DHS determined that he was holed up in the back part of a local restaurant owned by his family after street footage that day confirmed the anonymous call. The restaurant was located approximately one-fourth of a mile from Great American Ballpark. The restaurant was not open for business on the day in question.

An anonymous informant had notified federal officials that Williams had an arsenal of close range weapons at his disposal, including several assault rifles. A review of available street video of the two weeks prior to Opening Day revealed Williams entering the restaurant carrying cases of the appropriate size to hold assault rifles. It also showed him entering and leaving the location with several large packages. Law enforcement verified that one month prior, video cameras were installed around the interior and exterior of the restaurant. The cameras would alert Williams to the approach of local or federal law enforcement officials. Law enforcement determined that traditional apprehension methods had a high risk of failure and would result in Williams' ability to detonate all possible chemical and traditional bombs he had placed at several locations throughout the ballpark. Through battery-operated video surveillance, Williams would be warned of any traditional approach or attempt to apprehend and would immediately detonate the bombs.

> Upon thorough evaluation of the severity of the situation and believing traditional methods of apprehension had a high risk of failure, President Trump ordered a militarized drone strike against the restaurant. When the drone fired upon the building, Williams was killed instantly, and the restaurant was destroyed. There was no other loss of human life.

B. Analysis

The hypothetical situation above poses the following issue: Did President Trump's preemptive strike deprive Williams of his inherent due process rights guaranteed by the Constitution? To answer this question, it is imperative to analyze the Supreme Court's rulings in *Garner* and *Graham* regarding lethal force. It further requires analysis of the Court's rulings in *Hamdi* and *Eldridge*. Also, a review of the Court's ruling in *Ex parte Quirin* and the Tenth Circuit's ruling in *Colepaugh* is prudent. Finally, it is beneficial to determine if the strike on Williams complied with the DOJ White Paper.

This situation involves an American citizen acting in compliance with al' Qaida leadership on U.S. soil. The United States has been plagued with the imminent possibility of terrorist attacks on U.S. soil since 9/11. However, our country's case law has a gaping hole concerning what action is necessary and allowable if the situation occurs within U.S. borders.

1. Use of Force

In determining whether a drone strike on an American citizen comports with due process, it is prudent to first look at the legal justification for lethal force, as applied to the facts at hand. In *Garner*, the Court held that deadly force is reasonable when an officer has probable cause to believe that the suspect poses serious physical harm to others.[144]

First, for the deadly force to be necessary, the officer must have probable cause. In determining whether probable cause exists, courts look to the totality of the circumstances.[145] The test refers to a method of analysis where decisions are based on all available information rather than bright-line rules.[146] Under this test, courts focus "on the entire situation as described in the probable-cause affidavit, and not on any one specific factor."[147]

In the hypothetical, the government knew Williams was in correspondence with al-Qa'ida. By intercepting his online conversations,

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[144] Tennessee v. Garner, 471 U.S. 1, 11 (1985).

[145] *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (holding that the totality of the circumstances test is proper when assessing whether probable cause exists).

[146] Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75, 75–76 (2014).

[147] *Totality of the Circumstances Test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

the government determined that Williams planned an attack on U.S. soil in conjunction with al-Qa'ida leadership. Additionally, Williams admitted his guilt via his Twitter account and asserted a threat against the United States. On the day the strike occurred, video footage showed that Williams stationed himself inside his parents' restaurant. The totality of these circumstances solidifies that officials on the ground, DHS, and President Trump had probable cause to believe that Williams was armed, dangerous, and posed an immediate threat.

Second, the last part of the *Garner* test asks whether the suspect poses serious physical harm to others.[148] The Court explained the necessity of this prong of the test in *Scott*.[149] As previously stated, Williams was in the back of his family's restaurant. He fortified his position with his possession of assault rifles, his surveillance of the outside street, and his possession of the bomb detonation switch. If Williams felt forced or cornered, he could set off the bombs, which would kill thousands of people. This was an imminent risk of harm to others. Further, if he wanted to go down in battle, or if officers wanted to capture him, he had droves of assault weapons at his disposal, which would cause harm or death to officers on the scene. In sum, the deadly force used by the drone strike was reasonable because officials had probable cause for the serious risk of harm to others and the suspect.

In examining whether the drone strike complied with applicable standards as to the use of force, it must be determined whether the force was reasonable under the *Graham* rule.[150] In *Graham*, the Court ruled that courts are to evaluate excessive force claims under a reasonableness standard.[151] The Court explained that the question of whether the force used was reasonable hinges on the objective reasonableness of the officer.[152]

In many ways, this case mirrors the situation of the Dallas Shooter and "bomb robot" that occurred during the summer of 2016.[153] On July 7, 2016, people flooded the streets of Dallas, protesting the killing of two

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[148] *Garner*, 471 U.S. at 11.

[149] Scott v. Harris, 550 U.S. 372, 382 (2007).

[150] Graham v. Connor, 490 U.S. 386, 397 (1989).

[151] *Id.*

[152] *Id.*

[153] Henry Fountain & Michael Schmidt, *'Bomb Robot' Takes Down Dallas Gunman, but Raises Enforcement Questions*, N.Y. TIMES (last visited Jan. 22, 2018), https://www.nytimes.com/2016/07/09/science/dallas-bomb-robot.html?_r=0; *see* Wilson Andrews et al., *How the Attack on the Dallas Police Unfolded*, N.Y. TIMES (July 8, 2016), https://www.nytimes.com/interactive/2016/07/08/us/dallas-police-shooting-map.html?action=click&contentCollection=Science&module=RelatedCoverage®ion=Marginalia&pgtype=article (listing a timeline of the police response after an ambush attack on police officers).

black men by police officers.[154] Amidst the protest, shots rang out at 8:58 p.m.[155] Micah Johnson shot and killed five police officers.[156] After the shooting, Dallas Police cornered Johnson in a nearby garage.[157] Johnson exchanged gunfire with the police and told negotiators that the end was coming.[158] Later, the Dallas Police sent an armed bomb robot into the garage, which killed Johnson.[159] Dallas police chief, David O. Brown commented, "[o]ther options would have exposed the officers to grave danger."[160] University of Washington Law School professor, Ryan Calo, stated in an interview with *The New York Times*, "[n]o court would find a legal problem here . . . . When someone is an ongoing lethal danger, there isn't an obligation on the part of officers to put themselves in harm's way."[161]

In the hypothetical, officers would have placed themselves in mortal peril had they directly confronted Williams. Just like the shooter in Dallas, Williams posed a lethal danger to officers on the scene and individuals in and around Great American Ballpark. It now has to be determined whether the government's choice to deploy the drone strike was objectively reasonable.

The objective reasonableness test led to a "notoriously opaque and fact dependent" doctrine that became difficult for courts to articulate and police to incorporate into their training.[162] This requires a case-by-case evaluation. The Supreme Court opined that the proper application requires attention to the facts of each particular case, "including the severity of the crime at issue [and] whether the suspect poses an immediate threat to the safety of the officers or others."[163] Williams endangered the lives of thousands, and at any second, could have killed many people. Furthermore, the fact that he was armed and attempted to kill government officials earlier leads to the conclusion that he posed an immediate threat to officers on the ground. In Dallas, it was objectively

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[154] Andrews et al., *supra* note 153.

[155] *Id.*

[156] Richard Fausset et al., *Micah Johnson, Gunman in Dallas, Honed Military Skills to a Deadly Conclusion*, N.Y. TIMES, https://www.nytimes.com/2016/07/10/us/dallas-quiet-after-police-shooting-but-protests-flare-elsewhere.html (last visited Jan. 22, 2018).

[157] Andrews et al., *supra* note 153.

[158] Joel Achenbach et al., *Five Dallas Police Officers Were Killed by a Lone Attacker, Authorities Say*, WASH. POST, https://www.washingtonpost.com/news/morning-mix/wp/2016/07/08/like-a-little-war-snipers-shoot-11-police-officers-during-dallas-protest-march-killing-five/?utm_term=.bf99e5078b20 (last visited Jan. 22, 2018).

[159] *Id.*

[160] Fountain & Schmidt, *supra* note 153.

[161] *Id.*

[162] Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 218 (2017).

[163] Graham v. Connor, 490 U.S. 386, 396 (1989).

reasonable to take out a lethal threat that already killed five officers. Paralleling the facts in Dallas to this case, the government was objectively reasonable in ordering the drone strike against Williams. The government had the burden of protecting thousands of lives, as well as protecting the lives of officers on the scene.

2. Application of *Ex Parte Quirin*, *In Re Territo*, and *Colepaugh*

The cases of *Ex parte Quirin, In re Territo,* and *Colepaugh* must be examined by discussing their similarities, differences, and applicability to the case at hand. These cases shed light on precedent on how U.S. courts treat American citizens in wartime.

In *Ex parte Quirin*, the Court ruled that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance, and direction enter this country bent on hostile acts, are enemy belligerents."[164] The Court ruled that it did not matter whether the individuals were in the zone of active military operations.[165]

Like Haupt in *Ex parte Quirin*, Williams was an American citizen who aligned with an enemy force. But there are differences. Haupt trained with the Nazi regime and re-entered the United States. Williams only conferred with al-Qa'ida through electronic communication. Although Williams never went out of the country to meet with al-Qa'ida leadership, he aligned with their military arm. This alliance is shown by his received shipment of assault rifles and the placement of munitions in Great American Ballpark. Further, Williams engaged in hostile acts through the aid, guidance, and direction of al-Qa'ida. This was proven by the intercepted internet conversations between the two.

Additionally, Williams attempted to murder U.S. officials at the Potter Stewart Courthouse, strategically placed bombs across Great American Ballpark, took credit for the federal courthouse attack, threatened the Nation by means of his Twitter account, and readied himself for battle in a building full of assault weapons and the detonation switch to the bomb.

In conclusion, like the American citizen, Haupt, in *Ex parte Quirin*, Williams acted as an enemy belligerent and did not need to be afforded rights under the Constitution. Haupt claimed certain rights under the U.S. Constitution, which the Court rejected because those rights were never intended to protect enemy belligerents who violated the laws of war.[166] Williams's actions mirror, if not supersede Haupt's. Thus, under *Ex parte Quirin*, he does not have due process rights.

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164 *Ex parte* Quirin, 317 U.S. 1, 37–38 (1942).

165 *Id.* at 38.

166 *Id.* at 41, 45.

Looking to *In re Territo*, the facts vastly differ from the hypothetical. The U.S. Army captured Territo dressed in an enemy uniform on a foreign battlefield.[167] In *In re Territo*, Territo was actively in a war zone, taking up arms against the United States.[168] On the other hand, Williams was on U.S. soil, not in an active war zone, and not wearing enemy insignia.

First, the holding in *Ex parte Quirin* dictates that it does not matter whether Williams is in an active war zone, because acting as an enemy belligerent is enough.[169] Second, under *Ex parte Quirin*, the Court ruled that it does not matter if Williams wore military insignia. The Court ruled that even though the belligerents shed their uniforms for civilian garb, it did not alter their status.[170] Ultimately, the holding in *In re Territo* is inapplicable to Williams. Territo lived in Italy and actively served in the military for one of the Axis powers.[171] The Ninth Circuit's ruling and interpretation of the law in *In re Territo* does not apply to Williams due to the fact that Williams was on U.S. soil at the time of the drone strike.

In *Colepaugh*, the Tenth Circuit found the American citizen, William Colepaugh, to be an enemy belligerent.[172] The facts differ from that of *Ex parte Quirin* and the hypothetical, but ultimately, the court reached the same conclusion. As a German spy, Colepaugh committed espionage and other hostile acts on Germany's behalf.[173] This occurred in an active war zone and behind U.S. lines.[174] When he asserted his Fifth and Sixth Amendment rights as an American citizen, the Tenth Circuit denied these claims.[175] Echoing *Ex parte Quirin*, the court ruled Colepaugh was not afforded the same constitutional rights as an American citizen.[176]

Much like Colepaugh and Haupt, Williams was an American citizen, who became an enemy belligerent by aligning himself with al-Qa'ida. The Supreme Court holding in *Ex parte Quirin* and the Tenth Circuit holding in *Colepaugh* are analogous to the facts outlined in the hypothetical. Therefore, since Williams can be found to be a belligerent, he is not afforded the same rights as an American citizen.

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[167] *In re* Territo, 156 F.2d 142, 143 (9th Cir. 1946).
[168] *Id.*
[169] *Ex parte Quirin*, 317 U.S. at 37.
[170] *Id.* at 35.
[171] *In re Territo*, 156 F.2d at 143.
[172] Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956).
[173] *Id.*
[174] *Id.*
[175] *Id.* at 433.
[176] *Id.* at 432.

3. The *Hamdi* and *Eldridge* Approach

In *Hamdi*, an American citizen was deprived of his due process rights requiring a hearing and the opportunity for him to confront the presentation of evidence against him.[177] In that case, the plurality of the Court stated that citizen enemy combatants were entitled to some form of due process.[178] Justice O'Connor used the *Eldridge* test to limit the due process awarded to Hamdi.[179] Justice O'Connor opined that the Constitution permitted Hamdi to have the meaningful opportunity to challenge his enemy combatant status. [180]

Here, the government also deprived Williams of his due process rights without any chance of remedying the situation. By killing Williams with a military air strike, the government deprived him of his life—the most sacred right of an individual. However, like *Hamdi*, we must use the *Eldridge* test to balance the outcome. The *Eldridge* test requires the Court to balance (1) the importance of the interest at stake; (2) the risk of an erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards; and (3) the government's interest.[181]

Applying the *Eldridge* balancing test to the hypothetical, the government is able to neutralize Williams. The first factor of *Eldridge* requires the government to look at the importance of the interest at stake. Here, that interest is Williams' inherent right to life, one of the most fundamental rights a human holds.[182] The second prong of the test requires the government to value the risk of an erroneous deprivation of interest.[183] This means that the government needed to value the risk of depriving Williams of his rights and determine if any other procedures were applicable. Possible risks were harming the wrong individual due to an incorrect identification and failure to provide Williams with the right to a trial in front of his peers before being sentenced to death. Here, there was no chance of incorrectly identifying Williams due to the cameras set up on the street. However, the government ought to have looked to other alternatives before taking the drastic action of killing Williams without a trial.[184] One such alternative was negotiation. In the hypothetical, negotiation was not an option because of the imminent risk of harm to

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[177] Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion).

[178] *Id.*

[179] *Id.* at 528–31.

[180] *Id.* at 535.

[181] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

[182] *Id.*

[183] *Id.*

[184] *Id.*

thousands of individuals and the officers on site. DHS concluded that the person inside the restaurant was Williams, and it determined that he had the detonation switch to the bombs and was armed with assault rifles inside of the building. In addition to the possibility of negotiation, the government could have gone through the process of determining whether bombs were placed inside the ballpark. But these procedures and safeguards were not suitable due to the essence of time and the safety of others. The third prong of *Eldridge* evaluates whether the deprivation is balanced with the government's interest.[185] The government has a substantial interest in killing a known terrorist, protecting its citizens (43,000 citizens), and removing a threat.

Therefore, when using the *Eldridge* balancing test, the government has the authority to order an attack on Williams. The probable value of additional safeguards or procedures that could be used is little to none. Due to the time constraints, impending need to act, and possible injury and death of many individuals, force was the only option. Further, because the deprivation of Williams's life or a right to trial is substantially outweighed by the government's interest to protect its citizenry, the government withstands the remaining two factors of *Eldridge* and was correct in ordering the drone strike on Williams.

4. The Department of Justice White Paper

The DOJ created the White Paper specifically to address the threat of al-Qa'ida and the War on Terror.[186] The White Paper is in reference to al-Qa'ida and its members, and the hypothetical at hand deals with a suspect associated with al-Qa'ida. The hypothetical scenario is suitable for application of the standards contained in the White Paper because Williams is associated with the terror group al-Qa'ida. Therefore, the White Paper can be used for guidance in the hypothetical because there is a direct connection between Williams and al-Qa'ida. Other than guidance, the White Paper has no ruling authority. The White Paper is merely an outline, which can guide decision making and inform U.S. officials on possible legal arguments for this type of situation.

The White Paper outlines a three-step process for the use of lethal force against an American citizen overseas.[187] These steps include: (1) an informed, high-level official of the U.S. government must have determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) a capture operation must be infeasible (and those conducting the operation continue to monitor whether capture

[185] *Id.*

[186] WHITE PAPER, *supra* note 128, at 1.

[187] *Id.*

becomes feasible); and (3) such an operation would be conducted consistent with applicable law of war principles.[188]

Using the White Paper as guidance for the hypothetical situation, it is determined that the U.S. government acted within its rights when it ordered the preemptive drone strike against Williams. President Trump is the highest-ranking official of the U.S. government and the military.[189] President Trump determined that Williams posed an imminent threat to the citizens of the Greater Cincinnati Region, as well as the country. This was due to Williams's admission via his Twitter page that he had strong ties to al-Qa'ida, in addition to his admitted responsibility for the attempted assassination of U.S. officials. Additionally, the DHS briefed the President on the intercepted conversation between Williams and high-ranking al-Qa'ida militants in which they were planning a mass attack during Cincinnati Reds's Opening Day.

The White Paper further discusses that a determination of imminent threat does not need to be proven by clear evidence.[190] While the DHS had proof that Williams aligned himself with al-Qa'ida through his attempted terrorist attack on the Potter Stewart Courthouse, an intercepted conversation regarding a potential bombing, and a confession of terrorism via his Twitter account, there was still no hard physical proof that Williams had placed bombs throughout the ballpark. The combination of Williams's attack on the courthouse, the intercepted cyber communication planning the attack, and Williams's possession of several assault weapons was enough to justify President Trump's deduction that Williams presented an imminent threat to the livelihood and safety of American citizens. Williams's actions presented the U.S. government with an immediate necessity to defend itself. Al-Qa'ida and other terrorist organizations continually plan attacks across the United States and globally, limiting the government's window of opportunity to defend its citizens.[191]

The White Paper's second prong needed for the government to use lethal force against an American citizen requires the capture operation to be infeasible and those monitoring the situation constantly determining and updating the feasibility of capture.[192] Here, capture was infeasible. Due to his placement of video surveillance, law enforcement could not gain access to him, creating a risk of imminent harm to officers on the ground. Due to time constraints, it was not feasible to attempt to set up a line of

[188] *Id.*

[189] U.S. CONST. art. II, §§ 1–2.

[190] WHITE PAPER, *supra* note 128, at 7.

[191] *Id.* at 7–8.

[192] *Id.* at 1.

communication with Williams. Any provocation of Williams at that time and location had the high probability of provoking detonation of the bombs. The detonation of a bomb in that area would have guaranteed a high number of civilian casualties.

Finally, the government may not issue a strike on an American citizen if the strike violates the fundamental laws of war.[193] The strike must adhere to these four applicable principles of the law of war: (1) necessity, (2) distinction, (3) proportionality, and (4) avoiding unnecessary human suffering.[194]

As noted above, Williams's actions presented the U.S. government with an immediate necessity to defend itself—the first principle of the law of war is satisfied.

Second, the U.S. government must determine that there is distinction, which demands that parties to a conflict form a bright-line between civilians and combatants.[195] For there to be distinction for the purpose of the hypothetical, it must be determined whether Williams was a civilian at the time of the attack. Civilians are all people who are not members of an organized armed force to a party in conflict. "'[S]tates are obligated to never make civilians the object of [a military] attack,' unless they partake directly in hostilities."[196] Williams had known ties to al-Qa'ida. Via his Twitter page, he took credit for the attempted attack upon the Potter Stewart Courthouse and pledged another attack. Further, the DHS intercepted correspondence between al-Qa'ida leadership and Williams. These facts solidify the assertion that Williams was an al-Qa'ida militant who actively participated in the terrorist activities of the group. He was not a civilian, but an enemy belligerent threatening the safety of the American citizenry.

Third, the U.S. government must determine whether it is adhering to the law of proportionality. Under the rule, "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited."[197] In order to adhere to proportionality, the damage caused by a drone strike against Williams would have to be less

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[193] *Id.*

[194] *Id.* at 8.

[195] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol].

[196] Marisa Young, *Death from Above: The Executive Branch's Targeted Killing of United States Citizens in the War on Terror*, 2014 U. ILL. L. REV. 967, 986 (2014) (citing Geneva Protocol, *supra* note 195, at art. 51).

[197] 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 46 (2009).

than the damage caused to civilians, collateral, and other property around his location. The drone used against Williams was equipped with a precision explosive, capable of destroying a single residence by imploding the residence rather than exploding it. By this design, there would be little or no collateral damage to innocent lives. Considering these facts in perspective, the advantage of the strike far outweighed any risk created. Thus, the drone strike was proportional.

Fourth, the U.S. government must determine whether the drone strike would cause Williams unnecessary suffering. Williams was neither wounded nor subjected to any torturous practices because of the drone strike. In fact, the implosion of the restaurant instantly killed Williams. The U.S. government did not subject Williams to any inhumane conduct or unnecessary suffering. The attack was quick, efficient, and humane.

While the White Paper specifically outlines the steps taken for extrajudicial killings of American citizens overseas, it is helpful to parallel it to the hypothetical facts of the Williams drone strike. Given the facts asserted in the hypothetical, and the lack of precedent for the circumstances, the White Paper is a beneficial outline that the government can evaluate if a domestic terrorist attack involving an American citizen acting as a militant is imminent.

In sum, while this is an unprecedented act on U.S. soil, the government has the tools in place to reach the proper conclusion if needed. Looking to *Garner* and *Graham*, the force used against Williams, by means of a drone strike, was reasonable.[198] By applying the *Hamdi* analysis, coupled with the *Eldridge* balancing test, the government must weigh its interests and the interests of its citizens versus the deprivation of an individual's due process rights.[199] Furthermore, in times of peril, the U.S. government can look to the White Paper for constructive guidance as to whether a preemptive, militarized drone strike against an American citizen is allowable.[200] Additionally, the Supreme Court's ruling in *Ex parte Quirin* and the Tenth Circuit's holding in *Colepaugh* show that Williams is considered a belligerent and is not offered the same rights as American citizens.[201] Therefore, given the circumstances of the hypothetical, it would prove difficult to bring a successful challenge to the deprivation of his due process rights.

CONCLUSION

For a government to deprive one of its citizens of life is a serious and irreversible action. It is normal for an American citizen to believe that one

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[198] *See supra* notes 144–48, 151 and accompanying text.

[199] *See supra* notes 177–85 and accompanying text.

[200] *See supra* Part III.

[201] *See supra* notes 164–65, 172–76 and accompanying text.

of the main purposes of its government is to provide protection for every citizen. That assumption is correct and is clearly stated in the language of the U.S. Constitution. Under the law, every citizen has the right to life and liberty. However, when the government is presented with a situation in which the safety and security of other citizens are at risk, it is justifiable for that risk to be removed.

When considering the use of drones as a weapon of threat removal, it is apparent that the tactics of combat have evolved. It is possible to remove an enemy using highly technological methodology. However, these tactics are not new to modern warfare, as any victim of a terrorist bombing can attest. The necessity of technology to remain abreast of and subvert the plans of terrorists is ever present. After balancing of a myriad of factors, and once we have exhausted all safeguards and procedures, it is sometimes justifiable to determine that the safety and security of our country outweighs the rights of one person. It does not matter whether the combatant is an American citizen or whether the action is taking place on U.S. soil. A drone strike under the hypothetical is justifiable.

HOW THE CHANGES IN TECHNOLOGY ARE SHAPING THE LAW AND THE LEGAL PROFESSION IN AMERICA

*The Honorable Robert Humphreys**

INTRODUCTION

A bit over twenty years ago, the late astronomer Carl Sagan observed that "[w]e live in a society exquisitely dependent on science and technology, in which hardly anyone knows anything about science and technology."[1] Sagan's observation is at least as true today as it was when he made it.

The nature of lawmaking means that the law will always lag behind societal changes, but the law must eventually cope with those changes. It is up to us as lawyers to bring those changes about. The same is largely true of the way law is practiced.

The legal profession, as we know it today, is largely a product of the Industrial Revolution of the nineteenth and twentieth centuries. Given that lawyers are basically in the information business, I suspect that the impact on our profession—from the Information Revolution of the twenty-first century onward—will be even more profound.

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[1] Carl Sagan, *Why We Need to Understand Science*, 14.3 SKEPTICAL INQUIRER (1990), https://www.csicop.org/si/show/why_we_need_to_understand_science.

This Symposium is an effort to take the measure of where we are in that process and where we might be headed. Since Tim Cook of Apple, Eric Schmidt of Google, and Jeff Bezos of Amazon were all busy plotting world domination, and Mark Zuckerberg of Facebook is busy with his presidential campaign, I have been asked to step in and share my observations about the impact of today's information revolution on the following considerations: (1) technology's effect on the law, and (2) technology's effect on how we practice law.

Those of you who know me, know that I am basically a "geek." I have been fascinated with the advance of science and technology since I was a child, and with computers and software since my college days in the 1970's when I heard about a medical student named Ed Roberts who had developed the first "personal" computer—so called, because it was smaller than a Buick. I have been building, programming, and consulting about computers in the criminal justice system ever since. As an appellate judge, I have a pretty good view of the ongoing struggle of applying law from the last millennium to twenty-first century issues.

Ironically, the driving force behind all of the technological advances that the law and the legal profession have to cope with is yet another "law" of sorts. I refer to "Moore's Law."[2] In 1965, Gordon Moore, a founder of both Fairchild Semiconductors and Intel, predicted—so far correctly—that the processing power of a computer will double every two years.[3]

Because of the accuracy of Moore's Law, technological advances are on an exponential curve—touching practically everyone, everywhere. In an article for *MIT Technology Review*, Vivek Wadhwa analyzed the breadth of these advances as follows:

> Changes of a magnitude that once took centuries now happen in decades, sometimes in years. Not long ago, Facebook was a dorm-room dating site, mobile phones were for the ultra-rich, drones were multimillion-dollar war machines, and supercomputers were for secret government research. Today, hobbyists can build drones [or buy them from Amazon] and poor villagers in India access Facebook accounts on smartphones that have more computing power than the Cray 2—a supercomputer that in 1985 cost $17.5 million and weighed [almost 4 tons]. A full human genome sequence, which cost $100 million in 2002, today can be done for $1000—and might cost less than a cup of coffee by 2020.
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> We haven't come to grips with what is ethical, let alone with what the laws should be, in relation to technologies such as social media. Consider the question of privacy. Our [current privacy] laws date back

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[2] Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* 6 (FCC, Working Paper No. 29, 1997), http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp29.pdf.

[3] ARNOLD THACKRAY ET AL., MOORE'S LAW xvi–xvii, xix–xx (2015); *see* Werbach, *supra* note 2, at 6 (explaining the effect of Moore's Law on the internet).

> to the late [nineteenth] century, when newspapers first started publishing personal information and Boston lawyer Samuel Warren objected to social gossip published about his family. This led his law partner, future U.S. Supreme Court Justice Louis Brandeis, to write the law review article "The Right of Privacy." Their idea that there exists a right to be left alone, as there is a right to private property, became, arguably, the most famous law review article ever and laid the foundation of American privacy law [and current Fourth Amendment law].[4]

Yet today, technology has rendered privacy more illusory than real. If you own a computer or a smartphone, every detail of your life is an open book to Google, Facebook, Microsoft, and Apple.

With that prologue, I would like to begin with some observations about the impact of technology on various areas of the law. In the time available, I cannot do more than provide a sampler of what the nation's courts are currently wrestling with regarding the impact of technology in these areas.

I. INTELLECTUAL PROPERTY LAW AND THE DIGITAL MILLENNIUM COPYRIGHT ACT

Effective in 2000, Congress enacted the Digital Millennium Copyright Act (DMCA), which Mark Heaphy, partner at Wiggin & Dana, LLP, considered to be "the most sweeping amendment to copyright law since 1976."[5] In his presentation at the Nineteenth Annual Patent Practice Program in 2003, Heaphy discussed the impact of the DMCA, noting:

> Proponents of the DMCA argue that its provisions bring copyright law into the twenty-first century, by providing important protections for internet service providers, and by creating necessary safeguards to protect the rights of copyright holders against the relentless onslaught of new piracy technologies. On their view, the provisions of the DMCA provide essential legal mechanisms for stemming a dangerous erosion of intellectual property rights enabled by the internet and the digitization of information and various entertainment media.[6]

However, critics of the Act asserted that the Act was unnecessary and even harmful, "threatening free speech and First Amendment rights."[7] The role of the DMCA has been described as follows:

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[4] Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology*, MIT TECH. REV. (Apr. 15, 2014), https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology/ (alteration in original).

[5] Mark Heaphy, *The Impact of the Digital Millennium Copyright Act*, WIGGIN & DANA (May 8, 2003), http://www.wiggin.com/files/m%20heaphy%20impact%205-5-2003.pdf.

[6] *Id.*

[7] *Id.*

> It criminalizes production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works (commonly known as digital rights management or DRM). It also criminalizes the act of circumventing an access control, *regardless of whether or not there is actual infringement of copyright itself*. In addition, the DMCA heightens the penalties for copyright infringement on the Internet.[8]

The Electronic Frontier Foundation issued a report in 2014 arguing that over the last fifteen years, the DMCA has impeded scientific research, innovation, fair use, and more.[9] "In practice, the anti-circumvention provisions have been used to stifle a wide array of [what previously had been considered] legitimate activities."[10]

Litigation and threatened litigation since 2006 have highlighted the following issues.

A. Whether the DMCA Chills Free Expression and Scientific Research

As Edward Felton, Professor at Princeton University, stated in an article for *Slate*:

> Security researchers have long studied consumer technologies, to understand how they work, how they can fail, and how users can protect themselves from malfunctions and security flaws. This research benefits the public by making complex technologies more transparent. At the same time, it teaches the technology community how to design better, safer products in the future. These benefits depend on researchers being free to dissect products and talk about what they find.[11]

However, based on the language of DMCA 17 U.S.C. § 1201(a)(1), which says that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under [copyright law],"[12] security companies have been threatened with lawsuits if they disclose security flaws in software or attempt to detect and circumvent malicious code buried in software applications, CDs, DVDs, or other

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[8] Andrew Rissler, *Fair Use of Foul Balls: Major League Baseball Advanced Media and Its Counterproductive Takedown Notices to Fans*, 27 MARQ. SPORTS L. REV. 133, 135 (2016) (emphasis added) (citing U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (1998), http://www.copyright.gov/legislation/dmca.pdf).

[9] *Unintended Consequences: Sixteen Years Under the DMCA*, ELEC. FRONTIER FOUND. (Sept. 2014), https://www.eff.org/files/2014/09/16/unintendedconsequences2014.pdf [hereinafter *Unintended Consequences*].

[10] *Id.*

[11] Edward Felten, *The Chilling Effects of the DMCA*, SLATE (Mar. 29, 2013, 7:45 AM), http://www.slate.com/articles/technology/future_tense/2013/03/dmca_chilling_effects_how_copyright_law_hurts_security_research.html.

[12] 17 U.S.C. § 1201(a)(1)(A) (2012).

digital media.[13] Fearing DMCA liability, "online service providers . . . have censored discussions of copy-protection systems, programmers have removed computer security programs from their websites, and students, scientists and security experts have stopped publishing details of their research."[14]

B. Whether the DMCA Jeopardizes the Fair Use Doctrine

> By banning all acts of circumvention, and all technologies and tools that can be used for circumvention, the DMCA [arguably] grants to copyright owners the power to unilaterally eliminate the public's fair use rights. Already, the movie industry's use of encryption on DVDs has curtailed consumers' ability to make legitimate, personal-use copies of movies they have purchased.[15]

The music industry and e-book publishers are following suit.[16]

C. Whether the DMCA Impedes Competition and Innovation

Some of the ways that the DCMA has been used, arguably impeding competition and innovation, include "block[ing] aftermarket competition in laser printer toner cartridges, garage door openers, videogame console accessories, and computer maintenance services. Similarly, Apple has used the DMCA to tie its iPhone devices to Apple's own software and services."[17]

D. Limiting Access to Those with Disabilities

"For more than a decade, the [DMCA] has imposed a barrier to access for people with disabilities. It hinders access to books, movies, and television shows by making the development, distribution, and use of cutting-edge accessibility technology [to benefit the disabled] illegal."[18] For example, converting any book, movie, or any other copyrighted material to Braille, using an application that will "read" a book aloud, or adding closed captioning or an additional language track to a movie that

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[13] Kim Zetter, *A Bizarre Twist in the Debate over Vulnerability Disclosures*, WIRED (Sept. 11, 2015, 6:00 PM), https://www.wired.com/2015/09/fireeye-enrw-injunction-bizarre-twist-in-the-debate-over-vulnerability-disclosures/.

[14] *Unintended Consequences*, *supra* note 9.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Blake E. Reid, *The Digital Millennium Copyright Act Is Even Worse than You Think*, SLATE (Mar. 20, 2013, 1:06 PM), http://www.slate.com/articles/technology/future_tense/2013/03/dmca_copyright_reform_u_s_law_makes_digital_media_inaccessible.html.

the publisher has not already provided, arguably are no longer permitted under the DCMA.[19]

E. Who Owns What

Last year, the Librarian of Congress (the entity that regulates the DCMA) ruled that unlocking your own cellphone in order to get rid of all those annoying pre-installed bloat applications and advertising is illegal under the anti-circumvention measures of the Digital Millennium Copyright Act, because, while you may own the phone, you don't own the software that makes it work.[20]

Expect the DCMA to provide a lot of business for intellectual property lawyers and litigators.

II. CONTRACT LAW OR "THE CLICKS THAT BIND"

How many times have you seen on your computer, phone or tablet screen the words "Terms and Conditions—click to accept"? Nobody reads them. Everybody clicks.

As any first-year law student knows:

> [W]ith any legal contract, both sides, including the user, must agree ("assent") to the terms and conditions offered with the online service in order to create a legally enforceable "agreement." In addition, a user can demonstrate agreement in a variety of ways, either by words *or by deeds*, depending on the circumstances. Online, however, the line between these two categories can blur. Some service providers seek your agreement by requiring you to click the aforementioned "I Agree" button after being shown the agreement (i.e. a "clickwrap" agreement), whereas other service providers, alternatively, try to characterize your simple use of their website as your "agreement" to a set of terms and conditions buried somewhere on the site (i.e. a "browsewrap" agreement). There are many variations on these themes, such as mandatory checkboxes ("check this box to indicate your agreement to our terms and conditions") or email notices ("by continuing to use our service, you agree to the recent modifications to our terms of service").[21]

Courts are wrestling with the binding nature of such agreements—currently "clickwrap" agreements are mostly being upheld, but this is not so much the case with "browsewrap" agreements.[22]

In 2014, the Ninth Circuit Court of Appeals considered the enforceability of a browsewrap agreement in *Nguyen v. Barnes & Noble*,

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[19] *Id.*

[20] *Id.*

[21] Ed Bayley, *The Clicks that Bind: Ways Users "Agree" to Online Terms of Service*, ELECTRONIC FRONTIER FOUND. 1, 1 (Nov. 2009), https://www.eff.org/wp/clicks-bind-ways-users-agree-online-terms-service.

