REGENT UNIVERSITY LAW REVIEW

ARTICLES

NOTES

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The seal of the Regent University Law Review symbolizes the Christian heritage of Regent University. The shield represents the shield of faith. The crown at the top of the crest declares the One we represent, our Sovereign King, Jesus Christ. The three crowns represent the Father, Son, and Holy Spirit. The flame and the lamp represent the lamp of learning and the fire of the Holy Spirit. Laced throughout the crest is a ribbon that signifies the unity Christians share. The mission of Regent University is embodied in the surrounding words "DUCTUS CHRISTIANUS AD MUNDUM MUTANDUM"— "Christian Leadership to Change the World."

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A CENTER DEDICATED TO PRESERVING A CONSTITUTION DESIGNED FOR A MORAL AND RELIGIOUS PEOPLE

Mark D. Martin[*]
Bradley J. Lingo[**]
Michael G. Schietzelt[***]

President John Adams once observed, "Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other."[1] He wasn't the only Founding Father to hold this view. Indeed, James Madison wrote that our Constitution requires "sufficient virtue among men for self-government," otherwise, "nothing less than the chains of despotism can restrain them from destroying and devouring one another."[2]

Many of our Founders were men of faith or influenced by the Judeo-Christian tradition.[3] They understood that mankind was imperfect, selfish, and power-seeking. They had experienced first-hand the oppressive dictates of Parliament and the Crown that led to the American Revolution. And they were rightly suspicious of the accumulation of

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[1] John Adams, *Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (October 11, 1798)*, *in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING (Daniel L. Dreisbach & Mark David Hall eds., 2009).

[2] THE FEDERALIST No. 55, at 291 (James Madison) (George W. Cary & James McClellan eds., 2001).

[3] *See generally* Mark David Hall, *Did America Have a Christian Founding?*, HERITAGE FOUND. (June 7, 2011), https://www.heritage.org/political-process/report/did-america-have-christian-founding.

governmental power by one person or a small body—"the very definition of tyranny" according to Madison.[4]

So, the Founders imbued liberty-preserving principles into the very structure of the new government. They divided power between federal and state governments, apportioned federal power among three branches of government, and limited the power of the federal government to certain delegated functions. But the Founders also knew that these devices alone were inadequate to preserve and sustain our new nation.

Why did they believe that the success of the union ultimately depended on the virtue of the people? A virtuous people would courageously defend the rights endowed by their Creator, but a fearful people would cede these rights in exchange for a fleeting sense of security. As Princeton's Robbie George explains, "[P]eople lacking in virtue could be counted on to trade liberty for protection, for financial or personal security, for comfort . . . for having their problems solved quickly. And there will always be people occupying or standing for public office who will be happy to offer the deal."[5]

How do we cultivate the virtue needed to sustain our republic? To entrust the government with this task is to invite the fox into the proverbial henhouse. As Madison observed, "[W]hat is government itself, but the greatest of all reflections on human nature?"[6]

It falls to the family, the church, and educational institutions to transmit "to each new generation the virtues without which free societies cannot survive: basic honesty, integrity, self-restraint, concern for others and respect for their dignity and rights, civic-mindedness, and the like."[7] The Constitution itself will fail without institutions to teach people how its constraints protect liberty, to explain why that liberty is vital to the success of our country, and to inculcate the virtue needed to resist a culture of immediate gratification.[8]

For this reason, we are excited to launch Regent Law's newest endeavor, The Robertson Center for Constitutional Law. The Center will promote first principles in constitutional law such as textualism, originalism, separation of powers, limited government, judicial modesty, and religious freedom—all while helping educate and cultivate the next generation of Christian lawyers.

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[4] THE FEDERALIST No. 47, *supra* note 2, at 249 (James Madison).

[5] Robert P. George, *Ruling to Serve: A Fundamental Argument for Limited Government*, FIRST THINGS (Apr. 2013), https://www.firstthings.com/article/2013/04/ruling-to-serve.

[6] THE FEDERALIST No. 51, *supra* note 2, at 269 (James Madison).

[7] George, *supra* note 5.

[8] *See id.* (arguing that non-governmental institutions are the surest way to pass on the virtues essential to free society and to ensure the functioning of constitutional safeguards).

The most significant threat to our constitutional order is not a string of non-originalist decisions from the U.S. Supreme Court. It is instead, as our Founders warned, the failure to pass to subsequent generations the character, virtue, and knowledge required to preserve the constitutional safeguards. Victories in court will be hollow and ephemeral if we fail to instill in future generations the virtues upon which our nation was founded. The decisions of the Supreme Court and, ultimately, the preservation of the Constitution itself rest downstream from culture. Preserving the Constitution requires maintaining the virtuous culture it was designed to serve. We hope that Regent University School of Law and its Robertson Center for Constitutional Law will have a prominent role in preserving, protecting, and defending our Constitution.

The Center's first academic piece, "*Fulton* and the Future of Free Exercise" is in the pages that follow. That piece builds upon the research done by the Center when preparing an amicus brief to the United States Supreme Court in *Fulton v. City of Philadelphia*.[9] We hope this is just the first of many opportunities for the Center to combine academic scholarship and in-court advocacy in defense of our Constitution.

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[9] Bradley J. Lingo & Michael G. Schietzelt, Fulton *and the Future of Free Exercise*, 33 REGENT U. L. REV. 5, 6–7 (2020) (discussing the effect of *Employment Division v. Smith* on the free exercise of religion cases and the opportunity to better protect these rights in *Fulton v. City of Philadelphia*); Brief of Amicus Curiae the Robertson Ctr. for Const. L. in Support of Petitioners, Fulton v. City of Philadelphia, No. 19-123 (U.S. filed June 3, 2020) (arguing that *Employment Division v. Smith* has upset the interpretation of the Free Exercise Clause and that the Supreme Court should overrule *Smith* and return to the traditional interpretation of the Free Exercise Clause).

FULTON AND THE FUTURE OF FREE EXERCISE

Bradley J. Lingo
Michael G. Schietzelt[*]

Upon signing the Religious Freedom Restoration Act in 1993, President Clinton remarked, "We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom."[1] The act had sailed through Congress with bipartisan support. Democrats and Republicans united in the name of religious freedom to pass legislation repudiating the Supreme Court's 1990 decision in *Employment Division v. Smith*.[2]

Fast-forward about twenty-five years. American culture and politics have changed. Attitudes about religion have changed. Understandings about the individual rights secured by the Constitution have changed.[3] The legal and political disputes over religious liberty have changed. And while there is now more agreement on the civic value of diversity and pluralism, there is less agreement on the civic value of religious liberty.

The *Smith* Court could have never foreseen the profound cultural changes ahead and the extent to which those changes would increase the possibility for conflict between generally applicable laws and religious exercise. *Smith*'s understanding of the Free Exercise Clause, which once primarily burdened those with fringe religious views, increasingly burdens even those holding orthodox religious beliefs.[4]

Many civil-rights advocates—who once championed religious liberty—now view religious liberty as a deeply contaminated, if not toxic,

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[1] Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000 (Nov. 16, 1993).

[2] 494 U.S. 872 (1990); *see also* Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 250–51 (1998) (noting how conservative and liberal groups united in Congress to support the RFRA).

[3] The paradigmatic example over the last decade is *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[4] *See Smith*, 494 U.S. at 903–04 (O'Connor, J., concurring in judgment) (noting how the *Smith* decision concerned the religion of the Native American Church); Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 604, 609 (2003) (concluding the impact of *Smith* is a burden on those who seek an exemption from generally applicable laws for religious purposes).

civil right. For example, the U.S. Commission on Civil Rights ("USCCR")—a commission that "play[s] a vital role in advancing civil rights"[5]—issued a briefing report entitled *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*.[6] In it, Chairman Martin Castro characterized "religious liberty" and "religious freedom" as "code words for discrimination, intolerance, racism, sexism," and other "form[s] of intolerance."[7]

The waning of religious liberty in American civil-rights culture has many and complex origins. But *Smith*'s treatment of the Free Exercise Clause as a second-class First Amendment right contributed to it. By entrusting the protection of free exercise rights to the legislative branch, *Smith* injected politics directly into questions of religious liberty and exacerbated winner-take-all struggles over the levers of power.

Moreover, by protecting "neutral" and "generally applicable" laws from judicial scrutiny, *Smith* provides little incentive for government actors to accommodate free exercise. The *Smith* majority found it "horrible to contemplate that federal judges w[ould] regularly balance against the importance of general laws the significance of religious practice."[8] But it might be even more horrible to contemplate that government officials, shielded by *Smith*, have little reason to assess and balance the effect of their generally applicable laws on the religious exercise of Americans—even as today's free exercise disputes increasingly involve hot-button and intensely personal issues such as marriage, sexual morality, and abortion.[9]

One might discount the consequences of *Smith* if the constitutional text required its holding. But that is not clear.[10] Justice Scalia

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[5] *Mission*, U.S. COMM'N ON C.R. (July 10, 2018), https://www.usccr.gov/about/. According to the Commission's organic statute, the civil rights it seeks to protect include religious freedoms. 42 U.S.C. §§ 1975a(1)(A), (2)(D).

[6] U.S. COMM'N ON C.R., PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016).

[7] *Id.* at 29.

[8] *Smith*, 494 U.S. at 889 n.5.

[9] Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 869 (2014).

[10] In the years following the *Smith* decision, members of the Court and the legal academy debated whether the text and history of the Free Exercise Clause provide a near absolute protection against encroachments on religious conduct, subject only to "implied limitations . . . that are indisputably necessary," Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1116 (1990) [hereinafter *Free Exercise Revisionism*]; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 573–77 (1993) (Souter, J., concurring in part and concurring in the judgment) (noting that scholarship on the original meaning of the Free Exercise Clause contradicted *Smith* while noting the lack of uniformity in academic literature with respect to the Free Exercise Clause's meaning in light of historical evidence), or if they instead provide protection only against laws that single out religion or religious sects for disfavored treatment, *compare* City

characterized *Smith*'s holding as a "permissible reading" of the Free Exercise Clause.[11] And he tethered the holding to a normative judgment that "leaving accommodation to the political process" was "preferred to a system in which" the courts must decide whether an accommodation is required.[12]

But if what was "prefer[able]"[13] mattered in 1990, surely it also matters today.[14] In October Term 2020, the Supreme Court will decide *Fulton v. City of Philadelphia* and, perhaps, consider again the meaning of the Free Exercise Clause and whether to overrule *Smith*.[15] So, it is appropriate to reconsider the competing arguments for legislative and judicial accommodation regimes for free exercise, examine the historical justifications for protecting the free exercise of religion, and consider the implications for today.

We begin this Article with a primer on *Fulton v. City of Philadelphia*, the Supreme Court's Free Exercise Clause jurisprudence leading to *Smith*, *Smith* itself, and the legislative responses to it. We do that with an eye toward the question regarding whether *Smith* should be overruled. Next, we examine and respond to the arguments in favor of *Smith* and its legislative-accommodation approach. We then consider the historical justifications for the Free Exercise Clause and the religion clauses, again with an eye toward the contemporary debate over the Free Exercise Clause. Finally, we consider what all of that might mean for *Fulton*, the polarized context in which current free-exercise cases occur, and the protection of liberty in a pluralistic society.

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of Boerne v. Flores, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring in part) (refuting the dissent's theory by explaining how a broad reading of the Free Exercise Clause affirms the *Smith* rule—that religious exercise is permissible as long as it does not violate generally applicable laws*), with id.* at 548–64 (O'Connor, J., dissenting) (explaining how a historical understanding of the Free Exercise Clause shows, contrary to *Smith*, that the Framers intended religious beliefs to prevail unless the government was protecting a significant interest). Only for the sake of argument do we here accept the premise that the text and history of the Free Exercise Clause are unclear.

[11] *Smith*, 494 U.S. at 878.

[12] *Id.* at 890.

[13] *Id.*

[14] At the very least, the real-world consequences of *Smith* will be relevant to the Court's stare decisis analysis, should it decide to revisit *Smith*. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) (listing whether "the prior decision [has] caused significant negative jurisprudential or real-world consequences" as one of the Court's "broad considerations" regarding stare decisis).

[15] Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

I. SETTING THE STAGE: *FULTON*, *SMITH*, AND THE LEGISLATIVE RESPONSE TO *SMITH*

A. The Dispute in Fulton

In March of 2018, the *Philadelphia Inquirer* reported that "two of [Philadelphia's] foster care agencies . . . operate under policies that turn away LGBTQ people who come knocking."[16] One of those two agencies is Catholic Social Services of the Archdiocese of Philadelphia ("CSS"), a religious nonprofit organization that has provided foster care services in Philadelphia (the "City") for more than a century.[17] CSS "views its foster care work as part of its religious mission and ministry."[18] Though CSS originally handled its work privately, the City now heavily regulates these services and requires foster care agencies to work with it.[19]

The Third Circuit described the way CSS's views on marriage and the family affect its work:

> CSS adheres to the belief that marriage is between a man and a woman. It is not unwilling to work with LGBTQ individuals as foster parents. However, state regulations require it to consider an applicant's "existing family relationships" as part of the certification process. In applying this criterion, CSS will only certify foster parents who are either married or single; it will not certify cohabitating unmarried couples, and it considers all same-sex couples to be unmarried.[20]

Before the *Philadelphia Inquirer* published its article, a same-sex couple had never asked CSS to conduct a foster-care home study.[21] But when the *Philadelphia Inquirer* posed a hypothetical question to a spokesperson for the Archdiocese of Philadelphia, the spokesperson confirmed CSS's potential religious objection.[22]

And that began two months of contentious correspondence between City officials and CSS. The City argued its Fair Practices Ordinance required CSS to work with same-sex couples.[23] CSS refused, leading the

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[16] Julia Terruso, *Two Foster Agencies in Philly Won't Place Kids with LGBTQ People*, PHILA. INQUIRER (Mar. 13, 2018), https://www.inquirer.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-archdiocese-20180313.html.

[17] Fulton v. City of Philadelphia, 922 F.3d 140, 147 (3d Cir. 2019).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 148.

[21] *Id.*; *see also* Terruso, *supra* note 16 (reporting that the spokesman for the Archdiocese "wasn't aware of any recent inquiries from same-sex couples" at CSS).

[22] Terruso, *supra* note 16.

[23] *Fulton*, 922 F.3d at 148, 150.

City to institute an "intake freeze," meaning the city stopped referring foster children to CSS.[24]

In May 2018, CSS brought sixteen causes of action against the City, including that the application of the Fair Practices Ordinance to CSS violates the Free Exercise Clause.[25] The following month, CSS and the other plaintiffs moved for a preliminary injunction to force the City to resume its relationship with CSS.[26] At the most fundamental level, *Fulton* asks "whether the City of Philadelphia's termination of the contract that allowed [CSS] to help place children in the city with foster parents, on the basis of [CSS]' unwillingness to endorse same-sex couples as foster parents, violated the Free Exercise Clause."[27]

Relying on *Smith*, the district court determined that CSS's free exercise claim was unlikely to succeed on the merits.[28] The court concluded that the Fair Practices Ordinance was a neutral and generally applicable law and thus merited no more than rational basis review under *Smith*.[29] The Third Circuit affirmed.[30] To succeed on a free exercise claim, that court said CSS must show that it had been "treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views."[31] But the court found no evidence in the record of bias against or hostility toward religion.[32] Without evidence of anti-religious hostility or bias, the Third Circuit held that CSS was unlikely to succeed on the merits of its free exercise claim.[33]

In February 2020, the Supreme Court granted certiorari.[34] *Fulton* presents three questions to the Court. Each of those questions implicates *Smith* and its holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law'" conflicts with his or her religious practices.[35]

The first question asks the Court to resolve a circuit split over how one may show that a law is not generally applicable as required by

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[24] *Id.* at 148–49.

[25] *Id.* at 150–52.

[26] *Id.* at 150–51.

[27] Motion of the U.S. for Leave to Participate in Oral Argument as Amicus Curiae & for Divided Argument at *1–2, Fulton v. City of Philadelphia, No. 19-123 (U.S. Apr. 14, 2020).

[28] Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 680–90, 703 (E.D. Pa. 2018).

[29] *Id.* at 684.

[30] Fulton v. City of Philadelphia, 922 F.3d at 165.

[31] *Id.* at 154.

[32] *Id.* at 156–57.

[33] *Id.* at 159.

[34] Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (mem.).

[35] Emp. Div., Dep't of Hum. Res. v. Smith (Emp. Div. v. Smith), 494 U.S. 872, 879 (1990) (first quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment) and then citing Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940)).

Smith.[36] As the dispute in *Fulton* marched toward litigation, the City's stated legal grounds for imposing this policy on CSS shifted from the Fair Practices Ordinance, to a provision in CSS's contract, to the City's charter, and so on.[37] This, together with City officials' questionable statements about the Archdiocese of Philadelphia and about CSS's objection,[38] raises questions as to whether the policy at issue is neutral and generally applicable under *Smith*.

Should the Court hold that the law is neutral and generally applicable, the other two questions before the Court are "[w]hether *Employment Division v. Smith* should be revisited" and if so, "[w]hether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?"[39]

The question of whether *Smith* should be revisited is not new. The Justices of the Supreme Court have repeatedly called for it to be reassessed. Two years after *Smith*, the Court clarified the *Smith* standard in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[40] In his concurrence in *Lukumi*, Justice Souter expressed a long list of textual, historical, and procedural concerns he had over *Smith*, concluding that "in a case presenting the issue, the Court should reexamine the rule *Smith* declared."[41] Shortly after joining the Court, Justice Breyer suggested that the Court should take another look at *Smith*.[42] So too did Justice Gorsuch,

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[36] Petition for Writ of Certiorari at i, Fulton v. City of Philadelphia, No. 19-123 (U.S. July 22, 2019). Two circuits—including the Third Circuit in *Fulton*—have held that a law is generally applicable if it prohibits "the same conduct for all, regardless of motivation." Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1077 (9th Cir. 2015); *see also Fulton*, 922 F.3d at 154 (asserting that a free exercise challenger "must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views"). Six circuits more closely scrutinize individualized and secular exemptions from challenged laws and consider the impact of those exemptions on the government's proffered interest in prohibiting the religious conduct in question. Petition for Writ of Certiorari, *supra* note 36, at 22–26 (collecting cases).

[37] *See generally* Brief for Petitioners at 12–15, Fulton v. City of Philadelphia, No. 19-123 (U.S. May 27, 2020) (describing "six *post hoc* justifications" offered by the City as the basis for imposing its policy on CSS).

[38] *Id.* at 10–11 (detailing statements made by Philadelphia's mayor and by the Commissioner of the Department of Human Services).

[39] Petition for Writ of Certiorari, *supra* note 36, at i.

[40] 508 U.S. 520, 531–32 (1993).

[41] *Id.* at 559–60, 574–75 (Souter, J., concurring in part and concurring in judgment).

[42] City of Boerne v. Flores, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) ("[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided.").

who observed that "*Smith* remains controversial in many quarters."[43] Most recently, four justices signaled a willingness to revisit *Smith*.[44]

B. Smith*, Past and Present*

1. *Smith*'s Forebears

Smith hatched from the Supreme Court's decision in *Minersville School District Board of Education v. Gobitis*. *Gobitis* upheld a law compelling school children to salute the American flag and recite the Pledge of Allegiance.[45] The Gobitas children, Jehovah's Witnesses, were expelled from school for refusing to participate.[46] But because the law was of "general scope [and] not directed against doctrinal loyalties of particular sects," the Court found no interference with the free exercise of religion.[47]

Gobitis traced the "historic concept" that the Free Exercise Clause does not guard against generally applicable laws back to *Reynolds v. United States*, an 1878 case about whether the Free Exercise Clause required a religious exemption for bigamy in the Territory of Utah.[48] In *Reynolds*, the Supreme Court held that the Free Exercise Clause protected individuals from any statute that restricted belief, but provided no protection from statutes regulating religiously motivated conduct.[49]

Thus, if the Gobitas children and other religious minorities wished to find an accommodation, the Court said they should lobby rather than litigate: "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."[50]

This view of the Free Exercise Clause was short-lived: The Court overruled *Gobitis* only three years later in *West Virginia State Board of Education v. Barnette*.[51] *Barnette* took exception to *Gobitis*'s conclusion

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[43] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

[44] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (noting that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause").

[45] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 598–99 (1940).

[46] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 135 (2018).

[47] *Gobitis*, 310 U.S. at 593–94.

[48] *Id.* at 594–95 (citing Reynolds v. United States, 98 U.S. 145, 162, 166 (1878)).

[49] *Reynolds*, 98 U.S. at 162, 166–67. *But see* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (repudiating the distinction made in *Reynolds*).

[50] *Gobitis*, 310 U.S. at 600.

[51] 319 U.S. 624, 642 (1943).

that the Court was not competent to second-guess legislative resolution of First Amendment issues:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . .
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> . . . .
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> . . . We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.[52]

Justices Hugo Black and William Douglas, who were in the majority in both *Gobitis* and *Barnette*, wrote a concurrence explaining why they changed their minds.[53] While the Justices held to the premise that "[n]o well-ordered society" could grant an absolute right for religious objectors to engage in whatever religious conduct they wished, they also recognized that "[t]he First Amendment does not go so far."[54] But they had come to reject the idea that the legislatures are the only bodies competent to accommodate religious practices—the core premise of *Gobitis*: "Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices *must be made by this Court*."[55]

Throughout the next half-century, the Court refined the scope of protected religious conduct. In the 1963 case *Sherbert v. Verner*, the Court formally adopted the language of strict scrutiny for free exercise claims, holding that a law burdening religious exercise must be "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[56] Nearly a decade later, the Court reaffirmed the compelling state interest test in holding that the Free Exercise Clause exempted Old Order Amish communities from compulsory school attendance laws in *Wisconsin v. Yoder*.[57]

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[52] *Id.* at 638, 640.

[53] *Id.* at 643 (Black and Douglas, JJ., concurring).

[54] *Id.*

[55] *Id.* at 644 (emphasis added).

[56] 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). Justice Brennan, who authored the majority opinion in *Sherbert*, had advocated for this standard in *Braunfeld v. Brown*, arguing that this was the standard the Court applied "under all clauses of the First Amendment." 366 U.S. 599, 611–12 (1961) (Brennan, J., dissenting) (quoting *Barnette*, 319 U.S. at 639); Sherbert v. Verner, 374 U.S. 398, 399 (1963) (Brennan, J., delivering the opinion of the Court).

[57] 406 U.S. 205, 215 (1972).

Though religious objectors managed a handful of victories in the years that followed—particularly in cases regarding the denial of unemployment benefits[58]—the Supreme Court often upheld the government actions challenged under the Free Exercise Clause.[59] This led some academics to suggest that the compelling state interest test was, though cloaked in the language of strict scrutiny, weak in practical effect.[60] Nevertheless, courts continued to apply it throughout the 1970s and 1980s.[61]

2. *Employment Division v. Smith* Revives *Reynolds* and *Gobitis*

Alfred Smith and Galen Black were dismissed from their jobs at a drug rehabilitation clinic for ingesting sacramental peyote.[62] Because Smith and Black were dismissed for work-related misconduct, they were denied unemployment benefits.[63] The Oregon Supreme Court held that this action ran afoul of the Free Exercise Clause.[64] And so *Employment Division v. Smith* went to the Supreme Court for the first of two times.[65] The Supreme Court of the United States granted certiorari, vacated the decision, and remanded the case, asking the Oregon court to determine whether the religious use of peyote was a criminal act under state law.[66]

On remand, the Oregon Supreme Court reemphasized that the general criminalization of peyote was immaterial to its decision on whether the denial of unemployment benefits violated the Free Exercise Clause.[67] That court also concluded that a criminal prosecution for sacramental peyote use would run afoul of the First Amendment, should such a prosecution ever occur.[68]

The Supreme Court of the United States again granted certiorari. This time, the Court flatly rejected the free exercise claims. According to

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[58] *E.g.*, Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 835 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 720 (1981).

[59] *E.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988); O'Lone v. Est. of Shabazz, 482 U.S. 342, 345 (1987); United States v. Lee, 455 U.S. 252, 261 (1982).

[60] *Free Exercise Revisionism*, *supra* note 10, at 1110 ("[A]t the Supreme Court level, the free exercise compelling interest test was a Potemkin doctrine.").

[61] *Id.*

[62] Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

[63] *Id.*

[64] *Id.* at 875.

[65] *Compare* Emp. Div., Dep't of Hum. Res. v. Smith, 485 U.S. 660 (1988) (showing the first time *Smith* was heard in the Supreme Court), *with Smith*, 494 U.S. 872 (representing the second time *Smith* went to the Supreme Court).

[66] *Smith*, 494 U.S. at 875–76.

[67] Smith v. Emp. Div., 763 P.2d 146, 147 (Or. 1988) (per curiam).

[68] *Id.* at 148–49.

the majority, the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[69] To illustrate its point, *Smith* relied primarily on two cases: *Reynolds*, the nineteenth century case that based its reasoning on a later-rejected distinction between belief and conduct (a distinction *Smith* had rejected only two paragraphs earlier), and *Gobitis*.[70] From these two cases, the majority found its rule in principle: "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[71]

Smith used cases other than *Reynolds* and *Gobitis* to illustrate its rule.[72] But those cases were explicitly decided on grounds wholly independent of whether the law was neutral or generally applicable.[73] For instance, *Prince v. Massachusetts* upheld a conviction for violation of child labor laws in connection with the distribution of religious literature because "[t]he state's authority over children's activities is broader than over like actions of adults."[74] That analysis looks more like the compelling state interest prong of *Sherbert* than the standards of neutrality and general applicability required by *Smith*. And *Braunfeld v. Brown* concluded that a law barring businesses from opening on Sundays "impose[d] only an indirect burden" on Saturday Sabbatarians.[75] This implies that a direct burden on religious conduct *would* be a free exercise violation—regardless of whether the law was neutral or generally applicable.

To distinguish inconvenient precedents, *Smith* devised two categories of cases in which the compelling state interest test applies. In the first category are cases that implicate "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the

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[69] *Smith*, 494 U.S. at 878–79.

[70] *Id.* at 879. The judgment in *Reynolds* upholding the prohibition on polygamy was likely proper under the First Amendment, but that discussion is outside the scope of this Article. What is relevant, however, is *Reynolds*' discredited reasoning on which *Smith* relied. Reynolds v. United States, 98 U.S. 145, 166–67 (1878).

[71] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

[72] *Id.* at 879–80.

[73] *See generally Free Exercise Revisionism*, *supra* note 10, at 1124–27 (discussing how the precedents *Smith* relied on, in particular *Gobitis* and *Prince*, were decided on reasons other than whether the law was neutral or generally applicable).

[74] 321 U.S. 158, 168 (1944)*; see also Free Exercise Revisionism*, *supra* note 10, at 1125 (recalling that the Court in *Prince* chose to discuss the state's authority over children rather than whether the law at issue was neutral or generally applicable).

[75] 366 U.S. 599, 606 (1961); *see also Free Exercise Revisionism*, *supra* note 10, at 1125 (noting that the statute at issue in *Braunfeld* did not make religious exercise illegal).

press."[76] Reimagined in this way, a case like *Yoder* no longer applied the compelling state interest test to a religious objection to compulsory education. Instead, it was a "hybrid rights" case involving a religious objection to compulsory education alongside "the right of parents . . . to direct the education of their children."[77] This combination received the benefit of the compelling state interest test, though neither the religious objection nor the parents' rights to direct the education of their children would have been sufficient standing alone to overcome the neutral and generally applicable compulsory education laws.[78]

The second category of cases involved "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[79] This exception appeared tailored to carve out the line of unemployment benefits cases decided by the Supreme Court after *Sherbert*.[80]

The *Smith* Court made no attempt to justify the outcome based on the text of the Free Exercise Clause, summarily concluding that its reading of the clause is "permissible."[81] Absent from the Court's analysis is any examination of the historical record—a curious omission in an opinion authored by Justice Antonin Scalia. And the Court's characterization of precedent has been widely criticized, even by *Smith* apologists.[82]

Instead, as in *Gobitis*, normative preferences drove the analysis.[83] The Court feared that it would "court[] anarchy" to continue to apply the compelling state interest test—a "danger [that] increases in direct proportion to the society's diversity of religious beliefs."[84] And it

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[76] *Smith*, 494 U.S. at 881.

[77] *Id.* (first citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), then citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[78] *Yoder*, 406 U.S. at 215–16; *see also Free Exercise Revisionism*, *supra* note 10, at 1121 ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case.").

[79] *Smith*, 494 U.S. at 884.

[80] *See generally Free Exercise Revisionism*, *supra* note 10, at 1122–24 (discussing *Smith*'s treatment of the unemployment cases).

[81] *Smith*, 494 U.S. at 878.

[82] *E.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (conceding that *Smith* "exhibits only a shallow understanding of free exercise jurisprudence and [that] its use of precedent borders on fiction"); Aden & Strang, *supra* note 4, at 585–87 (noting the broad range of opinions that *Smith* commentators have about its impact on the Free Exercise Clause).

[83] *Cf.* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 853–54 (2001) (quoting Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989)) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.").

[84] *Smith*, 494 U.S. at 888.

characterized the use of strict scrutiny in all free exercise cases as an unaffordable "luxury" for a "cosmopolitan nation."[85]

It worried that interpreting the Free Exercise Clause as anything more than a nondiscrimination provision would encourage people to seek, and require courts to grant, religious exemptions from "civic obligations of almost every conceivable kind."[86] This, in turn, threatened to make functional government impossible and render "each conscience . . . a law unto itself."[87] What is more, the *Smith* Court found it "horrible to contemplate that federal judges w[ould] regularly balance against the importance of general laws the significance of religious practice."[88] So it left these judgment calls to be settled through the democratic process.[89]

Channeling *Gobitis*, *Smith* left minority religious groups to fend for themselves in the legislature, hoping that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[90] But *Smith* itself prophetically observed that some religious observers would suffer as a result: The "unavoidable consequence of democratic government" is "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[91]

This was an outcome for which neither party had asked. The parties in *Smith* focused their briefing and argument on the compelling state interest test and how the Court should have applied it to the facts of the case, with "neither party squarely address[ing] the proposition the Court was to embrace."[92]

Four justices resisted *Smith*'s revival of *Gobitis*. To the three dissenting justices, *Smith* was "a wholesale overturning of settled law

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[85] *Id.* (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

[86] *Id.* at 888–89.

[87] *Id.* at 890; *see also* Reynolds v. United States, 98 U.S. 145, 167 (1878) ("To permit [religious exemptions from general laws] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

[88] *Smith*, 494 U.S. at 889 n.5.

[89] *Id.* at 890.

[90] *Id.*; *see also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1961) ("Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.").

[91] *Smith*, 494 U.S. at 890.

[92] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 571–72 (1993) (Souter, J., concurring); *see also* Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties"*, 84 NEB. L. REV. 795, 815 (2006) (noting that neither the parties nor any amicus had addressed "the question of whether strict scrutiny should be jettisoned as the appropriate constitutional test for free exercise cases").

concerning the Religion Clauses of our Constitution."[93] Justice O'Connor, concurring in the result, wrote, "There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[94] According to Justice O'Connor, the First Amendment contains an "express textual mandate" prohibiting even neutral and generally applicable laws encroaching on religious conduct.[95] The Court, she continued, must balance this mandate against the state's regulatory interests "by requiring the government to justify any substantial burden on religiously motivated conduct."[96] Three years later, Justice Souter drew further attention to *Smith*'s inchoate textual analysis, observing "that a respectable argument may be made that the pre-*Smith* law comes closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced."[97]

C. RFRA, City of Boerne*, and State Reactions*

Smith immediately "produced a firestorm of criticism" from a broad coalition of religious communities, civil liberties organizations, and legal scholars.[98] After the Court declined to rehear the case, the coalition—which included groups ranging from the Christian Legal Society and the National Association of Evangelicals at one end of the ideological spectrum to the American Civil Liberties Union and Americans United for the Separation of Church and State at the other end[99]—petitioned Congress to overturn *Smith* by statute.[100] That effort succeeded three years later. In 1993, the Religious Freedom Restoration Act ("RFRA")[101]

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[93] *Smith*, 494 U.S. at 908 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

[94] *Id.* at 901 (O'Connor, J., concurring in judgment).

[95] *See id.* at 894 ("If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.").

[96] *Id.*

[97] *Lukumi*, 508 U.S. at 574 (Souter, J., concurring).

[98] Jacob, *supra* note 92, at 814; *see also* Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99, 99 (1990) (presenting an amicus brief—never filed due to a Supreme Court rule change—joined by "[a] large group of law professors . . . [and] a large coalition of religious and civil liberties organizations" in support of rehearing *Smith*).

[99] Jacob, *supra* note 92, at 815–17.

[100] *Id.* at 815.

[101] Pub. L. No. 103–141, 107 Stat. 1488.

passed the Senate by a vote of 97 to 3 and received "such broad support it was adopted on a voice vote in the House."[102]

When signing RFRA into law, President Clinton noted how "hesitantly and infrequently" Congress has acted to reverse a decision of the Supreme Court.[103] "But this is an issue in which that extraordinary measure was clearly called for."[104] President Clinton observed,

> [T]his act reverses the Supreme Court's decision [in *Smith*] and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.[105]

This effort to restore fully the compelling state interest test was limited by the extent of Congress's enforcement power under the Fourteenth Amendment as interpreted by the Supreme Court in *City of Boerne v. Flores*.[106] So, Congress responded again with the Religious Liberty Protection Act ("RLPA"), a bill that would have imposed the compelling state interest test on certain substantial burdens of religious exercise arising under Congress's spending and commerce powers.[107] RLPA never passed, however, due in part to a fracturing of the pro-RFRA coalition. Only six years after supporting RFRA, some of the prominent left-leaning members of the coalition expressed concern that religious liberties would allow "religious landlords or employers . . . [to discriminate] on [the] basis of religion, marital status, or sexual orientation."[108]

In 2000, Congress settled for the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a statute restoring the

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[102] Remarks on Signing the Religious Freedom Restoration Act of 1993, *supra* note 1, at 2000.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* City of Boerne v. Flores, 521 U.S. 507, 534–35 (1997) (holding that "RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion" and is therefore a substantive expansion of the Free Exercise Clause "imposing a heavy litigation burden on the States and . . . curtailing their traditional general regulatory power").

[107] H.R. 4019, 105th Cong. (1998).

[108] Jacob, *supra* note 92, at 828. As Professor Jacob notes, those on the left who opposed RLPA in substance likely lacked the ability to stop the bill on their own. *Id.* at 827 n.135. Instead, they teamed with a conservative coalition that, despite supporting religious liberties generally, opposed RLPA over concerns about the expansion of the federal commerce and spending powers. *Id.*

compelling state interest test in much more limited contexts.[109] "RLUIPA protects the religious liberty of prisoners and mental health patients, and it protects religious organizations in the zoning process."[110] While the scope of RLUIPA is decidedly less ambitious than RFRA, this narrow focus had three advantages. First, these restrictions were within the power of Congress to enforce upon the states—a significant concern following RFRA's partial invalidation in the Supreme Court.[111] Second, restoring religious liberty in these narrow contexts was more politically palatable given the fracturing religious liberty coalition.[112] Third, RLUIPA was targeted at one of the most common types of religious liberty cases under RFRA: those involving state prisoners. State prisoners accounted for "[o]ver half [of] the reported decisions" under RFRA, but they "prevailed only ten percent of the time and on only a very limited range of issues."[113]

Congress did not act alone to restore heightened scrutiny of laws burdening religious conduct in the wake of *Smith*. Twenty-one state legislatures have passed state-level RFRAs since 1990.[114] Many other states have tried and failed to enact a RFRA.[115] And courts in eleven states without a RFRA have interpreted their state constitutions to require some form of heightened scrutiny beyond what *Smith*'s interpretation of the Free Exercise Clause requires.[116] In total, thirty-two states have rejected the baseline required by *Smith* in favor of more robust protections for religious exercise. Still, in many jurisdictions, *Smith*'s interpretation of the Free Exercise Clause remains the strongest shield held by religious objectors.

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[109] *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000).

[110] Laycock, *supra* note 9, at 846.

[111] *See id.* at 845 ("Congress immediately set out to enact replacement legislation under other constitutional powers."); *see also* Jacob, *supra* note 92, at 829 (noting that Congress and advocates "gave up" on passing a broad bill).

[112] *See* Laycock, *supra* note 9, at 845–46 (explaining that the religious coalition began to fracture along partisan lines based on differences over civil rights claims that could arise).

[113] Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 570 (1999).

[114] Laycock, *supra* note 9, at 845 n.26 (cataloguing nineteen state RFRAs). Since Professor Laycock's article was published, two other states have passed RFRAs. ARK. CODE ANN. §§ 16-123-401 to 16-123-407 (LEXIS through 2020 Legis. Sess.); IND. CODE §§ 34-13-9-0.7 to 34-13-9-11 (West, Westlaw through 2020 Legis. Sess.).

[115] Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 475 & n.60 (2010) (compiling a list of failed state RFRA bills since 1999); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 & n.6 (1999) (compiling a list of failed state RFRA bills up to 1999).

[116] *See* Laycock, *supra* note 9, at 844 & n.22 (cataloguing cases from fourteen states requiring heightened scrutiny for burdens on religious conduct, though three of those states—Kansas, Indiana, and Mississippi—would later pass a state RFRA).

II. THE ARGUMENTS FOR *SMITH* AND RESPONSES TO THEM

Smith's scant treatment of the text and history of the Free Exercise Clause and of the relevant precedent has drawn significant criticism from members of the Supreme Court and the legal academy.[117] Many academics also criticize *Smith* on philosophical or normative grounds.[118] Others defend *Smith* on normative grounds, regardless of whether they agree with or are agnostic about the decision as a textual matter.[119]

For example, Professor Eugene Volokh makes an affirmative case for granting legislatures the final say on when religious conduct should be exempted from neutral and generally applicable laws.[120] And he further argues that the emergence of religious freedom statutes at the state and federal levels has created a better model, permitting the courts to grant accommodations while also allowing democratically-accountable legislatures to have the final word on any given exemption—something he refers to as the "common-law exemption model."[121]

Professor Volokh filed an amicus brief "in support of neither party" in *Fulton* in which he argued at length in favor of maintaining *Smith*.[122] Like the Court in *Smith*, Volokh expresses concern over opening the floodgates of litigation by establishing a stronger standard for protection of free exercise.[123] Consistent with his 1998 article on the common-law exemption model, Volokh is particularly interested in and persuaded by the difficulties of defining "harm," and he argues that legislatures are the branch best equipped to address this question.[124]

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[117] *E.g.*, *supra* notes 92–97 and accompanying text (describing the *Smith* dissent and concurrence along with Justice Souter's concurrence in *Lukumi* criticizing *Smith*); City of Boerne v. Flores, 521 U.S. 507, 544–65 (1997) (O'Connor, J., dissenting); *Free Exercise Revisionism*, *supra* note 10, at 1114–28.

[118] *E.g.*, *Free Exercise Revisionism*, *supra* note 10, at 1129–53; Laycock, *supra* note 9, at 100–13; Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering* Division of Employment v. Smith*, a Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388, 393 (1991).

[119] *E.g.*, Marshall, *supra* note 82, at 309 (agreeing with *Smith*'s "central contention" and attempting to "defend *Smith*'s rejection of constitutionally compelled free exercise exemptions without defending *Smith* itself"); Volokh, *supra* note 115, at 1531 (calling the arguments over the Free Exercise Clause's text and history "close to a tie" and arguing that the free exercise model rejected by *Smith* is "incompatible with the primarily democratic decision-making structure established by our Constitution").

[120] *See generally* Volokh, *supra* note 115, at 1474 (so arguing).

[121] *Id.* at 1469.

[122] Brief *Amicus Curiae* of Professor Eugene Volokh in Support of Neither Party at 21, Fulton v. City of Philadelphia, No. 19-123, 4–12, 23–30 (S. Ct. June 2, 2020) [hereinafter Brief of Professor Volokh]. At the time this article was drafted, amicus briefs in support of Respondents were not yet due. Thus, Professor Volokh was the only academic commentator to file a brief in *Fulton* arguing at length in favor of maintaining *Smith*.

[123] *Id.* at 4–12.

[124] *Id.* at 5; Volokh, *supra* note 115, at 1470.

This Part will examine and respond to some of Professor Volokh's arguments. It does so with an eye toward considering whether what might have been desirable in the 1990s remains the best model for today.

A. Substantive Due Process, Hybrid Rights, and the Problem with Defining "Harm"

Professor Volokh sees parallels between a constitutional exemption model for understanding the Free Exercise Clause and the substantive due process jurisprudence of the early twentieth century. In both contexts, proponents advance arguments that "[p]eople should have a constitutional right to do what they please . . . so long as they do not harm others."[125] This theory is unsound, according to Volokh, because the concept of harm is so ill-defined.[126] Normative and pragmatic views of what constitutes harm are widely divergent, and "[t]he only legitimate ways to finally resolve these controversies . . . is through the political process."[127]

But such an analogy is flawed. First, one must acknowledge a key difference between the implied substantive due process rights—whether accepted or rejected by the courts—and the enumerated right of religious liberty enshrined in the First Amendment. Even if one considers the Free Exercise Clause's text indeterminate, one must recognize that that "the text of the First Amendment itself 'singles out' religion for special protections."[128]

Second, even those who take a narrow view of the Free Exercise Clause accept that it will sometimes result in harm to innocent third parties. Volokh acknowledges this.[129] For instance, it is widely accepted that "[c]hurches have great autonomy in hiring and firing clergy, without constraint from antidiscrimination laws, labor laws, or (possibly) the torts of negligent hiring and retention."[130] Volokh attempts to distinguish this class of religious protections in part by suggesting that they are "justified by something more than the religious motivation for the claimant's actions."[131] So, for example, the ministerial exception to antidiscrimination laws, such as Title VII, "is justified by the importance

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[125] Brief of Professor Volokh, *supra* note 122, at 5.

[126] *Id.*

[127] *Id.*

[128] Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 9 (1985) [hereinafter *Accommodation of Religion*].

[129] Volokh, *supra* note 115, at 1470 ("The Free Exercise Clause, like other constitutional provisions, does secure a right to do certain categories of things—for instance, discriminate based on race or sex in hiring clergy—*even when* they harm others.").

[130] *Id.* at 1506; *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) ("[C]ourts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.").

[131] Volokh, *supra* note 115, at 1507.

of unhampered clergy selection . . . to the churches' ability to define and propagate their teachings."[132] In other words, free exercise protections require a religious motivation plus some other reason for the behavior to be protected.

Volokh's "something more than religion" calls to mind *Smith*'s hybrid rights theory. As described by Professor Richard Duncan, a hybrid rights claim under *Smith* is one in which "two insufficient constitutional interests—when combined—equal one sufficient hybrid claim."[133] According to the Court in *Yoder*, had the Amish wished to opt out of compulsory education on "philosophical and personal [grounds] rather than religious [grounds]," then their claim would not have been sufficient.[134] But the parents' right "to direct the education of their children"[135]—by itself, insufficient according to *Yoder*—combined with the religious objection—by itself, insufficient according to *Smith*—equals a valid claim triggering strict scrutiny.

Consider how this might be applied in the context of education hiring. Schools employing the Montessori method of instruction, for instance, must hire teachers familiar with and able to use the Montessori method in the same way that religious schools must hire teachers familiar with religious doctrine and practices. But because Montessori schools have no religious component to their curricula, they cannot raise the same free exercise defenses to Title VII claims that are available to private religious schools.[136] The only distinguishing factor between the two is the centrality of religion to the latter school's mission. And this, then, brings us back to where Volokh says we should not be—assessing the centrality of religion and making accommodations based on free exercise claims.

At bottom, Professor Volokh's attempt to distinguish protected religious conduct as being protected for reasons other than religion can be analogized to the *Smith* majority's attempt to distinguish successful free exercise cases. Neither attempt is logically satisfactory. Constitutional safeguards for religion—however broadly we interpret them—assume that some religious conduct causes harm but should be protected regardless.

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[132] *Id.*

[133] Duncan, *supra* note 83, at 857. In noting the logical inconsistency of hybrid claims as discussed in *Smith*, Professor Duncan suggests that the facts of *Smith* suggest that it should have been treated as a hybrid claim in the same vein as *Yoder* and that the Court failed to reach this question likely because the case was decided without briefing or argument on the issue. *Id.* at 858.

[134] Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

[135] Emp. Div. v. Smith, 494 U.S. 872, 881 (1990).

[136] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020) (holding that Catholic schools fall under the ministerial exception to Title VII); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (adopting the ministerial exception to Title VII "uniformly recognized" by the Courts of Appeals).

B. Strict Scrutiny and the Parade of Horribles

Professor Volokh also argues against overturning *Smith* because he thinks it is not appropriate to apply strict scrutiny to free exercise claims.[137] Like the parallel Volokh draws to substantive due process, his argument is again based largely on the difficulty of deciding "what should count as harm, and what in fact will cause that harm."[138]

Setting aside that these types of decisions have been the function of courts for centuries,[139] it is unclear why Professor Volokh focuses so narrowly on the strict scrutiny test as an objection to overturning *Smith*. As Professor Volokh notes elsewhere, "the *Sherbert*-era constitutional exemption framework was a complex body of law, with not one but several tests."[140] This complex body of law developed in a relatively short period of time—twenty-seven years—before *Smith* re-envisioned free exercise jurisprudence. Given more time to develop free exercise doctrines, courts would likely create more distinctions between classes of claims and the tests used to assess them, just as they have done with free speech claims.[141] One need not conceive of a standard for every religious objection that might arise to understand that the *Smith*-or-*Sherbert* binary is a false one.

Nevertheless, Volokh illustrates the frightful effects of "a constitutional regime where denials of religious exemptions had to be judged under strict scrutiny" by trotting out a parade of horribles.[142] If *Smith* were overturned, courts might have to assess claims of religious rights to assisted suicide,[143] freedom of contract,[144] or prostitution[145] under

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[137] Brief of Professor Volokh, *supra* note 120, at 16–23.

[138] *Id.* at 22–23.

[139] Indeed, Professor Volokh notes that, in developing common law, "[j]udges creating tort law, contract law, and property law have initially defined what constitutes harm to others." Volokh, *supra* note 115, at 1479. The legislature's role in later revising these decisions through statute is immaterial to the question of whether courts are well-suited for this role. *See also infra* note 239 (discussing some of the contours of the Free Speech Clause doctrine).

[140] Volokh, *supra* note 115, at 1495.

[141] Reed v. Town of Gilbert, 576 U.S. 155, 171–72 (2015) (applying strict scrutiny to a content-based speech restriction); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (holding that a time, place, or manner restriction on speech "must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so"); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (asserting that restrictions on obscenity, profanity, libel, and fighting words "have never been thought to raise any Constitutional problem").

[142] Brief of Professor Volokh, *supra* note 122, at 6.

[143] *Id.*

[144] *Id.* at 7–8.

[145] *Id.* at 10.

strict scrutiny. Echoing *Smith*, Volokh concludes that these cases "indeed would be 'horrible to contemplate.'"[146]

But this Pandora's Box is already open. Recall that, to distinguish previous cases applying strict scrutiny to religious claims, *Smith* created two classes of claims that would still be subject to strict scrutiny: individualized governmental assessments, such as the unemployment compensation cases, and cases involving hybrid claims, such as *Yoder*.

The hybrid rights theory proves especially problematic for these vignettes. Does religious liberty, asserted alongside the right to privacy,[147] mandate a religious right to assisted suicide? Does religious liberty, asserted alongside the "freedom of contract,"[148] allow a religious employer to pay less than minimum wage? Does religious liberty, asserted alongside the right to "autonomy of self,"[149] permit temple prostitution? Assuming a sincere claim,[150] it appears that *Smith* would *require* strict scrutiny in these cases.[151]

In any event, the courts' hands were not bound by the strict scrutiny test employed in *Sherbert*. And as Volokh acknowledges, even before *Smith*, the standard was much more complex than the courts suggested.[152] Alternatives to strict scrutiny exist should the Supreme Court overturn *Smith*. Indeed, overturning *Smith* might provide the needed catalyst for those tests to develop. And *Smith*'s preservation does not foreclose Volokh's *bêtes noires* from prevailing regardless.

C. Defining "Harm" Through the Political Process

Ultimately, most *Smith* apologists who advocate against a constitutional exemption regime believe that subjecting religious exemptions to the political process is "[t]he only legitimate way[] to finally resolve" the divergent views on harm.[153] But legislatures have their own institutional limitations that must be considered. Constitutional concerns may arise in the event that the legislature reacts to a news story or court

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[146] *Id.* at 23 (quoting Emp. Div. v. Smith, 494 U.S. 872, 889 n.5 (1990)).

[147] *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (noting that penumbras in the Fourteenth Amendment infer that an individual has the right to privacy).

[148] Adkins v. Child.'s Hosp., 261 U.S. 525, 545 (1923).

[149] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[150] Professor Volokh notes that at least two such cases have been brought, however the courts have deemed the claims insincere. Brief of Professor Volokh, *supra* note 122, at 10 (citing State v. Elise, No. 1 CA-CR 16-0373, 2018 WL 5729354, at *3 (Ariz. Ct. App. Nov. 1, 2018); Tracy v. Hahn, No. 90-56223, 1991 WL 148926, at *2 (9th Cir. Aug. 6, 1991)).

[151] *Cf.* Duncan, *supra* note 83, at 857–58 (explaining the breadth of the hybrid rights theory and asserting that "it is malpractice not to plead hybrid claims in free exercise litigation" because it would force the court to apply a more rigid strict scrutiny test against the government under *Smith*).

[152] Brief of Professor Volokh, *supra* note 122, at 8.

[153] *Id.* at 5.

opinion with perceived hostility or favoritism toward a sect.[154] And beyond these constitutional infirmities lie drafting problems that can make legislative accommodations more crude and imperfect than judicially crafted constitutional doctrine. As Professor Ira Lupu explains:

> To be politically palatable, religious liberty statutes must rely on sweeping and seemingly nondiscriminatory (as among faiths) general formulas in their coverage. Case-by-case adjudication of religious exemption claims, in contrast, will inevitably be context dependent, fact sensitive, and highly nuanced. Even those judges inclined to protect religion will be wary of laying down forceful and general principles which cannot be readily evaded in subsequent cases.[155]

Moreover, judges who think that the legislature will correct them may be less thoughtful in the first instance. And, in any event, one should question any assumption that the legislature will, in fact, "microlegislate" in response to any particular case or line of cases.[156]

We have not given our state and federal courts adequate time and opportunity to work out the issue of how to account for harm or balance it against free exercise values. In the fifty years between the Free Exercise Clause's incorporation against the states in *Cantwell v. Connecticut*[157] and the rejection of the compelling state interest test in *Smith*, the Court never truly committed to a unifying theory of the Free Exercise Clause. *Gobitis* first introduced the general applicability standard rejecting judicial accommodation in 1940, but that was rejected only three years later in *Barnette*.[158] *Barnette* observed that "freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction *only to prevent grave and immediate danger* to interests which the State may lawfully protect."[159]

Heightened scrutiny applied for a period after *Barnette* to cases involving the "high constitutional privilege[s]" enshrined in the First Amendment.[160] But within twenty years, the Court appeared to move to a

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[154] *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (overturning an ordinance passed with apparent animus toward the Santerians); Lupu, *supra* note 113, at 585 (noting the likely Establishment Clause issues in granting accommodations after the fact).

[155] Lupu, *supra* note 122, at 579 (footnotes omitted).

[156] *See id.* at 584 (referring to Volokh's common-law model).

[157] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[158] *Supra* Part I.B.1.

[159] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (emphasis added).

[160] Follett v. Town of McCormick, 321 U.S. 573, 578 (1944).

more modest view of the Free Exercise Clause.[161] Shortly thereafter, Justice Brennan revived the Clause by applying the compelling state interest test in *Sherbert*.[162] That test was more bark than bite, but courts spent nearly three decades developing a workable doctrine before the Supreme Court punted free exercise back to the legislatures in *Smith*.[163]

Today, cases directly implicating the Free Exercise Clause are relatively rare—except for those involving governmental actors' overt hostility toward religious practices.[164] State-level RFRAs have obviated the need for free exercise challenges in most states. And recent United States Supreme Court decisions have been decided under the federal RFRA.[165] And in those cases, it is the RFRAs that control each step of the courts' analyses and—at least for now—permit little flexibility in their application.

The presence of legislative schemes such as RFRA raises the "possibility of further atrophy of the judicial capacity to protect religion in the Constitution's name."[166] Professor Lupu observes that, in the free exercise context, statutory standards more strict than those of the Constitution will lead courts to pay less "rigorous and independent attention" to the constitutional claims.[167] And this will result in atrophy of related constitutional law: "[T]he possibilities for new and creative approaches to free exercise adjudication are likely to shrink over time; and some pre-existing categories of free exercise protection . . . may be diminished."[168]

Given the opportunity, the courts might prove more likely than legislatures to develop a flexible, durable approach to religious liberty that reconciles the constitutional right to free exercise with societal concerns over recognizing and alleviating harm.[169] But they need the space and time to do so.

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[161] *See* Braunfeld v. Brown, 366 U.S. 599, 611 (1961) (Brennan, J., concurring in part) (reminding the Court that it "is not confined [in First Amendment Cases] to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end").

[162] *See supra* notes 57–56 and accompanying text.

[163] *See supra* notes 62–64 and accompanying text.

[164] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (noting that the administrative hearing in question was marked by "clear and impermissible hostility toward" religious beliefs); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.").

[165] *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014); Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 422–23 (2006).

[166] Lupu, *supra* note 113, at 580.

[167] *Id.*

[168] *Id.*

[169] *Id.* at 586 ("[C]ourts operate under premises obliging them to employ rights of party access, methodology of decision-making and substantive legal norms that meet tests of consistency over time.").

III. FREE EXERCISE AT THE FOUNDING

The considerations that animated the founding generation's desire to protect religious liberty provide helpful perspective that transcends the current highly-charged context in which modern debates over religious liberty too often occur.[170]

A. Avoiding Conflicts Between Duties to Civil and Religious Authority

James Madison wrote that "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society."[171] Madison, "the leading architect of the religion clauses of the First Amendment,"[172] would later refer to conscience as "the most sacred of all property; other property depending in part on positive law, the exercise of [conscience], being a natural and unalienable right."[173]

Madison also observed, "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe."[174] He continued,

> And if a member of Civil Society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular Civil Society do it with a saving of his allegiance to the Universal Sovereign.[175]

Professor McConnell has succinctly noted the tension between the Founders' and *Smith*'s judgments about the nature of religious exercise and the general law: "*Smith* insists that conscience must be subordinate to civil law; Madison insists that civil law must be subordinate to conscience."[176] And, as Professor McConnell further explained in another piece, "Since some persons, otherwise good and law abiding citizens, will

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[170] The normative arguments in this Part are more thoroughly explored and established in *Accommodation of Religion*, *supra* note 128, at 17, 19–22.

[171] James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 327, 327 (Bruce Frohnen ed., 2002) [hereinafter *Memorial and Remonstrance Against Religious Assessments*].

[172] Flast v. Cohen, 392 U.S. 83, 103 (1968).

[173] James Madison, *Property* (1792), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1986).

[174] *Memorial and Remonstrance Against Religious Assessments*, *supra* note 171, at 327.

[175] *Id.*

[176] *Free Exercise Revisionism*, *supra* note 10, at 1152.

view religious claims as higher authority than civil law, it may be preferable to accommodate them than to provoke confrontation and disobedience."[177]

The *Smith* majority worried that interpreting the Free Exercise Clause as anything more than a nondiscrimination provision would encourage people to seek religious exemptions from "civic obligations of almost every conceivable kind."[178] And that might make functional government impossible, and "court[] anarchy"[179] by rendering "each conscience . . . a law unto itself."[180]

But when parts of the population view religious claims as superior to the civil law, refusing to allow exemptions from neutral and generally applicable laws might also result in "anarchy." It is not the Court's jurisprudence on the Free Exercise Clause that does or does not render each person's conscience "a law unto itself." It is instead the religious person's notions of right-and-wrong and of his or her perceived obligations to an authority that transcends civil society.

In fact, the binary choice between *Smith* and anarchy may be a false one. As Professor McConnell aptly notes, religious persons are "not free from law," but rather find themselves "subject to two potentially conflicting sources of law, spiritual and temporal."[181] These two sources of law are not often coextensive. For example, a religious person often abstains from lawful conduct that might violate religious beliefs, concluding that simply because something is legal does not make it right.

The opposite scenario—where the religious observer feels compelled to behave in ways that violate the law—is much more fraught. The perception that simply because something is *illegal* does not make it *wrong* threatens the legitimacy of the law, encouraging disobedience to the civil law under a claim of duty to a higher authority. This perception also threatens the "dynamic safeguards of order and good sense" that religious authorities often bring to conflicts between civil and religious authority.[182]

Such scenarios become more problematic as neutral and generally applicable laws increasingly come into tension with orthodox beliefs of mainstream religious groups. As Professor Douglas Laycock has observed, today's disputes are no longer confined to odd practices of minority

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[177] *Accommodation of Religion*, *supra* note 128, at 16.

[178] Emp. Div. v. Smith, 494 U.S. 872, 888 (1990).

[179] *Id.*

[180] *Id.* at 890; *see also* Reynolds v. United States, 98 U.S. 145, 166–67 (1878) ("To permit [religious exemptions from general laws] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.").

[181] *Free Exercise Revisionism*, *supra* note 10, at 1151 n.182.

[182] *Id.*

religions, but instead put "core teachings of large and mainstream religious organizations" against "powerful interest groups" with sophisticated and well-financed lobbying agendas.[183] The application of increased scrutiny to laws burdening free exercise may act as a "pressure release valve" to avoid such conflicts, which damage both government and religion.

B. Religion, Public Virtue, and the Republican Form of Government

"[T]here are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form."[184] To the founding generation, these "qualities" were conditions precedent to the success of the Union. "As the Founders understood it, the republic was peculiarly dependent on public virtue to maintain the mutual respect and harmony on which republican liberty rests."[185]

In Federalist 55, Madison wrote that if "there is not sufficient virtue among men for self-government," then "nothing less than the chains of despotism can restrain them from destroying and devouring one another."[186] In his farewell address, George Washington observed, "'Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of free Government."[187]

Two years later, President John Adams wrote in a letter to the Massachusetts Militia that "we have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[188]

The Founders sought to encourage and protect institutions that would teach citizens "to transcend their individual interests and opinions and to develop civic responsibility."[189] This education might come from many different institutions, such as families, schools, and civic organizations, but churches stood apart in their ability to inculcate

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[183] Laycock, *supra* note 9, at 869.

[184] THE FEDERALIST NO. 55, at 291 (James Madison) (George W. Carey & James McClellan eds., 2001); *Accommodation of Religion*, *supra* note 128, at 16.

[185] *Accommodation of Religion*, *supra* note 128, at 16.

[186] THE FEDERALIST NO. 55, *supra* note 184, at 291 (James Madison).

[187] George Washington, *Farewell Address* (Sept. 19, 1796), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES, *supra* note 171, at 72, 76.

[188] John Adams, *Letter to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts* (Oct. 11, 1798), *reprinted in* THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 471, 471 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

[189] *Accommodation of Religion*, *supra* note 128, at 16–17.

republican virtues. As Professor McConnell notes, "[h]istorically and to the present day, . . . no such institutions are as important to the process of developing, transmitting, communicating, and enforcing concepts of morality and justice as are the churches."[190]

Contrast this with *Smith*. The *Smith* majority worried that interpreting the Free Exercise Clause as anything more than a nondiscrimination provision would encourage people to seek religious exemptions from "civic obligations of almost every conceivable kind."[191] The Founders thought religion would lead the people to *embrace* their civic obligations.

IV. FREE EXERCISE TODAY

When *Smith* was decided, half of Americans of all faiths attended religious services at least monthly, with a third attending every week.[192] Today, however, the number of Americans who attend religious services weekly and the number of Americans who never attend religious services are roughly equal.[193] There are no obvious signs that this trend will abate.

The increasing secularization of society has profound implications for *Smith*'s concession that the "unavoidable consequence of democratic government" is "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[194] What happens when religious practice itself is no longer widely observed? What happens when orthodox religious views become marginalized in society? A rule that once burdened only those with fringe religious views now increasingly burdens even those holding orthodox religious beliefs.

A. The Politicization of Free Exercise

Smith assumed that the free exercise of religion—like the other values embodied in the First Amendment—would maintain strong and broad political support.[195] But, as discussed above, the coalition that backed RFRA fractured within five years of *Smith* as the ACLU and other left-leaning groups began questioning whether religious liberty was something worthy of support.[196] Today, civil liberties groups like the

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[190] *Id.* at 18.

[191] Emp. Div. v. Smith, 494 U.S. 872, 888–89 (1990).

[192] *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CTR. 14 (Oct. 17, 2019), [https://perma.cc/BN58-TM7B].

[193] *Id.*

[194] *Smith*, 494 U.S. at 890.

[195] *Id.*

[196] Jacob, *supra* note 92, at 828.

ACLU have largely abandoned defending religious liberty altogether, or at least view it skeptically as a stalking horse for discrimination.[197] This makes it virtually impossible to assemble the types of broad coalitions in support of religious liberty that were possible in the early 1990s. Our polity can no longer be expected to be "solicitous" of religious liberty, which is now a partisan issue.

Why did this happen? *Smith* deserves at least some of the blame. By eliminating constitutional protection of free exercise vis-a-vis neutral and generally applicable laws, *Smith* essentially *required* religious groups to insert themselves in the political process at the point when such laws are made. And *Smith* also raised the stakes by eliminating opportunity for court-ordered relief to such laws once they were in effect.[198] This politicization intensified as orthodox religious beliefs came into conflict with culture-war issues in the 1990s and 2000s.[199] And that undercut the institutional competence of the legislative branch to protect religious liberty in an even-handed way.

Observe how support for RFRA-laws, which once enjoyed near universal support, now falls along predictably partisan lines. For example, of the twenty-one states that have passed a RFRA statute, only five—Connecticut, Illinois, New Mexico, Pennsylvania, and Rhode Island—have voted for the Democratic presidential candidate more than half the time in the past six presidential elections.[200] In contrast, looking back at those same past six presidential elections, fourteen states with a RFRA either never voted for the Democratic presidential candidate during the same time frame or did so only once.[201]

One might argue that the different approaches to religious liberty in red states and blue states demonstrate our federalist system working as it should. States free to experiment with different policies will often adopt policies that fall along partisan fault lines depending on the political

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[197] Louise Melling, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (June 25, 2015), http://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html.

[198] 494 U.S. at 890.

[199] *See generally* Laycock, *supra* note 9, at 845–46, 869 (describing the escalating tension between religious and secular factions).

[200] *Historical Presidential Elections*, 270 TO WIN, https://www.270towin.com/historical-presidential-elections/ (last visited Sept. 17, 2020); *see* Laycock, *supra* note 9, at 845 n.26 (cataloguing the states that have passed a RFRA statute).

[201] Barack Obama won Indiana in 2008. *Id.* Bill Clinton won Kentucky, Louisiana, Missouri, and Tennessee in 1996. *Id.* Two states, Florida and Virginia, have split evenly between the major party nominees over the last six cycles. *Id.*

preferences of the state's citizens.[202] But that is cold comfort to religious minorities living in blue states.

