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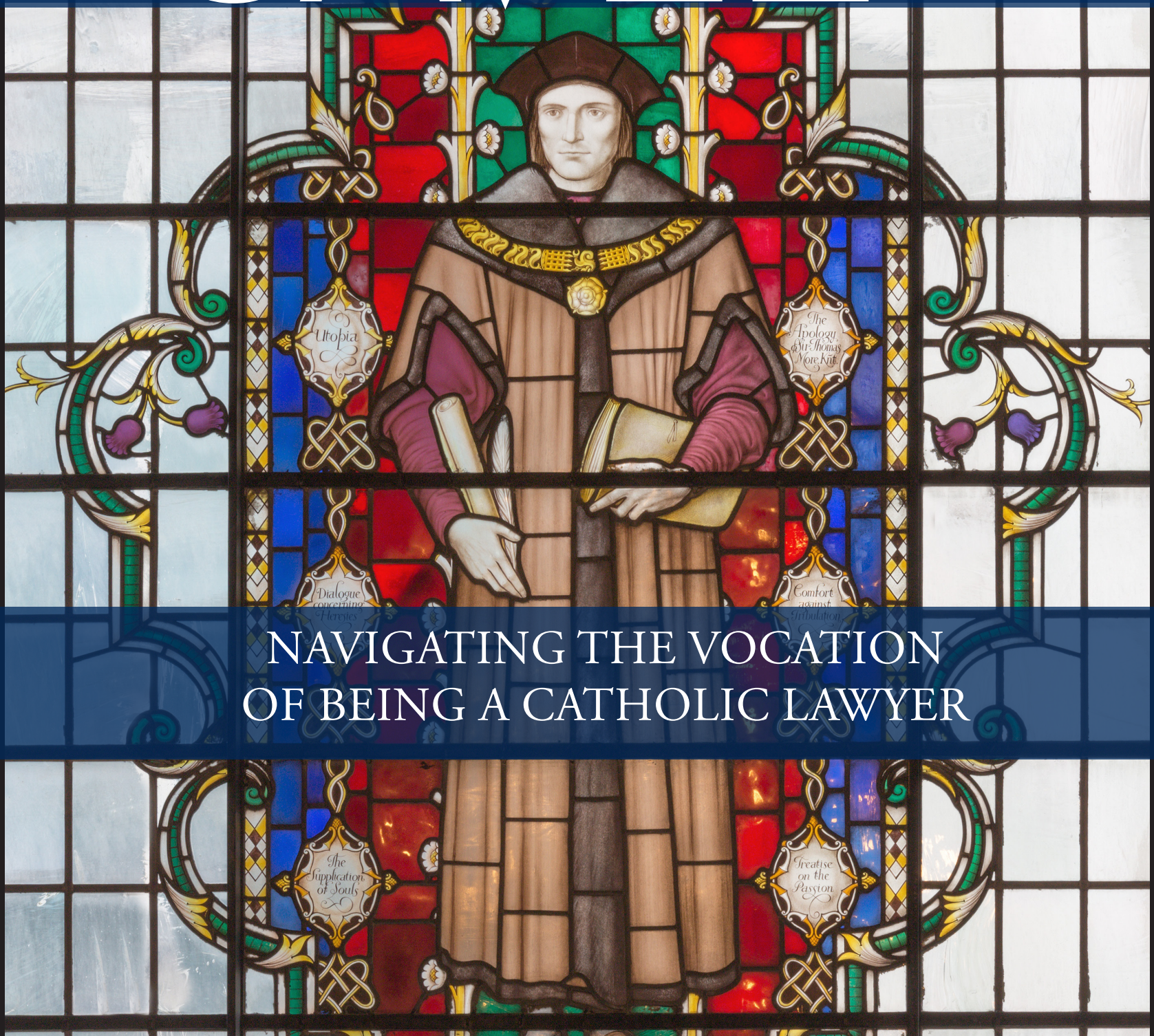

NAVIGATING THE VOCATION OF BEING A CATHOLIC LAWYER

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LETTER FROM THE EDITOR

Dear Reader:

This year's edition of *The Gavel* is special because it is the first edition of *The Gavel* which was completely done remotely. We have not had any in person activities or classes since March of 2020. We were forced to change the entire process for creating and publishing *The Gavel*, however, the Publications Committee was up to the challenge and successfully got the job done.

This year's edition of *The Gavel* features an article from our faculty supervisor, Professor Mark H. Bonner. As a little bit of background, Professor Bonner received his undergraduate degree from Georgetown University and his law degree from Washington College of Law. His legal career is quite impressive, serving as an Assistant U.S. Attorney in Los Angeles and the U.S. Virgin Islands as well as the Resident Legal Advisor in Moscow, Russia. He also served as a Senior Advisor and Chief of Staff to the Undersecretary of the Treasury for Enforcement at the U.S. Department of Treasury. Prior to becoming a professor at Ave Maria School of Law, he was a Senior Advisor in the United States Department of Homeland Security's Office of International Affairs, and he also taught as an adjunct professor of law at Georgetown University Law Center.

His article, *Aids to Navigation*, is an interesting piece and is true to the mission of our law school.

Additionally, this year's edition of *The Gavel* is packed with a wide variety of topics which showcase the different interests of our members. Our members wrote some extremely interesting pieces that I encourage you to take the time to read. Some of this year's articles include topics such as the structure of our presidential debates, Amazon's liability, sex trafficking, and issues stemming from Covid-19.

On behalf of the Moot Court Board, I sincerely hope you enjoy this year's edition of *The Gavel*.

Sincerely,

Olivia Victoria Lipnic
Editor-in-Chief of *The Gavel* and Vice President of Publications,
The Moot Court Board, Ave Maria School of Law

INSIDE

SPECIAL GUEST AUTHOR:

Professor Mark H. Bonner

AIDS TO NAVIGATION

By Professor Mark H. Bonner

Initially I thought I would write a brief piece about unintended implied assertions and whether they should be classified as hearsay. You will remember this issue from *Wright v. Doe d. Tatham* which you studied in Evidence.[1] But on further consideration I have decided instead to pass along some thoughts to guide us as we navigate the vocation of being a Catholic lawyer.

My old school tie is that of the Portsmouth Abbey School, a prep school run by a Benedictine monastery. The Prior of the monastery was an Englishman named Dom Aelred Graham (author of Zen Catholicism[2] and other works). Once a semester he would invite the sixth form boys (seniors) up to the monastery for tea and a chat. Our daily fare six days a week was classwork in the morning and mandatory sports in the afternoon – healthy mind in a healthy body. I remember these teas with Father Prior as being special, in that he made a deliberate effort to impart some wisdom to us. In that vein herewith are some thoughts and two lists to consider as you implement your policy of living and working.

1. SECULAR LAW EXPLICITLY REQUIRES MORAL ACTION.

Rule 1 of the Federal Rules of Civil Procedure provides that the Rules should be construed by the court and the parties to "secure the just determination of every action."

Rule 2 of the Federal Rules of Criminal Procedure provides that the Rules are to be interpreted "to provide for the just determination of every criminal proceeding and fairness in administration."

Rule 102 of the Federal Rules of Evidence provides that the Rules should be construed "to the end of ascertaining the truth and securing a just determination."

28 U.S.C. § 453 provides that every justice and judge of the Unites States will take an oath, swearing "to do equal right to the poor and to the rich."

The Oath of Admission to the Florida Bar[3] includes swearing: "I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land."

Attorneys seeking admission to practice before federal courts must swear to conduct themselves "uprightly."[4]

2. CLUES THAT SOMETHING IS WRONG.

In our Professional Responsibility studies, we lawyers learn of the canons of ethics and how to steer clear of malpractice and bar discipline. Practicing as a lawyer, however, is much more than just staying out of legal trouble; it's doing the right thing. Doing the right thing will ultimately make you happy[5]; doing wrong will sooner or later make you unhappy.

In order to make any sense out of these requirements to be just, true, fair, upright, *etc.*, a lawyer needs to have a workable concept of what the terms mean. The Natural Law helps, as does one's conscience (although it is entirely possible to self-pollute one's conscience into near-oblivion). The Church's analysis of this topic is also a reliable source to consider.

Lawyers do more than litigation. We do transactional work, give advice, and serve in Legislatures and on the Bench, and serve in powerful office in the Executive Branch. In assessing what are the right things to do, consider what the wrong things to do are. What are the wrong things to do? A handy guide is a list of the seven

deadly sins. If they'll send you to Hell, they are probably not good lawyering practice either. Here they are, then, the Seven Deadly Sins: Pride, Avarice, Envy, Wrath, Lust, Gluttony, and Sloth.[6]

These baddies[7] are powerful motivators of human action. They are regularly deployed in political advertising asking for your vote. For example: "vote for me and I'll give you something for free." What deadly sins are being marketed here? Avarice and Sloth. Add "I'll give you something that I've taken away from someone else," and Envy is added to the mix. Add yet again "and the person from whom I'm taking it to give to you doesn't deserve it anyway" and you've appealed to Envy and probably Wrath and Avarice to boot. Add finally "but you deserve it" and you've got Pride. Powerful temptations.

Lust is a special case and is marketed by advancing laws that permit a person to dispose of the consequences of indulging in this vice. Former U.S. Attorney General Bill Barr gave a noteworthy address on this topic – political and legal removal of consequences of bad action v. not doing the bad action in the first place – on October 11, 2019 to Notre Dame Law School:

> "In the past when societies are threatened by moral chaos, the overall social costs of licentiousness and irresponsible personal conduct becomes so high that society ultimately recoils and reevaluates the path that it is on. But today – in the face of all the increasing pathologies – instead of addressing the underlying cause, we have the State in the role of alleviator of bad consequences. We call on the State to mitigate the social costs of personal misconduct and irresponsibility.
>
> So the reaction to growing illegitimacy is not sexual responsibility, but abortion. The reaction to drug addiction is safe injection sites.
>
> The solution to the breakdown of the family is for the State to set itself up as the ersatz husband for single mothers and the ersatz father to their children. The call comes for more and more social programs to deal with the wreckage. While we think we are solving problems, we are underwriting them."[8]

3. MARKERS FOR THE RIGHT COURSE.

At the other end of the spectrum are the personal policy qualities of doing the right thing (a/k/a virtues): Faith, Hope, Charity, Prudence, Justice, Fortitude, Temperance; all fueled by gifts of the Holy Spirit of Wisdom, Understanding, Counsel, Knowledge, Fortitude (again), Piety, and Fear of the Lord.[9] As for this last one, since the reference to Hell, supra, probably gave you a little jolt, it just means rendering to God the things that are God's; which is healthy in that you're not God and He is, and it's well to remember that, powerful as we may become, we're not the last word on the matter.

