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CONTENTS

ARTICLES

PROFESSIONAL RESPONSIBILITY AND THE CHRISTIAN ATTORNEY: COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND BIBLICAL VIRTUES
Larry O. Natt Gantt, II
Charles H. Oates
Samuel Pyeatt Menefee 1

THE ARTICLE III EXCEPTIONS CLAUSE: ANY EXCEPTIONS TO THE POWER OF CONGRESS TO MAKE EXCEPTIONS?
John Eidsmoe 95

THE CONSTITUTIONALITY OF IRREBUTTABLE PRESUMPTIONS
James J. Duane 149

STRENGTHENING ARTICLE 32 TO PREVENT POLITICALLY MOTIVATED PROSECUTION: MOVING MILITARY JUSTICE BACK TO THE CUTTING EDGE
Brian C. Hayes 173

FROM "SNEAK AND PEAK" TO "SNEAK AND STEAL": SECTION 213 OF THE USA PATRIOT ACT
Brett A. Shumate 203

ESSAY

THE DEFINITION OF "PERSON": APPLYING THE *CASEY* DECISION TO *ROE V. WADE*

Bradley Aron Cooper 235

COMMENTS

WRONGFUL DEATH AND THE LEGAL STATUS OF THE PREVIABLE EMBRYO: WHY ILLINOIS IS ON THE CUTTING EDGE OF DETERMINING A DEFINITIVE STANDARD FOR EMBRYONIC LEGAL RIGHTS

Amber N. Dina 251

CHILDREN OF A LESSER LAW: THE FAILURE OF THE BORN-ALIVE INFANTS PROTECTION ACT AND A PLAN FOR ITS REDEMPTION

Roger Byron 275

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PROFESSIONAL RESPONSIBILITY AND THE CHRISTIAN ATTORNEY: COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND BIBLICAL VIRTUES

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I. INTRODUCTION 3
II. CLIENT-LAWYER RELATIONSHIP 6

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A. RULE 1.1: COMPETENCE
RULE 1.3: DILIGENCE 6
B. RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER 9
C. RULE 1.4: COMMUNICATION 13
D. RULE 1.5: FEES 15
E. RULE 1.6: CONFIDENTIALITY OF INFORMATION 18
F. RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS
RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES
RULE 1.9: DUTIES TO FORMER CLIENTS 21
G. RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE 27
H. RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYERS
RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL
RULE 1.18: DUTIES TO PROSPECTIVE CLIENT 32
I. RULE 1.13: ORGANIZATION AS CLIENT 34
J. RULE 1.14: CLIENT WITH DIMINISHED CAPACITY 35
K. RULE 1.15: SAFEKEEPING PROPERTY 36
L. RULE 1.16: DECLINING OR TERMINATING REPRESENTATION 37
M. RULE 1.17: SALE OF LAW PRACTICE 39
II. COUNSELOR 40
A. RULE 2.1: ADVISOR 40
B. RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS 41
C. RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL 42
III. ADVOCATE 43
A. RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS 43
B. RULE 3.2: EXPEDITING LITIGATION 46
C. RULE 3.3: CANDOR TOWARD THE TRIBUNAL 47
D. RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL 50
E. RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL 51
F. RULE 3.6: TRIAL PUBLICITY 53
G. RULE 3.7: LAWYER AS WITNESS 54
H. RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR 55
I. RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS 57
IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS 57
A. RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS 57
B. RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL 61
C. RULE 4.3: DEALING WITH UNREPRESENTED PERSON 62
D. RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS 63
V. LAW FIRMS AND ASSOCIATIONS 64

A. RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS
RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS 64
B. RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER 66
C. RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER
RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES 67
D. RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW 69
E. RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE 71
VI. PUBLIC SERVICE 72
A. RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE 72
B. RULE 6.2: ACCEPTING APPOINTMENTS 75
C. RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS
RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS
RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS 78
VII. INFORMATION ABOUT LEGAL SERVICES 80
A. RULE 7.1: COMMUNICATION CONCERNING A LAWYER'S SERVICES
RULE 7.2: ADVERTISING
RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS
RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION
RULE 7.5: FIRM NAMES AND LETTERHEADS 80
B. RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES 83
VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION 84
A. RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS 84
B. RULE 8.2: JUDICIAL AND LEGAL OFFICIALS 85
C. RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT 86
D. RULE 8.4: MISCONDUCT 89
E. RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW 91
IX. CONCLUSION 92

I. INTRODUCTION

The purpose of this article is to consider some correlations between the ABA Model Rules of Professional Conduct (the "Model Rules" or "Rules") and Holy Scripture.[1] Just as Christians are exhorted to pattern

[1] While this topic has not been discussed extensively in this article, the connection between Scripture and legal ethics has long been recognized. "When legal scholar David Hoffman published the United States' first course on legal ethics over 160

their conduct directly on Jesus' life and teachings, and more generally on the moral guidance of the Old and New Testaments, so attorneys must conform their actions to rules of professional responsibility. These rules vary from state to state, but their best general embodiment is in the ABA Model Rules, adopted by the American Bar Association's House of Delegates on August 2, 1983, and subsequently amended.[2] The Preamble to the Rules notes:

> Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by *personal conscience* and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.[3]

While the ABA, for whatever reason, has eschewed making reference to an attorney's religious beliefs, it is clear that these are closely intertwined with the phrase "personal conscience." The Preamble goes on to note:

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.[4]

These "basic principles" are nowhere defined or listed, but most Christian attorneys will have no trouble in identifying them with truths in the Bible.[5]

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years ago, his reading list began with the book of Proverbs from the Old Testament." Larry O. Natt Gantt, II, Discovering the Biblical Principles in the Model Rules of Professional Conduct 1 (Aug. 2004) (unpublished discussion paper at the 2004 Summer Program in Christian Jurisprudence, Regent University School of Law) (on file with author) (citing Gordon J. Beggs, *Proverbial Practice: Legal Ethics from Old Testament Wisdom*, 30 WAKE FOREST L. REV. 831, 831–32 (1995)). Prof. Oates co-led this discussion with Prof. Gantt in 2004 and, for several years prior to that time, had been working on confirming this connection.

2 *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2006 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1 (2006) (describing the history of the Model Rules).

3 MODEL RULES OF PROF'L CONDUCT pmbl. para. 7 (2003) (emphasis added); *see also id.* R. 2.1 (allowing attorneys to counsel clients on nonlegal, including moral, considerations).

4 *Id.* pmbl. para. 8 (2003).

5 Jewish practitioners will find the following discussion of use insofar as it relates to the books of the Torah. Muslims may find it less relevant, while Hindus, Jains, and many other religious adherents can at least appreciate the textual procedures herein

Something should be said about this article's methodology. The authors, each of whom has taught multiple classes in Professional Responsibility, decided several years back to produce a study comparing scriptural verses to relevant sections of the Model Rules to demonstrate to what degree the ABA's creation is compatible with biblical morality. This initial study is not intended to be exhaustive in nature, but rather is designed to highlight the principal similarities and differences between the Model Rules and biblical precepts in a way to assist Christian attorneys in matters of legal ethics. The idea has been to cover all sections of the Model Rules by offering at least a few relevant examples of Scripture that appear applicable to each rule under consideration. It has thus seemed best, even though this article is essentially about the Bible, to organize it according to provisions of the Rules, rather than vice versa.[6]

A determination was made to shorten the process of analysis by identifying core biblical virtues associated with the major subdivisions of each rule.[7] A list of these virtues was drawn up by Professor Gantt and subsequently revised by the co-authors through multiple iterations.[8] Nearly all of these values appeared in a biblical concordance and had cites potentially applicable to the rule subdivision in question. While it was clear that these core virtues would not necessarily cover *all* biblical material relevant to a rule, the authors believed that the scriptural references these virtues generated would be sufficient to convey a preliminary essence of "what the Bible had to say" about each rule. Clearly, there is a substantial overlap of virtues among rules; therefore, those virtues that are representative of a rule, but have appeared less frequently as being relevant to other rules, have been preferred in the discussion. Values of marginal applicability have been noted, where appropriate, in footnotes to the rules. The authors believed it was

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employed. The authors believe that attorneys of all faiths will benefit by seeking to identify the ABA's basic truths in their personal religious beliefs, although as Christians the authors feel that the Bible is the appropriate context to be used.

6 For an example of a different approach, organizing legal information in a biblical manner, see J. Nelson Happy & S.P. Menefee, *Genesis*!: *Scriptural Citation and the* Lawyer's Bible *Project*, 9 REGENT U. L. REV. 89 (1997). *See also* S.P. Menefee & J. Nelson Happy, *"In the Beginning Was the Word": Planning for a* Lawyer's Bible, 2 FOUNDATIONS, Fall 1999, at 4-15 n.1.

7 Rule 3.3, Candor Toward the Tribunal, for example, is represented by honesty, responsibility, truthfulness, fairness, and integrity. Morality and knowledge were dropped as being too general, and justice was dropped as not being directly applicable. Zeal for a worthwhile cause was identified as a virtue of secondary importance.

8 The authors recognize in this article that there are seven commonly held virtues: four cardinal (prudence, temperance, fortitude, and justice) and three theological (faith, hope, and love). *See* 12 ENCYCLOPEDIA BRITANNICA 392 (15th ed. 1998). The authors have chosen to use the term virtue in a broader sense in order to facilitate discussion of the relevant connections the Model Rules have with the Bible.

important to say *something* about *each* rule, but the sections herein do not necessarily mirror the depth of biblical material about a Model Rule.

Additionally, where possible, biblical narratives modeling the rule in question have been added. These do not always include a reference to one of the virtues identified with a rule, but they may add understanding about the applicability of Holy Writ to situations envisioned by the Model Rules.

One important question the authors addressed was which version of the Bible should be referenced. Different Christian groupings and denominations use various versions of the Holy Scriptures. Due to its importance to the American legal tradition, the authors strongly considered using the King James Version (KJV) as the primary text for all scriptural references. Ultimately, however, the authors concluded that using the New King James Version (NKJV) as the primary text would better serve the article's purpose because that version retains much of the KJV wording but revises the antiquated verbiage of the KJV.[9] Where a secondary text seemed to convey a better meaning, citations were also made to the KJV, the New International Version (NIV), or the New American Standard Bible (NASB).

II. CLIENT-LAWYER RELATIONSHIP

A. Rule 1.1: Competence
Rule 1.3: Diligence[10]

Two of the first three Model Rules describe the general work ethic attorneys are to uphold. First, Rule 1.1 states, "A lawyer shall provide *competent representation* to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation *reasonably necessary* for the representation."[11] Similarly, Rule 1.3 provides, "A lawyer shall act with *reasonable diligence and promptness* in representing a client."[12]

These standards, at first glance, certainly do not contradict Scripture, for the Bible is replete with passages and instances that encourage individuals to demonstrate the virtues of competence and diligence in their work.[13] Scripture also supports particular aspects of

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9 Therefore, any quotations to Scripture are to the NKJV unless noted otherwise.

10 Given their related emphases, Model Rules 1.1 and 1.3 are discussed together.

11 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003) (emphasis added).

12 *Id.* R. 1.3 (emphasis added).

13 *See, e.g.*, 2 *Corinthians* 3:5 (NIV) ("Not that we are competent in ourselves to claim anything for ourselves, but our competence comes from God. He has made us competent as ministers of a new covenant . . . ."); 2 *Timothy* 2:15 ("Be diligent to present yourself approved to God, a workman who does not need to be ashamed, rightly dividing the word of truth."); *Proverbs* 10:4 (promoting diligence), 21:5 (same); *Romans* 12:8 (same).

these rules, such as the importance of the virtues of knowledge and skill as they relate to individuals' ability to complete tasks before them,[14] and the virtues of thoroughness, preparedness, and promptness as they relate to the manner by which those individuals complete those tasks.[15] Furthermore, the comment to Rule 1.3 provides that lawyers are to act with "commitment," "dedication," and "zeal" in representing their clients; and these principles relate to the biblical virtue of zeal for a worthwhile cause.[16]

Despite this noncontradiction between the Rules and Scripture, many Christian scholars reason that the Bible goes beyond encouraging competence and diligence to promote "excellence."[17] Classic Bible reference resources, like *Nave's Topical Bible*, do not include references to "excellence."[18] However, many contemporary Christian ethicists underscore the virtue of excellence as it relates to work ethic.[19] In defining this virtue, Buck Jacobs writes:

> Excellence for a Christian is being the very best that God created you to be and not ever willingly settling for less. This may not mean that you are truly the best in the world at whatever you do. But it does mean that you will be the best YOU can be. Excellence is achieving your maximum God-given potential, progressively moving toward the highest utilization of all you have been sovereignly entrusted with.[20]

In his discussion, Jacobs cites *Proverbs* 22:29, which reads, "Do you see a man who excels in his work? He will stand before kings; [h]e will not stand before unknown men."[21] Conceptions of excellence, like Jacob's, draw from perhaps the most well-known scripture on work ethic,

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For additional scriptures promoting diligence, see *infra* notes 281–82 and accompanying text.

14 *See, e.g.*, *Proverbs* 13:16, 19:2 (promoting knowledge), 22:29 (NIV) (promoting skill).

15 *See, e.g.*, *Deuteronomy* 19:18 (NIV) (promoting thoroughness); 1 *Peter* 1:13, 3:15 (promoting preparedness); 2 *Timothy* 2:21 (same); *Proverbs* 15:23 (promoting promptness).

16 *See Proverbs* 19:2 (NIV) ("It is not good to have zeal without knowledge, nor to be hasty and miss the way."); *Romans* 12:11 (NIV) ("Never be lacking in zeal, but keep your spiritual fervor, serving the Lord.").

17 *See, e.g.*, DIANNA BOOHER, YOUR SIGNATURE WORK: CREATING EXCELLENCE AND INFLUENCING OTHERS AT WORK (2004); CHARLES GARRIOTT, WORK EXCELLENCE: A BIBLICAL PERSPECTIVE OF WORK (2005). Similarly, in the philosophy of lawyering papers that students write for Prof. Gantt's Professional Responsibility class, many students assert that they will uphold the virtue of "excellence" in their legal practice. *See* Philosophy of Lawyering Student Papers (on file with Larry O. Natt Gantt, II).

18 *See* ORVILLE J. NAVE, NAVE'S TOPICAL BIBLE: A DIGEST OF THE HOLY SCRIPTURES (1962).

19 *See supra* note 17.

20 BUCK JACOBS, A LIGHT SHINES BRIGHT IN BABYLON 54 (2006).

21 *Proverbs* 22:29. Other versions translate "excels" differently. *See, e.g.*, *id.* (KJV) ("Seest thou a man diligent in his business? [H]e shall stand before kings; he shall not stand before mean men.").

Colossians 3:23, which reads: "And whatever you do, do it heartily, as to the Lord and not to men . . . ."[22]

These references to biblical excellence, competence, and diligence illustrate two differences between the biblical virtues and the concepts of competence and diligence in the Model Rules. First, the Model Rules' concepts adopt a "reasonable person" standard, and such a "reasonableness" standard connotes work that is "fair, proper, or moderate under the circumstances."[23] Although the comment to Rule 1.3 advocates "commitment," "dedication," and "zeal" in representing clients, the entire discussion is couched within the standard in the rule's text of "reasonable diligence."[24] The biblical principles, however, do not base competence on the circumstances or on a reasonable standard but on the amount of effort the individual applies to the task and the extent to which that effort deviates from the individual's maximum potential.[25] The biblical principles are not measured primarily by the external aspects of the situation but by the internal effort of the individual.[26]

Second, the Model Rules' concepts speak nothing of an individual's attitude toward his or her work; they focus on particular external work standards.[27] In contrast, the biblical standards emphasize more the attitudes of individuals to their work than their external results.[28] Similarly, numerous biblical passages refer generally to the importance

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22 *Colossians* 3:23. Verse 24 continues, "knowing that from the Lord you will receive the reward of the inheritance; for you serve the Lord Christ." *Colossians* 3:24.

23 BLACK'S LAW DICTIONARY (8th ed. 2004) (first definition of *reasonable*). *Black's* third definition of "reasonable" applies expressly to a person but is rather nondescript in defining it as "having the faculty of reason." *Id.*

24 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003).

25 *See supra* note 16 and accompanying text.

26 *See Colossians* 3:22 ("Bondservants, obey in all things your masters according to the flesh; not with eyeservice, as men-pleasers; but in sincerity of heart, fearing God . . . ."); *cf.* DENNIS W. BAKKE, JOY AT WORK: A CEO'S REVOLUTIONARY APPROACH TO FUN ON THE JOB (2005) (describing a Christian CEO's philosophy in which the workplace should be a place where workers experience joy because they are encouraged to maximize their God-given talents).

27 As noted, the comment to Rule 1.3 speaks to lawyers' "commitment," "dedication," and "zeal," but these qualities are relevant to the lawyer's devotion to the representation of the client. They do not apply more generally to lawyers' personal attitude to their work.

28 For instance, *Colossians* 3:23 stresses working "heartily" (NKJV), or "with all your heart" (NIV). *See also* 2 *Timothy* 2:15 ("Do your best to present yourself to God as one approved, a workman who does not need to be ashamed and who correctly handles the word of truth."). In this emphasis on doing your best, Christian excellence differs from perfectionism. Perfectionism can cause individuals to sacrifice other important responsibilities in the effort to obtain "perfect" results. In addition, Gordon Smith contends that perfectionism is linked to self-centeredness whereas biblical excellence is "rooted in the conviction that God deserves our best." GORDON T. SMITH, COURAGE AND CALLING: EMBRACING YOUR GOD-GIVEN POTENTIAL 86–87 (1999).

of individuals' motives in the actions they take,[29] and Christian scholars emphasize the importance of motives as a component to moral actions.[30]

B. Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule 1.2 provides the general framework for describing the scope of a lawyer's representation of a client and the types of decisions that are within the lawyer's and the client's authority. The rule describes that clients have the authority to make decisions regarding the "objectives" of the representation and that lawyers are to consult with the client regarding the "means" by which those objectives are to be pursued.[31] The rule also maintains that a lawyer's representation of a client does not constitute an endorsement of the client's views or activities, and it provides that lawyers may limit the scope of representation under certain circumstances.[32] Finally, the rule adds that a lawyer shall not counsel a client to engage in conduct the lawyer knows is fraudulent, but a lawyer may discuss the legal ramifications of any proposed course of action with a client.[33]

In allocating the decision-making between the client and lawyer, Rule 1.2(a) affirms the general notion that lawyers are agents of their clients.[34] The rule's emphasis on this aspect of the attorney-client

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29 *See, e.g.*, *Proverbs* 16:2 (NIV) ("All a man's ways seem innocent to him, but motives are weighed by the LORD."), 21:2 ("Every way of a man is right in his own eyes; [b]ut the LORD weighs the spirits.").

30 *See, e.g.*, HADDON ROBINSON, DECISION-MAKING BY THE BOOK 86 (1991) ("Right deeds are righteous only if they proceed from right motives. There are a great many actions which, in and of themselves, are neither right nor wrong. They are made right when we act in love. They become wrong if we act in selfishness.").

31 MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003). Most scholars agree that this last provision implies that lawyers are within their ethical bounds if they make "means" decisions they believe are in the client's best interest even if the client disagrees with the lawyer's decision. Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 407 (2005) (citing MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 73 (2d ed. 2002) (reasoning that the "means are for the lawyer [to decide] after consultation with the client")); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 157 (1986) (stating that the lawyer must consult with the client about the means of representation but that "the lawyer retains the ultimate prerogative to act"); Robert M. Contois, Jr., *Ethical Considerations: Independent Professional Judgment, Candid Advice, and Reference to Nonlegal Considerations*, 77 TUL. L. REV. 1223, 1226 (2003) ("Rule 1.2(a) reserves to the client control of the purposes of the engagement but allows the lawyer to choose the means to be employed in performing the legal services . . . .").

32 MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003).

33 *Id.*

34 *See, e.g.*, Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1136 (1994).

relationship therefore points to biblical virtues such as honor, loyalty, trustworthiness, and servanthood. The apostle Paul discusses in several epistles the importance of accountability and order in human structures, such as in work relationships.[35] In *Ephesians*, he specifically instructs workers to "be obedient to those who are your masters according to the flesh, with fear and trembling, in sincerity of heart, as to Christ."[36]

Scholars have recognized that, despite the customary agent-principal relationship between lawyers and clients, lawyers sometime dominate the attorney-client relationship by exerting power over their clients.[37] Christian lawyers should not follow this practice in light of Model Rule 1.2(a) and consonant biblical virtues. Biblical principles affirm that the general act of obeying one's earthly employer can be an act that points to the employee's humility in obeying God.[38] This obedience is subject to the preeminent principle that Christian lawyers should not follow instructions that violate God's word.[39] Absent such conflict, Christian lawyers' service to their clients can model the biblical virtue, which permeates Scripture, that individuals should serve others.[40]

Rule 1.2(b) specifically implicates the biblical virtue of integrity. That section, as noted, maintains that a lawyer's representation of a

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35 *See Colossians* 3:22–25; *Ephesians* 5:22–6:9; 1 *Peter* 2:12–19; *see also* ALEXANDER HILL, JUST BUSINESS: CHRISTIAN ETHICS FOR THE MARKETPLACE 155 (1997) (noting that Paul "regarded responsible human authority as a gift from God—a common grace for all—that provides necessary order").

36 *Ephesians* 6:5. Paul adds that workers should obey "not with eyeservice, as men-pleasers, but as bondservants of Christ, doing the will of God from the heart, with goodwill doing service, as to the Lord, and not to men, knowing that whatever good anyone does, he will receive the same from the Lord, whether *he is* a slave or free." *Ephesians* 6:6–8.

37 *See, e.g.*, Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 556 (1991) (recognizing how the lawyer may "dominate" clients in the lawyer-client relationship).

38 *See Ephesians* 6:5–8.

39 Biblical scholars have recognized that, in comparing obedience to an earthly master to obedience to Christ, Paul gives the earthly obedience "higher meaning," such that workers can place limits on that obedience so that they do not violate moral truths. WALTER C. KAISER, JR. ET AL., HARD SAYINGS OF THE BIBLE 643 (1996); *see also id.* at 574 (discussing *Acts* 17:6–7 and *Revelation* 13 and 18 as passages that demonstrate how God does not demand unconditional obedience to the state). For two examples of godly disobedience to authority, see *Daniel* 3:8–30 (recounting Shadrach, Meshach, and Abednego's disobedience to a king's command to worship a golden statue) and *Daniel* 6:1–28 (recounting Daniel's disobedience to a kingly edict punishing anyone who prayed to a god or man other than the king).

40 *See, e.g.*, *Galatians* 6:2 ("Bear one another's burdens, and so fulfill the law of Christ."); 1 *Peter* 2:17 (NIV) ("Show proper respect to everyone: Love the brotherhood of believers, fear God, honor the king."), 4:10 ("Each one should use whatever gift he has received to serve others, faithfully administering God's grace in its various forms.").

client does not constitute an endorsement of the client's views or activities.[41] Scripture does not condition workers' obedience to their masters on the workers' agreement with the masters' instructions.[42] However, Scripture also does not instruct workers or those under the authority of others to follow blindly the directions of their superiors.[43] Christian lawyers thus must be careful not to hide behind their role in being an agent of their client to justify committing actions or furthering causes with which they find morally questionable. Lawyers need not agree with the objectives of their clients, but personal integrity demands that they maintain a moral justification for the actions they do on a client's behalf; lawyers' integrity suffers when they distance their personal morality from their professional lives.[44] Thus, Rule 1.2(b) reflects only part of the standard for Christian attorneys: although such attorneys are free to represent clients with which they disagree, they must justify such representation under larger moral principles that are consonant with scriptural truths.

Rule 1.2(c) specifically relates to the virtues of reasonableness and personal responsibility.[45] By requiring lawyers' scope limitations to be reasonable, the rule affirms the basic principle that lawyers remain responsible for their work for their clients; lawyers cannot avoid their basic duty to provide competent representation, for example, by enacting unreasonable limitations on their scope of service.[46] Scripture supports

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41 MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003).

42 For instance, Paul does not place such a condition on his instruction in *Ephesians* for slaves to obey their masters. *See Ephesians* 6:5–9.

43 *See, e.g., supra* note 39 and accompanying text.

44 *See* Larry O. Natt Gantt, II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Counseling in the Attorney-Client Relationship*, 16 REGENT U. L. REV. 233, 248–62 (2003-2004). Lawyers may validate representing a client with whom they personally disagree by pointing to a higher ethical principle, such as protecting individual liberties. *See* NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 25–26 (3d ed. 2004). Nevertheless, personal integrity in Scripture requires individuals to take moral responsibility for their actions.

45 Less directly, Rule 1.2(c) relates to the virtue of integrity. Specifically, the rule enables attorneys to maintain their personal integrity and still represent certain clients by allowing them to exclude from their representation certain actions that the lawyer finds personally distasteful. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2003) (reasoning that attorneys may limit their representation to "exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent").

46 Such limitation, however, may be a factor in assessing the level of competency required. *See id.* R. 1.2 cmt. 7 ("Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Lerner v. Laufer, 819 A.2d 471 (N.J. Super. Ct. App. Div. 2003) (holding that attorney did not commit malpractice by not investigating the reasonableness of a property settlement agreement because the attorney had properly limited his scope of representation).

this notion of personal responsibility and underscores that individuals remain responsible for their own conduct and should not cast blame on someone else.[47]

Finally, Rule 1.2(d) implicates the biblical virtues of honesty and discretion. In prohibiting lawyers from counseling or assisting a client in conduct that is criminal or fraudulent, the rule affirms that lawyers' advocacy role must be tempered by their larger obligation to uphold the laws of society. Such temperance is appropriate biblically in light of Paul's instructions for believers to submit to governmental authority.[48] The rule, however, adds that lawyers may discuss the legal consequences of a course of action with a client to assist that client in making a good faith effort to determine the "validity, scope, meaning, or application" of a law.[49] As the comment recognizes, this second part of the rule is not intended to discourage lawyers from giving their honest assessment of the client's course of conduct.[50] The comment adds, "There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed . . . ."[51]

Walking this line between counseling clients about problematic conduct and not assisting them in such conduct is not always easy, and it involves the biblical virtue of discretion. The New King James Version uses the term "discretion" nine times, seven of which pertain to the virtue at issue here.[52] The Hebrew word translated as discretion in five of those passages is *m'zimmah*,[53] which means more fully "purpose, discretion, device."[54] In one of the verses, the respective Hebrew word is

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47 *See, e.g.*, *Ezekiel* 18:20 ("The soul who sins shall die. The son shall not bear the guilt of the father, nor the father bear the guilt of the son. The righteousness of the righteous shall be upon himself, and the wickedness of the wicked shall be upon himself.").

48 *See Romans* 13:1–7. This submission, of course, is not absolute. *See supra* note 39 and accompanying text.

49 MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003).

50 *Id.* R 1.2 cmt. 9 ("This prohibition [in (d)], however, does not preclude a lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct.").

51 *Id.*; *see also* CRYSTAL, *supra* note 44, at 475–78 (discussing the thorny ethical issues that arise in determining the scope of Rule 1.2(d)).

52 *See* BibleGateway.com, Quick Search Results: Discretion, http://www.biblegateway.com/keyword/?search=discretion&version1=50&searchtype=all (last visited Aug. 25, 2006) (listing the following relevant passages: *Psalms* 112:5; *Proverbs* 1:4, 2:11, 3:21, 5:2, 8:12, 19:11).

53 JAMES STRONG, THE EXHAUSTIVE CONCORDANCE OF THE BIBLE 267 (1988), *available at* http://bible.crosswalk.com/OnlineStudyBible/bible.cgi?new=1&word=discretion&section=0&version=str&language=en.

54 FRANCIS BROWN ET AL., THE BROWN-DRIVER-BRIGGS HEBREW AND ENGLISH LEXICON 273 (Hendrickson Publishers 1996).

mishpat,[55] which more fully means "judgment, justice, ordinance."[56] In the other of the verses, the respective Hebrew word is *sekel*,[57] which more fully means "prudence, insight, understanding."[58] Based on these definitions, lawyers seeking to discern their ethical limitations in counseling clients will need discretion broadly defined as prudence, judgment, and understanding. Lawyers will develop such attributes from experience, but Scripture affirms that God is the source of true understanding: "Trust in the LORD with all your heart, [a]nd lean not on your own understanding; [i]n all your ways acknowledge Him, [a]nd He shall direct your paths."[59] Christian attorneys should therefore not neglect their responsibility to pray and seek guidance from the Lord in making the tough decisions that arise in counseling clients about questionable conduct.

C. Rule 1.4: Communication

Rule 1.4 provides general standards that govern attorneys' responsibility to communicate with their clients, including attorneys' responsibility to explain matters to their clients so that the clients can make "informed decisions" relating to the representation.[60] In fostering communication from lawyer to client, the rule first affirms the biblical principle of promptness. Specifically, sections (a)(1), (a)(3), and (a)(4) of the rule instruct lawyers "promptly" to inform clients when they need to provide their informed consent to a decision and "promptly" to respond to clients' reasonable information requests.[61] Similarly, by directing lawyers to keep clients "reasonably informed about the status of the matter," section (a)(3) encourages lawyers to communicate promptly with their clients when changes to the status of the matter occur.[62] A lawyer's failure to communicate promptly with clients is a common complaint raised by clients,[63] and lawyers are frequently disciplined or held liable for malpractice, in part, due to their failure to communicate.[64]

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55 STRONG, *supra* note 53.

56 BROWN ET AL., *supra* note 54, at 1048.

57 STRONG, *supra* note 53.

58 BROWN ET AL., *supra* note 54, at 968.

59 *Proverbs* 3:5–6.

60 MODEL RULES OF PROF'L CONDUCT R. 1.4 (2003).

61 *Id.* R. 1.4(a)(1), (4).

62 *See id.* R. 1.4(a)(3). Promptness is related to diligence, and for scriptures relevant to the relationship between the two virtues, see *infra* notes 281–82 (discussing Rule 3.2 ("Expediting Litigation")). *See also Proverbs* 15:23.

63 *See, e.g.*, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 826–27 n.109 (1992) (referencing statistics compiled by the State Bar of California showing that the most common allegations of lawyer misconduct involve "failure to perform, delay, abandonment" and "lack of communication") (citing Stephen G. Bené, Note,

Rule 1.4 also relates to the biblical virtue of honesty. Rule 1.4(a)(5) specifically provides that, when the lawyer knows the client expects assistance in violation of the law, the lawyer must consult with the client about any ethical limitations on the attorney's conduct.[65] In requiring this open communication, the rule relates to passages in Scripture where believers who are in conflict are encouraged to go to one another and discuss the conflict so that they can be reconciled.[66] Although these passages relate to conflicts among believers, they point to a larger principle that Christians should strive for peace with others and should conduct their lives in a way that avoids unnecessary conflict with others.[67] By requiring attorneys to explain to their clients these potential ethical dilemmas, Rule 1.4 thus reflects biblical principles encouraging attorneys to be proactive in avoiding attorney-client conflicts.

Finally, Rule 1.4 relates to the biblical virtue of knowledge. This virtue is implicated in the rule's requirement that attorneys explain to clients matters that will affect their "informed consent" so that clients can make "informed decisions" regarding the representation.[68] The New King James Version of the Bible uses the word "knowledge" 164 times,[69] and the word as translated comes from several different Hebrew and

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Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions, 43 STAN. L. REV. 907, 911 (1991)).

64 *See, e.g.*, Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 REAL PROP. PROB. & TR. J. 1, 20 (1991) ("Studies show that malpractice claims are reduced considerably when the lawyer maintains an appropriate degree of communication with the client.").

65 MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2003).

66 *Matthew* 18:15 ("Moreover if your brother sins against you, go and tell him his fault between you and him alone. If he hears you, you have gained your brother."); *see also* ROBERT H. MOUNCE, MATTHEW 176 (1991) (reasoning that "reconciliation" is the goal of confronting others with whom one is in conflict).

67 *See Romans* 12:18 ("If it is possible, as much as depends on you, live peaceably with all men."); *Philippians* 2:1–2 ("Therefore if *there is* any consolation in Christ, if any comfort of love, if any fellowship of the Spirit, if any affection and mercy, fulfill my joy by being like-minded, having the same love, *being* of one accord, of one mind."); 2 *Corinthians* 5:18 ("Now all things *are* of God, who has reconciled us to Himself through Jesus Christ, and has given us the ministry of reconciliation . . . ."); *see also* RICK WARREN, THE PURPOSE DRIVEN LIFE 152–59 (2002) (discussing biblical approaches to reconciling relationships); *infra* notes 253–54 (discussing how principles of reconciliation relate to Rule 2.4 ("Lawyer Serving as Third-Party Neutral")).

68 MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2003).

69 *See* BibleGateway.com, Quick Search Results: Knowledge, http://www.biblegateway.com/keyword/?search=knowledge&version1=50&searchtype=all (last visited August 26, 2006).

Greek words.[70] Biblical scholars underscore, however, that knowledge as the Bible conceives of it is more than "mental knowledge"; it also includes "moral knowledge."[71] Moral knowledge is described as "affect[ing] a person's will" and as "knowledge of the heart."[72] Scholars add that the book of *Proverbs*, which served as the foundation for legal ethics, deals principally with this kind of knowledge.[73] In supplementing the Model Rules with biblical principles, Rule 1.4's reference to "informed decisions" and many of the Rules' references to "informed consent"[74] thus should include more than an inquiry into whether clients understand the legal ramifications of a course of conduct. To be truly informed, clients should seek knowledge about the moral issues involved in their situation.[75]

D. Rule 1.5: Fees

Rule 1.5 includes several provisions that govern attorneys' fees and how they charge those fees to their clients. Rule 1.5(a) first provides the general standard that "[a] lawyer shall not make an agreement for, charge, or collect an *unreasonable* fee or an *unreasonable* amount for expenses."[76] The rule continues to provide specific guidance on how attorneys are to communicate the basis of their fees with their clients, how they are to form contingency fee agreements with their clients, and how they are to split fees with other attorneys.[77]

Rule 1.5 relates to various biblical virtues. In establishing the fee reasonableness requirement and the requirements for how lawyers are to determine their fee agreements, the rule relates to the virtues of reasonableness, honesty, integrity, and trustworthiness. Old Testament

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70 *See* EDWARD W. GOODRICK & JOHN R. KOHLENBERGER III, THE NIV EXHAUSTIVE CONCORDANCE 632 (1990) (addressing the word as translated in the New International Version).

71 *See* HAYFORD'S BIBLE HANDBOOK 678 (Jack W. Hayford ed., 1995) [hereinafter HAYFORD'S].

72 *Id.*; *see Proverbs* 1:7 ("The fear of the LORD is the beginning of knowledge . . . .").

73 HAYFORD'S, *supra* note 71; *see also* Beggs, *supra* note 1 (discussing how early legal ethicists used *Proverbs* in formulating legal ethical principles).

74 The Model Rules define the term "informed consent" in Rule 1.0(e) as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2003). Excluding any references in the comments, the Rules use that term in Rules 1.2, 1.4, 1.6, 1.7, 1.8, 1.9, 1.11, 1.12, 1.18, and 2.3.

75 This relationship between the legal and moral issues affecting a client's situation is also relevant to Rule 2.1. *See infra* notes 229–35 and accompanying text.

76 MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003) (emphasis added). Rule 1.5 also provides eight factors to be used in determining whether the legal fee is "reasonable." *Id.*

77 *Id.*

passages instruct individuals not to use "dishonest" scales or standards in their business transactions.[78] In that culture, no uniform system for weights and measures existed, and individuals commonly defrauded others in their business dealings by using weights that were lighter than they should have been.[79] These biblical passages are most analogous to a situation where a lawyer falsifies his billing record to overcharge his client. Such a falsification would violate both these biblical principles and Rules 1.5(b) to (e), which address different fee agreements and communications regarding fees.[80]

More broadly, however, the biblical passages about dishonest scales relate to lawyers who "cheat" their clients by charging them exorbitant fees. According to biblical scholar R.K. Harrison, "The Law demanded the use of correct scales and weights because the Redeemer of Israel was not only mighty but just and delighted in honest dealings among his people."[81] Attorneys who charge unreasonable fees therefore should consider whether, by charging such fees, they are being dishonest with their clients. Christian ethicist Jerry White describes one of the five guidelines for Christian businesses as the goal for "reasonable profit."[82] He notes that defining "reasonableness" is difficult in this regard but advises that sellers of services, like lawyers, should consider Scripture's "golden rule" and imagine themselves on the buying end in determining whether a fee is just and fair.[83] Under this framework, an attorney would violate biblical principles if he charged his client more than he thinks would be fair if he were the client. Thus, biblical principles appear to go beyond the baseline reasonableness requirement in Rule 1.5 to require Christian attorneys to consider fairness principles as well.[84]

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78 *Proverbs* 11:1 ("Dishonest scales *are* an abomination to the LORD, [b]ut a just weight *is* His delight."); *Leviticus* 19:35 ("You shall do no injustice in judgment, in measurement of length, weight, or volume.").

79 THE NIV STUDY BIBLE 171 n.19:35 (Kenneth Barker ed., 1985); R.K. Harrison, *Proverbs*, *in* EVANGELICAL COMMENTARY ON THE BIBLE 417–18 (Walter A. Elwell ed., 1989).

80 *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2003). Lawyers may violate these rule provisions even when they do not falsify the records if they exploit an arrangement by using "wasteful procedures." *Id.* R. 1.5 cmt. 5 ("A lawyer should not exploit a fee arrangement based primarily on hour charges by using wasteful procedures.").

81 Harrison, *supra* note 79, at 418.

82 JERRY WHITE, HONESTY, MORALITY & CONSCIENCE 79 (1996).

83 *Id.* (referencing *Luke* 6:31, which reads, "[a]nd just as you want men to do to you, you also do to them likewise").

84 Specifically with regard to the virtue of trustworthiness, lawyers who charge clients unreasonable fees are breaching a trust that is part of the attorney-client relationship. Like the merchants who switch the weights, such lawyers are taking advantage of someone who has placed a trust in them. Trustworthiness concerns particularly arise in Rule 1.5(e) regarding fee splitting. Referring lawyers can breach a trust owed to their client when they craft fee-splitting arrangements that provide for joint

Biblical passages on money and wealth also go beyond the requirements in Rule 1.5 in two other important respects. First, these passages speak to the importance of financial responsibility and stewardship.[85] They underscore that money and other material possessions ultimately come from God and are entrusted to individuals and should be used for God's purposes.[86] Christian attorneys therefore should recognize that their fees are like tools God has given them to use in fulfilling His will on earth.[87] Individuals who fail to manage their money so that they are unable to contribute to godly causes are not being proper stewards of God's resources.[88]

Second, many biblical passages caution individuals against being enticed by greed or the love of money.[89] Scripture goes beyond the text of Rule 1.5 in addressing attorneys' attitudes toward their fees, not just their actions regarding them. As theologian Gordon Fee reasons, "[T]he desire for wealth has inherent spiritual dangers, partly because wealth is unrelated to godliness in any way and partly because the very desire itself is like a trap . . . full of many hurtful desires that lead to all kinds of sin."[90] Christian attorneys therefore cannot claim virtuosity simply by looking at the amount of their fee or at whether they have followed the proper procedures for fee agreements. Rather, they must also search their hearts to consider the extent to which receiving that income has become the focus of their life.

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responsibility but they never follow up with the attorney to whom the work was referred. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2003).

85 *See Matthew* 25:14–30 (parable of the talents).

86 *See* 2 *Corinthians* 9:10 (NIV) ("Now he who supplies seed to the sower and bread for food will also supply and increase your store of seed and will enlarge the harvest of your righteousness. You will be made rich in every way so that you can be generous on every occasion, and through us your generosity will result in thanksgiving to God."); 1 *Timothy* 6:7 ("For we brought nothing into *this* world, *and it is* certain we can carry nothing out.").

87 Theologian Wayne Grudem adds, "It is most pleasing to God when gifts of money are accompanied by an intensification of the giver's own personal commitment to God . . . ." WAYNE GRUDEM, SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE 957 (1994); *see also* 2 *Corinthians* 9:7 ("So let each one give as he purposes in his heart, not grudgingly or of necessity; for God loves a cheerful giver.").

88 *Cf. Matthew* 25:14–30 (describing how the master chastised the servant who failed to grow the talent that was entrusted to him).

89 *See, e.g.*, *Proverbs* 28:20 ("A faithful man will abound with blessings, [b]ut he who hastens to be rich will not go unpunished."), 30:8 ("Remove far from me vanity and lies: give me neither poverty nor riches; feed me with food convenient for me . . . ."); 1 *Timothy* 6:10 ("For the love of money is the root of all evil: which while some coveted after, they have erred from the faith, and pierced themselves through with many sorrows."); *Hebrews* 13:5 (NIV) ("Keep your lives free from the love of money and be content with what you have, because God has said, 'Never will I leave you; never will I forsake you.'").

90 GORDON D. FEE, 1 AND 2 TIMOTHY, TITUS 145 (1988) (citations omitted).

E. Rule 1.6: Confidentiality of Information

Rule 1.6 addresses the significant standard in legal ethics that lawyers are not to disclose confidential client information. The rule specifically prohibits lawyers from revealing any information "relating to the representation" of the client.[91] The rule provides several exceptions to the prohibition, including recently adopted standards allowing attorneys to disclose confidential information necessary to prevent substantial financial injury to others in certain cases.[92]

In espousing the hallmark principle of attorney-client confidentiality, the rule highlights the biblical virtues of confidentiality and trustworthiness. *Proverbs* 11:13 exemplifies these principles; it reads, "A talebearer reveals secrets, but he who is of a faithful spirit conceals a matter."[93] Other scriptures more broadly point to the importance of an individual's faithfulness to another when that person puts his or her trust in the individual. For example, 1 *Corinthians* 4:2 provides, "Now it is required that those who have been given a trust must prove faithful."[94] Rule 1.6, specifically 1.6(b)(6), also affirms the biblical principle of submission to authorities.[95] By instructing attorneys to reveal client confidences if necessary to comply with "other law or a court order," the rule reminds attorneys that their obligations to government authority can trump their obligations to their clients.[96]

Less directly, through certain of its exceptions to the general rule of confidentiality, Rule 1.6 also relates to the biblical principle of compassion. These exceptions include allowing attorneys, as noted, to

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91 MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

92 *Id.* R 1.6(b)(2), (3).

93 *Proverbs* 11:13. Another version reads: "A gossip betrays a confidence, but a trustworthy man keeps a secret." *Id.* (NIV). A similar sentiment is expressed in *Proverbs* 20:19, which reads, "He who goes about as a talebearer reveals secrets; [t]herefore do not associate with one who flatters with his lips." Another passage in *Proverbs* adds that those who reveal secrets run the risk of damaging their reputation. *See Proverbs* 25:9–10.

94 1 *Corinthians* 4:2 (NIV); *see also* 1 *Timothy* 6:20 (encouraging Timothy to be faithful in being entrusted with the gospel). Being faithful to the trust another person commits in you relates to the faithfulness the Bible teaches that individuals should have when they confront a task with which God has entrusted them. For instance, when the apostle Paul describes his responsibility to preach the gospel, he writes, "If I preach voluntarily, I have a reward; if not voluntarily, I am simply discharging the trust committed to me." 1 *Corinthians* 9:17 (NIV). This passage also highlights how trustworthiness relates to the virtue of personal responsibility, which entails being responsible for those things entrusted to you.

95 The seminal biblical passage addressing a Christian's obligation to submit to governmental authorities is *Romans* 13:1–7. *See also Exodus* 22:28 ("You shall not revile God, nor curse a ruler of your people."); *Ezra* 7:26 ("Whoever will not observe the law of your God and the law of the king, let judgment be executed speedily on him, whether it be death, or banishment, or confiscation of goods, or imprisonment.").

96 MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2003).

disclose information to prevent financial injury and also to prevent "reasonably certain death or substantial bodily injury."[97] By including such exceptions, the rule recognizes that attorneys have duties to others that can override their duties to their clients. In allowing attorneys to disclose client confidences in certain instances to protect the interests of others, the rule affirms that individuals should be sensitive to the needs of others and should act to help others.[98]

Although Rule 1.6 recognizes how an attorney's duties toward others might supersede duties to clients, the rule does not go as far as the Bible in this recognition. Specifically, the rule's exceptions merely provide that attorneys "may" reveal confidential information in certain cases. Nowhere does the rule *require* attorneys to reveal such information.[99] The rule therefore, for instance, only allows attorneys to reveal confidential information to prevent death or substantial bodily injury; under this rule, an attorney would not commit ethical misconduct if she sat on client confidences even if disclosing such information would have saved someone's life.[100]

Scripture, in contrast, underscores the sanctity of human life and does not authorize an attorney's failure to protect another's life under the cloak of client confidentiality.[101] The attorney would, at a minimum, need to disclose to his client that he is going to reveal such information to the appropriate person in order to protect the other's life. If the attorney's disclosure to his client would heighten the danger to others, the attorney would be authorized to reveal the information without

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97 *Id.* R. 1.6(b)(1)–(3).

98 For Scriptures that promote the importance of compassion, see 1 *Peter* 3:8 ("Finally, all of you be of one mind, having compassion for one another; love as brothers, be tenderhearted, be courteous . . . .") and *Romans* 12:15 ("Rejoice with them that do rejoice, and weep with them that weep.").

99 MODEL RULES OF PROF'L CONDUCT R 1.6(b) (2003).

100 This conclusion assumes that disclosure is not necessary to comply with other law. *See id.* R 1.6(b)(1), (6). Several states vary from this Model Rule in requiring attorneys to disclose such information. *See* Emiley Zalesky, *When Can I Tell a Client's Secret? Potential Changes in the Confidentiality Rule*, 15 GEO. J. LEGAL ETHICS 957, 962 n.31 (2002) (listing the states that, in contrast to the Model Rules, require disclosure to prevent death or substantial bodily injury). The contours of Rule 1.6(b)(1) and its permissive versus mandatory approach have generated much discussion in legal scholarship. *See, e.g.*, Lewis Becker, *What Changes to the Model Rules Will Mean for Family Lawyers*, FAM. ADVOC., Fall 2003, at 9; Krysten Hicks, *Thresholds for Confidentiality: The Need for Articulate Guidance in Determining When to Breach Confidentiality to Prevent Third-Party Harm*, 17 TRANSNAT'L LAW. 295, 298–301 (2004); David Lew, *Revised Model Rule 1.6: What Effect Will the New Rule Have on Practicing Attorneys*, 18 GEO. J. LEGAL ETHICS 881 (2005); Irma S. Russell, *Keeping the Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations*, 3 WYO. L. REV. 513, 535–537 (2003).

101 Scripture is replete with passages, most notably the Ten Commandments, that forbid murder and underscore the sanctity of human life. *See, e.g.*, *Exodus* 20:13; *Matthew* 19:18; *Romans* 13:9.

discussing the matter with his client. Breaking the client's confidence does not necessarily involve an outright misrepresentation, and Scripture condones the actions of certain individuals who concealed the truth from others because those persons did not have a need or right to know the whole truth.[102]

Moreover, Scripture appears to condone an individual's lying in the narrow case of when necessary to prevent the death of innocent human life. For instance, in *Exodus* 1:15–21, the Pharaoh instructed the Hebrew midwives to kill male children born to Hebrew women. The midwives, however, let the boys live. When the Pharaoh questioned why they let the boys live, the midwives lied, telling Pharaoh that the Hebrew women gave birth before the midwives arrived. The Bible says that, in response to their actions, "God dealt well with the midwives: and the people multiplied, and grew very mighty. And so it was, because the midwives feared God, that He provided households for them."[103]

In another example, in *Joshua* 2, Rahab lied to the king of Jericho. Although she was hiding Hebrew spies on the roof of her home, she told the king that the men had left at dusk and that she did not know where they went.[104] Because of Rahab's actions, Joshua and his army spared Rahab and her family when they burned the city of Jericho.[105] New Testament passages affirm that Rahab was blessed because of her

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102 For instance, in 1 *Samuel* 16:1–13, God instructs Samuel to travel to Bethlehem to anoint David as king. When Samuel protests that Saul will kill him if he does so, God responds, "Take a heifer with you, and say, 'I have come to sacrifice to the LORD.' Then invite Jesse to the sacrifice, and I will show you what you shall do; you shall anoint for Me the one I name to you." 1 *Samuel* 16:2–3. Here, God does not instruct Samuel to lie because Samuel does perform the sacrifice. However, God's instructions did direct Samuel to make a deceptive statement because Samuel's statement was incomplete and hid the primary purpose of his visit. Other times, Jesus did not reveal the complete truth to his listeners in order to serve a larger purpose. *See, e.g.*, *Matthew* 24:13–35 (not revealing his identity to the two disciples on the road to Emmaus in order to draw out their hearts); David R. Reid, Devotions for Growing Christians: Exercise in Ethics, http://www.growingchristians.org/dfgc/ethics.htm (last visited Nov. 4, 2006) (citing *Matthew* 13:10–13 and reasoning that "[c]oncealment of truth is only a sin when an obligation exists to reveal the hidden facts or there is an intent to lead astray into moral error").

103 *Exodus* 1:20–21. Although the passage does not expressly say that the midwives were blessed because of their lying, the verse indicating that God dealt well with the midwives comes immediately after their misrepresentation and begins with "therefore." *Exodus* 1:21. *But see* Reid, *supra* note 102 (contending that the midwives were not blessed for lying but "for fearing God and refusing to participate in Pharaoh's program of infanticide").

104 *Joshua* 2:1–7.

105 *Joshua* 6:25 ("And Joshua spared Rahab the harlot, her father's household, and all that she had. So she dwells in Israel to this day, because she hid the messengers whom Joshua sent to spy out Jericho.").

actions.[106] In the cases involving imminent death of innocent victims, Scripture thus would deviate from the Model Rules in making the "may" in Rule 1.6(b) a "must," therefore requiring attorneys to reveal client confidences in such cases.

F. Rule 1.7: Conflict of Interest: Current Clients
Rule 1.8: Conflict of Interest: Current Clients: Specific Rules
Rule 1.9: Duties to Former Clients

Model Rules 1.7 to 1.9 espouse the general principles for determining conflicts of interest. Rule 1.7 provides the standard for determining conflicts regarding current clients. The rule presents a two-layered structure for determining such conflicts. First, the rule defines a "concurrent conflict of interest," and then the rule provides exceptions when a lawyer may represent a client notwithstanding the existence of such a conflict.[107] Rule 1.8 outlines detailed standards for specific situations that are fraught with the potential for conflicts among current clients.[108] Rule 1.9 delineates the general standard for assessing conflicts of interest between current clients and former clients.[109]

In providing the general principle that lawyers should not represent a client when the representation creates a conflict of interest with another client, these rules relate to several biblical virtues. Most notably, the rule relates to the principle of loyalty. In Scripture, this principle is most often associated either with loyalty to God, or faithfulness, or with loyalty to those in leadership. For instance, Jesus

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106 *See Hebrews* 11:31 ("By faith the harlot Rahab did not perish with those who did not believe, when she had received the spies with peace."); *James* 2:24–26 ("You see then that a man is justified by works, and not by faith only. Likewise, was not Rahab the harlot also justified by works when she received the messengers and sent them out another way? For as the body without the spirit is dead, so faith without works is dead also."). Although the *Hebrews* passage states that Rahab was blessed by her faith, that faith, as the *James* passage indicates, was manifest in her specific actions of hiding the spies and sending them on another way. The passage does not specifically mention her lying to protect the spies, and some have argued that the lying was therefore not justified. *See, e.g.*, Reid, *supra* note 102 (reasoning that "[n]o individual is ever forced to choose the lesser of two evils"). Nevertheless, her lying was not condemned, and her actions can be construed as an acceptable—although not perhaps the best—course of conduct. *See also Matthew* 1:5 (recounting that Rahab was in the ancestral line of Christ). Two other passages that might appear to condone dishonesty are 1 *Kings* 22:20–23 and 2 *Chronicles* 18:18–22. These passages record God's sending out a "lying spirit" in order to deceive the false prophets counseling Ahab. 1 *Kings* 22:22; 2 *Chronicles* 18:21. Christian scholars, however, have explained that these passages reflect the common practice of many biblical writers to use an imperative verb form even though the verb pertains only to what God permitted to happen as opposed to what He willed to happen. *See* KAISER ET AL., *supra* note 39, at 230–31.

107 MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003).

108 *Id.* R. 1.8.

109 *Id.* R. 1.9.

recognizes the importance of single-minded devotion to God when he states in *Matthew* 6:24: "No one can serve two masters; for either he will hate the one and love the other, or else he will be loyal to the one and despise the other. You cannot serve God and mammon."[110] Regarding loyalty to those in leadership, *Nave's Topical Bible* lists several references relating to the principle of loyalty, and nearly all of them relate to loyalty to political leaders or those in authority.[111]

In contrast, loyalty as implied in these rules is not loyalty to God or another authority but to the client. One might analogize loyalty to another authority and loyalty to client because lawyers serve as agents to their clients, and thus clients operate in a position of decision-making authority over their lawyers.[112] However, greater give-and-take exists in a lawyer-client relationship than in most relationships between rulers and their subjects.[113]

A related biblical principle that may better capture the nature of the attorney-client relationship is trust. *Nave's Topical Bible* associates "trust" with "faith,"[114] but the concept of "faith" as described in Scripture connotes more than trust—it connotes commitment or devotion.[115] Trust in a narrower sense connotes the belief that someone is actually the person—in character as well as identity—he or she purports to be.[116] The principle is embodied in biblical passages referenced earlier which provide that an individual who betrays a confidence is not

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110 *Matthew* 6:24.

111 *See* NAVE, *supra* note 18, at 810. For instance, *Nave's* lists, *inter alia*, the following verses as relating to "loyalty": *Exodus* 22:28 ("You shall not revile God, nor curse a ruler of your people."), *Proverbs* 24:21 ("My son, fear the LORD and the king; [d]o not associate with those given to change . . . ."), *Romans* 13:1 ("Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that exist are appointed by God."), and *Titus* 3:1 ("Remind them to be subject to rulers and authorities, to obey, to be ready for every good work . . . .").

112 *Cf.* State v. Ali, 407 S.E.2d 183 (N.C. 1991) (holding that tactical decisions of fully informed client should prevail over lawyer's decision due to principal-agent nature of relationship).

113 For instance, in contrast to the typical decision making allocation between ruler and subject, many scholars have interpreted Model Rule 1.2 as allowing attorneys to make tactical decisions regarding the means of the representation. *See* Gantt, *supra* note 31. Also, other scholars have stressed how the attorney-client relationship takes on the characteristics of a friendship. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071 (1976) (reasoning that the lawyer is like a "special-purpose" or "limited purpose" friend to his client).

114 NAVE, *supra* note 18, at 1342.

115 HAYFORD'S, *supra* note 71, at 595 (defining the concept of faith as used in Scripture as "a belief or confident attitude toward God, involving commitment to His will for one's life").

116 *Hayford's Bible Handbook* adds that the Hebrew word *chasah* translated as "trust" connotes "to trust, to hope, to make someone a refuge." HAYFORD'S, *supra* note 71, at 784.

trustworthy.[117] The conflicts rules, in turn, relate to trust in that they foster clients' ability to trust their attorneys; the rules prohibit attorneys from being duplicitous by representing conflicting causes at the same time.

These related principles of loyalty and trust relevant to Rules 1.7 to 1.9 are perhaps best seen by analyzing narrative passages describing the relationships between certain biblical characters. The classic example of loyalty between biblical characters is the loyalty between Jonathan and David in the Old Testament. Jonathan and David were close friends; therefore, when Saul, Jonathan's father, instructs Jonathan and the royal attendants to kill David, Jonathan tells David of his father's plan and encourages David to hide.[118] Jonathan then speaks well of David to his father, and Saul temporarily abandons his plan to kill David.[119] When Saul resumes his plot, Jonathan again demonstrates his faithfulness to his friend by telling him, "Whatever you yourself desire, I will do *it* for you."[120] As Jonathan continues to side with David, his father grows angry at him, even trying to kill Jonathan for "choosing" David over Saul.[121] Before David is finally forced to become a fugitive, Jonathan manages one last meeting with David and tells him, "Go in peace, since we have both sworn [friendship] in the name of the LORD, saying, 'May the LORD be between you and me, and between your descendants and my descendants, forever.'"[122]

This biblical narrative on loyalty illustrates the importance of loyalty to a worthwhile cause, here, the saving of David from the murderous plot of Saul. Loyalty to a cause, no matter what its content, however, is not a biblical virtue; for Scripture speaks of the virtue of

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117 *See supra* note 93 and accompanying text (discussing *Proverbs* 11:13, which reads, "[a] talebearer reveals secrets, [b]ut he who is of a faithful spirit conceals a matter").

118 1 *Samuel* 19:1–2. The *New Bible Commentary* underscores the importance of the narrative of Jonathan and David's friendship in 1 *Samuel*:

> Though it forms a part of the more significant story of the relationship between David and Saul, this section of 1 Samuel concentrates more on Jonathan than on Saul. The biblical writer had a purpose in describing so fully this proverbial friendship. He wanted to demonstrate beyond any doubt that the man whom David displaced from succeeding to the throne was his best friend.

NEW BIBLE COMMENTARY: 21ST CENTURY EDITION 314 (G.J. Wenham et al. eds., 1994). In their book, *The Word on Management*, John Mulford and Bruce Winston recognize how the story of Jonathan and David relates to the principle of loyalty. *See* JOHN E. MULFORD & BRUCE E. WINSTON, THE WORD ON MANAGEMENT 121 (1996).

119 1 *Samuel* 19:4–6.

120 1 *Samuel* 20:4.

121 1 *Samuel* 20:30 (NASB).

122 1 *Samuel* 20:42. The word "friendship" is inserted in the New King James Version quoted in the text to signify to what Jonathan and David were swearing; the New International Version includes this word in its translation. *See id.* (NIV).

turning from an illicit cause to a cause for Christ.[123] For Christians, loyalty to God predominates over loyalty to a client. The question therefore remains whether loyalty to a client is a virtue. Certainly, Christians are called to serve others.[124] However, the virtuosity of service to a client cannot be answered in the abstract for it depends on the express purpose of the representation and the underlying purpose for why the attorney is representing the client at issue.[125] What can be answered is that a lawyer who betrays a trust placed in him by one client to serve the interests of another commits a form of disloyalty that can be virtuous only in the narrowest of circumstances,[126] for Scripture points to the importance of an individual's faithfulness to another when that person puts his or her trust in the individual.[127]

This discussion of loyalty relates to similar virtues implicated by Rules 1.7 to 1.9: confidentiality and honesty. Biblical passages related to confidentiality are discussed above in the section on Rule 1.6. Passages relating to honesty are numerous and are discussed below in the section on Rule 3.1.[128] These two virtues pertain to the conflicts rules in particular ways. First, honesty is implicated in that lawyers who compromise their representation of certain clients because of duties to other clients are not honestly disclosing to the former group the interests that affect their ability to represent those clients competently. At a minimum, the rules provide that when the potential for a conflict reaches a certain threshold, lawyers must obtain the "informed consent" of their clients to continue the representation.[129]

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123 For an illustration of how loyalty to the cause of Christ is preeminent, see *Matthew* 10:35 (KJV) ("For I am come to set a man at variance against his father, and the daughter against her mother, and the daughter in law against her mother in law."). *See also supra* notes 34–44 and accompanying text (regarding submission to authority in the context of Rule 1.2).

124 *See, e.g.*, *Mark* 9:35 (NIV) ("Sitting down, Jesus called the Twelve and said, 'If anyone wants to be first, he must be the very last, and the servant of all.'"). In their philosophy of lawyering papers, many students speak highly of the importance of service as an attribute of the lawyer-client relationship. *See* Philosophy of Lawyering Student Papers, *supra* note 17.

125 For instance, lawyers who represent a seemingly repugnant cause may properly justify such representation because it serves a higher principle, such as preserving individuals' freedom of religion. *See* CRYSTAL, *supra* note 44, at 25.

126 *See supra* notes 101–06 and accompanying text (discussing passages in which condoned deception was limited to instances where it was needed to save innocent life).

127 *See, e.g.*, 1 *Corinthians* 4:2 (NIV) ("Now it is required that those who have been given a trust must prove faithful.").

128 *See, e.g.*, *Ephesians* 4:25 ("Therefore, putting away lying, 'Let each one of you speak truth with his neighbor,' for we are members of one another.'").

129 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4), 1.8(a)(3), 1.8(f)(1), 1.9(a)–(b) (2003).

Second, protecting client confidentiality is a pivotal reason why lawyers are to avoid conflicts of interest. Lawyers representing multiple clients in the same matter face confidentiality problems in that, as the comment to Rule 1.7 provides, "[E]ach client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit."[130] Moreover, even when lawyers are not representing multiple clients in the same matter, clients have the right to expect that the lawyers will not use confidential information learned from one client to the advantage of another.[131] Rule 1.9, in fact, expressly adopts a purpose of protecting confidential information in assessing whether a lawyer's representation of a current client conflicts with his or her former representation of a former client.[132]

These rules also relate to the broader biblical virtue of integrity.[133] As noted in the discussion of integrity throughout this article, personal integration is central to integrity. Individuals with integrity evidence holistic living in which they integrate the various aspects of their lives.[134] Integrity is not one virtue, but a "complex of virtues," which "work[] together to form a coherent character, an identifiable and trustworthy personality."[135] This view of integrity relates to character.

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130 *Id.* R. 1.7 cmt. 31.

131 Lawyers who know information advantageous to their client but are unable to use that information are materially limited in their representation of that client. *See id.* R. 1.7 cmt. 8.

> Even where there is not direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.

Id.

132 Rule 1.9 provides that such a conflict may exist if the current and former matters are "substantially related." *Id.* R. 1.9. In defining "substantial relationship," the comment provides that matters are such "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *Id.* R. 1.9 cmt. 3.

133 In addition to the virtues discussed in the text, Rule 1.8 relates to the virtue of reasonableness. Specifically, sections (a), (h), and (i) use "reasonableness" as a standard for assessing the ethicality of attorney actions. *See id.* R. 1.8(a), (h)–(i). As a virtue, reasonableness relates to prudence, and Scripture encourages individuals to be prudent in their actions. *See, e.g.*, *Proverbs* 12:23 ("A prudent man conceals knowledge, [b]ut the heart of fools proclaims foolishness.").

134 *See* Gantt, *supra* note 44, at 248. ("[C]entral to integrity is personal integration."); *see also* Richard Higginson, *Integrity and the Art of Compromise*, *in* FAITH IN LEADERSHIP: HOW LEADERS LIVE OUT THEIR FAITH IN THEIR WORK—AND WHY IT MATTERS 19, 20–23 (Robert Banks & Kimberly Powell eds., 2000) (describing five layers of integrity, with one being "personal consistency" and another being integrated living).

135 ROBERT C. SOLOMON, ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS 168 (1992).

Scripture illustrates this view of integrity. The word "integrity" is used twenty times in the New King James Version, nineteen of which occur in the Old Testament.[136] Biblical scholars state that the basic meaning of the underlying word as it is translated in Scripture is "wholeness, usually in the sense of whole-heartedness or sincerity, rather than faultlessness."[137] In commenting on the use of "integrity" in *Psalm* 26, Robert Higginson observes:

> It is interesting that the psalmist twice paints the scene of *walking in one's integrity*, the picture perhaps being that of a path or channel, a settled groove within which the good person operates, or of a godly ambience or atmosphere surrounding everything that he or she does. Integrity becomes the air one breathes or the ground one treads.[138]

Similarly, although the translators did not use the word "integrity," this principle of wholeness, or integration, is embodied in other passages, such as when Jesus censures the Pharisees for being "like whitewashed tombs, which indeed appear beautiful outwardly, but inside are full of dead *men's* bones and all uncleanness."[139]

The conflicts rules implicate this biblical view of integrity in that they limit attorneys' ability to "play a role" or "switch hats" depending on the client in the room. The ABA recognizes that attorneys must demonstrate a core of consistency in their representation of clients such that they preserve their "loyalty and independent judgment," which the ABA calls "essential elements in the lawyer's relationship to a client."[140]

In regulating conflicts, the ABA seeks primarily to safeguard attorneys' obligations to their clients.[141] In Rule 1.7(a)(2), the ABA recognizes that the "personal interest" of a lawyer may give rise to a

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136 *See* BibleGateway.com, Keyword Search Results: Integrity, http://www.biblegateway.com/keyword/?search=integrity&searchtype=all&version1=50&spanbegin=1&spanend=73 (last visited Nov. 17, 2006). The word occurs twenty-two times in the New International Version, including three times in the New Testament. *See id.* http://www.biblegateway.com/keyword/?search=integrity&searchtype=all&version1=31&spanbegin=1&spanend=73 (last visited Nov. 17, 2006).

137 DEREK KIDNER, PSALMS 1–72: AN INTRODUCTION AND COMMENTARY ON BOOKS I AND II OF THE PSALMS 118 (1973), *quoted in* Higginson, *supra* note 134, at 23.

138 Higginson, *supra* note 134, at 23–24 (emphasis added). Specifically, *Psalms* 26:1 reads: "Vindicate me, O LORD, [f]or I have walked in my integrity. I have also trusted in the LORD; I shall not slip." Similarly, *Psalms* 26:11 reads: "But as for me, I will walk in my integrity; [r]edeem me and be merciful to me." The New International Version translates the phrase "walk(ed) in my integrity" as "lead (led) a blameless life." *Psalms* 26:1, :11 (NIV).

139 *Matthew* 23:27.

140 MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2003).

141 *See id.* R. 1.7(a)(2) (providing that in cases where there is not direct adversity, conflicts are measured by whether the representation of one client will be "materially limited" by the lawyer's responsibilities to another client).

conflict of interest.[142] In this recognition, the rule seeks to ensure that such interests do not "materially affect" the lawyer's representation of the client;[143] and thus the rule affirms that the principal emphasis in the Rules is safeguarding the clients' interests, not preserving the lawyer's integrity. Yet, by raising the factor of such "personal" conflicts, the Rules do recognize that attorneys are more than merely agents of their clients. The Rules at least appreciate that attorneys' own integrity, being true to their personal convictions, may limit their ability to represent certain clients.[144] In this regard, the Rules acknowledge the biblical principle of personal wholeness or integrity.

G. Rule 1.10: Imputation of Conflicts of Interest: General Rule

Rule 1.10(a) states the general rule that when a lawyer is conflicted from representing a client under Rules 1.7 and 1.9, that conflict is imputed to all the members of the lawyer's firm.[145] The general concept of imputation is not antithetical to Scripture. The Bible, in fact, employs the principle of imputation in major theological doctrines, such as the imputation of Adam's sins to mankind, the imputation of believers' sin to Christ, and the imputation of Christ's righteousness to believers.[146] The ABA, however, went beyond the general notion of imputation and made important policy decisions in applying this principle to attorneys' conflicts of interest. According to Nathan Crystal:

> The rationale for the rule of imputed disqualification is based upon the fact that lawyers practicing in a firm have access to firm files and have mutual financial interests. As a result, *it is assumed* that any confidential information that one member of the firm has is accessible to other members of the firm and that any conflict of interest that affects a member of the firm will also affect other members. One can question the validity of these assumptions, especially in large firms, but the principle of imputed disqualification seems to be firmly established in the law of professional ethics.[147]

An important limitation of the rule of imputed disqualification pertains to lawyers moving between firms. In light of the general rule,

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142 *Id.*

143 *Id.*

144 *Cf. id.* pmbl. para. 9 ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to *the lawyer's own interest* in remaining an ethical person while earning a satisfactory living.") (emphasis added).

145 *Id.* R. 1.10(a). The only exception the rule provides is if the conflict was due to a "personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." *Id.*

146 HAYFORD'S, *supra* note 71, at 652–53 (citing, *inter alia*, *Romans* 5:12–19; 1 *Corinthians* 15:21–22; 2 *Corinthians* 5:21).

147 CRYSTAL, *supra* note 44, at 289 (emphasis added).

one could imagine scenarios in which a lawyer's imputed disqualification could have tremendous effect if it automatically disqualified all members of any new firm he joined. The ABA rejected this "double imputation" in favor of the more limited approach adopted by Rules 1.9(b) and 1.10(b). These rules provide for imputation only if the new matter is the same or "substantially related" to the client of the former firm or former firm member and the lawyer whose disqualification may be imputed actually has confidential information "material" to the matter.[148] Courts had rejected the principle of automatic double imputation as being unsound as a matter of policy,[149] and the ABA later codified this limitation in Rules 1.9(b) and 1.10(b).

Despite this limitation, the ABA has rejected screening attorneys as a remedy to avoid the general policy in Rule 1.10 of imputing disqualification to all firm members.[150] Although the ABA has adopted screening in a number of special circumstances—former government lawyers (Rule 1.11), former judges or third-party neutrals (Rule 1.12), and prospective clients (Rule 1.18)—its continued rejection of screening in the general rule of Rule 1.10 is noteworthy because several

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148 Rule 1.9(b) and 1.10(b) are corollaries. Rule 1.9(b) applies these principles in determining what clients a lawyer's new firm is conflicted from representing when a lawyer moves from one firm to another; Rule 1.10(b) applies these principles in determining what clients the lawyer's former firm is conflicted from representing when the lawyer leaves that firm. MODEL RULES OF PROF'L CONDUCT R. 1.9(b), 1.10(b) (2003).

149 *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753–54 (2d Cir. 1975) (holding that "it would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the names of all the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm").

150 The ABA addressed the issue of screening when it adopted the Model Rules in 1983. Parties argued in favor of screening, but the ABA rejected screening as a remedy. CRYSTAL, *supra* note 44, at 291–92. According to Hazard & Hodes, the drafters apparently concluded "that clients were entitled to assurances of confidentiality, and that this was possible only by a rule that disqualified the entire firm that hired a personally disqualified lawyer." *Id.* at 292 (citing 1 GEOFFREY HAZARD, JR. & WILLIAM HODES, THE LAW OF LAWYERING § 14.8, at 14-20 (3d ed. 2001)). Later, when the Model Rules underwent significant revision, the Ethics 2000 Commission recommended that Rule 1.10 be amended to allow screening as a remedy to avoid imputation when a personally disqualified lawyer joins a new firm. *See* ABA Center for Professional Responsibility, Ethics 2000 Commission Report on the Model Rules of Professional Conduct: Rule 1.10, http://www.abanet.org/cpr/e2k/e2k-rule110.html (last visited Nov. 4, 2006) (providing the text of the Commission's recommended revision). The ABA House of Delegates, however, rejected the recommendation when it voted on the revision in August 2001. *See* ABA Center for Professional Responsibility, Ethics 2000 Commission Report on the Model Rules of Professional Conduct: Rule 1.10 as Passed by House, http://www.abanet.org/cpr/e2k/e2k-rule110h.html (last visited Nov. 4, 2006) (outlining the actions of the ABA House of Delegates on the Ethics 2000 recommended revisions).

jurisdictions allow screening under similar circumstances.[151] In not allowing screening in the general rule, the ABA took the cautious route, deciding that the potential problems with screening outweigh its benefits.

Rule 1.10 thus can be said to relate to the biblical principle of prudence. Bible translators rarely have selected the term "prudence" to reflect connotations contained in the original Hebrew or Greek.[152] However, the word is used in key verses in *Proverbs*, in which the author explains the purpose of the book:

> The proverbs of Solomon son of David, king of Israel:
> for attaining wisdom and discipline; for understanding words of insight; for acquiring a disciplined and prudent life, doing what is right and just and fair;
> for giving prudence to the simple, knowledge and discretion to the young.[153]

The Hebrew word translated as "prudence" in verse 4 is *'ormah*.[154] The term also appears in two verses in Proverbs 8: "You who are simple, gain prudence; you who are foolish, gain understanding . . . . I, wisdom,

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[151] In the Ethics 2000 Commission's Reporter's Explanation of Changes, the Reporter noted that, at that time, seven jurisdictions had adopted rules that allowed screening of lateral hires. *See* ABA Center for Professional Responsibility, Ethics 2000 Commission Report on the Model Rules of Professional Conduct: Reporter's Explanation of Changes to Rule 1.10, http://www.abanet.org/cpr/e2k/e2k-rule110rem.html (last visited Nov. 4, 2006). The Reporter added, "The testimony the Commission has heard indicates that there have not been any significant numbers of complaints regarding lawyers' conduct under these Rules." *Id.* Several judicial decisions have considered the propriety of screening, with some adopting the Model Rules' approach and others permitting screening. *See, e.g.*, Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988) (permitting screening as a general rule); Roberts v. Hutchins, 572 So. 2d 1231, 1234 n.3 (Ala. 1990) (not allowing screening); Kala v. Aluminum Smetling & Ref. Co., 688 N.E.2d 258 (Ohio 1998) (permitting screening as a general rule). The *Restatement of Law Governing Lawyers* and the New York Court of Appeals allow for screening of disqualified lawyers only if the confidential information held by the lawyer is "unlikely to be significant in the subsequent matter." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124(2)(a) (2000); *see also* Kassis v. Teacher's Ins. & Annuity Ass'n, 717 N.E.2d 674, 671 (N.Y. 1999).

[152] The New King James Version uses the word "prudence" seven times. *See* BibleGateway.com, Keyword Search Results: Prudence, http://www.biblegateway.com/keyword/?search=prudence&searchtype=all&version1=50&spanbegin=1&spanend=73 (last visited Nov. 15, 2006). The New International Version uses the term five times. *See id.* http://www.biblegateway.com/keyword/?search=prudence&searchtype=all&version1=31&spanbegin=1&spanend=73.

[153] *Proverbs* 1:1–4 (NIV). The New King James Version translates verses three and four as, "To receive the instruction of wisdom, justice, judgment, and equity; [t]o give prudence to the simple, to the young man knowledge and discretion." *Proverbs* 1:3–4. The word translated as "simple" is *p'tha'iy*, which is defined as "foolish, simple," JAMES STRONG, A CONCISE DICTIONARY OF THE WORDS IN THE HEBREW BIBLE 97, *reprinted in* THE HEBREW-GREEK KEY STUDY BIBLE: KING JAMES VERSION (Spiros Zodhiates ed., 1991) [hereinafter Zodhiates], or "lacking wisdom," BROWN ET AL., *supra* note 54, at 834.

[154] STRONG, *supra* note 153, at 92.

dwell together with prudence; I possess knowledge and discretion."[155] Hebrew lexicons indicate that the word as used here primarily means "prudence" but can also mean "discretion: guile, subtilty, wilily, and wisdom."[156]

Despite the relative infrequent use of the term "prudence," it is clear that Scripture esteems prudence as an important virtue. Bible translators, for instance, have often used the word "prudent" to capture the meaning in the original text.[157] Moreover, topical Bibles include numerous entries under the concept of prudence.[158]

Prudence is a broad concept, but certain aspects of the term specifically relate to Model Rule 1.10. First, one aspect of prudence in Scripture is avoiding haste and seeking wise counsel before acting.[159] A second aspect noted in Scripture is foreseeing danger and thus knowing how to avoid it.[160] Third, *Nave's Topical Bible* lists under "prudence" scripture in the epistles in which Paul encourages the early believers not to eat food sacrificed to idols if that action causes others to stumble.[161]

By taking the cautious route and imputing conflicts without the possibility for screening, Rule 1.10 reflects these three aspects of biblical prudence. Proponents of screening contend that preventing screening: (1) assumes that lawyers will violate their duties to their former clients; (2) penalizes clients of the new firm, and (3) unfairly decreases lawyer

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155 *Proverbs* 8:5, :12. Another version translates these verses: "O ye simple, understand wisdom [*'ormah*]: and, ye fools, be ye of an understanding heart . . . . I wisdom dwell with prudence, and find out knowledge of witty inventions." *Id.* (KJV).

156 *See* BROWN ET AL., *supra* note 54, at 791 (defining the term simply as "prudence"); STRONG, *supra* note 153, at 92 (defining the term as "discretion: guile, prudence, subtilty, wilily, and wisdom"); Zodhiates, *supra* note 153, at 1648 (providing its own section on "Lexical Aids to the Old Testament" and there defining the term as "prudence, discretion, and wisdom").

157 The New King James Version uses the term twenty-two times. *See* Crosswalk.com, Verse Search Results: Prudent, http://bible.crosswalk.com/OnlineStudy Bible/bible.cgi?new=1&word=prudent&section=0&version=nkj&language=en (last visited Nov. 17, 2006). The New International Version uses the term eleven times. *See id.* http://bible.crosswalk.com/OnlineStudyBible/bible.cgi?word=prudent&section=0&version=niv&new=1&oq=prudent (last visited on Nov. 17, 2006).

158 *See* NAVE, *supra* note 18, at 1017–18.

159 *See, e.g.*, *Proverbs* 24:6 ("For by wise counsel you will wage your own war, [a]nd in a multitude of counselors *there is* safety."), 25:8 ("Do not go hastily to court; [f]or what will you do in the end, [w]hen your neighbor has put you to shame?"). *Nave's* lists both of these passages under its entries for "prudence." NAVE, *supra* note 18, at 1017–18.

160 *See Proverbs* 22:3 ("A prudent man foresees evil and hides himself, [b]ut the simple pass on and are punished.").

161 NAVE, *supra* note 18, at 1018 (referencing 1 *Corinthians* 8:8–13); *see also Romans* 14:13–21 (instructing believers not to eat or drink anything that would cause others to stumble in their faith); 1 *Corinthians* 6:12 ("All things are lawful for me, but all things are not helpful. All things are lawful for me, but I will not be brought under the power of any.").

mobility.[162] Despite these concerns, the ABA's continued rule of imputation demonstrates prudence by recognizing the high level of temptation that attorneys face to violate client confidences and the high level of difficulty that exists to discover and prove such breaches.[163] Moreover, although the ABA has rejected the "appearance of impropriety" standard as a basis for disqualifying lawyers,[164] its refusal to allow screening generally does recognize that screening may feed into the skepticism the public already exhibits towards lawyers' ability to police themselves.[165]

Another biblical principle that is relevant to Model Rule 1.10 is accountability. Throughout Scripture, the Bible speaks of the importance of Christians operating in community. Most notably, Paul uses the metaphor of the "body" to show how Christians need each other to function most effectively in fulfilling the Christian mission.[166] In addition, the principle of biblical accountability is exemplified in the many relationships in Scripture in which individuals serve with or under others so that they can grow in their faith. The most evident example is in the ministry of Jesus himself in which he selected the twelve disciples so that he could teach and mentor them so that they, in turn, could be the leaders of the faith.[167] Paul also demonstrated the importance of this mentoring relationship in his association with Timothy.[168]

By instituting imputation, Rule 1.10 specifically points to principles of accountability in recognizing that lawyers working in a firm normally benefit professionally from being accountable to one another. For instance, the comment to Rule 1.6 ("Confidentiality") recognizes that lawyers in firms may discuss with each other information relating to their clients,[169] presumably often because they are able to glean insights from each other which will benefit the representation. In imputing conflicts, the rule affirms that lawyers in firms often consult with each other and that therefore the best policy, at least under the general rule

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162 CRYSTAL, *supra* note 44, at 292.

163 *See* FREEDMAN & SMITH, *supra* note 31, at 287 (outlining several reasons why the general prohibition against screening "relies on presumptions that are based on common sense and the practicalities of proof").

164 CRYSTAL, *supra* note 44, at 288.

165 *See* FREEDMAN & SMITH, *supra* note 31, at 288 ("A major purpose of the conflict rules is to allay that [public] skepticism, and an unpoliceable assurance of screening by a law firm is not likely to achieve that goal."); *see also Public Perceptions of Lawyers, Consumer Research Findings*, 2002 A.B.A. SEC. OF LITIG. REP. 4 (finding that the public believes that lawyers do a poor job of policing themselves).

166 1 *Corinthians* 12:12–31.

167 *See Matthew* 4:18–22 (calling of the first disciples); *Luke* 5:1–11 (same).

168 *See* 1 *Timothy* 6:11–21 (Paul's charge to Timothy); 2 *Timothy* 3:10–4:22 (same).

169 MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (2003).

for conflicts, is to disqualify the entire firm and remove any temptation to violate any screening mechanism.

H. Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employers
Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.18: Duties to Prospective Client

The above rules relate to conflicts of interest in particular areas. Model Rule 1.11 establishes standards that determine when lawyers moving in and out of government service are conflicted from current work activities.[170] Model Rule 1.12 provides standards for conflicts when lawyers move from serving as judges or third-party neutrals on a matter to representing one of the parties involved.[171] Model Rule 1.18 outlines standards for deciding when lawyers may be conflicted because of their consultation with a former prospective client.[172]

Because these rules also concern conflicts of interest, they relate to the same biblical principles as the conflicts rules above: confidentiality, loyalty, prudence, accountability, and integrity. What is noteworthy about these particular rules, however, is that they allow screening of attorneys who are conflicted because of their former service as a government lawyer (Rule 1.11(b)),[173] their former service as a judge or other third-party neutral (Rule 1.12(c)),[174] or their consultation with a former prospective client (Rule 1.18(d)).[175]

The question therefore arises whether the fact that screening is allowed in these rules is less biblically "prudent" than the disallowance of screening in Rule 1.10. As noted above, biblical prudence refers generally to discretion and wisdom,[176] so it is difficult to conclude that biblical prudence leads to any specific conclusions about whether screening or general imputation is less prudent.[177] Monroe Freedman

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170 *Id.* R. 1.11.

171 *Id.* R. 1.12(a).

172 *Id.* R. 1.18(c).

173 *Id.* R. 1.11(b).

174 *Id.* R. 1.12(c).

175 *Id.* R. 1.18(d).

176 *See supra* note 156 and accompanying text.

177 Rule 1.18 provides that lawyers who receive confidential information from a prospective client are not disqualified, and thus need not be screened, unless that information "could be significantly harmful" to that former prospective client. MODEL RULES OF PROF'L CONDUCT R. 1.18(c) (2003). Moreover, the comment to Rule 1.10 provides that lawyers are not disqualified where the person who is conflicted is a nonlawyer although the comment does recommend that such nonlawyer should be screened. *Id.* R. 1.10 cmt. 4. Analyzing whether these exceptions to imputation and lawyer screening are

and Abbe Smith contend that the reason screening has been allowed in these cases is due to business pressures on lawyers to increase their job mobility.[178] It is difficult to justify, then, why screening is allowed in certain contexts but not in the general context.[179] If this distinction is not justifiable, biblical principles of equity and justice would support treating like situations alike.

Regarding biblical prudence, however, what can be said is that such prudence recognizes that individuals are subject to temptations and that avoiding those temptations to sin is important in avoiding committing the sin itself. For instance, *Proverbs* 27:12 reads, "A prudent man foresees evil and hides himself . . . ."[180] Thus, *if* screening is allowed, setting up proper screening procedures would be prudent.

In these rules, screening is appropriate if "the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom" and "written notice is promptly given" to the respective parties, in Rules 1.11 and 1.12, so that they can "ascertain compliance with the provisions of this rule."[181] The ABA adopted in 2001 a new rule, Rule 1.0(k), which defines "screened." That rule defines the term as "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protected information that the isolated lawyer is obligated to protect under these rules or other law."[182] The comment to Rule 1.0, in turn, provides more information on appropriate screening, most importantly that the disqualified lawyer should acknowledge the obligation not to communicate about the matter and that the other lawyers working on the matter should be informed of the screening.[183] The comment provisions, although important, are not binding,[184] and the comment adds that "[a]dditional screening measures that are appropriate for the particular matter will depend on the circumstances."[185]

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biblically prudent is too specific based on the general nature of the biblical passages on that virtue.

178 FREEDMAN & SMITH, *supra* note 31, at 285–86.

179 *See id.* at 286 n.106.

180 *Proverbs* 27:12.

181 MODEL RULES OF PROF'L CONDUCT R. 1.11(b), 1.12(c) (2003). Rule 1.18(d)(2) provides for written notice to the prospective client but does not require such client to determine the propriety of the screening. *Id.* R. 1.18(d)(2).

182 *Id.* R. 1.0(k).

183 *Id.* R. 1.0 cmt. 4.

184 *See id.* pmbl. para. 14 ("Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.").

185 *Id.* R. 1.0 cmt. 9.

The ABA thus has sought to find a balance by requiring screening but not being too restrictive in dictating how the screening should be implemented. Many biblical passages point to the individual's ability to "pick his battles" wisely and discern when it is best to avoid conflict.[186] In this respect, the ABA's balance may demonstrate prudence; it required the basic elements of screening but "picked its battles" by not mandating universal screening dictates in all circumstances.

I. Rule 1.13: Organization as Client

Rule 1.13 covers a lawyer's basic ethical responsibilities when representing organizations. The rule begins by providing the foundational principle that lawyers who represent organizations represent the organization, not its constituents.[187] The rule then provides standards governing how lawyers should proceed when they learn that one of the constituents is acting in a way that injures the organization.[188]

In affirming the lawyers' duty to their client, the organization, Rule 1.13 affirms biblical principles of loyalty, which are described above. As with representing two clients with conflicts, a lawyer confronts problems when representing both an organization and its constituents for, as quoted above from *Matthew*, "No one can serve two masters; for either he will hate the one and love the other, or else he will be loyal to the one and despise the other. You cannot serve God and mammon."[189]

Rule 1.13(c) also relates to the biblical principle of confidentiality. Specifically, this rule allows an attorney to reveal confidential information of the organization to someone outside the organization if the highest authority fails to address a clear violation of law that the lawyer believes will result in "substantial injury" to the organization.[190] Although revelations of confidential information can often be seen as a breach of trust,[191] such revelation here actually affirms the principle of trust because the revelation is necessary for the attorney to uphold his loyalty to his client, the organization.

