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Law firm partners are astonishingly mobile.1 According to one report, nearly half of the equity partners in the nation’s largest law firms are lateral transfers from other firms rather than home grown partners.2 Other reports paint a very similar picture.3 Lateral movement by lawyers is now so commonplace that law firms may be described as “but temporary resting places for their partners.”4

Where partners’ migrations between firms are voluntary, they may be inconsequential, interesting, or lamentable, but they are essentially mundane. But that is not the situation where partners’ migrations are forced, as in the case of law firm breakups. In fact, law firms are oddly fragile organizations. The departure of just a few key partners who control significant portable business can in some instances start a firm on a downward spiral toward failure. Although the seeds of those partners’ dissatisfaction may have been sown over a period of months or even years, their exodus may upend the firm in far less time. Consider, for example, the swift demise of LaBrum & Doak, LLP, a century-old insurance defense firm based in Philadelphia. A little more than a decade ago, the partners of LaBrum & Doak, LLP voted to dissolve when three rainmaking partners decided to move their practices to a competing firm.5 Similarly, the partners of the California litigation boutique Dickson, Carlson & Campillo voted to dissolve the firm after a major rainmaker, Debra Pole, and her right-hand man arranged to join Brobeck, Phleger & Harrison LLP, taking one of the Dickson

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1. Although this article typically refers to partners, the statements made and principles expressed here generally apply equally to shareholders in law firms structured as professional corporations and members in firms organized as limited liability companies (“LLCs”).
3. See, e.g., James W. Jones, Foreword, 43 TEX. TECH L. REV. 445, 446 (2011) (“Today, laterals make up a significant percentage of the partnership ranks of most firms, and in many firms the laterals even outnumber the ‘natives.’”).
firm’s largest clients with them. Litigation between the firms and the individual partners followed.

Even large and outwardly strong law firms fold with curious frequency. With large law firms, as with other types of organizations, outward appearances are sometimes deceiving. Large law firms may disband as a result of competitive pressures, destabilizing internal dynamics, unsatisfactory financial performance, or some combination of the three. This phenomenon first manifested itself in the 1980s—or at least that is when it became newsworthy. In early 1988, notoriously aggressive Finley Kumble Wagner Heine Underberg Manley Myerson & Casey, then one of the nation’s largest and most visible law firms, collapsed in spectacular fashion. At the time of its failure, Finley Kumble had 250 partners and more than 450 associates. More recent dissolutions have been no less remarkable. Prominent national law firm Brobeck, Phleger & Harrison LLP, which at one time had over 900 lawyers, dissolved in February 2003. One of Chicago’s largest law firms, Altheimer & Gray, dissolved suddenly in the summer of 2003. The respected international law firm, Coudert Brothers LLP, dissolved in August 2005. Coudert was founded in 1853 and, at its peak, was one of the largest law firms in the world. In 2008, venerable Heller Ehrmann LLP, which once counted over 650 lawyers, dissolved after its partners lost confidence in the firm’s leaders. In December 2008, Thelen LLP, another large law firm with offices on both coasts, closed its doors. New York’s Thacher Proffitt & Wood LLP, which survived the

7. The Dickson firm filed two lawsuits against Pole, the other former partner, William Fitzgerald and the Brobeck firm, and Pole and Fitzgerald filed cross-complaints against their former law firm and partners in the second action. Both sides alleged a variety of equitable, contract, and tort claims. Id. at 682-83.
8. The same is naturally true for other types of law firms, with intellectual property law boutiques offering an obvious example. See, e.g., Dan Slater, What Went Wrong at Defunct IP Boutique Morgan & Finnegan? IP LAW & BUS. (June 3, 2009), http://www.law.com/jsp/law/sfb/lawArticleFriendlySFB.jsp?id=1202431167045 (discussing the collapse of the highly-regarded IP firm Morgan & Finnegan).
10. KUMBLE & LAHART, supra note 9, at 13.
destruction of its offices on September 11, 2001, also dissolved in December 2008.\(^\text{17}\) In March 2009, the partners of Philadelphia’s 287-lawyer Wolf Block Schorr and Solis-Cohen LLP, once one of the city’s elite firms, voted to dissolve.\(^\text{18}\) In March 2011, Howrey LLP, once one of the nation’s largest law firms, and Miami-based Yoss LLP, the nation’s largest minority-owned law firm, both dissolved.\(^\text{19}\) There are numerous other examples of large and prestigious law firms failing—the collapses of Cleveland-based Arter & Hadden and Boston’s Hill & Barlow and Testa Hurwitz & Thibeault come quickly to mind. In plainly the strangest case yet, Dreier LLP dissolved within a few weeks of founding partner Marc Dreier’s arrest in Toronto in December 2008 in the last of an astonishing series of huge fraud schemes.\(^\text{20}\) Dreier’s bizarre case aside, this history suggests that large and mid-sized law firms will unfortunately continue to dissolve in the future.\(^\text{21}\)

Then, of course, there are small law firms that dissolve when the partners simply opt to go their separate ways. It is fairly common, for example, for firms that specialize in plaintiffs’ litigation to dissolve so that the partners can pursue their own practices and either keep all of the contingent fees they earn or share them with colleagues on terms that they control or prefer.

Regardless of the type of firm or reasons for dissolution, law firms that dissolve typically have unfinished client business, such as pending litigation and open transactional matters. Firms may have hundreds or even thousands of open client matters at the time of dissolution, including litigation matters that may take months or even years to complete. Departing partners who plan to continue practicing law often would like to take client matters with them to their new firms; indeed, their ability to do so may determine the quality of their new employment arrangements, or whether they have any meaningful professional opportunities at all. The law firms to which the partners of the dissolved firm are migrating, whether existing or created out of the diaspora, may be vitally

\(^{17}\) Id.


interested in acquiring the unfinished business of the former firm’s clients. As for clients caught in the dissolution mix, there will generally be a need for continued representation. To the extent clients can maintain continuity in their representations by leaving their matters with the partners who represented them at the dissolved law firm rather than retaining new lawyers, they are often wise to do so. In most instances they would probably prefer to do so. After all, transferring a matter to a new lawyer may squander case- or transaction-specific knowledge, may result in a loss of expertise more generally, and may increase the cost of the representation as new counsel must be paid to get up to speed on the matter.

If the only parties concerned about the financial aspects of partner migrations in the wake of law firm dissolutions were the moving partners themselves, their new law firms, and clients, associated issues would be few. But dissolved law firms have creditors, and firms that either voluntarily or involuntarily enter bankruptcy following dissolution create estates administered by bankruptcy trustees who are charged with maximizing the value of the estate. Especially in dissolutions of small law firms, even former partners may be adverse with respect to financial and client affairs. Thus, a tug-of-war often wages over the dissolved firm’s “unfinished business,” which consists of “all [client] matters in progress which have not been completed at the time the firm is dissolved.”22 Holding one end of the rope are the migrating partners and their new law firms; gripping the other end are the dissolved firm’s creditors or bankruptcy trustee or liquidation plan administrator, and perhaps other former partners. The stakes in these contests may be substantial. In 2011, for example, Covington & Burling LLP and a group of former Heller Ehrman LLP lawyers who relocated to Covington when Heller folded and agreed to pay nearly $5 million to settle an unfinished business claim brought by the Heller bankruptcy estate.23 In 2010, the law firm of Baker & McKenzie agreed to pay $6.65 million to compensate the bankruptcy estate of Coudert Brothers LLP for profits that Baker & McKenzie earned on unfinished business former Coudert partners brought to the firm after Coudert dissolved.24 Baker & McKenzie further agreed to forfeit most of its interest in an estimated $17 million in contingent fees for litigation that former Coudert partners were handling.25

The law firm “unfinished business doctrine,” as it has become known, essentially establishes that absent an agreement to the contrary, partners in a

25. Id.
dissolved law firm have a duty to account to the dissolved firm and their former partners for all fees generated from work in progress at the time of the firm’s dissolution in accordance with their percentage interests in the firm. Quite simply, pending matters are uncompleted transactions that require winding up after dissolution, and are therefore partnership assets subject to post-dissolution distribution. As a Wisconsin court explained, “all partners of the dissolved [law] firm are generally entitled to share in fees for pre-dissolution work in progress earned after dissolution, even if the client has exercised [its] right to discharge the attorney or attorneys who are sharing in the fees.”

The reason is that dissolution does not terminate the firm’s pre-existing contracts with its clients, such that partners who perform under such contracts do so as fiduciaries for the benefit of the dissolved partnership. The 1984 California Court of Appeal decision in Jewell v. Boxer epitomizes the unfinished business doctrine. Accordingly, the doctrine is commonly referred to as “the Jewel rule.” The unfinished business doctrine has been notably modified since Jewel in the many jurisdictions that have adopted the Revised Uniform Partnership Act to permit former partners to deduct overhead and reasonable compensation before remitting to the dissolved partnership any monies earned from completing unfinished business.

This allowance of compensation beyond any sums the former partner would receive for her partnership share is often described as “extra compensation.”

It is easy to understand why the unfinished business doctrine frustrates migrating partners and their new law firms. From their perspectives, the unfinished business doctrine enslaves them to the dissolved firm. Assuming for the sake of argument that the dissolved firm has any right to fees from unfinished business, which the former partners and their new firms energetically deny, that claim should be confined to recovery in quantum meruit. That is how, for example, in the absence of an agreement to the contrary, a firm is typically compensated in a contingent fee case where a lawyer voluntarily dissociates from the firm and continues to represent the client in the matter after departing.

Moreover, the doctrine is potentially disadvantageous to clients because in some cases it arguably discourages partners and their new firms from continuing the clients’ representations. Migrating partners are better advised to decline continuing representations and pursue only new matters because then they are working for themselves and their new firms.

These concerns, however, are counter-balanced by at least three factors. First, *Jewel* makes clear that the unfinished business doctrine is purely a default rule, meaning that partners may contract out of it. Such agreements are sometimes described as “*Jewel* waivers.” Granted, this is immaterial if the partners have not suitably planned for dissolution and thus have not contractually dispatched with the unfinished business doctrine. Second, migrating partners want to keep many of the clients with unfinished business because they are frequently the best sources of new matters, and those clients would be unlikely to furnish new business if the partner responsible for their existing matters abandoned them. In other words, it is often in the long-term best interests of the migrating partners and their new firms to take on the dissolved firm’s unfinished business. Third, as the dissolved partnership winds up its affairs, the interested parties may reasonably compromise any unfinished business claims, thereby loosening the cuffs on displaced partners if not removing them entirely. Nonetheless, it is true that there would be no need for negotiation if this doctrine did not exist in the first place.

The unfinished business doctrine remains controversial and its contours are in many cases imperfectly understood. Superficially, anyway, the unfinished business doctrine seems to abrade essential professional responsibility principles regarding clients’ right to counsel of their choice. Moreover, two new concerns have appeared: First, can a waiver of unfinished business rights in a partnership agreement or other agreement reached in anticipation of dissolution be unwound if the dissolved firm files for bankruptcy? Second, does a law firm that employs the former partner of a dissolved firm itself face liability related to any unfinished business that the lawyer brings to the firm? It is accordingly time to examine the unfinished business doctrine in practical fashion.

We begin our analysis of the unfinished business doctrine in Part II with a discussion of partnership dissolution, winding up, and termination principles. Part III examines key contours of the unfinished business doctrine, including (a) the *Jewell v. Boxer* decision; (b) expansion of the *Jewel* rule beyond the dissolution of partnerships to the dissolution of law firms structured as professional corporations and limited liability companies; (c) the application of the unfinished business doctrine to a law firm with a hybrid partnership-

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34. *Hillman On Lawyer Mobility*, supra note 4, § 4.6.4, at 4:82.
35. *Jewel*, 203 Cal. Rptr. at 19 (“But partners are free to include in a written partnership agreement provisions for completion of unfinished business that ensure a degree of exactness and certainty unattainable by rules of general application.”).
II. Key Aspects of Partnership Dissolution and Termination

Partnerships are voluntary associations. The Uniform Partnership Act of 1914 ("UPA"), long the basis for many states’ partnership laws, treats partnerships as aggregates of their members rather than as distinct entities. The UPA defines "dissolution" as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business." Under the UPA approach, a partnership dissolves any time a partner permanently leaves the firm, even if the firm outwardly appears to continue. Accordingly, law firms organized as partnerships in jurisdictions that have adopted the UPA may avoid this result by including in their partnership agreements (a) a provision setting the term of the partnership; or (b) an anti-dissolution provision differentiating withdrawal from dissolution and recognizing the latter only upon the vote of a specified number of partners. A partnership agreement may include both types of provisions. For example, a law firm partnership agreement might provide:

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39. UNIF. P’SHIP ACT § 29 (1914).
40. HILLMAN ON LAWYER MOBILITY, supra note 4, § 4.3.3, at 4:24.
41. In re Popkin & Stern, 340 F.3d 709, 714 (8th Cir. 2003) (applying Missouri law).
42. HILLMAN ON LAWYER MOBILITY, supra note 4, § 4.3.2.2, at 4:18. A provision in a partnership agreement specifying a term of partnership does not actually prevent a partner from withdrawing prematurely and thus causing the firm to dissolve. But such a premature dissolution is considered wrongful and the remaining partners may avoid winding up and continue the business uninterrupted. Id. at § 4.3.2.2, at 4:19.
43. Id. at § 4:3.2.3, at 4:19.
44. See, e.g., In re Popkin & Stern, 340 F.3d at 711 (quoting the law firm’s partnership agreement).
Term of Agreement. The Partnership shall continue from the effective date of this Agreement until terminated and liquidated in accordance with the provisions hereof. None of the following events shall cause a termination of this Agreement, or a dissolution, termination or liquidation of the partnership: the death, mental incapacity, bankruptcy, retirement, whether voluntary or involuntary, or permanent removal or withdrawal from the Partnership of any partner or partners, the dissolution of a corporate partner, or the addition to the Partnership of one or more additional partners.

* * *

Termination of Partnership. The Partnership may be dissolved and terminated at any time by the affirmative vote of 3/4 of all of the partners.45

The Revised Uniform Partnership Act (“RUPA”), which has now been adopted in most jurisdictions, differs from the UPA in various key respects.46 In terms of differences that are meaningful in the dissolution context, RUPA establishes that a partnership is an entity separate from its constituent partners.47 Like the UPA, RUPA grants partners the right to withdraw from their partnerships at any time.48 But unlike the UPA, a partner’s withdrawal does not necessarily cause the partnership’s dissolution under RUPA.49 RUPA distinguishes between dissolution and withdrawal through the use of the term “dissociation,” which denotes a partner’s withdrawal from a partnership, whether voluntary or involuntary.50

Under both the UPA and RUPA, a partnership’s dissolution does not halt its operations.51 Dissolution does not terminate the partnership.52 In the partnership

45. Confidentiality obligations prevent me from identifying the law firm from whose partnership agreement these provisions are taken.


47. ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT § 201 (2010-11 ed.) (“A partnership is an entity distinct from its partners.”).

48. Compare UNIF. P'SHIP ACT §§ 31(1)(b) & (2) (1914) (discussing dissolutions caused both permissibly and wrongfully), with HILLMAN ET AL., supra note 47, at § 602(a) (“A partner has the power to dissociate at any time, rightfully or wrongfully, by express will . . . .”).

49. HILLMAN ON LAWYER MOBILITY, supra note 4, § 4.4.2, at 4:46.

50. Id.

51. UNIF. P'SHIP ACT § 30 (1914) (“On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.”); HILLMAN ET AL., supra note
context, “dissolution” and “termination” are not synonymous. Rather, the dissolved partnership enters a winding up phase. “Winding up,” which is sometimes referred to as “liquidation,” is the period of time after dissolution and before termination during which all partnership affairs are settled. In fact, “liquidation” is an incomplete description of this period because reducing the partnership’s assets to cash is only part of the process. The process of winding up a partnership generally involves reducing the assets to cash (liquidation), paying creditors, and distributing to partners the value of their respective interests. A law firm that is winding up will have to notify its clients and perhaps withdraw from representations, and may further be required to assist clients in securing new counsel and satisfy obligations to displaced employees. Winding up may also include the prosecution of legal claims belonging to the partnership. Whatever it entails, winding up is a dissolved partnership’s sole business or purpose. In the case of a large law firm, dissolution and winding up are typically accomplished pursuant to a formal plan of dissolution, and the firm may well engage outside professionals such as accountants and lawyers to assist it in winding up. There is no set time within which winding up must be completed, although it should be completed within a reasonable time. Law firm wind-ups may be protracted because they involve bringing all matters pending at the time of dissolution to a close, and litigation matters may take months and even years to resolve. In any event, the partnership terminates only when the winding up process is complete.

47, at § 802(a) (providing that after dissolution, a partnership continues for the sole purpose of winding up its affairs and that the partnership is terminated when winding up is completed).
55. GREGORY, supra note 38, at 368.
59. See LESLIE D. CORWIN & ARTHUR J. CIAMPI, LAW FIRM PARTNERSHIP AGREEMENTS § 7.05[4], at 7-23 (2008) (offering a sample plan of dissolution which, among its terms, provides for the retention of professionals to assist in the winding up process).
The UPA and RUPA take very different approaches to compensating partners for time spent completing the unfinished business of a dissolved partnership. Under the UPA, a partner other than a surviving partner is entitled to no extra compensation for her services in winding up the partnership’s affairs.64 “Extra compensation” as used here means compensation greater than any sums the partner will receive as her share of the dissolved partnership.65 Under the UPA, however, partners are entitled to reimbursement for reasonable overhead expenses incurred in completing the dissolved firm’s unfinished business, meaning that a given partner’s partnership share of unfinished business will be net post-dissolution income, not gross.66 In contrast, under RUPA, a partner is entitled to reasonable compensation for services rendered in winding up the business of the dissolved partnership, plus the reimbursement of related overhead.67 The manner in which overhead is calculated when computing unfinished business obligations can therefore be a significant issue.

Of course, partnership is a fiduciary relationship and partners owe fiduciary duties to each other and to their firms.68 Dissolution alters partners’ fiduciary duties in some respects, but it does not entirely extinguish them. Specifically, dissolution erases a partner’s loyalty obligation not to compete with the partnership in the conduct of partnership business.69 Thus, a partner may compete with her former colleagues and dissolved firm for new business, even if that new business comes from clients that were clients of the firm at the time of dissolution.70 In all other respects, however, partners’ fiduciary duties continue through the winding up phase.71 This includes non-equity partners.72 In some

64. See Unif. P’ship ACT § 18(f) (1914) (“No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.”). See, e.g., Kahn v. Seely, 980 S.W.2d 794, 798-99 (Tex. App. 1998) (applying Texas version of UPA and denying former partner extra compensation for winding up dissolved partnership’s affairs).


66. Id. at 19. Unfortunately, courts do not agree on how to calculate reasonable overhead expenses for which a partner may seek reimbursement. Hammes v. Frank, 579 N.E.2d 1348, 1353 (Ind. Ct. App. 1991). Under one formulation, “overhead” refers to a lawyer’s direct costs, i.e., those costs that can be specifically attributed to a matter without apportionment. Id. The other possibility is to include within the definition of overhead indirect costs that cannot be allocated to a particular case or matter, such as rent, library expenses, staff salaries, utilities, and so on. See id. (noting the competing approaches). For more on this unsettled but important issue, see infra Part III.E.


68. Corwin & Ciampi, supra note 59, § 1.03[1], at 1-9.

69. Hillman et al., supra note 47, at § 404(b)(3) (restricting a partner’s duty of loyalty “to refrain from competing with the partnership in the conduct of partnership business before the dissolution of the partnership”) (emphasis added).


71. See Tucker v. Ellbogen, 793 P.2d 592, 597 (Colo. Ct. App. 1989) (“After the dissolution of a partnership, each partner continues to have a fiduciary duty to the other partner until the
jurisdictions the continuation of fiduciary duties may be statutorily prescribed. Under RUPA, for example, partners’ duties to account and to refrain from dealing with the partnership on behalf of a party having an adverse interest expressly continue through wind up. 73 The duty of good faith and fair dealing set forth in RUPA section 404(d) has no durational limit and therefore should be understood to continue through the winding up phase. 74 Naturally, termination of the partnership terminates the partners’ fiduciary duties. 75

Included among partners’ post-dissolution fiduciary duties is the obligation to complete the partnership’s unfinished business. 76 The failure to discharge this duty is actionable, and a monetary damage award that can be credited in an accounting ordinarily remedies such a failure. 77 It is possible to breach this duty by requiring another partner to bear a disproportionate burden of unfinished business to complete. 78

partnership assets have been divided and the liabilities have been satisfied.”); Ruse v. Bleeke, 914 N.E.2d 1, 11 (Ind. Ct. App. 2009) (“Partners owe a fiduciary duty to one another that continues until final termination of the business of the partnership.”); Miami Subs Corp. v. Murray Family Trust, 703 A.2d 1366, 1374 (N.H. 1997) (stating that fiduciary duties continue through winding up and until termination); M.R. Champion, Inc. v. Mizell, 904 S.W.2d 617, 618 (Tex. 1995) (stating that partners owe each other and their partnership a fiduciary duty in the winding up of partnership business); Investor Assoc. v. Copeland, 546 S.E.2d 431, 436 (Va. 2001) (stating that “partners owe each other a fiduciary duty in winding up partnership affairs”). But see 6D Farm Corp. v. Carr, 882 N.Y.S.2d 198, 201 (N.Y. App. Div. 2009) (stating that “[t]he ‘fiduciary relation between partners terminates upon notice of dissolution, even though the partnership affairs have not been wound up’”) (quoting In re Silverberg, 438 N.Y.S.2d 143, 144 (N.Y. App. Div. 1981)). The 6D Farm Corp. court’s blanket statement is dubious, however, since the court in In re Silverberg, whose opinion the 6D Farm Corp. court quoted, was referring only to partners’ post-dissolution ability to represent clients who were clients of the firm at the time of dissolution. In re Silverberg, 438 N.Y.S.2d at 144. Read properly, In re Silverberg expresses only the general rule that dissolution erases a partner’s loyalty obligation not to compete with the partnership in the conduct of partnership business, but leave intact other fiduciary duties. The case certainly does not support the broad rule that the 6D Farm Corp. court apparently drew from it. Accordingly, courts and lawyers should be very wary of relying on the 6D Farm Corp. opinion as authority on this issue.


73. Hillman et al., supra note 47, at §§ 404(b)(1) & (2).

74. See id. § 404(d) (“A partner shall discharge the duties to the partnership and the other partners . . . consistently with the obligation of good faith and fair dealing.”).

75. See Marr v. Langhoff, 589 A.2d 470, 476 (Md. 1991) (stating that partners’ “mutual fiduciary duties cease when the winding up is completed”).


77. Dickson, Carlson & Campillo, 99 Cal. Rptr. 2d at 685.

78. Id.
III. THE UNFINISHED BUSINESS DOCTRINE’S ESSENTIAL CONTOURS

This Part examines the development of the unfinished business doctrine in the courts, beginning with the seminal case on the subject, Jewel v. Boxer.\(^79\) As we will soon see, Jewel involved the dissolution of a law partnership and a struggle over contingent fees. Later cases expanded the unfinished business doctrine to the dissolutions of firms organized as professional corporations and limited liability companies, recently to firms with hybrid partnership-corporate structures, and to disputes over matters billed hourly. At the outset, it is important to recognize that courts tend to apply the unfinished business doctrine only when a law firm dissolves and ultimately terminates its affairs; the doctrine typically does not apply where one or more partners withdraw from a firm but the firm continues in business.

A. The Jewel of the Unfinished Business Doctrine

Jewel v. Boxer\(^80\) is the seminal case on the application of the unfinished business doctrine to law firm partnership dissolutions. Jewel arose out of the dissolution of the California law firm of Jewel, Boxer & Elkind (“JBE”) by agreement of its partners: Howard Jewel, Stewart Boxer, Peter Elkind, and Brian Leary.\(^81\) The partners had neither a written partnership agreement nor an agreement allocating fees earned from active cases upon dissolution of the partnership.\(^82\) Boxer, Elkind, and several associates had handled most of JBE’s personal injury and workers’ compensation cases, while Jewel and Leary handled the remainder of the firm’s cases.\(^83\) Shortly after dissolution, each former partner sent a letter to each current client he had represented at JBE informing the client of the firm’s dissolution and enclosing a substitution of counsel form that allowed the partner to continue to represent the client at the partner’s new law firm.\(^84\) From the dissolution, two new firms emerged: Jewel & Leary and Boxer & Elkind.\(^85\) The new firms represented the clients on the identical terms that JBE had represented them.\(^86\)

Sometime later, Jewel & Leary sued Boxer & Elkind seeking an accounting of the fees received from these cases on the basis that they were an asset of the dissolved partnership.\(^87\) In allocating the fees, the trial court first determined the four lawyers’ partnership interests in JBE on a percentage basis.\(^88\)

81. Id. at 15
82. Id.
83. Id.
84. Id. at 15-16.
85. Jewel, 203 Cal. Rptr. at 15.
86. Id. at 16.
87. Id.
88. Id.
then allocated the disputed fees among the old and new firms by weighing (1) the time spent by each firm in handling the case; (2) the source of each case (always JBE); and (3) the result achieved by the new firm. Based on this formula, the trial court determined that Jewel & Leary owed JBE just over $115,000, while Boxer & Elkind owed a little more than $291,000. Jewel & Leary appealed on the ground that the trial court erred in allocating fees on a quantum meruit basis. The California Court of Appeal ultimately agreed and held that:

[I]n the absence of a partnership agreement, the Uniform Partnership Act requires that attorneys’ fees received on cases in progress upon dissolution of a law partnership are to be shared by the former partners according to their right to fees in the former partnership, regardless of which former partner provides legal services in the case after dissolution. The fact that the client substitutes one of the former partners as attorney of record in place of the former partnership does not affect this result.

The Jewel court began its analysis by explaining that under California’s version of the UPA then in effect, a dissolved partnership continued until it completed the winding up of its unfinished business and that no partner (except for a surviving partner) was entitled to extra compensation for services rendered in completing unfinished business. “Extra compensation” means receipt by a former partner of the dissolved partnership of compensation greater than that which the former partner would have received as her share of the dissolved partnership. Thus, absent a contrary agreement, any income derived from the completion of unfinished business must be allocated to the former partners according to their respective interests in the dissolved partnership. Jewel & Leary advocated this position. Boxer & Elkind, on the other hand, contended that the substitution of lawyers transformed JBE’s unfinished business into new business belonging to the new firm, thus removing it from the purview of the UPA. Thus, Boxer & Elkind reasoned, JBE’s recovery was limited to an award under quantum meruit for services rendered before it was discharged.

The court rejected this argument based principally on authority from other jurisdictions holding that income received by former law partners from cases that were active at the time of dissolution was to be allocated on the basis of the

89. Id.
90. Jewel, 203 Cal. Rptr. at 16.
91. Id. at 15.
92. Jewel, 203 Cal. Rptr. at 15.
93. Id. at 16.
94. Id. at n.2.
95. Id. at 16.
96. Id.
97. Id. at 16-17.
98. Jewel, 203 Cal. Rptr. at 17.
partners’ respective interests in the dissolved partnership and not on a quantum meruit basis.\textsuperscript{99} Boxer & Elkind attempted to distinguish those cases on the basis that the firms there did not have the clients sign a substitution of counsel form discharging the dissolved firm.\textsuperscript{100} This claimed distinction did not influence the court, however, because it had to examine “the circumstances existing on the date of dissolution . . . not events occurring thereafter, to determine whether business is unfinished business of the dissolved partnership.”\textsuperscript{101} California precedent established that a partner completing unfinished business cannot sever the rights of the other partners in the dissolved partnership by entering into “new” contracts with clients to complete such business.\textsuperscript{102} As a result, the formal substitution of counsel from JBE to either of the two new firms did not alter the character of the subject cases as the unfinished business of JBE.\textsuperscript{103} To hold otherwise, the court explained, would permit former partners of a dissolved partnership to breach their fiduciary duty not to take any action regarding unfinished partnership business for personal gain.\textsuperscript{104}

The court observed that there were sound policy reasons for prohibiting law partnerships from collecting extra compensation.\textsuperscript{105} First, the rule prevents partners from competing for the most lucrative cases during the life of the partnership in anticipation of retaining those matters if the partnership dissolves.\textsuperscript{106} Second, this approach discourages partners from racing to seize client files and seeking personal gain by soliciting existing clients upon dissolution.\textsuperscript{107}

In an attempt to counter these arguments, Boxer & Elkind argued that enforcement of the rule against extra compensation would impair clients’ right to counsel of their choice because former partners would not want to perform all of the post-dissolution work on particular cases in exchange for only a portion of the fees attributable to their efforts.\textsuperscript{108} The court rejected this argument for two reasons. First, this was all that the former partners would have received had JBE

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\textsuperscript{100} Id. at 18.


\textsuperscript{103} Id.

\textsuperscript{104} Id.

\textsuperscript{105} Jewel, 203 Cal. Rptr. at 18.

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id.
Second, in addition to their partnership shares of such income, they would receive their partnership shares of the income generated by the work of the other former partners even though they performed no post-dissolution work in the other former partners’ cases. As a result, the allocation of fees according to each former partner’s interest in JBE would not impose an undue hardship on any partner assuming that each partner completed the work in the matters for which he was responsible.

The court acknowledged that, at first glance, applying the rule against extra compensation might sometimes appear to be unfair, as where a former partner brings in an especially lucrative case just before dissolution and nearly all work on it is performed post-dissolution. Even so, the former partners’ fiduciary duties to one another would likely prevent any undue hardship. As the court explained:

First, each former partner has a duty to wind up and complete the unfinished business of the dissolved partnership. This would prevent a partner from refusing to furnish any work and imposing this obligation totally on the other partners, thus unfairly benefitting from [the other partners’] efforts while putting forth none of his or her own. Second, no former partner may take any action with respect to unfinished business which leads to purely personal gain. . . . Thus, the former partners are obligated to ensure that a disproportionate burden of completing unfinished business does not fall on one former partner or one group of former partners, unless the former partners agree otherwise.

The court recognized that the probability of partners completing unfinished business in close proportion to their respective partnership interests was remote. But partners are free to include in a written partnership agreement provisions for completing unfinished business “that ensure a degree of exactness and certainty unattainable by rules of general application.” If any of the former partners in this case bore disproportionate responsibility for completing JBE’s unfinished business, that was solely the consequence of their failure to have a written partnership agreement providing for a different result. They would simply have to bear that burden.

109. Id.
110. Id.
111. Jewel, 203 Cal. Rptr. at 18.
113. Id. at 19 (citations omitted).
114. Id.
115. Id.
116. Id.
117. Id. at 19.
In summary, the trial court erred by allocating post-dissolution income between Jewel & Leary and Boxer & Elkind on a quantum meruit basis. The Jewel court therefore remanded the case to the trial court to reallocate the disputed fees according to the former partners’ respective partnership interests in JBE.

The unfinished business doctrine is now widely accepted in the law firm partnership context. Yet many lawyers continue to advocate for fees to be allocated based on quantum meruit or pursuant to some other method. The cases that quantum meruit advocates commonly offer in support of their position, Kelly v. Smith and Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C., are either inapposite or unpersuasive.

In Kelly, Timothy Kelly withdrew from the law firm of Beckman, Kelly & Smith. The remaining partners continued to practice together and kept the firm’s name. Apparently sparked by Kelly’s challenge to the continued use of his name, the parties came to dispute Kelly’s right to retain contingent fees earned on cases that he took with him when he withdrew. The partners drafted the firm’s partnership agreement with the intent of achieving a “clean break” between the firm and a withdrawing partner by valuing the partner’s interest in the partnership as of the last day of the month of withdrawal. Nevertheless, the agreement did not expressly address a withdrawing partner’s payment to the firm regarding any cases that followed him. The court thus concluded that Kelly was not entitled to receive any payments from the firm after his departure except for those specified in the agreement and that the firm was not entitled to payment for services provided by Kelly in the matters he took with him. The firm was only entitled to recover under quantum meruit the reasonable value of the services it performed prior to the departed clients’ choices to terminate the firm

118. Jewel, 203 Cal. Rptr. at 19.
119. Id.
121. 611 N.E.2d 118 (Ind. 1993).
123. Kelly, 611 N.E.2d at 119.
124. Id. at 120.
125. Id. at 121.
126. Id.
and retain Kelly.\textsuperscript{127} The \textit{Kelly} court noted the approach taken in \textit{Jewel} and similar cases, but distinguished those cases on the basis that the partners there did not have a partnership agreement that addressed their respective rights and obligations upon dissolution.\textsuperscript{128}

\textit{Kelly} does not suggest that the unfinished business doctrine should be discarded in favor of quantum meruit. The partners in \textit{Kelly} had a written partnership agreement that attempted to address withdrawals; although imperfect, the agreement was sufficient for the court to discern their intent and therefore to reject the UPA’s default rules.\textsuperscript{129} That fact alone distinguishes \textit{Kelly} from \textit{Jewel}. Moreover, \textit{Kelly} involved a single partner’s withdrawal, which, while still affecting dissolution of the partnership under the UPA, differs from a dissolution leading to termination of the partnership. If nothing else, this fact drove the court’s conclusion that the “termination and buy out” provision in the partnership agreement, which established the value of a withdrawing partner’s interest in the partnership as of the last day of the month of withdrawal, applied to \textit{Kelly}’s situation.\textsuperscript{130}

In \textit{Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.},\textsuperscript{131} the trial court apportioned the fees earned on the dissolved law firm’s unfinished business under quantum meruit rather than in accordance with the former partners’ predissolution partnership interests.\textsuperscript{132} One of the former partners, Bernstein, attempted to appeal the trial court’s decision. Bernstein argued that the fees from cases pending upon the firm’s dissolution should have been distributed as provided in the UPA—a position supported by Illinois authority.\textsuperscript{133} Unfortunately for Bernstein, either he or his lawyer mistakenly dismissed his appeal in the trial court, thereby depriving the appellate court of jurisdiction to hear it.\textsuperscript{134} Bernstein might have cured that error by asking the trial court to vacate his voluntary dismissal or by timely filing a new notice of appeal, but he did neither. Instead, he improperly requested that the appellate court vacate the trial court’s dismissal of his appeal, and even that request came too late. Lacking jurisdiction to hear the appeal, the \textit{Bernstein & Grazian} court dismissed it.\textsuperscript{135} The court never reached the merits of Bernstein’s appeal.

With Bernstein’s appeal dismissed, the \textit{Bernstein & Grazian} court considered his former partner’s claim that the trial court had been overly

\begin{footnotes}
\item[127]\textit{Id.} at 122.
\item[128]\textit{Id.} at 121.
\item[129]\textit{Kelly}, 611 N.E.2d at 121. ("It is clear that the parties intended that the UPA be preempted by the agreement and that the affairs between them be wound up at the moment of the withdrawal of a partner.").
\item[130]See \textit{id.} at 120-21 (explaining the provision and discussing its importance).
\item[131]931 N.E.2d 810 (Ill. App. Ct. 2010).
\item[132]\textit{Id.} at 815.
\item[133]\textit{Id.} at 815 (citing Ellerby v. Spiezer, 485 N.E.2d 413 (Ill. App. Ct. 1985)).
\item[134]\textit{Id.} at 816-17.
\item[135]\textit{Kelly}, 611 N.E.2d at 820.
\end{footnotes}
generous in allocating fees to Bernstein under quantum meruit. The trial court had awarded Bernstein ten percent of the fees earned from the former firm’s open cases. The appellate court ultimately concluded that Bernstein had not established his right to an award of any fees under quantum meruit and it therefore vacated the trial court judgment in his favor.

In the end, Bernstein & Grazian is a case about appellate procedure and its perils, and the granular aspects of quantum meruit. The decision is a rejection neither of Jewel nor of the unfinished business doctrine in general. The only reason the case could even be said—however inaccurately—to have “rejected” the unfinished business doctrine is because Bernstein’s procedural missteps deprived the court of the opportunity to consider the issue.

At least two courts have rejected the unfinished business doctrine, but those decisions are incompletely reasoned and therefore lack persuasive force. The first, *McDonald v. Trans Atlas Marine Corp.*, arose out of the dissolution of the Louisiana law firm of Stegeman & Falcon. Russell Stegeman and Timothy Falcon were the partners in the firm. The firm operated under a simple partnership agreement executed in April 1989 that made no provision for dissolution of the partnership or the division of costs and fees thereafter. The agreement gave Stegeman a two-thirds interest in the partnership’s profits and losses, and Falcon a one-third interest in the same. Stegeman & Falcon dissolved by mutual consent on March 13, 1990. Stegeman and an associate of the firm, William Perry, began practice as Stegeman & Associates, while Falcon went solo. At the time of dissolution, the firm was representing Russell McDonald in a Jones Act case originated for the firm by Perry. Perry’s employment agreement with Stegeman & Falcon provided that he was to receive one-third of any fee the firm collected on McDonald’s case. Ten days after Stegeman & Falcon dissolved, McDonald terminated Stegeman & Associates as his counsel and hired Falcon to continue his representation.

Falcon did substantial work on McDonald’s case from March 13, 1990, forward and filed suit on McDonald’s behalf in August 1991. Perry claimed

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136. *Id.* at 825-27.
137. *Id.* at 825.
138. *Id.* at 827.
141. *Id.* (reciting that the partnership agreement stated that the signatories would practice law as a general partnership, allocated Stegeman’s and Falcon’s interests in the firm’s profits and losses, specified that the firm’s files would be numbered in a particular manner, and stated that any file opened after October 1, 1988, would be classified as a partnership file).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
147. *Id.*
to have done substantial work on McDonald’s case between April 1989 and March 1990, but he could produce no evidence of his efforts; Stegeman did no work on the case. When it came time to allocate the contingent fee earned from McDonald’s case, Falcon argued that the fee should be divided on a quantum meruit basis, with him receiving 99 percent of the fee because he did 99 percent of the work, and Perry and Stegeman receiving the other one percent for any work by Perry. Stegeman and Perry countered that the fee should be allocated one-third to Perry and two-thirds to Stegeman & Falcon. Of the portion of the fee that should be paid to the firm, Stegeman argued, he should receive two-thirds and Falcon one-third pursuant to their partnership agreement. Stegeman seemed to be on solid ground; in another fee dispute with Falcon, a Louisiana appellate court had enforced the Stegeman & Falcon partnership agreement.

The *McDonald* court observed that although Stegeman & Falcon secured McDonald’s representation while still a functioning partnership, the vast majority of the work on the matter was done post-dissolution. The court reasoned that once the partnership terminated, however, Stegeman and Falcon practiced in separate firms and the provision in the partnership agreement for the division of profits and losses thus became an unethical and unenforceable “fee-splitting” agreement. As a result, the fee should be divided on a quantum meruit basis.

Stegeman argued that the McDonald case was a partnership asset of Stegeman & Falcon and, because the firm’s partnership agreement included no termination provision, Falcon had a fiduciary duty to “preserve and protect the partnership assets.” The court obviously did not grasp Stegeman’s argument, distinguishing a case that Stegeman had awkwardly attempted to analogize by noting that Stegeman performed no services on McDonald’s behalf after Stegeman & Falcon dissolved, Stegeman retained no responsibility for McDonald’s representation after Stegeman & Falcon dissolved, and McDonald had expressly discharged Stegeman & Falcon in order to retain Falcon individually. As for the other case between Stegeman and Falcon, the court distinguished it on the basis that most of the work there had been performed before the firm dissolved and that the underlying employment agreement in that

148. *Id.* at *1.
149. *Id.* at *2.
150. *Id.*
151. *Id.*
154. *Id.* “Fee-splitting” is discussed in *infra* Part IV.A.
156. *Id.* at *3.
157. *Id.*
case had specifically addressed a situation in which a client terminated the firm’s engagement.\textsuperscript{158}

The bottom line for the court in \textit{McDonald} was that the provision in the Stegeman & Falcon partnership agreement concerning the division of costs and profits was relevant only so long as the partnership was in operation.\textsuperscript{159} The “most logical and equitable” approach, the \textit{McDonald} court reasoned, was to apportion the fees as in any other case in which a client discharges lawyer other than for cause.\textsuperscript{160} In such a case, the discharged lawyer is entitled to payment for his services on a quantum meruit basis, and if the client retains replacement counsel, the total fee should be apportioned between the lawyers based on their relative contributions to the client’s representation and other factors.\textsuperscript{161} Here, this meant dividing any fees earned by the partnership pursuant to the partnership agreement while treating any fees earned post-dissolution as the property of the lawyer earning them.\textsuperscript{162} Balancing the amount of work done by Falcon as compared to Perry with the fact that Falcon never would have been positioned to represent McDonald but for his partnership with Stegeman, the court awarded Falcon 90 percent of the fee and Perry and Stegeman & Falcon the remaining ten percent.\textsuperscript{163} Since the total fee was $43,000, this meant that Perry and the dissolved partnership split $4,300, with Perry receiving one-third pursuant to his employment agreement and Stegeman & Falcon the other two-thirds. Out of that fraction, Stegeman would receive two-thirds and Falcon one-third in accordance with the partnership agreement.\textsuperscript{164}

Whether it was because the parties did not brief the issues well or because the court was distracted, the \textit{McDonald} court did not appreciate the difference between the dissolution of a partnership and the termination of a partnership. The court treated these events as identical even though they are not. Although the concept of a partnership’s dissolution can be slippery, it seldom eludes courts as completely as it apparently did in this case. The \textit{McDonald} court never discussed \textit{Jewel} or the unfinished business doctrine, nor explained why Louisiana partnership law might command a different result. When presented with Stegeman’s somewhat awkward argument that Falcon had a fiduciary obligation to preserve and protect the dissolved partnership’s assets, which might have been more neatly framed as an argument that Falcon was obligated to complete McDonald’s representation as part of the winding up process and divide the resulting fee in accordance with the partners’ respective interests in the dissolved firm, the court simply distinguished the two Louisiana cases on

\begin{itemize}
\item \textsuperscript{158} Id. at *4.
\item \textsuperscript{159} Id. (discussing a Louisiana trial court order in yet another fee dispute between Falcon and Stegeman).
\item \textsuperscript{160} Id. (citing Hebert v. State Farm Ins. Co., 588 So. 2d 1150 (La. Ct. App. 1991)).
\item \textsuperscript{161} Id. \textit{McDonald}, 1993 WL 133840, at *4 (quoting \textit{Hebert}, 588 So. 2d at 1152).
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id. at *5.
\item \textsuperscript{164} Id.
\end{itemize}
which Stegeman relied rather than grappling with the partnership law issue.\textsuperscript{165} If the \textit{McDonald} court believed that its equitable approach was superior to the result that would have followed from the application of the unfinished business doctrine—a view that many migrating partners and their new law firms would likely share—then in fairness it should have explained why that was so and how it comport with Louisiana partnership law.