[22] *Id.*

Inc.[23] The Ninth Circuit noted that courts have enforced browsewrap agreements when users had actual notice of the agreement.[24] However, where "there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract."[25] Inquiry notice of a browsewrap agreement then depends on the design and content of the website and the agreement's webpage.[26] In simpler terms, "[t]he issue turns on reasonable *notice* and *opportunity to review* [the terms of the proposed agreement]—whether the placement of the terms and click-button afforded the user a reasonable opportunity to find and read the terms without much effort."[27] Expect a lot of litigation along these lines as more commerce moves online and webpages replace paper contracts.

Another area of technology that will influence the area of contract law, along with property law, business law, and international law is the concept of "smart contracts."[28]

You may have heard of so-called digital currency such as Bitcoin or Ethereum.[29] They are based upon an evolving and very complex concept known as "blockchain" technology.[30] Blockchain technology uses very robust encryption, community records management, and transaction processing managed by a decentralized peer-to-peer network to create highly secure, distributed ledgers.[31] Bitcoin "currency," for example, are simply ledger entries that can be sold or traded to others for goods, services or other currency.[32]

You probably don't think much about ledgers. One reason I went to law school was because I thought that there would be no math. But the reality is that both the law and modern society are intimately entwined

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[23] 763 F.3d 1171, 1174–77 (9th Cir. 2014).

[24] *Id.* at 1176.

[25] *Id.* at 1177.

[26] *Id.*

[27] Bayley, *supra* note 21, at 1–2.

[28] Jonathan Bick, *Are 'Smart Contracts' Smart Enough?*, L.J. NEWSLS. (Sept. 2017), http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/09/01/are-smart-contracts-smart-enough/.

[29] Ryan Derousseau, *Everything You Need to Know About Ethereum, Bitcoin's Biggest Rival Cryptocurrency*, MONEY (Dec. 22, 2017), http://time.com/money/5073131/what-is-ethereum-everything-know-cryptocurrency/.

[30] *Id.*

[31] PHILIP BOUCHER, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, HOW BLOCKCHAIN TECHNOLOGY COULD CHANGE OUR LIVES 5 (2017), http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/581948/EPRS_IDA(2017)581948_EN.pdf.

[32] *Id.* at 6.

with ledgers of one type or another. "A ledger consists simply of data structured by rules. Any time we need a consensus about facts, we use a ledger. Ledgers record the facts underpinning the modern economy. Ledgers confirm ownership."[33] Deed books are ledgers that tell us who owns what and whether their land is subject to any caveats or encumbrances.[34] A corporation, even a law firm, is reflected in ledger form, as a network of ownership, employment and production relationships.

> Ledgers confirm identity. Businesses have identities recorded on government ledgers to track their existence and their status under tax law. The register of Births Deaths and Marriages records the existence of individuals at key moments, and uses that information to confirm identities when those individuals are interacting with the world.
>
> Ledgers confirm status. Citizenship is [reflected in a government] ledger [evidenced by a passport or social security number], recording who has the rights and is subject to obligations due to national membership. The [voter registration] roll is a ledger, allowing . . . those who are on that roll a vote. Employment is [recorded in a] ledger, giving those employed a contractual claim on payment in return for work.
>
> Ledgers confirm authority. Ledgers identify who can . . . access what bank account, who can work with children, who can enter restricted areas. At their most fundamental level, ledgers map economic and social relationships.[35]

The key point about any ledger is trust. Agreement about the facts and when they change—trust that the ledger is accurate—is one of the fundamental bases of market capitalism and democratic society.[36] "Governments are the trusted entity that keeps databases of citizenship and the right to travel, taxation obligations, social security entitlements, and property ownership. Where a ledger [transaction] requires coercion in order to be enforced, the government,"[37] through the courts, enforces the terms of the transaction reflected in the ledger.

Blockchain technology is changing all of that. It is extremely complex technology blending advanced cryptology and digital signatures with game theory.[38] Essentially, it's a decentralized, shared database "populated with entries that must be confirmed and encrypted" and

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[33] Chris Berg, Sinclair Davidson & Jason Potts, *The Blockchain Economy: A Beginner's Guide to Institutional Cryptoeconomics*, MEDIUM (Sept. 26, 2017), https://medium.com/@cryptoeconomics/the-blockchain-economy-a-beginners-guide-to-institutional-cryptoeconomics-64bf2f2beec4.

[34] *Glossary*, PROP. INSIGHT (Apr. 16, 2012, 8:16 AM), https://www.xpresservices.biz/pdfs/20120416_PI_GW_Market_report.pdf.

[35] Berg, *supra* note 33.

[36] *Id.*

[37] Berg, *supra* note 33.

[38] Robert Hackett, *Why Big Business Is Racing to Build Blockchains*, FORTUNE (Aug. 22, 2017), http://fortune.com/2017/08/22/bitcoin-ethereum-blockchain-cryptocurrency/.

cannot thereafter be altered or erased.[39] "Think of it as a kind of highly encrypted and verified shared Google Document, in which each entry in the sheet depends on a logical relationship to all its predecessors. Blockchain [technology] offers a way to securely and efficiently create a tamper-proof log of sensitive activity . . . ."[40] This can include anything from digital currency such as Bitcoin, to shareholder records, to so called "smart contracts" that enforce themselves without the need for a government to step in.[41] The authenticity of the transaction is easily verified by the entire world, because everybody has ready access to a copy of the ledger online.[42] Cryptography and the decentralized nature of the database ensure that it is not possible to forge or in any way alter the ledger records.[43]

This technology promises to have the most profound impact of any other on every aspect of society, and thus the law, over the next few decades and lawyers must learn how it works and how it is being used in commerce if they expect to effectively advise and represent clients in the twenty-first century.

III. CIVIL RIGHTS LAW

> Employers can get into legal trouble if they ask interviewees about their religion, sexual preference, or political affiliation. Yet they can [and do] use social media to filter out job applicants based on their beliefs, looks, and habits. Laws forbid lenders from discriminating on the basis of race, gender, and sexuality. Yet they can refuse to give a loan to people whose Facebook friends have bad payment histories, if their work histories on LinkedIn don't match their bios on Facebook, or if a computer algorithm judges them to be socially undesirable.[44]

Expect a great deal of litigation over the use of social media as a legal basis to discriminate in many areas of the law.

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[39] Andrew Meola, *Understanding Blockchain Technology, Bitcoins and the Rise of Cryptocurrency*, BUS. INSIDER (Aug. 25, 2017, 4:36 PM), http://www.businessinsider.com/blockchain-technology-cryptocurrency-explained-2017-8.

[40] *Id.*

[41] *Id.*

[42] MICHAEL CROSBY ET AL., BLOCKCHAIN TECHNOLOGY, SUTARDJA CTR. FOR ENTREPRENEURSHIP & TECH. 1, 3 (2015), http://scet.berkeley.edu/wp-content/uploads/BlockchainPaper.pdf.

[43] Paul Bischoff, *What Is Blockchain? 10 Experts Attempt to Explain Blockchain in 150 Words or Less*, COMPARITECH (Mar. 17, 2017), https://www.comparitech.com/blog/information-security/what-is-blockchain-experts-explain/.

[44] Wadhwa, *supra* note 4.

IV. CRIMINAL LAW AND EVIDENCE

The current action in the criminal law area also involves the use of social media, but with those lesser known parts of the internet known as the "Dark Web" and the "Deep Web."[45]

When you think of social media outlets such as Facebook, Twitter, or Instagram, your mind does not generally jump to the ramifications of those sites on law enforcement. However, with the advent of the social media age came the ability for criminal enterprises to coordinate in a new fashion. Social media enables people to organize in a virtual world with little-to-no societal or geographical boundaries.

Although social media easily lends itself to criminal use and abuse, it also provides lots of tools for law enforcement to track down criminals.[46] I have lost count of the number of cases that have crossed my desk in recent years where Facebook or another social media site provided the evidence to solve a murder, crack a drug ring, or apprehend a child molester. Criminals provide valuable personal information when they post on these sites.[47] Using the proper analytical tools, police can piece together quite a story about those suspected of criminal activity, ranging from behavioral patterns and habits to actual confessions.[48] As social media continues to impact society, so will its influence be felt in law enforcement.

Many criminals use peer-to-peer networking and file sharing software designed to operate in the Dark Web using direct, encrypted communications links or internet locations in the Deep Web.[49] Law enforcement agencies also have adapted to use the same tools to catch software pirates, child molesters, drug dealers, counterfeiters, con artists,

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[45] Andy Beckett, *The Dark Side of the Internet*, GUARDIAN (Nov. 25, 2009, 19:05 EST), https://www.theguardian.com/technology/2009/nov/26/dark-side-internet-freenet.

[46] Social Media Use in Law Enforcement, LEXISNEXIS (Nov. 2014), https://risk.lexisnexis.com/insights-resources/infographic/law-enforcement- usage-of- social-media- for-investigations- infographic.

[47] *Id.*

[48] *Id.*

[49] John Kronick, *What is the Dark Web?*, PCM BLOG (Oct. 31, 2017), https://blog.pcm.com/2017/10/31/dark-web-what-it-is/. "The 'dark web' is the encrypted network that exists between Tor servers and their clients, whereas the 'deep web' is simply the content of databases and other web services that for one reason or another [have not been or] cannot be indexed by conventional search engines. . . . The darknets which constitute the dark web include small, friend-to-friend peer-to-peer networks . . . ." *The Deep/Dark Web*, CYBER INFO. (Apr. 28, 2016), https://thanatos.me/page/2/.

Only 6% of the internet is indexed by Google and other search engines, so the dark web and deep web constitute approximately 94% of all the sites and resources on the internet. JJ Rosen, *The Internet You Can't Google*, TENNESSEAN (May 3, 2014, 1:33 PM), https://www.tennessean.com/story/money/tech/2014/05/02/jj-rosen-popular-search-engines-skim-surface/8636081/.

and terrorists.[50] The challenge for criminal lawyers, both prosecution and defense, is conveying the technical intricacies of these esoteric and not commonly known aspects of the internet to judges and jurors who have no idea such digital worlds exist.

Beyond social media, prosecutors, defense attorneys, and judges struggle with if and how the traditional rules of evidence apply to the digital evidence gathered by police in our brave new world of high-tech. By way of example, my Court has recently dealt with evidentiary issues of first impression in Virginia involving the use of GPS tracking devices,[51] the extent to which machine generated information constitutes hearsay,[52] the requirements for the authentication of text messages,[53] and the evidentiary foundation required for the introduction of the contents of a cell phone.[54]

The pervasive use of social media also has unintended consequences. One such example is the social media mobile app known as "Waze."[55] This app is a commuter-centric phone app that allows users to communicate with one another and navigate through traffic with real-time, user-based updates.[56] In short, its purpose is to use social crowdsourcing to help people "beat" traffic.[57] However, one of the features on the app allows users to identify the locations of police officers. This is generally used as a warning to "slow down" in that area—but for those with malice in their heart[s], it can be used as an easy way for violent gangs and terror groups to find and hunt down police officers.

The information revolution has currently resulted in the de facto control of the availability and delivery of the majority of the world's information by several of "the companies that know us best," including,

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[50] Joseph Cox, *7 Ways the Cops Will Bust You on the Dark Web*, MOTHERBOARD (June 26, 2016, 9:00 AM), https://motherboard.vice.com/en_us/article/vv73pj/7-ways-the-cops-will-bust-you-on-the-dark-web; *see also Social Media Use in Law Enforcement*, LEXISNEXIS (Nov. 2014), https://risk.lexisnexis.com/insights-resources/infographic/law-enforcement-usage-of-social-media-for-investigations-infographic (discussing the widespread use of social media for investigations).

[51] Foltz v. Commonwealth, 706 S.E.2d 914, 915 (Va. Ct. App. 2011) (en banc), *aff'd*, 732 S.E.2d 4, 7 (Va. 2012).

[52] Tatum v. Commonwealth, 440 S.E.2d 133, 135 (Va. Ct. App. 1994).

[53] Atkins v. Commonwealth, 800 S.E.2d 827, 828–29 (Va. Ct. App. 2017).

[54] Rivera v. Commonwealth, 788 S.E.2d 144, 145–46 (Va. Ct. App. 2015).

[55] Zach Miners, *It's Official: Google Buys Mapping App Developer Waze*, COMPUTERWORLD (June 11, 2013, 1:38 PM), https://www.computerworld.com/article/2497703/mobile-apps/it-s-official--google-buys-mapping-app-developer-waze.html.

[56] *About Us*, WAZE, https://www.waze.com/about (last visited Feb. 1, 2018).

[57] *Id.*

but not limited to, Google, Apple, Amazon, Microsoft, Facebook, Verizon, AT&T, Comcast, Sprint, and T-Mobile.[58]

For example, Google has convincingly demonstrated that information is power and data is information. Its entire, highly successful, business model is built on the collection, use, and sale (for advertising purposes) of personal information about everyone who uses any Google service or application.[59] They collect that information with our permission (because nobody reads those terms and conditions) by recording search queries, providing free word processing, web browser and other applications, free cloud storage for photos and other files, and monitoring everything that passes through a Google application or service.[60] In short, we are not Google's customers, we are Google's *product* and others have begun to notice the ramifications of that fact. Because of Google's success, most major tech companies are following Google's lead in the collection and marketing of user data. The fact that Google and companies like it know virtually everything about you and your daily activities is not only valuable for marketing purposes, but if that data is readily available to law enforcement, solving crimes becomes pretty easy. That effort has already begun.

As you may know, Amazon's Alexa, Google's Google Assistant, Apple's Siri, Microsoft's Cortana, and most recently, Samsung's Bixby are all software applications residing on phones, PCs, tablets and dedicated devices such as Amazon's Echo that allow voice control of all manner of products and applications.[61] Each of these applications constantly listen for an attention word that signals that they are needed.

In February of this year, Arkansas prosecutors served a subpoena on Amazon seeking copies of all recorded conversations obtained from an

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[58] Steve Andriole, *Apple, Facebook, Twitter, Amazon, Google, Comcast, AT&T and Verizon Know You Well – OK with that?*, FORBES (Jan. 29, 2018, 10:09 AM), https://www.forbes.com/sites/steveandriole/2018/01/29/apple-facebook-twitter-amazon-google-comcast-att-verizon-know-you-well-ok-with-that/#2584ce0e29a4.

[59] *How Ads Work*, GOOGLE, https://privacy.google.com/how-ads-work.html (last visited Feb. 1, 2018).

[60] *Your Data*, GOOGLE, https://privacy.google.com/your-data.html, (last visited Feb. 1, 2018).

[61] Jeff Dunn, *We Put Siri, Alexa, Google Assistant, and Cortana Through a Marathon of Tests to See Who's Winning the Virtual Assistant Race — Here's What We Found*, BUS. INSIDER (Nov. 4, 2016, 10:49 AM), http://www.businessinsider.com/siri-vs-google-assistant-cortana-alexa-2016-11/#the-setup-theres-no-perfect-way-to-evaluate-a-talking-ai-database-let-alone-four-of-them-but-i-tried-to-cover-as-many-fundamental-topics-as-i-could-1; Robert, *Samsung May Name Its Voice Assistant 'Bixby,' and Debut It on the Galaxy S8*, TECH. BREAKING NEWS (Nov. 6, 2016), https://m.technologybreakingnews.com/2016/11/samsung-may-name-its-voice-assistant-bixby-and-debut-it-on-the-galaxy-s8/.

Alexa enabled device in the home where a murder took place.[62] Prosecutors reasoned that because Alexa is constantly listening, Amazon is likely constantly recording everything said since it may be useful marketable data and therefore likely recorded the events leading up to the death of the victim.[63] Amazon has acknowledged that Alexa is always listening and that it records everything directed to Alexa but denies that it keeps a record of anything else that Alexa hears.[64] Nevertheless, Amazon is aggressively seeking to quash the subpoena, confirming for many a suspicion that Amazon (and the other companies with similar "digital assistants") do indeed constantly harvest data by recording everything that is said in range of the microphone instead of only those words spoken after the attention word.[65] If true, the availability of such data in the hands of corporate third parties will be a treasure trove of evidence for law enforcement and a privacy advocate's worst nightmare.

In the 2002 science fiction movie, *Minority Report*, Tom Cruise plays the role of a police officer charged with arresting murderers *before* they commit their crime based upon the precognition abilities of three psychics.[66] Modern technology is close to realizing the same ability.

> Predictive analytics is a highly complex science, which uses statistical data and algorithms to make [predictions] concerning a myriad of behavioral issues. And through the utilization of cutting edge software coupled with the services of highly trained analysts, the often insurmountable amount of internet data can be tamed, and the outcome can yield positive results in the fight against crime.[67]

The internet, in general, has given those with criminal tendencies many ways to advance their criminal goals.[68] Using access to the internet and sophisticated analytical algorithms developed originally for use by the NSA, CIA and FBI to predict terrorist activities and targets:

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[62] Gerald Sauer, *A Murder Case Tests Alexa's Devotion to Your Privacy*, WIRED (Feb. 28, 2017, 10:00 AM), https://www.wired.com/2017/02/murder-case-tests-alexas-devotion-privacy/.

[63] *Id.*; *see also* State v. Bates, No. CR20160370, 2016 WL 7587405 (Ark. Cir.) (aff. for search warrant) (explaining the police's concern that the Amazon Echo device contained relevant evidence).

[64] Sauer, *supra* note 62.

[65] Eliott C. McLaughlin & Keith Allen, *Alexa, Can You Help with This Murder Case?*, CNN (Dec. 28, 2016, 8:48 PM), https://www.cnn.com/2016/12/28/tech/amazon-echo-alexa-bentonville-arkansas-murder-case-trnd/index.html.

[66] *Minority Report*, IMDB, http://www.imdb.com/title/tt0181689/ (last visited Feb. 1, 2018).

[67] Jennifer Chase, *The Age of Technology and the Impact on Law Enforcement*, AUTHOR JENNIFER CHASE (Mar. 8, 2017), https://authorjenniferchase.com/2017/03/08/the-age-of-technology-and-its-impact-on-law-enforcement/.

[68] *Id.*

> Law enforcement analysts are now able to sift through the plethora of data left behind by these criminals. Drawing on data from cell phone companies, financial institutions, and other publicly accessed forums, analysts are able to determine connections between cases and activities, and oftentimes, they can predict a future threat [with a high degree of reliability].[69]

V. CRIMINAL PROCEDURE: SURVEILLANCE, PRIVACY, AND THE FOURTH AMENDMENT

Let us take a moment for a short trip down Fourth Amendment memory lane:

The Supreme Court of the United States held in *Olmstead v. United States* that the Fourth Amendment protects "persons, houses, papers, and effects" as the text of the amendment specifies.[70] In other words, there was a property test for Fourth Amendment application.

That changed in 1967 with *Katz v. United States*—"[T]he Fourth Amendment protects people, not places."[71] *Olmstead* was overruled and the test for application of the Fourth Amendment became the "reasonable expectation of privacy" test.[72]

In *Kyllo v. United States*, the Supreme Court held that the use of a thermal imaging device from a public vantage point to monitor the radiation of heat emanating from a person's home was a "search" within the meaning of the Fourth Amendment, and thus required a warrant if the technology was not available to the general public.[73]

Most recently, in *United States v. Jones*, the Supreme Court resurrected a property test for application of the Fourth Amendment when it held that by physically installing a GPS tracking device on the defendant's car, the police had committed a trespass against Jones's "personal effects"—this trespass, in an attempt to obtain information, constituted a search per se.[74]

This series of cases has created a number of interesting constitutional issues when applied to the use of modern technology in society. Some of the questions for courts and constitutional scholars that they are currently wrestling with are:

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[69] *Id.*

[70] 277 U.S. 438, 450 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

[71] 389 U.S. 347, 351 (1967).

[72] *Id.* at 360–61 (Harlan, J., concurring).

[73] 533 U.S. 27, 29, 34 (2001).

[74] 565 U.S. 400, 402, 404–05 (2012).

Is Kyllo *still good law since the infrared device used in that case is now generally available to the public?*[75]

What effect will the abandonment of our privacy to corporate third-parties have on the application of the Fourth Amendment to the data collected by those third parties?

How does the Fourth Amendment apply generally in a digital world?

Seven years ago, I wrote a concurring opinion in the case of *Foltz v. Commonwealth*, which involved the use of a GPS location device by police officers.[76] In response to the concurring opinion by one of my colleagues, I observed as follows:

> Advances in technology in the twenty-first century have engendered a growing number of previously unavailable investigative and surveillance techniques—such as the GPS location tracking illustrated by this case—that allow the government to conduct what many intuitively find to be an increasingly troubling degree of monitoring of its citizens, potentially on a vast scale, by targeting information that is at least, in some sense, "public." . . . [W]e are not talking about the "public" events of a single evening, but rather the comprehensive observation or electronic tracking that takes place over a period of days, weeks, or months. While it is reasonable to expect that anyone might witness any one of such a series of public activities or events, it does not follow that one cannot reasonably expect that a particular person or group would not be privy to all of them. Similarly, one might reasonably expect something as intensely personal as their genetic profile to remain private even if such a profile could in principle be extrapolated from residual DNA left upon a glass or fork "abandoned" in a public restaurant.[77]

Since I wrote that opinion expressing my view, that instead of property or privacy, the basis for Fourth Amendment jurisprudence should be security as the text of the Amendment actually specifies; advances in technology have underscored the thoughts I expressed in *Foltz*.

Currently, Google, Apple, Microsoft, Amazon, Facebook, and your internet service provider know absolutely everything about you and your family, including what you like to wear, eat, and do for fun; every place your phone—and presumably you—has ever been when it was powered on; and what your vices are. By law, they provide any or all of that information to the government upon request through an administrative

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[75] A FLIR C2 Compact Thermal Imaging System is $499 on Amazon as of this writing. AMAZON, https://www.amazon.com/FLIR-C2-Compact-Thermal-Imaging/dp/B00T9RANUC/ref=sr_1_5?ie=UTF8&qid=1510504358&sr=8-5&keywords=infrared+imaging&dpID=518vU3laFjL&preST=_SX300_QL70_&dpSrc=srch (last visited Feb. 1, 2018).

[76] 706 S.E.2d 914, 927 (Va. Ct. App. 2011).

[77] *Id.* at 927–28 (Humphreys, J., concurring).

subpoena.[78] Because that data is provided voluntarily by you to third parties, and is now their property under the terms you agreed to when you used their software or service, it is not currently subject to protection by the Fourth Amendment.[79]

So, can there be any reasonable expectation of privacy if there is no such thing as real "privacy" in today's world?

When companies like Home Depot, Anthem, J.P. Morgan Chase, Yahoo, and most recently Equifax—to name only a few—are hacked,[80] resulting in the theft of the personal identifying information of hundreds of millions of Americans that make it easy for criminals to open accounts, make purchases in the name of, and ruin the credit of millions of people—is there any realistic legal recourse? It is easy to raise these questions but we as a profession must help our clients find the answers.

This is an appropriate segue to some thoughts about the impact of technology on the way lawyers serve their clients.

VI. THE IMPACT OF TECHNOLOGY ON THE PRACTICE OF LAW

Blair Janis, director of software development at the WealthCounsel Companies and an adjunct faculty member at the Brigham Young University Law School, offered the following preface to his colloquy on the impact of technology in recent years:

> Do you remember what you were doing on June 29, 2007? There are days in history that are significant and memorable. I can still remember where I was and what I was doing on March 30, 1981, when Ronald Reagan was shot; on January 28, 1986, when the Space Shuttle *Challenger* exploded on live television . . . and of course[,] September 11, 2001. So what is significant about June 29, 2007? That is the day the first iPhone was released. Perhaps it was not as historically significant at the time as some of these other events, but the release of the iPhone has arguably had more impact on how we have integrated the use of technology into our daily work and personal lives than any other technology [in the last century].[81]

I am also old enough to remember when the practice of law was considered a profession like medicine where the primary focus was on

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[78] 18 U.S.C. § 2703(c)(2) (2012).

[79] *See Jones*, 565 U.S. at 417 (Sotomayor, J., concurring) (questioning the wisdom of the lack of Fourth Amendment protection for information voluntarily disclosed to third-parties).

[80] Taylor Armerding, *The 17 Biggest Data Breaches of the 21st Century*, CSO (Jan. 26, 2018, 3:44 AM), https://www.csoonline.com/article/2130877/data-breach/the-biggest-data-breaches-of-the-21st-century.html.

[81] Blair Janis, *How Technology Is Changing the Practice of Law*, GP SOLO (May/June 2014), https://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changin g_practic e_law.html.

serving the client. In recent years, it unfortunately has become more of a business, with the primary motivation being the bottom line and shareholder profit instead of service to individual clients. In my view, the proper use of technology can allow today's lawyer to return the focus to the client, but the use of that same technology also presents some challenges unique to our profession.

It should go without saying that word processing, spreadsheet, telecommunications, database, presentation, and legal research software have improved productivity and lowered overhead for lawyers along with every other business.[82] "[E]lectronic billing ('e-billing') is gradually replacing traditional paper invoices. Technology has also become an important legal marketing tool and new law firm websites and legal blogs spring up daily in cyberspace."[83]

However, there is one fundamental truth that lawyers practicing law in the twenty-first century have to come to grips with. You cannot effectively advise or represent any client on any legal subject without a basic understanding of the actual mechanics of how personal and business relationships are conducted these days. Simply knowing the law is not enough; you must learn and understand the vocabulary of the information age such as what terms like "IP address," "SMS," "cryptocurrency," and the "cloud" mean and how they are used by your clients.[84] Obviously younger lawyers will adapt more easily, but those of us who started practicing law in the last century have a lot of catching up to do.

Although courts have been slow to adopt it, particularly here in Virginia, electronic filing allows attorneys to file lawsuits, motions and other pleadings from their offices at any hour of any day without a trip to the courthouse—potentially allowing more time to focus on the client's case.[85]

The evolving rules regarding e-Discovery "require parties in litigation to preserve and produce documents that exist only in electronic form ('e-documents') such as e-mails, voicemails, graphics, instant messages, e-calendars and data on handheld devices."[86] In many cases, that all adds up to terabytes of data.

> The time-intensive process of reviewing and producing millions of pages of electronic information has spawned a new host of litigation database management tools. This database technology allows legal

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[82] *Id.*

[83] Sally Kane, *Legal Technology and the Modern Law Firm*, BALANCE (May 15, 2017), https://www.thebalance.com/technology-and-the-law-2164328.

[84] *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2014) (explaining a lawyer's duty of competence, which includes an understanding of technology).

[85] *See* Kane, *supra* note 83 (explaining e-filing and its acceptability nationwide).

[86] *Id.*

> professionals to image, code, analyze, review and manage the massive amounts of electronic evidence, a process called "electronic database discovery" (EDD).[87]

The other side of the technology coin is the impact of technology on the traditional law firm business model and the ethical implications brought about by the use of digital technology by lawyers and also the use of technology to avoid using a lawyer.

> While the technology *around* the legal world advances at an exponential rate, the technology *within* the legal world, especially as it relates to [actual] lawyering (i.e., providing legal services as opposed to running a law business), is much slower. There are good reasons for this. Lawyers in general are risk averse. We need to be. One of the primary benefits of using a lawyer for legal services is to obtain some level of guarantee that the advice or outcome of our services will actually accomplish the purpose for which the services were provided. This places a heavy burden of responsibility on lawyers to ensure not only that the actual services they provide[,] but also the manner in which they provide [them,] will not in some way increase the risk of breaching [their professional duties of confidentiality and competent representation].[88]

Because lawyers are risk averse, we tend to stick with what we know works.

> This creates tension between the risk aversion in the legal profession and the ever-changing expectations and demands of legal service consumers. This tension is measured as the difference in the rate of adoption of new technology by legal service *consumers* and the rate of adoption of new technology by legal service *providers*.[89]

With the rate of advance in technology generally doubling every two years, consistent with Moore's Law, that tension between us and our potential clients continues to grow, and "the legal services industry will find itself competing with outside providers attempting to fill the gap."[90]

This spectacle is already occurring. Companies offering web-based, self-help legal advice and services such as LegalZoom, Nolo, Rocket Lawyer and A Peoples' Choice will help people prepare their own will, file for divorce and prepare other legal documents.[91] Bar associations in

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[87] *Id.*

[88] Janis, *supra* note 81 (emphasis added).

[89] *Id.* (emphasis added).

[90] *Id.*

[91] *Best Online Legal Forms*, BUSINESS.COM (Jan. 30, 2018), https://www.business.com/categories/best-online-legal-forms/; *About Us*, NOLO, https://www.nolo.com/about/about.html (last visited Feb. 10, 2018).

various states have tried to suppress these companies without much success.[92]

"E-discovery and the growing use of electronic litigation database tools have even given birth to a brand new profession, the litigation support professional, to implement and manage these new technology tools."[93] Instead of hiring associates to sift through mountains of data stored in various digital formats, discovery review is more often being outsourced to lawyers in India and other countries with lower labor costs, who remotely access the discovery data on a law firm's server or through the "cloud," or the discovery review is delegated to artificial intelligence software.[94] Given the relative ease with which hackers can gain access to data, including personal and confidential information stored on any device connected to the internet, there are serious ethical and liability questions that have to be answered with respect to allowing client information to be stored where it can be more easily stolen.

The dictionary defines artificial intelligence as "an area of computer science that deals with giving machines the ability to seem like they have human intelligence" and "the power of a machine to copy intelligent human behavior."[95]

As I just mentioned,

> [e]lectronic discovery (e-discovery) is an area where there are numerous examples and implementations of artificial intelligence both replacing work product from lawyers and at the same time improving the experience of law practice. Much has been written, discussed, and litigated around the technology and benefit of e-discovery. The focus of most providers is to provide intelligent algorithms to find information based on concepts and key words agreed upon by the parties to the litigation. The "hot new thing" in e-discovery is the use of a higher-level artificial intelligence concept called predictive coding.[96]

This is similar to the same technology I mentioned earlier in connection with using digital analytics and artificial intelligence algorithms to predict terrorist and criminal activity.

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[92] *See, e.g.*, George Leef, *LegalZoom Takes on a State Bar That Doesn't Want Competition*, FORBES (July 22, 2015, 3:00 PM), https://www.forbes.com/sites/georgeleef/2015/07/22/legalzoom-takes-on-a-state-bar-that-doesnt-want-competition/2/#508849b67ffe (explaining the conflict between LegalZoom and the ABA).

[93] Kane, *supra* note 83.

[94] *Outsourcing Legal Tasks: Five Potential Ethical Violations to Avoid*, AM. DISCOVERY, http://www.americandiscovery.com/resources/industry-insights/2016/01/outsourcing-legal-tasks-five-potential-ethical-violations-to-avoid/ (last visited Feb. 2, 2018).

[95] Janis, *supra* note 81.

[96] *Id.*

> Essentially, predictive coding is a process whereby a machine learns from watching human behavior and then applies what it learns. This is the technology behind how Amazon and Google seem to always know what you are looking for before you start looking. The machine's learning algorithms are designed to gather data, analyze it, and then make decisions about what is relevant. And because of the increased computing power on these machines, this is done very quickly.[97]

VII. PEERING INTO THE FUTURE

Just as predictive analysis is helping the intelligence agencies prevent terrorist attacks and law enforcement catch criminals on the web, it is also being developed as a tool to predict legal outcomes.

"Chicago-Kent College of Law professor Daniel Martin Katz . . . and his colleagues created an algorithm to predict the outcomes of U.S. Supreme Court cases.[98] It attained 70 percent accuracy for 7,700 rulings from 1953 to 2013."[99] Chicago-based NexLP, which stands for next generation language processing, wants to take this idea one step further, working with analyzed information to predict the outcome of future litigation.[100] How this will play out remains to be seen, but all of you have ringside seats. I only hope I will be able to retire before I am replaced by a computer algorithm.

CONCLUSION

Well, I hope this symposium has given you a lot to think about today and that you found it both informative and useful. We certainly live in interesting times, and to some, that is a curse. For lawyers and judges, it is a challenge. Good lawyers love a challenge. Because you are here, I know you are up to it! Thank you and Godspeed.

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[97] *Id.*

[98] Julie Sobowale, *How Artificial Intelligence is Transforming the Legal Profession*, ABA J. (Apr. 2016), http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession.

[99] *Id.*

[100] *Id.*

A RISING TIDE LIFTS *MOST* BOATS: HOW TECHNOLOGY FLOATS GOOD LAWYERS AND SINKS THE BAD

*The Honorable Kevin M. Smith**

INTRODUCTION

> [C]ounsel for the Respondent argued that as attorneys we need to "take care of our own." As a result of Mr. McMaster's comments, the Hearing Panel feels compelled to clarify its role in the disciplinary system. . . . [T]he Hearing Panel must be mindful that the public and the legal profession deserve to be protected from attorneys who have caused harm. *The Hearing Panel is not required nor is it permitted to shield a lawyer from the effect of failing to comply with his duties as an attorney.*[1]

McMaster's comment, "take care of our own," sounds absurd, yet, how often do lawyers observe colleagues engaging in questionable conduct and do nothing about it, or, as McMaster put it, choose to "take care of [their] own" by brushing aside such conduct as no big deal?

Consider attorneys practicing law in most courts who consistently exhibit the following behaviors:

- late for hearings;
- never timely responding to discovery requests;
- filing form motions with out-of-date or even overturned case law;
- filing motions and briefs full of typos and misstatements of law;
- consistently giving clients bad legal advice; or
- bullying clients into taking pleas on cases with clear suppression or dismissal issues.[2]

Everyone has a bad day now and then, so being late to court on one of those bad days, or committing some of the above mistakes on occasion, does not warrant professional discipline, but sometimes it is endemic, the

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1 *In re* Doudin, 249 P.3d 1190, 1198 (Kan. 2011) (emphasis added).