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186 *See, e.g.*, *Matthew* 12:14–16 (Jesus in avoiding his enemies); *Mark* 3:7 (same); *John* 11:47–54 (same); *Acts* 16:3 (Paul in circumcising Timothy because of the Jews who lived where they were traveling).

187 MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2003).

188 *Id.* R. 1.13(b)–(f). Rule 1.13(g) addresses the situation when a lawyer who is representing an organization also represents one of its constituents. *See id.* R. 1.13(g).

189 *Matthew* 6:24.

190 MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2003). In response to the Enron and other corporate scandals, the ABA amended the rule in 2003 to adopt this "reporting out" provision. *See* CRYSTAL, *supra* note 44, at 478.

191 *See Proverbs* 11:13 ("A talebearer reveals secrets, [b]ut he who is of a faithful spirit conceals a matter.").

One might contend that lawyers may nevertheless be duplicitous in dealing with constituents who believe the lawyers are representing them, not the organization. However, the rule avoids such an ethical quandary and affirms the biblical virtue of honesty by requiring attorneys in Rule 1.13(f) to explain to the organization's constituents that they represent the organization when the attorneys learn that the organization's interest and those of the constituent with which they are dealing are adverse.[192]

J. Rule 1.14: Client with Diminished Capacity

Model Rule 1.14 provides the ethical guidelines for how attorneys are to deal with clients with diminished capacity, whether because of minority, mental impairment, or some other reason.[193] The theme of the rule is that attorneys representing such persons should "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[194] An attorney is authorized to consult others or seek the appointment of a guardian ad litem only under very limited circumstances.[195] The comment to the rule underscores this theme: "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect."[196]

In presenting this theme, Rule 1.14 affirms the biblical virtue of respect, specifically respect for the personhood of others. Scripture teaches that all individuals are created in the image of God.[197] Moreover, Jesus spent considerable time ministering to the disabled, healing many of them.[198] In recounting these healings, Scripture often records how the individuals were touched spiritually as well as physically.[199] By affirming individuals' worth, even when their ability to make decisions may be "diminished," Rule 1.14 is in harmony with biblical principles of self-worth.

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192 MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2003).

193 *Id.* R. 1.14.

194 *Id.* R. 1.14(a).

195 Specifically, the lawyer can take such protective measures "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest." *Id.* R. 1.14(b).

196 *Id.* R. 1.14 cmt.

197 *Genesis* 1:26 ("Then God said, 'Let Us make man in Our image, according to Our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth.'").

198 For instance, Jesus healed a man with leprosy (*Matthew* 8:2–4), a paralyzed man (*Matthew* 9:2–7), two blind men (*Matthew* 9:27–31), a deaf mute (*Mark* 7:31–37), and a crippled woman (*Luke* 13:11–13), among others.

199 *See John* 9:1–34 (reciting the story of the healing of a man born blind).

Rule 1.14 also relates to the principles of confidentiality, prudence, and discretion. The rule asserts that information relating to the representation of individuals with diminished capacity remains confidential and can be revealed only to the extent needed to take protective actions to protect the client's interests.[200] As for prudence and discretion, the rule involves these principles in requiring attorneys to make the difficult decision of whether to take protective action in dealing with a client with diminished capacity.[201] The rule does not give attorneys much guidance in making this decision; in two instances the lawyer's actions are based on what he deems "reasonable."[202] The biblical virtues of prudence and discretion can guide Christian attorneys in making this decision. As noted above, one aspect of biblical prudence is avoiding haste and seeking wise counsel before acting,[203] and a related aspect is foreseeing danger and thus knowing how to avoid it.[204] In considering whether to take protective action, attorneys applying these principles would deliberate intently before making such decision and would, when possible, consult with others.

K. Rule 1.15: Safekeeping Property

Rule 1.15 provides several guidelines for how attorneys should handle and manage client funds when they receive and deliver them.[205] In outlining these guidelines, the rule relates to the biblical principle of honesty. One of the Ten Commandments provides, "You shall not steal."[206] The rule follows this principle by specifically requiring attorneys to properly identify the property of clients and to maintain such property separately from the lawyer's own property. In addition, the rule requires attorneys to keep accurate records of account funds and other property owned by the client.[207] Lawyers are consistently disciplined for failing to manage client funds and maintain accurate

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200 MODEL RULES OF PROF'L CONDUCT R. 1.14(c) (2003); *see Proverbs* 11:13 (encouraging the keeping of secrets confidential).

201 MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2003).

202 *Id.*

203 *See supra* note 159 and accompanying text.

204 *E.g.*, *Proverbs* 22:3 ("A prudent man foresees evil and hides himself, [b]ut the simple pass on and are punished."). For a more detailed discussion on how prudence relates to discretion, see the sections above on Rules 1.2 and 1.10.

205 MODEL RULES OF PROF'L CONDUCT R. 1.15 (2003).

206 *Exodus* 20:15. Stealing often begins with coveting another's property, and *Exodus* 20:17 reads, "You shall not covet your neighbor's house; you shall not covet your neighbor's wife, nor his male servant, nor his female servant, nor his ox, nor his donkey, nor anything that *is* your neighbor's."

207 MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2003).

records.[208] Scripture, however, affirms the importance of attending to the details in developing any enterprise; *Proverbs* 24:3–4 provides, "Through wisdom a house is built, [a]nd by understanding it is established; [b]y knowledge the rooms are filled with all precious and pleasant riches."[209]

Rule 1.15 also relates to the biblical virtues of personal responsibility and trustworthiness.[210] As noted above, 1 *Corinthians* 4:2 states, "Now it is required that those who have been given a trust must prove faithful."[211] Although Paul wrote this passage expressly in the context of being trusted with information, not property, nothing indicates that the principles in the passage do not extend to property. Moreover, the importance of a person's managing property entrusted to him relates to the biblical principle of stewardship. Stewardship is evidenced in the story of God's creation. The first thing God said to Adam and Eve was "[b]e fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth."[212] Scholars have interpreted this passage as indicating the responsibility mankind has for managing creation, which God entrusted to it at the beginning at time.[213] In a similar way, lawyers who are entrusted with client property have a responsibility to manage it well and ensure that the "entrustor's" interests are protected.

L. Rule 1.16: Declining or Terminating Representation

Rule 1.16 presents provisions governing when attorneys must decline representation and withdraw from representation and when they may withdraw from representation.[214] In presenting these guidelines, the rule relates to several biblical virtues. First, the rule affirms the importance of the biblical principle of competency, which is discussed above in detail regarding Rule 1.1 ("Competence"). Specifically, Rule 1.16(a)(2) relates to the biblical principle by providing that attorneys must decline representation when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the

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208 *See* AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROF'L CONDUCT 249–57 (5th ed. 2003) [hereinafter ANNOTATED MODEL RULES] (listing cases concerning lawyers' violations of Rule 1.15).

209 *Proverbs* 24:3–4.

210 As noted in footnote 94, *supra*, trustworthiness relates to the virtue of responsibility, which entails being responsible for those things entrusted to you.

211 1 *Corinthians* 4:2 (NIV); *see also* 1 *Timothy* 6:20.

212 *Genesis* 1:28. The stewardship principle is also extended to the gifts and talents God gives individuals. *See Matthew* 25:14–30 (parable of the talents).

213 *See* Herb Williamson, What Does the Bible Say About Stewardship?, http://www.umcgiving.org/News/pdfs/AboutStewardship.pdf (last visited Nov. 4, 2006).

214 MODEL RULES OF PROF'L CONDUCT R. 1.16 (2003).

client."[215] By including this provision, the rule relates to *Colossians* 3:23, which reads: "And whatever you do, do it heartily, as to the Lord and not to men . . . ."[216] Christian lawyers should seek high standards in their representation and if their impairment would cause them to believe they are not upholding such standards, they must terminate the representation.

In the rule's section on when an attorney may withdraw from representation, the rule first relates to the biblical principle of submission to authorities. Rule 1.16(b)(2) and (3) expressly provide that lawyers may withdraw if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent" or if "the client has used the lawyer's services to perpetrate a crime or fraud."[217] In recognizing a lawyer's responsibility to submit to the state and not commit crime or fraud,[218] the rule affirms the biblical principle of submitting to governing authorities. This principle relates specifically to various Model Rules, and the seminal biblical passage on this point is *Romans* 13:1–3, which reads:

> Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that exist are appointed by God. Therefore whoever resists the authority resists the ordinance of God, and those who resist will bring judgment on themselves. For rulers are not a terror to good works, but to evil. Do you want to be unafraid of the authority? Do what is good, and you will have praise from the same.[219]

In section (b)(4), the rule also relates to the virtue of integrity. That section allows the lawyer to withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[220] The lawyer's personal integrity is upheld through the rule because the lawyer is allowed to prioritize such integrity over continued devotion to his client; lawyers are not required to continue representation when such representation violates a principle the lawyer deems central to his or her character.[221]

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215 *Id.* R. 1.16(a)(2).

216 *Colossians* 3:23. The next verse continues, "knowing that from the Lord you will receive the reward of the inheritance; for you serve the Lord Christ." *Colossians* 3:24.

217 MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(2)–(3) (2003).

218 *See id.* R. 8.4(b)–(c) (providing that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" or to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

219 *Romans* 13:1–3.

220 MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2003).

221 *See* Gantt, *supra* note 31, at 375–77.

Finally, in sections (b)(5) and (b)(6), the rule relates to the principle of personal responsibility. These sections allow attorneys to withdraw in the case when the client fails to fulfill an obligation to the lawyer after the client has been warned and in the case when the representation "will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client."[222] In both of these instances, the rule recognizes that lawyers' responsibility to their clients engender some responsibilities from the client in return. Scripture affirms that when individuals work, they are entitled to reasonable wages for their labor.[223] Therefore, lawyers are biblically justified in terminating representation when the clients do not fulfill their reasonable obligations to their counsel.

M. Rule 1.17: Sale of Law Practice

Rule 1.17 outlines specific guidelines that govern how attorneys should handle the sale of their law practice.[224] In providing these guidelines, the rule affirms the biblical virtue of honesty. It specifically requires the selling attorney to give written notice to each of the seller's clients about the sale.[225]

The rule also relates to the biblical principle of loyalty by prohibiting the selling attorney from engaging either in the private practice of law or in the specific practice area that has been sold in the geographic area or jurisdiction where the practice was conducted.[226] Through the first restriction, the rule avoids the potentiality for conflicts and the appearance that the lawyer is being disloyal to his former clients by selling the practice but continuing to practice in that geographic area. The second restriction, however, does not equally avoid these concerns because the attorney can continue to practice in other areas of law within the jurisdiction.[227] As discussed in other sections of this article, Scripture affirms the virtues of loyalty and trustworthiness.[228] Christian attorneys may determine that upholding these virtues leads them to follow procedures above and beyond Rule 1.17 in order to ensure they

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222 MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5)–(6) (2003).

223 *See, e.g.*, *Romans* 4:4 (NIV) ("Now when a man works, his wages are not credited to him as a gift, but as an obligation."). *But cf. Matthew* 20:1–16 (Jesus' parable that grace applies in certain circumstances such that individuals receive more than what they deserve).

224 MODEL RULES OF PROF'L CONDUCT R. 1.17 (2003).

225 *Id.* R. 1.17(c).

226 *Id.* R. 1.17(a).

227 *Cf.* ANNOTATED MODEL RULES, *supra* note 208, at 281 (discussing the 2002 revision allowing attorneys to sell only a practice area and not their entire practice).

228 *See, e.g.*, *Matthew* 6:24 ("No one can serve two masters; for either he will hate the one and love the other, or else he will be loyal to the one and despise the other. You cannot serve God and mammon."); *see also supra* notes 111–28 and accompanying text.

avoid a situation where selling all or some of their practice appears to breach the trust their clients have placed in them.

II. COUNSELOR

A. Rule 2.1: Advisor

Model Rule 2.1 provides general principles for attorneys in their role as advisors to their clients. It provides first that the lawyer must "exercise independent professional judgment and render candid advice."[229] In this provision, the rule affirms the biblical virtues of honesty and personal responsibility. Lawyers are not simply to tell the clients what the clients want to hear; as the comment to the rule states, "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[230] Part of a lawyer's responsibility to his or her client is to be competent,[231] and competence necessitates that the lawyer give honest advice based on his or her professional opinion. Scripture includes many examples of wise men seeking wise counselors,[232] and lawyers thus uphold this biblical principle if they provide their clients with such counsel.

Rule 2.1 also affirms the biblical principle of integrity, most notably through the second sentence of the rule, which reads that lawyers may counsel clients not only on the law but also on "other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[233] The comment adds, "Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."[234] Through this recognition, the rule upholds the personal integrity—or personal integration—of the lawyer by authorizing the lawyer to bring nonlegal considerations into his or her discussions with the client. Lawyers are therefore not obliged to separate artificially their professional lives from their nonlegal, and sometimes quite personal, opinions on the matter. The rule thus allows lawyers to avoid being like the Pharisees and instead to match their actions with their motives, intentions, and feelings.[235]

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229 MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

230 *Id.* R. 2.1 cmt. 1.

231 *See id.* R. 1.1.

232 *See, e.g.*, 1 *Chronicles* 27:32.

233 MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003). As is discussed throughout this article, this virtue of personal integrity is reflected in other Model Rules, notably 1.2, 1.5, 1.7–1.12, 1.16, 3.3–3.5, 3.8, 3.9, 5.4, 5.7, 6.2–6.4, 7.2, 7.6, and 8.4.

234 *Id.* R. 2.1 cmt. 2.

235 For a detailed discussion of the relationship between Rule 2.1 and personal integrity, see Gantt, *supra* note 44. *See also* Higginson, *supra* note 134, at 24; *Matthew* 5:21–28, 23:27.

B. Rule 2.3: Evaluation for Use by Third Persons

Rule 2.3 allows a lawyer to evaluate a matter affecting a client for a third party if the lawyer reasonably believes that the review is compatible with the lawyer-client relationship.[236] However, a lawyer must obtain informed consent from the client when he knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely.[237] Unless disclosure is authorized in relation to a report, however, such evaluations are protected under Rule 1.6.[238] Rule 2.3 relates to the virtues of loyalty, confidentiality, and fairness.[239]

One could argue that the generally permissive nature of this rule is supported in *Philippians*, "[l]et each of you look out not only for his own interests, but also for the interests of others."[240] In its limitations, however, Rule 2.3 recognizes the importance of a lawyer's loyalty to his client. As discussed in other sections of this article, several scriptures describe the biblical view of loyalty.[241] Jesus puts it best in *Matthew*, "[n]o one can serve two masters; for either he will hate the one and love the other, or else he will be loyal to the one and despise the other."[242] One aspect of loyalty that is present in Scripture and related to this rule is the biblical injunction against having a "double" heart or mind. In *Psalms*, for example, the Psalmist complains, "[t]hey speak idly everyone with his neighbor; *with* flattering lips *and* a double heart they speak";[243] and Paul says that deacons should "be reverent, not double-tongued."[244] Similarly, *James* notes, "a double-minded man" is "unstable in all his ways,"[245] and later exhorts, "purify your hearts, you double-minded."[246] Rule 2.3 aligns with these scriptural principles by regulating situations

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236 MODEL RULES OF PROF'L CONDUCT R. 2.3(a) (2003). The ABA deleted Rule 2.2 in February 2002, and the Model Rules no longer contain a rule with that number. *See* ABA Center for Professional Responsibility, Ethics 2000 Commission Report on the Model Rules of Professional Conduct: Rule 2.2, http://www.abanet.org/cpr/e2k/e2k-redline.html (last visited Nov. 21, 2006).

237 *Id.* R. 2.3(a)–(b).

238 *Id.* R. 2.3(c).

239 Virtues related to Rule 1.6 would also obviously apply here. *See supra* note 93–107.

240 *Philippians* 2:4.

241 Loyalty as a virtue is discussed in detail in the above section on Rules 1.7 to 1.9. *See supra* notes 111–28 and accompanying text.

242 *Matthew* 6:24; *see also* 1 *Corinthians* 4:2 ("Moreover it is required in stewards that one be found faithful.").

243 *Psalms* 132:2; *see also* 1 *Chronicles* 12:33.

244 1 *Timothy* 3:8.

245 *James* 1:8.

246 *James* 4:8.

where the lawyer would be "double-minded" by serving the third party in a way that limits his representation of his client.

Confidentiality is certainly of importance to this rule. *Proverbs* states that, "[a] talebearer reveals secrets, but he who is of a faithful spirit conceals a matter,"[247] and that "[t]he heart of the righteous studies how to answer, but the mouth of the wicked pours forth evil."[248] *Deuteronomy* states: "The secret things belong to the LORD our God, but those things which are revealed belong to us and to our children forever, that we may do all the words of this law."[249] In any dealings with third parties, therefore, the Christian attorney must appropriately maintain the confidences of his client and keep the interests of his client paramount.[250]

C. Rule 2.4: Lawyer Serving as Third-Party Neutral

The provisions of Rule 2.4 apply when an attorney assists two or more non-clients in resolving a dispute as an arbitrator, mediator, or in another third-party capacity.[251] Unrepresented parties must be informed that the lawyer is not representing them, and they must be clear on the difference between an attorney's role in this situation and when representing a client.[252] Therefore, Rule 2.4 implicates the virtues of reconciliation and trustworthiness.

The principle of reconciliation is an important theological principle in Scripture. Paul writes in *Corinthians*:

> Now all things *are* of God, who has reconciled us to Himself through Jesus Christ, and has given us the ministry of reconciliation, that is, that God was in Christ reconciling the world to Himself, not imputing their trespasses to them, and has committed to us the word of reconciliation.[253]

Although this passage speaks specifically of how Christ reconciled God to mankind, Christian ministries have adopted this concept of reconciliation as a core principle in how Christians should address and

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247 *Proverbs* 11:13; *see also Proverbs* 10:19 ("In the multitude of words sin is not lacking, but he who restrains his lips is wise."), 12:23 ("A prudent man conceals knowledge, but the heart of fools proclaims foolishness."), 13:16 ("Every prudent *man* acts with knowledge, but a fool lays open his folly."); *Amos* 5:13 ("Therefore the prudent keep silent at that time.").

248 *Proverbs* 15:28.

249 *Deuteronomy* 29:29.

250 *James* 4:8.

251 MODEL RULES OF PROF'L CONDUCT R. 2.4(a) (2003).

252 *Id.* R. 2.4(b).

253 2 *Corinthians* 5:18–19.

resolve conflict.[254] Christians serving as third-party neutrals thus should be mindful of this principle.

The virtue of trustworthiness is evident in how Rule 2.3 instructs third-party neutrals to explain their role in the matter to unrepresented parties. As discussed in the above section on Rules 1.7 to 1.9, Scripture recognizes the importance of an individual's being faithful to another when that person puts his or her trust in the individual. For example, 1 *Corinthians* 4:2 provides, "Now it is required that those who have been given a trust must prove faithful."[255] Trust in this sense conveys the belief that someone is actually the person—in character as well as identity—he or she purports to be.[256]

In sum, the biblical role of a third-party neutral is described in *Galatians*: "Now a mediator does not *mediate* for one *only*,"[257] clearly indicating that the mediator must consider *both* sides in reaching an agreement. Similarly, 1 *Timothy* makes plain that "*there* is one God and one Mediator between God and men, *the* Man Christ Jesus,"[258] suggesting that Christian third-party neutrals should attempt to emulate the Savior in their deportment. They should be trustworthy and faithful to their role by fairly considering the interests of both parties in seeking to bring them towards reconciliation.

III. ADVOCATE

A. Rule 3.1: Meritorious Claims and Contentions

Pursuant to Rule 3.1, no proceeding may be brought or defended, or any issue asserted or controverted unless there is a non-frivolous basis in law and fact for so-doing.[259] The lawyer for a criminal defendant or a

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254 For instance, the well-known Christian conciliation ministry Peacemaker Ministries references this passage in describing its distinctive approach toward conflict reconciliation. *See* What Makes Peacemaker Ministries Distinctive?, http://www.peacemaker.net/site/c.aqKFLTOBIpH/b.1172255/apps/s/content.asp?ct=1245257 (last visited Nov. 9, 2006).

255 1 *Corinthians* 4:2 (NIV); *see also* 1 *Timothy* 6:20 (encouraging Timothy to be faithful in being entrusted with the gospel); *supra* notes 94, 117–18 and accompanying text.

256 *Hayford's Bible Handbook* adds that Hebrew word *chasah* translated as "trust" connotes "to trust, to hope, to make someone a refuge." HAYFORD'S, *supra* note 71, at 784.

257 *Galatians* 3:20; *see also Galatians* 3:19 ("[A]*nd it was* appointed through angels by the hands of a mediator . . . .").

258 1 *Timothy* 2:5; *see also Hebrews* 12:24 ("Jesus [is] the Mediator of the new covenant . . . .").

259 A frivolous action is one where the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (2003).

respondent facing incarceration, however, may require that every element of the case be established.[260] This rule specifically embodies the virtues of honesty, reasonableness, and zeal for a worthwhile cause.

Regarding honesty, this rule appears to be closely related to the biblical proscription against being a false witness in a case, best known from the commandment that "[y]ou shall not bear false witness against your neighbor."[261] Indeed, this concern seems to have been a continuing worry among the Israelites. *Psalms* pleads, "Do not deliver me to the will of my adversaries; [f]or false witnesses have risen against me, [a]nd such as breathe out violence,"[262] and *Proverbs* notes that two of the seven things the Lord hates are "[a] false witness *who* speaks lies, and one who sows discord among brethren."[263] Jesus himself notes in *Matthew* that "out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false witness, [and] blasphemies. These are *the things* which defile a man . . . ."[264] In fact, false witnesses were employed by the chief priests, elders, and the council to bring Christ to his death.[265]

Proverbs further notes that, "[h]e *who* speaks truth declares righteousness, [b]ut a false witness, deceit";[266] and *Psalms* states that the person who may stand in the Lord's holy place is "[h]e who has clean hands and a pure heart, [w]ho has not lifted up his soul to an idol, [n]or sworn deceitfully."[267] *Deuteronomy* prescribes the treatment to be accorded someone who swears falsely:

> If a false witness rises against any man to testify against him of wrongdoing, then both men in the controversy shall stand before the LORD, before the priests and the judges who serve in those days. And the judges shall make careful inquiry, and indeed, if the witness is a false witness, who has testified falsely against his brother, then you shall do to him as he thought to have done to his brother; so you shall put away the evil from among you.[268]

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260 *Id.* R. 3.1.

261 *Exodus* 20:16; *see also Deuteronomy* 5:20, 19:16–20.

262 *Psalms* 27:12; *see also Proverbs* 3:30 (NIV) ("Do not accuse a man for no reason—when he has done you no harm.").

263 *Proverbs* 6:19; *see also Proverbs* 19:5 ("A false witness will not go unpunished, and *he who* speaks lies will not escape."), 19:28 (NIV) ("A corrupt witness mocks at justice."), 21:28 ("A false witness shall perish . . . ."), 25:18 (NIV) ("Like a club or a sword or a sharp arrow is the man who gives false testimony against his neighbor.").

264 *Matthew* 15:19–20.

265 *Matthew* 26:59–66; *see also Mark* 14:55–64; *Acts* 6:13. For a further discussion of false witnesses, see *infra* notes 291–309 and accompanying text (discussing Rule 3.3).

266 *Proverbs* 12:17; *see also Proverbs* 12:19 ("The truthful lip shall be established forever, but a lying tongue *is* but for a moment."), 12:22 ("Lying lips *are* an abomination to the LORD, [b]ut those who deal truthfully *are* His delight."), 15:26 ("The thoughts of the wicked *are* an abomination to the LORD, [b]ut *the words* of the pure *are* pleasant.").

267 *Psalms* 24:4.

268 *Deuteronomy* 19:16–19.

The wise attorney should pattern himself or herself on the allegorical description of wisdom in the Bible.

> Listen, for I will speak of excellent things,
> And from the opening of my lips *will* come right things;
> For my mouth will speak truth;
> Wickedness *is* an abomination to my lips.
> All the words of my mouth *are* with righteousness;
> Nothing crooked or perverse *is* in them.
> They *are* all plain to him who understands,
> And right to those who find knowledge.[269]

Similarly, wherever possible, the Christian attorney should attempt to follow Paul's advice: "[W]hatever things are true, whatever things are noble, whatever things are just, whatever things are pure, whatever things are lovely, whatever things are of good report, if there is any virtue and if there is anything praiseworthy—meditate on these things."[270] Contrast this with the lot of the deceitful man whose tongue devises mischief: "You love evil more than good, [l]ying rather than speaking righteousness. . . . You love all devouring words, [y]*ou* deceitful tongue. God shall likewise destroy you forever; [h]e shall take you away, and pluck you out of *your* dwelling place, [a]nd uproot you from the land of the living."[271]

The Christian attorney should echo the biblical plea: "take not the word of truth utterly out of my mouth, [f]or I have hoped in Your ordinances."[272] *Proverbs* says that, "[r]ighteous lips *are* the delight of kings, [a]nd they love him who speaks *what is* right."[273] Similarly, as individuals are called to "[p]rovid[e] . . . for honest things, not only in the sight of the Lord, but also in the sight of men,"[274] every man should "'speak truth with his neighbor,' for we are members of one another."[275] To abide by the numerous biblical precepts on honesty, the Christian attorney should thus stick strictly to the truth and should not attempt to deceive others with nonmeritorious claims.

Regarding the other related virtues of reasonableness and zeal for a worthwhile cause, Scripture goes beyond Rule 3.1 in encouraging Christian attorneys to balance those virtues by not stirring up unnecessary strife and by avoiding litigation when possible.[276] In

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269 *Proverbs* 8:6–9.

270 *Philippians* 4:8.

271 *Psalms* 52:3–5.

272 *Psalms* 119:43; *see also* Beggs, *supra* note 1, at 841 (noting that "*Proverbs* condemns any form of dishonesty").

273 *Proverbs* 16:13.

274 2 *Corinthians* 8:21 (KJV).

275 *Ephesians* 4:25.

276 David Hoffman, who published the United States' first text on legal ethics, "condemn[ed] nuisance litigation as a form of extortion." Gordon J. Beggs, *Laboring Under*

Proverbs, Solomon instructs "What you have seen with your eyes do not bring hastily to court, for what will you do in the end if your neighbor puts you to shame?"[277] Similarly, Jesus instructs his followers in *Matthew*, "Settle matters quickly with your adversary who is taking you to court. Do it while still with him on the way, or he may hand you over to the judge, and the judge may hand you over to the officer, and you may be thrown into prison."[278]

B. Rule 3.2: Expediting Litigation

According to Model Rule 3.2, "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[279] This rule incorporates the virtues of diligence, preparedness, and readiness.

The Christian attorney should attempt to emulate God as depicted in *Psalms* 22: "[D]o not be far from Me . . . hasten to help Me!"[280] God has "commanded *us* to keep [His] precepts diligently."[281] Clearly a similar attitude toward legal practice is required not only because it is the lawyer's livelihood and calling,[282] but also because the expediting of a just cause is surely pleasing to God.[283]

Unlike the king's dilatory wedding guests,[284] but like the ten wise virgins of Jesus' parable, the Christian attorney should always be prepared and ready to proceed, for we "know neither the day nor the

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the Sun: An Old Testament Perspective on the Legal Profession, 28 PAC. L.J. 257, 264 (1996) (citing DAVID HOFFMAN, A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (1836), *reprinted in* AMERICAN LAW: THE FORMATIVE YEARS 754 (Arno Press 1972)).

277 *Proverbs* 25:7–8 (NIV); *see also Proverbs* 6:16–19 (stating that "one who sows discord among brethren" is an "abomination" to the Lord). Unfortunately, the current public perception of attorneys in America does not live up to this standard. According to one study, "Americans say that lawyers are greedy, manipulative, and corrupt" and complain that they "misrepresent their qualifications, overpromise" and "are not upfront about their fees." *Public Perceptions of Lawyers*, *supra* note 165.

278 *Matthew* 5:25 (NIV).

279 MODEL RULES OF PROF'L CONDUCT R. 3.2 (2003).

280 *Psalms* 22:19.

281 *Psalms* 119:4.

282 *See Proverbs* 10:4 ("He who has a slack hand becomes poor, [b]ut the hand of the diligent makes rich."), 12:24 ("The hand of the diligent will rule, [b]ut the lazy *man* will be put to forced labor."), 13:4 ("The soul of a lazy *man* desires, and *has* nothing; [b]ut the soul of the diligent shall be made rich."), 22:29 ("Do you see a man *who* excels in his work? He will stand before kings; [h]e will not stand before unknown *men*."), 27:23 ("Be diligent to know the state of your flocks, [a]*nd* attend to your herds.").

283 *See Proverbs* 15:23 ("A man has joy by the answer of his mouth, [a]nd a word *spoken* in due season, how good it is!").

284 *Matthew* 22:2–8.

hour in which the Son of Man is coming."[285] Paul tells Titus that believers should "be subject to rulers and authorities, to obey, to be ready for every good work."[286] Diligence will be rewarded:

> For God *is* not unjust to forget your work and labor of love which you have shown toward His name, *in that* you have ministered to the saints, and do minister. And we desire that each one of you show the same diligence to the full assurance of hope until the end . . . .[287]

Delay and hesitation, on the other hand, are to be avoided. Jesus states in *Luke* that "[n]o one, having put his hand to the plow, and looking back, is fit for the kingdom of God."[288] Similarly, many verses in *Proverbs* contrast diligence and the sluggard.[289] The Christian attorney thus should make sure that he or she does not unnecessarily hold back the course of litigation, but rather works to ensure prompt operation of the legal process.[290]

C. Rule 3.3: Candor Toward the Tribunal

Model Rule 3.3 prohibits an attorney from knowingly making a false statement of fact or law to a tribunal, failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer,[291] failing to disclose legal authority in the jurisdiction which is directly adverse to his client and not disclosed by opposing counsel, or offering false evidence.[292] A lawyer who represents a client in an adjudicative proceeding and who has knowledge of criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.[293] These duties continue to the close of a proceeding and may mandate disclosure of information otherwise protected by Rule 1.6.[294] In an ex parte proceeding, a lawyer shall inform the court of all material facts enabling

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285 *Matthew* 25:13; *see also Matthew* 24:44 ("Therefore you also be ready, for the Son of Man is coming at an hour you do not expect."), 25:1–14.

286 *Titus* 3:1.

287 *Hebrews* 6:10–11.

288 *Luke* 9:62; *see also Hebrews* 6:12.

289 *See supra* note 21; *Proverbs* 12:24.

290 As noted in the section on 3.1, Jesus instructs his followers to settle matters quickly before going to court. *Matthew* 5:25. A corollary to this principle would be to continue the process of reaching a quick resolution even after the formal litigation process has begun.

291 At least one Christian legal scholar has commented that the Model Rules attempt a distinction between candor and honesty that is not supported by Scripture. *See* Beggs, *supra* note 1, at 841–43 (noting that, unlike Rule 3.3, "*Proverbs* leaves no room for deception").

292 MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1)–(4) (2003).

293 *Id.* R. 3.3(b).

294 *Id.* R. 3.3(b)–(c).

it to make an informed decision, whether or not these are adverse.[295] Virtues involved in this rule include honesty, personal responsibility, fairness, integrity, and zeal for a worthwhile cause.

Biblical repugnance for false witnesses has already been discussed under Rule 3.1.[296] As that discussion confirms, Christian attorneys should deal with the tribunal as if they were giving an "account to Him who is ready to judge the living and the dead."[297] Like a good servant of the Lord, it should be said of the Christian attorney that, "[t]he law of truth was in his mouth, [a]nd injustice was not found on his lips. He walked with Me in peace and equity, [a]nd turned many away from iniquity."[298]

The passages on false witnesses are uniquely relevant to Rule 3.3 in that Rule 3.3(a)(3) concerns the controversial situation of how lawyers should respond when they know their client has testified perjuriously.[299] Some jurisdictions allow attorneys to permit their clients to testify perjuriously as long as the clients testify narratively and without guidance by the lawyer's questioning.[300] The comment to Rule 3.3 allows attorneys in those jurisdictions to adopt such an approach but directs attorneys in other jurisdictions to take "reasonable remedial measures."[301] The comment adds that withdrawal may sometimes be sufficient, but it reasons that because the attorney should "undo the effect of the false evidence," the attorney may also need to disclose the perjury to the tribunal.[302]

Directing attorneys to remedy and "undo" false testimony is consonant with biblical principles because, as discussed above, the Bible does not approve of false witnesses. Moreover, Scripture counsels against an attorney being associated with a false witness, for "[t]he righteous hate what is false."[303]

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295 *Id.* R. 3.3(d).

296 *See supra* notes 261–75 and accompanying text.

297 1 *Peter* 4:5; *see also* Beggs, *supra* note 276, at 266 (asserting that ethicist David Hoffman "also insists that counsel forego the ever-present temptation to misstate or misquote authority, tactics which he regards at best 'as feeble devices of an impoverished mind' and at worst 'as pregnant evidences of a disregard for truth, which justly subjects them to be closely watched in more important matters'").

298 *Malachi* 2:6.

299 MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2003).

300 *See* CRYSTAL, *supra* note 44, at 118. This approach is often referred to as the "narrative" approach. *Id.*

301 MODEL RULES OF PROF'L CONDUCT R. 3.3. cmt. 1 (2003).

302 *Id.* R. 3.3 cmt. 10.

303 *Proverbs* 13:5 (NIV); *see also Proverbs* 21:28 (NIV) ("A false witness will perish, and whoever listens to him will be destroyed forever."). The narrative approach thus does not appear consonant with Scripture because, in that approach, the attorney does not

However, in its direction for candor, Rule 3.3 draws a distinction that is not present in the biblical precepts. The rule, as noted, prohibits an attorney from knowingly making a false statement of material fact or law, but it allows an attorney to withhold material information from the tribunal under many circumstances.[304] As scholar Gordon Beggs has observed:

> "Candor" [under the Model Rules] . . . requires an honest answer to a specific inquiry, but permits the withholding of unfavorable information not specifically requested by an opponent. The underlying assumption is that the adversary system affords the parties an impartial tribunal, whose responsibility it is to determine the truth of the matter. Under these rules, the practice of discovery, negotiation, alternative dispute resolution, and trial has evolved into an exercise in gamesmanship in which reputable attorneys divulge adverse information only where it is impossible to interpret an adversary's inquiry in a way which does not require disclosure.[305]

This view of "candor" contrasts with the scriptural view of honesty, as interpreted by Beggs and others. For instance, Beggs asserts that "Proverbs leaves no room for deception,"[306] and ethicist Jerry White reasons that Scripture requires "complete honesty" and that deception and silence can be just as dishonest as outright lying.[307]

As noted in the discussion on Rule 1.6 ("Confidentiality"), a small number of biblical passages imply that deception is acceptable in the narrow circumstance of when it is necessary to prevent innocent human

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clearly disassociate himself from the false testimony and instead allows it to be presented without any remedial measure by the attorney.

304 For instance, an attorney must disclose such material facts when necessary to correct a false statement of fact or law the lawyer previously made to the tribunal. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2003). Similarly, a lawyer may, in certain circumstances, be required to disclose material facts when necessary to prevent another person from engaging in criminal or fraudulent conduct related to the proceeding. *Id.* R. 3.3(b).

305 Beggs, *supra* note 1, at 842. Such a view of candor presupposes a properly functioning adversary system, but much of the modern practice of law takes place outside the formal adversary process. *See id.* at 833 (observing that "contemporary practice centers on the office and board room and not on the courts"). Beggs contrasts this modern position with the position taken by nineteenth century legal ethicists David Hoffman and George Sharswood. Both men advised attorneys against concealing material information only to surprise their opponents at later times. *See id.* (citing HOFFMAN, *supra* note 271, at 764; MEMORIAL TO GEORGE SHARSWOOD, PROFESSIONAL ETHICS 73–74 (5th ed. 1993)). Moreover, at the extreme end, such gamesmanship is sanctionable. *See, e.g.*, Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1080, 1084 (Wash. 1993) (sanctioning party for "evasive and misleading responses" to discovery requests).

306 Beggs, *supra* note 1, at 843.

307 WHITE, *supra* note 82. Beggs does not outline what constitutes deception. White defines *deceive* as "to cause to accept as true or valid what is false or invalid." *Id.* at 53 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 290 (Henry Bosley Woolf ed., 1981) [hereinafter WEBSTER'S]). He adds that the term means "to delude, mislead, or beguile." *Id.*

life from being taken.[308] Except in this situation, Scripture contains unequivocal proscriptions against dishonesty, including deception. In addition to the passages referenced above, *Proverbs* 24:28 provides, "Do not . . . use your lips to deceive."[309] Christian attorneys cannot avoid this proscription by pointing to conventional mores of lawyering for "the LORD condemns a crafty man."[310] In addition, they should not resort to such gamesmanship because their opponents do so; the golden rule remains applicable and Christian attorneys may be surprised at how maintaining high ethical standards can set the tone for relations with opponents such that those opponents uphold the same standards as well.[311]

D. Rule 3.4: Fairness to Opposing Party and Counsel

Rule 3.4 requires fairness to opposing parties and counsel. The rule specifically provides that a lawyer may not unlawfully obstruct another party's access to evidence, alter, destroy or conceal a document or other material of potential evidentiary value, or counsel or assist another person in committing such an act.[312] He may not falsify evidence, counsel, or assist a witness in testifying falsely, or offer an illegal inducement to a witness.[313] A lawyer may not knowingly disobey a court obligation, except for a refusal based on the assertion that no valid obligation exists,[314] nor may he make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legal discovery request by an opposing party.[315] In trial, an attorney may not allude to irrelevant or unsupported matters, assert personal knowledge of facts unless testifying as a witness, or state a personal opinion as to justness, credibility, culpability, guilt, or innocence.[316] An attorney finally should not ask a person other than a client to refrain from giving relevant information to another party unless the person is a relative, employee, or agent of a client and the lawyer believes the person's interests will not be adversely affected by refusing to give such information.[317]

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308 *See supra* notes 102–06 and accompanying text.

309 *Proverbs* 24:28 (NIV).

310 *Proverbs* 12:2 (NIV).

311 *See* JOSEPH ALLEGRETTI, THE LAWYER'S CALLING 99 (1996) (encouraging lawyers to consider the golden rule in how they conduct their litigation practices). The golden rule is contained in Jesus' discussion on the greatest commandment. *See Matthew* 22:39 ("You shall love your neighbor as yourself.").

312 MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2003).

313 *Id.* R. 3.4(b).

314 *Id.* R. 3.4(c).

315 *Id.* R. 3.4(d).

316 *Id.* R. 3.4(e).

317 *Id.* R. 3.4(f).

In Rule 3.4, the biblical virtue of fairness is obviously involved. Scripture instructs believers to treat others fairly. For instance, *Proverbs* provides in its prologue that one of the goals of its teachings is to enable the reader to acquire a "disciplined and prudent life, doing what is right and just and *fair*."[318]

In the rule, the virtues of honesty, integrity, and personal responsibility also play a role. Biblical injunctions against false witnesses have already been discussed under Rules 3.1 and 3.3,[319] but the Christian attorney is called to do more than avoid this pit. *Micah* notes that God requires believers, "to do justly, [t]o love mercy, [a]nd to walk humbly with your God."[320] Doing justice involves treating the opposing counsel fairly.[321] The Bible also is clear that protecting procedural rights is vital to upholding substantive justice.[322] Christian attorneys therefore maintain their personal integrity and responsibility when they recognize that they advance justice by adhering to proper procedure in their dealings with the opposing party and counsel.

E. Rule 3.5: Impartiality and Decorum of the Tribunal

Rule 3.5 states that a lawyer shall not seek to illegally influence a judge, juror, prospective juror, or other official,[323] and shall not "communicate *ex parte* with such a person during the proceeding unless

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318 *Proverbs* 1:3 (NIV) (emphasis added). The King James Version and New King James Version translate the word "fair" at the end of verse 3 as "equity."

319 *See supra* notes 261–75 and accompanying text.

320 *Micah* 6:8; *see also Deuteronomy* 10:12–13 ("And now, Israel, what does the LORD your God require of you, but to fear the LORD your God, to walk in all His ways and to love Him, to serve the LORD your God with all your heart and with all your soul, *and* to keep the commandments of the LORD and His statutes which I command you today for your good?").

321 On the interrelationship between justice and fairness, it is noteworthy that *Nave's Topical Bible* does not list passages associated with the topic of fairness, but instead directs its readers to see "justice." Crosswalk.com, http://bible.crosswalk.com/Concordances/NavesTopicalBible/ntb.cgi?number=T1712 (last visited Nov. 4, 2006). This cross-referencing is understandable because fairness seems to relate to treating like people and situations alike whereas justice appears to be a broader concept. For a practical discussion on the different attributes of biblical justice, see Dan Van Ness, *Characteristics of Biblical Justice*, *in* WHAT DOES THE LORD REQUIRE OF YOU? 23–35 (Lynn R. Buzzard ed., 1997).

322 *See, e.g.*, *Deuteronomy* 17:6 (containing a requirement that two or three witnesses must testify against an individual for that person to be put to death), 19:15 (containing a requirement that two witnesses must testify against an individual in order for that individual to be convicted of a crime); *see also* Michael P. Schutt, *What's a Nice Christian Like You Doing in a Profession Like This?*, 11 REGENT U. L. REV. 137, 140–42 (1998-1999) (discussing how the Bible affirms the importance of procedural safeguards in the pursuit of justice). Even at the trial of Jesus, which contained many procedural irregularities, *see infra* note 348, the Sanhedrin did take the testimony of two witnesses in compliance with Jewish law. *See* MOUNCE, *supra* note 66, at 247.

323 MODEL RULES OF PROF'L CONDUCT R. 3.5(a) (2003).

authorized to do so by law or court order."[324] A lawyer shall not communicate with a juror or prospective juror after the jury has been discharged when prohibited by law or court order, when the juror has made known to the lawyer a desire not to communicate, or when the communication involves misrepresentation, coercion, duress or harassment.[325] Furthermore, a lawyer shall not engage in conduct intended to disrupt a tribunal.[326] Virtues involved in this rule include integrity, fairness, honesty, and justice.

The Bible contains numerous passages that underscore that bribery should not be resorted to in a cause of action. *Exodus*, for example, notes:

> You shall not follow a multitude in doing evil, nor shall you testify in a dispute so as to turn aside after a multitude in order to pervert justice.
>
> . . . .
>
> . . . You shall not pervert the justice due to your needy brother in his dispute. . . . [Y]ou shall not take a bribe, for a bribe blinds the clear-sighted and subverts the cause of the just.[327]

Similarly, *Deuteronomy* contains the exhortation, "You shall not pervert justice due the stranger or the fatherless . . . ."[328]

Gary Haugen, founder of the International Justice Mission, defines injustice as "abuse of power."[329] Christian attorneys who seek to improperly influence a judicial official are encouraging those officials to abuse the power with which the judicial system has entrusted them. Lawyers who commit such misconduct are also abusing their power as officers of the court.[330] Moreover, a central component to biblical justice is due process,[331] and due process requires decision-makers to be impartial.[332] Improperly influencing judicial officials is therefore more

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324 *Id.* R. 3.5(b).

325 *Id.* R. 3.5(c).

326 *Id.* R. 3.5(d).

327 *Exodus* 23:2, :6, :8 (NASB); *see also Deuteronomy* 16:19 ("You shall not pervert justice; you shall not show partiality, nor take a bribe, for a bribe blinds the eyes of the wise and twists the words of the righteous."); 1 *Samuel* 8:3 (demonstrating Samuel's sons accepting bribes). For other scriptures against bribery, see *Deuteronomy* 10:17, 2 *Chronicles* 19:7, *Psalms* 26:10, *Proverbs* 17:23 (NIV), *Ecclesiastes* 7:7 (NIV), and *Isaiah* 5:23. Scripture strongly condemns bribery because it fosters injustice and discrimination.

328 *Deuteronomy* 24:17.

329 GARY A. HAUGEN, GOOD NEWS ABOUT INJUSTICE: A WITNESS OF COURAGE IN A HURTING WORLD 72 (1999) (defining injustice further as occurring "when power is misused to take from others what God has given them, namely, their life, dignity, liberty, or the fruits of their love and labor").

330 *Cf.* MODEL RULES OF PROF'L CONDUCT pmbl. para. 1 (2003) (describing lawyers as "officer(s) of the legal system").

331 *See supra* note 322 and accompanying text.

332 HILL, *supra* note 35, at 36 (adding that "[i]mpartiality forbids decision-makers from having preexisting biases or from reaping personal gain from their decisions").

than about bribery; it is about corruption and injustice.[333] Scripture is clear that the righteous should hate injustice,[334] and Christian attorneys should therefore avoid any activity that promotes injustice.

F. Rule 3.6: Trial Publicity

Rule 3.6 provides direction on how lawyers should deal with trial publicity. An attorney involved with the investigation or litigation of a matter should not make an extrajudicial statement if he should know that it will be disseminated publicly and is substantially likely to "materially prejudic[e]" a related adjudicative proceeding.[335] He may, however, "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[336] This rule applies to all lawyers, whether in firms or government agencies, that are involved in an investigation or litigation.[337] The major biblical virtues underlying this rule are self-control and fairness.[338]

Rule 3.6 is first related to the unbridled use of the tongue mentioned in *Proverbs*. The wise man is urged to "[p]ut away from you a deceitful mouth, [a]nd put perverse lips far from you[,]"[339] and is warned that "[w]ise *people* store up knowledge, [b]ut the mouth of the foolish *is* near destruction."[340] Similarly, *James* and other books of the Bible discuss the danger of an unbridled tongue.[341]

Rule 3.6 is also connected with fairness. In this connection, the rule is designed to protect an individual's right to a fair trial.[342] As noted

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333 Judge John Noonan, in his seminal book on bribery, reasons that Christians' responsibility to seek to imitate God lies at the root of the biblical prohibition of bribery. *See* JOHN T. NOONAN, BRIBES 705 (1984) (discussing how *Deuteronomy* 10:17 explains that God shows no partiality and takes no bribes).

334 *See Proverbs* 13:5 (NIV).

335 MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2003).

336 *Id.* R. 3.6(c).

337 *Id.* R. 3.6(d).

338 Tact is a virtue that is tangentially related to self-control. Tact is defined as "a keen sense of what to do or say in order to maintain good relations with others or avoid offense." Merriam-Webster OnLine, http://www.m-w.com/dictionary/tact (last visited Nov. 9, 2006).

339 *Proverbs* 4:24.

340 *Proverbs* 10:14. *Proverbs* frequently characterizes the fool as a babbler. *See Proverbs* 10:6, :8, :13, :18–19, :31–32.

341 *See James* 1:26, 3:1–12. Knowing when to speak and when to keep silent is a prominent wisdom theme in Scripture. *See Job* 38:2, 42:1–6; *Proverbs* 10:14, 11:12–13, 12:23, 13:3, 17:28, 18:2, :6–8; *Ecclesiastes* 3:7.

342 MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2003) (observing that "[p]reserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where a trial by jury is involved").

above, central to biblical notions of fairness and justice is the impartiality of any respective decision-maker.[343] Attorneys who misuse the media to make prejudicial public statements, therefore, not only infringe upon biblical principles of self-control in speech, but also broader principles of fairness.

G. Rule 3.7: Lawyer as Witness

Model Rule 3.7 states that an attorney should not be an advocate at a trial where he may be called as a necessary witness unless his "testimony relates to an uncontested issue" or to the value of his legal services, or where "disqualification . . . would work substantial hardship on the client."[344] He may be an advocate if another attorney in his firm is likely to be called as a witness except where precluded by Rule 1.7 or 1.9.[345] Justice and loyalty are underlying virtues to this rule.

The rule fosters justice by attempting to avoid uncertainties the trier of fact may face in discerning whether statements made by an advocate-witness are to be "taken as proof or as an analysis of the proof."[346] Justice demands that proper evidence be presented to the trier of fact, and Scripture contains several instances of individuals who were improperly incriminated by the use of fragmentary or erroneous information.[347] In fact, Jesus himself was wrongly accused based on improper evidence, rendering his trial "illegal."[348] In order to promote justice, the Christian lawyer should, whenever possible, restrict him or herself to the advocate role, with the prime duty being to represent the client with integrity.

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343 HILL, *supra* note 35, at 36.

344 MODEL RULES OF PROF'L CONDUCT R. 3.7(a)(1)–(3) (2003).

345 *Id.* R. 3.7(b).

346 *Id.* R. 3.7 cmt. 2; *see also* Ronald D. Rotunda, *Learning the Law of Lawyering*, 136 U. PA. L. REV. 1761, 1766–67 (1988) (noting that, unlike other rules, 3.7 is routinely enforced by the courts because a violation contaminates the truth-finding process by confusing the fact-finder).

347 HILL, *supra* note 35, at 37 (citing the examples of Jesus, Stephen, and Paul).

348 HAYFORD'S, *supra* note 71, at 287. The trial before the Sanhedrin is recounted in *Matthew* 26:59–68, and it contained numerous procedural irregularities. First, Jesus was convicted based on the testimony of two witnesses who claimed that Jesus said he was able to destroy the temple and rebuild it in three days. This testimony was misleading in that (1) Jesus "never said . . . *he* would destroy the temple, only that [it] would be destroyed," *see Matthew* 24:1–2, and (2) Jesus was referring to "his body" when he spoke of the "temple." MOUNCE, *supra* note 66, at 247. Second, the trial was flawed in that the high priest demanded that Jesus answer whether he was the Son of God, but Jewish law prohibited requiring a person to incriminate himself. *Id.* Other irregularities include that Jesus was tried at night, not in the proper location, during the Passover season, without a day's delay before the verdict, and without separate examination of the two witnesses. *Id.* at 250.

This focus on the advocate role relates to loyalty.[349] Except in extraordinary cases, the attorney should avoid being placed in a position where he or she may undermine the client's case. Such a position would compromise the loyalty and trust the client has placed in the lawyer. As noted above in the discussion of Rules 1.7 to 1.9, a lawyer who betrays a trust placed in him by one client to serve other interests commits a form of disloyalty that can be virtuous only in the narrowest of circumstances,[350] for Scripture points to the importance of an individual's being faithful to another when that person puts his or her trust in the individual.[351]

H. Rule 3.8: Special Responsibilities of a Prosecutor

Prosecutors have several responsibilities under Rule 3.8. A prosecutor shall not prosecute "a charge that the prosecutor knows is not supported by probable cause,"[352] and shall "make reasonable efforts to [see] that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given [a] reasonable opportunity to obtain counsel."[353] The prosecutor may "not seek to obtain from an unrepresented accused a waiver of important pretrial rights,"[354] and must make timely disclosure of all information that tends to negate guilt or mitigate the offense.[355] He or she may not subpoena a lawyer in a "criminal proceeding to present evidence about a past or present client" under most circumstances.[356] Finally, he or she should

> refrain from making [most] extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and [should] exercise reasonable care to prevent [those] associated with the prosecutor in a criminal case from making . . . statement[s] that the prosecutor would be prohibited from making under Rule 3.6 or [Rule 3.8].[357]

Respect for others, fairness, integrity, and justice are virtues that are applicable to this rule.

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349 The virtue of loyalty is also discussed extensively in the section on Rules 1.7 to 1.9. Perhaps the seminal verse on loyalty is *Matthew* 6:24, which states: "No one can serve two masters; for either he will hate the one and love the other, or else he will be loyal to the one and despise the other." *See also Luke* 16:13.

350 *See supra* notes 102–06 and accompanying text (discussing passages in which condoned deception was limited to instances where it was needed to save innocent human life).

351 *See, e.g.*, 1 *Corinthians* 4:2.

352 MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2003).

353 *Id.* R. 3.8(b).

354 *Id.* R. 3.8(c).

355 *Id.* R. 3.8(d).

356 *Id.* R. 3.8(e)(1)–(3).

357 *Id.* R. 3.8(f).

Proverbs calls for the integrity a Christian prosecutor should seek to display, noting that "[t]he integrity of the upright will guide them, [b]ut the perversity of the unfaithful will destroy them,"[358] and "[t]he righteous *man* walks in his integrity."[359] As an officer of the court, it is the prosecutor's duty to "[d]efend the poor and fatherless; [d]o justice to the afflicted and needy[; d]eliver the poor and needy; [and f]ree them from the hand of the wicked."[360]

This express obligation of prosecutors to do justice is included in the comment to Rule 3.8, but the Model Rules do not contain a similar obligation for attorneys generally.[361] In fact, it is a "well-accepted" proposition among legal ethicists that prosecutors have broader ethical obligations than do attorneys generally. These broader obligations imply more than adherence to certain procedural standards, like the giving of exculpatory material to defense counsel.[362] Rather, they imply an obligation to work toward ensuring that prosecutions end in just results.[363]

As noted, Scripture supports the importance of procedural due process as a way of ensuring that the state does not overstep its authority in punishing those under its jurisdiction.[364] However, Scripture does not single out prosecutors for special obligations toward justice; passages like those above which call individuals to "do justice" are universal in application and therefore apply generally to all attorneys.[365] Christian attorneys, whether prosecutors, defense counsel, or otherwise, should heed the biblical instructions for justice. Moreover, as the commentary on prosecutors provides, such an obligation to achieve justice requires more than adherence to procedural standards, and therefore, Christian attorneys should recognize that they share some

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358 *Proverbs* 11:3.

359 *Proverbs* 20:7.

360 *Psalms* 82:3–4.

361 *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2003) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

362 *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963); CRYSTAL, *supra* note 44, at 179–80.

363 *See* CRYSTAL, *supra* note 44, at 178; *see also* Berger v. United States, 295 U.S. 78, 88 (1935) (reasoning that a federal prosecutor's interest in criminal prosecution is "not that it shall win a case, but that justice shall be done"); AM. BAR ASS'N, ABA STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(c) (1992) ("The duty of the prosecutor is to seek justice, not merely convict.").

364 *See supra* note 322; *see also supra* notes 331–34 and accompanying text.

365 For instance, the directive in *Micah* 6:8 "to do justly, [t]o love mercy, [a]nd to walk humbly with your God," has been used by theologians, political leaders, and others to encapsulate fundamental keys to spiritual maturity for all believers. *See* GEORGE GRANT, THE MICAH MANDATE: BALANCING THE CHRISTIAN LIFE 8–10 (1999). In fact, Scripture links doing justice with being righteous generally. *Id.* at 13–14; *see also Job* 29:14 ("I put on righteousness, and it clothed me; [m]y justice *was* like a robe and a turban.").

responsibility in ensuring that their legal work ends in "just" results.[366] They cannot hide behind their representative role to overlook these broader concerns for justice.

I. Rule 3.9: Advocate in Nonadjudicative Proceedings

Rule 3.9 provides that an attorney representing a client in a nonadjudicative proceeding before a legislative body or administrative agency shall note that his appearance is in a representative capacity and shall adhere to Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.[367] Honesty and integrity are the major underlying virtues for this provision.[368]

This rule promotes honesty by ensuring the attorney is forthright about his representative role, and such forthrightness comports with Scripture because the Bible maintains that silence can amount to immoral deception.[369] In requiring this disclosure, the rule encourages the attorney to remain true to his representative role, and such role faithfulness comports with biblical notions of integrity.[370]

Other than these virtues, this rule expands the arena in which the Christian attorney is expected to operate ethically, rather than requiring any special biblically-sanctioned behavior. The scripture verses applicable in Rules 3.3, 3.4, and 3.5 will thus tend to apply here as well.

IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

A. Rule 4.1: Truthfulness in Statements to Others

The Model Rules require that a lawyer stick to the truth in his or her representation of a client. Rule 4.1 specifically provides that no false statement of material fact or law can be made to a third person,[371] nor may a lawyer fail to disclose a material fact if this is necessary to avoid a

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366 Joseph Allegretti underscores that biblical justice is more than about fair procedures; it also includes an ethic of caring and love for the parties involved in a dispute. *See* ALLEGRETTI, *supra* note 311, at 105–08 (reasoning that biblical justice "entails a concern *both* for procedures and outcomes"). Allegretti contends that pursuing such justice thus requires that lawyers not focus solely on advancing their clients' rights but that they consider the other parties involved and the broader moral issues at stake. *Id.* at 106–07; *see also supra* note 321 and accompanying text.

367 MODEL RULES OF PROF'L CONDUCT R. 3.9 (2003).

368 Through the other operative rules, virtues such as personal responsibility, truthfulness, fairness, and justice also apply.

369 *See* WHITE, *supra* note 82, at 57–58 (discussing biblical arguments for why silence can amount to sin).

370 *See* Gantt, *supra* note 44 (discussing how biblical notions of integrity eschew role differentiation in which lawyers define themselves differently based on different roles they assume).

371 MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2003).

client's criminal or fraudulent action and is not prohibited by Rule 1.6.[372] Here, the Model Rules draw on the virtues of honesty and fairness.

Honesty has been a theme throughout several of the rules already discussed, such as Rules 3.1 and 3.3.[373] This theme remains central here; the virtue of honesty incorporates verbal truthfulness, which is particularly at issue in this rule. Rule 4.1, however, introduces a new aspect to this virtue. Whereas the rules above focus largely on the lawyer's duty of honesty to the court or to his clients, Rule 4.1 addresses the lawyer's duty as it pertains to statements to others.

Through this focus, biblical notions of one's responsibility to his neighbor are particularly relevant. For instance, one of the Ten Commandments states: "You shall not bear false witness *against your neighbor*."[374] Similarly, as individuals are called to "[p]rovid[e] . . . for honest things, not only in the sight of the Lord, but also in the sight of men,"[375] every person should "put[] away lying . . . [and] speak truth *with his neighbor*, for we are members one of another."[376] The Psalmist says that the person who may dwell in the Lord's sanctuary is "[h]e who walks uprightly, [a]nd works righteousness, [a]nd speaks the truth in his heart; [h]e who does not backbite with his tongue, [n]or does evil *to his neighbor*, [n]or does he take up a reproach *against his friend*."[377]

Scripture thus makes plain that the lawyer's duty of truthfulness and honesty is not based on a limited obligation founded on the authority of the tribunal. Rather, in keeping with the golden rule and the virtue of fairness, biblical notions of honesty apply to all "neighbors." "Neighbors," moreover, is not a narrow class of individuals, for Jesus extended the Old Testament notion of "neighbor" to include strangers and thus all mankind.[378]

Throughout the Bible, passages underscore the value of truthful representation.[379] God puts Cain under a curse when he answers Him falsely concerning the whereabouts of Abel.[380] Joseph keeps several of his brothers in prison "that your words may be tested to see whether there is

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372 *Id.* R. 4.1(b).

373 *See supra* notes 261–75, 296–310 and accompanying text.

374 *Exodus* 20:16 (emphasis added); *see also Exodus* 23:1 ("You shall not circulate a false report."), :7 ("Keep yourself far from a false matter . . . ."); *Leviticus* 19:11 ("You shall not . . . deal falsely, nor lie to one another.").

375 2 *Corinthians* 8:21 (KJV).

376 *Ephesians* 4:25 (emphasis added).

377 *Psalms* 15:2–3 (emphasis added); *see also Psalms* 51:6.

378 HAYFORD'S, *supra* note 71, at 712 (referencing the parable of the Good Samaritan in *Luke* 10:25–37).

379 *See* Beggs, *supra* note 1, at 841 (asserting that "[n]o matter what the financial stakes, Proverbs counsels honest behavior that will preserve the blessing of a good reputation: '[T]o be esteemed is better than silver or gold.'" (quoting *Proverbs* 22:1 (NIV)).

380 *Genesis* 4:9–10, :12.

any truth in you,"[381] and King Ahab berates the prophet Micaiah, "'How many times shall I make you swear that you tell me nothing but the truth in the name of the LORD?'"[382] God has Jeremiah search Jerusalem: "If you can find a man, [i]f there is *anyone* who executes judgment, [w]ho seeks the truth, [a]nd I will pardon her."[383] He later complains to him: "Everyone will deceive his neighbor, [a]nd will not speak the truth; [t]hey have taught their tongue to speak lies; [t]hey weary themselves to commit iniquity."[384] Similarly, God uses Amos to castigate those "who turn justice to wormwood, and lay righteousness to rest in the earth . . . . They hate the one who rebukes in the gate, [a]nd they abhor the one who speaks uprightly."[385] Furthermore, God tells Zechariah and the people of Israel, "These are the things you shall do: Speak each man the truth to his neighbor; [g]ive judgment in your gates for truth, justice, and peace . . . ."[386]

In the New Testament, the apostle Paul rails against those "who suppress the truth in unrighteousness,"[387] and tells the Corinthians, "we can do nothing against the truth, but for the truth."[388] The Ephesians are similarly exhorted: "Therefore, putting away lying, '[l]et each one of you speak truth with his neighbor,' for we are members of one another."[389] These biblical examples demonstrate that honesty is more than a proverbial platitude; rather, figures throughout biblical history have stressed the importance of honesty in their dealings with others.

By requiring attorneys to be truthful in their communications with others, Rule 4.1 thus agrees with biblical principles of honesty. The rule does so without condition based on the lawyer's motives for the misrepresentation. The rule and a majority of courts interpreting the ethical standards do not make any distinction based on whether the attorney was pursuing legitimate ends.[390] The inquiry is based on

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381 *Genesis* 42:16.

382 1 *Kings* 22:16; *see also* 2 *Chronicles* 18:15.

383 *Jeremiah* 5:1.

384 *Jeremiah* 9:5; *see also Jeremiah* 9:3 ("And *like* their bow they have bent their tongues *for* lies. They are not valiant for the truth on the earth.").

385 *Amos* 5:7, :10.

386 *Zechariah* 8:16.

387 *Romans* 1:18. Another version renders this phrase as "who suppress the truth by their wickedness." *Id.* (NIV).

388 2 *Corinthians* 13:8.

389 *Ephesians* 4:25. The Bible contains isolated examples of condoned dishonesty and deception. In *Joshua* 2, Rahab lies to the king of Jericho; in *Exodus* 1:15–20, the Hebrew midwives lie to Pharaoh; and in 1 *Samuel* 16:1–2, Samuel is not completely candid about David's anointing. *See supra* notes 102–06 and accompanying text.

390 Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 NOTRE DAME L. REV. 722, 739 (1989) (citing *In re* Malone, 480 N.Y.S.2d 603, 606 (App. Div. 1984)).

whether the attorney intended to make the misrepresentation prohibited by the rules; mitigating circumstances reduce punishment, but they do not affect culpability.[391]

In reaching these conclusions, the courts have flatly rejected attorneys' arguments that the "end justifies the means" in attempting to excuse their dishonesty.[392] Scripture similarly rejects such arguments. For example, in two instances, Abraham misleads others about his wife's identity in order to protect his life, but his deception leads to tragedy in one case and near tragedy in the other.[393] Scripture soundly rejects pragmatism as a source for truth and instead establishes absolute principles that guide believers in all situations.[394]

Despite this similarity between the rule and Scripture, Rule 4.1 contrasts with biblical precepts in two important respects. First, like Rule 3.3, the rule does not require complete honesty and limits the attorneys' obligation only to statements of "material" fact or law.[395] The comment to Rule 4.1 adds, "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact."[396] The rule thus permits lying and deception in negotiation as long as they are part of a "generally accepted convention."

Legal ethicists have disagreed over whether negotiation inherently requires attorneys to engage in some level of misrepresentation.[397]

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391 *Id.*; *see also In re* Friedman, 392 N.E.2d 1333, 1335 (Ill. 1979) (holding that attorney violated ethical rule even though he engaged in deception in an attempt to disclose bribery); *Malone*, 480 N.Y.S.2d at 606 (holding that attorney violated ethical standards even though he instructed officer to testify falsely in order to protect the officer from physical harm).

392 *Friedman*, 392 N.E.2d at 1335; *Malone*, 480 N.Y.S.2d at 606.

393 *See Genesis* 12:10–20, 20:1–18; *see also* Reid, *supra* note 102.

394 *See, e.g.*, 1 *Corinthians* 1:18–2:16 (showing how Paul contrasts the wisdom of the world with true wisdom, which comes from God). For a bibliography on how Christian truth contrasts with a secular pragmatism, see Daniel B. Wallace, *The Church in Crisis: A Postmodern Reader*, BIBLE.ORG, http://www.bible.org/page.asp?page_id=1544 (last visited Nov. 4, 2006).

395 MODEL RULES OF PROF'L CONDUCT R. 4.1(a)–(b) (2003).

396 *Id.* R. 4.1 cmt. 2 (adding that "[e]stimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud"); *see also* CRYSTAL, *supra* note 44, at 387–89 (discussing other examples of "'accepted conventions'" where misrepresentations do not amount to statements of material fact).

397 *See* CRYSTAL, *supra* note 44, at 386–87 (discussing ethicists on both sides). For instance, compare James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 1980 AM. B. FOUND. RES. J. 926, 927–28 (1980) ("The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled."), with Reed E. Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 99 (1994-1995) ("A lawyer is both a better

Scripture, however, clearly discourages misrepresentation, for as noted above, the Bible is replete with passages disapproving of lying and deception.[398] Christian scholars have therefore reasoned that the Bible requires total honesty and that lying is never justified.[399]

Second, Rule 4.1 contrasts with Scripture regarding lawyers' obligations to make corrective disclosures. Rule 4.1(b) provides that lawyers only have a duty to disclose information when the fact is "material" and when "disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [Confidentiality of Information]."[400] In addition to the "material" requirement discussed above, lawyers thus only have a duty to disclose in limited circumstances.

Legal ethicist Nathan Crystal has argued that, despite the seemingly limited scope of Rule 4.1, attorneys have a duty of disclosure in several types of cases where nondisclosure is equivalent to a misrepresentation.[401] Even if one were to adopt this interpretation, the ethical standards do not rise to the biblical standards. As noted above, Scripture provides that silence alone can be deceptive in certain situations and Scripture forbids deception.[402] Christian attorneys therefore should not rely on the limited obligation in 4.1(b) and should question whether their silence amounts to deception; if so, their conduct is not biblical.

B. Rule 4.2: Communication with Person Represented by Counsel

Model Rule 4.2 states that in his representation of a client, a lawyer should not speak about the subject with someone he knows to be represented by another lawyer in the matter unless he "has the consent of the other [attorney] or is authorized to do so by law or a court

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person and negotiator for reconceiving negotiation as a collaborative process of moral truth-seeking.").

398 *See supra* notes 261–75, 373–89 and accompanying text.

399 WHITE, *supra* note 82; Loder, *supra* note 397 (reasoning that lying is never justified). *But cf. supra* notes 102–06 and accompanying text (discussing examples of condoned dishonesty).

400 MODEL RULES OF PROF'L CONDUCT R. 4.1(a)–(b) (2003).

401 Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1077–82 (1998-1999) (outlining four situations where attorneys have a duty to disclose: (1) to correct previous representations the attorney made that are now false or were false when made; (2) to correct mistakes about the contents of a writing; (3) when the attorney has a fiduciary duty to the opposing party to disclose information; and (4) when failure to disclose breaches standards of good faith and fair dealing).

402 *See* WHITE, *supra* note 82; *see also supra* note 307.

order."[403] Honesty, trustworthiness, and fairness are virtues relevant to this rule.

As noted, Scripture condemns deceit and not just outright lying.[404] Attorneys who communicate with represented persons may engage in deceptive conduct in order to advantage their clients,[405] even if they do not actually make any false statements. Lawyers in such cases are therefore violating biblical principles of honesty and trustworthiness by using their role to mislead the other party to reveal confidential information. Such deception also violates principles of fairness in that the unethical conduct interferes with the integrity of the represented person's attorney-client relationship.[406] Scripture thus supports the rule's prophylactic prohibition banning communication without the other lawyer's consent.

C. Rule 4.3: Dealing with Unrepresented Person

According to Model Rule 4.3, an attorney with a client should not "state or imply that [he] is disinterested" to a person unrepresented by counsel, and he should "make reasonable efforts to correct [such a person's] misunderstanding" of the lawyer's role."[407] These requirements implicate the virtues of honesty and trustworthiness in a way that is similar to how those virtues apply to Rule 4.2.[408] For instance, the rule relates to trustworthiness in ensuring the attorney does not deceive the unrepresented person into trusting him based on a misunderstanding of his role.

What is unique about this rule is that it singles out unrepresented persons for special treatment in a way that resembles the special treatment accorded widows, orphans, and strangers in the Bible, none of

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403 MODEL RULES OF PROF'L CONDUCT R. 4.2 (2003).

404 *See, e.g., Psalms* 101:7 ("He who works deceit shall not dwell within my house; [h]e who tells lies shall not continue in my presence."); *see also supra* notes 261–75, 373–89 and accompanying text.

405 *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 (2003) (reasoning that the rule is designed, among other things, to prevent possible "overreaching" by lawyers who contact represented parties).

406 CRYSTAL, *supra* note 44, at 350 (citing Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part I)*, 70 TENN. L. REV. 121, 140–47 (2002)). The concern against overreaching by attorneys is so strong that attorneys are not allowed to contact represented persons even when those persons' attorneys are not conveying settlement offers to them. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-362 (1992). This prohibition appears biblically justified because the offeror-party's attorneys have other recourses to ensure that principles of justice are upheld. *See id.* (discussing such alternatives).

407 MODEL RULES OF PROF'L CONDUCT R. 4.3 (2003).

408 Specifically, the rule contains certain requirements to ensure the unrepresented person has an accurate, true understanding of the lawyer's role. *See id.* R. 4.3 cmt. 1.

whom could count on the normal system of family support. In *Deuteronomy*, the Lord is described as the one who "administers justice for the fatherless and the widow, and loves the stranger."[409] Later in the book, one of the curses pronounced on Mount Ebal was: "'Cursed *is* the one who perverts the justice due the stranger, the fatherless, and widow. And all the people shall say, Amen!'"[410]

Scripture contains numerous passages chastising those who abuse their power to oppress the powerless.[411] Christian attorneys thus should not abuse their power as attorneys to take advantage of unrepresented parties. Upright treatment and fair dealing with such individuals, while continuing to represent the legitimate interests of one's client, should be required of all Christian attorneys.

D. Rule 4.4: Respect for Rights of Third Persons

In his representation of a client, according to Model Rule 4.4, an attorney should not "embarrass, delay, or burden a third person [without good reason] or use methods of obtaining evidence that violate [that person's] legal rights."[412] An attorney "who receives a document relating to the representation of [his] client [who] knows . . . that the document was inadvertently sent shall promptly notify the sender."[413] Civility and respect for others are the key virtues involved with Rule 4.4.[414]

One excellent exemplification of this rule may be found in Christ's admonition in *Mark* concerning the second great commandment, "'*[y]ou shall love your neighbor as yourself.*'"[415] *Psalms* similarly notes that "[t]hough the LORD *is* on high, [y]et He regards the lowly."[416] These passages underscore that Christian attorneys have no excuse to treat a third party in a non-Christian way. Moreover, the passages encourage

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409 *Deuteronomy* 10:18.

410 *Deuteronomy* 27:19; *see also Psalms* 94:6 ("They slay the widow and the stranger, [a]nd murder the fatherless."); *Isaiah* 1:23 ("They do not defend the fatherless, [n]or does the cause of the widow come before them.").

411 Here, the rule relates to the virtue of fairness as a secondary consideration. *See, e.g.*, *Ecclesiastes* 4:1 ("Then I returned and considered all the oppression that is done under the sun: And look! The tears of the oppressed, [b]ut they have no comforter—[o]n the side of their oppressors *there is* power, [b]ut they have no comforter."); *see also* HAUGEN, *supra* note 329, at 72–74 (describing examples from the Bible and other sources which support his definition of injustice as the "abuse of power").

412 MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2003).

413 *Id.* R. 4.4(b).

414 The virtues of fairness and reasonableness also apply.

415 *Mark* 12:31; *see* Gantt, *supra* note 1 (arguing further the applicability of the biblical standard found in *Matthew* 5:43–44 ("You have heard that it was said, '*You shall love your neighbors* and hate your enemy.' But I say to you, love your enemies, bless those who curse you, do good to those who hate you, and pray for those who spitefully use you and persecute you . . . .")).

416 *Psalms* 138:6.

Christian attorneys to go beyond the civility and respect for others embodied in this rule; they are challenged to love their opponents.

V. LAW FIRMS AND ASSOCIATIONS

A. Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

Rules 5.1 and 5.3 are considered together because they both address lawyers' ethical responsibilities when supervising others. According to Rule 5.1, a partner in a law firm, and an attorney who possesses comparable managerial authority in a law firm, shall make efforts to ensure that the firm has measures in place giving reasonable assurance that all lawyers in the firm conform to the Model Rules.[417] A lawyer having supervisory authority over another shall make reasonable efforts to ensure that his subordinate conforms to the Rules,[418] and a lawyer shall be responsible for another lawyer's violation if he orders or ratifies the conduct, or as a partner, or supervisory lawyer, fails to take reasonable remedial action when he knows of the conduct and its consequences could be avoided or mitigated.[419]

Rule 5.3 contains similar provisions as applied to supervising nonlawyers. First, the rule provides that, when dealing with nonlawyers employed, retained by, or associated with lawyers, a partner in the firm, and an attorney who possesses comparable managerial authority in the firm, shall make reasonably sure that measures are in place giving reasonable assurance that the nonlawyer's conduct is compatible with a lawyer's professional obligations.[420] The rule also provides that the lawyer with direct supervisory authority shall make sure that the nonlawyer's conduct is indeed compatible.[421] Finally, the rule states that a lawyer will be held responsible for a nonlawyer's conduct that violates a rule if he orders or ratifies the conduct, or if he knows of the conduct at a time when its consequences could be avoided or mitigated, but does not take reasonable remedial action.[422]

For both Rule 5.1 and Rule 5.3, the twin virtues of personal responsibility and accountability play a role. The biblical relationship patterned in these rules is one of stewardship. Lax partners or lax supervisory lawyers could be likened to the rich man's unjust steward in *Luke* 16, who is ordered to "[g]ive an account of [his] stewardship, for

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417 MODEL RULES OF PROF'L CONDUCT R. 5.1 (a) (2003).

418 *Id.*, R. 5.1(b).

419 *Id.* R. 5.1(c)(1)–(2).

420 *Id.* R. 5.3(a).

421 *Id.* R. 5.3(b).

422 *Id.* R. 5.3 (c)(1)–(2).

[he] can no longer be steward."[423] Christ speaks of "that faithful and wise steward, whom his master will make ruler over his household,"[424] and *Titus* notes that a bishop, as the steward of God, "must be blameless."[425] Similarly, Paul says, "it is required in stewards that one be found faithful."[426] *Romans* states that "each of us shall give account of himself to God";[427] and 1 *Peter* notes, "[t]hey will give an account to Him who is ready to judge the living and the dead."[428]

In addition to the stewardship model, one could argue that the provisions in these rules are similar to biblical provisions on the master's relationship with his servant. First, Scripture instructs masters to treat their servants fairly.[429] Second, Scripture addresses masters' responsibility for the actions of their servants. In *Exodus*, for example, the commandment to keep the Sabbath holy reads: "[B]ut the seventh day is the Sabbath of the LORD your God. In it you shall do no work: you, nor your son, nor your daughter, nor your male servant, nor your female servant, nor your cattle, nor your stranger who is within your gates."[430] Just as the Hebrew patriarch was supposed to oversee compliance with this law, so the Christian attorney is responsible for the behavior of his or her employees or associates.

Not only wealth, but position is a gift of God, and the recipient will be held accountable for his or her conduct. Partners and supervisory lawyers should be mindful of Jesus' statement in *Luke,* "For everyone to whom much is given, from him much will be required; and to whom much has been committed, of him they will ask the more."[431] The partner and supervisory lawyer is akin to the teacher discussed in *James* 3. There, James holds the teachers to a higher standard because they exert influence over trusting students, a relationship that makes the students vulnerable to serious error.[432] These biblical principles supplement the

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423 *Luke* 16:2.

424 *Luke* 12:42.

425 *Titus* 1:7.

426 1 *Corinthians* 4:2.

427 *Romans* 14:12; *see also Hebrews* 4:13 (NIV) ("Nothing in creation is hidden from God's sight. Everything is uncovered and laid bare before the eyes of him to whom we must give account.").

428 1 *Peter* 4:5.

429 *See Ephesians* 6:9; *Colossians* 4:1.

430 *Exodus* 20:10.

431 *Luke* 12:48. Biblical conceptions of integrity support this principle of accountability such that Christians who are in authority over others are to be accountable for the actions of those they supervise. *See* Higginson, *supra* note 134, at 21–22; *see also infra* note 438 and accompanying text.

432 *See James* 3:1. Furthermore, because masters can expect their Christian servants to work willingly, servants can expect their Christian masters to act like Christ. *See generally Ephesians* 6:9; *Colossians* 4:1.

provisions in Rules 5.1 and 5.3 and place upon Christian partners and supervisory lawyers special responsibilities to ensure that those whom they supervise conduct themselves ethically.

B. Rule 5.2: Responsibilities of a Subordinate Lawyer

Model Rule 5.2 provides that a lawyer is bound by the Model Rules even when acting at the direction of another person,[433] but that a subordinate lawyer does not violate the Rules when acting in accordance with a supervisory attorney's "reasonable resolution" of a question of professional responsibility.[434] Like with Rules 5.1 and 5.3, accountability and responsibility are the virtues involved here.

Although partners may have forgotten the days of their youth, associates will probably identify with Paul's advice in *Ephesians*:

> Bondservants, be obedient to those who are your masters according to the flesh, with fear and trembling, in sincerity of heart, as to Christ; not with eyeservice, as men-pleasers, but as bondservants of Christ, doing the will of God from the heart, with goodwill doing service, as to the Lord, and not to men, knowing that whatever good anyone does, he will receive the same from the Lord, whether he is a slave or free.
>
> And you, masters, do the same things to them, giving up threatening, knowing that your own Master also is in heaven, and there is no partiality with Him.[435]

Christians are encouraged to obey the *legitimate* dictates of civil authority,[436] which could be likened to the reasonable instructions of their legal superiors. Just as Christians have the implicit duty to resist ungodly dictates from superiors, so attorneys must judge whether the resolution of a question of professional responsibility by a supervisory attorney is "reasonable."

In asking subordinate attorneys to make this judgment, Rule 5.2 underscores its primary principle that attorneys are responsible for their own misconduct—that it is not an acceptable excuse to say that one was merely acting pursuant to the direction of others. In this provision, the rule relates to the biblical principle of personal responsibility. Scripture

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433 MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (2003).

434 *Id.* R. 5.2(b). Some critics have stated that this rule provides insufficient motivation for subordinate lawyers to contemplate difficult ethical issues. *See* Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 889 (1997) (noting that "[b]ecause the senior lawyer takes the responsibility for any misjudgment, the junior lawyer has little incentive to even consider tough ethical issues, let alone raise them").

435 *Ephesians* 6:5–9; *see also Romans* 13:1–7 (demonstrating Paul's exhortation to submit to earthly authorities).

436 On the limits of when disobeying authority is acceptable, see *Daniel* 1:3–14, 6 (civil disobedience of Daniel) and 3 (civil disobedience of Shadrach, Meshach, and Abednego). *See also supra* note 39 and accompanying text (discussing the limits of civil disobedience).

discusses in several passages how one's righteousness is not based on one's ancestry or on one's associations with others; salvation is individually determined.[437] Similarly, Christian ethicist Richard Higginson reasons that one layer of integrity is personal responsibility and accountability. He asserts that individuals who act with integrity face problems not by hiding from them or placing the blame on others; rather, they receive constructive criticism and appropriately share the responsibility for the problem.[438] Rule 5.2 thus appears in line with biblical principles by resting, in most cases, responsibility for the unethical conduct on those who take part in it, even if they are acting pursuant to another's direction.

C. Rule 5.4: Professional Independence of a Lawyer
Rule 5.7: Responsibilities Regarding Law-Related Services

Rules 5.4 and 5.7 are considered together because they both regulate lawyers who are involved with business activities ancillary to the practice of law. Rule 5.4 proscribes business associations with nonlawyers where legal services are provided.[439] It specifically provides that, except under limited circumstances, "[an attorney] or law firm should not share legal fees with a nonlawyer."[440] "A lawyer shall not form a partnership with a nonlawyer if any of the [partnership's activities include] the practice of law";[441] shall not "permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate [his] professional judgment";[442] and "shall not practice [as part] of a professional corporation . . . authorized to practice law . . . if: (1) a nonlawyer owns any interest therein . . . , . . . is a corporate officer or director . . . , . . . or has the right to direct or control [the lawyer's] professional judgment."[443] Honesty, integrity, and loyalty are the virtues implicated in this rule.

Rule 5.7 subjects lawyers involved in providing law-related services to the same standards that apply to the practice of law.[444] Examples of

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437 *See, e.g.*, *Ezekiel* 18:20 ("The soul who sins shall die. The son shall not bear the guilt of the father, nor the father bear the guilt of the son. The righteousness of the righteous shall be upon himself, and the wickedness of the wicked shall be upon himself."). For examples when individuals in the Bible attempted to shift the responsibility for wrongdoing to another, see *Genesis* 3:12–13 (Adam); 3:13 (Eve); 16:2, :5 (Sarah); 25:29–34, 27:23 (Esau); *Exodus* 32:22–24 (Aaron); 1 *Samuel* 15:20–21 (Saul); and *Matthew* 27:24 (Pontius Pilate).

438 Higginson, *supra* note 134, at 21–22.

439 MODEL RULES OF PROF'L CONDUCT R. 5.4 (2003).

440 *Id.* R. 5.4(a)(1)–(4).

441 *Id.* R. 5.4(b).

442 *Id.* R. 5.4(c).

443 *Id.* R. 5.4(d)(1)–(3).

444 *Id.* R. 5.7(a).

law-related services include tax preparation; accounting; trust services; real estate counseling; title insurance; financial planning; legislative lobbying; psychological counseling; social work; economic analysis; and patent, medical or environmental consulting.[445] Even when law-related and legal services are distinct from each other, such as through different entities or separate support staff, the Model Rules are applicable to the lawyer unless the recipient of the law-related services is reasonably assured that legal services are not being provided and that the protections afforded to the recipient of legal services do not apply.[446] Examples of safeguards normally available in a lawyer-client relationship include the protection of client confidences and the prohibition against representing conflicting interests.[447] When the full protection of the Model Rules is not applicable to the provision of law-related services, other principles of law, such as the law of principal and agent, govern the legal duties owed to the recipient of the services.[448] Honesty and integrity are virtues relevant to this rule.

Biblical passages relating to believers' relations with unbelievers are analogous to these rules. First, the Bible prohibits Christians from being "unequally yoked."[449] Even though this prohibition is generally referred to in the context of marriage, it should also be considered in certain business situations, notably where significant control over one's actions would be willingly yielded to an unbeliever through a partnership or association. Scripture certainly does not tell Christians to have no association with unbelievers,[450] but Christians are prohibited from being affiliated with them to the degree that they significantly influence the direction and outcome of believers' moral decisions.

Second, although it is more of a stretch, in *some ways* these rules can be likened to the many biblical prohibitions against Hebrews mixing with idol-worshippers. Joshua, for example, exhorted the Israelites:

> Therefore be very courageous to keep and to do all that is written in the Book of the Law of Moses, lest you turn aside from it to the right hand or to the left, *and* lest you go among these nations, these who remain among you. You shall not make mention of the name of their gods, nor cause *anyone* to swear *by them*; you shall not serve them nor bow down to them, but you shall hold fast to the LORD your God, as you have done to this day. [451]

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445 *Id.* R. 5.7 cmt. 9.

446 *Id.* R. 5.7 cmt. 3.

447 *Id.* R. 5.7 cmt. 2.

448 *Id.* R. 5.7 cmt. 11.

449 2 *Corinthians* 6:14.

450 *See Mark* 2:15–17; 1 *Corinthians* 5:9–10.

451 *Joshua* 23:6–8.

Just as the Jews had a different belief system and code of conduct than others in the land, so attorneys are called to follow a code of professional responsibility that does not necessarily apply to nonlawyers or to nonlegal activities.[452] Attorneys who submit to nonlawyers therefore run the risk of compromising their independence and integrity as lawyers and their honesty and loyalty to their clients. Similarly, attorneys who provide law-related services potentially compromise their integrity and honesty unless they either provide Model Rule protections to the recipients of those services or provide those services in settings where the recipients know those protections do not apply.

D. Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Generally, Rule 5.5 provides that a lawyer may practice law only in jurisdictions in which he or she is authorized to practice.[453] The purpose of the rule is to protect the public from the rendering of legal services by unqualified persons.[454] The rule is broadly divided into two parts. The first two subsections proscribe the practice of law in jurisdictions in which the lawyer is not authorized.[455] The latter two subsections outline permissible modes of multijurisdictional practice.[456] The purpose of these subsections is to enable licensed lawyers to practice law on a limited basis in other jurisdictions where they are not otherwise permitted to practice.

The rule identifies four circumstances in which a lawyer in good standing in the licensing jurisdiction may provide legal services on a temporary basis in another jurisdiction in ways that would not create an unreasonable risk to clients, the public, or the courts.[457] Legal services

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452 Lawyers can be professionally disciplined for nonlegal activities as those activities relate to their fitness to practice law. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2003). Nonlegal activities generally, however, are not subject to the Model Rules.

453 *Id.* R. 5.5 cmt. 1.

454 *Id.* R. 5.5 cmt. 2. The rule does not prohibit a lawyer from employing paraprofessionals and delegating functions to them, so long as the lawyer supervises the work and remains responsible for it. *Id.*

455 *Id.* R. 5.5(a)–(b).

456 *Id.* R. 5.5(c)–(d).