And opportunities for legislative compromise at the state level have substantially decreased since *Smith*. Consider how geographic partisan clustering further entrenches the red state-blue state RFRA divide. In 2020, thirty-five states representing nearly eighty percent of the American population have a so-called "trifecta government," where one party controls all chambers of the state legislature and the governor's mansion.[203] Across the United States, there is only one state legislature where the two chambers are controlled by different parties.[204] When *Smith* was decided thirty years ago, only fourteen state legislatures were split between the two parties and only nineteen states had trifecta governments.[205]

Moreover, a look at the intensity of the contempt directed toward state RFRAs and proponents of religious liberty prompts questions about whether our federalist system has started to malfunction with respect to religious liberty. Take, for example, Indiana's adoption of a RFRA in 2015. Indiana's bill adopted the same test as the 1993 federal RFRA, protecting against governmental actions that "substantially burden a person's exercise of religion," but carving out an exception for laws that advance a "compelling governmental interest" using the "least restrictive means."[206] According to Daniel Conkle, a professor at Indiana University's Maurer School of Law, Indiana's RFRA was unlikely to permit the type of

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[202] Firearms possession provides a useful illustration. *Compare, e.g.*, CAL. PENAL CODE § 26150 (West 2020) (granting local authorities discretion in the issuance of concealed carry permits); N.Y. PENAL LAW § 400.00 (McKinney 2020) (same), *with* Taff v. State, 2018 Ark. App. 488, *1 (2018) (holding that possession of a weapon without the specific intent to commit a crime is not illegal in Arkansas) *and* H.R. 1013, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019) (clarifying that Arkansas does not require a permit for concealed carry).

[203] *See* David French, *Yes, America Could Split Apart*, THE FRENCH PRESS (Sept. 20, 2020), https://frenchpress.thedispatch.com/p/yes-america-could-split-apart (claiming there are thirty-six trifecta governments); *see also Democratic Gains Bring 'Trifecta' in 14 States*, THE GAZETTE (Nov. 11, 2018) https://www.thegazette.com/subject/news/government/democartic-gains-iowa-election-2018-gop-controlled-20181111 (claiming that the 2018 election results brought the total number of Democratic trifectas to fourteen and left twenty-two Republican trifectas in place); *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas (last visited Sept. 30, 2020) (noting that after 2019, Democrats held fifteen trifectas and Republicans held twenty-one). Though these sources claim there are thirty-six trifecta states, the authors here omit Nebraska, which has a unicameral, nonpartisan legislature.

[204] French, *supra* note 203.

[205] *See Partisan Composition of State Legislatures 1990–2000*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/documents/statevote/legiscontrol_1990_2000.pdf (last visited Oct. 24, 2020) (charting the legislative party split in the 1990s).

[206] *Compare* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (adding the compelling government interest exception to the substantial burden test), *with* IND. CODE § 34-13-9-8 (2015) (same).

discrimination the critics feared, as "courts generally have ruled that the government has a compelling interest in preventing discrimination and that this interest precludes the recognition of religious exceptions."[207]

Nevertheless, Governor Mike Pence provoked significant local and national criticism when he signed the bill.[208] The *New York Times* ran an editorial castigating the law, Governor Pence, and advocates of religious liberty, entitled *In Indiana, Using Religion as a Cover for Bigotry*.[209] Its editorial board wrote that "[t]he tactic of using so-called religious freedom laws to justify and support anti-gay discrimination is relatively new," emerging only after state and federal courts began invalidating bans on same-sex marriage.[210] Even so, the board conceded that Indiana's RFRA "does not, as some opponents claim, specifically permit businesses to refuse to serve gays and lesbians."[211] But, it said this was only because the bill's "drafters were too smart to make that explicit. Instead, the law allows individuals or corporations facing discrimination lawsuits to claim that serving gays and lesbians 'substantially' burdens their religious freedom."[212]

The *Times* editorial board was unequivocal: "[N]obody is fooled as to the law's underlying purpose."[213] All this, even though Indiana was the twentieth state to pass such a RFRA, doing so twenty-two years after President Clinton signed similar legislation at the federal level years before gay marriage was a significant political issue.[214] Attitudes had changed significantly in the years between 1993 and 2015. In 2015, few

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[207] Daniel O. Conkle, *Law Professor: Why Indiana Needs 'Religious Freedom' Legislation*, INDIANAPOLIS STAR https://www.indystar.com/story/opinion/readers/2015/03/07/indiana-needs-religious-freedom-legislation/24477303/ (Apr. 3, 2015, 11:51 AM).

[208] Ed Payne, *Indiana Religious Freedom Restoration Act: What You Need to Know*, CNN (Mar. 31, 2015, 12:53 PM), https://www.cnn.com/2015/03/31/politics/indiana-backlash-how-we-got-here/.

[209] Editorial Board, *In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES (Mar. 31, 2015), https://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a-cover-for-bigotry.html.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] The twenty-first (and, as of 2020, last) state to pass a RFRA was Arkansas, which enacted a state RFRA around the same time as Indiana. Kevin Trager & Alyse Eady, *Arkansas Governor Signs New 'Religious Freedom' Bill*, USA TODAY (Apr. 3, 2015, 2:07 PM), https://www.usatoday.com/story/news/politics/2015/04/02/arkansas-religious-freedom-bill/70831330/. Significant controversy surrounded Arkansas's bill as well, with Republican Governor Asa Hutchinson threatening to veto the act unless the legislature made significant alterations. Dana Liebelson, *Arkansas Governor Says He Won't Sign 'Religious Freedom' Bill Until Changes Are Made*, HUFFPOST (Apr. 1, 2015, 12:04 PM), https://www.huffpost.com/entry/religious-freedom_n_6985090. The legislature acquiesced, and Governor Hutchinson signed the revised version. 2015 ARK. ACTS 975 (codified at ARK. CODE. ANN. §§ 16-123-401 to 16-123-407 (West, Westlaw through 2020 session)).

paused to consider the possibility that religious liberty itself might be a civic value worth preserving.

Perhaps even more concerning is the recent use of "cancel culture" tactics by out-of-state actors to influence policymaking. After Governor Pence signed Indiana's RFRA into law, multiple governors and mayors prohibited public spending on travel to Indiana.[215] And in 2016, Georgia Governor Nathan Deal, a Republican, vetoed a RFRA in Georgia under intense pressure from the film industry, the National Football League, and major corporations such as AT&T, Bank of America, and Google.[216] This sort of nationalized, corporate, "cancel-culture" applied to entire states threatens to eliminate the regional differences that are a feature of our federalist system. Religious liberty might be one of this trend's first casualties.

Will another state RFRA be passed anytime soon? It seems doubtful. A coalition akin to the one that drove RFRA through Congress seems impossible to assemble today.[217] Powerful civil rights organizations, including the USCCR and the ACLU, now oppose the expansion of religious liberty.[218] Indeed, it is probably more likely that portions of federal and state RFRAs will be repealed.

Several such efforts are underway. For example, the Equality Act was last year introduced in the House of Representatives.[219] That bill would explicitly revoke federal RFRA protections to the extent that they conflict with certain expanded federal anti-discrimination protections.[220] As another example, the Do No Harm Act, which presently has 215 cosponsors, seeks to amend the federal RFRA to deny religious exemptions from a number of federal statutory and regulatory schemes.[221]

All of this prompts the question: Is it still fair to assume that our political branches will be "solicitous of" free exercise values?[222] Professor Ira Lupu pointed out two decades ago, "[t]hese are not the sort of battles for which ordinary politics are well-suited; they cannot readily be compromised, should not be resolved on the basis of political strength, and

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[215] Payne, *supra* note 208.

[216] Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-gay*, WASH. POST (Mar. 28, 2016, 11:55 AM), https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/.

[217] *See supra* note 108 and accompanying text.

[218] PEACEFUL COEXISTENCE, *supra* note 6, at 29; Melling, *supra* note 197.

[219] H.R. 5, 116th Cong. (2019).

[220] *Id.* § 1107.

[221] S. 593, 116th Cong. § 3 (2019); *H.R. 1450 – Do No Harm Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/1450/cosponsors?searchResultViewType=expanded (last visited Nov. 10, 2020).

[222] Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

encourage rather than soften sectarian animosities."[223] Professor Lupu's observation is even more true today. Allowing the legislature to have the final word on these matters might prolong and inflame disputes that might otherwise be settled judicially.

B. A Way Forward Through Fulton

This brings us back to *Fulton*. Assuming the Court reaches the question of whether to overrule *Smith* and concludes that it was wrongly decided, the Court will still have to confront the real-world consequences of that case. That is, even if a majority of the justices reject *Smith* as a matter of originalism, the Court must still evaluate whether to preserve *Smith* based on stare decisis.[224]

The Court's stare decisis analysis, should it get that far, will look at "three broad considerations": (1) whether "the prior decision . . . [is] grievously or egregiously wrong[;]" (2) whether "the prior decision [has] caused significant negative jurisprudential or real-world consequences[;]" and (3) whether "overruling the prior decision [would] unduly upset reliance interests."[225]

Given the normative arguments adopted in *Smith*, *Smith*'s negative jurisprudential and real-world consequences merit particularly close examination in *Fulton*. *Smith* begat increased political attention and decreased judicial attention to questions of free exercise. At the same time, *Smith* provided little incentive for partisan government actors to seek common-sense, win-win solutions over winner-take-all decrees.

Increased politicization has led our polity to forget or ignore the values that animated the founding generation's desire to protect free exercise. It has also undermined the competence of the political branches to resolve these disputes. And judicial inattention has caused the Free Exercise Clause to lag behind other First Amendment provisions in terms of defining the contours and nuances of the protection. This will continue so long as RFRAs provide litigants with the strongest claim for an accommodation.[226] Of course, if opponents of religious liberty are

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[223] Lupu, *supra* note 113, at 584.

[224] Janus v. AFSCME, 138 S. Ct. 2448, 2478–79 (2018).

[225] Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part). Regarding the first consideration, it is difficult to argue that *Smith* adequately considered the text and history of the Free Exercise Clause. But offering any more on that point is beyond the scope of this Article. And, with respect to the third broad consideration, it is easy to argue that reliance interests in *Smith* never took root. Congress and many states restored much of the pre-*Smith* status quo with twenty-one states and Congress adopting RFRA laws and courts in eleven states imposing heightened scrutiny for state constitutional claims. And even where the *Smith* standard still applies, courts cannot agree on what *Smith* means and fail to apply it consistently.

[226] Lupu, *supra* note 113, at 580–82.

successful, it might not be long before neither the First Amendment nor RFRAs provide significant protections to free exercise.

The path forward will require a more robust judicial role in determining with finality which harms to recognize, how to assess their severity, and whether the government interest in preventing them is sufficiently compelling. Some resist that prospect.[227] It's no easy task. But the alternative—increasingly divisive and winner-take-all battles with both sides talking past each other—will inflict much greater societal and cultural damage.

Part of the answer may be found in the pluralism that Madison embraced and *Smith* rejected.[228] Madison argued that "security" for both "civil rights" and "religious rights" must be obtained through diversity.[229] But instead of natural allies, too many advocates see religious liberty and pluralism as adversaries. "The degree of security in both cases will depend on the number of interests and sects," which "depend[s] on the extent of country and number of people comprehended under the same government."[230] Our polity possesses such diversity in greater abundance now than it did at the time of *Smith*.

Many of the disputes over religious liberty are not zero-sum conflicts, though framing them as such makes for compelling political theatre. Consider the facts in *Fulton*. Two of approximately thirty foster care agencies held religious objections to placing foster children with same-sex couples.[231] Same-sex couples wishing to foster in Philadelphia had roughly twenty-eight other options from which to choose. CSS is one of many diverse options available to serve the city and its foster-families. On the facts of that case, the question is not whether a same-sex couple wishing to foster in Philadelphia be able to do so. It is instead whether CSS will be able to continue to serve Philadelphia's foster system without violating its religious beliefs. Diverse views on marriage and family create space in Philadelphia for both the same-sex couple to foster and for CSS to serve the foster community without compromising its religious beliefs.

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[227] *E.g.*, Volokh, *supra* note 115, at 1494 (explaining why judicial discretion in RFRA cases is beneficial); Lund, *supra* note 115, at 464–65 (reasoning that judges should not be able to give permanence to a religious exemption).

[228] *Compare Accommodation of Religion*, *supra* note 128, at 19 (observing that "[t]he typically Madisonian solution" to the problem of "realiz[ing] the benefits of religion in public life without suffering the dangers" was to embrace pluralism as a way "to foster strong and vigorous religion and at the same time guarantee against religious tyranny"), *with* Duncan, *supra* note 83, at 854 ("In *Smith*, the voice whispering in Justice Scalia's ear warned him that a strongly protective free exercise doctrine would place at risk not only drug laws but also laws dealing with compulsory military service, payment of taxes, manslaughter, child neglect, compulsory vaccination, traffic regulation, minimum wages, child labor, animal cruelty, environmental protection, and racial equality.").

[229] THE FEDERALIST NO. 55, *supra* note 184, at 270–71 (James Madison).

[230] *Id.* at 271.

[231] Fulton v. City of Philadelphia, 922 F.3d 140, 147–48 (3d Cir. 2019).

There is, to be sure, a dignitary harm that comes from being turned away by an agency that holds a religious objection to the status of one's marriage. And assessing that harm and the level of state interest in preventing it can be difficult and complex.

But some cases are easier than others. *Fulton* would be a significantly more difficult case if CSS were the only option available, or if it had turned away scores of same-sex couples hoping to foster. But that did not happen; no same-sex couple has ever sought to work with CSS.[232] And while the City of Philadelphia might have good reasons for wanting to prevent dignitary harm to its gay community, that choice comes at a cost to CSS and the parents and children it serves, who would otherwise be left as collateral damage in the culture wars.

This is the type of functional, individualized analysis that the judiciary is uniquely equipped to handle.[233] Courts routinely make judgements like this when dealing with other First Amendment claims.[234] And courts do so today when dealing with claims under federal and state RFRAs.[235] Moreover, courts would likely develop even better mechanisms for making these determinations if forced to do so as a matter of constitutional law. *Fulton* provides an opportunity to start down that path.

That path might, in fact, lead to greater liberty for all. Just last term, the Supreme Court created space for protecting the rights of LGBTQ workers subjected to discrimination in *Bostock v. Clayton County*[236] while

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[232] *See supra* note 21 and accompanying text.

[233] *Cf.* Lupu, *supra* note 113, at 578–79, 584–92 (discussing institutional and constitutional weaknesses of a legislative accommodation regime).

[234] First Amendment speech protection is a rich constitutional doctrine. The Court has identified different classes of speech regulations, as in the viewpoint discrimination, content discrimination, and time, place, and manner restriction cases mentioned in note 142. The Court has identified several exceptions to the protections of the Free Speech Clause, as in *Chaplinsky v. New Hampshire*. 315 U.S. 568, 572 (1942). The Court applies different tests for different types of forums, such as traditional public forums and designated public forums, which receive strict scrutiny as in *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009), and nonpublic forums, which receive only rational basis review as in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 54 (1983). The Court has also had occasion to consider what might be a compelling interest, and how that might differ from one governmental official to the next. *Compare* Reno v. ACLU, 521 U.S. 844, 849 (1997) (holding that federal statutory provisions shielding minors from obscene or indecent internet communications violated the First Amendment despite "the legitimacy and importance of the congressional goal of protecting children from harmful materials"), *with* Morse v. Frederick, 551 U.S. 393, 397 (2007) (holding that school officials could regulate student speech that could "reasonably be regarded as encouraging illegal drug use").

[235] *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006) (detailing the decisions the court has to make in RFRA cases); Cutter v. Wilkinson, 544 U.S. 709, 722–23 (2005) (finding "no cause to believe" that heightened scrutiny could "not be applied in an appropriately balanced way").

[236] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

also creating space for protecting the rights of religious schools that wish to fire a teacher who plays a "vital part" in advancing the schools' religious missions.[237] While some may celebrate the former decision and lament the latter, others lament the former and celebrate the latter. Few stop to consider how these decisions might support each other. As others have observed, the Court's willingness to uphold and expand the free exercise claims as it did in *Guadalupe* may be the very thing that facilitated the decision in *Bostock*.[238] Disputes over religious liberty in the courts do not have to be winner-take-all.[239] And in fact, today, compromise may be more likely to come from the courts than the legislatures.

Fulton v. City of Philadelphia provides an opportunity for the Court to assess the real-world consequences of Smith. *Smith*'s injection of politics into questions of religious liberty has debased religious liberty and divided our nation. Today, too many factions in our nation view each other as enemies. And too few appreciate the mutual symbiosis between pluralism and religious liberty. *Fulton* may provide the Court with an opportunity to lead us toward "a healthier and more respectful political climate."[240]

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[237] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020).

[238] Adam J. White, *Is Religious Liberty "Dismantling" Progressive Legal Victories—Or Making Them Possible in the First Place?*, MEDIUM (July 12, 2020), https://medium.com/@adamjwhite/is-religious-liberty-dismantling-progressive-legal-victories-or-making-them-possible-in-the-5bcce0482c6c.

[239] William J. Haun, *The Supreme Court Wants Religious Americans—and Those Who Disagree with Them—to Live and Let Live*, WASH. POST (July 14, 2020, 12:37 PM), https://www.washingtonpost.com/opinions/2020/07/14/supreme-court-wants-religious-americans-those-who-disagree-with-them-live-let-live/.

[240] *Id.*

BOSTOCK V. CLAYTON COUNTY: A PIRATE SHIP SAILING UNDER A TEXTUALIST FLAG

*Rena M. Lindevaldsen**

INTRODUCTION

While heralded by many as a momentous civil rights moment for those who identify as homosexual or transgender, the Supreme Court's decision in *Bostock v. Clayton County* ushers in new threats to the safety, well-being, and constitutional rights of many Americans.[1] In *Bostock,* the Supreme Court announced that the plain language of the historic 1964 civil rights legislation that prohibited discrimination based on "race, color, religion, sex, or national origin,"[2] also prohibited discrimination based on homosexual or transgender status because it is "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[3] Putting aside for the moment the validity of the statutory interpretation reflected in the decision, which will be discussed later, there are significant policy questions left unanswered that impact the daily lives of many.

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[1] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1778–83 (2020) (Alito, J., dissenting); Ariane de Vogue & Devan Cole, *Supreme Court Says Federal Law Protects LGBTQ Workers From Discrimination*, CNN (June 15, 2020, 12:22 PM), https://www.cnn.com/2020/06/15/politics/supreme-court-lgbtq-employment-case/index.html (quoting Joe Biden calling the ruling "a momentous step forward for our country").

[2] *Bostock*, 140 S. Ct. at 1737 (majority opinion). 42 U.S.C. § 2000e-2(a)(1) (2012). The Civil Rights Act of 1964, Title VII, reads in relevant part:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (2012).

[3] *Bostock*, 140 S. Ct. at 1737, 1741. Although the majority opinion refers to homosexual and transgender status, this Article will primarily use sexual orientation and gender identity insofar as those are the phrases that have already been added to several federal and state statutes.

The Supreme Court's holding that sex discrimination in Title VII now includes discrimination based on sexual orientation and gender identity raises more questions than it answers. For example, does sex discrimination in other federal statutes and under the U.S. Constitution also include sexual orientation and gender identity?[4] If not, on what basis will that distinction be made? Does the *Bostock* decision mandate a conclusion that people can use the bathroom or locker room that is consistent with their gender identity but inconsistent with their biological sex? The same question applies to college dormitories. Must biological men be permitted to compete in women's sports in schools (Title IX) or professionally (Title VII)? Do hospitals and doctors engage in sex discrimination in the provision of medical services if they refuse to provide sex reassignment surgery to a man who believes he is a woman, or vice versa? And, what about religious organizations with sincerely held religious beliefs that conflict with the notion that people can change their sex or that same-sex attractions are acceptable? Will the ministerial exception protect their employment decisions and, if so, for what types of employees?

These are just a few of the questions that were left for another day.[5] But, as Justice Alito's dissenting opinion points out, the answers to those questions were not left entirely on a clean slate.[6] Rather, the Supreme Court jumped in to cut short the ongoing legislative process over whether to add sexual orientation and gender identity to various federal laws. As a result, "the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution" of the legitimate, competing interests.[7] That "bargained legislative resolution" could have weighed the competing interests of homosexuals and transgender individuals against the significant interests mentioned above; all too often, those interests are ignored or trivialized. Whether it is a school forced to grant boys access to the girls' locker room, a physician who is forced to perform a double mastectomy on a woman who wants to be a man, prisons required to house men in women's facilities, or businesses forced to compromise their sincerely held religious beliefs or other business standards, courts often overlook the religious, scientific, and medical beliefs, or other significant interests of those required to accommodate a person's sexual orientation or gender identity.

Only time will tell how broadly the *Bostock* decision will sweep. For the moment, we should be concerned with the willingness of a majority of

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[4] *See id.* app. C at 1791–96 (Alito, J., dissenting) (identifying federal statutes that prohibit sex discrimination).

[5] *Id.* at 1753–54 (majority opinion).

[6] *Id.* at 1778–83 (Alito, J., dissenting).

[7] *Id.* at 1778.

the Court to engage in "legislation" under the guise of plain language statutory interpretation.[8]

I. BACKGROUND

Title VII prohibits *specific* types of employment discrimination against an employee or prospective employee "*because of* such individual's race, color, religion, *sex*, or national origin."[9] In June 2020, the Supreme Court decided that "discrimination because of sex" included employment decisions based on the employee's sexual orientation or gender identity.[10] The employees in those cases argued that sexual orientation and gender identity discrimination are related to "sex" because a person's sex helps determine if the person is same-sex or opposite-sex attracted or whether the person's gender identity is consistent with one's biological sex.[11] The employers argued that sexual orientation and gender identity are distinct from sex and, therefore, employment decisions based on an employee's sexual orientation or gender identity do not constitute sex discrimination.[12] The Court agreed with the employees, concluding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[13]

Before *Bostock*, the Supreme Court had viewed sex discrimination as differential treatment based on an employee's being a part of the

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[8] *Id.* at 1754–55. This Author shares the concerns of the dissenting opinions about the purported textualist analysis in which the majority engaged. The substance of the decision to include sexual orientation and gender identity within sex discrimination is likely to have widespread impact on the competing interests at stake. But the notion that the majority's analysis represents a textualist analysis that applied the plain language of the statute could have even more significant, longstanding effects as it strikes at the very balance of separation of powers. Thus, the primary focus of this Article is to explain how the majority reached its decision that "discrimination because of sex" includes gender identity and sexual orientation and why the dissenting opinions believe that analysis is disingenuous and overreaching.

[9] 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

[10] *Bostock*, 140 S. Ct. at 1744–45. The questions presented in *Harris* were "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)." R.G. & G.R. Harris Funeral Homes Inc. v. EEOC, No. 18-07, available at https://www.supremecourt.gov/qp/18-00107qp.pdf. The question presented in *Bostock* and *Zarda* was "Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination 'because of . . . sex' within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2." Bostock v. Clayton Cnty., No. 17-1618, available at https://www.supremecourt.gov/qp/17-01618qp.pdf (consolidated with Altitude Express, Inc. v. Zarda, No. 17-1623).

[11] *Bostock*, 140 S. Ct. at 1739, 1741–42.

[12] *Id.* at 1744–45.

[13] *Id.* at 1741.

identifiable group of men or women. For example, in *Frontiero v. Richardson*, the Court declared unconstitutional a federal statute that prevented a female member of the uniformed services from claiming her husband as a dependent for the purpose of obtaining increased quarters allowances and medical benefits without proving her husband was actually dependent on her income.[14] The statute, however, permitted a male member of the uniformed services to claim his wife as a dependent without offering such proof of financial dependency.[15] The Court discussed the "long and unfortunate history of sex discrimination" in this nation that "was rationalized by an attitude of 'romantic paternalism,'" which led to "gross, stereotyped distinctions between the sexes."[16] That attitude included the belief that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[17] Before the Civil War, women could not "hold office, serve on juries, or bring suit in their own names."[18] In fact, they were not granted the right to vote until 1920, upon the ratification of the Nineteenth Amendment.[19]

In striking down the federal statute, the Court recognized that "sex, like race and national origin, is an *immutable characteristic*" that "frequently bears no relation to ability to perform or contribute to society."[20] Thus, "statutory distinctions between the sexes often have the effect of invidiously relegating the *entire class of females* to inferior legal status without regard to the actual capabilities of its individual members."[21]

A few of the Court's sex discrimination cases from the 1970s highlight the pervasive discrimination women faced in the workplace that were premised on certain roles for men and women. For example, in *Weinberger v. Wiesenfeld*, the Court confronted the question of whether a federal statute violated the equal protection guarantee secured by the Due Process Clause of the Fifth Amendment because it afforded benefits to male wage earners that were not provided to female wage earners.[22] Specifically, death benefits of male wage earners were payable to the widow and the couple's minor children while death benefits of female wage

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[14] 411 U.S. 677, 690–91 (1973).

[15] *Id.* at 688.

[16] *Id.* at 684–85.

[17] *Id.* at 684. The Court also referred to the views expressed by Thomas Jefferson that "women should be neither seen nor heard in society's decisionmaking councils." *Id.* at 684 n.13 (citing MARTIN GRUBERG, WOMEN IN AMERICAN POLITICS: AN ASSESSMENT AND SOURCEBOOK 4 (1968)).

[18] *Id.* at 685.

[19] *Id.*

[20] *Id.* at 686 (emphasis added).

[21] *Id.* at 686–87 (emphasis added).

[22] 420 U.S. 636, 637–38 (1975).

earners were payable only to the minor children.[23] After his wife passed away, Mr. Wiesenfeld was denied social security survivors' benefits for himself because those benefits "were available only to women."[24]

After acknowledging the reality in the 1970s that it was more likely that men would be the primary supporters of their spouses, the Court explained that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."[25] Refusing to pay survivor benefits to the husband of a female wage earner fails to equally protect the efforts of female workers. "[S]he not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others."[26] The rationale in *Weinberger* echoed the Court's rationale in *Frontiero*, decided two years earlier. "[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the *entire class of females* to inferior legal status without regard to the actual capabilities of its individual members."[27]

In another case, *Califano v. Goldfarb*, the Court struck down a provision in the Federal Old-Age, Survivors, and Disability Insurance Benefits program because survivors' benefits were payable to the husband of a deceased wife *only* if he could prove he was receiving at least one-half of his support from his deceased wife, whereas a surviving wife did not have to satisfy the support requirement.[28] Relying on *Weinberger*, the Court explained that the statutory support requirement "operates 'to deprive women of protection for their families which men receive as a result of their employment.'"[29] The statute "disadvantages women contributors to the social security system as compared to similarly situated men."[30] The Court characterized the presumption that wives are usually dependent on their husbands as based on "'archaic and overbroad' generalizations."[31]

In 1978, the Court explained that "[b]efore the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women,

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[23] *Id.*
[24] *Id.* at 639–40.
[25] *Id.* at 645.
[26] *Id.*
[27] Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (emphasis added).
[28] 430 U.S. 199, 206–07 (1977).
[29] *Id.* at 206 (quoting *Weinberger*, 420 U.S. at 645).
[30] *Id.* at 208.
[31] *Id.* at 217 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

whether or not the assumptions were valid."[32] After the Civil Rights Act, however, employment decisions "cannot be predicated on mere *stereotyped* impressions about the characteristics of males or females."[33] For example, "[m]yths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less."[34] The Court acknowledged that there "are both real and fictional differences between women and men."[35] But, an employer cannot base its employment decision on a "true generalization about the class" if that generalization does not apply to the individual employee.[36]

In that case, "the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees" because "as a class, women live longer than men.[37] The Court held that requiring women, as a class, to pay more than men, as a class, directly conflicted with the Civil Rights Act.[38]

A few years later, the Court also concluded that "in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented," an employer can "consider as one factor the sex of a qualified applicant."[39] The Court's first step in the analysis of that case was to determine whether there existed a "'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'"[40] If so, then the employer could properly consider an applicant's sex in an effort to remedy the imbalance.[41]

In *Price Waterhouse v. Hopkins*, the Court interpreted sex discrimination to include sex stereotyping.[42] Specifically, sex stereotyping constitutes sex discrimination because an employer acts based on a belief that a woman should (or should not) act a particular way.[43] In that case, a woman who was described by Price Waterhouse as "an outstanding professional" had her partnership consideration put on hold based on the perception that she "was sometimes overly aggressive," "macho," and

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32 City of L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

33 *Id. (*citing Sprogis v. United Air Lines, Inc., 444 F.2d 1195, 1198 (7th Cir. 1971)) (emphasis added).

34 *Id.*

35 *Id.*

36 *Id.* at 708.

37 *Id.* at 704.

38 *Id.* at 710–11.

39 Johnson v. Transp. Agency, 480 U.S. 616, 620–21 (1987).

40 *Id.* at 631 (citing United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979).

41 *Id.* at 631–32.

42 490 U.S. 228, 251 (1989).

43 *Id.* at 250.

could use a "course at charm school."[44] One partner "objected to her swearing only 'because it's a lady using foul language.'"[45] The man responsible for explaining to Hopkins the reasons for the decision to put her candidacy on hold stated that "in order to improve her chances for partnership, . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[46]

In analyzing plaintiff's claim, the Court concluded "that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision."[47] To give employers freedom of choice in making employment decisions, "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person."[48] Only the five criteria listed in the statute are "forbidden . . . . Any other criterion or qualification for employment is not affected by" Title VII.[49] "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[50] An employer cannot "evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . 'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[51]

Nine years later, the Court addressed the question of whether workplace harassment can violate Title VII's prohibition against discrimination because of sex "when the harasser and the harassed employee are of the same sex."[52] In concluding that it did, the Court explained that Congress demonstrated an intent in Title VII "to strike at the entire spectrum of disparate treatment of men and women in employment."[53] It protects both men and women.[54] Turning more to the point of whether male on male discrimination was prohibited by Title VII, the Court stated that "it would be unwise to presume as a matter of law

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[44] *Id.* at 234–35 (first quoting Pl.'s Ex. 15; then quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1113 (1985); then quoting Def.'s Ex. 30; and then quoting Def.'s Ex. 27).

[45] *Id.* at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1110, 1117 (1985)).

[46] *Id.* (quoting Hopkins, 618 F. Supp. at 1117).

[47] *Id.* at 241–42.

[48] *Id.* at 242.

[49] *Id.* at 244 (quoting 110 CONG. REC. 7213 (1964)).

[50] *Id.* at 250.

[51] *Id.* at 251 (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

[52] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 76 (1988).

[53] *Id.* at 78 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

[54] *Id.*

that human beings of one definable group will not discriminate against other members of their group."[55]

The Court clarified that Title VII:

> does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."[56]

In making the decision of whether harassment is hostile or abusive, "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[57]

II. BOSTOCK V. CLAYTON COUNTY

A. The Majority's Opinion

In June 2020, the Court decided the question of whether "discrimination because of sex" included discrimination based on "homosexuality or transgender status."[58] The opinion was authored by Justice Gorsuch and joined by Chief Justice Roberts and Justices Breyer, Ginsburg, Kagan, and Sotomayor.[59] The opinion actually decided three cases; two of the cases involved the question of whether sexual orientation was included within the scope of Title VII's prohibition of discrimination because of sex, and the third case raised the question of whether sex discrimination under Title VII included gender identity.[60]

The majority opinion proclaimed at the outset that the answer in the case is "clear" based on the ordinary meaning of the phrase "because of

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55 *Id.* (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)).
56 *Id.* at 81 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).
57 *Id.* at 82.
58 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1744, 1754 (2020).
59 *Id.* at 1737.
60 *Id.* at 1737–38.

sex."[61] It then spent the remainder of the opinion explaining what it did and did not consider appropriate to include in its ordinary meaning analysis. For example, the ordinary meaning did not include dictionary definitions,[62] what individuals understood the terms to mean in ordinary conversation,[63] how courts had interpreted it for over fifty years,[64] how the EEOC applied it for nearly fifty years,[65] or how Congress treated sexual orientation and gender identity in other statutes.[66]

After engaging in what it called a textualist analysis to determine the ordinary meaning of the phrase "discrimination because of sex," the majority concluded that "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[67] Relying on prior precedent in *Phillips v. Martin Marietta Corporation*, *Los Angeles Department of Water and Power v. Manhart*, and *Oncale v. Sundowner Offshore Services, Incorporation*,[68] the majority in *Bostock* concluded that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[69] In particular, "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."[70]

As an example, the majority explained that "[i]f the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."[71] Similarly, "an employer who fires a transgender person who was identified as a male at birth but who now identifies as a

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[61] *Id.* at 1737, 1740–42.

[62] *Id.* at 1739.

[63] *Id.* at 1745.

[64] The majority opinion did not squarely address the dissents' discussion of the judicial or EEOC decisions concluding that sex did not include sexual orientation. *Compare id.* at 1750–51 (majority opinion) (discussing the original meaning of sex discrimination without reference to judicial or EEOC opinions), *with id.* at 1777–78 (Alito, J., dissenting) (detailing how over the last 50 years the judiciary and EEOC concluded sex did not include sexual orientation). It did, however, mention a few complaints that were filed within years of Title VII's passage. *Id.* at 1750–51, 1757–58, 1777.

[65] *Id.* at 1757, 1777.

[66] *Compare id.* at 1750–51 (discussing the use of legislative history in other statutes), *with id.* at 1770–71 (Alito, J., dissenting) (discussing how sexual orientation historically was treated in other statutes).

[67] *Id.* at 1737, 1744 (majority opinion).

[68] *Id.* at 1743–44. For a brief discussion of *Manhart* and *Oncale*, see *supra* notes 32–36, 52–57 and accompanying text. In *Phillips*, the Court addressed the question of whether it constituted sex discrimination to refuse to hire women with young children when the employer would hire men with young children. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971). The Court answered that it did. *Id.*

[69] *Bostock*, 140 S. Ct. at 1741.

[70] *Id.* at 1737.

[71] *Id.* at 1741.

female," discriminates based on sex "[i]f the employer retains an otherwise identical employee who was identified as female at birth."[72] Because, as the majority concluded, "homosexuality and transgender status are inextricably bound up with sex," an employer treats an individual differently because of sex when the employer discriminates based on homosexuality or transgender status.[73]

1. Ordinary Meaning of "Discrimination Because of Sex."

The majority opinion stated that it relied on the ordinary meaning of the phrase "because of sex" in 1964, which is distinct from what "because of sex" meant in *ordinary conversation*.[74] The Court did not find the ordinary conversation meaning helpful to its analysis because most people would not look at the circumstances from the proper "but-for" perspective. For example, the court explained, if asked, a person might say he was fired "because [he was] gay or transgender" rather than "because of sex."[75] Similarly, the majority explained that a woman, like the plaintiff in *Phillips,* who was not hired because she had young children (when men with young children were hired), might tell people she was fired because she was a mother when in fact she was fired "because of sex."[76] In "conversational conventions," the speaker just focuses on "what seems most relevant or informative to the listener" and does not embrace the proper but-for analysis required for Title VII.[77] Thus, the ordinary conversational meaning of discrimination because of sex could not control.

Nor did the Court find the dictionary definitions persuasive.[78] To reach that conclusion, the Court admitted that the contemporaneous dictionary definitions defined sex with reference to male or female as determined by reproductive biology, but the employees contended that some in 1964 believed the term had a broader meaning.[79] Because the Court asserted that its decision did not turn on the dictionary definitions, it assumed for the sake of argument that the employers were correct.[80]

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[72] *Id.*

[73] *Id.* at 1742. Justice Alito called the majority's analysis arbitrary line drawing. *Id.* at 1761 (Alito, J., dissenting). The Court attempts to draw "a distinction between things that are 'inextricably' related and those that are related in 'some vague sense.'" *Id.* at 1761 (quoting *id.* at 1742 (majority opinion)).

[74] *Id.* at 1738–39, 1745 (majority opinion).

[75] *Id.* at 1745.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 1739–41.

[79] *Id.* at 1739.

[80] *Id.*

After explaining that "because of sex" incorporated a but-for analysis[81] and that to "discriminate" meant to make a difference in treatment,[82] the Court held that an employer violates Title VII when it "intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex."[83] The Court then concluded that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[84]

2. Intentional Discrimination Based on Sex.

In response to the Court's conclusion that it is impossible to discriminate based on homosexuality or transgender status without discriminating based on sex, the employers argued that they did not *intend* to discriminate based on sex (as distinct from sexual orientation or gender identity).[85] In rejecting that argument, the Court offered a couple hypotheticals. First,

> Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women.[86]

Even though the employer would *not* know the employee's sex, the majority concluded that the discrimination was because of sex.[87] To explain its conclusion, the majority said it needed to *change* its own hypothetical "ever so slightly."[88] That change involved shifting the focus from the employer's intent to what the applicant was thinking. Thus, the majority provided a hypothetical applicant who did not know what the words homosexual or transgender meant. As a result, the applicant would first need to determine his or her biological sex in order to know whether he or she (i) is attracted to someone of the same sex (homosexual) or (ii)

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[81] *Id.* at 1739–40.
[82] *Id.* at 1740.
[83] *Id.*
[84] *Id.* at 1741.
[85] *Id.* at 1744.
[86] *Id.* at 1746. At oral argument before the Supreme Court, the attorney representing the employees admitted that it would not constitute sex discrimination if the employer had a blanket policy against hiring gay and transgender individuals without knowing the applicant's sex. *Id.* at 1759 (Alito, J., dissenting).
[87] *Id.* at 1746 (majority opinion).
[88] *Id.*

identifies as a gender inconsistent with biological sex (transgender).[89] Thus, because the employee only knows if he is homosexual or transgender by first knowing his sex, "the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex."[90]

Second, the majority asked readers to

> Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.[91]

In other words, even though the employee was known to be a female before the party and was considered a valued employee, when the employer fires that female employee because she is married to another female, that constitutes sex discrimination rather than sexual orientation discrimination.[92]

3. Sexual Orientation and Gender Identity Discrimination Necessarily Constitute Sex Discrimination.

In an effort to explain the logic of those two hypotheticals, and after it conceded that "homosexuality and transgender status are distinct concepts from sex,"[93] the Court held that discrimination based on homosexuality or transgender status necessarily constitutes sex

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[89] *Id.*

[90] *Id.*

[91] *Id.* at 1742.

[92] *Id.* at 1742–43. In his dissent, Justice Alito disagreed that it constituted sex discrimination because the firing had nothing to do with the employee's sex; rather, she was fired for her sexual orientation. *Id.* at 1760 (Alito, J., dissenting). He provided his own hypothetical for the employer who fired any employee who was homosexual. *Id.* at 1763. That hypothetical included (i) men attracted to men; (ii) women attracted to men; (iii) women attracted to women; and (iv) men attracted to women. *Id.* The employees who would be discharged had "one thing in common"—their attraction to members of their own sex—"in a word, sexual orientation." *Id.*

[93] *Id.* at 1746–47 (majority opinion).

discrimination because "the first cannot happen without the second."[94] In other words, the applicant or employee only knows if he or she is homosexual or transgender after first determining whether he or she is a biological male or female.

The majority rejected the employers' arguments that Congressional intent conflicted with the conclusion that sexual orientation or gender identity discrimination constituted sex discrimination.[95] In particular, the majority found it irrelevant that Congress had added sexual orientation and gender identity to other statutes after it had amended Title VII but failed in each attempt to add it to Title VII—there simply is "no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one."[96] The majority posited that perhaps some legislators knew its original impact, but hoped others would not notice or perhaps some did not consider the issue at all.[97]

4. Explaining the But-For Causation Requirement.

In an effort to rein in the effects of the Court's expansive interpretation of discrimination because of sex, the employers argued that the but-for analysis needed to be applied differently for claims of discrimination based on sexual orientation or gender identity.[98] They argued that pursuant to the usual "but-for test," the court must "change one thing at a time and see if the outcome changes."[99] If it changes, then the Court has found a but-for cause.[100] The employers asserted that the usual test did not work properly in the case of sexual orientation.[101] For example, if you ask whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman, you only answer yes to that question if you change *two* traits at a time, not one: first, change Bostock from a male to a female; second, change Bostock's attraction from men to women. Because Mr. Bostock, as a man attracted to men, would have been fired if he were a woman attracted to women, two traits were changed and sex is *not* the but-for trait. Rather, Bostock would not have been fired if he or she were attracted to someone of the opposite sex. Thus, the but-for trait is *same-sex attraction,* not sex. The majority rejected that analysis, stating that the but-for analysis can indeed be satisfied through the

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94 *Id.* at 1747.
95 *Id.* at 1746–47.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.* at 1739.
100 *Id.*
101 *Id.* at 1747–48.

combination of different factors—here, sex along with sexual orientation or gender identity.[102]

5. The Policy Concerns Were Irrelevant to the Decision.

Finally, the majority rejected the various policy arguments raised.[103] The employers argued that the statutory terms were ambiguous given that Title VII had been applied to situations not contemplated by its drafters—male on male discrimination or sex stereotyping—and was sought here to be applied for the first time to sexual orientation and gender identity.[104] The majority explained that such application to situations beyond the principal evil behind the statute "does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth'" of the statute.[105] When the employers asserted that "because of sex" was vague insofar as few, if any, in 1964 expected that phrase would be applied to sexual orientation or gender identity, the majority disagreed and pointed to a couple of sexual orientation claims brought under Title VII in the 1970s and some mention during the Equal Rights Amendment debate that homosexuals might be protected from discrimination.[106] The majority added that one should not conclude that Congress intended to exclude sexual orientation and gender identity from sex discrimination just because the groups were "politically unpopular" at the time.[107]

As it wrapped up its opinion, the majority dismissed concerns over the widespread legal and policy implications of its decision. In particular, it left for another day how to decide cases dealing with sex-segregated bathrooms, locker rooms, and dress codes.[108] And, it explicitly left

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[102] *Id.* at 1748.

[103] *See id.* at 1749 (showing how the majority explained that it could have readily dismissed all of the policy arguments because they are irrelevant when the "meaning of the statute's terms is plain").

[104] *Id.*

[105] *Id.* (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

[106] *Id.* at 1750–51. According to the dissent, there was one complaint in 1969 and another in 1974. *Id.* at 1772 (Alito, J., dissenting). In the face of the couple of claims filed in the few years after Title VII was enacted, every federal appeals court before 2017, representing thirty judges, concluded that Title VII did not include sexual orientation. *Id.* at 1757; *id.* at 1824 (Kavanaugh, J., dissenting); *see also id.* at 1777 (Alito, J., dissenting) (listing cases that show the Court of Appeals' understanding of sex discrimination in the context of Title VII). With respect to gender identity, the concept did not even exist until the early 1970s. *Id.* at 1772.

[107] *Id.* at 1751 (majority opinion).

[108] *Id.* at 1753.

undecided the significant balancing of interests at stake in free exercise of religious claims.[109]

B. A Dissenting Perspective

The dissenting opinions had no kind words for the majority's purported textualist analysis. Justice Alito, who was joined by Justice Thomas, called the majority opinion "deceptive"—and written with breathtaking "arrogance."[110] Justice Alito wrote that "[t]he Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."[111] He also took aim at the majority's characterization that its opinion exemplified judicial humility.

> Is it humble to maintain, not only that Congress did not understand the terms it enacted in 1964, but that all the Circuit Judges on all the pre-2017 cases could not see what the phrase discrimination "because of sex" really means? If today's decision is humble, it is sobering to imagine what the Court might do if it decided to be bold.[112]

Justice Kavanaugh also expressed his belief that the Court had acted outside its role. He admonished the majority to remember "we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise 'neither Force nor Will, but merely judgment.'"[113] The dissenting opinions asserted that the Court had engaged in "legislation" rather than in an ordinary meaning interpretation by "updat[ing] Title VII to reflect what it regards as 2020 values."[114]

To understand the dissenters' concerns, it is important to understand that the only question really before the Court was how to interpret the phrase "discrimination because of sex." Following prior precedent, in answering that question, the Court needed to first determine whether the plain language of the statutory text answered the question; if so, then

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[109] *Id.* at 1753–54. The employer in *Harris* unsuccessfully raised a Religious Freedom Restoration Act claim in the lower courts but did not raise the claim before the Supreme Court. *Id.* at 1754.

[110] *Id.* at 1754, 1757 (Alito, J., dissenting).

[111] *Id.* at 1755–56 (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997)).

[112] *Id.* at 1778.

[113] *Id.* at 1823 (Kavanaugh, J., dissenting) (quoting THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

[114] *Id.* at 1755, 1761 (Alito, J., dissenting); *id.* at 1836–37 (Kavanaugh, J., dissenting).

there would be no need to consider congressional intent.[115] If, however, it was ambiguous whether the scope of the phrase "discrimination because of sex" encompassed discrimination based on "sexual orientation" or "gender identity," then congressional intent would be relevant.[116] Both sides believed the language was clear: the majority, that it included sexual orientation and gender identity; the dissent, that it did not.[117]

Because the majority concluded the text was clear that "discrimination because of sex" includes claims based on sexual orientation or gender identity discrimination, it found the congressional intent to be irrelevant.[118] The dissenting opinions discussed the legislative history only to bolster their conclusion that "discrimination because of sex" does not encompass sexual orientation or gender identity discrimination.[119]

1. The Ordinary Meaning of Sex, Sexual Orientation, and Gender Identity.

The majority and dissenting opinions agreed that Supreme Court precedent makes clear that in interpreting a statute, the Court should determine the ordinary meaning of the words and phrases *at the time of enactment*.[120] Here, that relevant time would be 1964. Relying on dictionaries contemporary to 1964, judicial opinions, EEOC interpretations of Title VII, presidential executive orders, canons of statutory construction, and common understanding, Justice Alito's dissent concluded that "because of sex" in Title VII did not include sexual orientation or gender identity.[121] Justice Alito said it was "preposterous" for the Court to try to convince readers that it was simply enforcing the terms of Title VII by including sexual orientation and gender identity within the prohibition of sex discrimination.[122]

Although the Supreme Court has previously explained that Title VII is a "'broad rule of workplace equality' [that] 'strike[s] at the entire spectrum of disparate treatment' based on protected characteristics,"[123] it

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[115] *Id.* at 1749 (majority opinion).

[116] *Id.*

[117] *Id.* at 1737; *id.* at 1756 (Alito, J., dissenting).

[118] *Id.* at 1749 (majority opinion).

[119] *Id.* at 1776–77 (Alito, J., dissenting); *id.* at 1824 (Kavanaugh, J., dissenting).

[120] *Id.* at 1738 (majority opinion); *id.* at 1766 (Alito, J., dissenting); *id.* at 1828 (Kavanaugh, J., dissenting); *see also* Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

[121] *Bostock,*140 S. Ct. at 1771–73, 1777–78 (Alito, J., dissenting).

[122] *Id.* at 1755 (Alito, J., dissenting).

[123] Zarda v. Altitude Express, Inc., 883 F.3d 100, 111 (2d Cir. 2018) (first quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993); and then quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

is not a broad, catch-all statute that seeks to eradicate *all* workplace discrimination. Rather, it "singles out for prohibition discrimination based on *particular* categories and classifications that have been used to perpetuate injustice—but not all such categories and classifications."[124] As Justice Kavanaugh explains in his dissent, there is a difference between interpreting a word broadly to give it full meaning and interpreting it so broadly that it changes the meaning.[125]

> It is true that meaningful legislative action takes time—often too much time, especially in the unwieldly morass on Capitol Hill. But the Constitution does not put the Legislative Branch in the "position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution."[126]

Focusing on the majority's ordinary meaning analysis, Justice Alito explained that "'our job is not to scavenge the world of English usage to discover whether there is any possible meaning' of discrimination because of sex that might be broad enough to encompass discrimination because of sexual orientation or gender identity."[127] Rather, the Court should consider dictionary definitions, what the words meant in ordinary conversation, and plain old common sense.[128] And, in analyzing the meaning of words, when a *literal* interpretation of a word or phrase contradicts the *ordinary* meaning, the ordinary meaning should prevail.[129] Justice Kavanaugh provided several examples where the Supreme Court upheld the ordinary meaning over the literal meaning: applying the ordinary meaning, the Supreme Court previously held that beans were not seeds (even though they may be in the language of botany); tomatoes were vegetables (even though they are actually fruit); an aircraft was not

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[124] *Id.* at 147 (Lynch, J., dissenting) (emphasis added).

[125] *Bostock*, 140 S. Ct. at 1834–36 (Kavanaugh, J., dissenting).

[126] *Id.* at 1836 (quoting William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700 (1976)).

[127] *Id.* at 1772 (Alito, J., dissenting) (quoting Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting)).

[128] *Id.* at 1766 ("Dictionary definitions are valuable because they are evidence of what people at the time of a statute's enactment would have understood its words to mean."); Carachuri-Rosendo v. Holder, 560 U.S. 563, 573–74 (2010) (quoting Lopez v. Gonzales, 549 U.S. 47, 53 (2006)) ("When interpreting the statutory provisions under dispute, we begin by looking at the terms of the provisions and the 'commonsense conception' of those terms."); Roschen v. Ward, 279 U.S. 337, 339 (1929) ("[T]here is no canon against using common sense in construing laws as saying what they obviously mean.").

[129] *Bostock*, 140 S. Ct. at 1824–25 (Kavanaugh, J., dissenting).

a vehicle (even though it technically is one); and water was not a "mineral deposit" (even though water is actually a mineral).[130]

Dictionary and other definitions at the time reveal that sexual orientation and gender identity were, and are, distinct from the definition of sex.[131] While sex classifies men and women into two groups based on immutable, biological distinctions, sexual orientation refers to a person's sexual identity and sexuality and does not classify individuals based on whether they are a man or woman.[132] According to both the Oxford and Webster dictionaries, "sex" refers to the "[e]ither of . . . two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions."[133] The American Psychological Association similarly defines "[s]ex" as the "biological status as male or female" with "attributes that characterize biological maleness and femaleness."[134]

Before *Bostock*, the Court also repeatedly acknowledged the biological reality that men and women fall into two distinct groups, most notably distinguishable by their reproductive capacities.[135] "We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant."[136] "[T]o a fluent speaker of the English language—then and now—the ordinary meaning of the

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[130] *Id.* at 1825–26.

[131] Tiffany L. King, Comment, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. Davis L. Rev. 1005, 1007–08 (2002).

[132] *See Definition of Sexual Orientation*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/sexual%20orientation (last visited Sept. 16, 2020) (defining "sexual orientation" is "a person's sexual identity or self-identification as bisexual, heterosexual, homosexual, pansexual, etc."); *Sexual Orientation*, LEXICO BY OXFORD, https://www.lexico.com/en/definition/sexual orientation (last visited Sept. 16, 2020) (defining the same term as "[a] person's identity in relation to the gender . . . to which they [sic] are sexually attracted; the fact of being heterosexual, homosexual, [or bisexual]"); *see also Bostock*, 140 S. Ct. app. A, at 1784 (Alito, J., dissenting) (including the full definitions of "sex" from a number of dictionaries).

[133] *Sex*, LEXICO BY OXFORD, https://www.lexico.com/en/definition/sex (last visited Sept. 16, 2020); *see also Definition of Sex*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/sex (last visited Sept. 16, 2020) (defining the same term as "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures").

[134] AM. PSYCH. ASS'N, REPORT OF THE APA TASK FORCE ON GENDER IDENTITY AND GENDER VARIANCE 28 & app. C (2008), https://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf.

[135] City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 202–08 (1978); United States v. Virginia, 518 U.S. 515, 588 (1996).

[136] Michael M. v. Superior Ct., 450 U.S. 464, 471 (1981).

word 'sex' does not fairly include the concept of 'sexual orientation.' . . . The words plainly describe different traits. . . ."[137]

Turning to the definition of sexual orientation, the American Psychological Association has explained, "*Sexual orientation is distinct from other components of sex and gender*, including biological sex (the anatomical, physiological and genetic characteristics associated with being male or female), gender identity (the psychological sense of being male or female), and social gender role (the cultural norms that define feminine and masculine behavior)."[138] "Sexual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to men, women, or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions . . . ."[139] "Sexuality" is different than "sex."[140] "The two terms are never used interchangeably, and the latter is not subsumed within the former."[141]

The Supreme Court also previously recognized that one's sexual orientation concerns matters of sexuality, not biological sex. In *Obergefell v. Hodges*, the Court explained that *Lawrence v. Texas* confirmed a dimension of freedom for same-sex couples to enjoy intimate association, recognizing that "[w]hen *sexuality* finds *overt expression* in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[142] The Court did not strike the Texas law down because it discriminated based on one's sex but, rather, because it discriminated based on one's intimate sexual choices—one's sexuality. Similarly, the Court's decisions in *Bowers v. Hardwick*,[143] *Romer v. Evans*,[144] *United States v. Windsor*,[145] and *Lawrence v. Texas*,[146] "would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore

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[137] Zarda v. Altitude Express, Inc., 883 F.3d 100, 148 (2d Cir. 2018) (Lynch, J., dissenting) (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting)).

[138] AM. PSYCH. ASS'N, ANSWERS TO YOUR QUESTIONS FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 1 (2008) (emphasis added), https://www.apa.org/topics/lgbt/orientation [hereinafter ANSWERS TO YOUR QUESTIONS FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY].

[139] *Id.*; *see also* AM. PSYCH. ASS'N, REPORT OF THE APA TASK FORCE ON GENDER IDENTITY AND GENDER VARIANCE 28 (2009), https://www.apa.org/pubs/info/reports/gender-identity ("Sexual orientation refers to the tendency to be sexually attracted to persons of the same sex, the opposite sex, both sexes, or neither sex.").

[140] *Hively*, 853 F.3d at 363 (Sykes, J., dissenting).

[141] *Id.*

[142] Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) (alteration in original) (emphasis added) (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

[143] 478 U.S. 186 (1986).

[144] 517 U.S. 620 (1996).

[145] 570 U.S. 744 (2013).

[146] 539 U.S. at 558.

received the same heightened scrutiny as sex discrimination."[147] In contrast with the meaning of "sex," "sexuality" is "the quality or state of being sexual," "the condition of having sex," or "sexual activity."[148] To subsume one's sexuality, sexual identity, and sexual orientation within Title VII's prohibition against sex discrimination is to fundamentally change the meaning of "sex" discrimination and to undermine the purpose of the law.

Similarly, gender identity is distinct from sex. While a person's sex falls into one of two identifiable groups and is based on biology, "gender identity" is fluid and based on a person's "internal sense of being male, female, some combination of male and female, or neither male nor female."[149] In fact, the Lexico Dictionary, powered by Oxford, expressly states that "gender identity" is "[a]n individual's *personal sense* of having a particular gender."[150] Sex and gender identity are distinct concepts.

Justice Alito stated in his dissent that Americans in 1964 "would have been shocked" to learn that Congress' prohibition against sex discrimination included sexual orientation or gender identity.[151]

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[147] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1833 (2020) (Kavanaugh, J., dissenting). Admittedly, those cases were decided under the Equal Protection Clause of the U.S. Constitution, but there was not even a suggestion in the decisions of those cases by the nineteen justices who participated in those cases that sexual orientation discrimination would be treated the same as sex discrimination. *Id.*

[148] *Sexuality*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/sexuality (Sept. 11, 2020); *Sexuality*, LEXICO BY OXFORD, https://www.lexico.com/en/definition/sexuality (last visited Sept. 16, 2020) (defining "sexuality" as a person's "[c]apacity for sexual feelings," his or her "sexual orientation or preference," or as "[s]exual activity.").

[149] *Definition of Gender Identity*, MERRIAM-WEBSTER https://www.merriamwebster.com/dictionary/gender identity (last visited Sept. 16, 2020); *see also* ANSWERS TO YOUR QUESTIONS FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY, *supra* note 138, at 1 ("*Gender identity* refers to a person's internal sense of being male, female, or something else."); ANSWERS TO YOUR QUESTIONS FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY, *supra* note 134, at 28 (stating that one's gender identity is a "person's basic sense of being male, female, or of indeterminate sex"). The American Psychological Association expressly states that "sex" and "gender" are not the same. ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY AND GENDER EXPRESSION, *supra* note 138, at 28. "*Sex* is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy." *Id.* "*Gender*," on the other hand, "refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women." *Id.* Although "sex" and "gender" are not synonymous, courts often interchange them when referring to sex or gender discrimination. However, they are not the same and the informal use of gender to refer to sex should not be used as a means to now protect gender identity. Taken together, sex and gender are the biological and societal realities faced by women as generally distinct from men, which differences resulted in Title VII protections against sex discrimination.

[150] *Gender Identity*, LEXICO BY OXFORD, https://www.lexico.com/en/definition/gender_identity (last visited Sept. 18, 2020) (emphasis added).

[151] *Bostock*, 140 S. Ct. at 1772 (Alito, J., dissenting).

Homosexuality was listed as a mental disorder in the Diagnostic and Statistical Manual until 1973[152] and sodomy was a crime in every state except Illinois.[153] "The term 'transgender' is said to have been coined '"in the early 1970s"' and the term 'gender identity[]' . . . first appeared in an academic article in 1964."[154] In 1969, just five years after Title VII was enacted, "the great majority of physicians surveyed . . . thought that an individual who sought sex reassignment surgery was either '"severely neurotic"' or '"psychotic."'"[155]

Justice Kavanaugh summarized the ordinary meaning of sex and sexual orientation this way:

> Most everyone familiar with the use of the English language in America understands that the ordinary meaning of sexual orientation discrimination is distinct from the ordinary meaning of sex discrimination. Federal law distinguishes the two. State law distinguishes the two. This Court's cases distinguish the two. Statistics on discrimination distinguish the two. History distinguishes the two. Psychology distinguishes the two. Sociology distinguishes the two. Human resources departments all over America distinguish the two. Sports leagues distinguish the two. Political groups distinguish the two. Advocacy groups distinguish the two. Common parlance distinguishes the two. Common sense distinguishes the two.[156]

Despite this history and understanding, the majority concluded that the ordinary meaning of sex discrimination included discrimination based on sexual orientation and gender identity.[157]

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[152] *Id.* at 1769.

[153] *See* Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.–C.L. L. REV. 531, 538 (1992) (recognizing Illinois as the first state to decriminalize sodomy in 1961).

[154] *Bostock*, 140 S. Ct. at 1772 (first quoting Jack Drescher, *Transsexualism, Gender Identity Disorder and the DSM*, 14 J. GAY & LESBIAN MENTAL HEALTH 109, 110 (2010); and then quoting Richard Green, *Robert Stoller's Sex and Gender: 40 Years On*, 39 ARCHIVES SEXUAL BEHAV. 1457, 1457 (2010)).

[155] *Id.* at 1773 (quoting Jack Drescher, *supra* note 154, at 110).

[156] *Id.* at 1835–36 (Kavanaugh, J., dissenting). Prior to 2017, all thirty federal judges in the first ten Courts of Appeals that addressed the question concluded that Title VII does not prohibit sexual orientation discrimination. *Id.* at 1833. Executive Orders by Presidents Johnson, Nixon, and Clinton all treated sexual orientation separately from sex discrimination. *Id.* at 1831.

[157] *Id.* at 1741 (majority opinion).

2. Congress Did Not Intend to Include Sexual Orientation or Gender Identity in Title VII.

Admittedly, there are limitations on the use of congressional intent in determining the meaning of a statute,[158] but where a court significantly expands the scope of the statute, the history can demonstrate the error. First, it is fair to presume that Congress expected "sex" to be interpreted consistently with the understanding then, and now, that it refers to the biological classification of people into one of two groups based primarily on their reproductive capacities. Indeed, as discussed above, the Supreme Court precedent after 1964 focuses on the historical differential treatment in the workforce of women as a group.[159] It belies common sense to think that the pervasive discrimination against women that led to the addition of "sex" in Title VII was also meant to reach sexual orientation and gender identity. Justice Kavanaugh stated that to interpret it that broadly "rewrites history. Seneca Falls was not Stonewall. The women's rights movement was not (and is not) the gay rights movement."[160]

Second, the fact that Congress has added sexual orientation and gender identity as additional protected categories in other federal statutes, while repeatedly declining to do so in Title VII, is evidence that Congress understands that the words have different meanings.[161] "[O]ne of the most basic interpretive canons" is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[162] If sexual

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[158] *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislatures by which we are governed.").

[159] *See supra* text accompanying notes 22–27.

[160] *Id.* at 1828–29. On July 19, 1948, what is referred to as the first women's rights convention, took place at Seneca Falls. *Today in History–July 19: The Seneca Falls Convention*, LIBR. OF CONG., https://www.loc.gov/item/today-in-history/july-19/ (last visited Sept. 16, 2020). Only twenty-eight years earlier, women gained the right to vote through the ratification of the Nineteenth Amendment. U.S. CONST. amend. XIX. In contrast, the Stonewall Riots, as some refer to them, are seen by many as a turning point in the LGBT movement. Sarah Pruitt, *What Happened at the Stonewall Riots? A Timeline of the 1969 Uprising*, (June 1, 2020), https://www.history.com/news/stonewall-riots-timeline (last visited Sept. 16, 2020).

[161] *See Bostock*, 140 S. Ct. at 1829 & n.5 (Kavanaugh, J., dissenting) (listing several federal statutes that reference sexual orientation and/or gender identity in addition to sex); *see also id.* at 1829 & n.6 (listing several proposed amendments to Title VII that would have added sexual orientation to Title VII). For example, one federal statute requires colleges and universities to report information about crimes on campus, including crimes involving bodily injury, to any person in which the victim is targeted because of his or her protected status, which includes sexual orientation and gender identity. 20 U.S.C. § 1092.

[162] Corley v. United States, 556 U.S. 303, 314 (2009) (alteration in original) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)); *see also* Pa. Dept. of Pub. Welfare v. Davenport, 495

orientation and gender identity discrimination are themselves sex discrimination, as the Court held in *Bostock*, it renders sexual orientation and gender identity superfluous in those other federal statutes.

Because Congress has chosen in other statutes to include "sexual orientation" and "gender identity" alongside "sex," it reflects the reality that the terms are distinct, even if related in some way.[163] In fact, arguing that one must necessarily consider a person's sex to consider his or her sexual orientation or gender identity only proves that the terms reflect related, but distinct, concepts. One's sex refers to the biological fact of being male or female. How that male or female identifies or expresses him or herself sexually reflects that person's sexual orientation. And, whether that person identifies as a male or female, apart from biological sex, is gender identity. To conclude that "sexual orientation" and "gender identity" are subsumed within the prohibition against discrimination "because of sex" would violate the canon of construction against construing words in a statute so as to render any of them "superfluous, void, or insignificant."[164]

Third, relying on the canon of construction of *noscitur a sociis*, which means that a word is known by the company it keeps,[165] "sex" in Title VII should be interpreted as one word in a group of words with some related meaning. Except for religion, all of the categories listed in section 2000e-2 are based on immutable characteristics.[166] Sexual orientation and gender identity, however, are not an immutable characteristic in the same

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U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment").

