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“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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The bigotries, phobias, and moral crimes of the Trump administration are too legion for any law review to examine completely, even in a special jumbo edition. The best we can do is expose and seek to correct them one obnoxious offense at a time. In “The *Ejusdem Generis* of A-B-: Ongoing Asylum Advocacy for Domestic Violence Survivors,” Linda Kelly zeroes in on an especially repellent Department of Justice (“DOJ”) opinion in which the misogyny and xenophobia of Trumpism coalesce into something close to pure cruelty.

In *Matter of A-B-* then-Attorney General Jeff Sessions unilaterally reversed the policy established by the DOJ’s Board of Immigration Appeals that facilitated protections to immigrant victims of domestic violence seeking asylum. *A-B-* narrows the rules, heightens the burdens, and otherwise worsens the already-hellish lives of some of the poorest, most desperate and forlorn refugees to arrive at our borders. These are mostly women who’ve already suffered indefensible gender-based cruelty and violence and are now far more likely to be redirected back for even more of it.

Kelly’s article is a how-to manual for human rights attorneys advocating on behalf of these asylum-seekers. She provides insight and analysis along with practical, tactical suggestions for how to win these cases. It is written both with moral urgency and a strategist’s blueprint for winning in court.

The permeation of racism in our criminal justice system generally, and in the courts specifically, is a topic which has lately been given plenty of ink but nowhere near enough action. For all the discussion, there’s been little meaningful remediation. Jana DiCosmo’s “Racism in the Legal Profession: A Racist Lawyer is an Incompetent Lawyer” separates itself from the din in two essential ways.

First, it addresses an aspect of the fundamentally racist U.S. criminal justice system rarely discussed in popular or scholarly literature—racist lawyering. This is to be distinguished from the obvious, larger problem that so many lawyers hold racist beliefs and prejudices. Traditionally, when racist lawyers have been sanctioned by the bar it has been for ethical violations—with their racial animus treated as a “character and fitness” issue that diminishes public

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THE EJUSDEM GENERIS OF *A-B-*: ONGOING ASYLUM ADVOCACY FOR DOMESTIC VIOLENCE SURVIVORS

On June 11, 2018, Attorney General Sessions published his opinion in *Matter of A-B-*¹ and overruled *Matter of A-R-C-G-*.² In so doing, Sessions single-handedly dismantled an accord between domestic violence survivors, their advocates, and the U.S. government, which was reached less than four years prior and had ended a fifteen-year struggle. Decided in 2014 by the Board of Immigration Appeals (BIA), *A-R-C-G-* was the only decision with national precedential value that provided asylum to domestic violence survivors. It was the culmination of a complicated history, winding through three Presidential administrations and numerous negotiations in the wake of the negative *Matter of R-A-* opinion, which was published and then vacated upon the (ultimately unrealized) hopes that certain regulations would be published.³

Sessions' overruling of *A-R-C-G-* unleashed a firestorm. Fourteen former Immigration Judges immediately released a joint statement criticizing his *A-B-* decision as one made upon "reasons understood only by himself" and calling upon the courts or Congress to "reverse this unilateral action and return the rule of law to asylum adjudications."⁴ Various immigration courts across the country began issuing detailed briefing instructions in cases affected by *A-B-*.⁵ Numerous articles and op-eds expressing disapproval were also published.⁶ On July 11, 2018, USCIS issued a detailed memorandum providing instruction on *Matter of A-B-* to all relevant USCIS officials adjudicating reasonable fear, credible fear, asylum, and refugee claims.⁷ On July 25, 2018, the U.S. House Committee on Appropriations passed an amendment to block any DHS funding to implement *Matter of A-B-*.⁸ On August 7, 2018, a federal lawsuit was filed requesting an injunction to block the implementation of *Matter of A-B-* in expedited removal proceedings.⁹

As the legal and political controversy rages on, domestic violence survivors continue to reach the U.S. borders and appear before U.S. asylum officers and immigration judges seeking asylum. *A-B-* has already significantly reduced the number of positive decisions for domestic violence survivors in credible fear interviews along the U.S. border¹⁰ as well as immigration courts.¹¹ Asylum seekers cannot wait for the next possible chapter of legal pronouncements. This article intends to serve as an immediate tool for domestic violence asylum seekers and their advocates who now must respond to *Matter of A-B-*.

While *A-B-* systematically discredits *A-R-C-G-*'s interpretation of the asylum criteria for domestic violence survivors, it does not definitively disqualify domestic violence asylum claims. Instead, *A-B-* demands more "rigor" in the presentation and adjudication of asylum claims.¹² *A-B-* reevaluates each of asylum's critical criteria: 1) defining membership in a particular social group;

2) evidencing persecution; 3) showing a foreign government's unwillingness or inability to prevent such persecution; 4) establishing the nexus between such persecution and membership; and 5) proving the non-viability of internal location. Fortunately, as *A-B-* acknowledges, this demand for greater rigor in asylum evaluation can be met by returning to the main source of asylum: *In re Acosta*.¹³ By following *Acosta*'s roadmap, domestic violence survivors can meet the expectations set forth by *A-B-*.

1. Membership In A Particular Social Group

For domestic violence survivors, the most fundamental challenge is fitting the domestic violence claim into one of asylum's limited statutory grounds. Asylum can be granted based on one of the following five factors: "race, religion, nationality, membership in a particular social group or political opinion."¹⁴ The struggle to define "membership in a particular social group" originates with *Acosta*.¹⁵ Relying on the principle of *ejusdem generis*, *Acosta* says "membership in a particular social group" must be defined consistently with the other four grounds. Such consistency leads to membership in a particular social group necessitating a "common, immutable characteristic . . . that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to change."¹⁶

More recently, the "common, immutable characteristic" demand of the particular social group standard was compounded by the BIA's near conflicting demands of "particularity" and "social distinction." "Particularity" signifies that a particular social group's terms are exacting enough to avoid a group being "amorphous," "subjective," "inchoate," or "indeterminate."¹⁷ In contrast to the narrowing of "particularity," "social distinction" considers whether the society in question "perceives, considers, or recognizes persons sharing the particular characteristic to be a group."¹⁸ Combined, the twin requirements of "particularity" and "social distinction" force asylum seekers to walk a tightrope. "A particular social group must avoid, consistent with evidence, being too broad to have definable boundaries and too narrow to have larger significance in society."¹⁹ Finally, to avoid circularity, whatever the characteristics defining the group, they cannot be rooted in the harm asserted.²⁰ "If a group is defined by the persecution of its members, then the definition of the group moots the need to establish actual persecution."²¹

Against this framework, *A-B-* shatters *A-R-C-G*'s particular social group of "married women in Guatemala who are unable to leave their relationship." Chastising the BIA for its "cursory" analysis and acceptance of DHS' concession that such a group satisfied the "particular social group" standard, *A-B-* critically examines and rejects *A-R-C-G*'s proposed, and comparable, groups.²² *A-B-* concludes that being "unable to leave their relationship" is tantamount to basing the group in the violence because the "inability 'to leave' was created by the harm or threatened harm."²³ The terms "married," "women," and "unable to leave the relationship" were held to be insufficient to demonstrate social distinction—although arguably creating a group narrow enough to satisfy particularity. Sessions also criticized the *A-R-C-G* Board for accepting DHS' concession that the proposed group was "cognizable" and

noted that DHS provided “no explanation” of support for that concession.²⁴ The BIA’s recognition of Guatemala’s “culture of machismo and family violence” and lack of enforcement of domestic violence laws was not enough for Sessions.²⁵ Instead, he required that the evidence must establish that the class be “recognizable by society at large.”²⁶ According to *A-B-*, “there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances.”²⁷

Practice Tip:

In the face of such challenges, how should a particular social group for domestic violence survivors be defined? Initially, relevant circuit precedent must be reviewed. *A-B-* is a controlling federal administrative precedent, which federal circuits must follow absent contrary circuit precedent.²⁸ Importantly, a few circuits have rejected the social distinction criterion, preferring to rely solely on the “common immutable” characteristic and “particularity” aspects of the “particular social group” requirement.²⁹ Nevertheless, assuming all three elements must be met, how can the membership in a particular social group be maintained in a post *A-B-* world?

a. Recasting the term “Unable to Leave the Relationship”

Sessions’ characterization of the “unable to leave the relationship” element as a proxy for defining the group through the violence is *A-B-*’s greatest challenge and greatest folly for asylum applicants. Unlike Sessions, the *A-R-C-G-* Board clearly stated that “married women in Guatemala unable to leave their relationships” avoided the circularity trapping, since domestic violence did not define the group.³⁰ Presenting evidence in asylum cases that explains this disconnect is now critical. Reliance on basic domestic violence theory is one way to strongly refute *A-B-*’s naïve understanding of domestic violence.

When Lenore Walker, a pioneer in the domestic violence movement, introduced the “cycle of violence” concept in 1979, she defined “the battered woman” as one subject to an ongoing pattern of tension building, acute battering, and batterer contrition.³¹ While such work was critical to early explorations of domestic violence, its overemphasis on physical violence gave way to a more nuanced understanding of the many reasons that women stay in an abusive relationship.³²

Walker’s “cycle of violence” was eventually replaced with the “power and control wheel,” which depicts domestic violence as a central hub of “power and control, attached to spokes illustrating the array of forces compelling a woman to stay.”³³ It illustrates that a woman’s inability to leave a relationship is not strictly due to her fear of violence. Love,³⁴ shame,³⁵ children,³⁶ culture,³⁷ religious vows, and scarcity of resources³⁸ are among the many legitimate, non-violence based explanations for a woman’s decision to stay in such a relationship. Evidence of this nature can be submitted through an asylum applicant’s testimony as well as the submission of numerous documented sources within domestic violence literature.³⁹ By providing these kinds of

non-violence related explanations, a domestic violence survivor can prove that her “inability to leave the relationship” is not rooted in violence. In so doing, she can avoid the circularity trap set up by *A-B-*.

b. Eschewing the “Unable to Leave Relationship” Term

Beyond recharacterizing the “unable to leave” term, domestic violence survivors can advance other particular social groups theories.⁴⁰ For example, based on the facts of *A-R-C-G-*, another possible social group may simply be: “Married Guatemalan Women.”⁴¹ This proposed group avoids the “circular definition in violence” criticism.⁴² However, it is also clearly at risk of being considered insufficiently “particular.” Defenses against this latter criticism may include the courts’ repeated recognition that group size does not matter.⁴³ And, backed by *ejusdem generis*, an asylum applicant can cite the numerous large, non-domestic violence groups routinely recognized by courts.⁴⁴ In this regard, the applicant might also quote Sessions’ own words in *A-B-*: “Although the category of protected persons [within a particular group] may be large, the number of those who can demonstrate the required nexus likely is not.”⁴⁵

c. Proposing Alternative “On Account of” Grounds

Finally, domestic violence asylum seekers and their advocates must explore and propose all other viable “on account of” categories. Does the applicant’s violence and fear have any roots in religion, political opinion, race, or nationality?⁴⁶ An asylum applicant need only show that the harm was motivated “in part” by one of these recognized statutory bases for asylum.⁴⁷ *Fiadjoë v. Attorney General* exemplifies this tactic.⁴⁸ In *Fiadjoë*, a Ghanaian woman was awarded asylum after being sexually abused and subjected to servitude by her father from the age of seven, a priest of the Trokosi sect.⁴⁹ Notably, the asylum award was not framed “on account of membership in a particular social group,” such as family or domestic violence. Instead, the Third Circuit relied “on account of religion”⁵⁰ because the Trokosi religious practice of making women and children sacrificial slaves was well documented by the U.S. State Department.⁵¹

2. Persecution

A-B- also reinforces domestic violence asylum applicants’ need to demonstrate the three basic prongs of persecution. While statutorily either “past” or a “well-founded fear” (*i.e.*, future) persecution suffices, *Acosta* and later decisions interpret the term “persecution” to include a showing that the harm is (1) “severe,”⁵² (2) inflicted in order to “overcome a characteristic of the victim,”⁵³ and (3) inflicted by “either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”⁵⁴

a. Severity

Typically, a domestic violence survivor’s testimony and corroborating evidence (such as hospital records, police reports, and third party affidavits)⁵⁵ will leave little doubt that the abuse suffered is “repugnant”⁵⁶ enough to meet the “severity” standard.

However, in the wake of *A-B-*, the “persecution” challenge for domestic

violence survivors is demonstrating the nexus between such abuse and the protected characteristic in addition to proving the foreign government's inability or unwillingness to control against such acts.

b. Intent to Overcome

Despite *R-A-* having been vacated nearly 20 years ago, Sessions' *A-B-* opinion relies heavily upon *R-A-*'s explanation that a domestic violence survivor is targeted by her husband "because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm."⁵⁷ Such an ignorant remark creates a non-existent difference. Of course, an abuser targets his wife because she is his wife. However, it is only when she assumes that marital status that she becomes a member of a class vulnerable to persecution because both her husband and her country's government condone the subjugation of married women. The proposed, albeit never finalized, regulations causing the vacatur of *R-A-* recognized this nexus: "[I]n the domestic violence context, an adjudicator should consider any evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she enters into a domestic relationship."⁵⁸

Practice Tip:

Certainly, neither the vacated *R-A-* nor the never finalized regulations provide authoritative guidance. Yet the recognition of a nexus between abuse and marital status within the proposed regulations at least provides a strong counter to *A-B-*'s reliance on *R-A-* and its failure to see an abusive partner's "intent to overcome" his victim. The proposed regulations also draw a useful analogy between slaves persecuted "because of race" and domestic violence victims "because of membership in a particular social group."

For example, in a society in which members of one race hold members of another race in slavery, that society may expect that a slave owner who beats his own slave would not beat the slave of his neighbor. It would nevertheless be reasonable to conclude that the beating is centrally motivated by the victim's race. Similarly, in some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or because of her status in a domestic relationship. This may be a characteristic that she shares with other women in her society, some of whom are also at risk of harm from their partners because of this shared characteristic. Thus, it may be possible in some cases for a victim of domestic violence to satisfy the "on account of" requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share this characteristic, because only one of these women is in a domestic relationship with the abuser.⁵⁹

In short, once a slave, or a wife, assumes such status, the persecutor readily relegates that individual into a group which may be subject to harm—even if he is only limited to harming that one individual. Relying on this concededly harsh analogy may help adjudicators recognize a similar nexus for domestic violence survivors.

3. Government “Unable or Unwilling” to Control the Persecution

The government’s inability or unwillingness to control the private actor is the third prong of persecution discussed by *A-B-*. Keeping with precedent, *A-B-* instructs that when the conduct is by a private actor the asylum applicant must show “more than” that the government has “difficulty . . . controlling the private behavior.”⁶⁰ Rather, the applicant must show that “the government condoned” the private actions “or at least demonstrated a complete helplessness to protect the victims.”⁶¹

Practice Tip:

Because the standard of “unable or unwilling”—otherwise stated as “complete helplessness or condoning”—was remanded without being addressed by the BIA in *A-B-*, the Attorney General’s opinion also cannot make a definitive ruling.⁶² This indecision creates significant opportunities for domestic violence survivors and their advocates. Certainly, the requirement demands more than inaction by the local police.⁶³ “Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it.”⁶⁴ Again, an applicant’s testimony, expert affidavits, or other third-party affidavits and country condition documentation proves critical. How many times did the applicant seek help? What police response, if any, occurred? If the police did not investigate the abuse, was the applicant given a reason? Whether or not the applicant sought police assistance, can government condonation or ineptitude be otherwise documented? What do country reports say about the existence of domestic violence laws and the national and/or local government’s sincerity in prosecuting domestic violence offenders? These considerations serve as a starting point for satisfying this third factor.

4. “On Account Of” Membership in a Particular Social Group

The “on account of” nexus in *A-B-* also charges the *A-R-C-G-* Board with not undertaking its own analysis and for simply accepting DHS’s concession that the persecution *A-R-C-G-* suffered “was, for at least one central reason, on account of her membership in a particular social group.”⁶⁵ According to Sessions, the *A-R-C-G-* Board “cited no evidence that her ex-husband attacked her because he was aware of, and hostile to, ‘married women in Guatemala who are unable to leave their relationship.’ Rather, he attacked her because of his preexisting relationship with the victim.”⁶⁶ *A-B-* squarely burdens domestic violence survivors—like other asylum seekers—to prove the nexus.

This nexus challenge is rooted in Supreme Court precedent. Although not explicit in the refugee definition, the ordinary meaning of the “on account of” nexus is that persecution is on account of *the victim’s* “race, religion, nationality, membership in a particular social group or political opinion.”⁶⁷ The U.S. Supreme Court established the victim-focused standard when Elias-Zacarias fled Guatemala in fear of recruitment by the guerrillas.⁶⁸ Elias-Zacarias’ request for asylum was rejected.⁶⁹ No matter how credible, his fear was not of persecution on account of *his* political opinion. No evidence of Elias-Zacarias’ support for the Guatemalan government or political opposition to the guerrilla existed. His resistance to guerrilla recruitment was, at

best, for reasons of self-preservation.⁷⁰ As the Supreme Court reasoned, the guerrillas' motivation for recruiting Elias-Zacarias was due to an interest in filling their ranks, not a belief that Elias-Zacarias should be targeted for holding a contrary political opinion. The guerrillas' own political ambitions, independent of Elias-Zacarias, were also "irrelevant."⁷¹

In many asylum cases, establishing the persecutor's motive can be complicated—both as a legal and factual matter. Yet the obvious example of direct retaliation in which the victim expresses a political opinion contrary to that of the persecutor is only one model. When the victim does not personally manifest one of the five factors, persecution may still occur "on account of" a protected ground. The persecutor may "impute" a protected ground (such as political opinion or religious belief) to the victim.⁷² The persecutor may also have "mixed motives" for engaging in persecution.⁷³ Only one motivation needs to be tied to a protected ground.⁷⁴ However, whatever the "on account of" theory, the victim has the burden of proof. Either by direct or circumstantial evidence, the applicant must establish the persecutor's motive.⁷⁵

Against this backdrop, reconsider the challenge for domestic and other personal violence survivors. Oftentimes, it is clear words or direct actions that are key to establishing the "on account of" nexus." Critically, when asylum was granted to a rape victim in *In re D-V*- she was able to testify that the soldiers verbally identified her as a "fanatic for Aristide" while they were raping her and that they wore scarves like those of the Ton Ton Macoutes, "which had signified blood and had meant that people and places would be ravaged."⁷⁶

By contrast, no "on account of" nexus was found in the case of Castillo-Hernandez.⁷⁷ Castillo-Hernandez, an indigenous Guatemalan woman targeted and raped by uniformed individuals, claimed persecution because of her Mayan ethnicity or imputed political opinion of neutrality in post-civil war Guatemala.⁷⁸ Amnesty International reports were introduced to establish that the sexual crimes and killings of Guatemalan women were linked to gender. Yet, in denying Castillo-Hernandez's claim, the Eleventh Circuit stated, "[The] roving gang of ex-guerrillas . . . made no comments indicating they were attacking her and her mother because they were Mayan and spoke Canjobal or because they thought the women had remained neutral during Guatemala's civil war almost ten years earlier. The attackers' actions were consistent with private acts of violence and not persecution based on a protected factor."⁷⁹

Predictably, in many cases of domestic violence tangible demonstrable evidence is lacking. The standard is misguided if not offensive. How often will an individual raping his intimate partner articulate his motivations? And more importantly, why should a survivor have to depend upon the willingness of a perpetrator to explain himself? The "one central reason" standard seems to empower the perpetrator and leave the victim without a legal haven.

Fortunately, while a persecutor's words and direct actions are invaluable, asylum's overarching "reasonable person" standard (embodied in well-founded fear) does not require an applicant to establish conclusively why persecution happened.⁸⁰ "Rather, an asylum applicant 'bear[s] the burden of establishing facts on which a reasonable person would fear that the danger arises on

account of his race, religion, nationality, membership in a particular social group, or political opinion.”⁸¹

Practice Tip:

Certainly, any statements by the persecutor regarding his dominant, patriarchal position in relation to his intimate partner and women in similar relationships are key. Expert and other third-party affidavits as well as country condition documentation regarding the role of women in such relationships are also invaluable. However, domestic violence survivors and their advocates must also emphasize the reasonable person standard and the need for ejusdem generis review.

In other “on account of” determinations, courts often conclude there is no other “reasonable explanation” for the persecution other than the asserted nexus.⁸² By analogy, a perpetrator of domestic violence may have a “preexisting personal relationship” with his parents, his siblings, and friends. Yet these individuals are not subject to domestic violence. The persecution is saved only for his most intimate partner. Contrasting an abuser’s behavior *vis-à-vis* differing personal relationships debunks Sessions’ claim that domestic violence only occurs because of the “pre-existing relationship.” Apart from the applicant’s membership in the particular social group, no other reasonable explanation exists for the domestic violence.

Finally, courts must be reminded that Sessions’ remark that ARCG was attacked by her husband “because of his preexisting personal relationship with [her]”⁸³ does not dispositively prevent domestic violence survivors from establishing the nexus. Sessions is guilty of the very criticism he levied on the BIA—reaching a conclusion without conducting an evaluation.⁸⁴ In any event, the factual conclusion regarding the nexus in one case does not control another.