457 *Id.* R. 5.5 cmt. 5. The legal services may be provided on a temporary basis where they: (1) are undertaken in association with a lawyer admitted in the jurisdiction and who actively participates in the matter; (2) are related to a proceeding before a tribunal in the jurisdiction if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding; (3) are related to an alternative dispute resolution proceeding in a jurisdiction, if the services are related to the lawyer's practice in a jurisdiction in which the lawyer is admitted and are not services for which the forum requires pro hac vice admission; or (4) are not otherwise provided for and are related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. *Id.* R. 5.5(c)(1)–(4).

that are "temporary" may be provided "on a recurring basis, or for an extended period of time," as when the representation involves "a single lengthy negotiation or litigation."[458]

Rule 5.5 also permits a lawyer licensed in one jurisdiction to practice law on either a temporary or continuous basis in another jurisdiction where the legal services are provided solely for the lawyer's employer or its affiliates,[459] or as authorized by federal or other law.[460] The lawyer's ability to represent the employer beyond the jurisdiction of licensing generally serves the employer's interests and does not create an unreasonable risk to the employer or others.[461] Under some circumstances, a lawyer may have to inform the client that the lawyer is not licensed to practice law in the temporary jurisdiction. For example, such notice may be necessitated when the representation requires knowledge of the law of the temporary jurisdiction.[462]

A lawyer who practices law in a temporary jurisdiction is subject to the disciplinary authority of that jurisdiction.[463] A lawyer may be subject to the disciplinary authority of both the temporary jurisdiction and the licensing jurisdiction for the same misconduct.[464] Biblical virtues related to Rule 5.5 include honesty, competence, and submission to authorities. Each of these virtues is needed to comply fully with this rule.

Honesty enables a lawyer not to participate in the unauthorized practice of law, and to comply with the multijurisdictional rules. In *Genesis* 43:12, Jacob finds silver in his sacks and orders his brother to return it to whomever mistakenly placed it there.[465] Scripture instructs people to deal with each other honestly.[466] According to *Proverbs* 16:11, "Honest scales and balances are from the LORD . . . ."[467] Another verse says that the Lord detests lying lips but delights in people who are truthful.[468] Rule 5.5(b)(2) aligns with Scripture because it calls on lawyers to be honest in how they represent their authority to practice law.

Competency concerns a lawyer's ability to remain in compliance with rules regulating the admission to the practice of law and all the

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458 *Id.* R. 5.5 cmt. 6.

459 *Id.* R. 5.5(d)(1). This subsection applies to in-house corporate lawyers, government lawyers, and others employed to render legal services to the employer.

460 *Id.* R. 5.5(d)(2).

461 *Id.* R. 5.5 cmt. 16.

462 *Id.* R. 5.5 cmt. 20.

463 *Id.* R. 5.5 cmt. 19.

464 *See id.* R. 8.5.

465 *Genesis* 43:12.

466 *See supra* notes 261–75, 373–89 and accompanying text.

467 *Proverbs* 16:11 (NIV).

468 *Proverbs* 12:22.

rules of professional responsibility. Rule 5.5 seeks to uphold competency by limiting lawyers' ability to practice law in jurisdictions where they have not been formally adjudged competent by being admitted to practice. The Bible urges believers to go beyond mere competency and to strive for excellence.[469] It is contrary to the idea of excellence and preparedness for an attorney to neglect taking the appropriate steps to ensure he has the requisite ability to represent a client. In providing the best representation for a client, an excellent lawyer will comply with the rules governing the ability to practice law in various jurisdictions.

Rule 5.5 also invokes the biblical virtue of submission to authorities. Scripture admonishes believers to submit themselves to God.[470] Christians are also directed to submit to authority. Jesus himself submitted to His Father by going along with the authorities' plan to crucify him. Jesus is the model of submission. He humbled himself and was obedient to his Father's will even to death.[471] 1 *Peter* 2:13 instructs that because Christ suffered as an example, believers should follow in his steps by submitting to authority.[472]

Scripture says that everyone must submit to governing authority and that those who rebel against authority rebel against what God has instituted and will bring judgment on themselves.[473] As such, attorneys have a duty to follow state ethics rules and to submit to the governing ethics board of their state. Lawyers should submit to authority, not only because of possible punishment, but also for the sake of conscience.[474] In doing so, lawyers are held accountable for their actions, and thus are given a greater incentive to be honest and fair in their dealings.

E. Rule 5.6: Restrictions on Right to Practice

Rule 5.6 limits restrictions imposed on a lawyer's right to practice. The rule generally seeks to prevent law firms from imposing post-departure limitations on a lawyer's freedom to practice law.[475] The rationale is two-fold. First, members of the public should have the right to select lawyers of their choosing, and covenants that restrict a lawyer's right to practice law diminish the pool of legal talent available. Second, lawyers should have the freedom to practice their profession without

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469 *See supra* notes 21–30 and accompanying text (discussing the relationship between competency and biblical excellence).

470 *James* 4:7.

471 *Philippians* 2:8.

472 1 *Peter* 2:13.

473 *Compare Romans* 13:1–5 *with* 1 *Peter* 2:13–14; *see also infra* note 625 (discussing other biblical passages related to submission to authorities).

474 *See Romans* 13:5.

475 MODEL RULES OF PROF'L CONDUCT R. 5.6 (2003).

undue restraint.[476] Ironically, the rule protects the lawyer's freedom to practice law by limiting the lawyer's freedom to lose it by contract. The freedom to practice law and to earn one's livelihood is a valuable commodity to be treasured.

Not surprisingly, the biblical virtue most closely associated with this rule is freedom. The theme of freedom is prominent in Scripture. The exodus of the Israelites from bondage in Egypt to eventual freedom in the Promised Land is one of the best-known narratives in Scripture.[477] Their liberation was for the purpose of serving God and obeying his laws.[478]

John makes an explicit reference to freedom. The book records that Jesus told the Jews who believed in him, "If you hold to my teaching, you are really my disciples. Then you will know the truth, and *the truth will set you free.*"[479] In *Romans* Paul writes that Christians are freed from the power of sin and death through faith and the transforming power of the Holy Spirit.[480] These verses contrast the political or external concept of freedom with the spiritual work of salvation.[481] The Spirit of the Lord brings freedom.[482] Paul makes clear that this freedom is not a license to do whatever a believer wants; rather, it leads to moral transformation.[483]

It is clear that the scriptural alternative to bondage is not freedom in some abstract sense, but freedom to serve God. By contrast, the liberation of the lawyer from the bondage of a covenant not to compete contemplates an economic freedom to prosper in the practice of law.

VI. PUBLIC SERVICE

A. Rule 6.1: Voluntary Pro Bono Publico Service

Rule 6.1 provides an aspirational standard of fifty (50) hours of pro bono legal services per year.[484] A substantial majority of the lawyer's

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476 ANNOTATED MODEL RULES, *supra* note 208, at 491. An exception is provided for the sale of a law practice pursuant to Rule 1.17. MODEL RULES OF PROF'L CONDUCT R. 5.6 cmt. 3 (2003).

477 *See generally Exodus.*

478 *See, e.g., Exodus* 19:4–5. The subsequent history of the Israelites was one of repeated disobedience to God. *See, e.g., Joshua* 7:1–21; *Judges* 2:7–23, 3:5–11, 6:1–16.

479 *John* 8:31–32 (NIV) (emphasis added).

480 *See Romans* 8:2 ("For the law of the Spirit of life in Christ Jesus has made me free from the law of sin and death.").

481 EVANGELICAL DICTIONARY OF BIBLICAL THEOLOGY 271 (Walter A. Elwell ed., 1996) (defining *freedom*).

482 *See* 2 *Corinthians* 3:17.

483 *See* 2 *Corinthians* 3:18; *see also* EVANGELICAL DICTIONARY, *supra* note 481, at 272.

484 MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003). The rule states that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year." *Id.*

time, according to the rule, should be spent serving the needy or organizations that serve the needy.[485] The rule reflects the virtues of justice for the poor, compassion, respect for others, servanthood, and intercession.

Proverbs 21:13 warns against closing one's "ears to the cry of the poor."[486] In fact, *Proverbs* expressly encourages believers to represent the poor and needy: "Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy."[487] In emphasizing lawyers' responsibility to serve the needy, as opposed to not-for-profit enterprises more generally, the rule thus parallels biblical instructions for believers generally.

Indeed, compassion and justice for the poor earn praise in Scripture as noteworthy virtues.[488] Jesus' familiar words continue to echo today concerning compassion for those in need: "[F]or I was hungry and you gave Me food; I was thirsty and you gave Me drink; I was a stranger and you took Me in; I *was* naked and you clothed Me; I was sick and you visited Me; I was in prison and you came to Me."[489] It is clear that a Christian lawyer who renders assistance to the needy ministers vicariously to the Lord.

Besides these virtues, the Bible also calls individuals to serve out of respect for others and to intercede on their behalf. Respect for the basic dignity of human individuals comes from the value attributed to them because they are created in the image of God.[490] Christians are, for example, never to "exploit the poor" because of the respective worth of every human being and the position in which the poor find themselves.[491]

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485 *Id.* According to the rule, "[i]n fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means." *Id.* R. 6.1(a)(1). Alternatively, the rule calls for legal services "without fee or expectation of fee" to organizations focusing on the poor. *Id.* R. 6.1(a)(2).

486 *Proverbs* 21:13.

487 *Proverbs* 31:8–9 (NIV).

488 *See, e.g., Acts* 9:36 ("At Joppa there was a certain disciple named Tabitha, which is translated Dorcas. This woman was full of good works and charitable deeds which she did.").

489 *Matthew* 25:35–36.

490 *See Genesis* 1:26 ("Then God said, 'Let Us make man in Our image, according to Our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth.'").

491 *Proverbs* 22:22–23 ("Do not rob the poor because he *is* poor, [n]or oppress the afflicted at the gate; for the LORD will plead their cause, [a]nd plunder the soul of those who plunder them."). Another version states: "Rob not the poor, because he is poor: neither oppress the afflicted in the gate: For the LORD will plead their cause, and spoil the soul of those that spoiled them." *Id.* (KJV).

The Scriptures consider any type of disregard for the poor as "contempt" against God Himself.[492]

Intercession is another virtue inherent in this rule. The lawyer is to be the voice of those who cannot speak for themselves.[493] The fact that such a rule exists in the legal system is testimony to the value our society places on defending the needs of those who cannot speak for themselves. Attorneys as a group have something unique to offer society by the role they have been given. Specifically, the role of advocate gives lawyers a unique advantage to address the needs of the disadvantaged, thus giving such individuals an equal footing with those in society who are more fortunate.[494]

Servanthood is exhibited in rendering service to the community. For example, Rule 6.1 looks favorably on providing legal services pro bono or at a "substantially reduced fee" to organizations "seeking to secure or protect civil rights, civil liberties or public rights."[495] Lawyers are asked to aspire to see their communities improved and, because of the unique abilities of lawyers, they are to give from their abilities to serve the community. A blind man once extended his cup of alms to Paul and Peter in order to receive a donation. Although poor also, they gave of what they had to offer in order to benefit a member of the Jewish community.[496] This is precisely the type of spirit that the model rule encompasses, and such spirit is of great value to society.

A noteworthy distinction becomes apparent when considering this rule in contrast with the Bible. The standard of the rule is aspirational, while the biblical standard gives a clear directive to care for the poor and intercede on their behalf.[497] A lawyer cannot be forced to serve others, despite the "should" language in the Model Rules.[498] An example of this reality is the case of *De Lisio v. Alaska Supreme Court*, where the Alaska Supreme Court held that forcing a lawyer to represent an indigent without just compensation was a violation of the lawyer's due process

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492 *Proverbs* 14:31 ("He who oppresses the poor reproaches his Maker, [b]ut he who honors Him has mercy on the needy.").

493 *Proverbs* 31:8–9 ("Open your mouth for the speechless, [i]n the cause of all who are appointed to die. Open your mouth, judge righteously, [a]nd plead the cause of the poor and needy.").

494 *Cf.* Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1455 (2004) ("That oaths and statutes continually have required, or at least urged, service to the poor underscores society's long held view that lawyers are essential to the administration of justice.").

495 MODEL RULES OF PROF'L CONDUCT R. 6.1(b)(1) (2003).

496 *See Acts* 3:6 ("Then Peter said, 'Silver and gold I do not have, but what I do have I give you: In the name of Jesus Christ of Nazareth, rise up and walk.'").

497 *See, e.g.*, *Proverbs* 29:7 ("The righteous considers the cause of the poor, [b]ut the wicked does not understand such knowledge.").

498 *See, e.g.*, De Lisio v. Ala. Supreme Court, 740 P.2d 437 (1987).

rights.[499] Likewise, the believer cannot be forced to comply with the biblical mandate. However, failing to comply disappoints the divine expectation and the Bible also warns that "[i]f a man shuts his ears to the cry of the poor, he too will cry out and not be answered."[500] Moreover, one should wonder why any human made in God's image should be given less access to, at least in theory, justice? Indeed, the rich are not more human than the poor. The God of the Bible would agree.[501]

B. Rule 6.2: Accepting Appointments

Rule 6.2 provides that as an officer of the court, a lawyer must ordinarily accept an appointment by a tribunal to represent a client. However, a lawyer may seek to avoid an appointment only for "good cause."[502] The rule acknowledges the possibility of a moral dilemma arising between the undesirable nature of the client or the matter and the expectations of the lawyer. The rule concedes that a lawyer is ordinarily "not obliged to accept a client whose character or cause the lawyer" considers "repugnant."[503] This concession would seem on its face to run contrary to the expectation in Rule 6.1 that lawyers will provide *pro bono publico* service.[504] However, Comment 1 to Rule 6.2 underscores that a lawyer fulfills this *pro bono* "responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients."[505] Moreover, this expectation in Rule 6.1 is affirmed by the fact that the

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499 *Id.* at 442.

500 *Proverbs* 21:13 (NIV). Moreover, although the Bible teaches that individuals are saved by faith and not works, *see, e.g.*, *Romans* 3:21–28, it also teaches that good works demonstrate true faith. *See, e.g.*, *Matthew* 7:19–20 ("[B]y their fruits you will know them."); *James* 2:26 ("For as the body without the spirit is dead, so faith without works is dead also.").

501 GRUDEM, *supra* note 87, at 450 ("Every single human being . . . still has the *status* of being in God's image and therefore must be treated with the dignity and respect that is due to God's image-bearer.").

502 MODEL RULES OF PROF'L CONDUCT R. 6.2(a)–(c) (2003). Examples given of "good cause" include a likelihood of violating the Model Rules, an unreasonable financial burden on the lawyer, or the cause being "so repugnant to the lawyer" that a likely impairment to the relationship exists so as to affect "the lawyer's ability to represent the client." *Id.*

503 *Id.* R. 6.2 cmt. 1 ("An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.").

504 *Id.*

505 *Id.*; *see also* ANNOTATED MODEL RULES, *supra* note 208, at 514 ("Rule 6.2 does not actually create an obligation to accept a court appointment. Rather, it presupposes the obligation.").

"good cause" exception in Rule 6.2 is construed narrowly, especially when the lawyer claims good cause due to his aversion to the case.[506]

The rule offers further guidance in dealing with an undesirable appointment. Good cause exists for declining an appointment of a client whose cause is unpopular if the lawyer is not competent in the matter,[507] or if undertaking the representation would result in a conflict of interest,[508] or "if acceptance [of the appointment] would be unreasonably burdensome."[509] The rule requires the lawyer to work for the appointed client as though the lawyer was being paid by the client.[510]

Rule 6.2 encompasses a variety of biblical virtues. These include personal responsibility, servanthood, integrity, and respect for others. Personal responsibility is highlighted in the Pauline epistle to the Corinthians, where Paul "required" stewards to "be found faithful."[511] Paul intimates that his reward is greater for performing a duty against his own will.[512]

The rule also reflects the virtues of servanthood and integrity. In his letter to the Ephesians, Paul challenges Christians to do their service in good will "as to the Lord, and not to men."[513] Even when an attorney finds the character of a client to be "repugnant," this verse challenges the lawyer to view his service as an offering to God. As noted above in earlier sections of this article, the virtue of integrity requires "personal integration," in which individuals exhibit personal consistency.[514] The Scriptures reinforce this idea when they challenge Christians to live by what they preach. For example, the Bible praises those who are obedient to the ordinances of God.[515] The rule thus reflects this virtue by

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506 ANNOTATED MODEL RULES, *supra* note 208, at 515–16 (discussing cases and rule history addressing the good cause standard under Rule 6.2).

507 MODEL RULES OF PROF'L CONDUCT R. 6.2 cmt. 2 (2003).

508 *Id.* (noting that a conflict of interest exists "when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client").

509 *Id.* For example, when it would impose an unjust financial sacrifice. *Id.*

510 *Id.* R. 6.2 cmt. 3.

511 1 *Corinthians* 4:2.

512 In the same epistle Paul states: "For if I do this willingly, I have a reward; but if against my will, I have been entrusted with a stewardship." 1 *Corinthians* 9:17. Another translation states: "For if I do this voluntarily, I have a reward; but if against my will, I have a stewardship entrusted to me." *Id.* (NASB).

513 *Ephesians* 6:7.

514 *See supra* notes 132–34 and accompanying text; *see also* WEBSTER'S, *supra* note 307, at 595 (defining *integrity* as "firm adherence to a code of esp[ecially] moral or artistic values").

515 *Romans* 2:13 ("For not the hearers of the law are just in the sight of God, but the doers of the law will be justified . . . .").

encouraging attorneys to turn their concern for the poor into action by accepting the appointment of needy clients.

Lastly, the Bible promotes the virtue of respect for others. One of the laudable attributes of the American legal system is its concern for those who cannot defend themselves. The Scriptures teach that the righteous show concern for the poor. In fact, God promises to "deliver" those who are concerned for the poor.[516]

The importance of accepting appointed representation is emphasized in *Reese v. Owens-Corning Fiberglass Corp.*[517] In that case, Mr. Rockey was appointed by a U.S. Magistrate to represent an individual in a case involving employment law. Rockey, after speaking with the client, requested removal from the case because he had no experience in employment law and was a sole practitioner. The court determined that with "adequate preparation and tutelage" the lawyer should be able to achieve adequate competency, and it appointed an experienced "mentor" to assist him.[518] Mr. Rockey also alleged that he would suffer financial hardship should he be forced to represent the defendant. The court found that Rockey did not adequately show that he would suffer financial hardship under the rule because he was not required to use his own funds to represent the client. The court stated that "Mr. Rockey has either forgotten or simply disregards his professional obligations to the court and the public not to attempt to avoid court appointments to represent indigent persons."[519] Nevertheless, the court removed him as counsel out of concern for the interests of the plaintiff and the judicial system, but not before directing his attention to the importance of Rule 6.2 and admonishing him to "seriously consider whether he should file civil cases in this court in the future."[520]

This case represents the legal system's preference to give proper representation to everyone. Rule 6.2 does not exist as a way out for lawyers and should be used only in extraordinary circumstances. The Model Rules and Scripture agree, at least in principle, that individuals are not to prefer the wealthy over the poor and downtrodden.

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516 *Psalms* 41:1 ("Blessed is he who considers the poor; [t]he LORD will deliver him in time of trouble.").

517 962 F. Supp. 1418 (D. Kan. 1997).

518 *Id.* at 1419.

519 *Id.* at 1420.

520 *Id.*

C. Rule 6.3: Membership in Legal Services Organizations Rule 6.4: Law Reform Activities Affecting Client Interests Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs

These three rules are part of the "public service" group of ethics rules and are considered together because they regulate lawyers' involvement in different law-related public service programs. According to the Preamble to the Model Rules, "a lawyer should strive to . . . exemplify the legal profession's ideals of public service."[521] Lawyers who represent clients through "legal services organizations"[522] often encounter conflicts of interest. These rules attempt to avoid or minimize these conflicts in such a way as to allow and encourage participation in legal services organizations.[523]

Rule 6.3 provides that "[a] lawyer may serve as a director, officer or member of a legal services organization . . . notwithstanding that the organization serves persons having interests adverse to a client of the lawyer."[524] In order to avoid such conflicts, the rule instructs the lawyer to refrain from participating in any decision or action of the organization that would violate Rule 1.7 ("Conflict of Interest: Current Clients") or "could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer."[525] Only the organization's staff lawyers actually represent clients; board members do not. Legal services clients do not confer with or confide in board members.[526] Although these characteristics protect board members from some conflicting activity, the rule includes its requirements to ensure all conflicts are avoided by effectively screening lawyer board members from certain aspects of the organization's decision-making process.[527]

Rule 6.4 allows a lawyer to "serve as a director, officer or member of [a law reform] organization . . . notwithstanding that the reform may affect the interests of a client of the lawyer."[528] When the lawyer participates in a decision that may benefit the interests of a client, the lawyer's only obligation is to disclose that fact.[529] "A lawyer is . . .

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521 MODEL RULES OF PROF'L CONDUCT pmbl. para.7 (2003).

522 The Model Rules do not define this term.

523 In fact, the comment to Rule 6.3 encourages such participation directly: "Lawyers should be encouraged to support and participate in legal service organizations." MODEL RULES OF PROF'L CONDUCT R. 6.3 cmt. 1 (2003).

524 *Id.* R. 6.3.

525 *Id.*

526 *See* 2 HAZARD & HODES, *supra* note 150, § 52.2, at 52-4.

527 *See generally* Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279 (1999).

528 MODEL RULES OF PROF'L CONDUCT R. 6.4 (2003).

529 *Id.* The client need not be identified. *Id.*

obligated to protect the integrity of the program by making an appropriate disclosure [to] the organization when the lawyer knows [that] a private client might be materially benefited."[530]

Thus, Rule 6.3 provides the remedy of nonparticipation in a decision, whereas Rule 6.4 allows disclosure to cure a Rule 1.7 conflict. By minimizing or eliminating such conflicts in relatively simple ways, these legal services organizations are encouraged and promoted.

Rule 6.5 provides guidelines regulating lawyers' involvement with legal services programs. The ABA adopted this rule in 2002 out of a concern that the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs providing short-term limited legal services.[531]

By encouraging lawyers' involvement in these public service activities, these three rules imply the biblical virtues of respect for others, justice for the poor, and servanthood. Scripture teaches individuals to respect others and to reach out to those in need. Christians are to consider others better than themselves. The apostle Paul told the church in Rome to "[b]e kindly affectionate to one another with brotherly love, in honor giving preference to one another."[532] Again, Paul in his letter to the church at Philippi said to "[l]et nothing be done through selfish ambition or conceit, but in lowliness of mind let each esteem others better than himself."[533] Furthermore, 1 *Peter* 2:17 says to "Honor all people. . . . Fear God. Honor the king."[534] Christians are to serve one another as unto God. If all lawyers practiced this virtue, then clients would likely never want for a judicially-appointed lawyer.

As observed in the preceding sections on Rules 6.1 and 6.2, the Bible has a lot to say about assuring justice to the poor.[535] Individuals are not to pervert justice, or to favor the wealthy over the poor.[536] The psalmist,

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530 *Id.* R. 6.4 cmt. 1.

531 *See* ABA Center for Professional Responsibility, Reporter's Explanation of Changes: Model Rule 6.5, http://www.abanet.org/cpr/e2k/e2k-rule65rem.html. These programs are under the auspices of a nonprofit organization or a court-annexed program, for example, a "legal-advice hotline or pro se clinic, the purpose of which is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented." *Id.*

532 *Romans* 12:10. Another version states: "Be devoted to one another in brotherly love. Honor one another above yourselves." *Id.* (NIV).

533 *Philippians* 2:3. Another version states: "Do nothing out of selfish ambition or vain conceit, but in humility consider others better than yourselves." *Id.* (NIV).

534 1 *Peter* 2:17. Another version states: "Show proper respect to everyone: . . . fear God, honor the king." *Id.* (NIV).

535 *See Exodus* 23:6 ("You shall not pervert the judgment of your poor in his dispute."). Another version states: "Do not deny justice to your poor people in their lawsuits." *Id.* (NIV).

536 *See Leviticus* 19:15 ("You shall do no injustice in judgment. You shall not be partial to the poor, nor honor the person of the mighty. In righteousness you shall judge

David, said that "the LORD secures justice for the poor and upholds the cause of the needy."[537] And *Proverbs* states that "[t]he righteous considers the cause of the poor, [b]ut the wicked does not understand *such* knowledge."[538] Lawyers are in a position either to deny justice to the needy or to be the Lord's instruments in achieving justice for the poor in court. Scripture condemns those who would deprive the poor of justice in the courts.[539] In sum, lawyers are servants of the justice system and those it serves. *Ephesians* tells servants to "[s]erve wholeheartedly, as if you were serving the Lord, not men."[540]

VII. INFORMATION ABOUT LEGAL SERVICES

A. Rule 7.1: Communication Concerning a Lawyer's Services
Rule 7.2: Advertising
Rule 7.3: Direct Contact with Prospective Clients
Rule 7.4: Communication of Fields of Practice and Specialization
Rule 7.5: Firm Names and Letterheads

Model Rules 7.1 to 7.5 deal with dissemination of information about a lawyer's services. Rule 7.1 regulates communications made by lawyers about themselves or their services, and requires that they be truthful.[541] Rule 7.2 regulates lawyer advertising through various media and prohibits rewarding others for recommending the lawyer's services.[542] Rule 7.3 circumscribes the parameters on direct contact with prospective clients.[543] Communications regarding specialization and fields of practice

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your neighbor."). Another version states: "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly." *Id.* (NIV).

537 *Psalms* 140:12 (NIV).

538 *Proverbs* 29:7. Another version states: "The righteous care about justice for the poor, but the wicked have no such concern." *Id.* (NIV).

539 *See Amos* 5:12 (NIV) ("For I know how many are your offenses and how great your sins. You oppress the righteous and take bribes and you deprive the poor of justice in the courts.").

540 *Ephesians* 6:7 (NIV).

541 MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt 1 (2003). Interestingly, the word *truthful* appears nowhere in the Model Rules except in two comments to this rule. Statements about a lawyer's services must be "truthful," *id.* R. 7.1 cmt. 1, and "truthful" statements that are misleading are prohibited. *Id.* R. 7.1 cmt. 2. The word *truthfulness* appears only in the title of Rule 4.1 ("Truthfulness in Statements to Others"). And the word *truth* appears only in a comment to Rule 3.3 ("Candor Toward the Tribunal"), in reference to "the truth-finding process." *Id.* R. 3.3 cmt. 11. This comment says that the adversary system is designed to implement the truth-finding process. *Id.*; *see also* Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209 (2006) (discussing the dichotomy between the truth-seeking goal of the judicial system and the lawyer's obligation to hide the truth under the protection of the attorney-client privilege and the confidentiality rule).

542 MODEL RULES OF PROF'L CONDUCT R. 7.2 (2003).

543 *Id.* R. 7.3.

are regulated by Rule 7.4,[544] while firm names and letterheads are governed by Rule 7.5.[545] These five rules are viewed generally as regulating advertising, though they are broader in scope. The virtues requisite for compliance with these rules include honesty and integrity.

As noted above in the section on Rule 4.1 ("Truthfulness in Statements to Others"), maintaining verbal truthfulness is central to upholding the virtue of honesty. The legal community values such truthfulness, as evidenced by these five rules, the U.S. Constitution, and case law.[546] Rule 7.1 is representative of the four rules that immediately follow it, and it will be discussed herein as a proxy for those rules. Rule 7.1 addresses all types of communications about a lawyer's services and requires that they be truthful.[547] Although the rule applies to all communications concerning a lawyer's services, violations seem to occur most frequently in the context of advertising.[548] Communication made by the lawyer about himself or his services that is "false or misleading" is a violation of the rule.[549] The rule also prohibits statements that are truthful but misleading.[550] Examples include reports about a lawyer's achievements on behalf of former clients that would lead a reasonable person to expect the same or similar results,[551] and "an unsubstantiated comparison of [a] lawyer's services . . . with the services . . . of other lawyers [that] . . . would lead a reasonable person to conclude that the comparison can be substantiated."[552]

As discussed in other sections of this article, honesty is a key biblical virtue.[553] One of the Ten Commandments requires truthfulness

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544 *Id.* R. 7.4.

545 *Id.* R. 7.5.

546 *E.g.*, *In re* R.M.J., 455 U.S. 191 (1982) (holding that false or misleading advertising may be regulated). The First Amendment protects commercial speech, which includes advertising. In *Bates v. State Bar of Ariz.*, the Court extended the commercial speech protection to apply to advertising by lawyers. 425 U.S. 748, 841 (1976). In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court concluded that all commercial speech receives some First Amendment protection except speech that is misleading or speech that encourages illegal activity. 447 U.S. 557, 564–66 (1980).

547 MODEL RULES OF PROF'L CONDUCT R. 7.1 (2003); *see supra* note 541.

548 ANNOTATED MODEL RULES, *supra* note 208, at 530.

549 MODEL RULES OF PROF'L CONDUCT R. 7.1 (2003).

550 *Id.* R. 7.1 cmt. 2.

551 *Id.* R. 7.1 cmt. 3.

552 *Id.* (adding that these violations may be cured by appropriate disclaimer or qualifying language). For a biblical example of a true but misleading statement, see *supra* note 102.

553 *But cf. supra* notes 102–06, 389 and accompanying text (discussing specific cases in which dishonesty was condoned in Scripture in order to protect innocent human life).

about one's neighbor.[554] Scripture also admonishes its readers to be truthful and honest in their dealings with others.[555]

For failure to comply with the truthfulness standard in the Model Rules, sanctions imposed against lawyers are often relatively mild.[556] Violation of the biblical standard for truthfulness can be far more severe. One of King Solomon's proverbs warns that being untruthful may allow a man to profit for a while, but that in the end "his mouth will be filled with gravel."[557] The author of the book of *Acts* tells the story of a couple, Ananias and Sapphira, who sought to mislead the local church by factual misrepresentation and omission of a material fact.[558] The church members had decided to sell their possessions and give the proceeds to the church leaders to be distributed to the members according to need. Ananias and Sapphira sold their possessions but withheld some of the proceeds and surrendered only a portion to be distributed. They misrepresented the amount given by failing to divulge the full proceeds received from the sale. They were considered to have lied to God rather than man and were struck dead on the spot.[559] These examples highlight the stark contrast between the Model Rules and Scripture in the penalty for violating mandates for truthfulness.

These rules implicate integrity in that honesty and truthfulness are properly viewed as components to integrity.[560] Integrity is also relevant in how the rules encourage lawyers to treat others with respect. In

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554 *Exodus* 20:16 ("You shall not bear false witness against your neighbor.").

555 *See, e.g.*, *Leviticus* 19:35 (NIV) ("Do not use dishonest standards when measuring length, weight or quantity."); *Deuteronomy* 25:15–16 (NIV) ("You must have accurate and honest weights and measures, so that you may live long in the land the LORD your God is giving you. For the LORD your God detests anyone who does these things, anyone who deals dishonestly.").

556 *See, e.g.*, *In re* Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig., No. 99-MD-1309, 2004 U.S Dist. LEXIS 7789 (D. Minn. 2004) (holding that for "misconduct of a serious nature" the offending lawyer was required to submit to the court a list of recipients of and respondents to the offending advertisement, pay reasonable attorney's fees, prepare and disseminate a retraction to the recipients of the offending advertisement, at his own cost, and was prohibited from representing any person who responded to the offending advertisement); *In re* Huelskamp, 740 N.E.2d 846 (Ind. 2000) (sanctioning attorney with a public reprimand in holding that attorney's statement in advertising literature referring to his Marine Corps service and experience as assistant professor at university was deceptive and misleading where such statement could be interpreted to exaggerate attorney's legal experiences, in that reasonable person might have believed incorrectly that attorney was currently a Marine Corps lawyer or a law professor).

557 *Proverbs* 20:17 ("Bread gained by deceit is sweet to a man, [b]ut afterward his mouth will be filled with gravel.").

558 *Acts* 5:1–11.

559 *Id.* (noting in verse five that Ananias did not lie "to men but to God" and in verse nine that Sapphira "test[ed] the Spirit of the Lord").

560 *See* Higginson, *supra* note 134, at 20–23 (describing five layers of integrity, with the first one being high moral standards, like "honesty").

particular, Rule 7.3 generally prohibits direct solicitation of prospective clients because of the potential for abuse.[561] A lawyer is in a position to take unfair advantage of a potential client at a time when that person may be overwhelmed by circumstances giving rise to the need for representation.

The Bible requires its adherents to look to the "interests of others."[562] There remains something about human dignity that compels people not to take advantage of each other and to help each other when the other is down. The Bible also states, "[t]herefore, whatever you want men to do to you, do also to them, for this is the Law and the Prophets."[563] The golden rule requires that people treat each other in the same way they would like to be treated. Rule 7.3 thus affirms these principles by prohibiting lawyers from soliciting business in situations when the "interests of the other," here the potential client, would not be served.

B. Rule 7.6: Political Contributions to Obtain Legal Engagements or Appointments by Judges

This rule states that a lawyer or law firm may not accept legal work from the government or an appointment by a judge if a political contribution was made or solicited for the purpose of obtaining such work or appointment.[564] When political contributions are made by lawyers for the purpose of obtaining legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the award is made on the basis of competence and merit. In such instances, the integrity of the profession is undermined.[565] This practice, known as "pay-to-play," was publicized

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561 MODEL RULES OF PROF'L CONDUCT R. 7.4 cmt. 1.

> The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

Id.

562 *Philippians* 2:4 ("Let each of you look out not only for his own interests, but also for the interests of others.").

563 *Matthew* 7:12.

564 MODEL RULES OF PROF'L CONDUCT R. 7.6 (2003). Examples of appointments a judge may make include special master, referee, commissioner, receiver, guardian, or other similar position. *Id.* R. 7.6 cmt. 3.

565 *Id.* R. 7.6 cmt. 1.

and denounced in a *Columbia Business Law Review* article in 1999.[566] Rule 7.6 was enacted shortly thereafter to address the problem.

The virtues associated with this rule include integrity and purity because lawyers uphold these virtues in their practice when they resist the temptation to buy business through political contributions. *Proverbs* 11:3 illustrates the biblical value placed on integrity: "The integrity of the upright will guide them, [b]ut the perversity of the unfaithful will destroy them."[567] The Scriptures also challenge individuals to purity. Jesus in the Sermon on the Mount calls his followers to remain "pure in heart, [f]or they shall see God."[568] The apostle Paul similarly mandates in his first letter to Timothy, "[K]eep yourself pure."[569]

Both integrity and purity are illustrated in the biblical account of Joseph and Potiphar's wife.[570] Because Joseph was a man of integrity, he remained pure in the face of sexual temptation. As a result, God caused Joseph to succeed in spite of difficult circumstances.[571]

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

A. Rule 8.1: Bar Admission and Disciplinary Matters

Rule 8.1 requires that a lawyer be truthful on bar applications and in disciplinary matters. If an applicant makes any "false statements of material fact" or "fails to disclose" necessary facts in connection with his or her bar admission or in connection with any disciplinary procedure, the applicant may run afoul of Rule 8.1.[572] This rule principally relates to the virtue of honesty.

The legal community seeks to demonstrate that it values truthfulness by punishing attorneys through suspension or disbarment for lying on the bar application. In *People v. Mattox*, an attorney who was disbarred from the practice of law in Kentucky for a misdemeanor charge later applied for and passed the Colorado bar exam.[573] In her bar application, she failed to disclose her prior discipline in Kentucky. As a

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566 Jon B. Jordan, *The Regulation of "Pay-To-Play" and the Influence of Political Contributions in the Municipal Securities Industry*, 1999 COLUM. BUS. L. REV. 489, 492 (1999).

567 *Proverbs* 11:3; *see also Proverbs* 10:9 ("He who walks with integrity walks securely, [b]ut he who perverts his ways will become known.").

568 *Matthew* 5:8.

569 1 *Timothy* 5:22.

570 *Genesis* 39:1–23 (recounting how Joseph resisted the advances of his master's wife and then was imprisoned after she falsely accused him of trying to sleep with her).

571 *Genesis* 39:21–23 (noting how Joseph obtained the "favor" of the prison keeper such that he "committed to Joseph's hand all the prisoners who were in the prison" and that "whatever [Joseph] did, the LORD made it prosper").

572 MODEL RULES OF PROF'L CONDUCT R. 8.1 (2003).

573 862 P.2d 276, 276 (Colo. 1993).

result, the Colorado Supreme Court suspended the attorney from the practice of law for one year.[574] Similarly, in *Florida Bar v. Webster* an attorney was disbarred from the practice of law because he knowingly failed to disclose past disciplinary action taken against him in Florida when he was applying for admission to other states' bars.[575]

The account of Simon Peter's denial of Jesus illustrates the value of truthfulness.[576] Even though Peter was a follower of Jesus and spoke of his dedication to Him, Peter still lied three times when asked whether he was with Jesus before Jesus was arrested. Peter was fearful of what would happen to him if he told the truth, just like applicants who have something they are fearful of reporting on a bar application. Peter's denial shows that the consequences of lying may be significant.[577]

B. Rule 8.2: Judicial and Legal Officials

Lawyers are occasionally called on to evaluate the professional or personal fitness of persons being considered for judgeships or for public legal offices. Public legal offices include the office of the attorney general, the prosecuting attorneys, and the public defenders. The administration of justice is improved when lawyers express honest and candid opinions on such matters. Conversely, false statements by lawyers can unfairly undermine public confidence in the administration of justice.[578] Rule 8.2 emphasizes the need for truthfulness in such statements in order to improve the administration of justice.

False criticism of judicial and legal officials is prohibited because of the need to maintain justice within the legal system. Lawyers sometimes pay a high price for tarnishing the reputation of judges and legal officials. In *In re Palmisano*, a lawyer was disbarred after repeatedly making false statements about judges before whom he had appeared.[579] The court accurately observed that "disbarment is costly for an attorney, but permitting an incompetent or otherwise inappropriate person to practice law is costly for clients and the administration of justice."[580]

Truthfulness and justice thus are virtues inherent in this rule. The Bible teaches that Jesus was without sin.[581] When Pilate asked Jesus if

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574 *Id.* at 277.

575 662 So. 2d 1238, 1239 (Fla. 1995). Webster was disbarred from the Florida Bar and the District of Columbia Bar for his misconduct. *Id.* at 1240–41.

576 *Matthew* 26:69–75.

577 *See Matthew* 26:75. Peter denied knowing Jesus, the one who died for him so he could have eternal life. When he realized what he had done, Peter wept bitterly. *Id.*

578 MODEL RULES OF PROF'L CONDUCT R. 8.2(a) (2003).

579 70 F.3d 483, 487–88 (7th Cir. 1995).

580 *Id.* at 486.

581 *See, e.g.*, 2 *Corinthians* 5:21 (stating that Jesus "knew no sin"); *Hebrews* 4:15 (stating that Jesus "was in all points tempted as we are, yet without sin"); 1 *Peter* 2:22

he was the King of the Jews, Jesus responded truthfully in the affirmative,[582] knowing the consequences.[583] Jesus was executed shortly thereafter.[584] The importance of justice is reflected in *Micah* 6:8, which summarizes the qualities that matter to God.[585] The importance of justice is also emphasized when Moses chose godly men who were above reproach to sit as judges in order to better assure justice for the people.[586] Chapter 13 of the book of *Romans* underscores how God uses judges and public officials to advance justice.[587] Christian lawyers therefore advance justice when they promote an honest dialogue about such officials.

C. Rule 8.3: Reporting Professional Misconduct

Lawyers are required to report the professional misconduct of other attorneys[588] and of judges.[589] "Self-regulation of the legal profession requires that" lawyers report misconduct in order to initiate a disciplinary investigation "when they know of a violation of the Rules of

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(stating that Jesus "committed no sin"); *see also* GRUDEM, *supra* note 87, at 535–36 (discussing biblical teaching on the sinlessness of Christ).

582 *Matthew* 27:11 (NASB) ("Now Jesus stood before the governor, and the governor questioned Him, saying, 'Are You the King of the Jews?' And Jesus said to him, 'It is as you say.'").

583 The Sanhedrin accused Jesus of sedition in claiming to be a king, knowing such a charge would be more effective with Pilate than a charge of blasphemy. SPIRIT-FILLED LIFE BIBLE 1460 n.27:11 (1991).

584 *Matthew* 27:37 ("And they put up over His head the accusation written against Him: THIS IS JESUS THE KING OF THE JEWS.").

585 *See Micah* 6:8 ("He has shown you, O man, what is good; [a]nd what does the LORD require of you [b]ut to do justly, [t]o love mercy, [a]nd to walk humbly with your God?"), (NASB) ("He has told you, O man, what is good; and what does the LORD require of you but *to do justice*, to love kindness, and to walk humbly with your God?") (emphasis added).

586 *Exodus* 18:17–24. Verses 21 and 22 specifically read: "[Y]ou shall select from all the people able men, such as fear God, men of truth, hating covetousness; and place such over them to be rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. And let them judge the people at all times." *Exodus* 18:21–22.

587 *Romans* 13:1–7. Verses 1 and 2 specifically read: "Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that exist are appointed by God. Therefore whoever resists the authority resists the ordinance of God, and those who resist will bring judgment on themselves." *Romans* 13:1–2.

588 MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2003). Subsection (a) provides 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." *Id.*

589 *Id.* R. 8.3(b).

Professional Conduct."[590] Rule 8.3 provides for certain exceptions. The rule "does not require disclosure of information otherwise protected by Rule 1.6,"[591] "or information gained by a lawyer or judge while participating in an approved lawyers assistance program."[592]

Not every violation is reportable. The violation must raise a "substantial" question as to the offender's honesty, trustworthiness, or fitness as a lawyer.[593] The term "substantial" refers to the seriousness of the offense and not the quantum of evidence.[594] A lawyer retained to represent a lawyer whose professional conduct is in question is not required to report misconduct and is governed by the rules applicable to the client-lawyer relationship.[595]

This rule highlights the virtues of personal responsibility and boldness. Personal responsibility and boldness are required to "rat" on one's colleagues by reporting professional misconduct when doing so may be unpopular. The apostle Paul had made many converts and close personal friendships in the churches he had visited on his several journeys, but in his later epistles to these churches he was willing to hold these people accountable for the wrongs they were committing. Paul's letter to the church in Corinth is an example of responsibility and boldness in pointing out such misconduct.[596] The ultimate good is achieved when the offender is repentant and restored.[597]

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590 *Id.* R. 8.3 cmt. 1 ("An apparently isolated violation may indicate a pattern that only an investigation can uncover."). This situation is especially true when the victim is unlikely to discover the violation. *Id.*

591 *Id.* R. 8.3(c). A comment adds that "a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." *Id.* R. 8.3 cmt. 2.

592 *Id.* R. 8.3(c).

593 *Id.*

594 *Id.* R. 8.3 cmt. 3.

595 *Id.* R. 8.3 cmt. 4.

596 1 *Corinthians* 4:14–21.

> I do not write these things to shame you, but as my beloved children I warn *you.* For though you might have ten thousand instructors in Christ, yet *you do* not *have* many fathers; for in Christ Jesus I have begotten you through the gospel. Therefore I urge you, imitate me. For this reason I have sent Timothy to you, who is my beloved and faithful son in the Lord, who will remind you of my ways in Christ, as I teach everywhere in every church.
>
> Now some are puffed up, as though I were not coming to you. But I will come to you shortly, if the Lord wills, and I will know, not the word of those who are puffed up, but the power. For the kingdom of God *is* not in word but in power. What do you want? Shall I come to you with a rod, or in love and a spirit of gentleness?

Id.

597 2 *Corinthians* 7:8–9.

> For even if I made you sorry with my letter, I do not regret it; though I did regret it. For I perceive that the same epistle made you sorry, though only for a

Boldness is further illustrated in *Ephesians* 5:11.[598] There the apostle Paul exhorts his converts to refuse to participate in wrongful conduct, and to expose it. Likewise, a lawyer has a duty to refrain from participating in wrongful conduct,[599] and to expose such conduct of which he has knowledge.

On the issue of exposing misconduct to those in authority, it is instructive to consider Jesus' discussion in *Matthew* 18 of how Christians should handle misconduct within the church.[600] Jesus states that the wronged party may properly expose the guilty person's actions "to the church" if that person does not repent after private confrontation.[601] Although this church discipline process does not provide a direct analog to how professional discipline should take place,[602] it does support the notion that public exposure of another's misconduct is appropriate in certain circumstances. Two purposes of church discipline are to keep the misconduct from spreading to others and to honor Christ by protecting the purity of the church.[603] Similarly, lawyers maintain the integrity of the profession by exposing professional misconduct. Public surveys have found that Americans believe lawyers do a poor job policing themselves, so attorneys should take this reporting obligation seriously.[604]

Rule 8.3 also relates to the virtue of honesty. As noted in other sections of this article, Christian ethicists maintain that silence can amount to dishonesty.[605] As David Gill contends:

> Refusing to speak to or about someone can be an insult or a harmful, irresponsible act. On some occasions we must overcome our fear or laziness and raise our voices for the truth and for our neighbor. To

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> while. Now I rejoice, not that you were made sorry, but that your sorrow led to repentance. For you were made sorry in a godly manner, that you might suffer loss from us in nothing.

Id.

598 *Ephesians* 5:11 ("And have no fellowship with the unfruitful works of darkness, but rather expose them.").

599 MODEL RULES OF PROF'L CONDUCT R. 8.4 (2003).

600 *Matthew* 18:15–20. For an excellent discussion of biblical passages and principles related to the church-discipline process, see GRUDEM, *supra* note 87, at 894–900.

601 *Matthew* 18:17.

602 For instance, *Matthew* 18:15 instructs the wronged party first to confront the guilty one, but the professional discipline process does not speak to whether the wronged party, which may be a client, should confront the guilty attorney.

603 GRUDEM, *supra* note 87, at 895.

604 *See Public Perceptions of Lawyers*, *supra* note 165.

605 *See supra* notes 291, 369 and accompanying text; *see also Ezekiel* 33:6 (NIV) ("But if the watchman sees the sword coming and does not blow the trumpet to warn the people and the sword comes and takes the life of one of them, that man will be taken away because of his sin, but I will hold the watchman accountable for his blood.").

> stand by quietly and allow a miscarriage of justice or an innocent person to be slandered is to be guilty.[606]

Christian attorneys thus must consider whether they are violating biblical standards of honesty when they fail to report serious misconduct of which they are aware.

D. Rule 8.4: Misconduct

Rule 8.4 discusses the various ways a lawyer may commit professional misconduct.[607] The types of included offenses are those involving professional character, as such character relates to the practice of law.[608] Traditionally excluded are offenses involving "moral turpitude."[609] By contrast, the Bible draws no such distinction. One who is guilty of one sin is guilty of all.[610] Attorneys thus cannot claim that

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606 DAVID W. GILL, DOING RIGHT: PRACTICING ETHICAL PRINCIPLES 294 (2004). Gill adds that Christians are not required to speak up in all situations, but he refrains from providing specific parameters on when silence is acceptable. *Id.* at 294–95.

607 MODEL RULES OF PROF'L CONDUCT R. 8.4 (2003).The rule states:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Id.

608 *Id.* R. 8.4 cmt. 2. These include offenses involving "violence, dishonesty, breach of trust, or serious interference with the administration of justice." *Id.* Examples of illegal conduct that reflect adversely on fitness to practice law include fraud and willful failure to file an income tax return. *Id.*

609 *Id.* Comment 2 to the rule highlights this distinction:

> Many kinds of illegal conduct reflect adversely on fitness to practice law . . . . However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law.

Id.

610 *James* 2:10 ("For whoever shall keep the whole law, and yet stumble in one point, he is guilty of all."). The entire law as revealed in the Scriptures is an expression of God's will so that breaking any part of the law is synonymous with breaking the law as a whole. To commit an isolated offense is to rebel against God Himself. SPIRIT-FILLED LIFE BIBLE, *supra* note 583, at 1897 n.2:10-13. One who keeps the entire law but fails in one part is as guilty and in need of a savior as one who is a frequent transgressor.

their professional actions are consistent with biblical principles simply because they are professionally ethical. The Model Rules, in fact, recognize that they do not cover all improper conduct for which an attorney can be "personally answerable."[611]

Negligent or incompetent representation may constitute professional misconduct that is prejudicial to the administration of justice in violation of Rule 8.4.[612] Conversely, competent representation is important to the proper administration of justice. According to the Model Rules, competence is developed through the lawyer's own efforts toward self-improvement. The comments to Rule 1.1 ("Competence"), for instance, identify that lawyers can achieve and maintain competence through "preparation and study."[613] For the believer, competence comes from God.[614] Christian attorneys therefore should recognize that maintaining competence in their practice depends not only on their efforts but also on grace and provision from God.[615]

Multiple biblical virtues are expressed in this rule, including integrity, honesty, trustworthiness, truthfulness, and personal responsibility. Personal responsibility is particularly noteworthy. *Romans* 13 describes the responsibility a person has not only to God but also to governing authorities.[616] Lawyers and Christians both have a clear obligation to obey the governing authorities. The lawyer is accountable to his state's disciplinary authority; the Christian is accountable to God.[617] Lawyers have a responsibility to the justice system; Christians have a responsibility to their community and the

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611 MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 2 (2003).

612 *See, e.g.*, People v. Crist, 948 P.2d 1020 (Colo. 1997) (finding misconduct when a lawyer abandoned his law practice, leaving some sixty pending cases).

613 MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2003); *see also id.* R. 1.1 cmts. 4, 6; *supra* notes 11–15 and accompanying text (discussing Model Rule 1.1 in detail).

614 2 *Corinthians* 3:5 (NIV) ("Not that we are competent in ourselves to claim anything for ourselves, but our competence comes from God.").

615 *Compare Philippians* 4:13 ("I can do all things through Christ who strengthens me."), *with John* 15:5 ("I am the vine, you *are* the branches. He who abides in Me, and I in him, bears much fruit; for without Me you can do nothing.").

616 *Romans* 13:1–5.

> Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that exist are appointed by God. Therefore whoever resists the authority resists the ordinance of God, and those who resist will bring judgment on themselves. For rulers are not a terror to good works, but to evil. Do you want to be unafraid of the authority? Do what is good, and you will have praise from the same. For he is God's minister to you for good. But if you do evil, be afraid; for he does not bear the sword in vain; for he is God's minister, an avenger to execute wrath on him who practices evil. Therefore you must be subject, not only because of wrath but also for conscience' sake.

Id.

617 *See Romans* 14:12 ("So then each of us shall give account of himself to God.").

world.[618] Christian lawyers thus face responsibility and accountability under both systems.

The lawyer is accountable for his misdeeds if he is caught. By contrast, the believer knows that he is accountable to his omniscient and omnipresent God for any misconduct, whether observed by people or not.[619] The author of *Hebrews* says that "[n]othing in all creation is hidden from God's sight. Everything is uncovered and laid bare before the eyes of him to whom we must give account."[620]

E. Rule 8.5: Disciplinary Authority; Choice of Law

Rule 8.5 discusses which jurisdiction controls when a lawyer is subject to discipline.[621] A lawyer is subject to discipline in the jurisdiction in which he is admitted to practice and in jurisdictions where he "provides or offers to provide any legal services."[622] A lawyer therefore may be subject to discipline in multiple jurisdictions that impose different obligations.[623] The second part of this rule attempts to resolve any conflicts that may arise if a lawyer is subject to discipline in more than one jurisdiction.[624]

As lawyers may be subject to more than one set of ethical rules which impose different obligations, Christians are responsible to dual authorities with differing rules,[625] governmental and Godly. Rule 8.5(b) determines that which set of rules controls depends on the factors of whether the conduct was connected with a matter pending before a

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618 *See Matthew* 5:13–14 ("You are the salt of the earth; but if the salt loses its flavor, how shall it be seasoned? It is then good for nothing but to be thrown out and trampled underfoot by men. You are the light of the world. A city that is set on a hill cannot be hidden.").

619 *Hebrews* 4:13.

620 *Id.* (NIV).

621 MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2003).

622 *Id.* R. 8.5 cmt. 1.

623 *Id.* R. 8.5 cmt. 2.

624 *Id.* R. 8.5(b).

625 *See* Romans 13:1–3 (regarding submission to governmental authority); *see also Matthew* 22:20–22 ("And He said to them, 'Whose image and inscription is this?' They said to Him, 'Caesar's.' And He said to them, 'Render therefore to Caesar the things that are Caesar's, and to God the things that are God's.' When they had heard these words, they marveled, and left Him and went their way."); 1 *Timothy* 2:1–2 ("Therefore I exhort first of all that supplications, prayers, intercessions, *and* giving of thanks be made for all men, for kings and all who are in authority, that we may lead a quiet and peaceable life in all godliness and reverence"); *Titus* 3:1 ("Remind them to be subject to rulers and authorities, to obey, to be ready for every good work . . . ."); 1 *Peter* 2:13–17 ("Therefore submit yourselves to every ordinance of man for the Lord's sake, whether to the king as supreme, or to governors, as to those who are sent by him for the punishment of evildoers and *for the* praise of those who do good. For this is the will of God, that by doing good you may put to silence the ignorance of foolish men—as free, yet not using liberty as a cloak for vice, but as bondservants of God. Honor all *people.* Love the brotherhood. Fear God. Honor the king.").

tribunal, where the conduct took place, and where the predominant effect of the conduct was.[626] For the Christian believer, God's standards control and take precedence over governmental standards. Therefore, although *Romans* 13 underscores that Christians must obey governmental standards, other biblical passages illustrate how that obedience ends when those standards violate God's principles.[627]

IX. CONCLUSION

Despite the foundation of legal ethics in biblical principles of morality,[628] the modern encapsulation of legal ethics, the ABA Model Rules of Professional Conduct, rarely uses terms like *morality*, *conscience*, or *truth*. The Rules recognize that fundamental principles of morality affect ethical decisions, but they avoid detailed discussion of such principles, implying that they are beyond the scope of the Rules.[629] Such a sterile recitation of legal ethics leaves many attorneys hanging in their search for guidance as to how to fill in the ethical gaps the Rules fail to resolve.

In Paul's second letter to Timothy, he writes, "All Scripture *is* given by inspiration of God, and *is* profitable for doctrine, for reproof, for correction, for instruction in righteousness, that the man of God may be complete, thoroughly equipped for every good work."[630] Biblical virtues are a natural place to turn to add depth to the relatively shallow ethical provisions included in the Model Rules. Indeed, for Christians, the Bible takes precedence over the Rules in defining the parameters of ethics and morality.[631] This article thus has sought to connect these two principal

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626 MODEL RULES OF PROF'L CONDUCT R. 8.5(b) (2003).

627 *See* JAMES R. EDWARDS, ROMANS 306 (1992) ("[N]either Paul nor the NT teaches that when a government forsakes its God-ordained function of honoring good and punishing evil that a Christian is obligated to serve it."); EVERETT F. HARRISON, ROMANS 136–37 (1995) ("A circumstance may arise in which [the believer] must choose between obeying God and obeying men (Act[s] 5:29). But even then he must be submissive to the extent that, if his Christian convictions do not permit his compliance, he will accept the consequences of his refusal."); KAISER ET AL., *supra* note 39, at 577 ("If . . . the authority of the state runs counter to this divine intent, then that authority should not be understood as God-given."). *Acts* 5:28–29 recounts the instance when Peter and the other apostles taught in the temple courts in violation of orders from the Sanhedrin. When the apostles were arrested, they asserted, "We must obey God rather than men!" *Acts* 5:29 (NIV). For other scriptures that address limitations on individuals' responsibility to follow governmental standards, see, for example, *Daniel* 3 and 8 and *Acts* 17:5–7. *See also supra* note 39 and accompanying text.

628 *See supra* notes 1, 73 and accompanying text.

629 *See* MODEL RULES OF PROF'L CONDUCT Scope para. 16 (2003) ("The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.").

630 2 *Timothy* 3:16–17.

631 *See supra* note 39 and accompanying text.

sources of legal ethics today in a way that guides the modern attorney, Christian or not, in his or her search for greater insight into the contours of legal ethics. This article is not intended to be exhaustive in its scope, but its goal is to promote an informed understanding of both the Rules and Scripture. With such understanding, modern attorneys will hopefully be equipped to recapture the importance of moral truth to the practice of law.

THE ARTICLE III EXCEPTIONS CLAUSE: ANY EXCEPTIONS TO THE POWER OF CONGRESS TO MAKE EXCEPTIONS?

*John Eidsmoe**

Here is a typical coffee-table discussion that could take place anywhere in America:

> *"What's gotten into these federal courts lately? They legalize abortion and sodomy, then they prohibit the Ten Commandments and 'under God' in the Pledge!"*
>
> "They're just enforcing the Constitution. That's their job."
>
> *"Not like that it isn't. It's time Congress told the judges to quit messing with basic American values."*
>
> "Congress can't interfere with the Court. The Constitution provides for separation of powers."
>
> *"It also provides checks and balances. One of those checks is the power of Congress to cut off the Court's jurisdiction."*
>
> "That's insane! The Constitution says no such thing!"
>
> *"It sure does! Just look at Article III, Section 2, Paragraph 2: 'In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.'"*
>
> "Well, that can't mean what you say it means."

And so the debate continues. As the federal courts consider cases that involve the most deep-seated convictions of Americans, and issues on which Americans are sharply divided, they understandably strike raw nerves. Public frustration is redoubled since, of the three branches of government, the judiciary is the furthest removed from popular election and public influence. Many believe that the nation is being governed by

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the "majority vote of a nine-person committee of lawyers, unelected and holding office for life."[1]

Frustrated by court decisions prohibiting Ten Commandments displays and armed with substantial popular support, Decalogue supporters have proposed the Constitution Restoration Act, which would limit the federal courts' jurisdiction over cases involving the acknowledgment of God through the public display of the Ten Commandments.[2] In a similar vein, opponents of same-sex marriage have introduced the Marriage Protection Act, which would remove the federal courts' jurisdiction over cases arising under the Defense of Marriage Act.[3] Still others have proposed the Pledge Protection Act, which would prohibit federal courts from hearing cases involving the phrase "under God" in the Pledge of Allegiance.[4]

Opponents of these bills are often astounded that anyone could seriously believe that Congress could encroach on the federal courts' independence in so blatant a manner as this. Conversely, supporters are equally incredulous that anyone could question Congress's power to limit the Court's appellate jurisdiction when that power is plainly spelled out in Article I, Section 2.

What does the Exceptions Clause really say? What did the Framers mean by it? How have the courts interpreted it, and how do constitutional scholars understand it today? This article will explore these questions.

On an even deeper level, these questions go to the heart of the judiciary's role in our constitutional republic—a role that has been disputed almost from the beginning. Gouverneur Morris, who chaired the Committee on Style and wrote most of the final draft of the Constitution, declared that "[t]hose, who are charged with the important duties of administering justice, should, if possible, depend only on God."[5]

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1 Lino A. Graglia, *Judicial Review on the Basis of 'Regime Principles': A Prescription for Government by Judges*, 26 S. TEX. L. REV. 435, 441 (1985).

2 H.R. 3799, 108th Cong. (2004).

3 H.R. 3313, 108th Cong. (2004). This bill passed the House of Representatives. 150 CONG. REC. H6613 (daily ed. July 22, 2004). The Senate read the bill and then referred it to the Committee on the Judiciary; there has been no further action pertaining to this bill. 150 CONG. REC. S8853 (daily ed. Sept. 7, 2004).

4 H.R. 2028, 108th Cong. (2004). This bill passed the House of Representatives. 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004). The Senate received the bill from the House, but there has been no further action pertaining to this bill. 150 CONG. REC. S9722 (daily ed. Sept. 27, 2004).

5 Gouverneur Morris, Speech Composed for the King of France, With Some Observations on the Constitution, *in* 2 THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS 490, 506 (Jared Sparks ed., Boston, Gray & Bowen 1832).

But Thomas Jefferson, primary author of the Declaration of Independence, the third President of the United States, and a frequent critic of the Federalist-controlled judiciary, warned that "[t]he great object of my fear is the federal judiciary. That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is ingulphing insidiously the [state] governments into the jaws of that which feeds them."[6]

From the inception of the Republic, Americans have looked on the third branch of government with mixed apprehensions. On the one hand, most agree with Gouverneur Morris that judges should decide cases justly on their merits, unaffected by political pressure. On the other hand, most also share Jefferson's concern that if judges are not checked and balanced by other branches or levels of government, they will become tyrannical and oppressive.

These concerns surfaced in the early 1800s, when President Jefferson and others objected to the opinion written by Chief Justice John Marshall in *Marbury v. Madison*, which held that the Supreme Court had the power to invalidate acts of Congress that conflict with the Constitution.[7] Jefferson emphatically rejected Marshall's doctrine of judicial review and pressed for the impeachment and removal of several Federalist judges.[8]

Conflict between the judicial and executive branches arose again in the 1820s and 1830s. In a series of decisions,[9] the Supreme Court limited the authority of states to regulate Indian nations on their tribal lands. President Andrew Jackson strongly resisted these decisions, reportedly responding to the 1832 *Worcester v. Georgia* ruling by saying, "John Marshall has made his decision," and "[n]ow let him enforce it."[10]

Shortly after the outbreak of the War Between the States (1861–1865), conflict again surfaced between the executive and judicial branches. A federal circuit court, in an opinion written by Chief Justice Taney, a Democrat, ruled that President Abraham Lincoln lacked

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6 Letter from Thomas Jefferson to Judge Spencer Roane (Mar. 9, 1821), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 188, 189 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899).

7 5 U.S. (1 Cranch) 137, 180 (1803).

8 ALAN BRINKLEY, AMERICAN HISTORY: A SURVEY 198–200 (11th ed. 2003). Jefferson's congressional allies impeached and removed District Judge John Pickering of New Hampshire. A majority in the House voted to impeach Supreme Court Justice Samuel Chase, but the Jeffersonians fell short of the two-thirds vote needed in the Senate to remove him from office. *Id.* at 199–200.

9 Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. Mc'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

10 BRINKLEY, *supra* note 8, at 229, 245. Some historians question whether Jackson actually used those words, but in any event the decision was not enforced. *Id.*

constitutional authority to suspend the writ of habeas corpus.[11] Lincoln regarded this ruling as a personal embarrassment and an impediment to his conduct of the war and issued a presidential warrant for Taney's arrest, although the warrant was never served.[12]

Again in the 1930s, conflict arose between the executive and judicial branches, with Congress caught in the middle. President Franklin D. Roosevelt pressed for the passage of New Deal legislation to create various federal programs that were intended to bring the nation out of an economic depression. But a conservative-dominated Supreme Court invalidated much of this legislation, claiming it violated the Commerce Clause or the General Welfare Clause.[13] Roosevelt sought to change the ideological makeup of the Court by proposing legislation which, if passed by Congress, would authorize the appointment of one additional Justice for every Justice over the age of seventy.[14] Roosevelt declared the following in his *Fireside Chat* to the American public on March 1, 1937:

> We have * * * reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.
>
> I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.[15]

Roosevelt's "court-packing" plan encountered widespread opposition from Congress, the public, and many Democrats, and was never

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11 *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487).

12 FREDERICK S. CALHOUN, THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789–1989, at 103 (1989). Calhoun says the warrant was placed in the hands of Ward Hill Lamon, U.S. Marshal for the District of Columbia, with Lincoln's instructions to "use his own discretion about making the arrest unless he should receive further orders." *Id.* Lamon decided not to arrest Chief Justice Taney, and as Calhoun says, "Taney was thus spared the embarrassment of imprisonment, the country was saved from an additional constitutional crisis, and Lamon neatly avoided embroiling himself and the president in another controversy." *Id.*

13 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

14 LEWIS PAUL TODD & MERLE CURTI, RISE OF THE AMERICAN NATION 713–14 (1964).

15 CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 314 (8th ed. 2004) (quoting Franklin D. Roosevelt, *Fireside Chat* (radio broadcast Mar. 9, 1937)). Note the similarity of Roosevelt's rhetoric to that of conservative critics of the Court today.

adopted.[16] In a key decision later that year, Chief Justice Charles Evans Hughes appeared to separate himself from the conservative bloc, resulting in a 5-4 decision upholding the National Labor Relations Act.[17] The tension cooled as the remaining conservative Justices retired over the following several years.[18]

The issue, however, remains very much alive as Americans continue to debate how to restrain judicial overreaching while at the same time preserving judicial independence. In the latter half of the twentieth century, most criticism of the judiciary has been from conservatives. In the 1950s and 1960s, many conservatives criticized the Warren Court for decisions concerning the rights of criminal defendants,[19] and some called for the impeachment of Chief Justice Earl Warren.[20] From the 1970s through the present, conservatives have criticized the federal courts' rulings on abortion,[21] sodomy,[22] the role of religion in the public arena (specifically school prayer),[23] and the public display of religious symbols.[24]

It is obvious from this brief history that criticism of the federal judiciary has not been limited to any one side of the political spectrum. During each era, a variety of remedies have been suggested: impeaching judges and Justices, refusing to enforce judicial decrees, amending the Constitution, "packing" the court, appointing judges and Justices who

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16 *Id.*

17 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

18 DUCAT, *supra* note 15, at 314–15; TODD & CURTI, *supra* note 14, at 714.

19 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

20 BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT–A JUDICIAL BIOGRAPHY 250, 280–82, 491, 541–42, 627 (1983).

21 Roe v. Wade, 410 U.S. 113 (1973). Subsequent decisions following *Roe* were also criticized. *E.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

22 Lawrence v. Texas, 539 U.S. 558 (2003).

23 Lee v. Weisman, 505 U.S. 577 (1992).

24 Stone v. Graham, 449 U.S. 39 (1980) (dealing with a mandatory display of the Ten Commandments in Kentucky public schools). More recently, a sharply divided Supreme Court struck down a Ten Commandments display in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), and upheld a Ten Commandments display at the Texas State Capitol in *Van Orden v. Perry*, 545 U.S. 677 (2005). On August 18, 2006, in a fascinating opinion that combines folksy expressions with elements and structure from Dante's *Inferno*, a federal judge upheld as constitutional a Ten Commandments display in Stigler, Oklahoma. Green v. Bd. of County Comm'rs, 450 F. Supp. 2d 1273 (E.D. Okla. 2006).

For conservative criticism of these rulings, see generally ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003); PHYLLIS SCHLAFLY, THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT (rev. ed. 2006); EDWIN VIEIRA, HOW TO DETHRONE THE IMPERIAL JUDICIARY (2004).

are more to the critics' liking, and limiting the Supreme Court's appellate jurisdiction or the jurisdiction of other federal courts.[25]

The last of these remedies—limiting the federal courts' jurisdiction—is the focus of this article. This article will examine the wording of the Exceptions Clause of Article III, Section 2 of the U.S. Constitution, the circumstances that gave rise to its adoption, statements of the Framers that bear on its meaning, the views of early and current constitutional scholars, and Supreme Court decisions on the Exceptions Clause.

Both sides seem firmly entrenched in their positions. This article hopefully will provide information and food for thought for both sides. The issue is more complex than either side recognizes, and while the authority to limit the Supreme Court's appellate jurisdiction and the jurisdiction of lower federal courts definitely exists, it is subject to abuse and should be exercised carefully and in ways that do not conflict with the rest of the Constitution.

I. UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2, PARAGRAPH 2

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[26]

The words of this provision that are the subject of this article are *"with such Exceptions, and under such Regulations as the Congress shall make."* Over the years several interpretations have been suggested: (1) Congress has unfettered discretion to limit the Supreme Court's appellate jurisdiction;[27] (2) Congress may limit the appellate jurisdiction of the Supreme Court so long as another federal court remedy is available (that is, so long as the aggrieved party may bring the action in

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[25] At the time of this writing, several bills to limit the Court's appellate jurisdiction are pending in the 108th Congress, but the best known is the Constitution Restoration Act. H.R. 3799, 108th Cong. (2004). Since this bill may undergo substantial change by the time this article is published, the author will not attempt to provide a detailed analysis of it here.

[26] U. S. CONST. art. III, § 2, para. 2. This provision remains in effect today except that cases in which a state is a party are also affected by the Eleventh Amendment, ratified in 1795, which states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment does not affect the interpretation of the Exceptions Clause and will not be discussed further in this article.

[27] *See infra* pp. 24–29.

a lower federal court);[28] (3) Congress may limit the appellate jurisdiction of the Supreme Court regardless of whether a lower federal court has jurisdiction, because the aggrieved party may bring the action in a state court;[29] (4) Congress may limit the appellate jurisdiction of the Supreme Court so long as no federal constitutional right is involved;[30] (5) Congress may limit the appellate jurisdiction of the Supreme Court, unless this action would have the effect of reversing or overturning a court decision, or affect the outcome of a pending case;[31] and (6) the Exceptions Clause modifies the word "Fact," not the phrase "appellate Jurisdiction," and simply means that Congress may limit the authority of the Supreme Court to alter fact determinations by juries.[32]

A. The Adoption of the Exceptions Clause

The Constitutional Convention was scheduled to begin on May 14, 1787, but a quorum was not present. The Convention, therefore, began its deliberations on May 25.[33] On May 29, Edmund Randolph of Virginia presented the "Virginia Resolves," which were proposals of the Virginia delegation. Resolve No. 9 called for the establishment of a national judiciary:

> That the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the *dernier ressort,* all piracies and felonies on the seas; captures from an enemy; cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested, or which respect the collection of the national revenue; impeachments of any national officer; and questions which involve the national peace or harmony.[34]

The Virginia Resolves distinguished between original and appellate jurisdiction, but gave Congress no power to make exceptions to the federal courts' jurisdiction.

Also on May 29, Charles Pinckney of South Carolina presented a draft of a more detailed plan for a federal government. Article IX of Pinckney's plan provided for a judicial system:

> ART. IX. The legislature of the United States shall have the power,

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28 *See infra* pp. 31–32, 36–37, 38–39, 41, 42–43.

29 *See infra* pp. 20, 39–41, 43–45.

30 *See infra* pp. 29–30, 36–37, 41.

31 *See infra* pp. 38. *Contra* pp. 45–46.

32 *See infra* pp. 16–17, 48–49.

33 JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION (1819), *reprinted in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 139, 139 (photo. reprint 1968) (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

34 *Id.* at 144. *Dernier ressort* means "last resort."

> and it shall be their duty, to establish such courts of law, equity, and admiralty, as shall be necessary.
>
> The judges of the courts shall hold their offices during good behavior and receive a compensation which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers, and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors, and other public ministers, this jurisdiction shall be original; and in all the other cases appellate.
>
> All criminal offences (except in cases of impeachment) shall be tried in the state where they shall be committed. The trials shall be open and public, and be by jury.[35]

Pinckney's plan contained some features that were eventually adopted: the power and duty of Congress to establish courts, judges serving during good behavior, fixed compensation, a Supreme Court, public trials in the jurisdiction where the offense took place, trial by jury, and original jurisdiction in a few cases and appellate jurisdiction in all others. His plan contained no mention of congressional authority to limit the courts' jurisdiction.

On June 15, William Patterson of New Jersey submitted a set of resolutions to the Convention. Resolution 5 read as follows:

> *Resolved*, That a federal judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the executive, and to hold their offices during good behavior ; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary, so established, shall have authority to hear and determine, in the first instance, on all impeachments of federal officers ; and by way of appeal, in the *dernier ressort*, in all cases touching the rights and privileges of ambassadors; in all cases of captures from an enemy ; in all cases of piracies and felonies on the high seas ; in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any act or ordinance of Congress for the regulation of trade, or the collection of the federal revenue. That none of the judiciary officers shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for [_____] thereafter.[36]

Mr. Patterson's resolutions distinguish between original and appellate jurisdiction and limit original jurisdiction to cases involving

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35 *Id.* at 148–49.

36 *Id.* at 176. Patterson left a blank space between "for" and "thereafter" at the end of the quote, presumably to be filled in at a later time.

impeachments. His resolutions contain no provisions for Congress to limit the courts' jurisdiction.

On June 18, Alexander Hamilton submitted a plan of government which contained the following provision:

> The supreme judicial authority of the United States to be vested in [_____] judges, to hold their offices during good behavior, with adequate and permanent salaries. This court to have original jurisdiction in all causes of capture; and an appellate jurisdiction in all causes in which the revenues of the general government, or the citizens of foreign nations, are concerned.[37]

Like the other proposals, Hamilton's plan provided for very limited original jurisdiction and broader appellate jurisdiction, but no provision for congressional limitations on jurisdiction. The plan also provided for a chief executive and a senate, both of which were to serve during good behavior.[38] One of the Framers noted that Hamilton's plan was "approved by all and supported by none," and was neither discussed nor voted on.[39]

A Committee of the Whole House then considered Mr. Patterson's resolutions, and on June 19, the Committee reported its approval of nineteen resolutions. Resolutions 11–13 read as follows:

> 11. *Resolved,* That a national judiciary be established, to consist of one supreme tribunal ; the judges of which to be appointed by the second branch of the national legislature ; to hold their offices during good behavior ; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution.
>
> 12. *Resolved,* That the national legislature be empowered to appoint inferior tribunals.
>
> 13. *Resolved,* That the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any national officers, and questions which involve the national peace and harmony.[40]

For the remainder of June and much of July, the delegates considered these various proposals.

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37 *Id.* at 179. Hamilton left a blank space between "in" and "judges" at the beginning of the quote, presumably to be filled in at a later time.

38 *Id.*

39 One source attributes this statement to James Madison. W. CLEON SKOUSEN, THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION 159 (1985). Another source attributes a similar statement to William Johnson of Connecticut. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 366 (Max Farrand ed., rev. ed. 1966).

40 MADISON, *supra* note 33, at 181–83.

On July 18, the Convention unanimously passed a resolution "that a national judiciary be established,"[41] and another that this judiciary was "to consist of one supreme tribunal."[42] The delegates considered a proposal to amend Resolution 11 so that the "national executive" rather than the "second branch of the national legislature" would appoint federal judges; this proposed amendment was defeated.[43] They also considered an amendment that would change Resolution 11 to read that "the judges . . . shall be nominated and appointed by the executive, by and with the advice and consent of the second branch of the legislature of the United States, and every such nomination shall be made at least [_____] days prior to such appointment."[44] This amendment, too, was defeated.[45] Then came another amendment which would change Resolution 11 to read: "that the judges shall be nominated by the executive ; and such nomination shall become an appointment, if not disagreed to, within [_____] days, by two thirds of the second branch of the legislature."[46] The delegates unanimously agreed to postpone consideration of this amendment.[47] They unanimously accepted the provisions of Resolution 11 concerning service during good behavior and punctual compensation.[48] They struck the provision concerning increased compensation, but left the provision concerning diminished compensation intact.[49] They approved Resolution 12 unanimously and changed Resolution 13 to read: "[t]hat the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony."[50]

On July 26, the delegates referred the resolutions they had adopted, as well as the proposals of Mr. Pinckney and Mr. Patterson, to a Committee on Detail consisting of John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania. They then adjourned until August 6 to give the Committee on Detail

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41 *Id.* at 209.

42 *Id.*

43 *Id.*

44 *Id.* The proposed amendment left the number of days blank.

45 *Id.*

46 *Id.* at 209–10. The proposed amendment left the number of days blank.

47 *Id.* at 210.

48 *Id.*

49 *Id.*

50 *Id.*

time to consider these proposals.[51] At the time of adjournment, the adopted resolutions concerning the judiciary read as follows:

> XIV. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature ; to hold their offices during good behavior ; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made, so as to affect the persons actually in office at the time of such diminution.
>
> XV. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.
>
> XVI. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony.[52]

Up to that time, the delegates had considered the original and appellate jurisdiction of the federal judiciary, but had not considered the possibility of giving Congress the authority to limit the jurisdiction of the federal courts.

On August 6, the delegates reconvened and received the report of the Committee on Detail. The Committee presented the draft of a constitution in which part of Article XI read as follows:

> ART. XI. SECT. I. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.
>
> SECT. 2. The judges of the Supreme Court, and of the inferior courts shall hold their offices during good behavior. They shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.
>
> SECT. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the legislature of the United States ; to all cases affecting ambassadors, other public ministers, and consuls ; to the trial of impeachments of officers of the United States ; to all cases of admiralty and maritime jurisdiction ; to controversies between two or more states, except such as shall regard territory or jurisdiction ; between a state and citizens of another state ; between citizens of different states ; and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the legislature shall make. The legislature may assign any part of the

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51 *Id.* at 220–22.

52 *Id.* at 222.

> jurisdiction above mentioned, (except the trial of the President of the United States,) in the manner, and under the limitations, which it shall think proper, to such inferior courts as it shall constitute from time to time.
>
> SECT. 4. The trial of all criminal offences (except in cases of impeachments) shall be in the state where they shall be committed, and shall be by jury.[53]

No notes or minutes are known to exist which would give us insight into the deliberations of the Committee on Detail. Nevertheless, it is clear that during their deliberations the proposed constitution began to take shape in a form similar to the Constitution today. The Exceptions Clause appears in much the same form as the one finally adopted. The added sentence that permits the legislature to assign areas of appellate jurisdiction to inferior courts might appear as a limitation on the power of Congress to limit the Court's appellate jurisdiction. The last sentence of Section 3 might indicate that, under the draft constitution of the Committee on Detail, Congress may limit the Court's appellate jurisdiction only if it assigns that appellate jurisdiction to an inferior federal court.

On August 27, the Convention considered the proposed Article XI. According to Madison's *Notes*, the following discussion occurred:

> Mr. GOVR. MORRIS wished to know what was meant by the words "In all the cases before mentioned it [jurisdiction] shall be appellate with such exceptions &c," whether it extended to matters of fact as well as law—and to cases of Common law as well as Civil law.
>
> Mr. WILSON. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed.
>
> Mr. DICKINSON moved to add after the word "appellate" the words both as to law & fact which was agreed to nem: con:[54]

James Wilson's answer to Gouverneur Morris could indicate that the delegates intended the Exceptions Clause to empower Congress to limit the Court's appellate jurisdiction over substantive issues of law, common and civil, as well as to empower Congress to withdraw from the Court the power to disturb jury verdicts.

A proposed amendment to part of Section 3 read as follows: "In all the other cases before mentioned, original jurisdiction shall be in the courts of the several states, but with appeal, both as to law and fact, to the courts of the United States, with such exceptions, and under such

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53 *Id.* at 228–29.

54 Convention Floor Debate (Aug. 27, 1787) *in* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 535, 539 (Adrienne Koch ed., Ohio Univ. Press 1984) (1840) (alteration in original). *Nem: con:* is an abbreviation for *nemine contradicente*, which means "no one dissenting." BLACK'S LAW DICTIONARY 1066 (8th ed. 2004).

regulations, as the legislature shall make."[55] This amendment was withdrawn, and another amendment was proposed:

> In cases of impeachment, cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, both as to law and fact, with such exceptions, and under such regulations, as the legislature shall make . . . .[56]

There was a proposed amendment to this amendment, which would have added the following language: "But in cases in which the United States shall be a party, the jurisdiction shall be original or appellate, as the legislature may direct."[57] This amendment, too, was amended by striking the words "original or."[58] This amendment to the amendment passed, but the original amendment was then defeated,[59] thus bringing the delegates back to Article XI as originally proposed by the Committee on Detail.

The delegates then approved an amendment to change the words, "the jurisdiction shall be original," to "the Supreme Court shall have original jurisdiction."[60] Another amendment, that read "[i]n all the other cases before mentioned, the judicial power shall be exercised in such manner as the legislature shall direct," was defeated.[61] A proposal to delete the last clause of Section 3, the clause which provides that Congress may assign areas of appellate jurisdiction to inferior federal courts, passed unanimously.[62]

The delegates then turned their attention to other portions of the proposed draft. On September 8, they chose a Committee on Revision, sometimes called the Committee on Style, to prepare a final draft of the proposed constitution. That Committee consisted of William Samuel Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts.[63]

On September 12, the Committee presented its Revised Draft of the Constitution.[64] Again, no records of the Committee's deliberations are available, but the language of Article III (The Judiciary) was almost exactly in the form that was finally adopted. The delegates struck the

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55 MADISON, *supra* note 33, at 268–69.

56 *Id.* at 269.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at 295.

64 *Id.* at 297.

words "both in law and equity" from Section 1, apparently because the same language appears in Section 2.[65] In the phrase of Section 2, "both in law and equity," they struck the word "both."[66] They defeated a proposal to add the words, "and a trial by jury shall be preserved, as usual, in civil cases," to Section 2, Clause 3.[67] And they also defeated a proposal to add the words, "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."[68] With these minor changes, Article III was adopted on September 15, along with the other six Articles of the Constitution. The delegates formally signed the Constitution on September 17, in the Year of Our Lord 1787.[69]

From the foregoing we may draw the following conclusions:

(1) The delegates intended to distinguish between original and appellate jurisdiction.
(2) The delegates intended that the Supreme Court's original jurisdiction be limited to a few narrow areas, mostly involving foreign nations and disputes between states, and that other types of cases be within the Court's appellate jurisdiction.
(3) The proposal that Congress may limit the Supreme Court's appellate jurisdiction apparently arose in the deliberations of the Committee on Detail, and this Committee drafted the Exceptions Clause in a form similar to that which was finally adopted.
(4) Proposed language that Congress may remove cases from the Supreme Court's appellate jurisdiction and give their jurisdiction to inferior federal courts was defeated, and may indicate that the delegates did not want to require that Congress give appellate jurisdiction to an inferior federal court as a condition for withdrawing jurisdictions from the Supreme Court.
(5) The delegates intended that the Supreme Court have jurisdiction over cases of both common and civil law, and of matters of both law and fact; however, they were careful to preserve the right to trial by jury.

The Convention sent its proposed constitution to Congress, which unanimously approved it on September 29 and sent it to the states for ratification. The debate over ratification in the newspapers and in the

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65 *Id.* at 314.

66 *Id.*

67 *Id.* at 315. The Seventh Amendment appears to have accomplished the objective of this provision. *See* U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

68 MADISON, *supra* note 33, at 315.

69 *Id.* at 317–18.

various state ratifying conventions can be helpful in understanding how the nation understood the Exceptions Clause.

The *Federalist*, a series of eighty-five essays written in 1787 and 1788 by John Jay, Alexander Hamilton, and James Madison, were published in newspapers to explain the proposed Constitution and to persuade people to support its adoption.[70] In *The Federalist Nos. 78–83*, Hamilton addressed the constitutional provisions concerning the judiciary. Seeking to assure his readers that the federal judiciary was not a threat to their liberties, Hamilton declared in *No. 78* that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them."[71] The judiciary, Hamilton wrote, "may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[72]

In *No. 80*, Hamilton set forth the various aspects of Supreme Court jurisdiction and then concluded that essay with the following statements:

> From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears, that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected, that the national legislature will have ample authority to make such *exceptions,* and to prescribe such regulations, as will be calculated to obviate or remove these inconveniences.[73]

In *No. 81*, Hamilton noted the objections of those who feared that Article III would eliminate trial by jury or allow the Supreme Court to substitute its own findings of fact for those of the jury. Hamilton insisted that "the expressions, 'appellate jurisdiction, both as to law and fact,' do not necessarily imply a re-examination in the supreme court of facts decided by juries in the inferior courts."[74] But he added the following:

> "If, therefore, the re-examination of a fact, once determined by a jury, should in any case be admitted under the proposed constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or

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70 George W. Carey & James McClellan, *Introduction* to THE FEDERALIST, at xliii–xlv (George W. Carey & James McClellan eds., 2001).

71 THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

72 *Id.*

73 THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 71, at 416.

74 THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 71, at 424.

by directing an issue immediately out of the supreme court.[75]

Hamilton closed *No. 81* by again setting forth the Exceptions Clause as a protection against judicial abuse:

> The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that, in the partition of this authority, a very small portion of original jurisdiction has been reserved to the supreme court, and the rest consigned to the subordinate tribunals; that the supreme court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable; that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils, will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.[76]

In *No. 80*, Hamilton seems to say the Exceptions Clause empowers Congress to limit the Court's appellate jurisdiction over substantive matters of common and civil law, and in *No. 81*, he seems to say the Exceptions Clause empowers Congress to limit the Court's authority to review jury determinations. *The Federalist* appears to be consistent with the explanation James Wilson gave to Gouverneur Morris at the Convention: the Exceptions Clause includes the power to limit the Court's appellate jurisdiction over civil and common law, and also includes the power to limit the Court's appellate jurisdiction over jury determinations.[77]

Other leading Americans expressed their views on the Constitution, and the Anti-Federalists (those who opposed ratification of the Constitution) raised the specter of an overly powerful judiciary as one of their primary objections. George Mason of Virginia, one of three delegates who refused to sign the Constitution, set forth his objections to the Constitution, one of which was the power given to the judiciary:

> The judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several states ; thereby rendering laws as tedious, intricate, and expensive, and justice as unattainable, by a great part of the community, as in England ; and enabling the rich to oppress and ruin the poor.[78]

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75 *Id.*

76 *Id.* at 425.

77 *See supra* note 54 and accompanying text.