2 *See generally* T. Michael Mather, *Twelve Most Common Mistakes by Beginning Attorneys*, 26 TEMP. J. SCI. TECH. & ENVTL. L. 43, 44 (2007); Dan Pinnington, *The Most Common Legal Malpractice Claims by Type of Alleged Error*, LAW PRAC. (July/Aug. 2010), https://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_webonly_webonly07101.html.

way some lawyers practice law every day. Yet, these lawyers often practice law in this way for years before their states' disciplinary authorities hold them accountable—it is unconscionable. Indeed, any lawyer or judge who knows someone engaged in such repeated irresponsible lawyering and doesn't report him is also engaging in professional misconduct. Model Rule 8.3(a) states: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[3] It is not optional; the lawyer "shall inform the appropriate professional authority" when the other lawyer's conduct calls into question his "honesty, trustworthiness or fitness."[4]

As the Kansas Supreme Court observed, a lawyer's duty in such instances is not to take care of his own, rather, it's to protect the public and the legal profession from unprofessional lawyers.[5]

I. ADVANCES IN TECHNOLOGY MAKE UNPROFESSIONAL LAWYERS STAND OUT EVEN MORE, AND MAKE OTHER LAWYERS' DUTY TO REPORT THEM EVEN MORE CRITICAL

"Plausible deniability is a politician's best friend."[6] It also seems to be what many lawyers who practice law side-by-side with habitually unprofessional lawyers count on. Reporting a colleague to the state bar's disciplinary authority is distasteful, and many lawyers fear that once a report is made, it will make it easier for someone to report them too.[7] Indeed, there's truth to the mantra, "[b]ut for the grace of God there go I."[8] Yet the inclination to not report someone for fear of turnabout is more applicable to the inadvertent error, the mistake everyone is bound to make eventually, not the repeated errors that a little planning or responsible lawyering would have cured. In our modern world, excuses for such endemic bad behaviors are getting less and less palpable.

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[3] MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (AM. BAR ASS'N 2016).

[4] *Id.*

[5] *In re* Christian, 135 P.3d 1062, 1064, 1067 (Kan. 2006).

[6] Aaron Blake, *Plausible Deniability: The Thing President Trump Can't Stop Abusing*, WASH. POST (July 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/07/04/plausible-deniability-the-drug-that-president-trump-cant-stop-abusing.

[7] Thomas P. Sukowicz, *The Ethics of Reporting on Your Colleague—or Yourself*, GPSOLO (Oct./Nov. 2009), https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/sukowicz.html.

[8] *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 102d Cong., 1st Sess. 260 (1991).

Today more than ever, *all* lawyers, not just the ones with big firms or with lots of operating capital, have access to affordable and often *free* technological advances that will prevent the most common oversights that lead to lawyer misconduct claims.[9] A technological tide is lifting all boats and the clients of the hard-headed old-school lawyer who refuses to embrace technologies to manage his practice will suffer. The hard-headed old-school lawyer will drown in the oncoming tsunami, making it impossible for lawyers or judges to let such malpractice go unreported. This Article illustrates that impossibility by considering (1) the changing demographics of the profession; (2) how disciplinary authorities and the courts discipline attorneys for behaviors impacted by the misuse of technology; and (3) how bad behaviors indicative of the misuse of technology resemble those behaviors of lawyers impaired by substance-abuse or mental illness, but disciplinary authorities and the courts will not give technology-ignorant lawyers the same grace that they do for legitimate mitigating circumstances.

II. DEMOGRAPHICS OF THE PROFESSION AND HOW THE USE OR MISUSE OF TECHNOLOGY IMPACTS THE ETHICAL PRACTICE OF LAW

A. The Top Malpractice Errors Haven't Changed Much over the Years, but the Technology Tools That Can Minimize Them Are More Accessible Than Ever, to Everyone

Technology has dramatically impacted the practice of law.[10] Properly implemented, it helps modern lawyers avoid the pitfalls of the profession's less enlightened past.[11] Indeed, the top legal malpractice errors today, as well as those of almost a decade ago, and likely those of the future, are impacted by lawyers' use or misuse of technology. In 2010, for example, the top five legal malpractice errors were:

- failure to know or apply law;
- planning error;
- inadequate discovery or investigation;
- failure to file documents; and
- failure to calendar.[12]

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[9] *See, e.g.*, *Free Legal Research Resources*, HARV. L. SCH. LIBR., https://guides.library.harvard.edu/free (last visited Mar. 17, 2018) (providing multiple links to free legal research resources).

[10] *See generally* Blair Janis, *How Technology Is Changing the Practice of Law*, GPSOLO (May/June 2014), https://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html (discussing multiple ways in which technology has impacted the practice of law).

[11] *Id.*

[12] Pinnington, *supra* note 2.

Consider how today's technology can help prevent these errors. Simple and cheap internet search engines are available to research case law and generate contracts, wills, and other legal documents.[13] Calendar and task management applications make setting trial dates, case filing tasks, and filing deadlines as easy as speaking into a cell phone assistant.[14]

Yet, there were technology options in 2010—options that lawyers guilty of the above lapses could have used had they tried.[15] All but the most stubborn and tight-fisted "old-school" lawyers used PCs and the internet for research, and many courts had begun transitioning to e-filing, albeit on a limited, voluntary basis.[16] "The cloud" had not yet infiltrated our profession,[17] but wireless and remote access to client data by lawyers had. Nonetheless, a lawyer's effective use of 2010 technology would have prevented most, if not all, of these errors.

In 2015, a survey of malpractice insurance carriers revealed some the top errors to be:

- conflict of interest;
- procedural errors;
- failure to calendar or follow up;
- failure to know or provide adequate advice; and
- choice of law.[18]

Adding then-available cloud backups, cloud law practice management tools, and more pervasive e-filing to the law practice tech toolbox, a lawyer's effective use of 2015 technology would likely have prevented these errors.

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[13] *See Legal Document Management Software*, CAPTERRA, https://www.capterra.com/legal-document-management-software (last visited Mar. 17, 2018) (giving access to numerous legal document generating tools).

[14] *See Legal Calendar Software*, CAPTERRA, https://www.capterra.com/legal-calendar-software/ (last visited Jan. 12, 2018) (giving access to numerous law practice calendar and task management tools).

[15] Joshua Poje, *Technology Trends for 2010*, YOURABA (Jan. 2010), https://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/articles/youraba0110.html.

[16] *25 Years Later, PACER, Electronic Filing Continue to Change Courts*, U.S. CTS. (Dec. 9, 2013), http://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts.

[17] Cloud computing is growing exponentially. "The market generated $100 billion a year in 2012, which could be $127 billion by 2017 and $500 billion by 2020." Eric Griffith, *What Is Cloud Computing?*, PCMAG (May 3, 2016, 12:01 AM), https://www.pcmag.com/article2/0,2817,2372163,00.asp.

[18] *Lawyers' Professional Liability Claims Trends: 2015*, AMES & GOUGH, 2015, at 1, 4, http://www.law.uh.edu/faculty/adjunct/dstevenson/007a%20Legal%20Malpractice%20Claims%20Survey%202015%20Final.pdf.

Finally, recent Illinois malpractice trial data identifies the following top six claims:

- bad advice;
- conflict of interest or breach of a fiduciary duty;
- missed deadline;
- document or drafting error;
- inaction or nonappearance; and
- investigation or discovery.[19]

Except for the different order and the appearance of conflict of interest in the 2015 survey, the top errors haven't changed much. But technology's impact on the errors is often dramatic, and whether a lawyer is properly utilizing such technologies in his practice is glaringly obvious in the courtroom.

Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[20] Thus, as long as the attorney can acquire the legal knowledge needed for the particular legal matter and exhibits the skills and preparation "reasonably necessary for the representation," he can represent the client.[21]

Moreover, Comment [8] on Rule 1.1 states: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[22]

Thus, lawyers are not only obligated to do their homework to learn the law, but also to learn about relevant technologies and how to apply them to the profession.[23]

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[19] Herbert M. Kritzer & Neil Vidmar, When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims and Their Resolution 67 (July 7, 2015) (unpublished manuscript), *available at* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6182&context=faculty_scholarship.

[20] MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

[21] *Id.* at r. 1.1 cmt. 2.

[22] *Id.* at r. 1.1 cmt. 8 (emphasis added).

[23] *See generally* Jeffrey Allen, *Technology and Ethics: Tips and Traps*, GPSOLO (Oct./Nov. 2010), https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/solo_lawyer_ethics_technology_backup_metadata_confidentiality.html.

B. More New Lawyers Means Not Only More Inexperienced Lawyers, but Younger, Tech-Savvy Lawyers to Compete Against the Older, Tech-Stubborn Ones

There are more than 1.3 million licensed lawyers in the United States.[24] The number of new law school graduates decreased by almost nine percent in 2016, resulting in fewer than 40,000 law degrees last year.[25] Most disturbing, is the dwindling number of *law* jobs available to fresh graduates.

> [T]he [National Association for Law Placement] study pegged the employment rate for 2015 law graduates at 86.7 percent – virtually unchanged from the year before. That's a far cry from the 91.9 percent rate seen before the financial crisis in 2007 but is still a step up from the class of 2013's soft 84.5 percent rate.[26]

These numbers may be overly optimistic.

> The aggregated school data shows that 73 percent of the 2016 graduates of the 204 law schools approved by the ABA to offer the J.D. degree were employed in full-time long-term Bar Passage Required or J.D. Advantage jobs roughly 10 months after graduation. That compares to the approximately 70 percent of the graduates reporting similar full-time long-term jobs last year. The higher percentage of students so employed, however, results from an approximately 7 percent decrease in the size of the graduating class. The absolute number of full-time long-term Bar Passage Required or J.D. Advantage jobs declined by 4 percent from 28,029 for 2015 to 26,923 in 2016.[27]

With more than a million lawyers already practicing law, tens of thousands of new lawyers entering the profession each year, and only so many jobs to go around, the result is thousands of unemployed inexperienced lawyers needing clients and cases to generate legal fees to pay living expenses and the massive amount of law school loan debt most of these fresh graduates are burdened with.[28] What do many of these

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[24] *ABA National Lawyer Population Survey*, AM. BAR ASS'N (Dec. 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202017.authcheckdam.pdf.

[25] Andrew Soergel, *Hiring Outlook Bleak for New Law Grads*, U.S. NEWS & WORLD REP. (Aug. 18, 2016, 4:19 PM), https://www.usnews.com/news/articles/2016-08-18/hiring-outlook-bleak-for-new-law-grads.

[26] *Id.*

[27] Bill Choyke, *Media Advisory*, AM. BAR ASS'N (May 11, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2017_employment_data_2016_graduates_news_release.authcheckdam.pdf (discussing the employment data for the graduating law class of 2016).

[28] The average private law school debt is $127,000.00, and the average public law school debt is $88,000.00. *The Report of the Task Force on Financing Legal Education*, AM. BAR ASS'N (June 17, 2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admiss

unemployed law school graduates do? The ones who pass their states' bar exams often open solo law practices.[29] Before technology via the internet took hold of the profession, such lawyers needed easy access to bar associations, law schools, or court law libraries since the online legal databases of the time, Westlaw or LexisNexis, were cost prohibitive.[30] Without access to such resources, these lawyers were barred from any area of the law that necessitated acquiring new legal knowledge in compliance with Rule 1.1. Law schools have responded to this new dynamic:

> The typical law school has been hit hard by a more than 40 percent drop in applications in the last five years, and many graduates from these schools have had significant difficulty finding professional employment. These law schools are eager to look for more effective ways to prepare students to compete in the modern legal marketplace.[31]

Specifically, law schools are integrating technology into legal education, including teaching students how to use high-tech law practice management, discovery, e-filing, and legal research tools.[32]

C. Cheap, Easily Accessible Technology Levels the Playing Field, Exposes the Tech Dunces, and Makes Malpractice More Evident in Non-Tech-Savvy Lawyers

Old-school lawyers must now compete against fresh graduates who know how to utilize new technologies in the practice of law.[33] "[S]tudents

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ions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf.

[29] *See generally* Noam Scheiber, *An Expensive Law Degree, and No Place to Use It*, N.Y. TIMES (June 17, 2016), https://www.nytimes.com/2016/06/19/business/dealbook/an-expensive-law-degree-and-no-place-to-use-it.html (discussing recent law school graduates' plans of opening their own firms).

[30] Erin Geiger Smith, *Can a Lawyer Survive Without Westlaw and Lexis?*, BUS. INSIDER (Feb. 22, 2010, 11:22 AM), http://www.businessinsider.com/can-a-lawyer-survive-without-westlaw-and-lexis-2010-2.

[31] Andrew Perlman, *Innovation in Legal Education*, LAW PRAC. TODAY (Jan. 2014), https://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/2014/january14/innovation-in-legal-education.html.

[32] "A recent Gartner report predicts that by 2018, 'legal IT courses will be required for the graduates of at least 20 U.S. Tier 1 and Tier 2 law schools.'" Richard Granat & Marc Lauritsen, *Teaching the Technology of Practice: The 10 Top Schools*, 40 LAW PRAC. MAG. 46, 49 (July/Aug. 2014), http://mazdigital.com/webreader/31892?page=46. *See also* Roy Strom, *Law Schools' Tech-Training Conundrum: If We Teach Them, Will They Get Jobs?*, AM. LAW. (July 20, 2016), http://www.law.com/sites/articles/2016/07/20/law-schools-tech-training-conundrum-if-we-teach-them-will-they-get-jobs/ (discussing how there are few law schools teaching students the skills needed to solve legal problems using technology).

[33] *See, e.g.*, Kenneth J. Hirsh & Wayne Miller, *Law School Education in the 21st Century: Adding Information Technology Instruction to the Curriculum*, 12 WM. & MARY BILL RTS. J. 873, 874 (2004), http://scholarship.law.wm.edu/wmborj/vol12/iss3/15 (The premise of the article is that in 2004, legal education hadn't changed much in 120 years and that there

who graduate with these new skills can offer traditional employers a 'two for one'—traditional legal skills plus training and insights into how to deliver legal services more effectively and efficiently, and in a manner that clients increasingly demand."[34] Moreover, such skills put new graduates in a position to better compete as solos and in non-traditional legal environments.[35] From a practical standpoint, many unemployed new lawyers forced into solo practice can compete better against older lawyers since they have enhanced technology skills and lower overhead.[36] For example, legal research is no longer biased in favor of lawyers and big firms that can afford the exorbitant prices of the big-name legal databases. Today's tech-savvy lawyers have Google Scholar,[37] Fastcase,[38] and online state and federal case and statute databases.[39] Most of these resources are free and include cite checking features to ensure that the cases are still good law. Such advances also make it easier for lawyers to embrace new practice areas due to the ease of getting up to speed in even complex areas of the law.

With these breakthroughs in technology in the law, it's getting easier to identify ignorant lawyers doing a poor job for their clients by citing outdated case law or statutes that have been superseded.[40] It is simply too easy to cite check with the aforementioned technologies for a lawyer's repeated errors in this regard to not have something to do with technological ignorance, intentional or otherwise. Such *willful* ignorance can permanently damage a lawyer's reputation. The last thing any responsible lawyer wants a judge to do is question his position before the

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was a need to integrate technology training in legal education.); *see also* Mike Willee, *New Lawyers and Technology – The Changing Culture of Legal Practice*, EVOLVE LAW (Nov. 22, 2017), http://evolvelawnow.com/blog/new-lawyers-technology-changing-culture-legal-practice/# (discussing how young lawyers are introducing new technology to an older generation of lawyers).

[34] Perlman, *supra* note 31.

[35] *Id.*

[36] Pamela Bucy Pierson, *Solo and Small Firm Practices Set to Thrive in the New Legal Marketplace*, GPSOLO EREPORT (June 2015), https://www.americanbar.org/publications/gpsolo_ereport/2015/june_2015/solo_small_firm_practices_set_thrive_in_new_legal_marketplace.html.

[37] *Google Scholar*, GOOGLE, https://scholar.google.com (last visited Jan. 22, 2018).

[38] FASTCASE, https://www.fastcase.com (last visited Mar. 17, 2018).

[39] *See, e.g.*, Databases & eResources, Libr. of Cong. (Dec. 19, 2017), https://www.loc.gov/law/find/databases.php (providing links to databases and eResources that contain legal and legislative information for the United States).

[40] *See, e.g.*, Matthew A. Porter & Brett M. Anders, *Federal Court in Washington Sanctions Attorney for Citing "Badly out of Date" Case Law*, E-DISCOVERY L. TODAY (Aug. 22, 2016), https://www.ediscoverylawtoday.com/ ("finding that defense counsel's citation of case law analyzing a prior version of the Federal Rules of Civil Procedure was 'inexcusable'"); Sukowicz, *supra* note 7 (noting an attorney's failure to ascertain appropriate principles from research).

judge reads the brief! It only takes one or two proffers with overruled case law or old statutes to get on a judge's bad side. Again, due to the ease of use of the above free technologies, it's getting more obvious that lawyers guilty of research oversights are probably not utilizing such technologies and may be on the brink of committing malpractice or ethical breaches.[41]

D. The Practical Impact on Lawyers Because of Their Use or Misuse of Technology

Lawyers' use or misuse of technology impacts lawyers in two ways. One, lawyers who are up-to-date no longer have to spend hours on end drafting contracts for most scenarios. There are literally dozens of low-cost online document generator tools for all areas of law, from contracts to estate planning.[42] Neither can they as easily justify flow-through-billing of the online database research rates since there are many free online legal research options available.[43]

The most universally accessible free online database is Google Scholar.[44] This service provides access to every state's legal opinion databases, all federal legal opinion databases, as well as statutes, law review publications, and pretty much any scholarly journal imaginable.[45] Many of the latter do require membership to subscription services, but at least the researcher can review article overviews before paying for them. Most, if not all, states have online databases for direct access to court cases, statutes, and regulatory orders.[46] Moreover, Google Books[47] is the scholar's dream come true with access to all scanned publications of Project Gutenberg,[48] which includes all known books, fiction and nonfiction, that are part of the public domain, as well as a searchable

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[41] Aaron George, *3 Ways Technology Will Make You a Better Lawyer*, LEXICATA (Sept. 1, 2017), https://lexicata.com/blog/3-ways-technology-will-make-better-lawyer/.

[42] *Legal Document Management Software*, CAPTERRA, https://www.capterra.com/legal-document-management-software/ (last visited Jan. 22, 2018).

[43] *See, e.g.*, *Free Legal Research Resources*, *supra* note 9 (containing free online legal research resources).

[44] *See Google Scholar*, *supra* note 37 (providing "an easy, free way to search and read published opinions of the United States Supreme Court"); *see also* Mary Shultz, *Comparing Test Searches in PubMed and Google Scholar*, PMC (Oct., 2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2000776/ (comparing Google Scholar with other search engines).

[45] *Google Scholar*, *supra* note 37.

[46] *See, e.g.*, *Case Status and Information*, VA.'S JUD. SYS., http://www.courts.state.va.us/caseinfo/home.html (last visited Mar. 17, 2018) (providing an online case database).

[47] *Google Books*, GOOGLE, https://books.google.com (last visited Jan. 24, 2018).

[48] *Free Ebooks*, PROJECT GUTENBERG, https://www.gutenberg.org (last visited Mar. 17, 2018).

database of most copyrighted works that require purchase before the researcher can download the content. The net result of the availability of online forms and free research databases to all lawyers is that if clients challenge the legal fees charged by their less tech-savvy lawyers, the lawyer stuck in the 1980s will probably see his bill chopped dramatically and never service the disgruntled client again.[49]

Perhaps most important, given the fast-paced changes in case law, slower but methodical changes in statutory law, and the easy access to updates available to tech-savvy judges and lawyers, judges are much more likely to know when the lawyer's contracts, estate plans, and other services provided to the client are hollow and not the result of effective representation. Lawyers' misuse (or nonuse) of technology will impact the lawyers' credibility with the court and might result in unfavorable rulings that could lead to ineffective representation, malpractice, or professional ethics claims once the clients become aware of the lousy job their lawyers did representing them.

E. Older Lawyers from Small Practices Face Discipline for Tech-Related Issues More Often than Younger Lawyers, and More Often than All Lawyers in Bigger Firms

When considering the impact of technology on the practice of law, it's important to consider the profile of cases that lead to claims of bad lawyering.

- Almost eighty percent of the reported claims were brought against solo practitioners or lawyers in firms of 2 to 5 lawyers.
- Almost half of the claims involved just two areas of practice, plaintiffs' personal injury and real estate.
- About two-thirds of claims were brought against lawyers in practice more than ten years.[50]

Considering these data points together, it appears we have an environment where experienced (older) solo practitioners are most vulnerable to the fallout of tech-related bad lawyering. Without factoring in the impact of use or nonuse of technology, two-thirds of claims are against lawyers with more than ten years of experience.[51] As the industry is populated with more and more tech-savvy young lawyers, the more vulnerable, technology-resistant lawyers will find themselves under the

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[49] *See* MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2016) (attorneys may not charge unreasonable fees).

[50] Kritzer & Vidmar, *supra* note 19, at 7.

[51] *Id.*

microscope even more. Again, tech-resistant lawyers will stand out like sore thumbs.[52]

II. LAWYERS WHO FAIL TO TAKE ADVANTAGE OF TECHNOLOGY WILL FACE DISCIPLINARY AUTHORITIES AND COURTS WILLING TO SANCTION BAD LAWYERS REGARDLESS OF THE GENERATION TO WHICH THEY BELONG

Of the top errors in malpractice claims, most are avoidable with the responsible use of technology, either through properly implemented law practice management and document processing software, or online research tools.[53] These errors include bad advice, missed deadlines, document or drafting errors, and inaction or nonappearance. As to investigation or discovery errors, lawyers can avoid lapses that aren't related to docket or task management processes by gaining a basic understanding of how technology impacts the evidence discovery process.

A. Bad Advice

1. Criminal Law

In criminal practice, the most common "bad advice" claim is "ineffective assistance of counsel"[54] since the Sixth Amendment of the United States Constitution preserves the right to "[a]ssistance of [c]ounsel for [one's] defense."[55] Many convicted criminal defendants who serve prison time will eventually ask a court to commute his sentence based on "ineffective assistance of counsel."[56] To state a claim of ineffective assistance:

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52 *See generally* David Curle, *The Legal Industry Generation Gap*, LEGAL EXECUTIVE INST. (Sept. 14, 2015), http://legalexecutiveinstitute.com/the-legal-industry-generation-gap/ (noting that Baby Boomers in law firms are often standing in the way of technological progress).

53 *See* Susan Saab Fortney & Jett Hanna, *Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669, 680 (2002), *available at* http://scholarlycommons.law.hofstra.edu/faculty_scholarship/721 (discussing avoiding malpractice claims with conflicts of interest by using technology); *see also* Catherine Sanders Reach, *Using Technology to Achieve Superlative Client Communications*, 34 LAW PRAC. 40, (Mar. 2008), https://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v34_is2_pg40.html (discussing using technology to avoid malpractice claims for not communicating with clients).

54 Brandon Sample, *Bad Advice Amounts to Ineffective Assistance of Counsel, High Court Rules*, HABEAS CORPUS (June 24, 2017), https://sentencing.net/habeas-corpus/ineffective-assistance-of-counsel.

55 U.S. CONST. amend. VI.

56 *See, e.g.*, Cristina Law, Comment, *Trevino v. Thaler: Falling Short of Meaningful Federal Habeas* Corpus *Reform*, 105 J. CRIM. L. & CRIMINOLOGY 499, 504–05 (2015) (analyzing ineffective assistance of counsel arguments in federal habeas petitions).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[57]

Moreover, "[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."[58]

How does technology impact such representation? First, not knowing the most recent case law overruling prior precedent is inexcusable given the ease of keeping up to date on the law through the use of simple online research tools. "Back in the day" it was debatable whether the bar needed year-end case law update CLEs to educate practitioners on the latest developments in the law; even before online access to court opinions, all courts published paper slip opinions from each session, so a little reading would have sufficed to update practitioners. Because instant online access wasn't available, disciplinary authorities could not hold lawyers to today's higher standard.[59] Today, it is certainly not enough for an attorney to just know the constitutional principles on probable cause to arrest or on search and seizure; he must also make a cursory periodic review of new case law.[60] Proof of this insufficiency is the roller coaster ride of the past couple years that state and federal courts have taken DUI practitioners on.[61] For many years, courts upheld civil statutes that mandated drivers submit to breath or blood tests or else face suspension of their driving privileges.[62] This led many states to criminalize breath or blood test refusals.[63] Many

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[57] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[58] *Id.*

[59] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2016) (showing how the American Bar Association model rules now expect attorneys to keep up with technology to be considered competent).

[60] *Id.* at r. 3.8.

[61] Martindale-Nolo Research, *Refusing a DUI Chemical Test: What's Likely to Happen and How Much Will It Cost?*, LAWYERS.COM (2015), https://www.lawyers.com/legal-info/criminal/dui-dwi/refusing-a-dui-chemical-test-whats-likely-to-happen-and-how-much-will-it-cost.html.

[62] *See, e.g.*, South Dakota v. Neville, 459 U.S. 553, 559–60, 564 (1983) (acknowledging the constitutionality of civil statutes that suspend licenses for refusals and even force drunk drivers to submit to breath or blood tests since resulting evidence isn't testimonial in nature and thus not protected under the 5th Amendment). *Contra* Missouri v. McNeely, 569 U.S. 141, 144, 151 (2013) (holding that to justify a warrantless blood draw the officer must have probable cause and sufficient facts to show an exigency exists whereby the BAC would dissipate if required to wait for a warrant).

[63] Eleven states impose criminal penalties for those who refuse breath or blood tests. *See* Sam Hananel, *Supreme Court Limits State Laws that Make It a Crime to Refuse Blood*

less-well-informed practitioners pled out their clients to minimize or eliminate jail time.[64] However, doing so effectively waived the clients' rights to appeal under statutes that the U.S. Supreme Court ultimately held unconstitutional under the Fourth Amendment's protection against unreasonable search and seizure.[65]

Packingham v. North Carolina is a more recent example of how attorneys' refusal to embrace new technology by, at the least, bringing their legal research techniques into the twenty-first century, will lead to successful ineffective assistance, malpractice, and attorney misconduct claims.[66] In *Packingham*, the Court considered whether North Carolina violated the First Amendment of the Constitution when it made it "a felony for a registered sex offender 'to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.'"[67]

For an ironic twist to the discussion in this Article, consider what disturbed the Court most about the statute: "[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences."[68] Simply stated, the North Carolina legislature failed to grasp the import of the not-so-new technology of the internet and how it's changed how all Americans acquire information and distribute their thoughts and ideas into the world.[69] In other words, the Court recognized that the World Wide Web is forever entwined into our free speech rights. "Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue

Tests for Drunk Driving, ST. LOUIS POST-DISPATCH (June 23, 2016), http://www.stltoday.com/news/local/crime-and-courts/supreme-court-limits-state-laws-that-make-it-a-crime/article_901bbfd3-203c-5d3c-98b0-965c39652eea.html.

[64] *See, e.g.*, State v. Trahan, 870 N.W.2d 396, 399 (Minn. Ct. App. 2015) (defendant plead guilty because the prosecutor offered a lesser sentence within the presumptive range); *see also* O'Connell v. State, 858 N.W.2d 161, 164 (Minn. Ct. App. 2015) (defendant appealed guilty plea because it was compelled by an improper denial of his motion to suppress urine test results).

[65] *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2184–85 (2016) (holding that states can criminalize breath test refusals but not blood test refusals since the latter are more invasive).

[66] 137 S. Ct. 1730 (2017).

[67] *Id.* at 1731 (quoting N.C. GEN. STAT. ANN. §§ 14-202.5(a), (e) (West 2015)).

[68] *Id.* at 1737.

[69] *Id.* at 1736.

lawful and rewarding lives."[70] Consequently, the Court observed that the statute suppressed "lawful speech as the means to suppress unlawful speech," and held the statute invalid.[71] The impact of this opinion is reverberating in state and federal courts.[72] In sex offense cases, it's common to include in plea agreements and probation conditions a general bar to unsupervised computer access.[73] *Packingham* has rendered these general bars to the exercise of First Amendment rights unconstitutional.[74] Yet, months after the decision, less tech-savvy attorneys are likely still advising their clients to agree to unconstitutionally excessive limitations on internet access to avoid prison sentences.[75] Many of these attorneys will be surprised to discover at their bar associations' CLE case law updates that such agreements became illegal on June 19, 2017.[76] Had the above-referenced attorneys embraced very simple technologies to enhance their legal research, they would have known about *Packingham* the day the Supreme Court released its opinion.[77]

Padilla v. Kentucky[78] is another case that's still dinging attorneys with ineffective assistance of counsel claims seven years after its publication. In *Padilla*, the defendant's attorney secured a plea deal that kept him out of prison.[79] Unfortunately, the defendant was an illegal immigrant.[80] The crime he pled to virtually mandated deportation.[81] The

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70 *Id.* at 1737.

71 *Id.* at 1738.

72 *See, e.g.*, Doe v. Kentucky, No. 3:15-cv-14-GFVT, 2017 WL 4767143, at *1 (E.D. Ky. 2017) (showing the Federal District Court granting permanent injunction after considering ruling in *Packingham*); State v. Cutshall, 906 N.W.2d 205, 205 n.1 (Iowa Ct. App. 2017) (vacating a portion of the sentence based upon the decision in *Packingham*).

73 *See, e.g.*, *Standard Sex Offender Conditions*, S.C. DEP'T PROB., PAROLE & PARDON SERVS. (Nov. 29, 2012), https://www.dppps.sc.gov/content/download/52770/1230497/file/1401+Standard+Sex+Offender+Conditions+.pdf ("*If permitted by the Department to have computer and internet access*, I will abide by the Computer/Internet Use Agreement for Sex Offenders." (emphasis added)); Erin Fuchs, *Here's What Life Is Like After You Get out of Prison for a Sex Offense*, BUS. INSIDER (Oct. 10, 2013, 3:14 PM), http://www.businessinsider.com/what-do-sex-offenders-have-to-do-on-probation-2013-10.

74 *Packingham*, 137 S. Ct. at 1738.

75 United States v. Morgan, 696 F. App'x 309, 309 (9th Cir. 2017) (mem.) (vacating the special condition of supervised release which was plead to by Defendant).

76 *Packingham*, 137 S. Ct. at 1738.

77 *See, e.g.*, Dickens v. United States, No. 17-0083-WS-MU, 2017 U.S. Dist. LEXIS 181260, at *5, *9–10 (S.D. Ala. Sept. 25, 2017) (Plaintiff claimed ineffective assistance of counsel based upon the holding in *Packingham v. North Carolina*).

78 559 U.S. 356 (2010).

79 *Id.* at 359.

80 *Id.*

81 *Id.*

attorney didn't advise the client about this collateral consequence.[82] In fact, the attorney told him that he "did not have to worry about immigration status since he had been in the country so long [(40 years)]."[83] The defendant claimed that had he known the plea would have virtually mandated his deportation, he would have insisted on going to trial.[84] Consequently, the Court reversed the conviction, remanded to the trial court, and found that the attorney provided ineffective assistance of counsel to the defendant.[85] In its harsh rebuke, the Court held that "[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'"[86] Surely, almost eight years after *Padilla*, attorneys are not failing to advise on immigration issues, right? Sadly, courts are still setting aside plea agreements where attorneys failed to advise clients of the immigration consequences, indicating that attorneys still aren't using cutting-edge online research tools to stay up-to-date on immigration and criminal law developments.[87]

It's easy to type a Boolean search[88] such as "immigration issues in plea deals" into Google Scholar, Casemaker, Fastcase, Westlaw, or LexisNexis; the search generates hundreds of cases in Google Scholar with *Padilla* coming up as the first case on Google.[89] Yet, attorneys still missed this earth-shattering, precedent-setting opinion months and even years after its release.

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[82] *Id.* at 359–60.

[83] *Id.* at 359.

[84] *Id.*

[85] *Id.* at 374–75.

[86] *Id.* at 374 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

[87] *See, e.g.*, Budziszewski v. Comm'r of Corr., 42 A.3d 243, 246–47 (Conn. 2016) (reversing conviction where attorney said defendant probably wouldn't be deported); *Ex parte* Aguilar, No. WR-82,014-01, 2017 Tex. Crim. App. LEXIS 894, at *1–2, *4 (Tex. Crim. App. Sept. 20, 2017) (reversing conviction since attorney failed to advise client of immigration consequences of plea); *Ex parte* Torres, 483 S.W.3d 35, 46 (Tex. Crim. App. 2016) (one year after *Padilla* was released, attorney failed to advise client of immigration consequence of plea).

[88] Boolean searches allow you to combine words and phrases using the words AND, OR, NOT and NEAR (otherwise known as Boolean operators) to limit, widen, or define your search. Most Internet search engines and Web directories default to these Boolean search parameters anyway, but a good Web searcher should know how to use basic Boolean operators.

Wendy Boswell, *What Does Boolean Search Really Mean?*, LIFEWIRE (July 8, 2017), https://www.lifewire.com/what-does-boolean-search-3481475.

[89] *See Google Scholar*, *supra* note 37 (Click "Case Law" option, then type in the search field "immigration issues in plea deals," then click the magnifying glass symbol to complete the search.).

Tech-savvy practitioners knew about the above case law changes upon the courts' release of online slip opinions.[90] For example, in my home state of Kansas, the appeals courts release opinions each Friday morning at 9:30 a.m., and published cases are available for immediate review on the Kansas courts' website.[91] The United States Supreme Court maintains a blog that provides daily updates of the Court's docket as well as links to released opinions, and even articles summarizing these decisions.[92] *All* federal circuits have websites with links to archived and recent opinions.[93] Lawyers don't need the annual CLE case law or legislative updates from their local bar associations, or even printed slip opinions, to inform them of the latest changes in federal and state law. They have the internet and all its inexpensive and often free resources.[94]

2. Civil, Contract, and Family Law

In *Leonard v. Reeves,* the court observed that "[a]ttorneys are obligated to scrutinize any contract that they advise their clients to execute, and are required to disclose the full import of the agreement and the possible consequences that may arise upon execution of it."[95] In the context of the use of technology to enhance the attorney's legal counsel, Model Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[96] "Under this rule, an attorney owes his client the duty of diligent investigation and research."[97]

> The standard of care that an attorney must exercise in the representation of a client is that degree of care, skill, and diligence that is exercised by prudent practicing attorneys in his locality. . . . He is not

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[90] *See, e.g.*, *Slip Opinion*, AM. B. ASS'N, https://www.americanbar.org/groups/public_education/publications/insights/teaching_legal_docs/reading_a_supremecourtbrief/slip_opinion.html (last visited Jan. 31, 2018) (defining a slip opinion).