An accurate world-view requires faith in God and a proper reaction to it. So, as you lead our community, be sure to accentuate the positive (virtue) and take a pass on the vice. Getting a vote (or a verdict) by playing on a person's worst nature is not the best way.

Keeping in mind the aforesaid vices and virtues should be a good aid to navigation for you. And, for a concise statement of the best advice ever, consider these two: "repent and believe in the gospel,"[10] and "do whatever He tells you"[11]; advice from our King and Queen, respectively. ○

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5 The fruits of the Holy Spirit are: charity, joy, peace, patience, kindness, goodness, generosity, gentleness, faithfulness, modesty, self-control, and chastity. CATECHISM OF THE CATHOLIC CHURCH § 1831 (Doubleday 2d ed., 1994). Even the last one was finally OK with St. Augustine.
6 *Id*. at § 1866.
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CAPITAL PUNISHMENT: A BLACK & WHITE ISSUE

By: Olivia Lipnic

From 1977 until 2018, approximately 1,490 prisoners were executed in the United States.[1] Of those 1,490 prisoners, 836 were white, and 640 were African American or Hispanic.[2] The statistics may not seem problematic on first glance, but when compared to the total U.S. population, the disproportionate representation is clear. White Americans make up roughly seventy-six percent of the U.S. population, while African Americans make up thirteen percent, and Hispanic Americans make up eighteen percent.[3] The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishment inflicted."[4] The unequal treatment and disproportionate representation of minority races in capital punishment cases could be labeled as cruel and unusual. There are multiple ways to put an end to the disproportionate representation of minority races in capital cases. Attempting to create more diverse juries, is one way to safeguard the rights of defendants while also making sure that justice is served.

In *Flowers*, the unequal treatment of minority races in capital punishment cases was brought to light. Curtis Flowers allegedly murdered four people in 1996, and was tried six separate times for the murders.[5] Flowers was convicted in the first three trials, but each of the convictions were eventually reversed.[6] At the third trial, the jury was made up of eleven white jurors and only one African American juror, the jury convicted him and sentenced him to death.[7] In all six trials, the same prosecutor represented the state of Mississippi.[8] Throughout the six trials, a total of forty-one out of forty-two African American prospective jurors were struck by the State.[9] The population of the town where the murders took place was roughly fifty-three percent African American, and forty-six percent white, however, the juries were still mostly made up of white jurors.[10] The case is primarily focused on the numerous *Batson* violations.[11] However, it can also be used to highlight the issues that may arise when using a jury made up primarily of one race.

The jury serves as a checks and balances between the defendant and the prosecution.[12] A specific race cannot be excluded from being on a jury.[13] Race-neutral policies should be applied throughout the jury selection process to a certain extent. A potential juror should not be struck solely on the basis of their race, however, the courts should also attempt to be more race conscious at the same time because of the benefits a diverse jury can provide. The quality of juror deliberations could be increased with more diversified juries.[14] People of different races likely do not have the same experiences as others, and that is a consideration that should be used when selecting jurors. When diversity is prioritized in jury selection, there is a variety of people from different races with different social experiences that allows for more interpretation of the facts which could enhance the quality of their deliberation.[15]

Every citizen in the United States has a protected right and is guaranteed equal protection of the law.[16] A criminal, no matter what the offense may be, should never be subjected to a more severe punishment solely based on their race. Making diversity a priority in jury selection is a potential solution to an ongoing issue of disproportionate representation of minority races in our criminal justice system. ○

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THE FREE EXERCISE OF RELIGION, COVID-19, AND THE SUPREME COURT OF THE UNITED STATES

By: Bernard Carollo

The age-old tension that arises when government action interferes with religious liberty has once again surfaced amidst the COVID-19 pandemic. Since COVID-19 first caught the public's eye, it has affected virtually every aspect of our lives; from court decisions to the way we practice our faith. As one federal judge put it:

> We are a relatively young nation. But our Constitution is the oldest in the world. We describe it as enduring—a value that must be protected not only when it is easy but when it is hard. And this is a hard and difficult time. A new virus sweeps the world, ravages our economy and threatens our health. Public officials, including the defendants in this case, make minute by minute decisions with the best of intentions and the goal of saving the health and lives of our citizens. But what of that enduring Constitution in times like these? Does it mean something different because society is desperate for a cure or prescription?[1]

These words simply, yet profoundly, summarize the issue faced by courts hearing claims that invoke the protection of the Constitution during a pandemic. As the fundamental right to religious exercise tends to conflict with the public's health and safety at a time like this, courts face the daunting task of weighing these competing interests every time a religious claimant brings a free-exercise claim.

The result—lower courts applying different standards of review under the Free Exercise Clause and ultimately arriving at seemingly contradictory conclusions.

Eventually, the Supreme Court chimed in to clear things up and issued three principal opinions on the Free Exercise Clause during the pandemic. This paper looks at the first and third of these cases, discussing the facts and backgrounds of both, but primarily focusing on the reasoning in each case.

In late May 2020, the Court first addressed the issue in *South Bay United Pentecostal Church v. Newsome*.[2] South Bay United concerned a plaintiff church's petition for emergency injunctive relief against California's stay-at-home order in time to celebrate the holy day of Pentecost, which it argued unfairly discriminated against religion and violated the First Amendment.[3] The church argued that the orders imposed an attendance cap on religious gatherings but allowed certain entities—including factories, offices, and restaurants—to fully reopen.[4] A divided Court declined to interfere with the orders and denied the church's petition.[5]

Chief Justice Roberts concluded the orders "appear to be consistent with the Free Exercise Clause of the First Amendment," and explained his reasoning in a concurring opinion.[6] Chief Justice Roberts opened by stating "[COVID-19] has killed thousands of people in California and more than 100,00 nationwide" and there is "no known cure, no effective treatment, and no vaccine."[7] He then recognized that California's stay-at-home order was "to address this extraordinary health emergency" and the church faced a particularly high bar.[8]

Relying on *Jacobson v. Massachusetts*, the Chief Justice Roberts reasoned that the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect" and "[w]hen those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad."[9,a] Under this standard, Chief Justice Roberts thought it had to be indisputably clear the state's order violated the Constitution, a standard the church failed to meet.[10] Furthermore, for Chief Justice Roberts, the restrictions on places of worship were comparable to those on secular gatherings, including concerts and theatrical performances, and the order exempts or treats more leniently only dissimilar activities in which people neither congregate in large groups nor remain in close proximity for extended periods.[11]

However, in November 2020, the Supreme Court ruled in favor of the religious claimant in *Roman Catholic Dioceses of Brooklyn v. Cuomo*.[12] In this case, the plaintiffs challenged New York Governor Andrew Cuomo's Executive Order 202.68 and its 10- and 25-person occupancy limit on religious gatherings.[13] The underlying restrictions pertain to three designated zones, each with different levels of regulation. In a red zone, religious gatherings were limited to an occupancy limit not more than 10 persons, while businesses categorized as "essential" may admit as many people as they wish.[14] The list of "essential" businesses includes places such as camp grounds, garages, as well as non-essential business, such as manufacturing plants and transportation facilities.[15] The Court noted "[t]he disparate treatment is even more striking in an orange zone."[16] In an orange zone, attendance at houses of worship is limited to 25 persons while even non-essential businesses may decide how many persons to admit.[17] The Court stated that these categorizations "lead to troubling results."[18] As evidence, the Court referenced testimony from a health department official that a large store in Brooklyn could literally have hundreds of people shopping there on any given day, while a nearby church or synagogue would be prohibited from allowing more than 10 to 25 people inside for a worship service.[19]

The Court's opinion made no mention of *Jacobson* which Chief Justice Roberts so heavily relied on in his concurrence mentioned above.[20] The Court also found Governor Cuomo's statements important in that factories and schools have contributed to the spread of COVID-19, but are still treated less harshly than churches and synagogues, "which have admirable safety records."[21] The Court's conclusion, the orders violated the Free Exercise Clause of the First Amendment.[22]

In conclusion, the two decisions offer an interesting perspective into the challenges faced by the judiciary in applying the law during a public health crisis. Even the Supreme Court has trouble balancing the conflicting interest between the rights guaranteed by the Constitution and the health and safety of the public at large.

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[a] Jacobson was a 1905 Supreme Court case rejecting a constitutional challenge to mandatory vaccination during a smallpox epidemic.

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[3] *Id.*

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[7] *Id.*

[8] *Id.* at 1614.

[9] Jacobson v. Massachusetts, 197 U.S. 11, 38, 25 (1905); *S. Bay United Pentecostal Church*, 140 S.Ct. at 1613.

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[11] *Id.*

[12] *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 69 (2020).

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[14] *Id.* at 66.

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

FULFILLED BY AMAZON: IS THE WORLD'S LARGEST RETAILER A SELLER?

By: Sarah Baulac

The obvious answer seems to be yes, of course, Amazon is a seller. In fact, it is the "world's largest retailer,"[1] grossing more than $152 billion in profit.[2] Yet, in 2020, the Fifth Circuit Court of Appeals certified the question to the Texas Supreme Court to determine whether Amazon is a seller pursuant to the Texas Products Liability Act.[3] This is not the first time the question of whether Amazon is a seller has been posed. So far, the question has arisen in the courts of eleven states, and judiciaries in California, Mississippi, Wisconsin, New York, and New Jersey have held that Amazon is a seller at least in limited instances.[4]

In *McMillan v. Amazon*, the Fifth Circuit Court of Appeals specifically asked the Texas Supreme Court to determine whether "[u]nder Texas products-liability law, is Amazon a "seller" of third-party products sold on Amazon's website when Amazon does not hold title to the product but controls the process of the transaction and delivery through Amazon's Fulfillment by Amazon program?"[5] The instant case arose when the McMillan family purchased a remote control from Amazon.com and the family's toddler swallowed the remote's battery.[6] The McMillans averred that the "battery's caustic fluid from its electric charge [] caused severe, permanent, and irreversible damage to the child's esophagus."[7] Since the Chinese listed seller did not answer the McMillans' complaint nor appear in the case, the McMillans were left to seek recourse for the toddler's injuries from Amazon.[8] The McMillans rely, in part, on the fact that the listed seller used the Fulfillment by Amazon program to impart liability to Amazon.[9]