78 GEORGE MASON, OBJECTIONS OF THE HON. GEORGE MASON TO THE PROPOSED FEDERAL CONSTITUTION (1787), *reprinted in* 1 ELLIOT'S DEBATES, *supra* note 33, at 494, 495. Three delegates (Elbridge Gerry of Massachusetts, George Mason of Virginia, and Edmund Randolph of Virginia) refused to sign the Constitution. Governor Randolph

Luther Martin, a Maryland delegate who had signed the Constitution and upon later reflection decided he must oppose it, believed "the proposed Constitution not only makes no provision for the trial by jury in the first instance, but, by its appellate jurisdiction, absolutely takes away that inestimable privilege, since it expressly declares the Supreme Court shall have appellate jurisdiction both as to law and fact."[79]

Richard Henry Lee, a congressman from Virginia, expressed his objections in a letter to Governor Edmund Randolph dated October 16, 1787, which quoted Sir William Blackstone as saying the right to trial by jury is "the most transcendent privilege, which any subject can enjoy or wish for,"[80] and that "every [sic] tribunal, selected [sic] for the decision of facts, [sic] is a step towards establishing aristocracy—the most oppressive of all [sic] governments."[81] He then addressed the Exceptions Clause and found it to be an inadequate remedy:

> The answer to these objections is, that the new legislature may provide remedies! But as they may, so they may not; and if they did, a succeeding assembly may repeal the provisions. The evil is found resting upon constitutional bottom ; and the remedy, upon the mutable ground of legislation, revocable at any annual meeting.[82]

The power of the judiciary was a major objection raised by Anti-Federalist writers. One such writer, using the penname the Federal Farmer, wrote the following:

> By ART. 3. SECT. 2. all cases affecting ambassadors, other public ministers, and consuls, and in those cases in which a state shall be party, the supreme court shall have jurisdiction. In all the other cases beforementioned, [sic] the supreme court shall have appellate jurisdiction, both as to *law and fact*, with such exception, and under such regulations, as the congress shall make. By court is understood a court consisting of judges; and the idea of a jury is excluded. This court, or the judges, are to have jurisdiction on appeals, in all the

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changed his mind and decided to support the Constitution, concluding that it was flawed, but better than the status quo, and he expressed the hope that Virginia and other states would work for changes in the Constitution, among other things, "[i]n limiting and defining the judicial power." EDMUND RANDOLPH, A LETTER OF HIS EXCELLENCY, EDMUND RANDOLPH, ESQ., ON THE FEDERAL CONSTITUTION (1787), *reprinted in* 1 ELLIOT'S DEBATES, *supra* note 33, at 482, 491.

79 LUTHER MARTIN, LUTHER MARTIN'S LETTER ON THE FEDERAL CONVENTION OF 1787 (1788), *reprinted in* 1 ELLIOT'S DEBATES, *supra* note 33, at 344, 381.

80 RICHARD HENRY LEE, LETTER FROM THE HON. RICHARD HENRY LEE, ESQ., ONE OF THE DELEGATES IN CONGRESS FROM THE STATE OF VIRGINIA, TO HIS EXCELLENCY, EDMUND RANDOLPH, ESQ., GOVERNOR OF SAID STATE (1787), *reprinted in* 1 ELLIOT'S DEBATES, *supra* note 33, at 503, 504 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *379).

81 *Id.* (quoting 3 BLACKSTONE, *supra* note 80, at *380).

82 *Id.*

> cases enumerated, as to law and fact; the judges are to decide the law and try the fact, and the trial of the fact is being assigned to the judges by the constitution, a jury for trying the fact is excluded; however, under the exceptions and powers to make regulations, congress may, perhaps introduce the jury, to try the fact in most necessary cases.[83]

But the Federal Farmer saw the Exceptions Clause as a possible danger to the people's liberties:

> Thus general powers being given to institute courts, and regulate their proceedings, with no provision for securing the rights principally in question, may not congress so exercise those powers, and constitutionally too, as to destroy those rights? clearly, [sic] in my opinion, they are not in any degree secured.[84]

Brutus, another Anti-Federalist writer,[85] objected strongly to the powers granted to the federal judiciary in a series of letters to the people of New York.[86] Then, in a letter dated March 6, 1788, he addressed the Exceptions Clause:

> It may still be insisted that this clause does not take away the trial by jury on appeals, but that this may be provided for by the legislature, under that paragraph which authorises [sic] them to form regulations and restrictions for the court in the exercise of this power.
>
> The natural meaning of this paragraph seems to be no more than this, that Congress may declare, that certain cases shall not be subject to the appellate jurisdiction, and they may point out the mode in which the court shall proceed in bringing up the causes before them, the manner of their taking evidence to establish the facts, and the method of the courts proceeding. But I presume they cannot take from the court the right of deciding on the fact, any more than they can deprive them of the right of determining on the law, when a cause is once before them; for they have the same jurisdiction as to fact, as they have as to the law. But supposing the Congress may under this

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83 Letter from the Federal Farmer, Oct. 10, 1787, *reprinted in* THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 43, 53 (Herbert J. Storing ed., 1985) [hereinafter THE ANTI-FEDERALIST]. Both Federalists and Anti-Federalists frequently used pennames, often of Roman significance such as Cato, Brutus, Agricola, Publius, and others. The identity of the Federal Farmer is uncertain; some have attributed his writings to Richard Henry Lee. THE ANTI-FEDERALIST, *supra*, at 24.

84 Letter from the Federal Farmer, Jan. 20, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 79, 85.

85 Mr. Herbert Storing, editor of *The Anti-Federalist*, reports that "Brutus" has generally been identified as Robert Yates, a New York delegate to the Constitutional Convention who left before the Convention concluded because he believed the developing Constitution gave the federal government too much power. However, Storing personally considers this identification "somewhat questionable." THE ANTI-FEDERALIST, *supra* note 83, at 103.

86 Brutus XI, Jan. 31, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 162; Brutus XII, Feb. 7, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 167; Brutus XIII, Feb. 21, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 173; Brutus XIV, Feb. 28, 1788, *reprinted in* THE ANTI-FEDERALIST, *supra* note 83, at 176.

> clause establish the trial by jury on appeals, it does not seem to me that it will render this article much less exceptionable. An appeal from one court and jury, to another court and jury, is a thing altogether unknown in the laws of our state, and in most of the states in the union.[87]

The Exceptions Clause arose occasionally during the debates in the various state ratifying conventions, though it is uncertain how often it arose since some of the states did not keep transcripts of their proceedings. At the Pennsylvania ratifying convention, James Wilson, who had been an influential delegate to the Constitutional Convention and who would later serve as a Supreme Court Justice, argued that the Supreme Court should have the authority to set aside jury verdicts because

> [t]hose gentlemen who, during the late war, had their vessels retaken, know well what a poor chance they would have had when those vessels were taken in their states and tried by juries, and in what a situation they would have been if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdicts of those juries.[88]

He acknowledged that in some cases it might be necessary to limit the Court's appellate jurisdiction, but this is best done by Congress, as needed, rather than fixing those limits in the Constitution.

> There are other cases in which it will be necessary; and will not Congress better regulate them, as they rise from time to time, than could have been done by the Convention? Besides, if the regulations shall be attended with inconvenience, the Congress can alter them as soon as discovered. But any thing done in Convention must remain unalterable but by the power of the citizens of the United States at large.
>
> I think these reasons will show that the powers given to the Supreme Court are not only safe, but constitute a wise and valuable part of the system.[89]

Early in the Virginia Ratifying Convention, on June 5, 1788, Patrick Henry opened the case against ratification with a stirring oration. Among many other objections, he argued that the federal judiciary could be far more oppressive than a state or local judicial system.

> It is a fact that lands have been sold for five shillings, which were worth one hundred pounds : if sheriffs, thus immediately under the eye of our state legislature and judiciary, have dared to commit these outrages, what would they not have done if their masters had been at Philadelphia or New York? If they perpetrate the most unwarrantable

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87 Brutus XIV, *supra* note 86, at 178–79.

88 THE DEBATES IN THE CONVENTION OF THE STATE OF PENNSYLVANIA ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1787), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 33, at 415, 493.

89 *Id.* at 494.

> outrage on your person or property, you cannot get redress on this side of Philadelphia or New York ; and how can you get it there? If your domestic avocations could permit you to go thither, there you must appeal to judges sworn to support this Constitution, in opposition to that of any state, and who may also be inclined to favor their own officers. When these harpies are aided by excisemen, who may search, at any time, your houses, and most secret recesses, will the people hear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a niggardly hand ; and here there is a strong probability that these oppressions shall actually happen. I may be told that it is safe to err on that side, because such regulations may be made by Congress as shall restrain these officers, and because laws are made by our representatives, and judged by righteous judges : but, sir, as these regulations may be made, so they may not; and many reasons there are to induce a belief that they will not.
>
> . . . .
>
> . . . Where are your checks in this government? Your strongholds will be in the hands of your enemies. It is on a supposition that your American governors shall be honest, that all the good qualities of this government are founded; but its defective and imperfect construction puts it in their power to perpetrate the worst of mischiefs, should they be bad men ; and, sir, would not all the world, from the eastern to the western hemisphere, blame our distracted folly in resting our rights upon the contingency of our rulers being good or bad? Show me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty! I say that the loss of that dearest privilege has ever followed, with absolute certainty, every such mad attempt.[90]

Virginia Ratifying Convention President Edmund Pendleton argued that Congress's power to establish inferior tribunals included the power "to appoint the state courts to have the inferior federal jurisdiction."[91] He noted the possibility that the Supreme Court, with appellate jurisdiction, could overturn jury findings of fact and send cases back to local tribunals, much to the vexation of the litigants. But this possibility, he said, can be remedied by the Exceptions Clause.

> You cannot prevent appeals without great inconveniences; but Congress can prevent that dreadful oppression which would enable many men to have a trial in the federal court, which is ruinous. There is a power which may be considered as a great security. The power of making what regulations and exceptions in appeals they may think proper may be so contrived as to render appeals, as to law and fact,

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[90] THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1788), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 33, at 1, 58–59.

[91] *Id.* at 517.

> proper, and perfectly inoffensive. How will this power be exercised? If I thought there was a possibility of danger, I should be alarmed.
>
> But when I consider who this Congress are,—that they are the representatives of the thirteen states, (which may become fourteen or fifteen, or a much greater number of states,) who cannot be interested, in the most remote degree, to subject their citizens to oppressions of that dangerous kind, but will feel the same inclination to guard their citizens from them,—I am not alarmed.[92]

Henry and Pendleton seemed to agree that Congress could limit the Court's appellate jurisdiction. Both agreed that this is a substantial power; Henry said it could be used to prevent sheriffs from engaging in unlawful searches and seizures. But they disagreed as to whether this was an adequate check on judicial abuse. Pendleton said that since congressmen represent the states and the people, they can be trusted to protect their constituents from judicial abuses. Henry said it is naïve to rest our liberties on the assumption that our leaders will be virtuous.

George Mason, one of the Constitutional Convention delegates who had refused to sign the Constitution, argued that the appellate jurisdiction of the Supreme Court could be abused by appeals that would be vexatious to people who could not afford the costs of litigation.[93] James Madison answered the objection with the Exceptions Clause: "As to vexatious appeals, they can be remedied by Congress."[94] But Patrick Henry, perhaps the best known and most eloquent of the Anti-Federalists, was not convinced:

> The verdict of an impartial jury will be reversed by judges unacquainted with the circumstances. But we are told that Congress are to make regulations to remedy this. I may be told that I am bold; but I think myself, and I hope to be able to prove to others, that Congress cannot, by any act of theirs, alter this jurisdiction as established. It appears to me that no law of Congress can alter or arrange it. It is subject to be regulated, but is it subject to be abolished? If Congress alter this part, they will repeal the Constitution . . . . What is meant by such words in common parlance? If you are obliged to do certain business, you are to do it under such modifications as were originally designed . . . . If Congress, under the specious pretence of pursuing this clause, altered it, and prohibited appeals as to fact, the federal judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void.[95]

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92 *Id.* at 520.

93 *Id.* at 524.

94 *Id.* at 538.

95 *Id.* at 540–41.

On June 20, Mason again objected to the powers of the judiciary.[96] John Marshall, later to become Chief Justice of the Supreme Court, answered with the following statements:

> Gentlemen ask, What is meant by law cases, and if they be not distinct from facts? Is there no law arising on cases of equity and admiralty? Look at the acts of Assembly. Have you not many cases where law and fact are blended? Does not the jurisdiction in point of law as well as fact, find itself completely satisfied in law and fact? The honorable gentleman says that no law of Congress can make any exception to the federal appellate jurisdiction of facts as well as law. He has frequently spoken of technical terms, and the meaning of them. What is the meaning of the term *exception?* Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people. Who can understand this word, *exception*, to extend to one case as well as the other? I am persuaded that a reconsideration of this case will convince the gentleman that he was mistaken. This may go to the cure of the mischief apprehended. Gentlemen must be satisfied that this power will not be so much abused as they have said.
>
> The honorable member says that he derives no consolation from the wisdom and integrity of the legislature, because we call them to rectify defects which it is our duty to remove. We ought well to weigh the good and evil before we determine. We ought to be well convinced that the evil will be really produced before we decide against it. If we be convinced that the good greatly preponderates, though there be small defects in it, shall we give up that which is really good, when we can remove the little mischief it may contain, in the plain, easy method pointed out in the system itself?[97]

During the ratification process, supporters and opponents seemed to agree that judicial abuse was possible, and they focused especially on the power of the Supreme Court to overturn jury verdicts on questions of fact. They generally agreed that Congress could use the Exceptions Clause to limit the Court's authority to overturn jury verdicts (although Brutus and Patrick Henry questioned that), but they disagreed as to whether that was an adequate remedy. Federalists thought congressmen would have a natural inclination to protect their citizens from abuse; Anti-Federalists thought it was foolish to place that trust in the hands of fallible human beings in Congress.

Both sides seemed to agree that Congress's authority to make exceptions and regulations to the Court's appellate jurisdiction went beyond the questions of jury verdicts. Hamilton and Madison saw the

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96 *Id.* at 551.

97 *Id.* at 559–60.

Exceptions Clause as a general power to limit appellate jurisdiction, and Marshall believed Congress's authority to limit appellate jurisdiction extends as far as Congress shall determine that the interest of the people requires.

B. Early Constitutional Scholars

Constitutional scholars of the early 1800s addressed the Exceptions Clause but did not expound on it in great detail. Chancellor James Kent, whose *Commentaries on American Law* are often compared to Blackstone's *Commentaries*, simply noted that "[t]he Supreme Court was also clothed by the Constitution 'with appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress should make'; and, by the Judiciary Act of 1789, appeals lie to this court from the circuit courts, and the courts of the several states."[98] He provided no further interpretation of the Exceptions Clause.

St. George Tucker (1752–1827), a Virginia Supreme Court Justice, federal judge, and law professor, wrote in his *View of the Constitution of the United States* that "the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the congress shall make . . . ."[99] Later he suggested that

> congress appears to have considered, that it was not necessary that the supreme court should have original jurisdiction, but that it might, in the discretion of congress, be invested with it in those cases. By the constitution, originally, the Supreme Court might have had appellate jurisdiction, both as to law and fact, in all cases. But the ninth article of amendments provides that no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. A provision which has removed one of the most powerful objections made to this department.[100]

In 1825, William Rawle (1757–1836), United States District Attorney for Pennsylvania, wrote *A View of the Constitution*, which was used as the basic textbook on the Constitution at the United States Military Academy at West Point. He wrote concerning the Exceptions Clause: "The power given to except and to regulate does not—*ex vi termini*—carry with it a power to enlarge the jurisdiction: so far

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98 JAMES KENT, COMMENTARIES ON AMERICAN LAW 298–99 (Oliver Wendell Holmes ed., 12th ed., Boston, Little, Brown, & Co. 1873) (1826).

99 ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION OF THE UNITED STATES (1803), *reprinted in* A VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 91, 117 (Liberty Fund 1999).

100 *Id.* at 297. At the time Judge Tucker wrote this treatise, the Bill of Rights consisted of twelve amendments, the first two of which were not ratified at that time. His reference to the "ninth article of amendments" is actually a reference to the Seventh Amendment which limits the authority of the federal courts to disturb jury verdicts in civil cases. *Id.* at xxi.

therefore as it relates to the subjects of jurisdiction, we must consider it as confined by the enumeration of them."[101] Rawle believed Congress's power to limit the Court's appellate jurisdiction did not include the power to remove cases from the Court's appellate jurisdiction and add those cases to the Court's original jurisdiction, which was fixed as enumerated in Article III, Section 2, Clause 2.

Joseph Story (1779–1845), Supreme Court Justice and Harvard law professor, wrote *A Familiar Exposition of the Constitution of the United States* in 1840. He assumed that Congress had a general power to limit the Supreme Court's appellate jurisdiction, but addressed whether the Court's enumerated appellate jurisdiction was presumed to exist unless limited by Congress, or whether it existed only if Congress granted the Court appellate jurisdiction in those cases. He concluded that the Court had appellate jurisdiction as enumerated, unless limited by Congress under the Exceptions Clause.

> The appellate jurisdiction is to be, "with such exceptions, and under such regulations, as the Congress shall prescribe." But, here, a question is presented upon the construction of the Constitution, whether the appellate jurisdiction attaches to the Supreme Court, subject to be withdrawn and modified by Congress; or, whether an act of Congress is necessary to confer the jurisdiction upon the court. If the former be the true construction, then the entire appellate jurisdiction, if Congress should make no exceptions or regulations, would attach, by force of the terms, to the Supreme Court. If the latter, then, notwithstanding the imperative language of the Constitution, the Supreme Court is lifeless, until the Congress has conferred power on it. And if Congress may confer power, they may repeal it. So that the whole efficiency of the judicial power is left by the Constitution wholly unprotected and inert, if Congress shall refrain to act. There is certainly very strong ground to maintain, that the language of the Constitution meant to confer the appellate jurisdiction absolutely on the Supreme Court, independent of any action by Congress; and to require this action to divest or regulate it. The language, as to the original jurisdiction of the Supreme Court, admits of no doubt. It confers it without any action of Congress. Why should not the same language, as to the appellate jurisdiction, have the same interpretation? It leaves the power of Congress complete, to make exceptions and regulations; but it leaves nothing to their inaction. This construction was asserted in argument at an early period of the Constitution, and it has since been deliberately confirmed by the Supreme Court.[102]

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101 WILLIAM RAWLE, A VIEW OF THE CONSTITUTION 231 (Philadelphia, H.C. Carey & I. Lea 1825). *Ex vi tirmini* means "from or by the force of the term" or "from the very meaning of the expression used." BLACK'S LAW DICTIONARY 626 (8th ed. 2004).

102 JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED

The early constitutional scholars referred to the Exceptions Clause in their writings; they acknowledged its force and effect but did not expound on its meaning. Justice Story, who is widely regarded as the leading constitutional scholar of the 1800s, whose life overlapped with those of the Framers, and who *knew* many of the Framers personally, addressed the Exceptions Clause and declared that Congress's power to make exceptions is "complete."[103]

C. The Case Law

Understandably, some might question how objective a court can be when deciding questions concerning the court's own power or jurisdiction. But as Chief Justice John Marshall wrote in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[104]

The best-known case involving the Exceptions Clause is *Ex parte McCardle*, an 1868 Supreme Court case involving a Mississippi newspaper editor who was detained by occupying federal military authorities awaiting trial on charges of writing and publishing "incendiary and libelous" articles critical of Reconstruction and military rule of the South following the War Between the States.[105] McCardle filed a petition for a writ of habeas corpus, claiming that his imprisonment was unconstitutional and that his prosecution violated the First, Fifth, and Sixth Amendments, and that an 1867 statute authorized the Supreme Court to hear appeals from denials of writs of habeas corpus. The United States argued that the 1867 Act applied only to state prisoners, not federal prisoners. The Supreme Court rejected this proposition and set the case for argument.[106]

The *McCardle* case was argued on March 9, 1868. On March 12, Congress repealed the provision of the 1867 Act that gave the Supreme Court appellate jurisdiction over writs of habeas corpus. Several members of Congress clearly stated that their purpose was to prevent the Supreme Court from deciding *McCardle*, and thereby to hinder Reconstruction. One congressman declared that the amendment was "aimed at 'striking at a branch of the jurisdiction of the Supreme Court . . . thereby sweeping the [McCardle] case from the docket by taking away

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STATES 274–75 (Regnery Gateway 1986) (1859).

103 *Id.* at 275.

104 5 U.S. (1 Cranch) 137, 177 (1803). Note that Chief Justice Marshall did not say it is *exclusively* the province and duty of the judicial department to say what the law is.

105 74 U.S. (7 Wall.) 506 (1868).

106 *Id.* at 509.

the jurisdiction of the court.'"[107] President Andrew Johnson vetoed the bill on March 25, and Congress overrode his veto on March 27.[108]

Chief Justice Salmon P. Chase, writing for a unanimous Court, discussed the ongoing question whether the Court's constitutional jurisdiction is self-executing, noting that Congress has often acted as though a grant of appellate jurisdiction by Congress constituted a denial of jurisdiction not granted. However, he said that was not the determinative issue here:

> The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.
>
> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.[109]

Many assume that *McCardle* settled once and for all the principle that Congress has unrestricted power to limit the Supreme Court's appellate jurisdiction in whatever way Congress chooses. Others question whether the *McCardle* ruling went that far. They note that McCardle still had other appellate rights in federal courts, including the right to appeal to the Supreme Court under the Judiciary Act of 1787. Chief Justice Chase said that

> [c]ounsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[110]

While it seems clear that *McCardle* held that Congress may limit the Court's appellate jurisdiction, an argument can be made that the *McCardle* court did not define the outer parameters of Congress's power.

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107 William W. Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 229, 239 (1973) (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868) (statement of Rep. Wilson)) (alteration in original).

108 *Id.* at 239–40.

109 *McCardle*, 74 U.S. (7 Wall.) at 513–14.

110 *Id.* at 515.

One could argue, consistently with *McCardle*, that Congress may not limit the Court's appellate jurisdiction in a manner that precludes relief in another court.

A few months after *McCardle*, the Court decided *Ex parte Yerger*, another case of a newspaper editor challenging the Military Reconstruction Act.[111] The Court did not directly contradict or overrule its holding in *McCardle*, but the Court took jurisdiction of Yerger's case, noting that the 1867 Act which repealed the Court's appellate jurisdiction over writs of habeas corpus did not affect the Court's jurisdiction over writs of certiorari. *Yerger* could be read as restricting Congress's power to limit the Court's appellate jurisdiction. But a careful reading of *Yerger* does not support that interpretation. The Court narrowly defined what Congress had done, not what Congress had the power to do.

In fact, prior to *McCardle*, the Court had taken an even narrower view of its own jurisdiction and a broader view of the power of Congress to define and limit its jurisdiction. In earlier years, the Court seemed to believe its powers of jurisdiction were not self-executing. Rather, even in those areas in which the Constitution gives the Court original or appellate jurisdiction, the Court believed that it could exercise that jurisdiction only pursuant to an act of Congress. In the 1799 case, *Turner v. Bank of North America*, Justice Samuel Chase wrote:

> The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we posess [sic] it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.[112]

In *Durousseau v. United States*, Chief Justice John Marshall took a slightly enlarged view of Supreme Court jurisdiction:

> Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme

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111 75 U.S. (8 Wall.) 85 (1869).

112 4 U.S. (4 Dall.) 8, 10 n.1 (1799). See also *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321 (1796), where the Court held that admiralty cases were "civil actions" and therefore within the power of appellate review that Congress had given to the Court. "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." *Id.* at 327.

> court, as ordained by the constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.[113]

But while Chief Justice Marshall thought the Court's jurisdiction was conferred directly by the Constitution, subject to the limitations imposed by Congress, a later Supreme Court decision said otherwise. In *Barry v. Mercein*, the Supreme Court ruled that "[b]y the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of congress."[114]

By 1861 the Court was ready to say its original jurisdiction was conferred directly by the Constitution and did not require congressional authorization. Chief Justice Roger Taney wrote in *Kentucky v. Dennison* that the Court is authorized to exercise original jurisdiction "without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."[115]

But in the exercise of appellate jurisdiction, the Court considered itself more dependent on Congress. In 1865 the Court held in *Daniels v. Railroad Co.* that in order for the Court to exercise appellate jurisdiction in a case,

> two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority.
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> . . . [I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.[116]

With this background we now look again at the leading Exceptions Clause case, *Ex parte McCardle*. The Court again considered the nature of its appellate jurisdiction and concluded that this jurisdiction came directly from the Constitution.

> It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."[117]

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113 10 U.S. (6 Cranch) 307, 313–14 (1810).

114 46 U.S. (6 How) 103, 119 (1847).

115 65 U.S. (24 How.) 66, 98 (1861).

116 70 U.S. (8 Wall.) 250, 254 (1865).

117 *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–13 (1868) (quoting U.S. CONST.

While the Court in *McCardle* decided that its appellate jurisdiction was derived directly from the Constitution, it expressly recognized Congress's power to make exceptions and regulations to this jurisdiction. The *McCardle* and *Yerger* decisions never questioned the extent of Congress's power to make exceptions and regulations; they addressed only the extent and interpretation of the exception Congress had in fact made in the Act of 1867. These decisions never questioned whether Congress could have gone further in limiting appellate jurisdiction, had Congress so desired. To interpret *McCardle* and *Yerger* as restricting Congress's authority to make exceptions and regulations is to read more into the language of these decisions than is actually stated therein, and to ignore the background of the cases on which *McCardle* and *Yerger* are based.

The next major Exceptions Clause case is *United States v. Klein*.[118] By an 1863 statute, Congress had provided that property owners could file claims in the Court of Claims to recover property that had been confiscated by the Federal Government during the War Between the States, provided the claimant had not engaged in any acts of rebellion against or disloyalty to the United States. Various claimants had presented presidential pardons to establish that their Confederate military service or other aid to the Confederacy did not bar them from claiming their property under the 1863 Act. To counter these claims, in 1870 Congress enacted a statute providing that the presentation of any such pardon to the Court of Claims, or upon other proof presented to the Court of Claims that any such pardon exists, would cause the jurisdiction of the Court of Claims to cease, and require the Court of Claims to promptly dismiss the claim. Chief Justice Chase, speaking for the Court majority, held that provision of the 1870 statute unconstitutional.[119]

However, one must be careful in citing *Klein* as authority for the proposition that Congress may not limit the Court's appellate jurisdiction. Chief Justice Chase clearly stated, "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[120] Rather, Chief Justice Chase said that this was an attempt to limit the President's power to pardon.

> Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. This court is required to receive special pardons as evidence of guilt and to treat them as null

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art. III, § 2, cl. 2).

118 80 U.S. (13 Wall.) 128 (1872).

119 *Id.* at 147.

120 *Id.* at 146.

> and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.[121]

Furthermore, Chief Justice Chase wrote that the statute prescribes rules of evidence by which the Court must decide a case:

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?
>
> We think not . . . .[122]

The Court viewed the case as a matter of the President's power to pardon and the Court's authority to consider the President's pardon in property claims. At most, *Klein* stands for the proposition that in a case in which the United States is a party, Congress may not prescribe rules that require the Court to decide the case in favor of the United States. To that small extent, *Klein* may limit the power of Congress to restrict the Court's appellate jurisdiction.

In 1881 the Court considered *The "Francis Wright,"* another Exceptions Clause case, and simply ruled that

> while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.[123]

Two leading twentieth century cases address the Exceptions Clause. In 1995, in *Plaut v. Spendthrift Farm, Inc.*, the Court heard a challenge to an act of Congress that had the effect of overturning a previous Supreme Court decision.[124] The Court had previously held that litigation

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121 *Id.* at 148.

122 *Id.* at 146.

123 105 U.S. 381, 385–86 (1881).

124 514 U.S. 211 (1995).

based on section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 must be commenced within three years of the violation and within one year after discovery of the facts constituting the violation, and dismissed several lawsuits that did not meet that statute of limitations.[125] In 1991 Congress passed and the President signed into law a new provision to the effect that those cases and similar cases must be reinstated. Justice Scalia wrote the opinion for the Court majority which held that the 1991 statute was unconstitutional. Justice Scalia acknowledged that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."[126] However, since the 1991 statute required the Court to reopen final judgments, it violated the fundamental principle that "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies."[127] The separation of powers doctrine required that this statute be struck down as unconstitutional.

The following year, in 1996, the Court considered *Felker v. Turpin.*[128] Felker had been convicted of murder and sentenced to death, his appeal to the state appellate court had been denied, and his petition for a writ of habeas corpus in federal district court had been denied as well. He then brought a second habeas corpus petition in federal court, but while it was pending, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.[129] This Act provides that after a first petition for writ of habeas corpus has been denied, subsequent petitions for writs of habeas corpus must be dismissed unless the law under which the petitioner had been convicted has been changed, or unless new evidence has been discovered that could not previously have been known, and no reasonable fact-finder would have convicted petitioner if this evidence had been presented at the trial.[130]

Felker argued that the Act of 1996 was an unconstitutional usurpation of the appellate jurisdiction of the federal courts. But the Court, in its opinion written by Chief Justice Rehnquist, held that the Act is constitutional. Chief Justice Rehnquist noted that the Act did not deprive the Court of its jurisdiction to hear the first petition for writ of habeas corpus, and further, that the Act did not deprive the court of its

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125 *Id.*

126 *Id.* at 226.

127 *Id.* at 218 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

128 518 U.S. 651 (1996).

129 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

130 *Id.*

authority to hear original petitions for writs of habeas corpus. He concluded:

> This conclusion obviates one of the constitutional challenges raised. The critical language of Article III, § 2, of the Constitution provides that, apart from several classes of cases specifically enumerated in this Court's original jurisdiction, "[i]n all the other Cases . . . the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." . . . The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.[131]

Justice Stevens concurred, joined by Justices Souter and Breyer, noting that the Court's response to the argument that the Act exceeded Congress's authority under the Exceptions Clause was "incomplete."[132] He wrote:

> [T]here are at least three reasons for rejecting petitioner's argument that the limited exception violates Article III, § 2. First, if we retain jurisdiction to review the gatekeeping orders pursuant to the All Writs Act—and petitioner has not suggested otherwise—such orders are not immune from direct review. Second, by entering an appropriate interlocutory order, a court of appeals may provide this Court with an opportunity to review its proposed disposition of a motion for leave to file a second or successive habeas application. Third, in the exercise of our habeas corpus jurisdiction, we may consider earlier gatekeeping orders entered by the court of appeals to inform our judgments and provide the parties with the functional equivalent of direct review.[133]

Justice Souter also wrote a concurring opinion joined by Justices Stevens and Breyer. Like Justice Stevens, Justice Souter noted that the Act did not, at least as applied in this case, totally cut off the Court's power of appellate review: "I write only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."[134]

Neither Chief Justice Rehnquist nor the authors of the concurring opinions argued that Congress could not completely remove the Court's powers of appellate review in cases like this one. Chief Justice Rehnquist

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131 *Felker*, 518 U.S. at 661–62 (quoting U.S. CONST. art. III, § 2, cl. 2) (alteration in original).

132 *Id.* at 666 (Stevens, J., concurring).

133 *Id.*

134 *Id.* at 667 (Souter, J., concurring).

simply noted that the Court's powers of appellate review are not completely removed by this Act. Justice Souter observed that if the Court's powers of appellate review were in fact removed, the question whether Congress had exceeded its Exceptions Clause powers would be open. He did not venture to say how that question would be decided.

From this examination of the case law we may draw the following conclusions:

(1) Before *McCardle* (1868), the Court did not question or inhibit Congress's power to limit the Court's appellate jurisdiction.
(2) Before *McCardle,* the major issue concerning the Court's appellate jurisdiction was whether that jurisdiction had to be conferred on the Court by both the Constitution and an act of Congress, or whether appellate jurisdiction was conferred by the Constitution alone. Both Chief Justice Marshall and Chief Justice Taney concluded that appellate jurisdiction was conferred by the Constitution alone, unless limited by Congress, and by the time of *McCardle*, this issue seems to have been settled.
(3) *Klein* (1871), which concluded that an act of Congress directing the Court to dismiss any claim for recovery of property if a presidential pardon for serving the Confederacy was found to exist, did not raise an Exceptions Clause issue but rather was an unconstitutional attempt by Congress to interfere with the authority of the Court to receive evidence and determine its significance.
(4) *Francis Wright* (1881) recognized Congress's limitless power to restrict the Court's appellate jurisdiction.
(5) *Plaut* (1995) held that Congress may not retroactively command federal courts to reopen final judgments, as this interferes with the judicial power to decide cases.
(6) *Felker* (1996) upheld the power of Congress to limit the Court's authority to hear multiple habeas corpus petitions, but left open the possibility that Congress might exceed its Exceptions Clause authority if it were to remove the Court's authority to hear such cases entirely.

In sum, it is clear that the Court acknowledges Congress's authority to restrict the Supreme Court's appellate jurisdiction. However, the Court might limit Congress's power under the Exceptions Clause when congressional action would require the Court to reopen or reverse final decisions, or where congressional action would cut off all of a defendant's avenues to seek redress of grievances through the courts.

Before leaving the case law, it is important to address a collateral issue—the authority of Congress to limit the jurisdiction of other federal courts. This article focuses on the Exceptions Clause as applied to the Supreme Court, but the jurisdiction of other federal courts is a related issue. The Constitution does not directly address the issue, but Article

III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[135] In a parallel clause of Article I, Section 8, Congress is given power "[t]o constitute Tribunals inferior to the supreme Court."[136]

The simplest and most common view is that because inferior federal courts exist only as creations of Congress, Congress can define, expand, or limit the jurisdiction of those courts in whatever ways Congress sees fit, except for cases that the Constitution specifically delegates to the Supreme Court. And the Court has so held on several occasions. In *Sheldon v. Sill*, the Court held that "[c]ourts created by statute can have no jurisdiction but such as the statute confers."[137] In *Ex parte Bollman*, the Court, in an opinion written by Chief Justice Marshall, held that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."[138] In *United States v. Hudson & Goodwin*, the Court held that Congress's power to create inferior courts necessarily carried with it "the power to limit the jurisdiction of those Courts to particular objects."[139] More recently, in *Lauf v. E.G. Shinner & Co.*, the Court reaffirmed that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."[140]

In opposition to this position, some have cited Justice Story's opinion in *Martin v. Hunter's Lessee*.[141] While his words about Congress's authority to limit the jurisdiction of inferior federal courts were only dictum, Justice Story wrote that "[i]f, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*."[142] He also wrote:

> [Congress] might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.[143]

Justice Story's dictum may be read as saying that Congress must create inferior courts with full federal judicial power. It may also be read

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135 U.S. CONST. art. III, § 1.

136 U.S. CONST. art. I, § 8, cl. 9.

137 49 U.S. (8 How.) 441,449 (1850).

138 8 U.S. (4 Cranch) 75, 98 (1807).

139 11 U.S. (7 Cranch) 32, 33 (1812).

140 303 U.S. 323, 330 (1938); *accord* Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943).

141 14 U.S. (1 Wheat.) 304 (1816).

142 *Id.* at 330.

143 *Id.* at 331.

as saying that if Congress creates inferior courts, it must give them full federal judicial power. Full resolution of this question is beyond the scope of this article. Note, however, that none of the subsequent Supreme Court decisions cited above have followed Justice Story's lead in that direction. The case law supplies little support to the notion that Congress's power to limit the jurisdiction of inferior federal courts is in any way limited.

II. RECENT AND CONTEMPORARY SCHOLARS

Much of the recent and contemporary scholarship on the Exceptions Clause is more critical of jurisdiction-stripping than either the case law or early scholarship. Many lawyers and law professors are accustomed to using the judiciary as the avenue to bring about policy changes. Understandably, they view Exceptions Clause legislation as a barrier to their own efforts as well as to those of the federal courts.

Many view Exceptions Clause legislation as the efforts of social and political conservatives to prevent the courts from striking down conservative legislation. Professor Ira Mickenberg of the University of Dayton School of Law, describes bills in Congress to divest the Supreme Court of jurisdiction to hear certain classes of appeals as "[p]rimarily a brainchild of the so-called 'New Right'" and claims that "these proposals are designed to remove controversial social issues, such as abortion, busing, school prayer, and pornography, from the scope of Supreme Court review."[144] Mickenberg argues that the various Supreme Court cases on the Exceptions Clause merely involve procedural limitations and do not actually exempt categories of cases from Supreme Court review, and insists that impeachment[145] and constitutional amendment[146] are the proper courses of action when one believes a federal court has decided a case wrongly.

Harvard Law Professor Laurence Tribe notes that Congress has often limited the federal courts' jurisdiction:

> The Emergency Price Control Act of 1942 took a different if equally controversial tack: Congress denied individuals who were criminally prosecuted for price control violations the right to challenge the validity of the price control regulations in that trial; instead, regulations could be challenged only by bringing an action before a special Emergency Court of Appeals within 30 days after an unsuccessful administrative challenge to the regulations. So too, the

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144 Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 497 (1983).

145 *Id.* at 534.

146 *Id.* at 541–42.

> Voting Rights Act of 1965 requires a state seeking judicial review of a decision of the Attorney General suspending the state's voting regulations to bring its action only in the District Court for the District of Columbia. Finally, the Selective Training and Service Act of 1940 placed a particularly draconian limitation on federal jurisdiction: in a suit in which an individual was prosecuted for failing to report for induction, the federal court could not hear the individual's defense that he had been wrongly classified; he could raise this argument only by submitting to induction and proceeding through administrative and judicial remedies while in the service.
>
> Federal courts held none of these jurisdictional regulations to be unconstitutional.[147]

Nevertheless, Tribe warned that this does not mean current jurisdiction-stripping proposals are constitutional. If such proposals violate citizens' constitutional rights or even unintentionally burden the exercise of such rights, they warrant strict scrutiny: "[I]f busing were demonstrably the only remedy to effectuate one's right not to attend a segregated school, federal legislation limiting judicial power to order busing as a remedy would appear highly suspect."[148] He cited a 1953 Harvard Law Review article in which Professor Henry Hart argued that Congress does not have the authority to limit the Court's appellate jurisdiction in ways that "will destroy the essential role of the Supreme Court in the constitutional plan."[149] Tribe observed that Hart's thesis "has never been put to the test" in the courts.[150] We should also note that neither Hart's thesis nor Tribe's thesis appears in the clear language of the Exceptions Clause. At the risk of making an irreverent pun, the Exceptions Clause contains no exceptions to Congress's power to make exceptions. Tribe noted, correctly, that the Court can consider the constitutionality of Congress's use of the Exceptions Clause:

> The argument that Congress can wholly preclude review even of preliminary jurisdictional issues may flow from an incomplete reading of Ex Parte McCardle . . . . But even in McCardle it appears that the Court did indeed decide whether the congressional action was consistent with the Constitution. The Court noted, for example, . . . "We are not at liberty to inquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the

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147 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 270–71 (3d ed. 2000) (footnotes omitted).

148 *Id.* at 273.

149 Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953), *quoted in* TRIBE, *supra* note 147, at 277.

150 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 49 (2d ed. 1996).

> power to make exceptions to the appellate jurisdiction of this court is given by express words."[151]

Dr. Louis Fisher, Senior Specialist in Separation of Powers for the Congressional Research Service of the Library of Congress, articulated a balanced approach:

> The Exceptions Clause, it is argued, gives Congress plenary power to determine the Court's appellate jurisdiction.
>
> Although this approach appears to be grounded on constitutional language, the Exceptions Clause must be read in concert with other provisions in the Constitution. An aggressive use of the Exceptions Clause by Congress would make an exception the rule and deny citizens access to the Supreme Court to vindicate constitutional rights. Stripping the Supreme Court of jurisdiction to hear certain issues would vest ultimate judicial authority in the lower federal and state courts, producing contradictory and conflicting legal doctrines.
>
> . . . To deny the lower federal courts jurisdiction to hear claims arising under the Constitution would upset the system of checks and balances, alter the balance of power between the national government and the states, and strengthen the force of majority rule over individual rights . . . .
>
> Withdrawing appellate jurisdiction from the Supreme Court and withdrawing jurisdiction from the lower federal courts would also undercut the Supremacy Clause in Article VI, which states that the Constitution and federal laws "made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."[152]

Although it is unclear what Dr. Fisher means by an "aggressive use" of the Exceptions Clause that could make the exception the rule, he seems to imply that Congress could limit the Court's appellate jurisdiction occasionally, but not too often. At what point does Congress cross the line and go beyond the powers authorized by the Exceptions Clause?

His suggestion that limiting the federal courts' jurisdiction could "alter the balance of power between the national government and the states" ignores the fact that the power to limit the federal courts' jurisdiction is vested in the federal Congress. The claim that limiting the federal courts could "strengthen the force of majority rule over individual rights" assumes that federal courts are more sensitive to individual rights than are state courts—an assumption that has probably been accurate at certain times in the nation's history, but far from universally true. And his claim that limiting federal-court jurisdiction would

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151 *Id.* at 47 n.20 (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) (citation omitted)).

152 LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 1036 (6th ed. 2005) (quoting U.S. CONST. art. VI, cl. 2).

"undercut the Supremacy Clause" falls flat when one recognizes that the Supremacy Clause says that the Constitution is the supreme law of the land, that the reference to the "Constitution" must include the entire Constitution, and that the Exceptions Clause is part of the Constitution.

Dr. Fisher also cites a report by the Association of the Bar of the City of New York titled *Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review*.[153] Citing proposals to limit judicial review of public prayer, abortion, busing, and drafting women into military service, the report calls these proposals a "radical departure from the system of checks and balances that has served our nation well for the past two centuries . . . ."[154] In this respect, the New York City Bar misses the point: far from being a departure from the system of checks and balances, the Exceptions Clause is one of the checks and balances. It is a check the Framers gave to Congress to limit the power of the Judiciary, a power the Framers would not have given to Congress had they not intended that it be at least occasionally used.

The report of the New York City Bar does raise a significant question: If Congress removes an issue from the federal courts' jurisdiction, what happens to cases the federal courts have already decided on that issue? The report gives the following answer:

> [O]ne of the ironies of the present bills is that the constitutional interpretations with which the bills' sponsors differ would remain frozen as the supreme law of the land forever, binding upon state courts under the Supremacy Clause and the doctrine of *stare decisis*, without any possibility of change through the evolution of legal thought or a change in judicial (particularly Supreme Court) personnel . . . .[155]

The issue raised by the New York City Bar is important, but their conclusion does not automatically follow. When Congress acts under the Exceptions Clause the status of previously decided cases is far from clear. If the bill expressly declares that previous federal cases have no precedential force, what weight should be given to that declaration? Constitutional interpretation may be emphatically the role of the courts, but it is not necessarily exclusively the role of the courts. In any event, when Congress removes a matter from the federal courts' jurisdiction, state courts will feel free to ignore previous federal court decisions without fear of reversal.

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153 ASS'N OF THE BAR OF THE CITY OF N.Y., JURISDICTION-STRIPPING PROPOSALS IN CONGRESS: THE THREAT TO JUDICIAL CONSTITUTIONAL REVIEW (1981), *reprinted in* FISHER, *supra* note 152, at 1041.

154 *Id.*

155 *Id.* at 1042.

Professor Akhil Amar of Yale Law School has argued for a middle-ground position on the Exceptions Clause. On one side, he says, was Justice Joseph Story, who insisted that since Article III vests all judicial power in the Supreme Court and other federal courts, these courts must have full jurisdiction of all cases itemized in Article III.[156] Amar summarizes Justice Story's position in three premises:

> First, the judicial power of the United States must extend to certain cases, and must be vested—in either original or appellate form—somewhere in the federal judiciary. Second, there are some cases, such as federal criminal prosecutions, falling within the mandatory judicial power that could not be heard as an original matter by state courts. Federal criminal prosecutions were, for Story, "unavoidably . . . exclusive of all state authority." Any delegation of such cases to state trial courts, therefore, would impermissibly vest "the judicial Power of the United States" in non-Article III courts. Third, the Supreme Court's original jurisdiction could not be expanded to take cognizance of all such exclusively federal cases. From these three premises, Story deduces his conclusion: Congress is obliged to establish "one or more inferior courts" in which "to vest all that jurisdiction which, under the Constitution is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance."[157]

Professor Theodore Eisenberg supports Justice Story's position. He maintains that the Founders intended that all cases listed in Article III be decided by federal courts, and that Congress, therefore, must establish inferior federal courts to hear at least some of the cases that the Court cannot hear itself.[158] Professor William Crosskey goes beyond Justice Story's position and argues that every case itemized in Article III must be heard, either at trial or on appeal, by a federal court.[159] However, Amar rejects Justice Story's position because "Article III plainly imposes no obligation to create lower federal courts."[160] Article III uses mandatory language regarding jurisdiction, such as "'the judicial Power *shall* be vested' and '*shall* extend,'" but uses permissive language concerning inferior courts: "'such inferior Courts as the Congress *may*' ordain."[161] Amar notes that "[i]f 'shall' means 'must,' then 'may' has to

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156 Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 216–19 (1985).

157 *Id.* at 211–12 (quoting Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330–31, 337 (1816)) (footnotes omitted).

158 Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 508 (1974).

159 1 WILLIAM CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 610–20 (1953).

160 Amar, *supra* note 156, at 212.

161 *Id.* (quoting U.S. CONST. art. III, § 1).

mean 'can, but need not.'"[162] Amar also notes that Justice Story, writing in 1816, did not have access to Madison's *Notes,* which were first released in 1837 and which demonstrate that Article III, Section 2 was a "'Madisonian compromise' to give Congress the choice of creating inferior federal courts or proceeding through state trial courts."[163] Amar also observes that Congress regularly provided for state court prosecution of federal cases beginning in the early 1800s, and despite Justice Story's reservations, the Supreme Court upheld prosecutions in consenting states in *Houston v. Moore*.[164]

On the other side, Professor Henry Hart has argued that Congress need not create inferior federal courts, and that Congress can make exceptions to the Supreme Court's appellate jurisdiction, so long as in doing so, Congress does not impede the "essential role" of the Court.

> The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. *McCardle,* you will remember, meets that test. The circuit courts of the United States were still open in habeas corpus, and the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance.[165]

While it is possible that Congress could exercise its Exceptions Clause power in a way that impedes the essential functions of the Court, thus "reading the Constitution as authorizing its own destruction,"[166] Hart observes that "[o]ur whole constitutional history shows that Congress generally doesn't intend to violate constitutional rights, and a court ought not readily to [sic] assume any sudden departure."[167]

Hart believes that Congress could assign certain types of cases to state courts without impeding the Supreme Court's essential functions or destroying the constitutional plan.[168] He notes that "[t]he state courts always have a general jurisdiction to fall back on. And the Supremacy Clause [Article VI, Section 2] binds them to exercise that jurisdiction in accordance with the Constitution."[169] But Amar counters that Hart has sidestepped the Article III mandate that "judicial power *shall* be vested in *federal* courts and *shall* extend to *all* cases arising under the Constitution, laws and treaties of the United States."[170] And Tribe

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162 *Id.*

163 *Id.*

164 *Id.* at 213 (citing Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820)).

165 Hart, *supra* note 149.

166 *Id.*

167 *Id.* at 1399.

168 *Id.* at 1401.

169 *Id.*

170 Amar, *supra* note 156, at 216.

observes that Hart's "essential functions" test "has never been put to the test in the courts."[171]

In support of Hart's position, Professor Martin Redish believes that Congress may leave final jurisdiction over a constitutional issue to the state courts,[172] much like the preemption doctrine by which Congress has supreme authority to regulate interstate commerce, but is not required to do so, and may leave such regulation to the states.[173] But Amar argues that Redish's analogy between Congress's regulatory power over commerce and the Supreme Court's jurisdiction over federal cases is invalid because the Court has a watchdog role of checking the other branches and levels of government.[174]

Amar also interacts with Professor Leonard Ratner's argument that Congress may limit the Supreme Court's appellate jurisdiction provided it does not destroy the Court's "essential" functions, which are "(1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority."[175] Ratner concludes that

> [a]lthough these essential functions would not ordinarily be disrupted by a procedural limitation restricting the availability of Supreme Court review in some but not all cases involving a particular subject, legislation denying the Court jurisdiction to review any case involving that subject would effectively obstruct those functions in the proscribed area.[176]

Amar says Ratner's thesis is "problematic" because it has "little grounding in explicit text or firm constitutional history."[177]

Obviously some in Congress have believed that their authority to limit the Court's appellate jurisdiction goes further than Ratner would acknowledge. Ratner noted that

> as early as 1830 congressional legislation was introduced which proposed to eliminate the Supreme Court's appellate jurisdiction over state court decisions . . . . The 1830 proposal would have allowed the

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171 TRIBE, *supra* note 150.

172 Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 909, 912 (1982).

173 Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319 (1851); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 585 (1987).

174 Amar, *supra* note 156, at 222–23.

175 Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960).

176 *Id.*

177 Amar, *supra* note 156, at 220.

> state courts to determine for themselves the meaning of the Constitution, laws, and treaties of the United States . . . .[178]

Of course, it should also be noted that the 1830 legislation did not pass.[179]

Ratner made a helpful contribution to the debate by citing definitions of the term *exception*. "Ash's [*The New and Complete*] *Dictionary of the English Language,* published in London in 1775, described the term [*exception*] as 'an exclusion from a general rule or law.'"[180] Samuel Johnson, in *A Dictionary of the English Language* (1755), defined *exception* as an "exclusion from the things comprehended in a precept, or position; exclusion of any person from a general law."[181] From these and other definitions, Ratner concluded that if an exception became too commonplace, it was no longer an exception: "[A]n exception cannot nullify the rule or description that it limits. In order to remain an exception, it must necessarily have a narrower application than that rule or description."[182] Noah Webster's 1828 *An American Dictionary of the English Language* lends further support to Ratner's position, defining *exception* as:

> The act of excepting, or excluding, from a number designated, or from a description; exclusion. All the representatives voted for the bill, with the *exception* of five. All the land is in tillage with an *exception* of two acres. 2. Exclusion from what is comprehended in a general rule or proposition. 3. That which is excepted, excluded, or separated from others in a general description; the person or thing specified as distinct or not included. Almost every general rule has its *exceptions* . . . .[183]

Ratner seems to be saying that Congress has power to make exceptions to the Court's appellate jurisdiction so long as they remain exactly that—exceptions. If they become too commonplace, they are no longer exceptions, but the rule. But at what point do the exceptions become the rule? And how does one determine this? By the number of exceptions? By their importance? By the breadth of cases they cover? And who makes the determination that they are so numerous that they are no longer exceptions? All of these questions are problematic.

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178 Ratner, *supra* note 175, at 159.

179 *Id.* at 159–60.

180 *Id.* at 168 (quoting JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, n.p. 1775)) (footnote omitted).

181 *Id.* (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, n.p. 1755)).

182 *Id.* at 169.

183 *Id.* at 168 (quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 76 (1828)).

After surveying the various commentators on the Exceptions Clause, Amar concluded that Congress may limit the Supreme Court's appellate jurisdiction over certain types of cases, provided Congress creates an inferior federal court with jurisdiction to hear such cases.

> First, Article III vests the judicial power of the United States in the federal judiciary, and not in state courts, or in Congress. Second, the federal judiciary must include one Supreme Court; other Article III courts may—but need not—be created by Congress. Third, the judicial power of the United States must, as an absolute minimum, comprehend the subject matter jurisdiction to decide finally all cases involving federal questions, admiralty, or public ambassadors. Fourth, the judicial power may—but need not—extend to cases in the six other, party-defined, jurisdictional categories. The power to decide which of these party-defined cases shall be heard in Article III courts is given to Congress by virtue of its powers to create and regulate the jurisdiction of lower federal courts, to make exceptions to the Supreme Court's appellate jurisdiction, and to enact all laws necessary and proper for putting the judicial power into effect. Fifth, Congress's exceptions power also includes the power to shift final resolution of any cases within the Supreme Court's appellate jurisdiction to any other Article III court that Congress may create. The corollary of this power is that *if* Congress chooses to make exceptions to the Supreme Court's appellate jurisdiction in admiralty or federal question cases, it *must* create an inferior federal court with jurisdiction to hear such excepted cases at trial or on appeal; to do otherwise would be to violate the commands that the judicial power "shall be vested" in the federal judiciary, and "shall extend to all" federal question and admiralty cases.[184]

While Amar's argument has a certain appeal, the reasons he presents for it are unconvincing. His argument that federal judges have greater incentive to issue sound decisions because they are subject to removal for lack of *good behavior* falls flat when one considers how few federal judges have ever been removed from office for any reason, let alone for issuing bad decisions. State judges and justices generally have to stand periodically for reelection or reappointment; one might argue that this is actually better assurance that they will decide cases soundly, than is the rarely-used power to remove federal judges. His argument that federal judges are assured independence from other branches of government while state judges are not, ignores the fact that Article IV, Section 4 requires that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government,"[185] and the enabling acts by which Congress admits new states into the Union commonly include this

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184 Amar, *supra* note 156, at 229–30.

185 U.S. CONST. art. IV, § 4.

guarantee.[186] Many state constitutions have stronger *separation of powers* clauses than does the federal Constitution.[187]

Amar's argument that "Article III vests the judicial power of the United States in the federal judiciary, and not in state courts, or in Congress"[188] sounds convincing until one carefully reads the language of Article III: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[189] Focus on the key verbs of the dependent clause: *ordain* and *establish*. If Article III used only the word *establish*, Amar might have a sound argument: the judicial power vests and must therefore reside permanently in the Supreme Court and inferior federal courts established by Congress. Arguably, that judicial power could not be re-delegated to a state court. But the clause reads "ordain and establish." Why did the Framers use both words? Is there a shade of difference between them?

Webster's 1828 *An American Dictionary of the English Language* defines the two words as synonyms that can have the same meaning, but also gives shades of difference in their meanings. *Establish* can mean "[t]o enact or decree by authority and for permanence; to ordain; to appoint; as, to *establish* laws, regulations, institutions, rules, [and] ordinances . . . ."[190] But the word can also mean "[t]o found permanently; to erect and fix or settle; as, to *establish* a colony or an empire."[191] The same dictionary defines *ordain* as follows:

> Properly, to set; to establish in a particular office or order; hence, to invest with a ministerial function or sacerdotal power; to introduce

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186 *E.g.*, Act of February 22, 1889, ch. 180, 25 Stat. 676 (enabling the creation of North Dakota, South Dakota, Montana, and Washington); Act of July 16, 1894, ch. 138, 28 Stat. 107 (enabling the creation of Utah); Act of June 20, 1910, ch. 310, 36 Stat. 557, 568–79 (enabling the creation of Arizona).

187 *E.g.*, COLO. CONST. art. III ("The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."); MASS. CONST. pt. 1, art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."). The Alabama Constitution includes a provision nearly identical to that of Massachusetts. ALA. CONST. art. III, § 43.

188 Amar, *supra* note 156, at 229.

189 U.S. CONST. art. III, § 1.

190 NOAH WEBSTER, NOAH WEBSTER'S FIRST EDITION OF AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (2d ed., Foundation for American Christian Education 1980) (1828).

191 *Id.*

> and establish or settle in the pastoral office with the customary forms and solemnities; as, to *ordain* a minister of the gospel. In America, men are *ordained* over a particular church and congregation, or as evangelists without the charge of a particular church, or as deacons in the episcopal church.[192]

The terms *ordain* and *establish* can be used as synonyms, or they can have different meanings. Ordaining an inferior court could mean investing that inferior court with certain powers; establishing an inferior court could mean creating an inferior court that did not exist before. So which interpretation is more likely to be correct: that which treats these words as synonyms or that which treats them differently?

A basic principle of statutory and constitutional construction is the presumption against redundancy.[193] We presume the drafters did not use unnecessary words; they would not have used two words where one would suffice. If they wrote "ordain and establish" instead of just "establish," we presume the words "ordain and" add a shade of meaning that would not be present had they just wrote "establish." The Framers of the Constitution chose their words with special care. As James Madison wrote concerning "charters of liberty" like the Constitution, "Every word . . . decides a question between power and liberty . . . ."[194]

A fair interpretation of Article III, Section 1, then, is that federal judicial power vests in (1) the Supreme Court; (2) inferior federal courts that Congress may establish; or (3) inferior state courts that Congress may ordain or clothe with federal jurisdiction. If this interpretation is correct, then one could fairly conclude that Congress can limit the jurisdiction of the Supreme Court and other federal courts over a particular subject, so long as state courts retain jurisdiction over that subject matter.

A more recent contributor to this discussion, Doctor Edwin Vieira, believes that Congress has the authority to limit the Supreme Court's appellate jurisdiction, but he recognizes that this authority is not absolute. He argues that Congress cannot use its Exceptions Clause power to deny a litigant the opportunity to vindicate a constitutional right because "that would deny constitutional protection to litigants otherwise entitled to it."[195] Also, he states that Congress cannot use the Exceptions Clause to deny a litigant the opportunity to defend his First Amendment rights because the fact "that the First Amendment

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192 *Id.*

193 *See* United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992); United States v. Menasche, 348 U.S. 528, 538–39 (1955); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

194 James Madison, *Philadelphia: Charters*, NAT'L GAZETTE, Jan. 19, 1792.

195 EDWIN VIEIRA, HOW TO DETHRONE THE IMPERIAL JUDICIARY 273 (2004).

postdates the Exceptions Clause would be a strong argument that the former imposes limitations on the latter."[196]

Before Congress can invoke the Exceptions Clause, Vieira says, Congress must determine that the Supreme Court's interpretation of the Constitution on a particular point is wrong; and he argues that Congress has the authority to make such a determination.[197] He observes that in *Marbury v. Madison*, Chief Justice John Marshall held that the Justices have a duty to interpret the Constitution since they "take an oath to support it[.] This oath certainly applies in an especial manner, to their conduct in their official character . . . . Why does a judge swear to discharge his duties agreably [sic] to the constitution . . . , if that constitution forms no rule for his government?"[198]

Vieira notes, however, that Congress and the President, just like the Justices of the Supreme Court, take an oath to support and defend the Constitution of the United States.[199] That being the case, Congress and the President, like the Court, have a constitutional duty to interpret the Constitution.[200] He cites the following statement of President Andrew Jackson:

> [T]he opinion of the Supreme Court . . . ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive . . . , but to have only such influence as the force of their reasoning may deserve.[201]

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196 *Id.* at 277.

197 *Id.* at 233–34.

198 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78, 180 (1803).

199 VIEIRA, *supra* note 195, at 215–16 (citing U.S. CONST. art. VI, cl. 3; *id.* art. II, § 1, cl. 8).

200 *Id.* at 207–46.

201 *Id.* at 220–21 (quoting Andrew Jackson, Veto Message (July 10, 1832), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1145 (J. Richardson ed., N.Y., Bureau of Nat'l Literature 1897)).

Vieira's belief that Congress has authority to interpret the Constitution is central to his belief that Congress can limit the appellate jurisdiction of the Supreme Court.

> For Congress to withhold appellate jurisdiction from the Supreme Court over certain constitutional issues, it must first determine for itself the meaning and application of the Constitution in the premises, and then conclude either that: (i) based on prior judicial decisions and the then-present composition of the bench, the Court will *wrongly* decide the issues; or (ii) the Court should not be permitted to hear the issues at all, *howsoever* it might decide them. In the first instance, Congress might believe that the Court's judicial decisions on the subject have been wrong, that the present group of Justices will not correct these errors, and that therefore removal of appellate jurisdiction will protect the constitutional rights of parties against whom otherwise the Court would enter new and no less erroneous rulings.[202]

In a case involving same-sex marriage, by making a determination that the Court has interpreted or is likely to interpret the Constitution wrongly, Congress demonstrates its good faith. Congress demonstrates by this determination that they are not seeking to violate a litigant's constitutional rights, because in the view of Congress, the Constitution properly interpreted does not confer a right to same-sex marriage. Vieira supports his position convincingly, but for nearly two centuries, the Court has been accustomed to being the final arbiter of constitutional interpretation. Given that background, there is no assurance that the Court will accept Vieira's position. It is possible they might accept this position, but it is also possible that the Court would see this position as a challenge to their own authority and react vigorously.

The recent and contemporary scholars cited above are representative of many others who have written on the Exceptions Clause. From their writings one might draw the following conclusions:

(1) Many recent and contemporary scholars, such as Mickenberg and the New York Bar Association, seem hostile to the Exceptions Clause, either because they fear its use by conservatives or because it interferes with their use of the courts to effect social change.
(2) Fisher recognizes the legitimacy of the Exceptions Clause but insists it must be read in conjunction with the rest of the Constitution.
(3) Tribe suggests that use of the Exceptions Clause to deny a litigant the opportunity to vindicate a fundamental constitutional right would be subject to strict scrutiny.

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202 *Id.* at 272. Vieira also suggests a related and intriguing possibility: "Similarly, through its power '[t]o constitute Tribunals inferior to the Supreme Court,' Congress could create a special court with jurisdiction over all or certain types of constitutional questions." *Id.* at 282 (quoting U.S. CONST. art. I, § 8, cl. 9) (alteration in original).

(4) Ratner maintains that the Exceptions Clause may not be invoked in a way that would impede the "essential functions" of the federal judiciary, which are to (a) resolve conflicting interpretations of federal law and (b) maintain federal supremacy. Furthermore, he suggests that Congress may not use the Exceptions Clause so frequently that the exceptions become the rule.
(5) Most agree that Congress may not limit the appellate jurisdiction of the Supreme Court without providing or allowing another opportunity for a litigant to vindicate his or her constitutional rights. Eisenberg and Crosskey believe that Congress must provide this means of redress through an inferior federal court. Hart and Redish believe that Congress may provide this means of redress through either federal or state courts. The language of Article III, Section 2, "ordain and establish," supports the interpretation of Hart and Redish.
(6) Vieira acknowledges that Congress may not limit the Supreme Court's appellate jurisdiction for the purpose of denying a litigant the opportunity to vindicate his or her constitutional rights. He notes, however, that sometimes Congress may not seek to deny the litigant's constitutional rights; rather, in these instances Congress simply does not believe the litigant (or the Court) is interpreting the Constitution correctly. In these instances Congress can avoid this problem by adopting its own interpretation of the relevant constitutional provision, enter a finding that the Court is likely to interpret the provision wrongly, and therefore withdraw the appellate jurisdiction of the Court on that subject.
(7) Tribe observes that even when Congress removes a case from the Court's appellate jurisdiction, the Court retains the authority to consider whether Congress's act of removal is constitutional.

III. CONCLUSION

Constitutional powers, like muscles, atrophy if they are not used. If in fact the Framers intended the Exceptions Clause to be a congressional check on judicial power, it is important to understand the nature, extent, and limits of this check. We have examined the text of Article III, the proceedings concerning the Exceptions Clause in the Constitutional Convention of 1787, the ratification debates, the views of early constitutional scholars, the case law, and the views of recent and contemporary constitutional scholars. Now it is time to draw some conclusions from these studies.

From James Wilson's response to Gouverneur Morris's question about the meaning of the Exceptions Clause on the Convention floor on August 27, 1787, it is clear that one purpose of the Exceptions Clause was to enable Congress to prevent the Supreme Court from overturning

jury verdicts in lower courts.[203] Numerous other statements could also indicate that this was not the only purpose of the Exceptions Clause. For example, in *Federalist No. 80*, Hamilton assured his readers that if the federal court system causes "inconveniences," the "national legislature will have ample authority to make *exceptions* . . . ."[204] In *No. 81*, he said the federal courts could not interfere with trial by jury but added that the Supreme Court's appellate jurisdiction was "subject to any *exceptions* and *regulations* which may be thought advisable . . . ."[205] James Wilson argued at the Pennsylvania ratifying convention that the appellate jurisdiction of the Supreme Court needed to be limited occasionally, but "will not Congress better regulate them, as they rise from time to time, than could have been done by the Convention?"[206] During the Virginia ratification debates, convention president Edmund Pendleton argued that the Exceptions Clause empowered Congress to except and regulate appellate jurisdiction so that appeals would not be vexatious and burdensome to litigants. He acknowledged that Congress could abuse this power but considered this unlikely since Congress consisted of representatives of the thirteen states.[207] Similarly, when George Mason argued that the Supreme Court's appellate jurisdiction could be abused by costly appeals, James Madison responded that "[a]s to vexatious appeals, they can be remedied by Congress."[208] And John Marshall's answer to George Mason stated that Congress can make exceptions to the Court's appellate jurisdiction both as to law and to fact, and that "[t]hese exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people."[209] Neither the language of the Exceptions Clause, nor any statements on the Convention floor, nor any statements by supporters or opponents during the ratification debates, give any indication that Congress's power to make exceptions to the Supreme Court's appellate jurisdiction is limited in any way.

Early constitutional scholars give little insight into the meaning of the Exceptions Clause. James Kent, St. George Tucker, William Rawle, and Joseph Story acknowledge the existence of the Clause but do not expound on its meaning.[210]

The pre-*McCardle* (1868) case law gives no indication that Congress's power under the Exceptions Clause is in any way limited.

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203 *See supra* note 54 and accompanying text.

204 THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 71, at 416.

205 THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 71, at 424.

206 *See supra* note 89 and accompanying text.

207 *See supra* note 92 and accompanying text.

208 *See supra* note 94 and accompanying text.

209 *See supra* note 97 and accompanying text.

210 *See supra* Part I.B.

The issue, rather, was whether the constitutional grants of jurisdiction to the Court were self-executing without an act of Congress, or whether an act of Congress was necessary to implement any constitutional grant of jurisdiction. *Wiscart v. D'Auchy*,[211] *Turner v. Bank of North America*,[212] and *Barry v. Mercein*[213] held that even if the Constitution delegates jurisdiction to the Supreme Court, the Court cannot exercise that jurisdiction unless authorized by an act of Congress.[214] But *Durousseau v. United States* held that the Supreme Court's jurisdiction is given by the Constitution, not federal statute, and is effective with or without an act of Congress.[215] *Durousseau* recognized, however, that Congress can make exceptions to the Court's appellate jurisdiction.[216] By 1861 the Court seems to have decided firmly, in *Kentucky v. Dennison,* that its original jurisdiction came directly from the Constitution, independent of federal statutes.[217] But as late as the 1865 case, *Daniels v. Railroad Co.*, the Court still believed its appellate jurisdiction had to be conferred by statute.[218] None of these cases suggest that Congress's power to limit the Court's appellate jurisdiction is in any way limited.

Ex parte McCardle established that both the Court's original jurisdiction and its appellate jurisdiction are conferred by the Constitution, not by Congress, "[b]ut [are] conferred 'with such Exceptions, and under such Regulations as the Congress shall make.'"[219] *McCardle* gave no indication that Congress's power under the Exceptions Clause is in any way limited. *United States v. Klein* invalidated an act of Congress requiring the Court to dismiss a claim for recovery of property when evidence of a pardon was presented.[220] But the Court expressly stated that "this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power,"[221] but rather an invalid attempt to dictate to the Court what use and construction it should give to the evidence of a pardon.[222] *The "Frances Wright"* held that the extent of Congress's power under the

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211 3 U.S. (3 Dall.) 321 (1796).

212 4 U.S. (4 Dall.) 8 (1799).

213 46 U.S. (6 How) 103 (1847).

214 *See supra* text accompanying notes 113, 115.

215 10 U.S. (6 Cranch) 307, 313–14 (1810).

216 *Id.*

217 65 U.S. (24 How.) 66, 98 (1861).

218 70 U.S. (8 Wall.) 250, 254 (1865).

219 *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–13 (1868) (quoting U.S. CONST. art. III, § 2).

220 80 U.S. (13 Wall.) 128, 146 (1872).

221 *Id.*

222 *See supra* note 122 and accompanying text.

Exceptions Clause was for Congress to determine.[223] Two more recent cases, *Plaut v. Spendthrift Farm, Inc.*[224] (1995) and *Felker v. Turpin*[225] (1996), suggest that Congress may not limit the Court's appellate jurisdiction in a way that denies the Court the opportunity to perform its essential functions.[226]

Recent and contemporary legal scholars often seem hostile to the Exceptions Clause but have difficulty denying that the plain language of the Clause, the history of its adoption and ratification, and most of the case law indicates that Congress's power to limit the Court's appellate jurisdiction is itself unlimited. The most persuasive arguments for a more restrictive interpretation are that (1) the Exceptions Clause must be balanced against other portions of the Constitution;[227] (2) Congress may not use the Exceptions Clause in a way that would deny the Court the power to perform its "essential functions";[228] (3) Congress may use the Exceptions Clause so long as the litigant still has the opportunity to pursue his or her remedies in a federal court;[229] (4) Congress may use the Exceptions Clause so long as the litigant still has the opportunity to pursue his or her remedies in either a federal or a state court;[230] (5) an *exception* by definition must be a departure from the norm and therefore the exceptions may not be so numerous as to become the rule;[231] and (6) Congress may use the Exceptions Clause in a way that denies a litigant the opportunity to pursue an alleged constitutional right, so long as Congress has made a finding that the relevant provision of the Constitution should properly be interpreted in a certain way and that the Court is likely to interpret that provision wrongly.[232]

The supreme irony is that the final arbiter of the validity of Exceptions Clause limits on the Court's appellate jurisdiction will, in all probability, be the Court itself. The Court has never ruled on the "essential functions" test, though language in *Plaut*[233] and *Felker*[234] suggests that at least some of the Justices might be sympathetic to this

223 105 U.S. 381, 385–86 (1881).

224 514 U.S. 211 (1995).

225 518 U.S. 651 (1996).

226 *See supra* text accompanying notes 125–32.

227 *See supra* note 154 and accompanying text.

228 *See supra* notes 151, 178–79 and accompanying text.

229 *See supra* notes 160–61, 187 and accompanying text.

230 *See supra* notes 175–76 and accompanying text.

231 *See supra* notes 180–83 and accompanying text.

232 *See supra* notes 195–202 and accompanying text.

233 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

234 Felker v. Turpin, 518 U.S. 651 (1996).

position.[235] In *Yerger*[236] and in *Felker*, the Court seemed to consider it important that the litigant had other avenues to pursue his or her remedies.[237]

Must those avenues be federal courts, or could they include state courts as well? The argument that they could include state courts is persuasive. Many of the Framers believed human rights were best protected at the state level. Roger Sherman of Connecticut, one of the most influential delegates to the Constitutional Convention, argued on the Convention floor that a federal bill of rights was unnecessary because "[t]he State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient."[238] No one present disputed his statement, and the proposal to create a bill of rights was defeated, 0-10, with Massachusetts abstaining.[239] Virginia Ratifying Convention President Edmund Pendleton stated that Congress's power to establish inferior tribunals included the power to "appoint the state courts to have the inferior federal jurisdiction."[240] Many of the nation's leading legal minds were present at that ratifying convention, including James Madison, John Marshall, George Wythe, George Mason, and Patrick Henry; none of them disputed or questioned Pendleton's assertion. Amar has noted that Article III, Section 2 was a compromise that gave Congress the choice of creating inferior federal courts or proceeding through state courts,[241] and that Congress regularly gave such authority to state courts in the early 1800s, a procedure which the Court upheld in *Houston v. Moore*.[242] Hart observed the basic principle that the state courts have general jurisdiction,[243] and Article VI, Section 2 provides that "the Judges in every State shall be bound thereby [by the United States Constitution], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[244] Against this backdrop, there is little to support the assertion that only federal courts can adequately fulfill the function of protecting human rights.

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235 *See supra* notes 133–34 and accompanying text.

236 *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869).

237 *See supra* text accompanying notes 133–34.

238 Convention Floor Debate (Sept. 12, 1787), *in* MADISON, *supra* note 54, at 616, 630.

239 *Id.*

240 *See supra* note 91 and accompanying text.

241 *See supra* note 163 and accompanying text.

242 18 U.S. (5 Wheat.) 1 (1820).

243 *See supra* note 169 and accompanying text.

244 U.S. CONST. art. VI, cl. 2.

So if a senator were to ask about his or her authority to limit the Court's appellate jurisdiction on a particular matter, I would offer the following advice:

(1) The Framers were concerned about judicial usurpation of power, just as they were concerned about usurpation of power by other branches of government, and they intended the Exceptions Clause of Article III, Section 2 of the Constitution to be a congressional check on the judiciary. The Framers would not have given Congress that check had they not intended that Congress use that check in appropriate circumstances.

(2) However, Congress must consider what exercises of the Exceptions Clause power are likely to be upheld by the courts. Accordingly Congress should consider the following:
   (a) If Congress were to enact a statute entirely cutting off all federal court jurisdiction over that type of case, the Court might uphold the statute.
   (b) If Congress were to enact a statute cutting off all federal court jurisdiction over that type of case but providing that state courts shall have jurisdiction, the Court probably would uphold the statute.
   (c) If Congress were to enact a statute cutting off Supreme Court appellate jurisdiction over that type of case, but leaving jurisdiction with some federal court, the Court would be even more likely to uphold the statute.
   (d) If Congress were to enact a statute like those described in (a), (b), or (c) above, and add language to the effect that the relevant provision of the Constitution should be interpreted a certain way and that the Court is likely to interpret it wrongly, that added language might possibly increase the likelihood that the Court would uphold the statute.

Giving the Exceptions Clause a broad interpretation raises the possibility that a litigant may be frustrated in his or her effort to redress grievances. But the main purpose of the Constitution was not to remedy every possible grievance or vindicate every imaginable right, but to provide a workable structure of government, checking and balancing power between the federal and state governments and among the three branches of the federal government.

The Exceptions Clause, like most other provisions granting powers to government, contains the possibility of abuse. It is incumbent on all of us to ensure that the Exceptions Clause power is used in a restrained and responsible manner. But a refusal to use it when warranted is an abdication of the duty the Framers placed on Congress to check and balance the judiciary.

THE CONSTITUTIONALITY OF IRREBUTTABLE PRESUMPTIONS

*James J. Duane**

I. INTRODUCTION

Twenty-five years ago, in *Fairfax County Fire and Rescue Services v. Newman*, the Supreme Court of Virginia was called upon to decide the standard for assessing the constitutionality of a statutory presumption: that is, a law which "makes the proof of one particular fact presumptive evidence of another fact."[1] The employer in that case argued that it had been denied due process by a workers' compensation rule that certain health problems suffered by firefighters were "presumed" to be occupational diseases suffered in the line of duty and covered under the law.[2] The court unanimously concluded that, for any presumption to be constitutional under the due process clause, even in a civil case, "the presumption *must* be rebuttable."[3]

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1 222 Va. 535, 539, 281 S.E.2d 897, 900 (1981) (citing Crenshaw v. Commonwealth, 219 Va. 38, 42, 245 S.E.2d 243, 246 (1978)).

2 The court was ruling on what was then section 65.1-47.1 of the Virginia Code, entitled "Presumption as to death or disability from respiratory disease," which at that time provided:

> The death of, or any condition or impairment of health of, salaried or volunteer fire fighters caused by respiratory diseases . . . hypertension or heart disease, resulting in total or partial disability shall be presumed to be an occupational disease suffered in the line of duty that is covered by this act unless the contrary be shown by a preponderance of competent evidence . . . .

VA. CODE ANN. § 65.1-47.1 (West 1990) (repealed 1991). That presumption is now codified at section 27-40.1.

3 *Newman*, 222 Va. at 539–40, 281 S.E.2d at 900 (emphasis added) (citing *Crenshaw*, 219 Va. at 42, 245 S.E.2d at 246). This was not some slip of the pen; the court later reiterated in the same opinion that "[t]he second prong of the [constitutional] test requires the presumption to be rebuttable. . . . As long as an employer may introduce evidence in rebuttal of the presumption, the employer's constitutional rights of due process have been protected." *Id.* at 541, 281 S.E.2d at 901. In announcing this rule, *Newman* did not explicitly include the words "even in a civil case," as I have done, but that *was* a civil case, and the court saw no reason to hesitate to adopt such a standard of review, even though it cited nothing but a line of criminal cases to support this proposition. *See infra* note 7.

This necessarily implies, as the Court of Appeals of Virginia has much more recently reasoned, that all irrebuttable presumptions must be unconstitutional.[4] To keep things simple, I shall refer to this rule as the holding in *Newman*, even though that case also established a number of other points that are of no concern to us here.[5] The court thought that its holding was dictated by both state and federal law, for it announced that it was interpreting the requirements of "due process of law under the Fourteenth Amendment of the United States Constitution and Article I, § 11 of the 1971 Virginia Constitution."[6] In support of this conclusion, however, the court cited no federal cases, and no authority but its own holdings in a line of earlier criminal cases dating back almost thirty years.[7]

That holding has never been overruled, qualified, or retracted by the Supreme Court of Virginia, and it obviously remains the law of this commonwealth.[8] Even to this day, the court of appeals continues to believe that a presumption must be rebuttable before it will survive

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[4] Medlin v. County of Henrico Police, 34 Va. Ct. App. 396, 407 n.5, 542 S.E.2d 33, 39 n.5 (2001) ("[I]rrebuttable presumptions are unconstitutional . . . ."); *see also* Town of Purcellville Police v. Bromser-Kloeden, 35 Va. Ct. App. 252, 262, 544 S.E.2d 381, 385–86 (2001) (citing *Newman* for the rule that a presumption must be rebuttable to be constitutional).

[5] Actually, the court held that this requirement was only half of a two-part test for testing the constitutionality of any presumption under the due process clause; the court added that "a 'natural and rational' evidentiary nexus must exist between the fact proved and the fact presumed." *Newman*, 222 Va. at 539–40, 281 S.E.2d at 900 (citing *Crenshaw*, 219 Va. at 42, 245 S.E.2d at 246). This distinct constitutional requirement of a rational evidentiary nexus is well settled, as we shall see, and I take no issue with that part of the court's holding.

[6] *Id.* at 539, 281 S.E.2d at 900.

[7] The only legal authority the court cited in *Newman* for this proposition was its holding in *Crenshaw v. Commonwealth*. *Id.* at 539–40, 281 S.E.2d at 900. In that earlier case, in support of its ruling that a statutory presumption must be rebuttable to survive a due process challenge, the court had also cited no federal cases, and no authority but two other criminal cases it had decided in 1953 and 1956. *See Crenshaw*, 219 Va. at 42, 245 S.E.2d at 246. *Newman* was thus the first time the court applied that standard in its review of a statutory presumption in a *civil* case. To make matters worse, as we shall see, *Crenshaw* was very poorly reasoned and wrong even in its understanding of what the constitution requires in a criminal case.

[8] In a case decided several years after *Newman*, the Supreme Court of Virginia briefly cited and described three opinions by the United States Supreme Court—all of them written before 1976—which had adopted a more discriminating and nuanced approach to measuring the federal constitutionality of irrebuttable presumptions. Etheridge v. Med. Ctr. Hosp., 237 Va. 87, 98, 376 S.E.2d 525, 530 (1989). But those three federal cases were all decided *before* the Virginia Supreme Court's contrary rulings in both *Newman* and *Crenshaw*, and none of them involved the requirements of the Virginia Constitution. So it is impossible to argue with a straight face that *Etheridge* somehow overruled or modified the holdings in those two other cases. It is no wonder that the Virginia Court of Appeals continues to cite *Newman* as the law of Virginia, even after *Etheridge*, and has done so three times in the past eight years. *See infra* note 9.

constitutional scrutiny. In three cases decided within the past eight years, the Court of Appeals of Virginia, citing *Newman*, concluded that a challenged statutory presumption was constitutional only after first checking to ensure, among other things, that it was rebuttable.[9]

So far as I am aware, until today nobody has ever publicly challenged or questioned the Virginia Supreme Court's holding in *Newman* that all irrebuttable presumptions are unconstitutional. But that statement is simply not true. Indeed, it *cannot* be true, because it would wreak havoc with the law of this state.

For starters, there is something inherently suspicious on its face about the categorical declaration that "irrebuttable presumptions are unconstitutional," even if only because of its remarkable brevity. Given the complexity of modern constitutional doctrine, it is rarely possible to accurately state any rule of constitutional law in fewer than fifty words.

Moreover, the United States Congress obviously does not think that irrebuttable presumptions are unconstitutional, because it enacts them all the time. For example, one federal statute on the books declares that when a coal miner is shown by X-ray or other clinical evidence to have pneumoconiosis (black lung disease), "there shall be an *irrebuttable presumption* that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be."[10] Many other federal statutes adopt similar presumptions that may not be rebutted.[11]

The Virginia General Assembly also believes that it has the power to enact valid irrebuttable presumptions. Out of the dozens of Virginia statutes that declare that certain facts "shall be presumed," many add an explicit provision that the presumption "may be rebutted"[12]—which

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[9] *Town of Purcellville Police*, 35 Va. Ct. App. at 261–62, 544 S.E.2d at 385–86; *Medlin*, 34 Va. Ct. App. at 407 n.5, 542 S.E.2d at 39 n.5; City of Hopewell v. Tirpak, 28 Va. Ct. App. 100, 122 n.24, 502 S.E.2d 161, 172 n.24 (1998), *aff'd in part, vacated in part on other grounds*, 258 Va. 103, 515 S.E.2d 557 (1999); *see also* Hur v. Va. Dep't of Soc. Servs. Div. of Child Support Enforcement, 13 Va. Ct. App. 54, 59, 409 S.E.2d 454, 457 (1991) (not citing *Newman*, but likewise rejecting a due process challenge to a statute after the court concluded that the law merely created a rebuttable presumption).

[10] Black Lung Benefits Act, 30 U.S.C. § 921(c)(3) (2000) (emphasis added).

[11] *E.g.*, Metro. Stevedore Co. v. Rambo, 515 U.S. 291, 296 (1995) (interpreting the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, and noting that "[f]or certain injuries the statute creates a conclusive presumption of incapacity to earn wages"); *see also* 8 U.S.C. § 1228(c) (2000); 11 U.S.C. § 1126(f) (2000); 12 U.S.C. §§ 632, 1849(d), 2244(b), 3760(e), 3764(b) (2000); 15 U.S.C. §§ 37(c), 54(a), 77b(a)(3), 80a-2(a)(34) (2000); 16 U.S.C. §§ 1455(e)(2), 1907 (2000); 22 U.S.C. § 2197(j) (2000); 25 U.S.C. § 657 (2000); 33 U.S.C. § 1508(b)(1) (2000); 38 U.S.C. § 8521 (2000); 42 U.S.C. § 9115(b)(1) (2000); 43 U.S.C. § 1340(c)(2) (2000); 45 U.S.C. § 231k(a) (2000).

[12] There are over a dozen Virginia statutes that declare that some fact "shall be presumed" and then go on to explicitly recite that such presumption is "rebuttable" or "may be rebutted." *E.g.*, VA. CODE ANN. §§ 8.01-46.1 (2002), 8.01-413.01 (2000), 15.2-2314 (2003

would be a strange and redundant thing to spell out if all constitutionally valid presumptions, by definition, were rebuttable.

Moreover, dozens of statutes scattered throughout the Virginia Code explicitly create an irrebuttable presumption by specifying the circumstances under which certain facts will be "*conclusively* presumed." Examples of such conclusive presumptions can be found in Virginia's laws on Public Procurement;[13] Civil Remedies and Procedure;[14] Corporations;[15] Counties, Cities, and Towns;[16] Courts of Record;[17] Domestic Relations;[18] Elections;[19] Fiduciaries;[20] Highways, Bridges, and Ferries;[21] Insurance;[22] Motor Vehicles;[23] Property and Conveyances;[24] Public Service Companies;[25] Religious and Charitable Matters;[26] Taxation;[27] and Workers' Compensation.[28] Every one of these statutes creates an irrebuttable presumption; both in ordinary usage and as a legal term of art, it is undisputed that a *conclusive* presumption and an *irrebuttable* presumption are the exact same thing.[29]

& Supp. 2006), 19.2-159 (2004 & Supp. 2006), 33.1-346 (2005), 33.1-373 (2005), 38.2-1322 (2002), 38.2-1603 (2002 & Supp. 2006), 38.2-4230 (2002), 46.2-1209 (2005 & Supp. 2006), 58.1-2224 (2004), 62.1-194 (2006), 63.2-1202 (2002 & Supp. 2006), 63.2-1233 (2002 & Supp. 2006), 64.1-76 (2002). Still others achieve the same result more indirectly by providing that some fact "shall be presumed . . . unless the contrary be shown" by competent evidence. *E.g.*, *id.* §§ 15.2-1511 (2003), 27-40.1 (2004), 51.1-813 (2005). Others explicitly create a "rebuttable presumption," in those exact words. *E.g.*, *id.* §§ 18.2-61 (2004 & Supp. 2006), 46.2-341.27 (2005).

13 *Id.* § 2.2-4372(D) (2005).

14 *Id.* § 8.01-313(A)(2) (2000).

15 *Id.* § 13.1-643(E) (2006).

16 *Id.* §§ 15.2-2627, -5126 (2003), -5431.15(A) (2003), -6302 (2003 & Supp. 2006), -6409(J) (2003).

17 *Id.* § 17.1-258.5 (Supp. 2006).

18 *Id.* § 20-163(D) (2004).

19 *Id.* § 24.2-434 (2006).

20 *Id.* §§ 26-40 (2004), -40.01(B) (2004 & Supp. 2006).

21 *Id.* §§ 33.1-184, -431(D) (2005).

22 *Id.* §§ 38.2-2807(D) (2002), -2906(D) (2002), -5009(A)(2) (Supp. 2006).

23 *Id.* § 46.2-2080 (2005).

24 *Id.* §§ 55-58.1(3), -79.77(C), -106.2, -131, -248.47 (2003).

25 *Id.* § 56-480 (2003).

26 *Id.* § 57-15(B) (Supp. 2006).

27 *Id.* §§ 58.1-2282(B), -3832(3) (2004).

28 *Id.* §§ 65.2-300(A), -404(B), -504(C), -515(A) (2002).

29 This point is beyond dispute. The terms "irrebuttable presumption" and "conclusive presumption" mean the exact same thing. BLACK'S LAW DICTIONARY 1223 (8th ed. 2004). This point is made in every leading treatise on evidence law. *E.g.*, 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 497 (6th ed. 2006); RICHARD D. FRIEDMAN, THE ELEMENTS OF EVIDENCE 553 (3d ed. 2004); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 112 (3d ed. 2003); ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW 109 (2d ed. 2004); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 5.02[1] (2006); GLEN WEISSENBERGER & JAMES

But you can hardly blame the Virginia General Assembly for supposing that it has the lawful authority to draft irrebuttable presumptions. Only one year after the Virginia Court of Appeals recently declared open season on conclusive presumptions with its statement that "irrebuttable presumptions are unconstitutional,"[30] another panel of that same court paradoxically announced that the General Assembly is ordinarily free to enact conclusive statutory presumptions if it wishes to do so.[31] The apparent message from the court of appeals to the General Assembly is this: "If you have a *lot* of extra time on your hands, you may enact all the conclusive presumptions you like (go ahead; make our day), although we shall then be obligated to strike down every single one of them as unconstitutional." That sounds like a rather spiteful taunt for a court to make, don't you think?