At base, the decision in \textit{McDonald} is sufficiently infirm that no court ought rely on it, let alone follow it. Indeed, the one court to have considered the \textit{McDonald} approach rejected it in favor of the unfinished business doctrine as articulated in \textit{Jewel}.\textsuperscript{166}

The second decision, \textit{Welman v. Parker},\textsuperscript{167} arose out of the dissolution of a four-partner Missouri law firm with no written partnership agreement.\textsuperscript{168} In late November 2004, Cameron Parker told her partners that she would be withdrawing from the firm at the end of the year.\textsuperscript{169} Parker and her fellow partners soon met to discuss the process of dissolving and winding up the partnership, but reached no agreement on these subjects.\textsuperscript{170} As a result of these discussions, however, the partners divided up their case files.\textsuperscript{171} One of the files that Parker took was a contingent fee matter for Charles Yates, whom she had represented since 2002.\textsuperscript{172} None of the other lawyers had done appreciable work on the case. Yates naturally followed Parker to her new firm and signed a new contingent fee agreement with Parker’s new firm.\textsuperscript{173} When Yates’s case settled in 2006, Parker’s new firm collected a contingent fee of just under $120,000.\textsuperscript{174} In 2007, Parker’s former partners sued seeking an accounting, wind-up and termination of their former partnership, and alleging that Yates’s case was an asset of the dissolved partnership.\textsuperscript{175} The trial court, relying on an Illinois case adopting the unfinished business doctrine,\textsuperscript{176} held “that ‘contingent fee cases pending at the time of dissolution continue to be partnership business after dissolution, and fees from those cases are assets of the partnership.’”\textsuperscript{177} Parker appealed to the Missouri Court of Appeals, which reversed the trial court.\textsuperscript{178}

\begin{footnotes}
\item 165. \textit{McDonald}, 1993 WL 133840 at **3-4.
\item 166. Sufrin v. Hosier, 896 F. Supp. 766, 770 (N.D. Ill. 1995) (expressly rejecting the \textit{McDonald} court’s approach in favor of the \textit{Jewel} court’s view).
\item 167. 328 S.W.3d 451 (Mo. Ct. App. 2010).
\item 168. \textit{Id.} at 453.
\item 169. \textit{Id.}
\item 170. \textit{Id.}
\item 171. \textit{Id.} at 453-54.
\item 172. \textit{Id.} at 454.
\item 173. \textit{Welman}, 328 S.W.3d at 454.
\item 174. \textit{Id.}
\item 175. \textit{Id.}
\item 176. \textit{Id.} (citing Ellerby v. Spiezer, 485 N.E.2d 423 (Ill. App. Ct. 1985)).
\item 177. \textit{Id.} at 454.
\item 178. \textit{Id.} at 458.
\end{footnotes}
The *Welman* court seized on client-choice principles\(^{179}\) to hold that when “a law firm is retained by a client on a contingent-fee basis and the client elects to hire a different law firm after the first firm dissolves and before judgment or settlement has been reached on his or her case, the dissolved law firm is only entitled to recover the reasonable value of the services it provided.”\(^{180}\) This amount cannot exceed the amount provided for by the original contingent fee contract and is payable only upon the occurrence of the contingency.\(^{181}\) The contingent fee earned upon the ultimate settlement or judgment is not an asset of the dissolved partnership.\(^{182}\)

In reaching this result, the *Welman* court apparently believed that adopting the unfinished business doctrine would obligate Yates to pay a full contingent fee to both the dissolved firm and to Parker’s firm.\(^{183}\) Of course, application of the unfinished business doctrine would have done no such thing. Rather, Parker and her former partners would have shared the contingent fee earned by Parker in accordance with their right to fees in their former partnership.\(^{184}\) Yates still would have paid but one contingent fee. Moreover, the *Welman* court misunderstood the client choice principles on which it predicated its decision. Nothing about the application of the unfinished business doctrine would have restricted Yates’s right to discharge Parker’s former law firm as his counsel and to continue his relationship with her. As the court in *In re LaBrum & Doak, LLP*,\(^{185}\) explained:

> The right of the client is distinct from and does not conflict with the rights and duties of the partners between themselves with respect to profits from unfinished business since, once the fee is paid to the attorney, it is of no concern to the client how the fee is distributed among the attorney and his or her partners.\(^{186}\)

If, for example, Parker’s former law firm had not dissolved and she had obtained the same settlement, Yates plainly would have had no interest in how Parker and her partners divided the $120,000 contingent fee. That result did not change because the same lawyers were seeking to divide the same fee post-dissolution.

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179. See *Welman*, 328 S.W.3d at 456 (“Under Missouri law, the decision as to whether the contingent-fee contract remains an asset of the dissolved partnership is solely the decision of the informed client who has the free choice to further engage the services of the former partners, the withdrawing partner—either individually or as a partner in a new partnership—or an entirely different attorney or law firm.”).
180. *Id.* at 456-57.
181. *Id.* at 457.
182. *Id.*
183. See *id.* (“Clients are free to discharge the law firm or attorney who represents them at any time and hire new counsel; requiring them to pay a double contingent fee would hinder this freedom.”).
186. *Id.* at 414.
Welman is a deeply flawed decision. Even courts that are inclined to resist application of the unfinished business doctrine should search for different authority for doing so.

B. Applying the Unfinished Business Doctrine to Law Firms Organized as Professional Corporations or Limited Liability Companies

Jewel involved a dissolved law partnership. Although most law firms are organized as partnerships, many are structured as professional corporations and others as limited liability companies (“LLCs”). May principals leaving a dissolved professional corporation or LLC argue that the unfinished business doctrine only applies to dissolved partnerships and therefore does not affect them? After all, the UPA and RUPA expressly apply only to partnerships.

Courts that have considered the issue have applied the unfinished business doctrine to the dissolutions of law firms organized as both professional corporations188 and LLCs. In short, the policy reasons behind the unfinished business doctrine do not depend on a law firm being structured as a partnership as compared to a professional corporation or LLC.190 Fox v. Abrams191 leads this line of authority.

Fox arose out of the dissolution of Abrams, Fox, Gibson & O’Rourke (“AFGO”), a law corporation. Fox, Gibson, and another shareholder resigned from AFGO and opened a new firm called Fox & Gibson.193 Before their departures, they had been working on personal injury and wrongful death cases. Many of those clients terminated their relationships with AFGO and substituted Fox & Gibson as their new counsel.195 Abrams claimed that he was

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187. Hillman on Lawyer Mobility, supra note 4, § 6.1, at 6:1-2 (providing a statistical breakdown of law firm organizational forms).
189. See, e.g., Hurwitz v. Padden, 581 N.W.2d 359, 362 (Minn. Ct. App. 1998) (noting that the Minnesota LLC statute referred to the “dissolution” of LLCs just as Minnesota’s version of the UPA referred to the “dissolution of partnerships and further stating that “the mere fact that the parties filed a limited liability company document with the state does not foreclose an examination of partnership law”).
192. Id. at 262.
193. Id.
194. Id.
195. Id.
entitled to share in the fees subsequently received by Fox & Gibson from cases that were open at the time of the split.196

The shareholders in AFGO had executed a “buy-sell agreement” that was intended to deal with shareholders’ death, disability, or disqualification from the practice of law, but which was silent on the subject of unfinished business.197 The departing shareholders’ theory, which carried the day in the trial court, was that under the buy-sell agreement, Abrams had no interest in AFGO’s work in progress at the time of their resignations beyond the reasonable value of any services that may have been performed on those cases before their departures.198 Thus, Abrams’ right to compensation, if any, derived solely from quantum meruit.199 Abrams appealed.

The appellate court held that the trial court had erred and, in doing so, quickly focused on the holding in Jewel as “show[ing] the proper way” to resolve the dispute.200 The Fox & Gibson shareholders naturally contended that Jewel did not apply because the decision was based on partnership law and AFGO had been structured as a corporation.201 The court saw no merit in this argument, observing that the Fox & Gibson shareholders could offer no persuasive reason why the principles of Jewel should not apply.202 The mere fact that AFGO had been organized as a corporation rather than as a partnership was not a sufficient basis for altering the unfinished business doctrine.203

The Fox court explained that the Jewel rule was not solely a product of partnership law, but was further based on sound policy reasons.204 Most importantly, the rule prevents partners from competing for the most lucrative cases during the life of the firm in anticipation that they might retain them should the partnership dissolve.205 It also discourages partners from grabbing files and seeking personal gain by soliciting clients upon dissolution.206 The same principles apply where a law firm is incorporated.207 When it comes to allocating fees for matters existing at the time a law firm dissolves, the law

196. Id. at 262 (summarizing the parties’ theories).
197. Fox, 210 Cal. Rptr. at 264.
198. Id. at 262.
199. Id.
200. Id. at 263 (citing Jewel v. Boxer, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984)).
201. Id. at 263-64. They also argued that Jewel should not control because of the presence of the buy-sell agreement. Id. at 263. That argument failed because the buy-sell agreement was silent with respect to Abrams’ claims against them and therefore did not prevent resort to the equitable principles explained in Jewel. Id. at 264.
202. Fox, 210 Cal. Rptr. at 264.
203. Id. at 266 (stating that “the fact that a law corporation is involved is no reason to disregard the fair and reasonable principles of Jewel v. Boxer”).
204. Id. at 265.
205. Id. (quoting Jewel v. Boxer, 203 Cal. Rptr. 13, 18 (Cal. Ct. App. 1984)).
206. Id. (quoting Jewel, 203 Cal. Rptr. at 18).
207. See id. (“Applying the reasoning of Jewel is fair to both sides and prevents the lawyers from scrambling for the work in process as the law firm breaks up.”).
“should simply recognize that the lawyers once practiced together and are now practicing separately on the same cases as before.”

The decision in Jewel was also based on law partners’ fiduciary obligations. It was well-known, the Fox court explained, that a substantial purpose for allowing professionals to incorporate was to permit them to take advantage of the tax benefits available to corporations and their employees. “There [was] no reason to hold that when lawyers decide to practice together in corporate form rather than partnership, they are relieved of fiduciary obligations toward each other with respect to the corporation’s business.” This was not to say that the Fox & Gibson shareholders had breached any fiduciary duties owed to Abrams. It was, however, to say that lawyers practicing together in a law corporation “owe each other fiduciary duties very similar to those owed by law partners,” and therefore the fact that a corporation is involved in a dispute over unfinished business is no reason to disregard “the fair and reasonable principles” established in Jewel.

The Fox court concluded that the cases that the Fox & Gibson lawyers took to their new firm should be considered AFGO’s unfinished business and that the fees earned from them should be allocated according to the lawyers’ respective equity interests in AFGO. It remanded the case to the trial court to determine which of the parties’ claims had to be retried to conform to that view.

Fox is consistent with the entrenched view that professional corporations exist principally for tax reasons. The decision was also ahead of its time in

208. Fox, 210 Cal. Rptr. at 265 (rejecting the Fox & Gibson’s shareholders’ attempts to favorably characterize themselves).
209. Id. at 266.
210. Id.
211. Id.
212. Id.
213. Id.
214. Id. at 264.
215. Fox, 210 Cal. Rptr. at 264.
216. See, e.g., In re Fla. Bar, 133 So.2d 554, 556 (Fla. 1961) (discussing a Florida statute adapting professional relationships to the tax laws so that professionals were on equal footing with other taxpayers); In re R.I. Bar Ass’n, 263 A.2d 692, 695 (R.I. 1970) (“The professional service corporation law in this state was enacted for the purpose of enabling members of the covered professions . . . to form corporations, thus putting [them] on an equal footing with other taxpayers.”). See also Boyd, Payne, Gates & Farthing, P.C. v. Payne, Gates, Farthing & Radd, P.C., 422 S.E.2d 784, 790 (Va. 1992) (determining that lawyers who organized their firm as a professional corporation to obtain tax benefits but who conducted themselves as partners should have their liabilities and rights determined under partnership law).

Tax policy was not the sole reason for allowing law firms to organize as corporations. Adapting corporate form also allowed law firms to avoid liabilities that were unrelated to their professional obligations. That benefit has become less pronounced with the proliferation of limited liability partnerships (“LLPs”). In fact, the tax advantages that originally motivated law firms to adopt corporate form have largely been eliminated and firms that exist in corporate form today generally do so for the traditional advantages of incorporation, including limited liability and perpetual existence. Hoaglund ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 741 (7th Cir. 2004).
that contemporary thought likens closely-held entities more to partnerships than to corporations.\textsuperscript{217} Yet, professional corporations are distinct organizations with many traditional corporate attributes.\textsuperscript{218} It is therefore reasonable to believe that some courts writing on a clean slate might disregard Fox in favor of other approaches. In context, however, that prospect seems either remote or inconsequential. Courts generally apply partnership law to professional corporations where the attorney-shareholders have dissolved the corporation, or where they intended to dissolve the corporation but failed to meet the formal requirements for dissolution.\textsuperscript{219} In contrast, courts tend to apply corporate law in cases in which the professional corporation continues as a going concern after the lawyer-shareholders have withdrawn.\textsuperscript{220} Compare that framework with the unfinished business doctrine of partnership law, which is typically held to apply only when a law firm actually dissolves—not when a firm is technically dissolved by a partner’s withdrawal but the remaining partners continue to practice together, or where a partner dissociates and the partnership continues as an entity. In other words, law firm disintegration is traditionally treated the same under both corporation and partnership law.\textsuperscript{221}

The Fox court expressed concerns that rejection of the unfinished business doctrine would potentially free shareholders to compete for the most lucrative files in the hope of retaining that work upon dissolution, or would encourage shareholders to grab files and solicit clients upon dissolution. These concerns can be addressed in ways other than through partnership law. Persons other than partners may be held to owe fiduciary duties, of course. For example, in some states, shareholders in close corporations are held to owe fiduciary duties to one another that parallel the fiduciary duties owed between partners.\textsuperscript{222} Moreover, shareholders in a professional corporation or members in an LLC are agents of the firm and, as such, owe the firm fiduciary obligations.\textsuperscript{223}

In summary, the present majority view embodied in Fox treats professional corporations and LLCs like partnerships in the unfinished business context. There are sound policy reasons for this approach. It is fair, however, to question whether courts that have yet to confront the issue might not bypass partnership law in favor of corporate law principles. Whether a change in approaches would yield a different result is debatable.

\textsuperscript{217} Hillman on Lawyer Mobility, supra note 4, § 6.3, at 6:7.
\textsuperscript{218} Id.
\textsuperscript{219} Christopher C. Wang, Comment, Breaking up Is Hard to Do: Allocating Fees from the Unfinished Business of a Professional Corporation, 64 U. Chi. L. Rev. 1367, 1383 (1997).
\textsuperscript{220} Id.
\textsuperscript{221} See id. at 1388 (arguing that courts should apply partnership law to shareholder withdrawals from professional corporations “where there is clear evidence of an agreement or an intention to dissolve the corporation,” but apply corporate law in all other circumstances).
\textsuperscript{223} Restatement (Third) of Agency § 1.01 cmts. c & e (2007) (noting that agency encompasses employer and employee and corporation and officer relationships, and explaining and if a relationship is one of agency, the agent owes a fiduciary obligation to the principal).
C. Hybrid Fox: A Partnership Comprised of Professional Corporations

Courts’ willingness to adhere to the Fox approach or to extend it to organizational forms with mixed partnership and corporate attributes was recently tested in *Heller Ehrman LLP v. Arnold & Porter LLP (In re Heller Ehrman LLP)*, an adversary action in the Heller Ehrman bankruptcy. Heller Ehrman LLP sued Arnold & Porter LLP on fraudulent transfer theories to recover profits that Arnold & Porter earned on Heller’s unfinished business.225 Arnold & Porter moved to dismiss the action based in part on the argument that the unfinished business doctrine did not apply because of Heller’s hybrid organizational structure.226 Heller Ehrman LLP was a California limited liability partnership with a California professional corporation as its managing general partner and several other professional corporations (incorporated in California and elsewhere) as its remaining partners.227 The individual lawyers who practiced with the firm were shareholders in the professional corporations and were employed by those entities.228

Arnold & Porter argued that Jewel did not apply because the shareholders in the Heller professional corporations were not partners in the law firm, and that Fox did not apply because of Heller’s unique two-tiered structure.229 Basically, Arnold & Porter argued, the unfinished business doctrine embodied in California case law did not apply to Heller because it was neither fish nor fowl—neither a partnership nor a corporation. The court was understandably skeptical of this argument and resolved to apply the principles announced in Jewel and extended in Fox “to a partnership consisting of corporations that are owned by the attorney-employees who give them professional life and meaning.”230

The court reasoned that the principles of Jewel and its progeny apply generally to lawyers who practice together in an organization and who “trust[ ] one another as fellow members of the same law firm.”231 Although the court found no authority applying the unfinished business doctrine to any law firm organized like Heller, it reasoned that the principles were the same and that it could “not ignore the substance of [Heller’s] existence in blind deference to the form of it.”232 In summary, the court was correctly satisfied that just as the Fox court extended the Jewel rule from partnerships to professional corporations, the same consequences and principles should follow and apply to Heller’s hybrid

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225. Id. at *1.
226. Id. at *2.
227. Id.
228. Id.
229. See id. (explaining the defendant’s positions).
231. Id.
232. Id.
Ultimately, the court granted Arnold & Porter’s motion to dismiss in part and denied it in part for reasons unrelated to the essential unfinished business doctrine holding.234

D. The Unfinished Business Doctrine as Applied to Hourly Rate Matters Rather Than Contingent Fee Cases

Just as some former colleagues locked in post-dissolution disputes attempt to distinguish Jewel based on the organizational structure of the law firms involved, others attempt to do so based on the characterization of the fees to be allocated. Jewel involved the allocation of contingent fees earned from unfinished business. In the most common scenario, lawyers argue that the Jewel rule should be confined to contingent fee cases and not applied to hourly fee representations.235 The same argument may be made based on other cases applying the unfinished business doctrine to contingent fee representations.236 Regardless of its source, this argument is dead on arrival.237 The Jewel court did not limit its holding to disputes over contingent fee matters,238 nor have other courts that have applied the unfinished business doctrine to contingent fee cases, as subsequent courts considering the issue have duly noted.239

Nor can lawyers escape the unfinished business doctrine in hourly rate cases by arguing that hourly rate matters are “finished” each month when a monthly invoice is sent, such that they are not, in fact, unfinished business to be apportioned according to the former partners’ interests in the dissolved partnership.240 That argument must fail. Lawyers who bill hourly charge for time spent on tasks before the tasks are completed, and even the fact that one or more tasks may be completed before a client is billed for them does not support a claim that the larger matter necessitating the performance of those tasks has been completed. In the end, “unfinished business” consists of all matters in progress at the time of dissolution; whether the firm is to be compensated by way of a contingent fee or paid on an hourly basis is irrelevant.241

Unfortunately, depending on the nature of a lawyer’s practice, there may be substantial disagreement over which hourly rate matters constitute unfinished

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233. Id. at *4.
234. See id. at *1, *6 (explaining the court’s decision).
235. See, e.g., Rothman v. Dolin, 24 Cal. Rptr. 2d 571, 572-73 (Cal. Ct. App. 1993) (recognizing but ultimately rejecting the argument that Jewel and its progeny apply only to contingent fee cases and not to hourly fee cases).
237. Id. at 4-5; Grossman v. Davis, 34 Cal. Rptr. 2d 355, 356 (Cal. Ct. App. 1994); Rothman, 24 Cal. Rptr. 2d at 572-73.
240. Rothman, 24 Cal. Rptr. 2d at 573.
241. Id.
business and which count as new business. This problem is most acute if a lawyer has a counseling practice, as where, for example, the lawyer regularly counsels clients on corporate or employment issues. In such a case, the court is unlikely to consider fees for services rendered to clients post-dissolution to be the property of the dissolved law firm. The lawyer will argue that each time she counsels a continuing client on an issue, it is new business; the fact that a single client is involved should not suggest otherwise. In fact, unless the lawyer’s services can be identified with a discrete matter open at the time of dissolution, post-dissolution fees may fairly be characterized as new business and thus not attributable to the unfinished business of her dissolved firm. This problem is to some extent alleviated in firms that require their lawyers to open new files for specific projects for regular clients, but even then it is not eliminated entirely.

E. Calculating Overhead and Reasonable Compensation

Under Jewel and the UPA, a partner other than a surviving partner is entitled to no extra compensation for her services in winding up the dissolved partnership’s affairs. Indeed, this approach is often described as the Jewel or UPA “no compensation” rule. “Extra compensation” as used here means compensation greater than any sums the partner will receive as her share of the dissolved partnership. Under Jewel and the UPA, however, partners may be reimbursed for reasonable overhead incurred in completing the dissolved firm’s unfinished business. In contrast, under RUPA, a partner is entitled to reasonable compensation for services rendered in winding up the business of the dissolved partnership, as well as to the reimbursement of related overhead. RUPA jurisdictions only require partners to account to their dissolved firms for the profits earned from unfinished business, while UPA jurisdictions require them to account for all fees earned from such matters. Unfortunately, courts hearing unfinished business cases often use the term “overhead” imprecisely.

242. Hillman on Lawyer Mobility, supra note 4, § 4.6.4, at 4:80.
243. Id.
244. Jewel v. Boxer, 203 Cal. Rptr. 13, 18-19 (Cal. Ct. App. 1984) (explaining the no extra compensation rule); Unif. P'SHIP ACT § 18(f) (1914) (“No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.”).
245. Jewel, 203 Cal. Rptr. at 16 n.2.
246. Id. at 19.
248. “Overhead” in the law firm context can generally be broken down into “direct costs” and “indirect costs.” Direct costs are those that can be allocated to a particular lawyer or other timekeeper, such as benefits, malpractice insurance, CLE expenses, and bar dues. Direct costs are factored into a timekeeper’s hourly rate. Indirect costs include rent, utilities, support staff salaries, library costs, and the like. Law firms typically allocate indirect costs to individual timekeepers...
Moreover, in RUPA states, it can be difficult to measure “reasonable compensation,” since a lawyer’s billable hourly rate necessarily accounts for or encompasses (1) the lawyer’s compensation or, in the case of a partner, some amount representing the partner’s expected profit distribution; (2) the lawyer’s assigned overhead; and (3) some profit margin.249 Thus, if a court in a RUPA jurisdiction allows a partner who is completing her dissolved law firm’s unfinished business to apply her full hourly rate or the full hourly rates of others at her new firm against the fees received, the dissolved firm will never recover any “profit” attributable to its unfinished business because, except perhaps in large contingent fee cases or matters billed with a premium component,250 there will be nothing left. That is especially true given that the partner is also entitled to recover “overhead.”

When calculating reasonable overhead which partners may claim in connection with the completion of a dissolved law firm’s unfinished business in UPA jurisdictions, courts differ on whether “overhead” refers only to the partners’ direct costs or whether it also encompasses their indirect costs.251 Courts are more inclined to allow partners to recover indirect costs where they bear disproportionate responsibility for completing the dissolved firm’s unfinished business.252 In fact, these courts are making an equitable adjustment pursuant to some formula so that they also can be factored into hourly rates. Ellen Freedman, How Much Does Your Hour Cost to Produce?, 2006, at 1, 4, available at http://www.freedmanlpm.com/pdfs/financial_management/HOW_MUCH_DOES_YOUR_HOUR_COST_TO_PRODUCE.pdf. For simplicity’s sake, this article will use the term “assigned overhead” to refer to the combination of direct costs and indirect costs attributed to a particular timekeeper and factored into the timekeeper’s hourly rate. As explained in this footnote and discussed in the following text, the use of “assigned overhead” is consistent with the manner in which law firms establish their hourly rates.

249. In principle, a lawyer’s hourly rate is set based on three components: (1) the lawyer’s compensation; (2) overhead; and (3) profit. 1 MARY ANN ALTMAN & ROBERT I. WEIL, HOW TO MANAGE YOUR LAW OFFICE § 402[1], at 4-4 to -5 (2009). The terminology used in this formula does not mesh well with partnership law, however, because it refers to both “compensation” and “profit” and partnership law is clear that partners do not earn compensation—they share profits. But law firms organized as partnerships must decide how to distribute profits among their partners, which they often do through an inaptly-named “compensation process,” and they must be able to budget. To these ends, firms often award partners “points,” “shares,” or “units” and then assign a dollar value to each point, share, or unit. For example, a partner may be allocated 300 points, each with a budgeted value of $1000. If the firm makes its budget, the partner will receive $300,000; if the firm exceeds its budget, the partner will receive more. Law firms distribute profits to partners various ways. Many do so through monthly draws plus periodic or year-end distributions. In any event, a partner’s hourly rate has to include an amount sufficient to pay the partner his or her budgeted share of profits (in our example here $300,000), which, while not truly “compensation,” occupies the same place in the standard hourly rate formula.

250. Premium components might include higher-than-standard hourly rates, bonuses, success fees based on the outcome of the representation, or other value-added compensation forms negotiated with clients.

251. See supra note 66 (citing Hammes v. Frank, 579 N.E.2d 1348, 1353 (Ind. Ct. App. 1991)). For a discussion of direct versus indirect costs, see supra note 248.

to the individual partners’ respective shares based on the division of labor in the winding up process.

Allowing partners to recover indirect costs as overhead in a UPA jurisdiction initially appears to make little sense because their new firm would seem to incur these costs regardless of whether they complete the dissolved firm’s unfinished business. But that is not necessarily true. To the extent the lawyers (or anyone assisting them) can work for clients other than those for whom they are completing unfinished business, their new firm can recover its indirect costs via the assigned overhead component of the partners’ hourly rates charged to those other clients. Out of fairness, then, partners in a UPA jurisdiction generally should be able to apply their assigned overhead against the fees received on unfinished business, not just their direct costs. The partners’ fiduciary duty to complete their former firm’s unfinished business should not require their new firm to effectively go out-of-pocket in the process.

In RUPA jurisdictions, which permit a partner who completes her dissolved law firm’s unfinished business to deduct “reasonable compensation and overhead” before remitting the remainder of the fees earned from the unfinished business to the dissolved firm, “reasonable compensation” cannot be understood to mean the partner’s full hourly rate, nor the full hourly rates of the other partners, associates, or legal assistants who work with her. Rather, reasonable compensation must be limited to those portions of timekeepers’ hourly rates that are intended to recover the timekeepers’ compensation and assigned overhead. The profit margin that law firms build into their hourly rates cannot be recoverable by relocated partners or their new firms; that profit belongs to the dissolved partnership.

To use the simplest possible example, assume that a partner’s $300 hourly rate at her new law firm in a RUPA jurisdiction is divided equally between (1) expected profit distribution; (2) assigned overhead; and (3) profit margin. Assume further that the partner has an associate whose time is billed at $150 per hour divided equally between compensation, assigned overhead, and profit margin. If the partner and associate each bill one hour for completing the unfinished business of the partner’s former law firm that is winding up, the partner’s new firm would be entitled to retain $200 for the partner’s time and

253. As explained in supra note 248, the assigned overhead figure will include both the partner’s direct costs and her indirect costs as determined by formula.


255. See supra notes 248-49 and the accompanying text for a discussion of assigned overhead and the elements factored into lawyers’ hourly rates. The court in Hammes v. Frank, 579 N.E.2d 1348 (Ind. Ct. App. 1991), appeared to allow the partner to recover as overhead the full hourly rates of the associates and paralegals who assisted him in completing his dissolved law firm’s unfinished business. See id. at 1353 (allowing the lawyer to include “the cost of paralegals, [and] associate attorneys . . . within the ambit of ‘overhead’”). As explained here, however, that approach is incorrect.
$100 for the associate’s time as reasonable compensation for completing the dissolved firm’s unfinished business. The remaining $150 is profit ($100 in partner time plus $50 in associate time) that belongs to the dissolved partnership under the unfinished business doctrine. This allocation is fair because the partner’s new law firm is not required to go out-of-pocket in permitting the partner to fulfill her fiduciary duty to the dissolved firm and the dissolved firm recovers the profit attributable to its unfinished business, which is all that it is entitled to receive.

What, then, does “overhead” refer to in RUPA jurisdictions? It cannot refer to a partner’s assigned overhead (nor to the assigned overhead of other timekeepers) because those costs are factored into the partner’s hourly rate (and those of other timekeepers). The logical conclusion is that in this context “overhead” refers to those matter-specific expenses that firms normally charge to clients in addition to their legal fees, such as postage, delivery or messenger service fees, travel expenses, long distance telephone charges, photocopying costs, computerized legal research costs, and the like. Thus, returning to our earlier simplistic example, if the partner and associate made photocopies in completing the dissolved firm’s unfinished business, the firm could deduct those costs from any amounts due the dissolved partnership in addition to the $300 in fees generated by the combined two hours billed by the partner and associate. Again, this approach is reasonable because the new firm should not be required to go out-of-pocket in allowing the partner to honor her fiduciary duties to her former firm.

In appropriate cases, the definition or understanding of overhead might be expanded to include extraordinary expenses incurred by the new firm that were clearly attributable to the lawyers’ relocation. For example, if the new firm identified the lawyers through a search firm, the headhunter’s fees would properly be considered overhead. Alternatively, if the lawyers’ move exposed the new firm to litigation with anyone other than the dissolved firm or its representative, such as a disqualification dispute, the legal fees incurred in that controversy should be treated as overhead.

As practicing lawyers are aware, not all engagements produce the desired level of profit and some produce none at all. These undesirable outcomes may be the product of (1) a client’s insistence on an hourly rate discount that reduces or even eliminates the profit component; (2) a firm writing-off time charged to a matter before billing the client based on the conclusion that the matter’s nature or scope, or the result obtained, does not support the full amount of time recorded by the responsible timekeepers; or (3) the client’s refusal to pay the full amount billed, coupled with the firm’s grudging acceptance of the client’s position. As long as these and other measures are taken by the partner’s new law firm in good faith and consistent with the manner in which it handles work that originates with it—and not for the purpose of artificially reducing the “profit” on the dissolved firm’s unfinished business—the dissolving firm should bear the
impact of any diminution of the profits resulting from the completion of its unfinished business.

**F. Summary and Synthesis**

In summary, a law firm that dissolves generally has “unfinished business,” which may be defined as “all [client] matters in progress which have not been completed at the time the firm is dissolved.” What constitutes unfinished business is determined on the date of dissolution, not based on events occurring thereafter. Whether particular client matters constitute unfinished business will generally be obvious. To the extent there is doubt whether a matter is in progress or has been completed, that determination should be made by examining the status of the tasks that must be accomplished to achieve the goals of the representation. Thus, the mere fact that a matter is open in a law firm’s filing system at the time of dissolution, or a final bill for services remains to be sent, for example, does not mean that a matter is in progress and therefore counts as unfinished business.

In UPA jurisdictions, the unfinished business doctrine establishes that absent a contrary agreement, partners have a duty to account to the dissolved partnership for all fees generated from work in progress at the time of dissolution according to their percentage interests in the dissolved firm. That is the *Jewel* rule. Pending client matters are uncompleted transactions that require winding up after dissolution, and are thus partnership assets subject to post-dissolution distribution. Because dissolution does not terminate the firm’s pre-existing contracts with its clients, partners who perform those contracts do so as fiduciaries for the benefit of the dissolved partnership. Critically, the unfinished business doctrine has been modified in jurisdictions that have adopted RUPA to permit partners to receive extra compensation (defined as reasonable compensation plus overhead) for their efforts in winding up partnership affairs. Reasonable compensation and overhead should be calculated as explained above. In RUPA jurisdictions, former partners must remit to their

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261. See, e.g., *In re Brobeck*, 408 B.R. at 326 & n.4 (discussing current California partnership law).
dissolved firms any profits attributable to the completion of unfinished business rather than all fees earned from that business.263

Importantly, courts typically apply the unfinished business doctrine only when law firms dissolve and ultimately splinter. The unfinished business doctrine is not normally implicated where one or more partners properly withdraw from a firm, thus causing a technical dissolution of the partnership in UPA states, but not having a significant practical effect on the firm from the outside. This is logical, especially since most law firms in UPA states prevent withdrawals from triggering dissolution by including in their partnership agreements a provision fixing the term of the partnership or an anti-dissolution provision, or both. Nevertheless, the UPA approach to dissolution can pose problems for law partnerships, and there is at least some risk that anti-dissolution provisions in partnership agreements may be found to be ineffective, such that agreements on the distribution of income post-dissolution remain important.

As its name clearly indicates, the unfinished business doctrine does not apply to fees earned from new business developed by lawyers post-dissolution.264 Fees earned from new business are not an asset of the dissolved partnership, even if the clients that generate the new business were clients of the dissolved firm.265 This approach reasonably balances a partner’s fiduciary duties to her former firm and partners in the winding up of the dissolved partnership’s affairs with her right to pursue her own livelihood. As the Wyoming Supreme Court explained:

The completion of unfinished business and liquidation of partnership assets are among the purposes of the winding-up stage of a partnership. . . . However, clients of a professional partnership form personal relationships with the individuals who provide services on their behalf. Frequently, these personal relationships are the basis for selecting which firm or business entity is utilized. The fact that a client continues working with the same individual on new business does not extend the fiduciary duty to share the profits of the dissolved partnership indefinitely.266

The unfinished business doctrine is a default rule. It may be invoked where the partners in the dissolved firm had no partnership agreement, or where the partnership agreement is silent on the completion of unfinished business. Because it is a default rule, partners may contract out of it.267 Indeed, the law

265.  Smith, Keller & Assocs., 875 P.2d at 1267.
266.  Id. at 1267-68
encourages partners to enter into agreements that govern the allocation of fees attributable to unfinished business for the reason that such agreements “can only aid in the timely and organized winding up of the partnership’s affairs.”

Although cases discussing the unfinished business doctrine typically refer to partnerships, the doctrine clearly applies to limited liability partnerships (“LLPs”).269 Partners in a general partnership that registers as an LLP still owe one another and their firm fiduciary duties.270 In fact, the body of underlying partnership law except for the unlimited liability of partners applies to LLPs.271 Courts have further extended the unfinished business doctrine to the dissolution of law firms structured as professional corporations and limited liability companies,272 as well as to firms with hybrid organizational structures.273 The doctrine applies regardless of whether the firm’s dissolution was de facto or formally accomplished.274 Additionally, the doctrine applies regardless of the method by which the firm is compensated for its lawyers’ services.275 Although many unfinished business disputes involve contingent fees, the doctrine’s reach is not so limited.

IV. PROFESSIONAL RESPONSIBILITY CONCERNS

Lawyers resisting application of the unfinished business doctrine often contend that the doctrine violates two essential principles of professional responsibility. First, recognition of the unfinished business doctrine may be said

275. Although no reported cases appear to have discussed the subject, the unfinished business doctrine should apply to flat fee matters. A “flat fee,” also known as an “advance payment retainer” or “advance fee retainer,” is intended to compensate a lawyer for all work to be done on a matter regardless of the complexity of the assignment or the time required to complete the assignment. Douglas R. Richmond, Understanding Retainers and Flat Fees, 34 J LEGAL PROF. 113, 118 (2009). A flat fee is a present payment to a lawyer in exchange for specified legal services to be provided in the future. Id. Thus, even if a flat fee is earned by a lawyer upon receipt, the representation for which it is paid may be incomplete at the time a law firm dissolves, thus casting the representation into the category of unfinished business.
to violate the general prohibition against fee-splitting. Second, the doctrine allegedly violates ethics rules prohibiting restrictions on lawyers’ right to practice. Neither argument has merit.

A. Fee-Splitting

“Fee-splitting” generally refers to the circumstances in which lawyers in different law firms may divide fees. 276 This practice can be troublesome, but because client referrals between lawyers and cooperative representations between lawyers in different firms may benefit clients, ethics rules restrict fee-splitting rather than prohibiting it. For example, Model Rule of Professional Conduct 1.5(e) provides:

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

1. the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
2. the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
3. the total fee is reasonable.277

California, which has not yet adopted the Model Rules, has its own rule, 2-200(A), which states:

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

1. The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
2. The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable. . .278

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276. “Fee-splitting” also refers to arrangements in which lawyers impermissibly share fees with non-lawyers. See MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (2011) (providing that “[a] lawyer or law firm shall not share legal fees with a nonlawyer” except in four circumstances).
277. Id. R. 1.5(e).
Restrictions on fee-splitting are supported by at least four rationales. First, courts find commercial methods of obtaining clients to be distasteful. Second, restrictions on fee-splitting assist courts and disciplinary authorities in policing lawyers’ conflicts of interest. They do this first by preventing lawyers who cannot handle matters because of conflicts of interest from nonetheless collecting fees for them and, second, by controlling against conflicts inherent in representations in which lawyers divide fees. Third, restrictions on fee-splitting protect clients from the clandestine employment of lawyers on their behalf. Indeed, clients generally are entitled to select their lawyers. Fourth, constraints on fee-splitting prevent the “aggrandizement” of legal fees.

Generally speaking, none of the foregoing concerns arise when a law firm dissolves and the former partners relocate to other firms. Regardless, the first question to be answered in any fee-splitting controversy is whether the lawyers involved are “in the same firm.” If they are, fee-splitting is no concern. It should therefore come as no surprise that courts have almost unanimously rejected fee-splitting claims in the unfinished business doctrine context. The reason for this outcome is simple—partners of a dissolved law firm continue to be treated as partners of the same firm during the winding up process for


281. RICHMOND ET AL., supra note 279, at 103.


283. RICHMOND ET AL., supra note 279, at 103; Pumphrey, 144 P.3d at 817.

284. RICHMOND ET AL., supra note 279, at 103. This principle is amply demonstrated by case law supporting clients’ broad right to discharge their lawyers as they see fit. See, e.g., Nabi v. Sells, 892 N.Y.S.2d 41, 43 (N.Y. App. Div. 2009) (explaining that “the client has the right to discharge the attorney at any time, for any reason, or for no reason, regardless of any particularized retainers agreement”); Watson v. Gibson Capital, LLC, 187 P.3d 735, 738 (Okla. 2008) (“Clients possess unlimited power to discharge a lawyer.”); Phillips v. Selig, 959 A.2d 420, 431 n.6 (Pa. Super. Ct. 2008) (observing that “the attorney-client relationship is terminable at the will of the client, even when established in a written contract”).

285. RICHMOND ET AL., supra note 279, at 103; Pumphrey, 144 P.3d at 817.


purposes of winding up the dissolved partnership’s affairs.\textsuperscript{289} As the court in \textit{In re Labrum & Doak, LLP}\textsuperscript{290} explained:

\begin{quote}
[A] law partnership does not terminate upon dissolution, but continues to exist until the winding up of partnership affairs is completed. . . . Therefore, the partnership’s contractual relationship with its clients does not terminate upon the entity’s dissolution. . . . Until the partnership’s affairs are wound up, the entity remains intact for the purposes of completing its affairs, and lawyers remain in the same firm until that process is completed.\textsuperscript{291}
\end{quote}

Or, as an Illinois court similarly reasoned:

The clients of the [dissolved] partnership were free to be represented by any member of the dissolved partnership or by other attorneys of their choice. This right of the client is distinct from and does not conflict with the rights and duties of the partners between themselves with respect to profits from unfinished partnership business since, once the fee is paid to an attorney, it is of no concern to the client how the fee is distributed among the attorney and his partners. . . . This does not result in improper fee splitting . . . since . . . the partnership continues until the winding up of the partnership affairs has been completed, and it is perfectly proper for law partners to split fees among themselves.\textsuperscript{292}

Moreover, as a comment to Model Rule 1.5 makes clear, ethics rules generally do not prohibit the “division of fees to be received in the future for work done when lawyers were previously associated in a law firm.”\textsuperscript{293} Even states that have not adopted this comment tend to interpret their versions of Rule 1.5(e) consistent with it.\textsuperscript{294} Quite simply, lawyers who were partners in a dissolved law firm may distribute among themselves fees for post-dissolution work furnished in matters entrusted to the firm before it dissolved without impermissibly splitting fees.\textsuperscript{295} The key here is the timing; the partners accepted the representation producing the fees while they were still practicing together in the same firm. In the same vein, and as the court in \textit{Frasier, Frasier & Hickman, L.L.P. v. Flynn}\textsuperscript{296} explained, Rule 1.5(e) “does not prohibit a law firm from

\begin{itemize}
\item \textsuperscript{289} Bader v. Cox, 701 S.W.2d 677, 682 (Tex. App. 1985); Gull v. Van Epps, 517 N.W.2d 531, 536-37 (Wis. Ct. App. 1994).
\item \textsuperscript{290} 227 B.R. 391 (Bankr. E.D. Pa. 1998).
\item \textsuperscript{291} \textit{Id.} at 414 (citations omitted). \textit{See also} Hurwitz, 581 N.W.2d at 363 (taking the same position).
\item \textsuperscript{292} Ellerby v. Spiezer, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985); \textit{see also} Sufrin, 896 F. Supp. at 769 (adopting this reasoning).
\item \textsuperscript{293} \textit{MODEL RULES OF PROF’L CONDUCT} R. 1.5 cmt. 8 (2011).
\item \textsuperscript{294} \textit{See, e.g.,} Piaskoski & Assocs. v. Ricciardi, 686 N.W.2d 675, 686 (Wis. Ct. App. 2004) (“Although Wisconsin has not yet adopted this comment, we have no reason to believe that it does not accurately describe the limited scope of SCR 20:1.5(e).”) (footnote omitted).
\item \textsuperscript{295} \textit{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} § 47 cmt. g (2000).
\item \textsuperscript{296} 114 P.3d 1095 (Okla. Civ. App. 2005).
\end{itemize}
sharing fees with a former partner under a separation agreement for work arising from matters that were entrusted to the firm before the partner’s departure.297

The same is true with respect to California Rule 2-200(A).298

B. Restrictions on Lawyers’ Rights to Practice

The partners of a dissolved partnership sometimes attempt to escape enforcement of the unfinished business doctrine by arguing that it violates Rule 5.6(a),299 which states that a lawyer cannot participate in offering or making “a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship,” except for agreements concerning retirement benefits.300 Although Rule 5.6(a) certainly safeguards lawyers’ professional autonomy, it is principally intended to protect clients’ interests.301 The prohibition against restrictive covenants in contracts between lawyers ensures clients’ freedom to select counsel of their choice.302 Because clients’ “freedom of choice is the paramount interest” ethics rules intend to serve, courts generally view agreements restricting lawyers’ right to practice as violating public policy.303 Financial disincentives in contracts between lawyers are routinely held to be unenforceable on that basis.304 This is because such provisions may have the same effect as a restrictive covenant and thus prevent or discourage a departing lawyer from representing clients who want to follow her.305

In theory, the unfinished business doctrine operates as would a provision in a law firm partnership or shareholders’ agreement that imposes financial disincentives on withdrawing partners or shareholders. Thus, the reasoning goes, the doctrine cannot be enforced when a law firm dissolves and particular clients wish to continue their relationships with the lawyers who represented them at the dissolved firm. But legal doctrines or rules are what they are—and they are not restrictive covenants in agreements.306 This argument therefore fails

297. Id. at 1101. See also Walker v. Gribble, 689 N.W.2d 104, 115 (Iowa 2004) (applying Iowa DR 2-107, a predecessor to Rule 1.5(e)).
300. MODEL RULES OF PROF’L CONDUCT R. 5.6(a) (2011).
304. Id. at n.20 (citing cases from several states); see, e.g., Arena v. Schulman, LeRoy & Bennett, 233 S.W.3d 809, 814 (Tenn. Ct. App. 2006) (finding that a financial disincentive in a shareholders’ agreement constituted an impermissible restraint on the practice of law).
on the facts. Moreover, law firm partners and shareholders may execute governing agreements that provide for the allocation of fees post-dissolution, and such agreements in and of themselves do not violate Rule 5.6(a). 307 In conclusion, there is simply no basis to conclude that Model Rule 5.6(a) and the unfinished business doctrine are generally incompatible.