The Fulfillment by Amazon program (hereinafter FBA) makes "products available to millions of customers on Amazon.com."[10] Essentially, the original seller simply packages the products according to Amazon's shipping guidelines and sends the products to an Amazon fulfillment center.[11] After Amazon receives the products, they make the products available on Amazon.com.[12] Once a consumer purchases the product, Amazon "pick[s], pack[s], and ship[s] the order on [the original seller's] behalf."[13] For these and other customer management services, Amazon charges fulfillment and inventory storage fees.[14]

Typically, Amazon would not be subject to the Texas Products Liability Act, except that manufacturer in this case failed to answer the complaint or otherwise appear.[15] Under the Texas Products Liability Act, a seller is defined as "a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof."[16] The United States District Court for the Southern District of Texas held that Amazon was in fact a seller in the instant case because although the "FBA program and other services offered do not automatically transform [Amazon] into a seller," the company is a seller because of "Amazon's deep involvement in the sales of [the] third-party vendor."[17] Specifically, the District Court referenced Amazon's role in storing the remote, providing the packaging, preparing the remote for delivery, and setting fees for itself when the remote sells.[18] The District Court also remarked that Amazon's product registration processes and role as "sole channel of communication between customers and vendors" made it "integrally involved in . . . the sales of third-party products such that it qualifies as a seller."[19] If the Texas Supreme Court follows the District Court's reasoning and determines that Amazon is a seller, then the corporation may ultimately be liable for toddler's injuries.[20]

Especially as "we now rely even more on online shopping,"[21] there will be far reaching implications for online retailers and consumers, alike, when the Texas Supreme Court makes its decision. The Texas Products Liability Act intends to give innocent consumers an avenue to address grievances when a product causes damage. Allowing Amazon to walk free would infringe upon the purpose of the statute and the objective of product liability in general—to protect people from dangerous products.[22] Holding in favor of the "world's largest retailer"[23] and determining that Amazon is not a seller would be a disservice to consumers relying on "virtual marketplaces for everything from luxuries to necessities."[24]

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NOT UP FOR DEBATE: THE SUBJECTIVE EXCLUSION OF MINOR PRESIDENTIAL CANDIDATES FROM THE BIGGEST NIGHT OF THE YEAR

By: Andrew Koehler

For many, a presidential election year is highly anticipated for the opportunities it brings to consider and reevaluate the country's direction under the chief executive, with the presidential debates the most prominent among them.[1] The Commission on Presidential Debates (CPD) was formed in 1987 when the Republican National Committee and the Democratic National Committee agreed to co-sponsor the debates,[2] and, by asserting their ability to self-regulate political biases, dismissed concerns that taking the debates out of independent hands would lead to increased partisanship.[3]

Although it has claimed political independence over the last thirty years, the CPD withstood claims of discrimination in their debate candidate selection process. For example, protestors accused the CPD of discriminatorily excluding Libertarian candidate Jo Jorgensen from the 2020 presidential debates; these protesters eventually gained national attention by causing the hashtag #LetHerSpeak to trend nationally on Twitter.[4] But on what legal grounds do these objections stand, if any at all? The CPD's three requirements for participation in the presidential debates are simply stated: (1) the candidate must be constitutionally eligible to be president, (2) the candidate must be on enough ballots to have a mathematical chance at securing an Electoral College victory, and (3) the candidate must garner the support of at least 15% of the electorate according to the average of five polls selected by the CPD.[5]

In a 2020 case, *Level the Playing Field v. FEC*, the plaintiffs appealed the administrative decisions of the Federal Elections Commission (FEC), which is tasked with enforcing the CPD's compliance with the regulations set forth in 11 C.F.R. § 110.13.[6] Specifically, as a nonprofit organization, the CPD may not utilize candidate selection criteria which "endorse, support, or oppose political candidates or political parties."[7] Instead, the CPD must use "'pre-established objective criteria' to select eligible candidates."[8] Addressing the plaintiffs' complaints that the CPD's 15% polling requirement was subjective, the D.C. Circuit Court pointed to three instances in which a minor party candidate received 15% of pre-election polling more than twenty-five years ago.[9] The court acknowledged that such a threshold may be difficult for an independent or minor party candidate, but that criteria "does not become 'subjective' merely because it is difficult to reach."[10]

Perhaps. But what if the criteria were impossible to meet? Although there is no legal requirement that the FEC make it easier for independent or minor parties to gain access to the debate stage,[11] surely it would be arbitrary or unreasonable for the FEC to classify impossible-to-meet criteria as objective. This was the reality of the CPD's 15% polling requirement in 2020 upon closer inspection. The polls used to average a candidate's support are entirely at the discretion of the CPD, and for the final presidential debate of the 2020 election cycle, the CPD chose to use the following five: "ABC/Washington Post; CNN; Fox News; NBC/Wall Street Journal; and NPR/PBS NewsHour/Marist."[12] However, the scripts utilized by four of the five polls chosen made no mention of an independent or minor party candidate whatsoever,[13] including any mention of Jorgensen, who met the first two CPD criteria.[14] Even the polls which permitted the respondent to answer "other" to the question of presidential choice did not record or otherwise indicate in the results who that "other" might be.[15] With only one of the five polls collecting data about independent or minor party preference, to net an average of 15% support, a candidate such as Jorgensen would have to amass 75% support in that one poll, a number that is not only wildly unrealistic for any party, it would also necessarily preclude at least one of the major parties from participation in the debate. Clearly, under these circumstances, the CPD's criteria are hardly objective—they are impossible to meet.

Ann Ravel, who called for review of the debate-access rules when she served as the chair of the FEC, raised several compelling points about the importance of including another option on the debate stage.[16] When asked in 2000 and in 2016, more than half of likely voters stated that they wished to see a third candidate at the debate.[17] Interestingly, this held true even when those polled were unlikely to vote for the third candidate.[18]

As a matter of policy consideration, including a third candidate in the debate provides several benefits. It would elevate the quality of the debate: with only two candidates, each candidate may strategize to sway viewers to his or her side by merely attacking the other candidate. With a third-party present, however, mere attacks are too risky as the viewer could be persuaded to the party on the sidelines. Therefore, each candidate would have to sway the viewer on the merits of his or her own argument. Additionally, without a third-party present, the two parties can avoid topics on which they agree, do not have a way to resolve, or of which they are unaware.[19] This was the case the last time a third party was included in the presidential debates—in 1992, "Ross Perot raised balancing the federal budget as a top issue.[20] Although Perot failed to carry a single state in the general election, voters responded favorably to his idea, and under the winner, Bill Clinton, the budget was balanced for the first time in 29 years."[21]

"When alternative candidates are denied the opportunity to promote forward-thinking policies at the most widely viewed political event of election season, the entire country suffers."[22] Indeed, these words seemed to foreshadow the first presidential debate of 2020 which was famously described as a "hot mess inside a dumpster fire inside a train wreck."[23] One cannot help but to wonder how it might have turned out differently had another candidate been included. ○

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HOW MUCH IS TOO MUCH WHEN USING SOCIAL MEDIA TO EVALUATE A PROSPECTIVE EMPLOYEE?

By: Tanner Borges

In today's world, social media is becoming an increasingly popular tool to screen potential job candidates. No longer is the process just a background check, but rather a more extensive look into the candidates' personal lives. The social media trend is being used on both ends of the hiring process, as it is also a helpful means of recruiting prospective candidates. But how much of a candidate's social media should be used to determine their suitability for a position? What happens when a dive into the applicant's online presence leads to disqualifications based on non-job-related qualifications?

With social media becoming so popular, there are some pros and cons to checking out an applicant online before meeting them. If the position applied for is a social media manager, checking that applicant's social media would be the best way to see their skills. Social media also allows companies to verify some of the candidate's information, such as their educational background, business experience, and other skills. An online account allows the company to get a more thorough idea of the applicant, instead of just a name on the resume. Harris Poll, at *CareerBuilder*'s request, surveyed human resource professionals and found that seventy percent of employers are using social media to help choose whether to hire a candidate or not.[1] The downside to using social media to vet an applicant is that it tempts the employer to look at more factors than would have been available before. The accuracy and reliability of such information found on social media is low, and yet companies will eliminate a candidate based on what is found. Each person checking the social media accounts is inevitably going to bring their own bias to rate what they are seeing online when considering an applicant.

Fact checking for business-related information may be a good use of social media, but companies do not end their search there. When using social media as part of the vetting process, it is important to remember the few federal laws that protect employees and potential employees against any job discrimination. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin.[2] The Age Discrimination in Employment Act of 1967 protects individuals who are forty years of age or older.[3] Title I and Title V of the Americans with Disabilities Act of 1990 prohibits discrimination against people with disabilities in private companies and state and local governments.[4] If an employer looks to social media finding one of the above mentioned protected characteristics and uses it improperly, the candidate has the right to take legal action. For instance, if an employer finds that an applicant is pregnant from her social media and eventually will need maternity leave, this cannot be used as a reason to eliminate her application.

Based on the Harris Poll survey from 2017, many reasons were given for deciding not to hire a candidate after finding their social media had nothing to do with potential work performance. Rather, thirty-nine percent of applicants were eliminated because of provocative or inappropriate photos.[5] Another thirty-eight percent of the applicants were not hired because of photos of themselves drinking.[6] Other factors that hurt the candidate were that twenty-two percent had an unprofessional screen name, and seventeen percent posted too frequently.[7] One-half of the employers were also scoping out an applicant's social media to see if it revealed a professional image.[8] More surprisingly, fifty-seven percent of the prospective employers were less inclined to contact an applicant for an interview if they could not find their social media.[9] The problem and potential illegality with using social media to such an extent is when biases are involved and used, either purposely or unconsciously.

The question becomes: is using social media to evaluate an applicant ethical? There is a dearth of rules regulating how much of social media should ethically be allowed in this vetting process. Some states, like California, have turned to enacting laws that prohibit employers from requesting passwords or usernames from an applicant.[10] Other

states, such as Maryland, Virginia, and Illinois, have also given protection to candidates and employees so they do not have to give social media account access.[11] New York has created a statute called the Lawful Off-Duty Conduct Law, which prohibits employers from taking an action against an employee for "political activities," "legal use of consumable products," and legal "recreational activities" done on their own time.[12] Though, these are narrowly interpreted by the courts and therefore not actually a valuable basis for protection.

The Society for Human Resource Management has a Code of Ethics requiring HR professionals to use the information in such a way that "will consider and protect the rights of individuals especially in the acquisition and dissemination of information while ensuring truthful communications and facilitating informed decision-making."[13] Unfortunately, due to the abundance of information on social media, companies will tend to allow other factors to sway their bias about a candidate. Since social media use in this process is still on the rise, there are not enough clear and specific laws to draw a line for where to stop evaluating an applicant's social media. Therefore, companies are free to hire, or not hire, a candidate based on what they find, as long as it does not violate current federal or state laws. Without a change, this type of vetting process will inevitably lead to ethical and legal questions of how much of a candidate's social media is too much in determining their job market value.