But the strangest irony of all is the fact that even the Supreme Court of Virginia, although it may not realize that it has been doing so, regularly makes up irrebuttable presumptions itself. Here are three obvious examples.

(1) The supreme court has held that "[i]n Virginia, a child under 7 years of age is *conclusively* presumed to be incapable of contributory negligence."[32] That is an irrebuttable presumption, plain and simple.

(2) When a statute forbids possession or use of a deadly weapon, whether a given instrument falls within that category is generally a

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J. DUANE, WEISSENBERGER'S FEDERAL EVIDENCE § 301.2 (5th ed. 2006). That is why any presumption, if it is not rebuttable, is conclusive by definition. Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 786 (1996) (noting that a presumption is "not a conclusive one" if it is "rebuttable"); Francis v. Franklin, 471 U.S. 307, 314 n.2 (1985) ("A mandatory presumption may be either conclusive or rebuttable."). That usage has been consistently adopted in Virginia as well. Grant v. Mays, 204 Va. 41, 44, 129 S.E.2d 10, 12–13 (1963) (contrasting a "conclusive presumption" with one that may be rebutted); Henrico County Div. of Fire v. Woody, 39 Va. Ct. App. 322, 328, 572 S.E.2d 526, 529 (2002) (contrasting "a rebuttable presumption" and "a conclusive presumption" as opposites). The reported cases, legal dictionaries, and evidence treatises appear to be unanimous on this point; I do not know of one that has ever suggested otherwise.

[30] Medlin v. County of Henrico Police, 34 Va. Ct. App. 396, 407 n.5, 542 S.E.2d 33, 39 n.5 (2001).

[31] *Woody*, 39 Va. Ct. App. at 329, 572 S.E.2d at 529 ("Had the General Assembly wished to write a conclusive presumption into Code § 65.2-402, it could have done so."). The *Woody* opinion does not even cite the court's holding one year earlier in *Medlin*, nor suggest how the two are to be reconciled, but it certainly gives no indication that the court was laboring under any mistaken impression that there might be some distinction between conclusive and irrebuttable presumptions. On the contrary, the court of appeals in that very case correctly contrasted "a rebuttable presumption" and "a conclusive presumption" as if they were opposites. *Woody*, 39 Va. Ct. App. at 328, 572 S.E.2d at 529.

[32] *Grant*, 204 Va. at 44, 129 S.E.2d at 12 (emphasis added) (citations omitted). The court added that "[c]hildren between the ages of 7 and 14 are presumed to be incapable of exercising care and caution for their own safety, and this presumption prevails unless rebutted by sufficient proof to the contrary." *Id.* (citations omitted).

question of fact for the jury.[33] Nevertheless, the Supreme Court of Virginia has held that some weapons may be declared "*per se* . . . deadly,"[34] and that "[t]here are deadly weapons such as a loaded pistol, a dirk, or an axe, which the court may pronounce *as a matter of law* a 'deadly weapon.'"[35] That is simply another way of saying that the law creates an irrebuttable presumption that such weapons are deadly.

(3) Another well-known irrebuttable presumption created by the Virginia Supreme Court is the doctrine of "negligence *per se*," which identifies certain kinds of conduct that are deemed to constitute negligence as a matter of law.[36] That rule also operates exactly like an irrebuttable presumption of negligence, for in such cases the jury is instructed that it must find the defendant negligent if he is shown to have violated a statute enacted for the public benefit.[37]

It boggles the mind to try to imagine how these three conclusive presumptions, among many others, were made up by the same state supreme court that has more recently declared that all irrebuttable presumptions are unconstitutional.[38] Logically there are only three

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[33] Pannill v. Commonwealth, 185 Va. 244, 254, 38 S.E.2d 457, 462 (1946) ("Generally, unless a weapon is *per se* a deadly one, the jury should determine whether it, and the manner of its use, places it in that category, and the burden of showing these things is upon the Commonwealth.").

[34] *Id.*

[35] *Id.* (emphasis added). As we shall see, by the way, this judicially-created presumption would still be open to serious constitutional challenge even if *Newman* were overruled. *See infra* notes 82–83 and accompanying text.

[36] *See* Schlimmer v. Poverty Hunt Club, 268 Va. 74, 78–79, 597 S.E.2d 43, 46 (2004) ("A party relying on negligence per se does not need to establish common law negligence provided the proponent of the doctrine produces evidence supporting a determination that the opposing party violated a statute enacted for public safety, that the proponent belongs to the class of persons for whose benefit the statute was enacted and the harm suffered was of the type against which the statute was designed to protect, and that the statutory violation was a proximate cause of the injury." (citing Halterman v. Radisson Hotel Corp., 259 Va. 171, 176–77, 523 S.E.2d 823, 825 (2000))).

[37] Butler v. Frieden, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967). Thus, for example, the jury in a case of negligence *per se* will be instructed by the trial judge: "If you believe from the evidence that the plaintiff stepped into the highway into the path of the defendant's car when it was close and in dangerous proximity to him, *then he was negligent*." RONALD J. BACIGAL & JOSEPH S. TATE, VIRGINIA PRACTICE JURY INSTRUCTION § 32:9 (2006) (emphasis added).

[38] If the Virginia Supreme Court's holding in *Newman* were good law, and all irrebuttable presumptions were an unconstitutional denial of due process under the Virginia Constitution, defendants should start arguing that their constitutional rights are violated any time they are denied the chance to put on evidence and make closing arguments in an effort to persuade a jury that, "at least in this one special case, my unusually precocious six-year-old victim could be guilty of contributory negligence," or "my loaded firearm should not be considered a deadly weapon," or "my admitted violation of this ordinance enacted for the public safety was not negligence." Each one of those defendants can truthfully claim that his defense would be severely prejudiced by a

possible explanations, and none of them reflect very well on the court. (1) The court simply did not know or else forgot that conclusive presumptions and irrebuttable presumptions are the same thing. (2) The court mistakenly made the indefensible assumption that the due process clause grants the judiciary greater latitude than it does to the legislative branch in making up irrebuttable presumptions.[39] (3) The court knew full well that its holding in *Newman* would logically require the reversal of the conclusive presumptions it had made up in earlier cases, and those cases have in fact already been overruled *sub silentio*, but the court declined to say so out loud until some litigant called them on this, and—until today—the court has been silently waiting for more than a quarter of a century for someone to point this out.

Moreover, the Supreme Court of the United States does not usually have any difficulty upholding and enforcing irrebuttable presumptions. Six years before *Newman* was decided, the Court explicitly rejected the suggestion that irrebuttable presumptions are always unconstitutional. In *Weinberger v. Salfi*, the Supreme Court was confronted with a due process challenge to the Social Security Act's presumption that denied all benefits to certain widows whose husbands died less than nine months after their marriage.[40] The Court noted that the presumption was, of course, "conclusive, because applicants were not afforded an opportunity to disprove the [presumed] presence of [an] illicit purpose" behind the marriage.[41] Nevertheless, the Court held that the statute was consistent with due process, and that even a conclusive presumption dealing with the noncontractual distribution of public benefits is

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judicially-created presumption that conclusively and irrebuttably removed those factual questions from the jury.

[39] That assumption would be absolutely indefensible. In contrast with the judiciary, the elected representatives of the legislature in any free society always have *more* power to fashion presumptions, since common-law presumptions created by the courts contain the potential to rewrite statutes in ways that would amount to an illegitimate and possibly unconstitutional usurpation of the legislative role. *See infra* note 83. This is a fundamental axiom of democratic theory in any self-governing political order.

[40] 422 U.S. 749 (1975). Under the statute, a woman who was married to an insured wage earner for less than nine months before his death could still qualify as his "widow" entitled to social security benefits in a few other ways—such as (for example) if they had children together, or if either legally adopted the child of the other during their marriage. *See id.* at 754 n.2, 780–81. In the absence of such other evidence, however, no woman could qualify for benefits under that program unless she was married to the wage earner for at least nine months before his death.

[41] *Id.* at 768. This quotation is taken from a portion of the Court's opinion that was describing the views and reasoning of the district court in that case, but it is plain from the context that the Supreme Court agreed with the lower court's indisputable description of the statute as "a conclusive presumption." If the Supreme Court had thought that the presumption was in fact rebuttable, it would have reversed the lower court on that ground alone, without engaging in extensive and unnecessary discussion to distinguish its earlier rulings that had overturned *irrebuttable* presumptions for other reasons. *Id.* at 768–74.

normally constitutional, provided only that it is "rationally related to a legitimate legislative objective."[42]

There is no question, therefore, that *Newman* was wrong the very day it was decided, at least in its construction of what is required by the Due Process Clause of the *federal* Constitution.[43] More recently, in *Michael H. v. Gerald D.*, the Supreme Court of the United States once again squarely held that a party adversely affected by a presumption is *not* denied due process of law merely because the presumption is conclusive or irrebuttable.[44] The Court rejected a constitutional challenge to a California statute which provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[45] A majority of five Justices agreed that this statute did not violate the Due Process Clause of the United States Constitution, even though it created a *conclusive* presumption that a man claiming to be the biological father of a child born to someone else's wife is not a "parent" entitled to visitation as a matter of right under California law.[46] Since that time, the Court has

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[42] *Id.* at 772. The Court distinguished earlier cases that had applied a stricter standard to the constitutional review of irrebuttable presumptions that burdened fundamental constitutional rights—although even those cases never held that such presumptions were automatically unconstitutional merely because they were conclusive. *Id.* at 768–72.

[43] In support of its holding that all presumptions must be rebuttable to be constitutional, the Supreme Court of Virginia in *Newman* did not cite or discuss *Weinberger v. Salfi*, or any other case decided by the Supreme Court of the United States.

[44] 491 U.S. 110, 119 (1989).

[45] *Id.* at 117 (quoting CAL. EVID. CODE § 621 (West Supp. 1989) (repealed 1992)). There is an analogous provision in Virginia's Domestic Relations Law, which provides that "a child born to a surrogate within 300 days after assisted conception" is conclusively presumed to result from the assisted conception if no interested party seeks a contrary judicial determination within two years after the birth. VA. CODE ANN. § 20-163(D) (2004).

[46] Justice Scalia, writing for a plurality of four Justices, explicitly and correctly reasoned that an otherwise permissible statutory presumption is not unconstitutional merely because it is conclusive. *Michael H.*, 491 U.S. at 119–21. In a separate concurrence, Justice Stevens rejected almost everything else in the plurality opinion, but he agreed with the plurality that (1) the challenged California statute was constitutional, even though he also agreed that (2) it created a "conclusive presumption" against the man claiming to be the biological father, *id.* at 135 (Stevens, J., concurring), by establishing "as a matter of law" that he was not a parent within the meaning of California law, *id.* at 133, thereby denying him the right to insist on "a judicial determination that he is her biological father." *Id.* at 132. Justice Stevens nevertheless concurred that the statute was constitutional, despite the detrimental impact of its conclusive presumption that the alleged biological father could not be her legal "parent" within the meaning of state law, because of his view that the California statutory scheme gave the trial judge sufficient discretion to award visitation to the man where that appeared to be in the best interests of the child. *Id.* at 135–36. In other words, even though Justice Stevens disagreed with the plurality as to whether California law erected an irrebuttable presumption that the alleged biological father was ineligible to seek visitation with the daughter of another man's wife in the discretion of the trial judge, he agreed with the plurality that the law created an

shown no hesitation in enforcing irrebuttable presumptions. In a recent labor law case, the Court unanimously upheld and enforced what it called a pair of "conclusive presumptions" that had been adopted by the National Labor Relations Board concerning the existence of majority support for a union in the period immediately following board certification, even though those presumptions could not be rebutted.[47]

At least since the Supreme Court's holding in *Michael H.*, it is now settled, if there was ever really any doubt, that a statutory presumption does not violate federal constitutional requirements merely because it is conclusive or irrebuttable. That case therefore partially overruled the Supreme Court of Virginia to the extent that the holding in *Newman* was based on an interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. But technically *Newman* remains good law in Virginia, because that ruling was also based on the court's interpretation of the due process requirements of the state constitution, and Virginia, like any state, enjoys the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[48] That is why one cannot honestly fault the Virginia Court of Appeals for declaring, twelve years after the decision in *Michael H.*, that irrebuttable presumptions are still unconstitutional, at least in Virginia.[49] And that is why the Supreme Court of Virginia is theoretically free, if it wishes, to adhere to its ruling in *Newman* that all irrebuttable presumptions are a violation of due process, at least under the state constitution. But that course is out of the question as a practical matter. As this paper shall demonstrate, the holding in *Newman* is utterly incoherent. There is nothing unconstitutional, illegal, or even un-American about irrebuttable presumptions. They have always abounded in our law. The only real mystery in this context is how the Supreme Court of Virginia was misled into declaring something so horribly mistaken.

II. DUE PROCESS AND IRREBUTTABLE PRESUMPTIONS: WHAT DOES THE CONSTITUTION REQUIRE?

To understand the constitutional validity of irrebuttable and conclusive presumptions, we must first identify what they are. To begin

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irrebuttable presumption that such a man could not be the legal "parent" of the child with an automatic right to visitation, and that *this* irrebuttable presumption was consistent with due process. *Id.* at 132–35. Not even the dissenters in *Michael H.* suggested that a statutory presumption must automatically be struck down merely because it is conclusive.

[47] Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 786 (1996).

[48] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (citing Cooper v. California, 386 U.S. 58, 62 (1967)).

[49] *See* cases cited *supra* note 4.

with, there is some disagreement as to whether there truly is such a thing as an "irrebuttable presumption." It all depends on how one identifies the defining characteristic of a "presumption," which has been aptly described as perhaps one of "the slipperiest member[s] of the family of legal terms."[50] Indeed, "one author has listed no less than eight senses in which the term has been used by the courts."[51]

Federal Rule of Evidence 301 provides that a presumption "imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption."[52] By that standard, some purists insist that all true presumptions must be rebuttable, by definition, and that an "irrebuttable presumption" is an oxymoron, since any presumption that conclusively compels a certain finding does not shift a burden of production to anyone; it simply ends the discussion entirely.[53] But that would render tautological and meaningless the insistence of the Virginia Supreme Court that a presumption "must be rebuttable" to survive constitutional scrutiny.[54]

Then again, under the broader view, it is often said that the defining characteristic of a presumption is merely that it involves any "mandatory inference drawn from a fact in evidence,"[55] or any "rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts."[56] Under this broader definition,

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50 2 BROUN ET AL., *supra* note 29, at 495.

51 *Id.* (citing Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196–207 (1953)).

52 FED. R. EVID. 301.

53 *See, e.g.*, MUELLER & KIRKPATRICK, *supra* note 29 (stating that conclusive or irrebuttable presumptions "are not really presumptions"); PARK, LEONARD & GOLDBERG, *supra* note 29 ("True presumptions must also be distinguished from so called 'conclusive presumptions' or 'irrebuttable presumptions.' These devices are not actually presumptions at all, even though they operate in a mandatory fashion and even though they express a relationship between certain basic facts and a presumed fact."); WEINSTEIN & BERGER, *supra* note 29 ("A so-called irrebuttable presumption does not satisfy the definition of a presumption because fact B must be assumed conclusively rather than conditionally.").

54 If all true presumptions are rebuttable by definition, as some have insisted, it would be meaningless for the Supreme Court of Virginia to declare that a presumption is constitutional only if it is rebuttable. Indeed, it would literally be as absurd as a "rule" declaring that a presumption is constitutional only if it is a presumption.

55 Taylor v. Kentucky, 436 U.S. 478, 483 n.12 (1978).

56 Martin v. Phillips, 235 Va. 523, 526, 369 S.E.2d 397, 399 (1988) (citation omitted). The court added, however, that "[t]he primary significance of a presumption is that it operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption." *Id.* (citation omitted). If the court meant to imply that all presumptions, by definition, always shift the burden of producing evidence to the opposing party, then there could strictly be no such thing as a truly irrebuttable presumption, as pointed out above.

which has been accepted by *Black's Law Dictionary*[57] as well as the General Assembly and Supreme Court of Virginia,[58] one may intelligibly describe something as a presumption that is irrebuttable, and distinguish it from one that may be rebutted.[59] When courts or legislatures or commentators refer to something as an "irrebuttable presumption," they invariably mean to describe a legal rule that can be expressed in some variation of this formulation: "If a party is able to offer undisputed proof of some fact *A*, then it shall be conclusively presumed that some other fact *B* is also true as a matter of law, and the opposing party shall not be allowed to offer any evidence or argument to the contrary."

But even though we can intelligibly describe such rules as irrebuttable or conclusive presumptions, the fact remains that they do not have much in common with the operation of an ordinary presumption, which is usually rebuttable. A conclusive presumption does not shift any burden of proof or any burden of production to the opposing party. It simply ends the discussion entirely, by establishing a legal equivalence between two facts and dictating that proof of one

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[57] The most recent edition defines a *presumption* simply as "[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." BLACK'S LAW DICTIONARY 1223 (8th ed. 2004). That reference work adds the observation that "[m]ost presumptions [but not all of them] are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence[,]" *id.*, and defines a *conclusive or irrebuttable presumption* as "[a] presumption that cannot be overcome by any additional evidence or argument," *id.*, thus rejecting the narrower view of those who insist that all true presumptions are rebuttable. The Supreme Court of the United States agrees, and has recently defined "conclusive presumptions" as those presumptions "which direct the jury to presume an *ultimate* element of the offense based on proof of certain *predicate* facts (*e.g.*, 'You must presume malice if you find an intentional killing')." Neder v. United States, 527 U.S. 1, 10 (1999).

[58] As noted above, the Virginia General Assembly and the appellate courts of this state have assumed that there is such a thing as a conclusive presumption, and that it can be meaningfully distinguished from a rebuttable presumption. I have learned from the editors of *A Guide to Evidence in Virginia*, published by the Boyd-Graves Conference of the Virginia Bar Association, that a revision of that reference work is already underway for the forthcoming 2007 edition, which will provide that

> [i]n all civil actions and proceedings not otherwise provided for by Virginia law, a *rebuttable* presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

A GUIDE TO EVIDENCE IN VIRGINIA § 301 (forthcoming 2007) (emphasis added). The word *rebuttable*, which does not appear in this sentence from § 301 of the 2006 edition, is obviously being added to distinguish such presumptions from those that are irrebuttable and therefore do not shift any burden of production.

[59] Professor Friedman probably sums it up best when he says that "not everything that is called a presumption is rebuttable." FRIEDMAN, *supra* note 29.

automatically requires a finding that the other is also true as a matter of law. As Justice Scalia has pointed out, however, "the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not."[60] This is why courts and legal scholars universally agree that any so-called "irrebuttable presumption," regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of *substantive* law masquerading in the traditional language of a presumption.[61] As one leading writer has observed, "a conclusive or irrebuttable presumption is really an awkwardly expressed rule of law."[62]

And this is why the Supreme Court was correct in *Michael H.* to reject any suggestion that the Due Process Clause categorically forbids an irrebuttable presumption. Any ordinary rule of substantive law can be easily recast into the language of an irrebuttable presumption, and vice versa, with no change in its meaning or operation. As Justice Scalia correctly observed in that case, "In this respect there is no difference between a rule which says that the marital husband shall be

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[60] Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (plurality opinion).

[61] *See* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 378 (1998) (noting that the National Labor Relations Board's "irrebuttable presumption of majority support for the union during the year following certification" is one of those "evidentiary presumptions" that "are in effect substantive rules of law"); *Michael H.*, 491 U.S. at 117, 119 (plurality opinion) (observing that although the California statute—providing that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage"—was "phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law" (quoting CAL EVID. CODE § 621 (West Supp. 1989) (repealed 1992))); United States v. Chase, 18 F.3d 1166, 1172 n.7 (4th Cir. 1994) ("A conclusive or irrebuttable presumption is considered a rule of substantive law."); 2 BROUN ET AL., *supra* note 29, at 525 n.16 ("Conclusive presumptions are really statements of substantive law . . . ."); RICHARD EGGLESTON, EVIDENCE, PROOF, AND PROBABILITY 92 (1978) ("Conclusive presumptions, sometimes called irrebuttable presumptions of law, are really rules of law. Thus it is said that a child under the age of fourteen years is conclusively presumed to be incapable of committing rape . . . . [This] is only another way of saying that such a child cannot be found guilty of rape."); MUELLER & KIRKPATRICK, *supra* note 29 ("Substantive law sometimes borrows the language of presumptions. . . . These rules are not really presumptions but substantive principles expressed in the language of presumptions."); PARK, LEONARD & GOLDBERG, *supra* note 29, at 109–10 ("[Conclusive or irrebuttable presumptions] are not evidence rules at all. They are new rules of substantive law."); WEINSTEIN & BERGER, *supra* note 29 ("An irrebuttable presumption is a rule of substantive law when [the presumed fact] is a material proposition."); WEISSENBERGER & DUANE, *supra* note 29 ("The term 'conclusive presumption' denotes what is more properly considered a rule of substantive law as opposed to an evidentiary, procedural device."); JOHN H. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE 454 (1935) ("'Conclusive presumptions' or 'irrebuttable presumptions' are usually mere fictions, to disguise a rule of substantive law (e.g., the conclusive presumption of malice from an unexcused defamation); and when they are not fictions, they are usually repudiated by modern courts.").

[62] FRIEDMAN, *supra* note 29 (emphasis omitted).

irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal father."[63]

Of course, the constitutional requirement of due process does impose some limits on the use of evidentiary presumptions in civil and criminal litigation.[64] In a criminal case it forbids the use of a presumption to establish an essential element of the prosecution's case or to shift the burden of proof to the defense on the central issue of intent, but that is true regardless of whether the presumption is rebuttable.[65] The Constitution also sets certain relatively minimal requirements that a presumption be shown to have at least some rational basis,[66] but that requirement also applies to both rebuttable and irrebuttable presumptions.[67] But none of those limits require a law to be struck down merely because it is worded or operates like an irrebuttable presumption.

The inherent absurdity of the ruling in *Newman* can be easily demonstrated. Compare the following statutes, which are obviously just four different ways of saying the exact same thing, and ask yourself which of them are unconstitutional under the holding in that case.

1. "It shall be unlawful to possess a loaded firearm in any school."
2. "It shall be unlawful to possess a deadly weapon in any school. For the purposes of this statute, a deadly weapon shall be *defined* to include any loaded firearm."

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63 *Michael H.*, 491 U.S. at 120 (plurality opinion).

64 A complete discussion of such constitutional limits is outside the scope of this paper. For a more detailed examination of the controlling Supreme Court precedents, *see* WEINSTEIN & BERGER, *supra* note 29, § 5.04[3][a]–[5].

65 It is a denial of due process to instruct a jury that a criminal defendant's intent is to be "presumed" from certain other facts, even if the jury is told "the presumption may be rebutted." Francis v. Franklin, 471 U.S. 307, 309 (1985).

66 *See* WEINSTEIN & BERGER, *supra* note 29, § 5.04[3][a]. This was the point the Virginia Supreme Court got right in *Newman* when it stated that, before a presumption may be upheld as constitutional, "a natural and rational evidentiary nexus must exist between the fact proved and the fact presumed." Fairfax County Fire & Rescue Servs. v. Newman, 222 Va. 535, 539–40, 281 S.E.2d 897, 900 (1981).

67 Several cases decided by the United States Supreme Court in the early 1970s struck down "irrebuttable presumptions" on constitutional grounds—not merely because they were irrebuttable, but because they were not shown to have a sufficient logical basis in experience. But the Court has since distinguished and limited those cases to presumptions that burden the exercise of a fundamental constitutional right, Weinberger v. Salfi, 422 U.S. 749, 772 (1975), and several Justices have even more recently observed (as many academic commentators had done) that those cases did not truly turn on the procedural implications of the operation of such alleged "presumptions," but rather on the fit between those substantive legislative classifications and the purposes they were designed to serve. *Michael H*, 491 U.S. at 120–21 (plurality opinion) (collecting authorities).

3. "It shall be unlawful to possess a deadly weapon in any school. For the purposes of this statute, any loaded firearm shall be deemed a deadly weapon *as a matter of law*."
4. "It shall be unlawful to possess a deadly weapon in any school. For the purposes of this statute, any loaded firearm shall be *irrebuttably presumed* to be a deadly weapon."

All of these statutes are absolutely identical in substance, meaning, and operation; all that distinguishes them is a meaningless variation in semantics. But which of them would be unconstitutional under *Newman*? It is far from obvious, because there are two different ways to read the holding in that case. One reading makes the rule of that case absurd, and the other renders it practically meaningless. And either way it is dead wrong.

On the one hand, it is possible to read *Newman* as a rule that requires the invalidation of any law, no matter how it is worded, that operates precisely like an irrebuttable presumption and is therefore, for all practical purposes, the functional equivalent of such a presumption. Under that reading, the due process clause of the Virginia Constitution would require the courts to strike down all four of the statutes outlined above, along with almost every other substantive legal rule on the books. That would of course be ludicrous. As the Supreme Court of the United States correctly warned—six years before *Newman* made that very mistake—any categorical ban on irrebuttable presumptions in the name of the Due Process Clause, if consistently applied, would be "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution."[68] And it would not stop there, for under that reading *Newman* would also require the state supreme court to abrogate all of the irrebuttable and conclusive presumptions it has made up itself, including its ruling that the judicial branch has the power to declare that a loaded firearm constitutes a deadly weapon as a matter of law.[69]

To avoid that extreme result, one could plausibly read *Newman* as forbidding only rules of law that explicitly use the language of an

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[68] *Weinberger*, 422 U.S. at 772. To be precise, the Court was describing what would happen if the Due Process Clause required the rejection of every irrebuttable presumption in public welfare legislation that "presumed a fact which was not necessarily or universally true." *Id.* at 768. That conclusion would obviously follow with far greater force if one were to adopt and consistently enforce an even more extreme rule, such as the Virginia Supreme Court's later holding in *Newman*, which would strike down *all* presumptions in *any* kind of legislation merely upon a finding that they are irrebuttable. *Newman*, 222 Va. at 539–40, 281 S.E.2d at 900 (citing Crenshaw v. Commonwealth, 219 Va. 38, 42, 245 S.E.2d 243, 246 (1978)).

[69] Pannill v. Commonwealth, 185 Va. 244, 253–54, 38 S.E.2d 457, 462 (1946).

irrebuttable presumption. Under that much narrower reading, only the fourth statute above would be unconstitutional, but not the others, even though all four are literally identical in both their meaning and how they would operate at any trial. That bizarre conclusion would flagrantly violate the legal axiom that "[c]onstitutional distinctions should not be based on technicalities in draftsmanship that do not affect the merits."[70] It would also render the rule in *Newman* utterly trivial, for the Virginia General Assembly could then always circumvent that supposed constitutional limitation with ridiculous ease, by simply rewriting any statute to make it say the same thing without using the three forbidden words "irrebuttable," "conclusive," or "presumption." In the next section of this paper we shall see how easy this is to do by taking a close look at a number of Virginia's statutory irrebuttable presumptions.

So the ruling in *Newman* is either absurd or virtually meaningless. And either way it is surely wrong because it would require (if nothing else) the invalidation of the fourth statute listed above—a statute that is plainly constitutional. That fact can be easily missed, of course, since the U.S. Constitution imposes such severe limits on the use of presumptions to assist the prosecution in a criminal case. For example, when a statute makes some act a crime, the jurors may not be instructed that a man's commission of that act, or his intent to do so, is "presumed" from other actions or facts, including some event taking place at a later date.[71] This is why Virginia Code section 18.2-183 is plainly unconstitutional in creating a rebuttable presumption of fraudulent intent in bad check cases when the defendant fails to make payment within five days after learning that his check has been dishonored by the bank for insufficient funds.[72] That is quite different, however, from any presumption, rebuttable or otherwise, that is used by the legislature as an awkward way of *defining* the essential terms of a criminal statute. Just as surely as a legislature may forbid possession of a loaded firearm in a school, it may do the same thing indirectly and a bit clumsily, if it wishes, by forbidding the possession of a deadly weapon—and then providing that a loaded firearm shall be irrebuttably presumed to be a deadly weapon. As one noted commentator has aptly observed: "Oddly enough, the most powerful way in which a jurisdiction can ease the prosecution's burden is

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[70] WEINSTEIN & BERGER, *supra* note 29, § 5.04[5].

[71] Carella v. California, 491 U.S. 263, 265 (1989) (holding that it is unconstitutional to tell jurors that the defendant's "intent to commit theft by fraud is presumed" if he failed to return a rented vehicle within a specified number of days after a request for its return).

[72] James J. Duane, *The Virginia Presumption of Fraudulent Intent in Bad Check Cases: The Statute That Dare Not Speak Its Name*, 31 VA. B. ASS'N NEWS J. 10 (June/July 2005).

also the one least vulnerable to constitutional attack: It may simply alter the definition of the crime."[73]

This was the fatal flaw in the reasoning of the Supreme Court of Virginia in *Crenshaw v. Commonwealth*,[74] the only case the court later cited in *Newman* in support of its contention that all irrebuttable presumptions are unconstitutional.[75] In *Crenshaw*, the court had erroneously reasoned that a statute criminalizing the possession of a radar detector in a motor vehicle—because the law added that the "[t]he Commonwealth need not prove that the device in question was in an operative condition or being operated"[76]—was unconstitutional because it created an irrebuttable presumption that was "a purely arbitrary mandate, violative of due process."[77] But the constitutional validity of such a statute depends *entirely* on whether possession of an inoperable radar detector may be forbidden as a rational exercise of the legislative police power (an issue outside the scope of this article), and has nothing to do with whether the legislature chooses to frame that prohibition in the language of an irrebuttable presumption. Assuming for the sake of argument that a legislature could lawfully forbid possession of an inoperable radar detector, just as it can (for example) declare an unloaded gun to be a dangerous weapon,[78] there is no possibility that the legislature would violate the due process clause merely because it chose to draft such a prohibition with the language of an irrebuttable presumption.

Moreover, even if *Crenshaw* had correctly stated the constitutional rule applicable to presumptions in criminal cases, it was extremely questionable for the state supreme court to later cite that standard in *Newman* as the rule governing civil cases as well. "Although there are constitutional considerations involved in the use of presumptions in civil cases, the problems are simply not of the same magnitude."[79] Indeed, as one leading evidence treatise persuasively reasons, it is "relatively unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases,"[80] in which burdens of

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73 FRIEDMAN, *supra* note 29, at 570.

74 219 Va. 38, 245 S.E.2d 243 (1978).

75 *See supra* note 7.

76 *Crenshaw*, 219 Va. at 40 n.1, 245 S.E.2d at 245 n.1.

77 *Id.* at 43, 245 S.E.2d at 247.

78 McLaughlin v. United States, 476 U.S. 16 (1986).

79 2 BROUN ET AL., *supra* note 29, at 522.

80 *Id.* at 525.

proof are assigned "not for constitutional reasons, but for reasons of probability, social policy, and convenience."[81]

To add to the irony, the Supreme Court of Virginia has gotten matters exactly backwards by holding that the judiciary has greater leeway than the legislature to create irrebuttable presumptions. Under either a narrow or a broad reading, the ruling in *Newman* would clearly (but erroneously) dictate that the Virginia General Assembly may not constitutionally pass a law to regulate the use of deadly weapons and then provide that a loaded firearm shall be irrebuttably presumed to be a deadly weapon. Yet that same court took it for granted in *Pannill* that the judiciary had the power to take that factual issue away from the jury through the creation of just such a conclusive presumption.[82] The truth is almost surely just the opposite. Under the due process clause, once the legislature has identified some factual issue as an element of a criminal offense, the judiciary has no power to decide that question or to remove it from the jury's consideration, no matter how "obvious" the issue may seem. A criminal defendant has a constitutional right to demand that the *jury* decide whether the government has proved all the factual elements of the charged offense as specified by the legislature, including the ultimate issues and not merely their "factual components."[83]

In addition to all of these other compelling objections to the reasoning and holding of *Newman*, that case—even if it is given its narrowest possible interpretation and only applied to statutes that explicitly use the language of a conclusive presumption—would require the invalidation of many statutes that have no constitutional infirmity at all. We can see these points more clearly by taking a look at some of the many irrebuttable presumptions that are scattered throughout the Code of Virginia, and the implications that would follow if they were subjected to a consistent application of the holding in *Newman*.

III. A LOOK AT SOME OF THE IRREBUTTABLE PRESUMPTIONS IN THE VIRGINIA CODE

The Virginia General Assembly frequently uses the language of conclusive presumptions when drafting statutes, although it uses that

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[81] *Id.* at 522; *see also* Lavine v. Milne, 424 U.S. 577, 585 (1976) ("Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.").

[82] Pannill v. Commonwealth, 185 Va. 244, 253–54, 38 S.E.2d 457, 462 (1946).

[83] United States v. Gaudin, 515 U.S. 506, 509–15 (1995); *see* James J. Duane, *Stipulations, Judicial Notice, and a Prosecutor's Supposed "Right" to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in* Old Chief v. United States, 168 F.R.D. 405, 436 n.135 (1996) (arguing that *Gaudin* calls into question the assumption of many lower courts that they have the power to essentially rewrite the essential elements of criminal statutes by deciding that certain instruments qualify as "deadly weapons" as a matter of law).

language to mean many different things.[84] These statutes, as it turns out, amply bear out the adage that a conclusive or irrebuttable presumption is usually nothing more than "an awkwardly expressed rule of law."[85] As we shall see, however, none of them are unconstitutional for that reason, and the consistent application of the contrary ruling in *Newman* would lead to intolerable—and sometimes comical—results.

Usually, the Virginia General Assembly uses an irrebuttable presumption, just as the Supreme Court of Virginia typically does,[86] to create or express a rule of *substantive* law. For example, Virginia Code section 55-248.47, which governs the sale or lease of a manufactured home, provides that "[t]he landlord shall not unreasonably refuse or restrict the sale or rental of a manufactured home located in his manufactured home park by a tenant. . . . Any refusal or restriction because of race, color, religion, national origin, familial status, elderliness, handicap, or sex shall be *conclusively presumed* to be unreasonable."[87]

This statute most certainly establishes an irrebuttable presumption, because it denies the defendant any opportunity to offer evidence to persuade the court that his refusal to rent to a family based on their race was reasonable under the circumstances. But surely the statute is not unconstitutional for that reason. There is no doubt that the Virginia General Assembly had the constitutional authority, if it had chosen, to draft a statute declaring that a refusal to rent to a person because of race

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[84] To add to the confusion, the Supreme Court of Virginia also sometimes uses the language of presumptions in ways that are not strictly accurate. For example, that court recently declared that in a wrongful death case, in the absence of evidence to the contrary, "it will be presumed that the deceased acted with ordinary care," and described this as "the presumption of ordinary care." Hot Shot Express, Inc. v. Brooks, 264 Va. 126, 136, 563 S.E.2d 764, 769 (2002). But the fact is that, just like the misnamed presumption of innocence, this

> so-called "presumption" is not evidence—not even an inference drawn from a fact in evidence—but instead is a way of describing the [defendant's] duty both to produce evidence of [contributory negligence] and to convince the jury [by a preponderance of the evidence].
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> . . . The principal inaccuracy is the fact that it is not technically a "presumption"—a mandatory inference drawn from a fact in evidence. Instead, it is better characterized as an "assumption" that is indulged in the absence of contrary evidence.

Taylor v. Kentucky, 436 U.S. 478, 483 n.12 (1978). Many so-called "presumptions," like this supposed presumption of a decedent's freedom from contributory negligence, are not true presumptions at all, but are merely a way of describing the burden of persuasion by reminding us of what we assume at the start of the trial before *any* evidence has been offered on the subject either way.

[85] FRIEDMAN, *supra* note 29.

[86] For examples of how the state's highest court has done the same thing, see *supra* notes 32–37.

[87] VA. CODE ANN. § 55-248.47 (2003) (emphasis added).

or certain other personal characteristics "shall be forbidden." That is precisely what the General Assembly intentionally accomplished, however imperfectly, through the clumsy wording of this statute.[88]

In Virginia, as in many other states, the language of an irrebuttable presumption is often used by legislatures and courts as an ungainly method of writing a *definition*. As one leading treatise puts it, any time some statute provides that fact A leads to an irrebuttable presumption of fact B, "[f]act B becomes another way of stating fact A."[89] Here is a good example from Virginia's Workers' Compensation Law, which provides: "For the purposes of this section, 'injurious exposure' means an exposure to the causative hazard of such disease which is reasonably calculated to bring on the disease in question. Exposure to the causative hazard of pneumoconiosis for ninety work shifts shall *be conclusively presumed to* constitute injurious exposure."[90] This is simply a maladroit method of defining "injurious exposure." The Virginia General Assembly could have made this definition just as precisely and even more clearly by deleting the four redundant words italicized above, declaring instead simply that "exposure to the causative hazard of pneumoconiosis for ninety work shifts shall constitute injurious exposure."

That act also provides that, in an action involving a deceased worker, any children under the age of eighteen of that employee "shall be *conclusively presumed to be* dependents wholly dependent for support upon the deceased employee."[91] This is, of course, just another way of defining those dependents entitled to relief under that provision, and could have been accomplished just as easily without the use of any presumption, merely by defining any child under the age of eighteen as a dependent entitled to relief under that act. There was no need to make any mention of any presumption of any sort, but you can't blame the members of the General Assembly for wanting to sound more like lawyers. It's all just innocent fun, since nothing turns on the distinction between these two ways of saying the same thing—nothing, that is, apart from the suggestion in *Newman* that one of these two equivalent formulations is just fine but the other is plainly unconstitutional.

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[88] For another example of a Virginia law which unnecessarily creates an irrebuttable presumption merely to define a rule of substantive law, Virginia's Insurance Law provides: "If all moneys accruing to the fund are exhausted in payment of retrospective premium adjustment charges, all liability and obligations of the association's policyholders with respect to the payment of retrospective premium adjustment charges shall terminate and shall be *conclusively presumed* to have been discharged." *Id.* § 38.2-2807(D) (2002) (emphasis added). That is just a more complicated way of saying, as statutes routinely do, that the policyholders shall have no further liability or obligations.

[89] WEINSTEIN & BERGER, *supra* note 29.

[90] VA. CODE ANN. § 65.2-404(B) (2002) (emphasis added).

[91] *Id.* § 65.2-515(A) (emphasis added).

Although courts and academic commentators have frequently asserted that irrebuttable presumptions are really just rules of substantive law[92] (and that is usually true), the Virginia General Assembly has gotten so swept up in the fun that it sometimes uses such presumptions to announce rules of *procedure* as well. When it does so, however, the language of a presumption is typically employed in a context where it means nothing at all. For example, one Virginia statute on service of process declares:

> In the case of a nonresident defendant not licensed by the Commonwealth to operate a motor vehicle, . . . the address reported by such a defendant to any state or local police officer, or sheriff investigating the accident sued on, if no other address is known, shall be *conclusively presumed to be* a valid address of such defendant for the purpose of the mailing provided for in this section . . . .[93]

This "conclusive presumption" is nothing more than a specification of those addresses that are proper for the service required under that statute. The four otiose words italicized here should have been left out of this statute entirely; their omission would not change the meaning or the operation of this strange statute in the slightest degree.

Likewise, one portion of Virginia's Banking and Finance Law decrees with lamentable ambiguity that "[s]ervice on a party to the account made at the address on record at the financial institution shall be *presumed to be* proper service for the purposes of this section."[94] If the Virginia General Assembly had intended to make this "presumption" rebuttable, they easily could (and probably would) have said so, although it is extremely unlikely that they could have intended something so bizarre. Statutes defining proper methods of service are useless unless they are written with precision and clarity. Any statute that announces a merely *rebuttable* presumption that some address will be sufficient for service of process would be tantamount to a statutory dare to "roll the dice and use this address for service at your peril, for only time will tell whether the judge will later conclude that the defendant can rebut the presumption that this address is usually the right one to use."[95] On the other hand, in the much more likely event that the General Assembly meant for this presumption to be conclusive, then the three words italicized above—the so-called "presumption" in this statute—were completely redundant, and the meaning of the statute would not be changed in the slightest detail if they were deleted altogether.

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92 *See supra* note 61.

93 VA. CODE ANN. § 8.01-313(A)(2) (2000) (emphasis added).

94 *Id.* § 6.1-125.3(D) (1999) (emphasis added).

95 Perhaps the only truly fitting title for such a statute would be: "DO YOU FEEL LUCKY, PUNK?"

It has been observed that every *statute of limitations* is, for all practical purposes, a "conclusive presumption" that actions after that deadline are barred.[96] Some Virginia statutes make that explicit, by using irrebuttable presumptions as a roundabout way of prescribing a statute of limitations. For example, Virginia's Domestic Relations Law provides:

> A child born to a surrogate within 300 days after assisted conception pursuant to an order under subsection B of § 20-160 or a contract under § 20-162 is *presumed* to result from the assisted conception. *This presumption is conclusive* as to all persons who fail to file an action to test its validity within two years after the birth of the child.[97]

Here we see that the traditional language of an irrebuttable presumption is simply being used to state that any action to challenge the rebuttable presumption must be brought within two years after the birth of the child. For other examples in which an irrebuttable presumption was unnecessarily used to define a statute of limitations, Virginia law declares that it is "conclusively presumed" that (1) a voter's registration was proper if no petition to challenge that registration is filed within six months,[98] (2) all writings admitted to record were in proper form for recording if they are not challenged within three years after they were recorded, except in cases of fraud,[99] and (3) the transfer of church property was properly conducted if no petition seeking to set such a transfer aside is filed within one year after the trustees' deed is recorded.[100] If all irrebuttable presumptions are truly unconstitutional, then all of these statutes must be struck down on the grounds that they deny due process to everyone who is denied the chance to contest the regularity of some filing just because nobody objected to it sooner. In fact, there was no need to use any presumption, much less a conclusive one, in any of these statutes. All of them could have made the same point by declaring that any action to challenge or dispute the legality or propriety of some event must be filed within a certain period after that event. That is what statutes of limitations *always* do.

Other Virginia statutes employ the language of presumptions in contexts where it has absolutely no meaning at all. The Virginia Freedom of Information Act contains this provision:

> Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public

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96 Stogner v. California, 539 U.S. 607, 616 (2003).

97 VA. CODE ANN. § 20-163(D) (2004) (emphasis added).

98 *Id.* § 24.2-434 (2006).

99 *Id.* § 55-106.2 (2003).

100 *Id.* § 57-15(B) (Supp. 2006).

> records and meetings shall be *presumed* open, unless an exemption is properly invoked.[101]

In the last sentence of this paragraph the word *presumed* has no discrete meaning at all. The obvious intent of the assembly was to specify that all public records and meetings shall be open to the public unless some specific statutory exception applies, but that is precisely what this sentence would have said if that meaningless word were simply deleted. Then again, that is exactly what this paragraph would have said if that entire *sentence* were deleted, since the preceding sentence said the same thing.

Another portion of the Virginia Freedom of Information Act contains perhaps the most bizarre presumption on the books in this state, when it curiously provides that "[a]ny failure by a public body to follow the procedures established by this chapter shall be *presumed* to be a violation of this chapter."[102] Well, of course it is; that always goes without saying. The statute contains no mention of any possibility that this presumption may be rebutted, and certainly appears to create a conclusive presumption, but it would be absurd to strike it down as unconstitutional on those grounds. Otherwise a public body charged with a violation of this law could always remind the judge: "Sorry, Your Honor, but your hands are tied; it would be unconstitutional to conclusively find us in violation of this chapter merely because we failed to follow the procedures it requires!"

Here is another example of a Virginia statute in which an irrebuttable presumption is used for no real purpose at all. Virginia's Workers' Compensation Law dogmatically decrees: "Every employer and employee, except as herein stated, shall be *conclusively presumed* to have accepted the provisions of this title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby."[103] Imagine the consequences for Virginia's tort law system if this conclusive presumption were struck down on the grounds that "all irrebuttable presumptions are unconstitutional"! By that logic, every injured worker who wishes to sue his employer should be able to insist "Well, *I* never agreed to accept workers' compensation benefits as my exclusive remedy, and my right to due process means that I must be given the chance to rebut the application of that inflexible presumption to defeat my right to sue my employer." That would be nonsense, of course. Any plaintiff who took that position would surely be advised by the judge: "You don't understand; your willingness to be bound by this law is simply

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[101] *Id.* § 2.2-3700(B) (2005) (emphasis added).

[102] *Id.* § 2.2-3713(E) (emphasis added).

[103] *Id.* § 65.2-300(A) (2002) (emphasis added).

immaterial, because you are subject to this law whether you like it or not." But that is why there was no need to insert this silly and irrelevant presumption in this statute to begin with. In truth, this is another poorly drafted statute that should not have mentioned any presumption at all. Its point could have been made more accurately and succinctly by simply declaring that all employers and employees are bound by this statutory scheme, and that it shall furnish the employees' exclusive remedy. The gratuitous extra nonsense about a make-believe presumption that "we will all pretend that everyone has agreed to accept and comply with this statute" is no more necessary here than it would be at the beginning of any other law, including statutes (such as the capital murder law) that impose far more drastic penalties for their violation.

Besides, it does great violence to the concept of a "presumption" when it is used, as it is here, to insist that something is true when we know that it is virtually always false. Genuine presumptions are always used to establish facts that we know to be true at least most of the time, even though we know they might be false in a given case (for example, that a man inexplicably missing for seven years is presumably deceased[104]). But for a legislature to dogmatically decree with a gratuitous conclusive presumption that all the state's workers and employers have agreed to something, even though they were given no say in the matter and many of them were born after the legislation was written, is as unnecessary—and as unhelpful—as the days when my mother unpersuasively insisted to her children: "You'll eat it, and you'll *like* it."

IV. CONCLUSION

When the Supreme Court of Virginia laid down the rule in *Newman* that all presumptions "must be rebuttable" to survive constitutional scrutiny, it announced a standard that was incoherent and indefensible. If that standard were consistently applied to every statute that operates *exactly* like an irrebuttable presumption, it would lead to legal anarchy and would require the overturning of nearly every substantive rule of Virginia law. On the other hand, if the ruling in *Newman* is to be applied only to those statutes that explicitly use the words "presume" or "presumption," it creates a trivial and absurd rule that can be easily circumvented by the legislature any time it pleases. Either way, that ruling—if consistently followed—would require the invalidation of many poorly drafted laws on the books, because of the Virginia General Assembly's unfortunate penchant for gratuitously using the language of conclusive presumptions when drafting definitions, substantive and procedural legal rules, and even for no particular purpose at all. It would

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[104] *Id.* § 64.1-105(A)(1).

also require the rejection of the many irrebuttable and conclusive presumptions that the Supreme Court of Virginia has created on its own, like the conclusive presumption that a child under the age of seven cannot be guilty of contributory negligence.

Why has that not yet taken place? The only possible explanation is that the lawyers in this state can be divided into four groups: (1) some simply do not know about the holding in *Newman*, even though it has now been on the books for a quarter of a century; (2) of those who know about *Newman*, some have not stopped long enough to think carefully about its outrageous implications; (3) of those lawyers who have realized those implications, all but one of them, in a remarkable demonstration of unselfish loyalty to the legal system, have chosen to not say anything for fear of temporarily unraveling that system altogether; and then (4) there's me.

Well, now the cat is out of the bag, and it's just as well. The answer to this problem is perfectly clear. There are two things that need to be done in Richmond, and the sooner the better.

The Supreme Court of Virginia must take the first available opportunity to explicitly overrule its statement in several cases, most recently *Newman*, that presumptions must be rebuttable to comply with the commands of the due process clause. That rule must be rejected entirely, and not merely watered down or qualified, because it is totally false and there was never any trace of truth or sense to it at all.[105]

Meanwhile, the Virginia General Assembly could do us all a great favor if it would stop writing statutes that explicitly create a "conclusive presumption," and then remove that phrase from the several dozen statutes where it now appears. That language is never necessary in any statute, and its lamentable frequency in the Virginia Code can only lead to a wide range of tragic and comical results as long as the highest court of the state insists that such presumptions are always unconstitutional.

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[105] To be truly gracious, the court might even go so far as to confess that what it said in *Newman* was never true, not even when it was first written, although it might be easier for the court to save face by simply declaring that *Newman* has been effectively overruled by subsequent decisions by the Supreme Court of the United States, including *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

STRENGTHENING ARTICLE 32 TO PREVENT POLITICALLY MOTIVATED PROSECUTION: MOVING MILITARY JUSTICE BACK TO THE CUTTING EDGE

*Brian C. Hayes**

I. INTRODUCTION

During the last fifteen years, the United States military has experienced a series of high-profile criminal investigations of its servicemembers.[1] These events highlight a potentially critical flaw in the protections which the Uniform Code of Military Justice (U.C.M.J.)[2] provides the accused: in the military justice system, the accused may face court-martial in the absence of a showing of probable cause that he or she has committed the charged offense.

Article 32 of the U.C.M.J. requires a "thorough and impartial investigation" of charges before they may be referred to a general court-martial.[3] Commentators on the military justice system frequently stress the extensive protections that the Article 32 process offers the accused.[4] These include the rights to be represented by counsel (including the right to appointed military counsel regardless of financial status), to present evidence, to cross-examine witnesses, and to receive a copy of the investigating officer's report if the charges are referred to court-martial.[5]

What Article 32 does not provide, however, is a bar to prosecutions based on insufficient evidence. The Article 32 process may facilitate the preparation of a fair and accurate report. However, a court-martial convening authority is free to disregard that report—even if the report finds no probable cause to believe that the accused has committed an offense.[6] As a result, the convening authority may decide to refer charges in the absence of any evidence that suggests that the accused has committed a crime.[7]

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1 *See infra* Part IV.

2 The U.C.M.J. consists of 145 articles, codified at 10 U.S.C. §§ 801–945 (2000 & Supp. 2006).

3 10 U.S.C. § 832(a) (2000).

4 *See, e.g.*, Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 221 (2002).

5 10 U.S.C. § 832(b) (2000).

6 *See infra* Part IV.

7 MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601(d) (2002) [hereinafter MCM]. The language of the rule requires the convening authority to have "reasonable grounds to believe that an offense triable by a court-martial has been

This lack of protection from unwarranted prosecution is a critical flaw in Article 32.[8] The political pressures inherent in the military justice system create a dangerous incentive for court-martial convening authorities to prosecute despite lack of evidence. To protect servicemembers from baseless charges, Congress should revise Article 32 to require the independent establishment of probable cause before a convening authority may refer charges to court-martial.

II. EXTERNAL INFLUENCES ON THE DECISION TO PROSECUTE

The armed services have a strong interest in maintaining an effective system of criminal justice. Military installations and communities, like their civilian counterparts, must deal with common legal issues, such as domestic violence, property crimes, drug use, and other challenges. Commanders must also maintain military discipline; the use of the military justice system to punish so-called "military crimes" is essential in this regard.[9] When there is probable cause to believe that the accused has committed a court-martial offense, either of these interests justifies prosecution.

Consider, however, two other scenarios: 1) a crime has occurred, but there is not probable cause to believe that the accused has committed it; or 2) there has been an allegation that a servicemember has committed a crime, but there is not probable cause to believe that he or she has in fact done so. In a routine case, the Article 32 investigation might well put the matter to rest. However, when the case is widely publicized or politically sensitive, the calculus changes. Despite lack of evidence, the convening authority may still have incentive to prosecute.

First, the convening authority may prosecute to protect the reputation of the command or service. When high-profile crimes occur, there is often concern that failure to prosecute someone (anyone) will create the perception that the command does not take the issue seriously—or worse, that a cover-up is afoot. Specific circumstances—including the race, sex, or rank of the victim and/or accused, the nature of the offense, and perception of how the command has handled similar cases—may aggravate the risk that the military community or the public

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committed and that the accused committed it, and that the specification alleges an offense" before referring a charge to court-martial. *Id.* As a practical matter, however, the decision is limited only by the convening authority's good faith. In addition, the fact that the convening authority is responsible for enforcing the law makes it all but impossible for him or her to be truly impartial. *Cf.* Gerstein v. Pugh, 420 U.S. 103 (1975) (stating that responsibility of prosecutor to enforce the law is inconsistent with neutral and detached evaluation of probable cause).

[8] *See infra* Part III.

[9] *See generally* MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW (1999).

will perceive impropriety.[10] Because trust in leadership is an essential component of military effectiveness, it is understandable that commanders wish to demonstrate that they are serious about responding to crime. The decision to refer charges to court-martial allows the convening authority to fend off allegations that the command or service condones certain criminal behavior, or that some servicemembers are immune from prosecution.

A second, less justifiable motive, is the convening authority's desire to protect his or her own reputation and career. Recent military scandals have seen widespread media and political pressure on the court-martial convening authority.[11] In some circumstances, this pressure may encourage the convening authority to prosecute simply in order to stave off criticism.

Senior military leaders are extremely susceptible to congressional pressure. Their promotions require the advice and consent of the Senate,[12] and officers holding 3- or 4-star rank must gain Senate approval to keep their rank upon retirement.[13] The typical court-martial convening authority must therefore maintain the goodwill of the Senate in order to secure his or her future. Angering even a single legislator may have serious, even fatal, repercussions for an officer's career.[14] As a result, it is understandable that senior officers may be eager to avoid taking action that will bring criticism from Congress.

In similar fashion, military leaders are often sensitive to media coverage of their decisions. Although the media have no official power over military officers, their influence is significant.[15] By shaping the way that Congress and the public view unfolding events, journalists can

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[10] For example, it is likely that the 1998 decision to recall Major General David Hale from retirement to face court-martial on adultery charges—a highly unusual step—was motivated at least in part by allegations that senior officers accused of sexual misconduct were not subject to the same punishment as other servicemembers. *See Army Misconduct Case Proceeds Against Retired Two-Star General*, HOUS. CHRON., Sept. 24, 1998, at A8.

[11] *See infra* Part IV.

[12] 10 U.S.C. §§ 624(c), 629(b) (2000).

[13] 10 U.S.C. § 1370(a), (c) (2000).

[14] For example, in 1992, naval aviators at Miramar Naval Air Station staged a comedy show which included sexual innuendos about Representative Patricia Schroeder. Five officers, including three fighter squadron commanders, were relieved over the incident—including one who had apparently just stopped in the officers' club for a drink and had been cleared of wrongdoing. H.G. Reza, *Five Officers at Miramar are Relieved of Command*, L.A. TIMES, July 25, 1992, at 1; H.G. Reza, *Happenstance Guns Down Miramar Officer's Career*, L.A. TIMES, Aug. 11, 1992, at 1.

[15] The tension between military and media and the challenge of achieving accurate coverage, particularly in the post-Vietnam era, are well documented. *See, e.g.*, James Kevin Lovejoy, *Improving Media Relations*, 82 MIL. L. REV. 49 (2002).

bring enormous pressure to bear.[16] A convening authority who becomes associated with a high-profile case is likely to receive closer scrutiny from Congress when considered for promotion or reassignment, particularly if the coverage has been unflattering. A controversial decision not to prosecute may threaten the convening authority's career.

For example, Army Major General Robert Clark commanded Fort Campbell, Kentucky during the 1999 murder of Private First Class Barry Winchell by a fellow soldier who believed Winchell to be homosexual. The Senate twice delayed Clark's promotion to lieutenant general, although an Army investigation had concluded that Clark had done nothing wrong.[17] This hesitation reflected media coverage of the nomination that focused largely on Clark's role in Winchell's murder. For instance, despite the fact that Clark had served for 33 years, including combat in Vietnam and the first Gulf War, a New York Times headline referred to him simply as the "General in [the] Gay-Bashing Case."[18] Among other criticisms, media commentators accused Clark of being too lenient towards one of the soldiers convicted in connection with Winchell's murder.[19]

Because convening authorities are responsible for the administration of military justice, it may be appropriate to examine how well they have carried out that responsibility. Nevertheless, episodes like the Clark nomination send a disturbing message: in high-profile cases, a decision not to prosecute to the fullest extent of the law may be fatal to one's career. This dilemma creates an incentive for convening authorities to refer charges to court-martial in order to preserve their career prospects. Inherent in this conflict of interest is the possibility that innocent servicemembers may be required to face loss of life or liberty in order to protect their superiors.

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[16] For example, attorneys representing a former Air Force Academy cadet informed members of the Senate Armed Services Committee of an article in *Vanity Fair* and an upcoming television appearance (on Oprah Winfrey's talk show) concerning their client's case. The attorneys requested a hearing before the Committee and promised to list the names of senators who supported their request on Winfrey's website. The Committee granted the hearing; according to one of the lawyers, the publicity was a "significant contributing factor." Vivia Chen, *Rough Flight*, AM. LAW., Feb. 2004, at 68.

[17] Bradley Graham, *Panel Backs Disputed Promotion of General*, WASH. POST, Oct. 24, 2003, at A23.

[18] John Files, *Committee Approves Promoting General in Gay-Bashing Case*, N.Y. TIMES, Oct. 24, 2003, at A16.

[19] Thomas Oliphant, *Justice Moves Slowly in Army Murder Case*, BOSTON GLOBE, June 17, 2003, at A17. Specialist Justin Fisher pled guilty to making a false official statement and was sentenced to twelve and a half years in prison. As a result, he avoided charges of being an accessory to Winchell's murder. Private Calvin Glover, the soldier who killed Winchell, was convicted of murder and sentenced to life in prison. Graham, *supra* note 17.

III. CONSEQUENCES OF UNWARRANTED PROSECUTION

What are the consequences of prosecuting a charge not supported by probable cause? From an extreme position, one could argue that such prosecutions do no real harm. Because the government must still prove guilt beyond a reasonable doubt in order to convict, perhaps it does not matter if the occasional defendant goes to court-martial without a showing of probable cause. Military defendants have the right to appointed defense counsel at no cost; they do not have to worry about losing a job while awaiting trial. In other words, if there really is no probable cause to prosecute, the accused will undoubtedly be acquitted and need not incur any expense. No harm, no foul.

This view, however, ignores the real damage inflicted by unwarranted prosecutions. First, the experience of court-martial harms the accused, even when he or she is eventually acquitted. Second, unnecessary courts-martial waste legal resources and decrease readiness. Third, guilty parties may escape punishment. Fourth, such cases create an ethical dilemma for military trial counsel. And finally, the practice of prosecuting without probable cause raises concerns about the legitimacy of the military justice system.

A. Consequences to the Accused

It is simply disingenuous to say that a person is not harmed by having to endure a court-martial, even one that results in acquittal. Despite the presumption of innocence, society attaches significant stigma to criminal defendants.[20] The experience places incredible strain on the servicemember and his or her family and friends. It may damage or destroy a marriage or other close relationship. Promotions are routinely delayed during the course of the court-martial proceeding,[21] and the accused may be suspended from normal duties. Being associated with a criminal investigation also has the potential to permanently destroy careers, even for those who are exonerated.[22] Military leaders

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[20] *See In re* Fried, 161 F.2d 453 (2d Cir. 1947).

> For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal.

Id. at 458–59.

[21] *See* 10 U.S.C. § 624 (2000).

[22] An example of the power of guilt by association is the experience of Captain Robert Stumpf, U.S. Navy, Retired. Stumpf attended the 1991 Tailhook Symposium, *see infra* Part VI.A, and became a subject of the investigation. Investigators cleared Stumpf of any wrongdoing, and he was selected for promotion and approved by the Senate. In 1995, however, the Senate Armed Services Committee asked the Navy not to promote Stumpf,

owe their subordinates loyalty and fairness, and should never place them at risk without solid evidence.

Even more significant is the fact that courts-martial do make mistakes. As in most civilian criminal courts, court-martial conviction rates run well over 90 percent.[23] Although an innocent accused will likely be acquitted, a small number of courts-martial result in convictions despite insufficient evidence.[24] By referring a charge to court-martial without probable cause, the convening authority creates the risk—however small—that an innocent servicemember will be convicted. This is simply unjust.

B. Effects on Readiness

The demands of military readiness also militate against convening unnecessary courts-martial. The court-martial process requires the labor of military judges and attorneys; it also takes witnesses and panel members away from their duties. Obviously, time spent in a court-martial is time that cannot be spent elsewhere; readiness suffers accordingly.

The accused's unit also suffers. It is common for the accused to be suspended from normal duties or administratively reassigned while charges are pending, placing an increased burden on the unit.[25] There is also a less tangible, but potentially more serious, effect on the unit's

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claiming that it had been unaware of his connection with Tailhook. Then-Secretary of the Navy John Dalton removed Stumpf's name from the promotion list. Stumpf was selected for promotion to captain a second time, upon which Secretary Dalton ordered a new investigation into Stumpf's role in Tailhook '91. Unwilling to endure another investigation, Stumpf retired. He was retroactively promoted to captain in 2002, only after intervention by Senator John McCain. Rowan Scarborough, *Tailhook Scandal 'Injustice' Righted*, WASH. TIMES, July 31, 2002, at A1.

[23] In fiscal year 2002, statistics for general courts-martial convictions were as follows: Army, 757 of 788 (96%); Navy and Marine Corps, 481 of 499 (96%); Air Force, 534 of 564 (95%); Coast Guard, 4 of 4 (100%). C.A.A.F. ANN. REP. (2002), *available at* http://www.armfor.uscourts.gov/annual/FY02/FY02AnnualReport.pdf.

[24] *See* United States v. Ayers, 54 M.J. 85 (C.A.A.F. 2000) (reversing convictions for indecent assault based on insufficient evidence). Ayers, a drill sergeant at Fort Lee, Virginia, was charged with several offenses arising from encounters with a trainee in 1996. *Id.* at 87–89. The trainee testified that she was "a willing participant," that she did not believe that she had been assaulted, and that Ayers stopped his advances when she objected. *Id.* at 88. Nevertheless, Ayers was convicted of indecent assault. *Id.* at 90. The court-martial took place during the unfolding scandal at Aberdeen Proving Ground, amidst tremendous pressure to prosecute drill sergeants accused of sexual misconduct. *Id.* at 92–93. Ayers's experience thus serves as a warning to those who see a decision to refer charges to court-martial as a harmless way of defusing public outcry. *See also* United States v. Campbell, 55 M.J. 591 (C.G. Ct. Crim. App. 2001); United States v. Dennis, No. NMCM 9900402, 2000 WL 33250668 (N-M. Ct. Crim. App. 2000); United States v. Johnson, 54 M.J. 67 (C.A.A.F. 2000); United States v. Ward, No. ACM 29083, 1992 WL 133256 (A.F.C.M.R. 1992).

[25] *See* MCM, *supra* note 7, R.C.M. 305 (providing for pretrial confinement).

readiness. Trust is an essential component of unit cohesion,[26] and the fact that a member of the unit has been charged with a crime may damage that trust. If the accused is a leader, the potential for harm is even greater. Subordinates may have genuine concern about serving under someone who has been accused of criminal behavior. In addition, the leader's ability to maintain discipline may be compromised by the perception that he or she is "in trouble" and vulnerable. Even an acquittal may not entirely undo the damage.[27] Convening authorities must recognize that the decision to refer a baseless charge does not come without consequences for the command.

C. Effect on Subsequent Prosecutions

Pursuing the innocent may also make it more difficult to punish the guilty. The Navy's Tailhook experience provides a case in point.[28] Although as many as 90 victims were assaulted during the course of the 1991 Tailhook Symposium,[29] the Navy was unable to obtain a single court-martial conviction in connection with the incident. This was partly due to the Navy's heavy-handed response, which actually hindered thorough investigation.[30] The pursuit of questionable charges tied up legal and investigative resources that should have been focused on finding and punishing those actually responsible.

Prosecuting the wrong defendant also makes it more difficult to convict the right defendant. First, trial counsel must explain away the earlier decision to charge someone else with the offense. Second, the convening authority risks crying "wolf." If one defendant has already been prosecuted without probable cause, panel members may be more skeptical of the government's motives in pursuing subsequent prosecutions.[31]

D. Ethical Concerns for Military Attorneys

When the convening authority decides to prosecute without probable cause, he or she also creates an ethical dilemma for the trial

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[26] Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, *in* EVOLVING MILITARY JUSTICE 3, 5–8 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

[27] *See supra* note 22.

[28] *See infra* Part IV.A.

[29] Office of Inspector Gen., U.S. Dep't of Def., Report of Investigation: Tailhook '91, at F1 (1993).

[30] *See* Scott Wilson, *APG Case Faces Test*, BALT. SUN, Mar. 31, 1997, at 1B.

[31] *See* United States v. Denier, 47 M.J. 253, 258 (C.A.A.F. 1997). In *Denier*, panel members were overheard discussing the case during a recess. *Id.* at 253. Two of the members commented that "if it weren't for command interest and problems they were having with the sexuality with the Tailhook scandal . . . Major Denier probably wouldn't get found guilty or just get a slap on the wrist." *Id.* at 258.

counsel assigned to prosecute the case.[32] It is a generally accepted principle of legal ethics that prosecutors should not pursue a charge not supported by probable cause.[33] This is expressly codified in state ethics rules and prosecutors' self-imposed professional standards,[34] and has been affirmed by the U.S. Supreme Court.[35] As a result, a civilian prosecutor who believes a charge to be baseless is not only permitted, but ethically obligated, to refuse to prosecute.[36]

The unique nature of the military justice system places trial counsel in a much more difficult position. The decision to prosecute rests not with the lawyer, but with the convening authority. In contrast to civilian codes of professional responsibility, military rules require only that the trial counsel recommend that any charge or specification not warranted by the evidence be withdrawn.[37] The convening authority is free to reject the recommendation and require the trial counsel to prosecute the case.[38]

This poses a serious ethical and moral dilemma. On one hand, as a military officer, the trial counsel is obligated to obey the lawful orders of a superior. On the other hand, it is the trial counsel who must pursue the repugnant task of trying to win a conviction while believing it to be unwarranted by the evidence.[39] It is wrong to place military lawyers in this morally untenable position.

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[32] This is a question of "ethics" in the sense of what is right, not in the sense of what conduct will bring disciplinary action. Because military lawyers are typically members of a state bar, it is theoretically possible that they could be disciplined for prosecuting a charge not supported by probable cause. However, it is likely that the Supremacy Clause would protect military lawyers from state discipline. *See* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 5-52.00 (2d ed. 1999 & Supp. 2003). Even if constitutionally permissible, state disciplinary action would be extremely unlikely. Although federal law now permits states to discipline United States attorneys, 28 U.S.C. § 530B (2000), such actions are virtually unheard of. *See* Jennifer Blair, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations*, 49 UCLA L. REV. 625 (2001).

[33] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2004).

[34] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.200 (Sept. 1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

[35] Wayte v. United States, 470 U.S. 598, 606 (1985).

[36] This is of course the ideal, and reality inevitably falls short. *See infra* Part V.A.

[37] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROF'L CONDUCT FOR LAW. R. 3.8(a) (May 1, 1992); Navy Rules of Prof'l Conduct, 32 C.F.R. § 776.47 (2004); Air Force TJAG Policy Mem. TJS-2, AIR FORCE RULES OF PROF'L CONDUCT R. 3.8(a) (Dec. 20, 2002); U.S. DEP'T OF TRANSP., COAST GUARD MILITARY JUSTICE MANUAL, COMDTINST M5810.1D § 6.C.1.a. (Aug. 17, 2000) [hereinafter CGMJM].

[38] In the Coast Guard, the convening authority who disapproves a recommendation for dismissal must also communicate in writing to the trial counsel the reasons for the disapproval and instructions as to how to proceed. CGMJM, *supra* note 37, COMDTINST M5810.1D § 6.C.1.b.

[39] A number of military lawyers clearly believe that it is unethical to prosecute a charge that is not supported by probable cause, despite military ethics rules that allow

E. Legitimacy of the Military Justice System

Finally, the need to preserve the legitimacy of the military justice system—among both servicemembers and civilians—argues against permitting unwarranted prosecution. To fulfill its role, military justice must not only be fair; it must also be perceived as fair.[40] The decision to prosecute without probable cause is antithetical to most Americans' basic notions of fairness, and risks the perception that the military is sacrificing the innocent in order to protect the institution.[41] When servicemembers believe that discipline is unfair, military effectiveness suffers accordingly.[42]

When a case has received extensive publicity, the need to demonstrate thoroughness and impartiality is even greater. High-profile prosecutions bring heightened scrutiny and the potential for wide-spread damage to the system's legitimacy. As an internal Navy JAG memorandum noted during the Tailhook investigation, "the military justice system and (Navy prosecutors) were going to be under the gun to demonstrate that these cases could be handled fairly and appropriately. I'm beginning to get very concerned that we're not passing the test."[43] These comments demonstrate the potential for serious damage to the perceived fairness of the system. When trained military lawyers begin to lose faith in the system's ability to do justice, what must the ordinary soldier or sailor think?

The American people must also have confidence that their military treats its servicemembers justly. Concerns about fairness in the military justice system have received increasing attention in the popular press,[44]

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them to do so. *See* Commander Roger D. Scott, *Kimmel, Short, McVay: Case Studies in Executive Authority, Law, and the Individual Rights of Military Commanders*, 156 MIL. L. REV. 52, 188 n.521 (1998) (stating that generally accepted ethical standards require showing of probable cause); Major James C. Mallon, *And the Blood Cried Out*, 154 MIL. L. REV. 149, 150 (1997) ("The duty of a prosecutor is to seek justice, not merely to convict, and charges should never be brought where probable cause is lacking." (footnote omitted)).

[40] *See* United States v. Argo, 46 M.J. 454, 464 (C.A.A.F. 1997) (Sullivan, J., concurring).

[41] For example, the statement of Staff Sergeant Nathanael C. Beach: "They are trying to show everybody that their back yard is clean, that they are going to punish offenders to the full extent of the law . . . [b]ut they have to investigate first." Wilson, *supra* note 30.

[42] *See* Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary: A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 647 (1994).

[43] H.G. Reza, *Navy Official Criticizes Handling of Tailhook Cases*, L.A. TIMES, June 19, 1993, at 1.

[44] *See, e.g.*, Juliette Kayyem, *Military Justice System a Self-Inflicted Casualty in Terror War*, CHRISTIAN SCI. MONITOR, Feb. 23, 2004, at 9, *available at* http://www.csmonitor.com/2004/0223/p09s02-cogn.html; Brad Knickerbocker, *How Just is U.S. Military Justice?*, CHRISTIAN SCI. MONITOR, Mar. 5, 2001, at 1, *available at* http://www.cs

including a 2002 *U.S. News & World Report* article concluding that "[m]ilitary courts are stacked to convict."[45] Fairly or unfairly, such perceptions may damage injustice; may harm morale, recruiting, and retention; and may diminish the respect that servicemembers receive from society. Eliminating the possibility that servicemembers must stand trial on baseless charges will help maintain confidence in the military justice system—both inside and outside the armed forces.

IV. HISTORY OF UNWARRANTED PROSECUTIONS

Unfortunately, the issues addressed above are not merely theoretical. In recent years, widely publicized and politically sensitive military criminal investigations have resulted in decisions to refer charges to court-martial, contrary to an investigating officer's finding that the evidence did not support prosecution. Both individuals and the services themselves have suffered the consequences.

During the 1990s, sexual politics became a central component of public and congressional discourse on military issues.[46] To a lesser degree, this has continued to the present day. One element of this debate—both a cause and a consequence—has been a series of high-profile sex-crimes investigations.[47] Much of the discussion of these events has been necessary and appropriate. At the same time, the politically sensitive nature of the issues threatened the fair and impartial handling of sexual assault cases. A decision to prosecute, regardless of lack of evidence, could be hailed as "sending a message" that certain behavior would not be tolerated. A decision not to prosecute, regardless of lack of evidence, might be criticized as "business as usual."

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monitor.com/2001/0305/p1s1.html; Kelly Patricia O'Meara, *How Just is Our Military Justice?*, INSIGHT, May 14, 2001, at 22; Warren Richey, *Making a Case for and Against Military Justice*, CHRISTIAN SCI. MONITOR, Dec. 12, 1996, at 1, *available at* http://www.csmonitor.com/1996/1212/121296.us.us.2.html. *But see* Michael Hill, *Military Justice*, BALT. SUN, Jan. 26, 2003, at 1C.

[45] Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19.

[46] *See, e.g.*, Thomas Ricks, *Latest Battle for the Military is How Best to Deal With Consensual Sex*, WALL ST. J., May 30, 1997, at A20; *see also* Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996).

[47] Although sex crimes were particularly prominent, they were not the only aspects of military justice to come under scrutiny during this period. Other high-profile investigations included the shoot-down of an Army Blackhawk helicopter by two Air Force F-15 fighters in Iraq in 1994, the collision of a Marine Corps aircraft with an Italian cable car in 1998, and the 2000 collision of the USS Greenville with the Japanese vessel Ehime Maru. *See* Matthew Brelis & Stephen Kurkjian, *Confronting the Enemy Within: Safety in the U.S. Armed Forces Since 1979*, BOSTON GLOBE, June 8, 1997, at A1; Daniel Williams & Sarah Delaney, *Italians Incensed By Verdict; Retribution Sought for Tragedy in Alps*, WASH. POST, Mar. 6, 1999, at A1. More recently, attention has focused on prosecutions related to terrorism, such as the prosecution of Army Captain James Yee. *See* Rennie Sloan, *Army Postpones Chaplain's Hearing*, L.A. TIMES, Dec. 10, 2003, at A25.

This section examines four occasions in which significant political and media pressure was brought to bear on the convening authority, and in which Article 32 failed to prevent prosecutions on the basis of questionable evidence. In three of these occasions, convening authorities referred charges to court-martial despite a contrary recommendation by the investigating officer. In the fourth instance, Aberdeen Proving Ground, a rash of overcharging suggests that the Article 32 process itself may have been influenced by political and media pressure. In all four occasions, the perceived legitimacy of the military justice system suffered.

A. The 1991 Tailhook Symposium

On September 8, 1991, the Tailhook Association, a group dedicated to promoting naval aviation, wrapped up its annual convention at the Las Vegas Hilton. In the following days, a number of women reported that naval officers attending the convention had sexually assaulted them.[48] Particularly shocking was the revelation of a "gauntlet," a hallway lined with naval officers who groped the women attempting to pass.[49] The Navy immediately launched an investigation of the incident, a process that would include several agencies and last more than a year.[50] However, the environment surrounding Tailhook was not conducive to a thorough and impartial investigation of the charges. Media frequently portrayed the Tailhook investigation as a battle for women's rights, in which victory would be measured by the number of prosecutions.[51]

An early target of the investigation was Commander Gregory E. Tritt, whom Navy investigators suspected of participating in the "gauntlet" and of assaulting Ensign Kim Ponikowski.[52] Proposed charges included assault, conduct unbecoming, making a false official statement, and failure to stop subordinates from assaulting women in the hallway.[53]

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[48] H.G. Reza, *Women Accuse Navy Pilots of Harassment*, L.A. TIMES, Oct. 30, 1991, at 1.

[49] *Id.*

[50] *See generally* Office of Inspector Gen., U.S. Dep't of Def., Report of Investigation: Tailhook '91 (1993).

[51] Newspaper headlines during the period implied criticism of what was perceived to be too small a number of criminal charges, particularly for serious offenses. *See, e.g.*, Dan Weikel & Gebe Martinez, *Just 1 Tailhook Marine Faces Assault Charge*, L.A. TIMES, July 26, 1993, at 1; Richard A. Serrano, *Only 3 in Tailhook Case Facing Assault Charges*, L.A. TIMES, Aug. 17, 1993, at 1.

[52] WILLIAM H. MCMICHAEL, THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY'S TAILHOOK SCANDAL 10 (1997).

[53] *Id.* at 173.

From the beginning, however, the Navy's case against Tritt was weak. Ensign Ponikowski could not identify him.[54] The one witness who placed him near the gauntlet had been drunk, and his testimony was inconsistent with Ensign Ponikowski's.[55] The investigating officer (IO), Commander Larry McCullough, recommended dropping the assault charges against Tritt altogether.[56] Nevertheless, Vice Admiral Paul Reason rejected the recommendation and referred the assault charges to court-martial.[57] Reason would later admit that he had not read McCullough's entire report, although he claimed to be familiar with it.[58]

The case against Lieutenant Cole Cowden proceeded in similar fashion. On January 14, 1992, the Navy charged Cowden with assault and conduct unbecoming an officer and gentleman.[59] The Article 32 hearing, however, revealed little to suggest that Cowden had committed a crime. The "victim" testified that she did not believe she had been assaulted; that "[e]veryone was joking, laughing, and having a good time"; and that the idea of using her name to prosecute Cowden was "absurd."[60] Although a second witness claimed that Cowden had assaulted her, she quickly admitted to a series of lies to Navy investigators.[61] As a result, Commander McCullough recommended that the conduct unbecoming charge be handled administratively. He found the assault charge totally without merit and recommended withdrawing it altogether.[62]

Lieutenant Damien Hansen, an assistant prosecutor on the Cowden case, agreed with McCullough's assessment and advised against court-martial. Hansen believed that a Cowden court-martial would be a frivolous prosecution; he was concerned not only with the poor chance of success, but with the ethical implications of pursuing the charge as well. Hansen prepared a memorandum to his superiors expressing these concerns.[63] Within days, he was removed from the case.[64] Once again,

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[54] *Tailhook Cases May Turn Shaky*, THE PLAIN DEALER (Cleveland, Ohio), July 12, 1993, at 7A.

[55] MCMICHAEL, *supra* note 52, at 170.

[56] *Id.* at 172. However, McCullough also recommended referral of the charges for conduct unbecoming, false statement, and failure to stop others.

[57] *Id.* at 173.

[58] *Id.* at 191.

[59] *Id.* at 139.

[60] *Id.* at 142–43.

[61] *Id.* at 145.

[62] *Id.* at 145–46.

[63] *Id.* at 146–47.

[64] At the time of the investigation, both prosecution and defense functions were part of the Naval Legal Services Office in Norfolk, Virginia. Beginning in 1996, the Navy separated prosecutors and defense attorneys into separate commands. Dave Mayfield,

Admiral Reason rejected the IO's recommendation and referred the charges to court-martial.[65]

Subsequent events suggest that the Article 32 investigations failed to protect Cowden and Tritt from charges that were completely unsupported by evidence. In the Cowden case, the military judge disqualified the prosecuting attorney for exceeding "the permissable bounds of his official role as a legal advisor" and ordered a review of the Article 32 investigation.[66] The reviewing officer recommended dismissal of all charges, and this time Reason concurred.[67] In the Tritt case, the military judge found that improper command influence tainted the investigation and ordered dismissal of the charges, finally bringing the ordeal to a close.[68]

The U.S. Court of Military Appeals later offered a scathing critique of the tactics that characterized the Tailhook investigations:

> The assembly-line technique in this case that merged and blurred investigative and justice procedures is troublesome. At best, it reflects a most curiously careless and amateurish approach to a very high-profile case by experienced military lawyers and investigators. At worst, it raises the possibility of a shadiness in respecting the rights of military members caught up in a criminal investigation that cannot be condoned.
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> . . . .
>
> The confusion of investigative and justice functions incident to this exercise had the potential for jeopardizing this prosecution.[69]

Tailhook demonstrates Article 32's weakness in the face of scandal. The pretrial investigations of Tritt and Cowden, although apparently thorough, failed to prevent the referral of charges based on scant evidence. The fact that Admiral Reason admitted to failing to completely read one of the reports suggests that the decision to prosecute may have been a foregone conclusion.

Tailhook also demonstrates the danger inherent in an institutional response to scandal. Under intense scrutiny, the Navy first acted to protect itself. The Secretary of the Navy and Chief of Naval Operations

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Navy Offers Young Sailors a Legal Ace, VIRGINIAN-PILOT (Norfolk, Va.), July 27, 1997, at B1.

65 MCMICHAEL, *supra* note 52, at 147–48.

66 *Id.* at 219.

67 *Id.*

68 *Id.* at 285.

69 Samples v. Vest, 38 M.J. 482, 487 (C.A.A.F. 1994) (footnote omitted). Lieutenant David Samples, the third officer to be court-martialed in connection with Tailhook, had sought writs of mandamus and prohibition from the Court of Military Appeals (now the Court of Appeals for the Armed Forces) to require the trial judge to find that prosecutors had given Samples a de facto grant of transactional immunity. *Id.* at 482. The court denied Samples relief, but strongly rebuked the prosecution for its handling of the case. *Id.* at 486–87.

had both attended Tailhook '91, together with a number of general and flag officers of the Navy and Marine Corps.[70] The Navy initially *under*-reacted to the scandal, creating the appearance of obstruction and cover-up.[71] As criticism of the response mounted, the service flip-flopped to the opposite extreme and *over*-reacted, by identifying a handful of junior officers for prosecution, despite insufficient evidence. This response—to protect the service and its leadership at the expense of the rank and file—is always a threat when scandal breaks. It is critical to the continual legitimacy of the military justice system that it protect servicemembers from being sacrificed in the name of institutional self-preservation.

Finally, Tailhook shows the real consequences of a decision to prosecute without probable cause. Tritt, exhausted and angered by the experience, retired from the Navy shortly thereafter.[72] Cowden's promotion to lieutenant commander was delayed while awaiting a court-martial that never happened, and he was temporarily suspended from flying.[73] At least one Navy prosecutor was forced to confront a serious ethical dilemma. Meanwhile, the perception of a witch-hunt severely damaged morale throughout the Navy, particularly among aviators.[74] Resenting the system's failure to protect its own, many experienced and talented officers left the Navy altogether, at great cost to the Navy in both money and experience.[75]

B. Aberdeen Proving Ground, 1996–1997

In November 1996, allegations surfaced that Army drill sergeants had raped, assaulted, or sexually harassed trainees at Aberdeen Proving Ground, Maryland.[76] The scope of the charges increased rapidly—by May 1997, twelve drill sergeants faced criminal charges in the incident.[77]

As the scandal at Aberdeen unfolded, Tailhook was still very much in the public eye. Consequently, there was tremendous pressure on senior leaders at Aberdeen to respond aggressively. Congressional

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[70] Office of Inspector Gen., U.S. Dep't of Def., Report of Investigation: Tailhook '91 (1993).

[71] *See generally* MCMICHAEL, *supra* note 52.

[72] *Id.* at 191, 322.

[73] *Id.* at 219.

[74] Sam J. Tangredi, *Regaining the Trust*, U.S. NAVAL INST. ON PROC., May 2001, at 38.

[75] James Webb, U.S. Sec'y of the Navy, Address at the Naval Institute Annual Conference (Apr. 25, 1996), *available at* http://www.jameswebb.com/speeches/navalinst address.htm.

[76] Jay Apperson et al., *Two Aberdeen Army Trainers Charged in Rape of Recruits*, BALT. SUN, Nov. 8, 1996, at 1A.

[77] Scott Wilson, *APG Case Exposes Screening Flaws, Too*, BALT. SUN, May 5, 1997, at 1B.

leaders took a strong interest in the investigation, specifically targeting the installation's leadership. Senator Barbara Mikulski of Maryland called for Senate hearings into the allegations, noted that "[t]he role of the base commanders must be examined,"[78] and demanded that wrongdoers be "severely" punished.[79] Major General John E. Longhouser, the convening authority, was well aware of the potentially explosive nature of the investigation,[80] and the Aberdeen leadership in turn pressured subordinate commanders to come down hard.[81]

In the case of Staff Sergeant Delmar Simpson, "coming down hard" seems to have been appropriate. In April 1997, Simpson was convicted of eighteen specifications of rape, as well as numerous other offenses.[82] Charges were also being referred against a number of other Aberdeen drill sergeants. In contrast to the solid case against Simpson, prosecutors seemed to have scant evidence to support the more severe sexual misconduct charges against the other defendants.

For example, an adultery charge against Staff Sergeant Nathanael Beach was referred to general court-martial.[83] Before trial, however, the Army announced that Beach would not face court-martial after all, but would instead receive nonjudicial punishment.[84] Beach's commander acquitted him of all charges with respect to sexual misconduct.[85]

Staff Sergeant Herman Gunter was also charged with a number of sex offenses, including rape. The convening authority dismissed the rape charges, but referred seventeen other counts.[86] However, only hours before the court-martial was to begin, prosecutors withdrew two charges

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[78] Paul W. Valentine & Martin Weil, *General Approves Aberdeen Courts-Martial; Mikulski Urges Joint Chiefs Chairman to End "Culture of Silence,"* WASH. POST, Nov. 27, 1996, at A12.

[79] United States v. Simpson, 55 M.J. 674, 682 (A. Ct. Crim. App. 2001).

[80] Longhouser testified that he discussed the emerging scandal, the likely media response, and the similarity to Tailhook with a number of other general officers. Scott Wilson, *Defense in Rape Case Says Army Disregarded Accused Sergeant's Rights*, BALT. SUN, Apr. 2, 1997, at 4B.

[81] *See Simpson*, 55 M.J. at 681.

[82] *Id.* at 674.

[83] *Captain, Two Sergeants to Face Court-martial in Sex Case*, ORLANDO SENTINEL, Nov. 27, 1996, at A14.

[84] Lisa Respers, *Aberdeen Soldier Won't Face Court-Martial in Sex Scandal*, BALT. SUN, Feb. 20, 1997, at A13.