[91] *See Kansas Supreme Court and Kansas Court of Appeals Opinions*, KAN. JUD. CTR., http://www.kscourts.org/Cases-and-Opinions/opinions/default.asp (last visited Mar. 18, 2018) (showing Kansas Supreme Court and Kansas Court of Appeals opinions that are updated every Friday); *see also Legal Research on the Web*, WASH. L., http://washlaw.edu (last visited Mar. 18, 2018) (providing a comprehensive list of online legal research sites, including states' case opinion URLs).

[92] *See* Aurora Barnes, *Petition of the Day*, SCOTUSBLOG (Feb. 9, 2018, 5:00 PM), http://www.scotusblog.com (providing daily updates of pending cases).

[93] *See, e.g.*, *Welcome*, U.S. CT. APPEALS FOR FIRST CIR., http://www.ca1.uscourts.gov (last visited Mar. 18, 2018) (The web addresses for the federal circuits are www.ca[circuit number].uscourts.gov, for circuits 1 through 9. For example, the address for the first circuit is http://www.ca1.uscourts.gov.).

[94] *See, e.g.*, *Free Legal Research Resources*, *supra* note 9 (providing multiple links to free legal research resources).

[95] 82 So. 3d 1250, 1262 (La. Ct. App. 2012).

[96] MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 2016).

[97] *Id.*; *Leonard*, 82 So. 3d at 1258.

> required to exercise perfect judgment in every instance. However, the attorney's license to practice . . . and his contract for employment hold out to the client that he possesses certain minimal skills, knowledge, and abilities.[98]

Finally,

> [i]n determining whether incorrect advice rises to actionable legal malpractice, the question is not whether or not the advice given was, by hindsight, correct, but rather whether or not the advice given was the result of the proper exercise of skill and professional judgment under the conditions existing at the time the advice was given.[99]

In *Leonard*, the court held that the out-of-state attorney properly exercised such skills.[100] He advised the client that if he showed up to court without signing a settlement agreement for child support arrearage he might be incarcerated for contempt of court.[101] While Leonard claimed that the grounds for contempt could have been contested, the risk of jail time was nonetheless real; thus, the attorney's recommendation that Leonard should sign the agreement to eliminate that risk was not malpractice, and consistent with the above standards of practice.[102] It's interesting to note that the attorney wasn't licensed in Leonard's state, Louisiana, but was authorized to practice via pro hac vice, so it's likely that the research he did to prepare was in fact online.[103]

Applying these standards to the modern-day practice of law, a lawyer must be able to properly research the legal principles involved in his client's case as well as review the provisions of the contract in question and apply the law to such provisions.[104] Being able to do so via online research provides up-to-date information at minimal costs to the lawyer and client.[105] Using such technologies is far more accurate and efficient than bookwork via the local law school, bar association or county court library, or even a firm's library. If, as in *Leonard*, an attorney is from another state and similarly represents a litigant pro hac vice, he would be obligated to have the requisite skills and resources to research the other state's law from his home state, likely using internet search engines,

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98 *Leonard*, 82 So. 3d at 1257 (citations omitted).

99 *Id.* at 1262.

100 *Id.* at 1260–61.

101 *Id.* at 1261.

102 *Id.* 1261–62.

103 *Id.* at 1258.

104 *Id.* at 1262.

105 *See 6 Affordable (or Free) Legal Research Services Online*, LAC GROUP, https://lac-group.com/seven-affordable-free-legal-research-services-online/ (last visited Mar. 17, 2018) (listing six affordable online legal research tools).

especially if the client enters into an attorney employment contract with a billable hourly rate and travel expense provision.[106]

In summary, lawyers don't necessarily have to do their legal research online to provide up-to-date legal advice to their clients. However, such technologies have become so cheap and easily accessible to *all* lawyers that the failure to utilize them will likely result in stubborn lawyers exposing themselves as incompetents and even as unethical practitioners. The value of their work product will diminish with each passing year while the value of more progressive lawyers' services increases exponentially. Eventually, enough bad advice spread over a substantial number of cases and clients will lead to successfully prosecuted malpractice or misconduct claims.

B. Missed Deadlines

Lawyers who beg judges to extend filing or discovery deadlines, especially when deadlines have already passed, invoke the image of the irresponsible kid crying, "the dog ate my homework," especially when it's the same bad actors engaging in this behavior time and again. Missing a deadline is also the malpractice or misconduct error that is the easiest to avoid via simple and low-cost computer technology. There is a plethora of computer-enhanced law practice management services available, including inexpensive cloud-based services like Clio, pricier alternatives such as Abacus, and even free online calendar and task management options such as Google Calendar and Yahoo,[107] as well as calendar and task management apps for iPhones, iPads, and Android[108] devices. Suffice to say that any lawyer who claims he doesn't have the resources to integrate technology into his trial and motions practice hasn't put much effort into bringing his practice into the early 2010s. Consequently, we are quickly approaching a time when lawyers who consistently miss deadlines *and* refuse to integrate simple and cheap modern technologies into their practices to mitigate such misconduct will experience the full wrath of judges and opposing counsel.[109]

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[106] *Leonard*, 82 So. 3d at 1254; MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2016) (attorneys may not charge unreasonable fees).

[107] ABACUSNEXT, https://www.abacusnext.com (last visited Jan. 29, 2018); CLIO, https://www.clio.com (last visited Jan. 29, 2018); *Google Calendar*, GOOGLE, https://calendar.google.com (last visited Jan. 29, 2018); *Yahoo Calendar*, YAHOO!, https://calendar.yahoo.com (last visited Jan. 29, 2018).

[108] APP STORE, https://www.apple.com/ios/app-store/ (last visited Jan. 29, 2018); GOOGLE PLAY, https://play.google.com/store/apps (last visited Jan. 29, 2018).

[109] *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2016) (stating that lawyers should keep up to date on the benefits of modern technology).

Such consistent irresponsibility does more than elicit anger and disrespect from judges and other lawyers. ABA Model Rule 8.3(a) mandates that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[110] Hence, failure to report such a lawyer to the disciplinary authority constitutes an ethical breach for the non-reporting lawyer or judge![111]

In *In re Disciplinary Proceeding Against Lopez*, the court considered whether the attorney's failure to meet *three* appellate brief filing deadlines constituted attorney misconduct.[112] Attorney Lopez requested extensions of time to file his brief, citing his busy trial schedule as the reason for missing the deadlines.[113] Yet, after the first extension, "[t]he order warned that '[a]ny further requests for extension of time for filing the opening brief are strongly disfavored.'"[114] Nonetheless, he requested two more and missed the third.[115] Eventually, the client retained another attorney to handle his appeal and Lopez transferred the file to that attorney.[116] Regrettably, Lopez exacerbated his misconduct by failing to ensure that the new attorney entered his appearance before the third deadline passed.[117] The court affirmed the disciplinary authority's decision on all counts.[118] Lopez's continued failure to meet the appeals court's filing deadlines violated Rule 1.3, which provides: "'[a] lawyer shall act with reasonable diligence and promptness in representing a client.' . . . [And Rule] 3.2 [, which] states that '[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.'"[119] Lopez's failure to follow up with new counsel violated Rule

> 1.15(d) [, which] requires: A lawyer [to] take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other

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[110] *Id.* at r. 8.3(a).

[111] *Id.*

[112] 106 P.3d 221, 230 (Wash. 2005).

[113] *Id.* at 223–25.

[114] *Id.* at 224.

[115] *Id.*

[116] *Id.* at 224–25.

[117] "The critical language of RPC 1.15(d) is that '[a] lawyer shall take steps to the extent reasonably practicable to protect a client's interests.'" *Id.* at 228. The court found this language mandated Lopez to ensure that new counsel complied with the appellate court's filing deadlines. *Id.*

[118] *Id.* at 234.

[119] *Id.* at 227.

> counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned.[120]

As a result of Lopez's poor organization that the wise use of simple technologies and better time management would have likely prevented, the court affirmed the disciplinary authority's sixty-day suspension of his law license.[121]

Walwyn v. Board of Professional Responsibility of the Supreme Court of Tennessee is an excellent example of how technology can aid scheduling to prevent lawyers from missing filing deadlines since it deals with multiple failures with different clients.[122] Walwyn missed appeals deadlines on three different cases.[123] He also failed to file timely motions for extensions and, when he did request extensions, failed to offer adequate explanations for his oversights.[124] As to these facts, the Hearing Panel of the Board of Professional Responsibility ("Panel") found that Walwyn violated "Rule of Professional Conduct 1.3 [, which] states that 'a lawyer shall act with reasonable diligence and promptness in representing a client.'"[125] The court affirmed the Panel's sanction of thirty days active suspension and five months of probation for mishandling three cases in close proximity to each other (from 2010 to 2013) with similar ethical lapses.[126] The attorney simply missed deadlines, from filing the trial transcripts and records on appeal, to briefs or motions to extend time to file said briefs. Better time and docket management would have avoided the errors completely. Given the time period involved and the availability of cheap and even free time management software when the incidents occurred, Walwyn would have easily avoided the errors had he diligently utilized such technology in his trial and appellate practices.

C. Document/Drafting Error

Form motions or briefs versus those specifically drafted for the instant case are common tools of the trade but can lead to horrific outcomes for lawyers and clients. The problem with this aspect of legal work isn't that lawyers should do the same work over and over even though the issues are the same, but that (1) lawyers often miss the same glaring errors from one case to the next, be they typos[127] or misapplication of case law, and (2) they don't bother cite checking for intervening case

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[120] *Id.* at 228.

[121] *Id.* at 223.

[122] 481 S.W.3d 151, 153–54 (Tenn. 2015).

[123] *Id.* at 155, 157–59.

[124] *Id.* at 155–59.

[125] *Id.* at 164.

[126] *Id.* at 153.

[127] Pinnington, *supra* note 2.

law.[128] Word and WordPerfect are great tools, and they actually save clients money when compared to the old-school method of typing out legal documents from scratch.[129] But overreliance on dated electronic documents, without paying attention to details such as updated case law and just plain line editing, is unprofessional. Furthermore, it would be nice to assume all judges are so committed to their state and federal constitutions that such bad lawyering won't negatively impact the clients' rights, but that's probably naïve. Therefore, such ineffective assistance of counsel probably negatively impacts the clients' cases as well. It is better to be the lawyer who uses basic technologies wisely by supplementing prior work with solid research and editing techniques, so it is not obvious that he relied on form motions. Indeed, some lawyers are so good at this that judges assume the opposite—that they *never* rely on dated legal research and writing. This should be every competent lawyer's goal.

As to how disciplinary authorities treat such errors, in *Board of Professional Responsibility v. Custis*, the court made it clear that lawyers can't pass the buck to their staff when they make serious "drafting errors" in documents filed with the court.[130] Custis filed a brief in a case wherein he included a witness's sworn credibility statements that were actually statements made in another, unrelated case.[131] He "claimed that the misrepresentations were simply an inadvertent, unintentional, embarrassing, typographical error. . . . [Moreover,] [h]e did not offer or take any steps to correct the misrepresentations . . . or to otherwise take remedial action."[132] He also blamed it on a "drafting error made by my paralegal."[133] The paralegal testified that the error was the result of a cut and paste mistake wherein he pasted residual text into the brief from WordPerfect's memory cache from another case, and that Custis "was kind of freaking out" when he discovered the error; moreover, Custis "goes over my work with a fine-toothed comb, but obviously something slipped through it."[134] What's of particular interest here is that Custis had been disciplined in 2012 and had agreed to integrate new safeguards into his procedures, including "better communication, weekly status meetings, and case files for every client detailing communications with the client,

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[128] *Id.*

[129] *See* Richard T. Rodgers, *WordPerfect as a Legal Systems Engine*, 21 CLEARINGHOUSE REV. 1181, 1211, 1212–13 (1988) (explaining how WordPerfect can be used to set up legal forms).

[130] (*Custis II*), 2015 WY 59, ¶ 4, 348 P.3d 823, 826 (Wyo. 2015).

[131] *Id.* at ¶ 9, 348 P.3d at 827.

[132] *Id.* at ¶ 4, 348 P.3d at 826.

[133] *Id.*

[134] *Id.* at ¶ 12, 348 P.3d at 827–28.

upcoming court dates, and client contact information."[135] The behavior leading to that censure involved an improper settlement offer to a victim in a criminal case.[136] One finding of the earlier tribunal that indicates Custis had an aversion to technology was that "Respondent did no research" before deciding to make the offer, revealing he may not have had access to online research tools.[137] Moreover, Custis had been practicing law for nineteen years when his prior ethical breach occurred, putting him in the high risk pool of attorneys—those practicing law for ten years or more.[138]

The court found Custis violated multiple rules.[139] First, although Custis offered a plausible explanation of how the false information was accidentally included in his brief, the court observed that he swore to the document's accuracy, including that he reviewed it prior to filing it with the court. Thus, he violated Rule 3.3(a) which provides: "'[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer'; [nor] '(3) offer evidence that the lawyer knows to be false.'"[140] Second, Custis couldn't delegate the responsibility of ensuring his court filings were accurate since Rule 5.3(c) holds lawyers responsible for the acts or omissions of their staff.[141] Finally, the court found that Custis violated two provisions of Rule 8.4, the misconduct provision of the rules, by (1) engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation"[142] and (2) "conduct that is prejudicial to the administration of justice."[143] The court adopted the Board of Professional Responsibility's recommendation of public censure and it assessed fees and costs.[144] As noted above, a few simple policies and procedures regarding the use of technology in Custis's law practice would have prevented this error. Namely, the firm could have purged the memory cache of its word processor software when staff or lawyers switched work from one case to another and stored each client's electronically filed materials in separate folders accessible via individual passwords so that commingling content would be less likely.

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[135] *Id.* at ¶ 13, 348 P.3d at 828.

[136] Bd. of Prof'l. Responsibility, Wyo. State Bar v. Custis (*Custis I*), 2012 WY 142, 295 P.3d 334, 336 (Wyo. 2012).

[137] *Id.*

[138] *Id.*, 295 P.3d at 344.

[139] *Custis II*, 2015 WY 59, ¶¶ 38–41, 348 P.3d at 832–34.

[140] *Id.* at ¶ 37, 348 P.3d at 832.

[141] *Id.* at ¶ 39, 348 P.3d at 832–33.

[142] *Id.* at ¶ 40, 348 P.3d at 833 (quoting Wyo. Rules of Prof'l Conduct r. 8.4(c) (2014)).

[143] *Id.* at ¶ 41, 348 P.3d at 833 (quoting Wyo. Rules of Prof'l Conduct r. 8.4(d) (2014)).

[144] *Id.* at ¶ 37, 348 P.3d at 836.

D. Inaction / Nonappearance

Inaction and nonappearance issues can almost always be avoided with basic technologies, such as computer calendaring and task management applications. Redundant electronic calendaring systems are a must, and every lawyer should add their clients' appearances to the firm's master calendar so that critical court appearances and tasks don't slip through the cracks.[145] All the cloud-based law practice management services provide this functionality,[146] as well as many of the "old school" computer based programs such as Abacus.[147] However, for the cost-conscious lawyer without deep pockets, Google and Yahoo offer viable options that cost nothing, sync across all devices, and are easily updated and accessed by law office staff.[148] With all these services available, missed appearances or inaction on pending cases is inexcusable, and the courts agree.[149]

The big problem with lawyers not appearing on cases or not taking action on behalf of their clients is that the clients pay the price. In *State ex rel. Oklahoma Bar Association v. Mirando*, eight former clients filed grievances against Attorney Mirando with several complaining that he failed to make court appearances for them with dire consequences.[150] Mirando failed to notify a client about an immigration hearing, whereupon the client missed the hearing, was arrested, and was threatened with deportation.[151] In another case, Mirando didn't bother filing his entry of appearance for a criminal defendant client even though

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[145] *See Tickler and Calendar Systems*, TENN. B. ASS'N, http://www.tba.org/tickler-and-calendar-systems (last visited Jan. 29, 2018) (describing a properly managed calendar and tickler system).

[146] *See Law Practice Management Software*, LAWYERIST.COM, https://lawyerist.com/law-practice-management-software/ (last visited Jan. 29, 2018) (providing a review of the most used law practice management software options, including cloud-based services).

[147] ABACUSNEXT, *supra* note 107.

[148] *See Google Calendar*, *supra* note 107; https://calendar.yahoo.com (last visited Feb. 8, 2018) (providing a free online calendar); *Google Sync*, GOOGLE, https://www.google.com/sync/index.html (last visited Jan. 19, 2018) (providing instructions on how to sync a Google or Yahoo calendar across multiple devices); *Yahoo Calendar*, *supra* note 107 (providing a Web-based calendar service).

[149] *See, e.g.*, Att'y Grievance Comm'n of Md. v. Harris, 810 A.2d 457, 478 (Md. 2002) (The court found a violation of Rule 1.1 of Maryland's Rules of Professional Conduct concerning competence where an attorney missed scheduled trial dates, did not inform clients regarding court appearances, and failed to serve process on defendants. The court noted that competence matters—and includes preparation and thoroughness.); Att'y Grievance Comm'n of Md. v. Mooney, 753 A.2d 17, 26 (Md. 2000) (noting that the failure to appear in court for a client constituted a violation of the duty of competence).

[150] 2016 OK 72, ¶¶ 1, 26, 376 P.3d 232, 234, 240.

[151] *Id.* at ¶ 7, 376 P.3d at 236.

the client paid him a $1000 retainer fee; the client did the legal work himself but the delay caused by Mirando's negligent representation delayed resolution by at least three months.[152] A DUI client paid Mirando $1700 and his failure to notify the client of a scheduled court appearance resulted in her arrest and a public defender ended up disposing of the case *after* the client spent time in jail as a result of Mirando's malpractice.[153] He didn't refund the unearned fee.[154] There were also numerous other issues with these and other complainants.[155] As to these specific grievances, they constituted violations of Rule 1.3 since "Mirando's lack of diligence was shown by missed court dates for which his clients were penalized by the court."[156] The Court suspended Mirando from the practice of law for two years and a day for these and the other proved allegations, and assessed costs.[157] The Court didn't find him in violation of Rule 1.1, specifically finding that "[i]n many instances, Mirando was an effective advocate for his clients. Moreover, counsel for the Bar stated Mirando was a competent lawyer, particularly in the courtroom."[158] Thus, Mirando's issues were managing his dockets and motions practice. It appears that things were simply out of control to the degree he appeared on some cases and not others, indicating that integrating technology into his practice via law practice management software or simply calendaring and task management applications might have prevented these unfortunate lapses. Indeed, he admitted that "he puts things on the 'back burner' with good intentions to follow up, but he often fails to do so,"[159] further supporting the proposition that these simple schedule and time management technologies would help him avoid such lapses in the future.

State ex rel. Counsel for Discipline of the Nebraska Supreme Court v. Wilson involves a lawyer flying by the seat of his pants, which seems to indicate he wasn't the sort to stay up-to-date on modern technology to enhance his law practice, especially where scheduling and research are concerned.[160] The client was an illegal immigrant who retained Attorney Wilson to contest a deportation order.[161] At the first hearing, the court

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[152] *Id.* at ¶ 9, 376 P.3d at 236.

[153] *Id.* at ¶ 10, 376 P.3d at 236–37.

[154] *Id.* at ¶¶ 10, 29, 376 P.3d at 237, 241.

[155] *Id.* at ¶¶ 7, 9–14, 376 P.3d at 236–38.

[156] *Id.* at ¶ 26, 376 P.3d at 240.

[157] *Id.* at ¶ 39, 376 P.3d at 243.

[158] *Id.* at ¶¶ 24–25, 376 P.3d at 240.

[159] *Id.* at ¶ 18, 376 P.3d at 239.

[160] 811 N.W.2d 673, 674–75, 677 (Neb. 2012). It's interesting to note that Wilson was admitted to the bar in 1986 so he fits the profile of the two-thirds of malpractice claims for lawyers practicing law ten years or more. Kritzer & Vidmar, *supra* note 19, at 7.

[161] *Wilson*, 811 N.W.2d at 674.

directed Wilson to file a form for his client to prevent removal from the country.[162] The court advised Wilson that if he didn't file the form with the court by the deadline, the client's claim for cancellation of removal would be abandoned.[163] Wilson filed the form with an agency and not the court. At the next hearing, the court noted that the form was not filed with the court so it held the claim abandoned.[164] It granted the client permission to voluntarily leave the country upon posting a $500 bond.[165] Wilson didn't get a copy of the receipt showing the bond was paid so he didn't file it with the court.[166] Consequently, the client's appeal of the court's ruling wasn't perfected, and new counsel was unsuccessful in reinstating the appeal.[167] The immigration court ordered the client removed from the country.[168] The instant court found that the above oversights violated Rule 1.1 (Neb. Ct. R. of Prof. Cond. § 3-501.1), evidenced a lack of competence, and warranted a public reprimand and a two year probation.[169]

With multiple hearings disregarded, deadlines missed, and tasks dropped, it's easy to imagine Wilson's scheduling and organization routine. He writes this and that note in the client file, pencils in a hearing date in his paper calendar, writes a cryptic note about where to file this or that form or motion on a Post-it note, then refers back to multiple scribbles in several different places when he returns to the office at the end of each day to "schedule" whatever he needs to do on any given case. He also may not spend much time getting up to date on the latest immigration law developments, such as reviewing slip opinions weekly or at least more than once a year. Consequently, several dropped balls on a few cases each week isn't unexpected, and the occasional train wreck involving a multi-case collision like the one that led to Nebraska's ethics charge is inevitable.

Another train-wrecked conductor, Attorney Daggs, exhibited a pattern of inaction in a variety of law practice areas.[170] In count I, it was alleged that Daggs took a fee to perfect the client's appeal, did so, and even appeared for the client.[171] However, he took no further action.[172] As a

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[162] *Id.* at 674–75.
[163] *Id.* at 675.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.* at 678.
[170] *In re* Daggs, 307 N.W.2d 66, 67–68 (Mich. 1981).
[171] *Id.* at 67.
[172] *Id.*

result, the appeal was dismissed.[173] Daggs offered to pay the complainant to withdraw the ethics complaint, further exacerbating his ethical morass.[174] In count IV, it was alleged that Daggs was appointed to represent an imprisoned felon in an appeal.[175] Thirteen months passed before he filed the claim of appeal; he did nothing for two more months then asked to withdraw.[176] There were additional affirmed ethical lapses, which are not relevant here.[177] The court was silent as to which rules Daggs violated, however, it affirmed the hearing panel and disciplinary board's findings that Daggs's behavior on these counts constituted inaction on behalf of his clients and upheld the board's one year suspension.[178]

As with lawyers missing court dates, missing filing deadlines or allowing too much time to pass before taking action, as Daggs did, are errors easily avoided with the wise use of law practice management technology, or even simple low-cost calendaring and task management software. Absent such technology, the clients are at the mercy of lawyers who may or may not regularly review paper calendars or tickler lists to catch cases that need action. Even if lawyers rely on paper or more traditional calendaring systems, staff members can keep electronic backups with alarms to alert them of essential tasks that need attention. This would ensure that clients aren't at the mercy of such arcane systems and it would make up for old-school lawyers' refusal to let go of the past.

It's important to note another aspect of law practice procedures that don't utilize the above technologies to keep track of filing deadlines, court dates, and case tasks. All professional liability insurance carriers consider whether a firm has backup calendar and task management systems when determining the firm's policy premiums and coverage.[179] Lawyers may think that paying liability insurance premiums is sufficient action to cover the financial losses associated with bad law practice management; however, since most carriers require lawyers to certify that such backups are in place, the failure to actually have them means there may not be

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[173] *Id.*

[174] *Id.*

[175] *Id.* at 68.

[176] *Id.*

[177] *Id.* at 67–68.

[178] *Id.* at 67, 71.

[179] *See generally* Christian A. Stiegemeyer, *Looking Good for the Underwriter*, 36 LAW PRAC. 43 (2010), https://www.americanbar.org/groups/law_practice/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is4_pg43.html (Insurance providers rely on information provided concerning calendaring and docket control procedures, which is something every law firm should have. A lack of such tools can significantly affect pricing, coverage, and the level of risk for the insurer.).

coverage for losses.[180] Or at least the insurance provider will resist paying out claims.[181] If a lawyer caught in such ethical challenges is fortunate to be merely suspended with future reinstatement conditioned on payment of restitution to the victims of his malfeasance, the lack of insurance coverage means he will have to pay the damages associated with his malpractice out-of-pocket.[182] For some cases, such as missed limitations periods in big-dollar personal injury cases, reinstatement could be cost-prohibitive.[183]

E. Investigation/Discovery

Attorneys had the ability to avoid many of the above errors years ago by integrating simple technologies into their law practices such as a $500 laptop, task and schedule management software, internet browsers, and a minimal dose of common sense. Hence, any semi-tech-competent lawyer has all he needs to avoid these pitfalls. Conversely, newer, more cutting-edge technology has impacted investigation and the discovery process profoundly in a very brief time span. Addressing the demands it creates requires lawyers to break down cases and issue spot in ways reminiscent of Constitutional or Property Law exams.

1. Lawyers Must Be Prepared to Look Under Rocks that Weren't There Before.

Take criminal law as an example. Federal prosecutors have provided e-discovery for several years now, and many state-level prosecutors are falling in line as well. The temptation is to assume that e-document dumps are sufficient, but savvy lawyers know better. Prosecutors provide what they are requested and nothing more.[184] What if the client's defense relies on his location during the crime, and he has a cell phone, but such data

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180 *See, e.g.*, Cont'l Cas. Co. v. Marshall Granger & Co., 921 F. Supp. 2d 111, 119–20 (S.D.N.Y. 2013) (noting that an insurer may void an insurance policy if it was procured through a material misrepresentation); FDIC v. Moskowitz, 946 F. Supp. 322, 329 (D.N.J. 1996) (An insured forfeits rights under an insurance policy by making a representation that is untruthful, material to the risk assumed, and reasonably relied upon by the insurer in issuing the policy.).

181 *See* cases cited *supra* note 180 (illustrating that insurance providers often resist, and are entitled by law, from paying out claims where a client has provided materially incomplete or incorrect information in order to obtain an insurance policy).

182 *See generally id.* (exemplifying disputes over insurance coverage because individuals are generally forced to pay out of pocket where insurance providers are permitted to rescind coverage).

183 *See, e.g.*, Clancy v. Goad, 858 N.E.2d 653, 655 (Ind. Ct. App. 2006) (upholding a jury verdict of over $10 million in a personal injury case); Hernandez v. Vavra, 880 N.Y.S.2d 50, 51 (N.Y. App. Div. 2009) (upholding a jury verdict of nearly $3 million).

184 *See, e.g.*, Giglio v. United States, 405 U.S. 150, 153–55 (1972) (illustrating the general unwillingness of prosecutors to provide more evidence than required).

isn't included in the prosecutor's disclosures? Cell tower location is so important that the courts are considering whether obtaining such information without probable cause violates the Fourth Amendment.[185] What if the defendant placed a call outside of traditional channels, such as "Voice over Internet Protocol" (VoIP)?[186] ISP data can identify which computer was used and which wireless routers were used.[187] Most electronic devices (computers, cell phones, tablet computers) have GPS chips that can pinpoint the location of the devices when calls are placed, whether cellular or VoIP.[188] Doesn't the lawyer's duty under Rule 1.1 mandate him to learn about such technologies and know what documents to request or subpoena, who to subpoena, and whether he must retain an expert witness to analyze such data? To reiterate, "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[189] Moreover, Comment [8] states, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[190] Consequently, if the state's discovery doesn't include cell phone tower data or ISP information and such information is relevant in the case, the defense lawyer must be able to identify its importance and obtain it. Regardless of whether the Supreme Court affirms the Sixth Circuit's ruling that cell phone location data is not protected, tech-savvy defense counsel better be prepared to subpoena and evaluate such data, so the client is properly represented.[191]

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[185] United States v. Carpenter, 819 F.3d 880, 886, 890 (6th Cir. 2016) (finding no Fourth Amendment right to prevent disclosure of cell tower location data), *cert. granted*, 137 S. Ct. 2211 (2017) (mem.).

[186] VoIP allows a user to call landlines, cell phones, or other computers through the internet using a device, such as a computer. *See How Voice over IP (VoIP) Works*, CISCO, https://www.cisco.com/c/en/us/solutions/small-business/resource-center/serve-customers-better/voip-how.html (last visited Jan. 24, 2018) (explaining how VoIP works).

[187] *See* Techwalla Editor, *How to Trace an IP Address to a Physical Address*, TECHWALLA, https://www.techwalla.com/articles/how-to-trace-an-ip-address-to-a-physical-address (last visited Jan. 24, 2018) (explaining how to trace an IP address to a physical location).

[188] *See id.*; Michael J., *How to Trace an IP to a Phone Number*, TECHWALLA, https://www.techwalla.com/articles/how-to-trace-an-ip-to-a-phone-numberaddress (last visited Jan. 24, 2018) (explaining how to trace an IP address to a phone number).

[189] MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

[190] *Id.* at r. 1.1 cmt. 8.

[191] *See* United States v. Carpenter, 819 F.3d 880, 886, 890 (6th Cir. 2016) (holding that no Fourth Amendment right to prevent disclosure of cell tower location data exists, highlighting its importance and relevance), cert. granted, 137 S. Ct. 2211 (2017); *In re*

Criminal defense attorneys must also be aware of how the courts are interpreting the Fourth Amendment in light of modern technology.[192] Although the Supreme Court has yet to decide the issue of whether the cell tower location data is protected and subject to probable cause, the Court already decided whether probable cause determinations apply to content of cell phones and other electronic devices.[193] In *Riley v. California*, the Court considered whether the "search incident to arrest doctrine" should be applied to a cell phone, which would allow police officers to look through the contents of a phone without a warrant after arresting an individual.[194] It considered the issue "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[195] Yet, in acknowledging the uniqueness of these technological marvels, the court observed that this balance test doesn't have "much force with respect to digital content on cell phones"[196] due to the privacy interests attached to digital content. It therefore held that "officers must generally secure a warrant before conducting such a search."[197]

What about social media? When the state requests data from third parties during its investigation, it only gets what it *specifically* requests in its business records' subpoenas and is only required to provide access to the information it received from third parties to opposing counsel.[198] Specifically, Federal Rule of Criminal Procedure 16(a)(1)(E) provides:

Smartphone Geolocation Data Application, 977 F. Supp. 2d 129, 147 (E.D.N.Y. 2013) (noting that telecommunication providers generally track geological data, which the government can procure through a subpoena or court order, increasing the importance for defendants to also acquire such information).

[192] *See, e.g.*, *Carpenter*, 819 F.3d at 886, 890 (holding that obtaining cell tower location data did not constitute a search for purposes of the Fourth Amendment).

[193] Riley v. California, 134 S. Ct. 2473, 2484–85 (2014).

[194] *Id.* at 2484.

[195] *Id.*

[196] *Id.* at 2484–85.

[197] *Id.* at 2485.

[198] *See, e.g.*, *About Our Practices and Your Data*, MICROSOFT, https://blogs.microsoft.com/datalaw/our-practices/ (last visited Jan. 28, 2018) ("Microsoft's legal compliance team reviews all requests to ensure they are valid, rejects those that are not valid, and only provides the data specified."); *Privacy*, APPLE, https://www.apple.com/privacy/government-information-requests/ (last visited Jan. 28, 2018) (Apple has "never allowed any government direct access to Apple servers."). *See* Thomas Fox-Brewster, *Inside Google's Fight to Keep the US Government Out of Gmail Inboxes*, FORBES (May 21, 2017, 3:00 PM), https://www.forbes.com/sites/thomasbrewster/2017/05/21/google-epic-court-fight-with-us-government-over-gmail-privacy/#11de13ca3020 (noting that companies have fought back and resisted attempts by the United States government to access user information).

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, *if the item is within the government's possession, custody, or control* and:
> (i) the item is material to preparing the defense;
> (ii) the government intends to use the item in its case-in-chief at trial; or
> (iii) the item was obtained from or belongs to the defendant.[199]

But federal law and many states' common law apply the "rule of completeness,"[200] which provides that if more information from such third parties (e.g., Facebook posts preceding or following the incriminating post) will provide perspective beneficial to the defendant, it must also be admitted into evidence. Hence, defense counsel must know when to serve his own more expansive subpoena to retrieve data above and beyond the state's evidence to put the incriminating evidence in a more favorable light.[201] If a lawyer fails to secure substantially complete discovery beyond the state's mandated responses, he faces the possibility of arguing the case with incomplete data incriminating his client regardless of what the "complete" evidence would have proven.[202]

As to the admissibility of social media records, Courts have held that such evidence is admissible when the profferer of such evidence makes a prima facie showing "(A) that the records were 'made at or near the time by—or from information transmitted by—someone with knowledge'; (B) that they were 'kept in the course of a regularly conducted activity of a business'; and (C) that 'making the record was a regular practice of that

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[199] FED. R. CRIM. P. 16(a)(1)(E) (emphasis added).

[200] *See* FED R. EVID. 106 (stating that if a party introduces part of a statement, an adverse party may introduce the remainder of that statement at any time); *see, e.g.*, State v. Eugenio, 579 N.W.2d 642, 649–50 (Wis. 1998) (noting that the Supreme Court of Wisconsin recognized the common law rule of completeness, which was codified in part by the Wisconsin legislature).

[201] Under the Federal Rules of Criminal Procedure, the defense has a reciprocal duty to disclose the evidence in its possession or control as long as it intends to use such in trial. If a defendant's subpoena discloses more incriminating evidence, he doesn't have to provide such to the state. FED. R. CRIM. P. 16(b)(1).