V. CURRENT CRITICAL ISSUES

There are two critical issues currently bearing on the unfinished business doctrine. First, whether bankruptcy may defeat or circumvent an unfinished business doctrine waiver in a partnership agreement. Second, whether a law firm that employs the former partner of a dissolved firm may itself face liability related to any unfinished business that the lawyer brings to the firm. These issues may overlap, as where a bankruptcy trustee sues a former partner of a bankrupt law firm and the law firm to which the former partner has migrated to recover profits attributable to unfinished business that the partner took with her to the new firm.

A. The Unfinished Business Doctrine in Bankruptcy

The leading case to date on the law firm unfinished business doctrine in bankruptcy is Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP). 308 Ronald F. Greenspan, the bankruptcy trustee for the estate of Brobeck, Phleger & Harrison LLP (“Brobeck”), sought to invalidate “eleventh hour amendments” to Brobeck’s partnership agreement and to recover profits from Brobeck’s unfinished business that he alleged were fraudulently transferred to ten former partners who relocated their practices to Orrick, Herrington & Sutcliffe LLP (“Orrick”) and Dorsey & Whitney LLC (“Dorsey”). 309 Greenspan also sued Orrick and Dorsey.

In terms of essential background, in January 2002, Brobeck and its primary lender, Citibank, executed a credit agreement by which Citibank acquired liens on all of Brobeck’s accounts receivable, unbilled time, and other assets. 310 In December 2002, Brobeck was in financial distress and several key partners had departed. 311 As a result, Citibank deemed Brobeck to be in default under their credit agreement. In late January 2003, Brobeck and Citibank negotiated a new credit agreement and entered into an amended security agreement in favor of Citibank. 312 Unfortunately, Brobeck was unable to accomplish a desired merger.

307. See id. (discussing partnership agreements containing such provisions in dispatching lawyers’ Rule 5.6(a) argument).
308. 408 B.R. 318 (N.D. Cal. 2009).
309. Id. at 325.
310. Id. at 326.
311. Id.
312. Id.
with another large law firm, Morgan, Lewis & Bockius LLP (“Morgan Lewis”), and on January 30, 2003, Brobeck’s leaders announced that the firm would soon dissolve.313

Meanwhile, Brobeck’s Policy Committee prepared a dissolution agreement and one of the partner-defendants in the adversary action, Grady Bolding, and other partners working with him drafted what became Brobeck’s Final Partnership Agreement (“FPA”).314 The Policy Committee directed Bolding and his cohorts to address in the FPA the unfinished business doctrine and “any Jewel-related liability.”315 By the time Brobeck entered its death throes, California had replaced its version of the UPA, which had existed at the time Jewel was decided, with the RUPA.316 Thus, the partners of a dissolved law partnership had become entitled to reasonable compensation for services rendered in winding up the partnership, and California’s version of the unfinished business doctrine provided that “in the absence of an agreement to the contrary, partners have a duty to account to the dissolved firm and their former partners for profits they earn on the dissolved firm’s ‘unfinished business,’ after deducting for overhead and reasonable compensation.”317 Of course, the Jewel court had chided the partners there for not having a written partnership agreement governing their firm’s dissolution and invited law firms organized as partnerships to contract around the default rules that it was required to apply.318 The RUPA as adopted in California permitted the Brobeck partners to do exactly that.319

The Brobeck partners needed no special incentive to avoid Jewel-related liability because another law firm had recently sued Brobeck for an accounting of profits that Brobeck had earned on unfinished business brought to Brobeck by former partners of the dissolved firm.320 In any event, the FPA included in Section 9(e) a so-called “Jewel waiver” that provided:

Except as specifically set forth below, neither the Partners nor the Partnership shall have any claim or entitlement to clients, cases or matters ongoing at the time of the dissolution of the Partnership other than the entitlement for collections of amounts due for work performed by the Partners and other partnership personnel on behalf of the Partnership prior to their departure from the Partnership. The provisions of this Section 9(e) are intended to expressly waive, opt out of and be in lieu of any right any Partner or the Partnership may have to “unfinished business” of the Partnership, as that term is defined in

313. Id. at 326.
314. In re Brobeck, 408 B.R. at 326.
315. Id.
316. Id. at n.4.
317. Id.
318. Id. at 327.
319. Id.
320. In re Brobeck, 408 B.R. at 327.
Jewel v. Boxer, or as otherwise might be provided in the absence of this provision through interpretation or application of the California Revised Uniform Partnership Act.321

The FPA did, however, except two contingent fee matters from the Jewel waiver—the Western MacArthur insurance coverage and bankruptcy litigation and the Tickets.com litigation—under a Section 9(e)(i) “carve out” which stated:

The Partners through the Partnership shall be and remain entitled to amounts to which any former Partner or Partners, or such former Partners’ partners, employer or affiliates (collectively, the “New Entities”) may otherwise become entitled in respect of amounts paid for legal services conducted after the former Partner’s dissociation from the Partnership upon dissolution of the Partnership, on ongoing business of Western MacArthur and MacArthur relating to the Chapter 11 proceedings of Western MacArthur Company and MacArthur Company and ongoing asbestos insurance coverage litigation, provided that in addition to offsetting costs, such New Entities shall be entitled to retain an amount in consideration of the value of the work performed on these matters by the New Entities. For purposes of this subparagraph . . . the value of the work so performed by New Entities after assumption of the case shall be equal to one hundred percent (100%) of the guideline hourly rates billed by the New Entities for work performed by any timekeeper . . . plus a portion of any additional amounts earned above such hourly rates as follows . . . .322

In early February 2003, Brobeck’s leadership explained to the partners that Section 9(e) of the FPA was intended to allow them to take their clients with them to their new firms without having to worry about the unfinished business doctrine forcing them to account to Brobeck for revenues they generated.323 After various discussions and meetings over the next two days, the Brobeck partners approved the FPA.324 The firm then began dissolution in accordance with the California RUPA.325

After Brobeck dissolved but before it entered bankruptcy, several former partners who were instrumental in Western MacArthur’s representation migrated to Orrick and Morgan Lewis.326 Both law firms entered into agreements to continue Western MacArthur’s representation that included contingent bonus fee arrangements.327 Morgan Lewis ultimately earned a $1 million bonus and Orrick eventually earned a $500,000 bonus.328 Other former Brobeck partners also

321. Id. (emphasis and footnote omitted).
322. Id. at 327-28.
323. Id. at 328.
324. Id.
325. Id.
326. In re Brobeck, 408 B.R. at 328.
327. Id. at 328-29.
328. Id. at 329.
moved to Orrick and clients that followed them produced a confidential amount of revenue for Orrick, including some retained profit.\textsuperscript{329} Other former Brobeck partners and their clients landed at Dorsey, which received a confidential amount of revenue from that unfinished business.\textsuperscript{330}

In September 2003, some Brobeck creditors filed an involuntary chapter 7 bankruptcy petition.\textsuperscript{331} Following his appointment as Brobeck’s trustee in bankruptcy, Greenspan sued Morgan Lewis, the firm that hired the most former Brobeck partners, alleging an unfinished business doctrine claim against Morgan Lewis for its share of the profits earned on the Western MacArthur representation.\textsuperscript{332} Those cases settled, with Morgan Lewis disgorging almost its entire Western MacArthur bonus fee.\textsuperscript{333} Greenspan settled with other former partners, but in 2008 he sued the defendants in this adversary action on various theories. The defendants and Greenspan then filed cross-motions for summary judgment.

Greenspan contended first that the \textit{Jewel} waiver in the FPA was an unlawful abdication of the Brobeck partners’ duty of loyalty and thus was invalid under the California RUPA, and that it was otherwise manifestly unreasonable, such that all unfinished business was the property of Brobeck’s bankruptcy estate.\textsuperscript{334} That argument went nowhere fast given that \textit{Jewel} and later courts had expressly encouraged partners to craft exactly the sort of agreement that the Brobeck partners had adopted.\textsuperscript{335} The court easily determined that Section 9(e) of the FPA complied with \textit{Jewel} and satisfied California partnership law.\textsuperscript{336} But those determinations were not dispositive because Greenspan also alleged that the \textit{Jewel} waiver was avoidable as an actual or constructive fraudulent transfer under the Bankruptcy Code and the California Uniform Fraudulent Transfer Act.\textsuperscript{337} Thus, Greenspan reasoned that he could recover for the benefit of Brobeck’s estate the dissolved firm’s unfinished business profits from the individual partners he sued, the law firms to which those partners moved, and any other transferees.\textsuperscript{338}

The fraudulent transfer doctrine prevents debtors from placing their property beyond their creditors’ reach when those assets should be available to satisfy creditors’ demands.\textsuperscript{339} Before it could determine whether there was a transfer, however, the court had to decide whether profits attributable to Brobeck’s

\begin{footnotes}
\footnotetext[329]{Id.}
\footnotetext[330]{Id.}
\footnotetext[331]{Id. at 330.}
\footnotetext[332]{\textit{In re Brobeck}, 408 B.R. at 330.}
\footnotetext[333]{Id.}
\footnotetext[334]{Id. at 331.}
\footnotetext[335]{Id. at 333-34.}
\footnotetext[336]{Id. at 333-36.}
\footnotetext[337]{Id. at 336.}
\footnotetext[338]{\textit{In re Brobeck}, 408 B.R. at 336.}
\footnotetext[339]{Id. at 337.}
\end{footnotes}
unfinished business were Brobeck’s property. While section 541 of the Bankruptcy Code defines “property of the estate,” state law determines the nature and extent of a debtor’s interest in property. The court staked out the parties’ competing positions:

The Trustee contends that the Unfinished Business (and the profit therefrom) is property under RUPA and Jewel, and that Brobeck had an interest in that property. The defendants contend that Brobeck’s interest in its Unfinished Business profits arises only if the partnership agreement is silent, and since the Brobeck partners had a contrary agreement as of the date of dissolution, Brobeck’s rights to Unfinished Business profits (other than those from Western [MacArthur] and Tickets.com) were precluded and never “sprang” into existence. In other words, they analogize the Jewel Waiver to a disclaimer, a legal fiction which eliminates any property interest that a disclaimant previously held in the disclaimed property. A disclaimant neither transfers nor possesses an interest in disclaimed property, and, consequently, creditors are unable to reach the disclaimed interest, even if the debtor is insolvent at the time the disclaimer is executed. . . . Therefore, if no property interest exists there can be no transfer, and the mere fact of insolvency cannot create a property interest where there was none to begin with under state law.

The court rejected the defendants’ argument as circular. The defendants recognized that profits from a law firm’s work in progress are a property right of the partnership at least when there is no partnership agreement to the contrary. The day before the Brobeck partners adopted the FPA containing Section 9(e), Brobeck had the right to recover such profits from any migrating partner; the day after, the firm no longer had that right. It was therefore incorrect to say that Brobeck’s right to the profits from its unfinished business never sprang into existence because that right did not exist until dissolution; the right continuously existed until the partners adopted the Jewel waiver in the FPA. Consequently, the court found Brobeck’s unfinished business to be Brobeck’s property.

Turning next to whether there had been a transfer of the disputed profits, the court noted that the Bankruptcy Code broadly defines the term “transfer” to include every direct or indirect mode of disposing of or parting with property, whether absolute or conditional. The hallmark of a transfer is a change in the

340. Id. at 337.
341. Id.
342. Id. at 327 (footnote and citations omitted).
343. Id.
344. In re Brobeck, 408 B.R. at 327.
345. Id. at 338.
346. Id.
347. Id. at 338 (quoting 11 U.S.C. § 101(54)).
transferor’s rights regarding the property after the transaction.\textsuperscript{348} Waiver of an interest in property is a transfer.\textsuperscript{349} Brobeck, through its partners’ adoption of the FPA, waived its interest in the unfinished business profits in question.\textsuperscript{350} There was accordingly a transfer of the unfinished business profits from Brobeck to its individual partners.\textsuperscript{351}

As for whether the Brobeck partners’ adoption of the \textit{Jewel} waiver in the FPA worked an actual fraudulent transfer of the firm’s unfinished business profits under the Bankruptcy Code, a finding to that effect would require proof that (1) the profits were property of Brobeck’s estate; (2) the transfer of the profits occurred within one year prior to the filing of Brobeck’s bankruptcy petition; and (3) the transfer was made with the actual intent to hinder, delay, or defraud the law firm’s creditors.\textsuperscript{352} The parties’ competing arguments pivoted on the third element. Greenspan contended that Section 9(e) of the FPA reflected the Brobeck partners’ actual intent to hinder, delay, or defraud creditors because the partners knowingly adopted it to avoid the default rules of California partnership law and understood the effect the \textit{Jewel} waiver would have on the firm’s creditors.\textsuperscript{353} The defendants countered that making an agreement that California law expressly permitted and, indeed, encouraged could not constitute fraud.\textsuperscript{354} Moreover, there was no evidence in the record to suggest that any Brobeck partner believed that approving the \textit{Jewel} waiver would harm the firm’s creditors.\textsuperscript{355} Finally, Greenspan could not establish which of Brobeck’s partners voted to approve the \textit{Jewel} waiver or their reasons for voting as they did.\textsuperscript{356}

Although seemingly inclined to lean in the defendants’ favor, the court concluded that the defendants’ actual intent was a question of fact reserved for determination at trial.\textsuperscript{357} As a result, neither side was entitled to summary judgment on the actual fraudulent transfer claim.\textsuperscript{358}

Greenspan had alternatively alleged that the \textit{Jewel} waiver was a constructive fraudulent transfer of Brobeck’s unfinished business profits under section 548(A)(1)(B) of the Bankruptcy Code.\textsuperscript{359} That theory required him to prove that (1) Brobeck had an interest in the unfinished business; (2) the interest was transferred within one year of the filing of the firm’s bankruptcy petition; (3)

\textsuperscript{348} Id. (citing \textit{Towers v. United States (In re Feiler)}, 218 B.R. 957 (Bankr. N.D. Cal. 1998), \textit{aff’d}, 218 F.3d 948 (9th Cir. 2000)).

\textsuperscript{349} Id. (citing \textit{Kapila v. United States (In re Taylor)}, 386 B.R. 361, 369 (Bankr. S.D. Fla. 2008)).

\textsuperscript{350} \textit{In re Brobeck}, 408 B.R. at 338.

\textsuperscript{351} Id.

\textsuperscript{352} Id. at 338-39 (citing 11 U.S.C. § 548(1)(A)).

\textsuperscript{353} \textit{In re Brobeck}, 408 B.R. at 339.

\textsuperscript{354} Id. at 339-40.

\textsuperscript{355} Id. at 340.

\textsuperscript{356} Id.

\textsuperscript{357} Id.

\textsuperscript{358} Id.

\textsuperscript{359} \textit{In re Brobeck}, 408 B.R. at 340.
Brobeck was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) Brobeck “received ‘less than a reasonably equivalent value in exchange for’” the Jewel waiver. Only the fourth element was at issue in the case.

A court deciding whether a debtor received reasonably equivalent value for property must first determine whether the debtor received “value” in the challenged transfer, meaning property or the satisfaction or securing of a present or antecedent debt of the debtor. “A transfer is for value if one is the quid pro quo of the other.” If there was value in exchange, the court must then determine whether the value of what the debtor transferred was reasonably equivalent to that which the debtor received in return. Reasonable equivalence is measured at the time of the transfer. There need not be exact equality in value, but the things transferred must be approximately or roughly equivalent in value. Because the prohibition against fraudulent transfers is intended to preserve the assets of the bankruptcy estate, reasonable equivalence is determined from the creditor’s perspective—not from a defendant’s standpoint. Finally, the analysis includes a temporal condition, such that there must be “‘an element of contemporaneity in the determination of whether . . . reasonable equivalence has been exchanged.’” Items of value coming to the debtor after the transaction do not count as consideration unless, perhaps, they were bargained for at the time of the original transaction.

The defendants asserted that various activities amounted to value in exchange for the Jewel waiver in the FPA, including assisting in collecting predissolution accounts receivable; executing waivers releasing one another and Brobeck from any claims relating to unfinished business, thus relieving Brobeck of the obligation to complete unfinished business or to account for it; avoiding malpractice claims against Brobeck had Brobeck retained responsibility for the unfinished business; enabling Brobeck to complete Western MacArthur’s representation; expending considerable time preparing fee applications in the Western MacArthur matter that benefitted Brobeck without receiving any compensation for those efforts; assisting former Brobeck employees in finding

360. Id. at 340-41 (quoting Brandt v. nVidia Corp. (In re 3dfx Interactive, Inc.), 389 B.R. 842, 863 (Bankr. N.D. Cal. 2008)).
361. In re Brobeck, 408 B.R. at 341.
362. Id. (quoting 11 U.S.C. § 548(d)(2)(A)).
363. Id.
364. Id.
365. Id.
366. Id. (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 540 n.4 (1994)).
367. In re Brobeck, 408 B.R. at 341 (quoting Brandt v. nVidia Corp. (In re 3dfx Interactive, Inc.), 389 B.R. 842, 863 (Bankr. N.D. Cal. 2008), and citing Kirkland v. Risso, 159 Cal. Rptr. 798, 801 (Cal. Ct. App. 1979)).
368. Id. at 342 (quoting Jackson v. Mishkin (In re Adler, Coleman Clearing Corp.), 263 B.R. 406, 466-67 (S.D.N.Y. 2001)).
jobs; and assembling and returning files to Brobeck clients. Greenspan dismissed these claims on the basis that the defendants either were bound to perform these tasks by virtue of their pre-existing fiduciary duties under California partnership law, were required to do so as a matter of professional responsibility, or had simply made “admirable gestures.” Moreover, even if any of those activities amounted to value, nothing in the FPA conditioned the Jewel waiver on any of them. The same was true for Dorsey’s claim that it conferred value in exchange for the Jewel waiver by taking over Brobeck’s former office space in Irvine, California.

In a further effort to make their case, the defendants first argued that the pre-existing duty rule did not apply because the Brobeck partners’ agreement to substitute new duties furnished adequate consideration for the FPA. Second, each Brobeck partner and the firm agreed there would be no duty to account for unfinished business profits (except for the Western MacArthur and Tickets.com cases), and the elimination of claims or compromise of disputes can constitute reasonably equivalent value. Third, Greenspan was considering but a small slice of Brobeck’s unfinished business and the activities of only few former partners. Fourth, Greenspan failed to recognize that Brobeck received $19 million in fees from the Western MacArthur case that it would not have collected but for the Jewel waiver, while the confidential amount that Orrick received from the case “pale[d] in comparison” and Dorsey allegedly received no profits.

The court concluded that even if what the defendants gave Brobeck constituted value, they did not exchange it for the Jewel waiver. In doing so, the court accepted Greenspan’s pre-existing duty argument. The individual partner-defendants’ argument that by taking on Brobeck’s unfinished business they avoided malpractice claims against Brobeck was at best speculative. The court also dismissed the defendants’ argument that by carving the Western MacArthur case out of the Jewel waiver, Brobeck received $19 million in fees that it would not have received otherwise and, because Orrick and Dorsey received far less or nothing, Brobeck actually “got the better end of the deal.”

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370. Id.
371. Id.
372. Id.
373. Id.
374. Id.
375. In re Brobeck, 408 B.R. at 342.
376. Id.
377. Id.
378. Id. at 343.
379. See id. (stating that the activities or events listed by the defendants as value were “required by law or professional ethics rules and hence do not constitute value in exchange”).
380. Id. at 344.
381. In re Brobeck, 408 B.R. at 343.
As the court saw matters, this argument failed under the express terms of the *Jewel* waiver. Section 9(e) of the FPA provided in pertinent part:

Except as specifically set forth below, neither the Partners nor the Partnership shall have any claim or entitlement to clients, cases or matters ongoing at the time of the dissolution of the Partnership other than the entitlement for collections of amounts due for work performed by the Partners and other Partnership personnel on behalf of the Partnership prior to their departure from the Partnership. The provisions of this Section 9(e) are intended to expressly waive, opt out of and be in lieu of any right any Partner or the Partnership may have to “unfinished business” of the Partnership. . . .

The relevant portion of the Section 9(e)(i) carve out provided:

The Partners through the Partnership shall be and remain entitled to amounts to which any former Partner or Partners, or such former Partners’ partners, employer or affiliates (collectively, the “New Entities”) may otherwise become entitled in respect of amounts paid for legal services conducted after the former Partner’s dissociation from the Partnership. . . .

Thus, on the date of transfer, Brobeck still controlled the Western MacArthur case; the Brobeck partners did not have any fees from the case to trade. The partners named as defendants could not defend Greenspan’s fraudulent transfer claim by asserting that they gave the fees from Western MacArthur to Brobeck when they had no right to claim the matter as their own. In sum, the $19 million in fees that Brobeck received from the Western MacArthur case could not constitute “value, or ‘new consideration,’” in exchange for the *Jewel* waiver.

Because it had determined that the defendants gave Brobeck nothing in exchange for the *Jewel* waiver and the unfinished business profits they collected, the court did not need to inquire into the reasonable equivalency of any value exchanged. All that remained for Greenspan to prove at trial was the amount of the defendants’ profits.

The court next addressed Greenspan’s allegations of actual and constructive fraudulent transfer under California law. The court resolved these claims consistent with its determination of the same claims under the Bankruptcy Code.

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382. *Id.* at 327 (emphasis omitted).
383. *Id.* (emphasis added).
384. *Id.* at 343.
385. *Id.*
386. *Id.* at 343-44.
387. *In re Brobeck*, 408 B.R. at 346.
388. *Id.*
389. *Id.* at 347-48.
The court additionally rejected Greenspan’s attempt to recover Orrick’s $500,000 bonus earned in the Western MacArthur case because the bonus did not constitute Brobeck’s unfinished business by virtue of the Section 9(e)(i) carve out in the FPA. Greenspan had argued that he was entitled to recoup the bonus from Orrick under the unfinished business doctrine; he did not allege any other theories of recovery. He was further limited in his ability to recover Orrick’s bonus because Orrick had entered into a separate agreement with Brobeck to continue Western MacArthur’s representation and the bonus was paid pursuant to that agreement. There was no suggestion that Brobeck’s agreement with Orrick was a fraudulent transfer.

To conclude, the court held that the Jewel waiver in Brobeck’s FPA was valid and did not violate California’s RUPA. Because the Jewel waiver effected a transfer of interests in Brobeck’s property while the firm was insolvent, however, Greenspan could challenge it as a fraudulent transfer under the Bankruptcy Code and California fraudulent transfer law.

It seems probable that the final chapter in In re Brobeck will not be written until the case reaches the Ninth Circuit. Although bankruptcy trustees have previously sued law firms to recover fees paid to the firm by or on behalf of an insolvent client, In re Brobeck appears to be the first reported case in which a trustee of a bankrupt law firm has sued to recover fees attributable to unfinished business from migratory partners of the dissolved firm and their new law firms. The case is a mixed bag for migratory law firm partners and shareholders. The In re Brobeck court validated lawyers’ ability to contract out of the unfinished business doctrine. At the same time, the decision illustrates the difficulties that await a dissolved firm that enters bankruptcy either voluntarily or involuntarily at the hands of its creditors. If the partners enter into a Jewel waiver when the firm is insolvent, a bankruptcy trustee may be able to challenge the agreement as a fraudulent transfer. The trustee’s rights arise on the date the bankruptcy petition is filed. As for transactions at risk, the trustee may reach back two years under the fraudulent conveyance provision in the

390. Id. at 348.
391. Id.
392. Id. at 328-29.
393. In re Brobeck, 408 B.R. at 348.
394. Id.
395. Id.
399. If a firm did not enter bankruptcy, creditors could still challenge a Jewel waiver on state law fraudulent transfer grounds.
400. Miller v. LaSalle Bank, N.A., 595 F.3d 782, 784 n.1 (7th Cir. 2010).
Additionally, under 11 U.S.C. § 544(b)(1), a trustee can “borrow” a state’s fraudulent conveyance statute to attack transactions that would be avoidable by an unsecured creditor under state law. Thus, so long as a debtor has at least one unsecured creditor, a trustee may be able to reach allegedly fraudulent transfers that occurred more than two years before the debtor sought bankruptcy protection if state law provides for a longer period.

With increasing frequency, large law firms in dire financial straits have concluded that bankruptcy affords a comfortable safe haven. As In re Brobeck demonstrates, however, bankruptcy court is not necessarily a friendly forum for law partnerships. In their efforts to maximize the value of bankrupt firms’ estates, trustees may aggressively pursue migratory partners and their new firms to collect fees or profits attributable to unfinished business.

### B. The Potential Liability of Destination Firms

The partners of a dissolved firm may face personal liability for their conduct in winding up the firm’s affairs. In addition, law firms that employ former partners of a dissolved firm are understandably concerned that they may face liability related to any unfinished business that the migrating partners bring with them. As noted in the Introduction, Baker & McKenzie paid $6.65 million to compensate the bankruptcy estate of Coudert Brothers LLP for profits that Baker & McKenzie earned on unfinished business imported by former Coudert partners after Coudert dissolved, and further agreed to forfeit most of its interest in approximately $17 million in contingent fees for litigation that former Coudert partners were handling. Also as noted earlier, Covington & Burling LLP paid

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402. 11 U.S.C.A. § 544(b)(1) (2010) (establishing a trustee’s ability to avoid a transaction that is voidable “under applicable law”).
403. In re Costas, 555 F.3d 790, 792 n.1 (9th Cir. 2009).
404. See, e.g., In re AFI Holding, Inc., 525 F.3d 700, 703 & n.4 (9th Cir. 2008) (applying the longer reach back period provided by California law in a case where, at the time, § 548(a)(1) only provided a one-year reach back period).
406. See id. § 7.05[1], at 7-20 to -22.3 (discussing partners’ post-dissolution obligations).
407. Main, supra note 397, at 13 (urging law firms hiring the former partners of dissolved law firms to “think twice about making a hiring decision that invites a lawsuit”). Occasionally, dissolved law firm’s bankruptcy trustee or an administrator overseeing a defunct firm’s winding-up will sue another law firm for causing the dissolved law firm’s downfall. See, e.g., Ross Todd, Rescues Gone Wrong?, AM. LAW., Feb. 2011, at 13 (reporting on a lawsuit by the administrator of the Coudert Brothers estate against Orrick that accused Orrick “of engaging in merger talks [with Coudert] while simultaneously recruiting 12 [Coudert] partners”); Nate Raymond, Coudert Estate Claims Orrick Dealt Firm a “Fatal Blow,” N.Y. L.J. (Dec. 15, 2010), available at http://www.law.com/jsp/nylj//PubArticleFriendlyNY.jsp?id=1202476201294 (last visited Dec. 15, 2010) (reporting that the court-appointed administrator overseeing the winding-up of Coudert Brothers had sued Orrick, Herrington & Sutcliffe for “delivering the ‘fatal blow’ to the defunct international law firm by poaching Coudert partners while simultaneously holding merger talks with the firm”). This Part does not discuss such claims or associated theories of recovery.
408. See supra notes 24-25 and the accompanying text.
$4 million to resolve an unfinished claim against it.\footnote{409} In \textit{In re Brobeck}, Morgan Lewis disgorged approximately $1 million in bonus fees to resolve Greenspan’s claims against it.\footnote{410}

An unfinished business dispute that expands to include a law firm that houses the former partners of a dissolved firm might set up as follows. Large Law Firm $A$ dissolves. Partner 1 and Partner 2, who were significant rainmakers at Firm $A$ migrate to Large Law Firm $B$, taking their clients—and their clients’ unfinished business—with them. Once at Firm $B$, they complete their clients’ unfinished business. Firm $B$ bills the clients of Partner 1 and Partner 2 for all services rendered in completing their unfinished business in Firm $B$’s name and the clients pay Firm $B$ for those services. Firm $A$’s bankruptcy trustee, creditors, other former partners, or liquidation plan administrator reason that those monies are Firm $A$’s property via the unfinished business doctrine and must be surrendered to Firm $A$ or its estate. The fiduciary obligations that Partner 1 and 2 owe to Firm $A$ in winding up partnership affairs compel this result. Not so fast, insists Firm $B$. Whatever fiduciary duties Partner 1 and Partner 2 owe Firm $A$, Firm $B$ owes no similar duties and thus can have no duty to turn over sums that, insofar as it is concerned, constitute the fruits of new business. This is sophistry from Firm $A$’s perspective, however, because Firm $B$ surely knew that Partners 1 and 2 had a fiduciary duty to complete their clients’ unfinished business for the benefit of Firm $A$, and Partners 1 and 2 billed their clients through Firm $B$ because that was the only practical way to collect the associated fees. Firm $B$ would never have allowed Partners 1 and 2 to collect those fees themselves. Ultimately, Firm $A$ or a stand-in threatens to sue Firm $B$ and Partners 1 and 2 to recover the fees (or at least the profits) attributable to Firm $A$’s unfinished business. Firm $B$ will surely negotiate a resolution to that claim which will involve it disgorging some portion of the subject fees or profits to avoid exposing its Partners 1 and 2 to liability. But what if a negotiated resolution cannot be achieved? What avenues are potentially available to Firm $A$ to recover the sums that it claims as its property? Although Firm $A$ probably cannot maintain an unfinished business claim against Firm $B$—that theory being confined to Partners 1 and 2—there are several other obvious possibilities.

Firm $A$ may assert that Firm $B$ holds the funds paid to complete Firm $A$’s unfinished business in constructive trust. A constructive trust is not actually a trust at all, but, rather, an equitable device or remedy employed by courts.\footnote{411} A court may impose a constructive trust where a party obtains a legal right to

\footnotesize{\begin{itemize}
\item \footnote{409} See \textit{supra} note 23 and the accompanying text.
\item \footnote{410} Greenspan v. Orrick, Herrington & Sutcliffe LLP (\textit{In re Brobeck}, Phleger & Harrison LLP), 408 B.R. 318, 329-30 (Bankr. N.D. Cal. 2009).
\end{itemize}}
property through fraudulent or abusive means, or by means that violate equity and good conscience. A constructive trust serves to prevent the unjust enrichment of the holder of the property in question. Indeed, the concepts of constructive trust and unjust enrichment are intertwined. Although courts commonly impose constructive trusts in cases of alleged fraud, a court may also establish a constructive trust if it would be against equitable principles to allow the holder to retain the disputed property even though it was acquired without fraud. The Connecticut Supreme Court summarized constructive trust principles as follows:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee . . . The imposition of a constructive trust by equity is a remedial device designed to prevent unjust enrichment. . . . Thus, a constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were to retain it.

A party ordinarily must establish its right to a constructive trust by clear and convincing evidence. Trial courts typically have the discretion whether to impose a constructive trust.

414. Tupper, 243 P.3d at 57.
415. Estate of Cowling v. Estate of Cowling, 847 N.E.2d 405, 411 (Ohio 2006) (quoting Ferguson v. Owens, 459 N.E.2d 1293, 1295 (Ohio 1984)); see also Estate of Draper v. Bank of Am., N.A., 205 P.3d 698, 706 (Kan. 2009) (explaining that “actual or constructive fraud does not have to be established before the constructive trust remedy can be ordered”); Carts & Parts, Inc. v. Rosales, 225 P.3d 1, 3 n.1 (Okla. Civ. App. 2009) (“In order to prevent unjust enrichment, a constructive trust may be imposed on property that passed to a third party even though there was no fraud, deceit, subterfuge, or any wrongdoing on the third party’s part.”); Ziromski, 6 A.3d at 377 (explaining that a constructive trust may be imposed for equitable reasons independent of fraud); Cavadi v. DeYeso, 941 N.E.2d 23, 33-34 (Mass. 2011) (“One type of constructive trust . . . may be imposed . . . without proof of fraudulent intent.”); LeFeber v. Johnson, 209 P.3d 254, 260 (Mont. 2009) (“Establishment of a constructive trust depends only upon a showing that the title holder would be unjustly enriched if permitted to retain the title.”); Faulknier v. Shafer, 563 S.E.2d 755, 758 (Va. 2002) (quoting Leonard v. Counts, 272 S.E.2d 190, 195 (Va. 1980)).
Of course, a constructive trust is a remedy—not an independent cause of action. Thus, a prospective beneficiary must allege a cause of action that warrants the creation of one. A former partner’s transfer of funds to her destination firm in the absence of an agreement with the dissolved firm concerning unfinished business generally should support the recognition of a constructive trust. The most obvious cause of action against a destination firm itself, however, is one for unjust enrichment, which generally requires a plaintiff to establish that (1) one person conferred a benefit on another; (2) the recipient appreciated or knew of the benefit; and (3) the recipient’s retention of the benefit without payment of its value would be inequitable under the circumstances. Regarding the first element, it is possible for the person who confers the benefit to be someone other than the plaintiff. Alternatively, as the cause of action is formulated in New York, a plaintiff alleging unjust enrichment must show that the defendant was enriched at the plaintiff’s expense and that it would offend equity and good conscience to permit the defendant to retain that which is sought to be recovered. Either way, there is no requirement of wrongdoing by the party alleged to have been unjustly enriched. For an unjust enrichment action to succeed, however, the plaintiff must lack an adequate remedy at law against the defendant.

Returning to our hypothetical scenario, Firm A would appear to have a viable unjust enrichment claim against Firm B. Partners 1 and 2 conferred a benefit on Firm B by completing their clients’ unfinished business while there and allowing Firm B to bill for those services, Firm B knew that it was collecting and retaining fees for Firm A’s unfinished business, and it would be inequitable or unjust to allow Firm B to retain those fees (or at least any profit earned on them). Firm B will surely argue that its enrichment was just and equitable, such that Firm A’s claim fails on the third element. But that argument seems difficult because by

422. See Jones v. Sparks, 297 S.W.3d 73, 78 (Ky. Ct. App. 2009) (casting the first element as a “benefit conferred upon [the] defendant at [the] plaintiff’s expense’’); Edwards v. Cascade Cnty., 212 P.3d 289, 295 (Mont. 2009) (“Unjust enrichment occurs when one has and retains money which in justice or equity belongs to another.”); Dema v. Tenet Physician Servs.-Hilton Head, Inc., 678 S.E.2d 430, 434 (S.C. 2009) (“A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another.”).
steering their clients’ unfinished business to Firm B, Partners 1 and 2 have arguably breached their fiduciary duties to Firm A. Even if Firm B did not actually know whether Firm A’s partnership agreement included a Jewel waiver that might have excused Firm A’s former partners from accounting for unfinished business, Firm B’s failure to ascertain that fact or to know the relevant law cannot help it under the circumstances. The fact that Firm B may not have consciously engaged in wrongdoing is no defense to an unjust enrichment claim.

An unjust enrichment claim may initially seem misplaced here. After all, it is not as though Firm B has received the sort of windfall often encountered in unjust enrichment cases; its lawyers earned those fees through their professional efforts. Yet Firm B did receive a windfall in the sense that it would not have acquired the migratory partners’ client relationships (or books of business, if you prefer) but for Firm A’s dissolution. Any seeming unfairness visited on Firm B is either ameliorated or cured if Firm B receives reasonable compensation plus overhead for its efforts in completing Firm A’s unfinished business, as it would in a RUPA jurisdiction. Firm B might also argue that an unjust enrichment claim should fail because a law firm with no connection whatsoever to any partner of Firm A, which we will call Firm C, could take on former clients of Firm A without incurring potential liability for Firm A’s unfinished business on an unjust enrichment theory. But that argument fails for the simple reason that the benefit conferred on Firm C is solely attributable to Firm A’s former clients, which, rather than maintaining their relationships with their lawyers from Firm A, decided to sever those ties and transfer their business. Firm C did not have the business delivered to it by migratory partners who owed fiduciary duties to the dissolved firm. Because Firm C has not had a benefit conferred on it by Firm A or its former partners, the first unjust enrichment element (the granting of a benefit by another person) is not met and Firm C’s enrichment thus cannot be labeled unjust.

Firm A may also consider suing Firm B for aiding and abetting Partner 1’s and Partner 2’s breaches of fiduciary duty in winding up Firm A’s affairs. Aiding and abetting liability requires that (1) the primary tortfeasor commit a tort that injures the plaintiff; (2) the defendant know that the primary tortfeasor’s conduct breached a duty owed by the primary tortfeasor to the plaintiff; and (3) the defendant substantially assist or encourage the primary tortfeasor’s misconduct.\footnote{426. See Restatement (Second) of Torts § 876(b) (1979); see also In re NM Holdings Co., LLC, 622 F.3d 613, 626 (6th Cir. 2010) (listing these elements in connection with claim for aiding and abetting breach of fiduciary duty).} A defendant’s conduct need not be animated by wrongful intent;\footnote{427. Sender v. Mann (In re Sender), 423 F. Supp. 2d 1155, 1176 (D. Colo. 2006).} ordinary business transactions may constitute substantial assistance for
purposes of aiding and abetting liability. The core of an aiding and abetting claim is the defendant’s knowing participation in the primary violator’s alleged misconduct. The defendant’s knowledge of the misconduct must be actual rather than constructive for liability to attach. This does not mean, however, that a plaintiff must produce a smoking gun; rather, a defendant’s knowledge may be inferred from facts. Of course, when the underlying tort is breach of fiduciary duty, a plaintiff must establish the existence of a fiduciary relationship and, in all cases, the plaintiff must be damaged by the conduct at issue.

Given that Partners 1 and 2 owe fiduciary duties to account to Firm A for the unfinished business that followed them to Firm B, and Firm B is substantially assisting or encouraging their breaches by billing, collecting, and retaining the associated fees, the pivotal question is Firm B’s knowledge of Partner 1’s and Partner 2’s breaches. Assuming that Firm B performed typical due diligence before admitting Partner 1 and Partner 2 to its partnership, it is probable that its leaders have the actual knowledge required to support aiding and abetting liability. Firm B may have sufficient knowledge to expose it to aiding and abetting liability even absent such due diligence. In contrast, if Firm A’s partnership agreement contained an appropriate Jewel waiver, such that Partners 1 and 2 have breached no fiduciary obligations to Firm A, then Firm B cannot face aiding and abetting liability. Absent primary liability, there can be no aiding and abetting liability.

Finally, for now, Firm A might sue Firm B for converting the fees earned from Firm A’s unfinished business. Conversion is an intentional tort. Conversion is the wrongful control or dominion over the property of another contrary to that person’s possessory right to, or interest in, the property. Although the tort of conversion developed in connection with personal property, it also applies to money. Liability for conversion does not require that the defendant intend to harm the rightful owner of the property or funds. For money to be the subject of a conversion claim, however, the funds must be

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431. See Cahaly, 885 N.E.2d at 810 (discussing actual knowledge of fraud).
433. See, e.g., Alexander v. Anstine, 152 P.3d 497, 503 (Colo. 2007) (concluding that lawyer could not be liable for aiding and abetting client’s breach of fiduciary duty where plaintiff failed to allege such a breach).
436. Id. at 288.
specific and identifiable.437 A mere obligation to pay money is not actionable as conversion.438 Simply stated, the plaintiff must be able to show that the money claimed or its equivalent belonged to it as though it was a specific piece of property and that the defendant converted it to its own use.439

Firm A should be able to establish its right to and interest in the legal fees produced by the completion of its unfinished business. Although it may not be able to itemize those fees at the time it sues, it can identify them by matter. Once it takes some discovery, Firm A should be able to identify the fees attributable to its unfinished business with any level of specificity that may be required. The fact that Firm B may believe that it has a superior claim to the disputed funds is not enough to avoid potential liability for conversion. In summary, Firm A should be able to make a colorable conversion claim against Firm B.

A destination firm’s potential liability for the unfinished business of partners who join it upon the dissolution of another firm emphasizes the need for the firm to evaluate its potential liability up front. If nothing else, the incoming partners may expect the firm to indemnify them for any unfinished business claims that their former firm may assert. At the very least, the new firm will want to inquire into the incoming partners’ unfinished business obligations and will ideally ask to examine any related agreements. In some instances, a firm may wish to consider negotiating an agreement with the dissolved partnership that proactively resolves any unfinished business obligations arguably owed by the migrating partners.