[85] Tom Bowman, *Sergeant Innocent of Most Charges: Beach Acquitted of Sexual Misconduct, Assault at Aberdeen*, BALT. SUN, Mar. 22, 1997, at 1B. Beach was found guilty of soliciting a trainee's help with a research paper, and pleaded guilty to violating a no-contact order. *Id.*

[86] Jackie Spinner, *Rape Charges Dropped Against Drill Sergeant*, WASH. POST, May 24, 1997, at B5.

that Gunter had intimidated a trainee into having sex with him.[87] The court-martial acquitted Gunter of indecent assault and adultery. He was convicted only of three counts, arising from attempts to hug and kiss a trainee and trying to obstruct the investigation.[88]

In a third case, Sergeant First Class William Jones was scheduled for a July 8 court-martial on charges that included indecent assault.[89] However, on the day of the court-martial, prosecutors requested a continuance for further investigation. When it was denied, they were unable to proceed.[90] Charges against Jones were dropped and never reinstated; he was administratively separated with a reprimand.[91]

These examples show a pattern in which sexual misconduct charges survived "screening" by the Article 32 investigation, yet failed to stand up when faced with an independent test. Although the above drill sergeants clearly violated lesser provisions of the U.C.M.J., there seems to have been little evidence to support more serious charges. Nevertheless, the investigating officers almost universally recommended referral.

The circumstances surrounding the investigations suggest that they were less than thorough. In one case, that of Sergeant First Class William Moffett, the Article 32 officer denied a defense request to delay the hearing by several days so that Moffett's alleged victims could testify in person, rather than by telephone. Asked about the decision, the investigating officer said that he had received orders "to get it done as soon as possible."[92] A military judge, finding that the denial prejudiced Moffett's ability to present a defense, ordered a new investigation.[93] As in the above cases, the charges against Moffett failed to hold up, and he was eventually permitted to resign in lieu of court-martial.[94]

Moreover, it was publicly known that Army criminal investigators had pressured women to claim that they had been assaulted. Several trainees admitted having consensual sex with drill instructors, but claimed that CID agents had pressured them to say that the sex was

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[87] Paul W. Valentine, *Army Drops "Sex-by-Fear" Charges Against Aberdeen Drill Sergeant*, WASH. POST, Aug. 15, 1997, at A15.

[88] *Army Drill Sergeant Acquitted of Sex Offenses, Convicted on Obstruction, Behavior Counts*, FORT WORTH STAR-TELEGRAM, Aug. 16, 1997, at 12.

[89] *Charges Withdrawn as APG Sergeant Faces New Allegations*, BALT. SUN, July 9, 1997, at 6C.

[90] Paul W. Valentine, *Army Stops Aberdeen Trial To Do Further Investigating*, WASH. POST, July 9, 1997, at B7.

[91] Paul W. Valentine, *Aberdeen Sergeant Loses Rank, Pay in Sex Scandal*, NEW ORLEANS TIMES-PICAYUNE, Oct. 29, 1997, at A12.

[92] Spinner, *supra* note 86.

[93] *Id.*

[94] Paul W. Valentine, *Two Drill Sergeants Receive Discharges: Aberdeen Sergeants Avoid Trials*, WASH. POST., Aug. 19, 1997, at D1.

forced. According to these soldiers, the agents promised reassignments and immunity from prosecution for violating the policy against fraternization.[95] This should have cast doubt on the credibility of the more serious accusations.

It is clear that there was a gross breakdown in discipline at Aberdeen, as well as serious criminal behavior by some drill sergeants. However, it also appears that several drill sergeants were charged with serious sex crimes (rape or indecent assault) despite evidence that they were at most guilty of fraternization, adultery, or disobeying orders. The fact that these charges were hastily withdrawn before they could be tested on the merits—in some cases on the day of trial—calls into question the quality of the pretrial screening process. In light of the intense congressional pressure and the rush to dispose of cases, it seems doubtful that the Article 32 investigations of Beach, Gunter, Jones, and Moffett truly produced an independent and accurate assessment of the charges.

The impact of the Aberdeen prosecutions has extended well beyond those accused. Eager to avoid a repeat of Tailhook, the Army conducted a worldwide investigation of its training facilities.[96] A number of senior officers were forced into retirement as their sexual histories were placed under a microscope.[97] Once again, events called into question the ability of the military to investigate in a fair and impartial manner.[98] At Aberdeen itself, soldiers reported that they were "walking on eggshells," and that male leaders were afraid that an unwelcome order to a female subordinate might result in criminal charges.[99] Five years later, this fear was still apparent on the installation.[100]

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[95] Jackie Spinner & Dana Priest, *Women Say Army Agents Bullied Them; Five Allege Investigators Urged Sex Accusations*, WASH. POST, Mar. 12, 1997, at B1; *Women Say Army Investigators Tried to Coerce Rape Allegations*, DALLAS MORNING NEWS, Mar. 12, 1997, at 1A.

[96] *See* Paul Richter, *U.S. Army Sex Scandal Grows in Germany*, L.A. TIMES, Feb. 21, 1997, at A1.

[97] Ironically, this included Major Gen. Longhouser. An anonymous caller to an Army hotline—established because of events at Aberdeen—accused Longhouser of adultery, prompting his resignation. Dana Priest, *Two-Star General at Aberdeen to Retire at Lower Rank*, WASH. POST, Jun. 3, 1997, at B1.

[98] *See* Wilson, *supra* note 30. Most serious were perceptions in the black community, including leaders of the NAACP and Congressional Black Caucus, that the Army deliberately targeted black soldiers for prosecution. *See* Scott Wilson, *Two More Aberdeen Sergeants Charged: NAACP Says Cases Against Black Soldiers Involve Prejudice*, BALT. SUN, Mar. 26, 1997, at 1C.

[99] *Rank and File, Like Army Itself, Feel Strain of Sex Bias*, ST. LOUIS POST-DISPATCH, Sept. 13, 1997, at 19.

[100] The author attended a briefing given by the garrison commander and command sergeant major of Aberdeen Proving Ground in 2002. According to the command sergeant major, preventing incidents of fraternization with trainees was his "number one priority."

C. The United States Military Academy, 1996–1997

In October 1996, United States Military Academy Cadet James Engelbrecht was charged with the rape of a fellow cadet during an off-campus party.[101] The Article 32 officer recommended against court-martial, suggesting instead that Engelbrecht receive administrative sanctions for improper behavior. Lieutenant General Daniel Christman, the Academy's superintendent, rejected the recommendation.[102] According to an Academy spokesman, Christman made his decision "because of the seriousness of the charges."[103] Engelbrecht would go to court-martial.

After deliberating for five hours, the panel acquitted Engelbrecht of rape and committing an indecent act.[104] According to Engelbrecht's attorneys, the complaining witness's testimony had been riddled with inconsistencies. "When your case consists of a person who says 'I don't recall what I didn't recall,' you've got problems," added attorney James Fitzgerald.[105]

West Point officials denied that political concerns had influenced the decision to refer court-martial charges against Engelbrecht.[106] Others, however, including Engelbrecht's family and attorneys, disagreed. "Engelbrecht and the woman were secondary," another of Engelbrecht's attorneys said after acquittal. "It was clear to everybody that they didn't want to be seen as covering up anything."[107]

The decision to prosecute Engelbrecht is troubling. Christman's explanation—that the seriousness of the charge justified court-martial—misses the point. If the seriousness of the charge were the primary factor in the decision to prosecute, everyone accused with a serious offense would stand trial, regardless of the evidence. It is unlikely that Christman—who holds a law degree—meant to endorse such an extreme result. In light of the fact that the Aberdeen scandal was still very much in the public eye, it seems probable that the decision to refer the charges to court-martial—and to cause Engelbrecht to face the risk of life in

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Protecting the installation—including the stockpiles of chemical weapons located at the Edgewood Chemical Activity—was the second priority.

[101] *Cadet Charged With Rape*, WASH. POST, Nov. 1, 1996, at A2.

[102] Fred J. Aun, *Cadet is Cleared of Raping Another at Party in Sussex*, STAR-LEDGER (Newark, N.J.), Jan. 25, 1997, at 11.

[103] *Id.*

[104] Frank Bruni, *Cadet From Conroe Acquitted of Raping Classmate*, HOUS. CHRON., Jan. 25, 1997, at 29.

[105] Holly Coryell, *Cadet's Attorney Sees No Grounds for Court-Martial*, THE RECORD (Hackensack, N. J.), Jan. 27, 1997, at A4.

[106] *Lawyer for Cadet Faults West Point*, ST. LOUIS POST-DISPATCH, Jan. 27, 1997, at 6A.

[107] *Id.*

prison—was simply an effort to avoid a similar scandal.[108] As a result, the perceived legitimacy of the military justice system sustained yet another blow.

D. The Air Force Academy, 2003–Present

In January 2003, an Air Force Academy cadet contacted U.S. Senator Wayne Allard and claimed that she had been raped at the Academy. The cadet also asserted that Academy leaders had refused to investigate her complaint.[109] By late February, at least eighteen current and former cadets had made similar allegations. Secretary of the Air Force James Roche vowed that the Air Force would "come down with a strong hammer."[110]

It was immediately apparent that the investigation would take place under a political microscope. On February 27, Secretary Roche declared that the Inspector General of the Air Force would review every case of alleged sexual assault or rape.[111] Shortly thereafter, U.S. Representative Tom Tancredo raised the stakes even higher. Although the investigation had scarcely begun, Tancredo demanded that the Academy's superintendent and commandant of cadets resign, saying: "The fact they are there is a disgrace."[112] Tancredo also demanded "dramatic, decisive remedies," and encouraged Secretary Roche to convene courts-martial.[113] Within three weeks, the Air Force reassigned four of the Academy's top leaders.[114]

The new leadership got the message. By late April, the Academy announced that it was convening Article 32 hearings for four cadets in connection with two alleged sexual assaults.[115] Meanwhile, members of Congress continued to weigh in on the process. "The fact that the Air Force is pursuing these two cases is significant," said a spokesperson for Senator Allard.[116] One of the alleged victims retained her own attorney,

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[108] Aun, *supra* note 102. "Some observers of the court-martial suggested that Christman pressed for the trial in order to avoid having West Point's image tarnished by accusations of a rape cover-up." *Id.*

[109] Tillie Fong, *Academy Rape Faces Scrutiny*, ROCKY MTN. NEWS (Denver), Feb. 14, 2003, at 30A.

[110] Bill McAllister, *Shock to AFA Culture Vowed*, DENV. POST, Feb. 26, 2003, at A1.

[111] Judy Graham, *Air Force Cadets Warned Over Rapes*, CHI. TRIB., Feb. 28, 2003, at 1.

[112] Bill McAllister & Erin Emery, *Tancredo Calls for AFA Heads*, DENV. POST, Mar. 6, 2003, at A1.

[113] *Id.*

[114] Richard A. Serrano, *Air Force Will Replace Four Top Academy Officers*, L.A. TIMES, Mar. 26, 2003, at A1.

[115] Erin Emery, *AFA Cadets Face Assault Charges*, DENV. POST, Apr. 23, 2003, at A1.

[116] *Id.*

who described his role as ensuring "that the prosecution is doing what it can to effectively use the legal system against the perpetrators."[117]

Cadet Douglas Meester was charged with rape and forcible sodomy.[118] However, the case against Meester presented serious flaws. The complaining witness testified that she did not say "no" during the alleged attack.[119] She also told investigators that she could see why Meester thought that the sex was consensual.[120] As a result, the investigating officer, Major Todd McDowell, recommended against court-martial.[121] Nevertheless, on June 30, 2003, Brigadier General John Weida, the new Academy commandant, decided to refer the charges against Meester.[122] Senator Allard immediately hailed the decision. "That's what needs to happen," an Allard spokesman said. "The judicial process needs to be executed regardless of the outcome."[123]

The outcome did nothing to allay concerns that the charges against Meester did not fit the facts. After spending nearly a year with a rape charge (and a possible sentence of life imprisonment) hanging over his head, Meester was allowed to plead guilty to the relatively trivial offenses of conduct unbecoming, dereliction of duty, and committing an indecent act. He received a fine and a reprimand.[124] The disparity between the initial charges and the final disposition suggest over-charging—something that effective pretrial screening could have prevented.

Meester's prosecution raised public questions about the integrity of the Air Force leadership,[125] including allegations by Meester's counsel that Air Force leaders deliberately decided to prosecute Meester in order

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[117] *Id.*

[118] Erin Emery, *Rape Court-Martial Set at AFA*, DENV. POST, July 3, 2003, at B1.

[119] *Id.*

[120] Pam Zubeck, *Air Force Rape Case Tossed Out*, THE GAZETTE (Colo. Springs, Colo.), Aug. 8, 2003, at 1.

[121] Erin Emery, *AFA Investigator: Drop Rape Case*, DENV. POST, May 25, 2003, at B2.

[122] Dick Foster, *Air Force Cadet Will Go to Trial in Rape Scandal*, ROCKY MTN. NEWS (Denver, Colo.), July 3, 2003, at 6A.

[123] Jon Sarche, *Cadet's Court-Martial in Rape Case Hailed as a First Step*, PHILA. INQUIRER, July 4, 2003, at A9.

[124] Erin Emery, *Cadet Cuts Deal; Rape Charge Dropped*, DENV. POST, June 9, 2004, at A1.

[125] Pam Zubeck, *AFA Rules Cadet Must Stand Trial*, THE GAZETTE (Colo. Springs, Colo.), July 3, 2003, at A1 ("The clear message that's been sent to the new leadership at the academy is that we fired your predecessors even when they didn't do anything wrong because they didn't take this seriously enough . . . . Put yourself in Weida's shoes. Which side are you going to err on?"); Editorial, *The Scapegoat*, ROCKY MTN. NEWS (Denver, Colo.), June 10, 2004, at 44A ("Memo to Weida: If you're going to make an example of someone, it helps if he actually is guilty. Otherwise you appear to be a creature of public relations with no regard for genuine justice.").

to appease Senator Allard.[126] The case further demonstrates the risk that political and media pressure will influence the charging decision, and the need for a more effective method of screening charges in order to protect the accused.

V. ARTICLE 32, ITS CIVILIAN EQUIVALENTS, AND THE SCREENING FUNCTION

The Article 32 investigation serves several functions. One is to provide the convening authority with adequate information to determine how to dispose of the case.[127] A second function is to provide the defense with discovery.[128] Article 32 generally serves these functions very well, and in these respects is superior to its civilian counterparts.[129] However, the U.C.M.J.'s legislative history also shows that Article 32 was intended to protect the accused from baseless charges.[130] Military courts have also stressed this purpose.[131] In its present form, Article 32 does not and cannot meet this objective.

Although it is not entirely clear how frequently convening authorities disregard an IO's recommendation, it is clearly not limited to the instances discussed above. A 1974 survey of Army lawyers showed that most experienced judge advocates believed that convening authorities rejected the IO's findings at least some of the time.[132] In the most experienced segment—officers who had experience with more than 100 Article 32 investigations, and who had held a management position in a staff judge advocate office—only 26.7% believed that

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126 Erin Emery, *Dismissal Urged for Rape Charge Facing Cadet*, DENV. POST, Apr. 18, 2004, at B6. The defense claimed that Weida had met with Secretary Roche in the days after the Article 32 hearing, after which Roche sent an e-mail saying, "Take that Sen. Allard. Look at the vigor with which the Air Force is prosecuting." *Id.*

127 *See generally* 1 GILLIGAN & LEDERER, *supra* note 32, § 9-10.00, at 350 (discussing purposes of the Article 32 investigation).

128 *Id.*

129 *See* sources cited *supra* notes 3–5.

130 1 GILLIGAN & LEDERER, *supra* note 32, § 9-10.00, at 351.

131 *E.g.*, United States v. Samuels, 10 C.M.A. 206, 212 (C.M.A. 1959) ("[Article 32] . . . stands as a bulwark against baseless charges.").

132 Major William O. Gentry, The Article 32–A Dead Letter? 28–32 (April 1974) (unpublished thesis, The Judge Advocate General's School) (on file with University of Virginia Law Library). Similarly, 53.3% of the most experienced group believed that recommendations were followed in a majority of cases. *Id.* at 32. Of the next group in the survey (officers with significant experience but who had not served at least one year in a management position), 60% believed that recommendations were followed in "almost all cases"; 40% answered in a majority of cases. *Id.* Despite the differences in responses among the two groups, it seems that most experienced Army lawyers were aware of at least some occasions in which the convening authority rejected the investigating officer's recommendation.

recommendations were followed in "almost all cases."[133] This suggests that rejection of the IO's recommendation is not infrequent.

Clearly, the current Article 32 does not ensure effective pretrial screening, which raises two additional questions. First, how successful are the comparable civilian equivalents? Second, what can be done to enhance Article 32's screening function? The following section examines civilian screening devices and finds that they are generally no better at protecting the accused than Article 32. It concludes with recommended revisions to Article 32 that would increase its effectiveness in screening charges against servicemembers.

A. Screening in the Civilian Criminal Justice System

In theory, the civilian criminal justice system requires the government to demonstrate probable cause to a neutral body—either a grand jury or a judicial officer—before a charge can proceed to trial.[134] Ethical guidelines also officially prevent civilian prosecutors from bringing baseless charges.[135] In reality, however, the effectiveness of civilian screening devices is questionable. Moreover, civilian prosecutors are subject to many of the same influences as their military counterparts—the desire for career advancement, pressure from superiors, and concern for public approval.

The grand jury is the older (and more controversial) of the two civilian screening devices. In addition to its investigatory function, it ostensibly protects citizens from unwarranted prosecution.[136] Although evidence varies,[137] the overall picture suggests that the grand jury is little more than a rubber stamp.[138] In the federal criminal system, for

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[133] *Id.* at 31–32.

[134] *E.g.*, U.S. CONST. amend. V (grand jury); CONN. CONST. art. I, § 8(a) (judicial officer). There is no constitutional right to a grand jury in military prosecutions. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces* . . . .") (emphasis added).

[135] *See supra* notes 33–35, 37 and accompanying text.

[136] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 343 (1974) (citing Branzburg v. Hayes, 408 U.S. 665, 686–87 (1972)).

[137] *See* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.3(b), at 301–04 (2d ed. 1999). The authors cite "no-bill" rates ranging from 20% to less than 2% in major American cities. *Id.* at 302 n.34. The effectiveness of screening is also by its very nature difficult to measure. A high rate of indictment may reflect the fact that prosecutors present only solid cases to the grand jury; it may also show that the grand jury is willing to indict the proverbial ham sandwich. Some observers argue that the rate of post-indictment dismissal for insufficient evidence is a more useful measure of the effectiveness of screening. *Id.* at 303.

[138] *See id.* at 302. The authors cite a 1988 Department of Justice study concluding that bindover and indictment rates in thirty American urban areas averaged 90% or greater. *Id.* at 302 n.34.

example, the grand jury indicts in over ninety-eight percent of cases.[139] Nor does the accused have significant procedural protections in the grand jury room. The government is not required to disclose exculpatory evidence to the grand jury,[140] normal rules of evidence do not apply,[141] and the grand jury may base an indictment entirely on hearsay.[142] These factors have caused many observers to conclude that the grand jury's ability to protect the accused is illusory.[143]

A second civilian screening device is the preliminary hearing. In the federal system[144] and many states,[145] the defendant has a right—at least in some circumstances—to a judicial hearing to determine whether a charge is supported by probable cause. If the judge or magistrate finds no probable cause to believe that the offense has been committed, or that the defendant committed it, the charge is dismissed.[146]

Like the grand jury, however, the preliminary hearing does not always live up to its potential as a screening device. There are wide disparities in dismissal rates at preliminary hearings, as well as disagreement about the significance of those disparities.[147] In the federal system and many states, prosecutors may circumvent the preliminary hearing altogether by directly indicting the defendant.[148] In other states, prosecutors may file an information directly with the trial court and bypass the preliminary hearing.[149] Only a handful of states maintain an absolute requirement that a judicial officer determine probable cause before the prosecution may continue.[150] Even the absolute right to a preliminary hearing may not entirely protect the accused from a determined prosecutor. In many jurisdictions, a finding that probable cause does not exist has no preclusive effect, and the state is free to bring the charge again.[151]

In addition, civilian prosecutors are no less susceptible to external influence than a court-martial convening authority; in fact, they may be

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139 *Id.* at 302.

140 United States v. Williams, 504 U.S. 36 (1992).

141 FED. R. EVID. 1101(d)(2).

142 Costello v. United States, 350 U.S. 359 (1956).

143 *See, e.g.*, Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

144 FED. R. CRIM. P. 5.1.

145 *See, e.g.*, ALA. CODE § 15-11-9 (LexisNexis 1995); COLO. REV. STAT. § 16-5-301 (2006); VA. CODE ANN. § 19.2-218 (2006).

146 *See* sources cited *supra* notes 135–36.

147 4 LAFAVE ET AL., *supra* note 137, § 14.1(a).

148 *Id.* § 14.2(c).

149 *Id.* § 14.2(d).

150 *See id.*

151 *E.g.*, ALA. CODE § 15-11-2 (LexisNexis 1995); People v. Uhlemann, 511 P.2d 609, 610 (Cal. 1973); People v. Noline, 917 P.2d 1256, 1267 (Colo. 1996).

more so. Prosecuting attorneys at the municipal and county levels are typically elected, and politics figure prominently in the appointment of United States Attorneys.[152] As a result, there is a strong political incentive for prosecutors to win convictions, particularly in cases that are notorious in the community.[153] In one particularly outrageous example, a state prosecutor has even campaigned on an explicit promise to convict a particular defendant.[154]

Given the incentive to win high-profile cases, the ability to circumvent the preliminary hearing, and the questionable effectiveness of the grand jury in screening, it seems that the civilian criminal justice system is no better than its military counterpart at protecting defendants from politically motivated prosecution. However, this is no excuse for the military system to rest on its laurels. On the contrary, military justice has often led the way in protecting the rights of criminal defendants,[155] and it should do so in this case as well. Recognizing that it is wrong to require a person to stand trial in the absence of probable cause, Congress should amend Article 32 accordingly.

B. Strengthening Article 32

Suggested changes to Article 32 have circulated for at least thirty years.[156] In 1973, Captain Lawrence J. Sandell proposed two such changes that Congress could adopt to strengthen Article 32 and affirm the fairness and progressivism of the military justice system.[157] First, an

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[152] Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 151–52 (2004).

[153] *See id.* at 153. *See generally* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996).

[154] *See* State v. Hohman, 420 A.2d 853 (Vt. 1980), *overruled by* Jones v. Shea, 532 A.2d 571 (Vt. 1987).

[155] *Compare* Miranda v. Arizona, 384 U.S. 436 (1966) (prohibiting unwarned questioning during "custodial interrogation"), *and* Gideon v. Wainwright, 372 U.S. 335 (1963) (recognizing the right to appointed counsel for indigent criminal defendants in certain prosecutions), *with* 10 U.S.C. § 831 (2000) (prohibiting any unwarned questioning that might tend to incriminate the accused), *and* 10 U.S.C. § 827 (2000) (establishing the right to detailed defense counsel in all general and special courts-martial). *See generally* Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 221 (2002).

[156] There has been official, as well as academic, attention to the possibility of changing the role of the convening authority in referring charges; however, these suggestions have been rejected. *See* COMPTROLLER GEN., FUNDAMENTAL CHANGES NEEDED TO IMPROVE THE INDEPENDENCE AND EFFICIENCY OF THE MILITARY JUSTICE SYSTEM 40 (1978). The Cox Commission received input with respect to Article 32 but took no official position on proposed changes. NAT'L INST. FOR MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 16 (May 2001), *available at* http://www.nimj.com/documents/Cox_Comm_Report.pdf.

[157] *See* Lawrence J. Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. KY. ST. L.F. 25, 54 (1973).

independent authority should decide the issue of probable cause. Second, a finding of no probable cause should result in dismissal of the charge.

An Article 32 investigating officer performs a quasi-judicial function.[158] Although not called upon to decide complex questions of law or rule on the admissibility of evidence,[159] the IO is responsible for decisions that in civilian life are left to a professional judge or magistrate.[160] As a result, the IO is held to standards similar to those set for a military judge.[161] However, an IO is only required to have the rank of major (or lieutenant commander) or to have legal training.[162]

A better approach, as recommended by Sandell, is to appoint a special court-martial military judge as the Article 32 investigating officer.[163] "This [practice] has the double advantage of providing an IO who is both legally trained and free from command control."[164]

Relying on military judges would also eliminate situations in which there is a potential for prejudice to the accused because of the IO's contact or relationship with an interested party. For example, in *United States v. Davis,* the executive officer of the Philadelphia Naval Base was appointed as the IO, despite the fact that he also supervised and evaluated the attorney detailed as defense counsel.[165] In a second case, *United States v. Brunson*, the IO received legal advice with respect to the investigation from the trial counsel in the case; this error caused the convictions to be set aside.[166] More recently, in *United States v. Argo*, the convening authority's staff judge advocate made improper ex parte contact with an IO and attempted to influence her conduct of the

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158 *See* United States v. Brunson, 15 M.J. 898, 901 (C.G.C.M.R. 1982) (stating that an Article 32 officer "must be viewed as a judicial officer" and is subject to ABA Criminal Justice Standards).

159 United States v. Samuels, 10 C.M.A. 206, 213 (C.M.A. 1959).

160 *See supra* notes 144–46 and accompanying text.

161 United States v. Reynolds, 24 M.J. 261, 263 (C.M.A. 1987).

162 MCM, *supra* note 7, R.C.M. 405(d)(1).

163 *See* Sandell, *supra* note 157, at 54. This change would of course have personnel implications for the armed services, and might well require the appointment of additional military judges. It would also have the secondary effect of furthering the creation of a two-tiered military judiciary. Eventually, it may be desirable to establish a formal structure by which newly-appointed and junior military judges (O-4 and junior O-5) preside over Article 32 investigations and special courts-martial, while senior military judges (senior O-5 and O-6) preside over general courts-martial.

164 *Id.* To fully achieve the second objective, Congress would have to implement additional reforms of the military judiciary. Under the current structure, military judges are appointed by and serve at the pleasure of the service's Judge Advocate General. Some military judges have complained of attempts to influence their decision-making. *See* Lederer & Hundley, *supra* note 42. While an investigation by a military judge might not achieve the ideal of true independence, it would come significantly closer.

165 20 M.J. 61, 64 (C.M.A. 1985).

166 15 M.J. 898, 901 (C.G.C.M.R. 1982).

investigation.[167] Such tactics may be uncommon, but they clearly do occur. A military judge would be less susceptible to potential conflicts of interest, as well as attempts by an interested party to sway the investigation.

By having a military judge decide the issue of probable cause, Congress would enhance the quality and legitimacy of the findings. With that in mind, the Article 32 investigating officer should have the authority to dismiss outright any charge not supported by probable cause.[168] If the Article 32 investigating officer does find probable cause, he or she would relay that finding to the convening authority together with a recommendation as to the disposition of the charges, consistent with current practice.[169] The convening authority would retain the discretion to refer the charges to general court-martial or to decide on an alternate disposition.[170]

C. Challenges to the Article 32 Officer's Findings

In cases of sufficient importance, the government might seek to challenge an Article 32 officer's finding of no probable cause. A revised Article 32 might accommodate this in one of two ways. The first approach would be to permit the government to appeal the decision. The federal system and some states permit prosecutors to appeal the dismissal of a charge for insufficient evidence.[171] Typically, when a magistrate or lower court judge conducts the preliminary hearing, the prosecutor may appeal a dismissal to the trial court.[172] In some states, prosecutors may also pursue the matter in the state's intermediate appellate court.[173]

The equivalent under the U.C.M.J. might be to permit the government to seek review by a general court-martial military judge, or to bring an interlocutory appeal under Article 62.[174] However, such appeals would make little sense. The Article 32 officer's finding is

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[167] 46 M.J. 454, 457 (C.A.A.F. 1997).

[168] *See* Sandell, *supra* note 157.

[169] *See* MCM, *supra* note 7, R.C.M. 405(e).

[170] *See id.* at R.C.M. 407. This discretion reflects the fact that the convening authority must consider other factors than the guilt or innocence of the accused—including military necessity, mitigating circumstances, and the interests of the command and/or community as a whole.

[171] *E.g.*, 18 U.S.C. § 3731 (2000); HAW. REV. STAT. § 641-43 (2006); ME. REV. STAT. ANN. tit. 15, § 2115-A (2006); ALA. R. CRIM. P. 15.7(a).

[172] *See, e.g.*, COLO. R. CRIM. P. 5(a)(4); State *ex rel.* Fallis v. Caldwell, 498 P.2d 426, 428–29 (Okla. Crim. App. 1972).

[173] *See, e.g.*, CAL. PENAL CODE § 871.5(f) (West Supp. 2006); COLO. R. CRIM. P. 7(h)(4).

[174] 10 U.S.C. § 862 (a)(1)(A) (2000).

essentially one of fact[175] and should be reviewed under a clearly erroneous standard. It is therefore hard to imagine a scenario in which a dismissed charge would be reinstated. An appeal would simply prolong the case, with little likelihood of a different outcome.

A better approach would be to allow the government the opportunity to refer the charge again. There is no constitutional bar to a second prosecution,[176] and such a practice would be consistent with the federal criminal system[177] and many state courts.[178] It is also possible to limit the ability to refer a dismissed charge (in order to prevent harassment of the accused or "shopping" for a more government-friendly IO). A simple fix would be to permit the convening authority to refer the charge again if he or she has a good faith belief that there is additional evidence that merits reconsideration.[179] The convening authority would then be required to order a new Article 32 investigation.

Of course, when the Article 32 officer does find probable cause, the accused may wish to challenge that finding. For the same reasons stated above, appellate review of the decision is inappropriate. If the convening authority decides not to refer a charge to general court-martial, the issue is moot.[180] Upon referral, the accused should be able to challenge the finding by means of a pretrial motion to dismiss.[181] This would be similar to the current process for remedying a legal defect in the investigation or referral of charges[182] but should be reviewed under a clearly erroneous

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[175] MCM, *supra* note 7, R.C.M. 405(a).

[176] United States *ex rel.* Rutz v. Levy, 268 U.S. 390, 393 (1925).

[177] *See* FED. R. CRIM. P. 5.1(f).

[178] *See supra* note 151 and accompanying text.

[179] *Cf.* WIS. STAT. ANN. § 970.04 (West 1998) (permitting district attorney to file another complaint if new evidence is discovered after a defendant has been discharged); Jones v. State, 481 P.2d 169, 171–72 (Okla. Crim. App. 1971) (requiring prosecutor who wishes to refile to present new evidence to same magistrate, or, in his absence, to a second magistrate who must show deference to dismissal); State v. Brickey, 714 P.2d 644, 647 (Utah 1986) (holding that refiling of a previously dismissed criminal charge violates state due process clause unless prosecutors have discovered new evidence). Other state limitations on prosecution following dismissal include requiring prosecutors to seek permission of the court, N.Y. CRIM. PROC. LAW § 170.50(3) (McKinney 1993), or to show a good-faith basis for a second prosecution. People v. Walls, 324 N.W.2d 136, 138–39 (Mich. Ct. App. 1982) (quashing warrant due to finding that second prosecution, with no new evidence, constituted harassment and violated defendant's due process rights).

[180] *See* MCM, *supra* note 7, R.C.M. 405(a) (stating that the failure to comply with the requirements of a pretrial investigation has no effect if the charge is not referred to general court-martial).

[181] This is the practice in some state courts. *See, e.g.*, IDAHO CODE ANN. § 19-815A (2004).

[182] *See* MCM, *supra* note 7, R.C.M. 905(b)(1).

standard. Failure to challenge the Article 32 officer's finding in a pretrial motion would waive the issue.[183]

D. Preserving the Record

Review of the IO's decision will also require the preservation of an accurate record. The Manual for Courts-Martial already provides that a court reporter may be detailed to an Article 32 hearing.[184] To ensure an accurate record, however, the rule should be amended to require a court reporter for all hearings. Another solution would be to tape record all Article 32 hearings, and to preserve a copy of the tape, together with any physical or documentary evidence in the case. If necessary, a court reporter could then transcribe a record for review by the trial judge or in a subsequent Article 32 hearing.

VI. A PROPOSED REVISED ARTICLE 32

Through incorporating these changes, a revised Article 32 would read as follows:

> (b) . . . For each charge and specification, a military judge must determine whether there is probable cause to believe that the offense has been committed and that the subject of the investigation has committed the offense.
>
> If probable cause exists as to any specification, the military judge must inform the convening authority and the accused. The military judge must also make a recommendation to the convening authority as to how to dispose of the case.
>
> The military judge must dismiss any charge or specification that is not supported by probable cause.
>
> Following a dismissal of a charge or specification under this Article, the convening authority may again refer the charge if there is reason to believe that there is additional evidence to justify doing so. The convening authority must then order a new investigation under this Article.

VII. CONCLUSION

It is wrong to prosecute without probable cause. The present Article 32 does not do enough to prevent this from happening. Congress should amend the Uniform Code of Military Justice to ensure that Article 32 requires an independent determination of probable cause before a charge may be referred to court-martial.

Given the breadth and aggressiveness of contemporary media coverage, it is clear that scrutiny of the military justice system is here to stay. Wars in Afghanistan and Iraq have dramatically increased the

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[183] *See id.* at R.C.M. 905(c).

[184] *Id.* at R.C.M. 405(d)(3)(B).

attention focused on the armed services in general, and military justice in particular. New politically sensitive and increasingly visible scandals continue to emerge. Abuses at the Abu Ghraib prison damaged American diplomatic efforts throughout the world,[185] prompted calls for the Secretary of Defense to resign,[186] and brought criticism on the President himself.[187] Although a number of enlisted personnel were convicted in connection with the abuse, members of Congress have pushed for more senior personnel to be held criminally liable.[188]

Meanwhile, the service academies remain in the spotlight. The Air Force Academy has continued to struggle with allegations of sexual assault. In June 2005, another cadet was court-martialed (and acquitted) on the basis of dubious evidence.[189] The process again raised questions about the Academy's ability to fairly investigate and prosecute sex crimes.[190] Later in 2005, the focus shifted to the allegations of religious bias and aggressive proselytizing.[191] And in 2006, a former quarterback of the Naval Academy's football team was charged with, but acquitted of, the rape of a fellow midshipman (although he was convicted of two lesser charges).[192] Whatever the issue of the moment, the academies will continue to receive close scrutiny.

These events—and others to come—will place tremendous pressure on court-martial convening authorities to satisfy demands for retribution. Some may choose to err on the side of caution—prosecuting anyone potentially connected with the scandal, whether or not that

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185 Edward Cody, *Iraqis Put Contempt for Troops on Display*, WASH. POST, June 12, 2004, at A1; Glenn Kessler, *At the Sea Island Summit, A Sea Change in U.S. Diplomacy*, WASH. POST, June 11, 2004, at A6.

186 James Barron, *Citing a 'Shamed America,' Gore Calls for Rumsfeld, Rice, Tenet, and 3 Others to Resign*, N.Y. TIMES, May 27, 2004, at 26.

187 *See generally* SEYMOUR HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2003).

188 Steven Lee Myers & Eric Schmidt, *The Reach of War: Investigations; Wide Gaps Seen in U.S. Inquiries on Prison Abuse*, N.Y. TIMES, June 6, 2004, at 11. At least one senior U.S. commander was "reassigned" amid speculation that he was relieved in response to the scandal. Thomas E. Ricks & Bradley Graham, *U.S. Plans to Name a New Commander*, WASH. POST, May 25, 2004, at A1.

189 Erin Emery, *Jury: Cadet Should Get Reprimand for Sex with Fiancee*, DENV. POST, June 5, 2005, at C4.

190 *Id.* Kuster was convicted of committing an indecent act for having sex with his fiancée in a hotel room where other cadets were present. Kuster avoided confinement, but nevertheless has a federal conviction. In contrast, Kuster's fiancée received a reprimand, graduated from the Academy with distinction, and was commissioned as an Air Force officer. *See also* Dick Foster, *AFA Officer Raises Doubts of Fairness in Rape Trial*, ROCKY MTN. NEWS (Denver, Colo.), May 27, 2005, at 32A.

191 Mike Soraghan, *AFA Religion Debate Erupts in DC: House Democrats' Effort to Condemn Intolerance Leads to War of Words*, WASH. POST, June 21, 2005, at A5.

192 Bradley Olson & Andrea F. Siegel, *Mid Acquitted of Rape: Ex-Navy QB Is Convicted of Lesser Charges*, BALT. SUN, July 21, 2006, at 1A.

decision is supported by the evidence. In this environment, the lack of a truly independent probable cause hearing for military defendants will continue to cause injustice. It is more essential than ever that Congress remedy this flaw.

While the military justice system is likely no worse than its civilian counterparts at protecting the accused from unwarranted prosecution, "no worse" is not good enough. By amending Article 32, Congress can grant unsurpassed pretrial protection to the military defendant, and allow the military justice system to once again set the standard for justice and fairness. Such an improvement to the system will inspire the respect and confidence of those in and out of uniform. Americans—civilian and military—deserve no less.

FROM "SNEAK AND PEEK" TO "SNEAK AND STEAL": SECTION 213 OF THE USA PATRIOT ACT

*Brett A. Shumate**

I. INTRODUCTION

Section 213 of the USA PATRIOT Act (Patriot Act)[1] has brought to light the existence of law enforcement tools about which few people were concerned before the attacks on September 11, 2001. This provision has also been a lightning rod for criticism on Fourth Amendment grounds because it explicitly authorizes two types of delayed-notification searches: "sneak and peek" and "sneak and steal" searches.[2] Unfortunately, the War on Terrorism has highly politicized the debate about these law enforcement tools. What before were seen as uncontroversial criminal law tools are now seen as a threat to civil liberties because of the current context.[3]

Delayed-notification searches are aptly described as covert or secret searches, surreptitious searches, and most deliberately—sneak-and-peek searches.[4] These warrants allow a law enforcement agent to "enter, look around, photograph items and leave without seizing anything and without leaving a copy of the warrant."[5] Agents often perform the search

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1 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act] (codified in scattered sections of the U.S.C.).

2 *See* Mary DeRosa, *"Sneak and Peek" Search Warrants: A Summary*, *in* PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT 101, 101 (Stewart A. Baker & John Kavanaugh eds., 2005) [hereinafter PATRIOT DEBATES].

3 *See* Heather MacDonald, *Sneak-and-Peek in the Full Light of Day*, *in* PATRIOT DEBATES, *supra* note 2, at 102, 102–03 (arguing that anti-Patriot Act demagogues use rhetorical techniques to attack section 213). The intersection of national security and civil liberties not only politicizes the debate but also triggers arguments related to the Executive's deference in matters related to national security. *See* Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, 18 N.Y. INT'L L. REV. 1, 68–69 (2005).

4 Kevin Corr, *Sneaky but Lawful: The Use of Sneak and Peek Search Warrants*, 43 U. KAN. L. REV. 1103, 1103 (1995). One of the earliest articles to address surreptitious searches is John Kent Walker, Jr., Note, *Covert Searches*, 39 STAN. L. REV. 545 (1987).

5 Corr, *supra* note 4. Drug investigations, specifically those involving methamphetamine labs, have been the area in which surreptitious searches have been consistently used because agents can maintain the secrecy of the investigation while gaining intelligence or confirming suspicions. *Id.* Surreptitious searches gained prevalence during the war on drugs in the 1980s. *See* Robert M. Duncan, *Surreptitious Search Warrants and the USA PATRIOT Act: "Thinking Outside the Box but Within the Constitution," or a Violation of Fourth Amendment Protections?*, 7 N.Y. CITY L. REV. 1, 9–10

when the owner is absent, observe the interior, and confirm any suspicions about possible illegal activity.[6] Agents will then seek a conventional search warrant to return to the property and seize evidence of criminal activity. In contrast with conventional search warrants, sneak-and-peek search warrants dispense with the notice and receipt requirements, at least temporarily. The dispensation of these requirements maintains the secrecy of the search and investigation.[7]

In some situations, section 213 of the Patriot Act also authorizes law enforcement agents to seize evidence during a sneak-and-peek search.[8] This type of search has been called a sneak-and-steal search,[9] and rarely has been discussed in the academic literature and case law. However, its use will likely increase because section 213 explicitly authorizes this type of search.[10] In fact, the Department of Justice has reported that during the twenty-two month period between April 1, 2003, and January 31, 2005, federal agents used this provision 108 times to execute court-approved delayed-notification search warrants, representing 0.2% of search warrants sought by law enforcement.[11] Of these 108 delayed-notification searches, forty-five were sneak-and-steal searches.[12] Sneak-and-steal searches thus constituted 21% of searches pursuant to section 213 during this period. Courts should expect to see these warrants, and challenges to them, with increasing frequency.[13]

(2004) (stating that by 1984 the DEA had persuaded federal judges to issue at least thirty-five surreptitious search warrants); *see also* United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Freitas (*Freitas II*), 856 F.2d 1425 (9th Cir. 1988); United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

[6] Paul V. Konovalov, Note, *On a Quest for Reason: A New Look at Surreptitious Search Warrants*, 48 HASTINGS L.J. 435, 443 (1997).

[7] *Id.* at 442; *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.12(b), at 816 (4th ed. 2004) (noting that surreptitious entry warrants authorize agents to "enter certain premises and look around (but not take anything) during the occupant's absence"); Corr, *supra* note 4 (noting that there is one exception to the rule that nothing is usually seized during the search).

[8] *See* Corr, *supra* note 4, at 1114 (noting the existence of sneak-and-steal search warrants).

[9] *Id.*

[10] USA PATRIOT Act § 213, 18 U.S.C. § 3103a (Supp. III 2003).

[11] Press Release, U.S. Dep't of Justice, Department of Justice Releases New Numbers on Section 213 of the Patriot Act (Apr. 4, 2005), http://www.usdoj.gov/opa/pr/2005/April/ 05_opa_160.htm (last visited Oct. 22, 2006).

[12] *Id.* In the eighteen-month period after the enactment of the Patriot Act, the Justice Department used this provision 248 times to delay notification. Duncan, *supra* note 5, at 4.

[13] Duncan, *supra* note 5, at 4–5 ("It stands to reason that the use of surreptitious search warrants in conjunction with conventional search warrants could increase in the coming years, as more law enforcement personnel learn of surreptitious searches and their potential benefits.").

This article will explore the distinction between these two types of surreptitious searches and the criticism that has been leveled against section 213. First, however, Part II of this article will discuss the Patriot Act generally and section 213 specifically. Part II will conclude by describing two of the leading criticisms against section 213—namely, that it grants radical new authority to the government to conduct secret searches and lowers standards for surreptitious searches.

Part III will survey the historical development of delayed-notification search warrants before the passage of the Patriot Act. Part III.A will discuss the pre-Patriot Act sneak-and-peek searches in the Ninth, Second, and Fourth Circuits. Part III.B will discuss the few pre-Patriot Act sneak-and-steal searches.

Part IV of this article will argue that both criticisms of section 213 are unsustainable given the historical development of surreptitious searches. First, Part IV.A will show that section 213 did not grant radical new authority to the government but actually codified majority practice with respect to sneak-and-peek searches. Second, Part IV.B will show that section 213 did not lower the execution standards of surreptitious search warrants but created standards where none previously existed. This part will conclude that section 213 of the Patriot Act protects Fourth Amendment interests by creating statutory standards and recognizing the distinction between sneak-and-peek and sneak-and-steal searches that courts have been unable or unwilling to recognize. Not only did section 213 acknowledge the distinction between the two types of searches, but it also recognized that sneak-and-steal searches should require an additional showing of necessity to authorize seizure in connection with a surreptitious search.

Part V will explain several proposed modifications to section 213. Part V.A will discuss congressionally proposed modifications and conclude that they are modest gains for the government that do little to restrict the use of surreptitious searches. Part V.B will suggest two modifications to the requirements for a sneak-and-steal search. In addition to the requirement that the government show "reasonable necessity for the seizure," the government should also be required to show that the seizure (1) is not intended to induce the target to illegal conduct and (2) will not disclose the search.

Finally, Part VI will conclude the discussion by summarizing the important points and recommending that the proposed modifications be accepted.

II. THE USA PATRIOT ACT

Congress enacted and President Bush signed the Patriot Act on October 26, 2001, in response to the attacks on the United States by

Islamic terrorists on September 11, 2001.[14] The Patriot Act gave federal authorities "greater power to conduct surveillance within the United States for purposes of both preventing terrorism and monitoring the activity of foreign intelligence agents."[15] However, many of the Patriot Act's numerous provisions, like section 213, are not limited to national security and terrorism investigations. Although many provisions were subject to sunset in December 2005, section 213 was not.[16] Part II.A provides a broad overview of section 213's legislative history and text. Parts II.B and II.C discuss section 213's authorization of sneak-and-peek and sneak-and-steal searches, respectively. Part II.D outlines the main criticisms of section 213 that will guide the remainder of the article.

A. Section 213: Authority for Delaying Notice of the Execution of a Warrant

Section 213 of the Patriot Act amends 18 U.S.C. § 3103a to allow delay in the notification of search warrants.[17] The Justice Department argued that "the law governing delay in immediate notice of a search warrant [was] a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinder[ed] the investigation of many terrorism cases and other cases."[18] Prior to the Patriot Act, "there was no statutory authorization for clandestine searches of private premises in criminal investigations, although [the Foreign Intelligence Surveillance Act] permitted such searches for national security purposes."[19] The Justice Department sought to have delayed-notification search warrants analyzed under "the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage."[20] Section

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[14] ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 21 (D.D.C. 2003).

[15] *Id.* In addition to sneak-and-peek searches, the Patriot Act granted the government expanded authority to issue national security letters. For a discussion of national security letters, as amended by the Patriot Act, see Brett A. Shumate, *Thou Shalt Not Speak: The Nondisclosure Provisions of the National Security Letter Statutes and the First Amendment Challenge*, 41 GONZ. L. REV. 151, 157–58 (2006).

[16] DeRosa, *supra* note 2; Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 DENV. U. L. REV. 375, 399 (2002); Press Release, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales Calls on Congress to Renew Vital Provisions of the USA PATRIOT Act (Apr. 5, 2005), http://www.usdoj.gov/opa/pr/2005/ April/05_ag_161.htm (last visited Oct. 22, 2006).

[17] USA PATRIOT Act § 213, 18 U.S.C. § 3103a (Supp. III 2003).

[18] Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1184 (2004) (quoting Attorney General Ashcroft's Draft Anti-Terrorism Package (Anti-Terrorism Act of 2001) Section-by-Section Analysis § 352) (internal quotation marks omitted).

[19] DeRosa, *supra* note 2.

[20] CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, THE USA PATRIOT ACT: A LEGAL ANALYSIS 65 (2002).

213, therefore, "resolves this problem by establishing a statutory, uniform standard for all such circumstances."[21]

The first sentence of section 213 recognizes both sneak-and-peek and sneak-and-steal searches by stating that notice may be delayed for any warrant "to search for and seize any property."[22] These warrants are not limited to terrorism cases; delayed-notification searches are allowed for any federal investigation.[23] Section 213 states:

> DELAY.—With respect to the issuance of any warrant or court order under this section, or any other rule of law, to *search for and seize any property* or material that constitutes evidence of a criminal offense in violation of the laws of the United States, *any notice required, or that may be required, to be given may be delayed if*—
> (1) the court finds *reasonable cause* to believe that providing immediate notification of the execution of the warrant may have an *adverse result* (as defined in section 2705);
> (2) the warrant prohibits the *seizure of any tangible property*, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds *reasonable necessity for the seizure*; and
> (3) the warrant provides for the giving of such notice *within a reasonable period of its execution*, which period may thereafter be extended by the court for good cause shown.[24]

B. Section 213: Sneak-and-Peek Searches

Section 213 specifically recognizes sneak-and-peek searches by authorizing the delay of the notice of a search. In a sneak-and-peek search, agents may "secretly enter, either physically or virtually; conduct a search, observe, take measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence."[25] In addition to finding probable cause for the search,[26] a court must find "reasonable cause to believe" that immediate notification will have an adverse result.[27] As set forth in 18 U.S.C. § 2705, an adverse result includes the endangering of the life or physical safety of an individual, flight from prosecution, destruction of or

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[21] Attorney General Ashcroft's Draft Anti-Terrorism Package (Anti-Terrorism Act of 2001) Section-by-Section Analysis, § 352, http://leahy.senate.gov/press/200109/092001.html.

[22] USA PATRIOT Act § 213.

[23] DeRosa, *supra* note 2.

[24] USA PATRIOT Act § 213 (emphasis added).

[25] DOYLE, *supra* note 20, at 62–63.

[26] Howell, *supra* note 18, at 1185.

[27] USA PATRIOT Act § 213(1).

tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardizing an investigation or unduly delaying a trial.[28] A judge must also prohibit the seizure of tangible property to permit a sneak-and-peek search.[29]

Both sneak-and-peek and sneak-and-steal searches under section 213 are closely related to the issuance and execution of conventional search warrants under Rule 41 of the Federal Rules of Criminal Procedure.[30] Excluding the notice requirement, Rule 41 remains applicable to these searches. A federal law enforcement agent may obtain a search warrant by appearing before a magistrate or judge and making a showing of probable cause that the search will reveal evidence of a crime, contraband, fruits of a crime, property designed for or intended to be used for committing a crime, or a person to be arrested or unlawfully restrained.[31] The officer must identify the "person or property to be searched" and "any person or property to be seized."[32] The magistrate or judge must issue the warrant if there is probable cause for the search.[33] Under conventional search warrants, the officer must then execute the warrant within ten days, during the daytime, unless the judge authorizes execution during the nighttime.[34] After executing the warrant, the officer must take an inventory of any property seized. He must then give a copy of the warrant and a receipt for the seized property to the person from whom the property was taken or leave a copy of the warrant and receipt at the place where the property was taken.[35] The executing officer must then promptly return the warrant and a copy of the inventory to the magistrate or judge.[36]

Section 213's modification of Rule 41's notice requirement is the heart of a surreptitious search. For a sneak-and-peek search, notice must be provided "within a reasonable period of [the search's] execution."[37] One proposal that would have required a seven-day period for delayed notice within section 213 was opposed by the Department of Justice and ultimately rejected by the Senate.[38] The Justice Department recognized, however, that the courts typically only authorize delay for

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28 18 U.S.C. § 2705(a)(2)(A)–(E) (2000); *see also* DeRosa, *supra* note 2; Howell, *supra* note 18.

29 USA PATRIOT Act § 213(2).

30 FED. R. CRIM. P. 41.

31 *Id.* at 41(b)–(c).

32 *Id.* at 41(e)(2).

33 *Id.* at 41(d).

34 *Id.* at 41(e)(2)(B).

35 *Id.* at 41(f)(3).

36 *Id.* at 41(f)(4); *see also* Konovalov, *supra* note 6, at 441–42.

37 USA PATRIOT Act § 213(3), 18 U.S.C. § 3103a (Supp. III 2003).

38 Howell, *supra* note 18, at 1188.

seven days.[39] Additionally, section 213 authorizes court-approved extensions "for good cause shown."[40]

C. Section 213: Sneak-and-Steal Searches

In contrast to section 213's authorization of sneak-and-peek searches, section 213's authorization of sneak-and-steal searches is relatively novel.[41] As Representative C.L. "Butch" Otter has argued, the Patriot Act and prior law part ways in that "officers may seize tangible property using a covert warrant under the Patriot Act without leaving an inventory of the property taken."[42] Indeed, none of the leading Second or Ninth Circuit cases addressed seizure in conjunction with a sneak-and-peek search warrant.[43] At least one federal court has recognized that section 213 authorizes sneak-and-steal searches by stating that "these new warrants may also authorize the seizure of tangible property."[44]

To clarify, a sneak-and-peek search warrant can only be issued if the judge prohibits the seizure of tangible property during the search.[45] A judge can convert a sneak-and-peek search into a sneak-and-steal search that authorizes the seizure of tangible property during the search only upon an additional showing of "reasonable necessity for the seizure."[46] This requirement for an additional showing of necessity is a higher burden than that which law enforcement must meet for seizures under a conventional search warrant.[47] Finally, the same post-search notice requirement for sneak-and-peek searches is also applicable to sneak-and-steal searches;[48] however, when agents perform a sneak-and-steal search they can delay notice twice. "First, the provision allows law

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[39] *Id.* at 1188–89; *see also* United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Freitas (*Freitas II*), 856 F.2d 1425 (9th Cir. 1988); United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

[40] USA PATRIOT Act § 213(3).

[41] *See* James B. Perrine, *The USA PATRIOT Act: Big Brother or Business as Usual?*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 163, 171 (2005) (noting that the "reasonable necessity standard for seizure of property under a delayed notification warrant is a feature of section 213 not readily evident from a review of case law").

[42] C.L. "Butch" Otter & Elizabeth Barker Brandt, *Preserving the Foundation of Liberty*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261, 272 (2005).

[43] *Pangburn*, 983 F.2d 449; *Villegas*, 899 F.2d 1324; *Freitas II*, 856 F.2d 1425; *Freitas I*, 800 F.2d 1451.

[44] ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 24 (D.C. Cir. 2003).

[45] USA PATRIOT Act § 213(2).

[46] *Id.* During the congressional debate regarding section 213, the Bush Administration sought the authority to conduct sneak-and-steal searches without an additional showing of necessity, but Congress rejected this proposal. Howell, *supra* note 18, at 1188.

[47] Perrine, *supra* note 41, at 172.

[48] USA PATRIOT Act § 213.

enforcement to delay notifying the person whose property was searched that a warrant has been executed; and second, should law enforcement seize some of that person's property, the government may delay providing an inventory and notice of what was actually taken."[49]

D. Criticisms of Section 213

Critics of the Patriot Act make two principal arguments in opposition to section 213.[50] Both criticisms relate to the extent to which section 213 allegedly expanded governmental authority to conduct surreptitious searches and lowered the execution standards of surreptitious search warrants.

First, critics argue that section 213 grants the government a "radical new power"[51] and "expand[s] government powers."[52] The American Civil Liberties Union ("ACLU") has argued that "[n]ow, the government can secretly enter your home while you're away . . . rifle

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[49] Nathan H. Seltzer, *When History Matters Not: The Fourth Amendment in the Age of the Secret Search*, 40 CRIM. L. BULL. 105, 113 (2004).

[50] Critics of section 213, of course, make many other arguments. They argue that section 213 allows the government to unilaterally conduct secret searches without ever providing notice to the target of the search. MacDonald, *supra* note 3, at 103–04. The ACLU suggests that the government can unilaterally conduct secret searches because "you may never know what the government has done." *Id.* at 103. This argument ignores the text of section 213: a judge can only issue a section 213 warrant if he finds "reasonable cause" to delay notice of the search. USA PATRIOT Act § 213. Moreover, section 213 explicitly requires the government to give the target of the search notice "within a reasonable time." *Id.*

Moreover, critics decry the fact that section 213 is not limited to terrorism cases. James X. Dempsey, *Sneak-and-Peek in the Full Light of Day: Reply to MacDonald, in* PATRIOT DEBATES, *supra* note 2, at 105, 106. James X. Dempsey argues that section 213 should be limited to terrorism cases because before the Patriot Act the government had the authority to conduct secret searches in international terrorism investigations through the Foreign Intelligence Surveillance Act. *Id.* Citizens should be afraid, he argues, because this authority is "available for all federal offenses," allowing federal investigators to enter one's home while asleep to investigate "student loan cases." *Id.* The Otter Amendment, which was passed overwhelmingly by the House, would bar funding to be used to support section 213 because Representative Otter has argued that section 213 "eliminates the time limits for notification under prior federal law, makes judicial review of the necessity of delayed notification perfunctory and so loosens the standard for delayed notification as to render it meaningless." Otter & Brandt, *supra* note 42, at 271; *see also* Howell, *supra* note 18, at 1185 (citing 149 CONG. REC. H7289-93 (daily ed. July 22, 2003) (amendment offered by Rep. Otter)). Otter has also objected to the fact that section 213 may be used in nonterrorism-related cases. Otter & Brandt, *supra* note 42. Both Mr. Dempsey and Representative Otter ignore the fact that pre-Patriot Act uses of surreptitious searches were not limited to terrorism cases, but took place primarily in drug cases. Limiting section 213 to terrorism cases would restrict investigative authority to limits that were unknown before the Patriot Act.

[51] Heather MacDonald, *Sneak-and-Peek in the Full Light of Day: Response to Dempsey, in* PATRIOT DEBATES, *supra* note 2, at 110, 110.

[52] Dempsey, *supra* note 50, at 105.

through your personal belongings . . . download computer files . . . and seize any items at will. . . . And, because of the Patriot Act, you may never know what the government has done."[53] Richard Leone, president of the Century Foundation, argues that the Patriot Act "allows the government to conduct secret searches without notification" and that the Act is "arguably the most far-reaching and invasive legislation passed since the Espionage Act of 1917 and the Sedition Act of 1918."[54]

Second, critics argue that "[t]he Patriot Act's 'sneak and peek' provision is about *lowering standards* for sneak and peek warrants, not imposing uniformity."[55] Even though prior case law had required a seven-day post-search notice, section 213 "overturn[ed] the seven-day rule and instead allow[ed] notice of search warrants to be delayed for an *indefinite* 'reasonable time.'"[56] Moreover, Representative Otter argues that, in authorizing sneak-and-steal warrants, the Patriot Act breaks from prior case law to allow officers to seize tangible property using a covert warrant.[57] He believes that the nonthreatening nature of section 213 makes it "more dangerous to the cause of preserving liberty" because it "has the potential to become the insidious mechanism of steady but discernable erosion in the foundation of our freedoms."[58] Likewise, the ACLU argues that section 213 "expands the government's ability to execute criminal search warrants (which need not involve terrorism) and seize property without telling the target for weeks or months."[59] Due to this lowering of standards, the critics contend, the government has the authority to conduct secret searches essentially without restraint.

The remainder of this article will examine whether these criticisms are valid by exploring the historical development of delayed-notification search warrants. After surveying this history in Part III, Part IV will argue that both of these criticisms are unsupportable given the historical development of such search warrants.

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53 MacDonald, *supra* note 3, at 103.

54 *Id.*

55 ACLU, Myths and Realities about the Patriot Act, http://action.aclu.org/reformthepatriotact/facts.html (last visited Oct. 22, 2006).

56 *Id.*

57 Otter & Brandt, *supra* note 42.

58 *Id.* at 273–74.

59 ACLU, *The Sun Also Sets: Understanding the PATRIOT Act "Sunsets,"* http://action.aclu.org/reformthepatriotact/sunsets.html (last visited Oct. 22, 2006).

III. HISTORICAL DEVELOPMENT OF DELAYED-NOTIFICATION SEARCH WARRANTS

A. Pre-Patriot Act Sneak-and-Peek Searches

Only three federal circuits have addressed delayed-notification search warrants: the Ninth Circuit,[60] the Second Circuit,[61] and the Fourth Circuit.[62] Their approaches to the issue are discussed below.

1. The Ninth Circuit: *United States v. Frietas*

United States v. Frietas (*Freitas I*) was the first circuit court case to address the issue and remains the seminal case in the area of delayed-notification search warrants.[63] In 1984 an anonymous informant contacted the Drug Enforcement Agency ("DEA") and revealed that Freitas was running a methamphetamine lab in his home in California.[64] The DEA applied for a surreptitious entry warrant for Freitas's home because the agents sought to determine the status of the methamphetamine lab.[65] The magistrate issued the warrant using a conventional warrant form but struck two items: (1) "the description of the property to be seized" and (2) "the requirement that copies of the warrant and an inventory of the property taken were to be left at the residence."[66] The warrant authorized the agents "to enter the home while no one else was there, look around, and leave without removing anything."[67] The warrant, thus, had no notice requirement.[68] The agents later applied for an extension of the original warrant, after which the agents seized various evidence at Freitas's home.[69]

Considering whether the surreptitious entry impermissibly tainted the later warrant, the district court "found that surreptitious entry warrants are neither valid under Rule 41 . . . nor constitutionally permissible."[70] The court then "held that the lack of notice violated both

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[60] United States v. Freitas (*Freitas II*), 856 F.2d 1425 (9th Cir. 1988); United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

[61] United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990).

[62] United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

[63] Corr, *supra* note 4, at 1104–05.

[64] *Freitas I*, 800 F.2d at 1452.

[65] *Id.* at 1453.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1453, 1456.

[69] *Id.* at 1453.

[70] *Id.* at 1454.

Rule 41 and the Fourth Amendment."[71] The Ninth Circuit reversed and held that the district court's holding conflicted with the Supreme Court's opinion in *United States v. New York Telephone Co.*[72] In that case, the Court construed Rule 41's definition of property as not being limited to tangible items and held that "seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b)."[73] The surreptitious search in *Freitas I* was a search of intangible, not tangible property; "[t]he intangible property to be 'seized' was information regarding the 'status of the suspected clandestine methamphetamine laboratory.'"[74] Even though the agents did not comply with Rule 41,[75] their noncompliance did not render the evidence inadmissible unless the agents intentionally and deliberately disregarded Rule 41 or the search violated the Fourth Amendment.[76]

Even though the Ninth Circuit agreed with the district court that the warrant failed to comply with Rule 41 or the Fourth Amendment, the court upheld the search under the good-faith exception to the exclusionary rule established in *United States v. Leon.*[77] Analogizing to *Massachusetts v. Sheppard,*[78] the court found that the agents' reliance on the warrant was objectively reasonable.[79] The court then remanded the case to the district court to make findings of fact critical to the agents' invocation of the good-faith exception.[80] In sum, the Ninth Circuit in *Freitas I* held that the warrant violated both Rule 41 and the Fourth Amendment but reversed the district court's conclusion that the agents did not satisfy the good-faith exception to the exclusionary rule in *Leon.*

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71 *Id.*

72 *Id.* at 1455.

73 *Id.* (citing United States v. New York Tel. Co., 434 U.S. 159, 170 (1977)) (internal quotation marks omitted).

74 *Id.*

75 *Id.* at 1455–56.

76 *Id.* at 1456.

77 468 U.S. 897 (1984).

78 468 U.S. 981 (1984).

79 *Freitas I*, 800 F.2d at 1457.

80 *Id.* Judge Poole's dissent in *Freitas I* is strikingly aggressive in its defense of the Fourth Amendment and in its disdain for surreptitious searches. The dissent accused the majority of "distort[ing] history, confound[ing] precedent, and shun[ning] the clear intent of the Fourth Amendment to the Constitution." *Id.* at 1458 (Poole, J., dissenting). Judge Poole viewed surreptitious searches as dangerous, offensive, and violative of the letter and spirit of the Constitution, and as ignoring the precise requirements of Rule 41. *Id.* According to the dissent, the majority gave law enforcement "carte blanche authority" to "make stealthy entry at night into the private residence of a citizen." *Id.* Rejecting any notion of good faith, the dissent believed that "it constituted free-roaming, unsupervised license to cast entirely aside all vestige of the right to privacy which under our Constitution over the decades has been held the due of us all." *Id.* Thus, surreptitious searches "constitute[] a dangerous and radical threat to civil rights and to the security of all our homes and persons." *Id.*

In *United States v. Freitas (Freitas II)*, the Ninth Circuit held that there was a sufficient basis to conclude that the agents acted reasonably in reliance on the warrant.[81] Rule 41 did not require suppression because the agents had not acted intentionally or deliberately with subjective bad faith, but instead had acted in good faith by consulting with an assistant U.S. attorney and magistrate.[82] The court noted that a violation is fundamental only where it is *clearly* unconstitutional under Fourth Amendment standards.[83] It also reiterated its holding in *Freitas I* that the surreptitious nature of the search did not violate the Fourth Amendment—the warrant was constitutionally defective only because it failed to provide for post-search notice within seven days.[84] "The constitutional infirmity did not emanate from the surreptitious nature of the entry or even from the fact that the warrant failed to provide for contemporaneous notice. Rather, it was based on a distinction between post-search notice and no notice."[85]

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[81] 856 F.2d 1425 (9th Cir. 1988).

[82] *Id.* at 1432.

[83] *Id.* at 1432–33.

[84] *Id.* at 1433. Shortly after *Freitas II*, the Ninth Circuit used the same reasoning in *United States v. Johns*, 948 F.2d 599 (9th Cir. 1991). In *Johns*, the FBI obtained a sneak-and-peek search warrant to gain surreptitious entry into a storage unit that allegedly contained a methamphetamine lab. The warrant made no provision for notification, and the officers intended to notify the owners only after an arrest had been made or when they decided to curtail their surveillance; in effect, the agents intended to put off notice indefinitely. Relying on *Freitas II*, the court held that the failure to give notice of the search was not a fundamental violation of Rule 41. *Id.* at 607. However, because the violation prejudiced the defendant, the evidence should have been suppressed but was not because the search fell within the good-faith exception to the exclusionary rule. *Id.* Even though the surreptitious search violated the Fourth Amendment because of the agents' failure to provide notice within a reasonable time, the good-faith exception did not require suppression of the evidence because the agents' objectively believed that the search was justifiable. *Id.* at 605 n.4. The court also reiterated that "warrants issued after *Freitas I* should *not* issue without a provision for seven-day notice absent a strong showing of necessity." *Id.* at 606. From now on, any warrant issued without a seven-day notice without a strong showing of necessity "will render inapplicable the good faith exception." *Id.*

[85] *Freitas II*, 856 F.2d at 1433 (citations omitted). Consequently, five conclusions can be made from examining the Ninth Circuit cases. First, surreptitious searches are unconstitutional when they do not provide for notice within a reasonable time after the search. Second, a reasonable time after the search must not exceed seven days. Third, the good-faith exception to the exclusionary rule allows the admissibility of evidence gained from a surreptitious search where post-search notice is provided within seven days after the search. Fourth, strict compliance with Rule 41 is not required—the real fight is in the Fourth Amendment analysis because evidence is only suppressed under Rule 41 where there is a fundamental violation, and there will only be a fundamental violation where there is a violation of the Fourth Amendment. Fifth, a search for intangibles is permissible under the Fourth Amendment and Rule 41.

2. The Second Circuit: *United States v. Villegas* and *United States v. Pangburn*

The Second Circuit's approach differs from the Ninth Circuit's because the Second Circuit roots the post-search notice requirement in Rule 41 and not the Fourth Amendment.[86] In *United States v. Villegas*, the DEA applied for a warrant to search a farm in New York where the agents believed the occupants were running a cocaine factory.[87] The affidavit stated that covert physical surveillance of the farm was difficult and that other investigatory techniques were insufficient.[88] The agents did not seek to seize the evidence on the premises but sought to conduct a search to photograph evidence without providing notice of the search for seven days.[89] The agents executed the warrant at night, took photographs, and seized nothing.[90] The judge granted extensions so the agents could continue their investigation without providing notice.[91] The agents then obtained another warrant to seize the evidence.[92]

On appeal, the defendant argued that the surreptitious search and delay in receiving notice violated Rule 41 and the Fourth Amendment.[93] First, the court rejected the defendant's Rule 41 argument because "courts must be deemed to have inherent power to issue a warrant when the requirements of [the Fourth] Amendment are met."[94] Second, the court rejected the defendant's particularity argument because *New York Telephone* made clear that the Fourth Amendment authorized the search and seizure of intangible property.[95] The court found that the warrant met the particularity requirement because the agents particularly described the place and items to be searched at the farmhouse.[96]

The court next turned to the defendant's argument that the warrant was unconstitutional because of the covert entry and because notice of the entry was not given until after his arrest.[97] The court began its analysis by citing *Dalia v. United States*[98] and *Katz v. United States*[99]

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86 *Compare* United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993) *with* United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

87 899 F.2d 1324, 1330 (2d Cir. 1990).

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.* at 1331.

93 *Id.* at 1332, 1334.

94 *Id.* at 1334.

95 *Id.* at 1334–35.

96 *Id.* at 1335–36.

97 *Id.* at 1336.

98 441 U.S. 238 (1979).

and noting that "[c]ertain types of searches or surveillances depend for their success on the absence of premature disclosure" and that where "nondisclosure of the authorized search is essential to its success, neither Rule 41 nor the Fourth Amendment prohibits covert entry."[100] Because the *Dalia* Court "described the contention that covert entries are unconstitutional for their lack of notice as frivolous," the court concluded that a covert entry without contemporary notice did not violate the Fourth Amendment.[101]

The court next turned to the safeguards required by the Fourth Amendment. Comparing covert searches to conventional searches and Title III[102] wiretaps, the court found surreptitious searches to be the least intrusive because there is no physical seizure of property. A surreptitious search only deprives the owner of privacy, whereas a conventional search deprives the owner of both his privacy and his property. Surreptitious searches are also less intrusive than wiretaps because they have a short duration, focus specifically on items sought in the warrant, and produce information from a specific moment in time, while wiretaps are ongoing and indiscriminate.[103]

The Second Circuit also required two safeguards. First, the officers must make "a showing of reasonable necessity for the delay."[104] Second, the officers must give the owner notice of the search within a reasonable time after the covert entry.[105] Citing *Freitas I*, the court noted that what constitutes a reasonable time will vary on the circumstances of each case and agreed with *Freitas I* that it should not exceed seven days.[106] Officers may seek extensions; however, they cannot be granted solely on

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[99] 389 U.S. 346 (1967).

[100] *Villegas*, 899 F.2d at 1336. *Dalia* held that "[t]he Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment." *Id.* (quoting *Dalia*, 441 U.S. at 248). *Katz* held that "when covert entry and nondisclosure are appropriate, Rule 41 does not require that the owner of the property be given advance or contemporary notice of the entry." *Id.* (citing *Katz*, 389 U.S. at 355 n.16 (1967)); *cf.* Saad Gul, *The Bells of Hell: An Assessment of the Sinking of ANR General Belgrano in the Context of the Falkands Conflict*, 18 N.Y. INT'L L. REV. 81, 114 (2005) (noting that international and U.S. law require that the actions must be judged in light of information contemporaneously available, and not with the benefit of hindsight).

[101] *Villegas*, 899 F.2d at 1336 (citing *Dalia*, 441 U.S. at 247) (internal quotation marks omitted).

[102] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (2000 & Supp. III 2003).

[103] *Villegas*, 899 F.2d at 1336–37.

[104] *Id.* at 1337.

[105] *Id.*

[106] *Id.*

the same basis as the first delay. Instead, the officers must make a fresh showing of the need for further delay.[107]

The Second Circuit further distinguished itself from the Ninth Circuit in *United States v. Pangburn*.[108] In *Pangburn*, DEA agents in New York and state law-enforcement agents in California were investigating a joint federal-state trafficking operation of chemicals used in the manufacture of methamphetamines. The California state agents obtained a surreptitious search warrant for a storage locker in California and sought to photograph any items located within the locker without providing notice or seizing the items.[109] The agents later obtained a second surreptitious search warrant and a conventional search warrant to seize the contraband found in the locker.[110]

The Second Circuit began its analysis by reviewing the Fourth Amendment, Rule 41, and the Supreme Court's holdings in *Katz* and *New York Telephone*.[111] The court next turned to the Ninth Circuit's holding in *Freitas I* and stated that "[d]espite the absence of notice requirements in the Constitution and in Rule 41, it stands to reason that notice [of] a surreptitious search must be given at some point after the covert entry."[112] The court noted that in *Villegas* it had followed *Freitas I* in requiring notice within a reasonable time not longer than seven days after the covert entry. Therefore, the court rejected the government's argument that the required notice was "merely a preferred procedure."[113]

The *Pangburn* court distinguished itself from the *Freitas I* court by noting that while the Ninth Circuit had held that the warrant was constitutionally defective for its failure to include a notice requirement, the *Villegas* court had made no such determination but had concluded that covert searches were less intrusive than conventional searches.[114] The court then noted that because "[t]he Fourth Amendment does not deal with notice of any kind," the court "preferred to root [the] notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment 'interests' concept developed by the *Freitas I* court."[115] Unlike the Fourth Amendment, Rule 41 actually discusses notice. Turning to the issue of whether Rule 41 should require

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[107] *Id.* at 1338; *see also* United States v. Ludwig, 902 F. Supp. 121 (W.D. Tex. 1995) (applying *Villegas* to a surreptitious search and finding that the agents acted in good-faith reliance on the warrant).

[108] 983 F.2d 449 (2d Cir. 1993).

[109] *Id.* at 450.

[110] *Id.* at 451.

[111] *Id.* at 453.

[112] *Id.* (emphasis omitted).

[113] *Id.* at 454.

[114] *Id.* at 454–55.

[115] *Id.* at 455.

the application of the exclusionary rule, the *Pangburn* court found there was no basis for suppression because there was no prejudice to the defendant, and the agents did not intentionally or deliberately disregard the notice requirement.[116] Thus, the conventional search warrant was properly issued on the basis of information gained through the surreptitious entries.[117]

3. The Fourth Circuit: *United States v. Simons*

The Fourth Circuit adopted the approach taken by the Second Circuit in 2000. In *United States v. Simons*, a CIA employee was internally investigated for downloading child pornography on his office computer.[118] The first search of Simons's computer took place when a supervisor, at his workstation, examined the computer.[119] A second search took place when the supervisor physically entered Simons's office to remove the hard drive and replace it with a copy.[120] A third search took place when the Federal Bureau of Investigation (FBI) applied for a surreptitious search warrant to search Simons's office and computer.[121] The judge issued the warrant but denied the surreptitious nature of the search—the agents were required to leave a copy of the warrant and a receipt for any property taken.[122] The agents executed the search warrant at night and copied the contents of the computer and other evidence but removed nothing from the office. The agents failed to leave a copy of the warrant or a receipt, and Simons did not learn of the search until forty-five days later.[123] The agents subsequently obtained another search warrant and seized evidence from Simons's office.[124]

Among other arguments, Simons argued that the third search violated the Fourth Amendment and Rule 41 because the agents did not leave a copy of the warrant or a receipt for the property taken.[125] The

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[116] *Id.*

[117] The Second Circuit's analysis differs from the Ninth Circuit's reasoning in several ways. First, the Second Circuit roots its notice requirement in Rule 41, while the Ninth Circuit roots its notice requirement in the Fourth Amendment. In the Second Circuit, notice is not a constitutional requirement, as the Ninth Circuit had concluded in *Freitas I*. Konovalov, *supra* note 6, at 457. Second, officers must make a showing of reasonable necessity for the delay. And third, post-search notice must only be received at some point after the covert entry, not necessarily within seven days.

[118] 206 F.3d 392, 395 (4th Cir. 2000).

[119] *Id.* at 396.

[120] *Id.* at 396–97.

[121] *Id.*

[122] *Id.* at 397.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 402.

court noted that the agents clearly violated Rule 41 by failing to provide notice but held that

> the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment [because it] does not mention notice, and the Supreme Court has stated that the Constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice.[126]

The court approvingly cited *Pangburn* and cited *Freitas I* only to contrast the Ninth Circuit's approach.[127] The Fourth Circuit thus aligned itself with the Second Circuit's approach in holding that surreptitious searches do not violate the Fourth Amendment.[128]

B. Pre-Patriot Act Sneak-and-Steal Searches

Unlike the frequent discussion of sneak-and-peek searches in prior case law, sneak-and-steal searches have had a much more limited treatment. In fact, only three federal cases have discussed them.[129] Unfortunately, courts were issuing sneak-and-steal warrants without recognizing the distinction between the searches authorized under such warrants and those authorized under sneak-and-peek warrants. The few cases involving sneak-and-steal searches before the Patriot Act did nothing to account for the greater intrusion entailed by sneak-and-steal searches. These courts simply approved the seizure in connection with the surreptitious search without recognizing the distinction between sneak-and-peek searches and sneak-and-steal searches. The historical development of sneak-and-steal searches is discussed to show that section 213 did not lower standards for surreptitious searches but actually created standards where none previously existed for sneak-and-steal searches. Moreover, section 213 recognizes the critical distinction between sneak-and-peek and sneak-and-steal searches and actually *raises* the required standards.

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126 *Id.* at 403 (citing Dalia v. United States, 441 U.S. 238, 247–48 (1979)).

127 *Id.*

128 Duncan, *supra* note 5, at 24.

129 *See, e.g.*, United States v. Miranda, 425 F.3d 953 (11th Cir. 2005); United States v. Heal, 972 F.2d 1345, 1992 WL 203884, at **1 (9th Cir. 1992) (unpublished table decision); United States v. Rollack, 90 F. Supp. 2d 263 (S.D.N.Y. 1999). Of course, there may in fact be additional cases in which courts authorized searches but the agents failed to provide notice. *See, e.g.*, DeArmon v. Burgess, 388 F.3d 609, 611 (8th Cir. 2004) ("According to appellants, the officers broke entry doors and locks on interior doors, damaged drywall and furniture, and seized a firearm, doorknobs and locks, photographs, personal papers, and jewelry. Also, according to appellants, the officers did not provide them with a copy of the search warrant and an itemized receipt for the seized property . . . ."). However, the three cases discussed here are the only cases that involve a surreptitious, or sneak-and-peek, search in which the court also authorized seizure in the warrant.

1. *United States v. Heal*

The first case to address a sneak-and-steal search without recognizing the greater Fourth Amendment interests was *United States v. Heal*, an unpublished opinion from the Ninth Circuit in 1992.[130] In *Heal*, the DEA obtained a surreptitious search warrant to enter a home where the agents believed the owner was engaged in methamphetamine manufacturing.[131] The warrant "permitted the agents to *seize* 'controlled substances' but not [drug] grow[ing] equipment."[132] The agents executed the warrant, but Heal's girlfriend thwarted the covert entry. The agents secured the home and obtained a conventional search warrant later in the day that allowed them to seize the marijuana-growing equipment.[133]

On appeal, Heal argued that the conventional search "warrant was illegal because it was based on the fruits of the poisonous first search warrant."[134] In a short opinion, the Ninth Circuit cited *Freitas I* and noted that "[a] surreptitious entry warrant may be valid if it adequately describes the property to be seized and if it includes a notice requirement."[135] Because the surreptitious search warrant listed the items to be seized and Heal was given notice within seven days of the entry, the surreptitious search warrant was valid.[136] The court never addressed the warrant's unique authorization of seizure in connection with the surreptitious search.

Heal is the first case to depart from previous surreptitious search cases.[137] Unlike *Freitas I* and *Pangburn*, which "authorized only a covert entry and search," *Heal* authorized "a covert taking of property."[138] The warrant authorized the agents to seize controlled substances found during the search.[139] One possible explanation for the court's authorization of a sneak-and-steal warrant is that "takings of contraband, and only contraband, may always be conducted during a covert entry search as long as the officers specifically ask for such limited seizure authority."[140] The court noted that "[b]ecause he could not lawfully possess it, a judicially authorized law enforcement 'taking' of it

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130 1992 WL 203884, at **1.

131 *Id.*

132 *Id.* (emphasis added).

133 *Id.*

134 *Id.* (internal quotation marks omitted).

135 *Id.*

136 *Id.*

137 Corr, *supra* note 4, at 1113.

138 *Id.* at 1114.

139 *Heal*, 1992 WL 203884, at **1.

140 Corr, *supra* note 4, at 1114.

does not offend any legitimate property interest."[141] However, the most likely explanation for the case is that it was based on a misreading of *Freitas I*—the Ninth Circuit had never before stated that a "surreptitious entry warrant may be valid if it adequately describes the property to be seized and if it includes a notice requirement."[142] *Freitas I* involved the seizure of intangible property, unlike the seizure of tangible property in *Heal*.[143]

2. *United States v. Rollack*

The Southern District of New York addressed the next case involving a sneak-and-steal search, which concerned the search of a prisoner's mail.[144] In *United States v. Rollack*, U.S. Bureau of Alcohol, Tobacco, and Firearms ("ATF") agents obtained a warrant to search *and seize* the defendant's mail because they believed he was using the mail to direct illegal gang activities.[145] The agents requested and were granted the authority to delay notice to avoid compromising the investigation.[146] "During the course of these intercepts, federal agents reviewed all of Rollack's incoming and outgoing mail and *copied or seized* six letters pursuant to the two warrants."[147] Here, the agents were not only authorized to execute a sneak-and-peek search, but also to seize the evidence. Although the defendant made many arguments to suppress the

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[141] *Id.*

[142] *Heal*, 1992 WL 203884, at **1 (citing United States v. Freitas (*Freitas I*), 800 F.2d 1451, 1456 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988)).

[143] *See* discussion *supra* notes 67–90 and accompanying text.

[144] United States v. Rollack, 90 F. Supp. 2d 263 (S.D.N.Y. 1999). A case that preceded *Rollack* was *United States v. Heatley*, in which the FBI obtained a sneak-and-peek warrant that authorized them "to examine and copy [the prisoner's] non-legal mail, both incoming and outgoing . . . and either to seize the contents or to return them to their original location—a 'sneak and peek' warrant." 41 F. Supp. 2d 284, 285 (S.D.N.Y. 1999). The case is unclear as to whether the agents were authorized to conduct a sneak-and-peek warrant to copy the mail and return the originals or whether the agents were authorized to sneak-and-steal the mail—in effect, not just to copy the mail but to seize it and prevent it from reaching its final destination. It appears that the agents conducted the search as if it was a sneak-and-peek warrant by merely copying the contents, even though they may have been authorized to seize the letters altogether. The seizure in the case thus seems to have been only that of intangible property through the copying of the letters, rather than the seizure of tangible property. Indeed, the court stated that "the only things that could be seized were statements contained in that correspondence," indicating that the warrant involved was actually one of the sneak-and-peek variety and the seizure being only of intangible property. *Id.* at 291. Either way, the case seems to be an odd one in that the defendant did not challenge the constitutionality of the warrant but argued that the warrant was simply overbroad and that the extension of the delay was improper. *Id.* at 285.

[145] *Rollack*, 90 F. Supp. 2d at 267.

[146] *Id.*

[147] *Id.* at 268 (emphasis added).

evidence, including an argument that Rule 41 was violated,[148] he did not challenge the authorization of the seizure in connection with the sneak-and-peek search. Like in *Heal*, the court in *Rollack* failed to recognize the distinction between sneak-and-peek and sneak-and-steal searches.

3. *United States v. Miranda*

In *United States v. Miranda*, a case involving perhaps the most brazen example of a sneak-and-steal search, DEA agents used a delayed-notification warrant to remove three pounds of methamphetamine from a residence "to make it appear that a burglary had been committed."[149] The agents staged the burglary because they "hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct."[150] On appeal, the court did not address the legality of the search because the government appealed the judgment of acquittal.[151] Because the search took place in August 2002, section 213 of the Patriot Act should have governed the issuance of the sneak-and-peek search warrant. Although seizure is permitted by the sneak-and-steal provision of section 213, the agents would have had to show reasonable necessity for the seizure. It is arguable whether a court would have found that staging a burglary would satisfy this burden.[152] Regardless, the agents in *Miranda* made no additional showing for the seizure beyond that required for the sneak-and-peek search. Even though this case arose after the Patriot Act, it provides further evidence that courts have failed to recognize the distinction between sneak-and-peek and sneak-and-steal searches.

In the cases discussed in this section, the government made no additional showing that seizure was necessary, as the Patriot Act requires. The courts' failure to recognize the distinction and to require an additional showing of necessity for the seizure is a major failing of these sneak-and-steal cases.

IV. REBUTTING THE CRITICISMS OF SECTION 213

Given the historical development of both sneak-and-peek and sneak-and-steal searches, both criticisms of section 213 are unsustainable. Part IV.A will first rebut the claim that section 213 grants radical new authority to the government. Part IV.B will then

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[148] *Id.* at 271.

[149] 425 F.3d 953, 956 (11th Cir. 2005).

[150] *Id.*

[151] *Id.* at 953.

[152] See discussion *infra* Part V.B for an argument that section 213 should be modified to prohibit the agents' conduct in *Miranda*.

rebut the claim that section 213 lowers standards for surreptitious searches.

A. Sneak-and-Peek in Section 213: Codifying Majority Practice

Section 213 does not grant radical new authority to the government. It is not, as one critic has put it, "a novel idea dreamed up by the Bush Administration and the Ashcroft Justice Department."[153] Far from creating radical new power, section 213 actually codifies majority practice regarding surreptitious searches and provides uniform statutory standards. "[F]or over a decade before passage of the USA PATRIOT Act, courts had sanctioned the use of sneak-and-peek warrants, and their use was, if not frequent, fairly routine."[154] Surreptitious searches were routinely used in drug cases throughout the 1980s and '90s.[155] The argument by some that "[s]ection 213 of the PATRIOT Act greatly expands what already was constitutionally questionable authority for delayed notification of the execution of search warrants" is simply not true with respect to sneak-and-peek searches.[156] Rather, Congress's entry into the field of surreptitious searches was an answer to the call for it to provide guidance in this area.[157]

In substance, section 213 has been "[c]haracterized as a codification of the Second Circuit decision"[158] and favors the Second Circuit's approach more than the Ninth Circuit's in several ways. First, like the Second Circuit's requirement that officers make a showing of "reasonable necessity for the delay,"[159] section 213 authorizes a sneak-and-peek

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[153] Howell, *supra* note 18; *see also* Beryl A. Howell, *Surveillance Powers in the USA PATRIOT Act: How Scary are They?*, 76 PENN. B. ASS'N Q. 12, 19 (2005).

[154] Howell, *supra* note 153.

[155] *See, e.g.*, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Freitas (*Freitas II*), 856 F.2d 1425 (9th Cir. 1988); United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988); *see also* MacDonald, *supra* note 3, at 103 (noting that "[f]or decades, federal courts have allowed investigators to delay notice of a search in drug cases, organized crime, and child pornography, for the same reasons as in section 213").

[156] Otter & Brandt, *supra* note 42, at 267. However, this same argument may be true with respect to sneak-and-steal searches. *See infra* Part IV.B.

[157] Howell, *supra* note 153 ("From a civil liberties perspective, rather than allow the continued expansion of exclusionary rule exceptions, it is preferable to provide courts with clear guidelines for use of the sneak and peek procedure—and that is what the USA PATRIOT Act provided."); Perrine, *supra* note 41, at 172 (arguing that "Congress's involvement in this area is preferable to a case-by-case modification of Rule 41 across the different circuits").