[202] While failing to file pretrial motions for discovery may not constitute ineffective assistance of counsel under the *Strickland* standard, Strickland v. Washington, 466 U.S. 668, 687 (1984), failure to do so can negatively impact a defendant's case. *See* State v. Carter, No. 91019, 2008-Ohio-6955, 2008 WL 5423554, at *3, ¶¶ 23, 26, 31 (Ohio Ct. App. Dec. 31, 2008) (holding that counsel provided ineffective assistance of counsel by, in part, failing to file any discovery motions). *Cf.* Willis v. Newsome, 771 F.2d 1445, 1448 (11th Cir. 1985) (holding that failure to file a pretrial motion for an autopsy in a murder case did not constitute ineffective assistance of counsel, even though the results might have produced exculpatory evidence).

activity[,]'" and as long as the company's evidence custodian signs a sworn affidavit certifying the same.[203]

The Second Circuit held in 2014 that "the district court [below] erred in admitting the web page evidence because the government presented insufficient evidence that the page was what the government claimed it to be—that is, *Zhyltsou's* profile page, as opposed to a profile page on the Internet that Zhyltsou did not create or control."[204] The net result of all these new developments in technology and the law is that lawyers must subpoena social media records independently from the state or opposing counsel, including all social networking sites the clients or opposing parties belong to, such as Facebook, Twitter, Instagram, Snapchat, etc. But it doesn't end there; the lawyer must also retain experts to analyze the data.[205] The same applies to civil practice, and perhaps more so since it involves civil litigants that don't have a constitutional duty to give each other all potentially exculpatory information, only to fulfill statutory obligations under state or federal law.[206]

2. Since Most "Discovery" Errors Are Connected to Missed Deadlines, Integrating Technology into Docketing and Case Management Is the Easiest and Best Way to Avoid Such Errors.

Despite the potential for investigation and discovery errors directly connected to tech-related evidence, the most common discovery error is actually a failure to comply with court- or statute-mandated deadlines. Hence, basic non-complex law office technology, such as docket, task, and practice management software as discussed above, would prevent the most common errors.[207]

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[203] United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) (quoting Fed. R. Evid. 803(6)(A)–(C)) (noting that Federal Rule of Evidence 902(11) allows the admission of evidence that satisfies the requirements of Rule 803(6)(A)–(C), and affirming the admission of Facebook and email data); United States v. Vayner, 769 F.3d 125, 129–31, 135 n.4. (2d Cir. 2014) (noting that the proponent must satisfy Federal Rule of Evidence 901, which requires the proponent to produce enough extrinsic evidence to verify that an item is what the proponent claims that it is, in order to admit a social media webpage into evidence, unless the item satisfies Federal Rule of Evidence 902, which provides several types of "self-authenticating" evidence including a "business record," which is codified in Rule 803(6)).

[204] *Vayner*, 769 F.3d at 127.

[205] *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2014) (indicating that a lawyer's duties under Rule 1.1 require him to keep abreast of technological changes, which implicates knowing who to subpoena and whether an expert witness is required to analyze relevant data).

[206] *See, e.g.*, FED. R. CIV. P. 26 (requiring a party to only disclose information that it may use to support its case, which excludes exculpatory information that a party would not use to support its claims or defenses).

[207] *See supra* text accompanying notes 107–09.

In *Attorney Grievance Commission of Maryland v. Gray*, Attorney Gray failed to timely respond to interrogatories and didn't depose the opposing party even though her client believed her husband was hiding assets.[208] She did serve opposing counsel interrogatories of her own, but that's the extent of her proactive discovery steps.[209] The parties agreed to a settlement before trial and Gray agreed to prepare the order; the court gave her ten days to prepare it.[210] Although she claims she sent it to opposing counsel for review, she didn't produce email verification or any means of corroborating her claim that she complied with the court's order to submit a proposed judgment within ten days[211] The ten day deadline passed.[212] The court ordered counsel to chambers to address the delay and issued an order settling the case immediately thereafter.[213] Gray's client filed a complaint alleging the above deficiencies in Gray's performance.[214] In addition to the above, the court observed that Gray failed to respond to the disciplinary administrator's letter notifying her of the client's complaints.[215] The court affirmed the administrator's determination that Gray's oversights violated rules 1.1 (competence), 1.3 (diligence), 3.2 (expediting litigation), and 8.1(b) (failing to respond to a lawful demand for information from disciplinary authority), [216] and it thereafter indefinitely suspended her from the practice of law.[217] Assuming that Gray failed to respond timely and failed to depose the necessary witnesses by the provided deadline because of poor docket and task management procedures, implementing technological solutions into her practice would have helped her catch her oversights before they damaged the client's case.

In re Boone provides a lesson about what happens when a lawyer knows he has a problem in his docket and task management systems, yet fails to address it.[218] A federal magistrate judge observed Attorney Boone's recurring behavior of missed discovery deadlines and failure to respond to discovery requests.[219] The first case stemmed from a police misconduct case in 1990, years before computer technology took a strong foothold in

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[208] 83 A.3d 786, 789 (2014).
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* at 791.
[217] *Id.* at 793.
[218] 7 P.3d 270 (Kan. 2000).
[219] *Id.* at 272, 274–77.

the practice of law.[220] It's a good example of how today's cheap and simple technology upgrades can help modern lawyers avoid the pitfalls faced by earlier generations. The federal court set aside a four-month discovery period.[221] Boone, representing the plaintiff, failed to provide discovery during this period and did not respond to the defendant's discovery requests.[222] The defendant filed a motion to compel and the judge issued a monetary sanction for Boone's failure to respond.[223] In addition, Boone failed to provide witness summaries to the defendant by the deadline. The defendant filed another motion to compel, Boone provided the summaries, and the court issued another monetary sanction against Boone.[224] Boone also filed a motion to extend time for informal discovery though he admitted he had no intention of actually conducting discovery.[225] Due to Boone's late filing of witness summaries, the court reopened discovery and assessed costs of the resulting depositions in the amount of $4500 to Boone.[226] Thus, Boone's poor docket and task management was both unprofessional *and* costly.

The second case was a sexual harassment and retaliatory discharge case.[227] The court set a four month discovery period.[228] Boone conducted minimal formal discovery during the four month discovery period and therefore requested a sixty day extension, which was granted with the judge "admonish[ing] Boone that no further extensions would be granted."[229] Boone requested another sixty day extension, which the judge denied.[230] Boone testified that although he requested extensions of time for discovery, he had no intention of actually conducting discovery.[231]

Another case involved investigation and discovery issues regarding an American with Disabilities Act claim.[232] The magistrate judge set a deadline for designating experts.[233] Boone requested an additional four

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220 *Id.* at 272.

221 *Id.*

222 *Id.*

223 *Id.* at 272–73.

224 *Id.* at 273.

225 *Id.* at 272–73.

226 *Id.* at 273. *But see id.* ("Boone paid $1,350 of the order pursuant to a payment plan set out in the order. The case was subsequently settled in a timely manner, and Magistrate Reid reduced the sanction to $2,500.").

227 *Id.* at 274.

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.* at 275.

233 *Id.*

weeks to designate experts.[234] At this point the judge noted on the record that Boone had a habit of missing discovery deadlines and requesting extensions.[235] "Magistrate Reid granted Boone's motion for additional time, but ordered that no further extensions would be permitted in any case Boone had pending before the court. Boone failed to properly designate expert witnesses in the case, and the judge prohibited Boone from calling any experts at trial."[236] Boone appealed the magistrate's ruling to the district judge.[237] Instead of reversing the magistrate judge's ruling, the district judge expanded the restriction to all Boone's cases.[238]

A fourth mishandled case was a medical malpractice case that was filed in the mid-1990s.[239] In 1996, the defendant filed a motion to compel discovery.[240] Boone failed to respond.[241] The magistrate judge also issued a show cause order setting a deadline for Boone to respond with his response as to why he shouldn't be ordered to pay costs of the motion as well as expert witness fees he incorrectly billed to respondent.[242] The court imposed the sanctions and Boone requested an extension to pay.[243]

Another case with the same discovery issues as above, as well as a multitude of other ethical lapses in other cases, were cited in the instant case.[244] The court affirmed the disciplinary panel's finding that Boone's ethical lapses violated, *inter alia*, Kansas Rules of Professional Conduct (KRPC) 1.3 (equivalent to ABA Model Rule 1.3), which provides that "a lawyer shall act with reasonable diligence and promptness in representing a client"[245]; KRPC 3.1 (equivalent to ABA Model Rule 3.1), which provides that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law"[246]; KRPC 3.2 (equivalent to ABA Model Rule 3.2), which provides that "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client"[247];

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[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.* at 277–79.
[245] *Id.* at 279–80, 284.
[246] *Id.* at 280, 282, 284.
[247] *Id.* at 282, 284.

and KRPC 8.4(d) (equivalent to ABA Model Rule 8.4(d)), which provides that "it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice."[248] The court suspended Boone for two years and placed him on probation subject to substantial supervision to ensure he dealt with the practice management issues that led to the complaints.[249] The ultimate outcome of this case indicates that the court acknowledged Boone's problems stemmed from his failure to properly manage his docket and case management tasks—in particular, failure to provide a timely response to court-mandated deadlines. Hence, wise use of technology would surely help Boone avoid missing deadlines upon expiration of his suspension.

Ironically, many of the attorney discipline cases involving missed discovery deadlines involve lawyers not timely responding (or not responding at all) to the *disciplinary administrators'* discovery requests.[250] In *Attorney Grievance Commission of Maryland v. Kent*, the Attorney Grievance Commission ("Commission") investigated an allegation that Attorney Kent, as trustee, misappropriated trust funds.[251] The hearing judge set discovery deadlines for all parties, and Kent failed to submit discovery by those deadlines.[252] Petitioner filed a motion for sanctions and the judge set another discovery deadline.[253] Again, Kent didn't respond.[254] As a sanction, the hearing officer deemed all allegations in the complaint admitted.[255] In addition to continued refusal to timely respond to discovery requests, Kent engaged in other acts that indicated his problem wasn't scheduling or task management related, but rather dishonesty.[256] In his case, it is doubtful that integration of technology into his practice would have made a difference. Nonetheless, given the severity of the discovery sanction which ultimately led to Kent's disbarment,[257] all lawyers should integrate some form of docket and task management

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[248] *Id.* at 283–84.

[249] *Id.* at 284.

[250] *See, e.g.*, Att'y Grievance Comm'n of Md. v. Gray, 83 A.3d 786, 789 (Md. 2014) (failing to respond to the disciplinary administrator's letters notifying him of client complaints).

[251] 136 A.3d 394, 396 (Md. 2016).

[252] *Id.* at 397.

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *See id.* at 399–405 (noting, in addition to discovery failures, the attorney knowingly and intentionally misappropriated trust funds for personal benefit, failed to keep accurate trust records, committed criminal embezzlement-fraudulent misappropriation, and lied to Bar Counsel in the course of the disciplinary investigation).

[257] *Id.* at 413.

software into their law practices to ensure that "good faith" discovery lapses don't impair clients' (or their own) cases.

In *Attorney Grievance Commission of Maryland v. Johnson*, Attorney Johnson faced multiple allegations involving his representations of several clients.[258] Nonetheless, despite the allegations against him, Johnson failed to answer the complaint filed against him within the fifteen day deadline, which led to discovery violations.[259] After the deadline passed, Bar Counsel filed a motion for default and Johnson moved for an extension of time to file an answer so he could retain counsel.[260] The hearing officer granted Johnson's motion to extend time, but didn't rule on the motion for default.[261] Johnson missed the extended time deadline.[262] Johnson filed a "Motion for Leave to Petition Court of Appeals for Remand" which the hearing judge denied and subsequently entered an order of default against Johnson for failure to file an answer.[263] Johnson filed an untimely motion to vacate default judgment.[264] The hearing officer set this motion for hearing.[265] At the hearing, Bar Counsel notified the hearing officer that Johnson had not responded to his discovery requests.[266] Johnson admitted to the discovery oversights and the hearing officer denied the motion to vacate.[267] As to Johnson's failure to adequately respond to Bar Counsel's discovery requests, the court affirmed the Commission's finding that his actions violated Maryland Lawyers' Rules of Professional Conduct (MLRPC) 8.1(b) (equivalent to ABA Model Rule 8.1(b)) since he "knowingly fail[ed] to respond to a lawful demand for information from [a] disciplinary authority."[268] These and other affirmations resulted in a court-imposed one year suspension,[269] which was less severe than the Commission's recommendation of an indefinite suspension.[270]

In this case, there are two points where Johnson's use of technology in his docket and task management protocol could have lessened the impact of his malpractice woes: (1) scheduling the deadline for filing his

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[258] 150 A.3d 338, 341 (Md. 2016).

[259] *Id.* at 342.

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.* at 342–43.

[264] *Id.* at 343–44.

[265] *Id.*

[266] *Id.*

[267] *Id.* at 344.

[268] *Id.* at 353.

[269] *Id.* at 353–54, 360.

[270] *Id.* at 354.

response, and (2) scheduling the deadlines for responding to Bar Counsel's discovery requests. Given that the court accepted Johnson's other mitigating factors and reduced the suspension when compared to the Commission's recommendation, it is likely that removing these two allegations from Bar Counsel's case would have reduced it even more—perhaps even to a probated sanction,[271] or a mere public censure.[272]

In summation, when considering the most common errors that lead to malpractice or professional ethics complaints, lawyers who integrate technology into their law practices via online research tools and organization software or applications are able to avoid the pitfalls that befall less tech-savvy practitioners. Moreover, as most of the above ethics opinions illustrate, mere irresponsible practice management arising from a failure to implement technology into the practice of law often results in harsh court-imposed sanctions to discourage such behavior in the future. These outcomes are especially interesting given that the above oversights also manifest in another category of complaints that generally result in merciful outcomes—those involving impaired lawyers.[273]

III. DISCIPLINARY AUTHORITIES ARE MERCIFUL TOWARD LAWYERS IMPAIRED BY ADDICTIVE SUBSTANCES OR MENTAL ILLNESS BUT NOT TOWARD THE PURELY IRRESPONSIBLE, TECH-RESISTANT LAWYERS

We are living in the year 2018. Steve Jobs and Steve Wozniak built the first affordable personal computer when they created the Apple II in

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[271] In many states, when attorney misconduct is a result of mental illness, substance abuse, or an inadvertent mistake, the disciplinary authority or court may place an attorney on probation as long as the attorney or his counsel provides a plan for probation that complies with the applicable disciplinary rule. *See, e.g.*, *In re* Foster, 258 P.3d 375, 378–80 (Kan. 2011) (The court considered, but denied probation, because the attorney failed to satisfy all of the required disciplinary rules for probation. The court noted the following mitigating factors that may warrant reduced discipline: "Absence of a Dishonest or Selfish Motive," "Personal or Emotional Problems" (such as a mental illness), cooperation with authorities during the disciplinary investigation and hearing, good character and reputation, and remorse.). *Cf. In re* Scholl, 25 P.3d 710, 714, 716 (Ariz. 2001) (reducing a two-year suspension to six months, in part because of respondent's successful rehabilitation efforts from a gambling addiction, but not entirely eliminating the suspension because respondent knowingly committed dishonest acts with the intention of violating the law).

[272] *Johnson*, 150 A.3d at 354 (arguing that if the appellate court granted the motion to vacate sanctions imposed below, because of discovery failures, a reprimand or a dismissal with a warning would have been the appropriate sanction). *See, e.g.*, *In re* Tullis, 499 S.E.2d 811, 812–13 (S.C. 1998) (responding to allegations of misconduct and entering into an agreement with disciplinary counsel whereby the attorney accepted a public reprimand and admitted to violating, *inter alia*, Rules 1.1, 1.4(a), 1.15(b), 8.4(a), and 8.4(e) of the Rules of Professional Conduct).

[273] *See* discussion *infra* section II.

1977.[274] IBM and Bill Gates's Microsoft Corporation continued the PC revolution by launching the IBM PC and MS-DOS in 1982.[275] Al Gore "invented" the internet in 1999 much to the surprise of BBN Technologies in Cambridge, MA, whose Ray Tomlinson sent the first internetworking email in 1971.[276] Steve Jobs invented the iPhone in 2007.[277] Thus, we've been in a computer literate world for more than thirty years. Moreover, computers have come a long way since MS-DOS required us to access computer files and functions with command lines. With Mac, Windows, iOS, and Android graphic user interfaces (GUI) proliferating to the masses, even toddlers can use armor-plated tablet computers without much effort. Therefore, given that most people reading this Article have either done relatively well on the LSAT or passed the bar and are practicing law, it's safe to say that all have sufficient intelligence to grasp basic computer technologies such as calendar and task management applications, and internet search engines. Indeed, online legal research was available through dedicated terminals in the 1970s and through computer emulation in 1989 through such services as Westlaw and LexisNexis,[278] although they cost hundreds of dollars a month or exorbitant hourly rates.[279] Nonetheless, any lawyer who attended law school as late as the 1980s likely benefited from "free" student access to these services and therefore is familiar with the advantages of online computer research.[280] Suffice to say that all such law students, lawyers,

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[274] *Apple II Personal Computer*, NAT'L MUSEUM AM. HIST., http://americanhistory.si.edu/collections/search/object/nmah_334638 (last visited Feb. 1, 2018).

[275] *Timeline of Computer History*, COMPUTER HIST. MUSEUM (2018), http://www.computerhistory.org/timeline/computers/#169ebbe2ad45559efbc6eb35720105c3.

[276] Glenn Kessler, *A Cautionary Tale for Politicians: Al Gore and the 'Invention' of the Internet*, WASH. POST (Nov. 4, 2013), https://www.washingtonpost.com/news/fact-checker/wp/2013/11/04/a-cautionary-tale-for-politicians-al-gore-and-the-invention-of-the-internet/?utm_term=.02817b8ae587; *The Father of Email*, RAYTHEON, https://www.raytheon.com/news/feature/ray_tomlinson (last updated Mar. 7, 2016).

[277] Todd Haselton, *Here's Every iPhone Released, in Order, and What Changed Along the Way*, CNBC (June 29, 2017, 1:29 PM), https://www.cnbc.com/2017/06/29/every-iphone-released-in-order.html.

[278] "Westlaw originally launched in 1975. It was West Publishing's answer to Lexis, the legal research service launched by Mead Data Central in 1973." Robert Ambrogi, *Westlaw's Days are Numbered*, LAW SITES (May 26, 2015), https://www.lawsitesblog.com/2015/05/westlaws-days-are-numbered.html.

[279] Xiaohua Zhu, *Access to Digital Case Law in the United States: A Historical Perspective*, IFLA, June 1, 2012, at 5, https://www.ifla.org/past-wlic/2012/193-zhu-en.pdf ("During the 1970s, LEXIS and Westlaw were still under development and only used by a limited amount of large law firms." For this reason, "from the beginning, only subscribers willing to pay premium prices could access the services.").

[280] *Id.* at 6 (noting that before the 1900s, "some bar associations had supported the development of [computer-assisted legal research] in order to give solo and small-firm

and judges know how to use technology, and they understand the positive impact it can have on a lawyer's practice and clients. Consequently, unless other circumstances contribute to a lawyer's commission of the above timeliness errors, judges and other attorneys aren't likely to tolerate a lawyer who exacerbates attorney incompetence by failing to adopt technology tools.

To put these errors in context and to emphasize how absurd it is to resist assimilating technology into the practice of law, consider the other conditions that most often lead to the same unprofessional behaviors: substance abuse and mental impairment. In *Geauga County Bar Association v. Snavely*, Attorney Snavely committed numerous ethical violations that harmed her clients.[281] She didn't have malpractice insurance and didn't disclose that to her clients as required in Ohio.[282] Snavely didn't maintain a trust account and didn't inform clients that when they paid flat fees they might be entitled to a refund if she didn't complete the representation.[283] Finally, Snavely forged one client's signature on an attorney malpractice insurance waiver form, which resulted in a misdemeanor conviction for forgery, and she served time in jail as a sanction.[284] The court adopted the parties' stipulation that:

> Snavely violated Prof.Cond.R. 1.4(c) (requiring a lawyer to inform the client on a separate written form that the lawyer does not maintain professional liability insurance and requiring the client to sign the form), 1.5(d)(3) (prohibiting a lawyer from charging a flat fee without simultaneously advising the client in writing that the client may be entitled to a refund of all or part of the fee if the lawyer does not complete the representation), 1.15(a) (requiring a lawyer to hold property of clients in an interest-bearing client trust account, separate from the lawyer's own property), 1.15(c) (requiring a lawyer to deposit advance legal fees and expenses into a client trust account, to be withdrawn by the lawyer only as fees are earned or expenses incurred), 1.15(e) (requiring a lawyer to promptly distribute all portions of client funds that are held in trust), 1.16(a) (requiring a lawyer to withdraw from representation when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client), 8.4(b) (prohibiting a lawyer from committing an illegal act that reflects adversely on the lawyer's honesty or trustworthiness), and 8.4(h)

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lawyers the same research power as large law firms"); *see also Lexis, Westlaw & Bloomberg Law*, GEO. L. LIBR., https://www.law.georgetown.edu/library/about/services-policies/lexis-westlaw.cfm (last visited Mar. 3, 2018) (offering students full use of Lexis Advance and Westlaw for research, educational, or employment related purposes).

[281] Geauga Cty. Bar Ass'n v. Snavely, 149 Ohio St. 3d 301, 302–03, 2016-Ohio-7829, 75 N.E.3d 117, 118–19, at ¶¶ 4, 6, 9.

[282] *Id.* at ¶ 4, 75 N.E.3d at 118.

[283] *Id.*

[284] *Id.* at ¶ 8, 75 N.E.3d at 118.

> (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law).[285]

Many of the above non-impaired lawyer cases involved irresponsible lawyering, but not blatant deception, as Snavely's forging the client's signature accompanied by a conviction for a crime of dishonesty. Yet, the bar suspended Snavely for two years with eighteen months stayed if she met certain conditions.[286] Why? Instead of being able to attribute her behaviors only to general irresponsibility or to non-integration of technology into her practice, she was addicted to drugs.[287]

> A chemical-dependency counselor diagnosed Snavely with a severe substance-abuse disorder; the disorder contributed to her professional misconduct; she has successfully completed inpatient, outpatient, and aftercare treatment and continues to be monitored by OLAP; and her counselor concludes that she is currently capable of engaging in the competent and ethical practice of law.[288]

Perhaps Snavely is an exception? She's not.[289] The fact is that lawyers addicted to substances and those challenged with depression and other mental health issues have legitimate excuses for their bad behavior. Indeed, all state bars have some sort of impaired lawyer committee that allows lawyers struggling with such issues to confidentially report their problems and get help before their conduct gets out of hand.[290] As an example, in *In re Gaul*, the court observed that "Jud.Cond.R. 2.14(A) provides that if a judge reasonably believes that the performance of a lawyer is impaired 'by a mental, emotional, or physical condition,' the judge 'shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.'"[291]

In *Disciplinary Counsel v. Eynon*, Eynon, an attorney, misappropriated client trust funds and even bounced checks on his trust account.[292] Eynon also failed to file a timely response to the complaint.[293] The court adopted the board's finding that Eynon violated the rules pertaining to his personal use of client trust funds and his failure to cooperate in the investigation.[294] Despite Eynon's theft of client funds and

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[285] *Id.* at ¶ 9, 75 N.E.3d at 118–19.

[286] *Id.* at ¶ 18, 75 N.E.3d at 120.

[287] *Id.* at ¶¶ 5, 15–17, 75 N.E.3d at 118–20.

[288] *Id.* at ¶14, 75 N.E.3d at 119.

[289] *See, e.g.*, cases cited *supra* note 271.

[290] *See, e.g.*, *In re* Disqualification of Gaul, 144 Ohio St. 3d 1202, 1203, 2015-Ohio-3929, 41 N.E.3d 420, 420, at ¶ 4 (noting that a judge may confidentially refer an impaired lawyer to an assistance program rather than to state disciplinary authorities).

[291] *Id.* at ¶ 4, 41 N.E.3d at 420.

[292] 135 Ohio St. 3d 274, 275, 2013-Ohio-953, 985 N.E.2d 1285, 1286, at ¶¶ 5, 7.

[293] *Id.* at ¶¶ 2, 6, 985 N.E.2d at 1285–86.

[294] *Id.* at ¶¶ 6–7, 985 N.E.2d at 1286.

failure to cooperate, the court permitted Eynon to submit a psychological report in mitigation and subsequently stayed the one year suspension subject to conditions.[295]

Substance abuse and mental illness are *legitimate* mitigating factors.[296] Even though behaviors attributed to a disorganized, chaotic law practice run by a lawyer unwilling to utilize technology to enhance his research, docket, and task management functions can mimic those that arise when a lawyer loses control of his practice due to addiction or mental health issues, such a cause will likely not mitigate the lawyers' punishment, especially in light of Rule 1.1 and Comment [8].[297] It is therefore imperative that any lawyer not impaired by legitimate mitigating conditions who exhibits the above bad behaviors in his practice adopt technology to help address any lapses before such *sore thumbs* force judges or fellow lawyers to report their lapses to the appropriate disciplinary authority.

CONCLUSION

There are many aspects of technology and the law that lawyers need to grasp to properly serve their clients. These include protecting client data and maintaining attorney-client privilege and attorney work-product confidences, which are not subjects of this Article. However, such issues are effectively moot if lawyers aren't willing to embrace the most basic technologies to serve their clients better and improve their reputations with the courts and other lawyers. Moreover, while the more complicated technology issues often require expert consultation and substantial financial resources to properly integrate into the practice of law,[298] those

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[295] *Id.* at ¶¶ 3, 15, 985 N.E.2d at 1286, 1288. *See also In re* Lang, 759 S.E.2d 47, 48–49 (Ga. 2014) (accepting a lawyer's petition for voluntary discipline who suffered from bipolar and depressive disorder and noting that emotional problems along with seeking treatment are factors that may warrant reduced discipline); Disciplinary Counsel v. Daniell, 140 Ohio St.3d 67, 70–71, 2014-Ohio-3161, 14 N.E.3d 1040, 1044–45, at ¶¶ 13–16 (2014) (holding that an attorney's mental impairments qualified as a mitigating factor and issuing a one year suspension stayed upon the condition, *inter alia*, that the attorney continued to obtain further treatment).

[296] *See, e.g.*, Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon, 821 N.W.2d 873, 881–82 (Iowa 2012) (Mental and physical conditions may be mitigating factors where a sufficient relationship exists between the improper conduct and the alleged mental or physical condition. Although untreated conditions, like alcoholism, may be an aggravating factor, seeking and complying with treatment is considered an additional and important mitigating factor.).

[297] *See supra* text accompanying notes 21–22 (discussing Rule 1.1 and Comment [8]).

[298] "One study suggests that the average organizational cost of a cybersecurity data breach for a U.S. company in 2016 was $7 million." Matthew D. Dunn, et al., *Cybersecurity: Regulatory and Litigation Consequences of a Data Breach*, CARTER, LEDYARD & MILBURN LLP (Apr. 26, 2017), http://www.clm.com/publication.cfm?ID=5587.

discussed herein are simple and inexpensive. Once adopted, such technology can prevent many common ethical and malpractice errors, which will have a dramatic impact on lawyer stress level, client satisfaction, and lawyer career satisfaction. It is possible that lawyers who use simple, yet effective, old-school paper organization systems or take the time to Shepardize cases cited in their briefs at the local law library, may not employ 21st century technology to improve their law practice processes—despite being just as capable as the freshest law school graduates. As the saying goes, "you can lead a horse to water, but you can't make him drink."[299] But such stubborn, technology resistant lawyers can't ignore the natural outcomes of this continued defiance: fewer clients paying fees for the diminished value of their services, or more time and money spent responding to ethics or malpractice complaints.

Technology has become inexpensive to acquire and easy to operate. Consequently, more lawyers who once did not have access to such law practice enhancers can now utilize technological advances to provide better legal counsel to clients. They can be more responsive to the demands of a law practice by better managing dockets, complying with filing deadlines, and being more accessible to clients who can now reach their tech-friendly lawyers via cell phone, email, and text. For the lawyers unwilling to adopt these technologies, their clients—along with other lawyers and judges—will begin to see a separation brought about by this tech evolution. A refusal to adapt won't necessarily lead to ethics or malpractice complaints, but it will make stubborn lawyers more likely to sink their practices as other lawyers adopt basic technologies. As the tide of technology enhanced legal research, discovery, investigation, and law practice management rises, bad lawyers will be easier to spot and lawyers and judges will have an ethical obligation to report their malfeasance to disciplinary authorities.

Don't be a bad lawyer. *Rise with the tide.*

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[299] CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/you-can-lead-a-horse-to-water-but-you-can-t-make-him-drink (last visited Mar. 3, 2018).

THIS MEANS *WAR*: A CASE FOR JUST REPARATIONS UNDER THE DOCTRINE OF INALIENABILITY

INTRODUCTION

A close examination of America's post-emancipation timeline reveals incessant cycles of racial discord marked by turbulent junctures of conflict between Blacks and American governments.[1] Sustained antagonism is evinced by at least one major declaration of mass dissent every twenty to thirty years since ratification of the Thirteenth Amendment.[2] Most recently, governmental impunity for the deaths of unarmed Blacks has increased the burgeoning divide.[3] The Black Lives Matter movement developed as a grass roots social era campaign to ameliorate the effects of racial injustices, specifically, the negative relationship between Blacks and their respective state governments.[4] However, since the founding of the movement, racial tensions have spilled over into the streets of various American cities.[5] In January 2016, a Working Group for the United Nations Human Rights Council announced its findings that black-Americans are in a human rights crisis.[6] It proposed a set of non-binding recommendations to assist the United States in repairing and reconciling its relationship with descendants of chattel slaves.[7] Notwithstanding various legal victories, such as the Thirteenth Amendment, other reconstruction era amendments, civil rights acts, and executive orders, the argument that descendants of slaves have not yet gained

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1 *See* Borgna Brunner, *Timeline: Key Moments in Black History, A Chronology of Black History from the Early Slave Trade to Today*, INFOPLEASE, http://www.infoplease.com/spot/bhmtimeline.html (last visited Jan. 12, 2018) (providing a timeline of critical events in black history since the slave trade).

2 *See generally* U.N. Human Rights Council, Rep. of the Working Group of Experts on People of African Descent on Its Mission to the U.S., ¶¶ 6–8, U.N. Doc. A/HRC/33/61/Add.2 (Aug. 18, 2016) [hereinafter U.N. Human Rights Council] (providing a historical overview of periodic dissent among African Americans since the colonial era).

3 *About*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited Jan. 12, 2018) [hereinafter BLACK LIVES MATTER]; *see also* U.N. Human Rights Council, *supra* note 2, at ¶ 20 (expressing the desire for change in light of the systematic targeting of African Americans).

4 BLACK LIVES MATTER, *supra* note 3.

5 Logan Churchwell, *Black Dallas Cop Sues Black Lives Matter, Soros for Inciting Race War*, BREITBART (Sept. 16, 2016), http://www.breitbart.com/texas/2016/09/16/black-dallas-cop-sues-black-lives-matter-soros-inciting-race-war/ (noting that mass violence has spread since the beginning of the Black Lives Matter movement); *see also* Ashley Fantz & Steve Visser, *Hundreds* Arrested *in Protests over Shootings by Police*, CNN (Aug. 4, 2016, 11:26 AM), http://www.cnn.com/2016/07/10/us/black-lives-matter-protests/ (addressing the protests occurring in Dallas, Ferguson, New York, Chicago, St. Paul, and Baton Rouge).

6 U.N. Human Rights Council, *supra* note 2, at ¶ 68.

7 *Id.* at ¶¶ 88–91.

equality and require an extensive large-scale reform to reverse deeply entrenched systems of oppression persists.[8]

No political philosopher influenced American polity more than theorist John Locke.[9] Not only did Locke's writings influence the tripartite system of government,[10] but also the three-part inalienable rights doctrine which delineates the fundamental rights to life, liberty, and property.[11] The doctrine is analogous to the separation of powers doctrine in that it underlies the very framework of the United States government.[12] The Framers understood that the fundamental rights are natural to man as God-given grants preceding government.[13] At the time of the founding, the common understanding of the absolute rights, as incorporated in the Declaration of Independence and the Fifth Amendment's Due Process Clause, was that they encompassed a corresponding right of repair in the event of an unjust breach.[14] This Note applies the inalienable rights theory, as proffered by Locke by examining the perpetual state of war[15] between the federal government and Blacks, which commenced concomitantly with slavery and propounds *war* as a foreseeable and natural consequence of an uncured denial of inalienable guarantees.[16]

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8 *Id.* at ¶¶ 98, 110.

9 Locke's writings influenced Thomas Jefferson, Alexander Hamilton, James Madison, and George Mason. *See* MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 20 (2d ed. 2013) (providing that the United States government was the first formal effort to enact Locke's social contract theory); *see also* Craig A. Stern & Gregory M. Jones, *The Coherence of Natural Inalienable Rights*, 76 UMKC L. REV. 939, 973 (2008) (discussing Locke's and Blackstone's influence on the Declaration of Independence).

10 Montesquieu also influenced the tripartite system of government. Locke's theory provided for an executive, legislative, and federative or foreign affairs power while Montesquieu provided for executive, legislative, and judicial powers. PAULSEN ET AL., *supra* note 9, at 86.

11 THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶ 87 (Jonathan Bennett ed., 2017) (1689).

12 THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776); *see also* McDonald v. City of Chicago, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and concurring in the judgment) (explaining that the institution of slavery was irreconcilable with the principles proclaimed by the Declaration of Independence and included in the structure of the Constitution); Stern & Jones, *supra* note 9, at 939–40.

13 *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 95–96 (1872) (Field, J., dissenting) (stating that fundamental rights do not gain their force from legislations, nor can legislations restrain them).

14 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *127–29 (discussing the resultant common law remedies arising from injuries to the "absolute" rights of life, liberty, and property).

15 The term "*state of war*" is a term of art which means conflict, enmity, and destruction. It is a state by which men do not operate under the common laws of reason, but by force, violence, and conflict. LOCKE, *supra* note 11, at ¶ 16.

16 *Id.* at ¶¶ 23–24.

Reparations claims and schemes have been widely covered by numerous legal scholars.[17] Some have repositioned the argument, casting doubt on the courts' competence to hear cases against untraceable or unknown directly liable parties.[18] Others have examined alternative causes of action including reparative theories under the Takings Clause,[19] or the "Material Disadvantage," restitution, and corrective justice models.[20] Numerous legal writings have addressed the necessity of post-emancipation slavery reparations,[21] but none have outlined its legal requirements under the inalienable rights guarantee—the common law due process doctrine. This Note does not identify specific instances of racial oppression with ambitions of proving injustice or inequality because those grounds are well-settled.[22] However, this Note posits that American chattel slaves were denied the right of inalienable liberties and that a fundamental liberty unjustly restrained can never be cured without both reparations and reconciliation.