VI. ANALYSIS

The unfinished business doctrine is certainly not flawless. It potentially produces results in some cases that are not optimally equitable or logical.440 This is most true in jurisdictions that adhere to the UPA and therefore prohibit migratory partners from receiving extra compensation for their efforts in winding up partnership affairs. This is the strict Jewel rule, or the “no compensation” rule. The Jewel court’s concern that a different rule might cause partners to compete for the most lucrative cases during the life of their partnership in the hope of retaining those matters upon dissolution seems a bit strained.441 First, this concern overlooks the usual relationships between clients and lawyers that generally prevent clients from being shifted between lawyers like pawns. Certainly, institutional clients are neither prone to manipulation nor the willing

439. Id.
subject of intra-firm rivalries. Second, this concern assumes that partners anticipate the dissolution of their firms at a time when they can effectively compete for existing business. The timing of law firm dissolutions is not always so convenient.442

The other policy reason that the Jewel court offered in support of the no compensation version of the unfinished business doctrine—it discourages former partners from wildly seizing files and seeking personal gain by soliciting a firm’s existing clients upon dissolution—also ignores the solidarity of attorney-client relationships, which generally renders such efforts futile. Clients control who represents them, and it is unreasonable to assume or presume in the absence of supporting evidence that departing partners will disrupt existing attorney-client relationships. Moreover, unless the individual lawyer has represented the client prior to dissolution, rules of professional conduct prohibit the lawyer from soliciting the client’s representation in the fashion contemplated by the Jewel court.444 If the Jewel court was concerned about pre-dissolution solicitation of clients by anxious partners, that fear is modulated by the fact that a partner who solicited clients prior to dissolution in anticipation of the firm’s collapse would breach her fiduciary duty to the firm.445 Such potential liability should discourage partners from pre-dissolution mischief of this sort.

The rationale that lawyers who feel wounded by the unfinished business doctrine have only themselves to blame because it is a default rule and they could have contracted out of it is not entirely satisfying. The problems here are practical ones that are almost impossible to fully appreciate unless you have been a law firm partner. To elaborate, if a law firm does not have a Jewel waiver in its partnership agreement and one of the partners or, in the case of a large firm, the leaders or managers, were to propose amending the partnership agreement to add one, the other partners would likely look upon the suggestion with suspicion.446 In fact, they might very well reason that the person making the recommendation anticipated or contemplated the firm’s dissolution.447 At the same time, the partners often overlook the inclusion of a Jewel waiver in a partnership agreement at the outset of the relationship because of the atmosphere of mutual respect and optimism that typically surrounds the formation of a new

442. See, e.g., Tritsch, supra note 12, at 118 (describing the sudden and unexpected dissolution of Altheimer & Gray, once one of Chicago’s largest law firms).
443. Jewel, 203 Cal. Rptr. at 18.
444. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2011).
446. See id. (explaining that to protect their clients, lawyers “place the worst possible construction on the outcome of any idea or proposal, and on the motives, intentions, and likely behaviors of those they are dealing with,” and that lawyers “carry this view into their dealings with their own partners”).
law firm. Of course, if a firm amends its partnership agreement to address unfinished business too near to a looming dissolution, it risks allegations that the amendment was intended to achieve a fraudulent transfer. In short, contracting out of the unfinished business doctrine is not necessarily as simple as courts apparently believe.

None of this means that the unfinished business doctrine is indefensible or unjustifiable from a policy standpoint. To the contrary, the unfinished business doctrine cements partners’ fiduciary duties at crucial times and encourages the orderly winding up of partnership affairs. The doctrine prevents various forms of self-interested gamesmanship by partners beyond those identified by the Jewel court. Without it, for example, rainmaking partners might delay billing for services performed prior to the partnership’s termination until they have landed at new law firms in an effort to feather their nests at the expense of their former partners and creditors of their former firms. Partners who control important client relationships might hold off on opening new matters for those clients until they have relocated their practices, or attempt to account for time spent on matters pre-dissolution in ways that will defeat the dissolving firm’s right to the associated fees.

At base, the unfinished business doctrine simply elevates the enforcement of partners’ fiduciary duties over competing considerations. No lawyer should doubt the importance of fiduciary duties between partners or between partners and their firms, nor should they question the wisdom of recognizing and enforcing those duties during times when relationships between partners are most frayed or strained. The seeming unfairness of the ban on extra compensation for time spent on winding up partnership affairs that was enforced in Jewel is cured in those states that have adopted RUPA and therefore permit extra compensation. Although it is true that lawyers’ general skepticism and reluctance to trust their partners can make contracting out of the unfinished business doctrine difficult, the fact that law partnerships are frequently low-trust organizations does not justify excepting them from the unfinished business

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449. See generally Hillman, supra note 62, at 454 (discussing the practical difficulty of amending law firm partnership agreements).
450. See, e.g., Gina Passarella, Wolf Block Seeks Payback From Partners; Attorneys Accuse Leadership of Side Deal, LEGAL INTELLIGENCER (Nov. 30, 2010), http://www.law.com//jsp/pa/PubArticleFriendlyPA.jsp?id=1202475447199 (discussing accusation that rainmaking partners at dissolved law firm used Jewel waivers and delayed billings to redirect the dissolved firm’s unfinished business profits to their new firms, thus forcing some partners to return their draws or distributions paid pre-dissolution in order to satisfy the firm’s debts).
453. See supra Part III.E.
If contracting out of the doctrine at the time a partnership is formed or as it is preparing to dissolve is also problematic, these two obstacles are also common to other types of partnerships, and thus cannot support a law partnership exception to the unfinished business doctrine. Bottom line, the unfinished business doctrine is a default rule, and partners can contractually circumvent it. Firms do so successfully. A treatise on law firm partnerships even offers a sample Jewel waiver for lawyers to use when preparing or amending their partnership agreements.

Continuing, the “lock-in” and “lock-out” criticisms of the unfinished business doctrine that are often voiced are not sufficiently persuasive to abandon the doctrine. To explain, the unfinished business doctrine—specifically the Jewel rule against extra compensation for winding up partnership affairs—is said to be unreasonable because it coerces partners to remain together in a firm when they contracted for partnership at will. If a partnership dissolves and the partners do not share equal responsibility for winding up the partnership’s affairs, those who bear the extra burden will suffer economically because they must share the fees from their work while their colleagues who shirk their responsibility in order to pursue new business will be allowed to keep those fees for themselves or their new firms. As a result, the partners stay together to avoid the economic disadvantage that might accompany dissolution and winding up. In other words, the Jewel rule allegedly “locks-in” partners in violation of basic freedom of contract principles.

As to the lock-in problem, there is absolutely no evidence whatsoever that this problem is anything other than theoretical. Indeed, the many law firm dissolutions highlighted in the legal media and described in reported cases amply demonstrate that disaffected partners are not being locked-in their firms by the threat of being unfairly compensated for their time spent in winding up partnership affairs. Partners who force their peers to bear disproportionate responsibility for completing an unfinished business risk liability for breaching their fiduciary duties. Lock-in criticism also overlooks the availability of extra compensation in the many jurisdictions that have adopted RUPA, and disregards law firms’ ability to contractually address unfinished business concerns, however difficult that may be. Additionally, it is perhaps possible that lock-in is

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454. It should go without saying that partners in other types of partnerships may also have significant trust issues.

455. CORWIN & CIAMP, supra note 59, § 6.03[7], at 6-40.4.

456. Epstein & Wisoff, supra note 448, at 1618.

457. Epstein & Wisoff, supra note 448, at 1616-17.

458. Id. at 1618.

459. Id. at 1617-18.

in some instances no problem at all, but instead an actual benefit because it may force partners to negotiate a reasonable resolution of their differences and thus avoid unnecessary dissolution, or at least compel them to negotiate an orderly dissolution and winding up.

Regarding the lock-out problem, there is similarly no evidence that it exists. Assuming client worthiness, migrating partners should seek to continue clients’ representations in order to be hired by those clients in new matters. As a general rule, repeat clients face no substantial risk of lock-out. As with the lock-in problem, partners’ potential liability for forcing their co-partners to bear disproportionate responsibility for completing the firm’s unfinished business mitigates the risk of shirking. The right to extra compensation further diminishes the risk of lockout in RUPA jurisdictions. Finally, ethics rules limit lawyers’ ability to drop clients with unfinished business.461

Not surprisingly, because the most vocal critics of the unfinished business doctrine are migratory partners or leaders of law firms that engage in significant lateral partner recruitment, there is a risk that at least some of them may either discount or neglect to consider the competing interests of a firm’s creditors and former partners who have legitimate financial interests in the dissolved firm’s receipt of either the fees or profits attributable to its unfinished business. Fees collected on unfinished business may be necessary to satisfy partnership debts. At the very least, they may be required for the dissolved firm to satisfy partnership debts out of partnership assets, rather than individual partners potentially being required to return draws or distributions or forfeit capital to satisfy creditors of the firm. Although partners in a firm organized as an LLP should generally be able to argue against personal liability for the dissolved firm’s debts based on the LLP shield, that is not necessarily so.462 Courts that have yet to address the unfinished business doctrine are likely to conclude that these considerations weigh in favor of enforcing the unfinished business doctrine.

From a practical standpoint, one of the simplest and most appealing arguments against the unfinished business doctrine is that because the dissolved firm cannot complete its unfinished business by virtue of its dissolution, migrating lawyers and their new firms should be allowed to treat the dissolved firm’s matters that they secure as new business that need not be shared with the dissolved firm. The defeating flaw in that argument lies in the partnership law concept of winding up. That is, the dissolved firm could complete its unfinished

461. Model Rules of Prof’l. Conduct R. 1.16(c) (2011) (requiring compliance with rules regarding notice to or permission of a tribunal when withdrawing from a representation); id. R. 1.16(d) (requiring a lawyer to take reasonable steps to protect a client’s interests upon termination of a representation).

462. See Bromberg & Ribstein, supra note 270, § 309, at 137 (“In general, partners must contribute on dissolution toward the satisfaction of partnership liability. This is an obligation among the partners, in contrast to the partners’ liability directly to third parties.”).
business if the responsible partners would wait until the partnership terminates before relocating their practices. Because such an expectation is generally unrealistic, however, the unfinished business doctrine serves as a reasonable substitute.

Another fundamental criticism of the unfinished business doctrine in the context of law partnerships is premised on the nature of attorney-client relationships. In short, because clients are not property and belong to no lawyer, and can discharge their lawyers at any time for any reason or for no reason at all, it is incorrect to treat their unfinished business as property of the dissolved firm. Yet this argument seems unlikely to carry the day. To start, it overlooks the fact that the subject clients had not discharged the dissolved firm at any relevant time and, indeed, followed their lawyers to their new firm. Second, the new firm doubtless wanted the migratory partners to join it precisely because they would bring their clients with them. The migratory lawyers surely touted their client relationships when negotiating their status at, and compensation with, the new firm. In other words, the migratory lawyers and their new firm cannot have it both ways; they cannot disclaim the unfinished business doctrine on client choice principles even as they are counting on client loyalty to obtain economic or financial benefits. Third, to the extent that client choice conflicts with partners’ fiduciary duties to one another and to their firm, most courts simply prioritize partners’ fiduciary duties. Courts place a high value on partners’ fiduciary duties in the dissolution context as elsewhere.

Long story short, the law firm unfinished business doctrine is a steadfast principle of partnership law. The various arguments arrayed against the doctrine are not compelling. States that have not already done so should adopt the RUPA approach to winding up, however, thus allowing partners to receive extra compensation for their services in winding up partnership affairs. This approach is dramatically superior to the UPA approach and the no compensation rule of Jewel.

463. See Phil Watson, P.C. v. Peterson, 650 N.W.2d 562, 565 n.1 (Iowa 2002) (stating that "clients do not ‘belong’ to [a] firm or its individual members"); Shamberg, Johnson & Bergman, Chtd. v. Oliver, 220 P.3d 333, 341 (Kan. 2009) ("A client is not an article of property in which a lawyer can claim a proprietary interest, which he can sell to other lawyers expecting to be compensated for the loss of a property right.") (quoting Palmer v. Breyfogle, 535 P.2d 955 (Kan. 1975)).


465. See generally Epstein & Wisoff, supra note 448, at 1605 ("The client has the right to terminate a contract upon dissolution of a law partnership. . . . However, if the client elects to have the contract completed, each partner is bound to comply.") (footnotes omitted).

466. See, e.g., Page v. Page, 359 P.2d 41, 44 (Cal. 1961) (stating that while “[a] partner at will is not bound to remain in a partnership,” he “may not dissolve a partnership to gain the benefits of the business for himself, unless he fully compensates his copartner for his share of the prospective business opportunity").
VII. CONCLUSION

Law firm partners are amazingly mobile. Where partners’ migrations between firms are voluntary, they are essentially mundane. But that is not the situation where partners’ migrations are forced, as in the case of law firm breakups. Even large and outwardly strong law firms fold with odd frequency. Regardless of the particular firm or reasons for dissolution, law firms that dissolve typically have unfinished client business. The law firm unfinished business doctrine essentially establishes that absent an agreement to the contrary, partners have a duty to account to the dissolved firm and their former partners for either all fees or all profits generated from work in progress at the time of a firm’s dissolution in accordance with their percentage interests in the dissolved firm. Pending matters are uncompleted transactions that require winding up after dissolution, and are therefore partnership assets subject to post-dissolution distribution. The unfinished business doctrine frustrates migrating partners and their new law firms. From their perspectives, the unfinished business doctrine enslaves them to the dissolved firm. For all the criticisms leveled at the unfinished business doctrine, however, it is an entrenched aspect of partnership law. To be sure, the doctrine operates far more fairly in states that have adopted the RUPA approach to winding up partnership affairs, thus allowing partners to receive extra compensation for their services in the process. But even without that enhancement the law firm unfinished business doctrine seems poised to endure.
LIFE, DEATH & THE GOD COMPLEX: THE EFFECTIVENESS OF INCORPORATING RELIGION-BASED ARGUMENTS INTO THE PRO-CHOICE PERSPECTIVE ON ABORTION

Stacy A. Scaldo*

I. INTRODUCTION

While speaking on the issue of healthcare in August of 2009, President Barack Obama told a meeting of Jewish rabbis, “We are God’s partners in matters of life and death.” While the President’s message was expressly targeting choices in healthcare and end of life decisions, the statement is representative of a shift in the public rhetoric reflective of all matters concerning life - including abortion. This, indeed, would be a remarkable change in both express policy and argument identification – one that appears to be a new weapon in the arsenal of those who identify themselves with the pro-choice movement. Historically, public arena based abortion arguments grounded in religious beliefs have been owned and used by traditional conservatives to support the pro-life agenda. However, for what appears to be the first time, the pro-choice movement, led by President Obama’s statements in August 2009, appears to be incorporating, embracing, and relying on God and religion as part of the “choice process.”

Due in large part to the changing face of the traditionally pro-life religious communities, a growing population of people who claim to be both religious and pro-choice, and the rise of independent, self-service religious practices, the use of God in the abortion debate no longer belongs solely to those that identify themselves as pro-life. These factors, however, are merely a consequence of a pro-choice religious framework initiated by the Supreme Court in Roe v. Wade and continued through present day abortion jurisprudence. The Court’s religion-based abortion justifications have

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2. Id. The article notes that President Obama had previously in the conference call quoted from a Jewish prayer, stating “who shall live and who shall die.” Id. Present on the call, Rabbi Irwin Kula later noted “[i]f we actually find a way to ensure that there’s universal access to medical care, then we will be God’s partners in matters of life and death.” Id.
3. See id.
redefined the historical positions, and flipped the use of religious arguments both in the law and in popular culture. As such, the pro-life community no longer owns popular religion-based abortion reasoning. Based upon the deepness of this impact, it may never get it back.

The goal of this article is to: (1) examine the causes of this rhetorical shift aimed at incorporating God or religion as a valid part of the “choice process”; (2) assess the current effectiveness of such an inclusion; and (3) discuss the potentially permanent impact this shift will have going forward. The decision by the President was a bold one. But, based upon the last forty years of case law, legal discourse, and societal acquiescence, it may be the argument that solidifies the pro-choice position once and for all.

II. THE USE AND EFFECTIVENESS OF RELIGION-BASED REASONING AND ARGUMENTS IN ROE, CASEY, STENBERG, AND GONZALES.

While is it clear that popular culture will almost universally exploit the religious nature of arguments and religion-based reasoning as a way to heat up any religiously affiliated debate, it is equally plain that the Court will employ any reasonable, and sometimes unreasonable, means to avoid a decision based on religious grounds or principles. The abortion cases are no exception. In fact, the Court in Roe v. Wade took careful measure to ensure the public that the right to abortion would not be determined by religious positions on abortion. In so doing, the Court not only addressed the specific question presented, but also set the standard to which all future abortion cases would adhere. This framework is evident in almost every post-Roe Supreme Court abortion case and is expressly so in Planned Parenthood of Southeastern Pennsylvania v. Casey, Stenberg v. Carhart, and Gonzales v. Carhart. True, the Court does not identify religion as the backbone of its stated reasoning. However, when viewed in a responsorial context, the language of the opinions demonstrates that religion, and religious beliefs about abortion, are at the heart of these decisions.

In order to examine how the Court sets up and tracks the “God’s partners” paradigm, it is important to also explore the relevant amicus curiae briefs filed on behalf of the parties in these four cases. The briefs filed by the religious or religiously affiliated organizations are vital, as they demonstrate telling aspects of the socio-religious status at each phase of the debate and during each time period. How these religious groups have influenced Supreme Court decision-

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6. Id. at 116-17.
10. Planned Parenthood, NARAL, etc. generally always file Amicus briefs in abortion cases because their very livelihood depends upon it. However, what religious organization files a brief, which side they align themselves with, and what arguments they make, are essential components to analyzing the changing abortion rhetoric and its effect on the “God’s partners” paradigm.
making when it comes to issues of abortion is representative of the entire changing abortion debate.

A. Roe v. Wade: Setting the Stage for Pro-Choice Religion-Based Holdings

In Roe, the Court was tasked with deciding whether the Constitution supported a woman’s right to choose to terminate her pregnancy through abortion. The Texas law prohibiting abortion except when necessary to save the life of the pregnant woman was challenged by Roe, whose desire to abort was not connected to any life threatening condition. The Court held 7-2 that the Constitutional right to privacy, as recognized in Griswold v. Connecticut, included the right to terminate a pregnancy by abortion. The Court set up a three stage analysis and determined that the state’s levels of interest in a pregnancy vary depending upon the trimester:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

In purpose and effect, the court created a sliding scale of autonomy based upon this trimester framework, acknowledging a women’s complete autonomy over the pregnancy during the first trimester and providing varying levels of acceptable state interference as the pregnancy continued into the second and third trimesters.

12. Id. at 120. The companion case to Roe, Doe v. Bolton was filed by a married couple. Id. at 121; Doe v. Bolton, 410 U.S. 179 (1973). They claimed that the wife was suffering from a disorder that caused her physician to recommend that she not become pregnant. Roe, 410 U.S. at 121. The Does claimed that if she should become pregnant, they would wish to terminate the pregnancy. Id.
15. Id. at 164-65.
16. Id. at 163-164.
1. The Briefs

Only two amicus curiae briefs on behalf of religiously affiliated groups were filed in the Roe case – one in favor of the pro-choice argument and the other in favor of the pro-life argument. The brief in favor of the pro-choice argument was filed on behalf of the following churches or organizations: the American Ethical Union, the American Friends Service Committee, the American Humanist Association, the American Jewish Congress, the Episcopal Diocese of New York, the New York State Council of Churches, the Union of American Hebrew Congregations, the Unitarian Universalist Association, the United Church of Christ and the Board of Christian Social Concerns of the United Methodist Church. The brief presented two main arguments in favor of finding the statutes at issue unconstitutional: (1) that the abortion laws at issue invaded the right to privacy; and (2) that they were an invalid exercise of police power.

The facially religious argument is contained within the broader argument as to the improper use of police power. The section’s title presumes that the belief that “the product of every conception is sacred” is a religious view. Based upon this viewpoint, the pro-choice amici argued mainly that protecting fetal life based upon the premise that the product of every conception is sacred (a religious view) violates the Establishment Clause of the First Amendment. Amici noted that the interest in the fetus stems, in its essence, from a misplaced “‘moral’ concern for the ‘potential of independent human existence.’” They argued that this moral concern is misplaced if it outweighs a “greater moral outrage: the deep human suffering of adults and children alike, that results from compelling one to continue an unwanted pregnancy, to give birth to an unwanted child, and to assume the burdens of unwanted parenthood.” Therefore, because not all people, and not all religions, regard the product of every conception as sacred, a law that prohibits abortion based on the sacredness of the potential life, necessarily chooses and imposes upon its citizens one religion or one set of religious beliefs over another in violation of the Establishment Clause.

18. Id. at 14-20.
19. Id. at 20-34.
20. Id. at 31. (Subsection B.3.c. of the brief is titled: “The religious view that the product of every conception is sacred may not validly be urged by the States as a justification for limiting the exercise of constitutional liberties, for that would be an establishment of religion”).
21. Id.
22. Id. at 31-32.
23. Motion of Am. Ethical Union et al., supra note 17, at 31-32 (quoting Doe v. Bolton, 319 F. Supp. 1048, 1055 (1970)).
24. Motion of Am. Ethical Union et al., supra note 17, at 31-32.
The brief in favor of the pro-life argument was filed on behalf of the Association of Texas Diocesan Attorneys. The arguments made in this brief focused on the concept of personhood and the status of a fetus as a person. In conformity with that argument, amici claimed:

[N]o federal court can rationally dispose of the issues in this case without confronting and resolving the issue of whether an unborn child is a person under the constitutional concept of the person. It also tells that if the unborn child is a person within the meaning of the Constitution then a state has the right to enact a statute seeking to protect the constitutional right to life of the unborn child providing it has done so in a reasonable way.

The concept of personhood would be the center of the debate in Roe. The Court's decision on the issue would set the stage for all future abortion regulation cases.

2. The Decision

As is evident from the opening paragraphs of the opinion, the Court in Roe did not expressly look to religion as the basis of the decision. However, the introduction makes clear in both structure and content that religion and religious ideology were key components of the Court’s reasoning. Broken into three distinct but overlapping parts, the introduction sets the stage for the holding in Roe and its progeny. First, the Court introduced the historical importance of the challenged legislation:

The Texas Statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

Next, the Court acknowledged the daunting task that lay ahead:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s

26. See id.
27. Id. at 48-49.
29. See generally id.
30. See generally id.
experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.32

Finally, in an effort to demonstrate a principled detachment regarding a deeply morality-driven issue, the Court noted that its task was “to resolve the issue by Constitutional measurement, free from emotion and of predilection.”33 The Court did not cite in pertinent part to either of the two amicus briefs filed by the religiously affiliated groups.34 It also facially avoided any reliance on religion in setting forth the framework of the opinion in the introduction. It is clear, however, even from these initial paragraphs, that the pro-choice religious brief had a deep impact on the Court’s ruling. In noting the “vigorous opposing views” and the differing philosophies, experiences, religious training, attitudes toward life, and moral standards, the Court was foreshadowing a buy-in of the argument made by the pro-choice religious amici – that the sacredness of human life is a distinct, religious concern rather than a universal one.35

Any ruling affording a woman the right to choose abortion, based upon a liberty or privacy interest, must at least in theory demonstrate that one life is entitled to more value than the other. The Roe Court was aware of this, and took great measure to mount a preemptive attack on its ruling that would be based on those grounds.36 Before addressing Roe’s specific claim that the Texas statutes violated her liberty and privacy interests, the Court spent approximately twenty-four pages of the fifty-four page opinion in damage control.37 This analysis was two-fold: first, the Court surveyed the history of abortion from a legal, medical, and religious perspective; second, the Court examined the purposes and interests of the state in enacting and maintaining criminal abortion laws.38

32. Id.
33. Id. In so doing, the Court quoted Justice Holmes:
[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.
Id. at 117 (quoting Lochner v. New York, 198 U.S. 45, 76 (1905)).
34. It did cite to the Brief of the Am. Ethical Union et al. in support of its statement that “organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.” See id. at 160 and n.58.
35. See id. at 116; see Motion of the Am. Ethical Union et al., supra note 17 at 31-32. The pro-choice religious amici also cited to Justice Holmes’ admonition in The Common Law that “moral predilections must not be allowed to influence our minds in settling legal distinctions.” Id. at 32.
36. See Roe, 410 U.S. at 129-53.
38. Id.
The purpose of the Court’s foray into the historical practices and legal ramifications of abortion was to demonstrate that the laws at issue in the case were “of relatively recent vintage.” As the Court noted, these criminal abortion laws did not really begin to surface in mass until the late 19th century. This is an important point from a religious perspective because it responded to a general societal belief that a pro-life stance had always been rooted in and connected to religious doctrine. It also placed the pro-life stance in the context of belonging to the new fundamentalist-based Christian upstarts that had gained momentum in the previous half-century. On several occasions throughout this analysis, the Court made a point of historical religious trends in support of and opposition to abortion. It noted that “[a]ncient religion did not bar abortion,” and that early Christian theology was inconsistent on the issue.

After explaining why criminal abortion laws, in large part, did not exist until relatively recently, the Court examined three interests historically proffered by the state to justify its enactment and continued existence: (1) the discouragement of illicit sexual conduct; (2) the protection of the pregnant woman against an unsafe medical procedure; and (3) the protection of prenatal life. The second state interest, that of protecting the pregnant woman against unsafe abortion procedures, was purely a medical interest, and the Court’s determination as to the value of that interest was medical as well. However, the first and third interests – discouraging illicit sexual conduct and protection of fetal life – included religious implications, both in the interest of the state and analysis by the Court.

The Court acknowledged that the discouragement of illicit sexual conduct was neither an interest advanced by the state in the case nor was it suggested by amici. The Court, however, determined it would be best to address as a first

39. Id. at 129.
40. Id.
41. Id.
42. Id.
43. See generally Roe, 410 U.S. 113.
44. Id. at 130.
45. Id. at 134. Up until the 19th Century, Christian theology had come to accept the idea that the point of “mediate animation” occurred by the age of 40 days for males and 80 days for females. Id. According to the Roe Court, there was agreement that “prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide.” Id. Due in large part to the lack of evidence to support the “40-80 day view,” quickening became the critical point. Id.
46. Id. at 147-52.
47. Id. at 148-50 (noting that abortion prior to the end of the first trimester is relatively safe, mortality rates for abortion in the first trimester when performed in a legal environment are equivalent to or less than the rates for normal childbirth, the risks to a woman increase as her pregnancy continues, and high mortality rates at illegal “abortion mills” strengthen the state’s interest in protecting the woman’s health later in the pregnancy).
48. Id. at 158, 150-152.
concern the occasional argument “that these laws were the byproduct of a Victorian social concern.” If not advanced by the state and not argued by amici, the reasonable assumption is that the Court was speaking to the public in anticipation of or in reaction to an ongoing argument based upon a particular set of religious and moral principles. This tends to fall in line with the Court’s assessment of both late 19th century and current religious attitudes toward abortion. The Court, in essence, was speaking directly to the pro-life religious sector of society and discounting any morally-based anti-abortion stance. The Court concluded, in line with the concessions of the pro-life argument, that the statutes at issue were overbroad in protecting the interest of discouraging illicit sexual conduct as “the law fail[ed] to distinguish between married and unwed mothers.”

The third interest of protecting prenatal life presented the Court with a different dilemma altogether. The parties to the case, amici, and in some way, the rest of society, were asking the Court to make a determination as to when life begins. The Court refused. Although acknowledging that historical abortion statutes and cases “impliedly repudiate[d] the theory that life begins at conception,” the Court carefully searched for middle ground. Instead of a finding on either side, it determined:

[A] legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life [sic] birth. In assessing the State’s interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

With this one statement, the Court handed both the pro-life and pro-choice communities victory and defeat. For purposes of the opinion and resulting legal framework, this evasion was not only intentional but necessary. To find that life begins at conception would to some extent require an elevation of fetal rights not previously provided. In so doing, the rights of the mother – and by extension, the second interest discussed by the Court in protecting the pregnant woman from submitting to a procedure which could place her life in jeopardy – would become subservient to that of the baby she carries. In weighing the equally competing rights and interests, certain death would trump potentially fatal

50. Id.
51. See id.
52. Id.
53. Id. at 159.
54. Id. at 151-52.
55. Roe, 410 U.S. at 150.
56. See id.
danger. As a consequence, the equation would be turned on its head. Instead of determining when the interest in potential life is great enough to require a regulation on abortion, the question would ask under what circumstances the interest in the pregnant woman’s life and health requires interference with natural fetal development. Even within the terms of maternal life and health, abortion as it has been defined would not exist because the mother and child would have equal standing. Death of the fetus would be a consequence of the attempt to save both.

The Court’s finding that the issue could be resolved without determining the status of a fetus beyond that of potential life would have equally far reaching implications. Facially, the Court took religion out of its reasoning. But, in implicitly adopting the argument of the pro-choice religious amici, the Court: (1) determined that the right to privacy included a woman’s right to choose to have an abortion; (2) demonstrated that religion and how religious views affect the abortion debate were noteworthy considerations of its decision; and (3) set the parameters for future religion-based arguments in Supreme Court abortion cases.

First, the ‘potential life’ determination was essential to the Court’s finding that the right to personal privacy includes the abortion decision. As stated above, if life begins at conception, the privacy right cannot extend to abortion as the life of the fetus is of equal status. However, by calling the fetus ‘potential life,’ the Court was able to circumvent the issue of when life begins and expressly avoid the religious ‘sanctity of life’ argument. Because the potential life status impinges on the right to privacy an unqualified attribute, it “must be considered against important state interests in regulation.”

57. Id. at 156-57 (noting that if the fetus is considered a “person” within the language and meaning of the Fourteenth Amendment, the fetus’ right to life would be guaranteed and the pro-choice argument would collapse).
58. See generally Id. at 150-157.
59. Id. at 117. (Article 1191 of the Texas Penal Code, the statute at issue in Roe, stated: If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By ‘abortion’ is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused).
60. See generally Id. at 113.
61. Infra at 10-11.
62. Infra at 11.
63. Infra at 11-12.
64. Roe, 410 U.S. at 156-57.
65. Id. at 154-55 (noting that the right is “subject to some limitations; and that at some point the state interests as to the protection of health, medical standards, and prenatal life become dominant”).
Second, in refusing to rule on the exact life status of the fetus, the Court acknowledged how deeply religion and religious beliefs are tied to this debate.\(^6\) In fact, the decision to avoid rendering life status to a fetus was based in part on the inconsistent religious theories:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.\(^7\)

Further discussion of the differing views of religious groups continued with the Court noting that the predominant Jewish and Protestant positions held to the theory that life does not begin until live birth, that organized religious groups taking a position have regarded it as a matter for the conscience of the pregnant woman and her family, and that the Catholic pro-life stance was a relatively recent one.\(^8\) As a consequence of these competing theories, the Court summed up its reasons for rejecting the sanctity of life argument by stating that it did “not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”\(^9\) In making that determination, however, the Court did that very thing. By adopting one theory of life – that a fetus is only a potential life – the Court did not just override the rights of the fetus; it foreclosed the ability for the fetus to have any rights of equal measure that could validly compete with that of the pregnant woman at an early stage of pregnancy.\(^8\) Instead, the fetus only becomes important if the state can show an interest sufficiently compelling to vie for legitimate state regulation – a situation never present at the beginning stages of a pregnancy.\(^7\) As future cases have noted, this state interest in fetal life is rarely sufficient to override the interests of the woman, even at the latest stage of a pregnancy.\(^7\)

The problem, of course, is that choosing the term “potential life” over “life” brings with it some far reaching, possibly unintended consequences. True, the State, on behalf of the potential life, is afforded the opportunity to demonstrate that some level of protection is warranted post-viability. But that the fetus was classified in \textit{Roe} as only a “potential life,” coupled with the decision that the interests of the fetus do not potentially become compelling until viability,

\(^6\) Id. at 159.
\(^7\) Id. at 159.
\(^8\) Id. at 160-61 (citing generally to the Motion of the Am. Ethical Union et al, \textit{supra} note 17).
\(^9\) Id. at 162.
\(^70\) \textit{Roe}, 410 U.S. at 163. (According to the Court, the compelling point for triggering the State’s important and legitimate interest in protecting potential life was viability. The court drew this line because “the fetus then presumably has the capability of meaningful life outside the mother’s womb”).
\(^71\) Id.
\(^72\) See generally \textit{Stenberg}, 530 U.S. 914; \textit{Gonzales}, 550 U.S. 124.
resulted in the Court’s at least implicit finding that the sanctity of human life is not strong enough to compete with the privacy interests of the pregnant woman.73 Furthermore, even post-viability, fetal rights would still be subject to the will of the pregnant woman as the term “potential” prohibits full protection and acknowledgement of personhood even at the very latest stage of pregnancy.74 It is this potentiality of life, as opposed to the existence of it, which validates applying the right to privacy to the abortion decision. In essence, by refusing to determine when life begins and by referring to the fetus as “potential life,” the Court did in fact answer the question of when life begins.75 According to the Roe Court, life begins at live birth.76

With this framework in place, the Court set the parameters of the arguments by religious amici in future abortion cases. In order to obtain any measure of success, the pro-life proponents would have to convince the Court to reexamine and ultimately change its “potential life” status or enact sufficient lawful regulation to significantly reduce the number of women choosing the exercise of this right.77 As demonstrated in Casey, any “success” by the pro-life movement with regard to either of these fronts has worked more to strengthen abortion rights than weaken them.78

73. See generally Roe, 410. U.S. 113.
74. See id. at 164-65.
75. Id.
76. Id.
77. The success of these endeavors can be viewed as nothing short of relative. The Court has continued to resist regulations based upon a finding that life begins from the moment of conception. However, it has allowed for states to hold an interest in whether pregnancies end in abortion or live birth. For example, in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), the Court held unconstitutional an “informed consent” clause in a state regulation in large part because it was “designed not to inform the woman’s consent but rather to persuade her to withhold it altogether.” Id. at 444. Acknowledging that “[a] State is not always foreclosed from asserting an interest in whether pregnancies end in abortion or childbirth[,]” Id. at n.33 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)), the Akron Court found that “the State’s interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman’s informed choice between abortion or childbirth.” Id. at 443-44. Distinguishing Akron, the Court in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), found legislative findings that “[t]he life of each human being begins at conception,” “[u]nborn children have protectable interests in life, health and well-being,” and that the laws should be interpreted to provide unborn children “all the rights, privileges, and immunities available to other persons, citizens, and residents” of the state acceptable. Id. at 504-05 (citing MO. REV. STAT. §§ 1.205.1(1), (2), 1.205.2). The Court clarified Akron, holding that “a State could not ‘justify’ an abortion regulation otherwise invalid under Roe v. Wade on the ground that it embodied the State’s view about when life begins. [...] The Court has emphasized that Roe v. Wade ‘implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.’” Id. at 506 (Roe, 432 U.S. at474).
B. Planned Parenthood of Southeastern Pa. v. Casey: A Wolf in Sheep’s Clothing

In Planned Parenthood of Southeastern Pa. v. Casey, the Court was asked to determine the constitutionality of five different sections of a Pennsylvania statute regulating abortion. The Court, for the sixth time in a decade, was also asked to overturn Roe v. Wade. Although split on its decision regarding the specific statutory regulations at issue, a plurality of the Court reaffirmed what it considered to be the central tenets of Roe: (1) “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the state”; (2) “the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health”; and (3) the State’s “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” It departed from the trimester test, determined that it was not part of the essential holding in Roe, and found that the trimester framework was not workable as it suffered from two basic flaws: “in its formulation it misconceives the nature of the pregnant woman’s interest; and in practice it undervalues the State’s interest in potential life.” In place of the trimester test, the plurality held in favor of an “undue burden” analysis. The Court held that “a law designed to further the State’s interest in fetal life which imposes an undue burden on the woman’s decision before fetal viability” is unconstitutional. The Court described an “undue burden” as a state regulation that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”

80. Id. at 844. The five provisions of the Pennsylvania Abortion Control Act were: §3205, requiring that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; §3206, mandating the informed consent of one parent for a minor to obtain an abortion, but providing a judicial bypass procedure; §3209, requiring that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; §3203, defining a ‘medical emergency’ to excuse compliance with those requirements; and §3207(b), §3214(a), and §3214(f), imposing certain reporting requirements on facilities providing abortion services.
81. Id.
82. Id. at 879-901.
83. Id. at 846.
84. Id. at 873.
85. Casey, 505 U.S. at 876.
86. Id. at 877.
87. Id.
1. The Briefs

Five amicus curiae briefs by religious or religiously-affiliated groups were filed in the *Casey* case. All five of them were filed by organizations traditionally considered on the pro-life side of the abortion argument. All five argued in favor of either upholding the regulations, overturning *Roe*, or both.

Of the five briefs filed on behalf of the pro-life religious amici, two in particular address the lingering issues of privacy and personhood. The first of these briefs joined together sixteen organizations: Catholics United for Life, Orthodox Christians for Life, National Organization of Episcopalians for Life, Presbyterians Pro-Life, American Baptist Friends of Life, Baptists for Life, Lutherans for Life, WELS Lutherans for Life, United Church of Christ Friends for Life, Disciples for Life, Nazarenes for Life, Task Force of United Methodists on Abortion and Sexuality, Concerned Women for America, the American Center for Law and Justice, the Catholic League for Religious and Civil Rights, and the Christian Action Council. The Catholics United for Life (CUFL) brief directed its criticism of *Roe* at the Court’s determination that unborn children were not to be considered “persons.” CUFL made two main arguments in support of its request to redefine “person” to include those not yet born: (1) the term “person” under the Fifth and Fourteenth Amendments includes all human beings and does not exclude the unborn; and (2) the Court in *Roe* rendered no valid justification for excluding human beings conceived but not yet born from protection as “persons.” According to the CUFL, the erroneous nature of the *Roe* decision hinged on the premise that unborn children were to be considered only potential life. It argued that the Court’s decision was inconsistent and
arbitrary in its conclusion that personhood requires birth. It also claimed that science, logic, legal consistency, and justice called for no distinction between the born and unborn.

The second pertinent pro-life religion-based amicus curiae brief filed in *Casey* focused on the right to abortion as a faulty extension of the right to privacy. Those signing on to this brief included the United States Catholic Conference, the Christian Life Commission, Southern Baptist Convention, and the National Association of Evangelicals. The United States Catholic Conference (USCC) brief argued that the privacy right, as it had been established prior to *Roe*, “consisted of a number of discrete cases protecting either certain private places, private relationships, or private spheres of life from unwarranted government intrusion.” The USCC distinguished this general application of privacy from the privacy right *Roe* contemplated:

In considering abortion . . . the calculation is never simply one of individual interests competing with interests of the state. The abortion decision is complex and certainly affects the life interests of others: the unborn child, the father, other members of the family, and society itself. The decision implicates the procreative interests of both partners, affects the integrity of the marriage relationship, and *ends a life . . . A constitutional right to abortion subjugates liberties that in other contexts are found to be fundamental, but in this context are considered less worthy of protection.*

The two noted amicus briefs attempted to overcome the designation of the fetus as merely a potential life. The first group of amici did so by contesting the lack of status afforded to the fetus. The second group attacked the privacy interest afforded to the pregnant woman. These two arguments appear to be separate and distinct. However, they are fully intertwined, each relying on the other for


The total meaningless of birth as a criterion for personhood is more apparent today than ever, when induced, “scheduled” deliveries are commonplace, when babies are removed from the womb for surgery and then replaced within their mothers, and when irremediably harmed mothers are sustained on life support systems solely to await the delivery of the uninjured child within the womb. Birth changes where the person is, not what the person is.


support and validity. Therefore, in order for the Court in *Casey* to address either of these arguments, it would have to address both.

2. The Decision

The first sentence of the opinion states: “Liberty finds no refuge in a jurisprudence of doubt.”104 The last sentence concludes: “We invoke [our responsibility] once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.”105 It is no coincidence that the *Casey* opinion starts and ends with the word “liberty.” Liberty is the theme of the case.106 As of 1992, liberty is the theme of the abortion debate.107

After introducing the issues in the case, explaining the procedural posture, and reaffirming the “essential holding of *Roe,*”108 the Court made clear how important the interest of liberty would be to the outcome of the case:

> Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall “deprive any person of life, liberty, or property, without due process of law.” The controlling word in the case before us is “liberty.”109

It further explained that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”110 The Court then used this liberty interest framework to combat the arguments in favor of redefining personhood and against privacy as a claimed abortion right.111

As set forth in *Roe,* the use of privacy as the anchor of the right to abortion is dependent upon the fetus being considered only a potential life.112 Liberty, however, is broader and could have the mark of validity even if full personhood status is afforded to the unborn. The idea of liberty in the abortion decision was not a new phenomenon orchestrated by the *Casey* Court. The Court in *Roe* acknowledged the liberty interest present and even contemplated that the pregnant woman cannot be isolated in her privacy.113 However, although not a new term, the Court’s use of liberty as the main interest to protect is not without importance. In order to fully appreciate the distinction, it is important to be clear

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104. *Casey,* 505 U.S. at 844.
105. *Id.* at 901.
106. *Id.* at 846-853. “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Id.* at 851.
107. See, *e.g.*, *Stenberg,* 530 U.S. 914.
108. *Casey,* 505 U.S. at 844-46.
109. *Id.* at 846.
110. *Id.* at 851.
111. *Id.* at 852-61.
112. See generally *Roe,* 410 U.S. 113.
113. *Id.* at 159.
about the difference in the meanings of each word—both plain and legal. The words privacy and liberty are more closely related in terms of legal definition than they are in their everyday usage.\textsuperscript{114} Liberty and privacy as rights or interests are both autonomous in nature. Privacy is sometimes spoken of as a right contained within the liberty interest.\textsuperscript{115} Despite this, there are some critical distinctions to be made. Black’s Law Dictionary defines “privacy” as “[t]he condition or state of being free from public attention or intrusion into or interference with one’s acts or decisions.”\textsuperscript{116} “Autonomy privacy” is further defined as “[a]n individual’s right to control his or her personal activities or intimate personal decisions without outside interference, observation, or intrusion.”\textsuperscript{117} Webster’s New World Dictionary defines “privacy” as “the quality or state of being private; withdrawal from company or public view; seclusion.”\textsuperscript{118} In comparison, “liberty,” according to Black’s, is “[f]reedom from arbitrary or undue external restraint, esp[ecially] by a government.”\textsuperscript{119} Webster’s defines “liberty” as “not confined; free.”\textsuperscript{120} Both words denote a certain, varying level of freedom. In their simplest terms privacy appears to be mostly used in a freedom from context—liberty, a freedom to.