[163] The gradual changes to President Nixon's original executive order concerning equal employment in the federal government show that the Executive Branch understands the terms are distinct. In 1969, the Executive Order discussed the language in Title VII, explaining that employment discrimination in the federal government would prohibit discrimination based on race, color, religion, sex, or national origin. Equal Employment Opportunity in the Federal Government, 34 Fed. Reg. 12985, 12985 (Aug. 8, 1969). In 1978, President Carter amended the executive order to include "handicap." Transfer of Certain Equal Employment Enforcement Functions, 44 Fed. Reg. 1053, 1053 (Dec. 28, 1978). In 1998, President Clinton again amended the executive order to include "sexual orientation." Equal Opportunity in the Federal Government, 63 Fed. Reg. 30097, 30097 (May 28, 1998). He amended it in 2000 to add "or status as a parent." Equal Employment Opportunity in Federal Government, 65 Fed. Reg. 26115, 26115 (May 2, 2000). Then, in 2014, President Obama amended it to add "gender identity," such that the original Executive Order's prohibition against "sex, or national origin" was revised by substituting it with "sex, sexual orientation, gender identity, or national origin." Equal Employment Opportunity in the Federal Government, 79 Fed. Reg. 42971, 42971 (July 21, 2014).

[164] 2A NORMAN SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 46:6 (7th ed. 2000).

[165] S.D. Warren Co. v. Me. Bd. of Env't Prot., 547 U.S. 370, 378 (2006) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)).

[166] 42 U.S.C. § 2000e-2(a)(1) (2012); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (stating that "sex, like race and national origin, is an immutable characteristic").

way that one's race, national origin, or biological sex are. The American Psychological Association, for example, has explained that "[s]ame-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and for some, sexual orientation identity (i.e., individual or group membership and affiliation, self-labeling) is fluid or has an indefinite outcome."[167] Stated differently, sexual orientation is fluid and changes—thereby, not immutable.

Gender identity is even more fluid than sexual orientation.[168] Unlike "sex," which is binary, "gender identity" encompasses a virtually unlimited number of identities. These identities include "Agender" ("a person who does not identify with any gender identity"); "Androgynous" ("a person who does not identity with or present as either a male or female"); "Cis" ("meaning a person who identifies with the sex they were born with"); "Gender Fluid" ("a person whose gender identity and presentation are not limited to one gender identity"); "Genderqueer" ("a person who identifies as something other than as part of the traditional two-gender system"); "Pangender" (an identity label "that challenges binary gender and is inclusive of gender-diverse people"); "Transgender" ("a person of a gender not traditionally associated with their sex at birth"); and "Two-spirit" ("a person who has both masculine and feminine characteristics and presentations").[169]

Including gender identity within sex discrimination actually undermines Title VII because the employee would be asking for protection *not* because he or she is a member of one of the two identifiable groups but because he or she desires to *switch from one group to another*.[170] In effect, to state that "sex" discrimination includes "gender identity" is to say that a person can be a member of *both* of the two, identifiable groups and still assert a discrimination claim against *one* of the two, other identifiable

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[167] AM. PSYCH. ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 2 (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

[168] According to WPATH, which is the leading organization setting standards for treatment of transgender individuals, seventy-seven to ninety-four percent of all transgender youth eventually align their gender identity with their biological sex. THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 11 (7th ed. 2012).

[169] Ronald S. Katz & Robert W. Luckinbill, *Changing Sex/Gender Roles and Sport*, 28 STAN. L. & POL'Y REV. 215, 218–20 (2017).

[170] The fluidity of gender also means it is not easily identifiable. *See id.* at 216–20 (identifying sixteen currently used gender identities in society). In fact, including "gender identity" within "sex" discrimination would permit an individual whose gender identity is consistent with his biological sex to still argue that he was subject to "gender identity" discrimination if he *believes* his employer perceived him to be a different gender identity. Because of gender identity's fluidity, there is, in essence, no objective standard by which to determine whether something constitutes "sex" discrimination.

groups. For example, a man who is a biological member of one group (males) but who thinks he is a member of the other identifiable group (females) can assert a discrimination claim either as a man or as a woman. The Court's jurisprudence has made clear that Title VII ensures that a person is not discriminated against in the workplace based on the fact that he or she is a member of *one* of two identifiable groups who is subject to discrimination because he or she is a member of *that* group.[171]

Finally, including sexual orientation and gender identity within sex discrimination does not serve the purposes of Title VII's prohibition against sex discrimination. Significantly, a refusal to hire homosexual or transgender employees is not "a covert means of limiting employment opportunities for men or for women as such; a minority of both men and women are gay, and discriminating against them discriminates against *them*, as gay people, and does not differentially disadvantage employees or applications of either sex."[172] That is very different than other types of "sex-plus discrimination that single out for disfavored status traits that are, for example, common to women but rare in men."[173] Thus, unlike discriminating against women, as a class, based on the notion that they should stay at home—which is rooted in their biologically distinct reproductive capacities—sexual orientation discrimination is not rooted in any distinction between men, as a class, and women, as a class. Rather, it is based on notions about how all people (men and women alike) should behave sexually.[174] To the extent such beliefs categorize people, it is not based on their sex, but rather on their sexuality.

Similarly, to treat gender identity discrimination as sex discrimination is based on a refusal to treat sex as binary and biologically based. Rather, it will require an employer to be entirely blind to an employee's biological sex, which the Supreme Court has never required.[175] Stephens' case highlights this point.

Stephens, who is a biological male, argued that Harris Funeral Homes engaged in discrimination because Harris Homes considered Stephens a male in order to conclude that Stephens should not be able to identify and present as a woman at work.[176] In other words, Stephens desired to penalize Harris Homes because it expected its employees to gender identify consistent with their biological sex. Now that Stephens'

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171 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).

172 Zarda v. Altitude Express, Inc., 883 F.3d 100, 152 (2d Cir. 2018) (Lynch, J., dissenting).

173 *Id.* at 152.

174 *Id.* at 157.

175 *Id.* at 149 n.15.

176 *See* Brief for Respondent Aimee Stephens at 25, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 18-107) ("Harris Homes's owner's repeated explanation that he fired Ms. Stephens because he viewed her as 'a man' makes explicit that he fired her 'because of [her] sex'"),

claims are considered sex discrimination, employers will be required to view their employees as asexual—thus giving employees the freedom to identify and present as either sex, based on their *mental* sense of self. However, the Supreme Court has consistently held that people fall into one of two, separately identifiable categories—male and female—and stated that Title VII's prohibition against "sex" discrimination does *not* require androgyny or asexuality.[177] The *Bostock* Court did not address this inconsistency in its decisions or explain how to reconcile the two opinions going forward.

3. Sexual Orientation and Gender Identity Discrimination Is Not Per Se Sex Stereotyping.

Although the majority opinion did not address the issue of whether sexual orientation or gender identity is a form of sex stereotyping, the lower court opinions did, which is why Justice Alito addressed it in his dissent.[178] In *Price Waterhouse v. Hopkins*, the Court concluded that sex stereotyping is a form of sex discrimination.[179] Specifically, sex stereotyping is sex discrimination because "an employer . . . acts on the basis of a belief that a woman cannot be aggressive, or that she must not be."[180] Sex stereotyping is a form of sex discrimination because Congress intended to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[181] The Court explained that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[182] "[W]e are beyond the day when an employer could evaluate employees by assuming . . . that they matched the stereotype associated with *their group*."[183] When an employer refuses to hire someone based on a stereotype of what men, as a class, or women, as a class, should look or act like, the employer "treats applicants or employees not as individuals but as members of a

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[177] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (stating that discriminating "on the basis of sex requires neither asexuality nor androgyny in the workplace").

[178] *Bostock*, 140 S. Ct. at 1763–64 (Alito, J., dissenting).

[179] 490 U.S. 228, 251 (1989).

[180] *Id.* at 250.

[181] *Id.* at 251 (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

[182] *Id.*

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

class that is disfavored for purposes of the employment decision by reason of a trait stereotypically assigned to members of that group as a whole."[184]

Sexual orientation and gender identity discrimination, however, are not examples of sex stereotyping prohibited by Title VII.

> [A]n employer who disfavors a male job applicant whom he believes to be gay does not do so because the employer believes that most men are gay and therefore unsuitable. Rather, he does so because he believes that most *gay* people (whether male or female) have some quality that makes them undesirable for the position, and that because this applicant is gay, he must also possess that trait.[185]

The employer is "not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women."[186] Stated differently, "heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all."[187]

Discrimination based on sexual orientation is not discrimination based on the "belief about what men or women ought to be or do," but rests on the "belief about what *all* people ought to be or do—to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex."[188] Such beliefs are different than stereotypes about how all men and women (regardless of sexual orientation) should behave. Similarly, "gender identity" discrimination is not an example of sex stereotyping prohibited by Title VII. An employer who disfavors a biologically male applicant who identifies as a female is not discriminating against the prospective employee because he is male, but because he refuses to identify consistent with his biological sex.

Admittedly, the employer is acting on the assumption that a biological male will state he is a male and a biological female will state she is a female. But, the employer is not deploying a stereotype about men or women to the disadvantage of either sex. In fact, the employer is not deploying a sex-cased stereotype at all; rather, the employer believes people should identify themselves consistent with their biological sex, regardless of whether their biological sex is male or female. Disparate

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[184] Zarda v. Altitude Express, Inc., 883 F.3d 100, 157 (2d Cir. 2018) (Lynch, J., dissenting).

[185] *Id.*

[186] *Id.* at 158.

[187] Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 370 (7th Cir. 2017) (Sykes, J., dissenting).

[188] *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting).

treatment of women, as a class, or men, as a class, is the focus of Title VII. To conclude that discrimination based on "gender identity" is subsumed within "sex" discrimination is to penalize an employer for expecting biological males to identify as males and biological females to identify as females. Nothing in Title VII's history sought to reach that far.[189]

III. CHALLENGES FOR THE FUTURE

Justice Alito chastises the majority opinion as "irresponsible" for its "brusque refusal to consider the consequences of its reasoning."[190] Significantly, the decision has significant legal and policy implications that cannot be properly balanced and considered now that the Court has stepped in to cut short the policy-making process. If the Court had allowed the legislative process to run its course, Congress could have considered the competing interests at stake and, perhaps, found ways to accommodate some of those interests. But, by intervening, the Court has "greatly impeded—and perhaps effectively ended—any chance of a bargained legislative solution."[191]

Justice Alito's dissenting opinion aptly described some of the significant, pressing legal and policy issues implicated by the Court's decision.[192] Those issues include privacy concerns in bathrooms, locker rooms, and college housing; whether biological men can compete in women's high school, college, or professional sports; employment decisions by religious organizations; health care decisions; freedom of speech; and constitutional standards for sex discrimination claims. Other issues not mentioned by the dissenting opinions also exist, including parental choice issues in public schools and proper medical treatment of transgendered prisoners.[193]

Restrooms and Locker Rooms. In the past few years, there have been a growing number of cases involving transgendered students who wish to use the restroom or locker room that is consistent with their gender identity rather than biological sex. For example, in a Wisconsin case, a high school girl who identified as a boy sued the school district after the school she attended refused to permit her to use the boys'

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189 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1757–58 (2020) (Alito, J., dissenting).

190 *Id.* at 1778.

191 *Id.*

192 *Id.* at 1778–83.

193 *See* Parents for Priv. v. Dall. Sch. Dist. No. 2, 326 F. Supp. 3d 1075, 1108–09 (D. Or. 2018) (discussing the types of choices that parents are allowed to make in their children's education); Tay v. Dennison, 457 F. Supp. 3d 657, 665–66, 670, 673 (S.D. Ill. 2020) (illustrating an example of a prisoner who wanted to transition to female who felt he was in danger as a male prisoner).

restroom.[194] The student alleged in her complaint that she would be humiliated if required to use the girls' restroom.[195] The school district reached an $800,000 settlement for its "discrimination."[196] In a similar case arising out of Florida, the district court specifically held that a transgendered student's interest in using the restroom consistent with the student's gender identity outweighed the school's interests in privacy for students.[197]

What makes these cases particularly interesting (or concerning) is that in earlier sex discrimination cases before the Supreme Court, it was *unquestioned* that men and women would have separate bathroom, sleeping, and changing facilities. For example, in writing for the majority of the Court in *United States v. Virginia*, Justice Ginsburg explained that in requiring Virginia Military Institute to become coeducational, it "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."[198] Even before that, when critics of the Equal Rights Amendment asserted that it would require unisex facilities, then-Professor Ruth Bader Ginsburg explained that a ban on sex discrimination would *not* require such results: "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."[199] Now, lower courts are reaching the opposite conclusion: that in the face of a claim of gender identity discrimination, the privacy interests of fellow students in separate places to disrobe or perform personal bodily functions is outweighed by the interests of the transgender student.[200] One court has stated that "[a] transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."[201]

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[194] Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ., 858 F.3d 1034, 1038–39 (7th Cir. 2017).

[195] Complaint at 13, A.W. v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 2:16—cv-00943 (E.D. Wis. Oct. 3, 2016).

[196] Jacey Fortin, *Transgender Student's Discrimination Suit is Settled for $800,000*, N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/us/transgender-wisconsin-school-lawsuit.html.

[197] Adams v. Sch. Bd. of St. John's Cnty., 318 F. Supp. 3d 1293, 1314–15 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286 (11th Cir. 2020).

[198] United States v. Virginia, 518 U.S. 515, 550 n.19 (1996).

[199] Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21, https:www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/Ginsburg.jpg [https://perma.cc/K667-9TTQ].

[200] Parents for Priv. v. Dall. Sch. Dist. No. 2, 326 F. Supp. 3d 1075, 1099–101 (D. Or. 2018).

[201] Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1052 (7th Cir. 2017).

Assuming sex discrimination in Title VII will mean the same for other federal statutes, in resolving these cases post-*Bostock*, the focus will be on the meaning of the majority's statement that future Title VII challenges will turn on "differences in treatment that injure protected individuals."[202] The plaintiffs in the cases challenging the sex-segregated restrooms and locker rooms assert that they are harmed and stigmatized by the policies.[203] Thus, the Court will need to balance the competing interests of schools in respecting those privacy interests of students and the alleged harm to students in having to use a restroom or locker room consistent with their biological sex.

The first two federal courts of appeal to decide the restroom issue post-*Bostock* concluded that a district policy requiring students to use a single-stall restroom or the restroom that corresponded with the student's biological sex violated Title IX as well as the Equal Protection clause of Fourteenth Amendment.[204] In reaching its decision, the Fourth Circuit Court of Appeals concluded that the policy constituted sex-based and transgender-based discrimination, both of which required heightened scrutiny review.[205] The dissent focused on the text of Title IX and its implementing regulations, which state that schools are permitted to provide "separate toilet, locker room, and shower facilities on the basis of sex,' so long as the facilities 'provided for students of one sex shall be comparable to such facilities provided for students of the other sex."[206] The high school in that case "created three new unisex restrooms that allowed [Grimm], as well as the other students, the privacy protected by separating bathrooms on the basis of sex."[207] The Eleventh Circuit Court of Appeals adopted similar reasoning, concluding that the district policy was sex-based discrimination in violation of the Equal Protection Clause and Title IX.[208]

Housing. Following the same line of analysis as the locker room and bathroom cases, Justice Alito expressed concern that the Court's decision could lead to Title IX challenges against universities if they refuse to

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[202] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (majority opinion).

[203] *Whitaker*, 858 F.3d at 1045.

[204] *See* Adams v. Sch. Bd of St. Johns Cnty., 968 F.3d 1286, 1291–92 (11th Cir. 2020); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593–94 (4th Cir. 2020).

[205] *Grimm*, 972 F.3d at 607–08, 610.

[206] *Id.* at 632 (Niemeyer, J., dissenting) (quoting 34 C.F.R. § 106.33 (2019)).

[207] *Id.* at 635.

[208] *Adams*, 968 F.3d at 1303. The dissent took issue with the majority's reliance on *Bostock* for its conclusion that the policy violated Title IX. *Id.* at 1311 (Pryor, J., dissenting). In particular, the majority said the safe harbor in Title IX that permits schools to have separate restrooms based on sex does not explain whether "sex" means biological sex or gender identity. *Id.* at 1309 (majority opinion). Looking at the historical context of Title IX, the dissent stated it is "unsurprising" that sex in Title IX did not mean gender identity. *Id.* at 1320 (Pryor, J., dissenting).

permit students to room together who are the opposite biological sex.[209] The language of Title IX provides that schools can maintain "separate living facilities for the different sexes."[210] However, if "sex" is interpreted to mean the gender a student identifies as, then schools would possibly engage in sex discrimination if they refuse to permit a biological male who identifies as a female to room with a biological female.[211] Justice Alito also speculated that similar claims could be asserted under the Fair Housing Act, which prohibits sex discrimination.[212]

Women's sports. One issue that has already resulted in at least two lawsuits involves female athletes who have been forced to compete alongside students with significant biological or hormonal advantages.[213] For example, biological males who identify as females have been permitted to race against biological females despite the significant size and strength advantage.[214] Conversely, some biological females may be forced to compete against other biological females who are in the process of transitioning and, thus, taking testosterone.[215] To the extent Title IX embraces the same meaning of "discrimination based on sex" as does Title VII, then *Bostock* would be strong evidence that prohibiting men who identify as women from competing on women's teams constitutes sex discrimination. Yet, as recent stories have highlighted—permitting men who identify as women to compete in women's sports poses a risk of injury to women and has deprived women of college scholarship opportunities as the men take top spots in the races.[216]

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[209] *Bostock* v. Clayton Cnty., 140 S. Ct. 1731, 1780 (Alito, J., dissenting).

[210] 20 U.S.C. § 1686.

[211] *Bostock*, 140 S. Ct. at 1780 (Alito, J., dissenting).

[212] *Id.*

[213] *See* Bianca Stanescu, *Transgender Athletes Don't Belong in Girls' Sports. Let My Daughter Compete Fairly.*, USA TODAY, https://www.usatoday.com/story/opinion/2020/06/19/transgender-athletes-robbing-girls-chance-win-sports-column/4856486002/ (June 19, 2020, 9:32 AM) (discussing a lawsuit against transgender inclusion in sports); Julie Moreau, *Idaho's Transgender Sports Ban Challenged in Federal Court*, NBC NEWS (Apr. 16, 2020, 3:43 PM), https://www.nbcnews.com/feature/nbc-out/idaho-s-transgender-sports-ban-challenged-federal-court-n1185381 (discussing a lawsuit in favor of transgender inclusion in sports).

[214] *See* Stanescu, *supra* note 213 (discussing the unfair advantage biological men gain when they compete in women's sports); Kaeley Triller, *Male Transjacking Will Ultimately End Women's Sports*, FEDERALIST (Dec. 4, 2019), https://thefederalist.com/2019/12/04/male-transjacking-will-ultimately-end-womens-sports/ (positing that allowing transgender athletes in women's sports is patently unfair to women who are forced to compete against men).

[215] *Bostock*, 140 S. Ct. at 1779–80 (Alito, J., dissenting) (noting that the majority's decision may force women to compete against females taking male hormones as they transition to male).

[216] *See* Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions'*, N.Y. TIMES, https://www.nytimes.com

In one of the first reported decisions addressing this question, the federal district court in Idaho concluded that transgender athlete was likely to succeed on the student's claim that the state law requiring college athletes to play on teams that corresponded with their biological sex violated the Equal Protection clause.[217] Ruling on plaintiffs' motion for preliminary injunctive relief, the court concluded that plaintiffs were likely to succeed because "[d]efendants have not offered evidence that the Act is substantially related to its purported goals of promoting sex equality, providing opportunities for female athletes, or increasing female athlete's access to scholarship."[218] In reaching that conclusion, the court did not rely on the purpose behind laws providing equal access to sports for women.[219] Instead, the court looked at the relatively small number of biological men who presently seek to compete as women and the lack of "compelling evidence" that biological women will be at a disadvantage by permitting biological men to compete on women's teams.[220]

In addition to the issues raised by high school and collegiate athletes, Justice Alito explained in his *Bostock* dissent that men and women could bring Title VII employment discrimination suits against professional sports teams who discriminate against an individual based on gender identity.[221] While it is possible that the employers might succeed under the bona fide occupational qualification exception, the exception has been interpreted very narrowly.[222] Thus, a biological male who identifies as a female could sue if denied employment with the WNBA based on his gender identity. According to the Supreme Court's *Bostock* decision, it seems logical for a court to conclude that it constitutes sex discrimination to prevent a man who thinks he is a woman from playing on a women's basketball team.

Employment by religious organizations. Many religious organizations hold strong religious beliefs that sexual relations outside the confines of a marriage between one biological male and one biological

/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html (Aug. 19, 2020) (discussing the lost scholarship opportunities for females when transgender males are allowed to compete with females).

[217] Hecox v. Little, No. 1:20-cv-00184, 2020 WL 4760138, at *39 (D. Idaho Aug. 17, 2020). In *Hecox*, Idaho passed a law mandating that all state-funded schools and colleges designate players for teams based on their biological sex. *Id.* That conflicted with the NCAA policy permitted a male to compete as a female after one year of hormone treatment. *Id.* at *1.

[218] *Id.* at *37.

[219] *Id.* at *30.

[220] *Id.* at *30–31.

[221] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1780 (2020) (Alito, J., dissenting).

[222] *Id.* (referring to 42 U.S.C. § 2000e-2(e)).

female is a sin.[223] Similarly, they believe that God created people as male and female and sex reassignment surgery is immoral.[224] A Supreme Court opinion issued after *Bostock* hopefully answers the question of whether religious schools can engage in gender identity and sexual orientation discrimination in hiring of their teachers and ministers. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court held that "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[225] This "ministerial exception" to the laws prohibiting employment discrimination recognizes that "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[226]

The questions left unanswered after *Bostock* and *Our Lady of Guadalupe* are whether religious organizations can engage in sex, sexual orientation, and gender identity discrimination with respect to roles outside ministers, teachers, and other faith leaders. The answer to those questions rest in the outcome of a court's balancing of First Amendment rights against the asserted interests in non-discrimination.

Healthcare. Controversies surrounding medical professionals involve two sides of the same coin: (1) prohibiting medical professionals from taking nonhormonal or surgical steps they believe would help a person struggling with gender identity issues, or (2) requiring medical professionals to perform medical procedures they believe violate their duty to "do no harm."[227] By way of example, "[t]he claims concerning

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[223] *See* Amy Orr-Ewing, *What Is Wrong with Sex Before Marriage?*, ZACHARIAS TRUST, https://www.zachariastrust.org/what-is-wrong-with-sex-before-marriage?%20 (last visited Aug. 26, 2020) (explaining why Christians adhere to the Biblical standard for sexual relations outside of marriage).

[224] *See Bostock*, 140 S. Ct. at 1781 (Alito, J., dissenting) (discussing the conflict between the moral policies of religious schools and the Title VII claims that faculty members may now be able to claim); *see also Genesis* 5:2 (New International Version) ("He created them male and female and blessed them.").

[225] 140 S. Ct. 2049, 2069 (2020).

[226] *Id.* at 2064.

[227] In addition to various state laws prohibiting discrimination in the provision of medical services, the Patient Protection Affordable Care Act prohibits sex discrimination by "'any health program or activity' that either receives federal financial assistance or is administered by a federal agency." Walker v. Azar II, No. 20-CV-2834, 2020 WL 4749859, at *1 (E.D.N.Y. Aug. 17, 2020) (quoting 42 U.S.C. § 18116(a)). In 2016, the U.S. Department of Health and Human Services, under President Obama, implemented a rule defining "on the basis of sex" to include sex stereotyping and gender identity. *Id.* In 2020, under President Trump, the U.S. Department of Health and Human Services adopted a proposed rule eliminating sex stereotyping and gender identity from the definition of discrimination "on

denial of care have included a hospital's refusal to perform a double mastectomy on the healthy breasts of a female college student,"[228] a physician's refusal to provide female hormones to a male,[229] a hospital's refusal to perform a hysterectomy on a healthy uterus,[230] and a hospital's refusal to perform chest reconstruction surgery on a female who had her healthy breasts removed as part of her transition to adopting a male identity.[231] In fact, after *Bostock*, a biological female sued Catholic Hospitals for its refusal to remove a healthy uterus of a woman who wants to transition to a male body.[232] The complaint specifically cited *Bostock* in support of the plaintiff's claims.[233]

Forcing medical professionals to perform these procedures violates the rights of conscience medical professionals hold to help heal their patients. In some situations, the policies also violate the free speech and free exercise rights of medical professionals. Not only are doctors being sued for their refusal to surgically alter or remove healthy body parts, but licensed mental health professionals are increasingly being prohibited from counseling minors who are struggling with *unwanted* gender confusion or same-sex attractions.[234] Several states prohibit mental health providers from counseling patients to help them align their gender identity with their biological sex.[235] At least twenty states and a host of municipalities similarly prohibit licensed mental health providers from counseling patients who are struggling with unwanted same-sex

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the basis of sex." *Id*. at *2–3. Two district courts have granted preliminary injunctive relief preventing implementation of the 2020 rule change. Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., No. 20-1630, 2020 WL 5232076, at *1 (D.D.C. Sept. 2, 2020); *Walker*, 2020 WL 4749859, at *1.

[228] Brief of Amicus Curiae Liberty Counsel in Support of Petitioner at 31, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Aug. 23, 2019).

[229] Keren Landman, *Doctors Refuse to Treat Trans Patients More Often Than You Think*, VICE (Jan. 29, 2018, 6:53 PM), https://www.vice.com/en/article/j5vwgg/doctors-refuse-to-treat-trans-patients-more-often-than-you-think.

[230] Samantha Schmidt, *Transgender Man Sues University of Maryland Hospital After It Canceled His Hysterectomy*, WASH. POST (July 17, 2020, 12:48 PM), https://www.washingtonpost.com/dc-md-va/2020/07/17/transgender-hysterectomy-lawsuit-maryland/.

[231] Amy Littlefield, *Meet the Trans Law Student Suing His Doctor for Canceling His Gender Affirming Surgery*, REWIRE (Jan. 3, 2018, 5:08 PM), https://rewire.news/article/2018/01/03/meet-translaw-student-suing-doctor-canceling-genderaffirmation-surgery/.

[232] Cath. News Agency Staff, *Transgender Lawsuit Against Catholic Hospital Cites New U.S. Supreme Court Precedent*, CATH. NEWS AGENCY (July 20, 2020, 5:47 PM), https://www.catholicnewsagency.com/news/transgender-lawsuit-against-catholic-hospital-cites-new-us-supreme-court-precedent-29681.

[233] *Id.*

[234] *See* Rena M. Lindevaldsen, *An Ethically Appropriate Response to Individuals with Gender Dysphoria*, 13 LIBERTY U. L. REV. 295, 296, 318 & n.2 (2019) (identifying the state statutes that prohibit the counseling of minors to choose their biological sex and discussing court decisions that have ruled that parents do not have the right to interfere with an overtly sexual school curriculum).

[235] *Id.* at 296.

attractions.[236] Instead, the counselors can only affirm existing gender identity or sexual orientation, *even if the patient does not desire that gender identity or sexual attraction*. Thus, youth who need help working through natural feelings during their formative years are denied that help.[237]

Freedom of Speech. One situation arising with some frequency is how people must address someone who identifies as a gender different than his or her biological sex. In a litigated case that is on appeal to the Sixth Circuit Court of Appeals, "Nicholas K. Meriwether, a philosophy professor at Shawnee State University, received a written warning from the university for violating its nondiscrimination policies because he refused to address a transgender student using the student's preferred gender identity title and pronouns."[238] Although he addressed other students by "Mr." or "Ms.," Professor Meriwether referred to the transgender student by the student's last name only so as to avoid the pronoun issue altogether. Meriwether lost his administrative appeal of that disciplinary action. He then "filed . . . suit against the Trustees of Shawnee State University and several Shawnee State University officials . . . for violating his constitutional rights," including rights to free speech and free exercise of religion under the state and federal constitutions.[239] The district court dismissed all his federal claims and "decline[d] to exercise supplemental jurisdiction over [his] state claims."[240] In an Oregon case that pre-dated *Bostock*, a transgender schoolteacher won a $60,000 settlement after coworkers allegedly failed to address a biological male teacher as "they."[241] In the settlement, the school also agreed to build gender-neutral restrooms at all district schools.[242] An Indiana school teacher was forced to resign because he refused to refer to students by

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[236] *See Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy (last visited Aug. 26, 2020) (listing the number of states that have bans on conversion therapy).

[237] *See* Lindevaldsen, *supra* note 234, at 318–19 (discussing the legislative efforts to ban such counseling and the court decisions involving challenges to those bans); *cf.* Pickup v. Brown, 740 F.3d 1208, 1230, 1236 (9th Cir. 2014) (concluding that speech by medical professionals is exempt from First Amendment protection before upholding a ban prohibiting counseling to individuals who would like to align their gender identity with their biological sex), *abrogated by* NIFLA v. Becerra, 138 S. Ct. 2361 (2018); King v. Governor of New Jersey, 767 F.3d 216, 220 (3d Cir. 2014) (affirming a ban on counseling to help minors deal with unwanted same-sex attractions), *abrogated by NIFLA*, 138 S. Ct. 2361 (2018).

[238] Meriwether v. Trs. of Shawnee State Univ., No. 1:18-cv-753, 2020 WL 704615 at *1 (S.D. Ohio Feb. 12, 2020), *appeal filed*, No. 20-3289 (6th Cir. Mar.16, 2020).

[239] *Id.*

[240] *Id.*

[241] Bradford Richardson, *Transgender Teacher Wins $60k Settlement for Co-Workers' Improper Gender Pronouns*, WASH. TIMES (May 25, 2016), https://www.washingtontimes.com/news/2016/may/25/transgender-teacher-awarded-60k-improper-pronouns/.

[242] *Id.*

their chosen gender identity rather than their biological sex.[243] Initially, he reached an agreement with the school where he would refer to all students by their last name rather than a pronoun.[244] He was then told that he would have to use the student's preferred pronoun.[245]

The anti-bullying and anti-discrimination policies, even outside the school context, leave no room for disagreement. For example, New York City recently passed an ordinance that requires employers, landlords, and other businesses to use the preferred name and pronoun of the employee, tenant, or client regardless of an individual's biological sex.[246] Noncompliance can be met with fines up to $250,000.[247] Justice Alito cited a federal case from California where the district court held that a hospital staff's refusal to use preferred pronoun violates the Affordable Care Act.[248]

The controversies surrounding business owners forced to accommodate a person's perceived gender identity mirror the legal issues that have arisen in the context of businesses forced to comply with sexual orientation nondiscrimination policies. When faced with public accommodations laws that prohibit discrimination based on sexual orientation, flower-shop owners, bakers, photographers, and wedding-venue providers, asserting that their sincerely-held religious beliefs prevent them from providing the service, have received court decisions, often involving sizeable monetary penalties, holding that they engaged in unlawful discrimination.[249]

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[243] Brianna Heldt, *Indiana Teacher Forced to Resign over Refusal to Use Transgender Pronouns*, TOWNHALL (June 6, 2018, 10:15 AM), https://townhall.com/tipsheet/brianna heldt/2018/06/06/indiana-teacher-forced-to-resign-over-refusal-touse-transgender-pronouns-n2487919.

[244] *Id.*

[245] *Id.*

[246] N.Y.C. Admin. Code § 8-102 (2019).

[247] *Id.*

[248] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1782–83 (2020) (Alito, J., dissenting) (citing Prescott v. Rady Child.'s Hosp. San Diego, 265 F. Supp. 3d 1090, 1098–100 (S.D. Cal. 2017)).

[249] *See* Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, No. 3:19-CV-851, 2020 WL 4745771, at *1 (W.D. Ky. Aug. 14, 2020) (prohibiting a county government from requiring an engagement and wedding photographer to use her services for same-sex weddings); State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1212, 1237 (Wash. 2019) (holding that a flower shop owner discriminated by not providing her services for a same-sex wedding); Gifford v. McCarthy, 137 A.D.3d 30, 34, 38, 41–42 (N.Y. App. Div. 2016) (holding that wedding venue owners could not refuse their services to a same-sex couple); Klein v. Oregon Bureau of Lab. & Indus., 410 P.3d 1051, 1056–57 (Or. Ct. App. 2017) (holding that bakery owners who refused to bake a wedding cake for a same-sex couple were sexually discriminating the couple); Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017) (holding that wedding videographers could be required by law to extend their services to same-sex couples); Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (comparing a wedding photographer's sexual discrimination to racial discrimination).

At least one business owner has been subjected to litigation involving claims that he engaged in discrimination based on gender identity and sexual orientation. On the same day that Jack Phillips of Masterpiece Cakeshop obtained a favorable ruling from the Supreme Court for refusing to bake a custom cake for a same-sex wedding ceremony, he had a complaint filed against him at the Colorado Civil Rights Commission for refusing to bake a cake celebrating a person's gender transition.[250]

In *Masterpiece*, the Court reversed the decisions below, which held that Phillips engaged in sexual orientation discrimination when he refused to bake a custom cake for a same-sex wedding reception.[251] During the entire litigation, which worked its way to the United States Supreme Court, Phillips asserted that his strong, religious beliefs prevented him from baking a custom cake celebrating a marriage contrary to the Bible.[252] Thus, when he was asked to bake the gender transition cake, he again refused based on his religious beliefs.[253]237.1 In June 2018, the attorney who requested the custom cake filed a complaint with the Colorado Civil Rights Commission against Jack Phillips and Masterpiece Cakeshop.[254]

These business situations implicate First Amendment free speech and free exercise of religion issues. When businesses are compelled to refer to a person by his or her gender identity rather than biological sex, or based on choices concerning sexuality, it infringes the free speech rights of the business. Similarly, forcing business owners to make business decisions that conflict with the sincerely-held religious beliefs of the owners of the entity raises free exercise of religion issues.[255]

Constitutional claims. As is often the case with constitutional jurisprudence, advocates will argue that *Bostock*'s decision to extend gender identity and sexual orientation within the scope of sex discrimination should apply to the Fourteenth and Fifth Amendment equal protection guarantees.[256] Justice Alito cited seven different complaints or decisions in which transgender individuals challenged a

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[250] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723, 1732 (2018); Scott Shackford, *Can a Baker Be Forced to Make a Transgender Celebration Cake?*, REASON (Aug. 15, 2018, 4:57 PM), https://reason.com/blog/2018/08/15/can-abaker-be-forced-to-make-a-transgen/.

[251] *Masterpiece*, 138 S. Ct. at 1723, 1732.

[252] *Id.* at 1723–24.

[253] Shackford, *supra* note 250.

[254] *Id.*

[255] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767, 2785 (2014) (holding that the United States Department of Health and Human Services ("HHS") mandate requiring closely held corporations to provide health-insurance coverage for methods of contraception contrary to the sincerely held religious beliefs of the companies' owners is unconstitutional under the Religious Freedom Restoration Act).

[256] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting).

variety of federal, state, or local laws on constitutional grounds.[257] If sex discrimination under the equal protection guarantees now includes sexual orientation and gender identity, those challenging a nondiscrimination law or ordinance will have the burden to demonstrate that the law does not advance a substantial government interest. Only time will tell whether free speech and free exercise of religion claims will win out over a state's interest in prohibiting sex discrimination (which would include sexual orientation and gender identity).

Schools. Controversies surrounding accommodations or nondiscrimination codes in schools based on sexual orientation or gender identity arise in the context of curriculum decisions, anti-bullying policies, access to restrooms and locker rooms, and counseling services. The three significant interests implicated in these situations are parental rights, the health and safety of children, and privacy interests. Although some courts have refused to acknowledge parents have rights concerning the curriculum once the parents make the choice to place their children in the public school,[258] the fact is that the goal of curriculum and anti-bullying policies is to change the way students perceive and understand sexuality and gender.[259]

As a promotional video for a public school in California demonstrates, the curriculum goes beyond trying to dispel certain stereotypes about what toys girls and boys should play with or what jobs they should pursue.[260] The schools encourage students to perceive sex and gender as fluid and, therefore, perhaps that they should identify as a gender inconsistent with their biological sex. In the video, the teachers explain the success they have had in getting children to reconsider their views on gender identity.[261] The video shows each young child in the classroom going up to the white board and placing an "x" on a line representing where on the spectrum they would place themselves in terms of identifying as a boy or a girl.[262] These curriculum decisions implicate the rights of parents to direct the education and upbringing of their children

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[257] *Id.*

[258] *See, e.g.*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1200, 1203–06, 1210–11 (9th Cir. 2005), *amended by* 447 F.3d 1187, 1191 (9th Cir. 2006) (holding that parents' privacy rights were not infringed when their children were asked sexually explicit questions by a student survey at a public school); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 529, 541 (1st Cir. 1995) (holding that a school assembly involving sexually explicit content did not violate the law).

[259] *Bullying of LGBT Youth and Those Perceived to Have Different Sexual Orientations*, STOPBULLYING.GOV, https://www.stopbullying.gov/sites/default/files/2017-09/lgbtyouthtipsheet.pdf (last visited Sept. 3, 2020).

[260] *Creating Gender Inclusive Schools Trailer,* NEW DAY FILMS, https:// https://www.newday.com/film/creating-gender-inclusive-schools (last visited Sept. 5, 2020).

[261] *Id.*

[262] *Id.*

on issues where many people have legitimate, conflicting opinions. In addition, when schools are introducing young, elementary-aged, students to these materials, parents might not be prepared to have their child exposed to some of these issues at such an early age.

The curriculum decisions also implicate the health of children. There is a medical consensus that seventy-seven to ninety-four percent of all children with gender dysphoria reconcile their gender identity to their biological sex as they progress through puberty into young adulthood.[263] When schools use curriculum emphasizing to children that gender confusion might mean they have a gender identity that does not match biological sex, they ignore the realities that such confusion is a natural part of becoming comfortable with being a male or female. As a result, there is concern that more children are opting to label themselves with a gender that is inconsistent with their biological sex, which can cause them to become entrenched in that belief. One expert explained the impact this way:

> It appears likely that being conditioned to believe you are the opposite sex creates ever-greater pressure to continue to present in this way, especially in young children. Once one has made the investment of coming out to friends and family, having teachers refer to you by a new name and pronoun, will it really be so easy to change back? Pediatric transition doctors in the Netherlands who first pioneered the use of puberty blockers in dysphoric children caution against social transition before puberty precisely because of the high desistance rates and the likelihood that social transition will encourage persistence.[264]

Steering children toward adopting a gender identity different than their biological sex is, at best, a risky course to pursue. Not only are there are many known medical and psychological health risks as they pursue a path that seeks to alter their sexual characteristics to align with their gender identity, but the dearth of research on the long-term consequences of puberty-suppressing and crossgender hormones should caution against so quickly encouraging children to explore a gender identity different than their biological sex.[265] However, given the strong deference afforded to decisions made by schools concerning curriculum,—and faced with a handful of federal court decisions holding that parents have no rights to

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[263] STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE, *supra* note 168.

[264] Lisa Marchiano, *Outbreak: On Transgender Teens and Psychic Epidemics*, 60 PSYCHOL. PERSP. 345, 351 (2017), https://www.tandfonline.com/doi/full/10.1080/00332925.2017.1350804.

[265] *Id.*

dictate curriculum choices,[266] the *Bostock* decision could usher in sweeping changes in schools that could potentially harm children.

CONCLUSION

Even though there are significant, negative legal and policy implications of adding sexual orientation and gender identity to Title VII's prohibition of sex discrimination, the potentially greater concern with the *Bostock* decision is its characterization as a case decided on a plain meaning interpretation. Under the guise of applying the ordinary meaning of "sex" in 1964, the Court ignored dictionary definitions; the common understanding; medical definitions; more than fifty years of federal circuit court decisions; several prior Supreme Court opinions treating sexual orientation distinct from sex; several failed attempts to amend Title VII to include sexual orientation and gender identity; the large number of other federal statutes that separately included sexual orientation and gender identity alongside sex as distinct categories; and several presidential Executive Orders that also separately listed sexual orientation and gender identity as categories distinct from sex.

Justice Kavanaugh asked the right question—"[s]o what changed"?[267] His answer: "the judges' decisions have evolved."[268] In essence, the majority opinion seized on the literal over ordinary meaning of the words to achieve a desired outcome that is contrary to history, legislative intent, and common sense. Justice Kavanaugh sounded the alarm about why the *Bostock* opinion should alarm us all:

> I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference.
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> Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictates—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law. Under the Constitution and laws of the United States, this Court is the

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[266] *See supra* note 258 and accompanying text.

[267] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1834 (2020) (Kavanaugh, J., dissenting).

[268] *Id.*

> wrong body to change American law in that way. The Court's ruling "comes at a great cost to representative self-government." And the implications of this Court's usurpation of the legislative process will likely reverberate in unpredictable ways for years to come.[269]

[269] *Id.* at 1836–37 (citations omitted).

"DO TO OTHERS WHAT YOU WOULD [*NOT*] HAVE THEM DO TO YOU": CALIFORNIA IS AN OUTLIER IN SANCTIONING EMOTIONAL APPEALS IN DECIDING BETWEEN LIFE AND DEATH

H. Mitchell Caldwell[*]
Allison Mather[**]

Abstract

Closing arguments by prosecutors that put jurors in the shoes of the victim are referred to as Golden Rule arguments. Such arguments are nearly universally prohibited because they replace rational and deliberative decision-making with a blatant appeal to jurors' emotions. The lone exception to this prohibition occurs in California, which condones such arguments during the penalty phase of capital trials when jurors are deciding between the life or death of a defendant. This Article calls for California, the only state sanctioning such arguments expressly, to abandon its practice and join the other death penalty states in prohibiting Golden Rule arguments at all phases of trial.

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INTRODUCTION

"[L]ook at [the knife] and think about what it would feel like if it went two inches into your neck."[1]

"Put yourselves in [Kristy Vert's] position there. She's lying on the floor in her room all by herself, bound. Her neck just slit."[2]

> Just put yourself in her shoes . . . . [P]ut yourselves where she was. And you're in that little daybed in the middle of the night . . . [H]e pushes you down on the bed, covers your little face with a pillow, starts to suffocate you, smother you, . . . [a]nd you're twisting and turning and gasping for breath, . . . [a]nd it goes on and it goes on and it goes on until you're unconscious.[3]

These arguments are referred to as Golden Rule arguments. The prohibition on Golden Rule arguments bars prosecutors during closing argument from urging the jurors to place themselves, their families, or other loved ones in the position of the victim.[4] Situating jurors or those near and dear to them in the dire circumstances of the victim, especially in the most severe criminal cases, is an appeal to their most gut-wrenching, darkest instincts. For that reason, these arguments are impermissible because they replace rational and deliberative decision-making with a blatant appeal to the jurors' emotions.[5]

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[1] Davis v. State, 604 So. 2d 794, 797 (Fla. 1992) (second alteration in original).

[2] Transcript of Daily Trial Proceedings at 2929, People v. Brown, No. 700200 (Cal. App. Dep't Super. Ct. 2012).

[3] State v. Perkins, 481 S.E.2d 25, 39 (N.C. 1997).

[4] Braithwaite v. State, 572 S.E.2d 612, 620 (Ga. 2002).

[5] Anne-Marie Mitchell & Jay Gulotta, *The Golden Rule in Closing Arguments: Is it*

The lone exception to the prohibition on Golden Rule arguments occurs in the penalty phase of a death penalty trial.[6] And that lone exception is expressly sanctioned only in California.[7] To be clear, at the juncture when the jurors are deciding whether the defendant should be executed or sent to prison for life without the possibility of parole, California prosecutors can appeal to the passions and prejudices of the jurors by urging them to imagine themselves or their loved ones at the mercy of the defendant.[8] Ordinarily, criminal sentencing is the exclusive province of judges without any jury involvement or input; but in capital cases, the defendant's fate rests in the hands of a jury.[9] Considering the gravity of the penalty decision in capital cases, permitting prosecutors to incite jurors' passions sets the stage for jurors to turn their life-or-death decision from one that is thoughtful, rational, and precise into one appealing to emotional, and even vengeful, instincts.

Of the twenty-eight death penalty states, only California sanctions such arguments.[10] Twelve of the twenty-eight death penalty states prohibit such arguments,[11] fourteen states have not litigated the issue,[12] and one state has offered mixed decisions concerning the propriety of Golden Rule arguments at the penalty phase of capital cases.[13]

This Article analyzes the law and the rationale prohibiting Golden Rule arguments during civil trials and the guilt phase of criminal trials, and then it turns to the court-created rationale for allowing such arguments during the penalty phase of capital trials. Then it explores whether the purposes of punishment are in any way served by permitting Golden Rule arguments at the penalty phase. Finally, this Article

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Still a Rule?, AM. BAR ASS'N (Feb. 8, 2012), https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2012/020812-golden-rule-closing-arguments/; *Braithwaite*, 572 S.E.2d at 620.

[6] *See* People v. Jackson, 199 P.3d 1098, 1117 (Cal. 2009) (explaining that juries can take emotional arguments into consideration when making decisions in the penalty phase of a death penalty trial).

[7] *See infra* Appendix (showing that California is the only state that clearly allows Golden Rule arguments in the penalty phase of a death penalty trial).

[8] *Jackson*, 199 P.3d at 1117.

[9] *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/sentencing/. While the jury's decision is advisory, with the court rendering the final decision, the jury's decision is rarely upset. *See* Andrew R. Ford, *Judges Do It Better: Why Judges Can (and Should) Decide Life or Death*, 124 DICK. L. REV. 463, 467 (2020) (explaining that only five states permit judges to interfere with jury advisory verdicts and do not allocate to jurors the sole sentencing responsibility in capital cases).

[10] *Jackson*, 199 P.3d at 1117; *States and Capital Punishment*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 24, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.

[11] *See infra* Appendix.

[12] *See infra* Appendix.

[13] *See infra* Appendix.

concludes with a recommendation prohibiting such impactful emotional appeals from contaminating the sentencing phase of death penalty trials, not just in California, but also in those capital punishment states that have not yet litigated the issue or have yet to set forth clear guidelines.

I. HISTORY AND PROHIBITION OF GOLDEN RULE ARGUMENTS DURING THE GUILT PHASE

"[D]o to others what you would have them do to you . . . ."[14] The "Golden Rule" is a common mantra in civil society, standing for the principle that we should treat others the way we would want to be treated. It has biblical roots, stemming from Jesus's "Sermon on the Mount."[15] Jesus described this Golden Rule as the second greatest commandment: "Love your neighbor as yourself."[16] He emphasized this commandment in his parable about the Good Samaritan, which describes a man who went out of his way to take care of another who was his social enemy, demonstrating that we should show mercy to one another.[17]

Whereas most individuals strive to live according to the Golden Rule—treating others the way that they wish to be treated—that guiding principle is turned on its head in the context of trials. A Golden Rule argument is one that urges jurors to imagine themselves in the position of a party or victim and to give that party or victim the punishment they would mete out if they were the party or victim.[18] Should an individual who robs, rapes, or engages in reckless conduct be treated in kind? Should society, through the decision of a jury, do unto the wrongdoer as he has done to society? While our impulse and even anger might be tempted under certain circumstances to answer that question "yes," our rational, thoughtful side should temper that impulse.

While the disfavor of Golden Rule arguments began in civil trials,[19] presumably as a mechanism to prevent inflated awards,[20] such arguments

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[14] *Matthew* 7:12 (NIV).

[15] *Id.; see* Dale C. Allison, Jr., *The Structure of the Sermon on the Mount*, 106 J. BIBLICAL LITERATURE 423, 424–25 (1987) (noting that the Sermon on the Mount can be found in chapters five through seven of the book of Matthew).

[16] *Matthew* 22:39 (NIV). Jesus said that the first and greatest commandment is to "[l]ove the Lord your God with all your heart and with all your soul and with all your mind." *Matthew* 22:37–38 (NIV).

[17] *Luke* 10:29–37 (NIV).

[18] *See* Miller v. Kenny, 325 P.3d 278, 300 (Wash. Ct. App. 2014) ("A golden rule argument urges jurors to imagine themselves in the position of a party and to grant that party the relief they would wish to have for themselves.").

[19] *See* Chisolm v. State, 529 So. 2d 635, 639–40 (Miss. 1988) (explaining that Golden Rule arguments were prohibited in civil cases long before they were banned in criminal cases).

[20] Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1360 (1995).

are almost universally prohibited throughout the American legal system because they "pander towards jurors' sympathies and emotions" rather than encouraging jurors to decide cases fairly and impartially.[21] In civil trials, the Golden Rule principle quickly emerged to avoid jurors' awarding exorbitant damages:

> It is hard to conceive of anything that would more quickly destroy the structure of rules and principles which have been accepted by the courts as the standards for measuring damages in actions of law, than for the juries to award damages in accordance with the standard of what they themselves would want if they or a loved one had received the injuries suffered by a plaintiff. In some cases, indeed, many a juror would feel that all the money in the world could not compensate him for such an injury to himself or his wife or children.[22]

In the criminal context, prosecutors are prohibited from "urg[ing] jurors to identify individually with the victims with comments like '[i]t could have been you' the defendant killed or '[i]t could have been your children.'"[23] The reasoning behind the Golden Rule ban is fairly straightforward: "[t]he law is reason unaffected by desire."[24] Thus, "a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim."[25]

During the guilt phase of criminal trials, Golden Rule arguments are impermissible in both capital and non-capital cases.[26] Prosecutors may "not ask the jury to reach [a] conclusion by putting themselves in the victims' shoes, [or] . . . make an improper appeal to the jurors' sympathy for the victims."[27] Further, counsel may not threaten the jurors with

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[21] Mitchell & Gulotta, *supra* note 5. "The condemnation of Golden Rule arguments in both civil and criminal cases, by both state and federal courts, is so widespread that it is characterized as 'universal.'" People v. Vance, 116 Cal. Rptr. 3d 98, 110 (2010). This is also reflected in the commentary for Federal Rule of Evidence 403, which explains that evidence is unfairly prejudicial and thus should likely be excluded if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an *emotional* one." FED. R. EVID. 403 advisory committee's note (emphasis added).

[22] Bullock v. Branch, 130 So. 2d 74, 76 (Fla. Dist. Ct. App. 1961).

[23] Bedford v. Collins, 567 F.3d 225, 234 (6th Cir. 2009) (second and third alterations in original).

[24] *Politics by Aristotle – Book III*, CLASSICAL WISDOM, https://classicalwisdom.com /greek_books/politics-by-aristotle-book-iii/6/ (last visited Nov. 10, 2020) ("[T]he law is passionless . . . ."). A popular variant of Aristotle is "the law is reason free from passion." The Law is Reason, Free from Passion, LAWASPECT.COM, https://lawaspect.com/law-reason-free-passion (last visited Nov. 10, 2020).

[25] People v. Leonard, 157 P.3d 973, 1001 (Cal. 2007).

[26] People v. Vance, 116 Cal. Rptr. 3d 98, 105–06 (Cal. Dist. Ct. App. 2010).

[27] People v. Young, 445 P.3d 591, 612 (Cal. 2019).

possible consequences for themselves, their families, or their communities if they choose to render a verdict for a particular party, such as suggesting that the jurors put themselves in the shoes of someone who might run into the defendant on the street late at night.[28] Occasionally, during the guilt phase courts may allow Golden Rule arguments in limited circumstances, such as when the argument is "a reasonable rebuttal to defense counsel's argument, not an appeal to the jurors' sympathy for the victims."[29]

One example of an impermissible Golden Rule argument occurred in *People v. Vance*.[30] During the closing argument in the guilt phase of the capital case, the prosecutor asked the jurors "to walk in [the victim's] shoes. . . . in order to get a sense of what he went through."[31] The prosecutor then painted a vivid picture for the jurors of what the victim experienced:

> In order for you as jurors to do your job, you have to walk in [the victim's] shoes. You have to literally relive in your mind's eye and in your feelings what [the victim] experienced the night he was murdered. You have to do that. You have to do that in order to get a sense of what he went through. Can you imagine thinking about just hanging out with your friends, people who you think are your friends, driving them around in your car from place to place. Being told to drive to Palomares, thinking you're going for one reason, being completely unaware that there's another plan. Being told to turn into a dark driveway, no cars in sight. Being told to turn off your car engine, the lights, the music. Getting out of your car with the two people you thought up to that point were your friends, the one you just had met that night and the one you have been with before. And then suddenly, without warning, being jumped, being put into a choke hold, taken down to the ground and choked out. You're trying to gasp for air but the pressure from the choke hold doesn't let up. You don't know what's going on and at first you think it's a nightmare. . . . You don't know what's going on. How long are you conscious in this situation? When do you know to fight? When do you get to fight? What are you thinking to yourself at

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[28] *See* Hodge v. Hurley, 426 F.3d 368, 384 (6th Cir. 2005) (explaining that "the prosecutor's suggestion that the jur[ors] try to 'put [themselves] in the place of someone that might run into [the defendant] at night' is a version of the impermissible 'golden rule argument'").

[29] *Leonard*, 157 P.3d at 1001.

[30] 116 Cal. Rptr. at 102.

[31] *Id.* at 106–07.

that time, what did I do, why me. This hurts.[32]

As the jurors listened, the prosecutor asked them how they would feel if they suffered the same experience.[33] The appellate court held that this argument was impermissible because "[e]motion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument."[34]

In *People v. Amezcua*, the prosecutor's appeal to the jurors' sympathies during the guilt phase of the capital trial was also found impermissible: "Remember what it must have been like to be one of [the defendants'] victims being shot and choking and trying to get your last breath out while your blood is gurgling in your lungs. What it must be like to be one of those people."[35] Likewise, in *People v. Fields*, the prosecutor's guilt phase closing argument walked the jurors through a murder from the victim's perspective.[36] The prosecutor's narrative ended with gruesome imagery:

> You hear Gail beg the defendant not to shoot you again, and the defendant shoots you again. . . . Do you wonder about heaven, about God? You know there is no escape. The defendant shoots you more times. He states that you are not dead, and he has to make sure you are dead, and he hits you with an object on your head leaving triangular marks, probably the gun. And there are now four lacerations on your head. And it takes 10 or 15 minutes for you to die. Blood meanwhile spatters on your face.[37]

In *People v. Mendoza*, a capital case where the defendant murdered a child in the presence of several other children, the prosecutor during the guilt phase asked the jury:

> Do you remember the thing [the defendant] said to little Sandra just before he executed her with a gun at her head? Can you

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[32] *Id.* at 107. In *Vance*, the defendant put the victim in a chokehold, causing the victim to lose consciousness, and then the defendant and his friend tied the victim up, put him in the back of the defendant's car, and threw him off of a cliff into a ravine where he was found dead a few days later. *Id.* at 103–04.

[33] *Id.* at 107.

[34] *Id.* at 112 (quoting People v. Jackson, 199 P.3d 1098, 1117 (Cal. 2009)). The circumstances in *Vance* led the reviewing court to find that the prosecutor's comments were reversible error. *Id.* at 113.

[35] 434 P.3d 1121, 1145 (Cal. 2019).

[36] 673 P.2d 680, 700–01 (Cal. 1983) (holding that the prosecutor's use of a Golden Rule argument counted as misconduct even though it was ultimately not considered prejudicial).

[37] *Id.* at 700.

> imagine the terror that this child is going through, and that all the people are going through? Certainly the children. Can you imagine that terror? It's not in the courtroom. We're not here doing some scientific experiment. Imagine yourselves at the scene. And what does he do?[38]

"During the guilt phase of a criminal trial, . . . [such statements] appeal[ing] to the passions of the jurors by urging them to imagine the suffering of the victim" are clear grounds for a claim of prosecutorial misconduct.[39] These statements encourage the jurors to allow their emotions to prejudice what should be "an objective determination of guilt."[40]

Conversely, some Golden Rule arguments have escaped censure. For instance, in *People v. Lopez*, an appellate court found that the prosecutor's hypotheticals during the guilt phase of the capital trial did not violate the Golden Rule prohibition.[41] There, the prosecutor posed a hypothetical where she (the prosecutor)

> beat a juror with a flashlight in the . . . deliberation room. She then made her point that four years later the juror, having never again visited the jury room, might not remember such details as the magazines on the table or the color of the rug but might vividly remember that the assault took place in the jury deliberation room.[42]

Next, the prosecutor

> asked a juror to imagine going into the prosecutor's bedroom and remembering an unusual piece in the room, namely, a 'weird clock . . . made from the head of a baby doll.' The juror's recollection of that one highly distinctive item in the room . . . would tend to show his actual presence in the room containing that unusual item.[43]

The prosecutor used this hypothetical to show that the victim's testimony was credible because he remembered seeing an unusual item in the defendant's bedroom.[44] Neither scenario required asking "the jurors to

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38 171 P.3d 2, 8, 15 (Cal. 2007).

39 *Jackson*, 199 P.3d at 1117.

40 *Id.* (quoting People v. Stanbury, 846 P.2d 756, 780 (Cal. 1993)).

41 175 P.3d 4, 10–11 (Cal. 2008).

42 *Id.* at 11.

43 *Id.*

44 *Id.*

stand in the shoes of the victims, so as to evoke jury sympathy for the victims."[45] The prosecutor took great pains to distance the jurors from feelings of suffering or injury sustained by the victim in favor of a common sense argument. Accordingly, the reviewing court found these arguments did not violate the prohibition against Golden Rule arguments.[46]

II. THE RATIONALE FOR PERMITTING GOLDEN RULE ARGUMENTS DURING THE PENALTY PHASE OF CAPITAL TRIALS

In stark contrast, during the penalty phase of a capital trial, prosecutors are permitted "wide latitude."[47] In fact, the prohibition of Golden Rule arguments in California at only this particular phase of trial is subverted, and "[p]rosecutors may ask juries to put themselves in the shoes of the victim."[48] That rationale for this lone exception is set forth as follows:

> The situation is different [from the guilt phase], however, during the penalty phase. "'Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision. Emotion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument. But emotion need not, indeed, cannot, be entirely excluded from the jury's moral assessment.'"[49]

The jury's determination at the penalty phase turns "on the jury's moral assessment of those facts [and circumstances] as they reflect on whether [the] defendant should be put to death."[50] In the foregoing passage, the California Supreme Court stressed the idea of allowing the jury to hear all the relevant facts for the jurors to make that "moral assessment."[51] Of course, those facts include the underlying crime, as well as the circumstances of the crime like the number of victims, the callousness and brutality of the crime, and the extent of the defendant's

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[45] *Id.*

[46] *Id.*

[47] *See* People v. Peoples, 365 P.3d 230, 294 (Cal. 2016) (describing comments that "fell within the wide latitude permitted prosecutors during closing argument in the penalty phase of a capital trial").

[48] *Id.* at 294.

[49] People v. Jackson, 199 P.3d 1098, 1117 (Cal. 2009) (quoting People v. Leonard, 157 P.3d 973, 1009 (Cal. 2007)) (citations omitted).

[50] *Id.* (quoting People v. Haskett, 640 P.2d 776, 790 (Cal. 1982)).

[51] *Id.*

remorse, if any.[52] Without question, all are legitimate facts and circumstances jurors should consider in rendering their life-or-death decision. Further, the defendant's criminal background should be included, as well as the underlying circumstances of any prior crimes.[53] The degree of violence involved in any past offenses should also be part of the assessment: a thief should be distinguished from a highwayman.[54] Additionally, the circumstances of the defendant's life, including his childhood development, familial issues, and any other relevant background contexts should be considered.[55] And indeed, victim impact evidence could at least tangentially bear on the jury's life-or-death decision in that the lives of those left behind were directly impacted by the victim's death as a direct offshoot of the defendant's conduct.[56]

However, despite California's general acceptance of Golden Rule appeals during the penalty phase as pertaining to that moral assessment, prosecutors are not given carte blanche to infuse their arguments with inflammatory appeals to passion and prejudice.[57] California courts have

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[52] *See* CAL. PENAL CODE § 190.2(a)(3), (14) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.) (providing that circumstances of a defendant's crime such as the level of brutality and number of victims should be taken into consideration when sentencing in the penalty phase of a capital trial); *see also* CAL. PENAL CODE § 190.3 (West, Westlaw through Ch. 78 of 2020 Reg. Sess.) (providing other relevant factors that may be considered); People v. Crittenden, 885 P.2d 887, 923 (Cal. 1994) (allowing jurors to assess the defendant's remorse during sentencing).

[53] PENAL § 190.3.

[54] *See id.* (showing that the extremity of violence the defendant used in past offenses should be weighed when determining the sentence in the penalty phase of capital trials).

[55] *See, e.g.*, *id.* (guiding that the key circumstances of the defendant's life including his background, physical and mental state should be factored in when pronouncing a sentence in the penalty stage of a murder trial).

[56] *See Jackson*, 199 P.3d at 1117–18 (holding that a jury can consider the impact of a victim's death on his family when sentencing a defendant). In addition, the California Penal Code delineates several other factors for the trier of fact to consider. PENAL § 190.3. ("(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1. (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. (c) The presence or absence of any prior felony conviction. (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct. (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person. (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication. (i) The age of the defendant at the time of the crime. (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.").

[57] *See* People v. Haskett, 640 P.2d 776, 790 (Cal. 1982) (explaining that inflammatory language inviting irrational and subjective responses from the jury is not appropriate).

admonished that "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed."[58] But so long as the prosecutor's comments are relevant, brief, and do "not exceed the bounds of propriety," prosecutors are free to employ Golden Rule arguments.[59] Nonetheless, despite such assurances, some seemingly improper arguments escape censure. For example, in *People v. Jackson*, the prosecutor's penalty phase plea asking "the jurors during argument to think of how they would feel if someone they loved dearly died 'in a gutter' like the victim did, 'choking on his own blood,'" was not misconduct and constituted a permissible use of a Golden Rule argument at the penalty phase.[60] Likewise, in *People v. Slaughter*, the California Supreme Court held that it was proper during the penalty phase for the prosecutor to have prompted the jurors to

> Think about the sheer terror, think about Eddie Keith, who was driving down the road, looking for the next off-ramp, probably counting the money in his head already that they're going to make on this drug deal, when he hears gunshots go off in the car, and he says 'Oh, shit.' He realized something's happening and then he gets it in the back of his head. Put yourself in Jeff DeRouen's shoes when he hears that loud bang in the back seat and he turns to see what's going on and he gets it in the side of the head. You have to look and ask yourself what type of person would do this? What type of person would snuff out two young lives like you and I swat a fly, that fast?[61]

Even in states that do not allow Golden Rule arguments expressly at the penalty phase, courts blur the line of what constitutes a Golden Rule argument;[62] consequently, such states debatably have sanctioned such arguments.[63] For example, in *Davis v. State*, the Florida Supreme Court upheld the prosecutor's penalty phase closing argument:

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[58] *Id.* Courts have embraced that "[t]he Western philosophical tradition long insisted that emotions and reason were antithetical to one another: the more one could free oneself from emotional influences, the more rational one would be." Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1609–10 (2007).

[59] *Jackson*, 199 P.3d at 1118 (quoting People v. Medina, 906 P.2d 2, 52 (Cal. 1995)).

[60] *Id.* at 1116–18.

[61] 47 P.3d 262, 277–78 (Cal. 2002).

[62] Davis v. State, 928 So. 2d 1089, 1121–22 (Fla. 2005) (acknowledging that although the prosecutor may have crossed a line, because there was no prejudicial effect the claim that they were improper was dismissed).

[63] *Id.* (dismissing a claim brought against a lawyer for giving a seemingly Golden Rule argument, therefore inadvertently holding that Golden Rule arguments may be allowed in some circumstances).