Part I argues that the common law doctrine incorporated a right of reparations following the unjust denial of inalienable liberties, and that such a right extended to American chattel slaves. American chattel slaves were born with inalienable rights and were unjustly robbed of the same coevally with the inception of slavery. When an inalienable right is taken by force, the resultant state is perpetual war, which continues until the breach has ended and has been repaired on terms acceptable to the injured. Slavery marked the beginning of conflict and its unabated consequences continued the state of war and a de facto condition of slavery far beyond emancipation. It continues by arguing that the federal government's connivance in failing to defend and guard slaves' inalienable liberties made it complicit in the robbery. Further, this Note moves forward with the premise that the power of reparations is implicit in modern due process analyses.

Implicit in every inalienable right is both the power and the right to be repaired in the event of injury.[23] In the absence of reparations, Blacks remained in the same disabled and damaged condition, which was both imported and imparted

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17 *See* David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U.L. REV. 1375, 1376–77, 1379–85 (2004) (suggesting models of reparations); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 251 (2003) (examining reparations claims under the Takings Clause); Zachary F. Bookman, Note, *A Role for Courts in Reparations*, 20 NAT'L BLACK L.J. 75, 75 (2006–07) (examining judicial competence to decide reparations disputes).

18 Bookman, *supra* note 17, at 102.

19 Wenger, *supra* note 17, at 251

20 Lyons, *supra* note 17, at 1381–82, 1397.

21 *Id.* at 1375; Wenger, *supra* note 17, at 192–93; Bookman, *supra* note 17, at 75.

22 *See* United States v. Bannister, 786 F. Supp. 2d 617, 630–32 (E.D.N.Y. 2011) (outlining both historical and current injustices experienced by Blacks in the United States).

23 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *123 (explaining that the common law provides a means for remedy wherever it provides rights that may be injured).

with the first chattel slave.[24] The common law doctrine incorporated the whole guarantee theorized by Locke—including the foreseeable continuation of conflict in the absence of cure.[25] This Note argues that descendants of chattel slaves have remained in the perpetual state of war and de facto slavery because they were not repaired and that the proof of its subsistence is manifest in the incessant cycles of conflict—in addition to the mirror-like pre- and post-emancipation conditions. Blacks were and are still the recipients of harsher criminal punishments, and consequently, are disproportionately represented in the criminal justice system.[26] The state of black poverty withstood the test of time, with sustained economic dependency, familial degradation, mass incarceration, and mis-education.[27] Broken familial bonds, which were shattered by slavery, continued through emancipation and survive in the modern day. Blacks remain in a system of racial subjugation eerily reminiscent of slavery conditions.[28]

Finally, this Note offers legal solutions and outlines possible models for both reparations and reconciliation. The United Nations's recommendations have no legal efficacy because the United States has not signed on to the human rights treaties that would allow individuals to bring claims directly to the international forum.[29] Numerous judicial barriers have stood between reparations claimants and actual awards.[30] Re-conceptualizing reparations claims under the inalienable rights guarantee and Due Process clause removes some judicial barriers.[31] However, at least one legal scholar has argued that Congress is the only branch which could effectively implement the massive scheme required to fully restore Blacks.[32] Part II discusses possibilities of providing reparations, reconciliation, and atonement in both judicial and legislative contexts, examines the legal implications of the inalienable rights theory, and concludes that the legislative branch is most appropriate to deliver the radical policies required to cure the condition.

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24 *See* Randall Robinson, *What America Owes to Blacks and What Blacks Owe to Each Other*, 6 AFR.-AM. L. & POL'Y REP. 1, 11–12 (2004) (examining African Americans' inherited deficit position in the race of life and the position which persists today).

25 LOCKE, *supra* note 11, at ¶ 20.

26 *See infra* Part II (discussing reparative and reconciliatory models that address the disproportionate representation of Blacks in the criminal justice system).

27 U.N. Human Rights Council, *supra* note 2, at ¶¶ 11, 50, 75.

28 *See infra* Part II (discussing reparative and reconciliatory models that address the system of racial subjugation and the lasting effects of slavery).

29 U.N. Human Rights Council, *supra* note 2, at ¶ 10.

30 *In re* African-Am. Slave Descendants Litig., 471 F.3d 754, 759–60 (7th Cir. 2006).

31 *See infra* section II.A (explaining the multitude of judicial barriers that hinder recovery for contemporary reparations claims).

32 Bookman, *supra* note 17, at 75.

I. BLACKS AND THE FEDERAL GOVERNMENT REMAIN IN A PERPETUAL STATE OF WAR WHICH CANNOT BE CURED WITHOUT REPARATIONS AND RECONCILIATION

Civil governments are established for the protection of persons[33] and property;[34] such protections were fundamental in the creation of America's government.[35] Political theorists concur that certain inalienable natural rights exist at birth and are not given by man.[36] Natural laws are the laws between nations, they are grounded in common sense and reason, and established for the preservation of all individuals by mitigating the consequences of conflict.[37] The guarantee was also written into France's national motto "liberté, egalité, fraternité";[38] the Japanese Constitution's "人生と自由と幸福の追求";[39] both the Canadian Charter of Rights's and the Universal Declaration of Human Rights's "life, liberty and security of the person";[40] and other similar provisions predating the Declaration of Independence.[41] The government lacks the authority to restrict or constrict

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[33] LOCKE, *supra* note 11, at ¶ 27.

[34] THE FEDERALIST NO. 54, at 285 (James Madison) (Gideon ed., 2001) (stating that "[g]overnment is instituted no less for protection of the property, than of the persons of individuals").

[35] THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

[36] LOCKE, *supra* note 11, at ¶¶ 4, 25; *see also* THOMAS HOBBES, LEVIATHAN 99–100 (W. G. Pogson Smith ed., Clarendon Press 1909) (1651) (acknowledging that man had a right of liberty and the power to preserve his own life prior to the covenant of sovereignty); JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 6 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762) (explaining that liberty accompanies humanhood); Stern & Jones, *supra* note 9, at 948–50 (explaining the view that life and liberty are natural rights which can neither be weakened nor strengthened by human legislation absent forfeiture by wrongdoing).

[37] The Prize Cases, 67 U.S. (2 Black) 635, 669–70 (1862).

[38] Elizabeth Manera Edelstein, Comment, *The* Loi *Toubon:* Liberté*,* Egalité*,* Fraternité*, but only on France's Terms*, 17 EMORY INT'L L. REV. 1127–28 (2003); *France at a Glance: Fact Sheet*, GOUVERNEMENT.FR, http://www.gouvernement.fr/en/france-at-a-glance (last visited Jan. 12, 2018) (translated "liberty, equality, fraternity").

[39] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. III, art. 13 (Japan) (translated "life, liberty, and the pursuit of happiness").

[40] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); Louis B. Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMMISSION JURISTS 17, 18 (1967).

[41] *See Declaration of Rights and Grievances, October 14, 1774*, LIBRARY OF CONG., http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/amrev/rebelln/rights.html (last visited Mar. 3, 2018) (stating that the colonial inhabitants were entitled to life, liberty, and property); Virginia Declaration of Rights of 1776, art. I, *available at* http://avalon.law.yale.edu/18th_century/virginia.asp ("That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.").

inalienable rights without just cause.[42] Under the common law, freedom was an original condition—slavery could only exist where positive law permitted.[43] Constitutional protections were established to secure individuals' pre-existing rights.[44] The Thirteenth Amendment was a mere reintroduction of the previously defied common law doctrine.[45]

This Section conceptualizes the reparations and reconciliation theory of property unjustly appropriated by another and returned in a state of disrepair. Section A argues that American chattel slavery was an unjust and illegitimate denial of inalienable liberties, which marked the beginning of a state of war and conflict between oppressing parties and Blacks. Section B argues that the United States government had an affirmative duty to guard and defend such liberties, and it entered the state of war with Blacks when it failed to do so. Section C asserts that a state of conflict continues in perpetuity until reparations and reconciliation are granted on terms acceptable to the oppressed.

Inalienable rights include the rights to life, to liberty, and to keep and possess property.[46] The Lockean natural rights guarantee is ingrained in the Preamble to the Declaration of Independence.[47]

> 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,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .[48]

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[42] LOCKE, *supra* note 11, at ¶ 4; *see* Stern & Jones, *supra* note 9, at 949–50 (expressing the heightened view that inalienable rights cannot be forfeited under any circumstances).

[43] Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510 (K.B.).

[44] *See* Johnson v. Am. Leather Specialties Corp., 578 F. Supp. 2d 1154, 1176 (N.D. Iowa 2008) (stating that Iowa's state inalienable rights guarantee was a codification of already preexisting doctrine); *see also* State *ex rel.* English v. Ruback, 281 N.W. 607, 609 (Neb. 1938) (addressing the Fifth and Fourteenth Amendments, and expressing that inalienable rights are secured by the Constitution).

[45] *Compare* U.S. CONST. art. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."), *with Somerset*, 98 Eng. Rep. at 509 (expressing "for the reducing [of] a man, guiltless of any offence [sic] against the laws, to the condition of slavery, [is] the worst and most abject state").

[46] BLACKSTONE, *supra* note 23, at *119; LOCKE, *supra* note 11, at ¶ 87.

[47] THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776); Stern & Jones, *supra* note 9 at 973.

[48] THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

It must be noted that involuntary servitude was a longstanding tradition which anteceded the Declaration of Independence.[49] Slavery was believed to be a state institution which was "regulated by [the states'] individual sovereignty."[50] America's vacillating relationship with slavery is evinced by the fact that Locke, the assumed drafter[51] of the pro-slavery *Fundamental Constitutions of Carolina*,[52] later drafted the anti-slavery treatises of government informing Jefferson's, Madison's, and Hamilton's early writings. However, Locke's colonial activities are distinguishable from his writings on political thought;[53] the *Fundamental Constitutions of Carolina* was drafted to invite colonists to a differential and practical style of learning and negotiation rather than an authoritative and strictly utopian mandate.[54]

A. American Chattel Slavery Was an Unjust and Illegitimate Denial of Inalienable Liberties, and Marked the Beginning of a State of War

This Note continues to analyze reparations under the Lockean inalienable rights theory, supported by William Blackstone's later explanation of the English common law. The three fundamental rights are so critical to an individual's continued existence in a civil society that even the individual, himself, cannot freely revoke them.[55] Under the common law, liberty was unjustly denied except when it was made punishment for the commission of a crime.[56] In addition to the right of locomotion, American chattel slavery curtailed the right of self-ownership.[57] Inarguably, no other

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[49] FREDERICK DOUGLASS, SPEECH ON WEST INDIA EMANCIPATION, Delivered at Canandaigua (Aug. 4, 1857), in TWO SPEECHES BY FREDERICK DOUGLASS 9–10 (Rochester, N.Y., C.P. Dewey 1857) (explaining that involuntary servitude and the abolition movement can be traced back to pre-Revolution England).

[50] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 536 (1857) (McLean, J., dissenting).

[51] David Armitage, *John Locke, Carolina, and the* Two Treatises of Government, 32 POL. THEORY 602, 603 (2004), http://scholar.harvard.edu/files/armitage/files/armitage-locke.pdf (explaining why Locke's colonial activities are irrelevant to interpreting his political writings); Vicki Hsueh, *Giving Orders: Theory and Practice in the* Fundamental Constitutions of Carolina, 63 J. HIST. IDEAS 425, 428 (2002) (distinguishing Locke's colonial participation in co-drafting the Fundamental Constitutions and the *Two Treatises*).

[52] THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA art. 107 (1669), *available at* http://avalon.law.yale.edu/17th_century/nc05.asp.

[53] Hsueh, *supra* note 51, at 428–29; *see generally* Steven G. Calabresi & Sofía M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1299 (2015) (explaining the impact of the Lockean Natural Rights theory on the abolition of slavery in the states).

[54] Hsueh, *supra* note 51, at 428–29.

[55] LOCKE, *supra* note 11, at ¶ 24.

[56] *See Somerset*, 98 Eng. Rep. at 509 (discussing the cruelty the condition of slavery imposes on an innocent man); BLACKSTONE, *supra* note 23, at *127 (discussing the elements of false-imprisonment).

[57] Wenger, *supra* note 17, at 220, 229–30, 251.

condition represents a loss of self-ownership more than subjection to arbitrary despotism.[58] Under the common law, a person had an interest in his labor and was able to reduce natural property to his own possession by combining it with the fruits of his labor.[59] Inalienable liberties include the right to pursue happiness, encompassing the right of autonomy while choosing a common occupation.[60] Indisputably, no other condition restrains the right to choose a common occupation more than a compulsory enlistment in a burdensome and execrable occupation. Property ownership and slavery are irreconcilable conditions—once slavery begins, all property rights end.[61]

Life, liberty, and property may only be denied if done by just means.[62] Just means have included forfeiture,[63] whether by wrongdoing or lawful conquest. As noted earlier, a person cannot freely revoke his own inalienable property rights—consequently, he may not submit himself into slavery but may surrender himself to the condition of hard labor and servitude.[64] Conquest may yield the right of a conqueror to enslave and appropriate the property of those who "supported the war against him" in exchange for recoupment of his costs and damages incurred while fighting the war.[65] Thomas Scott raised and rejected the notion of lawful conquest in his speech during the 1790 Slave Trade Debates.[66]

> I look upon the slave trade to be one of the most abominable things on earth; and if there was neither God nor devil, I should oppose it upon the principles of humanity, and the *law of nature*. I cannot, for my part, conceive how any person can be said to acquire a property in another; *is it by virtue of conquest*? What are the rights of conquest? Some have dared to advance this monstrous principle, that the conqueror is absolute master of his conquest . . . .[67]

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[58] LOCKE, *supra* note 11, at ¶ 23.

[59] *Id.* at ¶ 34; JAMES J. SULLIVAN, MICHAEL V. HERNANDEZ & ERIC A. DEGROFF, PROPERTY I CASES AND MATERIALS: THE STUDY OF PROPERTY I FROM A CHRISTIAN PERSPECTIVE 3 (2016).

[60] Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

[61] LOCKE, *supra* note 11, at ¶ 85.

[62] U.S. CONST. art. V (promulgating the denial of the rights to life, liberty, and property); *see also* Stern & Jones, *supra* note 9, at 949–50 (explaining that fundamental liberties may be forfeited by wrongdoing; however, distinguishing forfeiture of a liberty from forfeiture of the right to the liberty itself).

[63] LOCKE, *supra* note 11, at ¶ 196; Stern & Jones, *supra* note 9, at 949–50 (explaining the forfeiture doctrine premised on both Locke's and Blackstone's writings but arguing that forfeiture is limited to the underlying inalienable liberty and not the individual right to the same).

[64] LOCKE, *supra* note 11, at ¶ 24.

[65] *Id.* at ¶ 196.

[66] PAULSEN ET AL., *supra* note 9, at 79.

[67] *Id.* (emphasis added).

Three quarters of a century later, debates discussing the distinguishing characteristics of subjugation on the basis of race and enslavement under the lawful conquest theory persisted.[68]

Under the conquest theory, a conqueror is not the *absolute* master of his conquest. A valid conquest is circumscribed to the forfeiting party; neither his off spring[69] nor his possessions can be held as collateral gains.[70] Slave owners justified the cruel and depraved practice through the claim that slaves were in need of oversight—the paternalistic ethos.[71] Surely, a child is also subordinate to his parents and subject to some bondage while under their custody.[72] Generally, a parent is also permitted to appropriate the property of her child in exchange for "nurture, care, protection, maintenance and education."[73] However, even with the crudity of scientific data, the argument still lacks energy. First, unlike chattel slavery, the paternalistic relationship between a parent and a child arises from an equally beneficial exchange. Second, both a lawful conquest and a paternalistic relationship will draw to a guaranteed end. Lawful conquests and paternalistic relationships begin with expended resources by the dominant party and mere permissible recoupment while chattel slavery yielded an unlimited supply of labor. Chattel slavery began with a deficit to the slaves that was sustained as the years advanced.[74] The practice can find no legitimacy. An illegitimate breach of inalienable rights is a state of war waged by the aggressor against the weaker.[75]

The unjust breach initiated a state of war between the oppressing parties and the oppressed. As stated, the government's primary duty is to defend inalienable liberties. When a government sanctions trespass, it becomes complicit and directly engages in conflict with the oppressed.

B. The Federal Government Entered the State of War Against the Enslaved when It Failed to Protect Their Inalienable Rights

American chattel slavery was an illegitimate enslavement which unjustly divorced slaves from their inalienable rights. Unjust breaches of inalienable rights are not automatically converted into righteous deeds upon

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68 CONG. GLOBE, 39th Cong., 1st Sess. 200–01 (1866) (arguing against citizenship for former slaves but asserting American slavery arose from "theft and of robbery" rather than lawful conquest).

69 LOCKE, *supra* note 11, at ¶¶ 179–80.

70 *Id.* at ¶ 182.

71 CONG. GLOBE, 38th Cong., 2d Sess. 985 (1865).

72 Constance v. Gosnell, 62 F. Supp. 253, 254 (W.D.S.C. 1945).

73 *Id.*

74 Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States are Essential to Democracy*, 14 J. GENDER RACE & JUST. 633, 646–47.

75 LOCKE, *supra* note 11, at ¶¶ 176, 232.

governmental assent.[76] In fact, when a government notices but fails to guard a person's inalienable rights against unjust aggression, or when it sustains the arbitrary rule of another, the government cooperates in the robbery and enters the state of war against the injured.[77]

> For wherever violence is used and injury done, even if it is done by people appointed to administer justice and is dressed up in the name, claims, or forms of law, it is still violence and injury. The purpose of the law is to protect and get compensation for the innocent, by an unbiased treatment of all who come under it; and when this is not *genuinely* done, war is made upon the sufferers, and they—having nowhere on earth to appeal to for justice—are left to the only remedy in such cases, an appeal to heaven.[78]

The government is not responsible for every violent or forceful action by one individual against another.[79] However, it becomes culpable when it turns a blind eye to a genuine grievance, acquiesces, or sustains an unjust breach.[80] Whether the federal government actually acquiesced or approved of slavery is still a contentious topic.[81] Understandably, slavery existed within the states prior to the Declaration of Independence,[82] the Articles of Confederation left the federal government largely powerless,[83] and the Constitution may have never been ratified had it not been for some compromise in the area of slavery.[84] Foundational documents, including the United States Constitution, expressly guaranteed inalienable liberties to all, but included antithetical concessions protecting the slaveholding states.[85] However, the federal government's acquiescence, even if slight, is sealed in at least one Supreme Court holding.[86] Frederick Douglass's writings are

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[76] *Id.* at ¶ 207 (explaining that a governmental breach of inalienable rights becomes hostile and unjust when that breach removes the possibility of an appeal).

[77] *Id.* at ¶ 208.

[78] *Id.* at ¶ 20.

[79] *See id.* at ¶¶ 203–04 (providing that a person may not oppose the government for any other reason than the government's use of "unjust and unlawful force"); *see also id.* at ¶¶ 207–08 (establishing that an individual may not forcefully oppose the government unless the government forecloses her opportunity to appeal to the law for remedy).

[80] *Id.* at ¶ 208.

[81] *See* PAULSEN ET AL., *supra* note 9, at 73 (questioning whether the Constitution is a pro-slavery document).

[82] THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA art. 107 (1669), *available at* http://avalon.law.yale.edu/17th_century/nc05.asp.

[83] *See* PAULSEN ET AL., *supra* note 9, at 23–24 (discussing the inherent defects of the Articles of Confederation).

[84] *Id.* at 80–81.

[85] *Compare* U.S. CONST. art. V, *with id.* art. IV, § 2, cl. 3 (the fugitive slave clause); *id.* art. I, § 2, cl. 3 (the Great Compromise); *id.* art. V (protecting the international slave trade until 1808).

[86] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406–07, 536 (1857) (holding that a man of African ancestry could not be a citizen under the law).

windows, providing a glimpse into the minds and hearts of the black community following the Dred Scott decision:

> This infamous decision of the Slaveholding wing of the Supreme Court maintains that slaves are within the contemplation of the Constitution of the United States, property; that slaves are property in the same sense that horses, sheep, and swine are property; that the old doctrine that slavery is a creature of local law is false; that the right of the slaveholder to his slave does not depend upon the local law, but is secured wherever the Constitution of the United States extends; that Congress has no right to prohibit slavery anywhere; that slavery may go in safety anywhere under the star-spangled banner; that colored persons of African descent have no rights that white men are bound to respect; that colored men of African descent are not and cannot be citizens of the United States.[87]

Breaches of inalienable rights were already actionable under the common law doctrine prior to Constitution's ratification.[88] The Fifth Amendment's Due Process Clause[89] supersedes the common law inalienable rights doctrine.[90] It logically follows that, like the freedom of contract[91] which Locke outlined in the inalienable rights doctrine,[92] the right of reparations also awaits in the penumbra of statutory due process protections. As noted, the Fifth Amendment also includes the Takings Clause, which prohibits the government from apportioning personal property for public use without just compensation.[93] Just compensation in the reparative context has been appropriately examined.[94] However, other scholarly works have not thoroughly examined the government's direct responsibility for sanctioning the racially oppressive policies. Reparation under the Lockean guarantee impeaches the federal government for its indifference and disregard of its affirmative duties.

Disputants have argued that the government atoned for slavery by bloodshed during the Civil War,[95] but the argument discounts the other

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87 DOUGLASS, *supra* note 49, at 31.

88 Cullinane v. Arnold, No. SA CV 97–779GLT(EEX), 1998 WL 241510, at *2–3 (C.D. Cal. Mar. 30, 1998).

89 U.S. CONST. art. V.

90 *See* City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (explaining that Congress may enact legislation which supersedes common law).

91 W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (stating that the liberty interest encompasses a freedom of contract, but that the liberty interest may be circumscribed by state police powers).

92 *See* LOCKE, *supra* note 11, at ¶ 194 (referencing the natural right to property and detailing the right of contract for securing the same).

93 *See* Wenger, *supra* note 17 (examining slavery as a compensatory taking).

94 *Id.*

95 CONG. GLOBE, 39th Cong., 1st Sess. 201 (1866) (Andrew Rogers was a Democratic Party politician who represented New Jersey's 4th congressional district); Daniel J. Berger,

benefits of ending slavery in the South.[96] Logically, the argument assumes some debt owed by Blacks in exchange for equality and directly conflicts with the inalienable rights guarantee which accords such liberty from birth.[97] Another probable question would ask how the government should prioritize the rights of one over the rights of another. After all, Dred Scott's property interests were in direct conflict with the asserted interests of his enslaver.[98] In deciding these conflicts, the government must allocate just enough "freedom or moral power" for the preservation of a person's self and others and not the degradation thereof.[99]

1. Slavery conditions instituted a state of war

Slavery was a "peculiar institution"[100] of government sanctioned racial subordination.[101] Several legal scholars have posited that much of the economic and criminal problems facing Blacks are residuum of slavery.[102] Remnants of chattel slavery are ingrained in the United States Constitution,[103] and more than one hundred and fifty years post-emancipation, many Blacks still endure multifarious forms of racial injustices.[104] The institution of slavery created a disabling condition for slaves, and the public policy of racial subordination continues to damage their heirs. In the absence of reparative cure, an impassable barrier protrudes like

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Reparations for Slavery: They Have Already Been Paid, BLUFFTON U. (2002), https://www.bluffton.edu/homepages/facstaff/bergerd/essays/reparations.html.

[96] *See* 1 ERIC FONER, GIVE ME LIBERTY!: AN AMERICAN HISTORY 583 (4th ed. 2014) [hereinafter FONER, GIVE ME LIBERTY!]. In 1860, the North produced more than ninety percent of America's manufactured goods. To Northerners, sub-par educational, industrial, and social achievements of the South were concomitant effects of the slave labor system. Meanwhile, Southerners argued that earnings from the Cotton Kingdom were used to facilitate Northern advancement. Sectionalism continued to draw a sharp divisional line between the North and the South. The United States could not survive under two separate economic institutions and conflicting labor systems. Although the racial argument subsisted, the Union and Confederacy's public debates centered on the common goal of enforcing and protecting their own superior systems of labor.

[97] LOCKE, *supra* note 11, at ¶ 87.

[98] *See* Wenger, *supra* note 17, at 219–21, 230 (explaining the slave's property right to self-ownership, and how the Fugitive Slave Clause created a conflict of property interests between the slave and the slave owner).

[99] LOCKE, *supra* note 11, at ¶ 135.

[100] FONER, GIVE ME LIBERTY!, *supra* note 96, at 395, 397; 1 ERIC FONER, VOICES OF FREEDOM: A DOCUMENTARY HISTORY 207 (4th ed. 2014) [hereinafter FONER, VOICES OF FREEDOM].

[101] Lyons, *supra* note 17, at 1376.

[102] *See* Robinson, *supra* note 24, at 1–2 (examining African Americans' inherited deficit position in the race of life); *see also* Aiyetoro, *supra* note 74, at 641 (outlining disparities in both the criminal justice system and wealth accumulation).

[103] U.S. CONST. art. IV, § 2, cl. 3; *id.* art. I, § 2, cl. 3; *id.* art. V.

[104] U.N. Human Rights Council, *supra* note 2, at ¶¶ 20, 24.

a great wall separating Blacks from the promise of equality. Just as the institution of slavery survived both its reasons and justifications, [105] researchers now suggest that the behaviorism of racial subordination remains far past the positive laws which birthed and nurtured it.

The crux of the inalienable rights theory of reparations is comparable to the runner's analogy proffered by President Lyndon B. Johnson in his 1964 speech defending affirmative action:

> But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.[106]

From a natural rights perspective, it is intuitive to cure an inflicted disability with an advantage equal to the deficit.[107] Curing the deficit would not only repair the past damage but would deliver a message of equality to all necessary participants. It would also dissuade responsible parties from repeating the behavior. Such principles are the bedrock of the inalienable rights theory. Pre-emancipation anti-slavery writings previsioned some of the obstacles slaves would encounter in transitioning from commodities to human beings[108] with goals and aspirations never previously defined.[109] Post-bellum records also reveal the knowledge that the residuum of slavery would have some lasting impact on Blacks without reparations.[110]

In 1862, Samuel S. Cox raised the argument that Blacks cannot succeed in direct competition with Whites,[111] and surely the argument is likely to be revived. However, direct competition assumes equality from a starting position, which descendants of American chattel slaves have not been granted. The Institute for Policy Studies and the Corporation for Economic Development claims that the 400-year period of "slavery, segregation, and

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[105] Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510 (K.B.) ("The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created . . . .").

[106] Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), *available at* https://online.hillsdale.edu/document.doc?id=286.

[107] Aiyetoro, *supra* note 74, at 662–63 (highlighting examples of reparations models that repair past damage and contain symbolic representations of equality).

[108] DOUGLASS, *supra* note 49, at 15; FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 107–08 (Boston, Anti-Slavery Office 1846).

[109] DOUGLASS, *supra* note 49, at 8.

[110] CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

[111] FONER, VOICES OF FREEDOM, *supra* note 100, at 290–91.

institutionalized discrimination" created a wealth gap so wide that, at Blacks' current rate of advancement, would take 228 years to close.[112]

The United Nations highlighted some of the problems beleaguering descendants of chattel slaves, but no one issue is more prevalent, poignant, and troubling than disparate treatment in the criminal justice system.[113] Slave owners were permitted to use force and violence against their slaves.[114] In the modern era, officers use more physical force against black suspects than any other group.[115] Historically, judicial construction reinforced racial subordination where positive law failed—the rights of slaves and their progeny were nonexistent or enforced haphazardly.[116] Heavy intra-citizen racial conflict remained accompanied by governmental dominance.[117] Laws such as those leading to mass incarceration reveal a modern legislative readiness to punish crimes associated with prevalent black behaviors—a tendency not displayed toward similar white behaviors. For instance, 90% of new heroin users are white.[118] The heroin epidemic, characterized by a 286% increase in overdose deaths since 2002, has been responded to with medical treatment rather than force.[119] The United Nations found similarities between Jim Crow era policies and the government's crack cocaine policies feeding mass incarceration.[120] These conditions perpetuate the never-ending story of racial oppression and white impunity.[121]

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[112] Joshua Holland, *The Average Black Family Would Need 228 Years To Build the Wealth of a White Family Today*, NATION (Aug. 8, 2016), https://www.thenation.com/article/the-average-black-family-would-need-228-years-to-build-the-wealth-of-a-white-family-today/.

[113] U.N. Human Rights Council, *supra* note 2, at ¶¶ 20–57.

[114] DOUGLASS, *supra* note 49, at 9 (speaking about the abuses suffered by slaves at the hands of their slave masters).

[115] U.N. Human Rights Council, *supra* note 2, at ¶ 22.

[116] DOUGLASS, *supra* note 49, at 31; *Life After Slavery for African Americans*, KHAN ACAD., https://www.khanacademy.org/humanities/ap-us-history/period-5/apush-reconstruction/a/life-after-slavery (last visited Jan. 26, 2018).

[117] C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 23 (commemorative ed. 2002).

[118] *See* Sonia Saraiya, *Eric Holder Gets Real About Heroin and Race: It's a Crisis Because White People Are Hooked*, SALON (Feb. 24, 2016, 10:10 AM), http://www.salon.com/2016/02/24/eric_holder_gets_real_about_heroin_and_race_its_a_crisis_because_white_people_are_hooked/ (providing data showing ninety percent of new users are White, and addressing the government and society's response to the heroin epidemic).

[119] *See Today's Heroin Epidemic*, CDC, https://www.cdc.gov/vitalsigns/heroin/ (last updated July 7, 2015) (providing data showing rate of usage and death have climbed exponentially in the last ten years).

[120] U.N. Human Rights Council, *supra* note 2, at ¶¶ 31–32.

[121] DOUGLASS, *supra* note 49, at 15.

2. De facto slavery conditions proving the subsistence of a state of war

This subsection empirically examines the conditions of Blacks from slavery until the modern day to both confess congruity in conditions and to illustrate the fact that the deep wounds of slavery cannot be repaired without an extensive transformation. Blacks in the modern era are over-represented in all aspects of the criminal justice system[122] other than in employment within the system in which they are largely under-represented. Blacks are more likely to be stopped and detained by members of law enforcement.[123] Some individuals have suggested that Blacks are overrepresented in the criminal justice system because they commit more crime.[124] However, the assertion has not been proven.[125] For instance, Blacks account for about fourteen percent of drug users, which is representative of the general population, but are more likely to be arrested, convicted, and imprisoned for the crime.[126] The United States prison population has consistently risen over the last twenty years despite the overall reduction in crime,[127] and almost three-quarters of a million Blacks are currently in state or federal custody.[128]

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[122] U.N. Human Rights Council, *supra* note 2, at ¶¶ 20–57.

[123] *See, e.g.*, *id.* at ¶ 25 (reporting that although Blacks only constituted 67% of the population in Ferguson, Missouri, they accounted for 85% of traffic stops and 93% of arrests between 2012–14); Bill Quigley, *18 Examples of Racism in the Criminal Legal System*, HUFFINGTON POST (Oct. 4, 2016), https://www.huffingtonpost.com/entry/18-examples-of-racism-in-criminal-legal-system_us_57f26bf0e4b095bd896a1476 (reporting that a Black male aged twenty-five or younger in Kansas City has more than twice as great a chance of being stopped as a White male of the same age); *Stop-and-Frisk Data*, NYCLU, https://www.nyclu.org/en/stop-and-Frisk-data (last visited Feb. 17, 2018) (reporting that in every year since 2002, more than half of those subjected to stop-and-frisks in New York City are Black); *Stop-and-Frisk in Chicago*, ACLU ILL., https://www.aclu-il.org/en/stop-and-frisk-chicago-what-data-shows (last visited Feb. 17, 2018) (reporting that in 2014, Blacks constituted 32% of the population of Chicago, but 72% of stops); Chris Suarez, *Stop-and-Frisk Data Show African-Americans Disproportionately Detained*, DAILY PROGRESS (Aug. 23, 2017), http://www.dailyprogress.com/news/local/stop-and-frisk-data-show-african-americans-disproportionately-detained/article_1b606292-886e-11e7-960b-57d65b2b63d4.html (reporting that Blacks constitute approximately 20% of the population of Charlottesville, Virginia but approximately 70% of stop-and-frisks).

[124] THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 5–6 (2008).

[125] *Id.*

[126] *Id.*

[127] Charles C. W. Cooke, *Careful with the Panic: Violent Crime and Gun Crime Are Both Dropping*, CORNER (Nov. 30, 2015, 1:04 PM), http://www.nationalreview.com/corner/427758/careful-panic-violent-crime-and-gun-crime-are-both-dropping-charles-c-w-cooke; *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ (last visited Jan. 19, 2018).

[128] Antonio Moore, *The Black Male Incarceration Problem Is Real and It's Catastrophic*, BLOG (Dec. 6, 2017), https://www.huffingtonpost.com/antonio-moore/black-mass-incarceration-statistics_b_6682564.html.

Once convicted, Black males are 5.9 times more likely to be imprisoned.[129] If a drastic reparative scheme is not implemented, one in every three black males born today can expect to be imprisoned during his lifetime—this is *war*.[130]

The Working Group for the United Nations revealed that many impoverished Blacks residing in urban areas remain under a system of de facto residential segregation.[131] Slavery was the great architect of American racial segregation, which like any resolute design, was made to withstand the test of time. The persons enforcing segregation policies continued to behave in conformity with the guidelines of racial subordination far beyond removal of its legal importance. For example, the government established a decampment system which moved more middle-class Whites into suburban neighborhoods and Blacks into public housing.[132] In the 1950s, most public housing recipients in New York were white, but by 2012, the statistic drastically dropped to a mere five percent.[133] By the 1960s, numerous American cities were equipped with "dysfunctional public housing" systems, packed with welfare dependent Blacks.[134] Notwithstanding the Federal Fair Housing Act of 1968 and other anti-discriminatory policies, almost all of the nation's ten million public housing residents in the United States are segregated by race.[135] Notwithstanding the fact that housing has been legally desegregated, conditions created during segregation have not been reversed, repaired, or reconciled. At least one legal scholar has suggested that the change in living conditions will not occur until the government takes steps to reverse the consequences of its previous policies and regimes—*repair*.[136]

The state of war between the federal government, slaves, and slave progeny continued after emancipation because the breach was never repaired. Because neither slaves nor their descendants have been repaired, the conditions Blacks faced prior to emancipation are mirrored in the quality of their post-emancipation experiences. The condition is a de facto condition

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[129] U.N. Human Rights Council, *supra* note 2, at ¶ 29.