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A NOVEL LEGAL INDUSTRY: PRACTICAL AND PROFESSIONALISM IMPLICATIONS FOR LAWYERS IN THE WAKE OF COVID-19'S INDELIBLE IMPACT ON THE LEGAL PROFESSION.

By: Christopher Gero Prado

COVID-19 has impacted the legal profession in many ways. One of the more evident changes is that the legal profession now finds itself in an entanglement with video conferencing technologies.[1] Additionally, many lawyers have traded in their traditional commutes for a cozy walk across the house; while a hefty 42% of Americans are now working from home full-time,[2] a survey of law offices around the nation found that 48% are now operating entirely remotely.[3] Although some will argue without hesitation that these changes are for the better, several of the ABA's Model Rules of Professional Conduct should cause all legal professionals to pause and consider how it might affect their ethical obligations as an ongoing concern.[4]

VIDEOCONFERENCING'S IMPACT ON THE LEGAL PROFESSION

After COVID-19 prompted cancellation of the Supreme Court of the United States' March and April argument sessions, it held oral arguments remotely for the first time in history—albeit over telephone; upping the ante, the Michigan Supreme Court and the Supreme Court of Texas, among others, used videoconferencing platforms for oral arguments, allowing the public to get in on the action (and technological hiccups).[5] Closer to home, Florida firm Cole, Scott, & Kissane, P.A. has not only been relying on Zoom for pre-depositions, depositions, and mediations, but they were also the first firm in Florida to participate in a remote jury trial on the platform.[6] While the ability to employ videoconferencing technology may be exciting, it raises important considerations for the practicing attorney.

For example, Model Rule 1.1 provides in part that "[a] lawyer shall provide competent representation to a client."[7] With respect to maintaining competence, Comment 8 to Model Rule 1.1 states that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technologies[.] . . ."[8] What this means for legal professionals is simple; it would greatly behoove you to become familiar with (and comfortable using) videoconferencing technologies. Indeed, for more efficiently resolved matters like discovery or privilege issues, you may have no choice; in this context, Eleventh Circuit Judge Scott Bernstein said, to which Florida Bar President John Stewart agreed, that "[f]or [routine] five-minute matters, I don't think we're ever going back to live."[9] Not only will this save lawyers precious time, but it will save their clients precious money. An incidental benefit of such a transition is that it may ease the burden for lawyers seeking

to comply with Model Rule 1.5's prohibition against unreasonable fees;[10] though travel expenses are routinely (and permissibly) charged to clients,[11] it is doubtful many would consider these fees reasonable if lawyers no longer must handle such matters in person.

For lawyers no longer working in the traditional office environment, there are other concerns raised by the Model Rules.[12] For example, partners and supervisory lawyers working from home might find they need to implement new policies to ensure that they discharge their responsibility under Model Rule 5.1 to "ensure that all lawyers in the firm conform to the Rules of Professional Conduct."[13] Similarly, subordinate lawyers who "encounter [] matter[s] involving professional judgment as to ethical duty"[14] can no longer walk down the hall to ask for their supervisor's opinion as to the proper course of action they should take.[15] Holding a weekly meeting over Zoom would be a great way for lawyers to increase their competence with videoconference technologies while simultaneously checking in with their charges and/or supervisors.

Last but not least, Model Rule 1.6(c) provides that lawyers "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[16] Lawyers working from home will need to take steps to ensure that others within their home do not overhear and then later recommunicate confidential information; using a pair of headphones as the audio output for a proceeding conducted over Zoom would at least protect what is said by others parties. When possible, using a platform that allows the meeting host to make a participant's access conditional upon the entry of a password will ensure that only those who are supposed to be present can gain access to a remote meeting or proceeding.[17]

Until further guidance is disseminated by the ABA, state, and local bar associations, lawyers can employ common-sense to ensure they discharge their responsibilities under the Model Rules of Professional Conduct. Rest assured, experts will weigh in on the implications raised by the use of videoconferencing technologies, as it appears that this is one development in the legal profession brought on by COVID-19 that may be here to stay for good. O

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HOW THE CASH BAIL SYSTEM DISCRIMINATES AGAINST AFRICAN AMERICANS, AND WHY IT MUST BE REPLACED

By: James Kelleher

To understand why the cash bail system should be removed, it is important to have a general understanding of how it works and why it is in place. When a person is arrested for a crime in this country, the first place they appear is in front of a judge in the 24-hour court.[1] From there, they are either released on their own personal recognizance or have to post bail which requires paying a certain sum to be released.[2] If the defendant is not released on their own recognizance or does not/cannot pay the bail amount, then they remain in jail until their day in court.[3] The defendant has not been tried nor found guilty of any crime up to this point.[4] They remain in jail just because they are unable or unwilling to pay bail.[5]

The rationale behind the cash bail system dates all the way back to English common law.[6] In today's world, the purpose of it is to prevent the fleeing of defendants and to protect the community from crimes that a defendant could commit upon release.[7] A judge may release a defendant on their own recognizance, instead of setting bail, if they trust that the defendant will return for their next court date and not commit a crime during that period. In a vast majority of jurisdictions, judges have broad discretion in determining whether a defendant can be "trusted" and released on their own recognizance without having to post bail.[8] As a result of this discretion, there has been an unfortunately excessive amount of pretrial jail time due to judges requiring bail money and defendants not being able to afford

to pay the amount.[9]

Impoverished people of color have been greatly affected by the issues in the cash bail system.[10] African Americans and Latinos combined make up roughly thirty percent of this nation's population, yet account for over half of the prison population.[11] There are countless reasons that may explain why this is the case (e.g., police practices, educational reasons, zoning restrictions, etc.).[12] However, it is undeniable that the system of cash bail perpetuates the disparity by creating an unequal opportunity for poor people of color to leave the prison system.[13]

It is well known that there are extreme income disparities based on race. For example, research and polls show that the average African American family makes about $40,000 in annual income, compared to $71,000 in an average white American family.[14] The topic of racial income disparities is well-explored and has many different explanations for why it exists.[15] Regardless of why it exists, it cannot be ignored that African Americans are much less often able to afford bail than a white American.[16] Thus, impoverished African American defendants are punished and put in jail strictly for being poor.[17] They have not been tried or convicted of any crime up to this point, yet they are stripped of their liberties.[18]

Despite the innate racial issue with the bail system, there are avenues in which a defendant can receive aid when trying to post bail.[19] Bail bond companies exist to help a defendant by fronting bail money to the court.[20] Bail bond companies ask the defendant to pay only a percent of the bail to the company upfront—sometimes requiring as little as ten percent.[21] The bond companies may then require interest based on their payment to the court.[22] While this may be a helpful practice to some, it is often times ineffective at helping impoverished minority defendants since the companies consider things like credit and debt when approving their customers.[23] Further, even ten percent of a high bail can be too much for many poor defendants, especially if the bail bond company charges interest on the payment.[24]

In addition to the problems associated with impoverished minority defendants trying to afford pretrial bail to sustain their own liberty, minorities also tend to lose out on proper justice as well.[25] A study of a Kentucky jail found that defendants who are incarcerated for the duration of the pretrial period are "5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sent to prison" compared to people who were released during this period of time.[26] In addition, the sentences for defendants who remain incarcerated during pretrial are 2.78 times longer than someone who is not.[27]

Why the disparities one might ask? The answer is clear when one thinks practically about the challenges of being incarcerated. For example, a defendant who is locked up is not working and providing for themselves or their family.[28] As a result, financial issues begin to pile up, and the defendant is much less likely to be able to afford private counsel that would represent them well.[29] Further, even though an attorney may be appointed for a defendant who cannot afford a private lawyer, it is harder for that attorney to create a defense with more limited contact with their client.[30]

However, the most telling explanation for why defendants who are incarcerated pretrial are more likely to go to prison/jail and receive longer sentences is that they often enter in guilty pleas in an effort to minimize the amount of time they are behind bars.[31] They want to try to get back into the world as soon as possible for a multitude of understandable reasons such as work and family.[32]

Poor minority defendants are overwhelmingly affected by the issues in the bail bond system. These defendants are often locked up before trial because of their poor economic situation, not their guilt. The time spent in the prison system significantly affects the end result of these defendants' trials. Therefore, it is extremely important that the legislature and the judiciary focus on restoring minority defendants' constitutional liberties. ○

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EQUAL ACCESS ACT: WHY IT ONLY APPLIES TO SECONDARY SCHOOLS

By: Brittany Blocker

The *Equal Access Act* (hereinafter "the *Act*") in pertinent part says:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate

against, any students who wish to conduct a meeting within that limited open forum [whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time] on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[1]

In 1981, the Supreme Court held that a state regulation of speech should be content-neutral, or else it is subject to strict scrutiny.[2] The *Act* extended this decision to public secondary schools. But, because "Congress considered the difference in the maturity level of secondary students and university students before passing the [Act]," the Court of Appeals in *Board of Education of the Westside Community Schools v. Mergens* chose not to extend the *Act* beyond secondary schools.[3]

In 1990, the Supreme Court heard a case about a high school student club that was denied recognition.[4] There, the Court concluded that the high school was a limited public forum and received government funding; therefore the school could not discriminate.[5] The Court then went on to define some of the ambiguous language in the *Act*,[6] before noting that the *Act* is premised on the notion that a religious or political club is itself likely to be a "non-curriculum related student group."[7]

In 1993, the Supreme Court heard another case and evaluated the facts using the same language as the *Act*, without explicitly citing to it.[8] There, an outside church applied to use school premises to hold a video series for the community members.[9] Based on the *Act*, the Court found the school to be a limited public forum, and that the school in fact discriminated based on viewpoint because it would not allow the church to hold their meetings.[10]

In 2001, the Supreme Court heard another case on the subject that was about an outside Christian organization wanting to use a school cafeteria to hold after school religious worship for kids in the community ages 6-12.[11] Again, the Court found that the school was a limited public forum and discriminated based on viewpoint.[12]

Because the Supreme Court has decided a wide range of cases on this subject, the *Act* is constitutional and the Court choosing not to extend it to the college campus is valid. As there are different maturity levels between college students and school-age students, there should be some extra protections afforded to those on the younger end of the scale. One concern with each of these cases is that each of the schools argued that they had to discriminate based on viewpoint because they would be violating the Establishment Clause if they allowed it. But, in each of the cases cited here, the Court found that those claims were unfounded.[13] The Court has yet to extend the *Act* to adults, and there really is no need to. Universities that discriminate based on viewpoint are already subject to strict scrutiny, which is the highest burden.[14] Therefore, the *Act* is sufficient as written and is not needed to be extended. ○

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2 WIDMAR V. VINCENT, 454 U.S. 263, 270 (1981) (noting strict scrutiny places the burden on the government to demonstrate they have a compelling interest, and that the regulation or means chosen to achieve that interest is narrowly tailored).
3 BD. OF EDUC. OF WESTSIDE CMTY. SCH. V. MERGENS, 496 U.S. 226, 234 (1990).
4 *Id.*
5 *Id.* at 238.
6 *Id.* at 237 (seeking to define "non-curriculum related student group" and "meeting" in order to determine how to interpret the Act in the context of this case).
7 *Id.* at 238.
8 LAMB'S CHAPEL V. CTR. MORICHES UNION FREE SCH. DIST., 508 U.S., 384, 393 (1993).
9 *Id.*
10 *Id.* at 397.
11 GOOD NEWS CLUB V. MILFORD CENT. SCH., 533 U.S. 98, 103 (2001).
12 *Id.* at 120.
13 LAMB'S CHAPEL, 508 U.S. 384 at 395, see also GOOD NEWS CLUB, 553 U.S. 98 at….
14 WIDMAR, 454 U.S 263 at 270.