> [W]e know that the injury to the neck occurred first. . . . Mr. Landis would have been conscious for approximately five minutes prior to his death. Folks, I ask you to do something. If any of you have a second hand on your watch, go back to the jury room and sit in silence, total silence for two minutes, not five, just two, and I suggest to you it is going to seem like an eternity to sit there and look at one another for two minutes. Contemplate Orville Landis and the time he spent, not two minutes, but closer to five minutes[,] with his throat cut, bleeding profusely, then with that man continuing the attack by repeatedly stabbing him in the chest with enough force to go through his body to the back five times breaking bones, with enough force in his back to have nine of the eleven stab wounds, again, through his breaking bones. And that two to five minutes to Orville Landis, I suggest to you, was like an eternity of pain, suffering and hell. That is cruel punishment, that is cruel treatment to the victim.[64]

While Florida courts do not allow such Golden Rule arguments at the penalty phase, and "the prosecutor's comments may have crossed the line separating proper argumentation from an improper appeal to the jurors' emotions,"[65] the court nonetheless upheld the defendant's conviction because the prosecutor's error was found to be harmless.[66]

However, the Florida Supreme Court's decision in *Garron v. State* represents a rare case in which penalty phase Golden Rule arguments—when made in conjunction with other inflammatory remarks—constituted sufficient error to result in a mistrial.[67] In *Garron*, the court held that the prosecutor's penalty phase closing argument remarks were "so egregious, inflammatory, and unfairly prejudicial" that they justified a new penalty proceeding:

> [Y]ou can just imagine the pain this young girl was going through as she was laying there on the ground dying. . . . Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom

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64 *Id.*

65 *Id.* at 1122. The court held that although it was a close question as to whether this constituted an improper Golden Rule argument, the defendant failed to establish prejudice and the comment did not affect "the fairness and reliability of the proceeding." *Id.*

66 *Id.* For a discussion on harmless error, see *infra* Conclusion.

67 528 So. 2d 353, 358–59 (Fla. 1988).

into the bedroom where she expired.[68]

In ordering a new penalty phase trial, the Florida Supreme Court held that "[w]hen comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument," and the prosecutor in this case had "overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct."[69]

III. THEORIES OF PUNISHMENT

Assuming that Golden Rule arguments foster more death penalty verdicts than such trials without Golden Rule arguments, do such arguments result in a societal benefit?[70] Do Golden Rule arguments serve a legitimate function within the criminal justice system? Perhaps it would be helpful to view such questions as they relate to the larger functions of punishment. Do such arguments serve any of the primary goals of punishment: rehabilitation, deterrence, or retribution?[71]

Given that the options during the penalty phase are limited to death or life without the possibility of parole, rehabilitation is rendered meaningless as it relates to any impact of a verdict influenced by Golden Rule arguments. Regardless of the jury's decision, whether it be death or a life sentence without the possibility of parole, society's efforts at rehabilitation are not advanced because the defendant, regardless of the outcome, will never be released back into society.[72] Consequently, Golden Rule arguments have no bearing on any question of rehabilitation.

Deterrence focuses on inhibiting conduct of both the particular offender after his release from confinement as well as that of society by

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[68] *Id.* (alterations in original). The prosecutor made several other prejudicial remarks, including "If Le Thi were here, she would probably argue the defendant should be punished for what he did," and "Ladies and gentlemen, I believe at this point, I would hope at this point, that the jurors will listen to the screams and to her desires for punishment for the defendant and ask that you bring back a recommendation that will tell the people of Florida, that will deter people." *Id.* at 359.

[69] *Id.* The court also noted that the instructions given by the trial court to disregard the inflammatory comments did not have "any impact in curbing the unfairly prejudicial effect of the prosecutorial misconduct." *Id.*

[70] To our knowledge, there is not empirical support for the precise impact that Golden Rule arguments have on the frequency of death penalty verdicts.

[71] *See* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.").

[72] *See* Graham v. Florida, 560 U.S. 48, 74 (2010) (explaining that since defendants sentenced to life without parole "are often denied access to vocational training and other rehabilitative services that are available to other inmates," rehabilitation is not the supporting rationale).

using the defendant as an example to others to avoid future crimes.[73] Deterrence operates by creating fear within any potential offenders that the defendant's punishment will be repeated if another engages in the same criminal behavior.[74] It follows that Golden Rule arguments urging a sentence of death may serve as a deterrent for others contemplating serious criminal behavior endangering others' lives. If, indeed, Golden Rule arguments increase the likelihood of a death sentence, then they may serve a purpose in furthering this goal of punishment. However, a life without the possibility of parole would perhaps offer a similar disincentive. Although empirical research is widely inconclusive as to whether a death sentence truly functions as a deterrent to serious crimes including murder,[75] nonetheless, deterrence as it relates to capital cases cannot be entirely dismissed for its limited value.

The theory of punishment for which Golden Rule arguments could serve as a catalyst is retribution.[76] The idea that a defendant should suffer an "eye-for-an-eye" punishment as suggested by Golden Rule arguments fits squarely within retribution as a punishment theory.[77] By rendering the jurors surrogates of those near and dear to the victim, a prosecutor is essentially arguing, "Imagine if he took your loved one's life in such a horrible way. Shouldn't he have to suffer the same fate?" If such arguments do lead to more death sentences, then indeed retribution as a goal has been accomplished. However, are we convinced that retribution should remain a societal goal? United States Supreme Court Justice Marshall addressed this in *Furman v. Georgia*: "Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming

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[73] *See* Jason Iuliano, *Why Capital Punishment Is No Punishment at All*, 64 AM. U. L. REV. 1377, 1382 (2015) (defining specific and general deterrence).

[74] *Id.*

[75] Empirical studies suggest that the death penalty may not really be an effective deterrent. *Id.* at 1393 ("[D]eterrence is not a sound constitutional justification . . . for two reasons. First, the empirical data overwhelmingly suggests that the death penalty does not have a deterrent effect. Second, people's sentiments towards the death penalty are not influenced by the existence of or lack of a deterrent effect."); Dwight Aarons, *The Marshall Hypothesis and the Rise of Anti-Death Penalty Judges*, 80 TENN. L. REV. 381, 392 (2013) ("[N]o reliable studies have established that the death penalty deters."); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 841 (2005) (describing the "profound uncertainty" about the deterrent effect of the death penalty); *see also id.* at 809 (summarizing studies finding that as to the effects of executions, rather than just presence of death penalty laws, "there are about as many states whose experiences are consistent with the deterrence hypothesis as with the antideterrence one.").

[76] *See* Iuliano, *supra* note 73, at 1394–95 (explaining that retribution has several meanings, including paying one's debt to society and punishing criminals "because, and only because, they *deserve* it").

[77] *Id.* (discussing revenge as a basis for the retributive theory of punishment).

synonymous with vengeance."[78]

The goals to be accomplished by allowing Golden Rule arguments are muted and do not speak to the larger questions concerning the efficacy of the convicting and sentencing processes. The American criminal justice system has built an elaborate—and for the most part accurate—mechanism for determining guilt. From the point of arrest, on through trial and the post-trial period, our system undertakes exhaustive measures to ensure a fair and accurate process, one which mandates, among other things, that those sitting as jurors rise above their emotions and base their verdicts on the law and facts presented at trial.[79] Such a mandate is crystallized in the charge we give jurors.[80] And yet in these particular capital cases, where we call upon jurors to literally make a life-or-death determination, California courts allow an emotional appeal to enter into the fray: an emotional appeal designed to put jurors in the shoes of a victim experiencing death at the hands of the defendant. While theories of punishment may, to some extent, be furthered by Golden Rule arguments, it is important that courts balance these penal goals with the fair process to which *all*—even capital defendants—are entitled.

IV. GOLDEN RULE ARGUMENTS AS AN EXTENSION OF VICTIM IMPACT TESTIMONY

Courts do not permit jurors to hear victim impact testimony in the guilt phase of criminal trials.[81] However, at the penalty phase of a capital trial, the lens broadens to consider punishment not solely from the perspective of the perpetrator but also from the perspective of the victim, her family, and her acquaintances.[82] The spotlight is no longer exclusively on the perpetrator but also on other factors. Such a radical departure from focusing on the defendant and striving for impartiality—shifting to the

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[78] 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

[79] *See* United States v. Nobari, 574 F.3d 1065, 1076 (9th Cir. 2009) (cautioning against prosecutors trying to inflame the emotions of jurors).

[80] *See, e.g.*, Cal. Jury Instructions—Crim. (CALJIC) 0.50 (2018 Revision) ("You must base the decisions you make on the facts and the law."); *id.* at 1.00 ("You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."); *id.* at 8.84.1 ("You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings."); *id.* at 8.88 (2010 Revision) ("Do not let bias, sympathy, prejudice, or public opinion influence your decision.").

[81] *See* People v. Salcido, 186 P.3d 437, 481 (Cal. 2008) (prohibiting victim impact testimony at the guilt phase of a trial); *see also* State v. Bowman, 656 S.E.2d 638, 647 (N.C. Ct. App. 2008) (holding that the trial court erred in admitting victim impact testimony during the guilt phase); Wilson v. State, 142 So. 3d 732, 774 (Ala. Crim. App. 2010) (explaining that a prosecutor's introduction of victim impact testimony is impermissible at the guilt phase).

[82] *See* Payne v. Tennessee, 501 U.S. 808, 825–26 (1991) (permitting victim impact evidence at the penalty phase of capital cases).

victim's perspective—will invariably and understandably focus on emotion and passion rather than on the objectively appropriate punishment.[83]

Following the jury's verdict on guilt in non-capital cases, many jurisdictions allow—and even require—the court to hear victim impact evidence prior to delivering the defendant's sentence.[84] During the guilt phase, however, jurors are generally excluded from hearing victim impact evidence, as only the trial judge is deemed able to rise above any concerns of passion and prejudice that such testimony might provoke.[85] The judge, it is reasoned, is able to make her punishment decision divorced from any emotions stirred.[86] This responsibility, however, is extended to capital jurors during the penalty phase, as they weigh all relevant facts and circumstances, including victim impact evidence, before determining whether to give the defendant life in prison or sentence him to death.[87]

The introduction of victim impact evidence stemmed from the "Victims' Rights Movement" beginning in the 1970s.[88] The movement spurred Congress to pass the Victim and Witness Protection Act of 1982,[89] and later the Department of Justice issued the Victim and Witness Assistance Guidelines.[90] The 1982 Act made victim impact evidence in federal sentencing mandatory in an effort to encourage victim and witness participation in the criminal justice system.[91]

Victim impact evidence suffered a setback in 1987 as the United

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[83] *See* Booth v. Maryland, 482 U.S. 496, 507 n.10 (1987) (discussing when victim impact testimony may be relevant and cautioning about its potentially prejudicial effect).

[84] *See generally* John H. Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267–68 (2003) (describing that most states authorize victim impact evidence during capital sentencing). *See also In re* State, 597 A.2d 1, 3 (Del. 1991) (requiring victim impact evidence to be heard).

[85] *See* Blume, *supra* note 84, at 273 (explaining that while "most jurisdictions have a fairly strict policy of only permitting [victim impact evidence] at the sentencing phase of the proceedings," a few states permit such evidence at the guilt phase if it is proven particularly relevant); *see also* Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 858 (2015) (explaining that judges should be able to apply the law without allowing their emotions to interfere).

[86] *See* Wistrich et al., *supra* note 85, at 858 (explaining that the law, not personal feelings, should guide a judge's decisions).

[87] *E.g.*, CAL. PENAL CODE § 190.3 (West, Westlaw through Ch. 31 of 2020 Reg. Sess.); *see also Payne*, 501 U.S. at 827 (holding that states may properly conclude that victim impact testimony is a relevant factor for the jury to consider).

[88] Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 377, 379 (1996).

[89] *Id.* at 377.

[90] *Id.* at 377–78.

[91] *Id.* at 378–79; *see also* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982) ("[E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak.").

States Supreme Court held that the Eighth Amendment prohibits jurors from hearing victim impact evidence during the sentencing phase of capital cases, unless such evidence "relate[s] directly to the circumstances of the crime."[92] In *Booth v. Maryland*, the Court explained that only the defendant's character and immediate characteristics of the crime should be considered at sentencing; allowing victim impact statements "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime," and "create[] an impermissible risk that the capital sentencing decision [would] be made in an arbitrary manner."[93] However, *Booth* was overturned four years later in *Payne v. Tennessee*, when the Court held that victim impact evidence at the sentencing phase of capital cases did not constitute per se Eighth Amendment violations.[94]

In *Payne*, the Supreme Court held that the Eighth Amendment does not per se prohibit a jury during the penalty phase of a capital trial from considering the victim's character and the emotional impact of the death on the victim's family.[95] Testimony concerning the victim's character and the impact of the victim's death on those near and dear to the victim is one way to inform the sentencing authority about the harm the defendant caused.[96] Further, the *Payne* Court determined that if such evidence was unduly prejudicial, the defendant could seek relief under the Fourteenth Amendment's Due Process Clause.[97] Almost as an afterthought, the Court explained that victim impact evidence provides a vehicle through which the prosecution may rebut the defendant's mitigating evidence.[98]

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[92] Booth v. Maryland, 482 U.S. 496, 507 n.10, 509 (1987). A couple years later, the Court extended this prohibition to include prosecutors' statements to the jury about the victim's personal qualities. *See* South Carolina v. Gathers, 490 U.S. 805, 810 (1989) (explaining that a prosecutor cannot suggest to a jury that a person's religion or voter status is justification for a sentence of death).

[93] 482 U.S. at 502, 505.

[94] 501 U.S. 808, 827 (1991). Moreover, the Court in *Payne* held that the proper avenue for relief for inappropriate use of victim impact evidence—"that is so unduly prejudicial that it renders the trial fundamentally unfair"—is through the Fourteenth Amendment's Due Process Clause. *Id.* at 825.

[95] *Id.* at 825–27.

[96] *Id.* at 825.

[97] *Id.* When a criminal defendant subsequently brings a claim that the determination or verdict lacked the reliability required by the Eighth Amendment, the Supreme Court has held that such claim is properly analyzed as one of due process, asking "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

[98] *Payne*, 501 U.S. at 825. Interestingly, while a defendant may cross-examine the victim's family members or friends giving impact testimony, the defendant is "not entitled to disparage the character of the victims on cross-examination" because the family and friends' testimony is relevant to "show how the killings affected *them*, not whether they were *justified* in their feelings due to the victim['s] good nature and sterling character." People v. Boyette, 58 P.3d 391, 432 (Cal. 2002).

As with all evidence, victim impact evidence is subject to the typical evidentiary constraints and must be "more probative than prejudicial."[99] "The question is not simply whether victim impact evidence was emotional or demonstrated the devastating effect of the crime; rather, it is whether the testimony invited an irrational response from the jury."[100] Specifically, the evidence is permitted so long as it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case."[101] Moreover, the Supreme Court has clarified that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."[102] With this guidance, many states hold that "the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime."[103]

For instance, the prosecutor in *People v. Sattiewhite* compared the lives of the defendant's family to those of the victim's family: "And although [defendant's] sister[s] said they would rather visit him in prison than in a graveyard, think about what the Gonzales family does every Sunday after church. They bring their mother flowers at the cemetery."[104] The reviewing court held the prosecutor's comment was proper, stating that the "argument juxtaposing Gonzales's loss of life and the effect of that loss on her family against the continuing life defendant would have in prison was neither improper nor overly emotional."[105]

Discussions of victim impact evidence and Golden Rule arguments

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[99] People v. Rangel, 367 P.3d 649, 678 (Cal. 2016) (quoting People v. Duff, 317 P.3d 1148, 1177 (Cal. 2014)); *see also* Kelly v. California, 555 U.S. 1020, 1025 (2008) (explaining that "even under the rule announced in *Payne*, the prosecution's ability to admit such powerful and prejudicial evidence is not boundless," and then going on to weigh the probative value of the evidence admitted).

[100] *See* People v. Simon, 375 P.3d 1, 31–32 (Cal. 2016) (upholding the use of victim impact testimony because it "properly described how the murders impacted the witnesses' lives and did not paint a picture of the crimes as any more disturbing than the evidence already showed").

[101] People v. Wilson, 114 P.3d 758, 790–91 (Cal. 2005) (quoting People v. Pollock, 89 P.3d 353, 370 (Cal. 2004)).

[102] Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (quoting *Payne*, 501 U.S. at 830 n.2). *But see* Hyde v. State, 778 So. 2d 199, 213–14 (Ala. Crim. App. 1998) (holding that an opinion as to the appropriate sentence was harmless error); State v. Gideon, 894 P.2d 850, 863–64 (Kan. 1995) (holding that opinions regarding the appropriate sentence are not automatically reversible error).

[103] People v. Abel, 271 P.3d 1040, 1077 (Cal. 2012) (quoting People v. Lewis & Oliver, 140 P.3d 775, 840 (Cal. 2006)); *see also* State v. Clark, 990 P.2d 793, 808 (N.M. 1999) (permitting victim impact testimony as a circumstance of the crime); State v. Bernard, 608 So. 2d 966, 971 (La. 1992) (allowing a prosecutor to introduce evidence of the harm to a victim's survivors).

[104] 328 P.3d 1, 29 (Cal. 2014) (alterations in original).

[105] *Id.* at 30.

are often grouped together in court opinions.[106] The justification is the same for the exclusion of Golden Rule arguments and victim impact evidence at the guilt phase of a capital case: both forms of argument or evidence "deal with subjects that are inherently emotional, possessing an unusually potent power to sway juries, and . . . their use must therefore be rigidly confined and controlled."[107] But it is there where the two diverge. Victim impact evidence allows jurors to understand the loss experienced by those the victim has left behind, and as such, there is at least an attenuated connection to the defendant's conduct, as it was the defendant's conduct that caused the loss. With Golden Rule arguments, prosecutors are going beyond victim impact evidence by placing jurors directly in the position of the actual victim. The focus shifts from that anguish suffered by the victim's loved ones because of the defendant's conduct to anguish now experienced by the jurors themselves. The in-the-shoes-of-the-victims argument is untethered from the defendant's conduct. Instead of considering the impact on the victim's family and *their* emotional responses to the defendant's crime, Golden Rule arguments are designed specifically to elicit the direct emotions of the *jurors*, whose emotions should not come into play during sentencing (or any other time during trial). Golden Rule arguments are a step further removed from victim impact evidence and invariably should fall within the prohibition the United States Supreme Court has set forth.

CONCLUSION

Golden Rule arguments are largely inconsistent with the underlying rationales of the American criminal justice system and should be excluded from penalty phase arguments for several reasons. They are virtually prohibited in all other trials and in all states apart from California because they misdirect jurors, they fall outside the rationale supporting victim impact evidence, and they provide scant evidence of societal value.

A. Golden Rule Arguments Are Prohibited in All Phases of Other Trials and Are Unrelated to Moral Assessment Considerations

Golden Rule arguments should be excluded in capital sentencing for the same reasons they are prohibited in all phases of all other trials: these arguments replace logic, reason, and the law with passion and prejudice. During all other criminal trials, "a prosecutor may not inflame the passions or prejudices of the jury" by making arguments that place the

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[106] People v. Vance, 116 Cal. Rptr. 3d 98, 110–11 (Cal. Ct. App. 2010); Von Dohlen v. State, 602 S.E.2d 738, 745–46 (S.C. 2004); Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992).

[107] *Vance*,116 Cal. Rptr. 2d at 105–06.

jurors in the victim's shoes.[108] In *State v. Thompson*, the court during the guilt phase admonished the prosecution for making such an argument:

> [A] prosecutor's comments are improper if they invoke the passion and prejudice of the jury by "asking jurors to put themselves in the victim's place," stating "how a victim would have testified had he or she been alive to testify," suggesting that the jury should find the defendant guilty "out of vengeance or sympathy for the victim, or contending that the jury has a duty to protect the alleged victim—to become her partisan."[109]

If the rationale behind prohibiting Golden Rule arguments during civil trials or the guilt phase of criminal trials is to avoid encouraging the jury to make decisions based on emotions or passions, which in turn helps reduce unjust verdicts, then why should the penalty phase of a capital case be any different? What makes a capital sentencing trial so distinct that suddenly jurors can resist thinking with their hearts and emotions when faced with Golden Rule arguments?

As set forth earlier in Part III, the justification for permitting Golden Rule arguments during the penalty phase is that the emotion generated from such arguments "cannot[] be entirely excluded from the jury's moral assessment."[110] Without question, the life-or-death decision jurors make at the penalty phase differs from all other decisions we trust jurors to undertake. And, indeed, that moral assessment should include examining virtually every aspect of a defendant's life.

As part of that moral assessment, jurors should and must examine the underlying crime and the surrounding circumstances, such as the number of victims, the brutal nature of the murder, and whether the

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[108] R. Collin Mangrum, *I Believe, The Golden Rule, Send A Message, and Other Improper Closing Arguments*, 48 CREIGHTON L. REV. 521, 528–29 (2015). This is because men and women are "not impartial and fair when self-interest is involved," thus individuals cannot judge their own cases. Danner v. Mid-State Paving Co., 173 So. 2d 608, 612–13 (1965). Accordingly, it is improper for a prosecutor to ask jurors to decide from "the point of view of bias or self-interest," by placing themselves in the shoes of the victim. *Id.* Encouraging jurors to act out of self-interest is in direct conflict with the central aims of our criminal justice system: that a decision be rendered based on the facts and logical reasoning, removed from speculation or emotion. *See* Jay M. Zitter, Annotation, *Emotional Manifestations by Victim or Family of Victim During Criminal Trials as Ground for Reversal, New Trial, or Mistrial—Emotional Manifestations by Victim or Relative as Spectator During Particular Trial Phases*, 98 A.L.R. 6th 455, § 2 (2014) (pointing out the ideals of criminal jurisprudence); *see also* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-6.8(c) (AM. BAR ASS'N 2017) ("The prosecutor should not make arguments calculated to appeal to improper prejudices of the [jury].").

[109] 318 P.3d 1221, 1244–45 (Utah Ct. App. 2014) (citations omitted).

[110] People v. Jackson, 199 P.3d 1098, 1117 (Cal. 2009) (quoting People v. Leonard, 157 P.3d 973, 1009 (Cal. 2007)).

defendant shows remorse.[111] The jury should consider the defendant's criminal background and underlying circumstances of past crimes, as well as the defendant's upbringing, development, and family background.[112] And, as discussed earlier, victim impact evidence could at least peripherally bear on the jury's life-or-death decisions because the lives of those left behind were impacted by the victim's death as a derivative of the defendant's conduct.

However, the rationale behind that holistic moral assessment becomes strained when courts allow prosecutors to engage in Golden Rule arguments. While the host of the aforementioned considerations largely factors into the moral assessment in that they all arose in the wake of or informed the defendant's conduct, can the same be said of arguments conjuring images of the jurors themselves or their families and friends at the mercy of the defendant? Whereas the former considerations focus on the defendant's conduct, and to some extent on the immediate aftermath of that conduct, Golden Rule arguments place jurors in an emotional state disconnected from a focus on the defendant, instead concentrating on the fear, revulsion, horror, and rage of the *jurors themselves*. This is no longer about what the defendant did. This is now about what the prosecutor is doing to his or her jurors. A reaction borne of such emotions is wholly distinct from all other aforementioned circumstances. Allowing prosecutors to stir jurors' passions invoked by horror and rage is not the path forward to a moral assessment.

Indeed, Golden Rule arguments may actually impede a jury's ability to make the sought-after moral assessment. "Such argument 'diverts [the jurors'] attention from their legal duty to impartially apply the law to the facts in order to determine if [the defendant] had committed the crimes . . . for which he was on trial'" or for which he is to be sentenced to death.[113] Being impassioned by vitriol stemming forth from a prosecutor intent on a death sentence may indeed interfere with a jury's ability to undertake a thoughtful and rational moral assessment.[114] Such an assessment should rise above the raw emotion at the heart of Golden Rule

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[111] *See id.* (discussing the moral assessment jurors must make); People v. Crittenden, 885 P.2d 887, 923 (Cal. 1994) (allowing jurors to assess a defendant's remorse during sentencing); CAL. PENAL CODE § 190.3 (West, Westlaw through Ch. 31 of 2020 Reg. Sess.) (listing factors jurors should consider when sentencing).

[112] *See* PENAL § 190.3 (discussing considerations a jury should look at); Boyde v. California, 494 U.S. 370, 381–82 (1990) (discussing the relevance of a defendant's childhood, background, and character in the penalty phase of a capital trial).

[113] *Thompson*, 318 P.3d at 1244–45 (alterations in original) (quoting State v. Wright, 304 P.3d 887, 902 (Utah Ct. App. 2013)).

[114] *See generally* Victoria Estrada-Reynolds et al., *Emotions in the Courtroom: How Sadness, Fear, Anger, and Disgust Affect Jurors' Decisions*, 16 WYO. L. REV. 343, 349 (2016) (explaining that studies show jurors who feel anger towards a defendant are more likely to find a prosecutor's argument more important and are more likely to sentence a defendant to death).

arguments and undertake that determination with clear-eyed and rational contemplation.[115] By allowing Golden Rule arguments at this critical stage, we abandon any pretext of rational decision making.

B. Unlike Victim Impact Evidence, Golden Rule Arguments Are Unrelated to the Defendant's Blameworthiness

Golden Rule arguments are markedly different from all other facts and circumstances that jurors should consider in making their moral assessment of the capital defendant. They are "wholly unrelated to the blameworthiness" of the defendant.[116] In contrast, "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question."[117] It is relevant to the defendant's blameworthiness because it highlights that the victim's death is "a unique loss to society and in particular to his family."[118] While victim impact evidence may illuminate the moral culpability and blameworthiness of the defendant, Golden Rule arguments go too far in this endeavor and are disconnected from the defendant's moral culpability or blameworthiness.[119] Allowing the jurors to hear about how grief affects a man's widow and children or his community is wholly different from placing the jurors in that (deceased) man's shoes as he was beaten over the head with a lead pipe—urging the jurors to experience the pain he felt as his skull was crushed by the defendant. Golden Rule arguments are removed from the defendant's conduct. The jurors are no longer being given evidence about how the victim's loved ones were hurt by his death, but instead they are being virtually thrust into the crime.

Victim impact evidence permits a prosecutor to "argue to the jury the human cost of the crime of which the defendant stands convicted."[120] The human cost of murder certainly centers on the victim's family and survivors, but such a calculation does not require the jury to stand in the

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[115] *See* Mitchell & Gullata, *supra* note 5 (discussing the danger of Golden Rule arguments).

[116] Booth v. Maryland, 482 U.S. 496, 504 (1987) (holding that "the character and reputation of the victim and the effect on his family" are factors "wholly unrelated to the blameworthiness of a particular defendant").

[117] Payne v. Tennessee, 501 U.S. 808, 825 (1991).

[118] *Id.* (quoting *Booth*, 482 U.S. at 517). Such evidence serves to counteract the defendant's mitigating evidence. *Id.*

[119] *See, e.g.*, Von Dohlen v. State, 602 S.E.2d 738, 745 (S.C. 2004) ("[C]onsideration of victim impact evidence does not open the door to Golden Rule arguments urging the jury to subjectively analyze a case solely or primarily from the victim's viewpoint. *Payne* allows a prosecutor to call upon jurors to consider *objectively* a victim's uniqueness as an individual and impact of the crime on the victim's family. The *Payne* Court did not approve the use of Golden Rule arguments in a capital case.").

[120] *Payne*, 501 U.S. at 827.

victim's shoes and imagine the crime from the victim's perspective.

Golden Rule arguments historically have been deemed unduly prejudicial and would likely jeopardize the fairness of the sentencing trial.[121] Moreover, as the Supreme Court recognized in *Booth*, Golden Rule arguments come dangerously close to violating the Eighth Amendment's ban on practices creating an unacceptable risk of arbitrarily administering capital punishment.[122] The "jury's discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'"[123]

C. The Uncertainty of Whether Golden Rule Arguments Further the Goals of Punishment

As set forth earlier, the two primary justifications that have any application to the penalty phase of capital cases are deterrence and retribution.[124] If, as previously proposed, Golden Rule arguments do in fact increase the number of death verdicts, then are such arguments serving either of these goals? As to deterrence, the available data suggests that executions for murder offer rather inconclusive evidence that would-be murderers are deterred.[125] While some may argue that executions might deter some individuals from lesser offenses,[126] others counter that life without the possibility of parole most likely would serve the same purpose.[127] It is a difficult position to maintain that encouraging jurors to opt for death as opposed to life without parole has a much greater deterrent effect.

Retribution, on the other hand, is more difficult to discount. An eye-for-an-eye, tooth-for-a-tooth mindset has a certain seductiveness. After

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[121] *See supra* Conclusion Section A.

[122] *See* Booth v. Maryland, 482 U.S. 496, 501–05 (1987) (discussing the constitutional limits of sentencing considerations).

[123] *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).

[124] *See Gregg*, 428 U.S. at 183 (explaining that the two principal purposes of the death penalty are retribution and deterrence). However, it is important to note that "[c]riminal punishment can have different goals, and choosing among them is within a legislature's discretion." Graham v. Florida, 560 U.S. 48, 71 (2010). Moreover, because the alternative sentence of life without the possibility of parole disincentivizes any effort at rehabilitating a defendant for release back into society, rehabilitation (the third primary theory of punishment) is not served by Golden Rule arguments at the penalty phase; advocating for capital punishment has no bearing on rehabilitation as a theory of punishment. *Id.*

[125] *See* Donohue & Wolfers, *supra* note 75, at 841 (discussing the "profound uncertainty" of the deterrent value of the death penalty).

[126] *See* Brian Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 J. CRIM. L. & CRIMINOLOGY 927, 928 (1983) (noting a study that produced results "in support of the theory that executions deter crime in general [as well as] homicides in particular").

[127] *See* Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 558 (1990) (asserting life without parole accomplishes the same objectives as capital punishment).

all, shouldn't this doer of such evil receive harsh treatment in kind? The central tenet of retribution is for society to impose severe sanctions "to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense."[128] But in *Graham v. Florida*, the Supreme Court affirmed that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[129] As discussed above in Conclusion Sections A and B, Golden Rule arguments do not directly relate to or shed significant light on the moral culpability or blameworthiness of the defendant.[130]

While this eye-for-an-eye theory of punishment may have initially rooted itself in the American legal system, it "is no longer the dominant objective of the criminal law."[131] Nonetheless, retribution is neither "a forbidden objective nor one inconsistent with our respect for the dignity of men."[132] The Supreme Court explained in *Furman v. Georgia* that

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy–of self-help, vigilante justice, and lynch law.[133]

This sense of societal revenge is powerful, especially when defendants commit heinous crimes. When a defendant is executed, few will contemplate the deterrent value; rather, many will shrug and think that he got what he deserved.[134] However, many others will be repulsed that

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[128] *Graham*, 560 U.S. at 71; *see also* Iuliano, *supra* note 73, at 1397 ("For more than a century, the Supreme Court has upheld all three of these retributivist principles: (1) the guilty must be punished, (2) the innocent must not be punished, and (3) punishments must satisfy the demands of proportionality.").

[129] 560 U.S. at 71 (alteration in original) (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

[130] *See* discussion *supra* Conclusion Sections A–B.

[131] Gregg v. Georgia, 428 U.S. 153, 183 (1976) (quoting Williams v. New York, 337 U.S. 241, 248 (1949)); *see* Iuliano, *supra* note 73, at 1379–80, 1394 (explaining that in almost 200 years, "thirteen thousand people were put to death in the United States").

[132] *Gregg*, 428 U.S. at 183.

[133] 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

[134] Indeed, this is an important goal of capital punishment: the death penalty "may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Gregg*, 428 U.S. at 183. In this way, retribution furthers another goal of general deterrence by discouraging vigilante self-help as a means of societal revenge.

our government executed a human being.[135] The question of whether retribution is a justifiable objective is beyond the scope of this Article. If, indeed, retribution is a desired societal goal, and if Golden Rule arguments increase the likelihood of death sentences, then—and perhaps only then—can Golden Rule arguments be sanctioned.

D. But Will It All Amount to Harmless Error? A Call to Action for the Courts

Even if California courts heed the call of this Article and decide to extend the prohibition of Golden Rule arguments to the penalty phase, would the courts simply dismiss a prosecutor's prohibited Golden Rule argument as harmless error—thereby citing the prosecutor for misconduct but upholding the sentence?[136] Would the standard allow a reviewing court to decide that the jury would have arrived at a death sentence regardless of the improper statement?

The harmless error doctrine makes intuitive sense. If the error would not have altered the verdict, or in this case the sentence, then the verdict or sentence should be upheld.[137] Indeed, as the United States Supreme Court recognized in *Chapman v. California*, "the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'"[138] The *Chapman* Court "conclude[d]

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[135] *See* Michael A. Cokley, *Whatever Happened to That Old Saying "*Thou Shall Not Kill*?": A Plea for The Abolition of The Death Penalty*, 2 LOY. J. PUB. INT. L. 67, 113 (2001) (describing the repulsive nature of a capital execution).

[136] *See, e.g.*, Chapman v. California, 386 U.S. 18, 22 (1967) (explaining the harmless error doctrine).

[137] *See* United States v. Mechanik, 475 U.S. 66, 72 (1986) ("The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The '[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.' Thus, while reversal 'may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution,' and thereby 'cost society the right to punish admitted offenders.' Even if a defendant is convicted in a second trial, the intervening delay may compromise society's 'interest in the prompt administration of justice,' and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial." (alteration in original) (citations omitted)).

[138] 386 U.S. at 22 (quoting 28 U.S.C. § 2111); *see also* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); CAL. PENAL CODE § 1258 (West, Westlaw through Ch. 31 of 2020 Reg. Sess.) ("After hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.").

that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[139] A harmless error evaluation requires courts to inquire "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[140] During this inquiry, "the burden [is] on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment," and a "court must be able to declare a belief that it was harmless beyond a reasonable doubt."[141]

Harmless error has been subject to criticism on numerous occasions. For example, in *Chapman*, the Supreme Court recognized that "harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one."[142] Justice Stewart's concurrence in that case explained that "any harmless error rule . . . commits this Court to a case-by-case examination to determine the extent to which . . . [an alleged error] influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge."[143] Further, some scholars suggest that "harmless error does not have the capacity to change behaviors over time, because . . . [a]n error that is harmless in case one will likely be harmless in later cases."[144] While "[n]o one is entitled to a perfect trial,"[145] invoking the harmless error doctrine "creates problems that are arguably more momentous than the difficulties we [seek] to resolve."[146] Each time a court invokes harmless error, it "erode[s] an important legal principle. When we hold errors harmless, the rights of individuals, both constitutional and otherwise, go unenforced."[147]

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[139] *Chapman*, 386 U.S. at 22.

[140] Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963). Examples of what are per se reversible errors—and are therefore *not* harmless errors—include introducing involuntary confessions at trial, *see* Payne v. Arkansas, 356 U.S. 560, 567–68 (1958) (overturning a conviction because of a coerced confession), denying a defendant counsel at trial, *see* Glasser v. United States, 315 U.S. 60, 76 (1942) (requiring a new trial for ineffective assistance of counsel), and trying the case before a conflicted judge, *see* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (reversing a decision because of the judge's interest in the outcome).

[141] *Chapman*, 386 U.S. at 24.

[142] *Id.* at 22.

[143] *Id.* at 45 (Stewart, J., concurring).

[144] Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 61 (2002).

[145] Denise M. Faehnrich, *The "Harm" in the Application of the "Harmless Error" Doctrine to the Constitutional Defect in* In re C.V., 44 S.D. L. REV. 340, 366 (1999) (citing Kotteakos v. United States, 328 U.S. 750, 761 (1946)).

[146] Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995).

[147] *Id.*

The robust criticism of the harmless error doctrine is exacerbated when it occurs at the penalty phase of capital trials. Initially, considering only the consequence of the matter under discussion, the decision at this phase of a capital trial is the most significant decision American courts—and jurors—are called upon to make.[148] Given the gravity of the decision, there should be a heightened sense of the consequence of such a blatant appeal to raw emotion.[149] To simply dismiss a prosecutor's argument as inconsequential requires guesswork by courts as to whether a particular argument, especially a Golden Rule argument, pushed even a single juror toward a death sentence. Given the powerful emotional appeal of these arguments, such a determination is fraught with speculation.

Another concern raised in evaluating the efficacy of harmless error cuts across the spectrum of criminal trials and is particularly acute in the penalty phase: prosecutors are fully aware that when they cross the line into prohibited argument, they will be protected by reviewing courts under the shield of the harmless error doctrine.[150] Consequently, there is no incentive to curb their misconduct.[151] The sentence will be upheld, and

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[148] See William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 946, 948 (2006) (describing the essential role juries play in the sentencing phase of a trial and how they are uniquely equipped to make the ultimate life or death decision).

[149] *See* Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring) ("[T]he [Eighth] Amendment imposes a heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'" (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976))); California v. Ramos, 463 U.S. 992, 998–99 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."). "The Supreme Court, in crafting its policies on capital punishment, has constructed a kind of 'super due process.'" Diana Minot, *Silenced Stories: How Victim Impact Evidence in Capital Trials Prevents the Jury from Hearing the Constitutionally Required Story of the Defendant*, 102 J. CRIM. L. & CRIMINOLOGY 227, 232 (2012).

[150] *See* Chapman v. California, 386 U.S. 18, 22 (1967) (explaining that all 50 states have harmless error procedures that prevent convictions from being overturned for small errors); Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1322 (1988) (discussing protection of prosecutorial misconduct).

[151] *See* Fisher, *supra* note 150, at 1323–24 ("Although some argue that sanctions might be successfully applied to encourage prosecutors to follow the rules, simple admonition by the trial judge is not enough. The only way to ensure that defendants' due process rights are fully protected is to be more willing to reverse convictions for prosecutorial misconduct . . . [which will] deter prosecutors from violating rules of conduct designed both to ensure the fairness and protect the integrity of the truth-seeking process." (footnotes omitted)). *See generally* Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Misconduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. 1455, 1479–80 (2017) (exploring the idea that because the harmless error doctrine does not deter prosecutorial misconduct, such

the prosecutors can go on to their next case and once again engage in the same misconduct.[152]

The unfortunate reality with the current state of California law regarding Golden Rule arguments—and even that of states prohibiting such arguments—is that no matter at what trial phase these arguments are made, courts will likely continue to dismiss them as harmless error. Perhaps courts should take these improper arguments more seriously because they do have such gravitas and bear the potential to influence the jury's decision making process.[153] While it is challenging to know the precise impact that Golden Rule arguments have on juror deliberations, there is much support for the notion that emotional verdicts cannot be harmless.[154] Golden Rule arguments by design force jurors to try to empathize with the victim by asking them to put on the victim's shoes and walk around in them during what were most likely the most horrific moments of the victim's life. Studies have shown that empathy influences decision-making—even judicial decisions[155]—and that empathy is strongly linked to eliciting emotions.[156] In fact, emotional appeals have been deemed problematic because emotions are irrelevant to finding truth, and should thus be left out of the courtroom.[157] But the problem is

misconduct should be examined by a prosecutorial review board so that the prosecutors do not repeat the same errors again and again).

[152] *See* Caldwell *supra* note 151, at 1479 (discussing prosecutorial misconduct and the lack of consequences).

[153] Even early scholarship acknowledged the prevalence and power of emotional arguments. *See* ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 113 (George A. Kennedy trans., 2d ed. 2007) ("The emotions . . . are those things through which, by undergoing change, people come to differ in their judgments . . . ."). *See also* Estrada-Reynolds at al., *supra* note 114, at 349 (examining mock jurors' emotions and the influence of such emotions on their ultimate decision).

[154] *See, e.g.*, Estrada-Reynolds et al., *supra* note 114, at 349 (describing a study where mock jurors whose anger increased throughout the sentencing hearing were more likely to give the defendant the death penalty and were more likely to give significant weight to the prosecutor's arguments).

[155] *See generally* Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 53 (2015) (discussing the role of empathy in judicial decisions).

[156] *See* Sheri Lynn Johnson et al., *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 FORDHAM L. REV. 573, 588 (2016) (explaining that empathy can lead an individual to "ignore larger concerns such as fairness or impartiality," and that if an individual "is motivated to protect the target of his or her empathy, that person may be inclined to punish others who are hurting . . . that target"); *see also id.* at 589 ("[W]hen emotional stimuli cause heightened emotion, effortful cognitive processing is decreased. This decrease in cognitive processing may lead to increased punitiveness, because jurors do not have the emotional capacity to empathize and relate to the perpetrator of the victim's distress." (footnote omitted)).

[157] *See* Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 66 (1992) ("Appeals to emotion are fallacious because emotions are irrelevant as a basis for deciding an issue. While emotions have psychological relevance in that they have a persuasive impact on the human mind, they have no logical relevance because they are

that at sentencing, we are no longer concerned with seeking *truth*—the goal at sentencing is to impose justice through appropriate punishment.

Nonetheless, just as emotions impact each individual differently, Golden Rule arguments may or may not have negative repercussions on juror deliberations.[158] And if there is a risk that jurors are strongly influenced by the powerful appeals of Golden Rule arguments, then there is equally a risk that the sentence imposed is being decided arbitrarily. This puts the defendant in danger of suffering violations of his or her constitutional rights, and therefore, Golden Rule arguments should not be permitted at any phase of capital trials, including sentencing.[159]

incapable of establishing the truth of conclusions. Proving truth requires the mustering of convincing evidence and not simply the exploitation of emotional sensitivities. Emotions may move us to act, but reason should control the course of that action."). Some scholars have even suggested there may be an ethical obligation for attorneys to try to minimize the intensity and frequency of emotional impacts. *See, e.g.*, Pettys, *supra* note 58, at 1611–12 (admitting that it would be impossible to completely exclude everything emotional from a courtroom but also discussing a lawyer's potential ethical dilemma in deciding how to best present emotional evidence and whether to help mitigate its effects).

[158] *See* Jessica M. Salerno & Bette L. Bottoms, *Unintended Consequences of Toying with Jurors' Emotions: The Impact of Disturbing Emotional Evidence on Jurors' Verdicts*, JURY EXPERT (Am. Soc'y of Trial Consultants), Mar. 2010, at 16, 22–23 (discussing the effects of juror's emotions on their decisions).

[159] *See* Johnson et al., *supra* note 156, at 597 ("At the very least, the neuroscience of empathy compels the conclusion that harmlessness of the error—at least with respect to the sentencing decision—should be taken off the list of acceptable reasons for affirmance.").

APPENDIX: STATE-BY-STATE LAW ON GOLDEN RULE ARGUMENTS AT CAPITAL SENTENCING

State with Death Penalty	**Allow Golden Rule arguments in penalty phase?**
Alabama	No known judicial opinions
Arizona	No[160]
Arkansas	No known judicial opinions
California*	Yes[161]
Florida	No[162]
Georgia	No[163]
Idaho	No known judicial opinions
Indiana	No known judicial opinions
Kansas	No known judicial opinions
Kentucky	No[164]
Louisiana	No known judicial opinions
Mississippi	No[165]
Missouri	No[166]
Montana	No known judicial opinions
Nebraska**	No known judicial opinions
Nevada	No[167]
North Carolina	No[168]
Ohio	No known judicial opinions
Oklahoma	No[169]
Oregon*	No known judicial opinions
Pennsylvania*	No known judicial opinions

[160] State v. Morris, 160 P.3d 203, 216–17 (Ariz. 2007).

[161] People v. Jackson, 199 P.3d 1098, 1117 (Cal. 2009).

[162] *See* Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998) (discussing impermissibility of Golden Rule arguments in Florida); Garron v. State, 528 So. 2d 353, 359 (Fla. 1988) (explaining that making statements to inject fear or emotion into jury deliberations during the penalty phase is prosecutorial misconduct).

[163] Braley v. State, 572 S.E.2d 583, 593–94 (Ga. 2002).

[164] Dean v. Commonwealth, 777 S.W.2d 900, 904 (Ky. 1989).

[165] Evans v. State, 226 So. 3d 1, 31–32 (Miss. 2017).

[166] *See* State v. Rhodes, 988 S.W.2d 521, 528–29 (Mo. 1999) (en banc) (explaining that asking jurors to place themselves in the victim's place during the penalty phase is improper); State v. Storey, 901 S.W.2d 886, 901 (Mo. 1995) (en banc) (explaining that graphically detailing a crime with jurors as the victims is improper in capital cases during the penalty phase).

[167] Witter v. State, 921 P.2d 886, 928 (Nev. 1996).

[168] State v. McCollum, 433 S.E.2d 144, 152 (N.C. 1993).

[169] *See* Bland v. State, 4 P.3d 702, 728 (Okla. Crim. App. 2000) (holding that it was improper for prosecutors to make jurors sympathize with victim).

South Carolina	No[170]
South Dakota	No known judicial opinions
Tennessee	No[171]
Texas	Unclear[172]
Utah	No[173]
Virginia	No known judicial opinions
Wyoming	No known judicial opinions

* Indicates state with gubernatorial moratorium.[174]

**Nebraska requires a jury to find the existence of aggravating factors, then a three-judge panel determines the appropriate sentence.[175]

[170] Von Dohlen v. State, 602 S.E.2d 738, 745–46 (S.C. 2004).

[171] State v. Keene, No. E2017-00316-CCA-R3-CD, 2018 WL 389213, at *15 (Tenn. Crim. App. 2018).

[172] *See* Torres v. State, 92 S.W.3d 911, 920–22 (Tex. Ct. App. 2002) (upholding a penalty phase argument stating, "I want you to close your eyes and think of how that young man felt," yet claiming that the law prohibits having the defendant's punishment "assessed by a jury who will endeavor to assess the same punishment the victim would impose," and finding Golden Rule arguments improper in other cases).

[173] *See* State v. Todd, 173 P.3d 170, 175 (Utah Ct. App. 2007) (holding that prosecutors are not allowed to ask jurors to put themselves in the place of the victim in capital trials); *see also* State v. Campos, 309 P.3d 1160, 1174 (Utah Ct. App. 2013) (stating that Utah courts have prohibited prosecutors from making arguments asking jurors to "put themselves in the victim's place").

[174] *California Governor Announces Moratorium on Executions*, DEATH PENALTY INFO. CTR. (Mar. 13, 2019), https://deathpenaltyinfo.org/news/california-governor-announces-moratorium-on-executions.

[175] NEB. REV. STAT. ANN. § 29-2521(1) (LexisNexis, LEXIS through all Acts of 2020 Reg. Sess. of 106th Legislature).

GREED AND THE SEVEN DEADLY SINS: TREACHEROUS FOR THE SOUL AND LEGAL ETHICS

*Tory L. Lucas**

ABSTRACT

As religious, philosophical, and cultural ideas, the Seven Deadly Sins occupy a common understanding of the worst behaviors that plague human relationships. Pride. Greed. Lust. Envy. Gluttony. Wrath. Sloth. Not exactly the traits that you seek in mutually beneficial relationships! Striving for universal appeal, this novel Article presents the Seven Deadly Sins as a useful construct to explain why lawyers commit major ethical violations. The underlying premise is that one or more of the Seven Deadly Sins lies behind every major ethical violation. Focusing on greed specifically, this Article demonstrates how greed first enters one's thoughts to acquire wealth. As a lawyer feeds on greedy thoughts, the lawyer becomes bigger while others—most significantly, the client—become smaller. From the greedy lawyer's vantage, "I" grows far larger than "you." As the insatiable desire to acquire more wealth burns hotter, even at the expense and to the harm of others, the lawyer is consumed by greedy thoughts until greedy conduct ignites. As greed fuels the lawyer to relentlessly pursue more wealth, the lawyer's ability to recognize greed's impact on others is diminished. Predictably, greedy conduct inevitably harms others. This Article contends that lawyers can utilize the Seven Deadly Sins as a compelling construct to comprehend what drives greedy and harmful conduct. This construct will equip lawyers to travel a virtuous path that leads away from ethical misconduct and its catastrophic consequences to clients.

TABLE OF CONTENTS

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INTRODUCTION

> An old Cherokee is teaching his grandson about life. "A fight is going on inside me," he said to the boy. "It is a terrible fight and it is between two wolves. One is evil — he is anger, envy, sorrow, regret, *greed*, arrogance, self-pity, guilt, resentment, inferiority, lies, false pride, superiority, and ego." He continued, "The other is good — he is joy, peace, love, hope, serenity, humility, kindness, benevolence, empathy, generosity, truth, compassion, and faith. The same fight is going on inside you — and inside every other person, too." The grandson thought about it for a minute and then asked his grandfather, "Which wolf will win?" The old Cherokee simply replied, "The one you feed."[1]

Like the Cherokee's grandfatherly wisdom that every person is tempted by good and evil, a similar battle rages within lawyers. Appreciating the dynamic tension between good and evil, or virtue and vice,[2] this Article contends that the Seven Deadly Sins of pride, greed,

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[1] *Two Wolves: A Cherokee Legend*, FIRST PEOPLE (emphasis added), http://www.firstpeople.us/FP-Html-Legends/TwoWolves-Cherokee.html (last visited Nov. 5, 2020).

[2] PHYLLIS A. TICKLE, GREED: THE SEVEN DEADLY SINS 12 (2004) (explaining the tension between "virtues of courage, faith, fortitude, love, hope, prudence, and justice and their corresponding alter egos of pride, envy, anger, lust, sloth, gluttony, and greed").

lust, envy, gluttony, wrath, and sloth[3] serve as a useful construct to analyze what drives lawyers to engage in major ethical misconduct. Ultimately focusing on greed, the basic premise is that greedy thoughts lead to greedy conduct that harms clients. *Always*. Applying the two-wolf scenario, when greedy thoughts enter a lawyer's mind, the lawyer must choose whether to feed greed to the evil wolf. If the evil wolf is fed greed and grows in size, the good wolf does not stand a chance. And make no mistake—the evil wolf does not prowl seeking to do good. Clients are vulnerable when a greedy wolf disguised in lawyer's clothing seeks his next meal.[4]

Lawyers must seek good and avoid evil (that is, prefer virtue over vice), because a lot is riding on it. Lawyers belong to a service profession that helps clients, ensures the fair and efficient administration of justice, and supports our political and economic systems with the stabilizing force of the rule of law.[5] The beating heart of the legal profession embodies the virtues embedded in agency law.[6] Ethics rules guide lawyers toward virtuous conduct that provides value to clients and our society and away from vicious conduct that does the opposite.[7] The general idea is that a lawyer must act zealously and competently in the best interests of the client while avoiding conflicts of interest that put the lawyer's desires above the client's needs.[8] Unfortunately, barrages of self-interested thoughts tempt lawyers to serve themselves at the expense of clients. Greedy and misleading thoughts misdirect lawyers from doing good for

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[3] Scott Sullender, *The Seven Deadly Sins as a Pastoral Diagnostic System*, 64 PASTORAL PSYCH. 217, 217 (2014).

[4] *See, e.g.*, *infra* notes 277–288 and accompanying text (exemplifying how greedy lawyers can take advantage of their clients).

[5] *See* Tory L. Lucas, *Rethinking Lawyer Ethics to Allow the Rules of Evidence, Rules of Civil Procedure, and Private Agreements to Control Ethical Obligations Involving Inadvertent Disclosures*, 63 ST. LOUIS U. L.J. 235, 250 (2019) ("Preamble 1 reminds every lawyer that being 'a member of the legal profession' provides duties as 'a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.'").

[6] *See In re* Artha Mgmt., Inc., 91 F.3d 326, 328 (2d Cir. 1996) (recognizing that "[t]he relationship between a lawyer and client is one of agent and principal").

[7] *See* Tory L. Lucas, *To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of Public Debate and Creating an Express Investigation Deception Exception to the ABA* Model Rules of Professional Conduct, 89 NEB. L. REV. 219, 228 (2010) (explaining that lawyers "must seek to apply ethics rules" by "balancing . . . duties to clients, the system of justice, participants in that system, and democratic society itself").

[8] *Id.* at 228–29 (admonishing lawyers that as they "carry out their fundamental duties in our society—from assisting people in understanding their legal rights and obligations to helping resolve legal conflicts—they should be steadfastly committed to engendering public faith, trust, and confidence in the idea that [lawyers] conduct themselves diligently, competently, loyally, fairly, and honestly").

clients to doing well for themselves at the expense of the client.[9] Harmful thoughts lead to ethical misconduct that harms clients.

What causes lawyers to ignore the virtues of the legal profession to embrace viciously selfish conduct that harms clients, society, and lawyers themselves? Viewing legal ethics through the lens of the Seven Deadly Sins, this Article contends that these sins or vices[10] are the root cause of major ethical violations.[11] While legal ethics seek to ensure a mutually beneficial relationship between lawyer and client, the Seven Deadly Sins oppose that dynamic. At the heart of the Seven Deadly Sins lies a rejection of mutually beneficial relationships. Each of the Seven Deadly Sins harbors an incessant focus on self. The Seven Deadly Sins encourage thoughts—and then conduct—that exalt "I" above "you." Because the throne of self is built for one, the drumbeat of the Seven Deadly Sins resounds, "I despite others," "I at the expense of others," and "I over others." Under the seductive influence of the Seven Deadly Sins, a lawyer unwittingly proclaims, "Heads I win; tails you lose."[12] A lawyer's embrace of greed as one of the Seven Deadly Sins develops an unhealthy focus on self over others that results in ethical misconduct.

This Article equips lawyers to avoid an unhealthy focus on self by using the construct of the Seven Deadly Sins to expose the root causes of major ethical lapses. Part I builds an ethical foundation upon the Golden Rule. Part II develops a workable understanding of the Seven Deadly Sins with an emphasis on greed. Part III examines how greed causes chaotic consequences to the legal profession and how lawyers can guard against these ethical failings. At bottom, this Article helps lawyers guard their minds against the penetrating attacks of greedy thoughts before they transform into greedy and harmful misconduct.

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[9] *See* discussion *infra* Section III.C.1.

[10] "*[V]ice* and *sin* are often interchanged in medieval writings, but they are not identical. Vices and virtues were the concepts and terms of the Greek and Roman philosophers; sin of the Hebrew Bible and New Testament. Vices are character traits. Sins are specific acts of commission or omission." SOLOMON SCHIMMEL, THE SEVEN DEADLY SINS: JEWISH, CHRISTIAN, AND CLASSICAL REFLECTIONS ON HUMAN PSYCHOLOGY 14 (1997). This vice-sin distinction is consistent with this Article's fundamental premise that greed enters as a thought and ultimately turns to misconduct.

[11] The opening line of a lawyer discipline case agrees with this sentiment in noting that lawyer "discipline cases that result in disbarment often find the [lawyer] committing one of the seven deadly sins—*e.g.*, greed, lust, sloth." Att'y Grievance Comm'n of Md. v. Smith, 116 A.3d 977, 979 (Md. 2015). Curiously, there is no citation accompanying this statement. *Id.*

[12] This selfish attitude is reminiscent of the following observation by President Kennedy: "We cannot negotiate with those who say 'What's mine is mine and what's yours is negotiable.'" John F. Kennedy, Radio and Television Report to the American People on the Berlin Crisis (July 25, 1961), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY 533, 537–38 (1962).

I. THE GOLDEN RULE LAYS THE PROPER FOUNDATION FOR LEGAL ETHICS

Caring about others is an essential trait of lawyers.[13] This idea is articulated most elegantly in the Golden Rule: Do unto others as you would have them do unto you.[14] The Christian mandate of "love your neighbor as yourself"[15] extends even to enemies.[16] Because the Golden Rule is revealed in all major religions,[17] it is a uniform ideal that most people comfortably endorse. This Article contends that the Golden Rule is a universal aspiration of how lawyers should treat clients—and how all of us should treat each other.

Starkly juxtaposed to the Golden Rule stand the Seven Deadly Sins.[18] When the Golden Rule is applied to the confidential relationship between

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[13] *See* MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (AM. BAR ASS'N 2018) ("[A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.").

[14] *E.g.*, *Matthew* 7:12. Violating the Golden Rule also harms oneself: "Doing nothing for others is the undoing of ourselves." LADIES OF FABIOLA HOSP. ASS'N, THOUGHTS: SELECTED FROM THE WRITINGS OF FAVORITE AUTHORS 83 (1901).

[15] *Matthew* 22:36–40 (ESV); *see also 1 John* 4:20–21 (revealing that love for God is both conditioned on and evidenced by love for others).

[16] *See Luke* 6:27–31 (ESV) ("Love your enemies, do good to those who hate you, bless those who curse you, pray for those who abuse you. To one who strikes you on the cheek, offer the other also, and from one who takes away your cloak do not withhold your tunic either. Give to everyone who begs from you, and from one who takes away your goods do not demand them back. And as you wish that others would do to you, do so to them.").

[17] For versions of the Golden Rule, see Fred Smith & Brant Abrahamson, *Teaching About Religion: The Golden Rule*, 7 MULTICULTURAL EDUC. 28 (1999). Confucianism: "Do not do to others what you would not want others to do to you." *Id.* (quoting NAT'L GEOGRAPHIC SOC'Y, GREAT RELIGIONS OF THE WORLD 167 (1971)); Judaism: "You shall not take revenge or bear a grudge against your kinsfolk. You shall love your neighbor as yourself." *Id.* (quoting JEWISH PUBL'N SOC'Y, THE TORAH: THE FIVE BOOKS OF MOSES 217 (1962)); Hinduism: "This is the sum of duty: do naught to others which if done to thee, would cause thee pain." *Id.* (emphasis removed) (quoting SELWYN GURNEY CHAMPION & DOROTHY SHORT, READINGS FROM WORLD RELIGIONS 15 (1951) [hereinafter READINGS]; Buddhism: "Hurt not others with that which pains yourself." *Id.* (emphasis removed) (quoting READINGS, *supra*, at 174); Zoroastrianism: "That nature only is good when it shall not do unto another whatever is not good for its own self." *Id.* (emphasis removed) (quoting READINGS, *supra*, at 87); Christianity: "In everything do to others as you would have them do to you; for this is the law and the prophets." *Id.* (quoting *Matthew* 7:12 (NRSV)).

[18] Some might condemn religious references in this Article. One professor writing about sexual justice admitted that she invoked her organizational motif around the Seven Deadly Sins "with much trepidation" of possible student critique, based on previous published concerns. Ruthann Robson, *Sexual Justice, Student Scholarship and the So-Called Seven Sins*, 19 LAW & SEXUALITY 31, 35 (2010). One of her students asserted that "[u]sing religious references in judicial opinions is an impermissible exercise of a privilege that coerces the minority to accept the norms of the majority. Whether disguised as morals, proverbs, principles, tradition, or history, religious references undermine judicial integrity

lawyer and client, it supports mutual and reciprocal benefits in which neither party does to the other that which one would not want done to oneself if the roles were reversed. Displaying an utter lack of care for others, the Seven Deadly Sins perpetrate a full-frontal assault on mutuality and reciprocity. While the Golden Rule serves clients, the selfish desires powered by the Seven Deadly Sins serve clients up for harm. The throne of self is built for only one.

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and impartiality." *Id.* (quoting Sanja Zgonjanin, *Quoting the Bible: The Use of Religious References in Judicial Decision-Making*, 9 N.Y.C. L. REV. 31, 66 (2005)). Passing over the obvious distinction that a law review article that invokes the Seven Deadly Sins is "not a judicial opinion," the professor found

> justification [for using religious references] in a distinction the student author draws regarding the use of what has become an "independent lexical unit": "A usage has to have achieved some degree of linguistic autonomy; it must be capable of being meaningful outside of its original biblical context, usable by English speakers who do not read (or even know) the Bible as well as those who do."

Id. (quoting Zgonjanin, *supra*, at 65). The Seven Deadly Sins can serve as a unifying set of principles to analyze ethical misconduct, even if the source of these principles are contested.

To be sure, this Article contends that the Seven Deadly Sins can be applied to legal ethics in a way that has universal appeal. While realizing that the concept of sin might not be palatable to every viewpoint, this Article wholeheartedly believes that those who struggle with the religious themes surrounding the word "sin" are still able to benefit from the concept of the Seven Deadly Sins. Sin can serve as a universal human construct on how to view our relationships with others. At least among major religions, the concept of sin is not entirely foreign. Admittedly, the concept of sin—and the Seven Deadly Sins in particular—is most "completely embodied or embroidered" in the Christian faith. TICKLE, *supra* note 2, at 10; *see also* SFF-TIR, LLC v. Stephenson, 262 F. Supp. 3d 1238, 1257 (N.D. Okla. 2017) (claiming that "[t]he 'seven deadly sins' are a uniquely religious concept of Christian origin"). Even though

> the concept of sin may be extraordinarily associated with Christianity, it is not exclusive to it. Judaism employs the term "sin" (the usual English translation of the Hebrew "averva") . . . . Islam also uses "sin" as the English word to describe transgressions against Allah; Sharia (Islamic law) prescribes specific punishments for specific sins. [While] [n]onmonotheistic religions are less preoccupied with sin, . . . Hinduism's notion of dharma as an ethical code of conduct that, if violated, results in negative karma, might be analogous. In Buddhism, suffering (samsara) results from addictions or poisons such as anger and *greed*; the Noble Eight-fold Path and Buddhist precepts (numbering five and eight) set out guidelines for reaching Nirvana.
>
> Robson, *supra*, at 36–37 (emphasis added).

Even outside of the religious context, sin seemingly is understood in some fashion. "[A]ncient Greek philosophers analyzed various *vices*, ethical failings, wrongdoing, and character flaws. The Stoics, the Cynics, and the Epicureans were all concerned with human desires." *Id.* at 37 (emphasis added). In various dialogues with Socrates, Plato focused on how to achieve "good." *Id.* The concept of sin is not relegated to religious viewpoints or the dustbins of philosophical musings, "[m]odern philosophers have also taken up the subject of secularized sin: Thomas Hobbes, Immanuel Kant, David Hume, Friedrich Nietzsche, and many others have theorized in the realm of moral philosophy." *Id.* at 37–38.

Members of the legal profession are dedicated to noble ideals such as justice, zealous advocacy, transparency, loyalty, and honesty.[19] Major ethical violations result from a choice to value self over others. Lawyers who feast upon the Seven Deadly Sins will *always* harm clients. That harm redounds to the lawyer, the legal profession, and the system of justice. If the Seven Deadly Sins can be used as a construct to reveal that all major ethical violations are tied to a deadly choice to gratify some internal desire over and above everyone else, then that construct might carry a preemptive remedy. If a lawyer can identify that the root cause of unethical choices lies in an embrace of the Seven Deadly Sins, then that lawyer has an effective device to more clearly identify harmful thoughts before they ripen into harmful misconduct.

II. SEVEN CAN BE UNLUCKY: TOWARD AN UNDERSTANDING OF THE SEVEN DEADLY SINS

Before illustrating the link between the Seven Deadly Sins and major ethical misconduct, it is incumbent to first explore the concept of the Seven Deadly Sins. Each of the Seven Deadly Sins—pride, greed, lust, envy, gluttony, wrath, and sloth[20]—is born as a vicious thought that presages vicious behavior that produces vicious results. No matter one's theological or philosophical worldview, a lawyer who is driven by these vicious thoughts will not promote the common good.

Although this Article seeks a universal audience, it recognizes that the Seven Deadly Sins is a religious concept that occupies a spot in the Catechism of the Catholic Church.[21] These sins are "classified according to the virtues they oppose" and are "linked to the *capital sins* which Christian experience has distinguished."[22] The Seven Deadly Sins are capital sins "because they engender other sins, other vices."[23] That is, capital vices lead to other vices. Vicious thoughts and conduct, as it were, beget more vicious thoughts and conduct as behavior spirals downward. Counterbalancing the Seven Deadly Sins are the Seven Christian Virtues

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[19] *See, e.g.*, MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 1–3 (AM. BAR ASS'N 2018) (highlighting the principal functions of an attorney and suggesting an affirmative duty of care).