5. Internal Relocation

While not undertaking any evaluation of the *A-B-* facts, Sessions reminds asylum adjudicators to incorporate this element.⁸⁵ As a general matter, when an asylum applicant has otherwise met the criteria for asylum, the status may nevertheless be denied if internal relocation is a legally recognized alternative.⁸⁶ However, the internal relocation standard *and* the burden of proof vary *both* upon whether an asylum applicant has established a case of past *or* a case of well-founded fear of (*i.e.* future) persecution and upon whether the persecutor is a government or non-government agent.

a. Past Persecution

When a case of past persecution has been established, a rebuttable presumption arises that the applicant has a well-founded fear of persecution. It is then DHS’s burden to rebut this presumption by meeting two discrete considerations: (1) the applicant’s ability to relocate and (2) the reasonableness of relocation.⁸⁷

In demonstrating the applicant’s ability to relocate, DHS must first identify an area of the country where “the risk of persecution falls below the well-founded fear level” and then prove that such an area is “practically, safely and

legally” accessible to the applicant.⁸⁸ Once ability is established, the reasonableness of relocation factor considers whether “under all the circumstances, it would be reasonable to expect the applicant to do so.”⁸⁹ The non-exhaustive list of circumstances relevant to the reasonableness criterion includes all country conditions (e.g., civil strife, including economic, political, social, geographical, legal) as well as any personal conditions (e.g. age, gender, health, social and familial ties) that might make internal relocation unreasonable.⁹⁰

When DHS meets its two-step burden, an individual who has suffered past persecution may still be awarded asylum as a discretionary matter—because DHS has merely rebutted the presumption of well-founded fear—by showing “compelling reasons for being unwilling or unable to return”⁹¹ or “a reasonable possibility that he or she may suffer other serious harm upon removal to that country.”⁹² This humanitarian award of asylum understands that the severity of the past persecution makes it inhumane to require an individual to return to the very country where such atrocities occurred.⁹³

b. Well-Founded Fear of Persecution

In contrast to past persecution claims, when eligibility for asylum rests strictly upon a well-founded fear of persecution and nongovernmental persecution, the applicant retains the internal relocation burden and must meet a higher standard. In cases of nongovernmental persecution, the applicant bears the burden of showing “that it would not be reasonable for him or her to relocate.”⁹⁴ On the other hand, in cases of government-sponsored persecution, the burden shifts to DHS to show the reasonableness of relocation.⁹⁵

Practice Tip:

For domestic violence survivors, the internal relocation hurdle may be relatively easy to clear after the applicant has successfully met all of asylum’s other exceptional demands.⁹⁶ As *A-B-* recognizes, the severity of the violence suffered by domestic violence survivors is often so “repugnant”⁹⁷ that domestic violence claims will typically fall into the past persecution realm, thus placing the heavy “internal relocation” burden on the DHS. However, this in no way suggests that asylum applicants can overlook the internal relocation criteria. Applicants must counter any DHS arguments of relocation with both general country conditions and individual considerations.

Again, recognizing the dynamics of domestic violence is critical. Does the persecutor evidence a desire or ability to find the victim?⁹⁸ Has the victim’s isolation from family or friends eliminated a support system? Is the victim relying on physical treatment or other mental and social services in the United States that are not available in the home country?

Likewise, a domestic violence asylum applicant cannot presume her facts will establish past persecution. Arguing in the alternative for asylum strictly upon a well-founded fear puts the “reasonableness of relocation” burden on the applicant. Sessions’ remarks show the height of this standard: “When the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country’s government.”⁹⁹ Evidence unique

to the applicant's relationship to the persecutor, previous attempts to leave the relationship, the persecutor's ability and inclination to find the victim, as well as the home country's ability to protect domestic violence victims is therefore relevant. The domestic violence applicant can also introduce domestic violence literature or expert witnesses to show how the dynamics of domestic violence drive domestic violence perpetrators to great lengths to find their victims.¹⁰⁰

Conclusion

Over twenty-five years ago when I began advocating for asylum seekers, Esther Olavarria Cruz, already a seasoned asylum attorney said to me: "Asylum cases are like climbing a mountain. There are so many places where you can fall off." *Matter of A-B-* is a powerful reminder of the challenges presented by asylum law. However, with careful preparation, strong corroboration, and strict adherence to ejusdem generis, asylum remains within grasp for all asylum seekers, including domestic violence survivors.

NOTES

1. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).
2. *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014).
3. *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (en banc), vacated, 22 I&N Dec. 906 (AG 2001), remanded, 23 I&N Dec. 694 (A.G. 2005), remanded and stay lifted, 24 I&N Dec. 629 (AG 2008). In 1999, the Board in *Matter of R-A-* first considered whether "membership in a particular social group" could be because of domestic violence. Denying the claim, the *en banc* Board rejected the cognizability of the proposed particular social group "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." *Matter of R-A-*, 22 I&N Dec. 906, 918 (BIA 1999) (en banc). In 2001, Attorney General Janet Reno vacated *Matter of R-A-*, remanding it for the Board's reconsideration. Her instructions were a result of asylum regulations which had been proposed on behalf of domestic violence survivors on relevant asylum terminology including "persecution," "membership in a particular social group," and "on account of" a protected characteristic. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,597-98 (proposed Dec. 7, 2000). In 2003, Attorney General John Ashcroft certified *Matter of R-A-* for his review and remanded it to the Board in 2005 "in light of the final rule." *Matter of R-A-* 23, I&N Dec 694 (A.G. 2005). However, the proposed regulations were never finalized. In 2008, Attorney General Michael Mukasey certified the case for his review and issued an order that it be reconsidered without the need to await the final regulations. *Matter of R-A-*, 24 I&N Dec. 629 (A.G. 2008). Yet, because the parties then stipulated to asylum, the BIA ultimately never issued another published opinion in *Matter of R-A-*. R-A- was granted asylum on December 10, 2009. For a summary review of the procedural history of *Matter of R-A-* see *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390-391 (BIA 2014). For ongoing reliance on *Matter of R-A-* and the relevant proposed (never finalized) asylum regulations, see *infra* notes 57-59 and accompanying text.

4. Statement in Response to Sessions' Decision in *Matter of A-B*- by Retired Immigration Judges and Former Members of the Board of Immigration Appeals (June 11, 2018), available at <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/immigration-law-blog/posts/statement-in-response-to-session-s-decision-in-matter-of-a-b-by-retired-immigration-judges-and-former-members-of-the-board-of-immigration-appeals>
5. On file with author (briefing schedules of EOIR Immigration Courts in Arlington, VA and Newark, NJ).
6. Michelle Brané, Women Fleeing Domestic Violence Deserve Asylum, WASHINGTON POST (June 13, 2018); Katie Benner and Caitlin Dickerson, Sessions Says Domestic and Gang Violence are not Grounds for Asylum, NEW YORK TIMES (June 11, 2018); Elise Foley, Trump Administration Restricts Asylum Access for Victims of Gang and Domestic Violence, HUFFINGTON POST (June 11, 2018); Jane Fonda and Karen Musalo, Her Husband Beat Her and Raped Her. Jeff Sessions Might Deport Her, NEW YORK TIMES (May 17, 2018).
7. USCIS, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B*, Policy Memorandum (July 11, 2018).
8. House Committee on Appropriations, Department of Homeland Security House Appropriations Bill 115 H.R. ____ (July 25, 2018), available at <https://docs.house.gov/meetings/AP/AP00/20180725/108623/HMKP-115-AP00-20180725-SD004.pdf>; see also Noah Lanard, Republicans Voted to Block Jeff Sessions' Attacks on Asylum Seekers Fleeing Domestic Violence, Mother Jones (July 26, 2018), available at <https://www.motherjones.com/politics/2018/07/republicans-voted-to-block-jeff-sessions-attacks-on-asylum-seekers-fleeing-domestic-violence/>.
9. *Grace et al. v. Sessions*, Case 1:18-cv-01853 (D.C. DCt 2018). For further discussion of credible fear and expedited removal proceedings see Stephen H. Legomsky & Cristina M. Rodriguez, *Immigration And Refugee Law And Policy* (6th ed. 2015).
10. Noah Lanard, Jeff Sessions Has Been Targeting Asylum-Seekers Fleeing Domestic Violence. It's Been "Devastating," MOTHER JONES (July 26, 2018).
11. *In Re* ____ (Unpublished BIA, June 15, 2018) (on file with author).
12. *Matter of A-B-*, *supra* note 1 at 333.
13. 19 I&N Dec. 211 (BIA 1985).
14. 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(a).
15. *In re Acosta*, 19 I&N Dec. 211 (BIA 1985), *overruled on other grounds, in re Mogharrabi*, 19 I&N Dec. (BIA 1989).
16. *Ibid.*
17. *In re A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).
18. *In re W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014).
19. *Matter of A-B-*, *supra* note 1 at 336.
20. See, e.g., *M-E-V-G-*, 26 I&N Dec. at 236, n. 11; *W-G-R-*, *supra* note 18 at 215.
21. *Matter of A-B-*, *supra* note 1 at 335.
22. *Ibid.* at 333-334. In *A-R-C-G-*, DHS conceded that A-R-C-G- was a member of a "cognizable" social group that was both particular and socially distinct. The Board thus avoided considering whether A-R-C-G- could establish the existence of a cognizable particular social group without defining the group by the fact of persecution.").
23. *Ibid.* at 335.
24. *Ibid.* at 336.
25. *Ibid.* (relying on *A-R-C-G-*, *supra* note 2 at 392).

26. *Ibid.*
27. *Ibid.*
28. “The BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’ *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (relying on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). *Chevron*’s two-step analysis first asks, “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. Secondly, “[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute” *Id.* at 843; see also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).
29. In 2008, the BIA heightened the standard “particular social group” by adding the two requirements of “social visibility” and “particularity” to the traditional standard of “common immutable characteristic.” *In re E-A-G-*, 24 I&N Dec 591, 596 (BIA 2008), *In re S-E-G-*, 24 I&N 579, 584 (BIA 2008). Criticism of the new terms included decisions by the Third, Seventh and Ninth Circuits rejecting part or all the additional requirements. *Valdiviezo-Galdamez II. v. U.S. Att’y Gen.*, 663 F3d 582, 606-08 (3rd Cir 2011) (finding elements of social visibility and particularity “inconsistent” with prior Board decisions and that the BIA had not established a “principled reason” for adopting inconsistent requirements), *remanded sub nom, In re M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Gatimi v. Holder*, 578 F3d 611, 616 (7th Cir. 2009) (rejecting “social visibility”); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (clarifying while reserving assessment of validity of “particularity” and “social visibility”). Responding to such criticism, in 2014, the BIA re-interpreted and modified the new terms and changed “social visibility” to social distinction.” *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), *affirmed in part, vacated and remanded in part on other grounds sub nom. Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016). Such changes have resulted in the Third Circuit recent adoption of the “particularity” and “social distinction” terms, finding them to be compliant with *Chevron* standards. *S.E.R.L. v. Attorney General*, No. 894 F3d 535 (3rd Cir. 2018). After it’s earlier rejection of “social visibility,” the Seventh Circuit has failed to use or discuss “social distinction.” *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014). For earlier discussions of the “social distinction” and “particularity” terms and their origins see Linda Kelly, “On Account Of” Private Violence: The Personal/Political Dichotomy of Asylum’s Nexus 98, 108-118 (2017); Linda Kelly, The New Particulars of Asylum’s “Particular Social Group,” 36 WHITTIER LAW REV. 219 (2015).
30. *A-R-C-G-*, *supra* note 2 at 393, n. 14
31. “A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.” Lenore E. Walker, *The Battered Woman*, xv (1979).
32. Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 28-34, 53055 (1991) (criticizing the physical definition of domestic violence and its failure to address the “power and control, domination and subordination” dimensions); Joan S. Meier, Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice, 21 HOFSTRA L. REV. 1295, 1317-22 (1993) (focusing on the patriarchal dynamics of domestic violence); G Chezia Carraway, Violence Against Women of Color, 43 STAN. L. REV.

- 1301, 1305-1306 (1991) (relying on the patriarchal definition of domestic violence to include “economic violence, cultural violence, legislative violence, medical violence, spiritual violence, emotional violence and educational violence).
33. The “power and control wheel, otherwise known as the “Duluth Model” is attributed to the Duluth Domestic Abuse Intervention Project (DAIP) in Duluth, Minnesota. From a central hub of “power and control,” the wheel’s outer rim is a circle of physical and sexual violence. However, this central “power and control” is connected to the outer circle through spokes identified as such additional forces as using children, minimizing, denying, blaming, isolating, relying upon male privilege, coercing, threatening, intimidating, and abusing both emotionally and economically. Ellen Pence & Michale Paymar, Education Groups For Men Who Batter: The Duluth Model 1-15 (1993).
34. Walker, *supra* note 31 at 27 (recognizing the love which is restored during periods of contrition in the cycle of violence).
35. Mahoney, *supra* note 32 at 8 (acknowledging her reluctance to tell her own story).
36. R. Emerson Dobash & Russell Dobash, Violence Against Wives 148 (1979) (finding children to be the most cited reason a battered woman stays); Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women’s Movement, 61 N.Y.U. L.REV. 589, 614-615 (1986) (recognizing that a woman’s “connected nature” can result in making decisions regarding her own welfare in connection with consideration for both her spouse’s and children’s interests).
37. Kimberlé Crenshaw, Panel Presentation on Cultural Battery, 25 U.TOL.L.REV. 891, 893 (1995) (acknowledging that a victim of abuse does not want to leave, but simply wants the violence to stop); Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991).
38. Catherine T. Kenney & Karen R. Brown, Now Legal Def. & Educ. Fund, Report From The Front Lines: The Impact Of Violence On Poor Women (1996); Martha F. Davis & Susan J. Kraham, Protecting Women’s Welfare in the Face of Violence, 22 FORDHAM URB. L.J. 1141 (1995).
39. See *supra* notes 31-38 and accompanying text. For an additional sampling of the volumes of works dedicated to the patriarchal use of domestic violence see e.g., Ola W. Barnett & Alyce D. Laviolette, It Could Happen To Anyone: Why Battered Women Stay (2d ed. 2000); R. Emerson Dobash Et Al., Changing Violence Men (2000); Dobash & Dobash, *supra* note 36; Donald G. Dutton, The Domestic Assault Of Women: Psychological And Criminal Justice Perspectives (1995); Feminist Perspectives On Wife Abuse (Kersti Yllo & Michele Bograd eds., 1988); Jean Giles-Sims, Wife Battering: A Systems Approach (1983); Jerry M. Goffman, Self-Help Counseling For Men Who Batter Women (1983); Edward W. Gondolf & David M. Russell, Man To Man: A Guide For Men In Abusive Relationships (1987); Edward W. Gondolf, Men Who Batter: An Integrated Approach For Stopping Wife Abuse (1985); Neil S. Jacobson & John Gottman, When Men Batter Women: New Insights Into Ending Abusive Relationships (1998); Edward Jukes, Men Who Batter Women (1999); Legal Responses To Wife Assault: Current Trends And Evaluations (N. Zoe Hilton ed., 1993); Catharine A. Mackinnon, Feminism Unmodified: Discourses On Life And Law, 85-92 (1987); Pence & Paymar, *supra* note 33; Anson Shupe Et Al., Violence Men, Violent Couples: The Dynamics Of Domestic Violence (1987); Daniel Jay Sonkin Et Al., The Male Batterer: A Treatment Approach (1985); Richard A. Stordeur & Richard Stille, Ending Men’s Violence Against Their Partners: One Road To Peace (1989); Walker, *supra* note 31; David B. Wexler, Domestic Violence 2000: An Integrated Skills Program For Men: Group Leader’s Manual (2000); Woman Battering: Policy Responses (Michael Steinman ed., 1991); Cynthia Grant Bowman, The Arrest Experiments: A Feminist Critique, 83 J. CRIM. L. & CRIMINOLOGY 201 (1992); Donald G. Dutton & James J. Browning, Power Struggles And Intimacy Anxieties As

- Causative Factors Of Wife Assault, In Violence In Intimate Relationships 163 (Gordon W. Russell Ed., 1988); Ruth E. Fleury, Missing Voices: Patterns Of Battered Women's Satisfaction With The Criminal Legal System, 8 Violence Against Women 181 (2002); Carol Gregory & Edna Erez, The Effects Of Batterer Intervention Programs: The Battered Women's Perspective, 8 Violence Against Women 206 (2002); Demie Kurz, Physical Assault By Husbands: A Major Social Problem, In Current Controversies On Family Violence 88 (Richard Gelles & Donileen R. Loseke eds., 1993); Mahoney, *supra* note 32; Elizabeth M. Schneider, Making Reconceptualization of Violence Against Women Real, 58 ALB. L. REV. 1245 (1995); Malinda L. Seymore, Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence, 90 Nw. U.L. REV. 1032 (1996); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117).
40. Asylum applicants bear the burden of specifically delineating her proposed particular social group before the Immigration Judge. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018).
 41. Clearly, a different fact pattern will require changing the nationality, or if the applicant is not married casting the group through such terms as "Women of X Country" in intimate relationships or "Women of X Country with Children living with their partners."
 42. It will also avoid a much earlier criticism that the Particular Social Group were often being held to a higher standard by having to conflate various aspects of their claims, *see e.g., Matter of Kasinga*, 21 I&N Dec 357, 373 (BIA 1996) (Rosenberg concurrence); Linda Kelly, Republican Mothers, Bastards' Fathers and Good Victims, Discarding Citizens and Equal Protection through the Failures of Legal Images, 51 Hastings L.J. 557, 591-592 (discussing *Kasinga's* particular social group)
 43. "[W]e have rejected the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum...[T]he size and breadth of a group alone does not preclude a group from qualifying for asylum. *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 1962).
 44. Large groups accepted by the BIA include *In re H-*, 21 I&N Dec 337 (BIA 1997) (Somali clans); *In re V-T-S-*, 21 I&N Dec. 77 (BIA 1993) (Filipinos of Chinese ancestry). Numerous circuit opinions also support large groups. *See e.g., Singh v. INS*, 94 F3d 1353, 1359 (9th Cir. 1996) ("race" for Indo-Fijians, constituting half the population of Fiji); *Mihalev v. Ashcroft*, 388 F3d 772, 726 (9th Cir. 2004) ("gypsies"); *Harouni v. Gonzales*, 399 F.3d. 1163, 1172 (9th Cir 2005) (alien homosexuals); *Hernandez-Montiel v. I.N.S.*, 225 F3d 1084 (9th Cir. 2000) (Mexican men with female sexual identities); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) ("Somali females").
 45. *Matter of A-B-*, *supra* note 1 at 338 (quoting *Cece v Holder*, 733 F.3d 662, 673 (7th Cir. 2013).
 46. For my pre *Matter of A-B-* advocacy of alternative theories for domestic violence survivors *see* Kelly, "On Account of Private Violence, *supra* note 29
 47. *See e.g., Uwais v. U.S. Att'y Gen.*, 478 F.3d 513, 517 (2nd Cir. 2007). The applicant must show the protected ground was "one central reason" for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i). "It need not be the sole nor primary reason." *Gomez-Rivera v. Sessions*, 897 F3d 995, 998 (8th Cir. 2018) (quoting *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577 (8th Cir. 2009) ("[T]he persecution need not be solely, or even predominantly, on account of the [protected ground.]"). "But, the protected ground 'cannot be merely incidental or tangential' to another reason for the persecution." *Gomez-Rivera*, *id* (quoting *In Re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 213 (BIA 2007) (internal quotation marks omitted)).
 48. 411 F.3d 135 (3rd Cir. 2005).
 49. *Ibid*.

50. *Ibid.* at 160.
51. *Ibid.* at 161-64.
52. For a discussion of the level of physical or economic harm required *see e.g., Matter of Acosta*, *supra* note at 222; *see also Matter of T-Z-*, 24 I&N Dec. 163, 172-73 (BIA 2007).
53. *Kasinga*, *supra* note at 365, indicating that while persecution may also be inflicted to “punish” the victim for such characteristic, punishment is not essential.
54. *Matter of Acosta*, *supra* note 15 at 222.
55. Since 2005, credibility determinations for asylum applicants are subject to the REAL ID Act. Pub. L. No. 109-13 div. B, §§ 101(a)(3), 119 Stat. 231, 303 (2005) (codified at 8 U.S.C. § 1158(b)(1)(B)(iii)). While an applicant’s testimony alone may be credible, there is “no presumption of credibility”. 8 U.S.C. §1158(b)(1)(B)(iii). Credibility is based on a “totality of the circumstances” allowing negative credibility determinations to be based on identified inconsistencies which are unrelated to an applicant’s core asylum claim: “Considering the totality of circumstances, and all relevant factors, a trier of fact may base a credibility determination on...the consistency between the applicant’s or witness’s written and oral statements..., the internal consistency of each such statement, [and] the consistency of such statements with other evidence of record..., without regard to whether an inconsistency, inaccuracy, or falsehood, goes to the heart of the applicant’s claim, or any other factor.” *Id.* Additionally, the REAL ID Act’s requires providing all corroborating evidence which is “reasonably available”. 8 U.S.C. §1158(b)(2).
56. *Matter of A-B-*, *supra* note 1 at 337.
57. *Ibid.* (quoting *Matter of R-A-*, 22 I&N Dec at 920). In supporting his repeated reliance on *R-A-*, Sessions points to the BIA’s and other courts ongoing footnote reliance. *Matter of A-B-*, 27 I&N Dec. at 329 (quoting *M-E-V-G-*, 26 I&N Dec. at 231 n.7 (BIA 2014) (*R-A-*’s “role in progression of particular social group claims remains relevant”; *Henriquez-Rivas*, 707 F.3d at 1090 n.11 (“*R-A* was later vacated[.]...litigants and other courts have relied heavily upon its analysis.”); *Valdiviezo-Galdamez*, 663 F.3d 567-97, n 8 “*R-A-* is so important to the claim before us here.”). For earlier discussion of *R-A-* and its history *see supra* note 3 and accompanying text.
58. *PROPOSED REG*, *supra* note 3 at 76593 (emphasis added).
59. *Ibid.* at 75694.
60. *Matter of A-B-*, *supra* note 1 at 337 (quoting *Menjivar v. Gonzales*, 416 F3d 918, 921 (8th Cir. 2005) (quoting *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980)).
61. *Matter of A-B-*, *supra* note 1 at 337 (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) *see also* *Hor*, 400 F.3d, *supra* at 485.
62. *Ibid.* (BIA remands to the IJ on whether government unable or unwilling to control the persecutor).
63. *Ibid.* (“The fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States. There may be many reasons why a particular crime is not successfully investigated and prosecuted. Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it.”).
64. *Ibid.* at 338.
65. *Ibid.* (quoting *A-R-C-G-*, 26 I&N Dec. at 392, 395). For additional instances of *A-B-*’s criticism of the BIA for failing to engage in its own analysis *see supra* note 22-27 and accompanying text.
66. *Ibid.* at 339.

67. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).
68. *Ibid.*
69. *Ibid.*
70. *Ibid.*
71. *Ibid.*
72. *In re S-P-*, 21 I & N Dec. 486, 489 (BIA 1996). For further discussion of the “imputed political opinion” theory after *Elias-Zacarias* see Stephen H. Legomsky & Cristina M. Rodriguez, *Immigration And Refugee Law And Policy* 943-49 (6th ed. 2015).
73. *In re S-P-*, *supra* note 72.
74. *In re V-T-S-*, 21 I & N Dec. 792, 798 (BIA, 1997). For further discussion of the “one central reason” standard see *supra* note 47 and accompanying text.
75. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (the applicant “must provide some evidence of [motive], direct or circumstantial.”).
76. *In re D-V-*, 21 I. & N. 77, 79 (BIA 1993). Notably, *D-V-* was also “on account of political opinion” and not based on gender or any other derivation of “membership in a particular social group.” For my earlier advocacy of relying upon one of the alternative four “on account of factors of “political opinion, race, religion or political opinion” see *supra* notes 46-51 and accompanying text.
77. *Castillo-Hernandez v. U.S. Attorney General*, 297 Fed. Appx. 894, 897-898 (11th Cir. 2008).
78. *Ibid.*
79. *Ibid.* at 900.
80. *Matter of S-P-*, *supra* note 72 at 490.
81. *Ibid.* (quoting *Matter of Fuentes*, 19 I & N Dec. 658, 622 (BIA 1988); see also *In re V-T-S-*, 21 I & N Dec. at 798 (applicant bears burden of proving one motivation for kidnapping wealthy business owners in Philippines related to five factors).
82. In *Navas v. INS*, when police beat and threatened the spouse of a “known dissident,” the Ninth Circuit deemed it “logical, in the absence of evidence pointing to another motive, to conclude that they did so because of the spouse’s presumed guilt by association.” *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); see also *Meza-Manay v. INS*, 139 F.3d 759, 764 (9th Cir. 1980) (no other explanation or better evidence); *Ventura*, 264 F.3d at 1154 (direct or circumstantial guilt by association); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir 1999) (guilt by association or direct evidence); *Rios v. Ashcroft*, 287 F.3d 895 (9th Cir 2002).
83. *Matter of A-B-*, *supra* note 1 at 339. For earlier discussion of such remark see *infra* notes...and accompanying text.
84. For earlier discussions of this criticism see *supra* notes 22-27 and accompanying text.
85. *Matter of A-B-*, *supra* note 1 at 344.
86. *Matter of M-Z-M-R*, 26 I&N Dec. 28 (BIA 2012).
87. *Ibid.*
88. 8 C.F.R. §1208.13(b)(1)(ii); see also *Matter of M-Z-M-R*, *supra* note 86 at 34.
89. 8 C.F.R. § 1208.13(b)(1)(i)(B); see also *Matter of M-Z-M-R*, *supra* note 86 at 34.
90. *Ibid.*
91. 8 C.F.R. § 1208.13(b)(1)(iii)(A); see also *Matter of M-Z-M-R*, *supra* note 86 at 31; *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012).
92. 8 C.F.R. § 1208.13(b)(1)(iii)(B); see also *Matter of M-V-M-R*, *supra* note 86 at 31; *Matter of L-S-*, *supra* note 91.

93. *Matter of Chen*, 20 I&N 16 (BIA 1989).
94. 8 C.F.R. § 1208.13(b)(3)(i); see also *Matter of M-Z-M-R*, *supra* note 86 at 33 n.5 (citing *Matter of C-A-L-*, 21 I&N Dec. 754, 757 (BIA 1997) (Guatemala internal relocation; guerrillas located in remote areas, threats to general population decreased, low-profile victims able to relocate); *Matter of R-*, 20 I&N at 627 (India internal relocation outside of Punjab); *Matter of Acosta*, 19 I&N Dec. 211, 236 (BIA 1985), *modified on other grounds in Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (El Salvador internal relocation, guerrillas not persecuting taxi drivers country-wide).
95. 8 C.F.R. § 1208.13(b)(3)(i).
96. For a review of each of asylum's criteria see *supra* notes 54-59 and accompanying text (persecution); *supra* notes 14-51 and accompanying text (membership in a particular social group), *supra* notes 65-84 and accompanying text ("on account of").
97. *Matter of A-B-*, *supra* note 1.
98. For the story of the impossibility of one survivor to internal relocate see Pamela Constable, "He Forced Me Many Times. I Ran Away But He Always Found Me Again." WASHINGTON POST (Jan 31, 2016).
99. "When the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government." *Matter of A-B-*, *supra* note 1 at 345.
100. Martha Mahoney's separation assault theory explains how difficult it is to escape. Mahoney *supra* note 32 at 65-66: "Separation Assault is the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time."

RACISM IN THE LEGAL PROFESSION: A RACIST LAWYER IS AN INCOMPETENT LAWYER

Does a lawyer who manifests his or her racist beliefs during the legal representation of a client display a fundamental lack of competence to practice law? This article posits that there is at least one instance where the line between personal freedom and professional judgment is clear: Lawyers who manifest racist attitudes not only prejudice the administration of justice and tarnish a very noble profession, but such lawyers also call into question their very competence to practice law.¹

Part I examines cases involving bar applicants and lawyers who used racist speech and how the courts have traditionally viewed ethical violations involving racist speech.² Part II discusses the current academic literature on character and fitness in the context of lawyers who use racist speech. Part III analyzes racism as more than just a question of morality, but rather as a fundamental issue of competence.³ Part IV discusses the role law schools can play in changing the culture of lawyers. Part V concludes with issues of enforcement.

This article recognizes that there is no Orwellian Thought Police and that intentionally disguised and unconsciously held racist beliefs cannot be addressed unless such hidden beliefs are brought to light. Accordingly, objective measures—racist speech and conduct—are a necessary proxy for the analysis as to whether a lawyer has failed to competently represent his or her client. Racist speech is defined as the use of racial slurs,⁴ racial epithets,⁵ and racial innuendos⁶ while acting as a lawyer during or after⁷ the conclusion of the legal representation.⁸

Within the context of this discussion, the parameters of legal representation include any speech or conduct that occurs in the presence of one's client or while acting on the behalf of one's client. More specifically, such parameters also include any speech or conduct that occurs in the presence of a judge or other lawyers while acting on behalf of a client. This speech could be written in documents or correspondence filed with the court or communicated with one's client or opposing counsel. Legal representation does not include, however, speech or conduct by the lawyer while not acting in the course of a legal representation. Private conversations between lawyers and spouses in the privacy of their homes, for example, are not included in this article's definition of legal representation. While such speech or conduct may raise

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questions of personal morality and professional competence, those questions are beyond the scope of this article.

Part I: Racist Speech and the Courts Today

The administration of justice is one of the most important functions of a civil society. The effectiveness of the judicial system depends on the public's utmost trust in the fairness of those charged with the administration of justice. In the cases that follow, the most common reason courts cited for disciplinary action was to send a message to the entire bar that racist speech cannot be tolerated in a judicial system that prides itself on the equality of justice.

To date,⁹ racist speech by lawyers has been viewed primarily as a violation of ABA Model Rule of Professional Conduct 8.4(d).¹⁰ Despite readily characterizing such speech as "misconduct" under the code of ethics for each state, courts have not considered whether the use of racist speech by a lawyer during the course of legal representation indicates a lack of competence to practice law.

Bar Applicants

The courts seem to recognize that the professional consequences of racist speech vary depending on whether the offender is a bar applicant or has already been admitted to the bar. After all, it would be problematic to hold bar applicants to the standards of a professional system to which they have not even been admitted. For those not yet admitted to a particular bar, state bar admissions committees frequently have held the appropriate sanction to be the denial of bar admission.¹¹ Matthew Hale, a self-avowed white supremacist, is often cited as an example of a bar applicant denied admission to the bar due to his past and current racist speech and conduct.¹² His speech and conduct, coupled with his refusal to renounce it when his admission into the legal profession was at stake, amounted to a "monumental lack of sound judgment" in the eyes of his hearing panel.¹³ The hearing panel felt that it was only a matter of time before Hale would violate one or more of the Model Rules of Professional Conduct. When Hale appealed the hearing panel's decision, the reviewing court agreed with the conclusions of the panel, affirming the denial of Hale's admission to the bar.¹⁴

The hearing panel's concerns were prophetic. In 2006, Hale was sued by a church for trademark infringement because Hale used their church's name as the name of his own church even though the two churches were not affiliated with one another.¹⁵ Though originally ruling in Hale's favor, the district judge was forced to enter an order against Hale when the Seventh Circuit reversed and remanded the case.¹⁶ After entering this order, Hale made disparaging anti-Semitic comments against the district judge and attempted to enlist the help of one of his followers to assassinate her.¹⁷ He was convicted for conspiracy to commit first-degree murder.¹⁸

Lawyers Admitted to the Bar

Once admitted to the bar, lawyers are subject to many more forms of discipline, including private or public reprimands, temporary suspensions, and

permanent disbarments. Courts have held that the use of racist speech by lawyers violates ABA Model Rule 8.4(d), or its equivalent in the individual state's code of attorney ethics, because the racist speech was prejudicial to the administration of justice. The very accusation of racism among officers of the court casts doubt in the minds of the public and damages the perception of the legal profession as one based on integrity and fairness.¹⁹ The following cases may comprise only a small fraction of all the instances of lawyers disciplined for racist speech since some cases vaguely reference racist speech as the offending conduct without specifying exactly what was said.²⁰

Racist Speech Written in Court Documents and Correspondence

Even lawyers who violate the Model Rules of Professional Conduct with good intentions are still subject to discipline. In *Panel File 98-26*,²¹ for example, a lawyer was disciplined for filing a motion in a criminal case to prevent opposing counsel from bringing an attorney of color to be co-counsel.²² Her intention was to prevent opposing counsel from improperly introducing racial tensions in a case where she believed race was not an issue.²³ Once the lawyer realized the gravity of her actions, she immediately withdrew the motion from the court, without preventing the defense from having the counsel of their choosing.²⁴ The lawyer also apologized profusely.²⁵ The lower court held that the lawyer's sincere remorse mitigated the seriousness of the offense and imposed a private censure.²⁶ On appeal, the state supreme court reversed, holding that the sincere remorse, though laudable, is not a mitigating factor when the offense could have prejudiced the administration of justice by depriving a criminal defendant of the counsel of his choosing simply because that counsel was African American.²⁷

In another case, an attorney with less admirable motives filed a brief filled with racial slurs and sarcasm.²⁸ Referring to the defendants as "members of the black underclass,"²⁹ the brief continued: "The apparent motive of [defendants] was to be relocated into municipal public housing so that they might suck at the teat of the welfare state forever."³⁰ For these and several other racist comments, the court publicly censured the attorney who filed the brief, holding that the comments were "flagrantly unprofessional" and "degrading to [this] tribunal."³¹ In other words, the use of racist speech in court documents was prejudicial to the administration of justice because of the disrespect it showed for both the defendants and the court.

In *MacDraw, Inc. v. Cit Group Equipment Financing, Inc.*, a judge publicly censured two lawyers for sending the judge a letter questioning his impartiality based on their belief that the judge, an Asian American, would be biased in favor of their opponents, also an Asian American.³² The letter stated, in part:

Finally, as you may know, Mr. Orfanedes and I [the two lawyers subsequently sanctioned] have been involved in very highly publicized and significant public interest litigation...which involves a Mr. John Huang, Ms. Melinda Yee and other persons in the Asian and Asian-American communities... Recently, we came upon a document in this case which mentions your name in the context of other prominent Asian-American appointees of the Clinton Administration... Accordingly, could you please formally advise us whether you know either

of these individuals, as well as what relationship, contacts, and/or business, political or personal dealings, if any, you have had with them, or persons related in any way to the Clinton Administration. Please also advise us if you had seen the enclosed or similar newspaper articles or press accounts before this case was tried...³³

Upon reading the letter, the following exchange occurred:

Judge Denny Chin: You are conceding that ... you asked questions of the court, at least in part, because of my race?

Mr. Klayman [attorney]: In part. And let me tell you why. And I would [have] asked questions because you're also a recent appointee of the Clinton Administration. Has nothing to do with it. But you have been active, your Honor, for instance, in these kinds of efforts. And I commend you for your activity on behalf of the Asian-Americans, with regard to the Asian-American Legal Defense Fund and being president of the Asian-American Bar Association. I myself have been active in similar types of things and am fully supportive of those activities.

But we are all human, and sometimes, sometimes subjective criteria can unwittingly, no matter how ethical, no matter how decent, no matter how honest someone is—and we believe you to be that—they can subjectively influence our decision-making. I, for instance, would not sit as a Jewish American on a case that involved a Palestinian. I wouldn't do it if I was a judicial officer just because of a lot of things which enter into the subjectivity of all our thinking...

Now I believe your Honor has to search his own soul to a large extent. There may be independent legal requirements here on whether or not you wish to advise this court of some of the questions which we asked, which are benign, which were posed in a very respectful way. We ask this letter be made part of the court record.

Judge Chin: The letter has already been docketed. I am not going to search my soul. I do not need to do any soul searching at all. The letter is offensive. I do not think it is benign nor do I think it is respectful. Not at all.³⁴

Judge Chin had never met Mr. Huang or Ms. Yee, and the only characteristic they shared was their race and being cited in a newspaper as active in the Asian-American community.³⁵ In fact, it seems that the sanctioned lawyers only made the request for the judge to recuse himself based on the fact that both the judge and the lawyers' opponents were Asian American. It is doubtful that these lawyers would have requested the judge to recuse himself had both the judge and the lawyers' opponent been White.

Infuriated by the accusation that his race made him incapable of impartiality—a principle to which all judges take an oath³⁶—Judge Chin revoked their *pro hac vice* status to appear in that jurisdiction, refused to hear any future cases brought to him by the same lawyers, and required each lawyer to submit a copy of the disciplinary opinion to any future judge if they applied for *pro hac vice* status again in the same district.³⁷ A disciplinary committee later upheld the sanctions “[b]ecause the suggestions in the ... letter entailed

claims of partisan and racial bias with no factual basis, [and therefore] such charges were ‘discourteous’ and ‘degrading’ to the court... They were also ‘prejudicial to the administration of justice.’”³⁸

Racist Speech Directed at Opposing Counsel

Lawyers who direct racist attitudes toward other lawyers while acting in their professional roles also have been subject to discipline. Depositions, for example, can quickly become the setting of inappropriate speech.³⁹ During an already contentious pretrial deposition, one lawyer told another lawyer, “Don’t use your little sheeny Hebrew tricks on me.”⁴⁰ The court found the lawyer’s racist speech to be ethical misconduct prejudicial to the administration of justice because he purposefully used a racial slur to disrupt the deposition.

In another case, a lawyer made a less obvious racially based comment against opposing counsel during a deposition.⁴¹ The lawyer repeatedly berated opposing counsel, an African-American woman, for allegedly mispronouncing the words “establish” and “especially.”⁴² When disciplinary charges were filed against him, the lawyer admitted that he violated the Code of Professional Responsibility but raised an affirmative defense that there was a lack of sufficient evidence to establish that his misconduct was motivated by racism. The Special Referee evaluating the disciplinary charges found that the offending lawyer was probably motivated by sexism, not by racism.⁴³ The court reversed, holding that finding to be both absurd and disingenuous.⁴⁴

As a final example, the Florida Bar publicly censured an attorney who told another lawyer to “go back to Puerto Rico,”⁴⁵ after calling her a “stupid idiot”⁴⁶ and accusing her of not knowing “the law or the rules of procedure and that she needed to go back to school.”⁴⁷ The court held that the lawyer’s “disrespectful and abusive comments cross[ed] the line from that of zealous advocacy to unethical misconduct [that]... shall not be tolerated.”⁴⁸ Furthermore, his conduct prejudiced the administration of justice because it “disrupted the already difficult...cases.”⁴⁹

Racist Speech Directed at Clients

Lawyers who direct racist attitudes toward clients while acting in their professional roles have been subject to discipline. For example, during a recess in a courthouse hallway, a deputy district attorney prosecuting two Hispanic defendants for first-degree murder told defense counsel, “I don’t believe either one of those chili-eating bastards.”⁵⁰ The disciplinary committee found that the district attorney’s “use of a racial epithet while serving as a public official was intolerable and cast the integrity of the legal process into doubt.”⁵¹ After considering several mitigating factors, the disciplinary committee ordered the lawyer to be publicly censured as a statement to the entire legal community “that lawyers, especially those acting as public officials, must scrupulously avoid statements as well as deeds that could be perceived as indicating that their actions are motivated to any extent by racial prejudice.”⁵²

In 2004, an attorney was disciplined for harassing a former client and ex-girlfriend over a period of months.⁵³ Perhaps the most appalling evidence was the letter he sent her, signed with the pseudonym “White Aryan Resistance.”

The court quoted the letter in its entirety, as follows:

Dear Mrs. Negro....

In case you're too dumb to notice by now, you ARE being watched. We see it as our duty to keep watch on undesirables in our neighborhoods. You must know why you would be an undesirable.

We keep an eye on where you live, where you work and the college you go to a couple of nights a week. We are hoping that you will just pack up and move back to wherever you came from. Go back and get some of that big jungle cock you colored women crave so much and leave our White men alone.

You might be trying to live White, but you never will be.

Our neighborhood will be much better after you move out. We have not seen those two young thugs of yours around for awhile. Good.

Remember – you are being watched. Every car in back of you could be one of us. Every phone call could be one of us. By the way – your bed looked better with the curved wood headboard. Wear less when you're typing in the basement. Why aren't you sleeping much in your bedroom – that big black ass of yours really is something in the moonlight. It should make some jungle bunny real happy.

We'll see you around. Did you know the lock on your patio screen door needs fixin'?"⁵⁴

This letter was just one of many instances where the attorney used racial slurs and threatening language against his former client and ex-girlfriend.⁵⁵ The court found that the lawyer's conduct was so frightening and so egregious that no other punishment but permanent disbarment would suffice to protect the public, the bar, and the administration of justice.⁵⁶

Part II: Current Literature Addressing Racism Manifested While Representing Clients

To date, the literature about lawyers who use racist speech has been limited to questions of character and fitness under ABA Model Rule of Professional Conduct 8.4(d). When a lawyer's speech or conduct prejudices the administration of justice, it is the bar's responsibility to enforce a sanction proportional to the offense.⁵⁷

Some argue that the very function of bar admission officials is that of gatekeeper and protector of the judicial system, its actors, and the public.⁵⁸ According to Professor Carla D. Pratt, when an avowed racist who openly uses racist speech applies for admission to the bar, it is the bar officials' responsibility to deny admission in order to protect the public's trust in the legal profession and the safety of the administration of justice.⁵⁹ Pratt uses a Bible verse to illustrate her point: "The wisdom of Matthew 6:24 is infinite. 'No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other.'"⁶⁰ Pratt's article focused on the Illinois State Bar's denial of admission to Matthew Hale.⁶¹ Pratt continues:

If an applicant's religious canons mandate that the individual engage in conduct that violates the law of lawyering, that individual is presented with a dilemma and must choose which master he or she will serve, for it will not be possible for such an individual to comply with his or her religious canons and be a lawyer if those religious canons command conduct that will violate a rule of professional responsibility.

Thus, if an applicant's religious beliefs mandate conduct that is contrary to the ethical obligations of an attorney, it is both fair and necessary to exclude such a person from the profession for the purpose of preserving the integrity of the legal system as a whole.⁶²

Pratt's article expresses a concern about the racist lawyer's impact on society and clients they might refuse to represent.

Another article discusses the concerns inherent in forcing lawyers to represent clients they otherwise would not, as well as the underlying problems of why such lawyers would refuse to represent clients based on immutable characteristics such as race or sex. This article poses the central question in its title, "Do you really want a lawyer who doesn't want you?"⁶³ In this article, Professor Gabriel J. Chin questions the wisdom of forcing lawyers to overcome their prejudices in the name of the public interest. Chin expressed concern that the racist or sexist lawyer might become unenthusiastic, less zealous, and perhaps even incompetent, when forced to represent a client belonging to a group of people against which the lawyer holds prejudices.⁶⁴

Professor Chris K. Iijima wrote a provocative reply to Professor Chin that reframed the question entirely.⁶⁵ Instead of asking whether a client "really wants" a lawyer to represent him when the lawyer has racist prejudices against the potential client, Iijima thinks the more appropriate question must consider the fact that some clients are forced to choose from a limited market of lawyers.⁶⁶ In this case, Professor Iijima argues, the better question is "with whom should that power [to choose one's lawyer] rest?"⁶⁷ Iijima quickly answers, "As between the potential client or attorney, the answer must be that the power lies with the potential client."⁶⁸

The articles by Professors Chin and Iijima are unique because they address the issue of lawyer racism as a competence issue while other articles are often limited to questions of the lawyer's moral character.⁶⁹ Both Professors Chin⁷⁰ and Iijima⁷¹ discuss the merits of the concern that a lawyer's racist ideology may lead to incompetent representation of the client if the lawyer holds prejudices against the group to which the client belongs. Professors Chin and Iijima, like the authors of the other articles discussed, argue that racist lawyers may prejudice the administration of justice. The articles by Professors Chin and Iijima, however, do not critically analyze lawyer racism through the lens of the actual language of the competence-related Model Rules of Professional Conduct. Furthermore, most of the articles fail to even consider whether lawyer racism raises questions of competence at all.