[158] DOYLE, *supra* note 20, at 65 (citing 147 CONG. REC. H7197 (daily ed. Oct. 23, 2001)).

[159] *Villegas*, 899 F.2d at 1337.

search where there is "reasonable cause" for the delay.[160] Second, like the Second Circuit's requirement that the officers provide notice within a reasonable time,[161] section 213 also requires notice within a reasonable time.[162] Third, like the Second Circuit's recognition that officers may seek extensions for delaying notice,[163] section 213 also authorizes extensions for "good cause shown."[164] Therefore, section 213 did not create radical new authority, but simply codified the majority practice regarding sneak-and-peek searches.

B. Sneak-and-Steal in Section 213: Creating Standards Where None Previously Existed

Section 213 does not lower standards for the issuance of surreptitious searches but actually creates standards where none previously existed.[165] Where courts failed to recognize the distinction between sneak-and-peek and sneak-and-steal searches,[166] section 213 not only recognizes the distinction but also requires an additional showing to authorize a sneak-and-steal search.[167] In this respect, section 213 actually *raises* standards for surreptitious searches.

For a sneak-and-peek search, section 213 requires the government to show that there is *"reasonable cause* to believe that providing immediate notification of the execution of the warrant may have an *adverse result."*[168] A sneak-and-peek search warrant would likely be issued in the case where the FBI is investigating a chemical engineering student who has communicated with extremists in Yemen about a local

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[160] USA PATRIOT Act § 213(1), 18 U.S.C. § 3103a (Supp. III 2003).

[161] *Villegas*, 899 F.2d at 1337.

[162] USA PATRIOT Act § 213(3).

[163] *Villegas*, 899 F.2d at 1338.

[164] USA PATRIOT Act § 213(3).

[165] For an argument that the sneak-and-steal provision is blatantly unconstitutional, see Seltzer, *supra* note 49, at 141.

> Perhaps the greatest leap the sneak and peek provision takes is authorizing the actual seizure of tangible property without notice. This is the most blatant violation of Fourth Amendment principles. It strains credulity to imagine a situation where the government has such a significant interest in secretly seizing an individual's property without notice that it could be deemed "reasonable" under the Fourth Amendment. If the government takes an individual's property, nothing less than immediate notice would be constitutional.

Id. (citation omitted).

[166] *See, e.g.*, United States v. Miranda, 425 F.3d 953 (11th Cir. 2005); United States v. Heal, 972 F.2d 1345, 1992 WL 203884, at **1 (9th Cir. 1992) (unpublished table decision); United States v. Rollack, 90 F. Supp. 2d 263 (S.D.N.Y 1999).

[167] USA PATRIOT Act § 213.

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

chemical plant on the basis of a tip from the student's coworker.[169] Under such a warrant, the FBI could examine the contents of the student's computer to search for evidence that the student was involved in a plot to blow up the chemical plant. Reasonable cause exists to believe that if the FBI provides notification, the student will alert his fellow cell members, thereby resulting in the destruction of evidence of a potential plot to blow up the chemical plant. Notification could also put the FBI's informant, the student's coworker, at risk.

In contrast, for a sneak-and-steal search, the government must also show that there is "reasonable necessity for the seizure."[170] In the previous example, section 213 would probably authorize the FBI to surreptitiously enter the student's home and seize chemical evidence related to the plot to blow up the chemical plant. The FBI would also be required to prove that there is probable cause for the search and that there is reasonable cause to believe that notification would lead to an adverse result. But because the FBI requested the authority to seize items during the search, the FBI would also be required to show that there was reasonable necessity for the seizure. Here, that standard would likely be met if the FBI intended to test the chemicals to determine if they were capable of blowing up the chemical plant.

On the other hand, a sneak-and-steal warrant would not permit the FBI to seize items when there is no reasonable necessity for the seizure. For example, in the previous hypothetical, the FBI would probably not be permitted to seize contraband (a bag of marijuana) in plain view because the FBI is investigating the student for a possible terrorist attack, and the seizure of contraband is not related to the terrorism investigation because it is evidence of ordinary criminal wrongdoing. The seizure of items unrelated to the investigation is not of "reasonable necessity" because it has no connection to the terrorism investigation. In contrast, the seizure of the chemicals is of "reasonable necessity" because it is closely related to, and indeed furthers, the terrorism investigation.

When applied to previous sneak-and-steal cases, section 213 provides for much more consistent results. For example, in *Heal*, the agents were permitted "to seize 'controlled substances' but not grow[ing] equipment";[171] thus, the agents would have been required to show that there was reasonable necessity for the seizure. Although the judge failed to require it in *Heal*, this standard would be met for the seizure of the controlled substances if the agents intended to test the legality of the substances and then obtain a conventional search warrant. Likewise, reasonable necessity probably existed for the seizure of the prisoner's

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169 This hypothetical is taken from MacDonald, *supra* note 3, at 102.

170 USA PATRIOT Act § 213(2).

171 *Heal*, 1992 WL 203884, at **1.

mail in *Rollack* because the agents believed the prisoner was using the mail to direct illegal gang activities.[172] The agents hoped to learn of the prisoner's contact with the gang without disturbing the secrecy of the investigation.

However, the seizure in *Miranda,* in which the DEA used a surreptitious search to stage a burglary by removing several pounds of drugs,[173] would probably not be permitted under section 213 because no reasonable necessity existed for the seizure. Unlike in *Rollack* and *Heal,* in which the agents sought to maintain the secrecy of the search, the agents in *Miranda* did not seek to maintain the secrecy of the search because they removed a large quantity of drugs. Instead, the agents in *Miranda* used the cover of the surreptitious search to deceive the targets of the search rather than to further the investigation. Although the seizure may assist the investigation, the "reasonable necessity" language in section 213 should not be read to allow agents to stage a burglary.[174] Thus, section 213 should eliminate cases such as *Miranda* that highlighted the confusion in sneak-and-steal cases.

By recognizing the distinction between sneak-and-peek and sneak-and-steal searches and by requiring an additional showing of necessity to authorize seizure, section 213 actually raises standards for the issuance of sneak-and-steal search warrants. In the past, courts recognized their authority to authorize a surreptitious search but failed to distinguish a sneak-and-peek search from a sneak-and-steal search. By authorizing both searches without requiring an additional showing, courts ignored important Fourth Amendment interests that the Patriot Act now recognizes and protects. Once understood in this historical context, section 213 emerges as a restraint on the issuance of surreptitious searches.

V. AMENDMENTS TO SECTION 213

Facing a deadline to renew several Patriot Act provisions subject to sunset at the end of 2005, congressional negotiators reached a tentative agreement on several provisions in November 2005, including section 213.[175] The Patriot Act compromise, signed into law on March 9, 2006, imposes several additional limitations on delayed-notification search warrants authorized by section 213. Pro-government commentators have

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[172] United States v. Rollack, 90 F. Supp. 2d 263, 267 (S.D.N.Y. 1999).

[173] United States v. Miranda, 425 F.3d 953, 955 (11th Cir. 2005).

[174] For a discussion of a proposed modification that would eliminate cases like *Miranda*, see *infra* Part V.B.

[175] Jonathan Weisman, *Congress Arrives at Deal on Patriot Act*, WASH. POST, Nov. 17, 2005, at A1. Even though section 213 was amended, it was not subject to sunset. *See supra* note 16 and accompanying text.

concluded the compromise is a "win for the Administration,"[176] while the ACLU has argued the compromise "take[s] us from bad to worse."[177] Part V.A discusses the amendments to section 213 and argues that they do little to change the statutory scheme with respect to both sneak-and-peek and sneak-and-steal searches. In fact, these amendments may increase law enforcement's discretion in conducting surreptitious searches. Part V.B argues that two new modifications should be adopted for the issuance of sneak-and-steal search warrants.

A. The Amendments

First, the compromise provides more specificity with regard to the time within which agents must provide post-search notice. Section 114(a)(1) of the USA PATRIOT Improvement and Reauthorization Act of 2005 amends Patriot Act section 213(b)(3), which required notice within a reasonable time, to now require notice "within a reasonable time not to exceed 30 days."[178] However, the new provision allows a period beyond thirty days "if the facts of the case justify a longer period of delay."[179] This change makes thirty days the rule within which notice must be given but recognizes that, in certain cases, notice may not be reasonable in that time. Although this requirement may be considered an improvement because it provides more specificity and identifies the outer limits of a "reasonable time," it does not restrict law enforcement in practice because most courts have already concluded that a reasonable time should not exceed seven days.[180] In fact, this requirement may actually provide more flexibility to the government by allowing more time to provide post-search notice than currently exists.

Second, the compromise provides more specificity with regard to extending the time for post-search notice. Section 213 of the Patriot Act allowed extensions of time for post-search notice when there was "good cause shown."[181] The compromise continues to allow extensions for "good cause shown" but only "upon an updated showing of the need for further delay and that each additional delay should be limited to periods of 90

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[176] Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/posts/1132196140.shtml (Nov. 16, 2005, 20:55 EST).

[177] Press Release, ACLU, ACLU Says White House Usurps Patriot Act Reauthorization Process, Negotiators Neglect Privacy and Civil Liberties Concerns but Add Poison Pills (Nov. 16, 2005), http://www.aclu.org/safefree/general/21664prs20051116.html.

[178] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 114(a)(1), 120 Stat. 191, 210 (2006).

[179] *Id.*

[180] *See, e.g.*, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990); United States v. Freitas (*Freitas II*), 856 F.2d 1425 (9th Cir. 1988); United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

[181] USA PATRIOT Act § 213(3), 18 U.S.C. § 3103a (Supp. III 2003).

days or less, unless the facts of the case justify a longer period of delay."[182] This requirement also benefits the government. Under former section 213, post-search notice was to be given within a reasonable time, which courts interpreted as seven days.[183] The compromise extends a reasonable time to a maximum of thirty days. None of the pre-Patriot Act cases determined what a reasonable extension would be. However, one would assume that seven days would have been the outer boundary for an extension because courts concluded that a reasonable time for post-search notice meant seven days. The compromise, however, provides an outer limit of ninety days rather than seven.[184]

Third, the compromise imposes notification and reporting requirements on judges who authorize delayed-notification search warrants. Although section 213 lacked any reporting requirement when originally passed, the compromise now requires a judge to report to the Administrative Office of the U.S. Courts within thirty days after the expiration of a delayed-notification warrant (1) the fact that a warrant was applied for; (2) the fact that the warrant or extension was granted, modified, or denied; (3) the period of delay in giving the notice permitted by the warrant and the number and duration of any extensions; and (4) the offense specified in the warrant.[185] The Administrative Office of the U.S. Courts must then provide a report to Congress summarizing the data provided by federal judges.[186]

Considering these amendments as a whole, they appear to benefit the government because there are no serious modifications that will jeopardize the government's use of sneak-and-peek search warrants. These amendments will not likely change the current process by which delayed-notification search warrants are issued pursuant to section 213. Defining what constitutes a reasonable time is a modest improvement because it gives courts less discretion; however, this modification will be limited in its effectiveness because most courts construed a reasonable time to mean only seven days.[187] In fact, the modification will likely have

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[182] USA PATRIOT Reauthorization and Improvement Act § 114(a)(2). This is similar to the extension period of ninety days permitted in 18 U.S.C. § 2705(a)(4) (2000). However, section 2705 also authorizes the first delay period to be ninety days. *Id.* § 2705(a)(1). Therefore, the extension period matches the original authorized period. However, the compromise extends the extension period to ninety days even though a reasonable time to delay notice has been construed to be seven days.

[183] *See Pangburn*, 983 F.2d at 449–50; *Freitas I*, 800 F.2d at 1456.

[184] USA PATRIOT Reauthorization and Improvement Act § 114(a)(2) (stating that "extensions should only be granted upon an updated showing of the need for further delay and that each additional delay should be limited to periods of 90 days or less").

[185] *Id.* § 114(c).

[186] *Id.*

[187] *See Pangburn*, 983 F.2d at 449–50; United States v. Villegas, 899 F.2d 1324, 1337 (2d Cir. 1990); *Freitas I*, 800 F.2d at 1456.

the unintended effect of granting more discretion to law enforcement because it extends the time within which post-search notice must be given. The same is true of the requirements for extending post-search notice. Moreover, the requirements of judicial notice and annual reporting may help Congress do a better job at oversight but are unlikely to present an additional burden or limitation on the government.[188] In sum, the amendments should be seen as modestly increasing the government's discretion to conduct surreptitious searches while providing for greater specificity and oversight.

B. Modification of the Requirement that There be "Reasonable Necessity for the Seizure"

Despite Congress's efforts at reform, sneak-and-steal searches under section 213 require further modification. Currently, section 213 authorizes sneak-and-steal searches where, in addition to finding reasonable cause to delay notice of the search,[189] a court finds "reasonable necessity for the seizure."[190] Two new requirements are needed. Congress should also require the government to prove that the seizure (1) is not intended to induce the target to illegal conduct and (2) will not disclose the search.

The first requirement—that the seizure is not intended to induce the target to illegal conduct—is necessary to further define when there is "reasonable necessity" for a seizure.[191] A seizure that would only aid an investigation by inducing the target to further illegal conduct would not be permitted by "reasonable necessity" under this limitation. For example, in *Miranda*, agents did not provide notice of the search and staged a burglary to induce the targets in a conspiracy to commit further unlawful acts from which they could gather additional evidence.[192] Under

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[188] *Cf.* Posting of Orin Kerr to The Volokh Conspiracy, *supra* note 176 ("It'll be interesting to see if the reporting requirement makes some judges less willing to issue delayed notice warrants; I would imagine that some judges would rather not have to file the reports.").

[189] USA PATRIOT Act § 213(1), 18 U.S.C. § 3103a (Supp. III 2003).

[190] *Id.* § 213(2). The "reasonable necessity" standard is not one that has been frequently used in criminal law, thereby making it an amorphous concept that courts have yet to define. *See* Perrine, *supra* note 41, at 171 (noting that the "reasonable necessity standard for seizure of property under a delayed notification warrant is a feature of section 213 not readily evident from a review of case law"); *see also* Duncan, *supra* note 5, at 27 ("However, the 'reasonable necessity' provision dealing with the seizure of evidence leaves open the question of what constitutes 'reasonable necessity.'").

[191] Without this limitation it is unclear whether "reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, *i.e.*, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation." DOYLE, *supra* note 20.

[192] *See* United States v. Miranda, 425 F.3d 953, 956 ("They did not leave a copy of the search warrant because they wanted to make it appear that a burglary had been

those facts, no "reasonable necessity" supports the seizure because the staging of the burglary is not intended to gather evidence of past or continuing illegal acts but only to induce the target to commit further illegal acts. A seizure should only be permitted if it will gather evidence of past, continuing, or future unlawful behavior. Where the government conducts the seizure to determine the status of future unlawful behavior, for example, by seizing potentially explosive chemicals to determine if the target plans to execute a bombing plot,[193] there would also be reasonable necessity for the seizure. Therefore, the "reasonable necessity" test would require the government to show that the seizure is not intended to induce the target to illegal conduct; the seizure must be intended to gather evidence of past, continuing, or future crimes.

Additionally, it may be unreasonable under the Fourth Amendment if the government conducts a sneak-and-steal search that is intended to induce the target to illegal conduct. If the government is able to seize evidence and stage burglaries to induce the target to further unlawful behavior, as in *Miranda*, the target of the sneak-and-steal search has been subjected to unreasonable government behavior because the agents are inducing the target to commit further illegal acts by fraud.[194]

The government's conduct is even more unreasonable when a sneak-and-steal search, such as the one in *Miranda*,[195] alerts the target that a search has taken place without providing notice. Hence, the second requirement—that the seizure will not disclose the search—is required. This requirement is closely related to the first because a search that is intended to induce the target to illegal conduct will likely alert the target that a search has taken place. After the agents have completed the sneak-and-steal, they must make reasonable and good-faith efforts to maintain the secrecy of the search and investigation. This requirement

committed. By staging a burglary, the agents hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct."). One author has suggested that "reasonable necessity" would involve a situation where law enforcement agents execute a sneak-and-peek search and find a bomb or evidence of chemical or biological weapons. Duncan, *supra* note 5, at 27–28. The author suggests that the agents could seize the live bomb and possibly replace it with a dummy bomb "so as not to alert the targets about the surreptitious search." *Id.* Even though a court may uphold the seizure because it was made in good faith and in plain view, section 213 does not authorize this seizure. There may be "reasonable necessity for the seizure" at the moment the agents discover the bomb; however, section 213 requires that a court find there to be "reasonable necessity for the seizure" before the search takes place. USA PATRIOT Act § 213(2).

193 *See supra* text accompanying note 169.

194 *See* Jacobson v. United States, 503 U.S. 540, 548 (1992) ("In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.").

195 *Miranda*, 425 F.3d at 956.

would invalidate sneak-and-steal searches that are intentionally used to reveal the search or conducted with unreasonable care. Moreover, allowing seizures that would compromise the secrecy of the investigation under the cover of a surreptitious search would eliminate the purpose of a delayed-notification search warrant.[196] Although the target does not have specific notice that the government has invaded his privacy, he is alerted that someone, probably the government, has done so.

Government conduct is unreasonable when a sneak-and-steal search reveals that someone has been inside the target's home without disclosing the government's lawful intrusion because the target may justifiably feel that they have been burglarized and take steps to gather information and even contact the police regarding a suspected theft. For example, in *Mayfield v. Gonzales*, the FBI executed several sneak-and-peek searches while the Mayfield family was away from their home.[197] The searches were done "so incompetently that the FBI left traces of their searches behind, causing the Mayfield family to be frightened and believe that they had been burglarized."[198] Moreover, in *Miranda*, agents "did not leave a copy of the search warrant because they wanted to make it appear that a burglary had been committed [and] . . . hoped to precipitate activity within the Cuevas conspiracy that would provide additional evidence of criminal conduct."[199] Ninth Circuit Judge Kozinski, in his dissenting opinion in *United States v. Nates*, elaborated on the unreasonableness of the government's behavior when a secret search reveals that a search has taken place without identifying the government's intrusion:

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[196] Andrew C. McCarthy, *Spinning the PATRIOT Act: Sneaking a Peek at "Judge" Napolitano's Latest Debacle*, NAT'L REV. ONLINE, Apr. 7, 2005, http://www.nationalreview.com/mccarthy/mccarthy200504070805.asp ("If important items that a subject is likely to miss—like his checkbook—are removed, then the aim of the sneak-and-peek technique is destroyed.").

[197] No. Civ. 04-1427-AA, 2005 WL 1801679, at *3 (D. Or. July 28, 2005).

[198] *Id.* (internal quotation marks omitted).

[199] *Miranda*, 425 F.3d at 956. I do not share the view of Fox News Senior Judicial Correspondent Judge Andrew Napolitano that the FBI will make a practice of breaking into homes to stage burglaries:

> Sneak and peek allows FBI agents to invade your home . . . to break into your house and make it look like a burglary. To steal your checkbook, to plant a chip in your computer. . . . You could come back in the middle of this and think they are burglars and you could call the local police who don't know that they are FBI agents.

McCarthy, *supra* note 196 (quoting Napolitano). In Napolitano's opinion, the FBI is intentionally staging burglaries in the homes of the innocent among us. In my opinion, however, cases like *Mayfield* and *Miranda* are few and far between. These additional requirements are necessary, though, to ensure that when agents conduct a sneak-and-steal search they do not inadvertently cause such fears in the target of the search. This is done by maintaining the secrecy of the search and not inducing the target to illegal conduct. A surreptitious search should remain just that.

> This means that when something is lost, stolen, mislaid or broken, the [target] will be completely mystified as to what happened. He will have no idea where to inquire as to its whereabouts or demand compensation. He may spend countless hours looking for the item in places he might have left it, harassing people who might have taken it, never suspecting that a government agent used a passkey to go through his luggage. Being subject to a secret search and then never being told about it is something I think most people would find especially offensive, and this then bears on the reasonableness of the procedure employed by the government.[200]

In sum, two requirements should be added to section 213 to ensure its compliance with the Fourth Amendment's requirement that searches be reasonable. First, the government should be required to prove that the seizure is not intended to induce the target to illegal conduct. This requirement would only permit a seizure intended to gather evidence of past, continuing, or future crimes. Second, the government must prove that the seizure will not disclose the search. Intentionally alerting the target that someone has entered the premises and taken property, without notification that the government has lawfully done so, can produce unreasonable and justifiable fear in the target. For the protection of both the target and the investigation, a surreptitious search should remain just that—surreptitious.

VI. CONCLUSION

When understood in its historical context, section 213 neither grants radical new powers to the government nor lowers standards for the issuance of surreptitious searches. With respect to sneak-and-peek searches, section 213 codifies the majority practice that began in the

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[200] 831 F.2d 860, 867 (9th Cir. 1987) (Kozinski, J., dissenting). Although *Nates* did not involve a sneak-and-peek search, it did involve a surreptitious search of luggage at an airport. *Id.* at 861. Judge Kozinski believed that the search of the luggage at the airport may have violated the Fourth Amendment's reasonableness requirement. *Id.* at 864; *see id.* at 865 (noting "our collective discomfort with surreptitious governmental intrusions into our privacy"). Even though *Nates* was decided after *United States v. Freitas* (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), Judge Kozinski did not cite to it despite the fact that *Freitas I* may have allayed some of his concerns (or raised even more) regarding the surreptitious nature of the search. According to Judge Kozinski:

> A secret search is, perhaps, the hardest to justify in light of our shared notions of individual privacy and personal autonomy. Clandestine searches are, by and large, foreign to our way of thinking because of their inherent intrusiveness, the heightened risk of abuse they pose, and because they are inconsistent with principles of openness and fair play we normally expect of our public officials. The notion that, while an individual is temporarily separated from his property, law enforcement officers are rummaging through it at will, is difficult to square with contemporary notions of what is reasonable governmental conduct.

Nates, 831 F.2d at 865 (Kozinski, J., dissenting).

1980s. Surreptitious search warrants developed without congressional guidance for over fifteen years.[201] Before the Patriot Act was passed, two lines of cases developed with respect to sneak-and-peek search warrants. One line of cases, developed in the Ninth Circuit, held that surreptitious searches violated the Fourth Amendment when agents did not provide notice within a reasonable time after the search—within seven days.[202] The other line of cases, which began in the Second Circuit and was followed in the Fourth Circuit, held that notice was required by Rule 41 and not the Fourth Amendment.[203] Section 213 codified the Second Circuit's approach to surreptitious searches; it did not create a radical new authority to conduct these searches.

In the area of sneak-and-steal searches, however, courts had not developed a framework within which to analyze these unique searches. Courts frequently did not recognize a distinction between the two types of surreptitious searches, even though a surreptitious search in which a seizure occurs implicates greater Fourth Amendment interests than one without a seizure. By recognizing the important distinction between sneak-and-peek and sneak-and-steal searches, section 213 not only created new standards, but also raised those that were currently being practiced. For sneak-and-peek searches, beyond the required showing of probable cause, a court must find that there is reasonable cause to believe that immediate notification will have an adverse result.[204] Beyond that, to authorize a sneak-and-steal search, a court must make an additional finding of reasonable necessity for the seizure.[205] Section 213 therefore reaches an appropriate balance between Fourth Amendment protection and the necessities of criminal investigations.

However, section 213 could benefit from further modification, especially in the area of sneak-and-steal searches. Congress's recently proposed modifications to section 213 are not substantial revisions that will affect the government's authority to conduct surreptitious searches. Section 213 requires two additional modifications to comply with the Fourth Amendment's requirement that searches be reasonable. In addition to proving "reasonable necessity for the seizure,"[206] the government should also prove that the seizure (1) is not intended to induce the target to illegal conduct and (2) will not disclose the search.

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[201] The first circuit court to address surreptitious searches was *Freitas I* in 1986, and the Patriot Act was passed in 2001.

[202] United States v. Freitas (*Freitas I*), 800 F.2d 1451 (9th Cir. 1986), *modified*, 856 F.2d 1425 (9th Cir. 1988).

[203] United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993); United States v. Villegas, 899 F.2d 1324 (2d Cir. 1990).

[204] USA PATRIOT Act § 213, 18 U.S.C. § 3103a (Supp. III 2003).

[205] *Id.* § 213(2).

[206] *Id.*

These modifications should be adopted because a constitutional challenge to the sneak-and-steal provision of section 213 is sure to come.[207] When that time comes, the more constitutional protections that are in place, the greater the likelihood that section 213 will survive judicial scrutiny.

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[207] *See* Seltzer, *supra* note 49, at 141 (arguing that the sneak-and-steal provision of section 213 is blatantly unconstitutional and should be stricken from the Patriot Act).

> No court has yet confronted this level of governmental intrusion. Both the Second and Ninth Circuits strongly emphasized in reaching their decisions that only a seizure of intangible property occurred. The Second Circuit even opined that a surreptitious search with only a seizure of intangible property is the least intrusive of searches because the individual is not deprived of his property. Is this where the Second and Ninth Circuits would draw the line?

Id.

THE DEFINITION OF "PERSON": APPLYING THE *CASEY* DECISION TO *ROE V. WADE*

*Bradley Aron Cooper**

I. INTRODUCTION

Perhaps no Supreme Court case is as well known or as hotly debated as *Roe v. Wade*.[1] This sentiment was again proven true during the recent confirmation hearings of Justice Samuel Alito. In the course of those hearings, those who support the *Roe* decision found themselves on the one hand arguing that *Roe* was "well settled" law, while on the other hand voicing concern that Alito might become the swing vote that would eventually overturn *Roe*.[2] Senator Dianne Feinstein of California was one of those who, despite acknowledging Alito's qualifications, concluded that "[i]f one is pro-choice in this day and age, with the balance of the Court at stake, one cannot vote to confirm Judge Alito."[3] Therefore, one must ask: is *Roe* subject to being overturned, or is it settled law?

In the last major challenge to *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court acknowledged the "sustained and widespread debate" that the *Roe* decision had provoked.[4] In its attempt to quell this debate, the Court enunciated a strict standard of review by which the principle of stare decisis might be overcome,[5] thereby limiting future opportunities to reverse a previous holding of the Court.[6] "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[7]

Citing *West Coast Hotel Co. v. Parrish*[8] and *Brown v. Board of Education*,[9] the Court stated that for a case to overcome stare decisis it must show that either the facts behind the constitutional resolution of the earlier case are no longer true or society's previous understanding of

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1 410 U.S. 113 (1973).

2 *See* 152 CONG. REC. S153-54 (daily ed. Jan. 26, 2006) (statement of Sen. Feinstein) (discussing the Senate confirmation hearings of Justice Samuel Alito).

3 *Id.* at S153.

4 505 U.S. 833, 861 (1992).

5 *See id.* at 854–55.

6 While the reason for this standard was to demonstrate that neither the facts nor the understanding of the facts supporting the *Roe* decision had changed, and that therefore there was no reason to overturn *Roe*, this essay will examine whether such change has *now* occurred.

7 *Casey*, 505 U.S. at 854.

8 300 U.S. 379 (1937), *overruling* Adkins v. Children's Hosp., 261 U.S. 525 (1923).

9 347 U.S. 483 (1954), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896).

those facts justifying the earlier decision have changed.[10] While *Casey* then held that "neither the factual underpinnings of *Roe*'s central holding nor our [society's] understanding of it has changed,"[11] it now appears that both the cited underpinnings and understanding may be eroding. In other words, while the *Casey* decision was framed in such a way as to demonstrate the difficulty of overcoming stare decisis, specifically with respect to reversing *Roe*, it may in fact have opened the door to just such a reversal.

In *Roe*, the constitutional question focused on the competing rights of three parties: (1) a pregnant woman, (2) her unborn child, and (3) the State of Texas.[12] The mother asserted a right to privacy over her own body, as opposed to the unborn child's right to life and the state's interest in protecting that right to life.[13] The Court decided that the Fourteenth Amendment's use of the word "person"[14] did not refer to the unborn, and that, therefore, there was no constitutional right to life.[15] Additionally, the Court found that while the state did have a right to protect the *potentiality* of the life of a fetus, that interest was not strong enough to completely abrogate the mother's right to privacy.[16]

In contrast to that original ruling, there has been an evolution in lawmaking across the country that has either established or strengthened a state's right to protect the life of the unborn.[17] These measures have grown from basic tort laws that compensate parents for the loss of an unborn child,[18] to criminal codes that enable a state to prosecute the killer of an unborn child for murder.[19] Perhaps the most crucial aspect of this legislative activity is that many state criminal codes now define "person" to include the unborn at any stage of development.[20] The public support for these laws is also on the rise,[21]

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10 *Casey*, 505 U.S. at 863–64.

11 *Id.* at 864.

12 Roe v. Wade, 410 U.S. 113, 129, 153–54, 156–57 (1973).

13 *Id.*

14 *See* U.S. CONST. amend. XIV, § 1.

15 *Roe*, 410 U.S. at 158.

16 *Id.* at 159.

17 *See infra* Part II.B.

18 *Roe*, 410 U.S. at 162 ("In a recent development . . . some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.").

19 *E.g.*, TEX. PENAL CODE ANN. § 1.07(a)(26), (38) (Vernon Supp. 2006-2007).

20 *See infra* notes 50 (listing the twenty-four states that have homicide laws that cover unborn victims at any stage of development), 52–56 (citing specific homicide laws from five states that protect the life of human beings from fertilization until birth).

21 In a 2003 Fox News poll, 79% of the nine hundred registered voters polled answered "yes" when asked "[i]f a violent physical attack on a pregnant woman leads to the death of her unborn child, do you think prosecutors should be able to charge the attacker

particularly in response to high profile crimes like the murders of Laci and Conner Peterson.[22] As a result, it appears that not only is the applicable legal interest of states being solidified, but also society's understanding of the competing rights at issue in *Roe*.

This essay will attempt to measure these legal and societal changes to determine whether they meet the *Casey* standard for overturning *Roe v. Wade*. As part of that discussion, this essay will analyze some of the initial conclusions of *Roe* and compare them with the evolving legislation regarding fetal protection.

II. ROE V. WADE

A. The Definition of "Person" and the Fourteenth Amendment

One of the primary questions before the Court in *Roe* was whether a fetus qualifies as "a person within the meaning of the Fourteenth Amendment."[23] The importance of this question, put forth by the State of Texas, cannot be overemphasized, for had the Court agreed with the premise, the constitutional "right to life" would have given the states the authority to protect that life with whatever legislation they deemed necessary.[24]

Since the drafting of the Constitution, the definition of "person" and the rights afforded to such "persons" has continued to evolve. That process, however, has not always led to immediate change, as demonstrated by previous Supreme Court decisions. In *Bradwell v. Illinois*, Justice Bradley concurred with the decision to affirm the state's right to refuse a woman admittance to the state bar, claiming that one of the maxims of our common law system of jurisprudence had been that "a woman had no legal existence separate from her husband."[25] Likewise, in *Dred Scott v. Sandford*, the Court was unequivocal in its position that black slaves did not possess the same constitutional rights as white Americans.[26] The Court argued that even the language of the Declaration of Independence demonstrated this separation:

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with murder for killing the fetus?" National Right to Life, One Victim or Two?, http://www.nrlc.org/Unborn_Victims/UnbornPolls110703.html (last visited Nov. 10, 2006).

22 Scott Peterson was convicted of killing his wife Laci Peterson when she was eight-months pregnant with their son, Connor. Brian Skoloff, *'Callous' Peterson Sentenced To Die for Killing Wife, Fetus*, TORONTO STAR, Mar. 17, 2005, at A19, *available at* 2005 WLNR 4111617.

23 *Roe*, 410 U.S. at 157.

24 *Id.* at 156–57 ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument.").

25 83 U.S. (16 Wall.) 130, 141 (1872).

26 60 U.S. (19 How.) 393, 410–11 (1856).

> "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 them [sic] is [sic] life, liberty, and the pursuit of happiness . . . ."
>
> The general words above quoted would seem to embrace the whole human family . . . . But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted . . . .[27]

The Court went on to state that even if there was a change in public sentiment, the Framers' attitude toward blacks should be followed in any constitutional interpretation:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.[28]

Despite this rationale, both women and blacks eventually came to be seen as "persons" entitled to full constitutional recognition.[29] Further, while the decision in *Dred Scott* relied heavily on the Framers' supposed understanding of persons and rights, the Court recognized corporations as "persons" less than thirty years later in the landmark case of *Santa Clara County v. Southern Pacific Railroad Co.*[30]

In determining whether a fetus qualifies as a person under the Fourteenth Amendment, the *Roe* Court, though noting that "[t]he Constitution does not define 'person' in so many words"[31] found that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[32] To reach this conclusion, the Court turned to other portions of the Constitution, specifically the listing of qualifications for Congress[33] and for President,[34] and consequently determined that "in nearly all these instances, the use of the word 'person' was such that it has application only postnatally."[35] Like the *Dred Scott* Court before it,

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27 *Id.* at 410 (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

28 *Id.* at 426.

29 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

30 118 U.S. 394 (1886).

31 Roe v. Wade, 410 U.S. 113, 157 (1973).

32 *Id.* at 158.

33 *Id.* at 157 (citing U.S. CONST. art. I, §§ 2–3).

34 *Id.* (citing U.S. CONST. art. II, § 1).

35 *Id.*

the *Roe* Court was not so much interpreting a given definition as it was extrapolating a definition from legal contexts and usage.

This is clearly a departure from the more recent *Santa Clara County* decision in which the Court held, prior to ruling, that "[c]orporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States."[36] Were the *Roe* standard of textual usage applied to corporations, they too would clearly be excluded as persons within the meaning of the Constitution, since a corporation is clearly not qualified to hold a congressional or the presidential office. Yet the Court in *Santa Clara County* abandoned that interpretive strategy, choosing instead to recognize the importance of expanding the constitutional definition of "person" beyond that which the Framers originally had in mind.

It is important to note that such an expansion does not necessarily violate the Constitution itself, but rather may serve to achieve the ideals set forth in its text. For instance, while the phrase "all men are created equal"[37] is a timeless ideal captured in the Declaration of Independence, its drafters' perceived understanding of the word "men" in *Bradwell* and *Dred Scott* severely limited the realization of that ideal by limiting the application of the principle to only white males. Only a later acceptance of blacks as people enabled the idea of equality to draw closer to fulfillment. Although expanding legal recognition to women, blacks, and corporations might have gone beyond the original intent of the Framers, in so doing, the original ideal behind these protections—equality for all men—has been more fully realized.

This interpretative philosophy has already been applied by the Supreme Court in relation to other constitutional amendments. In *Trop v. Dulles*, the issue was whether the penalty of denationalization, or the loss of citizenship, was a constitutionally appropriate punishment for wartime desertion.[38] The Court determined that it was not, as the punishment violated the Eighth Amendment's prohibition against cruel and unusual punishment.[39] In explaining this decision, the Court expressed the following rationale:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . [Therefore, t]he Amendment must

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36 Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 394–95 (1886) (statement of facts).

37 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

38 356 U.S. 86, 87 (1958).

39 *Id.* at 101.

> draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[40]

The Court recognized that while the Framers' goal of prohibiting cruel and unusual punishment must be upheld, their concept of what constituted "cruel and unusual" must be subject to revisions that correspond with society's current concept of cruelty and the unusual. In other words, the Court has found that the evolving standards of a maturing society are legitimate tools for constitutional interpretation.

If that approach is valid, then one must wonder what the results would be if the same "evolving standard" were applied to the definition of "person." While the *Roe* decision was accurate in pointing out that "person" as used in the Fourteenth Amendment did not specifically refer to the unborn, it is clear from *Roe* that the exclusive meaning of "person" was also not specifically located within the amendment. Therefore, it appears that the constitutional parameters of "person" remain open not only to the same interpretive expansion that previously has been manifested in the legal status of women, blacks and corporations, but that it may also be subject to reinterpretation based on a maturing society's evolving standard of decency. As such measures have previously been critical to the realization of equality for men and the prevention of cruel and unusual punishment, similar actions should not be excluded from consideration in any future analysis of the definition of person.

B. The States' Interest in Protecting Life

The second main argument asserted by the State of Texas in *Roe* was that "apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception."[41] The Court found this argument unconvincing, however, choosing instead to focus on the legal standing of the unborn in the legislation of that day: "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."[42]

As the Court reasoned that the legal rights of the unborn were only actually acquired at birth, it correspondingly limited the state's compelling interest in protecting the unborn to the point of viability.[43] However, in basing its limitation of a state's interest in the protection of

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40 *Id.* at 100–01.

41 Roe v. Wade, 410 U.S. 113, 159 (1973).

42 *Id.* at 161.

43 *Id.* at 163.

the unborn on existing legislation, the Court opened the door to the possibility that future legislative changes might erode the foundation of their decision.

This is remarkable when one considers that the *Roe* decision had already noted the beginning of a shift in laws regarding the unborn:

> In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would *appear to be* one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life.[44]

This development, however, would prove significantly more than what it "appeared to be." Over the past three decades, fetal-rights legislation has exploded. At first, this legislation, while no longer limiting itself to the "born alive" rule noted in *Roe*, still maintained a "viability" standard and was enacted in only "some states."[45] Thus, recovery in tort law was preserved for situations in which the pregnancy-ending injury occurred after the fetus was "viable."[46] Now, however, only fourteen states continue to adhere to the "born alive" rule,[47] and six states currently allow for recovery for wrongful death even if the fetus was not viable at the time of the injury.[48]

This trend has also been followed by a host of state criminal laws intended to protect the unborn from harm. Currently, ten states have passed legislation criminalizing the death of a fetus that was either *quick*[49] or viable, and twenty-four states have passed laws that recognize fetal victims from the point of fertilization.[50] In addition, some states

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44 *Id.* at 162 (emphasis added) (footnote omitted).

45 *Id.* at 161.

46 *See id.* at 162 (noting the emergence of this "recent development" in a "few courts").

47 Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising From the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 AKRON L. REV. 41, 45–52 (2004).

48 *Id.* at 71–74.

49 *See* BLACK'S LAW DICTIONARY 1282 (8th ed. 2004) (defining "quickening" as "[t]he first motion felt in the womb by the mother of the fetus, usu. occurring near the middle of the pregnancy").

50 National Right to Life, State Homicide Laws that Recognize Unborn Victims (June 16, 2006), http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html [hereinafter State Laws]. The ten states that have enacted partial protection for the unborn are Arkansas, California, Florida, Indiana, Maryland, Massachusetts, Nevada, Rhode Island, Tennessee, and Washington. *Id.* The twenty-four states that protect infants throughout the prenatal period are Alabama, Alaska, Arizona, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *Id.* For a list of applicable state code sections and case law, see *id.*

have passed laws that criminalize battery of the unborn, regardless of the viability of the fetus.[51] While some members of the *Roe* Court might still have interpreted these developments as the protection of potential life, it is clear that the language of some of these state provisions is well beyond that position. For example, in Mississippi "the term 'human being' includes an unborn child at every stage of gestation from conception until live birth and the term 'unborn child' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."[52] In Illinois, "'unborn child' shall mean any individual of the human species from fertilization until birth."[53] Texas's definition of "person" now includes "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."[54] Likewise, Louisiana holds that "'[p]erson' includes a human being from the moment of fertilization,"[55] and Nebraska law states that "person" includes "an unborn child in utero at any stage of gestation."[56]

With these definitions in place, it is clear that the legal landscape has shifted significantly since *Roe*. The *Roe* Court claimed that the law had been reluctant to recognize that human life began before birth.[57] As illustrated above, however, that position is no longer a valid one. Consequently, the *Casey* claim that "neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed,"[58] is no longer tenable.

C. Casey *and Stare Decisis*

According to *Casey*, "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. . . . [T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[59] Out of this "respect for precedent," the *Casey* Court insisted that for a prior decision to be reversed, either the facts behind

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51 Aaron Wagner, Comment, *Texas Two-Step: Serving up Fetal Rights by Side-Stepping* Roe v. Wade *Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH L. REV. 1085, 1104 (2001) (citing 720 ILL. COMP. STAT. ANN. 5/12-3.1 (West 1993)).

52 MISS. CODE ANN. § 97-3-37 (2006).

53 720 ILL. COMP. STAT. 5/9-1.2 (2005).

54 TEX. PENAL CODE ANN. § 1.07(a)(26), (38) (Vernon 2003 & Supp. 2006–2007). In contrast, the *Roe* Court stated that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. 113, 158 (1973).

55 LA. REV. STAT. ANN. § 14:2(7) (2006).

56 NEB. REV. STAT. § 30-809 (2006).

57 *Roe*, 410 U.S. at 161.

58 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

59 *Id.* at 854 (citation omitted).

the decision, or else society's understanding of the facts, must be shown to have changed.[60]

After subjecting the facts of *Roe* to this examination, the *Casey* Court confirmed its earlier assertion that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973."[61] The same conclusion could not be reached today. One of the foundational legal principles behind the *Roe* decision was that "the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth."[62] Today, however, a majority of states have legislation in place that recognizes and protects the life of the unborn.[63] Some, as noted in Part II.B, *supra*, have gone so far as to recognize that human life begins at conception.[64] Thus, while the *Casey* Court attempted to solidify *Roe* by establishing a strict standard for overcoming stare decisis, it appears that very standard may now have been met, opening the door to a reversal of *Roe*.

The importance of this legislative shift is strengthened when one takes into account the Court's statement in *Gregg v. Georgia* regarding societal endorsement: "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty . . . ."[65] In other words, the Court itself recognizes that such a legislative majority constitutes a clear indication of society's position on an issue. Thus it would seem appropriate for the Court to reach a similar conclusion with regard to the legislation of the thirty-four states that currently recognize a fetus as a person[66] and conclude that society endorses the legal recognition of human life prior to birth. If, then, society's understanding of the factual basis of *Roe*—the fetus's lack of personhood—has changed significantly, another *Casey* standard for reversal may have already been met.

When the *Casey* Court set societal understanding of an issue as a standard for overruling a previous decision, it based its rationale on the *Brown v. Board of Education* ruling, which had overturned the Court's previous decision in *Plessy v. Ferguson* upholding segregation.[67] In the 1896 *Plessy* decision, the Court held that segregation did not violate the

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60 *Id.* at 854, 863–64.

61 *Id.* at 857.

62 *Roe*, 410 U.S. at 161.

63 *See supra* note 50 and accompanying text.

64 *See supra* notes 52–56 and accompanying text.

65 428 U.S. 153, 179–80 (1976) (footnote omitted).

66 *See supra* note 50 and accompanying text.

67 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 862–63 (1992) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

Equal Protection Clause of the Fourteenth Amendment.[68] By 1954, however, that understanding had changed:

> The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect . . . . Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896.[69]

Importantly, while the Court concluded that society's understanding of segregation had changed, this was clearly not the opinion of all Americans, as those in the South opposed to desegregation made clear in the following months and years. With that in mind, it seems that in the eyes of the *Casey* Court, "society" does not require "unanimity."

Today, there is convincing evidence that society's understanding is no longer aligned with the *Roe* decision. As noted in the introduction, public support of fetal homicide laws is overwhelmingly positive.[70] Accordingly, state legislatures have been quick to enact laws that reflect this shift in public sentiment.[71] Consequently, the *Casey* Court's assertion that the nation's understanding of the facts underlying the *Roe* decision had not changed is outdated.

It appears, therefore, that both of the standards *Casey* established for overturning a precedent-setting case have been met. *Roe*'s finding that the unborn are not people due legal protection, and its rejection of the states' interest in protecting life from conception, rested primarily upon the absence of existing legal recognition of the unborn. This "factual underpinning" has eroded substantially, as the vast majority of states have since enacted homicide laws protecting the unborn as individuals, with almost half the states enacting homicide laws that protect the unborn at any stage of development.[72] Likewise, *Casey*'s assertion that the nation's understanding of the facts underlying *Roe* has not changed is outdated as well, evidenced by this same legislative action of society's elected representatives, empowered to implement the will of the people. Accordingly, despite the current lack of a national consensus on the issue of abortion, it seems that *Roe* may now be vulnerable to reversal.

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68 Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

69 *Casey*, 505 U.S. at 863.

70 *See supra* note 21.

71 *See supra* notes 50–56 and accompanying text.

72 State Laws, *supra* note 50; *see also supra* notes 52–56 and accompanying text.

III. RELIANCE AND RIGHTS

A. Casey *and Reliance*

While thus far this essay has addressed *Roe*'s potential vulnerability as a result of state-enacted legislation granting legal recognition to the unborn, the question remains: Is *Roe* subject to being overturned? To answer this question, one must first readdress the *Casey* decision, for in its defense of the principle of stare decisis the Court mandated that, before a previous ruling can be overturned, an inquiry into the reliance on that previous ruling must be made.[73]

While stare decisis is seen as a method of protecting reliance interests, those interests are most commonly seen in the commercial context.[74] The reasoning behind such a principle is clear: once a legal rule is established, decisions involving the allocation of resources are made in reliance upon that rule remaining valid.[75] To reverse that legal rule, without analyzing the resulting costs of such a decision to those who had relied upon the rule, would be irresponsible.

In *Casey*, however, the Court acknowledged that under this traditional approach to analyzing reliance, "some would find no reliance worthy of consideration in support of *Roe*."[76] Accordingly, the Court chose to recognize a more indirect economic reliance that had developed as a result of personal reliance on the *Roe* decision:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[77]

Unlike traditional approaches to reliance that measure the cost of past investments made in reliance on a legal rule, the *Casey* Court chose to recognize a type of future reliance, whereby women are said to economically rely on the future availability of abortion.[78] In reality, the Court was not so much recognizing reliance, but rather the right to reliance, and through that, continued reliance.

In his dissent from the *Casey* decision, Chief Justice Rehnquist described this "as an unconventional—and unconvincing—notion of

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73 *Casey*, 505 U.S. at 855.

74 Michael S. Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1553 (2000).

75 *Id.*

76 *Casey*, 505 U.S. at 856.

77 *Id.*

78 *Id.*

reliance."[79] In further critiquing the majority's claims of reliance upon *Roe*, Rehnquist added: "The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their 'places in society' in reliance upon *Roe*."[80]

Years later, Justice Scalia would also comment on *Casey*'s assertion of women's reliance on *Roe*:

> This falsely assumes that the consequence of overruling *Roe* would have been to make abortion unlawful. It would not; it would merely have *permitted* the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired).[81]

Scalia's comments address both the more traditional reliance test and the modified future reliance as presented in *Casey*. Regarding traditional reliance, Scalia points out that while people have relied on the availability of abortion as protected by *Roe*, were *Roe* to be overturned, the right to terminate pregnancies that were the result of intimate relationships entered into under that reliance, would still be protected up until the point of viability. Accordingly, there would be no "loss" associated with one's past reliance on *Roe*.[82] Addressing the *Casey* Court's declaration of a future reliance, Scalia contends that since not all states would ban abortion, that avenue would remain available even if the Court overturned *Roe* and returned the right to legislate abortion to the states.[83]

While these arguments may adequately address the *Casey* assertion of a personal reliance on *Roe*, the majority opinion in *Casey* also presented the idea of a societal reliance on *Roe*, pointing out that "while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."[84]

As Rehnquist points out in his dissent, however, "at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed 'separate but equal' treatment of minorities."[85] In fact, when one considers the social and economic reliance that was placed on segregation, "[t]he 'reliance' argument for

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79 *Id.* at 956 (Rehnquist, C.J., dissenting).

80 *Id.* at 956–57 (Rehnquist, C.J., dissenting).

81 Lawrence v. Texas, 539 U.S. 558, 591–92 (2003) (Scalia, J., dissenting).

82 *See id.*

83 *See id.* at 592.

84 *Casey*, 505 U.S. at 856.

85 *Id.* at 956 (Rehnquist, C.J., dissenting).

retaining *Roe* is far weaker than the reliance argument for keeping *Plessy*."[86] Rehnquist, in dismissing the majority's reliance argument, concluded that "the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here."[87]

In addition to these reliance-based arguments, the majority in *Casey* also proposed that the principle of stare decisis should be even more rigidly adhered to when "the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*."[88] The Court stated that

> whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution . . . its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. . . . So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.[89]

While this decision would seem to imply that controversial decisions are to be considered nearly beyond reproach, eleven years later the Court would come to a completely different position on divisive rulings.

In *Lawrence v. Texas*, the Court ruled that a Texas statute that criminalized sexual intimacy between same sex partners was an unconstitutional violation of the Due Process Clause.[90] This holding directly overturned the Court's previous ruling in *Bowers v. Hardwick*, in which the Court held that a similar sodomy statute in Georgia did not violate the rights of homosexuals.[91] Apparently disregarding the *Casey* requirement of "an equally rare precedential force,"[92] the Court in *Lawrence* acknowledged that the "criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects,"[93] and then reversed itself, pronouncing that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."[94]

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86 Paulsen, *supra* note 74, at 1555.

87 *Casey*, 505 U.S. at 956 (Rehnquist, C.J., dissenting).

88 *Id.* at 866.

89 *Id.* at 867.

90 539 U.S. 558, 578–79 (2003).

91 478 U.S. 186, 192, 196 (1986).

92 *Casey*, 505 U.S. at 867.

93 *Lawrence*, 539 U.S. at 576.

94 *Id.* at 578.

Therefore, at least in *Lawrence*, the Court recognized that regardless of the principle of stare decisis, bad decisions must be corrected. It seems, then, that while "[t]he doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law[, i]t is not . . . an inexorable command."[95] This approach has led two recent commentators to agree with Professor Paulsen's evaluation of the *Casey* Court's presentation of stare decisis: "In practical terms, the doctrine means that precedent is followed, except when it isn't."[96]

This, of course, leaves open the question of whether *Roe* should be upheld simply because of stare decisis, or whether, if it were found to be "bad law," it should be overruled in spite of it. This uncertainty is further compounded by the *Casey* reliance standard, which is not only in itself a strong departure from traditional ideas of protecting economic interests, but is also viewed as a departure from historical rulings such as *Brown v. Board of Education*, where similar reliance interests were found to be secondary to constitutional adherence. Therefore, while neither the doctrine of reliance nor the doctrine of stare decisis can be seen as providing a clear avenue for reversal of *Roe*, it is equally true that neither provides a particularly safe harbor for it.

B. Determining Rights

As this essay indicated at the outset, the *Roe* case was about rights. In the end, the Court ruled that the unborn have virtually no rights, states have a limited right to protect the unborn, and a woman's right to privacy gives her the majority of power in reproductive decision-making.[97] However, as discussed earlier in this essay, the rights of the unborn, along with the states' ability to protect them, have increased dramatically over the past three decades.[98] It is this shift in legal recognition that has arguably served to meet the *Casey* standard for overcoming stare decisis as the legal foundation for *Roe*.

One aspect of *Roe* that has remained unchanged over the years, however, is a woman's right to privacy and the control that this right gives her in reproductive planning. Yet even this central holding may have been jeopardized by the Court's 1997 ruling in *Washington v. Glucksberg*.[99] In *Glucksberg*, the Court rejected the idea that physician-

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95 *Id.* at 577.

96 Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 106 (2005) (quoting Paulsen, *supra* note 74, at 1542).

97 Roe v. Wade, 410 U.S. 113, 152, 158, 163 (1973).

98 *See supra* Part II.B.

99 521 U.S. 702 (1997).

assisted suicide was a constitutionally protected right.[100] Though the Court avoided terminating the reproductive rights created in *Roe*, its analysis in *Glucksberg* "rejected the type of substantive due process reasoning that produced *Roe*."[101] In other words, while the *Glucksberg* ruling left the ultimate findings of *Roe* intact, it invalidated the method used to obtain those findings.

Years later in *Lawrence*, Justice Scalia, applying the *Glucksberg* analysis to the *Casey* standard for overcoming stare decisis, remarked:

> *Roe* and *Casey* have been equally "eroded" by *Washington v. Glucksberg*, which held that *only* fundamental rights which are "'deeply rooted in this Nation's history and tradition'" qualify for anything other than rational-basis scrutiny under the doctrine of "substantive due process." *Roe* and *Casey*, of course, 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.[102]

In speaking of "erosion," Justice Scalia presents the argument that yet another legal foundation for *Roe* has been removed: the Court has recognized that the process behind its decision to expand a woman's right to privacy was flawed. Therefore, while the *Casey* Court argued that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973,"[103] "it is absolutely clear that *Roe* could not have resulted in 1973 from the jurisprudence of substantive due process announced in *Glucksberg* in 1997."[104] Thus, as one set of rights are being expanded beyond the limits initially recognized in *Roe* (namely, the growing state recognition of the personhood of the unborn), another right established by *Roe* may be on the verge of being curtailed.

IV. CONCLUSION

Is *Roe* subject to being overturned? Or is it settled law? Though supporters of *Roe* point to the establishment of a fundamental right and the doctrine of reliance as reasons for maintaining the ruling, it appears that the legal facts and reasoning that lay behind the original decision have become either outdated by state-enacted legislation and evolving standards of decency, or rejected by subsequent Court decisions. "In fact, it is no exaggeration to say that the 'development of constitutional law since [*Casey*] was decided has implicitly . . . left *Roe* behind as a mere

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100 *Id.* at 728.

101 Paulsen, *supra* note 74, at 1557.

102 Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (citation omitted).

103 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992).

104 Paulsen, *supra* note 74, at 1558.

survivor of obsolete constitutional thinking.'"[105] It is therefore the conclusion of this essay that, as the *Casey* standards for overcoming stare decisis have been met, *Roe* is indeed in legal jeopardy and subject to reversal by the Court.

105 *Id.* at 1557–58 (quoting *Casey*, 505 U.S. at 857).

WRONGFUL DEATH AND THE LEGAL STATUS OF THE PREVIABLE EMBRYO: WHY ILLINOIS IS ON THE CUTTING EDGE OF DETERMINING A DEFINITIVE STANDARD FOR EMBRYONIC LEGAL RIGHTS

Philosophers and theologians may debate, but there is no doubt in the mind of the Illinois Legislature when life begins. It begins at conception.[1]

I. INTRODUCTION

In 1978, a healthy baby girl was born in northern England,[2] a child not of traditional *in vivo*[3] fertilization, but rather one born as a result of the groundbreaking technology of *in vitro*[4] fertilization. The birth of Louise Joy Brown, better known as the world's first "test-tube baby," sparked a heated worldwide debate as to the ethical and biological implications of creating human life outside the womb.[5] This debate continued as the United States implemented its own *in vitro* fertilization program at the Eastern Virginia Medical School,[6] and when in 1981, Elizabeth Jordan Carr, the first American *in vitro* success, was born in Norfolk, Virginia.[7]

To some, this technology was frighteningly reminiscent of Aldous Huxley's prophetic vision of genetically engineered children conceived in laboratories, while others hailed it as a medical miracle.[8] The media response initially focused on the ethical debate of "playing God"; however, the legal implications of *in vitro* fertilization quickly became

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1 Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 6 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act).

2 FIONA MACDONALD, THE FIRST "TEST-TUBE BABY" 4 (2004).

3 *In vivo* is defined as "[i]n the living body, referring to a process or reaction occurring therein." STEDMAN'S CONCISE MEDICAL DICTIONARY FOR THE HEALTH PROFESSIONS 1060 (John H. Dirckx ed., 4th ed. 2001) [hereinafter STEDMAN'S MEDICAL DICTIONARY].

4 *In vitro* is defined as "[i]n an artificial environment, referring to a process or reaction occurring therein, as in a test tube or culture media." *Id.*

5 MACDONALD, *supra* note 2, at 32–34.

6 GEOFFREY SHER, VIRGINIA MARRIAGE DAVIS & JEAN STOESS, IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES xvii (3d ed. 2005).

7 MACDONALD, *supra* note 2, at 31.

8 *The First Test Tube Baby*, TIME, July 31, 1978, at 58. Huxley's famous novel, first published in 1932, depicts a futuristic world where technicians orchestrate human conception, birth, and childhood development within a laboratory. This society shuns any barbaric woman who chooses to carry a child in her womb and give birth in the traditional way. ALDOUS HUXLEY, BRAVE NEW WORLD (First Perennial Classics 1998) (1932).

relevant. For example, a 1989 article in *Time* magazine discussed the complex legal dilemmas raised by *in vitro* technology, including such questions as "Who should exercise primary rights over the frozen embryo?" and "What rights, if any, does the embryo have?"[9] Today, more than twenty years after the inception of *in vitro* fertilization, the courts and state legislatures still struggle with these fundamental questions.

In February 2005, in a case of first impression, a Cook County district judge chose to review an interlocutory order to determine whether, under Illinois law, a couple could bring a wrongful death action for the destruction of their frozen preembryo.[10] The court, in *Miller v. American Infertility Group*, held that a preembryo is a human being and should be given the same legal status as an embryo developing in the womb.[11] That determination caused the media and legal community to probe further into the important issue of what rights should be given to all embryos, including those cryogenically preserved.

This note will focus on the legal status of the previable embryo. It begins with an overview of the processes of *in vitro* fertilization and cryopreservation. Part III examines the historical framework of wrongful death statutes as well as the various state statutory approaches to the wrongful death of an embryo. Part IV focuses on the struggle to define human life in Illinois, and whether, under Illinois law, there is a wrongful death remedy for a pre-implanted embryo. Finally, Part V challenges the states to allow wrongful death suits for all previable embryos and proposes a guide for change through model legislation.

This note will show why *Miller v. American Infertility Group* should be upheld, and why Illinois is on the cutting edge of establishing a definitive standard for embryonic legal rights.

II. OVERVIEW OF *IN VITRO* FERTILIZATION AND CRYOPRESERVATION

Since the dawn of *in vitro* fertilization (IVF) in the late 1970s, there has been an explosion of reproductive technologies. While no precise figure exists, it is believed "that more than one million babies have been born worldwide since 1978" as a result of IVF.[12] In the United States, approximately 400 clinics offer IVF[13] and "[a]t least 60,000 IVF

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[9] John Elson, *The Rights of Frozen Embryos*, TIME, July 24, 1989, at 63.

[10] Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 1 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act). Throughout this article and *Miller*, the term *preembryo* is primarily used to describe the embryo that is frozen and not yet implanted in the womb. This term is defined in the Illinois Gestational Surrogacy Act as "'a fertilized egg prior to 14 days of development.'" *Id.* at 2 n.2 (quoting 750 ILL. COMP. STAT. 47/10 (2002)).

[11] *See infra* note 136 and accompanying text.

[12] MACDONALD, *supra* note 2, at 32–34.

[13] SHER, DAVIS & STOESS, *supra* note 6.

procedures are performed . . . annually, with an average birthrate of 25%."[14]

To begin the *in vitro* process, a woman takes fertility drugs. These fertility drugs cause the ovaries to produce several mature eggs (as opposed to the single egg that is naturally released each normal monthly cycle).[15] After the eggs have matured, they are removed from the ovaries by an IVF surgeon using a needle guided by ultrasound technology.[16] The harvested eggs are then placed in a Petri dish and mixed with sperm and a special medium that assists in keeping them alive.[17] Around forty-six hours after the Petri dish conception, a growing "embryo is a translucent, amber-colored mass of two to six cells (blastomeres),"[18] and

> [w]ithin 72 hours of insemination most healthy embryos will have divided into seven to nine blastomeres. . . . By 96 hours the healthy embryo will have more than 80 blastomeres and will look like a mulberry, or morula. By 120 to 144 hours after insemination, most viable embryos will comprise more than 100 cells and have a fluid-filled center or blastula, and are said to be at the blastocyst stage.[19]

When the embryos have reached the blastocyst stage, the IVF surgeon will use a catheter to place several embryos into the uterus where ideally they will implant and continue to grow.[20]

While a normal IVF cycle can result in "one dozen to nearly three dozen eggs for fertilization," only "[a] few of the resulting embryos are implanted and . . . [typically] the remainder are cryopreserved."[21] As of May 2003, "according to a report released by the Society for Assisted Reproductive Technology . . . , an estimated four hundred thousand embryos are suspended in cryotanks in IVF clinics across the [United States]—the largest population of frozen embryos in the world."[22] The preembryo in *Miller* was similarly intended for cryopreservation.

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[14] Laura Bradford, *Three Ways to Give Nature a Helping Hand*, TIME, Apr. 15, 2002, at 52.

[15] SHER, DAVIS & STOESS, *supra* note 6.

[16] *Id.* at 38.

[17] *Id.* at 86.

[18] *Id.* at 87.

[19] *Id.* at 87–88.

[20] *Id.* at 95.

[21] KIM K. ZACH, REPRODUCTIVE TECHNOLOGY 81 (2004). *Cryopreservation* is the freezing of the embryos for use at a later date. STEDMAN'S MEDICAL DICTIONARY, *supra* note 3, at 235.

[22] *Id.* at 82–83.

III. WRONGFUL DEATH STATUTES

A. Historical Development of Wrongful Death Statutes

Under the English common law, no cause of action existed for wrongful death[23] because when either the tortfeasor or the victim died prior to litigation of the claim, the claim died as well.[24] The tortfeasor paid no monetary price to the deceased victim's dependents or heirs, making it "cheaper for the defendant to kill the plaintiff than to injure him."[25] This inconsistency in the common law meant that "the greatest injury that one person can inflict upon another, the taking of another's life, was without civil redress."[26] The British Parliament rectified this injustice by passing the Fatal Accident's Act of 1846,[27] commonly referred to as Lord Campbell's Act, which allowed for civil suit by any "person answering the description of the widow, parent or child who, under the circumstances, suffers pecuniary loss."[28]

In 1847, following England's lead, New York enacted a wrongful death statute patterned after Lord Campbell's Act.[29] Currently, every state has a statutory remedy for wrongful death that provides compensation to the victim's beneficiaries, and also provides deterrence for negligent behavior.[30]

B. History of Recovery for Injuries to the Unborn Child

During the first part of the twentieth century, a tortfeasor in the United States owed no duty to the child within a woman's womb—only a duty to the pregnant mother.[31] Early court cases such as *Dietrich v. Inhabitants of Northhampton* failed to recognize any personhood for the unborn.[32] *Dietrich* addressed whether a pregnant woman could bring a civil suit for the death of her child due to a miscarriage induced by her

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[23] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 127A, at 945–50 (5th ed. 1984).

[24] DAN B. DOBBS, THE LAW OF TORTS 803 (2000); *see also* 12 AM. JUR. TRIALS *Wrongful Death Actions* § 2, at 317 (2005) (clarifying that this principle "was embodied in the maxim, '*actio personalis moritur cum persona*' [which] [l]iterally . . . means that a personal action dies with the person").

[25] KEETON ET AL., *supra* note 23, at 945.

[26] 12 AM. JUR. TRIALS, *supra* note 24, § 2, at 323.

[27] *Id.* § 4, at 327.

[28] *Id.* § 4, at 328.

[29] KEETON ET AL., supra note 23, at 945.

[30] DOBBS, *supra* note 24, at 804.

[31] *Id.* at 781.

[32] 138 Mass. 14, 14 (1884), *overruled by* Torigian v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967). The Supreme Court of Massachusetts decided the first recorded American case of liability for prenatal injuries. *Id.*

fall on a defective sidewalk.[33] The court held that because the "unborn child was a part of the mother at the time of injury,"[34] the child had no separate cause of action for "injuries received by it while in its mother's womb."[35] For over fifty years, the common law reflected this "single entity" view that the unborn child had no legal existence apart from the mother.

However, in 1946, the court in *Bonbrest v. Kotz* rejected the notion that an unborn child is merely an extension of the mother.[36] There, a baby sustained nonfatal injuries due to professional malpractice during delivery. The District Court for the District of Columbia denied the defendant physician's motion for summary judgment agreeing with a Canadian court's assertion that "'it is but natural justice that a child, if born alive and *viable* should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.'"[37] The court explained that a "viable child being 'part' of its mother [is] a contradiction in terms" when "[m]odern medicine is replete with cases of living children being taken from dead mothers."[38] Moreover, the court also recognized the *previable embryo* within the womb as human life, noting that "[b]y the eighth week the embryo . . . is an unmistakable human being, even though it is still only three-fourths of an inch long."[39]

This case led the way for courts to recognize a separate action for the wrongful death of an unborn child. Today, although fourteen states still deny recovery for the wrongful death of a child that is not born alive,[40] the majority of states allow wrongful death actions for the death of a "viable" unborn child.[41] Six states give ultimate value in protecting

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[33] *Id.*

[34] *Id.* at 17.

[35] *Id.* at 15.

[36] 65 F. Supp. 138 (D.D.C. 1946).

[37] *Id.* at 142 (quoting Montreal Tramways v. Leveille, [1933] S.C.R. 456, ¶ 28).

[38] *Id.* at 140.

[39] *Id.* at 140 n.11 (citing GEORGE WASHINGTON CORNER, OURSELVES UNBORN: AN EMBRYOLOGIST'S ESSAY ON MAN 69 (1944)).

[40] Fourteen states continue to hold to the live birth requirement: Alaska, California, Florida, Indiana, Iowa, Maine, Nebraska, New Jersey, New York, Tennessee, Texas, Utah, Virginia, and Wyoming. *See infra* Part III.C.1.

[41] There are currently thirty states that uphold viability as the standard for wrongful death recovery: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, and Wisconsin. *See infra* Part III.C.2; *see also* Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 AKRON L. REV. 41, 53–71, 77–80 (2004).

human life by recognizing a claim for the death of a "previable" embryo.[42]

C. Three Jurisdictional Approaches to the Wrongful Death of a Fetus or an Embryo

1. Live Birth

Fourteen jurisdictions apply the most stringent test for liability, which denies all recovery for the wrongful death of a child that is not born alive.[43] Thus, a child wrongfully injured during birth will have no cause of action when a stillbirth results. On the other hand, the "live birth" requirement is satisfied even if the child dies within a few minutes of birth.[44] This rule effectuates the standard "that if the defendant does enough damage to terminate the life of the fetus before birth, he simply is not liable."[45] While this harsh position does create a bright line standard, it has been criticized for lacking an "understanding about fetal development," since "[t]he rule assumes that a fetus cannot be considered a person . . . at any point prior to birth."[46]

These minority "live birth" jurisdictions advance seemingly contradictory reasoning to "support their failure to permit a cause of action for the wrongful death of a viable unborn child."[47] For example, in *Justus v. Atchison*, parents urged the California Supreme Court to recognize a cause of action for the wrongful death of two full-term children who were delivered stillborn due to medical negligence during the course of delivery.[48] The parents argued that "[b]ecause California recognizes an action for prenatal injuries if a child is born alive, it is illogical to deny a cause of action to a different child who suffers identical prenatal injuries but dies shortly before birth instead of shortly thereafter."[49] Nevertheless, the court's analysis centered on "whether a stillborn fetus is a 'person' within the meaning of the [California] wrongful death statute."[50] The court concluded that, based on the legislative intent behind the California statute, a full-term stillborn child is not a person. The court defended its upholding of the live birth view, stating:

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[42] Six states have extended liability to the previable embryo: Georgia, Illinois, Louisiana, Missouri, South Dakota, and West Virginia. *See infra* Part III.C.3.

[43] *See supra* note 40.

[44] Kalafut v. Gruver, 389 S.E.2d 681, 684–85 (Va. 1990).

[45] DOBBS, *supra* note 24, at 782.

[46] Robin C. Hewitt, Farley v. Sartin*: Viability of a Fetus No Longer Required for Wrongful Death Liability*, 98 W. VA. L. REV. 955, 964 (1996).

[47] 19 AM. JUR. 3D PROOF OF FACTS *Wrongful Death of Fetus* § 8, at 125 (1993).

[48] 565 P.2d 122 (Cal. 1977).

[49] 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

[50] *Justus*, 565 P.2d at 124 (citing CAL. CIV. PROC. CODE § 377 cmt. (West 2004)).

> In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life . . . . In short, the unborn have never been recognized in the law as persons in the whole sense.[51]

While commentators may have initially opposed those states that allow a wrongful death recovery for the viable fetus, this was a weak argument for the California Supreme Court since at the time of the 1977 *Justus* decision, "twenty-five states had [already] recognized the cause of action."[52] Also, because wrongful death acts compensate or even vindicate the parents for the death of their unborn child, it does not necessarily follow that the unborn child has no intrinsic human value. Other live birth jurisdictions give similar illogical arguments and echo the poor conclusion of *Justus* "that a viable unborn child is not a person within the meaning" of their state's statute.[53]

In *Stern v. Miller*, the Florida Supreme Court held that a viable unborn child is not a "'person' for purposes of [the Florida wrongful death statute]" despite admitting that the great weight of authority supported allowing recovery.[54] The court noted the following arguments in support of the majority viability position:

> The courts are split where, as a result of the injuries he received, the child is subsequently stillborn . . . . The reasons for recovery are compelling: A viable fetus is a human being, capable of independent existence outside the womb; a human life is therefore destroyed when a viable fetus is killed; it is wholly irrational to allow liability to depend on whether death from fatal injuries occurs just before or just after birth; it is absurd to allow recovery for prenatal injuries unless they are so severe as to cause death; such a situation favors the wrongdoer who causes death over the one who merely causes injuries, and so enables the tortfeasor to foreclose his own liability.[55]

However, the Florida Supreme Court dismissed these compelling grounds for recognizing the viable unborn child as human life, and instead focused on the intent of the legislature to limit recovery to a "minor child," concluding "that a stillborn fetus is not within the statutory classification."[56]

Similarly, in the leading minority case of *Witty v. American General Capital Distributors, Inc.*, the Texas Supreme Court recognized that an

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51 *Id.* at 131 (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)).

52 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

53 *Id.*

54 348 So. 2d 303, 303 (Fla. 1977).

55 *Id.* at 305–06.

56 *Id.* at 307.

unborn child has "an existence separate from its mother" and that the live birth jurisdictions are substantially outnumbered by those states adopting the majority rule.[57] Yet, the court still refused to allow a mother to collect wrongful death damages for her child's death resulting from prenatal injuries.[58]

While many of the early live birth cases have been "subsequently overruled by judicial or legislative action,"[59] California, Florida, and Texas, as well as eleven other jurisdictions, still continue to hold to their minority position of no recovery for the wrongful death of an unborn child.

2. Viability

The majority of jurisdictions do permit fetal wrongful death actions on the condition that the child is "viable" at the time of death.[60] A viable child is one that is capable of living outside the womb.[61] The concept of legal viability "was first suggested by Justice Boggs of the Illinois Supreme Court in his dissent to *Allaire v. St. Luke's Hospital.*"[62] The majority opinion in *Allaire* held that an infant could not maintain a cause of action for nonfatal injuries received within the womb. However, in dissent, Justice Boggs argued that if the child had received an injury *in utero*, which later after birth caused the child's death, the common law would treat this as a punishable injury to a human being. Thus, it follows that one who inflicts nonfatal injuries on a child in the womb should also be punished:[63]

> The law should, it seems to me, be that whenever a child in utero is so far advanced in prenatal age as that, should by parturition by natural or artificial means occur at such age, such child could and would live separable from the mother, and grow into the ordinary activities of life, and is afterwards born, and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother.[64]

In 1949, the Minnesota Supreme Court, in *Verkennes v. Corniea*, first rejected the live birth requirement in favor of the viability rule.[65]

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[57] 727 S.W.2d 503, 505 (Tex. 1987) (citing Leal v. C.C. Pitts Sand & Gravel Co., 419 S.W.2d 820 (Tex. 1967)).

[58] *Id.* at 506.

[59] 19 AM. JUR. PROOF OF FACTS, *supra* note 47.

[60] *See supra* note 41.

[61] BLACK'S LAW DICTIONARY 1559 (7th ed. 1999).

[62] Hewitt, *supra* note 46 (citing Allaire v. St. Luke's Hosp., 56 N.E. 638 (Ill. 1900) (Boggs, J., dissenting)).

[63] *Allaire*, 56 N.E. at 641 (Boggs, J., dissenting).

[64] *Id.* at 642.

[65] 38 N.W.2d 838, 841 (Minn. 1949); *see also* Marks, *supra* note 41, at 44.

The court held that a cause of action would lie when a stillbirth results from prenatal injuries to a viable unborn child.[66] In refuting the common law belief that the child *in utero* is merely an extension of the woman's anatomy, *Verkennes* cited several cases including *Bonbrest v. Kotz*[67] and Judge Boggs's dissent in *Allaire*.[68] *Verkennes* led the way for other jurisdictions to expand liability for the wrongful death of a viable child within the womb.

3. Previability

Currently, Georgia, Illinois, Louisiana, Missouri, South Dakota, and West Virginia have extended wrongful death liability to those injuries causing the death of a previable child. Of these six, "five permit the cause of action at any point during gestation. Georgia alone uses 'quickening' as the point when a wrongful death action is recognized."[69]

In Georgia, *Tucker v. Carmichael & Sons* first broached the issue of whether an infant could recover damages for prenatal injuries. The state's highest court held in the affirmative for the child, emphasizing that life begins "when the child is able to stir in the mother's womb."[70] Four years later, a Georgia appellate court, in *Porter v. Lassiter*, ruled that an action may be maintained for the death of an unborn child who was "quick" or "able to move in the mother's womb" at the time of death.[71] In this case, the mother was approximately six weeks pregnant at the time of the accident and was four and a half months pregnant when a miscarriage occurred.[72] The court determined that the Georgia Code, which allows suit for the wrongful death of a "child," included that of a "quickened" fetus because it also declares that "the wilful killing of an unborn child so far developed as to be ordinarily called 'quick', [sic] is considered as murder."[73] Therefore, "[a]s a result of the *Porter* decision, Georgia became the first state to allow wrongful death recovery for the death of an unborn fetus that may not be viable at the time of the tortious act."[74]

In 1981, the Louisiana Supreme Court in *Danos v. St. Pierre* initially denied recovery for a six-month-old fetus that suffered prenatal

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66 *Verkennes*, 38 N.W.2d at 841.

67 65 F. Supp. 138, 138 (D.D.C. 1946).

68 *Allaire*, 56 N.E. at 641–42 (Boggs, J., dissenting).

69 Marks, *supra* note 41, at 71.

70 65 S.E.2d 909, 910 (Ga. 1951).

71 87 S.E.2d 100, 102 (Ga. App. 1955).

72 *Id.*

73 *Id.*

74 Jill D. Washburn Helbling, *To Recover or Not to Recover: A State by State Survey of Fetal Wrongful Death Law*, 99 W. VA. L. REV. 363, 423 (1996).

injury and was subsequently stillborn.[75] However, upon rehearing, the court reversed and allowed the parents of the deceased child to recover for the wrongful death.[76] To support its ruling, the court reasoned, "The loss to parents of a child who otherwise would have been born normally is substantially the same, whether the tortfeasor's fault causes the child to be born dead or to die shortly after being born alive . . . ."[77] Also, recent Louisiana legislation had pronounced "that a human being exists from the moment of fertilization and implantation."[78] *Danos* also rejected the argument that an unborn child is a part of the mother's anatomy, stating:

> We believe the infant is a child from the moment of its conception although life may be in a state of suspended animation the subject of love, affection, and hope and that the injury or killing of it, in its mother's womb . . . gives the bereaved parents a right of action against the guilty parties for their grief, and mental anguish.[79]

Missouri courts held to the position that a viable fetus is not a "person" within Missouri's wrongful death statute until the 1983 case of *O'Grady v. Brown*.[80] In *Rambo v. Lawson*, the Supreme Court of Missouri declined to extend liability to a previable fetus that died *in utero* as a result of an automobile accident.[81] However, the court reversed itself in 1995 and allowed recovery for the wrongful death of a previable child at four months gestation.[82] In examining the statutory intent behind state abortion regulation, which in part says that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being," the court found that the general assembly had directed "that the time of conception and not viability is the determinative point at which the legally protected rights, privileges, and immunities should be deemed to arise."[83]

In 1984, South Dakota specifically amended its statute to include the wrongful death of an unborn child.[84] In 1986, the Supreme Court of South Dakota held that even under the pre-amendment statute, because of the "'clear, overwhelming and growing majority of jurisdictions' permitting actions in such cases, a cause of action for the death of a

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75 402 So. 2d 633, 639 (La. 1981).

76 *Id.*

77 *Id.* at 638.

78 *Id.*

79 *Id.* at 639.

80 654 S.W.2d 904 (Mo. 1983).

81 799 S.W.2d 62, 64 (Mo. 1990).

82 Connor v. Monkem Co., 898 S.W.2d 89, 90–93 (Mo. 1995).

83 *Id.* at 91 n.6.

84 Helbling, *supra* note 74, at 426 (citing S.D. CODIFIED LAWS § 21-5-1 (1987)).

viable, unborn fetus did exist under the [former] wrongful death statute."[85]

The court further held in *Wiersma v. Maple Leaf Farms* that South Dakota's amended wrongful death statute provides a cause of action for the loss of the previable unborn child.[86] In this case, parents had brought a wrongful death action against a frozen food company claiming that the company's salmonella-contaminated chicken had caused the mother to miscarry. At the time of the miscarriage, the unborn child was clearly previable at only seven weeks gestation.[87] The court focused its analysis on the construction of the statute, and found that by amending the statute to include an "unborn child" and not a "fetus or embryo," the legislature meant to "include any child still within a mother's womb."[88] Furthermore, the intent of the legislature is seen where an "unborn child" in criminal statutes is defined as "'an individual organism of the species homo sapiens from fertilization until live birth.'"[89] The court also noted that apart from balancing "the privacy rights of the mother against her unborn child," the term "viability is purely an arbitrary milestone from which to reckon a child's legal existence," since this is a relative matter that may vary depending on the mother's health and other factors apart from the state of development.[90]

In West Virginia, the landmark case of *Farley v. Sartin* declared that a previable fetus is a "person" within the meaning of West Virginia's wrongful death statute.[91] In *Farley*, the plaintiff's pregnant wife was killed in an auto accident along with their child who had developed to approximately eighteen weeks gestation. The court held that

> justice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child ha[s] not yet reached viability at the time of death. . . . Our concern reflects the fundamental value determination of our society that life—old, young, and prospective—should not be wrongfully taken away.[92]

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[85] *Id.* at 427 (quoting Farley v. Mount Marty Hosp. Ass'n, 387 N.W.2d 42, 44 (S.D. 1986)).

[86] 543 N.W.2d 787, 789 (S.D. 1996).

[87] *Id.*

[88] *Id.* at 790.

[89] *Id.* (citing S.D. CODIFIED LAWS § 22-1-2(50A) (1996)).

[90] *Id.* at 792.

[91] 466 S.E.2d 522, 532 (W. Va. 1995).

[92] *Id.* at 533.

IV. ILLINOIS' STRUGGLE TO DEFINE HUMAN LIFE

A. Illinois Wrongful Death Act[93]

The Illinois Wrongful Death Act, "enacted by the General Assembly in 1853, created for the first time in Illinois a cause of action for death."[94] The Act patterns the 1847 New York statute, which substantially copied Lord Campbell's Act.[95]

In 1973, Justice Ryan in his dissent to *Chrisafogeorgis v. Brandenberg* asked: "'[W]hy set the line of demarcation at viability? Why should not a cause of action exist for the death of a fetus in its previable state?'"[96] In 1980, the Illinois Legislature enacted section 2.2 of the Illinois Wrongful Death Act which states:

> The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default.[97]

Senator Rhoads introduced this bill by explaining that while at the time case law permitted "'the representative of the unborn child at viability [to] bring a cause of action for wrongful death[,]'" there was no case law clarifying the gap between conception and viability, a gap that section 2.2 would now fill.[98]

B. Illinois Case History

1. Case History Prior to *Miller v. American Infertility Group*

In 1973, the Supreme Court of Illinois in *Chrisafogeorgis v. Brandenberg* first addressed whether under the Illinois Wrongful Death Act parents could recover for the wrongful death of a child who dies in

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[93] The text of section 1 of the act reads as follows:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . .

740 ILL. COMP. STAT. 180/1 (2002).

[94] 740 ILL. COMP. STAT. ANN. 180/0.01 hist. n. (West 2002).

[95] *Id.*

[96] John C. Wunsch, *Parental Recovery for Loss of Society of the Unborn: The Plaintiff's Perspective*, 77 ILL. B.J. 538, 539 (1989) (quoting Chrisafogeorgis v. Brandenberg, 304 N.E.2d 88, 92 (Ill. 1973) (Ryan, J., dissenting)).

[97] 740 ILL. COMP. STAT. 180/2.2 (2002).

[98] Wunsch, *supra* note 96 (quoting 81st Ill. Gen. Assemb., S. Proc., May 17, 1979, at 165 (statement of Sen. Rhoads)).

the womb.[99] During her thirty-sixth week of pregnancy, an automobile negligently struck Mrs. Chrisafogeorgis, later causing her baby boy to be stillborn. The Court had previously held in *Amman v. Faidy*[100] that "there is a right of action for injuries wrongfully sustained by a viable child . . . when the child survives the injuries and is born alive."[101] In *Chrisafogeorgis*, the court chose to extend this liability to a viable fetus that dies *in utero*.[102] The court cited cases from other jurisdictions which described the bizarre results of only allowing recovery for a child who is born alive. "For example, a doctor or a midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However if they badly injured the child they would be exposed to liability."[103] Justice Ryan further argued in his dissent that the distinction between viability and nonviability is relative and thus causes similarly incongruous results as the distinction made between a child who dies shortly before birth and one who dies shortly thereafter.[104]

In *Renslow v. Mennonite Hospital*, the court held that an infant could maintain an action against the hospital for injuries sustained from a negligent blood transfusion given to the mother *prior* to the child's conception.[105] The court noted that viability is a relative matter and that "denial of claims for injuries to the previable fetus may indeed cut off some of the most meritorious claims, for there is substantial medical authority that congenital structural defects caused by factors in the prenatal environment can be sustained only early in the previable stages."[106] While *Renslow* did not address wrongful death, it did cast doubt on upholding viability as the standard for recovery.

One year after *Renslow*, the court in *Green v. Smith* addressed whether a father could recover for the wrongful death of a child who died *in utero* at fourteen weeks gestation.[107] The court held that unless the fetus was viable, there would be no recovery, and that viability was a question of fact to be determined by the jury.[108] The court distinguished this from *Renslow* by stating:

> In our opinion there is a clear distinction between a common law cause of action on behalf of a live-born infant for injuries suffered prior to its

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[99] *Chrisafogeorgis*, 304 N.E.2d at 88–89.

[100] 114 N.E.2d 412 (Ill. 1953).

[101] *Chrisafogeorgis*, 304 N.E.2d at 89 (citing *Amman*, 114 N.E.2d at 417–18).

[102] *Id.* at 91.

[103] *Id.* at 92.

[104] *Id.* at 92–93 (Ryan, J., dissenting).

[105] 367 N.E.2d 1250, 1255 (Ill. 1977).

[106] *Id.* at 1252–53 (citing Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 563 (1962)).

[107] 377 N.E.2d 37, 38 (Ill. 1978).

[108] *Id.* at 39.

> having become viable, and a statutory cause of action for the destruction of a fetus not yet viable. The extent of the loss incurred by a living child burdened with mental or physical defects resulting from a prenatal occurrence is not affected by whether the injuries were suffered prior to or after he became viable. On the other hand, the Wrongful Death Act provides for recovery for the "death of a person," and we find no basis upon which to hold that one can cause the death of a fetus not yet viable.[109]

However, in 1980, the Illinois legislature amended the Wrongful Death Act to clarify that age of gestation will not bar recovery for the wrongful death of a developing child.[110] *Seef v. Sutkus* is the primary case addressing the wrongful death of a fetus following the amended legislation.[111] In *Seef*, a child was stillborn at thirty-eight weeks after a physician and hospital negligently failed to monitor the child and to perform a timely c-section.[112] The parents sought pecuniary damages for loss of the child's society.[113] The court explained that because section 2.2 of the Wrongful Death Act prohibits limitation of a wrongful death claim based on the state of gestation or development, "an unborn fetus is recognized as a 'person' and parents may recover damages for 'pecuniary injuries' resulting from the death of the unborn fetus."[114] The concurring opinion clarifies that the 1980 legislation eliminates the viability requirement of *Chrisafogeorgis*; however, the amount of pecuniary damages that the parents may recover is a separate issue.[115]

Illinois has led the way in enacting legislation that provides recovery for the wrongful death of a previable fetus. Recently, *Miller v. American Infertility Group* raised the important issue of whether the right of recovery given under the Illinois Wrongful Death Act to any "'state of gestation or development of a human being'" includes not only an embryo developing in the womb, but also an embryo artificially created and preserved *in vitro*, outside the womb.[116]

2. *Miller v. American Infertility Group*

Allison Miller and her husband, Todd Parish, sought treatment for

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[109] *Id.* at 38–39.

[110] 740 ILL. COMP. STAT. 180/2.2 (2002).

[111] 583 N.E.2d 510 (Ill. 1991).

[112] *Id.* at 511.

[113] *Id.* In the sense used here, "society" means "[t]he general love, affection, and companionship that family members share with one another." BLACK'S LAW DICTIONARY 1396 (7th ed. 1999).

[114] *Seef*, 583 N.E.2d at 511.

[115] *Id.* at 512–13 (Miller, J., concurring).