[20] CATECHISM OF THE CATHOLIC CHURCH ¶ 1866 (2d ed. 1997).

[21] *Id.* I am not a Catholic theologian, but this Article does not depend on my bona fides as such because the Seven Deadly Sins are a universally applicable set of despicable traits that repel and harm others. No matter one's religious viewpoint, this Article orients a lawyer's thinking to identify how vicious thoughts lead to vicious ethical misconduct.

[22] *Id.*

[23] *Id.*

of prudence, justice, fortitude, temperance, faith, hope, and charity.[24] These virtues carry out the Golden Rule;[25] the Seven Deadly Sins do not.[26]

At their most base level, the Seven Deadly Sins are bad thoughts that lead to bad decisions that lead to bad conduct that ends with bad results. When one embraces the Seven Deadly Sins in the most fleeting of thoughts, it creates a tiny snowball that is rolled down a hill. What starts as a small and innocent—even playful—mass of little snowflakes becomes uncontrollable and harmful as it storms down the hillside, not caring for anything or anyone that is in its path. Like an uncontrolled snowball, the consequences of uncontrolled vices are disastrous for lawyers, clients, and the legal profession.[27]

Perhaps John Steinbeck best captured the conflict between good and evil or virtue and vice:

> Humans are caught in their lives, in their thoughts, in their hungers and ambitions, in their avarice and cruelty, and in their kindness and generosity too—in a net of good and evil. . . . Virtue and vice were warp and woof of our first consciousness, and they will be the fabric of our last. . . . A man, after he has brushed off the dust and chips of his life, will have left only the hard, clean questions: Was it good or was it evil? Have I done well—or ill?[28]

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[24] These seven virtues combine the four classical cardinal virtues of prudence, justice, temperance, and courage with the three theological virtues of faith, hope, and charity that are "rooted in" human virtues. *Id.* ¶¶ 1805, 1813.

[25] The Catechism illustrates how good and virtuous conduct counterbalances bad and vicious conduct:

> A virtue is an habitual and firm disposition to do the good. It allows the person not only to perform good acts, but to give the best of himself. The virtuous person tends toward the good with all his sensory and spiritual powers; he pursues the good and chooses it in concrete actions. The goal of a virtuous life is to become like God.

Id. ¶ 1803. The Catechism teaches how virtuous living requires guarding thoughts ultimately to guard conduct:

> *Human virtues* are firm attitudes, stable dispositions, habitual perfections of intellect and will that govern our actions, order our passions, and guide our conduct according to reason and faith. They make possible ease, self-mastery, and joy in leading a morally good life. The virtuous man is he who freely practices the good. The moral virtues are acquired by human effort. They are the fruit and seed of morally good acts; they dispose all the powers of the human being for communion with divine love.

Id. at ¶ 1804.

[26] GEORGE ABRAHAM, THE SEVEN DEADLY WORK SINS (AGAINST THE GOLDEN RULE) 13 (2007).

[27] *See* discussion *infra* Part III.

[28] JOHN STEINBECK, EAST OF EDEN (1952), *reprinted in* JOHN STEINBECK 475, 763 (1986).

To help lawyers answer Steinbeck's question with an emphatic good, it is time to comprehend how to use the construct of the Seven Deadly Sins to avoid harmful and ethical misconduct.

A. Historical Development of the Seven Deadly Sins

Before relating the Seven Deadly Sins to legal ethics, it is prudent to understand their historical context and meaning. The Seven Deadly Sins have not always been referred to as sins, and they did not always number seven. The first foundational formulation of the Seven Deadly Sins appeared in *Praktikos*,[29] a spiritual guide that addressed the discipline of monks.[30] Fourth century Monk Evagrius Ponticus wrote *Praktikos* to help monks resist the passions of the flesh.[31] *Praktikos* did not serve as a theological treatise. Instead, it served as a manual on how monks could conquer temptations that arose within their decidedly ascetic lives.[32] A core belief of the ascetical practice is that "[t]he kingdom of heaven is impassibility of the soul accompanied by true knowledge of beings."[33] An overarching goal of an ascetic monk was to rid himself of passions and pleasures of the flesh.[34] To cultivate this mindset among monks, Evagrius cautioned his fellow monks that the root of all sin is formed by eight tempting thoughts: gluttony, sexual immorality, love of money, sadness, anger, acedia, vainglory, and pride.[35] Varying slightly from the current list in the Catechism,[36] Evagrius' compilation of tempting thoughts became the basis upon which the entire theological and psychological schema of the Seven Deadly Sins was later built.[37]

Evagrius characterized these eight tempting thoughts as demons that torment the soul.[38] He believed that these eight principal thoughts contained all tempting thoughts that would harm monks.[39] Evagrius taught that the choice of "[w]hether or not all these thoughts trouble the

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[29] WILLIAM HARMLESS, DESERT CHRISTIANS: AN INTRODUCTION TO THE LITERATURE OF EARLY MONASTICISM 322 (2004).

[30] EVAGRIUS, *Praktikos*, *in* EVAGRIUS OF PONTUS: THE GREEK ASCETIC CORPUS 95 (Robert E. Sinkewicz trans., 2003).

[31] HARMLESS, *supra* note 29, at 312–13, 318.

[32] *See id.* at 318 (explaining that *Praktikos* offered suggestions for combating evil thoughts that would arise during the monastic life).

[33] EVAGRIUS, *supra* note 30, at 97.

[34] *See* RICHARD FINN OP, ASCETICISM IN THE GRAECO-ROMAN WORLD 129 (2009) ("[A]sceticism, together with scriptural meditation, purified the soul and thus enabled contemplation of God.").

[35] EVAGRIUS, *supra* note 30, at 73–87, 97–98.

[36] CATECHISM, *supra* note 20, ¶ 1866.

[37] HARMLESS, *supra* note 29, at 322.

[38] Andrew Crislip, *The Sin of Sloth or the Illness of the Demons? The Demon of Acedia in Early Christian Monasticism*, 98 HARV. THEOLOGICAL REV. 143, 143–44 (2005).

[39] EVAGRIUS, *supra* note 30, at 97–98.

soul is not within our power; but it is for us to decide if they are to linger within us or not and whether or not they stir up the passions."[40] Even though written to an audience of monks, *Praktikos* speaks to universal audiences in its caution that the "eight tempting thoughts" tempt *all* people. Even though Evagrius did not necessarily teach that the thoughts themselves are sinful, he believed that a monk controlled the decision to allow *tempting thoughts* to "linger" to the point that passion would ignite and ultimately result in *sinful conduct*.[41] In response, Evagrius gave practical advice—thus the name of the treatise—on how to combat tempting thoughts as they arose.

Another fourth-century monk paralleled Evagrius' teaching and brought it to Europe. John Cassian wrote *The Institutes of the Coenobia and the Remedies for the Eight Principal Vices*.[42] He dedicated four books to rules that governed monastic life followed by eight books that explained the "eight principal obstacles to perfection encountered by monks."[43] Tracking Evagrius' "eight tempting thoughts," Cassian outlined eight faults or obstacles: gluttony, fornication, avarice, anger, sadness, acedia, vainglory, and pride.[44] Evagrius and Cassian demonstrated a consistency in religious thinking that a handful of thoughts influence conduct that harms others.

The eight tempting thoughts in *Praktikos* and the eight principal obstacles in *The Institutes* resemble the modern Seven Deadly Sins. Because those monastic texts did not enjoy a widespread audience, however, Evagrius and Cassian cannot be credited with establishing the pervasive global influence of the Seven Deadly Sins. But what started in the humble beginnings of monastic orders now has an enduring legacy that stands over the ages as a universal human motif known as the Seven Deadly Sins.[45]

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[40] *Id.*

[41] *Id. See* Sullender, *supra* note 3, at 218 (explaining that Evagrius focused on thoughts rather than sins under the belief that one could identify and clarify patterns of thinking before those thoughts resulted in destructive conduct).

[42] JOHN CASSIAN, THE INSTITUTES (Dennis D. McManus ed., Boniface Ramsey trans., 2000).

[43] Maurice M. Hassett, *Cassian*, *in* THE KNIGHTS OF COLUMBUS CATH. TRUTH COMM., THE CATHOLIC ENCYCLOPEDIA 404, 404 (Charles G. Herbermann et al. eds., special ed. 1913).

[44] CASSIAN, *supra* note 42, at 117.

[45] Nearly eight centuries before two Catholic monks developed the precursor to the Seven Deadly Sins which inherently built upon the Golden Rule, Aristotle developed the concept of the Golden Mean. As the Father of Western Philosophy, Aristotle wrote about ethics from a philosophical perspective. In *Nicomachean Ethics*, Aristotle proposed that happiness is man's highest goal; to achieve it, he must live according to certain virtues. ARISTOTLE, NICOMACHEAN ETHICS 16–17 (David Ross trans., Oxford University Press 1980). Like the monks, he explained that virtue is a habit that must be grown through teaching

In the early fifth century, a Christian barrister and poet by the name of Aurelius Clemens Prudentius published the first completely allegorical poem in European literature called *Psychomachia*, or *The Battle of the Human Soul*.[46] In this poem that enjoys close parallels to the Cherokee grandfather's story about the battle of the good wolf and evil wolf, Prudentius portrayed a gruesome battle between the personifications of virtues and vices.[47] The Virtues of Humility, Patience, Chastity, Sobriety, and Good Works cunningly and brutally take down the opposing Vices of Pride, Wrath, Lust, Luxury, and *Greed*.[48] *The Battle of the Human Soul* thus transformed religious and philosophical ideations from monastic writings into an art form, a form that would rapidly expand throughout the Middle Ages. At the dawn of the seventh century, the core of the Seven Deadly Sins was coming into full view of the general public.

The Seven Deadly Sins eventually were given the full weight of papal authority around the seventh century under Pope Gregory the Great.[49] As the founder of the medieval papacy, Gregory began to hold more secular

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and practicing. *Id.* at 28. Developing the idea that virtue is a mean between vices, he most famously illustrated virtue as the mean between two extremes—defect and excess. *Id.* at 43–45. As opposed to the writings of the monks who argued that true virtue is found at the opposite end of vice, EVAGRIUS, *On the Vices Opposed to the Virtues*, *supra* note 30, at 61, Aristotle argued that

> virtue is concerned with passions and actions, in which excess is a form of failure, and so is defect, while the intermediate is praised and is a form of success; and being praised and being successful are both characteristics of virtue. Therefore virtue is a kind of mean, since, as we have seen, it aims at what is intermediate.

ARISTOTLE, *supra*, at 38. Aristotle illuminated his idea of a Golden Mean by developing the virtue of courage. Aristotle illustrated defect and excess of courage by asserting that "the man who flies from and fears everything and does not stand his ground against anything becomes a coward, and the man who fears nothing at all but goes to meet every danger becomes rash; . . . courage, then, [is] destroyed by excess and defect, and preserved by the mean." *Id.* at 31. Even though Aristotle's view of virtue differed from the Seven Deadly Sins, he admitted that certain conduct simply is bad to which no virtuous "mean" applies: "spite, shamelessness, envy . . . adultery, theft, murder." *Id.* at 39. He admitted that "[i]t is not possible . . . ever to be right with regard to them." *Id.* Aristotle thus agreed that certain vices are universal. For purposes of this Article, it does not matter if you are Aristotelian. As long as you can agree that a lawyer who indulges one or more of the Seven Deadly Sins—and greed, in particular—will harm clients, then this Article provides a useful construct.

[46] MELANIE HOLCOMB, PEN AND PARCHMENT: DRAWING IN THE MIDDLE AGES 69 (2009).

[47] *Id.*

[48] Cornelia Joseph Lynch, Psychomachia of Prudentius: Text, Translation, and Commentary 61–100 (Aug. 1953) (M.A. thesis, University of Southern California) (ProQuest).

[49] Columba Stewart, *Evagrius Ponticus and the Eastern Monastic Tradition on the Intellect and the Passions*, 27 MOD. THEOLOGY 263, 272 (2011). Note that the Seven Deadly Sins "do not appear in the Bible as such, and are therefore not a Biblical 'quotation,' yet the provenance of the phrase is thought to be specifically Christian." Robson, *supra* note 18, at 36.

power.[50] The timing of this dynamic is historically important because Gregory brought Catholic teachings of the Seven Deadly Sins to a mainstream audience.[51] In *Moralia in Job*, Gregory essentially transformed eight tempting thoughts into Seven Deadly Sins.[52] Here is his list of seven sins that are matched with their English translation that correspond to today's common usage: *superbia* (pride), *ira* (wrath), *invidia* (envy), *avaritia* (greed), *acidia* (sloth), *gula* (gluttony), and *luxuria* (lust).[53] Gregory separated the seven sins into two groups: (1) the "sins of the flesh," which included gluttony and lust; and (2) "psychological sins" such as "pride, anger, envy, greed, and sloth."[54] Gregory emphasized that pride was the "beginning of all sin" because it represented "a revolt of the spirit against God" and lechery as "a revolt of the body against the spirit."[55] Gregory referred to pride as the "queen of sins" and the "root of all evil."[56] Gregory explained how "seven principal vices . . . spring doubtless from this poisonous root, namely, vain glory, envy, anger, melancholy, avarice, gluttony, lust."[57] The noticeable number Seven emerged.

Gregory expounded on why these seven sins are so deadly. He explained that the "seven principal vices produce from themselves so great a multitude of vices, [that] when they reach the heart, they bring, as it were, the bands of an army after them."[58] Gregory illustrated how each principal vice brings about its own host of other vices. For example, Gregory explained that "from vain glory there arise disobedience, boasting, hypocrisy, contentions, obstinacies, discords, and the presumptions of novelties."[59] While these seven vices serve as gateways to all other vices, Gregory cautioned that they also lead to each other because they are "so closely connected."[60] Gregory explained how pride begets vain

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[50] CAROLE STRAW, GREGORY THE GREAT: PERFECTION IN IMPERFECTION 2–3, 5 (1988).

[51] RAYMOND ANGELO BELLIOTTI, DANTE'S DEADLY SINS: MORAL PHILOSOPHY IN HELL 216 (2011).

[52] Gregory listed the seven deadly sins, then known as "capital vices or cardinal sins," in A.D. 590. SFF-TIR, LLC v. Stephenson, 262 F. Supp. 3d 1238, 1257 (N.D. Okla. 2017).

[53] ODD LANGHOLM, THE MERCHANT IN THE CONFESSIONAL: TRADE AND PRICE IN THE PRE-REFORMATION PENITENTIAL HANDBOOKS 20 (2003). Oddly, Ian Fleming of James Bond fame was not "content with the traditional articulation of the seven deadly sins." Robson, *supra* note 18, at 39. So he proposed a list of "seven deadlier sins": "avarice, cruelty, snobbery, hypocrisy, self-righteousness, moral cowardice, and malice." *Id.*

[54] Brian Cronin, "With sevene sinnys sadde beset": The Iconography of the Deadly Sins and the Medieval Stage 32 (May 2005) (Ph.D. dissertation, Tufts University) (ProQuest).

[55] LANGHOLM, *supra* note 53, at 20.

[56] 3 GREGORY THE GREAT, MORALS ON THE BOOK OF JOB 489–90 (J. Bliss trans., London, Oxford 1850).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

glory which leads to envy that causes anger; the progression continues on and on.[61] Obviously building upon the monastic work that focused on thoughts, Gregory instructed that these "first vices" sneak into the hearts of people by disguising themselves as harmless desires.[62] Before fleeting thoughts and desires stands "the hapless soul, [who] once captured by the principal vices, is turned to madness by multiplied iniquities."[63] Gregory stamped the Pope's Seal of Approval on the Seven Deadly Sins to become part of Catholic theology.[64] By analyzing the Seven Deadly Sins, Gregory updated the original works of a couple of obscure fourth century monks and thrust the sins into a greater light. He also completed the natural progression that deadly thoughts lead to deadly conduct.[65] While Gregory's writings provided practical spiritual guidance, they also shaped overall medieval spirituality as the Seven Deadly Sins gained widespread popularity.[66]

After the Seven Deadly Sins took root in Catholic thought that bled into the secular realm, the list flourished in the Middle Ages. In his thirteenth-century masterpiece *Summa Theologica*, Thomas Aquinas first articulated the list in its current formulation.[67] Aquinas was equipped to popularize the Seven Deadly Sins through his unique background that included training in religion in a monastery and in philosophy by his education at the University of Naples.[68] Aquinas taught that "mortal sin is so called because it destroys the spiritual life which is the effect of charity."[69] Aquinas reconciled theological teaching with philosophical teaching.[70] Inspired by Aristotle, *Summa Theologica* presented

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[61] *Id.*

[62] *Id.* at 491.

[63] *Id.* at 492.

[64] The Seven Deadly Sins remain part of the Catechism, and the "Anglican Communion, the Lutheran Church, and the Methodist Church—among other Christian denominations—continue to retain the list." SFF-TIR, LLC v. Stephenson, 262 F. Supp. 3d 1238, 1257–58 (N.D. Okla. 2017). Even the late evangelist, Reverend Billy Graham, "explicated the seven deadly sins." *Id.* at 1258. As a matter of privilege, let me point out that one of Billy Graham's grandsons, Basyle J. Tchividjian, has an office next to mine at Liberty University School of Law.

[65] Gregory transitioned from mere thoughts to resulting misconduct by casting "a distinctly moral and legal flavor over the schema of the Seven Deadly Sins, being concerned not just with purity of thought, as Evagrius had emphasized, but also with immoral behaviors or sins." Sullender, *supra* note 3, at 219.

[66] STRAW, *supra* note 50, at 2.

[67] *See* 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. 1, Q. 84, art. 4 (Fathers of the Eng. Dominican Province trans., Christian Classics 1981) (1911) (listing "vainglory, envy, anger, sloth, covetousness, gluttony, [and] lust"); AIDAN NICHOLS, DISCOVERING AQUINAS: AN INTRODUCTION TO HIS LIFE, WORK, AND INFLUENCE 6 (2002).

[68] NICHOLS, *supra* note 67, at 3–5.

[69] AQUINAS, *supra* note 67, at Pt. 2, Q. 35, art. 3.

[70] *Id.* at Pt. 2, Q. 2, art. 1.

philosophical arguments for theological beliefs, which possibly made certain religious beliefs palatable to the non-religious.[71]

Aquinas analyzed virtue and vice, but as pertinent here, he focused on the "seven capital vices [of] vainglory, envy, anger, sloth, covetousness, gluttony, [and] lust."[72] Following Gregory's lead, Aquinas defined "capital vices" as "those which give rise to others, especially by way of final cause."[73] He explained that "capital" derived its root from the Latin word "caput" meaning "head."[74] Just as the head of an animal is the principal director of the whole animal, Aquinas posited, so are capital vices the primary gateway for other vices.[75] Aquinas taught that the "capital vice is not only the principle of others, but is also their director."[76] By analyzing seven different "capital vices," Aquinas determined that each one truly is a principle vice that directs other vices.[77] By expanding the Seven Deadly Sins from a mere religious perspective to a more universal philosophical perspective, Aquinas brought objective analysis to what had become widely accepted in Catholic theology. *Summa Theologica* enshrined the Seven Deadly Sins as an enduring concept throughout the Middle Ages.[78]

While Aquinas supported the Seven Deadly Sins in religious and philosophical terms, an epic poem ensured that the Seven Deadly Sins as a popular literary theme would stand the test of time. In the fourteenth century, Dante Alighieri's *Divine Comedy* was a *tour de force* that

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[71] JEAN-PIERRE TORRELL, AQUINAS'S SUMMA: BACKGROUND, STRUCTURE, & RECEPTION 76–77 (Benedict M. Guevin trans., 2005).

[72] AQUINAS, *supra* note 67, at Pt. 1, Q. 84, art. 4. Aquinas followed Augustine in devoting "considerable energies to discussing and delineating sin in general and specific sins with great particularity." Robson, *supra* note 18, at 36. Augustine was a "Christian theologian of sin par excellence, without rival until Thomas Aquinas." *Id.* "Augustine is well known for his treatment of lust, especially in *The Confessions of St. Augustine*, in which he discusses his own 'failings' before his conversion to Christianity and famously recites his prayer, 'Grant me chastity and continence, but not yet.'" *Id.* at 36 n.29 (quoting AUGUSTINE, CONFESSIONS 145 (Henry Chadwick trans., 1991)). It seems safe to recognize that, among the world's religions, the idea of sin is most "completely embodied or embroidered" in the Christian faith. TICKLE, *supra* note 2, at 10.

[73] AQUINAS, *supra* note 67, at Pt. 1, Q. 84, art. 4.

[74] *Id.* at Pt. 1, Q. 84, art. 3.

[75] *Id.*

[76] *Id.*

[77] *Id.* at Pt. 1, Q. 84, art. 4.

[78] John L. Treloar, *The Middle-earth Epic and the Seven Capital Vices*, MYTHLORE, Oct. 1989, at 37–38. It is notable that in the late-thirteenth century, Archbishop Pecham's provincial Council of Lambeth published a catechetical manual which recited the Seven Deadly Sins and the Seven Works of Mercy—think Seven Heavenly Virtues—underscoring their importance in Catholic theology. EDWARD L. CUTTS, PARISH PRIESTS AND THEIR PEOPLE IN THE MIDDLE AGES IN ENGLAND 216 (London, Soc'y for Promoting Christian Knowledge 1898).

established the Seven Deadly Sins as a universal human motif.[79] Inspired by ancient epic poets like Virgil, the *Divine Comedy* told of Dante's grand journey with mythical and biblical characters through Hell, Purgatory, and Heaven.[80] On Dante's journey, he discovered sinners being punished for committing one of the Seven Deadly Sins. In Hell, Dante met "carnal sinners . . . in whom [r]eason by lust is sway'd,"[81] those condemned "[f]or the sin [o]f glutt'ny,"[82] those "o'er whom [a]v'rice dominion absolute maintains,"[83] and those "whom anger overcame."[84] While several of the Seven Deadly Sins were directly punished in Hell, Dante used Purgatory to develop and expound upon what is now the well-known list of Seven.[85]

While visiting Purgatory, Dante first encountered the Prideful, who have the farthest to climb to make it to Heaven.[86] They carried a burden so heavy that they could not stand up straight.[87] Dante then met the Envious, whose eyes were sewn shut for obvious reasons.[88] Dante next came upon the Wrathful, whose anger left them shrouded in dark smoke.[89] Then Dante saw the Slothful, who were forced to prove that they could be productive to counteract their laziness on earth.[90] Dante next encountered the Avaricious, who were forced to lie face down on the ground because they had failed to lift their heads from material things while on earth.[91] Dante then came upon the Gluttonous, who were forced to smell fresh fruit without having the luxury of eating any.[92] Dante last saw the Lustful, who

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[79] RUTH ELLIS MESSENGER, ETHICAL TEACHINGS IN THE LATIN HYMNS OF MEDIEVAL ENGLAND 177 (1930).

[80] *See* Raymond V. Schoder, *Vergil in the* Divine Comedy, 44 CLASSICAL J. 413, 414–15 (1949) (discussing how Virgil influenced Dante); Joseph G. Allegretti, *In a Dark Wood: Dante as a Spiritual Guide for Lawyers*, 17 ST. THOMAS L. REV. 875, 880 (2005) (summarizing Dante's journey).

[81] DANTE ALIGHIERI, DANTE'S INFERNO: THE VISION OF HELL FROM THE DIVINE COMEDY Canto V, *ll.* 39–40 (Henry Francis Cary trans., Lerner Publ'g Grp., Inc. 2015) (1892) [hereinafter ALIGHIERI, DANTE'S INFERNO].

[82] *Id.* at Canto VI, *ll.* 52–53.

[83] *Id.* at Canto VII, *ll.* 48–49.

[84] *Id.* at *l.* 119.

[85] *See* Robson, *supra* note 18, at 36 ("Dante (1265-1321), in *The Divine Comedy*, dedicated the middle canticle—*Purgatoria*—to the seven deadly sins and their respective purifications: the sin of lust, for example, is purged through fire; the sin of envy requires the sewing shut of the eyes.").

[86] DANTE ALIGHIERI, DANTE'S PURGATORIO: THE VISION OF PURGATORY FROM THE DIVINE COMEDY Canto X, *ll.* 108–28 (Henry Francis Cary trans., Lerner Publ'g Grp., Inc. 2015) (1901) [hereinafter ALIGHIERI, DANTE'S PURGATORIO].

[87] *Id.* Recognize the imagery that when one serves self at the expense of others, one is not liberated but is instead imprisoned. There are no winners when one plays with the Seven Deadly Sins.

[88] *Id.* at Canto XIII, *ll.* 33–35, 60–65.

[89] *Id.* at Canto XVI, *ll.* 1–22.

[90] *Id.* at Canto XVIII, *ll.* 88–115.

[91] *Id.* at Canto XIX, *ll.* 118–25.

[92] *Id.* at Canto XXIII, *ll.* 30–35.

endured the state of constantly being on fire.[93] This list of the Seven Deadly Sins encapsulates the ones so many people know today.

Just as the list itself took on different shape through the centuries, so too did its meaning. What originally functioned as a pseudo-lifestyle guide for cloistered monks wishing to conquer recurring temptations eventually morphed into a list that carried "a sensationalistic, dramatic, and fear-based orientation."[94] The change in perception from constructive to condemning was due, in part, to Dante's depiction of how sins were treated in Hell, where a specialized punishment for certain classes of sins was administered to those unfortunate enough to arrive there after death.[95] Indeed, as Dante passed through the Gates of Hell, he saw an ominous sign that read, "All hope abandon ye who enter here."[96] Dante's intense imagery, creativity, artistic license, and poetic language secured *Divine Comedy* as a literary masterpiece. The Seven Deadly Sins found their place as a literary theme that eventually would enjoy universal appeal.

Near the end of the fourteenth century, an English poet also tried to capture the theme of the Seven Deadly Sins. In *The Canterbury Tales*, Geoffrey Chaucer used an unlikely group of traveling characters to tell moral stories during their journey to Canterbury.[97] These characters and the moral tales Chaucer spins about them reflect the Seven Deadly Sins. For example, the Wife of Bath was prideful and lustful;[98] the Pardoner, the *Man of Law* (more on this later), and the Physician were *greedy*;[99] and the Monk was gluttonous.[100] Some maintain that the Wife of Bath and the Pardoner may embody all of the Seven Deadly Sins, which is curious because they were the only characters who admitted to being sinners.[101]

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[93] *Id.* at Canto XXV, *ll.* 117–33.

[94] Sullender, *supra* note 3, at 219.

[95] *See id.* ("This moralistic flavor was intensified further when Dante's 14th-century *Inferno* interwove the Seven Deadly Sins with the nine circles of hell.").

[96] ALIGHIERI, DANTE'S INFERNO, *supra* note 81, at Canto III, *l.* 9.

[97] R. B. MOWAT, A NEW HISTORY OF GREAT BRITAIN 146 (1921). Chaucer died before he was able to complete *The Canterbury Tales*. *Id.*

[98] *See* Frederick Tupper, *Chaucer and the Seven Deadly Sins*, 29 PUBL'NS MOD. LANGUAGE ASS'N AMERICA, 1914, at 108 (showing how the Wife of Bath exhibited pride); *see also* GEOFFREY CHAUCER, *The Wife of Bath's Prologue*, *in* THE RIVERSIDE CHAUCER 105, *l.* 605 (Larry D. Benson ed., 3d ed. 1987) [hereinafter RIVERSIDE CHAUCER] (showing the Wife of Bath's lust).

[99] *See* Tupper, *supra* note 98, at 107–08, 110 (arguing that the Pardoner and Man of Law were affected by greed); *see also* John Alexander MacPherson, Chaucer's Moral Vision: A Study of the Function of the Seven Deadly Sins in 'The Canterbury Tales' 54 (1955) (M.A. thesis, Assumption College) (ProQuest) (contending that the Physician exemplifies greed).

[100] MacPherson, *supra* note 99, at 60.

[101] B. W. LINDEBOOM, VENUS' OWNE CLERK: CHAUCER'S DEBT TO THE CONFESSIO AMANTIS 1 (2007).

Chaucer created a unique character to preach a sermon to the others whose stories reflected the Seven Deadly Sins.[102] The Parson stood alone as the only character who did not fall prey to the Seven Deadly Sins.[103] Unlike the other characters who told stories when it was their turn to speak, the Parson delivered a sermon that walked through the Seven Deadly Sins and their remedying Virtues.[104] He analyzed the Seven Deadly Sins of Pride, Envy, Anger, Sloth, Avarice, Gluttony, and Lechery; likewise, he gave the remedies in the form of Virtues that could overcome those Sins.[105] Following Evagrius' and Gregory's lead from centuries before, the Parson explained that all of the sins begin as mere *thoughts*.[106] Once a person is deceived by selfish thoughts, one will become trapped by the deadly sin.

Just as Dante used art to move the Seven Deadly Sins past religion and philosophy, so did Chaucer. He artfully painted the Seven Deadly Sins across the entire spectrum of humanity, and it did not matter if the characters were rich or poor, man or woman, or religious or not. The universality of the Seven Deadly Sins makes it a compelling story even today, which should make this Article approachable by any reader.[107]

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[102] MacPherson, *supra* note 99, at 14.

[103] *Id.*

[104] *Id.* at 16–17. This imagery harkens back to *Psychomachia* and the Cherokee grandfather's story about the Two Wolves. *See supra* text accompanying notes 1, 46–47.

[105] RIVERSIDE CHAUCER, *The Parson's Tale*, *supra* note 98, at *ll.* 472–962. Horace recognized that "[t]o flee vice is the beginning of virtue." HORACE: SATIRES, EPISTLES, AND ARS POETICA 255 (H. Rushton Fairclough trans., 6th prtg. 1942).

[106] 3 GEOFFREY CHAUCER, *The Parson's Tale*, *in* THE CANTERBURY TALES OF CHAUCER 187, 208 (Charles C. Clarke ed., London, Paris, & New York, Cassell Petter & Galpin n.d.) [hereinafter CANTERBURY TALES] ("[F]or [certainly], there is no deadly sin, but that it is first in man's thought, and after that in his delight, and so forth into consenting and into deed."). It cannot be overstated how devastating a thought can be when it is channeled into destructive conduct.

[107] The universal appeal of the Seven Deadly Sins is shown by its frequent use as a rhetorical device. *See* THEODORE L. BLUMBERG, THE SEVEN DEADLY SINS OF LEGAL WRITING (2008) (exploring the sins of poor legal writing); Robert W. Wood, *Settlements and Taxes: The Seven Deadly Sins*, 76 N.Y. STATE BAR J. 52, 60 (2004) (explaining that "[t]here are seven deadly sins . . . [that] should be considered in every case before the settlement agreement is signed and the money is paid"); Joel Levine, *The Seven Deadly Sins of Mediation*, 42 LITIG. J. 36, 36 (2016) (contending that avoiding the seven deadly sins in mediation "can't guarantee a favorable settlement . . . [but] at least lower the odds of self-inflicted wounds"); David I. Levine, *The Seven Virtues of Judging: Alvin Rubin's Civil Rights Opinions*, 52 LA. L. REV. 1499, 1500 (1992) (listing Seven Virtues of Judging found in Judge Alvin Rubin's civil rights opinions that explain "what judges should be doing to help us choose the kinds of people, the kind of society, we will be"); John M. Townsend, *Drafting Arbitration Clauses Avoiding the 7 Deadly Sins*, 58 DISP. RESOL. J. 28, 28 (2003) (detailing how a drafter of an arbitration clause can "avoid the most common pitfalls—or deadly sins—and how to draft the clause the right way"); D. Hull Youngblood, Jr., *7 Deadly Sins of Contract Drafting: Constructive Interpretation and Interpretative Construction*, 34 CORP. COUNS. REV. 155, 155 (2015) (using the Seven Deadly Sins as a "dramatic title" to focus the reader on "seven issues

Art was used as the Seven Deadly Sins pushed past the Middle Ages. *The Seven Deadly Sins and the Four Last Things* was a popular painting produced around 1500 and credited to Hieronymus Bosch.[108] Currently housed in the Museo del Prado,[109] the painting invites viewers to walk around a table that contains "fantastical depictions" of the Seven Deadly Sins.[110] In the middle of the circle is a depiction of Christ with the Latin phrase, "*Cave cave d[omin]us videt*," which means "Beware, beware, the Lord is watching."[111] Then, in a ring around the outside, are the Seven Deadly Sins. Directly below the Christ, Anger is depicted as two men in "a drunken brawl outside a tavern."[112] Moving counterclockwise around the circle, a woman looking at herself in a mirror held by Satan depicts Pride.[113] Lust is portrayed by two couples flirting while being entertained by a jester.[114] Then Sloth is seen as a man who neglects his prayers to sleep.[115] Gluttony is a family gorging themselves.[116] Greed is shown by a civil officer taking a bribe.[117] Envy is a couple coveting a rich man's falcon.[118] One scholar wrote that Bosch built upon the fear that Dante's art instilled: "Bosch's purpose in this portrayal of the seven deadly sins was to literally scare **the Hell out of us!**"[119]

After all these centuries, the Seven Deadly Sins remain alive in modern popular culture. This phenomenon suggests that the Seven Deadly Sins are as much cultural as they are religious or philosophical.

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that arise in drafting contracts that can present significant challenges for practitioners and their clients"); Robert E. Steinberg, *The Seven Deadly Sins in § 363 Sales*, 24 AM. BANKR. INST. J. 22, 22 (2005) (explaining that because asset sales under section 363 of the Bankruptcy Code have "many complexities that, if ignored, will undermine the process and greatly reduce the proceeds from the sale," debtor management should avoid "the seven most common mistakes" in the section 363 process); Robson, *supra* note 18, at 34–35 (sharing "observations about student scholarship and sexual justice" in the context of "[t]he so-called seven deadly sins [which] provide a rich tableau for interrogating student scholarship on sexual justice"). It is fun to note that Ian Fleming even "planned a series of essays by prominent writers on each of the sins for the *London Sunday Times*." *Id.* at 38.

[108] Robson, *supra* note 18, at 36.

[109] *Id.* at 36 n.31.

[110] *Id.* at 36; *see also Table of the Seven Deadly Sins*, MUSEO DEL PRADO (Apr. 6, 2020), https://www.museodelprado.es/en/the-collection/art-work/table-of-the-seven-deadly-sins/3fc0a84e-d77d-4217-b960-8a34b8873b70 (showing the painting as it appears at the Museo Del Prado).

[111] *Table of the Seven Deadly Sins*, *supra* note 110 (alteration in original).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Sally A. Struthers, *The Seven Deadly Sins of Hieronymus Bosch*, ART & ART HIST. FAC. PUBL'NS (Apr. 20, 1996), https://corescholar.libraries.wright.edu/art/15/.

For example, the Seven Deadly Sins were depicted through the performing arts in "the 1933 Kurt Weill opera/ballet," which was most recently performed in 2007.[120] In 1995, New Line Cinema released a blockbuster movie called *Seven*.[121] The movie was "based upon a fictitious story of a depraved photographer who commits seven torturous murders, each of which is designed to evoke or represent one of the traditional seven deadly sins recognized in the doctrines of the Roman Catholic Church."[122]

After that historical foray, it is time to present the Seven Deadly Sins as a modern set of unifying principles. A 2012 study concluded that the Seven Deadly Sins represent a continuous "core psychological component" which is evident in all of humanity.[123] Importantly, this study revealed that the Seven Deadly Sins actually "form a fundamental component of what it means to be human."[124] Perhaps surprisingly, it was "nearly immaterial" whether the Seven Deadly Sins were presented to men or women, the religious or non-religious, or married or non-married individuals.[125] When various demographics ranked the Seven Deadly Sins from least offensive to most offensive, pride was the least offensive.[126] Sloth, lust, and gluttony ranked in the middle of the spectrum.[127] Envy

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[120] Robson, *supra* note 18, at 38.

[121] Sandoval v. New Line Cinema Corp., 147 F.3d 215, 216 (2d Cir. 1998). The movie title often is stylized by using the number seven: Se7en. Robson, *supra* note 18, at 39 (explaining that the Seven Deadly Sins are depicted in "the 1995 popular movie, Se7en, with its serial killer who selects and tortures victims according to each one's sin (*greed: a lawyer*)" (emphasis added)).

[122] *Sandoval*, 147 F.3d at 216. In a chilling example of fiction writing non-fiction, an Oregon murder case involved a copycat killing based on the movie Seven. State v. Cook, 135 P.3d 260, 270 (Or. 2006). The murderer in that case "wanted to use the gun to try to kill someone and get away with it . . . to reenact the movie 'Seven.'" *Id.*; *see also id.* at 270 n.8 (explaining that the movie "Seven" was a "film portraying crimes of a serial killer who chooses victims based upon each victim's commission of one of the seven deadly sins" (emphasis removed)).

[123] Douglas M. Stenstrom & Mathew Curtis, *Pride, Sloth/Lust/Gluttony, Envy, Greed/Wrath: Rating the Seven Deadly Sins*, 8 INTERDISC. J. RSCH. ON RELIGION, 2012, at 1, 24.

[124] *Id.*; *see also* TICKLE, *supra* note 2, at 11 (acknowledging the presence of sin as "universally human").

[125] *See* Stenstrom & Curtis, *supra* note 123, at 23–24 (describing how results across various demographics were interestingly generally consistent, although noting there were a few minor variations).

[126] *Id.* at 9. The authors posited that Western society tends to create a "self-centered" culture that ultimately transforms pride from a vice to something more positive. *Id.*

[127] *Id.* The authors opined that sloth, lust, and gluttony ranked in the middle because they represented "basic animalistic needs" that were "neither extremely sinful nor entirely sinless" when compared to other sins. Leaving out lust, the study suggested that the Seven Deadly Sins could be placed on a scale in which pride, sloth, and gluttony were deemed "self-focused" while envy, wrath, and greed were considered to be "other-focused." *Id.* The self *always* is the focus of a person who feeds the Seven Deadly Sins; others are mere afterthoughts.

outranked pride, sloth, lust, and gluttony.[128] Ranked identically, *greed* and wrath claimed the top spot as *most offensive*.[129] "A 2005 . . . poll produced a new list for modern morality: cruelty, adultery, bigotry, dishonesty, hypocrisy, *greed*, and selfishness."[130] A powerful inference is that regardless of whether a person believes in sin in a religious sense, the Seven Deadly Sins strike a common chord in the human conscience. This common chord was recognized in *Greed: The Seven Deadly Sins*, in which the Seven Deadly Sins are described as inescapable, indispensable, and "invisible companions" for each human being.[131] There is a universality element to the Seven Deadly Sins.[132]

Armed with that understanding of the Seven Deadly Sins, it is time to narrow the focus from seven to one. It is time to comprehend why greed finds a prominent home in the Seven Deadly Sins.

B. Mine, Mine, Mine: Greed Demands All for Me and None for You

The universality of the Seven Deadly Sins makes it an alluring construct from which to view ethical misconduct among lawyers. While each of the Seven Deadly Sins makes for a revealing lens[133] through which to view all major violations of legal ethics, this Article now focuses specifically on greed among lawyers. In that vein, then, it is essential to develop a better understanding of why greed is counted among the Seven Deadly Sins by retracing the familiar historical path forged above.

Going back to the fourth century monks who served as the genesis for the Seven Deadly Sins, it is insightful to understand how these visionaries saw greed. Beginning again with Evagrius' *Praktikos*, the practical guide for monks, greed was seen as originating within one's mind.[134] Evagrius

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[128] *Id.*

[129] *Id.* It seems beyond dispute that a greedy *and* angry person is entirely intolerable!

[130] Robson, *supra* note 18, at 39 (emphasis added).

[131] TICKLE, *supra* note 2, at 11.

[132] One final display of the universality of the Seven Deadly Sins comes from its discussion in a recent federal case in Oklahoma. SFF-TIR, LLC v. Stephenson, 262 F. Supp. 3d 1238 (N.D. Okla. 2017). During voir dire, the defendants asked about "the Venire Panel's experience with, or knowledge of, or beliefs and feelings about, the Seven Deadly Sins." *Id.* at 1257. The district court prohibited the defendants from using the actual term "Seven Deadly Sins." *Id.* at 1259. Even though the court was unwilling to allow the defendants to "number them, call them deadly vices, or use the word 'sin[,]'" the court nevertheless allowed the defendants to "talk about civic virtues and vices" and "about pride, greed, envy, wrath, and sloth." *Id.*

[133] Similar to this Article's use of the Seven Deadly Sins as a lens through which to view legal ethics, Robson used each of the Seven Deadly Sins as a lens through which to view student scholarship and sexual justice. Robson, *supra* note 18, at 35.

[134] *See* EVAGRIUS, *supra* note 29, at 97–98 (explaining how greed and other sins arise from "categories in which every sort of thought is included").

believed that "[a]varice suggests a lengthy old age, inability to perform manual labour, famines that will come along, diseases that will arise, the bitter realities of poverty, and the shame there is in accepting goods from others to meet one's needs."[135] In other words, a person develops a love of money from fearful thoughts of not having enough and having to rely on others for support. By explaining that greed comes from one's thoughts, Evagrius instructed monks how to fight it.[136] Inevitably, the way that Evagrius wrote about greed was shaped by his surroundings.[137] Writing exclusively for monastic groups, Evagrius saw "little compromise with the realities of a lay community in [his] conception of" greed.[138] Evagrius' austere tone was borne from the fact that monks practiced "extreme abstinence," had virtually no possessions, and gave up everything to ensure their spiritual life was "unimpeded by worldly matter."[139] Evagrius instructed monks to avoid greed by having as little as possible—a monk who has "many possessions is a burdened vessel," while one "without possessions is a well-equipped traveler . . . a soaring eagle who only flies down for provisions when need presses him."[140] This advice might be somewhat out of touch with the realities of life outside of a monastery, but it sheds light on the power that greed commands once deployed within the mind.

In *Institutes*, Cassian cautioned monks that greed "begins by tempting [one] in regard of a small sum of money, giving him excellent and almost reasonable excuses why he ought to retain some money for himself."[141] Greed tries to overbear a monk's sense of reason by scaring the monk into believing that the monastery is insufficient to meet his needs.[142] Cassian warned that once a monk "bamboozled himself with such thoughts as these, he racks his brains to think how he can acquire at least one penny."[143] But one penny is never enough, for "so securing the

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[135] *Id.* at 98.

[136] *Id.* at 101.

[137] RICHARD NEWHAUSER, THE EARLY HISTORY OF GREED: THE SIN OF AVARICE IN EARLY MEDIEVAL THOUGHT AND LITERATURE 47–48 (2000).

[138] *Id.* at 47.

[139] *Id.* at 50.

[140] *Id. See also Hebrews* 13:5 (ESV) ("Keep your life free from love of money, and be content with what you have, for he has said, 'I will never leave you nor forsake you.'").

[141] John Cassian, *The Twelve Books on the Institutes of the Coenobia, in* A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 201, 250 (Philip Schaff & Henry Wace eds., Edgar C. S. Gibson trans., New York, The Christian Literature Co. 1894).

[142] *Id.* In a similar admonition, Mahatma Gandhi promised: "There is a sufficiency in the world for man's need but not for man's greed." Terri G. Seuntjens et al., *Defining Greed*, 106 BRIT. J. PSYCH. 505, 505 (2015).

[143] Cassian, *supra* note 141, at 250. *See also Proverbs* 30:8 (ESV) ("Remove far from me falsehood and lying; give me neither poverty nor riches; feed me with the food that is needful for me . . . .").

coveted coin, he torments himself worse and worse in thinking how he can double it."[144] And "a still more *greedy* craving for gold springs up, and is more and more keenly excited, as his store of money grows larger and larger. For with the increase of wealth the mania of covetousness increases."[145] As Cassian so vividly detailed, greed grows exponentially upon itself once even a tiny thought—as insignificant as a penny—is planted in one's mind. For the man who is greedy, Cassian alerted, "gold and the love of gain become to him his god."[146] Greed's destructive path of "wishing to become rich" leads one to "fall into temptation . . . and many unprofitable and hurtful desires, which drown men in destruction and perdition."[147] Although greed might initially begin as a mere protective thought, if fed, it ends up hurting the greedy person as well as others.[148]

Gregory also warned against the sly nature of greed. He counselled that greedy thoughts can be disguised as pious in caring only for "the want of those of [one's] family" and "to the care of providing for them."[149] Under this guise, the mind "may be secretly seduced and hurried into sin by seeking after wealth."[150] Demonstrating the counterbalancing forces of vice and virtue, Gregory admonished, "The arrow then insidiously assails

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[144] Cassian, *supra* note 141, at 250.

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

[146] *Id.*

[147] *Id.* at 251. *See also Proverbs* 28:20 (ESV) ("A faithful man will abound with blessings, but whoever hastens to be rich will not go unpunished."). Demonstrating the deceptive cruelty of greed, one study suggested that societal perception of greed changes based on general economic vitality: "When times are good and economic activities benefit a large portion of the population, greed is viewed as morally justifiable as a social good. . . . When times are bad, greed is seen as a sin and a vice . . . inevitably leading to folly and destruction." Rahul Oka & Ian Kujit, *Greed Is Bad, Neutral, and Good: A Historical Perspective on Excessive Accumulation and Consumption*, 1 ECON. ANTHROPOLOGY 30, 45 (2014).

[148] This Article draws enlightenment from a chart-topping song that demonstrated that the excess depravity of feeding the Seven Deadly Sins does not feed the soul. *Hotel California* by The Eagles implicitly teaches that the soul gets trapped under the weight of less fulfillment even as it feasts on its wildest desires. THE EAGLES, *Hotel California, on* HOTEL CALIFORNIA (Asylum Records 1976). Here is the Eagles' Don Henley's confession: "[Hotel California is] not really about California; it's about . . . the dark underbelly of the American dream. It's about excess, it's about narcissism." Travis M. Andrews, *Now It's the Eagles vs. Hotel California in a Federal Court*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/03/now-its-the-eagles-vs-hotel-california-in-a-federal-court/?noredirect=on. The next time you listen to Hotel California, consider how the character who indulges every desire ends up unfulfilled and trapped. *See* THE EAGLES, *supra* ("We are all just prisoners here, of our own device. And in the master's chambers, they gathered for the feast. They stab it with their steely knives, but they just can't kill the beast. Last thing I remember, I was running for the door. I had to find the passage back to the place I was before. Relax, said the night man. We are programmed to receive. You can check out any time you like, but you can never leave!").

[149] GREGORY THE GREAT, *supra* note 56, at 485.

[150] *Id.*

the horse of God, when the crafty enemy conceals for him a vice beneath a virtue."[151] Greed feeds a multitude of sins such as "treachery, fraud, deceit, perjury, restlessness, violence, and hardnesses of heart against compassion."[152] Greed seemingly is built upon reason until it has grown to such great proportions that it can no longer be controlled. The result is always the same—a selfish heart hardens against others in violation of the Golden Rule, indeterminately lifting oneself over others.

Aquinas expounded upon the idea of greed's sinfulness. Echoing the "self over others" mindset, he concluded that greed "makes man hateful to others, but not to himself" and "is caused by inordinate self-love, in respect of which, man desires temporal goods for himself more than he should."[153] Aquinas taught that covetousness "is a special sin," because it "is the root of all sins."[154] Just as the root of a tree "furnish[es] sustenance to the whole tree," when a man acquires wealth, he "acquires the means of committing any sin whatever, and of sating his desire for any sin whatever, since money helps man to obtain all manner of temporal goods . . . so that in this sense desire for riches is the root of all sins."[155] Greed makes you think about yourself more and others less; people become less valuable while self becomes invaluable.[156] Thus, Aquinas used philosophical underpinnings to reason that greed is one of the deadliest of the Seven Deadly Sins.

In the *Divine Comedy*, greed was punished in Hell and Purgatory.[157] Dante used the imagery of Hell to depict how the lovers of money—the

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[151] *Id.*

[152] *Id.* at 490. Lest one subscribe to the idea that only a Pope from fourteen centuries ago would be concerned with greedy misconduct, Pope Francis led a 2018 Christmas Eve Mass at St. Peter's Basilica at the Vatican in which he "urged Christians . . . to forgo the *greed*, gluttony and materialism of Christmas and to focus instead on its message of simplicity, charity and love." Nicole Winfield, *Pope Francis Leads Christmas Eve Mass at Vatican*, PBS NEWSHOUR (Dec. 24, 2018) (emphasis added), https://www.pbs.org/newshour/world/pope-francis-leads-christmas-eve-mass-at-vatican. Lamenting how people often find their meaning in possessions, Pope Francis counseled, "[W]e understand that the food of life is not material riches but love, not gluttony but charity, not ostentation but simplicity. . . . An *insatiable greed* marks all human history, even today, when paradoxically a few dine luxuriantly while all too many go without the daily bread needed to survive." *Id.* (emphasis added).

[153] AQUINAS, *supra* note 67, at Pt. 2, Q. 29, art. 4.

[154] *Id.* at Pt. 2, Q. 84, art. 1. *See also 1 Timothy* 6:9–10 (NKJV) ("But those who desire to be rich fall into temptation and a snare, and into many foolish and harmful lusts which drown men in destruction and perdition. For the love of money is a root of all kinds of evil, for which some have strayed from the faith in their greediness, and pierced themselves through with many sorrows." (emphasis removed)); Robson, *supra* note 18, at 51 ("At times, [greed] is identified as the source of all other sins, as in Paul's statement usually translated as 'The love of money is the root of all evil.'" (quoting *1 Timothy* 6:10 (KJV))).

[155] AQUINAS, *supra* note 67, at Pt. 2, Q. 84, art. 1.

[156] "Greed has been called the 'most social and by extension the most political of sins.'" Robson, *supra* note 18, at 51 (quoting TICKLE, *supra* note 2, at 23).

[157] John Scott, *Avarice in Dante and His Age*, DANTE STUDS., 2014, at 1, 9.

greedy—are separated into the hoarders and the prodigals.[158] Opposing each other, they hurl insults at each other, mockingly taunting "[w]hy holdest thou so fast?" and "why castest thou away?"[159] In a senseless exercise showing the worthlessness of greed, the two groups constantly travel in opposite directions around a circle until they run into each other again and again, turning around each time only to repeat the fruitless venture.[160] In Purgatory, Dante again encountered the Greedy.[161] Because they never lifted their eyes to heaven but rather were fixated on their earthly possessions, their punishment was being chained face down to the earth so they could not lift their eyes to heaven.[162]

In *Canterbury Tales*, Chaucer shared an interesting perspective on greed through the Pardoner, who preached about the dangers of greed by tricking people into giving him money for pardons.[163] The Pardoner admitted that his "only interest is in gain[, and] none whatever in rebuking sin."[164] He suffered from the same sin—greed—that he preached against, all without remorse.[165] The Pardoner told a cautionary tale of three men who wished to meet Death.[166] On their journey, they found a tree full of gold; overcome by greed, each man plotted to kill the others to keep the treasure for himself.[167] Through the Pardoner's Tale, Chaucer conveyed a clear message that greed ultimately leads to Death.[168] Sadly, witnessing how greed led to Death was not enough for the Pardoner. Even after finishing his harrowing tale of greed, he still tried to swindle his fellow travelers out of their money.[169] And this was after he already had told them his strategy and confessed to his own greed![170] Vividly portraying this corrupting irony, Chaucer painted a lasting and disturbing picture of the dire consequences wrought by greed.

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158 ALIGHIERI, DANTE'S INFERNO, *supra* note 81, at Canto VII, *ll.* 34–49.
159 *Id.* at *ll.* 30–31.
160 *Id.* at *ll.* 32–36.
161 ALIGHIERI, DANTE'S PURGATORIO, *supra* note 86, at Canto XIX, *ll.* 71–76.
162 *Id.*
163 CANTERBURY TALES, *The Pardoner's Prologue*, *supra* note 106, at 327.
164 *Id.*
165 RIVERSIDE CHAUCER, *The Pardoner's Tale*, *supra* note 98, at 194, *ll.* 424–34.
166 *Id.* at *ll.* 752–61, 812–13.
167 *Id.* at *ll.* 769–73, 812–17.
168 *Id.* at *ll.* 903–06, 942–47.
169 *Id.* at *ll.* 905–18.
170 *Id.* at *ll.* 328–48, 425–41.

C. A Modern Perspective on Greed

Modern studies on greed reaffirm what has long been known—greed is unhealthy.[171] Simply defined, greed is an *excessive* desire and self-interest to acquire more at the *expense* of others; tortuously, the craving for more is *insatiable*.[172] Greed results in a "*disordered* desire for, or delight in, money or monetary value."[173] "[T]he greedy personality [assumes] that protection and happiness emanate from acquisition . . . ."[174] As a greedy person seeks excessive maximization in always wanting more, the insatiable part of greed rears its head—the person actually develops deeper frustrations and utter dissatisfaction in not having enough and not having more.[175] This dystopian phenomenon of greed leads to "exclusiveness and withholding from others, and it involves a rupture between attaining or consuming an object and gaining satisfaction."[176] Greed's final result, paradoxically, is that "a person suffering from greed is not satisfied by acquisition; he always wants more."[177] And, it appears,

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[171] Societies have long held that greed produces destructive results. Oka & Kujit, *supra* note 147, at 33–34. And greed often is confused with materialism. Seuntjens et al., *supra* note 142, at 507. For example, a $1 billion, 27-story, 400,000-square foot mansion built for Mukesh Ambani in Mumbai, India, towers over millions of neighbors who live in slums. Jim Yardley, *Soaring Above India's Poverty, a 27-Story Home*, N.Y. TIMES (Oct. 28, 2010), http://www.nytimes.com/2010/10/29/world/asia/29mumbai.html. Whether Ambani is greedy for spending his wealth on his opulent house that shadows the poorest of the world is left for another day. *See* Lisa G. Lerman, *Greed Among American Lawyers*, 30 OKLA. CITY U. L. REV. 611, 630 (2005) (prodding the materialism debate by questioning "whether it is wrong for some people to be so wealthy when so many are utterly destitute"). Any distinction between greed and materialism is not of concern in this Article. The focus of this Article is to clearly define greed to understand why it is so harmful and then apply that definition to various case studies illustrating greedy conduct by lawyers. Asking how wealth is acquired, this Article contends that greed corrupts when a lawyer acquires wealth to the detriment of others through a limitless and unappeasable desire for more. This Article showcases lawyers whose greed drives them to do anything to gain wealth regardless of the consequences. It focuses on the kind of greedy thoughts that put the lawyer's needs far above the reciprocal needs of clients, the system of justice, or society itself. Greed is the poisonous motivator behind destructive misconduct.

[172] *See* Seuntjens et al., *supra* note 142, at 518 (discussing the components of greed); *see also* Lerman, *supra* note 171, at 615 (defining greed as a selfish desire for more regardless of the impact on others).

[173] Andrew Pinsent, *Avarice and Liberality*, *in* VIRTUES AND THEIR VICES 157, 160 (Kevin Timpe & Craig A. Boyd eds., 2014) (emphasis added).

[174] Lerman, *supra* note 171, at 615 (quoting David Farrugia, *Selfishness, Greed, and Counseling*, 46 COUNSELING & VALUES 118, 119 (2002)).

[175] Seuntjens et al., *supra* note 142, at 507, 518–19.

[176] Lerman, *supra* note 171, at 615 (quoting David P. Levine, *The Attachment of Greed to Self-Interest*, 2 PSYCHOANALYTIC STUD. 131, 132 (2000)); *see also* TICKLE, *supra* note 2, at 14 (reporting that the *Tao Teh Ching* teaches that the greatest calamity is "indulging in greed," while the *Guru Granth Sahib* or *Adi Granth* asks: "Where there is greed, what love can there be?").

[177] Lerman, *supra* note 171, at 615.

these are long-standing views of greed. As Horace predicted, "He who is greedy is always in want."[178] Likewise, Socrates allegedly warned, "He who is not contented with what he has, would not be contented with what he would like to have."[179]

As the dreadful cycle of wanting more deepens in dissatisfaction, the greedy person's focus becomes entirely self-interested with tunnel vision to acquire more.[180] Proving what Aquinas predicted many centuries ago, another one of the Seven Deadly Sins enters the mind to prod greed—envy now tempts the greedy person to acquire even more, deepening the cycle of "self-interested behaviour and tunnel vision."[181] Greed effortlessly "transform[s] into a sense of envy, jealousy[,] and avarice."[182] At this stage, the greedy person's concentration on self is entirely out of proportion to any concern for others.[183] As "I" grows larger, "you" becomes smaller, perhaps even unnoticeable. The inability to see others opens the door for immoral behavior as the greedy person enjoys feelings of superiority.[184] A person who embraces greedy selfishness develops "a strong sense of justification and entitlement."[185] Tragically, harmful conduct is inevitable when a greedy person's tunnel vision and obsessive desire for more result in the inability to even comprehend the long-term consequences of greedy conduct.[186]

The reason is simple and stands as a cornerstone of greed—as greed consumes a person's thinking and conduct, that person loses the ability to engage in "second-person relatedness to others" or to be mindful of mutual and reciprocal relationships.[187] When greed consumes a person, others are no more than a means to an end and can be treated in a depersonalized way.[188] A heart-wrenching example is that of a Walmart service worker who was trampled to death by shoppers charging through the doors

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[178] *In re* Broucek, 341 B.R. 623, 626 (Bankr. W.D. Mich. 2006) (accrediting this quote to the ancient Roman poet, Horace).

[179] Weiwei Li et al., *Neural Mediation of Greed Personality Trait on Economic Risk-Taking*, ELIFE (Apr. 29, 2019), https://elifesciences.org/articles/45093.

[180] Seuntjens et al., *supra* note 142, at 518–19.

[181] *Id.* at 518.

[182] Lerman, *supra* note 171, at 615 (quoting Farrugia, *supra* note 174, at 119). Perhaps this is why Buddhist thought identifies "greed [a]s one of the three poisons that create bad karma." Seuntjens et al., *supra* note 142, at 506.

[183] *See* Seuntjens et al., *supra* note 142, at 520 (explaining that self-interest is a result of greed as an individual focuses on themselves, rather than others, in their quest to acquire more).

[184] *Id.*

[185] Lerman, *supra* note 171, at 615 (quoting Farrugia, *supra* note 174, at 119).

[186] Seuntjens et al., *supra* note 142, at 520.

[187] Pinsent, *supra* note 173, at 168.

[188] *Id.* at 166.

seeking cheap goods.[189] Shockingly, even though everyone was participating in a shared experience, the shoppers were driven by greed in a way that allowed them to view everyone else in a depersonalized, second-person way.[190] When a person's desire to enrich himself leads to the literal trampling of another person—to the point of death—one can witness the destructive power of greed and why it stands out as one of the Seven Deadly Sins.

What compels a person to discard the Golden Rule in favor of the Seven Deadly Sins? What drives a person to travel down the bottomless pit of greed? Greed fills a void.[191] One might resort to greedy conduct after enduring a childhood marked by emotional or financial insecurity.[192] Seeking the support that was lacking in formative years, a person might be conditioned to crave support and stability in material goods.[193] In essence, a child conditioned with materialistic values may grow to be a greedy and materialistic adult.[194] Fear also motivates greed. Fear of death might drive a person to acquire material goods to mimic longevity or to rise in status to make a mark on the world that will endure after death.[195] Fear-based greed propels a person to acquire far more than would ever be necessary for one's own life. Fear of loss also can drive greed. When a person unduly focuses on the potential for loss, he might hedge against the loss by acquiring as many possessions as possible, and far more than necessary to protect against any feared loss.[196] In a bitter irony, striving for and attaining more wealth creates more insecurity, because "the more a person has, the more she can potentially lose."[197] Common to the Seven Deadly Sins, greed operates in a vicious cycle as thoughts drive more vicious behavior to cure perceived needs that only widen with each additional thought. Itches become impossible to scratch; the more you scratch, the more you itch. Invoking the snowball imagery from above, Dante's *Inferno* cautioned that the greedy "quest for more money, and more security for more money," is "like a rolling weight that becomes unstoppable . . . [with] its own ever-increasing momentum until crashing into an obstacle."[198] Nobody wins at the site of this fatal crash.

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189 *Id.* at 157.

190 *Id.* at 166.

191 *See* Lerman, *supra* note 171, at 631 (discussing how individuals fill voids in their life by acquiring more things, producing a level of greed within them, such as children filling an emotional void left by poor parents by acquiring a collection of expensive objects).

192 *Id.* at 622, 631.

193 *Id.* at 622.

194 *Id.*

195 *Id.* at 624.

196 *Id.*

197 Pinsent, *supra* note 173, at 168.

198 *Id.*

Even though it is unnecessary to claim that various fears universally drive greed, it is safe to say that patterns of greedy thinking pre-exist greedy conduct. Greed changes the way a person thinks about oneself and others. This idea that deadly thoughts lead to deadly behavior is nothing new, of course, as even cloistered monks many centuries ago compiled lists of such deadly thoughts that included greed.[199] The point is that greed initially enters your thoughts; once fed, greed consumes your thinking. As unceasing thoughts of greed invade the mind, self-centered conduct with harmful consequences most surely follows. Harm to others might at first be indiscernible. But because others are of no concern and greed cannot be satiated, greedy conduct endlessly sows more potential for harm, and the risk to others exponentially rises. At some point, with the great force of a boomerang, the harm to others ricochets back onto the greedy person. It then becomes obvious that the greedy person harmed others and, in the process, himself.[200] This theme will be illustrated below as greedy lawyers inevitably harm others and, consequently, themselves.[201]

III. LAWYERS AND GREED

Undoubtedly, lawyers are caricatured as greedy.[202] Before this Article illustrates how greedy lawyers commit major ethical violations, it is time for you to participate by recalling a greedy lawyer joke. Greedy lawyer jokes certainly abound. Here is a sampling.

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[199] *See* EVAGRIUS, *supra* note 29, at 97 (recording the works of Evagrius, a famous monk who believed that every human thought falls into one of eight categories: fornication, avarice (greed), gluttony, acedia, vainglory, anger, pride, and sadness).

[200] King Solomon taught that greed was deadly thousands of years ago: "So are the ways of everyone who is greedy for gain; [i]t takes away the life of its owners." *Proverbs* 1:19 (NKJV) (emphasis omitted).

[201] How can an Article on why greed is bad be published without referencing a famous speech about why greed is good! In the 1987 blockbuster *Wall Street*, Michael Douglas's flawed character, Gordon Gekko, gave this memorable speech on the virtues of greed: "[G]reed, for lack of a better word, is good. Greed is right, greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit. Greed, in all of its forms; greed for life, for money, for love, knowledge has marked the upward surge of mankind." Chris MacDonald, *Wall Street (1987) — "Greed is Good,"* THE BUS. ETHICS BLOG (Oct. 12, 2010), https://businessethicsblog.com/2010/10/12/wall-street-1987-greed-is-good/.

[202] Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 285 (1998). Additionally, "[p]laintiffs in any sort of litigation, especially personal injury cases, are often painted with the sin of greed." Robson, *supra* note 18, at 52 (citing Martin A. Kotler, *The Myth of Individualism and the Appeal of Tort Reform*, 59 RUTGERS L. REV. 779, 796 (2007) ("[T]he 'greedy plaintiff' theme provides the subtext in a number of different areas of tort law.")); Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 679 (2008) (referring to the wide-spread belief "that the common law has been hijacked by greedy plaintiffs and lawyers").