Just as the Court in Roe included liberty as an interest worthy of protection,\textsuperscript{121} the Court in Casey did not officially move away from privacy.\textsuperscript{122} It did, however, reclaim the right to abortion in a broader context by focusing on the liberty interest present in a woman’s decision whether to terminate a pregnancy.\textsuperscript{123} Noting that “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so,” the court acknowledged the inherent flaws in describing an act that necessarily will destroy the being of another as one protected by a right to act in seclusion.\textsuperscript{124} This shift to liberty, even if only rhetorical, set up the undue burden analysis based upon viability, balancing the pregnant woman’s liberty interest in terminating a pregnancy with the State’s important and legitimate interest in

\begin{itemize}
\item \textsuperscript{114} Compare Black’s Law Dictionary 1315 (9th ed. 2009), with Black’s Law Dictionary 1001 (9th ed. 2009).
\item \textsuperscript{115} See Am. Jur. 2d Constitutional Law § 614 (2010) (“The right of privacy is implicit in the concept of liberty guaranteed by the U.S. Const. Amend. XIV, § 1”).
\item \textsuperscript{116} Black’s Law Dictionary 1315 (9th ed. 2009).
\item \textsuperscript{117} Id. (defining the “right to privacy” as “[t]he right to personal autonomy”).
\item \textsuperscript{118} Webster’s New World College Dictionary 1142 (Michael Agnes ed., 4th ed. 2005).
\item \textsuperscript{119} Black’s Law Dictionary 1001 (9th ed. 2009).
\item \textsuperscript{120} Webster’s New World College Dictionary 826 (Michael Agnes ed., 4th ed. 2005).
\item \textsuperscript{121} See generally Roe, 410 U.S. 113.
\item \textsuperscript{122} See generally Casey, 505 U.S. 833.
\item \textsuperscript{123} Id. at 846-52.
\item \textsuperscript{124} Id. at 877. The idea that privacy may not be the most workable standard is a theme illustrated throughout the decision. “The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted” Id. at 869.
\end{itemize}
potential life.\textsuperscript{125} The effect of applying an undue burden analysis instead of the trimester test is twofold. First, it opened the door for greater regulation previability.\textsuperscript{126} Second, it appears to have reduced the right to choose abortion from a fundamental to a quasi-fundamental right.\textsuperscript{127} The two results, in turn, work to increase the State’s rights in regulating abortion both pre and post viability. Immediate analysis of this shift would favor the pro-life argument. As the \textit{Roe} decision had been interpreted as foreclosing regulation in the first trimester, \textit{Casey} was a win for those pushing for greater protection of the fetus at an early stage of pregnancy.

The undue burden analysis allowed for slightly less flexibility in making the abortion decision throughout all stages of pregnancy. But, basing that analysis on a liberty interest guaranteed that the overall right to abortion would remain. The difference between privacy and liberty, and their respective effects on the personhood of the fetus analysis, is most aptly conveyed in the Court’s lead up to the explanation of why the central tenets of \textit{Roe} would be affirmed:

\begin{quote}
[T]hough the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with the consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That the sacrifices have from the beginning of
\end{quote}

\textsuperscript{125} \textit{Id.} at 871.
\textsuperscript{126} \textit{Id.} at 872. One of the reasons for moving away from the trimester test was its rigid application with regard to early pregnancy abortion regulation. The Court, in adopting the undue burden analysis, noted the misapplication of Roe and also explained why the right to abortion is not one that is unqualified:

\begin{quote}
Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.
\end{quote}

\textsuperscript{127} \textit{Id.} at 873-78. \textit{See also} Roy G. Spece, Jr., \textit{A Fundamental Constitutional Right of the Monied to “Buy Out Of” Universal Health Care Program Restrictions Versus the Moral Claim of Everyone Else to Decent Health Care: An Unrmetting Paradox of Health Care Reform?}, 3 J. HEALTH & BIOMEDICAL L. 1, 33 (2007).
the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist that she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.128

Couched as a liberty interest, the personhood status of the fetus becomes far less important. While a privacy right could not stand as paramount to the life – not “potential” life – of a fetus, a liberty interest as applied to the abortion decision focuses far more on the freedom that a woman possesses in choosing her own destiny. The Court was not interested in disturbing nineteen years of reliance on that choice:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.129

Therefore, with Casey, the question moved from one of existence to one of importance. The Roe court could not answer the question of when life begins.130 The Casey court did not seem to be concerned with the question at all.131


When Stenberg v. Carhart132 came before the Court in 2000, the focus was on the ability of a state to ban the late-term intact D&E abortion procedure.133 The Court framed the issue as “whether Nebraska’s statute,134 making criminal the performance of a ‘partial birth abortion,’ violates the Federal Constitution” as interpreted in Roe and Casey.135 The Court ruled that the statute was

128. Casey, 505 U.S. at 852.
129. Id. at 856.
130. Roe, 410 U.S. at 150-52.
131. Casey, 505 U.S. at 870. (This is not to say that Casey disregarded the possibility that the rights of the fetus could ever override those of the pregnant woman. In stressing that viability was the fairest and most consistent line to draw in determining appropriateness of regulations, the Court acknowledged that “[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child”).
132. Stenberg, 530 U.S. 914.
133. Id. at 921-22.
unconstitutional for “two independent reasons.” The first reason was that the “law lack[ed] any exception ‘for the preservation of the . . . health of the mother.’” The second reason was that the statute “‘impose[d] an undue burden on a woman’s ability’ to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself.”

The Court discussed the health exception prong first, intentionally emphasizing that the earlier undue burden test would no longer be the sole arbiter of statutory validity. As the Court discussed, this health exception prong applies to more than the ability to choose abortion:

[A] State cannot subject a woman’s health to significant risks both in [the context where the pregnancy itself creates a threat to health], AND ALSO where state regulations force women to use riskier methods of abortion. Our cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed significant health risks. They make clear that a risk to a woman’s health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely (capitalization added).

This decision made clear what was unresolved in Casey - the health of the mother stands on its own and is not to be balanced against the interest of the state.

Although this case could have been decided by applying only the undue burden test, the Court split the previous test, which incorporated the concerns for the health of the mother in determining whether the state had imposed an undue burden on her choice, into a separate and distinct two-part test. In deciding that the statute posed an undue burden, the Court held that the statute had the

136. Id. at 930.
137. Id. (quoting Casey, 505 U.S. at 879).
138. Martin Haskell M.D., Dilation and Extraction for Late Second Trimester Abortion, Presented at the National Abortion Federation Risk Management Seminar (Sept. 13, 1992). (In a standard dilation and evacuation (D&E) procedure, the physician reaches into the uterus of the patient and pulls parts of the fetus out, dismembering these parts to be able to remove the fetus. Numerous passes are made until all of the fetal parts, the placenta and any remaining tissue are completely removed from the uterus. In comparison, the dilation and extraction (intact D&E or D&X) procedure is accomplished when “the surgeon grasps and removes a nearly intact fetus through an adequately dilated cervix.” Once all but the fetus’ head is delivered, the physician forces a pair of scissors into the base of the skull, separates the scissors to enlarge the opening, and sucks the contents of the skull out with a catheter. Once the skull is emptied, the physician delivers the now dead fetus intact).
139. Stenberg, 530 U.S. at 930 (quoting Casey, 505 U.S. at 874).
140. Id. at 930-39. The Court extended the health exception prong to a previable fetus as well. Justice Breyer noted that because the “law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.” Id. at 930.
141. Id. at 931.
143. Id. at 226-27.
“effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” The language of the statute, the Court reasoned, could have been interpreted to apply to the more commonly used D&E procedure as well as intact D&E because the procedures are similar in form. If this were the case, Nebraska and any other state would have had the opportunity to revise the statutory language and clarify that the ban only covered intact D&E abortions. The Court did not afford the State the opportunity to do this but instead promoted the health exception prong, a test that, based in large part upon the medical authority available at the time, would virtually block any state from creating legislation to stop this procedure.

1. The Briefs

With the constitutionality of the Nebraska partial-birth abortion statute in question and the constitutionality of partial-birth abortion bans hanging in the balance, the pro-choice religious amici retooled their arguments and once again had a measurable effect on Supreme Court abortion litigation. Six amicus curiae briefs were filed on behalf of religious or religiously affiliated institutions in the Stenberg case. Only one was filed by those ideologically aligned with the pro-choice movement. However, the single brief joined together fifty-four religious and religiously affiliated organizations as well as fourteen clergy and laypersons (hereinafter “Religious Coalition” brief). Three main arguments were posited: (1) that the Nebraska partial-birth abortion statute “impermissibly intrudes upon individual decisions about family” which are protected by the Constitution’s right to privacy and religious liberty; (2) that “the variety of religious views about abortion prohibits” the State from legislating in ways that interfere with a woman’s right to choose abortion; and (3) that the statute imposes upon both religious and non-religious women an undue burden on the right to terminate a pregnancy.

The first argument put forth by the Religious Coalition appears to be an updated version of that made by the pro-choice religious amici in Roe — namely that the choice to terminate a pregnancy is an issue of religious freedom, guaranteed by the Establishment and Free Exercise clauses of the Constitution. Therefore, choosing one view of conscience (or religion, or definition of life) over another impermissibly impedes the exercise of individual conscience.

144. Stenberg, 530 U.S. at 921 (quoting Casey, 505 U.S. at 877).
145. Id. at 939.
146. See generally id.
148. Id. at 4-9.
149. Id. at 9-20.
150. Id. at 20-23.
151. Id. at 6.
152. Id. at 6-7.
With the Roe and Casey decisions as arsenal, the Religious Coalition could validly, and constitutionally, mount a pro-choice religious argument. Quoting language from Roe and Casey that affirmed the individual and unique nature of the abortion decision and its deep connection to religion, spirituality, and morality, the Religious Coalition argued that “the Constitution prohibits governmental interference into crucial family decisions for which individuals look to the guidance of religious teachings and individual conscience.”

Because of this, and because “reasonable persons of good conscience disagree” as to the appropriateness of abortion, they argued the government must “refrain from imposing one view over all others.”

The Religious Coalition’s second argument furthered the overarching concern that Nebraska was choosing and legislating one religious belief over another. They detailed the general, and sometimes specific, doctrines of more than eleven religious faiths and called attention to the diverse teachings and theories among and within these groups. Arguing that the state had “unconstitutionally imbedded into law certain religious beliefs over others” by choosing to ban a particular form of abortion, the group used Casey as setting forth an acknowledgment that liberty includes religious liberty in family planning. In addition to noting that mandates of the statute clashed with many strongly held religious beliefs, the Religious Coalition highlighted the belief that it also interfered with the way in which adherents to particular religious faiths practiced their beliefs. They claimed: “For those for whom abortion may be required by their religion in the case of a threat to their life or health, the Act interferes with their choice. For those whose religion dictates that authentic choice is an ethical necessity, the Act negates the freedom of that choice.”

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154. Brief of Amici Curiae Religious Coal. for Reproductive Choice, supra note 147, at 8. Interestingly, the Religious Coalition chose to use the term “sanctity” in concluding that the abortion decision was deemed by the Court, and should remain, a matter of conscience:

This Court has properly respected the need for a woman’s autonomy in making such decisions, which must be made on an individual woman’s circumstances, her own personal or religious conscience, and the best available medical advice. Thus, the Court’s position says that every woman must be free to make decisions about when to have children, according to her own conscience and religious beliefs. Nebraska’s Act, therefore, violates the sanctity of individual decisions about family life protected by both the right of individual privacy and freedom of conscience.

Whether intended or not, the use of the word sanctity within this quote adds a different dimension to debate, one opposite of the often invoked “sanctity of human life” argument by the pro-life proponents.

The Religious Coalition’s third and final argument addressed the undue burden analysis established in *Casey*.\(^{160}\) The group proposed that the statute banning partial-birth abortion would pose an undue burden on a woman’s right to choose abortion in that it would “ban a woman from acting consistently with her religious conscience in making the most personal decision whether to terminate her pregnancy long before viability.”\(^{161}\) In essence, the group argued that the ban interfered with the rights of women to make decisions “in light of their own religious convictions and conscience.”\(^{162}\)

In comparison to the one brief filed by the pro-choice religious amici, five briefs were filed on behalf of various pro-life religious or religiously affiliated institutions.\(^{163}\) Contrary to the arguments of the pro-choice religious amici, the pro-life religious amici briefs avoided patently religious arguments.\(^{164}\) The themes throughout all of these briefs, however, make it clear that the arguments posited by the pro-life religious amici have their foundation in the religious doctrines and ideologies of these organizations. Among the five briefs, the recurring arguments could be placed into three main, but interrelated, categories: (1) the right to a partial birth abortion would be the creation of a new right neither provided by nor contemplated in the *Roe* and *Casey* decisions; (2) the statute at issue, which only bans one form of abortion, did not place an undue burden on a woman’s right to choose abortion; and (3) the practice of partial birth abortion blurs the line between abortion and infanticide.\(^{165}\)

The first main argument surfacing from this group of amicus briefs was that finding a constitutional right to a partial birth abortion would be creating a new right.\(^{166}\) Amici argued that *Roe* and *Casey* held that a woman has a constitutional right to terminate a pregnancy – not a right to kill a child during birth.\(^{167}\) In other words, “once birth begins, pregnancy is over.”\(^{168}\) They noted a

\(^{160}\) Brief of Amici Curiae Religious Coal. for Reproductive Choice, supra note 147, at 20-24.

\(^{161}\) Brief of Amici Curiae Religious Coal. for Reproductive Choice, supra note 147, at 21.

\(^{162}\) Brief of Amici Curiae Religious Coal. for Reproductive Choice, supra note 147, at 22.


\(^{164}\) See generally id.

\(^{165}\) See generally id.

\(^{166}\) See generally id.

\(^{167}\) See id.

\(^{168}\) *Knights of Columbus*, supra note 163, at 6-8. (noting the distinction between pregnancy and partial birth abortion. Pregnancy was defined as “the condition resulting from the fertilized
distinction between the right to abortion and the result of an abortion in that the right to terminate a pregnancy, essentially the right to empty the womb of a fetus, does not include the right to a dead fetus. In accordance with this principle, the right to choose does not include the right to choose how.

The second main argument focused on the undue burden test established in *Casey*. Amici argued that *Casey* guaranteed that there would be a point when the interest of the woman would not override the interest of the state in protecting fetal life. Relying on the language in *Casey* that a basic flaw of *Roe* was the “undervalue[d] State’s interest in the potential life within the woman,” they continued that banning the practice of partial birth abortion was one such example:

The Nebraska statute does not prohibit termination of any pregnancy that threatens maternal health. It forbids only the killing of a child in the birth canal with specific intent to do so. Moreover, it allows for the use of alternative pregnancy termination techniques, thereby assuring that abortion will always be available for pregnancies that endanger health.

As such, because the partial birth abortion ban did not prohibit a woman from terminating a pregnancy, it could not be said to pose an undue burden on a woman’s ability to have an abortion.

For their third main argument, the pro-life religious amici claimed that the partial birth abortion ban was constitutional as it helped to distinguish abortion from infanticide. They distinguished this particular type of abortion from all others and explained that it comes closest to the killing of a born child:

The difference between partial birth abortion and conventional abortion techniques is the evident similarity between the partial birth abortion method and infanticide. Partial birth abortion destroys the human child in a visible, open and explicit way, moments before birth, while conventional abortion methods do not. This explains the different public reaction to it, and why even legislators supportive of legal ovum. The existing of the condition beginning at the moment of conception and terminating with the delivery of the child.” (quoting BLACK’S LAW DICTIONARY, 1179 (6th ed. 1990)). Partial birth abortion, argued the Knights of Columbus, “involves inducing childbirth and then killing the living child during the birth process, in the birth canal”).

171. *See generally* Knights of Columbus, supra note 163; *Brief of Amici Curiae National Right to Life Committee et al. supra note 163; Brief of Agudath Israel of America supra note 163;; *Brief of the American Center for Law & Justice and the Thomas More Center for Law & Justice, supra note 163; Family Research Council, supra note 163.
176. Family Research Council, supra note 163, at 2-23.
abortion have voted in large numbers to ban it: All recognize that this abortion method, unlike others, involved killing a child who is in the birth canal, in the process of being born. This renders the procedure indistinguishable from infanticide.\footnote{177}

According to these groups, the blurring of the lines between abortion and infanticide is evident when location no longer logically affects the status of fetal rights.\footnote{178} “[I]f the child may be killed either in the womb during pregnancy or in the birth canal during birth, [nothing] prevents the same child from being killed once it is outside the birth canal[].”\footnote{179} While clinical in presentation, these three arguments contradict the Religious Coalition’s contention that religion and religious freedom requires that abortion remain a matter of conscience regardless of the stage of pregnancy or manner of procedure. The pro-life religious amici were intentionally attacking, once again, the determination as to when life begins. By the time \textit{Stenberg} found its way to the Court, however, the questions surrounding privacy, liberty, and personhood had turned from the theoretical to the geographical.\footnote{180}

2. The Decision

As previously noted, the \textit{Stenberg} Court determined the Nebraska statute was unconstitutional as it (1) lacked an exception for the health of the mother, and (2) posed an undue burden on a woman’s right to terminate a pregnancy.\footnote{181} While the interest in the woman’s health had always been a concern, \textit{Stenberg} officially elevated this interest beyond a mere factor in weighing the burden to a position that would hold equal value with the undue burden analysis.\footnote{182} Finding that a woman’s health was not just one factor to be balanced against state interests, the Court explained that the reach of the health exception requirement was applicable to both a woman’s ability to carry the pregnancy to term and also the determination as to the safety of particular abortion procedures.\footnote{183} Despite this, it made clear that doctors would not have “‘unfettered discretion’ in their selection of abortion methods.”\footnote{184} A health exception would be required “where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health.”\footnote{185} Although the Court

\footnote{177. Family Research Council, \textit{supra} note 163, at 8.  
178. Knights of Columbus, \textit{supra} note 163, at 19.  
179. Knights of Columbus, \textit{supra} note 163, at 19. \textit{But see} Hope Clinic v. Ryan, 195 F.3d 857, 882 (7th Cir. 1999) (“Line drawing is inescapable but the line between feticide and infanticide is birth. Once the baby emerges from the mother’s body, no possible concern for the mother’s life or health justifies killing the baby.”) (Posner, J., dissenting).  
181. \textit{Id.} at 930.  
183. \textit{Id.} at 931.  
184. \textit{Id.} at 938.  
185. \textit{Id.}
specifically addressed the lack of a health exception and requirement in certain circumstances of including one, it concluded “[r]equiring such an exception in this case is no departure from Casey, but simply a straightforward application of its holding.”

The Stenberg decision did not address religion. It did not explicitly address the arguments made by the religious or religiously affiliated institutions for either side of the issue. It did, however, frame the issue in the case so as to foreclose contemplation of the arguments posed by the pro-life religious amici. The issue as the Court framed it was whether the particular statute banning partial-birth abortion was constitutional. The pro-life religious amici asked the Court to determine whether the right to an abortion included the right to a dead fetus. A cursory review of these two questions may lead one to believe that the distinction between the two, if any, is subtle and of no import. A closer look reveals the true effect of the Casey decision.

Regardless of how the issue was framed, the resolution of the case would require an analysis of just how far the liberty interest in procuring an abortion could stretch. If the sole interest of the Court was to answer the issue of whether the statute was constitutional, it could have done so simply by applying the undue burden analysis. In fact, it acknowledged that the decision could stand on the undue burden analysis alone. However, the Court went beyond the express confines of Casey and officially raised the consideration of a health exception as a standalone requirement. Whether this was necessary is debatable. Roe and Casey already included the requirement that a health exception be contained in any such abortion ban post viability. As the “State’s interest in regulating abortion pre-viability is considerably weaker than postviability,” extending the health exception requirement to an abortion of a fetus pre-viability did not

186. Id.
187. See generally Stenberg, 530 U.S. 914.
188. See generally id.
189. See generally id.
190. Id. at 929-930.
192. Stenberg, 530 U.S. at 930. (Holding that the Nebraska statute was unconstitutional for “at least two independent reasons[,]” one of which was the imposition of an undue burden on the woman’s ability to choose a D&E abortion).
193. See Roe, 410 U.S. at 164-65; Casey, 505 U.S. at 878-79. The trimester test in Roe allowed for no regulation prior to the end of the first trimester, regulations in the second trimester aimed at “promoting its interest in the health of the mother” and “reasonably related to maternal health[,]” and regulations and even prescription of abortion in the third trimester “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” Id. at 164-65. Although Casey rejected the rigidity of the trimester approach, it reaffirmed that “subsequent to viability, the State in promoting its interest in the potentiality of human life, may if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother” Casey, 505 U.S. at 878-79 (quoting Roe, 410 US. At 164-65).
require creating a separate and independent test.\textsuperscript{194} Furthermore, the Court acknowledged that it was engaging in a “straightforward application" of \textit{Casey}.\textsuperscript{195}

The liberty interest becomes more important when a valid abortion regulation must pass not only the undue burden test but also contain a health exception. If the only hurdle is the undue burden test, a simple redrafting of the statute, where the banned procedure is explicitly described, would cure any overbreadth problem and avoid confusion as to what procedure was actually prohibited. But, at the stage of pregnancy when partial birth abortion is most frequently performed, the undue burden analysis alone may not fully support the woman’s rights over that state’s interest in fetal life. If, however, the test also includes a ban on any prohibition that places the woman’s health at risk, the right to an abortion, could, in fact, include the right to a dead fetus. The health exception, as set forth in \textit{Doe v. Bolton},\textsuperscript{196} is quite broad.\textsuperscript{197} In determining what may relate to health, the Court in \textit{Doe} found “the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”\textsuperscript{198} Because of the possibility that another abortion method could put a woman’s emotional, psychological, familial, or other “health” at risk, especially if another method resulted in a live baby, a “health-of-the-woman” requirement could be the catch-all barricade to prohibition-based abortion regulations. Therefore, despite all of \textit{Casey}’s regulation-friendly language, speaking of a woman’s right to choose abortion in terms of a liberty interest essentially foreclosed the state from reasonably prohibiting any of these late term abortions— even one that would require the killing of the fetus as a separate and independent step in the abortion procedure absent “substantial medical authority” to the contrary.\textsuperscript{199}

\textbf{D. Gonzales v. Carhart: The Breakdown of Pro-Life Religious Reasoning}

Three years after the Court decided \textit{Stenberg}, Congress passed the Partial-Birth Abortion Ban Act of 2003.\textsuperscript{200} The Act prohibits any physician from “knowingly perform[ing] a partial-birth abortion[.]”\textsuperscript{201} Congress included an

\textsuperscript{194} See \textit{Stenberg}, 530 U.S. at 930 (“Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation”).
\textsuperscript{195} Id. at 938.
\textsuperscript{197} See generally Doe, 410 U.S. 179.
\textsuperscript{198} Id. at 192.
\textsuperscript{199} In \textit{Casey}, the Court acknowledged the potential that the State’s rights could, under certain circumstances be strong enough to preclude a woman from choosing abortion late in the pregnancy. \textit{Casey}, 505 U.S. at 870. It noted: “In some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.” Id. The \textit{Stenberg} decision seems to contradict this statement.
\textsuperscript{201} Id.
exception in order to save the life of the pregnant woman.\textsuperscript{202} It did not include an exception for the woman’s health.\textsuperscript{203} However, responding to the decidedly flawed language and mandates of the Nebraska statute at issue in \textit{Stenberg}, Congress described the method of the banned procedure in greater detail, requiring a specific anatomical landmark stage of delivery and an overt act by the physician in addition to the delivery that kills the fetus.\textsuperscript{204}

The Court, in \textit{Gonzales v. Carhart}, upheld the Act, distinguished it from the Nebraska statute struck down in \textit{Stenberg}, and determined that it neither imposed an undue burden on a woman’s right to choose to have an abortion nor required a health exception.\textsuperscript{205} It found that the Act clearly only prohibited one type of abortion, intact D&E, and did not prohibit the D&E procedure where the fetus is removed in parts.\textsuperscript{206} The Court distinguished the language of the Act, which explicitly required the fetus to be delivered to an anatomical landmark, from the language in the Nebraska statute that required the delivery of a substantial portion of the fetus.\textsuperscript{207} While use of “substantial portion” of a fetus could prohibit both the intact D&E and the other D&E procedure, the anatomical landmark requirements limit the procedure to only intact D&E.\textsuperscript{208} Also, the Court found the mandate that the physician engage in an additional fatal overt act other than delivery further distinguished the banned procedure from other D&E procedures.\textsuperscript{209} Because the Act clearly identified which procedure would be banned, it was not overbroad.\textsuperscript{210} Therefore, it did not impose an undue burden on a woman’s ability to obtain an abortion at that stage of pregnancy.\textsuperscript{211}

With regard to the health exception, which the \textit{Stenberg} court all but made a requisite for the constitutionality of any abortion regulation, the Court determined that the lack of a health exception in the Act did not pose an undue

\textsuperscript{202} Id. \textsuperscript{203} See generally 18 U.S.C. \textsection 1531 (2003).\textsuperscript{205} Id. at 152-53.\textsuperscript{204} Id. \textsuperscript{206} Id. at 152-53.\textsuperscript{207} Id. \textsuperscript{208} Id.\textsuperscript{209} Id. at 153.\textsuperscript{210} Id. at 152-54.\textsuperscript{211} \textit{Gonzales}, 550 U.S. at 150-54.
burden on the abortion right. Based in large part on the reality that medical uncertainty exists as to whether intact D&E is ever the safest abortion method, the Court stated this "medical uncertainty does not foreclose the exercise of legislative power." It noted the language in Stenberg that an abortion regulation must contain an exception for the health of the woman "if substantial medical authority supports the proposition that banning a particular procedure could endanger women’s health[,]" but noted that such a "zero tolerance policy would strike down legitimate abortion regulations . . . if some part of the medical community were disinclined to follow the proscription." Such a narrow interpretation, the Court claimed, "would leave no margin of error for legislatures to act in the face of medical uncertainty." As such, because there was medical uncertainty as to whether intact D&E was ever the safest abortion procedure, the Court held that Congress was free to enact legislation banning the procedure without the inclusion of a health exception.

1. The Briefs

Once again, only one amicus brief was filed by pro-choice leaning religious or religiously affiliated institutions. The number of groups signing on to the brief dropped, however, to thirty-five. The group did not make any arguments that specifically addressed whether its members were of the opinion that the Act

212. Id. at 161-65.
213. Id. at 164.
214. Id. at 166 (quoting Stenberg, 530 U.S. at 938 ).
215. Id. at 166.
216. Id.
217. Gonzales, 550 U.S. at 166-67. According the Court:
   Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.
was constitutional. It focused instead on varying positions on abortion among the religious community. It first argued that there had never, in the history of the country, been a “single moral consensus on the issue of reproductive decision-making.” While this appears to suggest that the abortion decision could be viewed as separate from any one particular religious ideology, the group highlighted that the two main principles upon which arguments by religious groups in favor of reproductive freedom rested were, by their very nature, religious. The reproductive freedom arguments, so the group argued, have found their roots in “the sanctity of the life and health of the woman in the face of dangerous and illegal abortion procedures; and this nation’s founding principle of religious freedom and the right to act according to one’s own moral judgment.”

The group’s second point was also a consensus argument. It claimed that the varying religious communities were not in agreement as to whether abortion regulations should protect the health of the woman. It noted that “[t]his plurality of religious opinion is a testament to the intensely personal nature of the decision to terminate a pregnancy,” thereby making the act at issue “an undue government intrusion into a woman’s personal, religious, or moral sphere.” Specifically, the group identified the distinct categories of viewpoints among the religious institutions and religious groups. Despite the number of religions and religiously affiliated groups that are opposed to abortion, they acknowledged that many religions support a woman’s right to make reproductive decisions absent interference from the government, and that still others support the right to choose abortion where necessary to protect the life or health of the pregnant woman. With these varying sets of religious principles laid before the court, the group identified what appeared to be their main concern with the Act – a lack of religious freedom:

For women of faiths that encourage prayerful consideration of woman’s health, or in fact mandate that a woman’s health be preserved, the Act’s lack of a health exception is religiously intolerable. The Act leaves no room for such women to make highly personal decisions

219. See generally id.
220. See generally id.
221. Id. at 3.
222. Id. at 4-5.
223. Id. at 5.
225. Religious Coal. For Reproductive Choice, supra note 218, at 8.
226. See Religious Coal. For Reproductive Choice, supra note 218, at 8-22.
228. Religious Coal. For Reproductive Choice, supra note 218, at 12-14. (In addition to the two arguments noted, amici highlighted examples of religious organizations and individuals who have fought against abortion regulations that risk the health of the woman. Id. at 14-20. It also made note of religious democracies in different parts of the world that safeguard the health of the woman. Id. at 20-22).
about their health in consultation with their faith and in accordance with their religious values. Rather, the Act legislates one moral path as the path for all women (emphasis added).  

The pro-choice religious amici’s argument in Gonzales reaffirmed the positions taken by pro-choice religious and religiously affiliated institutions in Roe and Stenberg – that the decision regarding whether to have an abortion is personal, private, and in many ways, religious. It is because of the religious nature of the abortion decision – not despite it – that women should not be regulated out of the opportunity to make that choice.

As had come to be the norm by the time Gonzales made its way to the Supreme Court, the number of pro-life religious amici brief filings far exceeded the one brief filed by the pro-choice religious amici. The eight briefs filed included a total of approximately twenty-eight religious or religiously affiliated organizations. However, as was the case with many of the pro-life religious amici briefs filed in Roe, Casey and Stenberg, the arguments set forth by these groups were, on the whole, not based on or connected to religious principles.

The main arguments proffered by the pro-life religious amici were that the Partial Birth Abortion Act of 2003, a federal statute, was distinguishable from the Nebraska Act that was the subject of the Stenberg case. Some of the briefs

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230. See generally Religious Coalition for Reproductive Choice, supra note 218.
231. See generally Religious Coalition for Reproductive Choice, supra note 218.
233. See generally id.
234. See generally Family Research Council, supra note 232; Pro-Life Legal Defense Fund, supra note 165; United States Conference of Catholic Bishops, supra note 232.
focused on the importance of adhering to Congressional fact finding.\textsuperscript{235} They made note of the steep Congressional record and delineated intent of the legislature in drafting the statute.\textsuperscript{236} They argued, based on thorough investigation and comprehensive testimony, Congress’ determination that the intact D&E procedure is never medically necessary, is similar to infanticide, and that a health exception to the procedure would work to endanger the lives of infants.\textsuperscript{237} The groups argued that the congressional and trial court records demonstrated that no health exception was necessary for intact D&E abortions.\textsuperscript{238} Along those lines, some briefs further highlighted the distinguishing factors between \textit{Stenberg} and \textit{Gonzales}, claiming the federal act should be upheld as a permissible regulation under \textit{Casey}, the federal act explicitly applied only to intact D&E procedures and, as such, did not pose an undue burden, and \textit{Stenberg}’s factual findings should not be conflated with its constitutional holdings.\textsuperscript{239}

Most of the pro-life religious amici’s arguments were based upon the particular constitutionality of the statute at issue; however, there were more far-reaching arguments.\textsuperscript{240} These included requests to reexamine abortion jurisprudence on the whole\textsuperscript{241} and that the founding, relevant document to examine in determining the legality of abortion is the Declaration of Independence, which is based upon principles of a society formed under the watchful guidance of a Creator.\textsuperscript{242} Along the lines of the infanticide argument previously noted, one brief discussed findings that fetal pain is experienced by infants in the womb, and argued that a ruling that the Act is unconstitutional would cement the availability of abortion on demand.\textsuperscript{243}

While the pro-choice religious amici, backed by the notion that abortion choice is a matter of religious freedom, requested that the Court maintain the status quo as set forth in \textit{Stenberg}, the pro-life religious amici were seeking an opportunity to distinguish the \textit{Gonzales} case and influence what appeared to be a new, regulation-friendly majority.\textsuperscript{244} In line with the briefs filed in the three

\textsuperscript{235} See, e.g., Family Research Council, supra note 232; Pro-Life Legal Def. Fund, supra note 232.
\textsuperscript{236} Family Research Council, supra note 232; Pro-Life Legal Def. Fund, supra note 232.
\textsuperscript{237} Family Research Council, supra note 232 at 2-29.
\textsuperscript{238} Family Research Council, supra note 232; Pro-Life Legal Def. Fund, supra note 232.
\textsuperscript{239} See Pro-Life Legal Def. Fund, supra note 232; United States Conference of Catholic Bishops, supra note 232; Thomas More Society, supra note 232; Christian Med. and Dental Ass’n, supra note 232.
\textsuperscript{240} See generally Faith and Action, supra note 232; Thomas More Law Center, supra note 232; United States Conference of Catholic Bishops, supra note 232.
\textsuperscript{241} United States Conference of Catholic Bishops, supra note 232.
\textsuperscript{242} Faith and Action, supra note 232, at 9-23.
\textsuperscript{243} Tomas More Law Center, supra note 232, at 8-13.
\textsuperscript{244} See generally Geoffrey R. Stone, \textit{Our Faith-Based Justices}, CHI. TRIB. Apr. 30, 2007 (noting how the five justices joining to hold the statute in \textit{Gonzales} constitutional may have been adhering more to their Catholic faith than to the tenets of the law). See also Gila Stolper, “A Rank Usurpation of Power” – The Role of Patriarchal Religion and Culture in the Subordination of
previously mentioned cases, the religious arguments continued to be proffered to a much greater extent by the groups who align themselves with the pro-choice argument. The groups aligning with the pro-life perspective in large part maintained a clinical, non-religious tone to their arguments.

2. The Decision

Responding to Stenberg’s focus on the requirement that an abortion regulation or prohibition include an exception if “substantial medical authority supports the proposition that banning a particular procedure could endanger women’s health[,]” as well as its determination that the Nebraska statute was overbroad, the Court in Gonzales went to great pains to demonstrate how Congress appropriately responded to the mandates of the newly delineated partial birth abortion jurisprudence. It plainly demonstrated the differences between the Nebraska statute and the federal Act, acknowledging the federal government’s superior record-making capabilities, the benefit to Congress of the Stenberg decision in making its findings, and that time had afforded the opportunity for greater examination of the issues. Taking this into consideration, the Court, without trepidation, determined the Act: (1) was not void for vagueness; (2) did not impose an undue burden on a woman’s right to choose abortion because the restriction only prohibits the intact D&E procedure, and not the more common second trimester abortion methods; (3) did not require a health exception because substantial medical authority did not suggest the banned procedure was ever medically necessary, given the available abortion procedures considered to be safe alternatives; and (4) could be subject to as-applied challenges but not facial attacks.

The debate as to whether these findings are consistent with the constraints of Roe, Casey, and Stenberg has begun and will continue. Regardless, the


245. See generally Religious Coal. for Reproductive Choice, supra note 218.

246. Stenberg, 530 U.S. at 938.

247. Id.


249. See generally id.

250. Id. at 147-51.

251. Id. at 150-56.

252. Id. at 156-67.

253. Id. at 167-68.

Gonzales decision demonstrates the influence of the latent religion-based reasoning of the previous cases, whose analyses were a result of the arguments proffered in the religious and religiously affiliated amicus curiae briefs. As the Court in Gonzales made plain, any decision as to the validity of the Act would have to comport with the third general principle of Roe’s essential holding, as reaffirmed in Casey: “that the State has legitimate interests from the outset [of a pregnancy] in protecting the health of the woman and the life of the fetus that may become a child.”

Although a regulation that places a woman’s health in peril would not be upheld, not every regulation, according to Casey, must be designed with the woman’s health in mind. As such, the Court in Gonzales interpreted the third principle of Roe’s essential holding as it applied to the Act in terms of the Government’s interest in fetal life. It stated that the proper question was “whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.”

Observing that the central premise of the Court’s holding in Casey “was that [its] precedents after Roe had ‘undervalue[d] the State’s interest in potential life[,]’” it reasoned that an act that bans abortions involving partial delivery of a living fetus furthers that State interest. The Court stated:

Congress could [...] conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a “disturbing similarity to the killing of a newborn infant”... and thus it was concerned with “draw[ing] a bright line that clearly distinguishes abortion and infanticide.”

While it is clear that Congress had an interest in preventing a procedure that blurs the lines between abortion and infanticide, it is unclear whose interest Congress was attempting to protect. For example, it also took interest in the effects the procedure had on the medical community:

Partial-birth abortion... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end the that life.

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256. See generally Casey, 505 U.S. 833.
257. Gonzales, 550 U.S. at 146.
258. Id. at 146.
259. Id. at 157 (quoting Casey, 505 U.S. at 873).
260. Id. at 158 (quoting Congressional Findings 14(L) & (G)).
261. Id. at 157 (quoting Congressional Finding 14(J)).
It is difficult to see how an interest in fetal life was a concern of Congress or the Court when the regulation stops not one abortion. It only prohibits a certain abortion procedure in particular circumstances. Moreover, the difference in geography that the fetus finds himself or herself in at the time of the killing is really of no consequence to the furtherance of fetal interests. Consequently, the paramount interest in banning the partial-birth abortion procedure appears to be the protection of everyone but the fetus: the medical community who would be permitted to perform the procedure, the woman who would have to reconcile the way in which her abortion is performed, and the members of society at large who are uncomfortable with sanctioning this type of procedure.

The ability to call an anatomical landmark analysis the furtherance of the Government’s interest in fetal life is the direct result of Roe’s inability to grant personhood status to a fetus, regardless of the stage of pregnancy, coupled with Casey’s rhetorical switch to liberty as the foundational interest for the abortion right. A fetus does not have the right not to be killed until it is sufficiently outside of the woman’s body, such that it could be labeled a person under the law. The fetus’ ultimate fate is no different whether the abortion is performed through the intact D&E partial-birth or the standard D&E method. If the purpose of an abortion is not an empty womb but a dead baby, the Government’s interest in protecting fetal life is not served through the Act.

For evidence of how the pro-choice religion-based reasoning has neutered the Court’s ability to provide any valid protection for the Government’s interests in fetal life, even during the later stages of pregnancy, one need only look to its discussion of anatomical landmarks and scienter required to violate the Act. With regard to the position of the fetus at the time of the killing, in order to violate the Act, the physician must:

> [D]eliberately and intentionally vaginally delive[r] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.

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262. See id. at 181 (Ginsburg, J., dissenting) (claiming that the Act scarcely furthers the legitimate interest of the Government in protecting fetal life as it “saves not a single fetus from destruction, for it targets only a method of performing abortion”); see also Stenberg, 530 U.S. at 930 (Ginsburg, J., concurring) (the Nebraska law “does not directly further an interest ‘in the potentiality of human life’ by saving the fetus in question from destruction, as it regulates only a method of performing abortion”).


264. See generally Roe, 410 U.S. 113; Casey, 505 U.S. 833.

265. See § 1531.

266. See generally § 1531.

267. § 1531(b)(1)(A).
After the partial delivery, the physician must “perform[] the overt act, other than completion of delivery, that kills the partially delivered living fetus.” The physician must pull the fetus out past the anatomical landmark with the intention of killing the fetus with a separate overt act and then actually do so in order for the procedure to be subject to the Act. Therefore, if the fetus is dismembered before it is removed from the womb, if the physician collapses its skull and evacuates the contents of its head prior to the fetus reaching an anatomical landmark, or if a full partial birth abortion is performed by mistake, the Act is not violated. In the case of any of these three examples, the fetus ultimately is subject to no better fate than if a traditional Act-violating partial-birth abortion is performed. The only difference is that in a traditional Act-violating partial-birth abortion, the fetus could, by the process of birth, come dangerously close to legal personhood.

Further evidence of the Court’s ill-fated attempt to reconcile interests of liberty and fetal life can be found in its reliance on the infanticide argument as the basis for preventing the intact D&E procedure. The Court’s reasoning switches from the Government’s interest in prohibiting the procedure to a more general interest in abortion regulation. It states first that “[n]o one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life.” Then, after including D&E along with intact D&E as an infanticide-esque procedure, the Court moves to its now infamous “women’s regret rationale” and claims:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

This paragraph on women’s regret demonstrates both the desire of the Court to distance itself from previous abortion jurisprudence and the inability to do so. Knowing that its decision was limited to whether the Partial-Birth Abortion Act

268. § 1531(b)(1)(B).
269. See generally id.
270. See generally id.
271. See Family Research Council Brief, supra note 232 at 18 n.29. (arguing that the issue of when life begins is actually irrelevant in light of the fact that Congress and Courts have determined in numerous other situations that life begins at conception. The group highlighted the Unborn Victims of Violence Act, which it claimed “effectively holds that as to the whole world save for the pregnant woman and those cooperating with her in her voluntary abortion, persons deserving the equal protection of laws against killing begin at conception”).
273. Id. at 158.
274. Id. at 159.
was constitutional, it then had to find a way to sufficiently distinguish the procedure from the D&E procedure that it had just described as a devaluation of human life. It acknowledged that the standard D&E procedure could be considered as brutal, if not more brutal than the intact D&E procedure. It distinguished the two procedures by highlighting the geographic parameters of each procedure — a standard D&E procedure occurs while the fetus is still inside the mother; an intact D&E procedure occurs when the fetus is partially outside the mother. It then concluded that “[i]t was reasonable for Congress to think that partial-birth abortion, more than standard D&E, ‘undermines the public’s perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.” Again, the Government’s interest seems to be focused more on protecting those that are aware of the procedure — not those that are the subject of the procedure.