[116] Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 3 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (quoting 740 ILL. COMP. STAT. 180/2.2 (2002)) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act).

infertility from the Center for Human Reproduction in Illinois (Center).[117] In the typical preparation for *in vitro* fertilization,[118] the Center harvested Allison's eggs and then fertilized them with Todd's sperm. As a result, nine viable embryos were created and then frozen so that they could later be implanted in Allison's uterus. The couple believed "that at least one of these embryos developed into a healthy blastocyst"; however, it was wrongfully destroyed by the Center on or around January 13, 2000.[119] Allison and Todd first learned of their loss in June 2000 when they wished to transfer the embryo to another facility. The Center notified them by letter stating: "Based on our records, one of our junior embryologists informed you that we would freeze one embryo at the blastocyst stage . . . . A [senior embryologist] then decided not to cryopreserve this embryo."[120]

Miller and Parish filed suit against the Center and their complaint consisted of three counts including claims for negligence, willful and wanton misconduct, breach of contract, and wrongful death. On May 4, 2004, Judge David Lichtenstein dismissed with prejudice the claims based on negligence, willful and wanton misconduct, and breach of contract "with leave to replead, provided that the references to the Wrongful Death Act were removed."[121] Upon dismissal, Miller and Parish moved to reconsider. The court (with a new judge, as the previous trial judge had retired) denied the motion, refusing to reconsider the original order. The plaintiffs again moved for reconsideration, and Judge Jeffery Lawrence chose to review Lichtenstein's dismissal order and the order denying reconsiderations. [122]

A trial judge has the authority to revisit interlocutory orders—those orders that do not dispose of "all [the] counts or issues in the case."[123] Lawrence chose to review these orders since the case "involves an issue of public importance which is apparently one of first impression in Illinois."[124]

Not only is this an issue of first impression for Illinois, but one for almost all jurisdictions, with the exception being Rhode Island. In *Frisina v. Women & Infants Hospital of Rhode Island*, the Superior Court of Rhode Island held that three couples could not maintain an action for negligent infliction of emotional distress against a fertility

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[117] *Id.* at 1.

[118] *See supra* Part II.

[119] *Miller*, No. 02-L-7394, at 1–2.

[120] Dee McAree, *Wrongful Death Suit Allowed over Embryo*, NAT'L L.J., Feb. 14, 2005, at 4 (alteration in original).

[121] *Miller*, No. 02-L-7394, at 2.

[122] *Id.*

[123] *Id.*

[124] *Id.*

clinic following the loss and destruction of several frozen embryos.[125] In analyzing whether the destroyed preembryos were victims, the court cited various cases from other jurisdictions where frozen embryos were "'[not] recognized as 'persons' for constitutional purposes.'"[126] Also, the court deferred to *Miccolis v. Amica Mutual Insurance Co.*,[127] in which it had held "that a [pre]viable fetus is not a 'person' within the meaning of the wrongful death statute."[128] The *Frisina* court held that this "would [also] preclude pre-embryos from being considered victims."[129] Because Rhode Island holds to the viability approach for the wrongful death of the unborn, *Frisina*'s failure to extend legal rights to the frozen embryo is not surprising.

In *Miller*, Judge Lawrence presented two key issues: "(1) is a pre-embryo a 'human being' within the meaning of Sec. 2.2 of the Wrongful Death Act, and (2) must it be implanted in its mother's uterus to give rise to a claim under the Act for its destruction?"[130]

In analyzing whether section 2.2 of the Illinois Wrongful Death Act includes legal standing for the preembryo, as it does for the previable embryo, *Miller* emphasizes that the "words in a statute must be given their plain and ordinary meaning."[131] In 1980, section 2.2 was added to the Wrongful Death Act. It states: "The state of gestation or development of a human being when an injury is caused . . . shall not foreclose maintenance of any cause of action . . . arising from the death of a *human being* caused by wrongful act . . . ."[132] This amendment was sponsored by Senator Rhoads, who believed the bill would "'close a gap in the current law, both case and statutory law, covering that period . . . from the time of conception to the time of viability.'"[133]

However, neither Rhoads nor any of the other legislators attempted to define "human being." When necessary, the court may use "legislative history and the language of other statutes concerning related subject matter" to discern statutory construction.[134] While the Wrongful Death Act fails to define "human being," the Illinois Abortion Law of 1975 does

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[125] CIV. A. 95-5827, 2002 WL 1288784, at *1–2 (R.I. Super. Ct. May 30, 2002).

[126] *Id.* at *4–5 (quoting Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998)).

[127] 587 A.2d 67 (R.I. 1991).

[128] *Frisina*, 2002 WL 1288784, at *8 (citing *Miccolis*, 587 A.2d at 71).

[129] *Id.* at *8.

[130] Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 3 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act).

[131] *Id.* at 4 (citing Lulay v. Lulay, 739 N.E.2d 521, 527 (Ill. 2000)).

[132] 740 ILL. COMP. STAT. 180/2.2 (2002) (emphasis added).

[133] *Miller*, No. 02-L-7394, at 4–5 (quoting 81st Ill. Gen. Assemb., S. Proc., May 17, 1979, at 168 (statement of Sen. Rhoads)).

[134] *Id.* at 4 (citing People v. Hickman, 644 N.E.2d 1147, 1152 (Ill. 1994)).

define the term.[135] According to *Miller*, the Abortion Law makes it clear that while "[p]hilosophers and theologians may debate . . . there is no doubt in the mind of the Illinois Legislature when life begins. It begins at conception."[136] Section 1 of the Abortion Law declares:

> The General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State.[137]

Section 2 of the Illinois Abortion Law states that:

> (5) "Fertilization" and "conception" each mean the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum.
>
> (6) "Fetus" and "unborn child" each mean an individual organism of the species homo sapiens from fertilization until live birth. [138]

Because of the legislative intent behind section 2.2 of the Wrongful Death Act, as well as the Abortion Law's clear definition of "human being" including the unborn child "from the time of conception," the *Miller* order concludes that under Illinois statutory law an embryo not yet implanted in the womb is just as much a human being as an embryo developing *in utero*.[139]

The second issue addressed by *Miller* is whether a preembryo must be implanted in its mother's uterus to give rise to a claim under the Wrongful Death Act. Judge Lawrence again turns to the construction of the amendment. Although Rhoads's discussion of the bill focuses on the term "gestation," the final version of amendment section 2.2 reads "gestation or development of a human being."[140] Because section 2.2 also includes the term development, and not merely the term gestation, "it is a reasonable inference that [the legislature] must have contemplated nongestational development or development outside the womb."[141] In conclusion, *Miller* finds that it would be illogical to "allow a claim for the death of a human being after implantation in its mother's womb but deny it for one before implantation."[142]

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[135] 720 ILL. COMP. STAT. 510/1-15 (2002).

[136] *Miller*, No. 02-L-7394, at 6.

[137] 720 ILL. COMP. STAT. 510/1 (2002).

[138] *Id.* at 510/2; *see also id.* at 5/9-1.2 (defining "unborn child" under the Illinois intentional homicide statute to "mean any individual of the human species from fertilization until birth").

[139] *Miller*, No. 02-L-7394, at 6.

[140] 740 ILL. COMP. STAT. 180/2.2 (2002).

[141] *Miller*, No. 02-L-7394, at 8.

[142] *Id.*

V. PROPOSAL

A. Why All States Should Permit Recovery for the Wrongful Death of Both Previable Embryos and Preembryos

1. Natural Law Tradition of Valuing Life

> *If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished . . . and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life . . . .*[143]

Many jurisdictions, struggling with the determination of when life truly begins, have cited Blackstone to support a position of valuing early human life. For example, Justice Boggs, in his dissent in *Allaire v. St. Luke's Hospital*, cited Blackstone in support of the then innovative concept of legal viability.[144] Blackstone, reflecting the principle of justice for the unborn in *Exodus* 21:22, states:

> The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.
>
> 1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But [the modern law] doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor.
>
> An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy . . . . It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.[145]

Verkennes v. Corniea, the first case to reject the live birth requirement and adopt the viability standard, cited Blackstone in support of its expansion of legal rights for the unborn.[146] Both Boggs's dissent in *Allaire* and the majority in *Verkennes* found inconsistency between the current property and criminal law which treated the unborn as human "from the moment of conception," and the law of negligence

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[143] *Exodus* 21:22–23 (King James).

[144] Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting).

[145] 1 WILLIAM BLACKSTONE, COMMENTARIES *129–30.

[146] 38 N.W.2d 838, 840 (Minn. 1949).

which continued to treat the child as part of the mother.[147] Blackstone first emphasized this contradiction and declared that life begins "as soon as an infant is able to stir in the mother's womb."[148]

In the Illinois Supreme Court case of *Amman v. Faidy*, the court similarly cited Blackstone in support of its decision to allow an infant to maintain an action for prenatal injuries when it stated, "It would therefore seem to us to be an unwarranted reflection upon the common law itself to attribute to it a greater concern for the protection of property than for the protection of the person."[149]

The natural law, as reflected by Blackstone, gives foundational support for valuing human life and not treating the death of the unborn as a mere misdemeanor, but rather as an offense equal to that of the wrongful death of any other human being.

2. Scientific Evidence that the Previable Embryo is Human Life

In *Davis v. Davis*, a mother sought custody of seven cryogenically frozen embryos following a divorce.[150] Her ex-husband desired custody in order to have the embryos destroyed. At the trial in Maryville, Tennessee, world renowned French geneticist Jérôme Lejeune, M.D., Ph.D., testified to the humanity of the frozen embryos.[151] Lejeune passionately articulated that life begins at conception:

> [E]ach of us has a unique beginning, the moment of conception . . . . As soon as the twenty-three chromosomes carried by the sperm encounter the twenty-three chromosomes carried by the ovum, the whole information necessary and sufficient to spell out all the characteristics of the new being is gathered."[152]

Lejeune went on to speak of the unnecessary and potentially misleading terminology of labeling a frozen embryo a preembryo since

> [b]efore an embryo there is a sperm and an egg, and that's it. And the sperm and the egg cannot be a pre-embryo because you cannot tell what embryo it will be, because you don't know what sperm will go into what egg, but once it is made, you have got a zygote and when it divides it's an embryo and that's it.

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147 *Id.* (citing Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946)).

148 1 BLACKSTONE, *supra* note 145, at *129.

149 114 N.E.2d 412, 429 (Ill. 1953).

150 No. E-14496, 1989 WL 140495, at *1 (Tenn. Cir. Ct. Sept. 21, 1989), *overruled by* 842 S.W.2d 588 (Tenn. 1992).

151 JÉRÔME LEJEUNE, THE CONCENTRATION CAN: WHEN DOES HUMAN LIFE BEGIN? AN EMINENT GENETICIST TESTIFIES 22–23 (Ignatius Press 1992) (1990). In 1959, Jérôme Lejeune's genetic research identified the human chromosomal abnormality that accounts for Down syndrome, or Trisomy 21, the first chromosomal disorder to be positively identified. For his research on Down syndrome, he received the Kennedy Award and the William Allen Memorial Award, the highest honor in the world for genetics. *Id.*

152 *Id.* at 30.

> I think it's important because people would believe that a pre-embryo does not have the same significance as an embryo. And in fact, on the contrary, a first cell knows more and is more specialized . . . than any cell which is later in our organism.[153]

Lejeune's testimony is filled with detailed explanation of scientific advancements concerning the genetic code and the beginning of life. He describes the process of freezing embryos as placing them in a "concentration can."[154] This "can" does not stop life, to be later started anew after thawing. Rather, the low temperatures greatly slow down cells' microscopic movements and arrest "the flux of time" for the embryo, which if thawed "will again begin to flourish and to divide."[155] Lejeune clarifies that

> [a]n early human being in this suspended time inside the can, cannot be the property of anybody because he is the only one in the world to have the property of building himself. And I would say that science has a very simple conception of man; as soon as he has been conceived, a man is a man.[156]

The trial court heard from a total of seven experts in the fields of genetics, embryology, and *in vitro* fertilization, four of which agreed "that the seven cryopreserved embryos are human; that is, 'belonging or relating to man.'"[157] Based on their determination that the embryos were human beings, the trial court awarded the mother custody so that she would have the opportunity to bring the children to term through implantation. However, the court of appeals reversed, holding that "'the parties share an interest in the seven fertilized ova'" and remanded the case to the trial court to give them "'joint control . . . and equal voice over their disposition.'"[158] The Supreme Court of Tennessee held that the husband's interests outweighed the wife's, and thus the husband was entitled to custody of the embryos and had the ability to determine whether the embryos should be destroyed. The final outcome of *Davis* resulted in Tennessee adopting the standard that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[159]

Although Tennessee chose to treat frozen embryos as quasi-property, the testimony of Jérôme Lejeune, as well as his research and that of others within the scientific community, gives strong evidence for

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[153] *Id.* at 37–38.

[154] *Id.* at 47.

[155] *Id.* at 36.

[156] *Id.* at 47–48.

[157] Davis v. Davis, No. E-14496, 1989 WL 140495, at *4 (Tenn. Cir. Ct. Sept. 21, 1989), *overruled by* No. 180, 1990 WL 130807, at *3 (Tenn. Ct. App. Sept. 13, 1990).

[158] Davis v. Davis, 842 S.W.2d 588, 589 (quoting *Davis*, 1990 WL 130807, at *3).

[159] *Id.* at 597.

supporting the standard that human life begins from the moment the sperm fertilizes the ovum.

The law has long given deference to scientific advancement in the shaping of legal rights given to the unborn. For example, in 1900 Justice Boggs argued that

> [m]edical science and skill . . . have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother. . . . [I]s it not *sacrificing truth* to a mere theoretical abstraction to say the injury was not to the child, but wholly to the mother?[160]

In *Bonbrest v. Kotz*, the landmark case which rejected the notion that an unborn child is merely an extension of the mother, the court used current science to correct an error in the law.[161] The court held that because "modern medicine is replete with cases of living children being taken from dead mothers," a fetus can no longer be treated as legally one with the mother.[162]

Like *Bonbrest* and other cases which have used the understanding of modern medicine and human development to correct a scientifically outdated law, states should specifically amend their wrongful death statutes to reflect the current scientific evidence that life begins at conception. Not only must the law give rights to embryos *in utero*, but also to those embryos which are fully human but not yet implanted within the womb. "[Once] conceived, a man is a man."[163]

3. Inconsistency in Distinguishing *In Vivo* and *In Vitro* Previable Embryos

Those jurisdictions which reject the viability standard in favor of allowing wrongful death recovery for a previable embryo have justly done so in part due to the relativity and inconsistency of the viability standard. Likewise, Justice Ryan's concurrence in *Green v. Smith* argues for abandoning the viability standard in favor of a more definite standard.[164] Ryan argues that

> viability is . . . dependent upon the weight and race of the child and the techniques which are presently available to sustain the life of the fetus outside the womb. . . . For this court to base its determination

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[160] Allaire v. St. Luke's Hosp., 56 N.E. 638, 641 (Ill. 1900) (Boggs, J., dissenting) (emphasis added).

[161] 65 F. Supp. 138, 139–40 (D.D.C. 1946).

[162] *Id.* at 140.

[163] LEJEUNE, *supra* note 151, at 48.

[164] 377 N.E.2d 37, 40–41 (Ill. 1978) (Ryan, J., concurring). This case was prior to the 1980 amendment to the Illinois Wrongful Death Act that established a previability standard for wrongful death recovery for the unborn.

> that an unborn child becomes a 'person' only at the point of viability is to premise the right to maintain an action for wrongful death on an uncertain and continually changing standard.[165]

However, it is similarly inconsistent for those jurisdictions that have extended legal rights to the previable embryo in the womb to deny the same rights to the frozen previable embryo. The only difference between those embryos is that an *in vivo* embryo has implanted within the lining of the uterus.[166] Implantation, however, is not a definite standard for determining human legal status, since it can occur anywhere from six to twelve days after fertilization of the ovum.[167]

The best standard supported by scientific evidence is that of conception. From a legal standpoint, the actual date of conception may be less significant for naturally conceived children; however, it is crucial for those children conceived through *in vitro* fertilization, since in those cases one can pinpoint the precise timing of conception. The moment that the sperm fertilizes the egg—whether inside or outside of a woman's body—human life begins. Wrongful death law, as in *Miller v. American Infertility Group*, should reflect this definite standard.

B. Model Legislation

Below is suggested legislation which states may use as a model to amend their Wrongful Death Acts to reflect modern scientific understanding of human development and give equal legal rights to *in vivo* and *in vitro* human life.

> The state of gestation of a human being or the location of a developing human being when an injury is caused, when an injury takes effect, or at death, shall not bar any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default.
>
> A "human being" is an individual organism of the species *homo sapiens* beginning with the moment of conception, meaning the fertilization of a human ovum with a human sperm. Any form of preservation of a fertilized human ovum does not change its status as a human being.[168]

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[165] *Id.* at 40.

[166] Implantation is defined as "attachment of the fertilized ovum (blastocyst) to the endometrium, and its subsequent embedding in the compact layer." STEDMAN'S MEDICAL DICTIONARY, *supra* note 3, at 490.

[167] Allen J. Wilcox, Donna Day Baird & Clarice R. Weinberg, *Time of Implantation of the Conceptus and Loss of Pregnancy*, 340 NEW ENG. J. MED. 1796, 1797 (1999).

[168] This model legislation is a modification of section 2.2 of the Illinois Wrongful Death Act. *See* 740 ILL. COMP. STAT. 180/2.2 (2002).

VI. CONCLUSION

All jurisdictions have struggled to define when human life reaches the stage of development that will warrant recovery for wrongful death. The answer to this struggle is modeled both by Illinois' statutory and case law. The legislation protects the previable embryo, as does *Miller v. American Infertility Group*, which affirms that human life exists from conception until death. According to *Miller*, even previable frozen embryos should be recognized under wrongful death law as persons with legal status equal to that of a living child. Other previability jurisdictions should make the logical step to include rights not only for previable embryos in the womb, but also for those created and preserved through *in vitro* procedures. Those jurisdictions which still hold to the scientifically outdated standard of "live birth," as well as those which hold to the inconsistent standard of "viability" for wrongful death recovery, should follow Illinois' lead and amend their legislation to adopt "conception" as the definitive standard for embryonic legal rights.

Amber N. Dina

CHILDREN OF A LESSER LAW: THE FAILURE OF THE BORN-ALIVE INFANTS PROTECTION ACT AND A PLAN FOR ITS REDEMPTION

I. INTRODUCTION

The twentieth century saw significant progress made in the protection of children, and with good reason. Consider the following, all of which occurred in the United States within recent years:

- Weak and unable to fend for himself, a child was thrown into a dumpster and abandoned.[1]
- In obvious need of medical attention, which was immediately available, a child was merely wrapped in a blanket and died 2.5 hours later.[2]
- In desperate need of medical care, a child was laid on a table, abandoned in a closet and died.[3]
- Alive and moving, a child was sealed in a plastic bag and dumped in the trash, where he died.[4]
- Unknown whether he was alive or dead, a child was submerged into a toilet until his death became a certainty.[5]
- A child was plunged into a water-filled bucket and held there until he drowned.[6]
- While in a weakened state, a child was taken in hand and his neck was broken.[7]

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[1] Kathleen M. Casagrande, *Children Not Meant to Be: Protecting the Interests of the Child When Abortion Results in Live Birth*, 6 QUINNIPIAC HEALTH L.J. 19, 36 (2002).

[2] *Id.* at 46; Jill Stanek, *The Invisible Born-Alive Infants Protection Act*, DECLARATION FOUND., Aug. 24, 2004, http://www.declaration.net/news.asp (follow "2004" hyperlink under "Top News"; then follow "Stanek: The invisible . . ." hyperlink) (reporting two additional deaths that occurred in similar circumstances).

[3] Casagrande, *supra* note 1, at 36; Jill Stanek, *DOJ: Betraying Aborted-Alive Babies?*, WORLDNETDAILY, Sept. 20, 2006, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=52059 (reporting at least two additional deaths that occurred under similar circumstances).

[4] Jill Stanek, *Biohazard Bags & Buckets*, WORLDNETDAILY, Sept. 8, 2004, http://www.wnd.com/news/article.asp?ARTICLE_ID=40346; *"Aborted" Baby Born Alive, Authorities Say*, WORLDNETDAILY, Aug. 16, 2006, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=51549 (reporting an additional death that occurred under similar circumstances).

[5] Lynn Vincent, *Death by Drowning*, WORLD, June 18, 2005, at 39, *available at* http://www.worldmag.com/displayarticle.cfm?id=10740. "When I was in training to do second trimester abortions, I was told that we would have [women] deliver into the toilet so that if the baby happens to be alive, that it drowns." Lynn Vincent, *Labor and Delivery*, WORLD, May 28, 2005, at 27, *available at* http://www.worldmag.com/displayarticle.cfm?id=10673 (statement of a former abortion-clinic worker).

[6] Stanek, *supra* note 4.

- A child in a similarly weakened state was beaten with a dull instrument until he died.[8]
- Abandoned and struggling to breathe, twins were taken to a human body-parts wholesaler. When the wholesaler protested that live children were unacceptable, the supplier flooded the twins' transport container with water and drowned them. Afterwards, the sale was completed.[9]

While these children are dead and gone, some comfort might be taken in knowing that those responsible for their deaths were brought to justice. Except that they were not brought to justice. In fact, they were never prosecuted. And there is no indication that many of the deaths were even investigated.

How is this possible? It is simply that each of these children was marked for death.[10] Once marked for death, they had no rights.[11] Theirs was to die by hook or by crook. Each of these children was born alive through an abortion attempt. And then they were killed or left to die.

The Born-Alive Infants Protection Act of 2002 (BAIPA)[12] was enacted to end this obscenity and prevent legalized abortion from expanding to unhindered infanticide. It has failed.[13] In fact, BAIPA, an Act of Congress duly signed into law by the President of the United

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[7] *See* Celeste McGovern, *Unholy Harvest*, TODAY'S FAMILY NEWS, http://www.fotf.ca/tfn/life/articles/Unholy_Harvest.htm (last visited Nov. 9, 2006) (originally published in the March 2000 issue of *Canadian Citizen*).

[8] *See id.*

[9] Charlene Quint Kalebic, *Children, the Unprotected Minority: A Call for the Reexamination of Children's Rights in Light of* Stenberg v. Carhart, 15 REGENT U. L. REV. 223, 224 n.9 (2002-2003).

[10] H.R. REP. NO. 107-186, at 2 (2001).

[11] *Id.*; *see also* Casagrande, *supra* note 1, at 37–38. *But see* Hilary White, *Baby Girl Born Alive and Killed After Surviving Late-Term Abortion*, LIFESITE, Nov. 2, 2006, http://www.lifesite.net/ldn/2006/nov/06110205.html (reporting the investigation and potential criminal prosecution for the death of a child reportedly killed after being born alive through an abortion attempt).

[12] Born-Alive Infants Protection Act (BAIPA) of 2002, 1 U.S.C. § 8 (Supp. III 2003). BAIPA extends the full protection of the U.S. Code to any infant who completely exits the womb and subsequently exhibits one of four signs of life: breathing, a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles. *Id.* For the full text of BAIPA, see *infra* Part III.B.

[13] The executive and legislative approaches to BAIPA, analyzed in Parts II, V and VI.A, *infra*, have from before its enactment ensured its failure. As empirical evidence of this failure, a number of the deaths recorded in the opening paragraph of this section occurred well after BAIPA was enacted. *See supra* notes 4 & 6 and accompanying text; Stanek, *supra* note 2 and accompanying text; Stanek, *supra* note 3 and accompanying text. For reports of additional deaths following the enactment of BAIPA, see Stanek, *supra* note 3; Stanek, *supra* note 4; Jill Stanek, *Catholic Hospitals Commit—And U.S. Bishops Condone—Live-Birth Abortion*, WORLDNETDAILY, Sept. 15, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=40465.

States, amending 15,000 provisions of the *United States Code* and 57,000 provisions of the *Code of Federal Regulations*[14]—the first federal law in history to place any type of limit on the "right" to abortion[15]—effectively does not exist.[16]

This note considers how and why BAIPA has failed and what may be done about it. Part II is an inside look at the history and making of BAIPA and how it was destined from its inception to become a non-factor as a limit to the "right" to abortion. Part III covers the need for and purpose of BAIPA and analyzes its effect on current abortion law. Part IV discusses the current approach to enforcing BAIPA. Part V analyzes the primary reason the current approach to enforcing BAIPA has failed and proffers a foundational solution for this failure. Part VI suggests some preliminary actions to lay the groundwork for the successful enforcement of BAIPA and examines measures implemented in the state of Michigan as a potential framework for the federal protection of children born alive through abortion attempts. Part VII, in culmination, outlines a conceptually simple, comprehensive plan for ensuring the enforcement of BAIPA, and Part VIII concludes this note.

II. AN INSIDER'S LOOK AT THE HISTORY OF BAIPA[17]

In June 2000, the Supreme Court handed down *Stenberg v. Carhart*[18] and effectively struck down the partial-birth abortion laws of thirty-one states.[19] *Carhart*'s analysis marked a radical change in the

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[14] H.R. REP. NO. 107-186, at 37.

[15] *See* Hadley Arkes, *Unheralded Good*, NAT'L REV. ONLINE, July 31, 2002, http://www.nationalreview.com/comment/comment-arkes073102.asp.

[16] *See infra* Part V and *supra* note 13. *But see* Hadley Arkes, *Bush's Second Chance*, FIRST THINGS, Apr. 2005, at 13, *available at* http://www.firstthings.com/ftissues/ft0504/articles/arkes.html (discussing a BAIPA-related complaint filed by the DOJ in spring 2005).

[17] Most of the material for this section was taken from various publications of Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College. Professor Arkes was intimately involved in both the drafting and passage of BAIPA and testified before Congress on its behalf in both 2000 and 2001.

[18] 530 U.S. 914 (2000). In *Carhart*, the Court "struck down a Nebraska law banning partial-birth abortion, a procedure in which an abortionist delivers an unborn child's body until only the head remains inside of the womb, punctures the back of the child's skull with scissors, and sucks the child's brains out before completing the delivery." H.R. REP. NO. 107-186, at 2.

[19] HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 237 (2002).

> As [Justice] Kennedy made plain . . . in tones of injury and disbelief, [Justice] O'Connor had [via *Carhart*] staged a defection from a defection: In order to align herself with the liberal bloc in this case, she had to repudiate that carefully crafted middle course that Kennedy thought he had signed onto in *Casey*.
>
> . . . [H]e was [shocked] that O'Connor would be willing to walk away from her own holdings in *Casey* and other cases.

Court's approach to abortion in the United States,[20] causing concern among members of both Congress and anti-abortion groups.[21] In response to the Court's findings and analysis in *Carhart*,[22] Representative Charles Canady (R-FL), Chairman of the Subcommittee on the Constitution,[23] began work on a modest bill "to establish at least a limit to that sweeping 'right' to abortion."[24]

Using earlier bill drafts by Hadley Arkes[25] and Clark Forsythe,[26] Canady utilized Congress's authority to define the terms of the *United*

Id. at 239.

[20] H.R. REP. NO. 107-186, at 4.

> [W]hat was described in *Roe v. Wade* as a right to abort "unborn children" ha[d] now been extended by the Court to include the brutal killing of partially-born children just inches from birth . . . . [This] conclusion [was based] on claims by abortionists that partially delivering an infant before killing [him] is safer for the mother because it requires less "instrumentation" in the birth canal and reduces the risk of complications from "retained fetal body parts." . . . [T]hese same claims would support an abortionist's argument that fully delivering an infant before killing [him] is safer for the mother and is, therefore, constitutionally protected.

Id.

[21] ARKES, *supra* note 19, at 243–44. Concerned parties included Representative Charles Canady (R-FL), Chairman of the Subcommittee on the Constitution; Douglas Johnson, National Right to Life Committee; and Hadley Arkes. *Id.*

> [T]he political class had to put the question of whether [the] right to abortion would find a limit anywhere. If there was no barrier in infanticide—in the destruction of children at the point of birth—there might be no barrier anywhere in that vast field encompassing 'homicide' in all its varieties.

Id. at 234.

[22] *Id.* at 243–44.

[23] *Id.* at 244.

> [Canady was] not disposed to waste a moment, for he had put himself under term limits and he would be leaving the Congress at the end of the term . . . . He was determined, however, to get something done [in response to *Carhart*] before his time ran out in the chairmanship, and he quickly saw that the bill to preserve the child born alive offered the best practicable measure at this moment.

Id.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 245. Forsythe was then president of, and former counsel for, Americans United for Life. *Id.* In Forsythe's draft,

> a child "born alive" was taken to mean "the complete expulsion or extraction from its mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, caesarean section, or induced abortion."

Id. at 245 n.12.

States Code as the basis for the bill.[27] Its purpose was to "simply establish that the condition of being marked for an abortion did not remove the child from the class of rights-bearing persons."[28] After being introduced by Representative Canady, the bill was designated H.R. 4292, and hearings were scheduled for July.[29]

Representative Canady chose six individuals to give testimony at the hearings on behalf of H.R. 4292:[30] Robert George,[31] McCormick Professor of Jurisprudence at Princeton; Gerard Bradley,[32] Professor of Law at Notre Dame; Hadley Arkes,[33] Ney Professor of Jurisprudence and American Institutions at Amherst College; Jill Stanek,[34] R.N.; Allison Baker,[35] R.N.; and Gianna Jesson.[36]

Both Stanek and Baker testified to their experiences with "live birth abortions"[37] while employed as nurses at Christ Hospital in Oak Lawn,

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[27] *Id.* at 245.

> To pronounce in that way on the meaning of terms in federal law was not to enlarge the federal jurisdiction. The law would simply take that jurisdiction as it stood, and it would make the simple point that children who survive abortions were indeed persons who came within the protection of the law.

Id.

[28] *Id.* at 246.

[29] *Id.* at 247.

[30] *Id.* at 247–48.

[31] *Born-Alive Infants Protection Act: Hearing on H.R. 4292 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 60 (2000) [hereinafter *BAIPA Hearings*] (testimony of Robert George).

[32] *Id.* at 52 (testimony of Gerard Bradley).

[33] *Id.* at 6 (testimony of Hadley Arkes).

[34] *Id.* at 14 (testimony of Jill Stanek).

[35] *Id.* at 17 (testimony of Allison Baker).

[36] *Id.* at 23 (testimony of Gianna Jessen). Ms. Jessen is a survivor of a saline abortion attempt that left her afflicted with cerebral palsy. ARKES, *supra* note 19, at 248.

[37] "Live-birth abortions," also known as "induced-labor abortions," are composed of a three-step procedure:

> First, the physician opens the cervix . . . using either prostaglandin E2 gel, Cytotec3 or laminaria (little match-like sticks composed of seaweed) . . . . He inserts one . . . or two . . . pills in or near the cervix, irritating it and causing it to open. Second, after the cervix opens, the small baby . . . literally drops out of the womb. Sometimes, the baby dies in the process. However, many are born alive—thus the name, "live-birth" abortion. In this case, the third step is letting the baby die.

Stacy A. Scaldo, *The Born-Alive Infants Protection Act: Baby Steps Toward the Recognition of Life After Birth*, 26 NOVA L. REV. 485, 492–93 (2002) (quoting Catherina Hurlburt, *Live-Birth Abortions: The Next Step After Partial-Birth Abortion*, CONCERNED WOMEN FOR AM., July 1, 2000, http://www.cwfa.org/main.asp (follow "Core Issues – Sanctity of Life" hyperlink; then follow "Live Birth Abortions . . ." hyperlink).

The third step is not always to let the baby die, but to kill him by drowning or bludgeoning. *See* Kalebic, *supra* note 9, at 224 n.9; McGovern, *supra* note 7.

Illinois.[38] They each recounted witnessing instances of children born alive through this procedure who, though living for prolonged periods after birth (sometimes hours), were not given the available medical attention needed for continued survival.[39] Among the more notable instances was Ms. Baker's account of finding a vigorously moving infant laid naked on a table in a soiled utility room.[40]

H.R. 4292 faced opposition in the House.[41] Some claimed that there was a "dishonest purpose behind it."[42] Others claimed that "the bill did not supply any right that is not already guaranteed under the laws of the nation."[43] An ironic counter to the latter objection, however, came directly, albeit unintentionally, from the Illinois Attorney General's (AG) Office. An investigation into the eyewitness accounts of Jill Stanek and Allison Baker had been launched.[44] The Illinois AG, however, found "no violations of the law in regards to the practices at Christ Hospital, specifically [with respect to] the [live-birth] abortion procedure and the lack of medical treatment given to children born alive."[45] In a letter regarding the investigation, the Illinois AG stated, "[w]hile we are deeply respectful of your serious concerns about the practices and methods of abortions at this hospital, we have concluded that there is no

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38 ARKES, *supra* note 19, at 248.

39 *See BAIPA Hearings*, *supra* note 31, at 14–17 (testimony of Jill Stanek); *id.* at 17–18 (testimony of Allison Baker).

40 *Id.* at 18 (testimony of Allison Baker).

41 The National Abortion Rights Action League (NARAL) also opposed the bill. In a statement released the same day the hearings were held, NARAL stated:

> The basic tenets of *Roe v. Wade* were the subject of yet another anti-choice assault today, as the House Judiciary Subcommittee on the Constitution held a hearing on H.R. 4292, the so-called "Born-Alive Infants Protection Act." The Act would effectively grant legal personhood to a pre-viable fetus—in direct conflict with *Roe* . . . .
>
> . . . In proposing this bill, anti-choice lawmakers are seeking to ascribe rights to fetuses "at any stage of development," thereby directly contradicting one of *Roe's* basic tenets.

Press Release, National Abortion Rights Action League, *Roe v. Wade* Faces Renewed Assault in House (July 20, 2000), http://www.nrlc.org/Federal/Born_Alive_Infants/NARALonlive-born.pdf.

42 ARKES, *supra* note 19, at 268. Rep. Jerrold Nadler (D-NY) stated:

> The purpose of this bill is only to get the pro-choice members to vote against it so they can then slander us and say that we are in favor of infanticide . . . .
>
> . . . Mr. Speaker, I believe the only real purpose of this bill is to trap the pro-choice members into voting against it so that they can slander us . . . . [T]hat is why I voted in the committee in favor of the bill[,] so that we do not step into this trap.

Id.

43 Casagrande, *supra* note 1, at 37.

44 *Id.*

45 *Id.*

basis for legal action by this office against the Hospital or its employees, agents or staff."[46]

Ultimately, H.R. 4292 passed through the House in September 2000[47] with a final vote of 380-15.[48] The bill was then referred to the Senate. The Senate, however, would be H.R. 4292's final stop. The 2000 presidential election campaign was underway, and to the "deep astonishment" of its supporters, the bill never came to the Senate floor for a vote, apparently overshadowed by presidential politics.[49]

In 2001, the bill that would become H.R. 2175[50] was reintroduced in the House by Representative Steve Chabot (R-OH),[51] who had taken the outgoing Representative Canady's place as the Chairman of the Subcommittee on the Constitution.[52] A preamble was added to the bill,[53] made up of findings[54] and a list of purposes,[55] meant to provide clear

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[46] *Id.* at 37–38 (quoting Catherina Hurlburt, *Illinois Attorney General Finds No Wrongdoing at Christ Hospital*, CONCERNED WOMEN FOR AM., Aug. 24, 2000, http://www.cwfa.org/main.asp (follow "Core Issues – Sanctity of Life" hyperlink; then follow "Illinois Attorney General . . ." hyperlink)).

[47] *Id.* at 35.

[48] ARKES, *supra* note 19, at 268.

[49] *Id.* at 270.

> The word went around Capitol Hill that the bill never made it to the floor because Trent Lott, the leader of the Republican majority, had no particular interest in bringing it to a vote . . . . The further word circulating in Washington was that, of course, Lott would have brought the bill to the floor if he had received any directing word from the Bush campaign that it suited the interests of the campaign to draw attention to that issue and bring it to the point of judgment.

Id.

[50] *See* H.R. REP. NO. 107-186, at 1 (2001).

[51] ARKES, *supra* note 19, at 278.

[52] *Id.*

[53] *Id.* at 275.

[54] *Id.*

> The findings presented then a bill of charges against the law shaped in the decisions of federal judges. By drawing out the premises behind those decisions, the findings formed a moral critique that supplied, in turn, a justification for this new act of legislation. The findings would put in place new premises for the law.
>
> . . . .
>
> For those who had worked, over the years, for this bill, the findings offered the most gratifying confirmation [of the] rationale and logic behind the bill.

Id. at 277–78.

[55] *Id.* at 278. The full text of the "purposes" is as follows:

> (1) to repudiate the flawed notion that a child's entitlement to the protections of the law is dependent upon whether that child's mother or others want him or her;
>
> (2) to repudiate the flawed notion that the right to an abortion means the right to a dead baby, regardless of where the killing takes place;

meaning and context for the bill: "infants who are born alive, at any stage of development, are persons who are entitled to the protections of the law."[56] These findings were "bolstered by a notable addition,"[57] namely, the legal analysis handed down by the Third Circuit Court of Appeals in *Planned Parenthood v. Farmer*.[58]

Because party control of the Senate had shifted since H.R. 4292 had been introduced the previous year,[59] supporters of H.R. 2175 were concerned that the findings, which had been left out of H.R. 4292,[60] might not make it through the Senate.[61] This concern would prove of little consequence, however, as the findings were deleted before the bill ever reached the floor of the House. Without explanation, Representative James Sensenbrenner (R-WI), Chairman of the Judiciary Committee, removed the findings from the bill.[62] H.R. 2175 "would go to hearings, to markup, and to the floor in the same, spare version that had gone to the floor in September."[63]

While the supporters in the House were considering what effect this would have on the bill, Senator Rick Santorum (R-PA) introduced H.R. 2175 in the Senate.[64] It was offered as a rider to the Patients' Bill of

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(3) to affirm that every child who is born alive—whether as a result of induced abortion, natural labor, or caesarean section—bears an intrinsic dignity as a human being which is not dependent upon the desires, interests, or convenience of any other person, and is entitled to receive the full protections of the law; and

(4) to establish firmly that, for purposes of Federal law, the term "person" includes an infant who is completely expelled or extracted from his or her mother and who is alive, regardless of whether or not the baby's development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.

H.R. REP. NO. 107-186, at 3 (2001).

56 H.R. REP. NO. 107-186, at 1–2.

57 ARKES, *supra* note 19, at 275.

58 220 F.3d 127 (3d Cir. 2000). "According to the Third Circuit, under *Roe* and *Carhart*, it is 'nonsensical' and 'based on semantic machinations' and 'irrational line-drawing' for a legislature to conclude that an infant's location in relation to his or her mother's body has any relevance in determining whether that infant may be killed." H.R. REP. NO. 107-186, at 5. *Farmer* had been decided the previous July, just six days after the hearings for H.R. 4292. ARKES, *supra* note 19, at 275.

59 ARKES, *supra* note 19, at 279.

60 *Id.* at 266–67.

61 *Id.* at 279.

62 *Id.* To at least some supporters of H.R. 2175, this "gut[ted] the section that accomplished the purpose of the bill—the section that would dramatize to the public the premises that were being challenged now in the bill." *Id.* at 266. H.R. 2175, with its stated findings and purposes, was "a notable convergence of sentiment, years in the making, and it seemed unbelievable that it should all be waved aside now, as a matter of little consequence, by one man . . . ." *Id.* at 280.

63 *Id.* at 279.

64 *Id.* at 281.

Rights.[65] Initially, some spoke out against the bill.[66] Those opposed to H.R. 2175 "knew that they could not concede the human standing of the child marked for abortion without generating some unsettling questions about the child still in the womb."[67] To simply vote against the bill, however, would suggest that they in fact approved of infanticide. Instead, any objection to the bill was soon waived[68] with the hope and goal to "deprive of it any significance."[69] A wise move, for this hope would soon be realized.

Due to the terrorist attacks of September 11, 2001, further work on H.R. 2175 was delayed. Finally, in March 2002, H.R. 2175 passed the House by a voice vote.[70] The following July, it was passed in the Senate with unanimous consent.[71]

On August 5, 2002, flanked by Representative Chabot and Senator Santorum, President Bush signed the Born-Alive Infants Protection Act of 2002 into law.[72] At the signing, President Bush proclaimed:

> The Born-Alive Infants Protection Act is a step toward the day when every child is welcomed in life and protected in law. It is a step toward the day when the promises of the Declaration of Independence will apply to everyone, not just those with the voice and power to defend their rights.[73]

And then the Born-Alive Infants Protection Act, the first federal legislation in history to successfully place any type of limit on the judicially created "right" to abortion,[74] faded away into obscurity. Little,

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[65] *Id.*

[66] *Id.* at 282. "Deborah Stabenow, the new senator from Michigan, reacted instantly: She couldn't vote for that bill, she said; it sought to establish that the unborn child was a 'person' in the law even before birth." *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *President Bush Signs Born Alive Infants Protection Act*, NAT'L RIGHT TO LIFE, Aug. 5, 2002, http://www.nrlc.org/Federal/Born_Alive_Infants/BAIPAsigned.html [hereinafter *Pres. Signs*].

[71] *Id.*

> The price of passing the bill in the Senate was essentially to give the [opposition] what they wanted. The bill was introduced for its formal "readings" without explanation or fuss . . . . [T]he bill was "passed" late on a Thursday night, at the end of a cluttered legislative day . . . . There would be no role call, and so no [one] would be compelled to record a vote, either for or against . . . . Santorum would not be allowed to frame the bill, to point to its meaning, and no voice would be sounded to explain the significance of what was done.

Arkes, *supra* note 15.

[72] *Pres. Signs*, *supra* note 70.

[73] *Id.* Before signing BAIPA into law, President Bush confirmed, "This important legislation ensures that every infant born alive—including an infant who survives an abortion procedure—is considered a person under federal law." *Id.*

[74] *See* Arkes, *supra* note 15.

if anything, was ever said about it again. The White House was silent on the matter. Virtually no further word came from the House or the Senate. It is mentioned by name in only one published legal case, state or federal.[75] A total of six law review articles cover BAIPA in any detail.[76] And a year after its passage, Christ Hospital in Oak Lawn, Illinois—the very hospital whose practices were a catalyst to the creation and passage of BAIPA—was unaware that BAIPA even existed.[77]

Like the children it was meant to protect, BAIPA was birthed, laid aside, and allowed to die by those who should have cared for it most.[78]

III. BAIPA: ITS PURPOSE AND EFFECT

A. The Need for BAIPA

BAIPA was in large measure intended as a quasi-preemptive check on a federal judiciary that had demonstrated a clear inclination, most recently in *Stenberg v. Carhart*[79] and *Planned Parenthood v. Farmer*,[80] to expand the "right" to abortion to include the "right" to infanticide.[81] In

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[75] *See* Warnock v. Servicemembers' Group Life Ins., No. 1:03-CV-1329-DFH, 2004 U.S. Dist. LEXIS 8533 (S.D. Ind. Apr. 28, 2004).

[76] *See* Kathleen M. Casagrande, *Children Not Meant to Be: Protecting the Interests of the Child When Abortion Results in Live Birth*, 6 QUINNIPIAC HEALTH L.J. 19 (2002); Michele Kurs Frishman, *Wisconsin Act 110: When an Infant Survives an Abortion*, 20 WIS. WOMEN'S L.J. 101 (2005); Scott A. Hodges, *Beyond the Bounds of* Roe*: Does* Stenberg v. Carhart *Invalidate the Partial-Birth Abortion Ban Act of 2003?*, 57 OKLA. L. REV. 601 (2004); Charlene Quint Kalebic, *Children, the Unprotected Minority: A Call for the Reexamination of Children's Rights in Light of* Stenberg v. Carhart, 15 REGENT U. L. REV. 223 (2002-2003); Stacy A. Scaldo, *The Born-Alive Infants Protection Act: Baby Steps Toward the Recognition of Life After Birth*, 26 NOVA L. REV. 485 (2002); Richard Stith, *Location and Life: How* Stenberg v. Carhart *Undercut* Roe v. Wade, 9 WM. & MARY J. WOMEN & L. 255 (2003).

[77] Stanek, *supra* note 2.

[78] "For who would attach any meaning to a law, when those who enacted it did not proclaim it, or even ma[k]e some noticeable effort to impart its meaning to the public. In the absence of anything said officially, the meaning of the bill can be marked only in commentaries . . . ." *Id.*

[79] 530 U.S. 914 (2000).

[80] 220 F.3d 127 (3d Cir. 2000).

[81] H.R. REP. NO. 107-186, at 2 (2001). "The right to abortion created in *Roe* thus appears to encompass, at least in the Supreme Court's view, the right to infanticide." *Id.* at 6. This idea was first expressed by the federal judiciary in *Floyd v. Anders*, 440 F. Supp. 535, 539 (D.S.C. 1977).

> A child had survived an abortion for 20 days, and when the question was put as to whether there had been an obligation to preserve [his] life, the answer tendered by [Judge] Haynsworth was no. As he "explained," that was not a child but a fetus, and [referencing *Roe*] "the fetus in this case was not a person whose life state law could protect." In other words, the right to an abortion was the right to an "effective abortion," or a dead child.

Arkes, *supra* note 15 (quoting *Floyd*, 440 F. Supp. at 539).

Carhart, the Court implied that a child's right to protection under the law is not endowed by (virtual) birth,[82] but by some subjective notion of whether he is wanted by his mother.[83] In short order, *Farmer* built upon this concept by "conclud[ing] that a child's status under the law, regardless of the child's location [with respect to the womb], is dependent upon whether the mother intends to abort the child or to give birth."[84]

> Under the logic of these decisions, once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law . . . . And if a child who survives an abortion and is born alive would have no claim to the protections of the law, there would, then, be no basis upon which the government may prohibit an abortionist from completely delivering an infant before killing [him] or allowing [him] to die. The "right to abortion," under this logic, means nothing more than the right to a dead baby, no matter where the killing takes place.[85]

BAIPA—the sole federal statutory limit to the judicially created "right" to abortion—stands as the only affirmative legislative counter to this logic. Thus, it is the only federal obstacle to subsequent judicial findings that could potentially incorporate unrestricted infanticide into

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[82] *But see* U.S. CONST. amend. XIV, § 1 ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . .").

[83] *See* H.R. REP. NO. 107-186, at 2. "Nebraska's statute, making criminal the performance of a 'partial birth abortion,' violates the Federal Constitution . . . by 'impos[ing] an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself." *Carhart*, 530 U.S. at 929–30.

During the 2000 Congressional hearings for BAIPA, Professor Hadley Arkes testified:

> [t]he Court [via *Carhart*] has brought us to the very threshold of infanticide, and we are asked now to take a deep breath, avert our eyes, and simply get used to the notion that the right to abortion will be spilling past the child in the womb, to order the deaths of children outside the womb. It has become more critical than ever, at this moment, that a line be drawn.

BAIPA Hearings, *supra* note 31, at 14 (testimony of Hadley Arkes).

[84] H.R. REP. NO. 107-186, at 2. "[T]he [New Jersey] Legislature would have us accept, and the public believe, that during a 'partial-birth abortion' the fetus is in the process of being 'born' at the time of its demise. It is not. A woman seeking an abortion is plainly not seeking to give birth." *Farmer*, 220 F.3d at 143. *But see, e.g.*, BLACK'S LAW DICTIONARY 179 (8th ed. 2004) (defining *birth* as "[t]he complete extrusion of a newborn baby from the mother's body," and conspicuously lacking any reference to intent).

The *Farmer* court continued:

> In what can only be described as a desperate attempt to circumvent over twenty-five years of abortion jurisprudence, the [New Jersey] Legislature would draw a line [between abortion and infanticide] based upon the location in the woman's body where the fetus expires. Establishing the cervix as the demarcation line between abortion and infanticide is nonsensical on its face . . . .

Farmer, 220 F.3d at 143–44.

[85] H.R. REP. NO. 107-186, at 2.

this "right."[86] BAIPA is, in effect, the first and last federal statutory line of defense against judicially legalized infanticide.

B. The Effect of BAIPA on Current Abortion Law

BAIPA "is exclusively a definitional provision,"[87] and so does not "articulate any new substantive rule of law."[88] It does little more than enshrine into federal statute what is instinctively obvious to most, and what is codified to some extent in thirty states and the District of Columbia.[89] In its entirety, BAIPA reads:

> SECTION 1. SHORT TITLE.
>
> This Act may be cited as the "Born-Alive Infants Protection Act of 2002".
>
> SEC. 2. DEFINITION OF BORN-ALIVE INFANT.
>
> (a) In General.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:
>
> "§ 8. 'Person', 'human being', 'child', and 'individual' as including born-alive infant
>
> "(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words 'person', 'human being', 'child', and 'individual', shall include every infant member of the species homo sapiens who is born alive at any stage of development.
>
> "(b) As used in this section, the term 'born alive', with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.
>
> "(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive' as defined in this section."

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[86] "Any right must have its limit, including the right to abortion, and if that limit is not found in outright infanticide, we must ask: where could it possibly be?" *BAIPA Hearings*, *supra* note 31, at 14 (testimony of Hadley Arkes).

[87] H.R. REP. NO. 107-186, at 14.

[88] *Id.* "[The Act] does not call for an as-yet-unarticulated constitutional basis for lawmaking." *Id.* (quoting *BAIPA Hearings*, *supra* note 31, at 54 (testimony of Gerard Bradley)).

[89] H.R. REP. NO. 107-186, at 7. For an exhaustive list of relevant state code sections, see *id.* at 7 n.24.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by adding at the end the following new item:
"8. 'Person', 'human being', 'child', and 'individual' as including born-alive infant."[90]

The practical effect of BAIPA is simply this: from the time of birth and beyond, "all concerned have the normal, legal duties of care that they would have for any other infant."[91] It changes nothing in currently accepted abortion law—no constraint triggered by BAIPA is an issue until abortion is rendered a physical impossibility by the birth of the child.[92] "Nothing in [BAIPA] impairs any right to abortion or any right to end the pregnancy because the abortion and the pregnancy have ended"[93] before BAIPA is even a concern.[94]

There is, then, no less of a "right" to abortion in the wake of BAIPA than existed previously. There is only an implied federal statutory prohibition of infanticide.

IV. THE CURRENT APPROACH TO ENFORCEMENT

The enforcement of BAIPA has fallen to the Department of Health and Human Services (HHS).[95] To date, the sole enforcement actions taken by HHS are notification and education measures directed at "relevant entities," "state officials, health care providers, hospitals and child protective agencies."[96] The most pointed of these educational measures are HHS's internally promulgated instructions on how BAIPA interacts with the Emergency Medical Treatment and Labor Act

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[90] BAIPA, 1 U.S.C. § 8 (Supp. III 2003).

[91] *BAIPA Hearings*, *supra* note 31, at 53 (testimony of Gerard Bradley). BAIPA also amends 15,000 provisions of the U.S. Code and 57,000 provisions of the Code of Federal Regulations. H.R. REP. NO. 107-186, at 37.

[92] Having given "birth" by completely expelling the child from the womb, the Act assures equal protection of the law to the person just born. The woman is not then prohibited, by this or any other act, from securing or completing an "abortion." From the moment of birth on, "abortion" is, according to standard medical usage, impossible. No "pregnancy" remains to be terminated.
BAIPA Hearings, *supra* note 31, at 56 (testimony of Gerard Bradley).

[93] *Id.* at 6 (testimony of Hadley Arkes).

[94] In the end, BAIPA merely establishes the womb as a statutory "no man's land": a child can now *earn* his unalienable rights and citizenship by either 1) somehow, while *in utero*, endearing himself to his mother so that he is "wanted" and she chooses not to kill him, or 2) escaping from the womb with enough development and little enough bodily damage to exhibit one of the four BAIPA signs of life.

[95] *HHS Pledges Thorough Enforcement of Born-Alive Act*, NEWSMAX.COM, Apr. 27, 2005, http://www.newsmax.com/archives/articles/2005/4/26/212935.shtml.

[96] Culture & Cosmos, *Health and Human Services Pledges Thorough Enforcement of Born-Alive Act*, CULTURE OF LIFE FOUND., Apr. 26, 2005, http://www.culture-of-life.org/?Control =ArticleMaster&aid=1314.

(EMTALA)[97] and the Child Abuse Prevention and Treatment Act (CAPTA).[98] Each of these measures is presented in some detail in Parts IV.A and IV.B, *infra*.

A. BAIPA and EMTALA

EMTALA was "enacted to ensure public access to emergency services."[99] It places Medicare-participating hospitals that offer emergency services under three obligations with respect to medical emergency situations: a screening requirement,[100] a stabilization requirement, and a transfer requirement.[101] A hospital can be fined up to $50,000 per EMTALA violation, and a violating hospital places its Medicare-provider agreement at risk.[102] An individual physician faces fines up to $50,000 per violation and potential "exclusion from the Medicare and Medicaid programs."[103] EMTALA also authorizes private rights of action to redress violations.[104]

For EMTALA to apply to an emergency situation, and thus the requirement for a medical screening to exist, an individual must first "come to the emergency department" of a Medicare-participating

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[97] 42 U.S.C. § 1395dd (2000 & Supp. III 2003); *see* Memorandum from the Ctrs. for Medicare & Medicaid Servs. of the Dep't of Health & Human Servs. to State Survey Agency Dirs. (Apr. 22, 2005) (Ref. No. S&C-05-26) [hereinafter CMS Memo] (on file with author). This memorandum was sent with the stated purpose of providing guidance to state and regional personnel "regarding the enforcement of [EMTALA] during investigations of hospitals where the Born-Alive Infants Protection Act could be potentially implicated." *Id.*

[98] 42 U.S.C. §§ 5101–5107, 5111–5119c (2000 & Supp. III 2003); *see* Memorandum from the Admin. on Children, Youth & Families of the Dep't of Health & Human Servs. to State & Territorial Agencies Administering or Supervising the Admin. of the [CAPTA] Program (Apr. 19, 2005) (Log No. ACYF-CB-PI-05-01) [hereinafter ACF Memo] (on file with author).

[99] CMS Memo, *supra* note 97.

[100] In its entirety, the "screening" subsection of EMTALA reads:

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

42 U.S.C. § 1395dd(a).

[101] CMS Memo, *supra* note 97.

[102] *Id.*

[103] *Id.*

[104] *Id.*; *see* Preston v. Meriter Hosp., 700 N.W.2d 158 (Wis. 2005).

hospital.[105] This can be accomplished in several different ways.[106] A person can arrive at a dedicated emergency area of a hospital and request help for any medical condition.[107] A person can also arrive at any part of the hospital's property and request help for a possible *emergency* medical condition.[108] In either situation, the statutorily-required request for help can be made on behalf of the person needing assistance.[109] And, perhaps most significantly with respect to BAIPA, the request on behalf of the person needing assistance "will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior," that help is needed.[110] Should the required screening lead to the determination that the individual does have a requisite medical or emergency medical condition, EMTALA requires the hospital either to stabilize the individual or to transfer the individual if the applicable transfer requirements are met.[111]

Preston v. Meriter Hospital involved a child born "on an emergency basis" at a premature twenty-three weeks gestation in the birthing center of Meriter Hospital.[112] The hospital staff knew "that without at a minimum resuscitation and the administration of oxygen and fluids, [the] infant had virtually no medical chance to survive."[113] Regardless,

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[105] 42 U.S.C. § 1395dd(a); *EMTALA Requirements Extend to Born-Alive Infants Protection Act of 2002*, HEALTH L. NEWS, Spring 2005, http://www.pswslaw.com/news/Images/healthlaw_sum05.pdf [hereinafter *Health*].

[106] "Comes to the emergency department" has been defined by the Code of Federal Regulations as follows:

> With respect to an individual who is not a patient (as defined in this section), the individual—
>
> (1) Has presented at a hospital's dedicated emergency department, as defined in this section, and requests examination or treatment for a medical condition, or has such a request made on his or her behalf. In the absence of such a request by or on behalf of the individual, a request on behalf of the individual will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior, that the individual needs examination or treatment for a medical condition;
>
> (2) Has presented on hospital property, as defined in this section, other than the dedicated emergency department, and requests examination or treatment for what may be an emergency medical condition, or has such a request made on his or her behalf. In the absence of such a request by or on behalf of the individual, a request on behalf of the individual will be considered to exist if a prudent layperson observer would believe, based on the individual's appearance or behavior, that the individual needs emergency examination or treatment.

42 C.F.R. § 489.24(b) (2005).

[107] *Id.* § 489.24(b)(1).

[108] *Id.* § 489.24(b)(2).

[109] *Id.* § 489.24(b).

[110] *Id.*

[111] *Id.* § 489.24(d).

[112] 700 N.W.2d 158, 162–63 (Wis. 2005).

[113] *Id.* at 163.

the hospital refused treatment to the infant.[114] He died two-and-a-half hours later.[115]

In bringing a suit for damages, the child's parents argued that under EMTALA the hospital has the duty to screen anyone who arrives at any place in the hospital that can respond to the requested emergency medical care.[116] Meriter countered that EMTALA only applies in those areas of the hospital designated by the hospital as emergency departments.[117] The court found that EMTALA "requires a hospital to provide an emergency medical screening examination to an individual requesting emergency care, regardless of where he or she presents in the hospital."[118] Further, the court concluded that EMTALA "imposes a duty upon a hospital to provide a medical screening examination to a newborn who (1) presents to any part of the hospital[119] or (2) is born in the birthing center of the hospital and otherwise meets the conditions set forth in [EMTALA]."[120]

HHS has similarly indicated that, under BAIPA, EMTALA could apply to an infant born alive in a hospital's delivery department with a medical condition[121] and to an infant born alive elsewhere on the hospital grounds with an emergency medical condition, including an infant born alive from an abortion attempt.[122] In either instance, should the hospital not comply with EMTALA's medical screening requirement and the ensuing stabilizing or transfer requirements, the hospital may be found in violation of EMTALA and subject to the monetary and Medicare-related penalties listed in the beginning of this section.[123]

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[114] *Id.*

[115] *Id.*

[116] *Id.* at 165.

[117] *Id.*

[118] *Id.* at 167. "[I]t is a ridiculous distinction, one that places form over substance, to state that the care a patient receives depends on the door through which the patient walks." *Id.* (quoting McIntyre v. Schick, 795 F. Supp. 777, 781 (E.D. Va. 1992)).

[119] *Id.* at 167–70. The court's use of the term "emergency room" in its concluding analysis is misleading. *See id.* at 170. It is clear from the immediately preceding analysis that the court defines a hospital's emergency department to include the entire hospital property, in accordance with 42 C.F.R. 489.24(b). *See id.*

[120] *Id.* at 170. "When a baby is born in a hospital birthing center, the newborn has come to the emergency department for purposes of the EMTALA duty to provide a medical screening examination." *Id.* at 162.

[121] CMS Memo, *supra* note 97. This is assuming that the hospital's delivery department is found to be a "dedicated emergency department" per 42 C.F.R. § 489.24(b). *Id.*

[122] *Id.*

[123] EMTALA and its requirements do not apply to in-patients (i.e., once a person is admitted as a patient, the screening, stabilizing, and transfer requirements are no longer in effect). But "[w]ere an infant born alive and then admitted to the hospital, the [Medicare Conditions of Participation (CoPs)] would clearly apply to the infant . . . ." *Id.* If a hospital

B. BAIPA and CAPTA

CAPTA was created to provide the states with federal funding to help prevent child abuse. There are four CAPTA requirements that HHS regards as particularly relevant to ensuring compliance with BAIPA.[124] For born-alive infants, the state must provide:

> [1.] Coordination and consultation with individuals designated by and within health-care facilities with regard to responding to medical neglect;
> [2.] Prompt notification by the individuals designated within health-care facilities of cases of suspected medical neglect (including withholding of medically indicated treatment from disabled infants with life-threatening conditions) to child protective services;
> [3.] At a minimum, *the authority* for State child protective services to pursue any legal remedies as may be necessary to provide medical care or treatment for a child when such care or treatment is necessary to prevent or remedy serious harm to the child; and,
> [4.] The authority for State Child Protective Services to pursue, and the *actual pursuit* of, any legal remedies that may be necessary to prevent the withholding of medically indicated treatment from disabled infants with life-threatening conditions.[125]

HHS has further directed that "[a]ll references to a 'child' or 'children' in the definitions, provisions and assurances of [CAPTA], as amended, are to be read to include infants who are 'born-alive' as that term is [now] defined [under BAIPA]."[126] HHS has specifically required that the states ensure that their "laws, procedures and practices with respect to child abuse and neglect conform to the requirements of CAPTA as its terms are interpreted" by the addition of BAIPA to the *United States Code*.[127] Otherwise, the implication is that the state may be found noncompliant with the eligibility requirements of CAPTA and so lose the applicable CAPTA funding.

V. THE CENTRAL PROBLEM OF CURRENT BAIPA ENFORCEMENT MEASURES

A. The Failure of the Current Approach to Enforcing BAIPA

At the same time HHS released its instructions on how BAIPA affects EMTALA[128] and CAPTA,[129] HHS pledged (appropriately, if not

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were to violate those CoPs, it would put at risk its Medicare-provider agreement. Admitting an infant born alive as an in-patient must be done in good faith. *Health*, *supra* note 105.

[124] ACF Memo, *supra* note 98.

[125] *Id.* (citations omitted).

[126] *Id.*

[127] *Id.*

[128] CMS Memo, *supra* note 97; *see supra* Part IV.A.

[129] ACF Memo, *supra* note 98; *see supra* Part IV.B.

timely[130]) to "investigate all circumstances where individuals and entities are reported to be withholding medical care from an infant born alive in potential violation of federal statutes."[131] Therein, however, lies the problem—at least for children born alive through an abortion attempt.

Both EMTALA[132] and CAPTA[133] are report-oriented statutes—they are not triggered until someone reports a violation. This proves no real problem to infants born alive, in general. In the course of a "normal" birth, all involved have a vested interest in preserving the life of the child. The goal is to remove a *living* child from the womb and *preserve* that life by whatever means necessary and available. A violation of EMTALA or CAPTA is unlikely, at best, and would most assuredly be reported by either the child's parents or medical providers, respectively.

For an infant born alive through an abortion attempt,[134] however, this reporting requirement poses a significant problem. The goal of an abortion, as opposed to the goal of a "normal" birth, is to remove a *dead* child from the womb by *killing* the child through whatever means necessary and available. No one involved in an abortion attempt, save the child, gets what he wants unless the child is killed.[135] And once an

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[130] BAIPA was signed into law in August 2002. *Pres. Signs*, *supra* note 70. The referenced EMTALA and CAPTA instructions were not published until April 2005. CMS Memo, *supra* note 97; ACF Memo, *supra* note 98.

[131] Press Release, U.S. Dep't of Health & Human Servs., Statement by Sec'y Regarding Born-Alive Infant Prot. (Apr. 22, 2005) (on file with author).

[132] CMS Memo, *supra* note 97.

[133] ACF Memo, *supra* note 98.

[134] The protection of children born alive through abortion attempts was a central purpose for the enactment of BAIPA. *See* H.R. REP. NO. 107-186, at 3 (2001).

[135] At the risk of stating the obvious: the mother wants him dead; the attendant(s) wants him dead; the abortionist wants him dead. It is the abortionist's sole purpose to kill the child. That is his business, and any failure to do so endangers that business and thus the abortionist's livelihood.

There is also a far more sinister and lucrative incentive for the abortionist to ensure the child is killed: namely, the international fetal-tissue-trafficking market, where the corpse of a healthy, intact child brings the highest price. Kalebic, *supra* note 9, at 226.

> Fetal tissue trafficking is a large international business with an estimated global market of $1 billion in 2002, up from $428 million in 1996. According to the 1999 price list for one national broker, the going rate for a baby's eyes is $50; $150 for limbs; $150 for lungs and heart; $325 for a spinal cord; and $999 for an eight-week brain. The vast majority of "work orders" specify that the specimen must be "fresh," "normal," free of abnormalities and shipped on wet ice by Federal Express within hours of the abortion procedure. Therefore, in order to be fresh, normal and intact, [abortion procedures that damage the child's tissue] cannot be used; moreover, because the body parts must be free of abnormalities, brokers will only accept babies who were healthy before they were aborted.

abortion procedure begins, the entire life experience of the child from that point on is under the sole observation and direct control of those who want him dead.

This presents an exceptional conflict of interests:[136] the only people in a position to enforce the rights of a child born alive through an abortion attempt—a legal person due the full protection of the law—are the same people who want him dead and have acted to kill him. Moreover, under the normal circumstances of a child born alive through an abortion attempt, the only witnesses to the birth—and thus the only people in a position to report a BAIPA-related violation of EMTALA or CAPTA—are the potential violators themselves.[137]

HHS's approach to enforcing BAIPA has, then, rendered the enforcement of the most fundamental right of an entire class of persons now protected under law solely reliant upon the likelihood that a potential violator of a federal statute, with a vested interest in consummating the violation, either to independently abstain from the violation or report himself for the violation. HHS has, in sum, rendered BAIPA—the sole federal statutory limit to the "right" to abortion—effectively unenforceable. This, for a law, translates into practical nonexistence.

B. A Foundational Solution to the Conflict of Interests Inherent in HHS's Approach to Enforcing BAIPA

The simplest and most effective solution to any situation that involves a conflict of interests is the withdrawal of the conflicted party (or parties). If withdrawal is not an option, the second best solution is to neutralize any conflict of interests by the intervention of a disinterested third party.[138] Wholly removed from direct interest in the outcome of the situation in question, a disinterested third party is in the best possible position to ensure good faith and legal compliance on the part of all

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Id. at 225–26 (footnotes omitted). "The financial incentives afforded by the sale of fetal tissue actually encourage" abortion procedures that cause the least damage to the child's tissue, such as live-birth abortions. *Id.* at 226.

[136] *See also* Casagrande, *supra* note 1, at 46–54 (discussing the conflict of interests that arises when a child is born alive through an abortion attempt).

[137] Though, no doubt, the only witnesses to many offenses are the offenders, enforcing accountability for mortal offenses committed against children born alive through an abortion attempt offers unique challenges. One of the more obvious of these is that any evidence of an abortion attempt—including one that involved wrongdoing—is easily and routinely destroyed with no significant third-party involvement. The corpse (or "fetal tissue") is simply discarded and incinerated, with no investigation, no one the wiser, and no one to miss the victim.

[138] *See also* Casagrande, *supra* note 1, at 52–54 (discussing, *inter alia*, the need to involve an independent party when a child is born alive through an abortion attempt in order to dispel the resulting conflict of interests).

parties involved. In the event of noncompliance, and depending on the level of authority bestowed, the disinterested party can either penalize a violator or report him to an appropriate authority for adjudication.

The two criteria that trigger BAIPA—the complete expulsion or extraction of the infant from the mother and the infant's subsequent exhibition of one of four signs of life—require a reliable, credible, and competent observer to determine whether the criteria have been met and thus whether BAIPA is applicable to the situation at hand. While the usual observers of an abortion may be competent, the conflict of interests prevents them from being reliable, if not credible as well.[139] As the withdrawal of the conflicted parties in any abortion scenario is as unrealistic[140] as the reliability of the participants, a legitimate effort to enforce BAIPA would seem to require the presence of a disinterested third party at any abortion procedure that has the potential to result in a live-birth as defined by BAIPA.[141]

There is certainly precedent for such a requirement. In the same way that an authoritative escort was needed to enforce the law and ensure the safety and rights of black students attending "white only" schools during integration,[142] a disinterested third party is required at a qualifying abortion procedure to ensure that the safety and rights of an infant born alive are upheld. Children born alive through an abortion

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[139] *See supra* Part V.A.

[140] Over forty-seven million abortions have been performed in the United States since 1973, based on studies by the Allan Guttmacher Institute and the Center for Disease Control. Nat'l Right to Life, Abortion in the United States: Statistics and Trends, http://www.nrlc.org/abortion/facts/abortionstats.html (last visited Nov. 4, 2006).

[141] In addition to live-birth or induced-birth abortions, both D&E abortion attempts and saline abortion attempts have resulted in children born alive. "Mere dismemberment of a limb [during a D&E abortion] does not always cause death because [Dr. Carhart] knows of a physician who removed the arm of [a] fetus only to have the fetus go on to be born 'as a child living with one arm.'" Casagrande, *supra* note 1, at 30 (quoting Stenberg v. Carhart, 530 U.S. 914, 959 (2000)). And Gianna Jessen, who testified in support of BAIPA, is a survivor of a saline abortion attempt that left her afflicted with cerebral palsy. ARKES, *supra* note 19, at 248.

[142] *See* The Dwight D. Eisenhower Library, Little Rock School Integration Crisis, http://www.eisenhower.archives.gov/dl/LittleRock/littlerockdocuments.html (last visited Oct. 31, 2006) (discussing President Eisenhower's use of federal troops to enforce the findings of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

> Whenever normal agencies prove inadequate to the task and it becomes necessary for the Executive Branch of the Federal Government to use its powers and authority to uphold Federal [law], the President's responsibility is inescapable. In accordance with that responsibility, I have today issued an Executive Order directing the use of troops under Federal authority to aid in the execution of Federal law at Little Rock, Arkansas. This became necessary when my Proclamation of yesterday was not observed, and the obstruction of justice still continues.

Dwight D. Eisenhower, U.S. President, Radio Address Announcing His Executive Order Directing the Use of Federal Troops in Little Rock, Arkansas (Sept. 24, 1957), *available at* http://www.eisenhower.archives.gov/dl/LittleRock/PressRelease924571.pdf.

attempt are at least as oppressed, powerless, and voiceless as the beneficiaries of integration, and their very lives are at stake.[143]

If education and racial equality were worth the trouble of using a disinterested third party to ensure compliance with the law—is life itself worth any less?

VI. PRELIMINARY ACTIONS AND A PARTIAL MODEL

A. Recommended Preliminary Actions to Lay the Groundwork for the Enforcement of BAIPA

HHS's educational and notification efforts are a start for the enforcement of BAIPA, but barely. BAIPA amends 15,000 provisions of the *United States Code* and 57,000 provisions of the *Code of Federal Regulations*[144]—is it possible that EMTALA and CAPTA are the only two laws that BAIPA alters in any significant way? Potential age discrimination[145] comes immediately to mind. Or perhaps BAIPA creates a new subcategory of discrimination: e.g., gestational discrimination. Any effects of BAIPA on the Americans with Disabilities Act[146] must be addressed. It would also be surprising if existing civil rights legislation does not apply.[147] And surely, as a violation of BAIPA is a violation of federal law, an institution found to have violated BAIPA risks losing any tax exemption it may have.[148]

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[143] Considering the illustrations provided in Part I, many of which occurred well after BAIPA was enacted, *see supra* notes 1–9 and accompanying text, there is every reason to expect any abortion that lacks such an observer and results in a live birth to also result in a BAIPA violation. And a BAIPA violation almost certainly translates into a denial of the fundamental right to life of a person protected under the law.

[144] H.R. REP. NO. 107-186, at 37 (2001).

[145] *See* 42 U.S.C. §§ 6101–6107 (2000 & Supp. III 2003).

[146] 42 U.S.C. §§ 12101–12213 (2000 & Supp. III 2003). Children prenatally diagnosed with disabilities account for a significant number of abortion attempts. *See* George Neumayr, *The Abortion Debate that Wasn't Under the Radar*, AM. ASS'N OF PEOPLE WITH DISABILITIES NEWS, July 17, 2005, www.aapd-dc.org/News/disability/abortdebate.html.

[147] Arkes, *supra* note 16.

> If a student at a private college receives a loan from the federal government, the whole college is now considered a recipient of federal aid, and all relevant regulations of the federal government bear on all parts of the college. The President might simply put this question to the committees of Congress: If any patient, in a clinic or hospital, is covered by Medicare—or receives a loan from the Veterans' Administration or a check from Social Security—does the whole facility become a recipient of federal aid?

Id.

[148] *Id.* "The brute fact is that every hospital receives some kind of federal aid, and virtually all of them depend in one way or another on tax exemptions." *Id.* In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the university was denied federal tax exemption because its internal rules were found to violate federal public policy. *Id.* BAIPA,

Similarly, most everyone is at least passingly familiar with the judicially created "right" to abortion. Can it seriously be asserted that *anyone* is familiar with BAIPA? Surely an effort is in order to make the only federally legislated limit to this "right" as familiar as the "right" itself. "For who would attach any meaning to a law, when those who enacted it [do] not proclaim it, or even ma[k]e some noticeable effort to impart its meaning to the public."[149] Those that brought us BAIPA—the President and the supporting members of Congress—should at least endeavor to give some greater public accounting and explanation of BAIPA, to include why it was enacted and what effect it has and will have on the law.[150] "In the absence of anything said officially, the meaning of the bill can be marked only in commentaries . . . ."[151]

And, in the same way the public accounting of BAIPA's effect on the law is incomplete, the coverage of HHS's notification and education efforts is incomplete as well. To date, the only enforcement instructions provided by HHS with respect to BAIPA are directed solely at hospitals. Nothing has been said about how BAIPA affects the operation of abortion clinics. While "live-birth abortions" do occur in hospitals, this is not the only place they occur: if BAIPA is to be enforced, then such a major source of potential violations as an abortion clinic[152] cannot be ignored.

B. A Model in Michigan

In December 2002, following the enactment of BAIPA, Michigan approved a number of measures to protect children born alive through abortion attempts.[153] Among these was Michigan's own "born alive infant protection act."[154] Michigan's "baipa" closely resembles the federal BAIPA, but it comes much closer to establishing a legal environment where the rights of an infant born alive through an abortion attempt may be enforced. Four of these measures are worth a brief examination and provide insight into solving the enforcement problem of the federal BAIPA.

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by comparison of degrees, is a duly enacted statute of the United States, not a mere public policy. *Id.*

149 Arkes, *supra* note 15.

150 "[T]he simplest words spoken by the president [carry] the authority of his office and they have behind them the weight of the Executive branch." *Id.*

151 *Id.*

152 For examples of abortion clinic actions that were (or would be) BAIPA violations, see sources cited, *supra* notes 2, 4–5.

153 *See, e.g.*, 2002 Mich. Pub. Acts 311, 313, 334–36 (codified at MICH. COMP. LAWS § 333.1071 (2002)); *see also* Telephone Interview with Jill Stanek, R.N. (Nov. 18, 2005) [hereinafter Stanek Interview] (referencing the relevant Michigan legislative acts).

154 MICH. COMP. LAWS § 333.1071.

First, instead of merely *implying* a limit to the "right" to abortion, Michigan's "baipa" explicitly states that limit: "A woman's right to terminate her pregnancy ends when the pregnancy is terminated. It is not an infringement on a woman's right to terminate her pregnancy for the state to assert its interest in protecting a newborn whose live birth occurs as the result of an abortion."[155] There is no gray area here—no "wiggle room"—for differing interpretations. Michigan's "baipa" is an express limit on the "right" to abortion and an affirmative legislative declaration of intent and authority to protect the rights and lives of the state's most vulnerable citizens. Michigan did what BAIPA should have done.

Second, in the event a newborn's mother "refus[es] to authorize all necessary life sustaining medical treatment for the newborn or releas[es] the newborn for adoption,"[156] the child immediately falls under the guardianship of the state via Michigan's "safe delivery of newborns law."[157] If, then, a child is born alive through an abortion attempt, and the mother persists in her desire that the child die, she loses all parental authority over the child and immediately surrenders him to the state.

Third, in conjunction with its "safe delivery of newborns law," Michigan's "baipa" imposes express duties on the abortionist. In the event a child is born alive through an abortion attempt "in a hospital setting," the abortionist is required to "provide immediate medical care to the newborn" and transfer him "to a resident, on-duty, or emergency room physician who shall provide medical care to the newborn."[158] If the abortion occurs "in other than a hospital setting," e.g., in an abortion clinic, the abortionist is required to "provide immediate medical care to the newborn and call 9-1-1 for an emergency transfer of the newborn to a hospital that shall provide medical care to the newborn."[159]

Finally, Michigan gave its "baipa" some teeth. In Michigan, it is a "felony, punishable by imprisonment for not more than 10 years," for an abortionist to act "with intent to injure or wholly to abandon" a child born alive through an abortion attempt.[160] Thus, an abortionist found to have drowned or bludgeoned a child born alive through an abortion attempt,[161] or to have simply let the child born alive die without rendering the aid required by Michigan's "baipa," faces the threat of a felony conviction.

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155 *Id.* § 333.1072.

156 *Id.* § 333.1073(1).

157 *Id.*

158 *Id.* § 333.1073(2).

159 *Id.*

160 *Id.* § 750.135(1)-(3).

161 *See* Kalebic, *supra* note 9, at 224 n.9; McGovern, *supra* note 7.

C. Michigan's Model and BAIPA

The measures implemented in Michigan[162] provide a good foundational model for establishing the framework needed to enforce BAIPA: an express (as opposed to implied) limit to the "right" to abortion, a transfer of custody procedure, mandatory immediate medical care for the newborn, and penalties for noncompliance. But at least two additional measures are required to ensure effective enforcement: an express, though not exhaustive, definition of the "immediate medical care" an abortionist is required to provide an infant born alive, and the appointment of a disinterested third party to neutralize the conflict of interests inherent in an abortion that results in a live birth.[163]

1. Defining Immediate Medical Care

The purpose of any abortion procedure is termination of a pregnancy by killing the child in the womb. Due to the fragility of the human infant, one who survives such an attempt on one's life will almost certainly be in immediate need of basic resuscitation and stabilization measures.[164] No child born alive through an abortion attempt will likely survive without this most basic of care.[165]

It is therefore essential to define expressly the "immediate medical care" *any* abortion provider is required to render an infant born alive to include 1) on-site, basic neonatal resuscitation and stabilization procedures, 2) performed by independent, competent medical professionals, with the necessary equipment, 3) standing by in the immediate vicinity of the abortion.[166]

Unless those who are permitted to kill the child in the womb are required to provide the necessary resuscitation and stabilization measures should the child escape the womb alive, any attempt to protect the child under law is, at best, futile, because without it the child will never survive the event that first brings him under this protection. In effect, without this requirement, every infant born alive through an abortion attempt will be denied the fundamental right to life BAIPA is meant to secure.

2. Identifying the Disinterested Third Party

Part V, *supra*, covered the need for the presence of a disinterested third party at any abortion attempt that may result in a child born alive

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[162] *See supra* Part VI.B.

[163] *See supra* Part V (discussing the need for the intervention of a disinterested party at abortions that could result in a live birth).

[164] Stanek Interview, *supra* note 153.

[165] *See, e.g.*, *supra* notes 1–9 and accompanying text.

[166] *See* Stanek Interview, *supra* note 153.

to ensure compliance with BAIPA. All that remains is to identify this independent party. No one answer exists. There is, perhaps, no good answer. HHS, however, has unintentionally provided a workable candidate.

In its program instruction on how BAIPA affects CAPTA, HHS stated that for a state to remain eligible for CAPTA funds, the state's Child Protective Services (CPS) is to have the "authority" to ensure that "medical care [is provided] for a child when such care or treatment is necessary to prevent or remedy serious harm to the child," including a child born alive through an abortion attempt.[167] This is precisely the purpose for a disinterested party at an abortion attempt: the prevention and remedy of serious harm to the child born alive. HHS could not have expressed it better had they intended.

CPS exists to protect children, often children born into hostile, abusive families. A mother who has hired someone to kill her child is certainly approaching the outer bounds of hostility and abuse. CPS agents are already trained to recognize signs of physical abuse, and so likely are more readily trainable to competently recognize a "live birth" and the four BAIPA signs of life. CPS is also well funded, receiving both state and federal monies. In sum, CPS may be in a better position than any government entity to intervene as a disinterested party on behalf of a child born alive through an abortion attempt to ensure compliance with BAIPA. CPS was created to uphold the rights of children—let them be used to uphold the rights of *all* children, including those most recently recognized under the law.

The federal government, of course, cannot order CPS to serve in this capacity.[168] That direction would have to come from the states themselves. Due to the nature of CAPTA, however, this need does not present a problem. A fuller explanation is provided in Part VII, *infra*.

VII. A PLAN FOR BAIPA'S REDEMPTION

While there are any number of measures that could be taken to enforce BAIPA, some of which are listed in Part VI.A, *supra*, there is a fairly simple solution that would likely see the purposes of BAIPA accomplished almost immediately: The Born-Alive Infants Protection Act of 200X (BAIPA 200X).

As simple in form and content as its predecessor, but exceedingly more effective, BAIPA 200X utilizes existing federal law to establish the legal framework by which the purposes of the original BAIPA may be realized. The Act has two main parts. The first is a simple amendment to the *United States Code* to define expressly the term "abortion" as it

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[167] ACF Memo, *supra* note 98.

[168] *See* Printz v. United States, 521 U.S. 898 (1997).

applies to the killing of an unborn child. This is currently missing from the *Code*, despite the fact that "abortion" appears in relevant context in many of its sections. The definition comes from a neutral source, such as *Black's Law Dictionary*[169] or a recognized medical authority. And, though implicit in the original BAIPA and the accepted definitions of "abortion" itself, the amendment follows Michigan's example[170] and includes in the definition an express declaration of the sole limit BAIPA placed on the "right" to abortion: that is, the "right" to abortion ends when the child is born alive. This simple declaration, without credible question, undeniably affirms the logical conclusion of BAIPA and expressly establishes the statutory bright line between abortion and un-legalized infanticide originally intended by BAIPA.

The second part of BAIPA 200X amends CAPTA, specifically 42 U.S.C. § 5106(a)(b) and (c)(b). These subsections list the eligibility requirements states must meet to receive federal grants for child abuse and neglect prevention and treatment programs and programs for the investigation and prosecution of child abuse and neglect. The amendment asserts that in order for a state to qualify for assistance under 42 U.S.C. § 5106(a) and (c), the state shall have and implement a plan to prevent the abuse and neglect of all infants born alive, as defined under BAIPA. The plan must, at a minimum, include the following: an immediate transfer of parental custody procedure;[171] an express requirement that all abortionists provide immediate onsite neonatal resuscitation and stabilization procedures for any child born alive, including immediate patient transfer to a qualified, independent medical professional for treatment;[172] specific penalties for violations;[173] and appointment of a disinterested third party to neutralize the inherent conflict of interests present when an infant is born alive through an abortion attempt.[174]

BAIPA 200X also 1) includes a preamble, made up of a discussion of the purposes and policies behind its specific measures,[175] 2) addresses funding issues, and 3) provides a sample plan that meets its

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[169] According to *Black's*, *abortion* is the "artificially induced termination of a pregnancy for the purpose of destroying an embryo or a fetus." BLACK'S LAW DICTIONARY 6 (8th ed. 2004). In reference to human abortion, both *embryo* and *fetus* refer to a "developing but *unborn*" human in the earlier and latter stages of development, respectively. *Id.* at 561, 654 (emphasis added).

[170] *See supra* Part VI.B.

[171] *See, e.g., supra* Part VI.B.

[172] *See supra* Parts VI.B–C.

[173] *See, e.g., supra* Part VI.B.

[174] *See supra* Part VI.C; *see also supra* Part V (discussing the need for a disinterested third party at any abortion attempt that may result in a live birth).

[175] *See supra* notes 52–58 and accompanying text; *see also supra* Part VI.B.

requirements.[176] Where relevant, BAIPA 200X references Michigan's respective legislative measures as examples.[177]

There ultimately could be little justifiable resistance to BAIPA 200X, absent a desire to legalize *ex utero* infanticide. The federal legislature certainly has the authority to define the terms in the *United States Code*.[178] It has, as well, the authority to establish eligibility requirements for federal grants.[179] And the federal executive, for its part, has the responsibility to see that existing federal law is enforced. The two branches equally share the responsibility to ensure that the laws enacted are enforceable. The states, in turn, would without question be hesitant to disqualify themselves from the funding CAPTA provides, particularly when the effort to meet the requirements of BAIPA 200X is funded by the very grants for which the effort is made.

There is, in sum, every reason for the passage of BAIPA 200X, or a measure very much like it, and little reason for it to fail. Both the legislative and the executive authority and responsibility are obvious. The cooperation of the states is comfortably assured. It lays the groundwork for the effective enforcement of the only federal legislative barrier to abortion as unhindered infanticide.[180] It removes the absurdity of a law adopted into the *United States Code* replete with conflicting interests to the point of unenforceability. And, most importantly, BAIPA 200X protects and upholds the fundamental right to life due the most vulnerable legally recognized among us.

Who could fail to support, if not sponsor, such a measure? All that is required is the appropriate action on the part of those that enacted BAIPA in the first place.

VIII. CONCLUSION

Currently, the Born-Alive Infants Protection Act of 2002 is the only federal legislation in history to place a limit on the "right" to abortion,[181] a right created by a judiciary that seems bent on expanding this "right" to include outright infanticide.[182] BAIPA's only significant effect is to

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[176] An adequate example could easily be drawn from the measures discussed in Part VI.B–C, *supra*.

[177] *See supra* Part VI.B.

[178] U.S. CONST. art. I, § 8; *see also* H.R. REP. NO. 107-186, at 14 (discussing the Congressional authority to enact the relevant portions of the original BAIPA).

[179] South Dakota v. Dole, 483 U.S. 203 (1987).

[180] *See* Arkes, *supra* note 15.

[181] *Id.*

[182] *See* Stenberg v. Carhart, 530 U.S. 914 (2000); Planned Parenthood v. Farmer, 220 F.3d 127, 143–44 (3d Cir. 2000).

imply a statutory bright line separating abortion from unimpeded infanticide.[183] Due to the near-complete inaction of the legislative and executive branches of the federal government following BAIPA's enactment,[184] including the so-called "enforcement" measures of the HHS,[185] however, BAIPA is effectively nonexistent.[186] The direct result is that an entire class of legally recognized individuals are rendered human chattel and utterly denied the most basic protections of the law. An act as simple as The Born-Alive Infants Protection Act of 200X[187] would ensure that the purposes of the original BAIPA are accomplished and so uphold the fundamental right to life denied the most oppressed, voiceless, and powerless persons recognized under law.

"Any right must have its limit, including the right to abortion, and if that limit is not found in outright infanticide, we must ask: where could it possibly be?"[188]

Roger Byron

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[183] *See supra* Part III.

[184] *See supra* Part II.

[185] *See supra* Part IV.

[186] *See supra* Part V.

[187] *See supra* Part VII.

[188] *BAIPA Hearings*, *supra* note 31, at 14 (testimony of Hadley Arkes).