A lawyer is "[o]ne who defends you at the risk of your pocketbook, reputation and life."[203]

"Make crime pay. Become a lawyer."[204]

"It's a pleasant world we live in sir, a very pleasant world. There are bad people in it, . . . but if there were no bad people, there would be no good lawyers."[205]

"A lawyer is a gentleman who rescues your estate from your enemies and then keeps it to himself."[206]

"Know how copper wire was invented? . . . Two lawyers were fighting over a penny."[207]

Greed among lawyers is no laughing matter, however, because those harmed find no humor in it. Greedy lawyers hurt clients, themselves, and the legal profession.[208] When a lawyer entertains self-centered thoughts that more is never enough, those thoughts build into conduct. As thoughts and deeds feed greed to each other, the lawyer's focus leaves the client to concentrate on getting more for himself. The client is not even an afterthought but exists solely as a conduit through which the lawyer can attain more wealth. As the destructive force of greed spins out of control, it ultimately proves why greed is one of the Seven Deadly Sins—significant harm is inevitable.

A. Greed Destroys Reputations of Lawyers

When one visualizes the reputation of lawyers, it is not pretty. One scholar remarked, "What the public doesn't like about lawyers could fill volumes."[209] Although there are many reasons why the public lodges grievances against lawyers, "character defects associated with lawyers" stand out.[210] The most disliked trait? Greed.[211] And the perception that lawyers are greedy is widespread. National surveys report that about sixty percent "of Americans described attorneys as greedy"; over fifty

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[203] *Lawyer Sayings and Quotes*, WISE OLD SAYINGS, http://www.wiseoldsayings.com/lawyer-quotes/ (last visited Nov. 8, 2020) (accrediting Eugene E. Brussell with this quote).

[204] *Id.* (accrediting Will Rogers with this quote).

[205] CHARLES DICKENS, THE OLD CURIOSITY SHOP 819 (The Floating Press 2009) (1841).

[206] *Lawyer Sayings and Quotes*, *supra* note 203 (accrediting Henry P. Broughman with this quote).

[207] *Lawyer Jokes — the Good the Bad and the Dirty*, LAWYER JOKE COLLECTION, http://www.iciclesoftware.com/LawJokes/IcicleLawJokes.html (last visited Oct. 16, 2020).

[208] Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1682–86 (1994).

[209] Rhode, *supra* note 202, at 285.

[210] *Id.*

[211] *Id.*

percent thought that lawyers "charge[] excessive fees."[212] Lawyers are seen as "greedy, manipulative, and corrupt" and "are not upfront about their fees."[213] The perception of lawyers and the legal profession takes a hit with every greedy blow.

In the blockbuster movie *Seven*, about a murderer who kills victims based on their indulging the Seven Deadly Sins, a lawyer was used to portray greed.[214] When detectives played by Brad Pitt and Morgan Freeman found a bound and dead lawyer, they discovered a note with the following message: "One pound of flesh, no more, no less. No cartilage, no bone, but only flesh. This task done . . . and he would go free."[215] The murderer required that the lawyer cut one pound from his flesh with a butcher's knife as punishment for his greed.[216] Seeking God's vengeance on those who committed one of the Seven Deadly Sins, the murderer explained that he had picked the greedy lawyer as "a man who dedicated his life to making money by lying with every breath that he could muster . . . to keeping rapists and murderers on the streets."[217] In a sick and twisted way, the murderer explained that the lawyer's greed propelled him to do whatever it took to make money. Greed, indeed, was deadly.

B. Legal Ethics and Greed

To avoid abuses regarding money, legal ethics rules exhaustively regulate fees.[218] The reason is simple—even though a lawyer is retained to serve as the client's agent, the initial fee discussion is inherently

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[212] *Id.*; *see also* William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 16 (1991) (reporting that "12.3% of the private practitioners and 15.2% of the corporate counsel . . . believe that lawyers 'frequently' pad their hours to deliberately bill clients for work which they never performed" and "38% of the private practitioners and 40.7% of the corporate counsel . . . believe that lawyers 'occasionally' pad their hours").

[213] Larry O. Natt Gantt, II, et. al., *Professional Responsibility and the Christian Attorney: Comparing the ABA Model Rules of Professional Conduct and Biblical Virtues*, 19 REGENT U. L. REV. 1, 46 n.277 (2006) (quoting *Public Perceptions of Lawyers Consumer Research Findings*, A.B.A. SECTION OF LITIG., Apr. 2002, at 4).

[214] *See* Alan Jones, *Se7en*, RADIO TIMES, https://www.radiotimes.com/film/fxk8sc/se7en/ (last visited Oct. 21, 2020) (describing the killing of a lawyer who was murdered for committing one of the seven deadly sins: greed).

[215] Andrew Kevin Walker, *Se7en(1995)*, https://sfy.ru/?script=se7en (last visited Oct. 2, 2020). The reference to the pound of flesh is from *The Merchant of Venice*, in which one character signs a contract to give another man a pound of his flesh if he does not pay back a loan. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3, *ll.* 35–39.

[216] Walker, *supra* note 215.

[217] *Id.*

[218] *See* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR. ASS'N 2020) (prohibiting attorneys from charging unreasonable fees and requiring attorneys to disclose their rates and changes in fees to clients before and during representation).

conflict-laden and ripe for an abuse of trust.[219] While the client might believe that the lawyer is looking out for the client's sole interest in the fee discussions, the lawyer naturally is thinking about himself, too. To combat this natural phenomenon, lawyers must not seek an "unreasonable fee."[220] To combat misunderstandings, lawyers must clearly communicate with the client about fees.[221] Stressing honesty, legal ethics forbid lawyers from "knowingly . . . mak[ing] a false statement of material fact or law."[222] Lawyers likewise are forbidden from engaging in dishonest, fraudulent, and deceitful conduct or from making a misrepresentation.[223] A catch-all rule makes the sweeping statement that it is "professional misconduct" for lawyers to "engage in conduct that is prejudicial to the administration of justice."[224]

Despite this extensive regulatory regime, lawyers often violate the rules of legal ethics relating to money.[225] An insurance executive who covers risk management for lawyers wrote an insightful article in which he tried to answer "the fundamental question of why unethical billing practices persist"[226] with the goal "to answer this question and . . . offer practical advice to lawyers and law firms on preventing unethical billing practices for their own good and for the good of the profession."[227] When analyzing why lawyers overbill clients, falsify expenses, and defraud their firms, the article recited the following reasons: "ignorance of, or insensitivity to, applicable standards of conduct; insecurity; absence of stable professional bonds; lawyers' competitiveness; law firms compensation systems that directly reward lawyers' productivity based on

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[219] *See, e.g.*, FLA. RULES OF PRO. CONDUCT r. 4-1.7, cmt. (2020) ("The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee.").

[220] *See* MODEL RULES, at r. 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Whether a lawyer violates this unreasonable-fee prohibition requires an analysis of a multi-factor test (eight factors, to be specific). *Id.* at r. 1.5(a)(1)–(8).

[221] *See id.* at r. 1.5(b) (requiring disclosure of representation costs to clients within a reasonable time of the start of representation and requiring notification of a change in costs to clients); *see also id.* at r. 1.4 (generally creating a lawyer's duty to communicate with a client).

[222] *Id.* at r. 4.1(a).

[223] *Id.* at r. 8.4(c).

[224] *Id.* at r. 8.4(d).

[225] *See infra* text accompanying notes 230–237.

[226] Douglas R. Richmond, *For A Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 70 (2008) [hereafter *A Few Dollars More*]; *see also Douglas R. Richmond*, AM. CONF. INST. (Oct. 24, 2016), https://www.americanconference.com/lplfrasllegal-malpractice-870i17-nyc/speakers/douglas-r-richmond/ (noting that Douglas Richmond is the Senior Vice President of Aon Risk Services). This Article joins the search for the answer to that vexing question by focusing on the Seven Deadly Sins.

[227] *A Few Dollars More*, *supra* note 226, at 70.

billable hours; lawyers' perception of clients as adversaries; *greed and envy*; and mental illness, personality disorders, and substance abuse."[228]

Unsurprisingly, greed and envy—two of the Seven Deadly Sins—revealed themselves on this list!

Consistent with Lord Mansfield's teachings a century before, the Supreme Court of Minnesota in 1920 announced a long-standing common law rule "that misconduct, indicative of moral unfitness for the profession, whether it be professional or nonprofessional, justifies dismissal as well as exclusion from the bar."[229] The moral unfitness of the lawyer in that case was unchecked greed, which prompted the court to describe the lawyer as "a person of such *greed* that he ought not to be in a position to bargain for professional fees."[230] This proves that greed among lawyers is not a recent phenomenon in that nearly a century ago, a lawyer was disbarred for his greedy and dishonest misconduct.[231]

Greed is not good for the soul or for the legal profession. Professor Lisa G. Lerman is an expert on legal ethics who has studied lawyers and greed.[232] She analyzed how greedy lawyers display an unhealthy focus on materialism and a drive to acquire as much wealth as possible.[233] Proving that greed redounds harm onto the greedy, Professor Lerman recognized that greedy lawyers find themselves unhappy and in unhealthy relationships.[234] She also recognized a strong correlation between greedy conduct and mental disorders like depression, narcissism, and drug use.[235] Greed also harms others. Professor Lerman noticed that greedy lawyers engage in illegal practices,[236] summarizing cases in which greedy lawyers were prosecuted for stealing from their clients or firms through false billing and illegal spending.[237]

Greed surfaces at the crossroad between ethical duties and the acquisition of wealth. This is the jumping off point to critically analyze cases in which lawyers engaged in the deadly sin of greed and, in the process, committed major ethical violations. The cases reveal the pitfalls

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

[229] *In re* Cary, 177 N.W. 801, 803 (Minn. 1920).

[230] *Id.* at 804 (emphasis added).

[231] *Id.*

[232] *Expert Faculty, Lisa G. Lerman*, COLUMBUS SCH. OF LAW, https://www.law.edu/about-us/faculty-and-staff/directory/expert-faculty/lerman-lisa/index.html (last visited Sept. 19, 2020).

[233] Lerman, *supra* note 171, at 614–15, 620–22, 625–26.

[234] *Id.* at 623, 628.

[235] *Id.* at 623.

[236] *Id.* at 626–27.

[237] *Id.* at 619–20. To combat greed in the legal profession, Professor Lerman encouraged lawyers "to liv[e] lives of integrity and service to others," while lamenting how many lawyers only perform "a modest amount of pro bono work while simultaneously striving to move their six-figure incomes to seven figures." *Id.* at 630.

that cause lawyers to stumble when greedy thoughts dominate the mind and lead to misconduct that harms others.

C. Analysis of How Greedy Lawyers Harm Others and Themselves

There is great risk at the intersection of greed and lawyering. An article that compared rules of legal ethics to biblical virtues highlighted that "many biblical passages caution individuals against being enticed by *greed* or the love of money."[238] Supporting the idea that greedy thoughts presage greedy conduct, these scholars cautioned that lawyers' "attitudes toward their fees" are as important as "their actions regarding them."[239] Consistent with the historical account of the Seven Deadly Sins, the authors warned that "[t]he desire for wealth has inherent spiritual dangers, . . . partly because the very desire itself is like a trap . . . full of many hurtful desires that lead to all kinds of sin."[240] To combat the temptation of greed, the article encouraged lawyers to adhere to the "'golden rule' and imagine themselves on the buying end in determining whether a fee is just and fair."[241] By utilizing this helpful framework in thinking about fees, a lawyer would violate the Golden Rule "if he charged his client more than he thinks would be fair if he were the client."[242] Every case below demonstrates an outright rejection of the Golden Rule's focus on mutual reciprocity in favor of the selfishness found in greed as one of the Seven Deadly Sins.

1. Notorious Greed: Fantastical Failings

When greedy lawyers go big, they make headlines that reaffirm sad caricatures that hound the legal profession. In 2008, prominent lawyer WL[243] was sentenced to two years in prison for a two-decade operation

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[238] Gantt, II, et al., *supra* note 213, at 17 (emphasis added).

[239] *Id.*

[240] *Id.* (quoting GORDON D. FEE, 1 & 2 TIMOTHY, TITUS § 16 (1988)). Developing the theme to avoid "the love of money," the article demonstrated that greedy conduct stems from a lawyer's heart when making money from clients "has become the focus of [a lawyer's] life." *Id.*

[241] *Id.* at 16.

[242] *Id.*

[243] This Article does not seek to malign lawyers whose careers have been marked by ethical failings. The legal profession does not benefit from relentless finger-pointing at lawyers who have fallen from the moral high ground. Thus, this Article uses the initials of lawyers who are *reported* to have engaged in greedy misconduct. To the extent that this Article can alert even a single lawyer to recognize greedy thought patterns before they turn into greedy misconduct, then it might protect that lawyer, his or her clients, and the legal profession. The case studies below are only productive to that end. As a wise caution, let us not forget to "[l]et him who is without sin among you be the first to throw a stone" at those lawyers who are depicted on the following pages. *John* 8:7 (ESV).

that netted $250 million through class-action lawsuits with "ready-made plaintiffs."[244] WL and his firm paid clients $11.3 million for participating as lead plaintiffs in over 175 class actions.[245] MW, WL's partner, used this lucrative strategy to file class-action lawsuits against public companies by paying secret kickbacks to shareholders to serve as lead plaintiffs.[246] Before launching fraudulent lawsuits to rake in *millions* of dollars, WL and MW already were prominent lawyers in shareholder litigation that recovered *billions* of dollars through lawsuits against crooked companies like Enron, Lucent, and Tyco.[247] WL produced a legitimate settlement of a whopping $7.12 billion, the largest in history involving class-action securities.[248] As these lawyers grew their wealth and power, they often intimidated companies into settlements instead of defending expensive lawsuits brought by well-supported shareholders.[249] But greedy conduct that incessantly sought more wealth ultimately brought down these lawyers. After the illegal payments were discovered, WL was disbarred, sentenced to prison, fined, and ordered to perform community service.[250] What started as community service to protect shareholders from abuse turned into a criminal operation fueled by greed that ended in conviction, disgrace, and community service as a form of restitution and punishment. MW was sentenced to thirty months' imprisonment, fined $250,000, and ordered to repay nearly $10 million in forfeiture penalties because of the scam lawsuits.[251]

Even though WL pled guilty "to conspiracy to obstruct justice and make false testimony,"[252] he had a difficult time showing remorse after he was released from prison. Claiming that the lawsuits were filed "on behalf of real victims," WL said that he "would not have done anything differently," because he was "proud of the work we did even if I'm not

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[244] Molly Selvin, *Two-Year Sentence for Lerach*, L.A. TIMES (Feb. 12, 2008, 12:00 AM), http://www.latimes.com/business/la-fi-lerach12feb12-story.html.

[245] Marianne Regan, *Bill Lerach: Life After Prison*, SAN DIEGO METRO, http://www.sandiegometro.com/2010/10/bill-lerach-life-after-prison/ (last visited Aug. 29, 2020).

[246] Jonathan D. Glater, *Class-Action Lawyer Gets 30 Months in Prison*, N.Y. TIMES (June 3, 2008), http://www.nytimes.com/2008/06/03/business/03legal.html.

[247] *Id.*

[248] Stephen Taub, *Enron Settlements Hit Record $7 Billion*, CFO (Aug. 3, 2005), http://ww2.cfo.com/risk-compliance/2005/08/enron-settlements-hit-record-7-billion/.

[249] Peter Lattman, *Trying to Get Back in the Game*, N.Y. TIMES (June 21, 2011, 8:09 PM), https://dealbook.nytimes.com/2011/06/21/trying-to-get-back-in-the-game/.

[250] Regan, *supra* note 245.

[251] Glater, *supra* note 246.

[252] Debra Cassens Weiss, *Lerach Wants to Teach Law School Ethics Class During Home Confinement*, A.B.A. J. (Feb. 11, 2008, 1:06 PM), http://www.abajournal.com/news/article/lerach_wants_to_teach_law_school_ethics_class_during_home_confinement.

proud of some of the practices that were engaged in."[253] In a dramatic ends-justify-the-greedy-means way of thinking, WL conceded that although he "*probably* owe[d] plenty of people apologies," he applauded his firm's positive work because of "how much we achieved against extremely powerful and influential interests."[254] Even though many of the class actions were not essentially fraudulent, some of them betrayed a lawyer's "special responsibility for the quality of justice."[255] Using pre-fabricated plaintiffs to shovel millions of dollars in fees to a lawyer's pockets certainly was a lucrative business while it lasted, but the ultimate fallout harmed the lawyers (who already were fabulously wealthy) and assuredly harmed the reputations of lawyers in general. Lawyers garner the public's trust by acting in the interests of justice, not by greedily pursuing their own financial interests.

In the same year that WL and MW were sentenced to prison, a fabulously wealthy lawyer by the initials of RS "pleaded guilty to conspiring to bribe a judge."[256] Only greed could lure someone with a lucrative practice and vast wealth to risk it all for a little more. At the time of his crime, RS was earning $42 million a year for twenty-three years from a tobacco settlement.[257] That was not enough. RS reportedly refused to share fees with a lawyer who worked with him in a lawsuit involving insurance payments after Hurricane Katrina.[258] This is a prime example of a greedy attitude of "all for me and none for you." It is as though RS played a coin-flip game with the other lawyer along the lines of "heads I win, tails you lose." To avoid sharing fees with another lawyer, RS bribed a judge with $50,000 in exchange for a ruling that RS did not have to pay the fees.[259] To put in perspective the breathtaking scope of RS's wealth, after he served his last day of jail for bribing a judge, he emerged still claiming the top spot as the world's richest lawyer with a staggering $1.7 billion.[260] This level of eye-popping wealth that belongs to a man jailed for bribing a judge to save a few dollars brings to mind this quote from Warren Buffett: "If you get to my age in life and nobody thinks

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[253] *Q&A: Diane Bell Talks to Bill Lerach*, SAN DIEGO UNION-TRIB. (Apr. 11, 2010, 12:02 AM), http://www.sandiegouniontribune.com/sdut-q-diane-bell-talks-bill-lerach-2010apr11-htmlstory.html.

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

[255] MODEL RULES OF PRO. CONDUCT pmbl., ¶ 1 (AM. BAR ASS'N 2020).

[256] Debra Cassens Weiss, *Scruggs Pleads Guilty; Plus a Profile of the 'King of Torts*,' A.B.A. J. (Mar. 14, 2008, 4:06 PM), http://www.abajournal.com/news/article/scruggs_pleads_guilty.

[257] Terry Carter, *Long Live the King of Torts?*, 94 A.B.A. J. 44, 45 (2008).

[258] *Id.* at 48.

[259] *Id.* at 48–49.

[260] Jimmie E. Gates, *Disbarred Dickie Scruggs Called World's Richest Lawyer*, CLARION LEDGER (July 4, 2016, 2:01 PM), http://www.clarionledger.com/story/news/local/2016/07/04/disbarred-dickie-scruggs-called-worlds-richest-lawyer/86610052/.

well of you, I don't care how big your bank account is, your life is a disaster."[261]

Another example of lawyers and greed is the collapse of a storied law firm. Dewey & LeBoeuf ("Dewey") was a 1,300-lawyer New York law firm that was the product of a merger between the two eminent firms Dewey Ballantine and LeBoeuf, Lamb, Greene & MacRae.[262] Dewey's tower of greed collapsed after going bankrupt.[263] After a financial downturn, Dewey was unable to meet covenants tied to a $100 million revolving line of credit.[264] The firm's finance director had discussed with JS how they could make "possible accounting adjustments" to avoid breaching those covenants and defaulting on the line of credit.[265] An investigation unmasked a scandal in which JS and others defrauded lenders and insurance companies to conceal the firm's financial difficulties.[266] JS was criminally convicted for his role.[267] Why did a venerable law firm need such massive amounts of credit? Greed seems to be a big part of it. During his defense against the criminal charges that followed the implosion of his law firm, Dewey's former chair claimed that the massive firm failed

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[261] Tom Popomaronis, *Bill Gates: This Tiny Gesture of Warren Buffett's 'Means the World to Me'—Here's the Valuable Life Lesson Behind It*, CNBC (June 27, 2019, 12:35 PM), https://www.cnbc.com/2019/06/27/this-small-gesture-from-warren-buffett-taught-bill-gates-the-most-important-life-lesson.html. It is telling to read these words from a man whose wealth is many multiples of RS. Warren Buffet is currently worth $79.4 billion after having given away $41 billion. *#4 Warren Buffett*, FORBES, https://www.forbes.com/profile/warren-buffett/#5dfbcbfa4639 (last visited Sept. 27, 2020). Buffett preaches that the love of money is not the measure of a man's life; it is love itself:

> [W]hen you get to my age, you'll really measure your success in life by how many of the people you want to have love you actually do love you. I know many people who have a lot of money, and they get testimonial dinners and they get hospital wings named after them. But the truth is that nobody in the world loves them. That's the ultimate test of how you have lived your life. The trouble with love is that you can't buy it. . . . [T]he only way to get love is to be lovable. It's very irritating if you have a lot of money. You'd like to think you could write a check: I'll buy a million dollars' worth of love. But it doesn't work that way. The more you give love away, the more you get.

Marcel Schwantes, *Warren Buffett Says Your Greatest Measure of Success at the End of Your Life Comes Down to 1 Word*, INC. (Sept. 12, 2018), https://www.inc.com/marcel-schwantes/warren-buffett-says-it-doesnt-matter-how-rich-you-are-without-this-1-thing-your-life-is-a-disaster.html.

[262] Matthew Goldstein & Liz Moyer, *Former Dewey & LeBoeuf Executive Convicted in Split Verdict*, N.Y. TIMES (May 8, 2017), https://www.nytimes.com/2017/05/08/business/dealbook/dewey-leboeuf-verdict.html.

[263] *Id.*

[264] Matthew Heller, *Ex-Dewey & LeBoeuf CFO Convicted of Fraud*, CFO (May 9, 2017), http://ww2.cfo.com/fraud/2017/05/ex-dewey-leboeuf-cfo-fraud/.

[265] *Id.*

[266] *Id.*

[267] Goldstein & Moyer, *supra* note 262.

because of the "voracious *greed* of some of the firm's partners."[268] Many "[c]ommentators and lawyers agree the firm's exploding payroll helped hasten its demise."[269] As one former partner explained, "I am not sure when we lost our way on compensation matters, but at some point many of the partners started expecting—and receiving—compensation along the lines of senior partners at investment banks or rock stars."[270] A historic law firm merger collapsed in greedy disgrace.

While courts focused on criminal rather than ethical misconduct in the cases described above, the greed that drove WL, MW, RS, and JS violated legal ethics. JS violated ethics rules by "knowingly . . . mak[ing] a false statement of material fact or law" when he fixed records and shifted assets to secure the line of credit that protected promises of massive payouts.[271] WL and MS ignored legal ethics when they engaged in greedy conduct that was "prejudicial to the administration of justice"[272] by secretly padding the pockets of shareholders if they would participate as lead plaintiffs in high-profile lawsuits. While the lawsuits themselves may have been legitimate,[273] our system of justice cannot condone the frequent use of under-the-table payments.[274] And speaking of under-the-table payments, billionaire RS mocked justice when he bribed a judge so that he could inflate an already inflated bank account.[275] For no understandable reason, these greedy lawyers were willing to violate legal ethics to engage in dishonest, fraudulent, and deceitful misconduct to add a few more dollars to massive piles of existing dollars.[276] These lawyers had one thing in common—they pursued more and more money even at the expense of justice and their own integrity. Greed is the only fuel that can propel such reckless behavior.

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[268] Victor Li, *Dewey's Judgment Day*, 101 A.B.A. J. 36, 42 (Feb. 2015) (emphasis added).

[269] *Id.*

[270] *Id.*

[271] MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR. ASS'N 2020); *see* Heller, *supra* note 264 (explaining that JS was part of a scheme to manipulate his firm's financial records in an attempt to defraud lenders and conceal the firm's failing condition prior to its collapse).

[272] MODEL RULES, at r. 8.4(d).

[273] *Q&A: Diane Bell Talks to Bill Lerach*, *supra* note 253.

[274] Because the lead plaintiffs were getting more money than the rest of the class, it is possible that they were less inclined to look after the interests of the whole class. Glater, *supra* note 246. Further, by having ready-made plaintiffs, MW's firm had the first shot at certifying the class action, securing the spot as lead counsel, and getting more in legal fees. *Id.* Essentially, the class actions conducted in this manner served to primarily fuel a greedy machine, not accomplish justice.

[275] *See generally* MODEL RULES, at r. 8.4(d) (indicating that "engag[ing] in conduct that is prejudicial to the administration of justice" constitutes professional misconduct for a lawyer).

[276] *Id.* at r. 8.4(c).

2. Not-So-Notorious Cases of Greedy Lawyers

Greedy lawyers do not always make national headlines, commit major crimes, or cause storied law firms to crumble. Even though greedy misconduct among lawyers has the real potential to garner public attention, many major ethical violations committed by greedy lawyers remain relatively low-profile. Regardless of the potential for notoriety, however, greedy lawyers *always* cause harm. The cases below demonstrate how greedy thoughts lead to illogical conduct that causes serious ethical lapses. These case illustrations recall the teachings of Evagrius, Cassian, Gregory, and Aquinas that resound throughout the ages—greedy thoughts wreak havoc when fed with the unquenchable appetite for more.

JH was suspended from the practice of law after admitting to falsely billing a client for personal trips unrelated to the client's cause.[277] In a gross display of elevating self over others, JH perpetrated an "intentional and well orchestrated"[278] scheme to bill a client $40,203.18 to cover his expenses for six personal trips over a six-month period even though not a single second of a single trip was related to client business.[279] After confessing to the fraudulent billing, JH resigned his partnership at a law firm.[280] Greed must have crept into JH's thoughts while he enjoyed an "unblemished record,"[281] and those thoughts led to conduct with his first trip on the client's account. Portraying a recognizable pattern of greed, taking just one personal trip at a client's expense was not enough. Greedy thoughts led to greedy conduct six different times—to the tune of over $40,000 in six months—which ultimately led to his punishment for major ethical violations.[282] Fortunately, JH sought redemption by fully cooperating with the investigation into this unethical misconduct, paying "full restitution," and demonstrating remorse for his greedy actions.[283]

The court that punished JH previously approved the disbarment of RP for converting approximately $184,000 from a client and his own law firm over a five-year period.[284] In RP's case, the Disciplinary Committee

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[277] *In re* Horenstein (*Horenstein I*), 954 N.Y.S.2d 9, 9–11 (App. Div. 2012) (per curiam).

[278] *In re* Horenstein (*Horenstein II*), 19 N.Y.S.3d 164, 165 (App. Div. 2015) (per curiam).

[279] *Horenstein I*, 954 N.Y.S.2d at 10.

[280] *Id.* at 9.

[281] *Horenstein II*, 19 N.Y.S.3d at 165–66.

[282] *Id.* at 165; *see Horenstein I*, 954 N.Y.S.2d at 10 (explaining that between February and July 2011, Horenstein took six personal trips to Dallas, Texas, and billed a client for virtually every expense).

[283] *Horenstein II*, 19 N.Y.S.3d at 165–66.

[284] *In re* Pape, 817 N.Y.S.2d 49, 51 (App. Div. 2006) (per curiam); *Horenstein II*, 19 N.Y.S.3d at 165.

unearthed a fraudulent scheme that was "systematic[]," "deliberate," and had endured for multiple years.[285] RP's greedy scheme of "numerous" "devious activities" "[s]howed a brilliance in the way he expanded the 'double dip' system," avoided detection under the firm's accounting mechanism, and used a client's credit to balance his personal credit card.[286] Demonstrating how greed consumed RP's behavior over many years, the court emphasized that RP stopped his scheme only after he was caught.[287]

Though differing in length, tactics, and consequences, both of these cases have a common core—greedy thoughts led to greedy behavior. Under rational analysis, there is not much logic in how JH and RP ripped off their clients and firms. The risks clearly outweighed the rewards, but greed disregards and mutes logic and reason. Perhaps JH and RP had fleeting thoughts that nobody would notice if a little cash went missing. But by the time greedy thoughts became greedy conduct, it was too late—*little* morphed into a *lot*. Consistent with Evagrius' warnings on deadly thoughts, the process by which a lawyer ultimately can engage in systemic fraud and deceit is slow rather than quick. As with all of the Seven Deadly Sins, greed feeds itself as it grows. What might start as a fleeting thought to use a client's money for quick personal gain eventually leads to devastating consequences the farther along the greedy path the lawyer travels. But devastation comes at an incremental pace.[288] Self-focused conduct betrayed a greedy strain of thought that resulted in harm to the lawyers, their clients and law firms, and the notion that lawyers pursue justice.

To further illustrate how greedy lawyers cause unimaginable harm, take the case of AK, who represented firefighters who were severely injured while fighting a fire caused by a large explosion.[289] AK charged his wounded clients "$471,424.36 on their combined gross recoveries of $628,565.81."[290] To gather this staggering sum for himself, AK twice modified the contingent fee agreement with his clients.[291] The original agreement required that the clients pay AK forty percent of any recovery

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[285] *In re* Pape, 817 N.Y.S.2d at 51.

[286] *Id.* at 50 (alteration in original).

[287] *Id.* at 51.

[288] The incremental nature of the Seven Deadly Sins from thoughts to destructive behavior is noted by the Apostle James in his letter to the Jewish Diaspora: "[E]ach person is tempted when he is lured and enticed by his own desire. Then desire when it has conceived gives birth to sin, and sin when it is fully grown brings forth death." *James* 1:14–15 (ESV); *see also Matthew* 23:25–28 (explaining how the Pharisees seemed righteous on the outside, but inside they were filled with greed, self-indulgence, hypocrisy, and lawlessness).

[289] Att'y Grievance Comm'n of Md. v. Korotki, 569 A.2d 1224, 1226–27 (Md. 1990).

[290] *Id.* at 1226.

[291] *Id.*

from litigation.[292] As if forty percent was too paltry, AK later required that his clients increase his portion to sixty percent.[293] The apparent justification was that AK faced an appeal of the jury verdicts.[294] In the face of AK's threat that "he would drop the case" if the clients did not succumb to his demands to increase his cut of the recovery and believing that "they had no real choice," the clients reluctantly agreed.[295] Because greed rarely stops its march for more so suddenly, that was not the end of the matter. AK wanted to take more of the monies he recovered for the firefighters' brutal injuries.[296] AK again demanded that his clients modify the contingency fee agreement so that AK could get even more money.[297] How much did he want this time? AK sought an increase from sixty to seventy-five percent, apparently because he had to endure another appeal.[298]

The Court of Appeals of Maryland held that AK's fees were excessive.[299] The court stated that "the most acute factor surrounding this charging of an excessive fee is [AK]'s coming back to the well a second time."[300] Describing it as "a particularly aggravated case of *greed* overriding professionalism," the court suspended AK from the practice of law for eighteen months.[301] As this lawyer sought to take more and more from the badly injured firefighters—from forty to sixty to seventy-five percent—one wonders if the lawyer would have been willing to take it all. Although that sounds preposterous, greed consumes a person's thinking so deeply that "all-for-me-and-none-for-you" seems like a fair bargain, even in the face of horrific pain and suffering by his clients.

Standing beside AK's demonstration of greed is a similar case in which a lawyer's interest in short-term gain trumped the client's long-term interest. In a personal-injury case, AT entered into a contingency fee agreement with a client that would pay AT one third of recoveries without a lawsuit and forty percent of recoveries if a lawsuit were filed.[302] As soon as AT filed suit, the insurance company offered to settle the case; AT was advised by his client that the offer was satisfactory.[303] Before the client could accept the offer, however, AT required the client to amend the fee

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[292] *Id.* at 1228.
[293] *Id.*
[294] *Id.*
[295] *Id.* at 1229.
[296] *Id.* at 1230.
[297] *Id.*
[298] *Id.*
[299] *Id.* at 1226.
[300] *Id.* at 1236.
[301] *Id.* at 1226 (emphasis added).
[302] *In re* Thayer, 745 N.E.2d 207, 210–11 (Ind. 2001) (per curiam).
[303] *Id.* at 211.

agreement to increase AT's share from forty to fifty percent.[304] AT claimed that he deserved *half* "to prevent the medical provider or others from attaching the proceeds."[305] Without time to seek the advice of counsel on the increased fee and "fe[eling] she had no choice but to accept the new agreement," the client signed it so that she could receive the settlement proceeds.[306] When AT's unethical misconduct was uncovered, the Supreme Court of Indiana held that AT had charged an unreasonable fee and engaged in an impermissible business transaction with his client.[307] The court noted that AT's "efforts to extract a greater fee" after a settlement had been reached and "without any new consideration" was unreasonable.[308] Displaying an implicit appreciation for how the Seven Deadly Sins operate, the court observed that AT's "willingness to subordinate his clients' interests to his own" was motivated by "self-preservation" and "*greed*."[309] For his greedy misconduct that put his interests far above his client's, AT was suspended from the practice of law.[310]

A lawyer's desire to play "heads I win, tails you lose" with a client over fees is nothing new. The regulating body for Ohio lawyers once asked whether a lawyer ethically may

> enter a fee agreement whereby the client pays an hourly rate until settlement or collection of judgment at which time the attorney chooses between keeping the hourly fee or receiving a total fee equal to one third of the settlement or recovery depending upon whichever results in the larger fee to the attorney.[311]

Characterizing the fee agreement as providing the lawyer with "the comfort of receiving an hourly fee with the luxury of choosing a more lucrative contingency fee," the Board of Commissioners concluded that

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304 *Id.*

305 *Id.*

306 *Id.*

307 *Id.* at 211–12.

308 *Id.* at 212.

309 *Id.* (emphasis added).

310 *Id.* at 208, 212. AT's unethical misconduct was not limited to greed. In a bizarre display of other misconduct, AT actually "represented the victim of a crime [that AT] himself was charged with committing." *Id.* at 208. AT was suspected of battering his girlfriend. *Id.* During the investigation of his battery, AT led investigators to believe that he actually represented the girlfriend, who refused to cooperate with the investigation. *Id.* at 209–10. The Supreme Court of Indiana concluded that AK had violated legal ethics rules that prohibited a lawyer from laboring under an impermissible conflict of interest. *Id.*

311 Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Disciplines, OH Adv. Op. 95-7, 1995 WL 813790, at *1 (June 2, 1995).

this type of fee agreement was unethical.[312] The reason should come as no surprise—such an agreement "is, on its face, based upon *greed*."[313] The Board recognized that such a fee agreement was in no way contingent upon the benefits to the client or the risk of non-recovery.[314] Instead, the fee agreement's sole factor was to ensure the largest possible amount for the lawyer *without regard* for the client.[315] That sentiment represents greed's core to seek more at the expense of others. Simply put, greed has no regard for others. One-sided selfishness should not form the core of the trusted relationship between lawyer and client. Greed has no place there.

Another example of greedy misconduct involved a tenured law professor who represented clients who wanted to sue a drug manufacturer over its wholly ineffective lice-killing shampoo.[316] The law professor did not file suit; instead, he negotiated with the drug manufacturer to get refunds and coupons for his clients.[317] The law professor fared much better, receiving nearly a quarter of a million dollars in "secret attorney fees" from the drug manufacturer while promising not to tell anyone, including his clients, about his large payout.[318] His secret deal required that he "agree[d] never to represent anyone with related claims against the [drug manufacturer] and . . . agree[d] to keep totally confidential and not to disclose to anyone all information learned during his investigations."[319] The D.C. Court of Appeals remarked that the case presented "a congeries of [very serious ethical] violations that . . . may cause 'serious public doubt about the integrity of lawyers.'"[320] The court characterized the law professor's ethical misconduct as "wide-ranging and included conflicts of interests, dishonesty, improper conduct during settlement negotiations, and failure to protect a client's interests once the representation has ended."[321] The court opined that the law professor "demonstrated at best an ethical numbness to the integrity of the

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[312] *Id.*

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

[314] *Id.*

[315] *Id.* at *2; *see* Cincinnati Bar Ass'n v. Schultz, 71 Ohio St. 3d 383, 384 (1994) (explaining that this fee agreement was based *solely* on obtaining the largest fee).

[316] *In re* Hager, 812 A.2d 904, 908–09 (D.C. 2002), *reinstatement granted*, 878 A.2d 1246 (D.C. 2005) (per curiam); James V. Grimaldi, *Misconduct in Lice Case Puts AU Professor's Job in Jeopardy*, WASH. POST (Mar. 10, 2003), https://www.washingtonpost.com/archive/business/2003/03/10/misconduct-in-lice-case-puts-au-professors-job-in-jeopardy/3cd0752c-ee43-430d-8b3f-7c13143bda2a/?utm_term=.3b56ae45c72a.

[317] *Hager*, 812 A.2d at 909–10; Grimaldi, *supra* note 316.

[318] Grimaldi, *supra* note 316; *Hager*, 812 A.2d at 910.

[319] *Hager*, 812 A.2d at 908.

[320] *Id.* at 922.

[321] *Id.* at 921.

attorney-client relationship, the very core of the active practice of law."[322] Depicting an understanding of how greed operates, the court recognized that the law professor "accorded a higher priority to the collection of his fee than to serving his client or complying with professional standards."[323] The court further explained that the law professor's unethical "misconduct strikes at the heart of the attorney-client relationship, that is, the trust that clients place in their attorneys to pursue their legal interests," because it "encompasses precisely the fear clients have that their attorneys will be 'bought off' by opposing counsel, or that their attorneys will use the clients' case to surreptitiously profit from the representation."[324] The court held that by agreeing to the secret payment of his fees, the law professor ended up on the wrong side of "a classic conflict of interest—his interest in maximizing his fee versus his clients' interest in maximizing the amount paid to them."[325] When the scales of this "classic conflict of interest" are manned by a greedy lawyer, there is no doubt who wins in the allocation of fees. Because of the lawyer's greed, the court suspended him from the practice of law.[326]

Another disturbing case involved greedy lawyers who preyed upon an 82-year-old client "with physical infirmities whose mental acuities were waning."[327] The elderly client sought to update his will.[328] When he met with his lawyer, the lawyer brought along a young lawyer with little experience who also happened to be his son.[329] The two-lawyer team drafted the client's will that named *both* of them as executors, entitling them *both* to fees and commissions.[330] This cozy arrangement to extract as much as possible from the fragile client's estate did not sit well with the Court of Appeals of New York.[331] Recognizing that the lawyer duo "unquestionably came into . . . a confidential relationship which imposed on the attorneys a special obligation both of full disclosure and fair dealing," the court held that the lawyers' ethical failings amounted to fraud.[332] Recognizing that the lawyers had engaged in "impropriety and overreaching" and "cannot be permitted to take advantage of the constructive fraud" against their client, the court held that the lawyers

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322 *Id.*

323 *Id.* (quoting *In re* James, 452 A.2d 163, 170 (D.C. 1982)).

324 *Id.*

325 *Id.* at 912 (stating that the lawyer's seeking to enhance his fees at the expense of his clients "in the midst of secret settlement negotiations meant the conflict was even more pronounced").

326 *Id.* at 924 (administering a one-year suspension).

327 *In re* Estate of Weinstock, 351 N.E.2d 647, 648 (N.Y. 1976).

328 *Id.*

329 *Id.*

330 *Id.*

331 *Id.* at 650.

332 *Id.* at 649–50.

were precluded from serving as executors and receiving fees for their services.[333] Following that line of reasoning over a decade later, a New York Surrogate's Court in Bronx County firmly declared that "[t]he appointment of two or more members from the same law firm as co-executors in double commission cases, in almost every instance, can only be the product of gratitude, *greed* or ignorance."[334] The court opined that greed drove the two lawyers discussed above such that it was not "too harsh to hold that the *greedy* should receive nothing for their legal and executorial services."[335]

Another case that illustrates greed's impact on the legal profession arose in multi-district litigation that witnessed "an overabundance of *greed* by two sets of lawyers."[336] Several class actions from different states against a credit reporting agency were consolidated into one case.[337] As the parties worked toward settlement, the amount increased from "$20 million cash, plus in-kind relief" to $20 million in cash plus "credit monitoring services valued at around $50 per consumer" to a final settlement of nearly $110 million that included $75 million in cash plus $34.6 million of "in-kind" relief.[338] Once the settlement was approved, the real fight began—how much should the lawyers take from the proceeds? As some lawyers fought for higher and higher percentages of the recovery amount, the court hearing the arguments commented that it was "disturbed (and disappointed) by conduct of a lawyer that would even come close to the line of betraying the interests of a client (especially a consumer class for which the court has recognized the lawyer as its representative) in order to augment the lawyer's fees."[339] The court was displeased that one set of class lawyers sought to misrepresent to the court about threatening another set of lawyers "to undermine the settlement in an effort to convince them to lower their fee demand."[340] It is dangerous to interfere with a greedy lawyer's pursuit of fees.

Even though the lawyers claimed they were entitled to $19.74 million in fees, the Special Master reported that a fee with the "semblance of reasonableness" was more likely a lot less.[341] The Special Master was

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[333] *Id.*

[334] *In re* Estate of Thron, 530 N.Y.S.2d 951, 955 (Sur. 1988) (emphasis added).

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

[336] *In re* Trans Union Corp. Priv. Litig. (*Trans Union I*), No. 00 C 4729, 2009 WL 4799954, at *1 (N.D. Ill. Dec. 9, 2009), *order modified and remanded*, 629 F.3d 741 (7th Cir. 2011) (emphasis added).

[337] *In re* Trans Union Corp. Priv. Litig., 629 F.3d 741, 744 (7th Cir. 2011).

[338] Report and Recommendation of Special Master at 4–5, *Trans Union I*, 2009 WL 4799954 (No. 00 C 4729).

[339] *Trans Union I*, 2009 WL 4799954, at *4.

[340] *Id.*

[341] Report and Recommendation of Special Master, *supra* note 338, at 31.

blunt in how shocked he was when the hyper-inflated fee requests were submitted:

> The allocation briefs were remarkable for the size of the requests. While I expected counsel to aim high, I did not expect them to ask for *more* than they had previously requested from the Court. Nor, in light of the $12.98 million pie they were asked to divide, did I expect them collectively to shoot for more than the settlement cap of $18.75 million. Yet they did ask for more. *Much more*.[342]

The Special Master noted how "remarkable" it was for one lawyer to seek substantially higher fees even in the face of a lower overall fee amount while providing "no explanation for this tacit amendment of their original fee petition, nor any explanation for why their share should have increased by $1 million in the face of a shrunken available pie."[343] This pie allegory sums up how greed works. Imagine A and B must share one pie. Most people would see that there exists a mutual, reciprocal relationship between A and B in relation to the one pie, recognizing that the more A eats, the less B gets to enjoy. Greed confuses and subsumes one's thinking, however. If A were greedy, A would believe that he can eat all of the pie without the slightest comprehension that B's share decreases with every bite that A takes.

One last interchange between the court and a greedy lawyer stands out. One lawyer used flat-fee billings of twelve hours when traveling; "[t]he consequence of this practice is that there were travel days on which she billed close to, or even more than, 24 hours."[344] When asked to explain whether this constituted unethical misconduct, the lawyer gave an almost bad-faith response by claiming that while case law does not exactly "say that I can do that [*i.e.*, bill portal-to-portal]," the cases also "don't say that I can't do it either."[345] Greed blinds.

In a final case illustrating greedy misconduct, the legendary tobacco litigation comes to mind.[346] In that expansive litigation involving America's largest tobacco companies and forty-one states represented by about 300 lawyers from eighty-nine law firms, a jaw-dropping *$368.5 billion* deal was reached.[347] As can be expected in an article about greedy

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[342] *Id.* at 32 (second emphasis added).

[343] *Id.* at 33.

[344] *Id.* at 71.

[345] *Id.* at 72.

[346] Matthew Scully, *Will Lawyers' Greed Sink the Tobacco Settlement?*, WALL ST. J. (Feb. 10, 1998, 12:01 AM), https://www.wsj.com/articles/SB887064289825734000.

[347] *Id.* In a nutshell, the tobacco companies agreed to pay $368.5 billion over the next twenty-five years as reimbursement for tobacco-related Medicaid costs. *Id.*

lawyers, a major issue was how much would go to the lawyers—and they sought *huge* sums of money.[348] It probably goes without saying that each dollar that went to the lawyers was drawn from dollars that otherwise would have gone to victims. Of the $11.3 billion attributed to Florida alone, the lawyers sought "$2.8 billion—an average of $200 million per [lawyer], or roughly $14,000 per hour, assuming the lawyers spent every waking hour on the case for 42 months."[349]

In a remarkable tale of how greed operates to pit people with apparently similar interests against each other, not all lawyers who wanted to hold tobacco companies liable were on the same side. The lawyers who helped the states prosecute the case obviously were thrilled with the massive deal and their huge cut.[350] But the lawyers who were not part of the massive deal harshly opposed it, because the settlement meant that their cases against the tobacco companies would not be as prosperous.[351] In a strange historical twist, the greed of the lawyers in on the deal stood starkly in contrast to the greed of those lawyers who were not in on the deal but nevertheless wanted to profit at the expense of the tobacco companies.[352] It was almost as if the Golden Goose could not provide enough eggs to feed all of the lawyers' greed.

The fight between lawyers over fees was not the only one. Members of Congress tried to limit the lawyers "to a maximum of $150 an hour, with an absolute cap of 0.01% of the total $368.5 billion" so that the settlement funds could go to clients and not lawyers.[353] Ironically, the lawyers who were hired by the government and favored the government's taking $368.5 billion from the private tobacco companies then maintained that the government's power should be curtailed when trying to take *their* money.[354]

One component of the massive tobacco case involving the injured Florida smokers[355] might illustrate how greed corrupts. This part of the case established the "Engle Class," which was named after the lead

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348 *Id.*
349 *Id.*
350 *Id.*
351 *Id.*
352 *Id.*
353 *Id.*
354 *Id.*
355 *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996) (explaining that the smokers sued large tobacco companies for nicotine addiction and disease allegedly contracted due to smoking); *In re* Engle Cases, 283 F. Supp. 3d 1174, 1185 (M.D. Fla. 2017) (detailing how the smokers alleged that the tobacco companies "negligently manufactured and marketed their cigarettes, that they had manufactured cigarettes that were defective and unreasonably dangerous, and that they had conspired to conceal the dangers of cigarettes").

plaintiff in that class-action lawsuit.[356] Even though a jury in 1999 made historic and damning findings about cigarettes and tobacco companies,[357] in December 2006, the Supreme Court of Florida "decertified the class, and required class members to file individual lawsuits,"[358] because "individualized issues, such as legal causation, comparative fault, and damages predominate[d]."[359] Under this order, individuals who sued the tobacco companies could rely on the jury's findings from 1999 and have to prove only that "(1) that he [was] a member of the *Engle* class, and if so, (2) that his addiction to cigarettes caused his particular injuries, and (3) the amount of his damages."[360] Each plaintiff had one year to file a claim.[361]

With that somewhat protracted background, this is the point at which a greedy law firm—WF—entered the story. While the class action case was raging, WF busily collected about 6,000 names of individuals who had contacted it about suing the tobacco companies.[362] Even though WF refused to represent these individuals in separate actions, the creation of the Engle Class and easy path to recoveries lured WF to reach out to these people to beat the one-year deadline.[363] Because of the sheer number of potential plaintiffs, WF knew it was impossible to reach each one, so WF decided to simply file lawsuits for *all* of the potential members of the Engle Class to "preserve" their cases.[364] WF maintained that these fraudulent filings actually were the most ethical thing to do and that any non-viable cases could be dismissed later.[365] In 2008, WF filed about 3,700 complaints under the Engle Class, representing 4,432 claims, in several Florida

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[356] *See Reynolds*, 672 So. 2d at 40, 42 (affirming the certification of a plaintiff's class to contain those who suffered medical disease caused by smoking and cigarette addiction); *see also In re Engle*, 283 F. Supp. 3d at 1185 (referring to the plaintiffs in *Reynolds* as the "Engle" class). It is eerie to read that the plaintiffs were described as those "who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Reynolds*, 672 So. 2d at 40. Who would profit—and by how much—from those who were injured or died?

[357] *See* Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1256, 1257 n.4 (Fla. 2006) (listing the jury findings that tobacco companies misrepresented and misled consumers regarding the addictive nature of nicotine and cigarette causation of disease, and tobacco companies supplied defective cigarettes to consumers); *see also In re Engle*, 283 F. Supp. 3d at 1185 (explaining that the "jury . . . found generally that smoking causes certain diseases, such as lung cancer and coronary heart disease; that cigarettes containing nicotine are addictive; that the defendant-tobacco companies negligently manufactured and marketed their cigarettes; and that the tobacco companies manufactured cigarettes that were defective").

[358] *In re Engle*, 283 F. Supp. 3d at 1185.

[359] *Id.* (alteration in original) (quoting *Engle*, 945 So. 2d at 1268).

[360] *Id.* (citing Philip Morris USA Inc. v. Douglas, 110 So. 3d 419, 430 (Fla. 2013)).

[361] *Id.* (citing *Engle*, 945 So. 2d at 1277).

[362] *Id.* at 1186.

[363] *Id.*

[364] *Id.*

[365] *Id.* at 1196.

courts, ensuring the courts that they had authorization for every claim.[366] This was far from the truth. Many of the named plaintiffs never gave WF permission to file a claim, did not meet the requirements of the Engle Class, or were dead before their claims were filed.[367] It took significant work by the judiciary to figure out that a number of these filings were fraudulent.[368] At one point, the court stayed proceedings for two years to create individual dockets for each plaintiff.[369] During the extended stay, WF mailed letters to 2,756 "clients" to inform them that lawsuits had been filed on their behalf and that they needed to provide authority for WF to represent them.[370] Only 1,807 responses trickled in, well shy of the number of plaintiffs WF had certified.[371] Even in the face of this deficiency, WF still did not dismiss any claims.[372]

As the cases worked their way through litigation, the court ordered participating lawyers to review all individual claims still pending to ensure they were viable.[373] While lawyers for the defendants suggested that lawyers for each plaintiff gather personal information on every client, WF made assurances that they already had files for each client.[374] As was discovered later, WF had misrepresented the amount of client information they had and did not make a good-faith effort to investigate each claim.[375] When the deadline came, WF dismissed many claims and certified that they had reviewed each case that could be dismissed.[376] WF failed to mention that hundreds of these cases had included "non-smoking plaintiffs, [p]re-[d]eceased [p]laintiffs asserting personal injury claims, and those whose claims were previously adjudicated."[377]

As holes in WF's cases appeared, the court was worried that WF could not manage the volume of plaintiffs.[378] The court, through a "Temporary Special Master[,] recommended sending questionnaires to each plaintiff to gather essential information."[379] Opposing that plan, WF claimed that it had "ongoing and routine" contact with clients and there were not a

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[366] *See id.* at 1187 (explaining that WF filed complaints under the Engle Class in 2008 and further represented to the court in 2016 that WF had the authorization needed to file).

[367] *Id.* at 1187, 1189.

[368] *Id.* at 1198.

[369] *Id.* at 1187–88.

[370] *Id.* at 1188.

[371] *Id.*

[372] *Id.*

[373] *Id.* at 1188–89.

[374] *Id.* at 1189.

[375] *Id.* at 1189, 1197.

[376] *Id.* at 1189.

[377] *Id.* at 1190.

[378] *Id.* at 1191.

[379] *Id.*

sizeable group of cases that could be dismissed.[380] WF assured the court that client contact meant "writings or personal interviews or telephone calls" and that "within the last six months," WF had certified that all remaining plaintiffs were "alive, present [and] willing" to proceed with their claims.[381] These assertions were *blatantly false*.[382] Greed confounds one's thoughts, and the unraveling of these cases built upon greed were collapsing.

Despite WF's assurances, "the Court ordered [WF] to send questionnaires to each of the 2,600 remaining plaintiffs" and return them in three months.[383] When the time came to respond, WF returned only 1,724 replies.[384] As the long-played greedy game of deceit unraveled, WF hinted that they had not been in contact with all of their clients as previously certified.[385] The uncovered fraud was alarming—

> (1) 521 plaintiffs were already deceased (some for more than 20 years) when Counsel filed personal injury actions on their behalf; (2) 66 plaintiffs were living when Counsel filed wrongful death actions on their behalf; (3) 64 deceased plaintiffs had no survivors when Counsel filed wrongful death cases on their behalf; and (4) Counsel filed 39 wrongful death cases that were barred by the statute of limitations.[386]

In a hurried attempt to bury the fraudulent filings, WF tried to voluntarily dismiss as many cases as possible without explanation.[387] Defendants moved to dismiss almost 600 more cases, accusing WF that these cases were invalid for some of the reasons laid out above and that they had known of the fatal defects for six months without doing anything until caught.[388] Even as the greedy plan was revealed, WF tried to lie its way out of its mess.[389]

Over the next few years, approximately 1,000 cases were dismissed, and others were tried or settled.[390] 415 plaintiffs reached a settlement agreement of about $100 million.[391] WF delivered a solid amount of good to those clients who suffered harm. Regardless of the amount of good,

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380 *Id.*
381 *Id.* at 1192.
382 *Id.*
383 *Id.* at 1194.
384 *Id.*
385 *Id.*
386 *Id.* at 1195.
387 *Id.*
388 *Id.*
389 *Id.* at 1196–97.
390 *Id.* at 1200–02.
391 *Id.* at 1202.

however, the court froze any payments of fees to the lawyers until it could decide the appropriate sanctions for serial ethical misconduct.[392] Taking seven months to investigate the ethical misconduct, the Special Master concluded "that the Court [should] order Counsel to disgorge all attorney's fees and costs recoverable in this *Engle* Litigation."[393] WF objected, but the court sanctioned them for their greedy misconduct to the staggering sum of *$9.1 million*.[394]

This case ably illustrates that greedy thoughts led to greedy conduct that set in motion a downward spiral that became so powerful that it was nearly impossible to reverse course. There were multiple times over many years that afforded WF an ethical course to seek justice only for legitimate clients. Greedy thoughts turned a blind eye toward this eminently reasonable path. Even though WF stood to make many millions of dollars in fees, the desire for more squandered all. Greed makes no sense. But this is nothing new. Like the Cherokee grandfather's wisdom that each person controls which wolf to feed, it is easy to see that WF had every chance to feed only the Good Wolf. But for some unexplained reason, WF chose to feed greed to the Evil Wolf. And though the Good Wolf sought to aid others, the Evil Wolf played a winner-takes-all game of greed. And when greed wins, lawyers, clients, and the justice system lose.

3. Greedy Lawyers *Always* Cause Harm

A nearly quarter-century-old article in the *ABA Journal* exposed how greedy lawyers engage in overbilling. Because the case studies in that article underscore how greed corrupts lawyers, this section is devoted to its shocking findings. In *Greed, Ignorance and Overbilling*, Darlene Ricker recounted the fantastical world in which greedy lawyers operate.[395] Ricker began her report with this tease: "Sixty-hour days, documents that don't exist, [and] clerical work that fetches $300 an hour" is "not an Alice-in-Wonderland fantasy, but a peek through the looking glass into the kaleidoscope world of law firm overbilling."[396] Ricker described lawyer billing practices as "a world in which everything, even the most nonsensical, can—and does—happen," such as being "two places at once:

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[392] *Id.*

[393] *Id.* at 1203. Of the $39 million for lawyers, WF claimed $15.6 million. *Id.* at 1256 n.76.

[394] *Id.* at 1203, 1255–57.

[395] Darlene Ricker, *Greed, Ignorance and Overbilling: Some Lawyers Have Given New Meaning to the Term 'Legal Fiction.' Now the Profession Is Asking Why, How Widespread and How Do We Stop It?*, 80 A.B.A. J. 62, 62 (1994).

[396] *Id.*

on an airplane 35,000 feet above St. Louis [while simultaneously] at a law library in Los Angeles."[397]

Ricker recounted high-profile overbilling cases that had "clambered onto the full stage of American public opinion and its assessment of lawyers."[398] For example, one lawyer

> billed under his name for work performed by associates, paid personal expenses from a client account, and billed taxpayers more than $20,000 for work on a savings and loan case in which he claimed to have averaged more than eight billable hours every day for three weeks, without resting even one weekend day.[399]

Ricker recounted another famous case in which a lawyer billed forty-three hours in a single day; not to be outdone, another greedy lawyer billed sixty-two hours in a single day.[400]

Ricker listed two examples that demonstrate how greed produces an inability to see who is on the other side of the transaction. When the lawyer grows much larger than the client, greedy thoughts warp any sense of mutuality. In one case, a criminal defense lawyer "overbill[ed] the city of Philadelphia [by] $130,000 for representing *indigent* clients."[401] Lawyers appointed in death penalty cases charged the City of Los Angeles "almost $1 million a year to represent *indigents* on death row."[402] Instead of harnessing those dollars for more advocacy on behalf of vulnerable clients, these lawyers talked themselves into taking the money for themselves instead. One inescapable lesson should be that "I always defeats you" in a game of greed.

Other "appalling examples" of overbilling included charging hours for work done by a nonexistent lawyer, a lawyer who "subcontracted work" in the amount of "$700,000 . . . to a partner's brother who did no work on the file," and billing to files that had either not been opened or had long-been closed.[403] In an overstatement of the obvious, the ABA issued a formal opinion on billing practices in which it proclaimed, "It goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended."[404] Only a greedy lawyer would need that admonition.

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397 *Id.*
398 *Id.*
399 *Id.* at 62–63.
400 *Id.* at 63–64.
401 *Id.* at 63 (emphasis added).
402 *Id.* (emphasis added).
403 *Id.* at 64.
404 *Id.* (quoting ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-379 (1993)).

Ricker described the horrific billing of a greedy lawyer convicted "of bilking more than $2 million from his firm's major client."[405] That unethical lawyer ordered his younger partners—under penalty of termination—to inflate their billable hours, "in one instance charging [ten] hours of fees for [twelve] minutes of work."[406] If that were not enough, the lawyer "billed for personal expenses, such as family vacations, travel on the Concorde, [and] even dry-cleaning for his toupee."[407] Shredding mutuality formed by the Golden Rule, this lawyer embraced the self-centered tunnel vision notoriously reserved for those who openly embrace greed as one of the Seven Deadly Sins. If the greedy lawyer's young partners had billed him for extravagant personal expenses, you can be certain that he would have objected to such selfish and unethical billings.

Another example of jaw-dropping, breath-taking greed involved a Maryland lawyer in asbestos litigation who overbilled by more than $1,000,000![408] As an illustration of the depth to which this lawyer devolved, he "billed his client more than *$66,000* for Lexis research services that had actually cost *$395*."[409] It would not hurt to read that sentence again in case you somehow discount the lunacy of greed—a lawyer sought to collect $66,000 for $395 in expenses! And ponder who was on the losing end of this greed—victims of asbestos exposure who endured pain beyond measure. Even if this lawyer had helped his clients, as greed applied its blinders, the lawyer was willing to have his clients endure a little more pain so that the lawyer could indulge a little more pleasure through their contributions to his bank account.

After portraying some of the worst cases of greed among lawyers, Ricker then reported on what might cause such unethical misconduct. "Billing abuses generally fall into two categories of complaints: those involving fee disputes (such as unfair, excessive or unearned fees) and fraud (such as lying, falsifying documents or stealing)."[410] Ricker noted that experts claim that most billing abuse cases by large law firms reveal high profit margins that afford lawyers with lavish lifestyles; indeed, many experts believe that lawyers "feel an undue entitlement to the high life."[411] Recall the lessons from Dewey and LeBouef?

One billing expert estimated that once law firms stopped focusing on client advocacy and adopted revenue-generator models, "professionalism

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[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.* at 66.
[409] *Id.* (emphasis added).
[410] *Id.* at 65.
[411] *Id.*

became secondary" to producing prodigious fees.[412] Greed is an obvious driving force behind this incessant need for higher fees.[413] The expert cautioned that when a law firm's "moral tone" encourages "*greed* or overreaching," that immorality metastasizes and is passed to junior lawyers.[414] When "too few lawyers have decided to set their own moral compass," the sad result is that young lawyers gladly follow unethical senior lawyers "over the cliff."[415] Ricker recounted how one law professor asserts that unethical billing practices reveal "a basic character flaw" in certain lawyers.[416] Blunt and to the point, the law professor explained that any lawyer should have learned that it is "wrong to steal by the end of grammar school."[417] But greed has the ability to unlearn what is most elementary.

It is difficult not to be enraged by the level of greed that drives lawyers to commit so many vicious violations of ethical obligations. Undoubtedly, the public's caricature of greedy lawyers enjoys some grain of truth. These case illustrations reveal how some lawyers seek more at the expense of others—and most often it is the client at the losing end of the bargain. When a greedy lawyer takes, a client most certainly gives. But the lasting effects of greedy misconduct by lawyers goes beyond the trusted relationship between the lawyer and client. The legal profession, system of justice, and the rule of law suffer when greed corrupts the most basic of our common values. Once you take time to digest the greedy misconduct perpetrated by lawyers and portrayed above, ask yourself this question—do I believe that greed among lawyers is an inevitable human trait such that society must endure its devastation?

D. How to End Greedy Misconduct by Lawyers

This Article does not have *the* answer on how to end greedy misconduct by lawyers. But the major thesis is that lawyers can benefit mightily from an astute understanding of the tension between the virtues

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412 *Id.*

413 *Id.* at 66.

414 *Id.* (emphasis added).

415 *Id.* The idea of "losing one's moral compass" is commonly used to explain a respected figure's downfall into unethical behavior, such as Jeb Magruder who pled guilty in the Watergate Scandal and claimed, "I lost my moral compass." 2 MORAL EDUCATION: A HANDBOOK M-Z 282 (F. Clark Power et al. eds., 2008). Similarly, John Ehrlichman, the disgraced Counsel to President Richard M. Nixon and Assistant to the President for Domestic Affairs, explained how important it is to have your own moral compass. *Excerpts of Statements to Judge Sirica by Haldeman, Ehrlichman, and Mitchell*, N.Y. TIMES, Oct. 5, 1977. After ruminating on his unethical behavior in the Watergate Scandal, Ehrlichman stated, "[I]f I had any advice for my kids, it would be never to never, ever defer your moral judgments to anybody." *Id.*

416 Ricker, *supra* note 395, at 66.

417 *Id.*

embedded in the Golden Rule with the vices emboldened by the Seven Deadly Sins. It contends that if a lawyer consistently strives to practice law virtuously under the Golden Rule, while avoiding the temptations to embrace the vices in the Seven Deadly Sins, then that lawyer bears little risk of committing major ethical violations. The Article helps lawyers construct a mental framework that heeds the advice of monks from over sixteen centuries ago—if lawyers can identify the "tempting thoughts" that pester their minds, then they will be best equipped to avoid the mental traps set by the Seven Deadly Sins. Not only will lawyers stay out of those traps; so, too, will their clients.

The reasons are straightforward and historic. One author wrote that "our spiritual ancestors" developed the construct of the Seven Deadly Sins to try, "in their own cultural and religious frame of reference and without the benefit of modern behavioral sciences, to develop a classification system for what we now call personality disorders—enduring, pervasive patterns of . . . thinking . . . that cause various negative and destructive behaviors."[418] Between mere thought and destructive misconduct lies a critical choice. That enduring lesson that destructive thoughts precede destructive misconduct lies at the heart of any solution to the havoc wrought by greedy lawyers.[419] How can a lawyer employ proper thoughts and avoid the lure of greed? In a phrase, a lawyer must never cease to see *others* when practicing law.