THE IMPLICATIONS OF *REHAIF*

By: Carl Sergeant

One of the hallmarks of criminal law throughout the world is the requirement of proving mens rea, or the mental state element of a particular crime.[1] Mens rea can take the form of malice aforethought, intent, knowledge, reckless disregard, and many other forms. Prior to June 21, 2019, in order to be convicted of the crime of possessing a firearm while being a felon or unauthorized alien under 18 U.S.C. § 922(g), the government only had to show that the defendant knew he was in possession of a firearm.[2] Thus, the mens rea requirement excluded knowledge that the defendant was in the category of individuals prohibited from possessing a firearm and that the individual himself was personally prohibited from possessing a firearm. All that the government was required to show was that the defendant belonged to a prohibited category of individuals and that he knowingly possessed a firearm.

In *Rehaif v. United States*,[3] the Supreme Court indicated that an additional knowledge requirement must be proven to result in a conviction under 18 U.S.C. § 922(g). The court stated that, in order to be consistent with Congress's intent, the government must prove that the defendant "violated the material elements of §922(g)."[4] This clearly applies to the knowledge that the defendant belonged to the relevant category of prohibited individuals, but left the follow up question unanswered: Does the defendant need to know that the category to whom he belongs is prohibited from possessing a firearm? This question can be summed up by asking whether the new knowledge requirement extends only to the knowledge of one's status in the relevant category for a § 922(g) possession offense, or whether it also requires proof that the defendant knew his status prohibited him from possessing a firearm.

Several circuits, including the Tenth Circuit, have not addressed this issue directly although they have applied *Rehaif*. In *United States v. Fischer*,[5] the Tenth Circuit applied the knowledge requirement to the status element but did not take the extra step to further require proof that the defendant knew that having such a status would result in a personal prohibition for possessing a firearm. Again, the Tenth Circuit in *United States v. Daniels*[6] required the government to prove that the defendant knew of his relevant status, but did not extend the knowledge requirement laid out in *Rehaif* to knowledge of a personal

prohibition from possessing firearms.

While the Tenth Circuit has not directly ruled that the government is required to prove that defendants knew their status bars them from possessing a firearm, several other circuits have directly stated that knowledge of such a prohibition is not required. In *United States v. Bowens*,[7] the Sixth Circuit stated that "the Government arguably must prove that defendants knew they were unlawful users of a controlled substance, but not, as defendants appear to argue, that they knew unlawful users of controlled substances were prohibited from possessing firearms under federal law."[8]

Again, the Seventh Circuit interpreted *Rehaif* consistently with the Sixth Circuit.[9] In *United States v. Triggs*, the court rejected the implication that the government must prove that the defendant knew he "was legally barred from possessing firearms."[10] The court rejected this interpretation of *Rehaif* because "it would impermissibly gloss the term 'knowingly' in the statutory scheme with a willfulness requirement."[11]

Thus, in order to be consistent with other circuits and to properly construe congressional intent, circuits like the Tenth Circuit that have not limited the knowledge requirement only to the relevant status should do so. O

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3 139 S. Ct. 2191, 2194 (2019).
4 *Id.* at 2196.
5 796 F. App'x 504, 507–08 (10th Cir. 2019).
6 804 F. App'x 944, 946 (10th Cir. 2020).
7 938 F.3d 790. 797 (6th Cir. 2019) cert. denied sub nom.
8 *Id.*
9 United States v. Triggs, No. 19-1704, WL 3566909, at *3 (7th Cir. July 1, 2020).
10 *Id.*
11 *Id.*

SLAVERY'S MAKEOVER: SEX TRAFFICKING AND THE POSSIBLE FUTURE OF NEW LAWS

By: Amanda Newkirk

Commercial sex work was first recognized as a form of sexual slavery in the early 1900s in the United States; however, legislative attention to prostitution can be traced back to the Middle Ages, when prostitution was considered a governable, taxable commercial activity.[1] But, the term "sex trafficking" was not utilized until the second wave of the women's movement in the 1980's when advocates began objecting the exploitation of women and girls in pornography and prostitution.[2] To give perspective as to how sex trafficking has grown over time, human sex trafficking is the second largest criminal industry in the world, reaping an estimated $32 billion dollars per year.[3] A majority of people would agree that human trafficking of any kind is immoral, especially human sex trafficking. But how can it be stopped? What laws are being passed? What are courts saying?

LAWS DOMESTICALLY

In the United States, the first ample federal law entirely dedicated to addressing the trafficking of persons was the Trafficking Victims Protection Act (TVPA) in 2000. This act specifies a three-pronged approach that comprises of prevention, protection, and prosecution.[4] Currently, the U.S. defines human trafficking as "recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age."[5] Throughout the years, as traffickers change to escape the law and the evolution of technology, legislators reauthorized and amended TVPA to keep up. But that Act cannot cover everything. To support, the U.S. also created two other Acts to help fight sex trafficking: the Justice for Victims of Trafficking Act of 2015 (JVTA); and the Preventing Sex Trafficking and Strengthening Families Act of 2014 (PSTSF).[6]

The JVTA provides amendments such as: changes in criminal liability of buyers involved in buying humans through commercial sex trafficking; the creation of domestic trafficking victims funds to sustain victim assistance programs; block grants for child trafficking deterrence programs; and much more.[6] The PSTSF's function is more directed to help reduce sex trafficking among youth involved in foster care.[6] Specifically, this act compels child welfare agencies to report instances of sex trafficking to law enforcement, screen and identify victims of trafficking, and arrange for appropriate resources, depending on the conditions the child faced while trafficked.[6]

Looking to the judiciary, in *Charleston v. Nevada*, the Plaintiffs sought to challenge Nevada's statutes that allow certain counties to legalize prostitution.[7],[1] The Court discussed its limited power according to Article III standing requirements regarding cases and controversies.[8] The Court found that the plaintiffs in this case did not sufficiently meet the requirements of having "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[9] The Court based their reasoning on the fact that all plaintiffs, except one, asserted they were trafficked in other states aside from Nevada, and that while Plaintiffs were unlawfully forced into prostitution, the trafficking the Plaintiffs endured could not be sufficiently traced to the Nevada laws allowing legalized prostitution.[9] Based on these conclusions, and because Plaintiffs lacked Article III standing, the Court dismissed the case and the Nevada laws legalizing prostitution in some counties remain.[10]

LAWS GLOBALLY

Turkey:

On February 1, 2016, Turkey announced the consideration of executing heavier sentences for the offense of human trafficking, categorizing sex trafficking as a terrorist act and as an organized crime, and modifying the law to incorporate a penalty of confiscation of assets used regarding trafficking acts.[11]

Israel:

On July 17, 2017, Israel's parliament passed a new law authorizing

a district court judge to decree to fully or partially restrict access to an internet site based on a determination that the restriction is necessary to prevent any of the following acts: "(1) [C]ontinued commission of an offense through use of the website; (2) exposure of a user in Israel to activity that would have constituted an offense if carried out in Israel, when the website has a connection to Israel; (3) furthering of an activity by a terrorist organization as defined in the Law on the Fight Against Terrorism."[11]

France:

On April 13, 2016, France initiated a new law that would treat all prostitutes as victims, help transition prostitutes out of prostitution, and penalize individuals who solicited prostitutes.[11]

Netherlands:

In 2015, Netherlands extended sentencing for those found conducting human trafficking, depending on how the trafficking was organized.[11]

Thailand:

In August 2015, Thailand created a new criminal court division to handle human trafficking cases with a goal to speed up the process of handling these cases, so the pimps have less of an opportunity to intimidate the victims, flee, or have the case thrown out for other reasons.[11]

WHAT PEOPLE CAN DO

While many of these laws are either too new to know if they help, have not been implemented, or need more, to help fight sex trafficking, there are a few things people can do. If financially able to, donate to groups that not only help victims after the fact, but whose missions involve preventing sex trafficking. Look for signs (and report them) of possible trafficking, such as but not limited to: appearing malnourished; showing signs of abuse; avoiding eye contact, social interaction, and authorities; lacking official identification or employment papers; and lacking personal possessions.[12] Laws can only go so far, so people in the community need to be aware of the signs and report them, because even though "slavery" remains illegal, it is still very prevalent – but now with a makeover. O

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7 Charleston v. Nevada, 423 F. Supp. 3d 1020, (D. Nev. 2019).