Of importance is the fact that the Court only refers to the fetus as “potential life” when either quoting from a previous case or describing the confines of a previous holding. Otherwise, the fetus is described in a variety of ways including “human life,” “infant life,” and “life.” But this is the ultimate evidence of the *Casey* effect. Even an infant in the process of being born is still subordinate to the liberty interests of the woman in her choice to abort. It is true that the Court in *Gonzales* maintains, at least by way of not directly changing its status, that the fetus is potential life. But it cannot ignore the fact that the partial-birth abortion process is the closest that potential life can come to becoming a person entitled to Fourteenth Amendment protection. With the liberty interest of the woman maintaining a paramount position, the Partial-Birth Abortion Act, even though held constitutional, guarantees that the right to an abortion includes the right to a dead fetus. Therefore, abortion jurisprudence, as a result of its initial reliance upon the pro-choice religious and religiously affiliated amici, has rendered even partial-birth abortion prohibitions without any bite.

275. *Id.* at 160.
276. *Id.*
277. *Id.* (quoting Congressional Findings (14)(K)).
278. *Gonzales*, 550 U.S. at 146, 158.
279. *Id.* at 145, 157, 158, 159, 160, 164.
282. *See generally § 1531.

It is important to note that although the *Roe* Court could not decide when life begins, it clearly did not intend to extend lack of personhood to a fetus in the process of being born. *Roe*, 410 U.S. at 118 n.1. The distinction was acknowledged in *Roe* when the court stated that the Texas parturition statute which disallowed the killing of a child “in a state of being born and before actual birth” was not under attack. *Id.* It seems, however, that the subsequent abortion cases have done just that. If a fetus in the process of being born is entitled to Fourteenth Amendment protection, then not the health or even the life of the woman could override the fetus’ right to exist. This, of course, is clearly not what the partial-birth abortion statutes contemplate or protect. Furthermore, it could be argued that *Gonzales*, even though it appears to have restricted abortion procedures, has
E. The Varying Faces of Religion-Based Abortion Beliefs

The Amicus Briefs of the religious and religiously affiliated organizations demonstrate that positions on abortion do not necessarily fall along traditional religious lines. Institutional positions, however, do not fully explain the development of the “God’s partners in matters of life and death” philosophy. It is instead both a combination and a comparison of the institutional religious positions on abortion and the independent positions of those that are members of each respective religion, whose beliefs about abortion may or may not be connected to religious ideology at all.

1. Where the Churches Stand

As part of its U.S. Religious Landscape Survey, The Pew Forum on Religion & Public Life recently provided a breakdown of religious groups’ official positions on abortion. The beliefs of these organizations can be separated into five main categories: (1) those that fully oppose abortion; (2) those that generally oppose abortion except under certain circumstances; (3) those that generally support abortion rights except under certain circumstances; (4) those that fully support abortion rights; and (5) those that have no official position on the matter.

The Catholic Church is the only religious institution that fully opposes abortion. As part of its position, the United States Conference on Catholic Bishops has stated that “the only moral norm needed to understand the Church’s opposition to abortion is the principle that each and every human life has inherent dignity, and thus must be treated with the respect due to a human person.”

affirmed the idea of abortion on demand. See generally Gonzales, 550 U.S. 124. The intact D&E procedure prohibited by the Act is still allowed if the woman’s life is in danger. 18 U.S.C. § 1531 (2006). As the pregnancy continues, the standard D&E procedure becomes more dangerous due to the number of passes a physician has to make, the size and durability of fetal parts, and the sheer volume of fetal material that would need to be evacuated. See generally Stenberg, 530 U.S. at 922-30. Protecting or saving the life of the pregnant woman is a common reason for late term abortions. See generally id. at 932-36. If the later the abortion, the greater the threat, all late term abortions could fall under the category of the life-threatening and thus be entitled to protection.


There are nine religious institutions that generally oppose abortion except under certain circumstances. These include the Church of Jesus Christ of Latter-day Saints (Mormon Church), the Episcopal Church, the Evangelical Lutheran Church in America, Hinduism, Islam, Judaism, the Lutheran Church-Missouri Synod, the National Association of Evangelicals, and the Southern Baptist Convention.

The Church of Jesus Christ of Latter-day Saints considers exceptional circumstances surrounding abortion, including rape, incest, if the health or life of the mother is at stake, and cases of fetal abnormalities incompatible with life. Even in these cases, however, the Church does not justify abortion outright.

The Episcopal Church condones abortion in cases of rape, incest, a risk to the mother’s physical or mental health, or in cases of fetal abnormalities but forbids abortion as a means of birth control, sex selection, family planning, or convenience. Despite its belief in the sanctity of human life, the Church is opposed to any legislative, executive, or judicial action “that abridges the right of a woman to reach an informed decision about the termination of pregnancy or that would limit the access of a woman to safe means of acting on her decision.”

The Evangelical Lutheran Church in America takes the position that prior to viability, abortion should not be prohibited by law or lack of public funding if the mother’s life is threatened, if the pregnancy is the result of rape or incest, and where the fetus has abnormalities incompatible with life. The Church supports prohibitive regulations on abortion after viability unless the mother’s life is threatened or if the fetus has abnormalities incompatible with life.

In the Hindu religion, the correct path is the one that will do the least harm. As such, Hinduism opposed abortion except in circumstances where the mother’s health is at risk.

288. Id.
289. The Church of Jesus Christ of Latter-day Saints, Gospel Library, Gospel Topics, Abortion, http://lds.org/ldsorg/v/index.jsp?locale=0&sourceId=63c139b439e98010VgnVCM1000004d82620a__&vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD.
290. Id.
294. Id. at 10.
296. Id.
In Islam, abortion is permissible up to four months gestation if a mother’s life is in danger and sometimes in cases of rape.297 Although there is some debate as to the actual time marker, after four months, abortion is generally not permissible as the fetus is at that point thought to be a living soul.298 Islam allows an abortion to save the mother’s life because, even though there is a very high priority given to the sanctity of life, abortion in those cases would be the lesser of two evils.299

In the Jewish religion, the abortion position is in large part dependent upon the denomination.300 But, according to some scholars, “[j]ewish law not only permits, but in some circumstances requires abortion.301 “Where the mother’s life is in jeopardy because of the unborn child, abortion is mandatory.”302

The Lutheran Church-Missouri Synod takes the position that because “abortion takes a human life, it is not a moral option except to prevent the death of another person, the mother.”303

The National Association of Evangelicals, which is comprised of approximately thirty-nine different Christian-based denominations, opposed abortion except in the circumstances of risk to the life of health of the mother, rape, or incest.304

The Southern Baptist Convention, which is the largest Protestant organization in America, permits abortion in cases where the life of the mother is in danger.305

There are three religious organizations that generally support abortion rights but condemn abortion in certain excepted circumstances. The American Baptist Churches in the U.S.A., not to be confused with the Southern Baptist Convention whose position is stated in the previous category, supports abortion except when

298. Id.
299. Id. (Reasons for abortion being the lesser of two evils include: that “the mother is the originator of the foetus”; that “the mother’s life is well-established”; that “the mother has with duties and responsibilities”; that “the mother is part of a family”; and that “allowing the mother to die would also kill the fetus in most cases”.
300. Daniel Eisenberg, Abortion in Jewish Law, available at http://www.aish.com/print/?contentID=48954946&section=ci/sam. “While there is debate among Rabbis whether abortion is a Biblical or Rabbinical prohibition, all agree on the fundamental concept that . . . abortion is only permitted to protect the life of the mother or in other extraordinary situations. Jewish law does not sanction abortion on demand without a pressing reason.” Id. at n. 1.
302. Id.
used as a primary means of birth control. The Presbyterian Church (U.S.A) does not condemn abortion outright, believing it is a personal decision. However, the Church disapproves of abortion as a method of birth control or convenience. The United Methodist Church opposed abortion as a means of gender selection or birth control. The Church also opposes the intact D&E procedure, except in circumstances where the life of the mother is at risk, no alternative procedures exist, or in the case of fetal abnormalities incompatible with life.

The final two categories of religious institutions are those that fully support the right to have an abortion and those that have no official position on the matter. The Unitarian Universalist Association of Congregations and the United Church of Christ fully support abortion rights. Buddhism has taken no official position.

The official positions of the institutions noted above have for the most part remained from Roe to Gonzales. The statements of the different churches also tend to focus on the respective group’s belief as to the performance of the procedure and at what stages and under what circumstances the church finds

306. American Baptist Resolution Concerning Abortion and Ministry in the Local Church, 8006.5:12/87, available at http://www.abc-usa.org/LinkClick.aspx?fileticket=HJ4sJT1qzg%3d&tabid=199. (The Resolution states “As American Baptists we oppose abortion as a means of avoiding responsibility for conception, as a primary means of birth control, without regard for the far-reaching consequences of the act).


308. Id.


310. Id.

311. Right to Choose, 1987 General Resolution (June 3, 2010), http://www.uua.org/php/template/printer.php. (The Unitarian Universalist Association’s statement provides “the inherent worth and dignity of every person, the right of individual conscience, and respect for human life are inalienable rights due every person; and that the personal right to choose in regard to contraception and abortion is an important aspect of these rights,” and supports the right to abortion as legitimate aspects of the right to privacy).

312. Reproductive Health and Justice, Why the UCC is a Leader in this Area, http://www.ucc.org/justice/advocacy_resources/pdfs/reproductive-health-and-justice/reproductive-health-and-justice.pdf. In affirming the position of the United Church of Christ that “access to safe and legal abortion is consistent with a woman’s right to follow the dictates of her own faiths and beliefs in determining when and if she should have children,” the Church stated:

God has given us life, and life is sacred and good. God has also given us the responsibility to make decisions which reflect a reverence for life in circumstances when conflicting realities are present. Jesus affirmed women as full partners in the faith, capable of making decisions that affect their lives.

313. Buddhism and Abortion, BBC (November 23, 2009), http://www.bbc.co.uk/religion/religions/buddhism/buddhistethics/abortion.shtml. (While traditional Buddhism rejects abortion because it involves the deliberate destruction of a life, most Western and Japanese Buddhists believe in the permissibility of abortion. However, the religion has taken no official stance on the issue).
abortion acceptable.\textsuperscript{314} While they imply certain legal and political alignment on the issue, the churches’ focal points tend to be based upon the religious, social, and emotional.\textsuperscript{315} These ideological stances, even if not coupled with an explicit statement about the appropriateness of state regulation, paved the way for the rash of religiously affiliated groups to lobby the Supreme Court on these issues.

As has been previously noted, most of the religious amicus curiae briefs filed in these four cases were joined by religiously affiliated organizations – not the official churches. In many of those filings, the religiously affiliated groups presented abortion positions at least slightly distinguishable from their host religions. In some cases, separate groups descending from the same host religion filed or joined briefs on opposing sides of each other.\textsuperscript{316} These deviations signify a splintering within the churches regarding both ideological beliefs and the importance of adhering to church doctrine which can be best explained by examining the views not of the churches but their parishioners.

2. Where the Parish Stands

A corollary component of the religious institutions’ abortion positions examined by the Pew Forum on Religion & Public Life focused on abortion views categorized by religious affiliation.\textsuperscript{317} Generally, the study found, “individuals exhibiting high levels of religious commitment are much more likely to oppose legalized abortion in all or most cases than those who are less-observant.”\textsuperscript{318} When calculated based solely on religious affiliation, without regard to the level of commitment to the chosen faith, the percentages often deviate from religious teaching.\textsuperscript{319} For example, the Catholic Church takes the most hard line stance against abortion, arguing that there are no exceptions to the sanctity of life.\textsuperscript{320} However, 48% of Catholics believe abortion should be legal in all or most cases.\textsuperscript{321} Islam accepts abortion up to four months but only if the mother’s life is at risk or in cases of rape.\textsuperscript{322} However, 48% of Muslims believe abortion should be legal in all or most cases.\textsuperscript{323} While the Evangelical churches oppose abortion except in cases of life or health risks to the mother, incest or

\begin{itemize}
  \item \textsuperscript{314} See generally Religious Groups’ Official Positions on Abortion, supra note 284.
  \item \textsuperscript{315} See generally Religious Groups’ Official Positions on Abortion, supra note 284.
  \item \textsuperscript{316} See, e.g., Conference of Catholic Bishops, supra note 232; Thomas More Law Center, supra note 232.
  \item \textsuperscript{318} Id. (Among Americans who feel abortion should be illegal or all or most cases, 61% attend church weekly or more, 56% say religion is very important, 53% pray at least daily and 54% have an absolutely certain belief in a personal God).
  \item \textsuperscript{319} See Abortion Views by Religious Affiliation, supra note 317; Religious Groups’ Official Positions on Abortion, supra note 284.
  \item \textsuperscript{320} Religious Groups’ Official Positions on Abortion, supra note 284.
  \item \textsuperscript{321} Abortion Views by Religious Affiliation, supra note 317.
  \item \textsuperscript{322} Religious Groups’ Official Positions on Abortion, supra note 284.
  \item \textsuperscript{323} Abortion Views by Religious Affiliation, supra note 317.
\end{itemize}
rape,324 33% of Evangelical parishioners are in favor of abortion in all or most cases.325 Finally, the Hindu religion accepts abortion only if the mother’s health is at risk.326 But, 69% of Hindus support the right to abortion in all or most circumstances.327

There are two apparent exceptions to these variances. First, those religions that either impose or promote a higher level of commitment among parishioners tend to have parishioners who, on an individual level, adhere to the teachings of those religions.328 Jehovah’s Witnesses, for example, support abortion rights in all or most circumstances at a rate of only 16%.329 Also, Mormons, whose religion teaches that there is no outright justification for abortion although there may be exceptions for the life or health of the mother, rape, incest, or fetal abnormalities,330 believe at a rate of only 23% that abortion should be legal in all or most cases.331

Second, the religions whose stances on abortion can be considered mainstream to more liberal tend to have little deviation among parishioners.332 The Jewish religion is divided among denominations on the issue of abortion.333 However, Jewish teaching allows for, and in some circumstances requires a woman to get an abortion.334 Along those lines, 84% of Jews believe in the right to abortion in all or most cases.335 Also, Unitarians and other liberal faiths have fully supportive positions on abortion.336 Their followers support abortion in all or most cases by 77%.337 As one final example, the mainline Protestant churches generally support abortion except in cases of convenience, birth control, and family planning, among others.338 In line with those principles, 62% of the parishioners at those churches support abortion rights in all or most circumstances.339

The importance of these deviations from strict religious abortion doctrine is telling in light of the following statistics regarding the overall population. According to the Pew Forum, while as many as 74% of people believe there is a

Heaven, only 59% of people believe there is a Hell. Further, 71% of people are absolutely certain that God exists, compared to only 56% of people that say religion is very important to their lives. In terms of interpretation of scripture and religious teachings, only 33% of people believe the Word of God is literally true, and 27% of people believe there is only one true way to interpret the teachings of their religion. Finally, only 24% of people believe their religion is the one true faith leading to eternal life. One thing is clear from these statistics, at least with regard to abortion views. Except for religious communities that tend to be more culturally cloistered, Americans are far more inclined to follow church doctrine if it comports with their personal sense of liberty – an interest that has been constitutionally provided and reaffirmed by the Court.

F. “God’s Partners”: The Fusion of Law and Religion Regarding Individual Positions on Abortion and its Current and Future Effects on the Pro-Life and Pro-Choice Movements

With the Supreme Court decisions holding to liberty as the hallmark of abortion rights, and the religious population in America adhering more to the Court’s view of life than the position of their own religions, the “partners with God” paradigm is set in place. The public has moved from aligning with a particular religion and following its mandates, to marginalizing the religious institution in order to “focus on the individual search for private meaning and self-realization through religion.” Rebecca French has described what she calls “grocery cart religion.” This consists of “a personal brand of religion not based in the self . . . but in personal choice. An individual assembles a bricolage religion after filling a grocery cart with pieces from several different types of religious practice.” This type of practice “has only the rituals and ethical boundaries that the practitioner explicitly agrees to take on. Instead of following a revealed canon, the individual fits the interesting parts of different religions together into a structured personal spiritual practice.”

While the Pew Forum study does not address the specific effect of those who have created their own religion, the disparity between religious doctrine and the

342. Id.
343. Id.
344. See generally Casey, 505 U.S. 833; Stenberg, 530 U.S. 914.
346. Id. at 165.
347. Id. at 165-66.
348. Id. at 166.
individual beliefs of the churches' parishioners demonstrates a "grocery cart" attitude toward institutional religious principles. The parishioners have, to an extent, decided to pick and choose what they like about their chosen religion and ascribe only to those accepted principles. It is a subtle but important shift. For many, the center of one’s spirituality is not the religion, but the individual. If a certain religious principle infringes upon a right they have been told they are entitled to, the simple response is to just choose to disregard what consequently appears to be an oppressive position. Therefore, a position viewed by a parishioner as oppressive - for example, one that opposes abortion in all or most circumstances - is simply disregarded as outside the actual tenets of the faith and therefore not required for membership.

An explanation for this disconnect may be based upon how the public feels about the church-banned practices. A 2000 study in the Archives of General Psychiatry found that most women do not regret having had an abortion. According to the study, "the majority are satisfied and feel that they benefited from the abortion." A recent Guttmacher Institute study on why women have abortions demonstrates the individualized nature of women’s moral and religious reasoning:

In light of the public debate over the morality of abortion, it is notable that the women in our survey emphasized their conscious examination of the moral aspects of their decisions. Although some described abortion as sinful and wrong, many of those same women, and others, described the indiscriminate bearing of a child as a sin, and their abortion as “the right thing” and “a responsible choice.”

A percentage of young religious people appears to have accepted this individualized idea of faith and ambivalence to uncomfortable and unpopular religious teachings as well. One study found that “a majority of students at Catholic colleges and universities disagree with the position of the church hierarchy on sexual and reproductive health.” The study discovered that the opinions of students at these schools were for the most part in accordance with

350. French, supra note 345, at 165-66.
351. French, supra note 345, at 165-66.
352. French, supra note 345, at 165-66.
354. Id.
those who attended secular schools. The researcher was most surprised to find that “Catholic colleges were virtually indistinguishable from the private secular and public schools in terms of prominence of sexual behavior, hook-up culture, and attitudes about sex. Chastity and purity and saving sex for marriage was virtually nonexistent at Catholic colleges.”

With a religious population that is more secularized than it has been in the last forty years, the idea of maintaining a partnership with God in any variety of matters, especially those involving life and death, is more appealing than ever.

G. Conclusion

The Court, through its use of the idea of liberty, has done for abortion rights what secular pro-choice arguments never could. The pro-choice religious amici successfully convinced the Court of the difficulty in squaring abortion and religion – so the Court has avoided it in theory but embraced it in practice. As a prominent pro-choice religious advocate has stated,

The space between what is legal and what is right needs to be filled . . . . We must lead a more meaningful public conversation about the morality of abortion. To believe that there is a fundamental right to choose abortion is not the same as believing that there are no moral dilemmas worthy of debate.

The holding in Roe was based upon the Court’s inability to determine the deeply moral and religious question of when life begins. This finding created a rift in pro-life religious reasoning – one neither the pro-life religious amici in abortion litigation nor the religious teachings of our time have been able to overcome. The idea, after all, of liberty to do with one’s body what one wants is far more appealing than martyrdom. Until both the secular and non-secular pro-life movements can determine how to advance anti-abortion arguments reasoned in secular logic, we will remain God’s partners in matters of life and death.

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357. Id. (The study showed that of the students surveyed, 60% agreed abortion should be legal, 60% disagreed premarital sex was a sin, 78% disagreed condom use was a sin, and 57% agreed same-sex marriage should be legal).

358. Id.


Kris Helge*

I. INTRODUCTION

Information technology infrastructures should be designed with cutting-edge equipment that offers citizens consistent and dependable access to necessary and pertinent information. The infrastructures should be held accountable and regulated by a well-established legal system. Additionally, the infrastructures should create a body politic that trusts its government, is aware of its nation’s laws, regulations, and policies, and is motivated to contribute and participate positively in the national economy and political process.¹ In modern societies, the most efficacious means in which a nation-state can create an information infrastructure is via electronic technology (“e-technology”). Some nation-states are currently better prepared than others to provide information to their citizens via e-technologies, and some are more willing to provide a free exchange of electronic information. An assessment of how well a nation can disseminate freely accessible, valid, and reliable information, and how willing nations are to provide complete, accurate, and open information via e-technologies is defined as “e-readiness.”²

Scholars have posited numerous models to measure e-readiness.³ These models use various factors to measure a nation’s e-readiness.⁴ This paper takes

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2. See id. at 841.
3. Some of these models include the International Telecommunication Union Digital Access Index, World Economic Forum Networked Readiness Index, United Nations Conference on Trade and Development ICT Development Index, the Economist Intelligence Unit e-Readiness Index, Mosaic Group Index, Conference Board of Canada Connectedness Index, and ORBICOM Infostate Index. Adegbuyega Ojo, Tomasz Janowski & Elsa Estevez, Determining Progress Towards e-Government – What are the Core Indicators?, 360 UNU-IIST INT’L INST. SOFTWARE TECH. 1 (2007). See also BRUNO LANVIN, SOUMITRA DUTTA, & FIONA PAUA, THE GLOBAL INFORMATION
II. FACTORS USED TO ANALYZE E-READINESS AND THEIR CORRELATION TO SOCCER

This article seeks to decipher how adequately various countries—namely Nigeria, the Democratic People’s Republic of Korea, China, Japan, South Korea, the Netherlands, and the United States—have developed and implemented these electronic conduits and the necessary hardware and software to promote the free flow of electronic information. There are several important questions to consider in measuring the success that each nation has had in becoming “e-ready.” Are these nations’ governments utilizing these tools to benefit their citizens or to oppress them? Do the citizens have open access to electronic information? Is the electronic information to which they do have access censored? How are the electronic infrastructures and the electronic information that flows from these structures utilized, organized, and reviewed? How well are the EIIs regulated? What is the resulting effect regarding the citizens’ level of trust?

There are three factors that will be analyzed to assess each nation’s e-readiness score. Each nation will be examined by investigating how well it has organized an EII, how well this EII is regulated by the government, and how well each EII is trusted by the citizens. After calculating each nation’s e-readiness score, the article attempts to draw comparisons and show the correlation between the nation’s e-readiness score and the state of the nation’s soccer team.

A. Well-Organized EII

The first factor used to analyze e-readiness is whether a nation-state has a well-organized and functional EII. Various components of a functional EII may consist of the ability to gain access to and fully utilize electronic information.\(^6\)

\(^3\) See Al-Omari, supra note 1, at 842-44.

To implement these technologies, valid and reliable EII must also have an ample supply of freely accessible internet connections and technical systems. When nations have a sufficient supply of these types of information conduits, hardware, and software, then ubiquitous computing networks emerge that have positive and profound effects on a nation’s economy and citizen trust. Further, having such a multifaceted infrastructure in place is vital for a nation’s government and its citizens to protect and disseminate pertinent information. Providing these abilities allows a government and its citizens to create jobs, participate in the national and local economies, contribute in the political process, and benefit society as a whole. However, when these resources are not offered, citizens are unaware of important national and local policies, laws, and procedures. As a result, economies lag and societies are deleteriously affected.

B. Properly Regulated EII

The second factor used to analyze a nation’s e-readiness is whether it has adopted laws to effectively regulate the creation and implementation of an EII.
These legal regulations determine the following: whether a government is required—or has permission—to disseminate information to its citizens such as pertinent legislation, regulations, and rules; whether citizens can participate in the dissemination of information; whether dissemination is open or censored; what other types of information may be published; how it is dispersed; who distributes it; and by what means it may be circulated. The regulation of such actions should also specifically indicate what type of punitive actions government officials or private citizens will encounter if they abuse their position to commit fraud or malfeasance, in some way taking advantage of the nation’s EII.

In evaluating how to regulate electronic content and determining what type of information should be disseminated to a country’s citizens is a matter of personal choice. Different people can consider one type of content beneficial and utilitarian, whereas individuals from another geographical location or from a different religious or cultural perspective may consider the same type of content detrimental or offensive. The same type of content may even be considered legal in one nation-state and illegal in another. Further, most nation-states deem some content harmful to children, such as pornography, but implement divergent degrees of means to prevent children from viewing such content. These personal, group, cultural, and national differences exemplify why different nation-states manifest varied degrees of access to and regulation of EII. Yet,
this varied degree of access to electronic information ultimately results in an assorted array of personal rights, economic strength, and level of trust in different countries.

C. Resulting Level of Citizen Trust

The third factor that this article uses to evaluate a nation’s e-readiness is the resulting level of trust citizens have in their government to appropriately create, maintain, and regulate a nation’s EII. Trust is a complex and abstract psychological phenomenon, and many factors can affect the level of trust a person places in his or her government. For example, a private citizen needs to have something at stake and some amount of risk involved in order for trust to be an issue, such as trusting that the government has the competence to provide an EII that is capable and reliable enough to consistently circulate valid information. Also, the private individual must be confident that government officials are ethical and competent enough to securely provide valid and relevant information that will serve the citizens’ best interest. These factors are vital because many private citizens have a natural inclination to distrust government-run institutions like school systems, health care systems, and other state-run institutions. Despite this natural skepticism toward government-run institutions, if any entity can efficiently and transparently provide a valid and reliable service to consumers that benefits the citizenry, then such a service can fashion a high level of trust toward the service provider. However, if the government cannot offer a fully functional EII and operate it in an ethical manner, then citizens will manifest an inherent level of distrust.

1. Transparency Can Increase the Level of Trust

Transparency of national laws, policies, government activity, legal forms, and other information pertinent to citizens’ everyday lives can increase a

19. Id. at 33-34 (discussing examples such as government agents’ level of competence, benevolence and candidness toward its citizens, and how the government agents’ actions affect the living standards and quality of life of its citizens).
21. See Colesca, supra note 18 at 33-34.
22. See id. at 34. See also Merrill Warkentin et al., Encouraging Citizen Adoption of E-Government by Building Trust, Sept. 2002, at 157, 159-62.
23. Surveys have indicated many private individuals have a natural inclination to distrust government-run institutions, such as school systems or health care systems. One can assume the same level of distrust may be met when a government is attempting to provide an information infrastructure to its inhabitants. See Chrisanthi Avergerou, Interpreting the Trustworthiness of Government Mediated by Information and Communication Technology: Lessons from Electronic Voting in Brazil, 15 INFO. TECH. DEV. 133, 135-36 (2009).
24. See id. at 137.
population’s trust in its government.\footnote{Stephan Grimmelikhuijsen, Do Transparent Government Agencies Strengthen Trust?, 14 INFO. POLITY 173, 173-76 (2009).} Nations can create transparency by developing, providing, and managing a well-organized and user-friendly EII that is capable of disseminating this helpful information.\footnote{Id. at 173.} Increased transparency, which leads to an enhanced level of citizen trust, is considered to be vital to a developed and fully functional society.\footnote{Id. at 174.} As Professor Stephan Grimmelikhuijsen points out, when citizen trust in government is augmented, citizens comply more with domestic laws and a greater amount of interpersonal trust develops among citizens.\footnote{Id.} Increased levels of denizens’ trust toward their government can also benefit the economy and social harmony, as well as lower crime rates.\footnote{See id. at 173-76.} Such trust is often earned by increasing the amount of disclosed information (e.g., health, legal, or environmental information), thus leading to more transparency.\footnote{Id. at 175.} The more access to information, the greater the level of trust among citizens.\footnote{Grimmelikhuijsen, supra note 25, at 176, 184.} Therefore, to help foster a stable economy in which citizens trust their government, each nation’s government officials must develop and properly maintain a stable and reliable EII.

2. Honesty and Benevolence Increase Citizen’s Level of Trust

Professor Grimmelikhuijsen further suggests that honesty and benevolence of government officials greatly dictate the citizens’ amount of trust in their government,\footnote{Id. at 175.} at times even more so than the competence level of government officials.\footnote{Id.} This finding suggests that citizens are willing to forgive honest mistakes or a lesser aptitude in some government officials, but they will neither accept nor trust a government that tolerates corruption, dishonesty, and malevolent actions by its officials.\footnote{See id.} Grimmelikhuijsen defines honesty as “whether participants believe that the government agency performs its duties soundly.”\footnote{Id. at 175.}

Grimmelikhuijsen depicts benevolence as the level to which participants perceive the government as showing genuine care for its citizens.\footnote{Grimmelikhuijsen, supra note 25, at 175. Benevolence may refer to whether government agents are creating an EII to benefit the citizens, or to benefit the government. Does the government assist in repairing a problem with the EII when the citizens desire such a repair? Does (e.g. tells the truth, complies with current law, does not accept bribes…).} For
example, does the government provide open and transparent access to documents that citizens need to perform everyday life activities? Or, does the government want to filter and censor certain information so that citizens cannot make informed decisions? In summary, a display of benevolence to citizens is when a government promotes fairness to citizens. Grimmelikhuijsen empirically concludes that what affects the level of trust in citizens most is the manner in which the government ultimately acts and the actions it accepts and rejects as morally corrupt and wrong. Competence, or a lack thereof, in government agents who work with EIIIs is more likely to be overlooked or forgiven by a country’s citizens.

The following example clarifies how a government agency providing access to electronic information, which appears to be an act of honesty and benevolence, earns the trust of its citizens. Many government agencies offer websites, either at the national or local level, that house various legal forms to assist citizens in creating, maintaining, and dissolving various types of business organizations. As a private citizen visits one of these websites, he or she seeks a pertinent form to incorporate a business. At stake for the citizen is a timely filing of the articles of incorporation, or some other formation document for a specific type of business association, so that he or she may commence making a net profit. A possible negative outcome is not being able to locate the pertinent form on the website, and therefore not filing the formation document in a timely manner. This could result in the company losing potential capital due to a delay in opening a business, or being sued for allegedly running a business as a corporation or other form of business without properly filing the articles of incorporation. If the government fails to develop an electronic interface that fosters easy access to such necessary forms or engages in overtly corrupt practices to deceive a private citizen, the result may be economic damage or injury to a potential company’s goodwill. If such damage occurs, the injured denizen may display an enormous amount of distrust, fear, and resentment of the government. These negative emotions can result in citizens creating their own

38. See id. at 181.
39. Id.
40. Many states in the United States post business forms on a governmental website for its citizens such as Articles of Incorporation, Change of Registered Agent, Certificate of Withdrawal, etc. See Texas Secretary of State, http://www.sos.state.tx.us/index.html (last visited April 27, 2011). See also Mutawakilu A. Tiamiyu & Kemi Ogunsola, Preparing for E-Government: Some Findings and Lessons from Government Agencies in Oyo State, Nigeria, 74 S. Afr. J. Linn. & Inf. Sci. 58, 61 (2008). Governments in developed countries have moved beyond using their websites to provide information only, as they now offer forms one may download, paying for services, voting and other business or civic transactions. Many of these forms assist citizens in filing pertinent tax forms, creating or amending bylaws, or commencing a limited partnership.
norms and values, which lead to further corruption. However, if a government provides consistent access to valid and reliable information, then trust in the government increases. This increase in trust helps to foster job creation, economic growth, and the provision of efficient and reliable services to communities.

III. CALCULATING A NATION’S EII SCORE AND ITS CORRELATION WITH SOCCER TEAM SUCCESS

In evaluating the nations analyzed in this article, each country will be assigned a score that depicts its e-readiness. The e-readiness score consists of a range of 0-3. A score of 3 indicates that a nation has the highest level of e-readiness, and a score of 0 indicates that a nation has the lowest level of e-readiness. A nation earns a score of 3 if it has developed a stable, fully-functional EII that provides a user-friendly interface from which citizens may freely obtain an abundant amount of information that assists them in locating a panoply of information, such as the following: laws, government policy, instructional and applied forms with which one may file taxes, commence businesses, learn about health threats, obtain web addresses, links, or contact information, and a variety of other helpful information. A nation earning 3 points demonstrates that it can aptly, ethically, and legally regulate its EII and that its creation, management, and regulation of the EII results in a high level of citizen trust. Therefore, a point will be awarded to each country based on its ability to maintain an EII that allows citizens to access and disseminate valid and reliable information. A separate point will be awarded to each country that has valid and unequivocal laws that adequately regulate the operation of the EII. A third point will also be awarded to countries whose citizens appear to manifest at least a modicum of trust based on the operation and regulation of an EII.

A fun and effective way to demonstrate the importance of e-readiness is by analogizing each country’s e-readiness score to the current status of their national soccer team. Interestingly, the success or failure of a country’s national soccer team in international play is often a bellwether of that country’s ability to develop, maintain, and regulate an efficient and useful EII. A national soccer team’s success or failure may often be an accurate predictor of a nation’s EII.

41 See Gerald D. Berreman, Fear Itself: An Anthropologist’s View, BULL. ATOM. SCIENTISTS, Nov. 1964, at 8, 8 - 9. Berreman states that lack of communication leads to mutual ignorance of the fundamental assumptions upon which the social actions of others are based and which make possible prediction of their behavior and hence articulation of one’s own behavior with theirs. This mutual ignorance ultimately leads to fear. Fear is the product of distrust and suspicion. The dangerous consequence of this is that ultimately parties subjected to ignorance due to a lack of communication develop a sense of powerlessness, meaninglessness, and normlessness. Therefore, the argument could be posited that a society that does not effectively disseminate information to its citizens manufactures a society of unproductive citizens who may feel powerless to an overbearing government, and who resort to unscrupulous deed due to their perception of living in a normlessness society.
because the national soccer/football\textsuperscript{42} association’s (“SA’’/’’FA’’) infrastructure and governing regulations, and the reaction of players, coaches, and other members of the FA to the infrastructure and regulations, has an ostensible correlation with the nation’s EII, the regulations governing that infrastructure, and how its citizens react to the EII and governing regulations.

For purposes of this paper, actual success of a national soccer team is defined as its capacity to win the World Cup. The World Cup is the pinnacle of all international soccer tournaments played once every four years. In order to qualify for the tournament, a country’s national team must survive two or more years of grueling qualification matches.\textsuperscript{43} After qualifying for the World Cup, to be considered a realistic contender at the tournament’s commencement, a team usually needs to be ranked within the top fifteen countries of the world by the Fédération Internationale de Football Association (“FIFA”).\textsuperscript{44} The countries examined in this article exemplify how the success of a nation’s soccer team can predict the adequacy or inadequacy of a nation’s EII and the regulations that govern it.

\textbf{A. Nigeria’s Great Façade and the DPRK’s Hermetic Control}

The first two nations that will be examined are Nigeria and the Democratic People’s Republic of Korea (“DPRK”). The economic and soccer infrastructure of each nation will be examined along with the nation’s information technology infrastructure to determine each nation’s e-readiness score.

1. Nigeria’s Demographics and Resources

At first glance, Nigeria appears to be a nation with the appropriate resources to assemble a national soccer team that can repeatedly qualify and compete for the World Cup. For example, one soccer scholar has empirically posited that nations with larger gross domestic products (“GDPs”), large human populations, and adequate experience in playing the game of soccer can produce national soccer teams that can repeatedly win the World Cup.\textsuperscript{45} For the purposes of this

\textsuperscript{42} In most countries, the governing body of a national soccer team and its local club and youth teams is called a football association (“FA”). In the United States, the governing body is referred to as a soccer association (“SA”).

\textsuperscript{43} \textit{Soccer World Cup 2010 Preview 30-31}(Sevenoaks 2010).

\textsuperscript{44} FIFA.com, http://www.fifa.com/worldfootball/ranking/lastranking/gender=m/fullranking.html (last visited Aug. 4, 2010). FIFA updates these rankings every month. FIFA bases its rankings on a national team’s performance in recognized international matches played over the previous four years. Because the ranking system is based on team performance over the past four years, this sometimes elicits a great amount of criticism.

\textsuperscript{45} See Simon Kuper & Stefan Szymanski, \textit{Soccernomics: Why England Loses, Why Germany and Brazil Win, and Why the U.S., Japan, Australia, Turkey—And Even Iraq—are Destined to Become the Kings of the World’s Most Popular Sport} 1-44 (Nation Books 2009).
paper, GDP and populations are more closely analyzed than experience, although experience in international play will be mentioned for each country. Nigeria's GDP is approximately 357.2 billion, which ranks thirty-second in the world. Its population is about 152,217,341, which ranks eighth in the world, and it is currently the most populous country in Africa. More importantly, it is a country rich in natural resources, such as oil.

Nigeria is the sixth largest exporter of crude oil in the world and it is estimated to have forty-two billion barrels of crude oil reserves. Therefore, it is not lacking in capital to invest in a sport such as soccer. Nigeria is a nation with an abundance of money to invest in hiring the most experienced and intelligent managers and administrators in the world, and it has a large population from which to select and train genetically gifted athletes. It is duly noted that Nigeria lacks in international soccer experience compared to the soccer giants around the world such as Brazil, Italy, and France. Yet, despite the lack of international experience, these monetary luxuries should naturally produce a robust soccer infrastructure that produces highly skilled players and coaches, and multiple international tournament championships. However, similar to developing an EII, when the members of the governing body in charge of maintaining and regulating the soccer workforce and resources are complicit in committing corrupt acts, such maelstroms produce a feeble and susceptible infrastructure. As an unfortunate result, it is all but impossible to develop a national team that can be competitive at the World Cup level, much less win the World Cup.

2. Soccer Infrastructure

Nigeria exemplifies how reckless and wasteful management of resources begat a shabby soccer infrastructure. To establish a solid soccer infrastructure, an FA needs to locate and develop numerous highly talented players, employ experienced and proven coaches, build and maintain quality pitches and practice facilities, and earn the trust of all of these individuals to have faith in the mission of the soccer federation.
a. Nigeria’s Dilapidated Soccer Infrastructure

Nigeria’s national soccer team is incapable of performing any of the actions required to have a successful soccer infrastructure because its governing body, the Nigerian Football Federation (NFF), operates in a licentious and profligate manner. For example, due to money laundering schemes and other corrupt practices, in which the NFF participates on a regular basis, millions of dollars are confiscated and used for personal matters by NFF agents. These funds could be used to pay coaches and players their respective salaries or to invest in building soccer stadiums with cutting-edge technology that would attract the best Nigerian players and coaches.

One example illustrative of this corruption involves a Nigerian member of FIFA who was recently caught trying to sell his vote that would help select the host nations of the 2018 and 2022 World Cups for $800,000. Not only was this member of the NFF attempting to sell his vote for personal monetary gain, but concurrently he and his cohorts at the NFF were refusing to pay their national team coach his salary which was overdue about six months. Such greedy and prodigal actions committed by the NFF eliminate players’ and coaches’ trust in the NFF, and thus deter highly talented players and coaches from renewing employment, or sometimes ever commencing employment, with the NFF. Therefore, few Nigerian soccer players, coaches, or fans care about their own local leagues and usually prefer leagues abroad, where the players will receive fair pay, can be certain of their personal safety, and do not have to acquiesce to the widespread corruption of the NFF.

b. The NFF’s Poorly Managed Soccer Infrastructure

Due to the shameless actions of the NFF, most Nigerians who play for the Nigerian national soccer team elect to play professionally abroad in Europe, Asia, or the United States. When these players return to Nigeria to train with their national team cohorts for an international tournament, they have little time to prepare. For example, for World Cup preparations, these players are usually asked to return to Nigeria to train for only a month or two prior to the beginning of the tournament. Therefore, they have a limited amount of time to learn the

52. See Bloomfield, supra note 48, at 165-69.
54. Id.
56. See FRANKLIN FOER, HOW SOCCER EXPLAINS THE WORLD 140-41 (Harper 2004). In the late 1990’s and the early 2000s, some of the most talented Nigerians soccer players played in Ukrainian leagues. See also Bloomfield, supra note 48, at 160-61.
national team coaches’ playing philosophy and to build chemistry with other national team players. Yet, any limited potential of team chemistry is often thwarted by the NFF due to its incompetent and greed-motivated decisions. For example, the NFF incessantly fires managers just a few weeks prior to a major international competition due to a fee dispute or a battle of egos.\(^{57}\) In both 1998 and 2002, the NFF replaced their existing manager only a few weeks before commencement of the World Cup.\(^{58}\) Such administrative ineptness prevents national team players from adapting to a coaching system, thwarts players from learning teammates’ tendencies, creates a distinct lack of leadership, is deleterious to the confidence of the players and coaches of the NFF, and contributes to making the NFF soccer infrastructure weak.\(^{59}\)

Recently, the NFF displayed its irresponsibility and avarice by sacking its coach again just weeks prior to the commencement of the 2010 World Cup.\(^{60}\) Subsequently, the NFF asked Swede Lars Lagerback to begin working with its national team players just days prior to the World Cup.\(^{61, 62}\) To further exacerbate the situation, when the Nigerian national team arrived in South Africa for the World Cup, they discovered that the NFF had booked a hotel that was still under construction.\(^{63}\) Therefore, needing a place to sleep, the NFF was forced to spend an extra $125,000 to cancel its reservation and rebook at another hotel.\(^{64}\) These types of illogical, inexcusable, and unprepared actions by the NFF do not build a strong and reliable soccer infrastructure. Not surprisingly,

\(^{57}\) Lars Lagerback & Shaibu Amodu, *Can an African Team Win the World Cup?*, N. Afr., June 2010, at 40, 41.


\(^{59}\) See Kuper, *supra* note 45, at 269-70.

\(^{60}\) Obayluwana, *supra* note 58, at 56-57.

\(^{61}\) *Id.* Lars Lagerback was hired on May 22, 2010. Interestingly, Coach Lagerback had been sacked by Sweden just days before his Nigerian hire due to his inability to qualify Sweden for the World Cup. To put their complete hope in a foreign coach who had just spent two years failing to get Sweden qualified for the tournament had to be a bit unsettling for the Nigerian players.