Part III: A Racist Lawyer Is An Incompetent Lawyer

To limit the discussion of racism among lawyers as purely an issue under Model Rule 8.4(d) mischaracterizes the gravity and far-reaching consequences

of lawyers who use racist speech during the course of representation. The application of other ABA Model Rules to lawyers who use racist speech illuminates the broader issues of competence and diligence for all clients, not just minority clients “stuck” with racist lawyers.

Consider the following examples.

- (1) A White real estate lawyer refuses to represent a homeowner who wishes to have her property rezoned for commercial purposes. His only reason for refusing to represent her is because she is Black.
- (2) A White real estate lawyer representing a White client fails to present the highest bid to her client because that bid is offered by a Black businessman. Her only reason for refusing to present the offer to her client is because she believes that the Black businessman cannot possibly be wealthier than the other bidders and, therefore, his bid must be unreliable.⁷²

The first scenario is an example of a lawyer violating ABA Model Rule 8.4(d). The second scenario, on the other hand, is an example of a lawyer violating ABA Model Rules 1.1(a), 1.3, 1.4(b), 1.7(a)(2), 1.16(a)(2), and 2.1.⁷³

ABA Model Rule of Professional Conduct 1.1 requires that a lawyer admitted to the bar act with competence. The lawyer who refuses to present the most profitable bid to her client because her racism prevents her from properly evaluating all options for her client violates the rule’s demand for “thoroughness.”⁷⁴ While comments to the Model Rules are not binding, they provide additional insight to the rule’s meaning. The fifth comment to Model Rule 1.1 confirms the conclusion that the lawyer from the second hypothetical has failed to competently represent her client by not considering all of the “factual and legal elements” of the available bids.⁷⁵

The lawyer from the second hypothetical also violates Model Rule 1.3 by not using “reasonable diligence and promptness.”⁷⁶ Such diligence and promptness include representing the client’s interests “despite opposition, obstruction or personal inconvenience to the lawyer.”⁷⁷ It is arguable that the personal inconvenience factor might include dealing with third parties that the lawyer finds to be undesirable, such as the Black businessman from the second hypothetical.

Model Rule 1.4(b) is central to the problem posed by the second hypothetical’s lawyer. When the lawyer’s racism prevents her from presenting the most profitable bid to her client, the lawyer has violated Model Rule 1.4(b) by failing to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁷⁸

The lawyer from the second hypothetical may have also violated ABA Model Rule 1.7(a)(2)’s prohibition on representation where a conflict of interest would impair the representation of the client. Such conflicts of interest are not limited to the representation of multiple clients whose interests do not coincide. The conflicts of interest at issue in Model Rule 1.7(a)(2) also include those conflicts created by the lawyer’s “personal interest.”⁷⁹

The lawyer from the second hypothetical may have violated Model Rule 1.16(a)(2) by failing to withdraw from the representation after the Black businessman made a bid on the client's property. A lawyer violates Model Rule 1.16(a)(2) if she fails to withdraw from the representation despite knowing that her own "physical or mental condition" is preventing her from adequately representing her client.⁸⁰ Even if we cannot classify racism as a mental condition under Model Rule 1.16(a)(2), Model Rule 1.7(a)(2) still requires a lawyer to decline a case if she has strong feelings endangering her ability to independently exercise her professional judgment.

Finally, the lawyer from the second hypothetical also violates Model Rule 2.1 because she has allowed her racist attitudes toward the financial capabilities of Blacks to prevent her from exercising her "independent professional judgment" and giving "candid advice."⁸¹

Analyzing the two hypothetical scenarios described above through the lens of the ABA Model Rules of Professional Conduct helps illuminate some of the less obvious ways in which a lawyer can let his or her racism manifest itself during the course of legal representation. The first scenario is the conduct we typically worry about when discussing racism among lawyers. This is the obvious example of how racism can manifest itself into speech or conduct during the course of legal representation (or the refusal to provide such representation). The case of a lawyer who refuses to represent someone solely because of his or her race tarnishes an otherwise very noble profession.

But the lawyer who refuses to present the most profitable offer to her client is just as dangerous. If she believes that a Black person cannot possibly afford to pay the higher bidding price and wishes to save her client from wasting his time by entertaining such a "fantasy," then she improperly limits the options available for her client. Such a lawyer is incompetent because her racism prevents her from properly evaluating all of the options she should present to her client. The lawyer's racism skews her ability to give her client competent representation because of her racist view of a third party she does not represent. This scenario is the less obvious example of how racism can manifest itself in the course of legal representation.

In the second scenario, racism impacts the legal representation in a much more insidious manner. Not only does a lawyer's view of her own client matter to the ability to provide competent representation. Now we see that the lawyer's views of *non*-clients can also hurt the lawyer's ability to provide competent representation to her client.

The current literature, as previously discussed in Part II, focuses on racist speech and conduct as a violation of ABA Model Rule 8.4(d). While relevant, that limits the focus to the harm done to society and to those who are denied representation by racist lawyers, which is too narrow to understand the entire problem. The existing literature's central theme is that racist speech and conduct are evidence of a moral character flaw fatal to the character and fitness requirements to practice law. The literature is persuasive, but it is incomplete. Racist speech and conduct are also indicative of a fundamental lack of competence to practice law under Model Rules of Professional Conduct 1.1(a), 1.3, 1.4(b), 1.7(a)(2), 1.16(a)(2), and 2.1.

Part IV: Law Students, Civility, and the Next Generation of Lawyers

A look at the history of Howard Law School may serve us well here. Howard Law School has functioned as the starting point for social change in the past. Charles Hamilton Houston turned Howard Law School into a veritable training ground for lawyers who would be social engineers, i.e., agents of change, in the struggle against inequality.⁸² “A social engineer by definition was to be ‘the mouthpiece of the weak and a sentinel guarding against wrong.’”⁸³ Charles Hamilton Houston and Howard Law School became essential to the struggle against segregation. Houston and his colleagues first focused on litigating cases for law school applicants denied admission based on their race.⁸⁴ Only by building up enough precedent at the post-secondary education level could they hope to have more footing in challenging segregation in public schools at the elementary- and secondary-school levels.⁸⁵ “The NAACP’s victory of 1954 in *Brown v. Board of Education* was simultaneously the culmination of the legal campaign based on Charles Houston’s modified strategy carried forward by the NAACP’s cadre of lawyers and a watershed decision in constitutional law with respect to equal protection of the laws.”⁸⁶ In other words, it was only after Houston successfully argued for desegregation in law schools that the goal of desegregation in public elementary and secondary schools became attainable.

We can take a valuable lesson from this history as we try to find a solution to the problem of lawyers who use racist speech: Law schools can be the starting point for social change in today’s lawyer culture. Some law schools have begun efforts at fostering civility in the legal profession by administering oaths or affirmations of professionalism to incoming first-year law students. These oaths and affirmations indicate an emphasis on civility among students, professors, and future colleagues. The following examples are excerpts from student oaths administered at some law schools in the United States.

- (1) As a student and as a lawyer, I pledge to pursue the truth, to promote justice, and to uphold the principles of honesty, integrity, and civility.⁸⁷
- (2) To strengthen the law school community, I will conduct myself with dignity and civility and will treat all of my colleagues – students, staff and faculty – with kindness and respect.⁸⁸
- (3) From this day forward, I promise to do my utmost to live up to the high ideals of my chosen profession. I will remember that my actions reflect not only upon myself, but upon the ... School of Law and the legal profession. I vow to be a person of principle, compassion, strength, and courage. At all times, I will conduct myself with dignity and civility and show kindness and respect toward my classmates, teachers, and all persons.⁸⁹

One of the most promising initiatives is the Illinois Supreme Court Commission on Professionalism, which offers a sample oath for the nine law schools located in the state:

As I begin the study of law, I acknowledge that my role in the legal profession is a privilege that comes with responsibilities. Accordingly, I pledge to sup-

port my colleagues, respect the faculty and staff, and uphold the reputation of my school. I commit myself to service without prejudice, integrity without compromise, and to civility and professionalism in all my interactions. I will promote the principles of justice handed down by the generations of attorneys who have gone before me. This pledge I take freely and upon my honor.⁹²

Each of Illinois' law schools can adapt this sample oath, but the spirit behind the pledge remains the same: to practice law is a privilege, and civility is one of the responsibilities attendant to that privilege. Notably, the Illinois Commission specifically identifies "service without prejudice" as a key component of civility within the legal profession—something not explicitly stated in the previous examples. It is arguable, though, that "civility" encompasses the "absence of prejudice." In other words, the use of racist speech is antithetical to the very concept of civility.⁹³

Taking a single oath or affirmation at the beginning of one's law school career may not have the long-lasting effect many law schools would like. Another option is to create an ongoing discussion about the importance of professionalism among law students. Many law schools facilitate several programs in an effort to increase awareness about professionalism among its students as follows: mental health and substance abuse assistance programs and services, written codes of conduct and integrity, associations with the Inns of Court, professionalism lectures and seminars, mentor programs, law office management courses, professionalism orientation programs, pro bono/public service programs, and diversity sensitivity training courses.⁹⁴

By using these types of programs, law schools can teach students the importance of professionalism to providing competent representation. Additionally, the more effort, time, and resources law schools are willing to spend toward teaching professionalism, the more students may perceive professionalism as a critical legal skill rather than a mere best practice. In the words of the ABA Standing Committee on Professionalism, "[T]he process of professionalism training in law schools should not consist merely of a course or two, as good as they might be, but rather should consist of a continual and comprehensive educational and supportive focus."⁹⁵

It is too soon to tell if such efforts in law schools will create a new breed of lawyers who put professionalism ahead of prejudice. Nevertheless, the lessons we learn from Charles Hamilton Houston and his role in the history of civil rights can provide promise and hope toward the continued use of law schools as forerunners to larger social movements. Perhaps the Charles Hamilton Houstons of today can continue to work toward instilling the message that justice cannot be blind if the legal profession is comprised of individuals whose racism precludes them from providing competent legal representation.

Part V: Enforcement

Even if we agree that the use of racist speech while in the context of legal representation is indicative of incompetence, we are still tasked with finding a way to make these lawyers become competent. As discussed in the previous section, changing the culture among today's law students may be the most

effective way to eliminate racism-based incompetence. But what if changing today's professional culture fails to reach yesterday's lawyers?

Historically, sanctions are the primary mechanism used for dealing with violations of professional ethics. The most typical sanctions are private reprimands,⁹⁶ public reprimands,⁹⁷ temporary suspension⁹⁸ from the practice of law, and permanent disbarment.⁹⁹ Discipline of professional ethics violations, however, depends on the availability of evidence of the alleged misconduct. When racist speech is used in court documents, as in the *Sonksen*¹⁰⁰ and *MacDraw*¹⁰¹ cases, or when it is spoken in the presence of opposing counsel, as in the *Martocci*¹⁰² and *Sharpe*¹⁰³ cases, there is some amount of evidence upon which a disciplinary committee can rest its decision.

Enforcement becomes problematic, however, when the racism-motivated misconduct manifests itself in the form of *inaction*. The lawyer from the second hypothetical in Part III failed to provide competent representation to her client because her racist views towards Blacks prevented her from properly presenting the highest bid to her White client. In this case, neither the White client nor the Black businessman may ever find out that the Black businessman presented the highest bid. If the lawyer keeps her reasons to herself, there is no proof of misconduct. Without proof, corrective action becomes impossible. Admittedly, lack of proof is a problem for the enforcement of many professional ethics violations, not just those violations motivated by racism. We are thus constrained to grapple with how to enforce the Model Rules in those cases where sufficient proof of racism-based incompetence does, in fact, exist.

Even when such proof exists, however, practical problems for enforcement remain. Assume, for example, that the lawyer in the second hypothetical actually revealed her misconduct in an email to her colleague ("*can you believe that uppity Black man expected me to believe he could afford to pay \$2 million dollars for the Smith property?*"). With such evidence, both client-focused compensatory action (such as a malpractice claim) and more global deterrence-focused actions aimed at maintaining the integrity of the legal profession (such as reprimand, suspension, or disbarment) can be imposed. Discipline is now an option. Yet we are still left with some problems: Is there a remedy for the client or businessman whose bid was never presented to the lawyer's client? Does the remedy change if the transaction has already been completed?

With regard to the deterrence-focused actions mentioned above, the purposes of sanctions include both specific deterrence¹⁰⁴ and general deterrence.¹⁰⁵ Sanctioning an offending lawyer will likely be an effective means of informing and reminding the bar of the importance of not letting racism manifest itself into racist speech or conduct during the course of legal representation. Unfortunately, the typical sanctions of reprimand or temporary suspension, on their own, are nonetheless unlikely to achieve specific deterrence in the offending lawyer or help to improve the lawyer's ability to provide competent representation to her clients.

Court-ordered or employer-mandated diversity training coupled with

traditional discipline may have limited success. However, when a lawyer is recalcitrant in her racist beliefs, diversity education may serve as nothing more than politically correct lip service and an ineffective token effort to change the most impervious of offending lawyers. If anything, such discipline and education may just make the lawyer more diligent in hiding her true reasons for her action or inaction in the future.

Unlike a lawyer who intentionally harbors racist views, lawyers who unconsciously hold racial prejudices are more likely to improve. Indeed, in all areas of legal practice, self-awareness is critical to improvement. Diversity training courses may help lawyers become more aware of their biases and more sensitive to the perspectives of people who are of different racial backgrounds. Such courses could, among other goals, focus on breaking down racial stereotypes and identifying seemingly innocuous behaviors that could be interpreted as racist.

To be sure, lawyers are just as prone to hold both conscious and unconscious biases as are members of other professions. However, lawyers who consciously harbor racial animus or unconsciously engage in disparate treatment of individuals of a specific race are in danger of failing to provide competent representation to their clients, even when both they and their clients are of the same race. It is in these situations where racism can insidiously affect a lawyer's ability to provide competent legal representation without redress.

NOTES

1. This article does not discuss professionalism in its broadest sense. For the purposes of this article, professionalism is presumed to include the minimum requirements of each state's code of ethics to which lawyers promise to adhere upon admission to the bar of each state.
2. While of equal importance to eliminating racial prejudice in the legal profession, sexist speech and judicial misconduct are beyond the scope of this article.
3. This article is primarily positivistic in that it argues that racist speech and conduct are indicia of incompetence. Normative questions about First Amendment freedoms, while worthy of debate, are simply beyond the scope of this article. Lawyers who discuss the moral arguments surrounding the imposition of sanctions for the use of racist speech most commonly cite the First Amendment rights to freedom of speech and freedom of association. See W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001); Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9 (1998); Chris K. Iijima, *When Fiction Intrudes Upon Reality: A Brief Reply to Professor Chin*, 20 W. NEW ENG. L. REV. 73 (1998); Jason O. Billy, *Confronting Racists at the Bar: Matthew Hale, Moral Character, and Regulating the Marketplace of Ideas*, 22 HARV. BLACKLETTER L.J. 25 (2006). The United States Supreme Court has even recognized the ability for a state to regulate otherwise permissible speech and associational conduct by virtue of the fact that the speaker/actor was a lawyer and held to a higher standard of behavior. Cf. *In re Primus*, 436 U.S. 412, 439 (1978) ("The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar.").

4. *Slur*, n.3, OED ONLINE (Mar. 2018), <http://www.oed.com/view/Entry/182320> (last visited Apr. 14, 2018) (1.a.: “A deliberate slight; an expression or suggestion of disparagement or reproof.”). *See, e.g.*, *Nebraska v. Janousek*, 674 N.W.2d 464, 468 (Neb. 2004).
5. *Epithet*, n., OED ONLINE (Mar. 2018), <http://www.oed.com/view/Entry/63605> (last visited Apr. 14, 2018) (“An offensive or derogatory expression used of a person; an abusive term; a profanity.”). *See, e.g.*, *People v. Sharpe*, 781 P.2d 659, 660 (Colo. 1989).
6. *Innuendo*, n., OED ONLINE (Mar. 2018), <http://www.oed.com/view/Entry/96323> (last visited Apr. 14, 2018) (3.: “An oblique hint, indirect suggestion; an allusive remark concerning a person or thing, esp. one of a depreciatory kind.”). *See, e.g.*, *In the Matter of Thomas C. Monaghan*, 295 A.D.2d 38, 39 (N.Y. App. Div. 2002).
7. The ABA Model Rules of Professional Conduct recognizes that once a client-lawyer relationship has been created, the lawyer owes certain duties to the client even after the representation has concluded. *See* MODEL CODE OF PROF’L CONDUCT R. 1.9 (1983).
8. There are just a handful of cases that explicitly state the lawyers’ offenses. It is unclear whether this is due to a lack of offensive conduct or a lack of diligence in pursuing justice for these violations. Nonetheless, the individual cases themselves and the issues they raise deserve attention as the legal profession continues to pride itself on self-regulation. *See* MODEL CODE OF PROF’L CONDUCT Preamble (1983).
9. I have limited my analysis to case examples during or after 1983, the year in which the ABA Model Rules of Professional Conduct were adopted. Since the ABA’s adoption of the Model Rules of Professional Conduct, fifty-two States and Territories have adopted the ABA Model Rules of Professional Conduct as their own code of ethics. For purposes of uniformity in discussion, I have framed the issues in the language of the ABA Model Rules of Professional Conduct.
10. ABA Model Rule 8.4(d) states, “It is professional misconduct for a lawyer to: ... (d) engage in conduct that is prejudicial to the administration of justice.” Comment [3] to Model Rule 8.4, though not binding, provides further guidance: “A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice” MODEL CODE OF PROF’L CONDUCT R. 8.4 cmt. (1983).
11. *In re Application of Roger I. Roots*, 762 A.2d 1161 (R.I. 2000) (Though denied bar admission for other reasons, the case of Roger Roots also presented a state bar admission committee with an applicant who regularly used racist speech); *Hale v. Committee on Character & Fitness for Illinois*, 2002 U.S. Dist. LEXIS 4262 (N.D. Ill., Mar. 12, 2002), *aff’d*. *Hale v. Committee on Character and Fitness for the State of Illinois*, 335 F.3d 678 (7th Cir. 2003).
12. *Hale v. Committee on Character & Fitness for Illinois*, 2002 U.S. Dist. LEXIS 4262 (N.D. Ill., Mar. 12, 2002), *aff’d*. *Hale v. Committee on Character and Fitness for the State of Illinois*, 335 F.3d 678 (7th Cir. 2003).
13. *Hale v. Committee on Character and Fitness for the State of Illinois*, 335 F.3d 678, 681 (7th Cir. 2003).
14. The relevant text of the hearing panel’s decision is as follows: “Hale’s outspoken intent to continue discriminating in his private life, especially taken together with negative character evidence such as academic probation, an order of protection, and a list of arrests (not convictions), was inconsistent with the Rules of Professional Conduct. The Hearing Panel was also concerned about Hale’s refusal to repudiate a 1995 letter he wrote in response to published commentary in support of affirmative action, in which Hale referred to the female author’s ‘rape at the hands of a nigger beast.’ The letter, the Hearing Panel found, was insulting, inappropriate, and showed a ‘monumental lack of

sound judgment that would put Hale on a collision course with the Rules of Professional Conduct.’ Finally, the Hearing Panel concluded that Hale was not candid and open with it during the hearing.” *Id.*

15. *See* TE-TA-MA Truth Foundation-Family of URI, Inc. v. World Church of the Creator, 297 F.3d 662 (7th Cir. 2002).
16. *See id.*
17. *See* United States v. Hale, 448 F.3d 971, 981 (7th Cir. 2006).
18. *See* United States v. Hale, 448 F.3d 971 (7th Cir. 2006).
19. Disciplinary Counsel v. Frost, 909 N.E.2d 1271, 1278 (Ohio 2009) (“False statements impugning the integrity of members of the judiciary and judicial system [by accusing them of racism] erode public confidence” (citing Disciplinary Counsel v. Gardner, 99 Ohio St. 3d 416, 2003-Ohio-4048, 793 N.E.2d 425, at ¶ 30)).
20. *See, e.g.*, Office of Disciplinary Counsel v. Jackson, 84 Ohio St. 3d 386 (Ohio 1999) (the court disciplined an attorney who shouted racial epithets at opposing counsel, but the court did not include his specific language in its opinion.).
21. In re Charges of Unprofessional Conduct Contained in Panel File 98-26, 597 N.W.2d 563 (Minn. 1999).
22. *See id.* at 566.
23. *See id.* at 569.
24. *See id.* at 566.
25. *See id.* at 566.
26. *See id.* at 566-67.
27. Interestingly, however, the appeals court chose not to enforce the tougher penalty of public censure since lawyer discipline is not intended to punish, but rather to deter, and since the lawyer had already learned her lesson. *Panel File 98-26*, 597 N.W.2d at 568-69.
28. *See* Sonksen v. Legal Services Corporation, 389 N.W.2d 386 (Iowa Ct. App. 1986).
29. *Id.* at 389.
30. *Id.*
31. *Id.*
32. MacDraw, Inc. v. Cit Group Equipment Financing, Inc., 138 F.2d 33 (2d Cir. 1998).
33. *Id.* at 35-36.
34. *Id.* at 36.
35. The Honorable Denny Chin, *Legal Ethics: Access to the Legal Profession for Minorities: Introductory Remarks*, 2 J. INST. STUD. LEG. ETH. 49, 54 (1999).
36. *See MacDraw*, 138 F.2d at 37.
37. *See id.* at 37.
38. *Id.* at 38.
39. *See, e.g.*, Matter of Jordan Schiff, Docket No. HP 22/92 (N.Y. Feb. 2, 1993); *see also* STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS AND ETHICS* 792-95 (New York: Aspen Publishers, 8th ed. 2009).
40. In re Petition for Disciplinary Action against James Malcolm Williams, 414 N.W.2d 394, 397 (Minn. 1987).
41. In the Matter of Thomas C. Monaghan, 295 A.D.2d 38 (N.Y. App. Div. 2002).
42. *Id.* at 39.
43. *Id.* at 40.