Lawyers "do not simply serve their own desires."[420] Lawyers enjoy the privilege of representing clients and "serv[ing] as officers of the court to protect our legal system by standing as bulwarks of justice."[421] With every thought, lawyers "must remain vigilant in conducting themselves to ensure that the public trusts our justice system and the rule of law" and always "must work to improve the public's perception of the legal profession."[422] Occupying "a unique position in society by ensuring the fair operation of an entire branch of government, the judicial system," lawyers must never stop looking "outside 'of parochial or self-interested concerns' to ensure that their conduct serves the public interest."[423] To balance competing interests—lawyer's, client's, legal profession's, justice

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[418] Sullender, *supra* note 3, at 223–24.

[419] Many centuries ago, Evagrius warned that thoughts inevitably turn into conduct that cause harm: "Common to all thoughts: causing injury over time." William Harmless & Raymond R. Fitzgerald, *The Sapphire Light of the Mind: The* Skemmata *of Evagrius Ponticus*, 62 THEOLOGICAL STUD. 498, 529 (2001).

[420] Lucas, *supra* note 7, at 227.

[421] *Id.* at 228.

[422] *Id.*

[423] *Id.* (quoting MODEL RULES OF PRO. CONDUCT pmbl. ¶ 12 (AM. BAR ASS'N 2018)).

system's[424]—this Article asks lawyers to aspire to the values of the Golden Rule and reject greed and the Seven Deadly Sins.

Building upon a solid understanding of greed's crafty delusions and harmful consequences, lawyers must stave off greed and the Seven Deadly Sins and embrace the Golden Rule to foster trust with clients and the public. Simply punishing a greedy lawyer for harming clients and society is not much of an aspiration and is unfulfilling anyway. As demonstrated by the volume of cases above, there is no doubt that greedy lawyers cause harm and that the underlying misconduct must be punished. But if it were only that simple to focus on conduct and consequences while ignoring causes. Ethical misconduct is *not* the primary problem. Focusing on misconduct is backward-looking and cannot change harm caused by it. As fourth-century monks recognized, *thoughts are the primary problem*. Greed is rooted in the mind and heart long before it finds an outlet in destructive, unethical misconduct.[425] Greed starts small, but it grows as it is fed. And from its tiny beginning as a mere thought—me over others—it exponentially grows and metastasizes—feeding on itself—to the point where thoughts of others are pushed aside and become invisible.

Here is a chilling admonition to young lawyers to heed the wise advice to forge an ethical path that avoids the slow and unnoticeable creep of unethical choices fueled by greed:

> Unethical lawyers do not start out being unethical; they start out just like you—as perfectly decent young men or women who have every intention of practicing law ethically. They do not become unethical overnight; they become unethical just as you will (if you become unethical)—a little bit at a time. And they do not become unethical by shredding incriminating documents or bribing jurors; they become unethical just as you are likely to—by cutting a corner here, by stretching the truth a bit there.
>
> Let me tell you how you will start acting unethically: It will start with your time sheets. One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and you just won't have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you'll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform.

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[424] *See* Lucas, *supra* note 5, at 238 & n.4 (depicting the various interests at play when dealing with legal ethics).

[425] *See Matthew* 12:34 (NKJV) ("[F]or out of the abundance of the heart the mouth speaketh."); *Proverbs* 23:7 (NKJV) ("For as he thinketh in his heart, so [is] he." (alteration in original)).

> However, you will promise yourself that you will repay the client at the first opportunity by doing thirty minutes of work for the client for "free." In this way, you will be "borrowing," not "stealing."
>
> And then what will happen is that it will become easier and easier to take these little loans against future work. And then, after a while, you will stop paying back these little loans. You will convince yourself that, although you billed for ninety minutes and spent only sixty minutes on the project, you did such good work that your client should pay a bit more for it. After all, your billing rate is awfully low, and your client is awfully rich.
>
> And then you will pad more and more—every two minute telephone conversation will go down on the sheet as ton [sic] minutes, every three hour research project will go down with an extra quarter hour or so. You will continue te [sic] rationalize your dishonesty to yourself in various ways until one day you stop doing even that. And, before long—it won't take you much more than three or four years—you will be stealing from your clients almost every day, and you won't even notice it.[426]

The power of this advice lies in its simplicity that recognizes the lessons of the deadly nature of the Seven Deadly Sins—if a lawyer feeds greedy thoughts, greedy misconduct follows. Following this advice, lawyers can corral greedy thoughts before they find willing hands to carry out greed's destructive desires. The destructive cycle of greed can be slowed or stopped—one lawyer and one thought at a time. It certainly is necessary to investigate the harm caused by greedy lawyers and impose appropriate sanctions. But individual lawyers should seek to identify the root cause of greedy conduct—greedy thoughts—and muster resources to stunt greed's organic growth when first recognized. Perhaps this Article can help lawyers recognize when greedy—deadly—thoughts enter the mind. If lawyers can identify greedy patterns of thinking, then we can modify greedy patterns of misconduct. Far too much hangs in the balance not to try.

CONCLUSION

This Article erects a mental construct to analyze how the Seven Deadly Sins—and greed specifically—can be used to comprehend why

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[426] Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 916–17 (1999).

lawyers engage in serious ethical misconduct. It hopes to engender lively debate on how to combat greedy misconduct in the legal profession.[427] It is crucial to recognize that before greedy misconduct manifests itself in harm to clients, there are first small and barely noticeable thoughts of greed that creep into and begin to permeate a lawyer's mind. These indiscernible thoughts infect one's ability to see others. The infected mind begins to see only self as it builds a throne for one. The lawyer infected by these greedy thoughts will inflate "I" over "others." As the lawyer feasts on greedy thoughts, "I" gains importance while "others" are diminished and become unnoticeable. These barely noticeable thoughts of self over others do not stay small for long. Displaying Hulk-like uncontrolled expansion, these small thoughts transform rapidly and uncontrollably into large and consuming thoughts.

When a lawyer is consumed by greedy thoughts, those thoughts transform into little-noticed conduct that carries out the thoughts to serve one's self at the expense of others. On the ever-expanding path of greed, devastating conduct follows. When self becomes the focus of one's thoughts and deeds, small amounts of harm to others go unnoticed. With little regard for others, it is no wonder that small harm goes unnoticed, because others are not important. As harm to others grows from a lawyer's greedy misconduct, so too does the blindness that prevents a lawyer from seeing the harm. It is predictable that it is not until the lawyer's selfish misconduct causes serious harm that it manifests to both the lawyer and the client in dramatic fashion. The case studies above illustrate the foreseeable nature of greed's destructive force. By the time that greedy misconduct reaches its most destructive and deadly state, it is too late.

In *Catch-22*, Joseph Heller depicted how the lack of character allows vice to slay virtue: "It was miraculous. It was almost no trick at all, he saw, to turn vice into virtue and slander into truth, . . . brutality into patriotism, and sadism into justice. Anybody could do it; it required no brains at all. It merely required no character."[428]

This admonition of the lack of character harkens back to the opening paragraph of this Article in which the elderly Cherokee grandfather sought to instill wisdom into his grandson by telling the story of the Evil Wolf and the Good Wolf. The takeaway from that lesson was that the

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[427] If lawyers and the legal profession embrace the idea that the Seven Deadly Sins can serve as a useful construct to critically analyze and understand why lawyers engage in ethical misconduct, then our work is just beginning—six of the Seven Deadly Sins await analysis. As a brief tease, there are a number of possible paths of analysis remaining: (1) Envy and Plagiarism; (2) Lust and Sexual Relations with Clients; (3) Gluttony and Substance Abuse; (4) Sloth and Access to Justice; (5) Wrath and Unprofessional Behavior toward Colleagues, Clients, Courts, and Counsel; and (6) Pride and the Failure of Humility.

[428] JOSEPH HELLER, CATCH-22 336 (1955).

grandson controlled which wolf he fed—and the fed wolf ultimately would devour the unfed wolf. That, too, is the takeaway of this Article.

The solution to the consequences of greed as one of the Seven Deadly Sins is to recognize the destructive nature that greed unleashes on the legal profession. It is the nature of the Seven Deadly Sins to destroy that which seeks to prop itself up. This is no different than the nature of the Evil Wolf. To combat the devastation wrought by greedy lawyers, it is essential for lawyers to reject even the most fleeting of greedy thoughts and rebuke the Seven Deadly Sins before they become treacherous for the soul and legal ethics. It is essential that greed is not fed to any wolves in lawyers' clothing.

THREE GENERATIONS OF IMBECILES V. GENETICALLY DEFECTIVE CHILDREN – WHAT KIND OF SOCIETY DO WE WANT TO LIVE IN?

> *We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.*[1]

Justice Holmes' infamous opinion in *Buck v. Bell* reflects the views and purpose of the eugenics movement in the United States, namely, that society and the economy would be best served by preventing those deemed genetically unfit from bringing further generations of "imbeciles" into society.[2] Today, this same purpose is reflected in the purpose and results of preimplantation genetic testing to prevent the birth of genetically defective children.[3] Though modern society may cringe at Justice Holmes' "three imbeciles" opinion and claim to be more civilized, Holmes' blunt analysis accurately describes one motive for utilizing preimplantation genetic testing: to prevent genetically defective children from being brought into this world and burdening society.[4]

The eugenics movement was concerned with who could become a parent and bring life into this world based on an individual's genetic characteristics and the potential burden of future "imbecile" children on society.[5] Similarly, our current use of preimplantation genetic testing reveals societal discrimination regarding which lives are worthy of being born into our society and which lives are too burdensome to be worthy of life.[6] California's history of forced sterilization and current practices of unregulated preimplantation genetic testing reflect this societal

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1 Buck v. Bell, 274 U.S. 200, 207 (1927).

2 *Id.* at 205–08; Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 3–4 (1996).

3 Vicki G. Norton, Comment, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 UCLA L. REV. 1581, 1603–04, 1609, 1611–12 (1994).

4 *See Buck,* 274 U.S. at 207 (opining that the world would be better off if unfit individuals were prevented from reproducing); *see also* Norton, *supra* note 3, at 1603, 1609 (explaining how the concern of caring for a genetically defective child is one reason people use to promote preimplantation genetic testing).

5 Philip R. Reilly, *Involuntary Sterilization in the United States: A Surgical Solution,* 62 Q. REV. BIOLOGY 153, 153–56 (1987).

6 David S. King, *Preimplantation Genetic Diagnosis and the 'New' Eugenics*, 25 J. MED. ETHICS 176, 176, 178, 180 (1999) [hereinafter *Preimplantation Genetic Diagnosis*].

discrimination, are inconsistent with its claims of tolerance and equality, and reveal a flawed understanding of inherent human dignity and respect for diversity.

This Note compares and connects the motivation and implications of the United States' history of forced sterilizations with the current practices of preimplantation genetic testing, especially related to the State of California. In the first section, this Note explores the history and purpose of the eugenics movement and forced sterilizations in the United States with a focus on California. The policies and purposes of forced sterilization lay a foundation for the shared concerns of discrimination through preimplantation genetic testing. The second section discusses the relevant law and lack of standards for preimplantation genetic testing and the discriminatory results in California especially regarding gender selection. Lastly, the third section of the Note explores potential solutions to the discriminatory practice of genetic screening pertaining to California in light of California's recent apology to victims of forced sterilizations and touted commitment to creating a society that honors the human rights and human dignity of all people.

I. HISTORY OF FORCED STERILIZATIONS IN THE UNITED STATES AND THE CURRENT USE OF PREIMPLANTATION GENETIC TESTING

A. The Eugenics Movement

Merriam Webster defines eugenics as "the practice or advocacy of controlled selective breeding of human populations (as by sterilization) to improve the population's genetic composition."[7] This definition neatly sums up the purpose and practice of the United States' eugenics movement, which was motivated by lessening the economic burden of "defective" individuals and the potential for them to reproduce further defective and burdensome lives based on the assumption that certain kinds of individuals are more socially desirable than others.[8] Historical records of this period of time reflect that there was broad public support for the involuntary sterilization of defective individuals that took place.[9] Part of this support stemmed from scientists reporting that "characteristics such as criminality, promiscuity, feeblemindedness,

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[7] *Eugenics*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/eugenics (last visited Nov. 4, 2020).

[8] Reilly, *supra* note 5, at 153, 156, 162.

[9] *Id.* at 153, 158, 161.

insanity, and infectious diseases were hereditary" and could be cured in society by preventing those who carried these "defective genes from reproducing."[10] Additionally, leading eugenicists from this time period believed that "ills" of society, such as disease, crime, and poverty, could be eliminated if "socially deviant individuals" were kept from reproducing.[11] Groups that fell under this category included those labeled feebleminded, the deaf, the deformed, the drug-addicted, epileptics, criminals, the insane, and the homeless.[12]

1. Federal Law

From 1909 to 1979, thirty-two states had sterilization programs that targeted "undesirable" individuals.[13] During this time, there was no federal sterilization law, but the Supreme Court approved the State's practice of forced sterilization, most notably in Justice Holmes' infamous *Buck v. Bell* decision.[14]

In 1927, the Supreme Court heard *Buck v. Bell*, a case involving eighteen-year-old Carrie Buck that would become one of the most well-known cases from the eugenics movement.[15] Carrie Buck had been committed to Virginia's State Colony for Epileptics and Feeble-Minded (" State Colony") after giving birth to an "illegitimate" daughter that the Colony had determined was of "defective" mentality.[16] Carrie was determined to be not only a feeble-minded woman herself but was also the daughter of a feeble-minded mother.[17] As a result, the State Colony determined that she should be sterilized.[18]

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[10] Katherine A. West, Comment, *Following in North Carolina's Footsteps: California's Challenge in Compensating Its Victims of Compulsory Sterilization*, 53 SANTA CLARA L. REV. 301, 305 (2013).

[11] Lombardo, *supra* note 2, at 2–4.

[12] *Id.* at 3.

[13] James E. Hughes, EUGENIC STERILIZATION IN THE UNITED STATES, A COMPARATIVE SUMMARY OF STATUTES AND REVIEW OF COURT DECISIONS, Public Health Reports, v, 5 (Supp. 1940); Andrea Estrada, *The Politics of Female Biology and Reproduction*, CURRENT (Apr. 6, 2015), https://www.news.ucsb.edu/2015/015287/politics-female-biology-and-reproduction.

[14] Hughes, *supra* note 13, at v; Buck v. Bell, 274 U.S. 200, 207–08 (1927).

[15] *Buck*, 274 U.S. at 205; Trevor Burrus, *One Generation of Oliver Wendell Holmes, Jr. Is Enough*, CATO INSTITUTE (June 23, 2011, 5:03 PM), https://www.cato.org/blog/one-generation-oliver-wendell-holmes-jr-enough#:~:text='The%20most%20famous%20case%20of,attempt%20to%20forcibly%20sterilize%20her ("The most famous case of forced sterilization was the 1927 Supreme Court case of *Buck v. Bell*.").

[16] *Buck*, 274 U.S. at 205; Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in* Buck v. Bell, 43 Cath. Law. 125, 127 (2004).

[17] *Buck*, 274 U.S. at 205.

[18] *Id.*

Under Virginia's sterilization act, a patient who was deemed to be mentally defective could be sterilized without his or her consent after a finding of the superintendent of the State Colony was presented to the board of directors of the institution.[19] To be sterilized, the individual had to be given notice, the opportunity to attend hearings regarding his or her sterilization, and a chance to appeal to the Supreme Court of Appeals.[20]

Carrie challenged her sterilization under the Fourteenth Amendment, arguing that it violated due process and her right to equal protection under the law, but the Circuit Court, Supreme Court of Appeals of Virginia, and ultimately the United States Supreme Court found this argument unpersuasive.[21] The Supreme Court found that the process set in place by Virginia amounted to a procedure that protected the rights of the patient and therefore did not violate the Fourteenth Amendment.[22] In its holding, the Court upheld Virginia's interest in preventing the feebleminded and similar populations of individuals from burdening the State.[23]

Justice Holmes' decision legitimized state-run sterilization programs that prevented those who were considered unfit from reproducing.[24] In the wake of *Buck v. Bell,* the number of states with sterilization laws grew from seventeen to thirty, increasing the number of individuals who could be subject to forced sterilization.[25] While Virginia's sterilization act was eventually repealed in 1974, the Supreme Court as to this date has not overturned its decision in *Buck v. Bell*.[26]

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[19] *Id.* at 205–06.

[20] *Id.* at 206–07.

[21] *Id.* at 205, 207–08.

[22] *See id.* at 207 (explaining that Virginia's procedure did not violate a patient's due process rights under the Fourteenth Amendment).

[23] *See id.* at 207–08 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

[24] Antonia Hernandez, *Chicanas and the Issue of Involuntary Sterilization: Reforms Needed to Protect Informed Consent*, 3 CHICANO L. REV. 3, 4 (1976); *see also Buck*, 274 U.S. at 207 (opining that the society would be better off if it prevented unfit individuals from reproducing).

[25] Reilly, *supra* note 5, at 160.

[26] Hannah Lou, Note, *Eugenics Then and Now: Constitutional Limits on the Use of Reproductive Screening Technologies*, 42 HASTINGS CONST. L.Q. 393, 398 (2015).

2. Discriminatory Practices of State Sterilization Laws

With no federal law, sterilization occurred under individual states' sterilization laws.[27] Four groups of individuals lobbied for the passage of state sterilization laws: physicians; scientific eugenicists; legal professionals, including lawyers and judges; and members of affluent families.[28] In 1907, Indiana was the first state to enact legislation legalizing forced sterilization "of any habitual criminal[s], rapist[s], idiot[s], or imbecile[s]" who were in a state-run institution and deemed to be "unimprovable."[29] All that was required to sterilize an individual without his or her consent was that two surgeons outside of the institution agreed with the opinion of the institution's physician that the individual had no potential for improving his or her condition.[30] The Indiana legislation served as a model for many of the legislatures of seventeen states who passed similar laws between 1905 and 1917 targeting "confirmed criminals, idiots, imbeciles, and rapists."[31]

Throughout this period of forced sterilizations, women, minorities, and the poor were disproportionately sterilized.[32] Welfare reforms influenced this discrimination as a portion of the public believed that women who were recipients of public assistance did not have a right to decide when and if they will have children.[33] Native American women in particular were disproportionately sterilized, and over a three year period four hospitals performed more than 3,000 sterilizations of Native American women without obtaining their consent.[34] It is estimated that, between 1937 and 1968, more than one-third of Puerto Rican women who were of childbearing age were sterilized, and the practice became so commonplace that it was known colloquially as "la operación."[35]

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[27] *See* Hughes, *supra* note 13, at v, 4 (describing how states addressed the issue of forced sterilization in their own statutes because there was no federal law regulating the matter in 1940).

[28] Reilly, *supra* note 5, at 157.

[29] *Id.* at 154.

[30] *Id.* at 158.

[31] *Id.*

[32] Ariel S. Tazkargy, Note, *From Coercion to Coercion: Voluntary Sterilization Policies in the United States*, 32 LAW & INEQ. 135, 152 (2014).

[33] *Id.* at 151.

[34] *Id.* at 152; *see also* Brianna Theobald, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters*, TIME MAG., https://time.com/5737080/native-american-sterilization-history/ (Nov. 28, 2019, 11:47 AM) (explaining that for a period of six years following the enactment of the Family Planning Services and Population Research Act of 1970, approximately twenty-five percent of Native American Women who were of "childbearing age" were sterilized and describing how some of these sterilizations occurred under duress or pressure or were performed without the woman's full understanding of the procedure).

[35] Tazkargy, *supra* note 32, at 152.

Sterilization of poor black women in the south occurred so frequently that people began to refer to the procedure as a "Mississippi appendectomy."[36]

3. Forced Sterilization in California

> "*Sterilization is no panacea for these ills of mankind, but it is one of the many measures indispensable to any far-sighted and humanitarian program for dealing with society's tremendous burden of mental disease, deficiency, and dependency.*"[37]

California, which enacted the United States' third sterilization law in 1909, was among the first of the thirty-two states to legalize the sterilization of certain classes of people.[38] This legislation gave medical superintendents of asylums and prisons the ability to "asexualize" individuals in each institution if it would improve that person's "physical, mental, or moral condition."[39] California's "asexualization" law was expanded and updated in 1913 and 1917, broadening the scope of patients who could be sterilized to include those with a "mental disease which may have been inherited and is likely to be transmitted to descendants."[40] This expanded definition allowed individuals who were deemed to have "feeblemindedness" or a "perversion or marked departure[] from normal mentality or from disease of a syphilitic nature" to be sterilized.[41]

A pioneer in the eugenics movement, California is responsible for over 20,000 of the estimated 60,000 forced sterilizations that took place in the United States from 1909 to 1979.[42] This number made up over one-third of the people who were sterilized during this time and was greater than the number sterilized in the next four highest states together.[43] California had nine different institutions that performed sterilizations, seven of which were mental hospitals and two of which were described as

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[36] *Id.* at 151.

[37] HUM. BETTERMENT FOUND., HUMAN STERILIZATION TODAY 3 (1938), https://www.loc.gov/resource/rbpe.0020380g/?st=gallery.

[38] S.B. 1190, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

[39] Alexandra Minna Stern, *Eugenics, Sterilization, and Historical Memory in the United States*, 23 HISTÓRIA, CIÊNCIAS, SAÚDE—MANGUINHOS 195, 197 (2016) (Braz.) [hereinafter *Eugenics, Sterilization, and Historical Memory*].

[40] *Id.*

[41] *Id.*

[42] Cal. S.B. 1190; Alexandra Minna Stern, *Sterilized in the Name of Public Health Race, Immigration, and Reproductive Control in Modern California,* 95 AM. J. PUB. HEALTH 1128, 1128, 1129 (2005) [hereinafter *Sterilized in the Name of Public Health*].

[43] Cal. S.B. 1190.

"feebleminded homes" for individuals deemed to have decreased mental capacities.[44] In 1945, the medical director and superintendent of the Sonoma State Home reported that 80% of the 4,310 individuals sterilized between 1919 and 1943 had been subject to sterilization "for care and training . . . sex difficulties, custodial care, general maladjustment, i.e., burglary, theft, sex, forgery, truancy from school and epilepsy."[45]

The sterilization programs run in these homes had little to no oversight, granting state agencies and medical experts the power to determine who would be sterilized.[46] California's sterilization law gave broad powers to health experts, including superintendents of institutions, who could order the sterilization of an individual, even if the patient or the patient's family or guardian did not approve of the procedure.[47] Additionally, California's law enabled the authorities to sterilize a patient as a condition of discharge from a state hospital.[48] While in theory, such a patient consented to the sterilization, the fact that he or she was faced with a hospitalization that was unlimited in length and agreed to be sterilized in exchange for freedom unquestionably discredits any claim of consent.[49] The motivation for determining that a "patient" should be sterilized ranged from the belief that it would improve a patient's health, to concern over the financial burden of children on feebleminded patients, and the desire to prevent those deemed genetically unfit from bringing more unfit lives into the world.[50]

In addition to affecting the poor and disabled, California's sterilization programs disproportionately affected women, girls, and ethnic minorities.[51] Females were 14% more likely to be sterilized than men and boys, "and Latina female patients were 59[%] more likely to be sterilized than non-Latina females."[52] Across the nine institutions performing sterilizations, the average percentage of patients with Spanish surnames who were sterilized was 16%, a percentage that illustrates the program's disproportionate impact on this population, which did not represent more than 6.5% of California's population between 1910 and 1940.[53] Further, the Hispanics who were sterilized were younger overall

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[44] *Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 197.

[45] F.O. Butler, *A Quarter of a Century's Experience in Sterilization of Mental Defectives in California*, 49 AM. J. MENTAL DEFICIENCY 1, 1 (1945), http://www.eugenicsarchive.org/eugenics/image_header.pl?id=1384&printable=1&detailed.

[46] Cal. S.B. 1190.

[47] *Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 198.

[48] Reilly, *supra* note 5, at 158.

[49] *Id.*

[50] *Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 198.

[51] Cal. S.B. 1190.

[52] *Id.*

[53] *Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 197, 199.

than non-Hispanic victims of forced sterilization.[54] The sterilization of Hispanic and other minority teenagers often took place over the protest and written objection of parents or family members.[55] Additionally, although African Americans accounted for only about 1% of California's population, 4% of sterilizations performed in California were performed on African American "patients."[56]

a. California from 1965–1975

Although state sterilizations and the eugenics movement slowed down by the late sixties, from 1965 to 1975, an estimated 240 women, many of whom were of Mexican origin, were sterilized without their consent in Los Angeles County University of Southern California Medical Center.[57] The obstetrician who oversaw the sterilizations of these women was motivated to "cut the birth rate of the Negro and Mexican populations in Los Angeles County," mirroring the discriminatory motivation of previously forced sterilizations—to prevent undesirable populations from reproducing.[58]

The experiences of these Mexican women propelled some of the women who were sterilized to file suit against the U.S.C.—Los Angeles County Medical Center to seek redress for the forced sterilizations that had been performed.[59] Dolores Madrigal was sterilized when she was in the hospital giving birth to her second child in 1973.[60] She initially refused the doctor's suggestion that she be sterilized, but during the course of labor and after being told the procedure could be reversed, she signed forms authorizing her sterilization.[61] However, the form that she signed that gave her "consent" was in English while her first language was Spanish, and it was not until after the procedure was over that she learned that it was irreversible.[62]

Another woman, Maria Hurtado, was sterilized at the same hospital without her consent while she was unconscious after delivering a child by

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[54] *Id.* at 199–200. The mean age for non-Hispanic victims from 1935 to 1944 was twenty-six, while the mean age for Hispanic victims was twenty-three. *Id.*

[55] *Id.*

[56] *Sterilized in the Name of Public Health*, *supra* note 42, at 1131.

[57] Cal. S.B. 1190.

[58] *Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 205.

[59] Hernandez, *supra* note 24, at 4–5.

[60] *Id.* at 5.

[61] *Id.*

[62] *Id.*

caesarean section.[63] She only spoke Spanish and was not told that she had been sterilized until six weeks later at a checkup appointment.[64] Jovita Rivera was sterilized at the same Medical Center while she was there to deliver her baby.[65] While she was under anesthesia, a doctor recommended that she "have her 'tubes tied'" since her children burdened the government.[66] Jovita was not aware of the meaning of this phrase, received no counseling about the consequences of the operation, and was unable to comprehend the consent forms as she could speak and read only Spanish.[67] These forced sterilizations, which are just a few of the many forced sterilizations that targeted women and ethnic minorities,[68] further illustrate the discriminatory purposes behind sterilization policy that existed in California even in more recent history.

b. 2013 Prison Sterilizations

Despite the fact that California's sterilization laws were repealed in 1979, forced sterilizations have continued to occur in recent history.[69] In 2013, a report surfaced claiming that, between 2006 and 2010, 150 female inmates in California state prisons were sterilized without official authorization.[70] Following this report, an investigation into these allegations "confirm[ed] that 144 women had been sterilized between fiscal years 2005–2006 and 2012–2013" without official authorization and that thirty-nine of these cases suffered from "deficiencies in the informed consent process."[71] In response, California Senate Bill 1135, which prohibits sterilizations in California correctional facilities except when necessary for the immediate preservation of life or when medically required to address an individual's condition, was signed into law in 2014.[72] The purpose of the legislation is to prevent the sterilization of "vulnerable populations" and to "positively affirm that all people should

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63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 5–6.

68 *See* S.B. 1190, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (explaining that, although California's sterilization law did not specifically target any race or gender, in practice, racial minorities and women, as well as the impoverished and disabled, were disproportionately sterilized compared to other groups).

69 Cal. Welf. & Inst. Code § 552 (West 1979).

70 Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, REVEAL (July 7, 2013), https://www.revealnews.org/article/female-inmates-sterilized-in-california-prisons-without-approval/.

71 *Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 205.

72 S.B. 1135, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

have the right to fully self-determine their reproductive lives free from coercion, violence, or threat of force."[73]

c. California Apologizes

California's sterilization law remained valid until it was repealed by the legislature in 1979.[74] In 2003, California's then-Governor Gray Davis formally apologized on behalf of the State to the victims of California's forced sterilization programs and to their families.[75] Following the Governor's apology, on June 30, 2003, the California Senate passed a resolution expressing its regret over California's role in the eugenics movement and the movement's impact on the thousands of men and women who were forcibly sterilized.[76] In particular, it addressed "past bigotry and intolerance against the persons with disabilities and others who were viewed as 'genetically unfit' by the eugenics movement."[77] Further, it recognized "[t]hat all individuals must honor human rights and treat others with respect regardless of race, . . . color, national origin, ancestry, physical disability, mental disability, medical condition," and various other characteristics.[78] California's legislature urged "every citizen of the state to become familiar with the history of the eugenics movement, in the hope that a more educated and tolerant populace will reject any similar abhorrent pseudoscientific movements *should one arise in the future*."[79]

These words and hopes of the California Senate in 2003 profoundly apply to the use of preimplantation genetic screening in California. Its call to society to "honor human rights and treat others with respect"[80] regardless of ability should serve as a reminder to the state of the importance of enacting policies that prevent genetic discrimination through preimplantation genetic testing. Otherwise, such an apology is bound to come from the same state and lawmaking body regarding the

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[73] *Id.*

[74] WELF. & INST. § 552.

[75] Carl Ingram, *State Issues Apology for Policy of Sterilization*, L.A. TIMES (Mar. 12, 2003, 12:00 AM), www.latimes.com/archives/la-xpm-2003-mar-12-me-sterile12-story.html.

[76] S. Con. Res. 47, 2003–2004 Leg., Reg. Sess. (Cal. 2003); *see also* S.B. 1190, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (explaining the state of California's recent apology to the victims of forced sterilization).

[77] Cal. S. Con. Res. 47.

[78] *Id.*

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

[80] *Id.*

devaluing of human life and discrimination based on ability that results from preimplantation genetic screening.

B. Preimplantation Genetic Testing and Today's Eugenics: Who Can Be Born

1. Preimplantation Genetic Testing – Background

> *"At the time, the mantra was, 'Let's get rid of crime and poverty. Let's have healthy children. Who could argue against it?'"*[81]

The eugenics movement was focused on preventing certain populations from becoming parents and continuing "their kind" in order to prevent the burdening of society with "imbeciles."[82] Today, with advances in technology, this mindset has evolved to more subtle discrimination against who can be born using preimplantation genetic testing. While forced sterilizations and preimplantation genetic testing could be said to be completely different practices, especially as genetic testing is voluntary and not viewed as coercive or mandatory, the effects and purpose are the same: to prevent those deemed to be genetically defective from being born and burdening society.[83]

Additionally, the same vulnerable groups are affected primarily by preimplantation genetic testing—the poor, the disabled, children, and other marginalized groups.[84] If our society was as accepting of those with disabilities and actually considered them equal with the rest of society, there would be no need or desire for preimplantation genetic testing or prenatal genetic screening.[85] While preimplantation genetic testing is different than prenatal genetic screening, both services use technology to help the potential parent(s) make decisions on whether to continue or embark on a pregnancy based on the genetic diagnosis of their future child.[86]

Preimplantation genetic testing involves genetically testing and selecting embryos created in a laboratory for use in artificial reproductive

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[81] Ingram, *supra* note 75.

[82] Buck v. Bell, 274 U.S. 200, 207 (1927).

[83] C. Ben Mitchell, *Hurtling Towards Eugenics . . . Again*, CTR. FOR BIOETHICS & HUM. DIGNITY (Mar. 6, 2002), https://cbhd.org/content/hurtling-towards-eugenics-again (discussing the overlapping goal of prenatal genetic screening and sterilization processes).

[84] Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL'Y, L., & ETHICS 283, 301 (2008) [hereinafter *Predicting Probability*].

[85] *Preimplantation Genetic Diagnosis*, *supra* note 6, at 181.

[86] Norton, *supra* note 3, at 1603, 1612.

technologies ("ART").[87] At least one cell is removed from each embryo that has been created, and the DNA from this cell is analyzed to "pick" genetically desirable embryos for implantation.[88] Preimplantation genetic testing is favored by many because it gives the mother-to-be peace of mind knowing that there is a lower risk of a genetic disorder.[89] It is also seen as a positive alternative to prenatal testing and abortions should a prenatal test reveal genetic deficiencies that cause the mother or parents to decide to terminate the pregnancy.[90]

2. Burden on Society

Potential mothers and parents are not the only individuals who are concerned over the impact of bringing a genetically deficient child into the world.[91] A survey conducted in 1994 and 1995 of approximately 3,000 geneticists and genetic counselors revealed that an average of 20% of geneticists in "English-speaking countries and Northern Europe" felt that because of the availability of prenatal testing, it would be unfair to society to bring a genetically deficient child into the world knowingly.[92] In the same study, geneticists were asked if they agreed with the statement that "[a]n important goal of genetic counselling is to reduce the number of deleterious genes in the population."[93] Thirteen percent of geneticists in the United Kingdom, approximately fifty percent of geneticists in Eastern and Southern Europe, and nearly all geneticists in China and India agreed.[94]

Further evidence that preimplantation genetic testing is intended to reduce the burden placed on society by genetically defective individuals is the purpose behind prenatal screening. Though prenatal screening occurs under different circumstances, when a woman is pregnant instead of

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[86] *See Preimplantation Genetic Diagnosis*, *supra* note 6, at 176 (discussing how embryos selected as a result of preimplantation genetic testing are later implanted through in vitro fertilization).

[88] *Id.* at 176, 180.

[89] *Id.* at 176.

[90] *Id.* at 179.

[91] *See* Reilly, *supra* note 5, at 153–56, 158 (explaining that other groups, such as legislatures and eugenicists, cared about the effects of bringing defective children into the world).

[92] Dorothy C. Wertz, *Society and the Not-So-New Genetics: What Are We Afraid Of? Some Future Predictions from a Social Scientist*, 13 J. CONTEMP. HEALTH L. & POL'Y 299, 302–03, 339 (1997); *Preimplantation Genetic Diagnosis*, *supra* note 6, at 177.

[93] *Preimplantation Genetic Diagnosis*, *supra* note 6, at 177.

[94] *Id.*

before an embryo is implanted, both processes are concerned with identifying and detecting potential genetic issues at a certain point before birth.[95] Prenatal screening programs were introduced primarily as a benefit to the state, and it has been said that "it seems unlikely that prenatal screening would have been resourced to the degree that is has been if the purpose were purely to enable more informed choice, or if it were expected that most parents of a fetus with an abnormality would choose to continue the pregnancy."[96] In other words, the entire purpose of prenatal screening and, by logical extension, preimplantation genetic testing is to give prospective parents the opportunity to prevent the birth of a genetically defective child. "The success of prenatal screening programs is often measured in terms of the savings to society by reducing the incidence of children born with certain genetic conditions."[97] As far back as 1974, it was estimated that, should the government spend $5 billion on prenatal screening over a period of twenty years, it would achieve a net savings of $18 billion by reducing the frequency of Down syndrome.[98]

Because genetic testing of embryos occurs before implantation into a womb, this process is especially vulnerable to discrimination against "genetically defective" lives. First, the screening takes place within a clinic before the embryo is implanted, giving doctors and medical experts greater control over which embryos will be implanted, while removing the potential emotional barrier of choosing to go through an abortion if the woman was already pregnant and subject to prenatal screening.[99] As an illustration of medical experts' influence in preimplantation genetic testing, the American Society for Reproductive Medicine's Ethics Committee published an opinion finding that it was ethically acceptable for a provider to refuse to transfer an embryo that was highly likely to be born with a life-threatening condition, despite requests to transfer the embryo by the parent(s).[100] Additionally, the Committee stated that, in such circumstances a patient's request to transfer the embryos to another clinic in order to transfer the embryos is strongly discouraged.[101] Further,

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[95] *Id.* at 176, 179 (discussing the benefits of using preimplantation testing over prenatal testing).

[96] *Id.* at 177–78.

[97] Sonia M. Suter, *A Brave New World of Designer Babies?,* 22 BERKELEY TECH. L.J. 897, 947 (2007).

[98] *Id.*

[99] *Preimplantation Genetic Diagnosis*, *supra* note 6, at 176, 180.

[100] Ethics Comm. of the Am. Soc'y of Reprod. Med., *Transferring Embryos with Genetic Anomalies Detected in Preimplantation Testing: An Ethics Committee Opinion*, 107 FERTILITY & STERILITY 1130, 1135 (2017) ("[I]n circumstances in which a child is highly likely to be born with a life-threatening condition that causes severe and early debility . . . it is ethically acceptable to refuse to transfer such embryos upon patient request.").

[101] *Id.* at 1135.

the nature of ART procedures such as IVF already requires potential parents to choose which embryos out of a larger group will be implanted.[102] Combined with the ability to screen for genetic defects, potential parents will be more likely to choose embryos who do not have the potential for even minor or curable potential conditions.[103]

3. Discriminatory Results of Preimplantation Genetic Testing

Currently, preimplantation genetic testing allows potential parents to select embryos based on knowledge of which embryos might be more likely to develop a variety of genetic or chromosomal disorders, including cystic fibrosis, Tay-Sachs, and Down syndrome.[104] In total, preimplantation genetic testing is available for more than 1,000 conditions that range in severity from mild to serious and include a variety of conditions such as childhood diseases and adult-onset cancers.[105] The motivation of most parents is for greater chances of success in the ART process or for their child to have the best life possible, in of themselves seemingly innocent motivations.[106] While it is understandable that parents who have the option to seek the best for their children would want to provide them with the best genetically possible life given the technology available, preimplantation genetic testing goes further. On the surface, it might seem rational and reasonable to say that giving the opportunity to choose an embryo that is not genetically susceptible to a disability, such as autism or Down Syndrome, would be giving a child the best chance of life. However, this "choice" is not to give that individual the best chance at a successful life but choosing against that particular kind of life.

Others have undergone preimplantation genetic testing to have a child that is a matching donor for one of their existing children who is

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[102] *See* Judith Daar, *A Clash at the Petri Dish: Transferring Embryos with Known Genetic Anomalies*, 5 J. L. & Biosciences 219, 237 (noting that patients who conceive via ART choose which of the embryos will have a chance to become a born child).

[103] *Id.* at 228–29.

[104] *Predicting Probability*, *supra* note 84, at 290.

[105] Susannah Baruch et al., *Genetic Testing of Embryos: Practices and Perspectives of U.S. IVF Clinics*, 20 FERTILITY & STERILITY 1, 4 (2006).

[106] *See* CAL. IVF FERTILITY CTR., *Preimplantation Genetic Diagnosis and Screening (PGD and PGS)*, CAL. IVF FERTILITY CTR., www.californiaivf.com/ivf_pgd/ (last visited Sept. 6, 2020) (explaining how preimplantation genetic diagnosis and screening increase the chances of IVF working the first time); S. Andrew Schroeder, *Well-Being, Opportunity, and Selecting for Disability*, 14 J. ETHICS & SOC. PHIL. 1, 9 (2018) ("Parents of course want their children to live good lives, and they may be willing to make large sacrifices to ensure their children do not experience lives full of suffering.").

suffering from a serious illness or to prevent that child from being born with the same illness as an older sibling.[107] While provided as a tool for potential parents to have the best chance of successful births through ART, in practice, it allows for judgment calls to be made on which lives have worth and are worthy of being born, echoing the purpose of forced sterilizations of the genetically unfit.[108]

a. Disability

Parents pursue preimplantation genetic testing both to prevent and ensure that a child will or will not be disabled.[109] As previously mentioned, preimplantation genetic testing is used to screen for genetic deformities that indicate the likelihood that the child will be born with or develop a condition such as cystic fibrosis, Tay-Sachs, and Down syndrome.[110] Of disabilities, Down syndrome is a common condition for which unborn children are screened, as it can cause intellectual disability.[111]

b. Eradication of Down Syndrome

A pointed illustration of the discrimination that can result from preimplantation genetic testing is Iceland's near eradication of individuals with Down syndrome, which has resulted from increased abortions following prenatal test results showing the presence of the condition.[112] A Washington Post article published in 2018 reported that an estimated 85% of pregnant, Icelandic women chose to undergo optional prenatal testing and that nearly 100% of those who received positive indications of Down syndrome chose to terminate their pregnancies.[113] As a result, in 2009, there were only three babies born with Down syndrome in Iceland.[114] This trend is not isolated to Iceland however; in the United Kingdom, 90% of women whose tests indicate the presence of Down syndrome terminate their pregnancy, compared to 98% of similarly

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[107] Baruch et al., *supra* note 105, at 5.

[108] *See Preimplantation Genetic Diagnosis*, *supra* note 6, at 178, 180 (arguing that genetic testing and parental choice based on the results are eugenic in purpose and outcome); *see also supra* Section I.A (explaining the practices and underlying policies of the eugenics movement in the United States).

[109] *Predicting Probability*, *supra* note 84, at 285–86, 290, 295–96.

[110] *Id.* at 290, 295–96.

[111] Jamie L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995-2011)*, 32 PRENATAL DIAGNOSIS 142, 142 (2012).

[112] George F. Will, *The Real Down Syndrome Problem: Accepting Genocide*, WASH. POST (Mar. 14, 2018, 7:49PM), www.washingtonpost.com/opinions/whats-the-real-down-syndrome-problem-the-genocide/2018/03/14/3c4f8ab8-26ee-11e8-b79d-f3d931db7f68_story.html.

[113] *Id.*

[114] *Id.*

situated women in Denmark and 77% of similarly situated women in France.[115]

In the United States from 1995 to 2011, 67% of pregnancies testing positive for Down syndrome were aborted.[116] In California specifically, a study conducted on termination rates resulting from a prenatal diagnosis of Down syndrome found that, between 1989 and 1991, 88.3% of the 531 pregnancies diagnosed with Down syndrome were terminated; between 1995 and 2000, 72.2% of the 1,408 pregnancies diagnosed with Down syndrome were terminated; and between 2005 and 2007, 61.4% of the 466 pregnancies diagnosed with Down syndrome were terminated.[117] While this study showed a decreasing trend in the percentage of pregnancies that were terminated, the number was still well over half of the reported pregnancies diagnosed.[118]

Although these instances involved prenatal genetic screening, this is an extremely relevant example of the results of discriminatory practices through genetic testing of embryos either before or while they were in the womb. Additionally, as previously discussed, there is often less of a barrier for those who are using ART to conceive because discarding less genetically fit embryos does not carry the same emotional barrier as deciding to terminate a pregnancy.[119]

c. Purposeful Disability Selection

Some parents pursued preimplantation genetic testing to choose an embryo that carried the disability of the parents and would have that disability in common with them.[120] Three percent of IVF clinics in the United States have reported that they allowed parents to select embryos with disabilities.[121] Parents desiring to raise a child who shares their disability, such as deafness or dwarfism, usually do so with the purpose of sharing something with their child or knowing that they will better be able to care for a child that shares the same trait.[122] For instance, deaf

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[115] *Id.*

[116] *Id.*

[117] Natoli et al., *supra* note 111, at 147.

[118] *Id.*

[119] *Preimplantation Genetic Diagnosis*, *supra* note 6, at 179; *see also supra* Section I.B.2.

[120] Baruch et al., *supra* note 105, at 5.

[121] Karen E. Schiavone, Comment, *Playing the Odds or Playing God? Limiting Parental Ability to Create Disabled Children Through Preimplantation Genetic Diagnosis*, 73 ALB. L. REV. 283, 285–86 (2009).

[122] Schroeder, *supra* note 106, at 7–8.

parents often see their culture as "especially valuable and want to share that with their child."[123]

Critics have claimed that the parents' purposeful selection of "disabled" embryos is unethical because it inflicts a less than full life on their child.[124] While seemingly unusual to those who are not disabled, the reasoning of parents who seek to have a child that shares their disability is the same as that of the parent who chooses an embryo without a disability. Both parents are seeking what they view as the best chance for their child at life.[125] Yet, the one is usually viewed as morally wrong and the other morally right.[126] Both must be right, or both must be wrong; we cannot have it both ways.

d. Gender Selection

Preimplantation genetic testing of chromosomes during this process can also be used for sex selection of implanted embryos.[127] Although usually done in the context of screening for chromosome disorders that are specific to males, the practice of sex selection for the sake of sex selection has increased.[128] In a study published in 2005, 40% of couples who were using fertility treatment to conceive reported that, given the opportunity, they would like to choose the gender of their child.[129] A study released in 2006 by the Genetics and Public Policy Center on the Practices of United States IVF clinics found that 42% of U.S. clinics that offer preimplantation genetic testing have provided this service for non-medical sex selection and that 47% of these clinics were willing to defer completely to the parents on this choice.[130] United States' clinics that were a part of this study reported that "[n]on-medical sex selection was performed in 9[%] of the [preimplantation genetic diagnosis] cycles . . . provid[ed] in 2005."[131] Some parents pursued non-medical sex selection because of personal

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[123] *Id.* at 8.

[124] *See* Schiavone, *supra* note 121, at 294–96 (discussing how parents selecting an embryo for a potentially deaf child may seem to foster Deaf culture, but they could actually harm the child's education and career).

[125] *See* Schroeder, *supra* note 106, at 7 (recognizing that some parents choose to have a child with a disability in order to confer a special benefit on the child or to share something with the child that they consider valuable).

[126] *See id.* at 9 (contrasting the desire of parents to ensure that their children experience as little suffering as possible with the idea of purposefully choosing for their children to be born with a disability).

[127] *Predicting Probability*, *supra* note 84, at 294.

[128] *Id.* at 294–95.

[129] Robert Klitzman et al., *Anticipating Issues Related to Increasing Preimplantation Genetic Diagnosis Use: A Research Agenda*, REPROD. BIOMEDICINE ONLINE 37 (May 30, 2008), https://www.rbmojournal.com/article/S1472-6483(10)60188-5/pdf.

[130] Baruch et al., *supra* note 105, at 5.

[131] *Id.*

preference or because they wanted to balance the genders of their children.[132]

A more recent study conducted in 2017, which surveyed 493 ART clinics providing in vitro fertilization in the United States, reported that of the 476 clinics surveyed on sex selection, 72.7% (346 clinics) provided preimplantation genetic screening for this purpose.[133] Additionally, 83.5% of these 476 clinics offered sex selection for family balancing without infertility, and 74.6% offered it for any reason for couples who were not infertile.[134] It has been argued that, because of historical and societal preferences for male children, using preimplantation genetic testing for non-medical sex selection could be used to perpetuate discrimination against females, but others have dismissed this concern since, in the United States, parents select both female and male embryos.[135] However, this should still be concerning for society because even if both genders are selected, in every case, parents still make a choice between a male or female embryo, and this could be considered gender discrimination that conflicts with our claimed value of gender equality.[136]

4. Key Distinction

A key distinction between the previous legal forced sterilization of the unfit and our current unregulated discrimination of genetically defective children is that preimplantation genetic testing and the choice of which embryos to implant during ART is a voluntary choice.[137] Unlike state-sanctioned sterilization, the state is not requiring individuals who pursue ART to undergo genetic screening or to implant embryos that meet a certain criterion.[138] While this is a distinction worth noting, it does not

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[132] *Id.* at 5–6.

[133] Sarah M. Capelouto et al., *Sex Selection for Non-Medical Indications: A Survey of Current Pre-Implantation Genetic Screening Practices Among U.S. ART Clinics*, 35 J. ASSISTED REPROD. GENETICS 409, 410–13 (2018).

[134] *Id.* at 413.

[135] Kathy L. Hudson, *Preimplantation Genetic Diagnosis: Public Policy and Public Attitudes*, 85 FERTILITY & STERILITY 1638, 1643 (2006).

[136] Rachel Minkin, *Most Americans Support Gender Equality, Even if They Don't Identify as Feminists*, PEW RSCH. CTR. (July 14, 2020), https://www.pewresearch.org/fact-tank/2020/07/14/most-americans-support-gender-equality-even-if-they-dont-identify-as-feminists/ (discussing how a majority of Americans, regardless of political party affiliation or self-identification as feminists, agree that women should be treated equally to men).

[137] *See supra* Section I.A.3; Section I.B.1.

[138] *See* CAL. IVF FERTILITY CTR., *supra* note 106 (explaining that, when desired and performed, preimplantation genetic diagnosis allows selection of genetically normal embryos for transfer to increase the chances of IVF working the first time).

change that the result of private choice is as discriminatory against the same types of life as the state-sanctioned sterilization programs.

Additionally, while the state is currently not requiring preimplantation genetic testing, as briefly mentioned above, medical professionals do have an increased role in determining which embryos are transferred and given the opportunity to live.[139] While medical professionals obviously will play a significant role in the birth and now conception of a child, this influence is concerning when applied to determine which embryo is fit to be implanted. For instance, a doctor in New York stated that if his patient, who had an embryo that would have become a child with Down syndrome, had wanted to go forward with implantation, the clinic would not have performed the procedure.[140] While clinics like the one in New York are not run by the state, testimonies such as the doctor's harken back to the days of state-led forced sterilizations in which physicians and medical professionals in charge of institutions were given broad unregulated authority to determine who should be sterilized for the individual and society's good.[141]

5. California

> *[A]ll individuals must honor human rights and treat others with respect regardless of race, ethnicity, religious belief, economic status, disability, or illness; and be it further*
>
> *Resolved, That the Senate urges every citizen of the state to become familiar with the history of the eugenics movement, in the hope that a more educated and tolerant populace will reject any similar abhorrent pseudoscientific movement should it arise in the future. . . .*[142]

California led the nation in the number of people forcibly sterilized during the eugenics movement, but now California is known for its advanced fertility treatments, including preimplantation genetic testing.[143] A recent article in Vogue Magazine highlighted California as

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[139] *See supra* Section I.B.3.d (showing that preimplantation genetic testing is available to parents who wish to use it for selecting embryos); *Preimplantation Genetic Diagnosis*, *supra* note 6, at 180 (noting that, because the embryo has not yet been implanted, the decisions involve the male partner and doctors in addition to the woman).

[140] Andrew Joseph, *A Baby with a Disease Gene or No Baby at All: Genetic Testing of Embryos Creates an Ethical Morass*, STAT (Oct. 23, 2017), www.statnews.com/2017/10/23/ivf-embryo-genetic-testing/.

[141] *See Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 196, 198 (describing state-sterilization laws as a plan to combat degeneracy in society by preventing the reproduction of those deemed feebleminded or insane).

[142] S. Res. 20, 2003 Leg., 2003–2004 Reg. Sess. (Cal. 2003).

[143] Jancee Dunn, *How California Became the World's Fertility Treatment Destination*, VOGUE MAG. (Mar. 13, 2019), www.vogue.com/article/california-worlds-fertility-treatment-destination.

"the World's Fertility Treatment Destination."[144] California's status as a "Fertility Treatment Destination" is further evidenced by the Center for Disease Control and Prevention's data on fertility clinics from 2016, the most recent year available as of the writing of this Note, which showed that, of the 463 clinics that provided ART and reported data to the CDC, sixty-nine were in California.[145] A surrogacy company based in California, where 40% of their customers come from outside of the United States, advertises one of the reasons to pursue surrogacy in the United States, and California in particular, is that gender selection is legal.[146] A large number of individuals from China in particular are seeking out IVF and Fertility treatment in Los Angeles because of California's ART friendly policies and procedures.[147]

In addition to gender selection practices in California, California IVF: Davis Fertility Center advertises that it has used genetic testing techniques to screen for disorders and is "very proud of [its] high level of success."[148] Another California fertility center offers gender selection and tests embryos for abnormalities such as Down syndrome and potential for forms of leukemia, stating that "only the normal pre-embryos are transferred back to the woman's uterus to establish a pregnancy."[149]

II. THE LACKING LEGAL LANDSCAPE FOR PREIMPLANTATION GENETIC TESTING

1. Federal Law

Currently, there is no federal oversight of preimplantation genetic testing of embryos,[150] but two federal acts serve as possible bare minimum oversight. In 1992, Congress passed the Fertility Clinic Success Rate and

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[144] *Id.*

[145] *Id.*; Centers for Disease Control and Prevention, *Assisted Reprod. Tech. Surveillance – United States, 2016*, 68 SURVEILLANCE SUMMARIES 1, 4 (2019).

[146] *International IPs – FAQs*, AGENCY FOR SURROGACY SOLS., INC., www.surrogacysolutionsinc.com/international-ips/international-ip-faqs/ (last visited Sept. 6, 2020).

[147] Dunn, *supra* note 143.

[148] CAL. IVF FERTILITY CTR., *supra* note 106.

[149] S. Cal. Reprod. Ctr., *Preimplantation Genetic Diagnosis (PGD)*, TREATMENT OPTIONS, www.scrcivf.com/treatment-options/assisted-reproductive-technologies/pgd/ (last visited Oct. 22, 2020).

[150] Michelle J. Bayefsky, *Comparative Preimplantation Genetic Diagnosis Policy in Europe and the USA and Its Implications for Reproductive Tourism*, 3 REPROD. BIOMEDICINE & SOC'Y ONLINE 41, 43 (2016).

Certification Act which merely requires that ART programs and clinics annually report to the Center for Disease Control on pregnancy success rates and the identity of every embryo laboratory used by the program.[151] Additionally, the Americans with Disabilities Act of 1990 (the "ADA") seeks to prevent discrimination against the mentally and physically disabled in public life, including employment, school, and transportation and to ensure that those with disabilities have the same rights and opportunities as others.[152] While the ADA has not been applied to protecting the disabled from discriminatory practices pre-birth, such as during preimplantation genetic testing, it provides a policy foundation that demonstrates society's recognition of the importance of protecting the rights of the disabled and could help influence policymaking to prevent pre-birth discrimination on the basis of disability.

In 2004, the President's Council on Bioethics published concerns that even the limited use of preimplantation genetic testing, "screening for severe medical conditions, screening for genetic predispositions . . . for a given disease, elective sex selection, and selection with an eye to creating a matching tissue donor" results in treating the child as a "means to the parents' ends."[153] This policy concern, published nearly sixteen years ago, reflects the overarching concern that using preimplantation genetic testing to select genetically fit embryos reflects discrimination and exhibits a lack of value for the innate human dignity and human rights of all people, as did forced sterilization.

2. Examples of Other Countries

While the United States has not adopted any federal oversight of preimplantation genetic testing, other than requiring ART clinics to report annually to the Center for Disease Control, other nations have adopted some level of restrictions regarding gender selection.[154] For instance, Canada's Assisted Human Reproduction Act attempts to prevent sex selection implantation by prohibiting a procedure that would "ensure or increase the probability that an embryo will be of a particular sex" or identifies the sex of an embryo unless it is to prevent or diagnose a disorder or disease that is related to a specific gender.[155] The United Kingdom's Human Fertilization and Embryology (HFE) Act provides that

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[151] Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1.

[152] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

[153] PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 95 (2004).

[154] *See supra* text accompanying notes 150–151; *see also* Bayefsky, *supra* note 150, at 42–43 (contrasting the lack of regulatory oversight in the United States with regulations in place in France, Italy, Switzerland, and the United Kingdom).

[155] Assisted Human Reproduction Act, S.C. 2004, c 2, § (5)(1)(e) (Can.).

testing on embryos can only be authorized in two situations: (1) to determine whether the embryo has a gene, chromosome, or mitochondrion concern that could prevent its ability to develop and be born live; or (2) where there is a "particular risk" that the embryo could have an abnormality.[156] Additionally, the Act prohibits gender selection for "social reasons."[157]

France limits the use of preimplantation genetic testing to parents who will likely give birth to a child who will suffer from an incurable genetic disease or who wish to select an embryo that is genetically compatible with an existing sibling who suffers from a serious disease and could be treated through transplanting cells from the healthy child.[158] While each of these restrictions are minimal, they provide more protection against discrimination through preimplantation genetic testing than the United States currently offers.

3. California Law

California does not have legal restrictions on preimplantation genetic testing, and fertility centers widely advertise non-medical gender selection services for "family balancing."[159] While IVF and preimplantation genetic testing is limited to those who can afford the high cost of these services, this could soon change, at least in California, since in February 2019, the California Assembly introduced AB-767 *Health Care Coverage: In Vitro Fertilization*.[160] This legislation would require Covered California, California's government-run health exchange, to create optional coverage of in vitro fertilization.[161] While, as of the writing of the Note, this bill has not passed into law, it shows a significant trend to expand access to ART and preimplantation genetic testing through

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[156] Human Fertilisation and Embryology Act 1990, § 37, Sch. 2 para. IZA(1)(a)–(b) (U.K.).

[157] HUM. FERTILISATION & EMBRYOLOGY AUTH., CODE OF PRACTICE 98 (8th ed. 2017), www.hfea.gov.uk/media/2062/2017-10-02-code-of-practice-8th-edition-full-version-11th-revision-final-clean.pdf (U.K.).

[158] Sénat. Étude de législation comparée n° 188—Octobre 2008—Le diagnostic préimplantatoire, www.senat.fr/lc/lc188/lc1880.html (Fr.).

[159] CAL. IVF FERTILITY CTR., *supra* note 106 (advertising sex selection because family balancing is the parents' choice); *see also* N. Cal. Fertility Med. Ctr., *Family Balancing*, https://ncfmc.com/family-balancing/ (last visited Sept. 6, 2020) (explaining family balancing as selection of embryos of a specific gender for transfer into the uterus).

[160] A.B. 767, Cal. Leg., 2019–2020 Reg. Sess. (Cal. 2019) (as amended by Senate, June 6, 2019).

[161] *Id.*

California's state-run health insurance exchange, which would likely increase the number of individuals who make use of preimplantation genetic testing but were dissuaded by the high cost, and thus increase discrimination against those society has deemed unfit to be born

4. Biblical Principles

Although the Bible does not address preimplantation genetic testing specifically, it is full of commands to respect and protect the dignity of human life. First, the story of Creation states that every human being is made in the image of God and is valuable to Him.[162] Even though embryos created for ART are outside of the womb, they are still human beings who are made in God's image. The Bible also commands one to speak up for those who cannot speak for themselves and for the rights of those in need, to judge fairly, and to defend the rights of the poor.[163] Human embryos and populations that are actively discriminated against, such as the Down syndrome community, must be spoken up for especially when they cannot speak up for themselves. God also does not show one person or one group partiality and calls believers to do the same, which extends to choosing among embryos to be implanted based on gender, ability, or lack of ability.[164]

III. RECOMMENDATIONS FOR CALIFORNIA

The State of California has historically led the country, for better or for worse, as demonstrated by its role in the eugenics movement and its position as the "leader" in the number of individuals forcibly sterilized.[165] Given its reputation as a "Fertility Treatment Destination," it is extremely important for California to develop policies that will prevent discrimination through preimplantation genetic testing and promote human dignity for all people.

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[162] *See Genesis* 1:27 (Revised Standard Version) ("So God created man in his own image, in the image of God he created him; male and female he created them.").

[163] *See Proverbs* 31:8–9 (Revised Standard Version) ("Open your mouth for the mute, for the rights of all who are left desolate. Open your mouth, judge righteously, maintain the rights of the poor and needy.").

[164] *See James* 2:1 (Revised Standard Version) ("My brethren, show no partiality as you hold the faith of our Lord Jesus Christ, the Lord of glory."); *see also Romans* 2:11 (Revised Standard Version) ("For God shows no partiality."); *Deuteronomy* 10:17 (Revised Standard Version) ("For the LORD your God . . . is not partial and takes no bribe."); *Job* 34:19 (stating God does not show partiality and does not value some human beings more than others because he created all of them); *Proverbs* 22:2 ("The rich and the poor meet together; the LORD is the maker of them all."); *Acts* 15:9 (stating God makes no distinction between Jews and Gentiles, but cleanses all hearts by faith); *Galatians* 2:6 (reiterating that God shows no partiality).

[165] S.B. 1190, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

When considering how to approach the regulation of preimplantation genetic testing and decisions over which embryos to transfer, there are three primary groups of stakeholders in the outcome of the process.[166] The first group of stakeholders is the prospective parents, who have a reproductive liberty interest in deciding how and when they will bring a child into this world, an interest that was upheld by the Supreme Court in *Planned Parenthood v. Casey*.[167] The second group of stakeholders are physicians and medical professionals, who have an interest in serving their patients' interests while also upholding their professional standards and practices.[168] This group also has a key interest in the wellbeing of a child that may be born.[169] The final stakeholder is the state, which has competing interests in protecting potential human life and in protecting the health of the pregnant mother.[170] The Supreme Court in *Gonzales v. Carhart* affirmed that the state has the ability to regulate reproductive medicine in order to show its "profound respect for the life of the unborn."[171]

Unfortunately, no matter which way you slice preimplantation genetic testing, the creation of multiple embryos out of which some are selected for implantation results in a "choosing" of one life over another.[172] Each life, even potential life created outside of a womb, is created in the image of God and has innate human dignity that is worth protecting.[173] Preimplantation genetic testing, like forced sterilization of the genetically unfit to benefit society, reflects societal discrimination that some human lives are more valuable and socially acceptable than others and some lives burden society and therefore should be prevented.[174]

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[166] Daar, *supra* note 102, at 225.

[167] *Id.* at 225, 236–37; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977)) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

[168] Daar, *supra* note 102, at 225.

[169] *Id.*

[170] Roe v. Wade, 410 U.S. 113, 162 (1973) (asserting that the state "has still *another* important and legitimate interest in protecting the potentiality of human life").

[171] Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (quoting Casey, 505 U.S. at 877).

[172] *Preimplantation Genetic Diagnosis*, *supra* note 6, at 180.

[173] *See Genesis* 1:27 (Revised Standard Version) ("So God created man in his own image, in the image of God he created him; male and female he created them.").

[174] *See* Suter, *supra* note 97, at 947–48 (discussing the monetary savings to society by reducing the number of children born with genetic conditions); *see also supra* notes 10–12 and accompanying text (discussing the societal benefits that proponents of forced sterilization sought to achieve).

While today, preimplantation genetic testing is not run or mandated by the government, as forced sterilizations were, it is not inconceivable that in the near future the government could intervene in the name of public health or the good of society, as the state governments did during the United States' history of forced sterilization.[175] California's efforts to include IVF coverage in its state-run health exchange insurance plans is evidence that, at the very least, California's government will become more involved in ART and there is likely to be an increase in the use of preimplantation genetic testing as it becomes more affordable.[176]

California's open promotion of gender "selection" (discrimination) services through preimplantation genetic testing are especially troubling considering the state's recent history of "leading" the United States in the number of individuals forcibly sterilized.[177] These services conflict with claims that California is an inclusive and tolerant state, one that has been a leading voice in the "Me Too" movement and decries discrimination on the basis of sex and gender identity.[178] More recently, in response to the action taken by the Iowa legislature to ban the use of Medicaid spending on gender transition surgeries, California's Attorney General claimed that "California has taken an unambiguous stand against discrimination and government actions that would enable it."[179] As evidenced by previous laws sanctioning discriminatory sterilization against "undesirables" to protect society and the lack of legal protection against discrimination through preimplantation genetic testing, this simply is not true. California must implement legal safeguards to prevent discrimination against those deemed "genetically unfit" to fulfill the claim that it is a bulwark against discrimination.[180]

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[175] *See Preimplantation Genetic Diagnosis*, *supra* note 6, at 181 (stating government might someday interfere in preimplantation genetic testing for public health concerns); *Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 196, 198 (referencing the United States' use of sterilization laws to prevent procreation by those supposedly feebleminded who threatened the good of society).