\(^{64}\) *Id.* With the lack of hotels in South Africa, and the enormous amount of individuals traveling to South Africa for the tournament, it is amazing that the Nigerian footballers were able to confirm a new reservation. Also, it is amazing that the NFF had the monetary means to immediately pay $125,000 for a South African hotel, but they seem to be insolvent when it is time to pay the national team coach.
Nigeria did not win a single match during the 2010 World Cup, finished last in their qualification group, and did not qualify for the second round.\footnote{FIFA Threatens Nigeria With Suspension, FOX SPORTS: WORLD CUP 2010, http://msn.foxsports.com/foxsoccer/worldcup/story/FIFA-threatens-Nigeria-with-suspension (last visited Apr. 29, 2011). The thirty-two teams that qualify for the World Cup are divided into eight different groups, with four teams in each group. Nigeria was placed in Group B along with South Korea, Argentina, and Greece. The top two teams in each group qualify for the second round of the Cup.}

3. Illogical and Inhumane Soccer Regulations Promulgated by the NFF

Along with a weak soccer infrastructure, the NFF rarely enforces current regulations that could extinguish the corruption that deteriorates its core, and deters players and coaches from agreeing to commence work with or continue working with it. When the NFF enforces a regulation, it does so in an illogical and bizarre manner. For example, after the Nigerian national team’s poor showing in the 2010 World Cup, the Nigerian President, Goodluck Jonathon, arbitrarily declared that the Nigerian men’s national team was banned from international competition for two years.\footnote{See FOX SPORTS: WORLD CUP 2010, supra note 65. This ban would literally prevent a Nigerian national team from participating or training for any international tournament or friendly match.} However, the NFF has no statutory authority to regulate its national team by arbitrarily banning it for any period of time, and the statutes that govern the NFF only address the suspension of individuals—not of entire teams.\footnote{NIGERIAN FOOTBALL FEDERATION STATUTES, available at http://nigeriaff.com/docs/NFF%20Statutes.pdf (last visited August 9, 2010).} Further, FIFA’s rules eschew governments from interfering with their national team’s operations, such as banning an entire national team.\footnote{FOX SPORTS: WORLD CUP 2010, supra note 65.} To alleviate the Nigerian players, coaches, and staff from this illogical ban, FIFA ultimately put enough pressure on the NFF and President Jonathan so that he eventually rescinded this illogical ban. Even with this ban eliminated, the NFF is complicit in other activities, such as match fixing, that exacerbate the deterioration of the NFF.

B. Match Fixing in Nigerian Soccer

A major concern with regards to match fixing is the fact that the NFF does not enforce anti-match fixing regulations, and thus conspiracies to throw matches are endemic in Nigerian soccer. Also, a majority of the club teams in Nigeria are owned by Nigerian politicians,\footnote{Bloomfield, supra note 48, at 161.} who also have their hands in oil revenues.\footnote{See id. at 161-64.} Such business ventures often lead to conflicts of interests. As a consequence, the results of many matches are often decided days before they are played. The results of these predetermined matches are usually set by team
owners paying referees money to decide matches in a certain way. For example, at the end of the 2009 Nigerian Premier League season a club team named Bayelsa United needed only a draw against the Warri Wolves for Bayelsa United to win its first ever league championship. Warri are owned and operated by the governor of the Delta State. And both of these club teams play their home games in the Niger Delta, which has been a war-torn area over oil revenues for the past few decades. Prior to the start of the match, the two club team owners agreed to script the game so that Bayelsa United could win. Thus Bayelsa United could have its first league championship and Warri could still finish in fourth place, its highest finish ever in the Nigerian Premier League. The owners felt that such a result would be a positive psychological result for the players and fans by taking the sting out of recent violence in the Niger Delta, and the players and the local fans could celebrate successful seasons rather than worry about the ubiquitous guerilla attacks. As a result of the conspiracy to fix the match, when Bayelsa United was leading by a score of 1-0 after ninety minutes of play, the official decided to arbitrarily add five minutes of stoppage time. Well past three minutes of stoppage time, Warri scored a goal that tied the match. Interestingly, the Bayelsa players did not appear upset or frantic, nor did the Warri players look too enthusiastic that they had just remarkably tied the match in extra time. Instead, it appeared that the players had followed a prewritten script, just as the NFF or the team owners had directed. The owners were happy because they may have avoided possible violence, and the fans were then more likely to spend money on both clubs’ merchandise and tickets for the next season’s games.

71. Id. at 157.
73. Bloomfield, supra note 48, at 156-57. In the Nigerian Premiere League, teams are awarded one point for a tie, and three points for a win. At the conclusion of the season, the standings are determined by the number of points that have been earned by each team, similar to how the National Hockey Leagues determines final team standings.
74. Id. at 161.
75. Id. at 157.
76. Id. at 156-58.
77. Id. at 156-57.
78. Id.
79. Bloomfield, supra note 48, at 155-56. During a soccer match, the game clock never stops for injury, balls kicked out of play, or other actions causing play to temporarily cease. Therefore, it is common for two or three minutes to be added to the end of each half when players have suffered injuries or some other action has occurred that has resulted in a stoppage of play. Apparently, during this match, only two or three minutes of stoppage time was warranted.
80. Id. at 155-57.
81. Id. at 155-58. On the same day two other teams in the Nigerian Premier League also had a match. One of the teams Zamfara United needed to win by at least six goals to avoid being relegated to a lower division for next year’s season. They won the match 9-0. It is a very rare occurrence to score 9 goals in a soccer match.
The NFF has regulatory statutes in place that could eliminate match-fixing corruption, but it simply turns its head and continuously allows this brazen corruption to take place. The NFF seems to assume, why stop the corruption when it is generating revenue for the NFF and providing an arbitrarily legal, psychological opiate for its often upset, and sometimes violent, citizens? Regulations that could extinguish this fraud can be found in Article 2(f) promulgated by the NFF. This article grants the NFF the ability “to prevent all methods or practices which might jeopardize the integrity of matches or competitions or give rise to abuse of Association Football.” Further, Article 7 of the NFF statutes states that the “bodies and Officials of NFF must observe the Statutes, regulations, directives, decisions and the Code of ethics of FIFA” and of the Confederation of African Football (“CAF”). Both FIFA and CAF directly eschew any form of match fixing, corruption and other similar acts of fraud in an effort to maintain the integrity of the game. However, because these regulations are not enforced by the NFF, this type of corruption weakens the Nigerian soccer infrastructure by promoting brazen corruption, deterring highly skilled Nigerian soccer players and coaches from participating in Nigerian leagues, and injuring the international reputation of Nigerian soccer. These actions also cause Nigerian denizens to lose interest in the local soccer leagues because they lose trust that the owners are providing them with genuine soccer competitions.

C. Democratic People’s Republic of Korea (DPRK) – North Korea’s Demographics and Resources

Unlike Nigeria, the Democratic People’s Republic of Korea (DPRK), more commonly known as North Korea, is a closed society that does not project the potential of producing a national soccer team that can win the World Cup. The DPRK has a population of about 22,665,345 people, which ranks fifty-first in the world. The gross domestic product of the DPRK is approximately forty billion, which ranks ninety-sixth in the world. The DPRK soccer team also lacks

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82. Nigerian Football Federation Statutes Article 2(f), http://nigeriaff.com/docs/NFF%20Statutes.pdf (last visited Apr. 29, 2011). Although most of the statutes are vague, the NFF could regulate and eliminate match fixing with Article 2(f), and Article 7.
83. See Bloomfield, supra note 48, at 156-58.
86. See Bloomfield, supra note 48, at 160-61.
87. CIA World Factbook, supra note 46.
88. Id. The CIA World Factbook cautions that Korea does not publish any reliable National Income Accounts data; the data shown here is derived from purchasing power parity (“PPP”) GDP estimates for North Korea that were made by Angus Maddison in a study conducted for the OECD; his figure for 1999 was extrapolated to 2009 using estimated real growth rates for North Korea's
international competitive experience, because its hermetic government rarely allows the national team to play matches on foreign soil, and it is atypical for the DPRK government to allow a foreign national team to play in the DPRK. Unlike Nigeria, the DPRK is a poor country that lacks an abundance of natural resources. The country suffers economically from a production shortage of oil, gas, and electricity,\(^9\) its road system is limited and greatly unpaved,\(^9\) and most of the DPRK’s sea ports and airports are dilapidated and in need of repair.\(^9\)

Therefore, one can accurately surmise that the DPRK probably does not have a very competitive national soccer team.

1. Inhumane Treatment of Players and Coaches in the DPRK Equates to a Dilapidated Soccer Infrastructure

Similar to Nigeria, the DPRK Football Association (“DPRKFA”) also has a weak infrastructure due to its incessant malevolence and fraud. The DPRK FA openly threatens the safety of its players and coaches, and it often subjects them to physical torture if they do not produce results that are satisfactory to the country’s leadership.\(^9\) However, due to the secretive nature of the DPRK’s society, much about their soccer infrastructure must be surmised from what little insight the media and the few soccer participants have garnered during rare encounters with the DPRK’s national team and its FA members.\(^9\)

Although rare, glimpses of the national team demonstrate a soccer federation that operates in a similar manner as their hermetic and authoritarian government.

For example, in 2004, the Chinese club team, Beijing Celtic, was invited to play in a friendly match held in the DPRK. One of the players from that team chronicled and later published his experience while playing there.\(^9\) His documentation verifies that the DPRKFA operates in a similar guise as the DPRK government.\(^9\) For example, upon arriving at the DPRK airport, the Chinese players were stripped of any device that could be used to communicate.

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\(^90\). See id.
\(^91\). See id.
\(^93\). The DPRK Football Association is so secretive that their uniforms for the 2010 World Cup were not revealed until they played their first match on June 15, 2010. See Adam Thompson, Vendors Leave No Shirt Unturned Seeking North Korean Soccer Duds: Secrecy Suits Hermit Kingdom to a Tee; Will There be a Brand New Jersey?, WALL ST. J., May 27, 2010, online edition, available at http://online.wsj.com/article/NA_WSJ_PUB:SBI000142405274870471700457526823220877058.html.
\(^94\). Doug Naime, Fantasia, NEW REPUBLIC, Feb. 2004, at 34, 34.
\(^95\). See id.
with any person outside of the DPRK, their bags and their persons were thoroughly frisked and searched, and they were verbally and possibly physically coerced to throw the match and allow the DPRK national team to win. DPRKFA agents intimidated the Celtic players into agreeing to throw the match by threatening to immediately send them back to China without pay if they did not acquiesce. Celtic FC agreed to the DPRKFA demands, and the next day the DPRK national team shockingly won the friendly match 2-0.

The Chinese player who chronicled the trip noted, however, that the DPRKFA must have very strict standards for its players, because even if Celtic would have attempted to beat the DPRK players they probably would have lost. The DPRK team’s players were better conditioned and faster on the pitch than were Celtic. This was probably a result of the DPRK threatening harsh sanctions against its players if they were ever to succumb to an embarrassing loss. Many times throughout history, the DPRK soccer players have been tortured or killed after exhibiting poor performances on the pitch. For example, many DPRK players were fearful they would be sent to the DPRK’s version of the gulag after their embarrassing 7-0 loss to Portugal in the 2010 World Cup. These players exhibited this fear because it had actually happened to former players after performing poorly in the 1966 World Cup held in England. Therefore, most of the DPRKFA’s soccer infrastructure operates with inhumane and savage consequences if the players do not exhibit perfection on the pitch. Although many of the DPRKFA’s actions are hermetic and inconspicuous, what is known about this organization is that it promulgates unobtainable standards for its players and coaches, and it doles out ruthless and unconscionable punishments when players, coaches, and others associated with the DPRKFA do not meet these standards.

96. Id.
97. Id.
98. Id.
99. Id.
100. Naime, supra note 93, at 34.
101. See id.
102. Id.
104. Id.
105. See Barney Henderson, North Korean Football Team Shamed in Six-Hour Public Inquiry over World Cup, TELEGRAPH, (July 30, 2010), available at http://www.telegraph.co.uk/news/worldnews/asia/northkorea/7918468/North-Korean-football-team-shamed-in-six-hour-public-inquiry-over-World-Cup.html. The DPRK’s qualification for the 2010 World Cup was the first World Cup it had qualified for since 1966. See also SOCCER WORLD CUP 2010 PREVIEW 92 (Sevenoaks 2010).
2. DPRK’s Whimsical and Cruel Soccer Regulations

The regulations promulgated by the DPRKFA appear to have been dictated by the dictator Kim Jong-il. These regulations are illogical, inhumane, and they promote fear for all agents of the DPRKFA. For example, after returning home to the DPRK from a horrendous showing in the 2010 World Cup played in South Africa, the DPRKFA’s capricious regulations forced the manager of the team to become a construction worker, and he was concurrently accused of betraying Kim Jong-il’s heir apparent due to his team’s poor performance in the World Cup. This manager, Kim Jong-hun, is now said to be in fear for his life because others who have been charged with betraying Kim Jong-il or his heir apparent have been sentenced to death. In early 2010, one DPRK government official who oversaw a recent disastrous currency revaluation in the DPRK and another government official who was in charge of diplomatic talks with South Korea were both charged with the same crime for which the soccer manager was charged. Both of these top officials were ultimately put to death by a firing squad.

The DPRKFA exemplified another act of capricious and arbitrary regulation when DPRK players were treated in a demeaning manner upon returning home from their poor performance at the 2010 World Cup. This treatment was not life threatening, but it was still debasing because the players were forced to endure six hours of public, verbal barrage and humiliation before approximately four hundred people at the People’s Palace of Culture. Some of the spectators at the People’s Palace of Culture included government officials, students, and journalists, who all gleefully cheered and encouraged the verbal berating. The verbal onslaught developed into a climaxing circus-like atmosphere as it was led by a television commentator and sports minister Pak Myong-chol, who participated in the auditory condemnation of each player and the manager. After the onslaught was complete, but before the players were allowed to depart

106. His son and successor, Kim Jong-un, also appears to have a role in statutory promulgation.
107. Editor’s Note: At the time this article was written, Kim Jong-il was still the Supreme Leader of the DPRK. He subsequently passed away on December 17, 2011. His son, Kim Jong-un, succeeded him as Supreme Leader.
109. Henderson, supra note 104.
111. Id.
112. Id.
113. Henderson, supra note 104.
114. See id.
115. Id.
116. Id.
from the stage, they were forced to turn and face their team manager and publicly criticize him for betraying Kim Jong-il and Kim Jong-il’s heir apparent.117

D. Dreadful Ramifications of the DPRK and Nigeria’s Capricious Regulations

As a result of these capricious regulations, neither Nigeria nor the DPRK has ever produced a national soccer team that is remotely capable of winning the World Cup, and both nations usually compete poorly in other international tournaments. In the DPRK, the merciless treatment of players and coaches prevents talented players and coaches from wanting to subject themselves to possible humiliation, torture, or death. Such cruel treatment is apparently an accepted custom for the DPRKFA. As previously referenced, after being eliminated from the 1966 World Cup in England, several of the DPRK players and coaches were allegedly sent to prison camps because they conceded five unanswered goals to Portugal in a quarterfinal match, after leading 3-0.118 Further, after failing to qualify for the 1994 World Cup as a result of losing to South Korea in a qualifying match, DPRK government officials refused to allow the national soccer team to enter qualification for the 1998 and 2002 World Cups.119 In 2010, the DPRK national team did not even qualify for the second round of the Cup, only scored one goal, and conceded twelve goals to it opponents.120 One of the DPRK’s defeats consisted of an embarrassing seven to nil loss to Portugal.121 These embarrassing defeats are a result of the DPRKFA not being able to attract the most talented players and coaches due to the fear of mistreatment for poor performance.

IV. NIGERIA’S AND THE DPRK’S UNRELIABLE EIIs

A. Nigeria’s EII

Nigeria’s EII at both the national and local levels historically and currently mirrors its national soccer team’s infrastructure in that it is fragile and unreliable due to underdevelopment, highly vulnerable to corruption, and it lacks proper and fair enforcement of its regulations. Most of Nigeria’s various infrastructures, such as gas and oil, have a long history of dishonest oversight.122

117. Id.
118. Id.
119. SOCCER WORLD CUP 2010 PREVIEW 92-93 (Sevenoaks 2010). Again, this is a violation of FIFA rules, which state that governments cannot interfere with a nation’s national soccer team by banning it from international play.
120. Somaiya, supra note 107.
121. Id.
Nigeria was under military dictatorship rule until 1999, and during this reign, the efforts to establish an EII were miniscule, inefficient, and outdated. Thus, the first concerted government effort to develop an EII was when Nigeria commenced its attempt at forming a democracy in 2000. However, this preliminary attempt failed, as have several subsequent attempts. A major problem is that the Nigerian government’s attempts at creating an EII are not directed toward helping citizens gain access to relevant and reliable information. Instead, the attempts are implemented to provide a more convenient means of communication and transfer of information for government agents who work at the national and local levels of government. However, even with these objectives in mind, the efforts have mostly failed to create an EII at both the national and local levels of government in Nigeria.

B. Nigeria’s Adoption of Archaic Law Prevents a Burgeoning of its EII

Another contributing factor preventing Nigeria from creating and maintaining a valid and reliable EII is its application of antiquated and oppressive laws, rather than utilizing available modern legal charters and acts that guarantee Nigerian citizens a right to freely access and utilize information. For example, when the Nigerian government adopted the African Charter on Human and Peoples’ Rights Act of 1983, among other rights given, it overtly grants its citizens the right to receive information and the right to openly and freely express and disseminate opinions within the law. The current Nigerian Constitution also guarantees citizens the right to receive and impart

125. Id.
126. Id. These failures may be due to continued government inefficiency, fragmentation, duplication of records, corruption, lack of transparency, and unproductive clerks and administrators in charge of creating the infrastructure.
127. See id. at 59-60.
128. Id. at 62. Many of these government agents are utilizing the makeshift EII for corrupt purposes such as: money laundering, spying, selling drugs, committing 419 scams…
129. Id. at 63-64.
130. No special provision for monitoring or evaluating e-government initiatives other than the normal processes for monitoring and evaluating government projects exists in Nigeria. Therefore, e-government initiatives did not receive much regulation in Nigeria.
information. Further, Article IV(1) of the Declaration of Principles on Freedom of Expression in Africa, which the Nigerian legislature has adopted, makes clear that public bodies “hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.” Additionally, the Nigerian landmark case, *Abacha v. Fawehinmi*, clarifies that the African Charter on Human and Peoples’ Rights Act of 1983 has been fully adopted and incorporated by the National Assembly of Nigeria. Therefore, along with the Nigerian Constitution, the African Charter is fully binding and must be given full effect by the judicial power of the Nigerian Courts. In summary, all of these charters, treaties, laws, and constitutions have been accepted as primary law by the Nigerian legislature and by its courts. They, as a whole, grant Nigerian citizens the right to have access to information that affects their lives (e.g., laws, regulations, and necessary government forms to establish a business) and to freely distribute this information without government interference.

However, despite the legal authority to obtain and disseminate information without government interference, the Nigerian legislature and its judiciary have chosen to follow antiquated, conflicting, and oppressive laws, which were historically promulgated and adopted as accepted law. These laws were overtly repealed after gaining independence from the British and are in conflict with the above-mentioned, more recently promulgated and adopted, laws. For example, while under British rule, two common law acts adopted were the Official Secrets Acts of 1962 and the Evidence Act of 1945. These two acts are in gross conflict with current human rights laws adopted by the Nigerian legislature and correctly interpreted by Nigerian courts. Unfortunately, these two antiquated and restrictive laws are currently utilized by the Nigerian legislature and judiciary to maintain authoritarian control over its citizens, whereas the more modern laws granting freedom of information to Nigerian citizens are ignored.

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133. *Id.* at 219. See also CONSTITUTION OF NIGERIA (1999), § 39. The Nigerian Constitution states “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.”


1. Implementation of the Official Secrets Act

The origins of the Official Secrets Act may be traced to 1889 in the United Kingdom where it was promulgated. In 1911, the Official Secrets Act was revised by the British to maintain order in its Nigerian colony, resulting in oppressive conditions for Nigerians living under British rule. For example, the 1911 act made it a crime without possibility of defense for one to report the number of cups of tea consumed per week in a government department in Nigeria. The British policy for making the 1911 act so stringent was its belief that the less interference in governmental matters by the colonial inhabitants, the easier it would be to maintain order in the colony and bring about the national goals of the British. However, in 1989, before military rule ceased in Nigeria—and as British colonial rule was diminishing globally—the United Kingdom revised this act to strike a balance between a citizen’s right to information and possible damage to the national interest.

The intent of the 1989 version of the Official Secrets Act in the UK was to make it a criminal offense to disclose public information, but only if the disclosure had damaged national interests. Thus, the intent appears to have been to attenuate criminal penalties for the release of information that would not cause any harm to the British government. For example, one could freely, and without the threat of criminal punishment, report the amount of tea consumption by Nigerian government officials, or disseminate information regarding the current texts of statutes, case law, regulations, or other forms that could benefit citizens’ lives. However, when Nigeria gained its independence from the United Kingdom and established its new democracy in 1999, it codified the 1911 version of the statute and continues to enforce it against its citizens. Nigeria’s version of the 1911 Official Secrets Act is codified under section 9(1) of the Laws of the Federation of Nigerian Act which states that “any information or thing which under any system of security classification from time to time in use by or by any branch of government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of...
Nigeria. Therefore, it is still a crime to report the amount of tea consumption by Nigerian government officials. This is one reason citizens currently do not have access to current statutes, laws, and regulations.

Nigerian government officials assume these laws are promulgated to protect the government official and not the citizens. Accordingly, they should be of no concern to the citizens. Further, the Nigerian government is actively utilizing this antiquated law as the United Kingdom did in the early twentieth century: to control every action of its citizens that may interfere with the Nigerian government, thus maintaining a general level of ignorance among its citizens and their knowledge of the current law. This act is abrasively in conflict with the treaties, regulations, and statutes that have also been adopted by the Nigerian government that provide its citizens with freedom to access and disseminate information.

2. Evidence Act of 1945

Along with the Official Secrets Act, the Evidence Act of 1945 is also based on an antiquated law in the United Kingdom, which conveys that the British government is entitled to a cloak of secrecy and is therefore immune from having to disclose any of its actions and information. In 1945, a British court, in Duncan v. Camel Laird, interpreted this Act as declaring that the British government had sole authority to determine when government information should not be disclosed based on the content or class of a document. However, in 1968, a United Kingdom court in Conway v. Rimmer assuaged this Crown privilege by holding that the non-disclosure of government documents must be weighed against the public interest in seeing those documents.

Unfortunately, since establishing its own democracy in 1999, Nigerian courts and the Nigerian legislature have chosen to ignore the current law introduced in Conway and instead have decided to apply the overruled law in Duncan. As a result, Nigerian citizens are subject to many oppressive consequences of the Evidence Act of 1945. The following are some of these oppressive consequences: inability to access current and relevant government related information; failure of the branches of the Nigerian government to consider the public interest when determining whether to publicly disclose government information, and individuals being subjected to criminal prosecution if the government determines the wrong type of information has been disclosed. For example, the Nigerian Criminal Code Act states that any

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146. See Attorney-Gen. v. Mayor & Corp. of Newcastle-Upon-Tyne, (1897) 2 Q.B. 384, at 395.
148. See Conway v. Rimmer, (1968) A.C. 910, 910. See also Mba, supra note 131, at 224.
149. Mba, supra note 131, at 224.
151. Mba, supra note 131, at 224.
person who communicates or publishes any secret information that comes into his possession is liable to imprisonment for two years. Therefore, the Nigerian government may whimsically decide that information a citizen possesses or disseminates is in violation of arbitrary Nigerian laws and subject the citizen to prison time. For example, a citizen who obtains an electronic form to help commence a business can be put in prison for using and disseminating such a form, if the government deems such a form a government form. Similar to the NFF, such arbitrary and oppressive regulations adhered to by the Nigerian government weaken an already feeble EII, and more importantly, prevent the dissemination of valid and reliable information.

3. Infamous 419 Scams in Nigeria

One form of corruption burgeoning in Nigeria is termed “419 scams.” The etymology of such criminal activity can be traced to section 419 of the Criminal Code Act regarding financial crimes, which is titled “Obtaining Property by False Pretenses: Cheating.” 419 scams are performed by sending emails to individuals requesting that the recipient of the email send advanced funds with the promise of receiving multi-million (or billion) dollar payments in return. In the text of the email scams, the authors often claim to be “high government officials, senior military officers, oil industry executives, bank managers, politicians, and even widows of dead dictators.” The general theme of the emails usually promises to share millions or billions of dollars available from dormant accounts or charities if the recipient of the email will forward an initial security fee, usually in the amount of one-hundred thousand dollars or more.

Most recipients of these email scams initially perceive them to be fraudulent, however, every year a few people are bilked and defrauded of thousands or sometimes millions of dollars. A notorious example of fatuous deception occurred in 1989. A group of unethical Nigerians sent a series of meretricious letters, faxes, and phone calls to an oil executive in Texas asking him to be a partner in an endeavor where he could gain access to thirty-five million dollars that remained in a dormant Nigerian National Petroleum Corporation (“NNPC”) fund. After several attempts to entice the oil executive to travel to Nigeria

153. Id.
156. See Abioye, supra note 143, at 28-33.
157. Id. at 28.
158. See Blommaert, supra note 153, at 581-83.
159. Abioye, supra note 143, at 1-4.
and claim his share to the funds, the oil executive foolishly obliged.\textsuperscript{160} After traveling to Nigeria, the 419 scammers wined and dined the executive in a façade that appeared to be a NNPC office.\textsuperscript{161} The scammers explained to the oil executive that they needed him to transfer one-hundred thousand dollars to a NNPC bank account in London in order to secure the release of the funds. The executive’s avarice apparently clouded any logical thought, and he complied with the requested transfer.\textsuperscript{162} The day after the funds were transferred to the fictitious account, the supposed NNPC agents had vanished, the fabricated NNPC office was vacant, and the duped oil executive never saw his money or heard from any of the 419 scammers again.\textsuperscript{163}

One of the disheartening points about this Texas oil executive story is that, due to the helplessness and lack of understanding that infiltrates Nigeria, its citizens have developed ambivalence to corruption. They are cognizant that corruption undermines the country’s attempt at a technologically advanced and economically sustainable democracy, yet they also believe that wealth, power, and prestige in Nigeria are only obtained through corrupt practices like the 419 scams.\textsuperscript{164} A main contributing factor to the realization that wealth, power, and prestige only result from fraud in Nigeria is that the Nigerian government is not creating and maintaining a logical and fair system of laws and regulations. The Nigerian government is not providing its citizens with electronic or print access to the current laws and regulations, and the government is not promulgating any laws to punish the government officials that hold the citizens hostage.

C. The DPRK’s EII

Due to the hermetic nature of the DPKR’s electronic information infrastructure, a nature very similar to that of its FA, the DPRK has had difficulty extrapolating accurate statistics concerning its current condition. However, from what sparse information is available, it can be deduced that the DPRK’s information infrastructure also reflects its soccer infrastructure, in that it is antiquated, dilapidated, shady, and secretive. For example, a 1998 survey revealed that the DPRK had only one internet service provider.\textsuperscript{165} Further evidence has revealed that in the late 1990’s the DPRK’s government attempted to build a stronger information infrastructure that could effectively disseminate information to North Korean citizens. However, this attempt was futile because of corrupt practices and an inability to locate and retrieve technological parts from the current make-shift EII, which has been a result of the DPRK

\textsuperscript{160}. Id.
\textsuperscript{161}. Id.
\textsuperscript{162}. Id.
\textsuperscript{163}. Id.
\textsuperscript{164}. Id.
\textsuperscript{165}. Joerg Hebber, Building Bridges to North Korea, 6 Nature 711, 712 (2007).
government’s fear of losing control of its citizens. For example, as government agents attempted to locate equipment necessary to redesign and improve the currently crude EII, they discovered that key power and telecom transmissions were buried underground because the government was afraid of eroding state control of national information. The initial choice to conceal essential hardware has subsequently prevented any attempt to modernize and renovate an EII aimed at catching up with other countries around the world.

False Indications the DPRK Government May Loosen its Hermetic Grip on its EII

Despite historical decisions to hide necessary hardware, Kim Jong-il and his cronies have recently pursued actions and rhetoric that suggest a modicum of loosening government control of its EII with the goal of revamping the infrastructure. For example, Kim Jong-il believes that there are three kinds of fools in the twenty-first century: smokers, the tone-deaf, and the computer illiterate. Kim Jong-il recently assigned his oldest son, Jong Nam, to direct the Korea Computer Center, which now mandates that grade-school children receive extensive instruction regarding Pascal and other computer languages. This center commands that intellectually gifted children be channeled into science and technology programs at Kim Il Sung University and Kim Chaek University. To further Kim Jong-il’s technology goal, he also recently mandated that qualified DPRK students enter the IBM-sponsored International Collegiate Programming Contest. Many DPRK students have advanced to the finals of this competition due to their superior knowledge of complicated technology.

The DPRK government has also recently loosened its reigns on professionals and commercial entities by allowing them to collaborate on information technology projects with other foreign professionals. For example, the DPRK government has allowed hundreds of DPRK software engineers to work abroad in China, and in 2005, the DPRK government allowed Chan-Mo Park and Malcolm Gillis, a former president of Rice University, to establish the Pyongyang University of Science and Technology which now offers an

166. See id.
169. Stier, supra note 166.
170. Id.
171. Id.
172. Id. China willingly receives the North Korean software engineers because their cost of labor is substantially cheaper than that of a Chinese or Indian engineer.
173. Chan-Mo Park is a former president of Pohang University of Science and Technology in Seoul, South Korea. See Joerg Hebber, Building Bridges to North Korea, 6 NATURE 711, 712 (2007).
Additionally, some DPRK scientists have recently been allowed to travel to the United States and stay for approximately one month to participate in university colloquia regarding cutting-edge information technology. For example, Syracuse University is currently collaborating with Kim Chaeeck University of Technology, located in Pyongyang. The DPRK also opened its first internet café in 2002. These actions taken by the DPRK to strengthen its EII could theoretically and potentially place the DPRK on track to implement a valid and reliable infrastructure. However, despite these recent efforts at improving their EII, the DPRK’s illogical political policies and inhumane regulations ultimately prevent the pervasion of an efficient EII that can disseminate relevant and valid information to its citizens.

D. The DPRK’s Hermetic Legal Regulation of its EII

Knowledge of DPRK’s legal regulation of its EII is about as inconspicuous as the style of the DPRK national soccer team’s uniforms. Prior to the commencement of the 2010 World Cup, many soccer uniform vendors were unsuccessful in attempting to create and sell a North Korean soccer uniform due to the hermetic regime’s elusiveness in revealing any information about the country and its inner workings, including national team soccer uniforms. Subsequently, the DPRK’s uniforms were not revealed until the day of their first match. Much of the DPRK’s arbitrary and whimsical application of its law, which regulates the EII, is just as inconspicuous.

1. The DPRK’s Phony Freedom of Information Act (FOIA)

While many countries around the world are experiencing new found freedom in information dissemination, it is certain the DPRK has not passed any statute similar to the United States’ Freedom of Information Act (“FOIA”). Instead, the DPRK’s idea of a Freedom of Information Act appears to be setting up a reading room in the Grand People’s Study House located in the capital city, Pyongyang. This reading room allegedly allows any visitor to freely search through thirty million original government texts. However, it is doubtful these texts convey any content that is not government propaganda attempting to bilk its audience. Any pro-citizen rhetoric has certainly been censored by the government, and DPRK citizens are privy to only a minute amount of

174. Id.
175. Weird but Wired, supra note 167, at 43.
177. Id.
179. See Weird but Wired, supra note 167, at 43.
government issued information that explains the law by which they are governed. For example, the web pages accessible to DPRK citizens divulge little more than the daily “on the spot guidance” conferred by Kim Jong-il.\textsuperscript{180}

Although Kim Jong-il has displayed an inclination to implement some new information technologies, he apparently recalls that glasnost and perestroika significantly contributed to the demise of the communist Soviet Union regime.\textsuperscript{181} Even though the DPRK may be eluding glasnost and perestroika, implementing illogical and fraudulent regulations begets a feeble EII. This lack of transparency also results in citizens who are ignorant of the laws that govern them and distrust their government. Citizens may then seek to create their own alternative methods of making sense of their environments. For example, in Nigeria the EII is weak, and access to government information is very restrictive in that only individuals who have an official role in a government transaction or activity and absolutely require access to government information are granted access to that information.\textsuperscript{182} This weak infrastructure and very restricted access to laws and regulations prevents Nigerian citizens from gaining the knowledge that is necessary to help them earn a robust salary and contribute to the Nigerian economy. Such repression of knowledge creates an environment of ignorance and fear; thus, citizens begin to create their own set of norms, rules, and consequences.\textsuperscript{183} However, the norms and rules they create are usually unscrupulous and deleterious to society. For example, in Nigeria where the unemployment rate is high and citizens do not trust their corrupt government that withholds information, citizens often turn to corruption to survive.\textsuperscript{184}

2. Cyber-Crimes in the DPRK

Similar to Nigeria, the DPRK’s hermetic approach to the implementation of its make-shift EII, and its intentional equivocation regarding the current state of the law that regulates its infrastructure, creates feelings of isolation and distrust in its citizens. Subsequently, these psychologically distraught individuals also create their own sets of norms, rules, and consequences.\textsuperscript{185} Some of these norms lead an individual to a life of cyber-crimes so that they can earn a living, and many of the resulting cyber-crime perpetrators are ignored, if not encouraged, by

\textsuperscript{180} Id.

\textsuperscript{181} See id. See also Dmitri N. Shalin, Sociology for the Glasnot Era: Institutional and Substantive Changes in Recent Soviet Sociology, 68 SOC. FORCES 1019, 1023-25 (1990). Mikhail Gorbachev implemented glasnost and perestroika in the 1980 which is often attributed to the fall of Soviet style communism. These philosophies advocate for more government transparency, free market implementation, publicity, and openness.


\textsuperscript{183} See Berreman, supra note 41, at 8.


\textsuperscript{185} See Berreman, supra note 41, at 8.
the DPRK government. The DPRK has implemented a diminutive cyber warfare unit pervasively attempting to hack into the United States and South Korean military networks, and many of these attempts have been successful. It is also possible that other DPRK citizens will resort to email scams, similar to the Nigerian 419 swindles, out of desperation and distrust toward their corrupt government.

3. Alternative Stage-Skipping Model to Salvage and Improve the DPRK EII

In the alternative, the minuscule but incremental efforts of Kim Jong-il to improve the DPRK’s EII, coupled with new governmental leadership and policy, could quickly help improve the dilapidated DPRK EII. One economic method that could be applied in the DPRK, which could quickly help its EII stand on equal footing with countries such as the United States and the Netherlands, is called the “stage-skipping” model. This model was used in the Fujian Province in China to bypass some development stages and quickly assert itself as an economic competitor. It emphasizes that a nation-state with a late-comer economy may follow a lucrative forerunner’s path to develop, but at some point, it skips some stages to arrive on equal footing with the forerunner.

In order for the stage-skipping economic model to have success, a late-comer nation-state must produce well-educated and competent leaders who can maneuver a dilapidated economy into one that is flourishing. The DPRK has implemented some of the steps mentioned above by doing the following: increasing funding for educational endeavors that educate its citizens regarding EII, allowing its computer scientists to travel abroad and learn about emerging technological endeavors, and partnering with American professors to perform empirical research. Thus, the DPRK does have citizens with potential to develop a progressive and efficient EII. However, these efforts have not been consistently performed and, as a result, the DPRK may not be able to catch up to nations who are developing cutting edge EII. Unless there is a transformation in government policy, the citizens of the DPRK will suffer from not having access to a reliable and valid EII.

187. Id.  
188. See Keun Lee et al., The Possibility of Economic Reform in North Korea, 39 J. CONTEMP. ASIA 279, 280-83 (2009). The Fujian Province in China is located directly across the narrow straits from Taiwan. In the 1980s this province was one of the most economically backwards provinces in the world. Its backwardness was due in large part to the government closing it completely off from the rest of the world. However, in 1989, the Fujian province opened its economy and invested widely in other nations, mainly in Taiwan. By opening its markets up, this province increased its gross domestic product by approximately seventy-five percent. This increase was by and large a result of active export promotion and a vast increase in foreign direct investment.  
189. See id.  
190. Id.  
191. Id.
4. A Weak EII also Deleteriously Affects the Health of Citizens in the DPRK and Nigeria

Nigerians have suffered for years by not having access to educational wikis, blogs, or social networking tools that could be used to improve the health of citizens and save lives. Each year, millions of Nigerians contract HIV or malaria: diseases that could have been prevented if these Nigerians had access to valid and reliable information. Numerous electronic tools exist today—such as wikis, social networking tools like Facebook and Twitter, and blogs—that could spread valid and reliable information regarding how to prevent the spread of such diseases. Having knowledge about how to obtain and use a mosquito net, or where to obtain a safe vaccine, could prevent thousands of individuals from contracting malaria in one Nigerian village. This information could easily be distributed across all Nigerian cities and villages via a social network if Nigeria had a functional EII. Unfortunately, the Nigerian government continues to implement the EII for its own benefit, ignoring potential opportunities to disseminate life-saving information to its denizens. It is even more difficult to disseminate lifesaving information considering the fact that Nigeria has a population of approximately 152,217,340 citizens, but only has approximately 43,982,200 internet users. Additionally, only 1,718,000 Nigerians use Facebook.

E. E-Readiness Score for Nigeria and the DPRK

Currently, neither Nigeria nor the DPRK has developed even a scintilla of a valid and reliable electronic infrastructure. Accordingly, citizens are deprived access to all current laws within each respective country. Also, regulations from both countries regarding a citizen’s right to access and disseminate information are either nonexistent or are applied equivocally to a citizen’s detriment. Such harsh treatment leads citizens to mistrust their government. This mistrust leads a person to believe that they must act in a deceitful manner in order to survive.

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192. Social networking tools are largely blamed for beginning the recent revolutions in the Middle East. It remains to be seen whether social networking tools, such as Facebook and Twitter, can help spark political and EII revolutions in Nigeria, the DPRK, China and other countries that suffer from authoritarian governments that limit the reception, dissemination, and access to electronic information.


196. Id.
Based on these observations, Nigeria and the DPKR each receive a score of zero in all three categories, which results in a total sum of zero, on a scale of zero to three, in regard to their level of e-readiness.

V. CHINA, JAPAN AND SOUTH KOREA

Oppressed citizens of Nigeria and the DPRK can take solace and hope from examining how some nation-states that previously regulated their EII in a fraudulent manner have recently taken a more responsible approach, establishing emerging reliable and efficient EIIs that are regulated by fair and logical laws. Japan, South Korea, and, to a lesser extent, China are countries whose EIIs are illustrative of such emerging responsible and efficient infrastructures. Fans of soccer in Japan, South Korea, and China may also garner hope for the future as the current economic and demographic conditions for these three nations suggest they could become soccer powerhouses within this decade.

A. Demographics of Japan, South Korea and China

Japan, South Korea, and China are all economically powerful Asian countries, but their GDP and population statistics are somewhat varied. Japan has the third highest gross domestic product among sovereign nations in the world at about $4.31 trillion, and ranks tenth in the world in population with approximately 126,475,664 citizens. South Korea’s GDP ranks thirteenth in the world among sovereign nations at $1.459 trillion, and ranks twenty-sixth with a population of roughly 48,754,657 citizens. China maintains the third largest economy in the world with about a $10.09 trillion GDP, and ranks first in the world in population with roughly 1,336,718,015 citizens. Therefore, based on Kuper and Szymanski’s estimates, Japan, South Korea, and China should all be primed to become some of the new world soccer powers. These countries just lack the experience that other international soccer powers have, but experience should come over the next few years for these Asian sides.

197. Sovereign nations do not include the European Union, the United Kingdom, or other conglomerations of sovereign nations. Instead it only includes separate nations.
198. It is acknowledged that China just surpassed Japan as the country with the second largest GDP, and India is a close fourth with a GDP of approximately $ 4,046,000,000,000.
199. CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html (last visited May 2, 2011). It is suspected that Japan, despite the recent tragic earthquakes and nuclear reactor disasters, will remain ranked one of the top four nations in the world with regard to population and GDP, due to its culture of resiliency and persistence.
200. Id.
201. Id.
202. See generally Kuper, supra note 45.
203. Japan just won the Asian Football Club Asian Cup in January of 2010. Japan also won this coveted tournament in 1992, 2000, and 2004, thus showing their emergence as an Asian soccer power.
B. Japanese and South Korean Soccer Infrastructure

With regard to soccer infrastructure, South Korea and Japan were fortuitous when FIFA granted them the right to co-host the 2002 World Cup. These two nations took advantage of this opportunity by investing the revenue that streamed in while hosting this tournament into their respective soccer infrastructures. After the tournament, Japan and South Korea poured millions of dollars into developing their own domestic soccer leagues, and they upgraded their physical infrastructures by building new stadiums and renovating older stadiums. Both countries also creatively advertised the sport, and its newly created domestic leagues, to recruit highly talented players and coaches in order to entice local fans. These advertisements led to a large increase of revenue from fans purchasing the various domestic teams’ paraphernalia. The soccer infrastructures of these nations have become so well-built that many of their domestic players—who have been developed in these leagues—are being approached by the English Premier League, the Spanish La Liga, and other well-established professional leagues in Europe and in the United States.

Yet, despite the recent strengthening of these soccer infrastructures, they are still volatile. Due to their instability, the soccer performance of these nations still greatly lags behind some of the soccer world powers. Wolfram Manzenreiter illustrates this point with his empirically developed per capita index model that correlates the athletic (soccer) production of a nation with the population base of the country. Implementing this model, a country is considered to produce average soccer players, average quality operational soccer clubs, average attendance at soccer games, and average economically viable television contracts for matches compared to the rest of the world’s teams if it registers a score of 1.0 on the per capita index model indicator. All of these factors are also used to help measure the success of a nation’s soccer infrastructure. Over time, this model has indicated that, since 2002, Japan and South Korea have deftly increased their soccer infrastructure compared to the world norm with an index of 1.30 and 1.19, respectively.