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A SHIFT IN THE RIGHT DIRECTION:

The Recent Change in Justices Has Turned The Supreme Court in Favor of Religious Freedoms and Against Discriminatory Covid-19 Directives

By: Jonathan R. Fitzmaurice

COVID-19 directives that provide more favorable treatment to secular activities than non-secular activities—specifically, religious houses of worship—blatantly discriminate on the basis of religion. In 2020, the Supreme Court faced a trio of cases which challenged COVID-19 directives on First Amendment grounds: *South Bay United Pentecostal Church v. Newsom, Calvary Chapel Dayton Valley v. Sisolak,* and *Roman Catholic Diocese of Brooklyn v. Cuomo.*[1]

The COVID-19 directives in *South Bay*, *Calvary Chapel*, and *Roman Catholic* fall squarely within the fourth category of laws set forth by Justice Kavanaugh—laws which "supply no criteria for governmental benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category" and "provide benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category."[2] The favored categories across various states include the organizations that California exempted from its stay at home order and fifty-person capacity limitation,[3] the organizations that Nevada exempted from its fifty-person occupancy restriction and were permitted to operate at fifty percent of their fire code,[4] and the organizations that New York exempted from the occupancy restriction that it imposed on other organizations within each respective "zone."[5] Indeed, neither the California, Nevada, nor New York directive placed religious organizations in the favored or exempt category. Religious organizations were denied exempt status despite engaging in comparable activities and undertaking the same public health and safety precautions as the secular organizations that were granted an exemption.[6]

By singling out religious organizations for "especially harsh treatment," these directives cannot be classified as neutral and of general applicability.[7] The Supreme Court has held that, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[8] And when religious organizations are in the disfavored category, the law is not to be held constitutional merely because the State alleged that "other secular organizations or individuals are also treated *unfavorably*."[9] Rather, the State

carries the burden of "articulat[ing] a sufficient justification for treating some secular organizations or individuals *more favorably* than religious organizations or individuals."[10] Acknowledging this difference "is subtle but absolutely critical," and if it is not "fully understood, then cases of this kind will be wrongly decided."[11] Indeed, this "subtle" difference proved "absolutely critical" in *South Bay* and *Calvary Chapel*, whereby the Supreme Court issued two 5-4 decisions denying the challengers' applications for injunctive relief and misapplying precedent giving great deference to state laws enacted as an emergency public health measure.[12] The Court applied a far stricter and less deferential review in *Roman Catholic*, which led to a 5-4 decision granting the challenger's application for temporary injunctive relief.[13]

As applied to the religion clauses of the First Amendment, the *South Bay* and *Calvary Chapel* Court's departure from strict scrutiny in favor of a standard giving highly deferential treatment and broad latitude to state officials marks a severe withdrawal from well-established constitutional principles. But even assuming the Court should be deferential to states during a pandemic, "COVID-19 is not a blank check for a State to discriminate against religious people, religious organizations, and religious services."[14] The Constitution halts a state's latitude in the midst of a pandemic when the state's latitude discriminates based on religion.[15] While states "undoubtedly ha[ve] a compelling interest in combating the spread of COVID-19 and protecting the health of [their] citizens,"[16] the arguments set forth in *South Bay*, *Calvary Chapel,* and *Roman Catholic* were wholly insufficient to establish a compelling justification for treating some secular organizations more favorably than religious houses of worship. The challengers' applications for injunctive relief should have been granted in each case, not just *Roman Catholic*.

The addition of Amy Coney Barrett and the Supreme Court's ruling in *Roman Catholic* marks a substantial turn in the right direction for religious freedoms. The decisions in *South Bay* and *Calvary Chapel* evidence the Court's willingness to "cut[ ] the Constitution loose during a pandemic" and "yield[] to a particular judicial impulse to stay out of the way in times of crisis."[17] Indeed, "[f]ree religious exercise is one of our most treasured and jealously guarded constitutional rights[,]"[18] and while "[t]he Constitution guarantees the free exercise of religion[,] [i]t says nothing about the freedom to play craps or blackjack, [or] to feed tokens into a slot machine."[19] Given the current state of affairs, the conflict between COVID-19 directives and religious freedoms has not been, nor will it become, an isolated one. "In far too many places, for far too long, our first freedom has fallen on deaf ears,"[20] and surely, even COVID-19, a public health emergency, does not absolve the Court of its "duty to defend the Constitution."[21]

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2 *Sisolak*, 140 S. Ct. at 2611–12 (Kavanaugh, J., dissenting).
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4 *See* SISOLAK, 140 S. Ct. at 2613.
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6 *Id.*
7 *Id.*
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10 *Id.* (emphasis in original).
11 *Id.*
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13 ROMAN CATH. DIOCESE OF BROOKLYN V. CUOMO, No. 20A87, 2020 WL 6948354, at 1 (Nov. 25, 2020). Notably, the *Cuomo* decision involved a different set of Supreme Court Justices, as it was decided after Justice Amy Coney Barrett replaced the now deceased Justice Ginsburg.
14 SISOLAK, 140 S. Ct. at 2614–15.
15 *Id.*; NEWSOM, 140 S. Ct. at 1613, 1615 (Kavanaugh, J., dissenting).
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18 *Id.* at 14 (Sotomayor, J., dissenting).
19 SISOLAK, 140 S. Ct. at 2603–04 (Alito, J., dissenting).
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DISENFRANCHISING FELONS: A VALID STATE INTEREST OR A POLL TAX?

By Helen Mena

The number of disenfranchised citizens due to felony convictions has decreased by roughly one million since 2014.[1] This is the first time since the 1960s that the upward trend has shown a decrease.[2] This is largely attributed to the new policies states have implemented to counteract the rapid growth of disenfranchisement in previous years, which has historically been disproportionately composed of minorities.[3] Still, one out of forty-four adults who would otherwise be eligible to vote are disenfranchised due to a prior felony conviction.[4] Despite resistance backed by both individuals and organizations such as the ACLU, courts consistently uphold the constitutionality of state disenfranchisement policies requiring felons to pay the legal financial obligations (LFOs) associated with their sentences such as victim restitution.[5] This interpretation of the Fourteenth Amendment has been challenged with vigor, as some argue that these requirements amount to a poll tax in violation of the Twenty-Fourth Amendment and the Equal Protection Clause.[6] Nonetheless, in light of the plain language of the Fourteenth Amendment[7] and the Supreme Court's holding in *Richardson v. Ramirez*[8], this interpretation is not projected to change in the near future.

The right to disenfranchise felons arises from the express language of Section 2 of the Fourteenth Amendment, which states that the right to vote in an election may not be denied unless by reason of "participation in . . . crime."[9] This right is well established by the Supreme Court in *Richardson v. Ramirez*, where the Court held that the Equal Protection Clause does not invalidate the constitutionality of the exclusion of convicted felons from voting.[10] In reaching this conclusion, the Court not only pointed to the language but also to the legislative history and historical interpretations of the Fourteenth Amendment to reiterate the validity of these practices.[11] The effect

of this holding was to reinforce precedent in which the Court found that criminal records are among "factors which a State may take into consideration in determining the qualifications of voters."[12]

It is clear, however, that if a state law is enacted with a motivation to discriminate or an intent to disenfranchise by race, the Court will strike the law down as unconstitutional as it did in *Hunter v. Underwood*.[13] In light of evidence of a racially motivated enactment and an implicit discriminatory impact, the Court in *Hunter* deemed Article VIII Section 182 of the Alabama Constitution unconstitutional.[14] It did so without disturbing *Richardson*, stating that Section 2 of the Fourteenth Amendment had not been enacted with the purpose of enabling laws such as Alabama's.[15]

But where state law operates without purposeful discrimination, courts are likely to continue to uphold its validity, as has been the case with LFOs.[16] A U.S. District Court in Arizona found that requiring felons who had completed their sentence to pay LFOs did not violate the Equal Protection Clause.[17] This court was not entertained by arguments advanced by the plaintiffs that the Arizona law "disproportionately impacts indigent people" and furthered racial disparities in the criminal justice system.[18] Following the Supreme Court's holding in *Richardson*, the court added that the state had a legitimate interest in requiring that felons pay their LFOs before restoring their right to vote.[19] The court continued that this requirement was properly based upon Arizona's interest in "punishing and deterring criminal activity" through fines and restitution.[20]

This reasoning is strikingly similar to *Madison v. Washington*.[21] Finding that the requirement of paying LFOs was applied to felons across the board, the Supreme Court of Washington held that although this may disproportionately affect felons based on their financial status, that effect alone was insufficient to support a finding that the requirement violates the Equal Protection Clause. The court endorsed Washington's valid interest in "ensuring that felons complete all the terms of their sentence."

In response to the plaintiffs' argument that the requirement to pay LFOs constituted a poll tax, the court in *Madison* also pointed out that the requirement was not imposed upon those who have a right to vote, but on those who do not. This distinction was made because plaintiffs relied on the Supreme Court's decision in *Harper v. Virginia Board of Elections*, which struck down a poll tax administered to all citizens of Virginia, including those with the constitutional right to vote. This reliance proved unsuccessful, as the court distinguished the two and focused on framing the question in the context of the state's interest rather than the effects of the law itself.

Efforts to reframe the question as explored above have failed as courts agree that states have legitimate interests in requiring the payment of LFOs. Moreover, the Constitution's express language supports the states' rights to restrict enfranchisement of felons as they see fit. In light of this, one inevitably arrives at the conclusion that requirements to pay LFOs prior to the restoration of voting rights are here to stay.

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13 Hunter v. Underwood, 471 U.S. 222 (1985).

14 *Id.* at 226-233.

15 *Id.* at 233.

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17 *Coronado*, 2008 U.S. Dist. LEXIS 93291 at 6-14.

18 *Id.* at 8-13.

19 *Id.* at 9-10.

20 *Id.* at 9.

21 *Madison*, 161 Wash. 2d at 103.

22 *Id.* at 103-104.

23 *Id.* at 108.

24 *Id.* at 105.

25 *Id.*

26 Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

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THE UNEQUAL TREATMENT OF THE FEDERAL ELECTION CAMPAIGN ACT AGAINST THIRD-PARTY POLITICAL CANDIDATES

By: Alexis Goodwin

As every tax-paying American can probably recall, tax forms have a selection that allows taxpayers to elect to put three dollars of their federal tax to the Presidential Election Campaign Fund.[1] However, do most tax-paying Americans that elect for this option know that the Fund is only available to certain political candidates that meet requirements set forth by the Federal Elections Commission?[2] Likely not. This article discusses the unequal treatment of the Federal Elections Commission (FEC) as it relates to the Federal Presidential Election Campaign Fund for third-party candidates, as well as other inequalities such candidates face due to the bipartisan nature of the FEC and the Commission on Presidential Debates (CPD).