[130] *Id.*

[131] *Id.* at ¶ 50.

[132] Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america; Richard Rothstein, *Public Housing: Government-Sponsored Segregation*, AM. PROSPECT (Oct. 11, 2012), http://prospect.org/article/public-housing-government-sponsored-segregation#ftnt10/.

[133] Richard Rothstein, *supra* note 132.

[134] *Id.*

[135] *Id.*; *see also* Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOC. F. 571, 571, 578–81 (2015) (explaining that the Fair Housing Act and subsequent measures have not been as effective in reducing segregation in housing as originally hoped).

[136] Rothstein, *supra* note 132.

of slavery. Slaves and their descendants were not completely released from bondage because they continue to exist under the burden of disrepair.

C. A State of War Resulting from an Unjust Denial of Inalienable Rights Cannot Be Cured Without Reparations and Reconciliation on Terms Acceptable to the Oppressed

This Section argues that an unjust infringement of an inalienable right begins a state of war which cannot be cured upon the mere return of the right unjustly withheld. Reparations may offer both retrospective and prospective remedies; they not only compensate the victim for damages suffered but place him in a starting position where he is best positioned to progress beyond the injury. Inalienable rights and damages are inextricably intertwined concepts, which cannot be divorced.[137] Under Lockean principles, once rights are unjustly breached, the oppressed party has the power, if not the duty, to engage in conflict with his oppressors until the hostility ends and the oppressor both offers reparations and reconciles with the oppressed.[138] Under the common law, reparation was an absolute right, with force equal and opposite to the trespass—in regards to a deprivation of liberty, the remedy was a bipartite solution of freedom and damages.[139] Successful pre-revolutionary freedom suits resulted in freedom, retrospective damages for past time and labor, and a formal announcement proclaiming that the former slave was not property.[140]

American property and tort laws permit damages after removal of transgression.[141] Even a simple trespass to property or to chattel is actionable

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[137] *See* LOCKE, *supra* note 11, ¶ 181 (indicating that depriving another of a right necessitates reparation and that, if the injurious position is maintained by an unjust use of force, this creates a state of war).

[138] *Id.* at ¶ 20. A common government behaves unjustly when it fails to protect the oppressed from the aggressor. Wars in societies ended when the actual force concluded. However, the state of war in nature never ceases until freedom, peace, and reparations are granted. Neither grants the oppressor rights over the enslaved property or assets. Neither concludes without damage.

[139] *See, e.g.*, SAMUEL PUFFENDORF, OF THE LAW OF NATURE AND NATIONS bk. 3, ch. 1, § 1 (Basil Kennet trans., 3d ed. 1717) (contending that in cases of hurt or damage, the perpetrator shall make reparation).

[140] Arthur Zilversmit, *Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts*, 25 WM. & MARY Q. 614, 614–15 (1968); *Massachusetts Constitution and the Abolition of Slavery*, MASS.GOV, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery (last visited Mar. 14, 2018) (discussing the *Quock Walker* Case and the *Mum Bett* Case).

[141] Bouie v. City of Columbia, 378 U.S. 347, 357 (1964) (stating that the common law of civil trespass has always been recognized); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 413 (2003).

by some compensatory damages.[142] As previously discussed, the Court has accepted the existence of peripheral rights in the due process model,[143] such as the right to privacy,[144] and has conceded that liberty includes the right of contract and to choose a common occupation.[145] A breaching party must not only cease his unlawful act, but also must repair the rightful owner for his lost property right. Here, reparations have been referred to as a right, but Locke treated them as a power, equipollent to the Necessary and Proper Clause.[146]

> The injured party has the power of taking for himself the goods or service of the offender, by right of self-preservation; and everyone has a power to punish the crime to prevent its being committed again, by the right he has of preserving all mankind, and doing everything reasonable that he can to that end.[147]

Moreover, proof of reparative pre-conditions of emancipation are delineated in both religious and political historical writings. Biblical teachings evince the requirement of repairing slaves "liberally" prior to releasing them.[148] In addition, the biblical model of atonement requires both a confession and an overt request for forgiveness;[149] it also returns a value commensurate with breach.[150] Whether ingeniously or ingenuously designed, Lockean principles affirm the biblical model.[151]

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[142] *See* Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (stating that the common law has historically allowed punitive damages over and above normal compensatory damages in actions involving trespass); *see e.g.*, *id.* (noting that civil trespass has always been recognized by the common law and by many state laws).

[143] *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973) (stating that the Fourteenth Amendment has protected activities related to procreation, contraception, child rearing, and education).

[144] *Id.*

[145] W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (identifying previous disputes involving minimum wage laws as invocations of the liberty interest of the Due Process Clause); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[146] *See* LOCKE, *supra* note 11, ¶ 11 (describing how an injured party holds power of reparation against the perpetrator, because the perpetrator has acted antithetically to reason).

[147] *Id.*

[148] *Deuteronomy* 15:12–15 (New King James) ("If your brother, a Hebrew man, or a Hebrew woman, is sold to you and serves you six years, then in the seventh year you shall let him go free from you. And when you send him away free from you, you shall not let him go away empty-handed; you shall supply him liberally from your flock, from your threshing floor, and from your winepress. *From what* the Lord your God has blessed you with, you shall give to him. You shall remember that you were a slave in the land of Egypt, and the Lord your God redeemed you; therefore I command you this thing today.").

[149] 1 *John* 1:9 (New King James) ("If we confess our sins, He is faithful and just to forgive us *our* sins and to cleanse us from all unrighteousness." (emphasis added)).

[150] *Exodus* 22:7–9 (New International); *Leviticus* 6:5 (New International Version); *Proverbs* 6:31 (New International Version).

[151] *See* LOCKE, *supra* note 11, ¶ 87 (noting that man has the power to "judge and punish breaches of the law of nature by others"); *see also supra* text accompanying notes 148–50.

Not only did the government acquiesce in the policies of slavery, but it adopted and furthered the injurious policies post-emancipation.[152] Blacks have not been repaired and consequently have remained disabled and injured. Mere emancipation could never repair the deeply entrenched racially oppressive systems; cure requires an intensive curative scheme encompassing an element of reparation and reconciliation on terms acceptable to the oppressed. Reparations would both offer a compensatory aspect to cure past injuries and a prospective remedy which would place the injured in a position for equal progress. Such measures would send notice to the remainder of society that all men are equal, and that racially oppressive behaviors attend consequences and should be avoided.

II. REPARATIVE AND RECONCILIATORY MODELS

After arguing that American chattel slaves had the right of reparations following slavery and providing proof of impassable barriers which cannot be lowered without a successful reparations scheme, this Note now examines the plausibility of reparations claims under the newly conceptualized inalienable rights theory and suggests curative models. Legal scholars have previously highlighted some of the potential problems with implementing reparations schemes, including tolling statutes of limitation.[153] Reparative cure under the three-part inalienable rights theory requires not only a compensatory aspect, but a reconciliation aspect which offers future security for the injured party. Re-conceptualizing the law of reparations under the inalienable rights guarantee removes barriers, including statutes of limitation, and clears some jurisdictional defects of other reparations models. However, the judiciary is likely not capable of administering an extensive compensatory scheme and is not competent to deliver a required reconciliatory aspect. Section A examines the likelihood of successful reparations claims in court under the inalienable rights theory, and Section B discusses legislative models.

The demand for slavery reparations is not circumscribed to the United States. Descendants of slaves in the Caribbean Islands, Canada, and India are now seeking reparations from their former imperial enslavers.[154]

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[152] *See supra* text accompanying notes 86, 100–12.

[153] Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99, 99–100, 120–26, 128–29 (2007) (noting modern-day bars to reparations suits, including statutes of limitation); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691–93, 699–701, 703–04, 707–08, 711–12 (2003); Wenger, *supra* note 17, at 243–51.

[154] *A Call for Reparations for Blacks*, CBC NEWS (Aug. 8, 2001, 9:00 PM), http://www.cbc.ca/news/canada/a-call-for-reparations-for-blacks-1.261782; Barney Henderson, *India's Prime Minister Endorses Call for Britain to Pay Reparations for Colonial Rule*, TELEGRAPH (July 24, 2015, 9:43 PM), http://www.telegraph.co.uk/news/worldnews/asia/india/11762311/Indias-prime-minister-

Following the Emancipation of the West Indies, Great Britain implemented a compensatory scheme in favor of the former slaveholders with hopes that the rewards would trickle down to the former slaves, but they did not.[155] Freedom litigation within the United States extends as far back as the Revolutionary Era in 1774.[156] Following emancipation, some slaves were granted land reparations, but the promise of "forty acres" and a "mule[]" died along with the First Reconstruction.[157] Various technical barriers including statutes of limitation, causation, un-identifiability of both ancestors and descendants, and jurisdiction have barred current judicial claims in the modern era.[158]

Reparation and reconciliation schemes are widely disputed and highly complicated areas of law, policy, religion, and ethics.[159] Consistent with Locke's requirements for concluding a state of war, the following two components are common to successful reparations schemes: retrospective compensation, and reconciliatory devices to mitigate future consequences.[160] Reparations include pecuniary recoveries for the recoupment of lost property rights and restoring an injured party to his original position.[161] The reconciliation component attempts to break down the impassable barrier and "deeply entrenched systemic conditions"[162] which remain. Reconciliatory devices also deliver a message to others that the unjust behavior should be avoided and that continuance of the same attends consequences.[163] Successful reconciliation models encompass both an apology and a non-repetition component.[164] Both historical and modern day judicial

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endorses-call-for-Britain-to-pay-reparations-for-colonial-rule.html; Tim Lockley, *Britain Rules out Slavery Reparations*, CONVERSATION (Oct. 1, 2015, 10:42 AM), http://theconversation.com/britain-rules-out-slavery-reparations-but-should-the-caribbean-get-more-aid-48450.

[155] Eleanor Marie Lawrence Brown, *The Blacks Who "Got Their Forty Acres": A Theory of Black West Indian Migrant Asset Acquisition*, 89 N.Y.U. L. REV. 27, 82–83 (2014).

[156] Art Alcausin Hall, *There Is a Lot to Be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact the Fate of African American Reparations*, 2 SCHOLAR 1, 17–18 (2000).

[157] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 69–70 (1988); Lyons, *supra* note 17, at 1375–76.

[158] *In re* African-Am. Slave Descendants Litig., 471 F.3d 754, 758–59 (7th Cir. 2006).

[159] MEGAN BRADLEY, FMO RESEARCH GUIDE: REPARATIONS, RECONCILIATION AND FORCED MIGRATION §§ 2.1–2.2, 2.4, 3.1, 5.1 (2006), http://www.forcedmigration.org/research-resources/expert-guides/reparations-reconciliation-and-forced-migration/fmo044.pdf.

[160] *E.g.*, *id.* at §§ 1, 3.1–3.2; Posner, *supra* note 153, at 699.

[161] *See* Aiyetoro, *supra* note 74, at 634, 662–63 (arguing that the way to remedy the oppression and the continuing consequences of oppression that African descendants in the United States are suffering is to award them reparations).

[162] Lyons, *supra* note 17, at 1376.

[163] Wenger, *supra* note 17, at 208.

[164] Burkett, *supra* note 153, at 99.

opinions addressing slavery reparations have not denied injury but have rejected claims on various other technical grounds—some of which recognized earlier are ameliorated under the inalienable rights theory.[165]

A. Judicial Relief

The United States has not ratified the necessary treaties which would allow individual Americans to submit human rights complaints directly to the United Nations or other human rights bodies.[166] Therefore, the United Nations's recommendations are not legally binding.[167] The United States and other countries with advanced legal infrastructures have domestic, rather than international, claims processes. Specifically, class action settlements have facilitated several reparations claims within the United States.[168] Notwithstanding, judicial relief would still be difficult due to the relative impossibility of identifying ancestors and delivering the required reconciliatory component.

The courts have acknowledged the viability of reparations suits under restitution theories, which return the victim's loss to the injurer, and damage theories which quantify and monetize losses.[169] However, a multitude of judicial barriers stand between descendants of American chattel slaves and actual recovery.[170] The Seventh Circuit Court of Appeals concluded in *In re African-American Slave Descendants Litigation* that if a plaintiff were able to establish a plausible theory of recovery then he would still face measurable obstacles.[171] Conceptualizing reparations claims under the inalienable rights theory provides both a constitutional basis and a cognizable legal claim under pre-constitutional common law theories.[172] Here, the state of conflict and injury continues each day where reparations and reconciliation are not

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[165] *See In re* African-Am. Slave Descendants Litig., 471 F.3d 754, 762–63 (7th Cir. 2006) (noting that suits for century and a half old injuries have been barred by state statutes of limitation); *see also* Hamilton v. United States, No. 1:10-CV-808, 2012 WL 760691, at *6 (E.D. Tex. Feb. 9, 2012) (noting that "the direct victims of slavery and segregation are his ancestors, not himself").

[166] U.N. Human Rights Council, *supra* note 2, at ¶ 10.

[167] *Id.*

[168] Pollard v. United States, 69 F.R.D. 646, 648, 652 (M.D. Ala. 1976) (addressing the attorney's fees from a class action settlement for a reparation claim); MEGAN BRADLEY, FMO RESEARCH GUIDE: REPARATIONS, RECONCILIATION AND FORCED MIGRATION § 2.2 (2006), http://www.forcedmigration.org/research-resources/expert-guides/reparations-reconciliation-and-forced-migration/fmo044.pdf.

[169] *In re* African-Am. Slave Descendants Litig., 471 F.3d at 760; Charter Commc'ns Entm't I, DST v. Burdulis, 460 F.3d 168, 182 (1st Cir. 2006); ConFold Pac., Inc. v. Polaris Indus., 433 F.3d 952, 957–58 (7th Cir. 2006).

[170] *In re* African-Am. Slave Descendants Litig., 471 F.3d at 758–59.

[171] *Id.*

[172] *See supra* text accompanying notes 88–92 (associating breaches of inalienable rights with the Due Process Clause and the freedom of contract).

granted.[173] Repeated injuries may offer a plausible reason to toll statutes of limitation under the continuing wrongs doctrine.[174] Statutes of limitation may also be tolled for equitable reasons to avoid injustice, particularly when the government owes a special duty to the injured group.[175] If the claim were to become actionable under international law, statutes of limitation could be avoided as either a war crime or a crime against humanity.[176] Damage quantification would surely present some complications but should not bar recovery.[177] The identification of specific individual offenders would not be necessary because full responsibility may be allocated to the government as the principal party. Allocation of award to specific Blacks would pose an ethical problem because of the relative impossibility of identifying all of a person's ancestors or confirming their times or conditions of enslavement. If Blacks can prove injury, Article III standing objections may be defeated by presenting plaintiffs as representatives of their ancestors' estates because it would make the descendant the real party in interest.[178]

Sovereign immunity has proven to be a significant barrier to slavery reparations claims against American governments.[179] The federal government has agreed to waive sovereign immunity for its constitutional violations[180] or under statutory tort theories.[181] However, claims arising from slavery generally exceed the federal government's limited waiver of sovereign immunity.[182] Additionally, waiver is unavailable for causes of action accruing prior to the applicable enforcement statute's enactment.[183] A constitutional claim for money damages against the federal government may not be barred by sovereign immunity if accompanied by a substantive constitutional right.[184] Exceeding the substantive due process arguments made herein, courts may be more willing to find that rights are substantive when the

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173 Wenger, *supra* note 17, at 245.

174 Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 597 (9th Cir. 1990).

175 *See id.* (recognizing tolling for equitable reasons but refusing to toll where the government's duty was to Indian people in general, rather than a particular group of Indians).

176 Wenger, *supra* note 17, at 245–47.

177 *Id.* at 254–56.

178 *In re* African-Am. Slave Descendants Litig., 471 F.3d 754, 762 (7th Cir. 2006).

179 *See, e.g.*, Cato v. United States, 70 F.3d 1103, 1105–06 (9th Cir. 1995) (using sovereign immunity as a possible ground for dismissal in a claim for damages against the United States for enslavement of and discrimination towards African Americans); *see also* FDIC v. Meyer, 510 U.S. 471, 479–80 (1994) (refusing to adopt the FDIC's interpretation of a statute waiving sovereign immunity).

180 28 U.S.C. § 1491(a)(1) (2012).

181 28 U.S.C. § 1346(b)(1) (2012).

182 *See, e.g.*, *Cato*, 70 F.3d at 1105–06 (dismissing a claim for slavery damages).

183 *Id.* at 1106.

184 *See, e.g.*, Bowen v. Massachusetts, 487 U.S. 879, 887, 890–93, 911 (1988); United States v. Testan, 424 U.S. 392, 398 (1976).

government shares a special relationship with the injured parties.[185] However, it has not specifically determined whether the due process guarantee conferred the same.

An action under an enforcement statute such as 42 U.S.C. § 1982[186] must be accompanied by a colorable jurisdiction granting claim, which was actionable at the time of injury.[187] Suits have been unsuccessful under the Thirteenth Amendment's involuntary servitude doctrine because it was not ratified until after slaves' emancipation.[188] Constitutional claims against state governments may fail because the doctrine of inalienability was also not incorporated until after emancipation.[189] However, not only was the doctrine of inalienability applicable to the federal government during slavery by the Fifth Amendment, but it was also previously actionable under the common law.[190] It could also be argued that the Thirteenth Amendment's prohibition against involuntary servitude is implicit in the right to liberty, and, consequently, was already effective under the common law prior to ratification.

In 1975, the federal government settled an over nine million-dollar claim with almost 600 African American class members injured during the Tuskegee experiments.[191] The settlement offered compensatory relief but lacked a firm reconciliatory component. President Bill Clinton later reconciled the government's debt with the victims when he issued a formal apology; delivered a prospective two hundred thousand dollar grant to Tuskegee University; and, as a non-repetition component, requested the Department of Health and Human Services to engage the Black community in areas of health research and care.[192] The Working Group, among other legal and political scholars, has asserted that an apology is required for reconciliation.[193] It not only involves extending a hand to the oppressed

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[185] *See* United States v. Mitchell, 445 U.S. 535, 550 (1980) (White, J., dissenting) (stating that the government had a duty to remedy a breach when it had a fiduciary relationship with the injured).

[186] 42 U.S.C. § 1982 (2012).

[187] *In re* African-Am. Slave Descendants Litig., 471 F.3d 754, 757 (7th Cir. 2006).

[188] *Id.*

[189] Wenger, *supra* note 17, at 244.

[190] U.S. CONST. art. V; *see* Cullinane v. Arnold, No. SA CV 97-779 GLT(EEx), 1998 U.S. Dist. LEXIS 5575, at *5–6 (C.D. Cal. Mar. 24, 1998) (responding to a party's assertion that the common law provided an inalienable right prior to the Constitution's ratification, the court asserted that our current system does not recognize the common law as providing inalienable rights).

[191] Pollard v. United States, 69 F.R.D. 646, 647 (M.D. Ala. 1976).

[192] Posner & Vermeule, *supra* note 153, at 695 n.19.

[193] *See, e.g.*, GEO. UNIV., REPORT OF THE WORKING GROUP ON SLAVERY, MEMORY, AND RECONCILIATION TO THE PRESIDENT OF GEORGETOWN UNIVERSITY, at 29 (2016); Theodore R. Johnson, *How to Apologize for Slavery*, ATLANTIC (Aug. 6, 2014),

population in an effort to repair the broken relationship but encompasses a non-repetition component which addresses the underlying influences, and aggressively counteracts the consequences.[194] The Court is not competent to deliver the appropriate reconciliatory component.[195]

The inalienable rights theory would offer a greater likelihood of judicial relief, but claimants would still encounter significant obstacles.[196] Additionally, the court also lacks the facility to administer a large-scale reparations program to the millions of potential claimants. Claimants may also face other problems including identifying their own ancestors and quantifying the level of their damages. Most problematic is the court's inability to deliver the required apology and non-repetition component.

B. Legislative Relief

The federal government used legislative schemes to repair Indian tribes for lands taken by force, Japanese interned during WWII, persons exposed to radiation in mines, both survivors and descendants of the Hawaii Annexation, and victims of the Syphilis Experiments.[197] Many congressional acts have been enacted with aims of repairing discrete groups,[198] but to date, none have repaired descendants of American chattel slaves who are indisputably the most oppressed group in United States history. Representative John Conyers, a Democratic Congressman representing Michigan, first introduced H.R. 40 in 1989.[199] The bill proposes a congressional committee tasked with researching the effects of slavery and its progeny.[200]

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https://www.theatlantic.com/international/archive/2014/08/how-to-apologize-for-slavery/375650/. Theodore R. Johnson is a professor at Georgetown University's McCourt School of Public Policy. *Ted Johnson*, GEO. UNIV., https://gufaculty360.georgetown.edu/s/contact/00336000014SZm6AAG/ted-johnson (last visited Feb. 15, 2018).

[194] Burkett, *supra* note 153, at 99.

[195] Cato v. United States, 70 F.3d 1103, 1111 (9th Cir. 1995).

[196] Notably, this Note does not analyze the tort causation quandary in the context of slavery reparations. Judge Posner, opining for the United States Court of Appeals for the Seventh Circuit, in, *In re* African-Am. Slave Descendants Litig., 471 F.3d 754, 759 (7th Cir. 2006), discussed some of the relative complexities with proving causation in slavery reparations litigation. Causation would remain a formidable obstacle for slave-progeny in their judicial claims under the doctrine of inalienability.

[197] Posner & Vermeule, *supra* note 153, at 695–96.

[198] *See* Bookman, *supra* note 17, at 80–81 (discussing the Evacuation Claims Act and the Civil Liberties Act of 1988).

[199] Steve Bogira, *It's Time, Finally, to Discuss Reparations for African-Americans*, CHI. READER (May 28, 2014, 4:05 PM), https://www.chicagoreader.com/Bleader/archives/2014/05/28/its-time-finally-to-discuss-reparations-for-african-americans.

[200] *Id.*

> To acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequently de jure and de facto racial and economic discrimination against [Blacks], and the impact of these forces on living [Blacks], to make recommendations to the Congress on appropriate remedies, and for other purposes.[201]

Conyers first introduced the bill in 1989 and re-introduced it yearly until 2013. As of May 2014, the bill has never made it past Committee.[202] Representative Conyers's proposed bill would not immediately repair Blacks for slavery, oppression, and other harms suffered—it would only establish a task force which would in turn propose reparative measures.[203] The problem with H.R. 40 is that would not guarantee the intensive and large-scale reparations scheme that is required to defeat the antagonistic oppression as required under the inalienable rights guarantee.

Georgetown University recently employed a working group to assist it with reconciling and atoning for its past involvement in slavery.[204] The Working Group recommended that the University admit to owning, possessing, and selling a substantial number of slaves, and proposed a thorough accounting for the many unjust actions the University took to carry out the unjust enslavement.[205] An essential element of Georgetown's model is the overt admission and acknowledgment of its injurious impact on slaves and their descendants.[206] The Working Group determined that a formal apology was required to repair the relationship between the University and descendants of slaves it once held.[207] It found that another integral step in reconciling the relationship called for a dedication of numerous on campus sites to the recognition of slaves and those who actively aided them.[208] It continues to reconcile for its participation in slavery by suggesting that the University offer preferential admission to descendants of the slaves it once held.[209] A plausible argument is that the likelihood of preferential admission is tenuous due to the hardships of identifying ancestors. The Georgetown model provides an earnest example of reconciliation but lacks a firm compensatory component.

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[201] H.R. Res. 40, 113th Cong. (2013).

[202] Bogira, *supra* note 203.

[203] *Id.*

[204] GEO. UNIV., REPORT OF THE WORKING GROUP ON SLAVERY, MEMORY, AND RECONCILIATION TO THE PRESIDENT OF GEORGETOWN UNIVERSITY xi (2016).

[205] *Id.* at 13, 29.

[206] *Id.* at 28–29.

[207] *Id.*

[208] *Id.* at 38.

[209] *Id.* at 40.

In 2013, the Caribbean heads of government (CARICOM) established a reparations committee charged with preparing the case for reparations within the island groups.[210] The Committee proposed a ten-point action plan of reparations and reconciliation.[211] The program features a formal apology, development of cultural institutions, public health crisis remediation, illiteracy eradication, psychological rehabilitation, debt cancellation, and other programs and services.[212] The United Nations has endorsed the reparative model introduced by CARICOM.[213] It also suggested educational programs and other federal and state legislations to fully understand the impact of slavery and racial subjugation.[214] CARICOM offers a firm curative framework.

Finally, in 2017, Prime Minister Justin Trudeau of Canada announced an eighty-five million dollar reparations package for victims of Canada's "gay purge"—the decades long government sanctioned discrimination of homosexuals.[215] The reparations package includes a reconciliatory component via compensation and legislation aimed at reversing injustices in the criminal justice system.[216] Moreover, the reparation scheme included a formal apology by the Prime Minister.[217] The reparations package includes payment for past damages, an apology, and a non-repetition component.[218]

In addition to passing H.R. 40 or similar legislation, Congress must provide both a plan for compensatory reparations and reconciliation because both are required to end a state of war arising out of an unjust breach of inalienable rights.[219] Direct payments would be hard to measure due to the complexities in proving ancestry and the level of infringement. However, the government may compensate Blacks in various other ways. In addition to implementing the programs presented by the Caribbean Islands and Canada, the United States government must take action to reduce the home ownership disparities it sanctioned during slavery which deepened following

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210 *Reparations for Native Genocide and Slavery*, CARICOM (Oct. 13, 2015), http://www.caricom.org/reparations-for-native-genocide-and-slavery.

211 *Id.*

212 *Id.*

213 *Id.*

214 U.N. Human Rights Council, *supra* note 2, at ¶ 92.

215 Dan Levin, *Canada Offers $85 Million to Victims of Its 'Gay Purge,' as Trudeau Apologizes*, N.Y. TIMES (Nov. 28, 2017), https://www.NYTimes.com/2017/11/28/world/canada/canada-apology-gay-purge-compensation.html.

216 *Id.*

217 *Id.*

218 *Id.*

219 *See supra* Part I.C (discussing the requirement of reparations and reconciliation on acceptable terms to the oppressed).

the New Deal.[220] The disparity could be reduced by low interest loans and tax relief programs. A committee, as proposed in Conyers's H.R. 40, must also oversee ongoing disparities in the criminal justice system to repair disparities.[221] As represented by the Georgetown, Canadian, and United States's Tuskegee experiments models, the government must issue a formal apology, ensure non-repetition, and promise future security to the oppressed population. These intensive reparations programs require legislative remedy—*cure*.

CONCLUSION

The understanding of the inalienable rights guarantee at the time of the founding was that it encompassed a right of repair. Although the consequences of breach and sustained injury were not reduced to statutory form alongside the guarantee, perpetual conflict was natural and foreseeable. The state of war between Blacks and the federal government is manifested by the incessant conflict which cannot subside without repair. Slavery was such a deeply entrenched system that its policies cannot be eluded without an opposing force equal to the deficit. Intuitively and naturally, brokenness requires repair. The Lockean inalienable rights theory should be employed to argue the law of reparations before judicial and legislative bodies. Claims under the theory directly impeach the government for its failure to protect and remove the need to locate other directly responsible parties. Additionally, the new conceptualization of reparations claims increases the likelihood of judicial relief because it offers defenses to sovereign immunity, statutes of limitation, and other common jurisdictional barriers.

Makiba Gaines[*]

[220] *See supra* notes 131–36 and accompanying text.

[221] *See supra* notes 113–30 and accompanying text.

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PROTECTING RELIGIOUS PLURALISM: HOW THE LIBERTY THAT SUPPORTS SAME-SEX MARRIAGE PROTECTS RELIGIOUS CONVICTIONS

INTRODUCTION

In July 2012, two men walked into Jack Phillips's bakery, Masterpiece Cakeshop ("Masterpiece"), and asked him to "design and create a cake to celebrate their same-sex wedding."[1] In a brief exchange,[2] Mr. Phillips declined, "telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs."[3] However, Mr. Phillips advised them "that he would be happy to make and sell them any other baked goods."[4]

Both men promptly left Masterpiece,[5] and shortly after, Mr. Phillips "started [receiving] phone calls from people threatening and harassing him because of his decision" not to bake a cake that violated his personal beliefs.[6] Mr. Phillips treated the phone calls as "an opportunity to pray for people [that he otherwise] wouldn't know."[7]

The couple later filed a complaint "with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation under the Colorado Anti-Discrimination Act (CADA)."[8] After the Division found probable cause to credit the allegations, the couple filed a formal complaint with the Office of Administrative Courts.[9] In their complaint, they argued that Masterpiece had violated a Colorado statute prohibiting discrimination in places of public accommodation.[10]

An administrative law judge ruled against Masterpiece, and that ruling was affirmed by the Colorado Civil Rights Commission

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1 Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

2 *Client Story: Jack Phillips*, ALLIANCE DEFENDING FREEDOM, http://transfer.adflegal.org/detailspages/case-details/masterpiece-cakeshop-v.-craig (last visited Jan. 11, 2018).

3 *Masterpiece*, 370 P.3d at 276.

4 *Id.*

5 *Id.*

6 *Client Story: Jack Phillips*, *supra* note 2.

7 *Id.*

8 *Masterpiece*, 370 P.3d at 277 (internal quotation marks added).

9 *Id.*

10 *Id.* (citing COLO. REV. STAT. § 24-34-601(2) (LexisNexis, LEXIS through 1st Reg. and 1st Extraord. Sess. 2017)).

(Commission)[11] and the Colorado Court of Appeals.[12] The Commission's cease and desist order, which was affirmed on appeal, mandated that Masterpiece

> (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.[13]

On appeal, the Colorado Court of Appeals recognized that Jack Phillips had been a committed Christian for approximately thirty-five years,[14] and that he believed his work and faith could not be separated.[15] Instead, he believed that his work should honor God and "that he would displease God by creating cakes for same-sex marriages."[16] The United States Supreme Court granted certiorari,[17] and oral argument was held on December 5, 2017.[18]

Does the law afford religious individuals like Jack Phillips the freedom to live out their religious identity? Or, in our diverse and pluralistic society, are religious individuals excluded from the guarantees of freedom and equality proclaimed by *Planned Parenthood v. Casey*[19] and its intellectual progeny? This Note takes the position that the concept of freedom that undergirds same-sex marriage[20] compels equal protection for religious believers.

In *Planned Parenthood v. Casey*, the intellectual precursor to *Obergefell*, the Court defined the parameters of essentially "autonomous liberty" in what has been coined the "mystery passage."[21]

> [M]atters [] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own

11 *Id.*

12 *Id.* at 295.

13 *Id.* at 277.

14 *Id.*

15 *Id.*

16 *Id.*

17 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

18 *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/ (last visited Jan. 12, 2018).

19 505 U.S. 833 (1992).

20 Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

21 Michael V. Hernandez, *In Defense of Pluralism: Religiously Affiliated Law Schools, Olympianism, and Christophobia*, 48 U. TOL. L. REV. 283, 289 (2017).

concept of existence, of meaning, of the universe, and of the mystery of human life.[22]

Thus, if "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"[23] then religious choices cannot be excluded, unless the Court is willing to embrace "the indefensible and dehumanizing view"[24] that only sexually related choices are "central to personal dignity and autonomy."[25] Otherwise, it is impossible to harmonize punishing religious individuals for expressing their identity with the right to autonomous liberty established by *Casey* and its progeny—most notably, *Obergefell*.[26]

Expanding the framework from *Casey*, *Obergefell* proclaimed that "[t]he Constitution promises liberty to all within its reach . . . *to define and express their identity*."[27] Hence, *Obergefell* not only affirmed the right to define identity and the mysteries of life, but it affirmed the constitutional right to express that identity with the support of the state.[28] Jack Phillips seeks that same liberty to define and express his religious identity.[29] Punishing him for doing so is irreconcilable with the Court's conception of liberty. Consequently, if *Obergefell* and *Casey* were rightly decided, the Supreme Court must reverse the ruling of the Colorado Court of Appeals and rule in favor of Jack Phillips.

Part I of this Note analyzes the liberty protected by the Fourteenth Amendment and traces its development. *Dred Scott v. Sandford*[30] and *Lochner v. New York*[31] formulated the concept of substantive due process rights centered upon the word "liberty" found in the Fourteenth Amendment.[32] Together, they ushered into legal jurisprudence an era of absolute property and contract rights. But after the Court rejected its broad interpretation of the word "liberty" in the 1930's, its expansive

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[22] *Casey*, 505 U.S. at 851.

[23] *Id.*

[24] Hernandez, *supra* note 21, at 289.

[25] *Casey*, 505 U.S. at 851.

[26] Hernandez, *supra* note 21, at 289.

[27] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (emphasis added).

[28] *See id.* at 2605 (discussing the expanding interpretations of a fundamental right); *see also id.* at 2607 (discussing the application of this new right to every State). *But see id.* at 2635–36 (Thomas, J., dissenting) (discussing how the majority recognizes a right to state recognition of and support for homosexual marriages and not merely a freedom from state interference).

[29] Analyzing and defining the concept of religious identity is important in light of the Court's conception of liberty and deserves further, in-depth review. However, such analysis is beyond the scope of this Note and is superfluous for the present argument, since *Obergefell* has declared that individuals can define their own identity. *Obergefell*, 135 S. Ct. at 2593.

[30] 60 U.S. (19 How.) 393, 450 (1857).

[31] 198 U.S. 45, 53 (1905).

[32] *See* discussion *infra* section I.A.

reading of the term reemerged in *Griswold v. Connecticut*,[33] creating the modern era of substantive due process rights—sexual rights protected by the Fourteenth Amendment.[34] In *Planned Parenthood v. Casey*, the Court defined the parameters of autonomous liberty, culminating in *Obergefell*. However, *Obergefell* extended the intellectual framework from *Casey* one step further, holding not only that liberty protects private individuals from state interference, but that liberty mandates that the state sanction the private choices of individuals. Hence, liberty under the Fourteenth Amendment, post-*Obergefell*, protects more than the mere right to believe; it "mandates state action to validate and preserve autonomous choices rooted in individual belief" protected under the word "liberty" in the Due Process Clause.[35]

Part II of this Note summarizes the implications of the liberty protected by the Fourteenth Amendment. Principally, the conception of liberty pronounced by *Casey* and *Obergefell* compels protection for religious convictions.[36] If liberty includes the right to "define and express [one's own] identity,"[37] then religious individuals, like Jack Phillips, must be afforded that same right.