44. *Id.* at 40-41.
45. Florida Bar v. Martocci, 791 So. 2d 1074, *2 (Fla. 2001).
46. *Id.* at *2.
47. *Id.* at *3.
48. *Id.* at *10-11.
49. *Id.* at *11.
50. People v. Sharpe, 781 P.2d 659, 660 (Colo. 1989).
51. *Id.* at 660.
52. *Id.* at 660-61.
53. Nebraska v. Janousek, 674 N.W.2d 464 (Neb. 2004).
54. *Id.* at 468.
55. *See id.* at 467-69.
56. *See id.* at 472-73.
57. *See* MODEL CODE OF PROF'L CONDUCT Preamble, para. 12 (1983) ("The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves"); *id.* at R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority"); *id.* at R. 8.3 cmt. 1 ("Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct...").
58. *See* Carla D. Pratt, *Should Klansmen be Lawyers?: Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857 (2003).
59. *Id.* at 878.
60. *Id.* at 877.
61. *See* Hale v. Committee on Character & Fitness for Illinois, 2002 U.S. Dist. LEXIS 4262 (N.D. Ill., Mar. 12, 2002), *aff'd* Hale v. Committee on Character and Fitness for the State of Illinois, 335 F.3d 678 (7th Cir. 2003).
62. Pratt, *supra* note 58, at 878.
63. Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9 (1998).
64. *Id.* at 16-17.
65. *See* Chris K. Iijima, *When Fiction Intrudes Upon Reality: A Brief Reply to Professor Chin*, 20 W. NEW ENG. L. REV. 73 (1998).
66. *See id.* at 75.
67. *Id.*
68. *Id.*
69. *See* Billy, *supra* note 3; Pratt, *supra* note 58.
70. *See* Chin, *supra* note 63, at 16-17.
71. *See* Iijima, *supra* note 65, at 77-78.

72. These hypothetical scenarios are cast in terms of White vs. Black for purposes of simplicity, but the permutations of racism are endless.
73. Professor Patrick Johnston of Delaware Law School of Widener University deserves many thanks for this particularly helpful hypothetical.
74. MODEL CODE OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").
75. *Id.* at R. 1.1 cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem.").
76. *Id.* at R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").
77. *Id.* at R. 1.3 cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf . . .").
78. *Id.* at R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").
79. *Id.* at R. 1.7(a)(2) ("(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer . . .").
80. *Id.* at R. 1.16(a)(2) ("a lawyer shall not represent a client . . . if: . . . (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.").
81. *Id.* at R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").
82. See GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 76-85 (1983).
83. *Id.* at 85.
84. See DVD: The Road to Brown (California Newsreel 1990).
85. See *id.*
86. MCNEIL, *supra* note 82, at 200-01.
87. ALEXANDER BLEWETT III SCHOOL OF LAW UNIVERSITY OF MONTANA, STUDENT HANDBOOK: ACADEMIC YEAR 2018-2019 Appendix G (2018), available at <https://www.umt.edu/law/academics/students/handbook/default.php>.
88. DELAWARE LAW SCHOOL OF WIDENER UNIVERSITY, 2014-2015 STUDENT HANDBOOK e (2010), available at <https://delawarlaw.widener.edu/files/resources/201415studenthandbook.pdf>.
89. University of Dayton School of Law, *School of Law: Oath of Professionalism*, UNIVERSITY OF DAYTON, https://www.udayton.edu/law/students/professionalism_oath.php (last visited Nov. 6, 2018).
92. Sample Law School Pledge of Professionalism, 2Civility, <https://www.2civility.org/wp-content/uploads/Sample-Pledge-of-Professionalism.pdf>
93. *Compare Civility*, n. OED ONLINE (Mar. 2018), <http://www.oed.com/view/Entry/33581?p=emailAWT7KnBgIXulQ&d=33581> (last visited Apr. 17, 2018)

(“Behaviour or speech appropriate to civil interactions; politeness, courtesy, consideration”) *with Racism*, n. OED ONLINE (Mar. 2018), <http://www.oed.com/view/Entry/157097?p=emailAW0hEebCj.d5U&d=157097> (last visited Apr. 17, 2018) (“The belief that all members of each race possess characteristics, abilities, or qualities specific to that race, especially so as to distinguish it as inferior or superior to another race or races. Hence: prejudice and antagonism towards people of other races, esp. those felt to be a threat to one’s cultural or racial integrity or economic well-being; the expression of such prejudice in words or actions.”).

94. STANDING COMMITTEE ON PROFESSIONALISM OF THE AMERICAN BAR ASSOCIATION, REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS iv-v (2006), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/reports_migrated/LawSchool_ProfSurvey.authcheckdam.pdf.
95. *Id.* at iii.
96. A reprimand is “a mild form of disciplinary action – imposed after trial or formal charges – that declares the lawyer’s conduct improper but does not restrict his or her right to practice law.” BLACK’S LAW DICTIONARY 614-15 (3d pocket ed. 2006); *see also Private Reprimand*, BLACK’S LAW DICTIONARY 615 (3d pocket ed. 2006) (defined as “[a]n unpublished communication between a disciplinary agency and a wrongdoing attorney, admonishing the attorney about the improper conduct.”).
97. A public reprimand is a “published notice, appearing usually in a legal newspaper or bar journal, admonishing the attorney about improper conduct and describing the impropriety for the benefit of other members of the legal profession.” BLACK’S LAW DICTIONARY 615 (3d pocket ed. 2006).
98. A suspension is a “temporary deprivation of a person’s powers or privileges, esp. of office or profession <suspension of her bar license>.” BLACK’S LAW DICTIONARY 696 (3d pocket ed. 2006).
99. Disbarment is the “action of expelling a lawyer from the bar or from the practice of law, usually [b]ecause of some disciplinary violation.” BLACK’S LAW DICTIONARY 211 (3d pocket ed. 2006).
100. *Sonksen v. Legal Services Corporation*, 389 N.W.2d 386 (Iowa Ct. App. 1986).
101. *MacDraw, Inc. v. Cit Group Equipment Financing, Inc.*, 138 F.2d 33 (2d Cir. 1998).
102. *Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001).
103. *People v. Sharpe*, 781 P.2d 659 (Colo. 1989).
104. Specific deterrence is the theory of punishment used to deter the actual offender from reoffending. BLACK’S LAW DICTIONARY 206 (3d pocket ed. 2006).
105. General deterrence is the theory of punishment used to deter the broader population to which the actual offender belongs from committing the same offense that the actual offender committed. BLACK’S LAW DICTIONARY 206 (3d pocket ed. 2006).

MEASURING MERCY: PROTECTING PATIENT DISCRETION IN TERMINAL CARE UNDER THE FOURTEENTH AMENDMENT

I. Introduction

The pursuit of medical treatment is generally characterized by the hope of restored health. However, many patients must face the grave reality that the restoration of health is not always possible; patients afflicted with terminal illnesses are particularly familiar with this concept. For terminal patients, the greatest medical improvement to be achieved is pain relief through palliative treatment.

The World Health Organization defines palliative care as the “approach that improves the quality of life of patients and their families [...] through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain.”¹ In general, palliative care is medical treatment that seeks to relieve pain, rather than treat the underlying condition.² This form of medical treatment is not designed to cure; it does not combat disease agents, such as cancer cells. Rather, it is treatment given to relieve distressing symptoms associated with an underlying illness.³ For the purposes of this Article, palliative care refers to methods of pain management for terminal patients, particularly focusing on administration of pain-relieving measures at the end of life.

In recent years, studies have shown that a substantial minority of terminal patients experience irremediable pain during the dying process and are incapable of receiving relief through modern medicine. In cases of irremediable pain, competent, terminally ill adults must be allowed to pursue medical improvement equally with non-terminal patients by seeking palliative care, including palliation with both palliative and life-ending effects, such as physician-assisted suicide and euthanasia. To seek relief from pain is to exercise one of the most basic instincts of self-preservation. Additionally, the right of patients to determine the course of their own treatment is supported in case law by the Supreme Court’s recognition of personal privacy. This Article analyzes constitutional protections provided by the Fourteenth Amendment over terminal patients’ right to seek palliative care and discusses the implications that these protections have concerning access to life-ending palliation in cases of irremediable pain.

Kelsey Nicholas will graduate from the University of Mississippi School of Law in 2019. She would like to thank Prof. Larry J. Pittman for his guidance and encouragement throughout the writing of this Article. I would also like to thank Prof. Matthew R. Hall for his dedication and support to the Mississippi Law Journal through the Academic Legal Writing class, in which she participated.

Part I examines the Court's evolving substantive due process standards and gives an overview of case law in which the Court denied a constitutional interest in death, thereby upholding the constitutionality of assisted suicide statutes. The Court's metamorphic due process analysis has become more liberal with time, and now offers greater potential for recognizing of constitutional interests previously rejected under stricter standards of the past.

Part II addresses access to palliative treatment as a fundamental right of terminal patients with irremediable pain by applying the Court's substantive due process standard in *Obergefell*. This section also considers the Court's limitation on available palliation through the unconventional application of the double-effect principle in *Vacco v. Quill*. It asserts that the Court improperly used the principle to create a hairline differentiation between circumstances in *Vacco* and *Cruzan* which, ultimately, resulted in an unnecessary departure from legal precedent. Had the Court engaged in a more rigorous analysis of the double-effect principle, it would have determined that the double-effect principle has no place in legal analysis whatsoever, rendering the standard of permissible palliation unwarranted.⁴

Part III asserts that assisted suicide statutes are unconstitutional under the Equal Protection Clause. This section considers inconsistencies between legal causation standards and the Court's distinction between palliative measures that *cause* death and those that merely *hasten* death. This mincing of terms has been used to uphold assisted suicide statutes as the legal mechanism by which similarly situated palliative physicians are selectively, and unfairly, subjected to state prosecution.⁵

A. Background

The Fifth and Fourteenth Amendments of the U.S. Constitution contain the Due Process Clauses. These clauses have two prongs: (1) a procedural prong, which requires use of procedural safeguards before denying any person "life, liberty or property,"⁶ and (2) a substantive prong, which protects individual liberty from government deprivation, regardless of the procedural fairness "unless the infringement is narrowly tailored to serve a compelling state interest."⁷

Protected liberties of the Due Process Clauses were originally limited to those enumerated by the Fourteenth and Fifteenth Amendments, as well as rights adopted through selective incorporation, a doctrine that "incorporate[d] all of those guarantees of the Bill of Rights deemed to be fundamental."⁸ However, substantive due process has since become a tool by which the Court extends the Constitution's protections to unenumerated liberty interests found to be "so fundamental that [they] cannot be abridged absent a 'compelling state interest.'"⁹ Following the Court's recognition of a liberty interest as a fundamental right, the right is applied to the Fifth and Fourteenth Amendments, effectively protecting it from federal and state infringement absent a compelling state interest.¹⁰ This process has been used to recognize a myriad of unenumerated rights, including the rights to marry,¹¹ privacy,¹² to have children and direct their upbringing,¹³ the use of contraception,¹⁴ to bodily integrity,¹⁵ to abortion,¹⁶ and to refuse unwanted medical treatment.¹⁷

B. Glucksberg, Lawrence, and Obergefell: The Court's Evolving Due Process Analysis

The Court's standard for recognizing fundamental rights has evolved over time. Following allegations of governmental infringement on an asserted right, the Court must determine if the liberty interest is fundamental, provided that the asserted right is neither enumerated by the Constitution nor previously recognized as fundamental.¹⁸

In *Washington v. Glucksberg*, the Court clearly outlined its substantive due process analysis, stating:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty", such that "neither liberty nor justice would exist if they were sacrificed[...]. Second, we have required in substantive due-process cases, a "careful description" of the asserted fundamental liberty interest.¹⁹

Since *Glucksberg*, the Court has applied more liberal due process standards, which have resulted in the inclusion of rights previously denied under stricter ones. One such example is the Court's consideration of the constitutionality of statutes criminalizing "homosexual sodomy." This issue was originally addressed in *Bowers v. Hardwick*, where the Court upheld these statutes by analyzing the asserted right under the same due process standard later used in *Glucksberg*. The Court concluded that "the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy" and it further held that to claim the "right to engage in [sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."²⁰

However, 17 years later, the Court revisited the same issue in *Lawrence v. Texas* and overruled its former opinion, *Bowers*, stating:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward...the laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touch upon the most private human conduct, sexual behavior, and in the most private of places, the home.²¹

Re-examining the asserted liberty interest, the Court recognized the potential for prejudice in considering the nation's entire history, as was required by the previous due process standard used in both *Bowers* and *Glucksberg*.²² Instead, the Court narrowed the historical consideration of due process, finding that the "[n]ation's laws and traditions in the past *half century* are most relevant [because] they show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."²³

While still utilizing the two-pronged framework of *Bowers* and *Glucksberg*, the *Lawrence* opinion both narrowed the scope of U.S. history considered and reframed the asserted right. As a result, rather than considering whether the Constitution protected the right to engage in “homosexual sodomy” by analyzing all United States history, the Court considered the right to privacy in intimate relationships within the 50 years immediately prior to *Lawrence*. In doing so, the Court determined that the right to sexual privacy and personal relationships was within “the respect the Constitution demands for the autonomy of the person in making these choices.”²⁴

However, several years after *Lawrence*, the Court liberalized its due process test even further in *Obergefell* when addressing same-sex marriage. Rather than expanding a previous standard, as it had in *Lawrence*, the Court devised a new standard altogether, applying “reasoned judgment in identifying interests of the person so fundamental that the state accord them its respect.”²⁵ While not the focus of the due process analysis in *Obergefell*, the Court’s prior emphasis on history was not thrown out of the proverbial window. The Court again chose to further limit its consideration of history, holding that “[h]istory and tradition guide and discipline [the due process] inquiry but do not set its outer boundaries.”²⁶ While the *Obergefell* Court found that due process “has not been reduced to any formula,” indicating potential for future shifts in due process, recent and significant refinements in substantive due process have potential to enormously impact the merit of claims denied by the Court under stricter past standards.²⁷

C. Assisted Suicide Statutes and The Right to Die

To date, the United States Supreme Court has upheld the constitutionality of assisted suicide statutes, most of which impose criminal liability for physician-assisted suicide. This was illustrated by the unanimous 9-0 vote in *Washington v. Glucksberg*, where the Court declined to extend substantive due process to include the right to die.²⁸ A similar decision was reached by another 9-0 vote in *Vacco v. Quill*, where the Court declined to find that assisted suicide statutes created unequal protection of laws by denying patients the ability to end their lives through physician-assisted suicide while allowing other patients to pursue death by discontinuing life-sustaining measures, such as artificial ventilation.

One of the earliest cases sparking controversy over assisted suicide statutes was *Cruzan v. Missouri Department of Health*. Following a devastating car accident, Nancy Cruzan’s parents brought suit to facilitate the removal of Cruzan’s artificial nutrition and hydration after physicians diagnosed her vegetative state as permanent and without the possibility of recovery.²⁹ The Court’s decision was guided heavily by reliance on the common law doctrine of informed consent and it ultimately found a “particularized and intense interest in self-determination in [the patient’s] choice of medical treatment.”³⁰ This interest supported the ability of patients to refuse unwanted, although lifesaving, treatment.³¹ The Cruzans elected to end Nancy’s treatment and she passed away days later.

In *Glucksberg*, the respondents used the *Cruzan* opinion to assert that “the general tradition of self-sovereignty” and “basic and intimate exercises of personal autonomy” included the ability to receive physician-assisted suicide.³² The Court rejected the right to die as a fundamental right, holding that the United States history of criminalizing and condemning suicide revealed a strong tradition in preserving life.³³ The Court further noted that the informed consent doctrine was limited in function to allowing refusal of treatment as a patient *safeguard against* medical battery; no such provision was made to allow for *election* of treatment.³⁴ This function, considered in light of the prevalent societal disdain for suicide, ultimately allowed the Court to distinguish *Glucksberg* from *Cruzan*.³⁵

In *Vacco v. Quill*, the constitutionality of assisted-suicide statutes was challenged again, this time under the Equal Protection Clause. The appellants argued that assisted suicide statutes created unequal protection of laws by imposing an undue burden on patients seeking death through physician-assisted suicide or euthanasia, while allowing others to end their lives by refusing life-saving treatment, as established by *Cruzan*. It was further asserted that treatment refusal yielded the same result as physician-assisted suicide, arguably defeating any purpose in distinguishing between treatment refusal and administration of life-ending care.³⁶ The Court rejected this argument, drawing a causal distinction between death caused by the natural course of the patient’s disease following treatment refusal and death caused by “lethal medication prescribed by a physician.”³⁷ The Court also considered differences between the physician’s intent to relieve pain through traditional palliative care, as opposed to the physician’s intent to end life in physician-assisted suicide. In its attempt to create a bright line standard, the Court subtly employed the double-effect principle as the standard for permissible palliative care, by finding that “[j]ust as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended ‘double effect’ of hastening the patient’s death.”³⁸

Under these landmark opinions, the Court has unambiguously held that there is no right to die and has continually upheld the constitutionality of assisted suicide statutes. However, the Court has yet to consider the role of life-ending care as purely palliative medical treatment to terminal patients with intractable pain.

II. Substantive Due Process And Palliative Care

The ability of terminal patients to seek palliative care is a fundamental right supported by United States history, the Court’s respect for privacy in medical decision-making, and the reasoned judgment standard prescribed in *Obergefell*. The Supreme Court has yet to address terminal patients’ rights to access palliation, and such a claim could serve as a potentially viable vehicle by which terminal patients could receive access to life-ending palliative measures, such as physician-assisted suicide and euthanasia, in cases of unbearable suffering.

It has been said that “[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to be in possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”³⁹ The ability of individuals to exercise discretion in choosing their course of medically appropriate treatment goes to the very core of personal autonomy in American jurisprudence. Patient discretion also rings in the doctrine of informed consent, which protects the belief that every person of “adult years and sound mind, has [the] right to determine what shall be done with his own body.”⁴⁰ This well-established respect for bodily autonomy permeates many legal disciplines, including tort law, criminal procedure, and constitutional law.⁴¹ The Court’s expanding recognition of personal privacy, as illustrated by cases like *Griswold* and *Roe*, has lent itself to an evolving dialogue regarding ethics in the medical field and the role of patient discretion in medical treatment. Similarly, in recent years, federal and state legislatures have recognized and mirrored the Court’s respect for personal discretion and privacy in healthcare by increasing access to healthcare and implementing legislation that promotes deference to the discretion of terminal patients in choosing their final course of treatment.

A. The History and Tradition of Privacy as Support for Patient Discretion in Palliative Treatment

Palliative care is a necessary and established facet of medical treatment. Since the right to determine what occurs to one’s body is the foundation of personal privacy, patient discretion in choosing palliation methods should be regarded with the same respect as patient discretion in choosing curative treatment.

The right to privacy evolved from cases like *Griswold v. Connecticut*, where the Court found privacy to be “no less important than any other right carefully and particularly reserved to the people.”⁴² *Griswold*, in striking down statutes prohibiting use of contraceptives by married couples, forbids government interference with the “privacies of life,” or decisions so personal and intimate in nature that government interference amounts to an undue invasion of privacy.⁴³

Also, in *Roe v. Wade*, the Court greatly expanded privacy rights, finding that personal privacy was broad enough to encompass a woman’s decision to terminate her pregnancy, thereby greatly limiting government interference with these decisions.⁴⁴ American jurisprudence took an enormous step forward in its consideration of bodily autonomy when the *Roe* Court emphasized the importance of self-governance by weighing the personal privacy of expectant mothers against state interests with potential to infringe such privacy.⁴⁵ In support of its holding, the Court stated:

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass

a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.⁴⁶

Along the same lines, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court further recognized that "urgent claims of the woman to retain the ultimate control over her destiny and her body [are] claims implicit in the meaning of liberty."⁴⁷ These cases, along with others, such as *Rochin*, suggest that personal privacy includes self-governance in determining what shall or shall not occur with one's own body. Certainly, personal privacy is broad enough to encompass patient discretion in choosing medically necessary palliation.⁴⁸

In addition to case law, the U.S. legislature has also emphasized the importance of medical treatment and palliative care by facilitating access to public healthcare and upholding the right of individuals to seek medical treatment, including palliative care. In 1986, Congress passed the Emergency Medical Treatment and Active Labor Act (EMTALA), which explicitly imposed a duty on public and private hospitals to provide medical care to individuals in emergency situations.⁴⁹ EMTALA was created as an effort to facilitate access to emergency and post-emergency medical care for all, including the indigent and uninsured.⁵⁰ Given the fact that the medical field's "first priority is to minimize the patient's pain," the legislature, by mandating medical treatment, also mandates pain treatment when it is present in patients.⁵¹ The fact that the legislature does not distinguish between palliative and curative treatment evidences the importance of both in patient healthcare and indicates that both aspects of medical treatment should receive equal respect in regards to patient decision-making.