Federal political elections are regulated by the Federal Election Campaign Act (FECA), as codified in Title 52 of the United States Code Sections 30101-30146.[3] Congress created the Federal Elections Commission to be an "independent regulatory agency that administers and enforces federal campaign finance law.[4] The FEC is led by six commissioners that are appointed by the President and confirmed by the Senate.[5] Additionally, there cannot be more than three commissioners from any one political party, "and at least four votes are required for any official Commission action."[6] Because of

the statutory makeup of the Commission, it is arguably bipartisan, rather than nonpartisan, and frequently has deadlocks when voting on vital administration and enforcement of policies due to the even number of members.[7]

Importantly, the FECA created a public funding option under the Internal Revenue Service Code, chapter 95, also known as the Presidential Election Campaign Fund Act (PECFA).[7] This Chapter regulates the Fund and provides taxpayers with an option to elect to give three dollars of their federal tax to the public fund to be used for presidential elections.[8] The prevalence of the inequality is apparent in the PECFA § 9003(b)-(c); subsection (b) provides the regulations for major parties,[10] while subsection (c) regulates minor parties.[11] For a minor party to receive any amount of funds pre-election, the party must have received at least five percent of the total popular vote in the preceding election.[12]

The inequality of the PECFA creates an impossible paradox for any third-party candidate. To get federal funding for an election campaign, the party must first receive five percent of the popular vote in the preceding election. However, to get at least five percent of the popular vote, the party must *be able* to fundraise and pay in the same manner and amount as major parties. Furthermore, to qualify for matching funds, "a candidate in the primary elections must first raise over $5,000 in each of 20 states (i.e., over $100,000), consisting of small contributions ($250 or less) from individuals."[13]

One of the primary ways political parties and candidates can increase their funding is by participating in national debates. However, in 1987, the two major political parties, Democrats and Republicans, created the Commission on Presidential Debates.[14] The CPD is a 501(c)(3) nonprofit "staging organization."[15] To be a staging organization, FEC regulations require the organization to be a nonprofit that does not "endorse, support, or oppose political candidates or political parties."[16] Furthermore, the debates must include two candidates,[17] and the debate must not be structured "to promote or advance one candidate over another."[18] Finally, to select candidates for participation in such debates, the "organization must use pre-established objective criteria to determine which candidates may participate in a debate." However, the candidate's political party cannot be the sole selection criteria.[19] Although there are no specific criteria set out by the governing statutes, the CPD requires that those chosen must be leading candidates.[20] The CPD defines a "leading candidate" as one that has such a "level of public support that genuinely qualifies the candidate to be leading."[21] The CPD also requires that the candidate be constitutionally eligible to be President, be "on a sufficient number of state ballots to have a mathematical chance of winning a majority vote in the Electoral College," and have "at least fifteen percent of the national electorate, as determined by five national public opinion polling organizations."[22] Although the CPD has set criteria that determine the polls used in their decision, most public opinion polls do not include third-party candidates.[23]

Some political parties, candidates, and American citizens have argued that the CPD—and the current political debate system as a whole—is bipartisan, outdated, and paradoxically unjust. As the former Governor of Indiana, Mitch Daniels, opined in the Washington Post, the current requirements guiding the CPD create yet another "catch-22" for third-party candidates; "[o]nly a potential winner will be allowed to debate, but only a debate participant has a chance to win."[24] Daniels further explains that if a third-party candidate can get the chance to get on the debate stage, they might perform very well, which may result in them soaring through the polls.[25]

The current two-party system has been regulated, enforced, and enacted by a bipartisan Congress, which in turn has created a bipartisan FEC, which has then trickled down into a bipartisan CPD. It should come as no surprise then that no third-party candidate has led a successful presidential campaign—they were never afforded the chance for one. Times have changed drastically since the enactment of the FECA in the early 1970s and the creation of the CPD in the late 1980s; it is time that the presidential campaign structures change with it. ○

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APPLYING JUSTICE KAVANAUGH'S *STARE DECISIS* TEST TO *ROE V. WADE*

By: Jack Garwood

In *Ramos v. Louisiana*, Justice Kavanaugh articulated a three-part test for determining whether "special justification" exists to overrule Supreme Court precedent.[1] *Roe v. Wade* is a controversial decision; many legal scholars—including Justice Ginsburg—criticized its reasoning.[2] Justice Kavanaugh's opinion drew speculation that he was laying the groundwork to overturn *Roe*, so this article shall apply his test to *Roe*.[3]

The first question in Justice Kavanaugh's test is whether *Roe* is "grievously or egregiously wrong?"[4] Relevant considerations include: the "quality of [*Roe's*] reasoning"; its "consistency and coherence with other decisions"; "changed law"; "changed facts"; and "workability."[5]

Roe avoided the question of when life begins, claiming at the time there was no scientific consensus.[6] Now, technological advances mean the age of viability is ever-decreasing (currently 22-24 weeks, down from 28 weeks when Roe was decided[7]); and scientists are beginning to agree that life begins at conception.[8] Additionally, *Roe* "asked [courts] . . . to weigh the State's interests in 'protecting the potentiality of human life' . . . against the woman's liberty interest," and "[t]here is no plausible sense in which anyone . . . could objectively assign weight to such imponderable values."[9] The lack of workability has been demonstrated via substantial changes in the law since *Roe*, moving from a trimester framework to an "undue burden" test often applied as a balancing test, and now to a "substantial obstacle" test[10] (though courts disagree whether this is the correct standard to apply[11]).

The answer to the first question is yes; *Roe*'s faulty reasoning created a right to something the Constitution is absolutely silent on,[12] resulting in havoc for the courts.

The next question is whether *Roe* caused "significant negative jurisprudential or real-world consequences."[13]

Planned Parenthood, the largest abortion provider in the U.S., was founded by Margaret Sanger, who believed in eugenics as a way of "improving the human race through selective breeding, often targeted at poor people, those with disabilities, immigrants and people of color."[14] In the U.S., around sixty-eight percent of expectant mothers choose to abort their children after receiving a Down Syndrome diagnosis.[15] Groups such as Save Down Syndrome have been formed because tragically, they feel as though they have to justify their existence in a world that seems proud to be eradicating Down Syndrome through abortion.[16] Additionally, the abortion rate among black women is 27.1 per 1000 women, almost triple the abortion rate among white women,[17] advancing one of Sanger's racist goals (preventing minorities from reproducing[18]). Finally, *Roe* has led to the deaths of millions of unborn children who deserved a chance at life; in 2017, the number of abortions in the U.S. was estimated to be 862,000.[19]

Roe has caused significant negative real-world consequences: it has led to the deaths of millions of unborn children in the U.S., and has legitimized eugenicist thinking by providing for a constitutional right to a procedure that advances eugenicist goals.

The third question is whether overturning *Roe* would "unduly upset reliance interests?"[20]

Overturning *Roe* would not end or criminalize abortion in all fifty states.[21] Abortion would remain legal in twenty-one states (plus five states run by Democrats where state law is silent on abortion), and would likely become illegal or restricted in twenty-four states.[22] The issue of abortion would be returned to the laboratories of democracy that are the states.[23] Women primarily in the South and Midwest would likely have to travel some distance to access legal abortion.[24]

In conclusion, reliance interests would not be unduly upset. Therefore, when applied to *Roe*, all three prongs in Justice Kavanaugh's test have been met, and the Supreme Court would be justified in overturning *Roe*. ○

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STATUTE OF LIMITATIONS FOR A CHILD'S MEDICAL MALPRACTICE SUIT

By: Madeleine Karas

Imagine the horror of sending your child into surgery with a professional medical practioner only to later find out that there were complications during surgery that have now left your child in a worse condition. Now imagine something even more horrific – you attempt to bring a lawsuit against the practioner and/or their practice only to discover you are not able to do so because the injuries fall outside the statute of limitations period.

It is common to find state statutes difficult to interpret, especially when it comes to determining the statute of limitations period for a medical malpractice suit. Undoubtedly, this comes from the confusing language in the Florida Statute. My goal in this article is to help parents, children, and even doctors understand the time frame in hopes of avoiding the situation all together.

In particular, Fla. Stat. § 95.11 (4)(b) states the following:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued, except that this 4-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday.[1]

The statute further provides that:

> An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care.[2] The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care.[3] In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred, except that this 7-year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday.[4] This paragraph shall not apply to actions for which ss. 766.301-766.316 provide the exclusive remedy.[5]

In addition, the Florida Supreme Court has held that the two-year statute of limitations only begins to run when a plaintiff has "knowledge of the injury," which means "not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice."[6]

In contrast, the statute of repose must also be considered. The Statute of Repose essentially states that regardless of the date when injury is discovered, a claim cannot be brought more than four years after the incident. However, this four-year period shall not bar an action brought on behalf of a minor child on or before the child's eighth birthday.[7]

In conclusion, balancing the Statute of Limitations with the Statute of Repose can be tricky. Regardless, both must be considered prior to bringing a claim against a practitioner and/or their practice in order to avoid the headache and heartache of finding out that a lawsuit will not solve a child's medical issue(s). ○

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TOO LITTLE TO TRAFFIC

By: Connor Martin

The offense of *drug trafficking* in regard to heroin/opioids in the State of Florida sets the required quantity of illegal narcotics too low to justify the harshness of the penalties that accompany a conviction for the offense. Further, trafficking in narcotics is one of the very few non-violent offenses that can result in a sentence of life imprisonment without the possibility of parole.

The United States of America and many of its citizens have fallen victim to the opioid epidemic during the past decade. While the issue(s) of over prescribing and illicit abuse began in the 1990s with the medical community becoming increasingly more willing to prescribe powerful opioids, the cumulative effect has begun to show years later. In 2017, more than 47,000 Americans died as a result of an opioid overdose, including prescription opioids, heroin, and illicitly manufactured fentanyl, a powerful synthetic opioid. Such statistic and the inherently deadly nature of prescription opioids may be part of the reason for setting the bar significantly

lower for the offense of traffic in heroin than other narcotics. Florida Statue § 893.135 provides the penalties and quantity requirements to constitute the offense of trafficking in narcotics. While the threshold for trafficking in cannabis is understandably considerably higher than more dangerous narcotics such as heroin, cocaine, and methamphetamine, the disparity between heroin/methamphetamine and cocaine is uncanny. In order to constitute the offense of trafficking in narcotics, the State must prove that the offender possessed twenty-eight grams or more of cocaine, while the quantity for heroin and methamphetamine is only four grams.[1]

What is arguably even more of a discrepancy, as applied, is that when assessing the weight of the narcotics the State is permitted to use the weight of total composition of the narcotics and their mixtures. In terms of cocaine this means the cocaine itself and the, often times legal, additives used to increase the quantity of the cocaine. Though in terms of opioids such can be done by weighing prescription pills.[2] This becomes considerably more problematic when considering that a single pill, with a very small fraction of that pill containing actual opioids, can weigh more than a third of a gram, meaning that roughly twelve pills can constitute a trafficking in heroin charge. A conviction for trafficking in just four grams of heroin/opioids results in a minimum mandatory sentence of fifteen years imprisonment in the Department of Corrections.[3]

The low threshold that exists to constitute trafficking in heroin serves to increase an already overburdened judicial and penal system. This is particularly problematic in terms of the length of sentences offenders receive from a conviction for trafficking. As previously touched upon, the offense of trafficking is one of the only non-violent crimes that can result in a sentence of life imprisonment without the possibility of parole.