[176] *See* A.B. 767, 2019–2020 Cal. Leg., Reg. Sess. (Cal. 2019) (as amended by Senate, June 6, 2019) (mandating the development of options to include IVF in Covered California health care packages).

[177] *See Eugenics, Sterilization, and Historical Memory*, *supra* note 39, at 196, 205 (noting that from the 1920s to the 1950s, California institutions performed about 20,000 of the estimated 60,000 forced sterilizations in the United States until sterilization laws were repealed in the 1970s).

[178] *See* A.B. 887, 2011–2012 Cal. Leg., Reg. Sess. (Cal. 2011) (redefining "gender" in six different California state codes to include gender identity and gender-related behavior and appearance); *The #MeToo Laws Coming to California in 2019*, CBS L.A. (Dec. 20, 2018, 6:55 PM), https://losangeles.cbslocal.com/2018/12/20/sexual-harassment-laws-california-2019/ (noting newly passed bills that protect against sexual harassment).

[179] Press Release, Xavier Becerra, Att'y Gen. of Cal., Attorney General Becerra: California Will Restrict State-Funded and State-Sponsored Travel to Iowa (Sept. 13, 2019) (on file with author).

[180] *Id.*

Because of the inherent discrimination involved in preimplantation genetic testing, ideally, using testing in order to choose one embryo over another should not be legal and such testing should only be used for the purpose of preparing for the life of the child to be born. However, while ideal to prevent discrimination, it is unlikely that such a broad restriction would be upheld or even passed considering the broad discretion given to parents' rights to procreate.[181]

In consideration of this broad discretion, preimplantation genetic testing should be limited to individuals and couples who are unable otherwise to conceive. Limiting preimplantation genetic testing to individuals who are unable to otherwise have children would respect their reproductive autonomy and ensure that this technology is not being used to "choose" more "genetically fit" children by individuals who can reproduce without ART. This is especially important considering the possible expansion of access to such technologies in California through expanded state insurance coverage.

Additionally, California must prohibit the selection of embryos for implantation based on gender, disability, or lack of disability in order to prevent discrimination against the same vulnerable groups that were targeted through state-run forced sterilization programs. Again, this is especially important in light of the possibility of the expansion of coverage for IVF and preimplantation genetic screening. If California passes legislation requiring Covered California healthcare plans to expand health care coverage to IVF, it should restrict such coverage from being used to select embryos on the basis of ability, disability, or sex. Such restrictions would be in line with California's recently passed law preventing sterilization in prisons as a birth control option except when the individual's life is in danger or when the procedure has been deemed medically necessary to address the individual's diagnosis.[182]

Limiting IVF and preimplantation genetic testing would balance the interests of potential parents, physicians, potential children, and the State's interest in protecting life and preventing discrimination by allowing those who are infertile to access technology that allows them to become parents while protecting potential children, physicians, and society from participating and becoming victims to discriminatory practices against the most vulnerable.

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[181] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (explaining that personal decisions regarding reproduction are constitutionally protected from governmental intrusion).

[182] S.B. 1135, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

CONCLUSION

When California and the rest of the United States sterilized individuals deemed unfit to reproduce, the proffered justification was that this would give society and its children the best life possible, a difficult argument to refute.[183] Today, while we have apologized and expressed our regrets for devaluing these lives, we still practice this discrimination in a more subtle way and justify it in the name of giving our children the best life possible and preventing the burdening of society with genetically defective children. California must learn from its past and decide what kind of world it wants to live in, one that values diversity and upholds the human dignity of all people regardless of ability, or one that promotes discrimination to achieve a more genetically fit child and unburdened society.

Lauren Moustakas[*]

[183] Ingram, *supra* note 75.

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I WALK THE LINE:[1] BALANCING TEACHERS' AND STUDENTS' RIGHTS IN THE CONTEXT OF PUBLIC-SCHOOL DISCIPLINE

On December 4, 2015, John Ekblad, a physical science teacher at Central High School in St. Paul, Minnesota, attempted to break up an altercation between two students in the school's cafeteria.[2] In the process, one of the students made disparaging racial remarks before punching Ekblad, throwing him to the floor, and strangling him until he lost consciousness.[3] As a result, Ekblad sustained serious injuries, including a concussion, permanent brain damage, memory and hearing loss, and numbness on one side of his body.[4] Ekblad received workers compensation benefits, but the United States District Court for the District of Minnesota held that Ekblad was not entitled to additional remedies and that his § 1983 claim that the school failed to provide a safe workplace was meritless.[5]

Unfortunately, Ekblad is not the only teacher to have experienced student misbehavior that escalated into violence against teachers or other students.[6] In 2009, Deborah York, a teacher in Edina, Minnesota, sustained back and neck injuries that required multiple surgeries after she was attacked by a first-grade student who also injured thirteen of his classmates.[7] In November 2018, an assistant principal at RiverEast Elementary and Secondary School in St. Paul, Minnesota, sustained a

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[1] JOHNNY CASH, I WALK THE LINE (Sun Records 1956).

[2] Ekblad v. Indep. Sch. Dist. No. 625, Civ. No. 16-834 (DSD/SER), 2017 U.S. Dist. LEXIS 81057, at *1–2 (D. Minn. May 25, 2017); Anthony Lonetree, *St. Paul Teacher Assaulted by Student Loses Court Appeal*, STAR TRIB. (Aug. 9, 2018, 11:14 PM), http://www.startribune.com/st-paul-teacher-assaulted-by-student-loses-court-appeal/490514141/.

[3] Susan Berry, *Teacher Coalition Seeks to End Obama School Discipline Policy: 'A Lot of Fear in Schools,'* BREITBART (Mar. 2, 2018), https://www.breitbart.com/politics/2018/03/02/teacher-coalition-seeks-to-end-obama-school-discipline-policy-a-lot-of-fear-in-schools/; Lonetree, *supra* note 2; Matt Sepic, *St. Paul Teacher Injured in Lunchroom Brawl Mourns Career*, MPR NEWS (May 8, 2017, 6:33 PM), https://www.mprnews.org/story/2017/05/08/st-paul-teacher-talks-about-injury-after-fight.

[4] Berry, *supra* note 3; Sepic, *supra* note 3.

[5] *Ekblad*, 2017 U.S. Dist. LEXIS 81057, at *3, *5, *9–10 (noting that although the circumstances were "certainly unfortunate," Ekblad's claim did not meet the standard for establishing a § 1983 claim); Lonetree, *supra* note 2. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed. Ekblad v. Indep. Sch. Dist. No. 625, 744 F. App'x 325, 328–29 (8th Cir. 2018).

[6] *See infra* text accompanying notes 7–8.

[7] Berry, *supra* note 3.

concussion after a twelve-year-old student struck her multiple times in the head.[8]

Incidents such as these illustrate obvious problems in the area of student discipline, but lawmakers struggle to devise an effective solution that balances the rights of teachers to maintain a safe and orderly classroom with the rights of students to receive an education.[9] In May 2019, Texas lawmakers responded by passing legislation that gives schools greater authority to discipline "students who harass teachers."[10] The law was passed at the request of the Texas Classroom Teachers Association and "requires that public school students who harass school employees be removed from their regular classrooms and be referred to disciplinary alternative education programs," where they temporarily receive academic instruction and social skills training apart from their peers.[11] The Association, which believed that the law was essential to preserve an effective learning environment for students and a safe workplace for teachers, recommended the law after "receiving reports of students threatening teachers without consequence."[12] Existing school district policies prohibited students from harassing their peers,[13] but the new law also prohibits students from harassing teachers and other school officials.[14] Acts of harassment that result in removal from the classroom under the law include "making an 'obscene' comment, threatening to inflict bodily harm, falsely saying that someone has died or been injured and making repeated phone calls" that will likely harass or annoy another

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[8] Anthony Lonetree & Chao Xiong, *Police Investigating Alleged Assault of St. Paul Assistant Principal by Student*, STAR TRIB. (Nov. 24, 2018, 6:50 PM), http://www.startribune.com/police-investigating-alleged-assault-of-st-paul-assistant-principal-by-student/501183361/.

[9] *See* Aliyya Swaby, *Texas Just Made It Easier to Punish Students Who Harass Teachers. Will the Law Be Misused?*, TEX. TRIB. (July 24, 2019, 12:00 AM), https://www.texastribune.org/2019/07/24/texas-made-it-easier-punish-students-who-harass-teachers/ (depicting a legislature struggling to give teachers the right to manage violent behavior and remain safe while not simultaneously increasing the rate at which disadvantaged children are affected and forced to drop out).

[10] Harmeet Kaur, *A New Law in Texas Will Make It Easier for Schools to Discipline Students Who Harass Teachers*, CNN (Aug. 3, 2019, 1:28 AM), https://www.cnn.com/2019/08/03/us/texas-law-student-teacher-harassment-trnd/index.html. The law went into effect on September 1, 2019. *Id.*; TEX. EDUC. CODE ANN. § 37.006 (West, Westlaw through end of 2019 Reg. Sess. of 86th Leg.).

[11] Kaur, *supra* note 10; *accord* S. 2432, 86th Leg., Reg. Sess. 86 (Tex. 2019); EDUC. § 37.006(a)(G).

[12] Kaur, *supra* note 10.

[13] EDUC. § 37.001.

[14] Swaby, *supra* note 9; *accord* EDUC. § 37.006(a)(G).

person.[15] While received positively by teachers,[16] opponents question how inclusively "obscene" comments will be construed[17] and raise concerns that the law will be disproportionately applied to disabled or minority students.[18]

California lawmakers reacted differently to the problem by passing a law that will restrict the ability of teachers to remove disruptive students from their classrooms.[19] The law will prevent schools from suspending kindergarten through eighth-grade students who "[d]isrupt[] school activities or otherwise willfully def[y] the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties."[20] Existing California law prohibited schools from suspending students in kindergarten through third grade for disruptive or defiant acts.[21] The new law will apply these prohibitions to charter schools and prevent schools from suspending students in fourth or fifth grade for such acts.[22] The prohibitions on suspensions will apply to sixth through eighth grade students in public or charter schools for a period of five years beginning July 1, 2020.[23] Existing California law also prevented schools from expelling public school students in kindergarten through twelfth grade for similar acts of

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[15] Kaur, *supra* note 10; *accord* EDUC. § 37.006(a)(G); *accord* TEX. PENAL CODE ANN. § 42.07(a)(1)–(4) (West, Westlaw through end of 2019 Reg. Sess. of 86th Leg.).

[16] *See* Haley Harrison, *West Texas School Districts Respond to New State Law that Focuses on the Harassment of Teachers*, CBS7 (July 29, 2019, 7:45 PM), https://www.cbs7.com/content/news/West-Texas-school-districts-respond-to-new-state-law-513363301.html (noting positive reactions to the new law by school personnel); *see also* Kaur, *supra* note 10 (explaining why teachers requested the new law).

[17] Chloe Bradford, *New Texas Law Changes Disciplinary Actions for Students Who Harass Teachers*, CBS19 (July 25, 2019, 2:58 PM), https://www.cbs19.tv/article/news/new-texas-law-changes-disciplinary-actions-for-students-who-harass-teachers/501-9266de40-c8c7-4877-955b-6185efcdafdf; *see also* Swaby, *supra* note 9 (discussing the concern that teachers will be able to categorize practically anything as harassment due to the broad language in the law).

[18] Bradford, *supra* note 17; Swaby, *supra* note 9.

[19] *See* Andrew Sheeler, *California Bill to Ban Schools from Expelling Disruptive Students Close to Becoming Law*, SACRAMENTO BEE (Aug. 22, 2019, 12:59 PM), https://www.sacbee.com/news/local/education/article234218847.html (noting that the law would prohibit schools from suspending or expelling students who disrupt school activities or otherwise defy authority); Aris Folley, *California Bans Schools from Suspending Students Solely for Disruptive Behavior*, HILL (Sept. 10, 2019, 5:56 PM), https://thehill.com/homenews/state-watch/460795-california-governor-signs-bill-banning-schools-from-suspending-students; CAL. EDUC. CODE § 48901.1 (West, Westlaw through Ch. 33 of 2020 Reg. Sess.).

[20] S. 419, 2019 S., Reg. Sess. (Cal. 2019).

[21] *Id.*; CAL. EDUC. CODE § 48900(2) (2018) (amended 2020) (West, Westlaw through Ch. 58 of 2020 Reg. Sess.).

[22] Cal. S. 419.

[23] *Id.*

defiance.[24] The new law will extend these prohibitions to charter schools beginning July 1, 2020.[25]

In Minnesota, the incident involving York spurred an effort by lawmakers to pass legislation protecting the rights of teachers.[26] Representative Jenifer Loon introduced a bill to "clarify a teacher's authority to remove students from their classroom, establish a fund to help pay for medical costs after an incident[,] and notify teachers when students with violent histories are placed in their classrooms."[27] While the provisions providing notice to teachers and giving them the authority to remove disruptive students from the classroom became law, the provision providing compensation for teachers who were victims of student violence did not.[28]

This varying legislation illustrates disagreement about the proper way to address discipline problems in public schools, but discussion frequently leaves out a critical issue: the rights of teachers such as Ekblad and York.[29] This Note illuminates this important issue by addressing whether teachers' rights are adequately protected when teachers possess

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[24] *Id.*; EDUC. § 48900(2).

[25] Cal. S. 419.

[26] *See* Kevin Burbach, *Minnesota School Assault Bill: Do Teachers Need More Classroom Control?*, TWIN CITIES PIONEER PRESS (Apr. 7, 2016, 10:56 AM), https://www.twincities.com/2016/04/05/latest-school-assault-bill-would-give-minnesota-teachers-more-authority/ (noting that in April 2016, Minnesota lawmakers attempted to address multiple assaults by students against teachers by considering Representative Loon's bill increasing the authority of teachers in the classroom); *see also* Erica L. Green, *Why Are Black Students Punished So Often? Minnesota Confronts a National Quandary*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/us/politics/school-discipline-disparities-white-black-students.html?module=inline (noting that York's story "inspired a Minnesota bill bolstering teachers' authority to remove threatening students from their classrooms").

[27] Burbach, *supra* note 26.

[28] MINN. STAT. ANN. § 121A.64 (West, Westlaw through 2020 Reg. Sess. and 1st, 2d, 3d, and 4th Spec. Sess.) ("A classroom teacher has a legitimate educational interest in knowing which students placed in the teacher's classroom have a history of violent behavior, *including any documented physical assault of a district employee by the student*, and must be notified before such students are placed in the teacher's classroom.") (emphasis added); § 122A.42 (giving teachers the right to remove violent or disruptive students from the classroom); *accord* § 121A.61. *Compare* H.R. 3679, 2016 Leg., 89th Legis. Sess. (Minn. 2016) (proposing a fund to compensate school employees who were victimized by student violence), *with* § 121A (demonstrating that the proposed legislation did not become law).

[29] *See* SCOTT F. JOHNSON & SARAH E. REDFIELD, EDUCATION LAW: A PROBLEM-BASED APPROACH (2d ed. 2012) (containing an extensive discussion about school discipline but failing to include a discussion about the rights of teachers in that section); MARTHA M. MCCARTHY ET AL., PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS (4th ed. 1998) (containing a similar discussion on student discipline and addressing the subject of teachers' rights in an entirely different section).

limited rights to discipline students and maintain order in the classroom. Part I addresses the background and current lack of national education policy influencing the issue of public-school discipline. Part II provides a legal analysis of the dilemma by focusing on applicable case law dealing with the intersection of school discipline, students' rights, and teachers' rights to illustrate the necessity of placing equal emphasis on students' and teachers' rights in school. Part III sets forth guiding principles that should be considered in formulating potential solutions to the problem of limited teachers' rights and proposes possible solutions, such as increased parental involvement in student discipline and a sample Bill of Rights for teachers that could be adopted by States to protect the rights of teachers in public schools.

I. RECENT HISTORY AND CURRENT STATE OF NATIONAL SCHOOL DISCIPLINE POLICIES AND GUIDELINES

National education policies are an aspect of education law that has dramatic potential to influence the extent of teachers' rights or the lack thereof.[30] While school discipline is largely administered on a local basis by individual schools and school districts,[31] discipline policies and decisions are also influenced by national policy guidelines set by each presidential administration.[32] In 2014, midway through President Barack Obama's second term as President,[33] the Department of Education and the

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[30] *See* JOHNSON & REDFIELD, *supra* note 28, at 40 (noting that states must follow federal rules and regulations or else lose federal funding); *See, e.g.*, *infra* text accompanying note 34.

[31] *See* E. GORDON GEE & PHILIP T. K. DANIEL, LAW AND PUBLIC EDUCATION: CASES AND MATERIALS 9 (4th ed. 2009) (noting that local school districts comprise the base of the structure of American public education and generally possess a substantial ability to control local operations of schools); JOHNSON & REDFIELD, *supra* note 29, at 44 (noting that "education is still primarily a state and local function under the Tenth Amendment" and that "[s]tates also give local school districts certain powers of their own").

[32] *See* JOHNSON & REDFIELD, *supra* note 29, at 1 (noting that "[e]ducation law includes constitutional, statutory, regulatory, and common law. These sources are augmented by state and federal agency guidance documents and orders"). Congress, by means of the Spending Power, may become involved in education and may delegate authority to implement statutes to federal agencies, usually the Department of Education (the "DOE") in education matters. *Id.* at 26, 39–40.

> The methods of implementation by the . . . DOE include promulgating federal regulations, issuing agency guidance documents, policy statements and interpretive letters, and taking enforcement actions. . . . When properly adopted, agency rules or regulations themselves have the force and effect of law and must be followed by states and schools in order to maintain federal funding.

Id. at 40.

[33] U.S. DEP'T OF EDUC. ET AL., FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY 73 n.1 (2018) [hereinafter FINAL REPORT]; Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICHMOND L. REV. 1041, 1041 (2013).

Department of Justice jointly issued a series of documents that came to be known as "the Guidance," which prescribed methods of discipline as alternatives to suspensions or expulsions.[34] The purpose of the Guidance was to eradicate perceived racial bias in the administration of school discipline[35] and to address the problem that minority students are sometimes disciplined more frequently than their white classmates.[36] The Guidance noted that racial discrimination in violation of Titles IV and VI of the Civil Rights Act of 1964 can occur not only when schools intentionally target students for different discipline based on their race but also when disciplinary policies have a disparate impact, that is, when schools "evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race."[37]

To ensure that school discipline was more evenhandedly distributed, the Guidance laid out three principles that schools should follow. First, schools should foster positive school climates and focus on preventing misbehavior from occurring.[38] Action steps to achieve this goal included using tiered support prevention strategies, training school personnel in effective behavior management, collaborating with local child welfare and mental health agencies to improve student behavior and pool resources, and utilizing school-based law enforcement officers only to ensure school safety rather than to enforce routine discipline.[39] Second, schools should "[d]evelop clear, appropriate, and consistent expectations and consequences to address disruptive student behaviors."[40] The Guidance recommended that schools pursue this goal by creating high behavioral expectations for all students; fostering frequent dialogue between students, teachers, and families; developing proportional consequences for misbehavior; creating discipline policies that secure due process

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[34] FINAL REPORT, *supra* note 32, at 67, 73 n.1; Anya Kamenetz, *DeVos to Rescind Obama-Era Guidance on School Discipline*, NPR (Dec. 18, 2018, 9:52 AM), https://www.npr.org/2018/12/18/675556455/devos-to-rescind-obama-era-guidance-on-school-discipline.

[35] U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 1 (2014) (noting that the Department of Justice and the Department of Education "are issuing this guidance to assist public elementary and secondary schools in meeting their obligations under Federal law to administer student discipline without discriminating on the basis of race, color, or national origin").

[36] *Id.* at 2–3.

[37] *Id.* at 6–7, 11.

[38] U.S. Dep't of Educ., Guiding Principles: A Resource Guide for Improving School Climate and Discipline 1–2 (2014).

[39] *Id.* at 2–4, 6–10.

[40] *Id.* at 1 (emphasis removed).

protections for all students; and removing students from their regular classrooms only after all other options have been exhausted.[41] Finally, schools should "[e]nsure fairness, equity, and continuous improvement."[42] Steps to achieve this goal included teaching school staff members to fairly apply disciplinary policies in order to avoid a disparate impact on minority students as well as frequently evaluating disciplinary policies to eradicate discriminatory disciplinary methods and ameliorate the root causes of these practices.[43]

Although supporters favorably received the Guidance,[44] opponents believed the policy only exacerbated existing problems.[45] In 2018, President Donald Trump established the Federal Commission on School Safety, which was tasked with improving safety in public schools following the shooting that took place at Marjory Stoneman Douglas High School in Parkland, Florida.[46] During hearings held by the Commission, several teachers testified that under the Guidance, school administrators would simply conceal incidents of student misconduct or violence rather than risk being investigated by the Department of Education's Office of Civil Rights (the "OCR").[47] Studies conducted by the Commission confirmed the unanticipated adverse effects of the Guidance, and in its report, the

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[41] *Id.* at 11–15.

[42] *Id.* at 1 (emphasis removed).

[43] *Id.* at 7–8, 16–18.

[44] *See* Press Release, ACLU, ACLU Statement on Call for Repeal of Obama-Era School Discipline Guidance (Dec. 18, 2018), https://www.aclu.org/press-releases/aclu-statement-call-repeal-obama-era-school-discipline-guidance (stating that the Trump Administration's efforts to "[r]epeal[] this guidance will not make schools safer and sends a message that . . . the Department of Education is no longer committed to its mission to protect the civil rights of students and promote educational excellence through vigorous enforcement of civil rights in our nation's schools"); *see also Rescission of Obama-era School Discipline Guidance Is an Attack on Youth of Color*, ADVANCEMENT PROJECT (Dec. 18, 2019), https://advancementproject.org/news/rescission-of-obama-era-school-discipline- guidance-is-an-attack-on-youth-of-color/ (arguing that repealing the Guidance sends a message to minority students and students with disabilities that the DOE will no longer support these students); Allison R. Brown & Marlyn Tillman, *Keep Guidelines in Place That Work to Ensure Fair Discipline for Black, Brown Students*, USA TODAY (Jan. 6, 2018, 4:36 PM), https://www.usatoday.com/story/opinion/policing/spotlight/2018/01/06/keep-guidelines- place-work-ensure-fair-discipline-black-brown-students/998684001/ (arguing that the Guidance helps students and families better understand their rights and the responsibilities of schools and encourages schools to discover the root causes of misbehavior).

[45] See, e.g., Gail Heriot & Alison Somin, The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law, 22 TEX. REV. L. & POL. 471, 495–507 (2018) (discussing several instances in which the policies of the Office of Civil Rights that encouraged schools to reduce suspensions of minority students led to increased disruption in the classroom).

[46] FINAL REPORT, *supra* note 33, at 8; Green, *supra* note 26; Erica L. Green & Katie Benner, *Trump Officials Plan to Rescind Obama-Era School Discipline Policies*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/17/us/politics/trump-school-discipline.html; Kamenetz, *supra* note 34.

[47] FINAL REPORT, *supra* note 33, at 68.

Commission noted that "the Guidance's chilling effect on school discipline . . . has forced teachers to reduce discipline to non-exclusionary methods, even where such methods are inadequate or inappropriate to the student misconduct, with significant consequences for student and teacher safety."[48] Hans A. von Spakovsky and Roger Clegg, two policy experts at the Heritage Foundation, concurred with this assessment, noting that "[a]s a policy matter, there is overwhelming evidence that Obama-era policies culminating in this 'Dear Colleague' letter pushed schools to avoid disciplining students who needed to be disciplined. It made avoiding politically incorrect numbers more important than maintaining school safety."[49]

Further, the Commission found that the Guidance relied on a faulty understanding of Supreme Court precedent.[50] While the Guidance claimed that students were protected under Title VI not only from intentional discrimination but also from policies having a disparate impact,[51] the Supreme Court had determined that "the Equal Protection Clause requires proof of intentional discrimination and that disproportionate or disparate impact alone does not constitute a violation."[52] The Supreme Court expanded the analysis one step further in 2001 when it considered "whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964" and held that no such right existed.[53] In so holding, the Court noted that "interpreting Title VI's implementing regulations to cover unintentional discrimination [conflicts] with the fact that the Title VI statute itself 'prohibits only intentional discrimination.'"[54] Despite this clear precedent to the contrary, the Guidance suggested that evenhanded application of discipline policies could warrant investigation by the OCR, a possibility that incentivized

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[48] *Id.* at 69.

[49] Hans A. von Spakovsky & Roger Clegg, *Withdraw the Obama Administration's "Dear Colleague" Letter on School Discipline*, HERITAGE FOUND. (June 18, 2018), https://www.heritage.org/education/commentary/withdraw-the-obama-administrations-dear-colleague-letter-school-discipline.

[50] FINAL REPORT, *supra* note 33, at 70–71; *see also* von Spakovsky & Clegg, *supra* note 49 (arguing that the Supreme Court banned only "disparate treatment" in *Alexander v. Sandoval*).

[51] FINAL REPORT, *supra* note 33, at 70; *see supra* note 37 and accompanying text.

[52] FINAL REPORT, *supra* note 32, at 70 (first citing Washington v. Davis, 426 U.S. 229, 242 (1976); then citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); and then citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

[53] Alexander v. Sandoval, 532 U.S. 275, 278, 293 (2001); *see also* von Spakovsky & Clegg, *supra* note 49 (noting that *Alexander* "bans only 'disparate treatment.'").

[54] FINAL REPORT, *supra* note 33, at 71 (quoting *Alexander*, 532 U.S. at 280); *see also Alexander*, 532 U.S. at 282 ("These statements are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination . . . .").

schools to make discipline numbers proportional to enrollment numbers, regardless of whether the students deserved to be punished.[55]

In addition to its reliance on questionable legal theories, the Guidance improperly assumed that racial bias on the part of teachers was the primary cause of minority student suspensions, while "[r]esearch indicate[d] that disparities in discipline that fall along racial lines may be due to societal factors other than race."[56] Finally, because the Guidance was predicated on the assumption that the national government is better positioned to create disciplinary policies, it "offend[ed] basic principles of federalism and the need to preserve state and local control over education."[57]

The Commission recommended rescinding the policies of the Guidance that attempted to reduce exclusionary discipline, such as suspensions and expulsions, because the policies "made schools reluctant to address unruly students or violent incidents."[58] The Commission also strove to give schools authority and deference to create their own policies in light of the "special characteristics of the school environment."[59]

The Commission recommended a three-part approach to decrease school violence,[60] and its recommendations on school discipline fell under the preventative stage of the plan.[61] In lieu of the Guidance, the Commission recommended that the Department of Education develop resources describing best practices for school discipline that will guide schools in their efforts to create and equitably enforce disciplinary

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[55] FINAL REPORT, *supra* note 33, at 71.

[56] *Id.* at 70; *see also id.* at 67 (citing John Paul Wright et al., *Prior Problem Behavior Accounts for the Racial Gap in School Suspensions*, 42 J. CRIM. JUST. 257 (2014)) (noting that some have called into question the basis of the disparate impact theory in a public-school context). In their article on the causes of problem behavior in school, Wright and his fellow researchers argue that no set of variables has fully accounted "for the racial disparity in school discipline." Wright et al., *supra*, at 257. They cite several studies that suggest that minority students may be disciplined more frequently due to factors other than race such as being less prepared to enter school, being "disproportionately involved in delinquency and crime," and being "more likely to behave in ways that interfere with classroom and school functioning." *Id.* The study that Wright and his colleagues conducted revealed "that odds differentials in suspensions are likely produced by *pre-existing behavioral problems of youth that are imported into the classroom*, that cause classroom disruptions, and that trigger disciplinary measures by teachers and school officials." *Id.* at 263 (emphasis added).

[57] FINAL REPORT, *supra* note 33, at 67, 71.

[58] Kamenetz, *supra* note 34; *accord* FINAL REPORT, *supra* note 33, at 14 (recommending rescinding the Guidance and providing schools with information on "best practices" to improve school discipline).

[59] FINAL REPORT, *supra* note 33, at 71 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988)).

[60] *Id.* at 13–14 (stating that the efforts of the Commission are to prevent school violence, protect and mitigate the effects of school violence on both teachers and students, and respond and recover from incidents of school violence).

[61] *Id.*

policies.[62] The Committee also recommended that the Department provide information on how it will continue to enforce Title VI to eradicate intentional discrimination in schools.[63] The Guidance was rescinded on December 21, 2018.[64] No further guidelines or policy statements have yet been issued by the Department of Education on the issue of school discipline.[65]

II. LEGAL PRECEDENT ON SCHOOL DISCIPLINE, STUDENTS' RIGHTS, AND TEACHERS' RIGHTS IN PUBLIC SCHOOLS

A. Legal Precedent Regarding School Discipline

In addition to complying with national policy guidelines, local schools and districts must also administer discipline within controlling legal guidelines set out by courts.[66] In *Ingraham v. Wright*, the Supreme Court considered whether paddling students as a means of corporal punishment violated the Eighth Amendment's prohibition of cruel and unusual punishment.[67] In finding that the Eighth Amendment was not applicable to such punishment,[68] the Court held that a teacher may use such force as he or she "reasonably believes to be necessary for [the child's] proper control, training, or education."[69] Factors determining the reasonableness of corporal punishment include "the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the

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[62] *Id.* at 72.

[63] *Id.*

[64] U.S. DEP'T JUST. & U.S. DEP'T EDUC., DEAR COLLEAGUE LETTER 1 (2018) [hereinafter Trump Dear Colleague Letter]; Collin Binkley, *Trump Officials Cancel Obama-Era Policy on School Discipline*, U.S. NEWS (Dec. 21, 2018), https://www.usnews.com/news/politics/articles/2018-12-21/trump-officials-cancel- obama-era-policy-on-school-discipline.

[65] *See Policy Guidance Portal Index*, U.S. DEP'T EDUC., OFF. FOR C.R., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html (last visited Sept. 30, 2020) (showing a lack of further policy guidance documents after the December 21, 2018 documents). In fact, in the December 21 Trump Dear Colleague Letter, representatives from the Department of Education and the Department of Justice noted that they did not intend the letter to "add requirements to applicable law" or "create any rights, substantive or procedural." Trump Dear Colleague Letter, *supra* note 64, at 2.

[66] *See* JOHNSON & REDFIELD, *supra* note 29, at 1 (discussing how courts play a major part in education law by interpreting the numerous requirements of constitutional provisions, statutes, regulations, and common law principles, "providing constitutional review," and further noting that "the United States Supreme Court's jurisprudence interpreting statutory and constitutional requirements is hugely significant in the education arena").

[67] 430 U.S. 651, 653 (1977).

[68] *Id.* at 664.

[69] *Id.* at 661.

punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline."[70]

"Corporal punishment [has been] defined as the use of physical force with the intention of causing a child to experience pain so as to correct [his or her] misbehavior."[71] Today, nineteen states allow teachers to use corporal punishment to discipline students in public schools.[72] Forty-eight states allow teachers in private schools to utilize corporal punishment as a means of discipline.[73] Even if a state allows corporal punishment, each individual school district may choose whether to allow it.[74] States that do not allow the use of corporal punishment typically permit teachers to "use reasonable force when . . . necessary . . . to correct or restrain a student or prevent bodily harm or death to another [person]."[75]

In *Goss v. Lopez*, the Supreme Court issued guidance on the procedures that must be followed when briefly suspending a student from school.[76] Before school officials suspend a student for a period of up to ten days, they must first give the student written or oral notice of the charges against him and afford the student the opportunity to present his explanation of the facts,[77] but if the student is a danger to others or property, the notice and hearing may occur after the suspension.[78] The Court noted that its decision did not interpret due process to mean that students had the right to seek counsel, cross-examine witnesses, or call witnesses on their behalf because this would be too time-consuming for every minor suspension.[79]

While *Goss* provided much-needed clarification concerning the due process rights of students, the decision left several questions

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[70] *Id.* at 662.

[71] Elizabeth T. Gershoff & Sarah A. Font, Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy, SOC. POL'Y REP., 2016, at 2.

[72] *Id.* at 1; Christina Caron, *In 19 States, It's Still Legal to Spank Children in Public Schools*, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/us/corporal-punishment-school-tennessee.html?action=click&module=inline&pgtype=Article. The nineteen states that allow corporal punishment in public schools are: "Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming." Gershoff & Font, *supra* note 71, at 1.

[73] Caron, *supra* note 72; Gershoff & Font, *supra* note 71, at 4 (noting that only Iowa and New Jersey prohibit corporal punishment in private schools).

[74] Gershoff & Font, *supra* note 71, at 4.

[75] MINN. STAT. ANN. § 121A.582 (West, Westlaw through 2020 Reg. Sess.,1st through 4th Spec. Sess., and ch. 1 of 5th Spec. Sess.); N.C. GEN. STAT. § 115C-390.3 (through Sept. 27, 2019); TENN. CODE ANN. § 49-6-4107 (through 2020 Reg. Sess.).

[76] 419 U.S. 565, 581–83 (1975).

[77] *Id.* at 581.

[78] *Id.* at 582–83.

[79] *Id.* at 583.

unanswered.[80] Courts disagree about how much additional due process a student must receive when the conduct at issue is more serious than the conduct at issue in *Goss*.[81] However, "[m]ost courts have denied the need for adversarial type hearings for cases involving short-term suspensions."[82] Courts also disagree about how specific the required notice to the student must be.[83] Some courts have held that the notice must "state specific, clear and full reasons for the proposed action, including the specification of the alleged act upon which the disciplinary action is to be based and the reference to the regulation subsection under which such action is proposed."[84] Other courts require less specificity.[85]

Goss also left open the question of how much due process is required when a student is expelled.[86] The United States District Court for the Central District of California has found that "*Goss* clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses."[87] The court also found that in expulsion cases, notice requires that the student be informed "not only of the specific charge, but also the basic rights to be afforded the student."[88] The Seventh Circuit Court of Appeals, however, has found that to satisfy due process, expulsion procedures need only give the student notice of the charges and an "opportunity to be heard," but "need not . . . 'take the form of a judicial or quasi-judicial trial.'"[89]

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[80] GEE & DANIEL, *supra* note 31, at 160–61 (discussing the various approaches of lower courts concerning the amount of additional due process necessary when the student's offense is more serious, the specificity of the notice that the student must be given, and other issues).

[81] *Id.* at 160–61.

[82] *Id.* at 160 (first citing Granowitz v. Redlands Unified Sch. Dist., 129 Cal. Rptr. 2d 410, 416 (Cal. Ct. App. 2003) (holding that a school did not violate a student's due process rights when it suspended him for sexual harassment without a hearing); and then citing Covington Cnty. v. G.W., 767 So. 2d 187, 190–92 (Miss. 2000) (holding that a student was not denied due process when he received notice of his suspension for possession of alcohol on school grounds from the school superintendent rather than the school board attorney)).

[83] *See infra* notes 84–85 and accompanying text.

[84] Mills v. Bd. of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (requiring notice to be written and specifically stating the charges justifying the suspension or expulsion sought).

[85] *See* Wayne Cnty. Bd. of Educ. v. Tyre, 404 S.E.2d 809, 811 (Ga. Ct. App. 1991) (holding that a student was not denied due process because he "was made aware of the charges against him shortly after the incident which gave rise to his suspension and [he] was given an opportunity to answer the charge that he refused to obey an instructor's order").

[86] GEE & DANIEL, *supra* note 31, at 162.

[87] Gonzales v. McEuen, 435 F. Supp. 460, 467 (C.D. Cal. 1977).

[88] *Id.*

[89] Remer v. Burlington Area Sch. Dist., 286 F.3d 1007, 1010–11 (7th Cir. 2002) (quoting Linwood v. Bd. of Educ., 463 F.2d 763, 770 (7th Cir. 1972)).

B. Students' Rights Under Current Law

In addition, students have a variety of other rights that are protected under current law. For example, students enjoy substantial free speech protection.[90] The Supreme Court has held that although student speech at school is not unrestrained and must be balanced against the "comprehensive authority" of school administrators, students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate."[91] Generally, on-campus student speech may be curtailed only when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," supports a reasonable forecast of such an interruption, or invades the rights of others.[92] If student speech does not satisfy this standard, schools may only discipline students for their on-campus speech when the speech appears to advocate illegal drug use,[93] is "offensively lewd and indecent,"[94] or might reasonably be seen "to bear the imprimatur of the school."[95]

Courts disagree about when public-school administrators may discipline students for their off-campus speech.[96] In the absence of Supreme Court precedent on the issue,[97] courts have developed a variety of tests to determine when disciplinary action for off-campus expression may be permissible under *Tinker*.[98] Some courts analyze whether the totality of the circumstances permits regulation under *Tinker*.[99] Others require a threshold showing that it was reasonably foreseeable that the speech would reach campus[100] or that the student intended the speech to reach the school environment,[101] while others require "an identifiable

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90 *See infra* notes 91–103 and accompanying text.

91 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506–07 (1969).

92 *Id.* at 509, 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

93 Morse v. Frederick, 551 U.S. 393, 397 (2007).

94 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

95 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

96 *See* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 574 (4th Cir. 2011) (holding that the nexus between the student's speech and the school's pedagogical interests was sufficiently strong to justify disciplinary action). *But see* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 214–16 (3d Cir. 2011) (holding that the school failed to demonstrate a sufficient nexus between the student's off-campus speech and the school environment, and therefore, the school could not discipline the student for his speech).

97 Benjamin A. Holden, Tinker *Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech*, 28 FORDHAM INTEL. PROP., MEDIA & ENT. L.J. 233, 236-37, 257 (2018); Katherine A. Ferry, Comment, *Reviewing the Impact of the Supreme Court's Interpretation of "Social Media" as Applied to Off-Campus Student Speech*, 49 LOY. U. CHI. L.J. 717, 720–21 (2018).

98 *See infra* text accompanying notes 99–103.

99 Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1070 (9th Cir. 2013).

100 Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 38–39 (2d Cir. 2007).

101 Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 395 (5th Cir. 2015).

threat of . . . violence."[102] Finally, some courts require a sufficient nexus between the student's speech and the school.[103]

Students also possess Fourth Amendment rights in the school setting, although these rights are not as robust as in other contexts.[104] While a valid Fourth Amendment search generally requires probable cause and a search warrant,[105] in *New Jersey v. T.L.O.*, the Supreme Court held that school officials need not have probable cause before searching a student as long as the search is reasonable under the circumstances.[106] What is reasonable depends on whether the search was initially justified and whether the scope of the search was reasonably related to its objectives and was not "excessively intrusive[.]"[107] Regarding more intrusive strip searches, the Supreme Court, applying the *T.L.O.* standard, has found that a strip search of a thirteen-year-old student in an attempt to uncover banned prescription drugs was unconstitutional and violated the student's Fourth Amendment rights.[108] In so holding, the Court reasoned that such an intimate search would require:

> [T]he support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.[109]

While *T.L.O.* provides the general rule for individualized searches, suspicionless searches require the school to prevail in "a three part balancing test."[110] The "students' expectation of privacy" must be balanced against "the intrusiveness of the search, and . . . the school's special or significant need for the search."[111] While these various protections for students provide a much-needed bulwark against the erosion of students' rights, the rights of teachers must not be neglected and must receive similar protections.

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[102] *Wynar*, 728 F.3d at 1069.
[103] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).
[104] JOHNSON & REDFIELD, *supra* note 29, at 649.
[105] *Id.*; U.S. CONST. amend. IV.
[106] 469 U.S. 325, 341 (1985).
[107] *Id.* at 341–42.
[108] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368 (2009).
[109] *Id.* at 377.
[110] JOHNSON & REDFIELD, *supra* note 29, at 676.
[111] *Id.* (first citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–60 (1995); and then citing Bd. of Educ. v. Earls, 536 U.S. 822, 830–34 (2002)).

C. Teachers' Rights Under Current Law

Like students, teachers also enjoy certain protections under current law. "While federal law plays a role in employment issues—for example, in discrimination in hiring or firing employees, due process, or First Amendment rights—the issues in school employment are primarily governed by state law."[112] Most states have laws specifying the reasons for which a teacher under contract may be terminated.[113] For example, in Minnesota, provided they receive notice and a reasonable time to remedy any deficiencies, teachers may be terminated at the end of a school year for several reasons including inefficiency, persistent violations of school rules, and unbecoming conduct that "materially impairs the teacher's educational effectiveness."[114] Teachers may be immediately discharged for reasons such as immorality, felony conviction, unjustified failure to teach, or "willful neglect of duty," but they must be given prior written notice and may request a hearing within ten days.[115] In Delaware, teachers may be terminated for "[i]mmorality, misconduct in office, incompetency, disloyalty, neglect of duty or wilful and persistent insubordination."[116] Teachers must receive prior written notice and the right to be heard.[117]

"In the area of teacher discharge, due process protections generally include rights to pre-termination hearings and to review of administrative decisions. . . . The law establishes due process protections for tenured employees, but . . . the legal status of untenured employees is less certain."[118] For example, in *Board of Regents v. Roth*, the Supreme Court held that officials at Wisconsin State University-Oshkosh did not violate a professor's Fourteenth Amendment rights when they did not renew his one-year contract after it expired and did not offer him a hearing.[119] The Court noted that there was no indication that the officials' decision was based on the professor's free speech rights and the University had not imposed a stigma on the professor that prevented him from obtaining another job.[120] The Court noted that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired

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[112] *Id.* at 117.

[113] *Id.* at 133.

[114] MINN. STAT. § 122A.40(9) (2019). If a teacher's license has been revoked because he or she has committed certain predatory offenses, such as child abuse or soliciting a minor for prostitution, the teacher is not entitled to a notice or hearing. § 122A.40(13)(b).

[115] § 122A.40(13)(a) (2019).

[116] DEL. CODE ANN. tit. 14, § 1420 (LEXIS through 82 Del. Laws, ch. 292).

[117] *Id.*

[118] GEE & DANIEL, *supra* note 31, at 382.

[119] 408 U.S. 564, 566–69 (1972).

[120] *Id.* at 573–75.

in one job but remains as free as before to seek another."[121] In another case, the Court held that the "lack of a contractual or tenure right to re-employment, taken alone, [did not] defeat[] [a professor's] claim that the nonrenewal of his contract violated the First and Fourteenth Amendments."[122] The Court stated that a nontenured teacher has a constitutional right to a hearing before non-renewal of his contract if "he can show that the decision not to rehire him somehow deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract."[123]

Teachers also enjoy certain free speech protections.[124] The Supreme Court has found that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[125] However, this right is not absolute; when teachers speak in their capacity as teachers, their speech does not receive First Amendment protection, and they may be disciplined by the school for their speech.[126] The Supreme Court has summarized the current state of teachers' free speech protections thus:

> When a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern. If an employee does not speak as a citizen, or does not address a matter of public concern, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the First Amendment interest of the employee against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[127]

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[121] *Id.* at 575.

[122] Perry v. Sindermann, 408 U.S. 593, 596 (1972).

[123] *Id.* at 599.

[124] JOHNSON & REDFIELD, *supra* note 29, at 161 (noting that teachers' First Amendment "rights include the right to academic freedom . . . and the right to speak out on matters of public concern").

[125] Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 574 (1968).

[126] *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006) (holding that public employees are not protected by the First Amendment when engaged in official duties).

[127] Borough of Duryea v. Guarnieri, 564 U.S. 379, 386 (2011) (first quoting Connick v. Myers, 461 U.S. 138, 147 (1983); and then quoting *Pickering*, 391 U.S. at 568).

A teacher's right to teach has also been protected. In *Meyer v. Nebraska*, a teacher was convicted for teaching German to a student in violation of a Nebraska law, which prohibited any teacher in a private or parochial school from teaching a language other than English to students.[128] The Supreme Court held that a teacher's right to teach was protected by the Fourteenth Amendment.[129] In *Pierce v. Society of Sisters*, the Court considered a challenge to the Compulsory Education Act of 1922, which required all parents or guardians to send their children to school "in the district where the child resides."[130] The Society of Sisters operated its own school for children, but the Act required many of its students to drop out to attend public schools.[131] Among other things, the Society alleged "that the enactment conflicts with . . . the right of schools and teachers therein to engage in a useful business or profession."[132] The Supreme Court, relying on its decision in *Meyer*, held that the law was unconstitutional.[133]

A teacher's right to teach is not absolute, however. In *Boring v. Buncombe County Board of Education*, the Fourth Circuit Court of Appeals considered "whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play."[134] Reasoning that as a policy matter, it was more appropriate for the public school to choose the curriculum rather than the teachers, the court found that the teacher did not have this right.[135]

Notably, few cases have held that teachers have the right to a safe workplace in the context of school discipline. For example, in *Ekblad v. Independent School District No. 625*, the court found that Ekblad's § 1983 claim that the school district administrators failed to maintain a safe workplace was meritless because Ekblad did not meet the high standard necessary to prove a violation of his Fourteenth Amendment right to substantive due process.[136] In *Thomas v. Byrd-Bennet*, a teacher claimed that he was assaulted and attacked by ten students over a period of several months and that the school administrators "had a duty to protect him from harm, danger and injury and to maintain a safe workplace."[137] The Court of Appeals of Ohio affirmed the decision of the lower court

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[128] 262 U.S. 390, 396–97 (1923).
[129] *Id.* at 400.
[130] 268 U.S. 510, 529–30 (1925).
[131] *Id.* at 530–32.
[132] *Id.* at 532.
[133] *Id.* at 534–36.
[134] 136 F.3d 364, 366 (4th Cir. 1998).
[135] *Id.* at 366, 371.
[136] Civ. No. 16-834(DSD/SER), 2017 U.S. Dist. LEXIS 81057, at *9–10 (D. Minn. May 25, 2017).
[137] No. 79930, 2001 Ohio App. LEXIS 5404, at *1–2 (Ohio Ct. App. Dec. 6, 2001).

granting the administrators' motion to dismiss and found that the teacher had not alleged facts that would show the administrators' involvement in failing to control the students, that the administrators acted outside their authority, or that they acted maliciously, recklessly, or in bad faith, which would exempt them from immunity from suit.[138] In order to ensure that quality teachers remain in public schools,[139] it is imperative that the rights of teachers receive stronger protection.

III. SOLUTION TO INADEQUATE PROTECTION OF TEACHERS' RIGHTS

A. Relevant Principles

Any feasible solution that seeks to bolster the rights of teachers in the context of school discipline should incorporate and encapsulate the following principles. When teachers administer discipline and seek to maintain order in the classroom, they should remember that the purpose of discipline should be to prevent destructive behavior, rather than to punish the student or inflict retribution.[140] Discipline should be motivated by a desire to express love and demonstrate concern for the students' long-term well-being and happiness.[141] After all, schools serve the vital function of "teaching students the boundaries of socially appropriate behavior."[142] Accordingly, administrators should strive to create a school culture where discipline is recognized as a positive tool to mold students into productive members of society.[143]

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[138] *Id.* at *2–3, *8–9.

[139] *See* Eric Westervelt & Kat Lonsdorf, *What Are the Main Reasons Teachers Call It Quits?*, NPR (Oct. 24, 2016, 6:00 AM), https://www.npr.org/sections/ed/2016/10/24/495186021/what-are-the-main-reasons-teachers-call-it-quits (noting that qualified teachers often leave because of inadequate salary, lack of voice in school policies, poor administration, or cultures more concerned with passing students than teaching them).

[140] *See* Chip Ingram, *Five Characteristics of Biblical Discipline*, FOCUS ON FAM. (Aug. 30, 2019) [hereinafter Ingram, *Five Characteristics*], https://www.focusonthefamily.com/parenting/five-characteristics-of-biblical-discipline/ (discussing how discipline is necessary to deter destruction of a child's life and noting that "[d]isciplined lives reap rewards"); *see* Chip Ingram, *Punishment Versus Discipline*, FOCUS ON FAM. (Jan. 1, 2006) [hereinafter Ingram, *Punishment*], https://www.focusonthefamily.com/parenting/punishment-versus-discipline/.

[141] Ingram, *Five Characteristics*, *supra* note 140. Discipline motivated by proper concerns demonstrates love for the one being disciplined, not hatred. *See Proverbs* 22:15 (ESV) ("Folly is bound up in the heart of a child, but the rod of discipline drives it far from him."); *Proverbs* 13:24 (ESV) ("Whoever spares the rod hates his son, but he who loves him is diligent to discipline him.").

[142] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[143] *See* Christopher Suarez, *School Discipline in New Haven: Laws, Norms, and Beating* The Game, 39 J.L. & EDUC. 503, 527–28 (2010) (demonstrating that the utility of discipline is determined by the school culture established by the administrators).

While school discipline should be administered fairly and with due regard to students' rights and protections, the rights of teachers must not be neglected. If qualified teachers do not feel respected and valued in public schools, they may seek employment elsewhere, and the students' education will suffer.[144] Numerous studies have been conducted that demonstrate the positive impact that qualified teachers have on students' education.[145] For example, a highly regarded study by William L. Sanders and June C. Rivers discovered a positive correlation between student achievement and the quality of the teacher.[146] Sanders and Rivers found that the quality of the teacher had a greater impact than other variables, such as the schools' ethnic composition, the students' socioeconomic backgrounds, and the average student achievement level.[147]

In addition to helping students succeed academically, teachers also play a substantial role in improving students' lives in less obvious ways.[148] Research has shown that "[t]eachers who help students improve noncognitive skills such as self-regulation raise their grades and likelihood of graduating from high school more than teachers who help them improve their standardized test scores do."[149] In a recent study of more than 570,000 North Carolina students, C. Kirabo Jackson, a professor at Northwestern University, observed that students with teachers who invested in the students' non-cognitive skills "were more likely to have higher attendance and grades and to graduate than their peers."[150] The students also were less likely to be held back or suspended.[151]

Likewise, if the rights of teachers to make disciplinary decisions and maintain an orderly classroom are not respected, teachers may be less likely to remove disruptive students from the classroom, which could have

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144 *See* Westervelt & Lonsdorf, *supra* note 139 ("[O]verall, teachers and researchers say, educators want a bigger voice in school policies and plans. Many feel left out of key discussions."); *infra* note 145 and accompanying text.

145 Comm. on Sci. & Mathematics Tchr. Preparation, Nat'l Rsch. Council, Educating Teachers of Science, Mathematics, and Technology: New Practices for the New Millennium 44 (2001) [hereinafter Research Council] (asserting that "research in classrooms has demonstrated that teachers do make a tangible difference in student achievement").

146 *Id.* at 47; WILLIAM L. SANDERS & JUNE C. RIVERS, CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACADEMIC ACHIEVEMENT 4–7 (Nov. 1996), https://www.beteronderwijsnederland.nl/files/cumulative%20and%20residual%20effects%20of%20teachers.pdf.

147 RESEARCH COUNCIL, *supra* note 145, at 48.

148 *See* Youki Terada, *Understanding a Teacher's Long-Term Impact*, EDUTOPIA (Feb. 4, 2019), https://www.edutopia.org/article/understanding-teachers-long-term-impact (noting the less obvious impacts teachers have on students such as increased motivation, "ability to adapt to new situations, [and] self-regulation").

149 *Id.*

150 *Id.*; C. Kirabo Jackson, What Do Test Scores Miss? The Importance of Teacher Effects on Non-Test Score Outcomes, 2–3 (2016), https://www.nber.org/papers/w22226.pdf.

151 Terada, *supra* note 148.

an adverse effect on the ability of non-disruptive students to learn.[152] This adverse effect may result from the fact that "[a] teacher who spends large chunks of his or her time dealing with student discipline is not spending time on instruction. Inevitably, other students in a disruptive environment will suffer."[153] Disruptive students can also adversely impact the learning of their classmates by encouraging them to engage in the same disruptive behavior.[154] Finally, disruptive students can adversely impact the learning of fellow students because of "the effect of a distracting presence in a classroom. Even if a teacher is able to continue to teach and even if a student does not join the disruptive behavior, one or both may be distracted from the lesson because of the misbehaving student."[155]

B. Increased Parental Involvement Necessary

Schools should make a concerted effort to involve parents in the disciplinary process, since "school is just one context of students' lives, and educators are unlikely to reduce the disruptive or delinquent behavior of children without the help of families and the community."[156] While parental rights in private and home schools have been protected,[157] "[p]ublic schools have been uniformly successful in beating back the legal claims of parents seeking a meaningful role in decisions concerning their own children's education."[158] As a result, public education suffers.[159] Classroom discipline may also suffer.[160] Numerous studies have shown that "one of the greatest predictors for a child's educational success in any school environment is parental involvement."[161] In a highly-regarded

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[152] Mike Ford, *The Impact of Disruptive Students in Wisconsin Public Schools*, BADGER INST. (April 2013), https://www.badgerinstitute.org/Reports/2013/The-Impact-of-Disruptive-Students-in-Wisconsin-Public-Schools.htm (stating that "[t]he disruptive behavior leading to . . . suspensions is detrimental to teachers, school cultures, and ultimately, student learning").

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] Steven B. Sheldon & Joyce L. Epstein, Improving Student Behavior and School Discipline with Family and Community Involvement, 35 EDUC. & URB. SOC'Y 4, 21 (2002).

[157] Michael Farris & Bradley P. Jacob, *Public Schools' Pyrrhic Victories over Parental Rights*, 3 RICH. J.L. & PUB. INT. 123, 138–41 (1998).

[158] *Id.* at 123.

[159] *Id.* at 124.

[160] *See id.* (noting how the victory of public schools in the courts has decreased involvement from parents in public schools); Sheldon & Epstein, *supra* note 156, at 21 (noting how increased parental involvement can improve the behavior of students).

[161] Farris & Jacob, *supra* note 157, at 124; *see also* J. Kevin Barge & William E. Loges, *Parent, Student, and Teacher Perceptions of Parental Involvement*, 31 J. APPLIED COMMC'N

study, researchers Steven B. Sheldon and Joyce L. Epstein sought to determine "to what extent the implementation of school-family-community partnership activities designed to improve student behavior affect[ed] school-level reports of student behavior and school disciplinary actions."[162] The study asked schools to report whether they implemented partnership activities with parents and communities in an effort to reduce incidents of student discipline.[163] After examining the results, Sheldon and Epstein discovered a positive correlation between increased parent involvement and lower rates of student discipline, "regardless of schools' prior rates of discipline."[164] Schools that provided parents with more opportunities to be involved and to understand expectations for student behavior reported fewer student detentions and office referrals.[165] Additionally, schools that made a greater effort to communicate with parents and involve them in creating school policy reported fewer student detentions.[166] Among the strategies perceived to be the most effective in improving student behavior were using day planners to communicate with parents, organizing orientation sessions for new parents, and holding workshops to inform parents about the schools' expectations for student behavior.[167]

RSCH. 140, 140–41 (2003) (noting that students are more likely to be academically successful when parents are involved in their education and citing several studies to that effect); Philip Joseph, *The Role of Parents in the Dynamics of School Discipline*, 2 INT'L J. INDEP. RSCH. & STUD. 45, 45–46 (2013) (seeking to draw attention to the importance of parental involvement in students' education); Matthew Lynch, *Why Parental Involvement Matters*, EDVOCATE (May 29, 2019), https://www.theedadvocate.org/why-parental-involvement-matters/ (stating that "parent involvement is . . . the best predictor of a student's educational achievement").

[162] Sheldon & Epstein, *supra* note 156, at 6.

[163] *Id.* at 17.

[164] *Id.* at 20, 22.

[165] *Id.* at 20; *see also* Lily Eskelsen García & Otha Thornton, *The Enduring Importance of Parental Involvement*, NEATODAY (Nov. 18, 2014, 9:47 AM), http://neatoday.org/2014/11/18/the-enduring-importance-of-parental-involvement-2/ (noting that "[s]tudents with involved parents or other caregivers . . . show improved behavior"); Lynch, *supra* note 161 (stating that parents' interest in their students' education results in "fewer discipline problems"). In addition, studies have suggested that parental support for education could result not only in improved behavior in the classroom but also in general. *See* Deana B. Davalos et al., *Effects of Perceived Parental School Support and Family Communication on Delinquent Behaviors in Latinos and White Non-Latinos*, 11 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 57, 64 (2005) (noting the important impact parents have on students).

[166] Sheldon & Epstein, *supra* note 156, at 20.

[167] *Id.* at 18.

C. Sample Statement of Rights of Teachers

1. States that Have Implemented a Teachers' Bill of Rights to Protect Teachers

Codifying a Bill of Rights that expressly protects the rights of teachers could lend weight and legal force to the importance of teachers' rights. Currently, only Louisiana and Tennessee have enacted such a law.[168] Similar bills were introduced in California in 2016,[169] and Rhode Island in 2019,[170] but both bills failed.[171] Another such bill was introduced in the Oklahoma House of Representatives in 2009,[172] but no further action was taken on the bill after the Appropriations and Budget Committee recommended its passage.[173] In January 2019, a bill that recommended codifying a teacher bill of rights was introduced in the South Carolina State Senate,[174] but the bill is currently pending in the Committee on Education.[175] Most recently, on February 11, 2020, the Alabama House of Representatives introduced a Teacher Bill of Rights[176] modeled after its counterpart in Louisiana.[177]

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[168] LA. STAT. ANN. § 17:416.18 (Westlaw through 2019 Reg. Sess.); *see* TENN. CODE ANN. § 49-5-209 (LEXIS through 2019 Reg. Sess.) (providing in relevant part that an educator is entitled to "[r]eport any errant, offensive, or abusive content or behavior of students to school officials or appropriate agencies," to "[p]rovide students with a classroom and school in which the educators, students, . . . and peers will be safe," and to "[d]efend themselves and their students from physical violence or physical harm").

[169] S. 1225, 2016 Leg., 2015–2016 Reg. Sess. (Cal. 2016).

[170] H. 5366, 2019 Gen. Assemb., Jan. Sess. (R.I. 2019).

[171] *See SB-1225 Teachers: Teachers Bill of Rights Act*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB1225 (last visited Sep. 11, 2020) (showing that the California bill "died"); *see also Legislative Status Report*, ST. R.I. GEN. ASSEMB., http://status.rilin.state.ri.us/ (last visited Sep. 11, 2020) (showing that the Rhode Island bill was referred to the House Committee on Health, Education and Welfare, but that on February 27, 2019, the Committee recommended that the bill be held for further study).

[172] H. 2227, 52d Leg., 1st Sess. (Okla. 2009).

[173] *Bill Information for HB 2227 (2009–2010)*, OKLA. ST. LEG., http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2227&session=0900 (last visited Sep. 11, 2020).

[174] S. 244, 2019 Gen. Assemb., 123d Sess. (S.C. 2019); *S0244 General Bill, By Fanning and McLeod*, S.C. LEGISLATURE [hereinafter *S0244 General Bill*], https://www.scstatehouse.gov/billsearch.php?billnumbers=244&session=123&summary=B (last visited Sep. 11, 2020).

[175] *See S0244 General Bill*, *supra* note 174 (showing that the bill was referred to the Senate Committee on Education on January 8, 2019, and that no further action has been taken).

[176] H. 214, 2020 H.R., 2020 Reg. Sess. (Ala. 2020).

[177] Trisha Powell Crain, *Alabama Law Would Mandate Respect for Teachers*, ADVANCE LOC. (Feb. 27, 2020), https://www.al.com/news/2020/02/alabama-law-would-mandate-respect-for-teachers.html?fbclid=IwAR3gUgDSEpTe-

Notably, Louisiana protects the rights of teachers to discipline students in accordance with state and local policy, to "remove any persistently disruptive student from his [or her] classroom when the student's behavior prevents the orderly instruction of other students or when the student displays impudent or defiant behavior," to have his or her professional judgment respected in disciplinary matters, to "communicate with and to request the participation of parents in appropriate student disciplinary decisions," and to teach in a safe workplace.[178]

2. Teachers' Bill of Rights

(A) This Section shall be known as the Teacher Bill of Rights.

(B) In order to maintain a safe, orderly, and effective educational environment, it is imperative that the rights of teachers are respected and protected. Consequently, teachers, school administrators, parents, and students must recognize and understand the rights of every teacher in this State, which are:

(1) The right to teach in a safe and orderly workplace that is conducive to learning and free from threats or instances of violence or harassment by students or school staff.

(2) The right to be notified when a student with a history of violent behavior, including documented physical assault of a teacher or school staff member, is placed in his or her classroom.

(3) The right to reasonably discipline students in accordance with state, district, or school policy.

(4) The right to remove any repeatedly disruptive or defiant student from his or her classroom when the student's behavior precludes the learning of other students or presents a threat to the safety of the teacher or fellow students.

(5) The right to have his or her professional discretion respected by school or district officials when making reasonable curricular decisions or when making any reasonable disciplinary decision in accordance with state, district, or school policy.

(6) The right to due process of law, including notice and an opportunity to be heard, when responding to challenges to his or her disciplinary decisions or when facing termination.

(7) The right to defend him- or herself and students against physical harm or violence from any source. This includes the right to use

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c6pVCsxlVWEFeoLcL6D3uwu1fMXzmdEq5_w3P32N9WjZKU (explaining that among other rights, the bill would protect the rights of teachers to appropriately discipline students, remove disruptive or defiant students from the classroom, involve parents in disciplinary decisions, and enjoy a safe workplace).

[178] LA. STAT. ANN. § 17:416.18(A)(3)–(7) (Westlaw through 2019 Reg. Sess.).

reasonable force against a student when necessary to correct or restrain the student and to prevent physical harm or death to another person.

(8) The right to communicate with parents and guardians and to request their participation in the teacher's reasonable disciplinary decisions.

(9) The right to speak as a citizen on matters of public concern without fear of negative employment consequences.

(10) The right to present concerns about school policies and procedures to administrators without fear of reprisal.

CONCLUSION

Incidents of student violence against teachers such as John Ekblad and Deborah York have sparked disagreement about the proper way to balance teachers' rights with students' rights in the context of school discipline. While states have implemented varying solutions to the problem, most discussions and solutions do not sufficiently address teachers' rights, which are inadequately protected when teachers possess only limited authority to discipline students and maintain order in the classroom. The Guidance issued by President Obama's Administration in 2014 failed to correct the problem. Its faulty interpretation of Title VI and its threat of investigation for non-compliant schools led many schools to avoid addressing disciplinary problems. Because the Guidance has been rescinded, local schools and districts should have greater authority to address and formulate effective solutions to disciplinary issues.

Students enjoy substantial protection under current law, including significant protection for First and Fourth Amendment rights. Students must also be given due process when they receive corporal punishment or when they are briefly suspended from school. Teachers also possess some rights in the school setting, such as the right to due process in termination decisions, the right to free speech on matters of public concern, and the right to teach. For the most part, courts have not been willing, however, to protect teachers' rights to a safe workplace. If teachers do not feel safe at work, or if they do not feel valued and respected in their role, they may leave the educational profession to the detriment of their students' educations. Likewise, if schools do not uphold the rights of teachers to make disciplinary decisions and maintain an orderly classroom, teachers may be less likely to remove disruptive students from the classroom, which could adversely affect the ability of non-disruptive students to learn. Making a greater effort to involve parents in the disciplinary process could prevent teacher exodus, improve school discipline, and lead to fewer student suspensions or expulsions. Adopting a Bill of Rights that

protects the rights of teachers could lend legal force to the protection of teachers' rights and positively impact the school discipline problem. Only when action is taken will teachers' rights receive the respect and protection they deserve.

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