Additionally, beginning in 1994, the American Medical Association began to support free clinics as an "established component of the health system" in providing non-emergency care to the public.⁵² These clinics operate to cure and alleviate pain occurring with non-emergency conditions. A 2010 survey conducted by the National Institutes of Health found that there were 1,007 free clinics operating in 49 states and the District of Columbia, providing approximately 1.8 million individuals with medical care.⁵³ Of these, approximately 41.7% received government funding, evidencing the importance of healthcare, both curative and palliative, to the legislature.⁵⁴

And lastly, the most overt legislative support for palliative care occurred in 2001 when Congress declared that the calendar decade beginning January 1, 2001 would mark the Decade of Pain Control and Research.⁵⁵ In branding a decade with this title, the legislature engaged in efforts to raise public awareness of pain control and further facilitate research in the field of palliative medicine.

In sum, even the most cursory review of the past half century in the United States illustrates not only the importance of patient discretion as a part of personal privacy in making medical decisions, but also the important role that palliative care plays in the medical field. The legislature, by mandating medical treatment in emergency situations, funding non-emergency care, and

declaring the importance of palliative research, recognizes and emphasizes the importance of palliative care in patients' lives.

B. Palliative Care Under the Obergefell Due Process Standard

Under the *Obergefell* due process standard, terminal patients have a fundamental right to access palliation, including life-ending palliative treatment such as physician-assisted suicide and euthanasia, when medically appropriate. By applying reasoned judgment, and using United States history as a guide to determine the societal worth of an interest, the *Obergefell* Court adopted a more comprehensive due process analysis than those used previously in *Glucksberg* or *Lawrence*.⁵⁶ In light of the Court's and legislature's support for informed consent and personal privacy, an exercise of reasoned judgment must conclude that interests of terminal patients in palliative care require individualized respect from states, thereby rendering it a fundamental right.⁵⁷

In *Obergefell*, the Court found that the right to marriage was fundamental regardless of the genders of the marriage participants. In reaching its conclusion, the Court considered "individual autonomy" established from case law, like *Lawrence*, where choices regarding personal relationships "shape an individual's destiny" and, as such, are exempt from government interference.⁵⁸ Additionally, the right to marry was found to be the quintessential support for two-person unions unrivaled in the importance of promoting the intimate association of committed individuals.⁵⁹ The right of marriage "thus dignifies couples who wish to define themselves by their commitment to each other."⁶⁰ The *Obergefell* Court noted that familial union greatly benefits the home environment for "related rights of childrearing, procreation, and education."⁶¹ And finally, marriage was found to exist as the capstone of society's structure since, through the vows provided between couples, a bilateral benefit is created whereby the union supports familial structure, and society, in turn, nourishes the union by providing marital benefits in fields such as taxation, property rights, adoption rights, births and death certifications.⁶²

Similar to the societal benefits stemming from the institution of marriage, as discussed in *Obergefell*, society also receives a series of benefits from palliative care.⁶³ Pain, as a first indicator of illness, facilitates both treatment to alleviate distress and an inquiry into the patient's health, furthering detection and treatment of underlying illnesses. Pain treatment can assist in monitoring potential public health concerns and, ultimately, assist in fostering a healthier population, both of which are critical to the function and resulting prosperity of any given society. Lastly, and most importantly for the purposes of this Article, pain treatment relieves pain and suffering at the individual level for those enduring distressing conditions. Because palliative care is the only form of medical benefit available to terminal patients, an exercise of reasoned judgment should find that palliation is a fundamental right that should be afforded to the terminally ill.⁶⁴

1. Maritime Law Illustrates the Modern Legal View of Palliation as Vital Medical Treatment

In recent years, modern medicine has increasingly recognized palliative treatment as an invaluable specialty field, necessary to alleviate the suffering

of many. Somewhat surprisingly, maritime law has mirrored the evolving perception of palliative care as crucial treatment through the doctrine of maintenance and cure. This doctrine imposes liability on shipowners to pay for medical care of sailors who become injured or ill in the scope of their employment with a vessel.⁶⁵ Liability continues until the sailor's maximum medical benefit, or "cure", has been reached.⁶⁶

Maintenance and cure first arose under the Laws of Oleron in 1154.⁶⁷ Articles VI and VII of the Laws provide:

[If] . . . any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship. If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him . . . hire a woman to attend him, and likewise to afford him such diet as is usual in the ship. . . .⁶⁸

This doctrine was carried forward through history by maritime tradition and common law until it was formally recognized by Court in *Harden v. Gordon*, approximately 670 years after the doctrine's conception.⁶⁹ To date, maintenance and cure still imposes a legal duty on shipowners to care for an injured sailor "from the onset of the seaman's illness or injury until the point at which he is cured."⁷⁰

Maritime law has struggled to determine when the maximum medical benefit, or "cure," occurs and shipowner liability ends, particularly when injuries result in chronic conditions. Traditionally, pain management and medical treatment were considered entirely separate under maintenance and cure, relieving shipowners from a duty to pay for palliative care since there was no curative benefit.⁷¹ However, in 2010, the Eastern District of New York abandoned the traditional standard, stating: "[i]t is time to reconsider the old rule, now out of the main stream of medical practice."⁷² While noting that the "Supreme Court has not squarely addressed the issue of whether 'cure' encompasses palliative care,"⁷³ the *Haney* court noted that "[n]ew theories on medical treatment for pain relief [create] an evolving sense of the importance to doctors and patients of well-being and quality of life issues, [and] include pain management. *Palliative care is now encompassed in the notion of recovery and maximum improvement.*"⁷⁴

Haney, while representing a minority of courts accepting palliative care as medical improvement under maintenance and cure, is congruent with changing healthcare philosophy, which has abandoned its former "cure at all costs approach" to medicine.⁷⁵ Rather, *Haney* mirrors the sentiments of today's medical professionals, such as Dr. Peter Selwyn, M.D., a palliative expert at the Albert Einstein College of Medicine, who finds intrinsic value in the medical benefit provided to patients through palliative care.⁷⁶ Furthermore, the *Haney* court's analysis of the relationship between palliative care and the medical profession clearly depicts palliative care as treatment with an integral role in modern medicine.

Firstly, the *Haney* court considered the prominence of palliative programs in hospitals. The prevalence of palliative programs in state and private hospitals evidences the necessity of the palliation in treating patients and promoting an enhanced quality of life.

Secondly, the court considered the “sense of the importance to doctors and patients of well-being and quality of life issues, includ[ing] pain management.”⁷⁷ This progressive focus on palliation has compelled research and the discovery of “new theories on medical treatment for pain relief.”⁷⁸ Increased “advocacy, research and training in the field” has encouraged greater specialization of palliative medicine.⁷⁹ One example of specialization can be seen by the formation of institutions that actively support and promote the palliative field, such as American Academy of Pain Medicine (AAPM), an association dedicated to representing palliative physicians.⁸⁰ As previously discussed, the U.S. legislature has also passed measures with similar effects, promoting awareness and fostering research efforts in palliative care.⁸¹

Lastly, the court noted the importance of pain in diagnostics, citing the common practice of measuring patients’ pain in medical assessments, along with temperature, pulse, and blood pressure.⁸² The court found that measuring pain as a standard medical practice including pain recognition and management served as one of the most important considerations in administering treatment.⁸³ Based on the court’s analysis, palliative care is a vital part of medical treatment and should be considered a medical benefit to the same extent as curative treatment.⁸⁴

2. Palliative Care as a Medical Benefit

Although at one time it was considered tangential to the goals of curative treatment, in recent years, the medical field has actively brought palliative care into the fold of medical treatment.⁸⁵ Increasing awareness and inclusion of palliative care as an integral part of the medical field largely stems from the medical profession’s abandonment of the “cure at all costs” approach.⁸⁶ This former treatment approach fostered the idea that palliative care was exclusive of medical treatment because it did not promote a curative function. Because palliation did not provide a curative benefit, it was originally stigmatized by the misconception that it was a “giving up” measure, provided as an afterthought once the physician abandoned hope of providing a medical benefit to the patient.⁸⁷

However, in recent years, the medical field has adopted a more compassionate “do everything” philosophy” towards palliation, which has fostered “focused attempts to study end-of-life care and identify appropriate policies and procedures for providing palliative care.”⁸⁸ This modern philosophy has been mirrored in legislative efforts to garner support and raise awareness of palliative treatment. Such efforts have resulted in increasing recognition of palliation’s value in treating illnesses where the incurable nature of a disease causes patient distress and requires aggressive end-of-life care. For terminal patients, such treatment is a profound medical benefit because palliation “stands alone as the care for the patient who has been diagnosed with a [...]

terminal condition and for whom curative treatment is no longer the goal of care.”⁸⁹ While previously recognized as a “component of medical treatment,” the role of palliative care as a formal and vital measure of medical treatment continues to become more pronounced.⁹⁰

The inability of medicine to treat incurable diseases, such as cancer and AIDS, has particularly promoted palliative care in last half century.⁹¹ Dr. Selwyn recognizes the importance of evolving perceptions of palliative treatment in his extensive work with AIDs, stating: “[I]t took a disease we could not cure to teach us the true meaning of healing. Without knowing it, we became experts in palliative care.”⁹² Palliative treatment has evolved into a specialty field that touches patients receiving care in almost every medical discipline. While the ability to cure is not always possible, the ability to provide medical improvement to every patient is possible, even for the terminally ill. Terminal patients have as great an interest in receiving medical care through palliation as patients receiving curative treatment, and so terminal patients must be allowed to exercise their own discretion in determining what course of palliation they will pursue. This discretion extends to a patient’s election for life-ending palliation when intractable pain makes death medically appropriate.

3. The Right to Try: The Most Recent Demand for Patient Discretion in Terminal Care

The Right To Try movement is the most recent supporting discretion of terminal patients in choosing end-of-life treatment. This campaign was first sparked when Abigail Burroughs and her family faced off with the Food and Drug Administration (FDA) in their attempts to obtain access to Erbitux, an investigational drug that was, at the time, in the early stages of clinical testing.⁹³ In her two-year fight with squamous cell carcinoma, Burroughs exhausted all forms of treatment and was advised by her primary physician at Johns Hopkins Hospital to petition for access to Erbitux, a drug he believed had a significant chance of saving her life.⁹⁴ Her petition never came to fruition and, following Abigail’s death, the Abigail Alliance for Better Access to Developmental Drugs was formed to raise awareness and garner support for compassionate use of investigational drugs by the terminally ill.⁹⁵

In 2006, the Alliance brought a lawsuit against the FDA, alleging government infringement on terminal patients’ constitutional right to investigational drug access.⁹⁶ A 3-judge panel of the D.C. Circuit held:

[W]here there are no alternative government-approved treatment options, a terminally ill, mentally competent adult patient’s informed access to potentially life-saving investigational drugs determined by the FDA after Phase I to be sufficiently safe for expanded human trial warrants protection under the Due Process Clause.⁹⁷

Ultimately, the panel’s decision was overturned upon rehearing, but the Right to Try movement continued to lobby its cause and eventually gained notice from a multitude of state legislatures and the Goldwater Institute, a non-profit organization that drafted a model bill for the Right To Try campaign.⁹⁸ To date, 38 states have passed Right to Try legislation.⁹⁹ In August 2017, the

U.S. Senate unanimously passed the Right to Try Act, which Senator Johnson of Wisconsin argued to be the instrument of change requested by “thousands of patients and their families[,...]to advocate for their personal freedom [and] their personal liberty.”¹⁰⁰

The overwhelming state and federal support for Right to Try legislation illustrates national support for patient discretion in end-of-life care. Many investigational drugs are inherently dangerous and yield devastating side effects with extremely low success rates.¹⁰¹ However, despite the dangerous nature and probability of horrific side effects, federal and state legislatures still support efforts to offer terminal patients greater self-determination, acknowledging the overarching right of patient discretion in evaluating treatment risks and benefits.¹⁰² While the compassionate use of experimental drugs is an effort to prolong life, the same respect given to patients who wish to continue fighting their disease should be given to patients who determine that their fight is over, particularly when these individuals exist in a state of irremediable pain. Terminal patients whose pain cannot be managed must be allowed to engage in the same self-determination afforded by the Right to Try when life-ending palliation is medically appropriate and requested by the patient as a palliative measure.

C. Assisted Suicide Statutes Violate Due Process by Infringing Terminal Patients' Ability to Receive Palliation

The U.S. Supreme Court has only considered the constitutionality of assisted suicide statutes as an infringement on the right to die. While the Court has declined to find a fundamental right to receive physician-assisted suicide, two Justices have made clear that patients have a constitutionally cognizable interest in seeking pain relief. Further, the concurring opinions of *Glucksberg* and *Vacco* imply that the Fourteenth Amendment does make room for constitutional claims against statutes which compel patients to undergo physical pain by denying them appropriate treatment. To date, the Court has yet to explicitly address the constitutionality of assisted suicide statutes as a bar to the receipt of legitimate palliative treatment.

1. Life-Ending Care is Palliative when Patient Pain is Irremediable

By definition, terminal illnesses are those which are unresponsive to curative treatment.¹⁰³ However, as previously discussed, terminal patients can still benefit through palliation and have a constitutionally cognizable interest in receiving such care. In *Glucksberg* and *Vacco*, Justice O'Connor's concurring opinion recognizes the potential of future constitutional claims in palliative care. She states:

[A] patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. ... There is no need to address the question whether suffering patients have a *constitutionally cognizable interest* in obtaining relief from the suffering they may experience... *there is no dispute that dying patients... can obtain palliative care, even when doing so would hasten their deaths.*¹⁰⁴

Justice O'Connor's opinion, while prematurely finding no legal barrier to patients' receipt of palliative medicine, is congruent with the medical field in recognizing pain relief as the patient's highest priority. She explicitly references an undisputed right of patients to seek such relief, even to the point of unconsciousness or death.¹⁰⁵ Similarly to Justice O'Connor, Justice Stevens more overtly foreshadowed the potential for future constitutional claims by terminal patients when he noted "[t]he avoidance of severe physical pain would have to constitute an essential part of any successful claimant because ... the laws before us do not force a dying person to undergo that kind of pain."¹⁰⁶

In both opinions, Justices O'Connor and Stevens address hypothetical circumstances where patients are barred from receiving necessary pain relief. Such circumstances were not present in *Glucksberg* or *Vacco*, where these opinions appear. In finding that assisted-suicide statutes did not require patients to endure pain, Justice Stevens and Justice O'Connor relied on the Court's discussion of terminal sedation - the most advanced form of palliative care where the patient is kept sedated until death occurs from the underlying disease agent.¹⁰⁷ However, recent studies have shown that a significant minority of patients continue to suffer even under terminal sedation. Because of the newly discovered insufficiencies of terminal sedation, assisted suicide statutes do, in some cases, force patients to undergo pain where terminal sedation is ineffective and life-ending care is prohibited.¹⁰⁸ Given this new evidence, Justice Stevens's opinion indicates that the time is ripe to reconsider the constitutional interests of terminal patients in life-ending palliation to facilitate the "avoidance of severe physical pain."¹⁰⁹

2. Access to Palliation is a Fundamental Right That Encompasses Life-Ending Care When Patient Pain is Irremediable

The *Glucksberg* and *Vacco* concurrences and the modern due process standard, as established by *Obergefell*, indicate the fundamental nature of terminal patients' ability to determine the palliation they receive when pain is unbearable.¹¹⁰ If this right is fundamental, as case law suggests, then statutes prohibiting terminal patients in irremediable pain from receiving adequate palliation are unconstitutional.

Currently, many states have assisted suicide statutes which prohibit terminal patients from receiving physician-assisted suicide or euthanasia, even when requested as palliative measures by mentally competent adults awaiting certain death. However, when specific patient criteria are met, death can be considered the "only [medical] intervention that can accomplish the stated goals of treatment."¹¹¹ In such cases, and when requested by patients, the administration of life-ending palliation becomes a medically appropriate mechanism for ending intractable suffering.¹¹² Assisted suicide statutes create a legal barrier, or undue burden, to palliation that is necessary to prevent unbearable suffering in a significant minority of patients. By creating an undue burden on the ability of these individuals to receive palliative care, assisted suicide statutes infringe on dying patients' constitutional guarantees of due process.

3. The Supreme Court Incorrectly Limited Availability of Palliation by Asserting the Double-Effect Principle in *Vacco v. Quill*

In *Vacco*, the Supreme Court upheld the constitutionality of assisted suicide statutes by applying the double-effect principle, a philosophical concept utilized by the Court only once in the history of American jurisprudence.¹¹³ The double-effect principle pardons acts committed when a negative consequence is foreseeable, but unintended.¹¹⁴ With respect to palliative care, the double-effect principle only permits palliation where death is a foreseeable, but unintended, consequence. This requirement entirely prohibits administration of life-ending care, such as physician-assisted suicide and euthanasia. By using this principle as a mechanism to bar life-ending care, the Court also barred use of these measures as palliation in cases where pain is untreatable. To justify this unconventional application of non-legal doctrine, the Court stated, “just as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended ‘double effect’ of hastening the patient’s death.”¹¹⁵

The Court’s discussion of the double-effect principle is a minute portion of the *Vacco* opinion; however, since *Vacco*, this principle has echoed throughout state and federal courts in subsequent challenges of assisted-suicide statutes. Lower courts have interpreted the principle as a concrete standard set by the Court and now apply it as such.¹¹⁶ The Court’s unprecedented use of the double-effect in *Vacco* is inappropriate because legal principles, such as justification and proximate cause, are the mechanisms used to impose and limit defendant liability in law. Because well-established legal principles exist to address the same issue, use of the double-effect principle constitutes a divergence from legal precedent into philosophical doctrine, a maneuver which changed the outcome of the case.

Application of the double-effect principle materially affected the Court’s analysis in *Vacco*. The double-effect principle has been described as an “obscure, ambiguous, and controversial artifact of medieval Catholic theology” that offers “little direct effect on legal analysis.”¹¹⁷ Discrepancies between double-effect and legal causation principles are best seen when illustrated in a self-defense hypothetical. In self-defense, the double-effect principle states that, while harm to an assailant is foreseeable, the victim’s acts only *intend* self-preservation, not harm to his attacker.¹¹⁸ However, when applying a legal approach, the analysis of self-defense is very different. A legal analysis assumes that the victim intentionally harms his assailant *in order to* impede the initial attack because “the law presumes that a person intends the necessary and natural consequences of his acts.”¹¹⁹

Self-defense is a widely-accepted affirmative defense, meaning the victim’s acts in harming the assailant are still a violation of the law, but the acts are justified by the circumstances.¹²⁰ Put another way, if a victim kills an assailant in self-defense, the victim’s acts establish liability for crimes of murder or manslaughter, but the victim’s conduct is considered justified when there

is an “adequate triggering condition that prompted [the victim] to violate the letter of the law,” such as the assailant’s initial attack.¹²¹

Unlike the double-effect principle, which separates foreseeability and intent, the law examines intent in light of the foreseeability of consequences, and presumes that a person’s conduct becomes intentional once the individual becomes aware of likely consequences and acts anyway.¹²² After all, if a consequence is foreseeable, the person who foresees the likely effect and acts in a manner that brings about the effect does so “knowingly with respect to a material offense.”¹²³ The following hypothetical situation further illustrates the relationship of legal foreseeability and intent:

Person A is throwing rocks that land approximately 20 feet away from him. Person B, is 30 feet away from A and begins walking towards A. As B draws closer to A, the risk of hitting B with a rock increases and, when B is 20 feet away, A knows that if he throws another rock, it will almost certainly hit B. If A chooses to throw another rock, his conduct in hitting B with a rock is intentional because A foresaw the almost certain consequence and acted anyway.

The double-effect principle does not comport with legal culpability standards. Under the double-effect, terminal patients with intractable pain are incapable of receiving pain alleviation through treatment where death is foreseen and considered a treatment goal.

By using the double-effect principle to prohibit palliation where death is both foreseeable and intended, the Court assumes that pain relief and death are mutually exclusive objectives. However, they are not; where all other measures fail, the end of life is a palliative mechanism which brings a definite end to intolerable suffering. In some cases, terminal patients experience immense and unmanageable suffering in the dying process, even when receiving the most aggressive forms of palliative care available. Terminal sedation is largely considered the most advanced form of palliative care and was asserted by the *Glucksberg* Court as a solution to irremediable pain.¹²⁴ However, since 1997, several investigations have yielded data indicating that a “large minority” of patients continue to feel pain during their final days under terminal sedation.¹²⁵ The degree of unreliability associated with this procedure, with evidence suggesting that up to 10% of patients continue experiencing pain, causes many patients to reject terminal sedation as a treatment option to unmanageable pain.¹²⁶ Put plainly, despite excellent and aggressive palliative care, “some patients suffer tremendously during the dying process.”¹²⁷ When all other measures fail, the medical field views life-ending palliation as medically and ethically appropriate.¹²⁸ Specifically, four criteria must be met before life-ending palliation may be considered a potential treatment option. These include:

- (1) The patient and provider determine that relief of suffering is the most appropriate primary goal of treatment;
- (2) the patient is suffering unbearably;
- (3) optimal palliative treatment has been employed and has failed to reduce the patient’s suffering to a level that is bearable; and
- (4) the patient’s suffering will end upon her death.¹²⁹

The Court's assertion of the double-effect principle eliminates the possibility of life-ending palliation regardless of the suffering of the patient, even where the medical field determines life-ending care to be medically appropriate. In blindly invoking this principle, the Court disregards humanistic frailty and necessity of mercy in the dying process. By enforcing a standard that requires the absolute preservation of life without considering the devastating effect such a standard has on suffering patients, the Court discounts the entire purpose of palliative care—to relieve suffering through medically appropriate methods that reflect the patient's wishes. Denying this treatment denies dying patients pain relief and robs them of basic human dignity in their final days.