I. SUBSTANTIVE DUE PROCESS PROTECTED BY THE FOURTEENTH AMENDMENT

A. Dred Scott and Lochner—the Early Era of Substantive Due Process: Property and Contract Rights Protected by the Fourteenth Amendment

"The need for restraint in administering the strong medicine of substantive due process is a lesson th[e] Court has learned the hard way," or perhaps, a lesson that the Supreme Court has not learned at all.[38]

The Supreme Court first applied substantive due process in *Dred Scott*, one of the most ominous cases in Supreme Court history.[39] There, the Court struck down the federal Missouri Compromise of 1820,[40] on the

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33 381 U.S. 479 (1965).

34 *See* discussion *infra* section I.B.

35 Hernandez, *supra* note 21, at 289.

36 *See infra* notes 112–74 and accompanying text.

37 Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

38 *Id.* at 2616 (Roberts, C.J., Scalia & Thomas, JJ., dissenting).

39 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857); *Obergefell*, 135 S. Ct. at 2616 (noting that *Dred Scott* was the first case in which the Court applied substantive due process).

40 In 1819, Missouri requested to be admitted as a slave state. However, admitting Missouri as a slave state would have upset the balance between slave and free-states. *Missouri Compromise*, *in* THE READER'S COMPANION TO AMERICAN HISTORY 737, 737 (Eric Foner & John A. Garraty eds., 1991). To preserve the balance and to prevent future escalation, the Compromise permitted slavery below latitude 36° 30', forbade slavery above it, and admitted Missouri as a slave state and Maine as a free state. MICHAEL STOKES

grounds that slave owners had a substantive due process right under the Fifth Amendment to own slaves and bring their property into any federal territory.[41] As Chief Justice John Roberts elucidated, the *Dred Scott* Court ignored the Constitution and instead "relied on its own conception of liberty and property" to reach its result.[42] And by that decision, *Dred Scott* effectively ended any hope for political conciliation by declaring that any compromise forbidding slavery was unconstitutional.[43]

Justice Curtis in his dissent emphasized the importance of restraint and proper constitutional interpretation.[44] To him, the proper question was whether the Court may create a constitutional exception permitting or excluding slavery.[45] He answered that allowing a court to create or engraft a substantive exception not found within the Constitution "renders its judicial interpretation impossible."[46]

> Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.[47]

PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 769–70 (Robert C. Clark et al. eds., W. Acad. Publ'g, 2d ed. 2013).

[41] *Dred Scott*, 60 U.S. (19 How.) at 450. This was the second part of the Court's twin holding. The first portion held that no person of African descent could be a citizen of the United States and consequently could not be a citizen of any state. *Id.* at 403–04 ("The question before us is, whether the class of persons [of African descent] described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.").

[42] *Obergefell*, 135 S. Ct. at 2616.

[43] *Dred Scott*, 60 U.S. (19 How.) at 452 (stating that any compromise "which prohibited a citizen from holding and owning property of this kind in the territory of the United States," is unconstitutional); PAULSEN, *supra* note 40, at 770.

[44] *Dred Scott*, 60 U.S. (19 How.) at 620 (Curtis, J., dissenting) (according to Justice Curtis, the Court should "ha[ve] no concern" for political reasoning or ideology).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 620–21.

Dred Scott's holding was undermined on the battlefields of the Civil War and abrogated by the Fourteenth Amendment, but its approach to the Due Process Clause endured.[48] In a succession of early 20th century opinions, most notably *Lochner*, substantive due process reappeared.[49]

In *Lochner*, the Court struck down a New York labor law that established maximum working hours for bakery employees.[50] Rather than applying rational basis scrutiny to the law enacted by the New York legislature, the Court started with the conclusion that the statute interferes with the "liberty of the individual protected by the Fourteenth Amendment," because liberty includes the right to contract.[51] As a result, the Court framed its inquiry by questioning whether the labor restriction was *really* within the police power of the state, followed by intensely scrutinizing the legislature's rationale.[52] The Court declared that even actions passed for the health of an individual, thought traditionally within the police power of the state, were not saved from condemnation unless there existed "some fair ground, *reasonable in and of itself*, to say that there is *material* danger to the public health, or to the health of the employees."[53] Given the Court's methodology, it concluded that the labor law was not "*really* a health law," since it did not have any "direct relation to," or "substantial effect upon the health of the employee."[54] Therefore, the majority held that the New York labor law was unconstitutional.[55]

The dissenting Justices, as in *Dred Scott*, argued that the majority went far beyond appropriate judicial boundaries, ignoring the constitutional role of the Court and the States.[56] They reasoned that great deference should be given to the States within their constitutional sphere.[57] Hence, "so long as it does not appear beyond all question that [a State] has violated the Federal Constitution," States should be let alone in the management of their domestic affairs.[58] "Upon this point there is no room for dispute, for, the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power."[59]

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48 Obergefell v. Hodges, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting).

49 *Id.*

50 *Id.*

51 Lochner v. New York, 198 U.S. 45, 53 (1905).

52 *Id.* at 56.

53 *Id.* at 61 (emphasis added).

54 *Id.* at 64 (emphasis added).

55 *Id.*

56 *Id.* at 73 (Harlan, J., dissenting).

57 *Id.*

58 *Id.*

59 *Id.* at 68.

And if there is any doubt about the validity of a statute, "that doubt must therefore be resolved in favor of its validity."[60]

The dissenting Justices noted that it was irrelevant which economic theory in *Lochner* was sounder, because "[i]t is enough for the determination of this case . . . that the question is one about which there is room for debate and for an honest difference of opinion."[61] The statute "cannot be held to be in conflict with the Fourteenth Amendment, without enlarging the scope of the Amendment far beyond its original purpose and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several States."[62] Justice Holmes aptly remarked:

> [A] constitution is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[63]

Under *Lochner*, courts repeatedly invalidated state statutes that they thought were "meddlesome interferences with the rights of the individual"[64] and that were an "undue interference with liberty of person and freedom of contract."[65] In the decades following *Lochner*, the Court struck down nearly 200 state laws.[66] And often, the Court did so over strong dissents.[67] In essence, *Lochner* enshrined into constitutional law the personal policy decisions of judges, under the concept of liberty, leaving "no alternative to regarding the court as a . . . legislative chamber."[68]

Beginning in the mid-1930s, the Court retreated from *Lochner* and eventually repudiated its substantive due process approach in a sequence of judicial opinions.[69] By 1955, the Supreme Court declared that "[t]he day

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60 *Id.*

61 *Id.* at 72.

62 *Id.* at 73.

63 *Id.* at 75–76 (Holmes, J., dissenting).

64 *Id.* at 61 (majority opinion).

65 *Id.* at 60.

66 Obergefell v. Hodges, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting).

67 *Id.* (quoting Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 570 (1923) (Holmes, J., dissenting) ("The criterion of constitutionality is not whether we believe the law to be for the public good."), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

68 LEARNED HAND, THE BILL OF RIGHTS 42 (1958).

69 PAULSEN, *supra* note 40, at 1473; *see, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949) (holding that courts do not "sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom"); United States v. Carolene Prods., 304 U.S. 144, 154 (1938) (The Court rejected a substantive due process challenge to a federal

is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[70] "The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."[71] Instead the Court was clear, referring back to earlier cases rejecting *Lochner's* substantive due process approach, that "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies."[72]

B. The Modern Era of Substantive Due Process—Griswold, Roe, Casey, and Obergefell, the New Lochner: Sexual Rights Protected by the Fourteenth Amendment

Thirty years after the Supreme Court repudiated its substantive due process approach, it reemerged under a new title—"the right to privacy."

In 1963, in *Griswold*, the Supreme Court found that the Constitution includes a right of privacy that entitles married individuals to obtain contraceptives.[73] Although the Court acknowledged that "overtones" of its opinion "suggest that *Lochner v. New York* should be our guide,"[74] the Court attempted to differentiate its approach by relying on the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments instead of the word "liberty" in the Fourteenth Amendment.[75] The Court explained that "the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[76] Because marriage is

prohibition banning interstate shipment of "filled milk." The Court stated that legislative judgments must be accepted where "any state of facts either known or which could reasonably be assumed affords support for it."); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (*Parrish* overruled *Adkins*, a *Lochner* era case that struck down a minimum wage law for women. The Court noted: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty.").

[70] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

[71] Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[72] *Id.*

[73] 381 U.S. 479, 483, 485–86 (1965).

[74] *Id.* at 481–82 (citation omitted).

[75] *Id.* at 484.

[76] *Id.*

"intimate to the degree of being sacred,"[77] it must be "a relationship lying within the zone of privacy."[78]

But the majority's careful attempt to avoid the word "liberty" and the implication of *Lochner* was not enough. Both the concurring and dissenting opinions focused on the concept of liberty.[79] Justice Harlan noted in his concurring opinion that he could not join the majority because of its constitutional approach.[80] He stated that "the proper constitutional inquiry . . . is whether this . . . statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'"[81] Justice White similarly concurred in the judgment because, in his view, the law deprived married couples of "'liberty' without due process of law, as that concept is used in the Fourteenth Amendment."[82]

Justice Black's dissenting opinion criticized the majority's approach, which declared that the statute was unconstitutional because the justices found it offensive.[83] The dissent noted that the due process argument "is based . . . on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or . . . is offensive to a 'sense of fairness and justice.'"[84] But "[i]f these formulas . . . are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary."[85] The power to determine whether laws are unwise or unnecessary belongs to the legislature.[86] "[N]o provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous."[87] Neither the Due Process Clause nor any other clause grants courts the power to "measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no

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[77] *Id.* at 486.

[78] *Id.* at 485.

[79] *Id.* at 486 (Goldberg, J., concurring) (stating that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights"); *id.* at 502 (White, J., concurring) ("In my view this Connecticut law as applied to married couples deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment.").

[80] *Id.* at 500 (Harlan, J., concurring).

[81] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[82] *Id.* at 502 (White, J., concurring).

[83] *Id.* at 507 (Black, J., dissenting).

[84] *Id.* at 511.

[85] *Id.* at 511–12.

[86] *Id.* at 512.

[87] *Id.*

justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.'"[88] Such a construction of the Due Process Clause allowing federal courts to "veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied . . . by the . . . Constitution."[89]

The majority conspicuously failed to cite a long line of cases which "undoubtedly . . . support[ed] their result,"—*Lochner* and its related offspring.[90] But the two cases that the majority did cite, *Meyer v. State of Nebraska*[91] and *Pierce v. Society of Sisters*,[92] "were both decided in opinions by Mr. Justice McReynolds which elaborated the same . . . due process philosophy found in *Lochner v. New York*, one of the cases on which he relied in *Meyer*."[93]

Hence, *Griswold* was really about liberty—the liberty for husbands and wives to obtain contraception. However, the majority avoided the word to evade being labeled *Lochner*-esque. The Court in *Roe v. Wade*[94] and *Planned Parenthood v. Casey* demonstrated no such reluctance.

In *Roe*, the Court fully returned to the substantive due process approach of *Dred Scott* and *Lochner* by resting its opinion upon the word "liberty" found in the Fourteenth Amendment.[95] Although the majority recognized that other courts had determined that the right to privacy was based on other constitutional principles, the Court in *Roe* noted that the right is "founded in the Fourteenth Amendment's concept of personal liberty."[96] However, the Court never defined personal liberty, or explained

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[88] *Id.* at 513 ("[J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." *Id.* at 513 n.5 (quoting HAND, *supra* note 68, at 70) (alteration in original)); Rochin v. California, 342 U.S. 165, 175 (1952) (Black, J., concurring) ("What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'").

[89] *Griswold*, 381 U.S. at 513.

[90] *Id.* at 514–15.

[91] 262 U.S. 390 (1923).

[92] 268 U.S. 510 (1925).

[93] *Griswold*, 381 U.S. at 515 (citation omitted).

[94] Roe v. Wade, 410 U.S. 113 (1973).

[95] *Id.* at 153.

[96] *Id.*

how it encompasses the right to abortion.[97] Although the Court stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in [the] guarantee of personal privacy,"[98] the Court never analyzed whether the right to abortion was "fundamental" or "implicit in the concept of ordered liberty." After simply declaring that the right to privacy "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education,"[99] the Court concluded by asserting that, wherever the right of privacy is found, it "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[100]

In the modern era of substantive due process, *Roe* signaled that history and tradition would not guide the Court's opinion. In *Roe*, the majority of the court primarily used history only to explain the widespread existence of criminal abortion laws.[101] The Court began its historical overview by stating that "[i]t perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage."[102] The Court then went on to explain the common existence of criminal abortion laws and concluded its synopsis by remarking that "[i]t is with these interests, and the weight to be attached to them, that this case is concerned."[103] Hence, history served only as a precursor to the Court's actual analysis that followed. And in the Court's analysis, it made no reference to, and drew no conclusion from history. Instead, the Court merely asserted as a brute fact that the right to privacy was broad enough to include abortion.[104]

Although historical analysis was not a prominent feature of the majority opinion in *Griswold*, the majority still attempted to sustain its opinion based, in part, on history and tradition. In *Griswold*, the majority did not merely argue that the marital right to privacy was created by several constitutional guarantees.[105] It argued that the right to privacy was grounded in history: "We deal with a right of privacy older than the

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[97] *Id.* at 152–53.

[98] *Id.* at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[99] *Id.* at 152–53 (citations omitted).

[100] *Id.* at 153.

[101] *See id.* at 129–52 (explaining the history of criminal abortion laws from the origins of the Hippocratic Oath to modern organizations like the American Medical Association's stance on abortion).

[102] *Id.* at 129.

[103] *Id.* at 151–52.

[104] *Id.* at 153.

[105] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

Bill of Rights—older than our political parties, older than our school system."[106]

Unlike the majority opinion, history and tradition were prominent features of both Justice Goldberg and Justice Harlan's concurring opinions in *Griswold*.[107] Justice Goldberg focused on the importance of tradition.[108] He argued that "liberty protects those personal rights that are fundamental."[109] But he clarified that "[i]n determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions."[110] Rather, relying on *Snyder v. Massachusetts*,[111] he noted that judges "must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"[112] For Justice Goldberg, the appropriate "inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."'"[113]

Correspondingly, Justice Harlan promoted the concepts of history and liberty.[114] Relying on earlier precedent, Justice Harlan argued in his concurring opinion that the word "liberty" protects those "basic values 'implicit in the concept of ordered liberty.'"[115] However, he contended that history was the ultimate guide.

> Judicial self-restraint will . . . be achieved in this [due process] area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.[116]

Justice Holmes gave a similar ode to history in his dissent in *Lochner*. He remarked that "the word liberty . . . is perverted . . . unless it can be said that a rational and fair man necessarily would admit that the statute

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[106] *Id.* at 486.

[107] *See id.* at 493, 495–96 (Goldberg, J., concurring) (emphasizing the importance and sanctity of the family, "a relation as old and as fundamental as our entire civilization"); *id.* at 501–02 (Harlan, J., concurring).

[108] *Id.* at 486–87 (Goldberg, J., concurring).

[109] *Id.* at 486.

[110] *Id.* at 493.

[111] Snyder v. Massachusetts, 291 U.S. 97 (1934).

[112] *Griswold*, 381 U.S. at 493 (alterations and omission in original) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[113] *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).

[114] *Id.* at 500–01 (Harlan, J., concurring).

[115] *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[116] *Id.* at 501.

proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[117]

Despite the emphasis placed on history by former Justices, *Roe* signaled that the Court would not be inhibited by history and that history would not control the meaning of the word "liberty" in the Fourteenth Amendment.[118]

Following in the mold of *Dred Scott* and *Lochner*, *Casey* expanded *Roe*'s substantive due process analysis. And if there was any doubt, *Casey* made clear that history was not a controlling factor to determine the liberty protected by the Fourteenth Amendment.[119] The Court declared that the boundaries of Due Process "are not susceptible of expression as a simple rule"[120] and Due Process cannot be frozen in time.[121] To suggest that Due Process is fixed in some historical era "is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges."[122] Tradition, per the Court, "is a living thing,"[123] and "[t]he inescapable fact is that adjudication of substantive due process claims" must be based on "reasoned judgment."[124]

After rejecting history as a limiting principle, the Court went on to define the liberty protected by the Fourteenth Amendment.[125] Liberty "includes a freedom from all substantial arbitrary impositions and purposeless restraints."[126] Ultimately, the Court encapsulated its definition of liberty in its notorious "mystery passage:"

> [M]atters [] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[127]

Therefore, because abortion was one such decision in the eyes of five members of the Court, a decision "involving the most intimate and personal choices a person may make in a lifetime . . . central to personal dignity and autonomy," it was "protected by the Fourteenth

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[117] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[118] *See supra* notes 101–04 and accompanying text.

[119] *See infra* notes 120–24 and accompanying text.

[120] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992).

[121] *Id.* at 850 (quoting Rochin v. California, 342 U.S. 165, 171–72 (1952)).

[122] *Id.* (quoting *Rochin*, 342 U.S. at 171).

[123] *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

[124] *Id.* at 849.

[125] *Id.* at 848 (quoting *Poe*, 367 U.S. at 542).

[126] *Id.* (quoting *Poe*, 367 U.S. at 542).

[127] *Id.* at 851.

Amendment."[128] The Court reasoned that a woman's own "suffering is too intimate and personal for the State to insist . . . upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[129] Thus, "[t]he destiny of the woman must be shaped . . . [by] *her own conception* of *her spiritual imperatives* and her place in society."[130]

Obergefell marked the final evolution of substantive due process jurisprudence, following the intellectual framework developed in *Casey*. In *Obergefell*, the Court began its first sentence by framing the issue around the word "liberty": "The Constitution promises liberty to all within its reach . . . *to define and express their identity*. The petitioners . . . seek to find that liberty by marrying someone of the same sex . . . ."[131] The Court held, based on its "reasoned judgment," that the right to same-sex marriage is inherent in the liberty of the person under the Fourteenth Amendment.[132] Therefore, "[n]o longer may this liberty be denied to [same-sex couples]."[133] The Court reasoned that the word "liberty" extends beyond the Bill of Rights to "certain personal choices central to individual dignity and autonomy, including *intimate choices that define personal identity and beliefs*."[134] According to the Court, the "abiding connection between marriage and liberty" was the reason *Loving v. Virginia*[135] invalidated interracial marriage under the Due Process Clause.[136] Thus, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[137] Like choices concerning abortion and contraception, "decisions concerning marriage are among the most intimate that an individual can make."[138] The Court surmised that "[c]hoices about marriage shape an individual's destiny" and are one of "life's momentous acts of self-definition."[139] Therefore, the Court held that liberty must include same-sex marriage.[140] Thus, the Court mirrored the autonomous liberty approach outlined in *Casey*.

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[128] *Id.*

[129] *Id.* at 852.

[130] *Id.* (emphasis added).

[131] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (emphasis added).

[132] *Id.* at 2604–05.

[133] *Id.*

[134] *Id.* at 2597 (emphasis added).

[135] Loving v. Virginia, 388 U.S. 1 (1967).

[136] *Obergefell*, 135 S. Ct. at 2599.

[137] *Id.*

[138] *Id.*

[139] *Id.* (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

[140] *Id.* at 2604–05. The Court gave four reasons why marriage is fundamental under the Constitution, and it argued that the reasons "apply with equal force to same-sex couples." *Id.* at 2599. "A first premise of the Court's relevant precedents is that the right to personal

But the Court in *Obergefell* added to the intellectual framework of *Casey* by including an equal protection element.[141] The Court reasoned that laws that prohibited same-sex marriage "burden the liberty of same-sex couples, and . . . abridge central precepts of equality."[142] Apparently, "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[143] Although the Court noted that the Due Process and Equal Protection Clauses are independent principles, it noted that they are "connected in a profound way."[144] The Court used the Clauses together to define the concept of liberty.[145] The "interrelation of the two principles furthers our understanding of what freedom is and must become."[146] The Court concluded that the prohibition against same-sex marriage offends "central precepts of equality" just as the prohibition against interracial marriage in *Loving* violated "central precepts of liberty."[147] The Court proceeded to quote *Loving*: "To deny this fundamental freedom on so unsupportable a basis as . . . racial classifications . . . , [which are] so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."[148] Essentially, "[e]ach concept—liberty and equal protection—leads to a stronger understanding of the other."[149]

The Court in *Obergefell* jettisoned "the 'careful' [and objective] approach to implied fundamental rights taken by [the] Court in

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choice regarding marriage is inherent in the concept of individual autonomy." *Id.* "A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." *Id.* "A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id.* at 2600. "Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order." *Id.* at 2601. Supposedly, these four reasons justified changing the definition of marriage.

[141] *See infra* notes 142–49 and accompanying text.

[142] *Obergefell*, 135 S. Ct. at 2604.

[143] *Id.* at 2602.

[144] *Id.* at 2602–03.

[145] *Id.* at 2603 ("Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.").

[146] *Id.*

[147] *Id.* at 2603–04.

[148] *Id.* at 2603 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).

[149] *Id.*

Glucksberg."[150] After *Roe* and *Casey*, the Court reestablished the importance of history and tradition in *Glucksberg*,[151] which, prior to *Obergefell*, was the "leading modern case setting the bounds of substantive due process."[152] As Justice Antonin Scalia noted in his dissent in *Lawrence v. Texas*, *Glucksberg* effectively "eroded" *Roe* and *Casey*, cases which had "subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation's tradition."[153] *Glucksberg* asserted that judges must "exercise the utmost care" in recognizing implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[154] Accordingly, the majority in *Glucksberg* reasserted a two-part test, established through earlier cases, to identify the rights included under the Due Process Clause. First, the Due Process Clause only "protects those fundamental rights and liberties which are, *objectively*, 'deeply rooted in this Nation's history and tradition.'"[155] The right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[156] And second, the asserted liberty interest must be carefully described.[157] At the time that *Obergefell* was decided, *Glucksberg* was still the controlling test. Consequently, unless the right to same-sex marriage was "deeply rooted in this Nation's history and tradition," it only qualified for "rational-basis scrutiny under the doctrine of 'substantive due process.'"[158]

Nonetheless, the Court sidestepped *Glucksberg* and followed the framework from *Casey*, resting on its "reasoned judgment."[159] Defining a fundamental right cannot be reduced to any formula.[160] "Rather it requires courts to exercise *reasoned judgment* in identifying interests of the person

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[150] *Id.* at 2620–21 (Roberts, C.J., dissenting).

[151] *Id.* at 2618.

[152] *Id.* at 2621.

[153] Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

[154] Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (first quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992); then citing Moore v. East Cleveland, 481 U.S. 494, 502 (1977) (plurality opinion)).

[155] *Id.* at 720–21 (emphasis added) (quoting *Moore*, 431 U.S. at 503).

[156] *Id.* at 721 (first quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); then quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

[157] *Id.*

[158] *Lawrence*, 539 U.S. at 588 (quoting *Glucksberg*, 521 U.S. at 721).

[159] Obergefell v. Hodges, 135 S. Ct. 2584, 2597–98 (2015) (majority opinion).

[160] *Id.* at 2598 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

so fundamental that the State must accord them its respect."[161] And the Court's reasoned judgment was based upon "a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[162] Although "[h]istory and tradition guide and discipline this inquiry [they] do not set its outer boundaries."[163]

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[164]

In other words, the authors of the Bill of Rights and the Fourteenth Amendment did not know the meaning of the words that they drafted. Thus, "[w]hen new insight [discovered by the Court] reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[165] Presumably, the Court uses its "reasoned judgment" to address these liberty claims, in the same way the Court used its "reasoned judgment" to avoid *Glucksberg*.[166] Although the approach in *Glucksberg* was appropriate for physician-assisted suicide, the majority asserted that it was not appropriate for other fundamental rights, such as marriage.[167]

In sum, the Court adopted and expanded the idea of essentially autonomous liberty defined in *Casey*. Ultimately, according to the Court, liberty extends beyond the Bill of Rights to "certain personal choices central to individual dignity and autonomy, including *intimate choices that define personal identity and beliefs*."[168] Liberty protects "the most intimate [choices] that an individual can make,"[169] choices that "shape an individual's destiny."[170] Therefore, "[t]he Constitution promises liberty to all within its reach . . . *to define and express their identity*."[171] In other words, *Obergefell* reified the "mystery passage" of *Casey*—"[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[172]

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161 *Id.* (emphasis added).
162 *Id.* at 2602.
163 *Id.* at 2598.
164 *Id.*
165 *Id.*
166 *Id.* at 2602.
167 *Id.*
168 *Id.* at 2597 (emphasis added).
169 *Id.* at 2599.
170 *Id.*
171 *Id.* at 2593 (emphasis added).
172 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

However, *Obergefell* added an important distinction to substantive due process jurisprudence. *Obergefell* not only held that liberty protects private individuals from state interference, but it held that liberty mandates that the state sanction the private choices of individuals, protected under the Due Process Clause.[173] All of the substantive due process cases that preceded *Obergefell* involved plaintiffs seeking relief *from* the state: *Dred Scott* held that the government could not interfere with slave owners' "property";[174] *Lochner* held that the government could not interfere with a bakery employee's right to contract;[175] *Griswold* held that the government could not interfere with the marital relationship between a husband and wife by prohibiting their use of contraceptives;[176] and *Roe* and *Casey* held that the government could not interfere with a woman's decision whether to terminate her pregnancy.[177] Essentially, previous cases were constructed on the notion that liberty entails "the right to be let alone."[178] But "*Obergefell* went further, mandating that government sanction the private choice of same sex couples to enter into a marital union."[179] Therefore, liberty under the Fourteenth Amendment, post-*Obergefell*, protects more than the mere right to belief. "*Obergefell* implicitly establishes that constitutionally protected liberty mandates state action to validate and preserve autonomous choices rooted in individual belief."[180]

II. IMPLICATION: RELIGIOUS CONVICTIONS MUST BE PROTECTED UNDER THE FOURTEENTH AMENDMENT IF *OBERGEFELL* AND *CASEY* WERE RIGHTLY DECIDED

Punishing religious individuals, like Jack Phillips, for expressing their religious identity violates "the conception of liberty upon which *Obergefell* was based."[181] Expanding the intellectual framework from

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[173] *See Obergefell*, 135 S. Ct. 2607–08 ("The Court . . . holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold . . . that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."); *see also supra* note 28 and accompanying text.

[174] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

[175] Lochner v. New York, 198 U.S. 45, 64 (1905).

[176] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[177] *Casey*, 505 U.S. 833, 869 (1992); Roe v. Wade, 410 U.S. 113, 153 (1973).

[178] *See* Hill v. Colorado, 530 U.S. 703, 716 (2000) (discussing Justice Louis Brandeis's characterization of the "right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men." (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[179] Hernandez, *supra* note 21, at 289.

[180] *Id.*

[181] *Id.* at 288.

Casey, *Obergefell* declared that liberty protects the right to *define* and to *express* one's own identity with the support of the state.[182] The Court cannot now pick and choose those who are worthy of that right. Consequently, unless the Court is willing to adopt the profoundly misguided and dehumanizing view that only choices that are related to sex are "central to personal dignity and autonomy,"[183] it cannot logically exclude religious expression from the guarantees of liberty under the Fourteenth Amendment.[184]

At its core, *Masterpiece* concerns Jack Phillips's dignity.[185] Although the dignity of same-sex couples may be tangentially related, nothing in the case threatens the ability of same-sex couples to *exercise* their identity. Even if a small handful of vendors decline to provide goods or services for same-sex weddings, same-sex couples can still get married and can still purchase goods and services. Unlike the existential dilemma for Jack Phillips, a person participating in a same-sex relationship is not being asked to choose between his core identity and his livelihood. Individuals in same-sex relationships will have the same right to exercise their identity regardless of the result. The question here is whether religious individuals can also exercise their identity. At stake is the very ability to be a religious person and work in the marketplace.

Because of Jack's religious identity, he cannot lend his creative talents to support a message contrary to his own personal beliefs.[186] Forcing him to violate his identity would be deeply offensive to the notion of liberty upon which *Casey* and *Obergefell* were based and would signify that his identity is not worthy of dignity or legal respect. If *Casey* and *Obergefell* were rightly decided, then Jack Phillips must have the equal right to "*define* and *express*" his identity.[187]

However, recognizing and protecting religious identity does not entail permitting blanket discrimination. *Masterpiece* has nothing to do with status-based discrimination. Not serving someone because they are gay or because they are black is substantially different than not supporting same-sex marriage. After Mr. Phillips turned down the offer to "design and create a cake to *celebrate* [a] same-sex wedding," he offered to sell

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[182] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

[183] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[184] Hernandez, *supra* note 21, at 289.

[185] The View, *Baker in Supreme Court Gay Wedding Cake Jack Phillips Shares His Story*, YOUTUBE (June 30, 2017), https://www.youtube.com/watch?v=coBIZle18kM&t=1s (2:08–2:14) (providing a statement made by Kristin Waggoner, a lawyer representing Jack Phillips, that "dignity cuts both ways here, and Jack's dignity is at issue as well in this").

[186] *Client Story: Jack Phillips*, *supra* note 2.

[187] *Obergefell*, 135 S. Ct. at 2593 (emphasis added).

them "*any* other baked goods."[188] Mr. Phillips has no problem serving gay customers. He simply does not want to *take part* or be *involved* in supporting same-sex marriage. Thus, *serving someone who is gay is not the issue*. The issue is whether the government can coerce an individual to be *involved* in supporting a message with which he or she morally disagrees.

After the election of Donald Trump, several fashion designers announced that they would not dress the First Lady, Melania Trump, if asked.[189] Could Melania force these politically liberal fashion designers to design her dress? What if the NRA asked someone who had dedicated her life to gun control to bake a cake for an NRA event with guns on it? Does the act of opening a business eliminate the right to turn down a customer? What if a Christian group wanted to hire a Muslim band to perform a special worship service that declares Jesus Savior and Lord of the universe? Or consider the events from Charlottesville: what if a Nazi white supremacist group asked a black baker to bake a pro-slavery cake, or a cake enveloped with Nazi white supremacy symbols? Note, these are the same basic facts—a religious individual, Jack Phillips, being forced to do something that violates his religion and personal identity merely because he opened a business. Do private persons have the ability to turn down customers based on moral considerations or to avoid associating with or supporting a particular message?

According to the Commission that ruled against Jack Phillips, homosexual supporters deserve conscience rights, but religious individuals, like Jack Phillips, do not. Faced with a customer's request for a cake that reflected religious opposition to same-sex marriage, the Commission found that three cake artists who refused to bake cakes that conflicted with their personal beliefs were not guilty of discrimination.[190] Was the Commission correct? Can bakeries like "Le Bakery Sensual," which support homosexual behaviors, turn down a religious customer who

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[188] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015) (emphasis added), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

[189] Jim Campbell, Opinion, *Designers Can Refuse to Dress the Trumps. Other Artists Should Have the Same Freedom,* WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/opinions/designers-can-refuse-to-dress-the-trumps-other-artists-should-have-the-same-freedom/2017/01/18/f30a41f2-dce5-11e6-ad42-f3375f271c9c_story.html?utm_ term=.886899157a3d.

[190] William Jack, Charge No. P20140069X (Colo. Dep't of Reg. Agencies, Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/AzucarDecision.pdf; William Jack, Charge No. P20140071X (Colo. Dep't of Reg. Agencies, Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/GateauxDecision.pdf; William Jack, Charge No. P20140070X (Colo. Dep't of Reg. Agencies, Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/LeBakerySensualDecision.pdf.

asks for a cake that violates the baker's personal convictions? If the Court sides against Jack Phillips, liberal fashion designers will be forced to dress Melania; ardent gun control advocates will be forced to bake cakes for the NRA; and gay activists will be forced to bake religious cakes in opposition to same-sex marriage. Additionally, ruling against Jack Phillips would allow individuals to compel Muslim singers to perform worship songs to Jesus; and would allow white supremacists to coerce black cake bakers to bake Nazi white supremacist cakes. These results are untenable in a free and pluralistic society. Consequently, the Court must protect the liberty of all private citizens under the Fourteenth Amendment to exercise their religious and moral convictions.

If liberty really includes "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy"[191] then that liberty must extend to religious identity and conduct. Although *Reynolds v. United States* established that the government cannot regulate belief but can regulate conduct,[192] that distinction is unavailing and fundamentally at odds with *Casey* and *Obergefell*. Both *Casey* and *Obergefell* involved conduct—*Casey* involved the right to kill a developing human being.[193] But *Obergefell* went even further. In *Casey*, the Court declared that the government could not invalidate or "undu[ly] burden" the private choice of a woman to obtain an abortion.[194] In *Obergefell*, the Court held that liberty demanded that the State recognize and validate the private choices of same-sex couples.[195] Thus, the distinction between conduct and belief is immaterial. The focus of substantive due process is on the word "liberty" and the intimate nature of the choice involved.[196] For abortion, the Court reasoned that the decision was "too intimate and personal for the State to insist . . . upon its own vision," even though the decision involved conduct and another developing human being.[197] The Court concluded that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives."[198] And likewise, because of the intimate nature of the subject involved, religious believers must be able to shape their destiny through their own conception of their spiritual imperatives.

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[191] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[192] 98 U.S. 145, 164 (1879).

[193] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); *Casey*, 505 U.S. at 876 (using the term "potential life" to describe an unborn child).

[194] *Casey*, 505 U.S. at 876.

[195] *Obergefell*, 135 S. Ct. at 2607–08.

[196] *Casey*, 505 U.S. at 851.

[197] *Id.* at 852.

[198] *Id.*

Therefore, *Casey* and *Obergefell*, consistently applied, demand broad protections for religious adherents, because religion is quintessentially a choice "central to individual dignity and autonomy . . . that define[s] personal identity and beliefs."[199] And for many like Jack Phillips, no choice is more fundamental than religion.

CONCLUSION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion . . . ."[200] Government mandates forcing religious believers to violate their identity or forfeit their livelihood violates that fixed star and the concept of autonomous liberty developed by the Supreme Court and protected by the Fourteenth Amendment.[201] As the Supreme Court stated in *Casey*, its "obligation is to define the liberty of all, not to mandate [its] own moral code."[202] If "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"[203] then religious believers should be afforded the same right to define their own concept of existence and to "express their identity."[204] Liberty must be equally defined and applied beyond intimate choices in the bedroom. Otherwise, it is not liberty at all.

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[199] *Obergefell*, 135 S. Ct. at 2597.

[200] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[201] *See supra* note 191–99 and accompanying text.

[202] *Casey*, 505 U.S. at 850.

[203] *Id.* at 851.

[204] *Obergefell*, 135 S. Ct. at 2593.

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