A proposed solution to the shortcomings of Florida Statute § 893.135 is two-fold. The first would be to group all narcotics, aside from cannabis, in the same category and unify the quantity required to constitute the offense. The second would be to increase the low threshold quantity of narcotics that constitutes the offense, or at the very least require the State to prove that the actual amount of the prohibited substance met the threshold amount, not including its additives. While it is doubtful that increasing the quantity required to constitute the offense of trafficking is at the top of any legislative agenda, the tertiary effects of the low quantity certainly should be. Such effects include, but are not limited to, an over burdening of the judicial system, an increase in addicts that become part of the legal system when both they and the general population would be better served by having them enter treatment programs, and an increase in tax payer monies being spent to house, feed, and care for those sentenced under the trafficking statute for absurdly long periods of time. If our legislature would think beyond the demonized view of narcotics and put more consideration into better serving their consistency, they would see that four grams is… too little to traffic.

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THE MINISTERIAL EXCEPTION IS A SHIELD AND SWORD IN DISMISSING VALID CLAIMS BY TITLE VII DISCRIMINATED PLAINTIFFS

By: Victoria Martinez

INTRODUCTION

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[1] This is rooted firmly in the principle that the government is not to interfere with how religious entities select their religious officials and the reasons for terminating religious officials.

The ministerial exception has become both a sword and a shield for religious institutions to attack an individual's fundamental rights. Religious institutions are entitled to protection for their decision-making processes to ensure the government does not infringe upon their First Amendment right, however, the Court should recognize the same protection to employees whose rights are violated. This overly broad exception has created a split amongst the Circuit Courts which could potentially cause the Supreme Court to revisit the issue.

BACKGROUND

In *Hosana-Tabor*, the Supreme Court stated, "both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[2] The Religion Clauses of the First Amendment ensure that the states are not subjected to a national church and that the "Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."[3] While granting certiorari to the issue before the Justices, the Supreme Court expressly declined to decide whether the exception bars other typical suits including breach of contract or tortious conduct by religious employers.[4]

In *Serbian Eastern,* the Court reasoned that the First Amendment permits religious organizations to "establish their own rules and regulations for internal discipline and government, and to create tribunals" to resolve such disputes.[5] Civil courts are then bound to accept the decisions "of the highest judicatories of a religious organization of hierarchical polity in matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[6]

When the ministerial exception does not apply, "courts may decide disputes involving religious organizations so long as they, in accordance with the Religious Clauses, proceed without resolving any underlying controversies over religious doctrine."[7]

In *Hosanna-Tabor*, the Court was reluctant to adopt a "rigid formula" for deciding when an employee is considered to be a minister for purposes of the ministerial exception. However, the Court did point to significant factors in deciding that the plaintiff was a minister for purposes of the exception, such as: "the formal title given by the Church, the substance reflected in that title, her own use of that title,

and the important religious functions she performed for the Church."

POST *HOSANNA-TABOR*

After *Hosanna-Tabor*, the lower courts were left asking four principal questions in such cases: what qualified as a ministry, who qualified as a minister, what counted as impermissible interference by the government, and how is the ministerial exception applied procedurally? In deciding what organization is considered a ministry, the Supreme Court did not have to extensively analyze the issue in *Hosanna-Tabor* because there was no question that a Lutheran Church and Lutheran Elementary school were considered ministries for purposes of the exception. However, since then, the lower courts have approached the issue in two different ways. The Fourth Circuit concluded in *Hebrew Home* that a "religiously affiliated entity is a religious is a 'religious institution' for purposes of the ministerial exception whenever that entity's mission is marked by clear or obvious religious characteristics."

Additionally, the Second Circuit reasoned that in reviewing the employee/employer relationship and the religious characteristics of each, the Court "must consider the Establishment Clause which forbids 'an excessive government entanglement with religion.'" The Establishment Clause was intended to "afford protection to sponsorship, financial support, and active involvement of the sovereign in religious activity."

The Supreme Court revisited the ministerial exception in *Our Lady of Guadalupe* where the Court emphasized what matters over any factor or circumstance is what the employee actually does and what responsibilities they have within the religious organization. Through its ruling in *Our Lady*, the Supreme Court discarded the factors that lower courts relied on to assess and weigh whether or not individuals qualified under the exception, for an approach that allows any religious organization to state that their former employee is exempted from bringing suits against the organization because the employees served a role in the organization. "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."

The ministerial exception has been seen to cover almost all individuals affiliated with a religious organization or institution such as all religious teachers, music directors, and individuals who work at once-religiously affiliated hospitals. There are often situations that the rules provided by the Court in *Hosanna-Tabor* and *Our Lady* that do not best serve the interests desired to be protected by the First Amendment. Therefore, it is likely the Court should revisit the ministerial exception to also best protect the interests of those harmed by the protection of the exception. ○

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THE MURKY WATERS ARISING FROM THE PAYTON AND STEAGALD CIRCUIT COURT SPLIT

By: Michael Zivik

One of the biggest issues that the Fourth Amendment deals with is the warrant requirement. While the Supreme Court has defined the necessary requirements for obtaining an arrest warrant and a search warrant, they have failed to precisely articulate what level of proof is needed by law enforcement officers to enter into, what is believed, to be a third-party residence based off an outstanding arrest warrant.[1] As this article will explain, the Supreme Court did create a rule in *Payton v. New York*, which dealt with this issue, but left a lot to be interpreted by future courts. Specifically, this issue stems from the differing interpretations of the "reason to believe" standard offered by *Payton* and whether it equates to probable cause or requires a standard less than probable cause.

First, there are two bright-line rules which control the issue of what level of proof is necessary when officers are attempting to enforce an arrest warrant in a third-party residence. On one side, *Payton v. New York* held, "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[2] Although *Payton* set out this standard, it did not define the term "reason to believe." Under this line of cases, the probable cause determination for the arrest warrant carries with it the limited authority to enter a dwelling in which the suspect resides or where the police have reason to believe the suspect resides.[3] On the other hand, *Steagald v. United States* held, "police may not execute an arrest warrant in the home of a third person not named on the arrest warrant unless the police also have a search warrant for the third-person's home."[4] Under this line of cases, the Court does not believe an arrest warrant plus a reasonable belief are enough to enter the home of another person not named in the arrest warrant.

In determining whether entry pursuant to an arrest warrant is an unreasonable search, the principle provided in *Payton* has been interpreted by certain courts to require officers to have a reasonable belief that "the arrestee (1) lives in the residence, and (2) is within the residence at the time of entry."[5] The "reasonable belief" language

is at the center of this issue and has led to a circuit court split. For instance, the Third, Seventh, and Ninth Circuits have held that the Fourth Amendment requires an arrest warrant to arrest a suspect, and a search warrant to enter a third party's home to execute the arrest warrant.[6] In other words, these courts interpret "reason to believe" synonymously with probable cause, meaning an arrest warrant and a search warrant, both founded on separate probable cause determinations are required to enter the home of a third party.

An example can be found in the Third Circuit case of *U.S. v. Vasquez-Algarin*, where the court recognized the *Payton* interpretation of the Fourth Amendment doctrine, that law enforcement armed with only an arrest warrant, may not force entry into a home based on anything less than probable cause to believe that an arrestee resides at and is present within the residence.[7] The court explained that just as private citizens are provided protection from mistaken arrests by the requirement of officers needing probable cause, private homes must be protected from mistaken entry by, at a minimum, a probable cause determination.[8] The Third Circuit court makes it clear that the proper interpretation is equating probable cause to reasonable belief because of the strong privacy interests in one's own home.

Conversely, the First, Second, Fifth, Sixth, Eighth, Tenth, Eleventh and D.C. Circuits have held that officers must only have a "reasonable belief" that the suspect resides in the home to execute an arrest warrant for the suspect.[9] Meaning, officers only need an arrest warrant, founded on probable cause, and a reasonable belief (a level of determination less than probable cause), to conduct a search in a home. For example, in the Sixth Circuit case of *United States v. Pruitt*, the court interpreted the standard in *Payton* as something other than probable cause.[10] Specifically, the court said, "[h]ad the Court intended probable cause to be the standard for entering a residence, it would have either expressly stated so or used the same term for both situations. Instead, its use of different terms indicates that it intended different standard to apply."[11]

An argument in favor of having only one standard is that since officers have already obtained an arrest warrant founded on probable cause, requiring them to do so again would hinder their ability to effectively conduct their investigations. This is spelled out by the Court in *Payton* where it says:

[i]t is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law.[12]

Further, relying on this logic, the argument can be made that this method will save time for police officers since they will only need to make one trip to a judicial magistrate.

On the other hand, an argument in favor of having two standards is that merging them together, essentially, would be ignoring the necessary distinctions between a search warrant and an arrest warrant.[13]A search warrant may be issued for, among other things, "a person to be arrested or a person who is unlawfully restrained."[14]

The fact that a search warrant may be issued for "a person to be arrested" means that the requirements for an arrest warrant are not enough in some cases to effectuate a search.[15] Specifically, the Fourth Amendment was framed to prevent the ongoing routine of issuing general warrants.[16] By allowing a standard which requires less than probable cause to effectuate a search would be to ignore the textual requirements of the Fourth Amendment.

In conclusion, this issue draws a fine line between allowing police officers to properly conduct their investigations and the privacy protections one has in their own home. In my opinion, the efficiency interests for the police officers to conduct a timely investigation do not outweigh the privacy interests an individual has in their own home. Without a specific and straightforward plan set forth by the Supreme Court, each case will continue to be decided by a case-by-case analysis leaving courts with their own ideas on how to define reason to believe. ○

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On behalf of the entire Moot Court Board, we would like to express our great appreciation to Professor Bonner for his inspiring and unwavering support. Professor Bonner plays an instrumental role in the continuing successes of the Ave Maria Moot Court Board. His leadership and guidance in preparing our students and competitors to represent our school in our community and throughout the country is something we all truly value and appreciate. Professor Bonner's knowledge and real-world litigation experience serve as invaluable resources for our growth as law students and future attorneys. Our accomplishments as a Board can be credited to Professor Bonner's hard work and commitment, and for that, we thank you.

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