III. Equal Protection And Palliative Care

To date, the Court has considered the right of terminal patients to seek life-ending palliation through physician-assisted suicide under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.¹³⁰

In both *Glucksberg* and *Vacco*, the Court briefly distinguished physician conduct that causes death and establishes homicide liability, from conduct which merely hastens death and is exempt from liability.¹³¹ However, administration of almost every form of palliative care to terminal patients hastens death, given the weakened state of the body and high potency of the medication. Based on legal causation, palliation that hastens death, even through measures as commonplace as a morphine drip, is sufficient to establish homicide liability. Because all forms of palliative care hasten death to some extent in terminal patients, palliative physicians of terminal patients are similarly situated. Consequently, use of assisted suicide statutes for targeted prosecution of only physicians administering life-ending palliation is a violation of the Equal Protection Clause.

Finally, where the Court declines to find statutes unconstitutional *per se*, statutes may still violate the Constitution if used in an unconstitutional manner. Using assisted suicide statutes to prohibit terminal patients from receiving life-ending palliation, when medically appropriate, is an unconstitutional application of assisted suicide statutes.

A. Assisted Suicide Statutes Violate the Equal Protection Clause by Facilitating Discriminatory Prosecution of Similarly Situated Physicians

The Equal Protection Clause of the Fourteenth Amendment requires state governments to treat similarly situated persons in a like manner.¹³² Nearly every form of palliation in terminal patients satisfies causal standards of homicide liability by hastening death to some extent. Accordingly, assisted suicide statutes should treat all palliative physicians in the same manner, rather than facilitating selective prosecution of physicians administering physician-assisted suicide or euthanasia. Such discriminatory treatment of palliative physicians is not rationally related to a legitimate state interest. Previously asserted state interests, such as concern for medical integrity, are neither concrete nor particularized concerns sufficient to allow assisted suicide statutes to prosecute physicians in a discriminatory manner. Rather,

these interests are speculative and, as such, are not of greater importance than interests of physicians in receiving the equal protection of laws.

1. Selective Prosecution of Similarly Situated Palliative Physicians

The unfortunate reality of palliation in terminal patients is that, regardless of a physician's intent, the introduction of high-potency pain medication into a dying body hastens death, whether the administration is through a morphine drip or euthanasia. At common law, acts that hasten death are sufficient to establish homicide liability. Because the causal effects of most forms of palliation are the same, the Equal Protective Clause requires like treatment of all forms of medically appropriate palliative care for the terminally ill. The Equal Protection Clause prohibits states from prosecuting physicians for life-ending palliation while excusing other forms of palliation that support the same liability.

i) "Hastening" v. "Causing" Death

In *Vacco*, the Court engaged in a causation analysis and ultimately held that permissible care extended only to treatments that alleviated pain while *hastening*, but not *causing*, death.¹³³ The Court's rationale directly contradicts common law causation principles, which have held that acts that hasten or cause death are sufficient to establish homicide liability. Therefore, the Court's distinction in *Vacco* is a legal fiction.

As early as 1856, courts have held that "acts which hasten the death... may be laid... as the sole cause of [death]."¹³⁴ Put another way, individuals who cause harm that hastens another's death, without solely causing it, are liable for the death. In reaching this holding, one court candidly noted that murder itself does nothing more than hasten death, "bring[ing] it about sooner than the laws of nature would themselves have brought about if there had been no interference by criminal agency."¹³⁵ Where forces act concurrently to cause death, any conduct that hastens or contributes, even slightly, to the death is considered a cause of death.¹³⁶ In 2002, the Supreme Court of New Mexico, during a felony-murder case, held:

In cases where death results from multiple causes, an individual may be a legal cause of death even though other significant causes significantly contributed to the cause of death. Thus, even if the victim is at "death's door," a defendant is liable for the victim's death if his act hastens the victim's death.¹³⁷

By hastening death, a person can be a legal cause of death, even when other causes contribute far more significantly to the death.¹³⁸ Causation in criminal law does not require a defendant's conduct to be the sole cause of the outcome to support conviction, nor does law excuse conduct which only hastens the damage.¹³⁹

ii) Based on Legal Causation, All Palliative Physicians Are Similarly Situated Under the Equal Protection Clause

Causation sufficient to support homicide liability is established in almost every aspect of palliation for the terminally ill. In these circumstances, two forces actively work towards ending the patient's life: (1) the patient's

disease; and (2) the high dosage of pain medication administered, usually in increasing strength as the patient's condition worsens. Where unbearable pain requires a terminal patient to receive morphine in doses "to the point of causing unconsciousness or hastening death," the physician's administration of medicine bears a relationship to the patient's death sufficient enough to attribute the patient's demise to the physician's acts.¹⁴⁰ The physician's acts are sufficient to support homicide liability because the acts hasten the patient's death; however, the physician's acts are also considered justifiable to society as humane and necessary medical treatment.

Life-ending palliation is also humane medical treatment when requested by the dying whose suffering cannot be eased. However, under assisted suicide statutes, physicians undertaking the administration of these treatments are subjected to criminal liability that other palliative physicians, who also hasten death in terminal patients, are not. This is a blatant violation of the Equal Protection Clause. The equal protection of laws prohibits discriminatory prosecution of physicians administering life-ending care. In the same way that the law does not prosecute the doctor who starts a morphine drip, those who alleviate unmanageable suffering through life-ending palliation requested by a patient should not be subjected to criminal liability when their acts are medically appropriate.

2. State Interests in Upholding Assisted Suicide Statutes

i) The "Slippery Slope"

In the absence of a suspect class, the Court applies a rational basis test to determine the presence of unconstitutional discrimination under the Equal Protection Clause. Under the rational basis test, a state overcomes allegations of discrimination by illustrating that the alleged discrimination bears "a rational relationship to a legitimate governmental purpose."¹⁴¹

The most frequently asserted state interest has been the fear that a "slippery slope" will lead to undue pressure on terminal patients to end their lives through physician-assisted suicide and euthanasia.¹⁴² However, this concern is unfounded and entirely speculative. In all systems that rely in part on human discretion, there is always potential for abuse. One such example is organ donation. Studies have shown that a significant percentage of Americans feel that organ donation creates potential for abuse of discretion by medical professionals in forfeiting the lives of organ donors sooner than non-donors.¹⁴³ While abuse of discretion could just as easily occur in organ donation as it could in palliation, the medical field hinges upon physician discretion and guidance.

Physicians exercise discretion in every aspect of medicine from discharging patients to forming prognoses, and there will always be potential for abuse and error in these decisions. No discretionary system can guarantee perfect results, but concrete interests in alleviating patient pain should command greater regard than unfounded fears of abuse. Mere possibilities cannot paralyze the judiciary into ignoring the fundamental rights of the suffering.

Furthermore, many scholars feel the theoretical, slippery slope argument is overplayed and abstract.¹⁴⁴ When engaging in rational decision-making, all

patients weigh many factors and consider the appropriate value of each factor. In weighing these factors, a patient attaches an appropriate normative value to the factor based on their own life experiences and ideals.¹⁴⁵ Although different patients decide on different courses of action, logic suggests that all patients, even when from a variety of backgrounds and economic classifications, make healthcare decisions by using similar reasoning.¹⁴⁶

Finally, states that have passed legislation allowing life-ending palliation have not seen abuse-indicative correlations between the passage of these laws and the death rates of underprivileged groups.¹⁴⁷ In Oregon, data showed that the abuse of discretion predictions were “unfounded and that the option of aid in dying [had] not been unwillingly forced upon those who are poor, uneducated, uninsured, or otherwise disadvantaged.”¹⁴⁸ It should be presumed that physicians will continue to uphold their patient-physician duty even when treating unmanageable pain in new ways. The fact that abuse is always possible does not require the judiciary to adopt the bleakest possible view of humanity by assuming that every person capable of working evil will inevitably work such evil. The notion that a statute is the only measure preventing palliative doctors from becoming angels of death, ending lives without ethical guidelines or criteria, is absurd.

ii) Maintaining Integrity of the Medical Profession

Concern for the integrity of the medical profession was also asserted in *Vacco* and the Court agreed that New York had a state interest in maintaining physicians in their role as “patients’ healers.”¹⁴⁹ Once again, the Court did not recognize the unfortunate reality that not all patients can be healed. However, all patients are capable of receiving the diligent attention of their physician, regardless of whether the physician is administering a medical benefit through curative or palliative treatment.

Fear of degradation of the medical profession’s integrity is entirely speculative and nothing more than a re-packaging of the slippery slope argument, which has been disproven in states allowing physician-assisted suicide and euthanasia.¹⁵⁰ This assertion suggests that availability of new medical procedures capable of limiting excessive suffering will somehow relieve physicians of the duty they feel in ensuring that their patients receive treatment both proper and congruent with the patient’s wishes. Terminal patients with intractable pain exist in a painful, desiccated state until death, a process which, arguably, offends a physician’s duty to the patient more than the end of life. By prohibiting life-ending care, the Court blindly imposes a duty on physicians to engage in the absolute preservation of life without giving adequate regard to terminal patients’ ability to receive medical benefit through palliation or determine for themselves the treatment course they wish to pursue.

Additionally, the integrity of the medical field could potentially benefit from increased honesty and clarity that comes with allowing physicians to openly discuss a patient’s expressed desire to receive life-ending palliation, rather than treating the subject as taboo.¹⁵¹ The preservation of life does not support the medical field’s integrity where it denies a terminal patient’s wishes as they slowly and painfully drift towards death. These practices do not promote medi-

cal integrity; rather, this is the systematic siphoning of mercy out of medicine.

B. Preventing Life-Ending Palliation is an Unconstitutional Application of Assisted Suicide Statutes

Currently, assisted suicide statutes are used to prevent the administration of life-ending measures to terminal patients. In his concurring *Glucksberg* opinion, Justice Stevens used the “morality, legality and practicality of capital punishment” to draw similarities between the constitutionality of physician-assisted suicide and capital punishment statutes.¹⁵² He notes that, while capital punishment statutes are not inherently unconstitutional, the Court has found some applications of these statutes to be so.¹⁵³ Justice Stevens further states:

Today the Court decides that Washington’s statute prohibiting assisted suicide is not invalid on its face, that is to say, in all or most cases in which it might be applied. That holding, however, does not foreclose the possibility that *some applications of the statute might well be invalid*.¹⁵⁴

Therefore, even if assisted suicide statutes are not unconstitutional *per se* as infringements on the Due Process or Equal Protection Clauses, using these statutes almost exclusively to bar terminal patients with intractable pain from receiving palliation is an unconstitutional application of assisted suicide statutes.

Assisted suicide statutes are not frequently used to address non-medical assisted suicides because such crimes are often prosecuted under manslaughter and murder statutes. In *State v. Melchert-Dinkel*, the Supreme Court of Minnesota addressed a case where a man encouraged two teenagers to commit suicide through an online chatroom.¹⁵⁵ Melchert-Dinkel was convicted under Minnesota’s assisted suicide statute for advising and encouraging the suicidal acts.¹⁵⁶ On appeal, the Supreme Court of Minnesota found that the statute, insofar as it prohibited “adv[is]ing” and “encourag[ing]” suicide, was unconstitutional as an infringement on free speech.¹⁵⁷ Given that statutory prosecution for encouragement of suicidal acts will likely be met with free speech objections, the prosecution for such conduct is more productively pursued under manslaughter statutes as a “wanton or reckless” act causing another’s death.¹⁵⁸ However, if a physical act is taken by a person to assist the suicide of another, as opposed to verbal encouragement, these acts are frequently pursued under murder or manslaughter statutes.¹⁵⁹

The Supreme Court of California considered the overlap of murder, manslaughter, and assisted suicide in *In re Joseph G.*, where a minor was charged with murder after he entered into a suicide pact with another individual and survived. In distinguishing murder from assisted suicide, the court held:

[W]here a person actually performs, or *actively assists* in performing, the overt act resulting in death, such as shooting or stabbing the victim, [...] his act constitutes murder, and it is wholly immaterial whether this act is committed pursuant to an agreement with the victim, such as a mutual suicide pact.¹⁶⁰

The court also distinguished manslaughter from assisted suicide, finding:

[Manslaughter] contemplates some participation in the events leading up to the

commission of the final overt act, such as furnishing the means for bringing about death—the gun, the knife, the poison, or providing the water, for the use of the person who himself commits the act of self-murder.¹⁶¹

Given the distinctions made by the *In re Joseph G.* court, it is unclear what benefit assisted suicide statutes actually offer to state legal systems, except to facilitate selective prosecution of palliative physicians or potentially provide less severe punishment to physicians for administering medically necessary palliation to terminal patients in intractable pain. This author finds neither purpose particularly persuasive.

Because the full spectrum of homicidal conduct is adequately addressed by manslaughter and murder statutes, a logical inference suggests that assisted suicide statutes are maintained almost exclusively to prohibit physician-assisted suicide and euthanasia. To use these statutes to deter physicians from administering palliation is to deny terminal patients, in some cases, medically appropriate treatment and force them to undergo “severe physical pain.”¹⁶² This is an unconstitutional application of assisted suicide statutes because it is specifically and solely used to hinder the ability of terminal patients to receive palliative treatment.

Conclusion

Individuals standing at the precipice of death have a particularly poignant interest in the availability of palliative care. To date, the Court has never addressed physician-assisted suicide or euthanasia as a purely palliative measure. Palliative care is the sole medical benefit that can be provided to terminal patients and is, therefore, fundamental to these individuals. Given the reality that a large minority of terminal patients suffer enormously in the dying process and do not benefit from even the most aggressive palliative means, the end of life can provide a palliative effect in dire circumstances.

Under such circumstances, inducing death is medically-appropriate, justifiable conduct, and statutes prohibiting administration of these measures violate the Due Process and Equal Protection Clauses by (1) denying terminal patients with intractable pain the ability to seek palliative care, thereby compelling them to endure severe physical pain and (2) facilitating targeted prosecution against similarly situated palliative physicians who administer life-ending care to terminal patients.

NOTES

1. *WHO Definition of Palliative Care*, WORLD HEALTH ORG., <http://www.who.int/cancer/palliative/definition/en/> (last visited on Oct. 30, 2017) [hereinafter *Palliative Care*]; see Katherine Ledden, *A Nudge in the Right Direction with a Stick the Size Of CMS: Physician-Patient Communication at the End of Life*, 6 ST. LOUIS U. J. HEALTH L. & POL'Y 389, 392 (2013).
2. See *Palliative Care*, *supra* note 1.
3. See Ledden, *supra* note 1, at 395. More than 80% of large hospitals have multidisciplinary palliative programs which exist specifically to design effective palliative strategies for patients both receiving curative treatments and for those with terminal illness. Amy

- Kelley & Diane Meier, *Palliative Care--a Shifting Paradigm*, 363 NEW ENG. J. MED. 781 (2010).
4. See *Vacco v. Quill*, 521 U.S. 793, 798 (1997).
 5. *Id.*
 6. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.
 7. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003); see also *Daniels v. Williams*, 474 U.S. 327, 332 (1986).
 8. Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 253 (1982).
 9. *Chavez*, 538 U.S. at 776; see also *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997); Joseph Kadlec, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387 (2007) (“Courts use the Fifth and Fourteenth Amendments of the Constitution to prevent federal and state governments from depriving people of their liberty interests in unenumerated rights without due process of law.”).
 10. See *Chavez*, 538 U.S. at 776; Kadlec, *supra* note 9, at 387.
 11. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).
 12. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).
 13. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).
 14. See, e.g., *Griswold*, 381 U.S. at 479; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
 15. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952).
 16. See, e.g., *Roe v. Wade*, 410 U.S. 113, 114 (1973), holding modified by *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992).
 17. See, e.g., *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 287-79 (1990).
 18. See Kadlec, *supra* note 9, at 389.
 19. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).
 20. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).
 21. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).
 22. See *Glucksberg*, 521 U.S. at 721; *Bowers*, 478 U.S. at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 503 (1938)); *Mills v. Rogers*, 457 U.S. 291, 294 (1982).
 23. *Lawrence*, 539 U.S. at 559.
 24. *Id.* at 573.
 25. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).
 26. *Id.*; see also Richard S. Myers, *Obergefell and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54, 61 (2016).
 27. *Obergefell*, 135 S. Ct. at 2598.
 28. See *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).
 29. See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 261 (1990).
 30. *Id.* at 314.
 31. See *id.*
 32. *Glucksberg*, 521 U.S. at 724.
 33. See *id.* at 703.
 34. *Id.* at 725.
 35. See *id.* at 724.
 36. See *Vacco v. Quill*, 521 U.S. 793, 798 (1997).
 37. *Id.* at 801.
 38. *Id.* at 808.
 39. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 259 (1891). But see *In re E.G.*, 549 N.E.2d 322 (1990) (holding that bodily autonomy yields to a State’s interests in (1) the

- preservation of life; (2) protecting the interests of third parties; (3) prevention of suicide; and (4) maintaining the ethical integrity of the medical profession).
40. *Canterbury v. Spence*, 464 F.2d 772 (1972) (quoting *Schloendorff v. Society of New York Hospital*, 105 N.E. 92 (1914)); *see also* Restatement of Torts § 49 (1934).
 41. Lack of informed consent is a tort cause of action stemming from a physician's breach of the duty to inform the patient of medical alternatives and associated risks before the patient determines the course of treatment he or she wish to undertake. *See Canterbury*, 464 F.2d at 782 ("[I]t is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie. To enable patient[s] to chart [their] course understandably, some familiarity with therapeutic alternatives and their hazards becomes essential."); *Rochin*, 342 U.S. at 210-11 (holding that an officer's invasion of a suspect's body shocked the conscience of the court and offended human dignity and the Due Process Clauses). Over the past half century, there has been a clear expansion in the ability of individuals to determine their own course of action regarding medical treatment as an extension of personal privacy and autonomy. *See Roe v. Wade*, 410 U.S. 113, 152 (1973), *holding modified by* *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 287-79 (1990).
 42. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).
 43. *Id.*
 44. *See Roe*, 410 U.S. at 154.
 45. *See Roe*, 410 U.S. at 153-54.
 46. *Id.* at 153.
 47. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992).
 48. *See, e.g., id.* at 869; *Rochin*, 342 U.S. at 210-11 (holding that an officer's invasion of a suspect's body shocked the conscience of the court and offended the Due Process Clauses).
 49. *See* 42 U.S.C.A. § 1395dd (2011).
 50. *See Joseph Zibulewsky, The Emergency Medical Treatment and Active Labor Act (EMTALA): What It Is and What It Means For Physicians*, 14 PROC (BAYL UNI MED CENT) 339 (2001), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1305897/>; *see also* *Matter of Baby K*, 16 F.3d 590 (4th Cir. 1994) ("Congress enacted EMTALA in response to its 'concern' that hospitals were 'dumping' patients [who were] unable to pay, by either refusing to provide emergency medical treatment or transferring patients before their emergency conditions were stabilized.").
 51. James Blaufuss, *A Painful Catch-22: Why Tort Liability for Inadequate Pain Management Will Make for Bad Medicine*, 31 WM MITCHELL L. REV. 1093, 1097 (2005). *See also* Jacob Vigil, *Negligence in the Emergency Room*, 37 TR. 29, 30 (2001).
 52. Julie Darnell, *Free Clinics in the United States*, 170 ARCH INTERN MED. 946 (2010), available at <https://www.ncbi.nlm.nih.gov/pubmed/20548006>.
 53. *Id.*
 54. *See id.*
 55. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1603, 114 Stat. 1464, 1539 (2001) (declaring the calendar decade beginning in January 1, 2001 the Decade of Pain Control and Research).
 56. The Court found that marriage was vital to creating permanence and stability in the family structure, which is of immense importance to society. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).
 57. *See id.*
 58. *Id.* at 2599.
 59. *See id.*
 60. *Id.* at 2600.
 61. *Id.*
 62. *Obergefell*, 135 S. Ct. at 2600.
 63. *See id.* at 2598.

64. See Linda Farber Post & Nancy Neveloff Dubler, *Palliative Care: A Bioethical Definition, Principles, and Clinical Guidelines*, 13 BIOETHICS FORUM 17, 18 (1997) (“[Palliative care] stands alone as the care for the patient who has been diagnosed with a [...] terminal condition and for whom curative treatment is no longer the goal of care.”).
65. See *Fox v. Texaco, Inc.*, 722 So. 2d 1064, 1066 (1998) (“Maintenance and cure” is an ancient duty imposed upon the owner of a ship to provide food, lodging and necessary medical services to seamen who become ill or injured during service to the ship.”).
66. See *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962) (“[Maintenance and cure] extends during the period when he is incapacitated to do a seaman’s work and continues until he reaches maximum medical recovery.”).
67. See Arthur Crais, *Maintenance and Cure - A Trifecta for Seamen? Atlantic Sounding Co. v. Townsend, Messier v. Bouchard Transportation and Boudreaux v. Transocean Deepwater, Inc.*, 14 LOY. MAR. L.J. 13, 16 (2014).
68. Rod Sullivan, *Enforcing A Seaman’s Right to Medical Care After Atlantic Sounding v. Townsend*, TUL. MAR. L.J. 1, 4 (2009).
69. See *Harden v. Gordon*, 11 F. Cas. 480, 2000 AMC 893 (1823) (holding that a statute requiring the presence of a medical chest on ships did not preempt the general maritime duty of a shipowner to provide maintenance and cure to seaman aboard the vessel); see also *Shipowners’ Liability Convention*, art. 2, 54 Stat. 1693, 40 U.N.T.S. 169 (1939).
70. Jason Minkin, *When Should Seaman Maintenance and Cure Benefits Terminate?*, 1 DEPAUL J. HEALTH CARE L. 323, 323 (1996); see also *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975).
71. See, e.g., *Johnson v. Marlin Drilling Co.*, 893 F.2d 77, 78 (5th Cir. 1990); *Guidry v. The Offshore Drilling Co.*, 2007 WL 519761, at *3 (W.D. La. Feb. 15, 2007).
72. *Haney v. Miller’s Launch, Inc.*, 773 F. Supp. 2d 280, 293 (2010).
73. *Id.* at 291.
74. *Id.* (emphasis added).
75. See Rima J. Oken, *Curing Healthcare Providers’ Failure to Administer Opioids in the Treatment of Severe Pain*, 23 CARDOZO L. REV. 1917, 1920 (2002).
76. *Id.*
77. *Haney*, 773 F. Supp. 2d at 292.
78. *Id.*
79. *Id.*
80. See *id.*
81. See *supra* Section II(A)(1).
82. See, e.g., C. Sepulveda et. al., *Palliative Care: The World Health Organization’s Global Perspective*, J. PAIN AND SYMPTOM MGMT. 91 (2002) (discussing WHO efforts and developments in palliative care systems to improve the quality of life of the sick); DEP’T OF VETERAN AFFAIRS VETERANS HEALTH ADMIN., DIRECTIVE 2009–053: PAIN MANAGEMENT (2009), available at <https://www.va.gov/painmanagement/docs/vha09paindirective.pdf> (discussing “Pain as a Fifth Vital Sign” initiative).
83. See *Haney v. Miller’s Launch, Inc.*, 773 F. Supp. 2d 280, 293 (2010).
84. See *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106–386, § 1603, 114 Stat. 1464, 1539 (2001) (declaring the calendar decade beginning in January 1, 2001 the Decade of Pain Control and Research).
85. See Oken, *supra* note 75, at 1920.
86. *Id.*
87. *Id.* at 1936. See also Gary Walco et al., *Pain, Hurt, and Harm: The Ethics of Pain Control in Infants and Children*, 331 NEW ENG. J. MED. 541 (1994); Post & Dubler, *supra* note 64, at 17 (1997) (“[C]omfort came to be seen as what was left when there was ‘nothing more to do.’ In the process, death was perceived as a failure of skill and dying was unseemly for professionals to attend.”)

88. Post & Dubler, *supra* note 64, at 17.
89. *Id.* at 18.
90. See Oken, *supra* note 75, at 1928; Post & Dubler, *supra* note 64, at 17.
91. See Oken, *supra* note 75, at 1928.
92. Peter Selwyn, *Lessons from the AIDS Epidemic: Knowing Our Patients, Knowing Ourselves*, 3 J. PALLIATIVE MED. 263, 263 (2000).
93. Sam Adriance, *Fighting For the Right to Try Unapproved Drugs: Law as Persuasion*, 124 YALE L.J. FORUM 138 (2014).
94. *Id.*
95. Sue Kovach, *The Abigail Alliance: Motivated by Traffic Circumstances, Families Battle an Uncaring Bureaucracy*, LIFE EXTENSION (2017), <http://www.abigail-alliance.org/LEMSEP07pAbigailLR.pdf>.
96. See Abigail All. For Better Access to Developmental Drugs and Washington Leg. Found. v. Von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006), *on reh'g en banc sub nom. Abigail All. For Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007).
97. *Id.* at 486.
98. See Rebecca Dresser, *The "Right To Try" Investigational Drugs: Science And Stores In The Access Debate*, 93 TEX. L. REV. 1631, 1640 (2015) ("In 2014, the Goldwater Institute, a nonprofit organization whose mission is to protect freedom and prosperity, developed a model bill 'to protect the fundamental right of people to try to save their own lives'.").
99. See Jacqueline Howard, *What You Need to Know about Right-to-Try Legislation*, CNN (May 29, 2018). See, e.g., ALA. CODE § 22-5D-3 (2018); ARIZ. REV. STAT. § 36-1312 (West 2014); ARK. CODE ANN. § 20-15-2102 (2015); CAL. HEALTH & SAFETY CODE § 111548.2 (West 2017); COLO. REV. STAT. ANN. § 25-45-101 (West 2014); CONN. GEN. STAT. ANN. § 21a-70g (West 2016); FLA. STAT. ANN. § 499.0295 (West 2017); GA. CODE ANN. § 31-52-6 (2016); IDAHO CODE ANN. § 39-9402 (West 2017); ILL. COMP. STAT. ANN. 649.10 (West 2017); IOWA CODE ANN. § 144E.3 (West 2017); KY. REV. STAT. ANN. § 217.5407 (West 2018); MINN. STAT. ANN. § 151.375 (West 2015); MO. REV. STAT. § 191.480 (2014); NEV. REV. STAT. ANN. § 454.690 (West 2015); N.C. GEN. STAT. ANN. § 90-325.2 (West 2015); N.D. CENT. CODE ANN. § 23-48-02 (West 2015); OHIO REV. CODE ANN. § 4729.89 (West 2017); OKLA. STAT. ANN. tit. 63, § 3091.3 (West 2018); S.C. CODE ANN. § 44-137-20 (2016); S.D. CODIFIED LAWS § 34-51-4 (2018); TENN. CODE ANN. § 63-6-303 (2015); TEX. HEALTH & SAFETY CODE ANN. § 489.051 (West 2015); UTAH CODE ANN. § 58-85-103 (West 2018); VA. CODE ANN. § 8.01-179 (2018); W. VA. CODE ANN. § 16-51-6 (West 2016); WYO. STAT. ANN. § 35-7-1802 (2015).
100. 163 Cong. Rec. S4788-01 (daily ed. Aug. 3, 2017) (statement of Sen. Ron Johnson); see also Dresser, *supra* note 98, at 1640; Randy Tong, *AB 159: Can it Really Hurt "To Try?"*, 47 U. PAC. L. REV. 551, 562 (2016); Andrew Siddon, *'Right To Try' Senate Bill Could Face Slower Action in House*, CQ ROLL CALL, 2017 WL 3445741 (2017).
101. See Michael Malinowski, *Throwing Dirt on Doctor Frankenstein's Grave: Access to Experimental Treatments at the End of Life*, 65 HASTINGS L.J. 615, 618 (2014) ("The drugs worsened [the patient's] health immediately; the side effects were horrific...[This] story illustrates common human reaction when death becomes defined, tangible, and must be confronted.").
102. "Claims that patients need FDA protection because they are desperate and vulnerable demean individuals who are fully capable of making treatment decisions. To the contrary, terminally ill patients are rational and realistic people dealing with difficult circumstances." Dresser, *supra* note 98, at 1642.
103. See Post & Dubler, *supra* note 64, at 17.
104. Washington v. Glucksberg, 521 U.S. 702, 736-38 (1997) (emphasis added).
105. *Id.*
106. *Id.* at 791.
107. Terminal sedation is the practice of placing the patient in a drug-included coma to pre-

- vent severe pain until death; patients generally do not continue receiving nutrition or hydration, which is often the actual cause of death. K.C. Chambaere et. al, *Continuous Deep Sedation Until Death in Belgium: A Nationwide Survey*, 170 ARCH INTERN MED. 490 (2010) ("The continued administration of artificial nutrition or hydration is not encouraged unless the benefits outweigh the harm.").
108. See, e.g., Alexander Kon, *Palliative Sedation: It's Not a Panacea*, 11 AM. J. BIOETHICS 41 (2011); Michael T. Wolf, *Palliative Sedation in Nursing Anesthesia*, 81 AANA J. 113 (2003) ("A comprehensive review of the research literature [...] demonstrated [...] efficacy rates ranging from 71% to 92%.")
 109. *Glucksberg*, 521 U.S. at 791.
 110. See *supra* Section I(A).
 111. Kon, *supra* note 108, at 41-42; see also Post & Dubler, *supra* note 64, at 18 ("[Palliative care] stands alone as the care for the patient who has been diagnosed with a [...] terminal condition and for whom curative treatment is no longer the goal of care.").
 112. Kon, *supra* note 108, at 41-42.
 113. Edward C. Lyons, *In Incognito-the Principle of Double Effect in American Constitutional Law*, FLA. L. REV. 469, 471 (2005) ("Under certain circumstances, it is permissible unintentionally to cause foreseen 'evil' effects that would not be permissible to cause intentionally.").
 114. See David Price, *Euthanasia, Pain Relief, and Double Effect*, 17 LEGAL STUD. 323 (1997).
 115. *Vacco v. Quill*, 521 U.S. 793, 808 (1997).
 116. See, e.g., *Cooley v. Granholm*, 291 F.3d 880, 882 (6th Cir. 2002) ("Michigan law would distinguish between (1) withdrawal of life support and 'double effect' euthanasia through pain medication for patients suffering 'irremediable pain'—which are permitted—and (2) euthanasia for such patients through illegal physician-assisted suicide."); *Myers v. Schneiderman*, 85 N.E.3d 57, 79 (2017), *reargument denied*, 30 N.Y.3d 1009 (2017) ("The law has long used actors' intent or purpose to distinguish between two acts that may have the same result. Put differently, the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their unintended but foreseen consequences."); *Woods v. Com.*, 142 S.W.3d 24, 47 (2004); *State v. Weitzel*, No. 991700983, 2001 WL 34048225, at *3 (Utah Dist. 2001) (finding that the court must consider the defendant's conduct under the double effect principle); *State v. Naramore*, 965 P.2d 211, 214 (1998) ("Palliative care refers to medical intervention in which the primary purpose is to alleviate pain and suffering. It is sometimes referred to as having a double effect."); *Hobbins v. Atty. Gen.*, 518 N.W.2d 487, 495 (1994), *aff'd in part, rev'd in part sub nom*, *People v. Kevorkian*, 527 N.W. 2d 714 (1994).
 117. Lyons, *supra* note 113, at 471, 563.
 118. See Price, *supra* note 114, at 323.
 119. *Sandstrom v. Montana*, 442 U.S. 510, 522 (1979).
 120. See e.g., *State v. Juarez*, 794 S.E.2d 293, 397 (2016) ("Perfect self-defense, however, may be a defense to the underlying felony, which would thereby defeat the felony murder charge."); *Dykes v. State*, 571 A.2d 1251, 1254 (1990) ("Homicide committed in perfect self-defense is either justifiable or excusable. When the defense is established, the killer is not culpable."); *Faulkner v. State*, 458 A.2d 81, 82 (1983), *aff'd*, 483 A.2d 759 (1984); *State v. Bush*, 297 S.E.2d 563, 568 (1982) ("Perfect self-defense excuses a killing altogether."); *Com. v. Fox*, 73 Mass. 585, 585 (1856). "Justifiable self-defense is where a person is feloniously assaulted, being without fault himself, and necessarily kills his assailant to save himself from death or great bodily harm, or from other felony attempted by force or surprise. Excusable self-defense is where a person becomes engaged in a sudden affray or combat, and in the course of the affray or combat, necessarily, or under reasonably apparent necessity, kills his adversary to save himself from death or great bodily harm after retreating as far as he can with safety." *Whitehead v. State*, 262 A.2d 316, 319 (1970).
 121. Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 813 (2004).

122. *See* *People v. Brigham*, 216 C.A.3d 1039, 1054 (1989) (“If the principal’s criminal act charged to the aider and abettor is a reasonably foreseeable consequence of *any* criminal act of that principal, knowingly aided and abetted, the aider and abettor of such criminal conduct is derivatively liable for the act charged.”).
123. MODEL PENAL CODE § 2.02 (2017). In criminal law, intentional crimes account for conduct at is done purposely and knowingly. *See* *State v. Pierce*, 651 P.2d 62, 66 (Mon. 1982) (“Under the new Code, the concepts of ‘knowingly’ and ‘purposely,’ replace the old term ‘intentionally.’”).
124. “Terminal sedation is offered to dying patients who are suffering greatly and for whom conventional treatments are inadequate to relieve their suffering. With terminal sedation, patients are sedated [...] so that they are no longer aware of their suffering.” David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia*, 24 HASTINGS CONST. L. QUARTERLY 947, 968 (1997). *See* *Washington v. Glucksberg*, 521 U.S. 702, 780 (1997).
125. Kon, *supra* note 108, at 41; *see also* Wolf, *supra* note 108, at 113 (“A comprehensive review of the research literature [...] demonstrated [...] efficacy rates ranging from 71% to 92%.”); Stephanie Graboyes-Russo, *Too Costly to Live: The Moral Hazards of a Decision in Washington v. Glucksberg and Vacco v. Quill*, 51 U. MIAMI L. REV. 907, 934 (1997).
126. Kathryn Tucker, *The Death with Dignity Movement: Protecting Rights and Expanding Options After Glucksberg and Quill*, 82 MINN. L. REV. 923, 938 nn. 15 & 17 (1998).
127. Kon, *supra* note 108, at 41.
128. *See id.*
129. *Id.* at 41-42.
130. *See* *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997); *Vacco v. Quill*, 521 U.S. 793, 808 (1997).
131. *See* *Glucksberg*, 521 U.S. at 780.
132. *City of Cleburne, Tex. v. Cleburne Living Ctr.* 473 U.S. 432, 439 (1985).
133. *Vacco*, 521 U.S. at 808 n.11.
134. *See, e.g.,* *State v. Montoya*, 61 P.3d 793, 799 (N.M. 2002) (“Thus, even if the victim is at ‘death’s door,’ a defendant is liable for the victim’s death if his act hastens the victim’s death.”); *Oxendine v. State*, 528 A.2d 870, 872 -73 (1987) (explaining that one causes another’s death when his acts hasten or accelerate that death); *Adcock v. Com. of Kentucky*, 702 S.W.2d 440, 444 (Ken. 1986) (“If one unlawfully wounds another, and thereby hastens or accelerates his death by reason of some disease with which he is afflicted, the wrongdoer is guilty of the crime”); *Nelson v. State*, 198 S.E. 305, 309 (Ga. 1938) (“So too, where one inflicts upon another a wound, not mortal, but which through other natural causes, operate to cause death, such as blood poisoning resulting from a cut, the person so inflicting the wound will be accountable for his death.”).
135. *Nelson*, 198 S.E. at 309.
136. *See, e.g.,* *Russey v. Norris*, 2 Fed. Appx. 648 (8th Cir. 2001); *Jefferson v. State*, 276 S.W.3d 214,
137. (Ark. 2008) (“One whose wrongdoing is a concurrent proximate cause of an injury is criminal liable therefore the same as if his wrongdoing were the sole proximate cause of the harm done.”); *State v. Meekins*, 105 P.3d 420, 425 (Wash. App. 2005), *State v. Montoya*, 61 P.2d 763 (N.M. 2002).
138. *Montoya*, 61 P.3d at 799.
139. *See id.*; *State v. Torres*, No. 34-473, 2017 WL 626670, at *4 (N.M. App. 2017).
140. *See Torres*, 2017 WL 626670, at *4.
141. *Washington v. Glucksberg*, 521 U.S. 702, 736 (1997).
142. *Romer v. Evans*, 517 U.S. 620, 635 (1996).
143. *See Vacco v. Quill*, 521 U.S. 793, 808-09 (1997); *Glucksberg*, 521 U.S. at 785.
144. *See* Orly Hazony, *Increasing the Supply of Cadaver Organs for Transplantation: Recognizing that the Real Problem is Psychological Not Legal*, 3 HEALTH MATRIX 219,

- 240 (1993); Christy M. Watkins, *A Deadly Dilemma: The Failure of Nations' Organ Procurement Systems and Potential Reform Alternatives*, 5 CHI.-KENT J. INT'L & COMP. L. 1, 1 (2005) ("Another long-standing myth is that the medical profession may terminate an organ donor's life early or not try as hard to save the donor's life so that doctors may harvest the donor's organs.").
145. Sahil Godiwala, *Killing the Scapegoat: How the Poor are Manipulated in the Right to Die Debate*, 9 GEO. J. ON POVERTY L. & POL'Y 453, 462 (2002).
 146. *Id.*
 147. *Id.*
 148. M. Battin et. al., *Legal Physician-Assisted Dying in Oregon and the Netherlands: Evidence Concerning the Impact on Patients in "Vulnerable" Groups*, 10 J. MED. ETHICS 591-97 (2007).
 149. Kathryn L. Tucker, *Building Bridges Between the Civil Rights Movements of People with Disabilities and Those with Terminal Illness*, 78 U. PITT. L. REV. 329, 344 (2017); see also Battin et. al., *supra* note 147, at 591-97; DEP'T FOR HUMAN RES. OR. HEALTH DIV. CENTER FOR DISEASE PREVENTION AND EPIDEMIOLOGY, OREGON'S DEATH WITH DIGNITY ACT: THE FIRST YEAR'S EXPERIENCE 7 (1999) [hereinafter DIGNITY ACT].
 150. *Vacco v. Quill*, 521 U.S. 793, 808 (1997).
 151. See DIGNITY ACT, *supra* note 148 ("Patients who chose physician-assisted suicide were not disproportionately poor (as measured by Medicaid status), less educated, lacking in insurance coverage, or lacking in access to hospice care.").
 152. In some cases, a physician may believe that she is being asked to end a suffering patient's life by administering additional pain medication when pain is uncontrollable; but, due to criminal liability, there is lack of clarity in communication between the physician and patient regarding life-ending palliation. Having life-ending measures as a viable treatment option removes the chances of misunderstanding between the parties. See *State v. Naramore*, 965 P.2d 211, 213 (Kan. App. 1998).
 153. *Washington v. Glucksberg*, 521 U.S. 702, 738 (1997).
 154. *Id.*
 155. *Id.* at 739.
 156. See *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014).
 157. See *id.*; see also MINN. STAT. § 609.215 (1998).
 158. MINN. STAT. § 609.215 (1998).
 159. Model Penal Code § 210.3 (AM. LAW INST. 1985) ("Criminal homicide constitutes manslaughter when: (a) it is committed recklessly; or (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."). See Sean Sweeney, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RES. L. REV. 941, 953 (2017).
 160. See, e.g., *People v. Minor*, 111 A.D. 198 (N.Y. 2013) (finding that an assisted suicide affirmative defense warranted prosecution for the manslaughter crime of assisted suicide); *State v. Goulding*, 799 N.W.2d 412 (S.D. 2011) (holding that the defendant, in fatally shooting victim at the victim's request, committed murder, not assisted suicide); *Williams v. State*, 53 So. 3d 734, 746 (Miss. 2010); *State v. Forrest*, 362 S.E.2d 252, 256 (N.C. 1987) (holding that where a defendant kills a loved one in order to comply with the deceased's wishes, he acts with malice sufficient to support murder liability); *In re Joseph G.*, 667 P.2d 1176, 1180 (Cal. 1983).
 161. *In re Joseph G.*, 667 P.2d at 1180.
 162. *Id.*
 163. *Washington v. Glucksberg*, 521 U.S. 702, 791 (1997).





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trust in the legal profession. DiCosmo suggests that, more than just causing unethical conduct, participation in a racist ideology can blind attorneys to the best advice they should be giving their clients. That is, because these lawyers believe the myths and falsehoods of their own racism, they are incapable of effective advocacy. Her article explores different manifestations of racist lawyering and how, in these cases, the lawyer's racism harmed his or her client's cases.

Secondly, by making the case that racist lawyering should result in a finding of incompetence, DiCosmo provides a strategy that can spur meaningful change by excluding from practice some of the attorneys most responsible for the more overt racism in our court system. The article is an exemplar of activist legal scholarship, exploring new ideas and arguments and recommending a new way to achieve much-needed reform.

Life may be beautiful, but it doesn't end very prettily for most of us. Recent advances in medical technology have improved the lot of mankind in myriad ways, but (our constitutional right to refuse unwanted medical treatment notwithstanding) in many cases it has made an already unbearable demise even more protracted and excruciating. "Measuring Mercy: Protecting Patient Discretion in Terminal Care under the Fourteenth Amendment" by Kelsey Nicholas makes the constitutional case on behalf of terminally ill patients suffering incurable pain who seek physician-assisted suicide as a means of pain relief. New science has shown an essential premise of the Supreme Court's previous rulings upholding state bans on euthanasia to be false. These cases were premised on the belief that, with the aid of certain drugs, all forms of pain can be managed and even eliminated. Medical research, Nicholas claims, has since shown that underlying belief to be false. For some suffering patients, the only sure form of pain relief is death. Thus, anti-euthanasia laws upheld in prior cases condemn unwilling, moribund patients to experience torments that can be both agonizing and dehumanizing. Nicholas argues that the constitutional right to privacy in personal decision-making, whose boundaries the Supreme Court recently expanded when it recognized a right to same-sex marriage, extends to those who seek the absence of pain in their final moments, and that, far from doing them harm, the doctors who bring them relief-through-death are honoring their wishes and providing much-needed care.

National Lawyers Guild Review

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