205. See id.
206. See id.
207. See id.
208. Id. at 563. This model is derived from John Rooney’s per capita index that he developed in A Geography of American Sport. The model calculates \( I = \frac{N}{P} \times \left( \frac{A}{1} \right) \), where \( N \) is the number of players, and \( P \) is the total population of a country, \( A \) is the number of people per athlete in an athletic field. This model presents national variances measured against the overall output figure as 1.0.
209. Id.
210. Manzenreiter, supra note 203, at 563.
211. Id.
However, Japan and South Korea still have strides to make if they wish to begin producing elite soccer players and more competitive soccer clubs. The overall data suggests that the soccer infrastructures of Asian countries lag behind some of the more traditional soccer powerhouse countries that reside in Europe and South America; yet, the Asian soccer infrastructures are emerging. More specifically, this data suggests that Japan, China, and South Korea are lacking compared to Europe when evaluating the number of operational soccer clubs, performance of national soccer teams, game attendance, television contracts, and general economic activity generated by soccer infrastructures.\textsuperscript{212} For example, Manzenreiter’s per capita index model indicates Europe as a whole produces 2.5 times top-tier soccer players and club teams than the world norm.\textsuperscript{213} China’s index using this model is only .56,\textsuperscript{214} and thus, it has a developing soccer infrastructure that has more progress to make than Japan or South Korea. Yet, Japan and South Korea already appear to be emerging as top tier national soccer teams that can compete with their European counterparts.

C. Soccer Regulations in Japan and South Korea

The soccer infrastructures of Japan and South Korea may lag behind other more experienced soccer nations that have won world championships; however, the Japanese and South Korean FAs have created and applied logical regulations in a stable and beneficial manner. The ability to generate these logical regulations are largely a result of the Japanese and South Korean governments recently relinquishing control over the countries’ FAs. Prior to the establishment of domestic leagues in Japan and South Korea, the two nations’ FAs were tightly governed by highly centralized and bureaucratized federal government agencies.\textsuperscript{215} For example, in the late 1980s, these countries’ FAs promulgated regulations that mandated that national team players receive bare minimum salaries, and that the domestic teams were only marketed to citizens when it would benefit the governments for political purposes.\textsuperscript{216}

However, in the early 1990s,\textsuperscript{217} the Japanese and South Korean FAs convinced their respective governments to allow private corporate investment in both the domestic league teams and the national teams.\textsuperscript{218} This commercialization allowed for intelligent and determined young individuals from Japanese and South Korean advertising agencies to market the sport domestically and abroad. This marketing immensely increased interest in the

\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 569.
\textsuperscript{216} Manzenreiter, \textit{supra} note 203, at 569.
\textsuperscript{217} Japan won its first Asian Cup championship in 1992, shortly after its government decided to relinquish control of the Japanese FA.
\textsuperscript{218} See Manzenreiter, \textit{supra} note 203, at 564-67.
sport in Japan and South Korea, and thus corporations such as Coca-Cola, Canon, Fuji Film, JVC and others invested millions into these countries’ domestic and national teams. The release from repressive government control also rewarded these FAs with lucrative television contracts with organizations such as ESPN, and ultimately the opportunity to host the FIFA World Cup in 2002. The encouragement of private capital investment is a primary reason that Japan and South Korea have been able to produce great player and coaching talent, win international tournaments, and subsequently increase their ratings on the soccer per capita index.

The Japanese and South Korean FAs also put regulations in place that prevent profligate spending of new sources of local and foreign revenue. These regulations guarantee reinvestment of this money to strengthen and improve each nation’s soccer infrastructure. Shortly after the FAs began reaping the monetary gains of the new marketing campaign from the 2002 World Cup, new regulations mandated that both domestic leagues begin investing large percentages of the money by signing highly talented players and coaches from abroad to improve the reputation of the domestic leagues and the skills of local players developed for the national teams. Thus, the release of tight government control and allowing corporations to donate large sums of money to these domestic teams precipitated the ability of the South Korean and Japanese FAs to vastly improve the quality and reputation of their domestic leagues and national teams.

Evaluating Japan and South Korea’s responsible creation and implementation of FA regulations, and juxtaposing them against Nigeria and North Korea’s profligate spending and corruption, illustrates why some nations are able to create unwavering soccer infrastructures, while other nations fail. Consequently, the efforts to strengthen the Japanese and South Korean soccer infrastructures have resulted in magnificent and joyous performances for both countries in the past three World Cups.

D. China’s Dubious Soccer Infrastructure

Even though China’s soccer infrastructure has the potential to burgeon like its Asian neighbors, it is also in danger of regressing into an infrastructure that resembles the current Nigerian FA due to the Chinese government’s reticence to relinquish control. This peril exists because the Chinese government is solely

219. Id. at 564-66.
220. Id. at 565.
221. Id.
222. Id. at 566. Highly talented players such as Paul Gascoigne, Gary Lineker, and Zico were signed to play in the Japanese league in the mid nineteen-nineties. These players were treated to lavish guaranteed salaries and were paid throughout their tenure in Japan. They were not mistreated, lied to and denied salaries as highly recruited players in Nigeria still often are.
223. See SOCCER WORLD CUP PREVIEW, supra note 43, at 54-55, 78-79.
managing the Chinese FA and is not enforcing regulations to prevent corruption, fraud and injustice. In fact, a 2008 undercover police inquest uncovered bank accounts, records of soccer betting deals, computer data, and other overt activity that incriminated the Chinese FA management, players, coaches, team leaders, club staff and former players in a gambling ring and a match fixing scandal. Players, officials, team administrators, and other individuals involved with the Chinese FA frequently are paid by the Chinese mafia to fix matches.

In 2006, Yang Yu, a deputy general manager of the Guangzhou Yiyao Team in China, admitted to fixing a match between his soccer team and their opponent, Shanxi Luhu Yang. Yang described how he fixed matches by paying just one or two players to play poorly, or by compensating a referee to make certain calls and award random penalty kicks. More recently, on March 1, 2010, Chinese police arrested the former head of the Chinese FA, Nan Yong, on bribery and match fixing charges. Yong, Zhang Jianqiang (now the former director of the Chinese FA’s referees’ committee), and twenty other Chinese officials will now face a criminal trial on bribery charges.

The root causes of fraud in the Chinese FA are multifarious. Some members of Chinese soccer clubs resort to colluding with the Chinese gambling rings to pay debts. Due to the Chinese government’s regulations that prohibit largesse from corporations, many clubs are also facing potential insolvency. Therefore, to avoid financial ruin, some club administrators are complicit with Chinese gambling rings so that they can pay their players, coaches, and other debt. Other Chinese FA administrators, coaches, and players are motivated simply by avarice and participate in the collusion to reap the monetary gain for themselves. The average monthly salary of a starting Chinese player on a domestic Chinese league is four thousand Yuan, which translates to approximately six hundred and two United States dollars. It is very difficult to make a living on such a salary in China. Therefore, the monetary temptation is often too seductive for a Chinese soccer player to refuse.

226. Id. at 45-64.
227. See Abioye, supra note 162, at 47.
228. Id.
229. Roughly eighty-two percent of all penalty kicks taken in a soccer match result in a goal. See Jordet G. Hartman et al., Kicks From the Penalty Mark in Soccer: The Roles of Stress, Skill, and Fatigue for Kick Outcomes, J. OF SPORTS SCIS., Jan. 2007, at 121, 121-24.
231. Id.
232. See Abioye, supra note 162, at 47-48.
233. Id.
234. Id.
235. Id. at 48. See also Universal Currency Converter, http://www.xe.com/ucc/ (last visited May 1, 2011).
Is it possible to eradicate the lascivious gambling rings that currently pervade Chinese soccer? The Chinese FA has never overtly published and promulgated rules that could eliminate this type of malfeasance, although there may be some unpublished regulations that are equivocally implemented. However, it is unlikely that the Chinese FA would enforce such regulations even if they do exist because the Chinese government is sometimes slow to enforce governmental statutes that regulate fraud and other crimes in other aspects of the Chinese culture. For example, a plethora of individuals are arrested and implicated on charges of fraud and money laundering, but many FA officials and players are never prosecuted by the Chinese government.

The China FA must now decide whether it wants to develop into a strong, emerging soccer infrastructure equal to its Asian counterparts, or fade into the soccer-world abyss. One Chinese sociologist suggests that to evade the abyss, the Chinese FA must create and publish a long-term deterrence effort.\textsuperscript{236} Such a deterrence model must mandate that individual players who participate in match fixing shall be fined substantially, and shall be suspended from a sizeable amount of games.\textsuperscript{237} Whole teams that collude with the Chinese mafia or other gambling rings must be relegated to lower divisions and not allowed to participate in qualification matches,\textsuperscript{238} even if this involves the national team. These regulations must also be enforced if the Chinese FA desires to progress into soccer greatness like its close neighbors, Japan and South Korea. Otherwise, China will quickly resemble many African nations that are complicit in an abundance of match fixing schemes, salary fraud, and disorganization. However, one may surmise that based on the current Chinese FA policy, China could be headed in the wrong direction.

\textbf{E. Chinese IT Infrastructure}

China did not begin its development of an EII until the early 1980s. The modern feeble state of the Chinese EII, however, is more a result of its practice of protectionism and its capricious manner of promulgating and enforcing regulations, rather than its late start in the developmental process. China’s government did not commence an initial attempt at creating a sustainable EII until the mid-1980s.\textsuperscript{239} During this attempt, CANET developed the first internet e-mail node in China which was implemented in Chinese universities.\textsuperscript{240} This implementation of the internet was somewhat attenuated because it was only used in Chinese universities, and China did not subsequently commence an

\begin{footnotesize}
\footnote{236. See Abioye, supra note 162, at 48.}
\footnote{237. Id.}
\footnote{238. Id.}
\footnote{239. Yang Shaoguang, An Informal Discussion on Internet Matters, Chinese Educ. & Soc’y, Feb. 2006, at 65, 70.}
\footnote{240. Id.}
\end{footnotesize}
aggressive attempt to build a strong, sustainable EII that would serve individuals unaffiliated with a university until around 1991.241

China’s government decided to proceed with development of its EII in the early 1990s, and by 1994 the China Science and Technology Net successfully connected the Chinese government with the international internet, which marked the first time China had participated in the world internet family.242 By 1998, China had approximately 2.1 million internet users,243 and by 2004 it claimed to have 87 million online users, and 36.3 million online computers.244 Although the Chinese government has increased its electronic infrastructure with more widespread access to the internet, it still maintains tight government control over the content placed on the internet, who may use the internet, and for what purposes individuals may use the internet.245

Various ministries of the Chinese government coordinate hermetic control over internet usage and content.246 The ministry primarily responsible for overseeing use of the internet is the Ministry of Information Industry, established in 1998.247 This ministry has granted licenses to just a few internet providers and carefully scrutinizes their business practices to ensure that they do not conflict with the Chinese government’s philosophy or policy of promoting Chinese communist values.248 Some of the few internet provider licenses given by the Ministry of Information Industry were granted to the commercial networks ChinaNet and China Golden Bridge, as well as the academic networks China Education and Research Network and China Science and Technology Network.249

Two other Chinese government ministries also help oversee the business practices of internet provider licensees: the Ministry of State Security (“MSS”) and the Public Security Bureau (“PSB”).250 The PSB is charged with maintaining China’s civilian network security, including their online security.251 The MSS is responsible for external civilian intelligence, including online external intelligence.252 Both of these ministries regulate and restrict the number

242. See CIA World Fact Book, supra note 46.
243. Alex Zixiand Tan, China’s State-Coordinated Internet Infrastructure, COMM. OF THE ACM, June, 1999, at 44, 44.
244. See Shaoguang, supra note 238, at 70.
245. See Yu, supra note 240, at 32.
246. See Tan, supra note 242, at 44.
247. Id. at 45.
248. See id. at 45-46.
249. Id.
251. Id.
252. Id.
of private sector organizations that can interconnect with Chinese citizens; the Chinese government wants to preserve Chinese communist philosophy and policy among its citizens.\footnote{253}

Despite the authoritarian oversight and control over internet usage, some Chinese citizens have implemented the internet for creative innovation.\footnote{254} However, most innovation is stymied due to the government’s fear that original thought will be in conflict with the Chinese communist belief system.\footnote{255} As a result of the hermetic control, the development of the Chinese electronic information infrastructure is trailing other developing nations such as Malaysia, Japan, and the United States.\footnote{256}

\section{1. Controlling User Behavior}

Many of the specific regulations promulgated by the Chinese ministries are intended to control user behavior on the internet. However, these regulations are whimsical and promote protectionism. The Chinese government promotes protectionism on the internet because it adheres to Bill Gates’ quote in which he opined that the internet is a double-edged sword and that one may see half of the web as an angel and the other half as a demon.\footnote{257} The Chinese government apparently perceives approximately ninety-five percent of the internet as a demon, and some government officials view the large majority of the internet as social and cultural garbage.\footnote{258} Yet, the Chinese government espouses that the internet and access to it is a cornerstone of their drive for economic development.\footnote{259} This creates cognitive dissonance for agents of the Chinese government in that they desire to provide ample access to the internet in order to generate revenue for the government, yet they want to maintain tight control of content to ensure that citizens are not inundated with ideas and information contrary to Chinese communist belief. When balancing these two cognitive tensions, the Chinese government tends to err toward more government control rather than toward an open internet.

In erring toward hermetic control, the Chinese government reasons that its protectionist policy is necessary to protect children and adults from the dangers of exposure to free thinking that is available on the internet, which could result

\footnotesize
\begin{itemize}
\item \footnote{253}{See Tan, supra note 242, at 44.}
\item \footnote{254}{See Yu, supra note 240, at 31.}
\item \footnote{255}{Id. at 32.}
\item \footnote{256}{Edmund Prater et al., \textit{Emerging Economies, Operational Issues in China and India}, J. of Marketing Channels, June 2009, at 169, 177.}
\item \footnote{257}{Shaoguang, supra note 238, at 72.}
\item \footnote{258}{See id. at 66. Of course such extreme views are developed out of fear that free though and exposure to democratic ideas will lead to revolutions akin to those that have recently taken place in Tunisia, Libya, and Egypt.}
\item \footnote{259}{Maris G. Martinsons et al., \textit{State Censorship of the Internet in China}, COMM. OF THE ACM, Apr. 2005, at 67, 67.}
\end{itemize}
in uncivilized phenomena in China. Any unrestrained uncivilized phenomena could incite Chinese citizens to rebel against prescribed Chinese communist doctrine and ultimately prevent a citizen from being willing to sacrifice themselves for their motherland if the need arises. Therefore, instead of instructing Chinese children to think critically and decipher valid information from invalid information, China instead promotes protectionism and attempts to censor as much content as possible so that only the government decides which type of information is valid and which is invalid. For example, the Chinese government censors up to fifteen percent of foreign web sites and sometimes renders them completely inaccessible to individuals from China. In other words, the Chinese government prefers to inculcate a sense of complete submission to the Chinese state with intrusive censorship of the content of the Chinese internet broadband, rather than open the internet to new ideas and possibly make more money.

One catalyst that encourages the Chinese government to apply protectionist methods regarding internet use is the ubiquitous web bars and cyber cafés that have proliferated throughout China. Many Chinese government officials perceive these web bars and cafés as dissolute cultural atmospheres in which adults and children can behave without any inhibitions. Such unregulated behavior is anathema to the Chinese Communist party, because if one has the ability to behave without inhibitions, one may discover other means of regulation besides what the communist party offers, which may in turn lead to an uprising. The Chinese government also claims they are justified in censoring the internet because it may expose young Chinese people to wantonly issued books, publications, videos, and recordings that lean toward violence and sex. These licentious materials may severely erode the thoughts and morals of young Chinese citizens who are inexperienced in affairs of the world, causing them to become victims of a corrosive torrent of violence and pornography. Some of the primary materials the Chinese government wants to shelter its citizenry from include information regarding Taiwan, Tibet, the Falun Gong spiritual movement, and democracy. The Chinese government will extend great measure to protect its denizens from these topics. In fact, in a 2004 speech given in Shanghai, United States Vice President Dick Chaney’s discussion of expanding political freedom and yearning for democracy were completely removed prior to it being published or posted anywhere in electronic or print format.

260. See Shaoguang, supra note 238, at 71-2.
261. See id. at 66.
262. Id.
263. See id. at 73.
264. See id. at 78-79.
265. Id.
266. Martinsons, supra note 258, at 67.
267. Id.
2. Chinese EII Regulations Deter Private Business

Many of the Chinese government’s capricious regulations not only restrict individuals in their social life but also are deleterious to private business in China as well. For example, two regulations recently passed by the PSB, termed the Computer Information Network and Internet Security Protection and Management Regulation and the State Secrecy Protection Regulations of Computer Information Systems Internet Regulation, together require all internet networks operating in China to provide monthly reports of the number of users on the network, the number of pages viewed by each user, and the user profiles.268 Also, per these regulations, any user violation reported to the PSB may result in that citizen losing their ISP business license and network registration, as well as fines and possible criminal prosecution of the company, the company staff, and individual users.269 These regulations and other recently passed Chinese regulations all place an undue burden on private businesses.

To comply with these regulations, a private company would have to hire excess staff just to monitor the number of users on a network, the number of pages viewed, and create a profile for each user. This costs Chinese private businesses excess money and wastes their time, which ultimately cuts into their net profit. These regulations also call for criminal prosecutions for commercial entities or individuals who use the internet to incite an overthrow of the government or any other behavior that is contrary to the Chinese government’s ideals.270 These threatening criminal penalties also deter individuals from opening a private business because, under these regulations, owners of the companies can be criminally prosecuted for employee violation of the law and vice versa.271 Interestingly, none of these regulations can be used against government officials for such violations. The government and all of its hundreds of ministries are intentionally omitted from these regulations and statutes. Such carefully crafted phraseology appears to be a convincing deterrent to the opening of any private businesses in China that are not excessively entangled with the Chinese government itself.

A further deterrent for private business to implement internet technology is that China is not a constitutional society, and therefore, its citizens are not given notice and due process when they are suspected of violating a regulation that proscribes reading or posting information on the internet that is arbitrarily threatening to the Chinese government.272 In fact, many Chinese citizens are probably not even aware that to make such a post is a crime. Unfortunately, Chinese citizens are very rarely aware of the laws that govern them. Therefore,

268. See Yu, supra note 240, at 31-33.
269. Id.
270. Id.
271. Id.
272. See Martinsons, supra note 258, at 67.
numerous Chinese citizens may be arrested for posting something to the internet or reading a forbidden site that the Chinese government was unable to censor, even though they may not even be aware that they have violated a regulation.

Amnesty International ("AI") claims the Chinese government maintains the world’s largest prison for those who violate electronic technology regulations.\(^273\) AI further alleges that it has documentation of more than fifty individuals who are imprisoned in China for posting messages on the internet that are offensive or threatening to the Chinese government.\(^274\) One individual subjected to such imprisonment in China, named Huang Qi, set up a web site that discussed some content that was deemed threatening to the Chinese government.\(^275\) He was arrested by the Ministry of Information Industry, otherwise known as the “great firewall of China,” in June of 2000.\(^276\) Following his secretive trial, Huang Qi was sentenced to five years in prison in May of 2003.\(^277\)

\textbf{F. Effect of Chinese EII and Its Regulations}

The negative effect on China’s EII is beginning to be manifested as the Chinese government eschews open relationships with private businesses, and then fails to comply with contractual agreements. For example, China has tenuously agreed to arms-length business relationships with Microsoft, Facebook, and Google as long as Microsoft will open its source code, and Facebook and Google agree to certain censorship requests.\(^278\) It has also become apparent that, after agreeing to perform business with Google, the Chinese government directed domestic hackers to trespass the Google infrastructure and hack their site.\(^279\) One of the wikileaks cables released in December of 2010 revealed an allegation by a United States Embassy source in Beijing that the attacks against Google were ordered by the Politburo, the governing group of China’s Communist Party.\(^280\) Growing evidence also suggests that the Chinese government has also intentionally hacked into many sensitive servers in the United States.\(^281\) Some of these web violations redirected large volumes of internet traffic, such as secretive communications of the United States armed service, away from their directed targets and into the hands of members of the Chinese government.\(^282\) These types of cyber-attacks, coupled with vague

\(^{273}\) Id.
\(^{274}\) Id.
\(^{275}\) Id.
\(^{276}\) Id.
\(^{277}\) Id.
\(^{280}\) Id.
\(^{281}\) Id.
\(^{282}\) Id.
regulations and ill treatment of foreign and domestic electronic infrastructure investors, deter foreign and private domestic investment, which is usually a necessity for improving a country’s EII. Therefore, it is unlikely China will keep up with the burgeoning information infrastructures of some of its Asian counterparts, unless it revamps its hostile and untrustworthy business practices.

Unclear and capricious application of regulations, and a lack of efficient access to forms necessary to run a business also deter venture capitalists and entrepreneurs from investing in Chinese business associations. The erratic promulgation and application of regulations create a fear and a lack of trust in a citizen toward the government. Such fear and distrust leads to citizens deciding not to pursue business in their country. One study illustrates how such unpredictable regulations and irregular enforcement of those regulations diminishes productive domestic business in China. This empirical study developed an economic competitiveness and business competitiveness index based on the clarity of a nation’s laws with which private and state run business must comply. This study illustrates how China is behind the curve in EII development and commerce compared to other Asian countries. The index indicates that China is ranked fifty-seventh in the world, which pales in comparison to the United States, which is ranked second in the world in EII business and the amount of clarity regarding the laws that govern its EII.286 Furthermore, another study revealed that, due to China’s governmental agents turning their backs on certain fraud and collusion in everyday business practices, China ranked 79th out of 180 countries on a Global Corruption Index.287

For those individuals who are brave enough to attempt to commence a business in China, the lack of information available electronically in China can create quite a disheartening experience. For example, because Chinese citizens do not have access to regulations that govern their lives, it can take a Chinese citizen a great deal of time to set up a business that has adequate information technology support. It is impossible to set up a business quickly when a citizen is not given efficacious electronic access to the regulations, forms, and other necessary materials that explain how one is to comply with all of the nation’s regulations. Conversely, in the United States, an entrepreneur can locate all necessary regulations, forms, and other materials within a matter of minutes. Thus, an organized United States citizen can have all paperwork needed to commence a business filed in five days or less, whereas in China, it

283. Id.
284. Id.
285. Chao, supra note 278.
286. Id.
289. Id.
may take three months, or longer. All of these obstacles present a serious
deterrence to investment in China and result in a less advanced Chinese EII.

G. Japan’s and South Korea’s EII

Japan initially began developing its EII in 1992 for both government and
commercial use by building LAN cables, other necessary hardware, and by
providing access to information service providers (“ISPs”). Japan was one of
the few countries to concurrently develop local and nationwide ISPs, which
subsequently enabled them to develop their EII quicker than nations who only
built one type of ISP. The local ISPs are used for businesses or government
agencies that provide services or information to a limited area or a local
community. In contrast, the nationwide ISPs can provide service to all
Japanese citizens and to people outside of the Japanese state.

In addition to the success of the local and nationwide ISP systems in Japan,
the private ISPs that developed these systems had the judicious foresight to
implement broadband technology while laying the cable. Broadband is not
commonly found in the countries so far mentioned in this paper. As a result of
this EII creation process, in 2000, the percentage of Japanese citizens with
internet connections was between 12.5% and 23%. Further, by 2006, 95% of
Japanese citizens had a reliable internet connection, and almost all of this
95% had broadband access.

Japan’s EII was also strengthened in the 2000s by allowing private
companies to develop wireless systems that could provide internet service to
Japanese individuals on their wireless devices. This prescience of the
Japanese government to allow such investment of wireless technology attracted
more private business that further strengthened the Japanese EII. Because of the
nature of the Japanese society, most Japanese citizens spend an enormous
amount of time commuting, and therefore wireless internet connections
became very popular as soon as they were available in Japan. In fact, by 2005,
81.2% of the Japanese population accessed the internet via their mobile phone or

290. Toshihiko Takemura et. al., Positive Analysis on Vulnerability, Information Security
Incidents, and the Countermeasures of Japanese Internet Service Providers, 1 INT’L J. OF BUS.,
ECON., FIN. & MGMT. SCI., 220, 221 (2009).
291. Id. at 221.
292. Id.
293. Id.
294. Martin Sonia San, Risk, Drivers, and Impediments to Online Shopping in Spain and
Japan, 18 J. OF EUROMARKETING 47, 49 (2009).
295. Id. at 49.
296. Id.
297. Id.
298. Id.
299. Id. at 49-50.
other mobile device, whereas, 77.4% still used their desktop or laptop to access
the internet.300

Another important factor that contributed to Japan’s quick progress was that
Japan deregulated its EII in the 1990s (much like its FA) and opened its EII to
private and venture capital investment.301  This privatization of the EII market in
Japan lead to an EII “big bang” (deregulation) in that the burgeoning of EII
created numerous forms of communication and dissemination of information:
universities were connected to the internet with fast and efficient forms of
broadband, individual homes were connected to the most efficient forms of
broadband internet, and global communication and commerce connections
emerged.302

Japan has also improved their EII by researching and implementing
technologies such as a smart EII system, termed “TRON” technology (The Real-
time Operating System Nucleus), which theoretically created ubiquitous
intelligent buildings in which all Japanese citizens could interact.303  TRON
embedded microchips into buildings, appliances, and other building
infrastructures, which would communicate with each other to enhance the
quality of living and efficiency for Japanese citizens.304  An individual living in
a smart house can program their computer to receive any legal updates relevant
to necessary business filings for their corporation for a set period of time.305
This automated process is possible because the microchip in the individual’s
computer could communicate with any relevant tax entities, business law
databases, and courts with which necessary paperwork could be obtained or
filed. TRON was designed as an open system so that all Japanese citizens and
foreigners could interact with it.306  Further, TRON was omnipresent, as
microchips would be embedded in cell phones, cars, homes, and businesses.
Therefore, individuals could access needed information wherever they were
located. Such progression in Japan’s already advanced EII offers an increase in
efficiency, peace of mind, and citizen trust.

H. Valid and Effective Regulations for Japan and South Korea’s EIIs

As Japan expands its EII, cyber criminals exploit these innovative
technologies, and technological transgressions become more prevalent.
Therefore, the Japanese government has taken an aggressive approach against
foreign and domestic cyber criminals by establishing the Japanese Information

300.  Son, supra note 293, at 50.
301.  See Watanabe, supra note 8, at 81-82.
302.  See id. at 81-84.
303.  Id. at 81-82.
304.  See id. at 82.
305.  See id.
306.  See id.
307.  See Watanabe, supra note 8, at 82.
Security Countermeasures Promotion Office in 2001 to help prevent and prosecute cybercrimes. Additionally, since 2007, the Japanese government has created other agencies that have oversight in maintaining a freely accessible internet that is free of crime, fraud, and abuse. Some of these agencies include the Ministry of Internal Affairs and Communications (“MIC”), the Ministry of Economy, Trade and Industry (“METI”), and the National Institute of Information and Communications Technology (“NICT”). These government agencies fervently seek to eradicate fraudulent EII and encourage the burgeoning of venture capitalists that are developing crime-free innovations on the Japanese EII.

1. Japan’s Government Promotes an Open, Free Access and Educational Approach

To promote open access to information and to continue developing safe and innovative EII technologies, the Japanese government has taken more of a discovery and educational role, as opposed to a hermetic role. For example, one empirical study implementing logical regression analysis complied by Toshihiko Takemura, et al., suggests reduction of cyber-crimes can be accomplished more by educating the Japanese public, rather than by increasing government oversight. In other words, the Japanese government trusts its citizens to think for themselves and does not try to control its citizens’ thoughts. Thus, Japanese agencies tend to focus more on educational efforts such as seminars and displayed slogans that empower the public with valid knowledge about how to protect one’s technology from malware. This approach gives Japanese citizens a great amount of autonomy to acquire and apply knowledge, free from government interference.

Furthermore, the Japanese government has gathered and analyzed data regarding current and potential information security incidents. These include foreign governments hacking into Japanese government websites, individuals imbibing viruses into Japanese internet networks, and other malevolent causes of network malfunctions. These types of research are completed to educate government officials about potential threats and how to protect against those threats. This information can then be passed along to Japanese citizens. The Japanese Information Security Countermeasures Promotion Office was established specifically to perform an inquest regarding security incidents that arise in Japan and to create and implement a policy to prevent future security...
breaches.\textsuperscript{314} The National Information Security Center (“NISC”), another Japanese government agency, also helps to establish policies that protect its government and its citizens from potential cyber criminals.\textsuperscript{315} The NISC’s policy is referred to as the “Secure Japan” endeavor and imposes criminal penalties against private citizens or government officials who inflict malware on any Japanese citizen or business.\textsuperscript{316}

2. Specific Laws that Prevent EII Fraud, Malfeasance, and other Criminal Activity

South Korea’s and Japan’s proactive research endeavors have resulted in the development of reasonable and enforceable penal statutes to punish government officials and private citizens who commit a cyber-related crime. The Japanese legislature has also passed the Unauthorized Computer Access Law, which prohibits unauthorized computer access and the facilitation of unauthorized computer access by leaking or stealing other computer users’ passwords or identification materials.\textsuperscript{317} The Japanese legislature further enacted amendments to a criminal law passed in 1907 to impose criminal penalties for individuals who commit computer fraud, illegal production of electro-magnetic records for payment (including credit cards and other bank cards), or who commit obstruction of business by destroying computers or computer equipment.\textsuperscript{318} In Japan, when these crimes are committed, they are prosecuted and the criminals are punished.\textsuperscript{319} As a result, more individuals are deterred from being complicit in cyber-crime.

Similarly, South Korea has enacted penal statutes that allow prosecution of individuals who commit falsification or alteration of public and private electromagnetic records, commit interference with businesses using EII, commit fraud, or offer unauthorized disclosure of EII information.\textsuperscript{320} South Korea has also adopted the Promotion of Utilization and Communications Network Act to deter computer fraud and misuse of computer networks.\textsuperscript{321} As in Japan, when a person allegedly breaches one of these laws, he or she is also prosecuted and given an appropriate punishment.

\textsuperscript{314} See Takemura, \textit{supra} note 289, at 220.
\textsuperscript{315} \textit{Id.} at 220-21.
\textsuperscript{316} See \textit{id.}
\textsuperscript{317} Keiho [Penal Code], Law No. 128 of 1999, art. 4, no. 9.
\textsuperscript{318} Keiho [Penal Code], Law No. 45 of 1907, art. 4, nos. 161-2, 246.2.
\textsuperscript{319} \textit{Id.}
\textsuperscript{321} Acts No. 3920 of 1986.
3. Effect of EII Regulations in Japan and South Korea

The continual development of the South Korean and Japanese EIIs provides citizens with a sense of trust in their government and a confidence that their judicial system will punish those who break laws. The citizens also benefit from EIIs that allow open access to a wealth of valid information. The individual who is seeking to download the proper business formation forms may quickly do so from home, on a train, or at work. Additionally, they may customize the forms online and receive instant satisfaction knowing that their business has cleared the first hurdle towards making a profit. Thanks to the convenience offered by a reliable EII, self-starters in South Korea and Japan have the luxury of locating, completing, and filing necessary business commencement forms in the same day.

The commitment to developing a strong EII and to implementing rational regulations to protect the existence of an appropriate use of the Japanese EII has resulted in an economic boom for many Japanese and South Korean individuals. For example, these two countries now have ubiquitous computing networks that have a profound effect on almost every facet of the Asian world. Many private companies are burgeoning because Japanese and South Korean ISPs have provided access to many technologies that provide a way to effortlessly communicate with customers, disseminate information to them, and entice them with advertisements. This increase in communication can generate enormous economic gain and can also create competition between businesses that results in a better product for patrons.

4. Resulting EII Readiness Scores for China, Japan and South Korea

All of the data that has been examined leads to the conclusion that Japan and South Korea have well established and continuously innovated EIIs, as well as logical laws that regulate these EIIs in a fair manner. These two factors lead to an abundant amount of citizen trust, which ultimately produces motivation for foreign and domestically located individuals to conduct business, live in, and travel to Japan and South Korea. This business, domicile, and tourism friendly environment, which has in large part been created due to these two countries’ EIIs, has led to multiple advantages: growth of the national economy, job creation, the development of cutting edge technology, and the gravitation of highly creative and intelligent people to these two countries. Therefore, Japan and South Korea receive a point each for all three facets of our EII scale: a well-established EII, logically created and fairly implemented laws to regulate their

322. See San, supra note 293, at 48.
323. See San, supra note 293, at 48.
324. See Watanabe, supra note 8, at 81.
325. See id.
respective EIIs, and the ultimate manifestation of citizen trust in its government. Therefore, Japan and South Korea both receive a score of three on our e-readiness measurement scale.

On the other hand, while China’s EII has the potential to blossom and create the same citizen trust, economic benefits, and alluring environment as exists in its neighboring Asian countries, the autocratic government regulation and control prevent private citizens and businesses from this panoply of advantages. The laws promulgated to regulate the Chinese EII are capricious at best, and illogically implemented. Thus, the hermetically controlled EII and the erratically created and utilized EII regulations lead to a lack of citizen trust and an increased level of citizen fear of its government. Therefore, although China has great potential to earn three points on the e-readiness scale, it currently receives zero points on the e-readiness scale for failing to meet any of the prescribed criteria.

VI. THE NETHERLANDS AND THE UNITED STATES

The United States and the Netherlands constitute the final group of countries examined in this article. These two countries were selected because of their advanced soccer infrastructures and competitive national teams. An examination of these sophisticated soccer infrastructures demonstrates a strong correlation with the advanced nature of their respective EIIs. It is no mistake that the United States and the Netherlands are world powers in soccer and information technology.

A. Demographics of the United States and the Netherlands

The Netherlands boasts a population of approximately 16,783,092, and a GDP of around 680.4 billion. Thus, the Dutch have the twenty-second ranked GDP in the world, and they also have one of the most experienced national soccer teams in the world. According to Kuper and Szymanski’s empirical model, the Dutch are primed to win the World Cup, and in fact nearly did, losing 1-0 to Spain in the 2010 World Cup final. The Dutch have created a great soccer machine, sometimes referred to as “total football” or “Clockwork Oranje.” This is no accident, as the Dutch have taken full advantage of their vast pools of talent and immense monetary supply by building one of the strongest soccer infrastructures in the world in addition to maintaining it with rational and logical FA regulations. The Netherlands are one of the greatest teams in the history of international soccer. They consistently produce a national team that

328. Id.
329. See Kuper, supra note 45.
has the potential to win international tournaments. The Dutch most recently won the European Championship in 1988, reached the semifinals in the 2000 and 2004 European Cup, qualified for five of the past six World Cups, and finished second overall in the 2010 World Cup final.331

B. Soccer Infrastructure

Both the United States and the Netherlands have sturdy soccer infrastructures, boasting two of the strongest professional soccer leagues in the World. The Dutch league is called the Eredivise, which is ranked ninth out of fifty-three leagues in Europe. Some of the better known teams from this league consistently qualify for and progress successfully through the prestigious Champions League and Europa international tournaments held in Europe.332 The Eredivise has a successful business plan that reinvests its lucrative profits, providing each club an opportunity to attract highly skilled players and brilliant coaches. Many of the better-known teams in the Eredivise continually develop players that eventually play for the Dutch national team in international competition. Thus, the NFA’s infrastructure, frequently termed “total football,” which revolutionized the game of soccer in the 1960s,333 continues to create great soccer and entertainment.

The United States league, Major League Soccer (“MLS”), was established just after the 1994 World Cup, which the United States hosted.334 The MLS now boasts nineteen teams, with expansion teams being added in each of the past two seasons,335 and all of these teams are currently economically viable.336 There has been tremendous public and private investment league wide to build an infrastructure of soccer specific stadiums and to develop youth academies for each of the teams.

Such economic stability in the United States and the Netherlands is a result of pro-business regulations implemented league wide by the Eredivise and the MLS. The Netherlands Football Association (“NFA”) regulates soccer in the Netherlands and the United States Soccer Federation (“USSF”) regulates soccer in the United States. Both the NFA and the USSF adhere to FIFA’s statutes and implement their own bylaws to regulate malfeasance. For example, bylaw 241, section 2 of the USSF gives the acting Board of Directors authority to terminate, suspend, or fine any person who commits malfeasance, such as committing acts

331. The World Cup is the most difficult international tournament to qualify for and win, and arguably, the European Championship is the second most difficult to qualify for and win.
332. See DAVID WINNER, BRILLIANT ORANGE: THE NEUROTIC GENIUS OF DUTCH SOCCER 1-71 (Overlook Press 2010).
333. See id. at 28-39.
336. Id.
adverse to the best interests of the federation. Bylaws 703 through 706 of the USSF convey the due process all players, coaches, and other USSF members must receive before facing a hearing and possibly being fined, suspended, or terminated. Such due process includes being notified of the allegations being made, a right to a hearing, the right to appeal, the right to arbitration, and all administrative procedures. The USSF and the NFA honestly adhere to these bylaws, which prevent players and coaches from being subjected to the embarrassing public humility or physical torture Chinese and North Korean players may face. Further, the contracts of coaches and players are benevolently honored via the rule of law. Unlike players in Nigeria and North Korea, players and coaches in the United States and the Netherlands are not fired randomly weeks before a major tournament, and they are not denied payment of their salary despite a poor showing in a match. Such benevolence and honesty creates a rapport between highly talented players and coaches and their respective governing bodies. This rapport leads to success in international tournaments.

1. The United States SF Regulations Prevent Match Fixing

The USSF promulgates and implements rules that prevent players, managers, and other individuals affiliated with the USSF from gambling on matches, fixing matches, and participating in other types of corruption. For example, bylaw 241 of the USSF, states that the Board of Directors may suspend, fine, or terminate (or any combination thereof) the membership of any member of the federation if the Board determines that the member’s conduct is adverse to the best interests of the sport or the federation. This catch-all phrase would include the termination, suspension, or fining of any USSF member who participates in gambling on United States domestic or national team matches, as well as anyone who attempts to bribe anyone who can influence the outcome of a match. Further, bylaw 414 expresses that the Board may remove a Board Member for cause and after a reasonable notice, hearing, and opportunity to present his or her case. This regulation prevents high-level administrators in the USSF from being complicit in deceptive and criminal behavior, such as match fixing and/or gambling rings. Bylaws 701 through 708 of the USSF bylaws give the accused the right to have timely notice, a timely and fair hearing, the right to an appeal, the right to arbitration, and contain a definition of proper venue.

338. Id.
339. Id.
340. Id.
341. Id.
342. Id.
2. United States Soccer Regulations Promote Fairness and Trust

Because these bylaws are updated and enforced fairly, an environment of trust is established between the USSF players, coaches, and the governing Board. The players, coaches, and other members are cognizant that if anyone involved in the USSF commits a violation, they will be suspended, terminated, or fined. All of these laws and policies are clearly defined in the bylaws of the USSF; therefore, all USSF agents should be aware of all laws. Being aware of the possible outcomes of one’s decision due to consistent enforcement of these regulations creates a trust among the members of the USSF. As a result, each individual is more likely to understand the policy behind each law and will be more likely to comply with the laws.

3. The Netherlands FA Adopts FIFA Law – Which Deters Match Fixing and Promotes Fairness

The Netherlands has adopted, and adheres to, FIFA’s disciplinary bylaws for misconduct of a player, manager, or other agent of the NFA. Article sixty of these Bylaws makes it illegal for anyone to use violence or threats to coerce a match official into taking certain action or to hinder the official from acting freely. Any player, coach, or other member of the NFA caught complicit in such fraudulent action may be fined, suspended, or banned from future participation in Dutch soccer. Additionally, article sixty-two, section one conveys that anyone who offers, promises, or grants an unjustified advantage to a body of FIFA in an attempt to incite it or the individual themselves to violate any FIFA regulation may be banned, suspended, or terminated from NFA activities. Sections two through four of article sixty-two indicate that anyone who solicits, promises or accepts an unjust advantage for any type of consideration may also be fined, suspended, or terminated from the NFA. These sections also indicate that the NFA will further confiscate all assets garnered by the offender as a result of committing fraud. Article sixty-four states that anyone who fails to pay an entity such as a coach, player, or other NFA employee or agent their salary or other owed monies will be fined and assigned a final deadline to pay the owed entity in full. If an offender misses

344. Id. The NFA takes any accusations of this kind seriously, as a Dutch player was even suspended once for kissing a referee during a match. This was probably not an attempt to bribe. Nevertheless, the NFA is very persnickety in regard to any misbehavior that may be an attempt to influence a referee. See FARK.COM, http://www.fark.com/comments/355637/Dutch-soccer-player-suspended-for-kissing-Referee (last visited May 4, 2011).
346. Id.
347. Id.
348. Id.
this assigned deadline they may be subject to further fine, suspension, or perpetual termination. Article sixty-nine prescribes a single match, a multiple match, or a lifetime ban for anyone who conspires to fix a match. The NFA regularly enforces these regulations, which prevents a lot of the corruption that occurs frequently in China, North Korea, and Nigeria.

All of these regulations implemented by the Eredivise and the MLS result in solid soccer infrastructures. For example, instead of wanting to play abroad due to rampant corruption and malfeasance, some of the most talented players in the United States elect to play for an MLS team. For example, Landon Donovan, possibly the best player U.S. soccer has developed to date, elected to play for the Los Angeles Galaxy after a stint with a team in the German Bundesliga. David Beckham has also chosen to spend the twilight of his career playing with Donovan for the Galaxy, due to the economic and professional stability of MLS. In the Netherlands, the Eredivise has also helped many Dutch natives become some of the best players in the world. For instance, Siem De Jong played for Ajax, Wout Brama plays for the FC Twente Dutch club, and Eric Pieters competed with PSV, to name a few. These players choose to stay with the Eredivise and the MLS because these soccer organizations promote accountability and trust.

C. Dutch EII Infrastructure

Until the 1980s, the Netherlands’ EII was maintained by its government and subject to heightened state control. However, in the mid-1980s, the Netherlands decentralized their EII and encouraged private companies to develop and provide electronic information services. Now, the Netherlands implements a shared approach between the public and private companies, thus collaboratively building and maintaining a national EII. The policy behind this approach is to promote competition and innovation, allow all Dutch citizens to have access to electronic information, attract new inhabitants, bring in money to all cities in the Netherlands, and recruit the best and brightest entrepreneurs to the Netherlands. This public/private partnership has sought to implement contemporary technologies such a broadband and wireless local area network.

349. Id.
350. Id.
351. The Bundesliga is the top soccer division in the world, and is ranked as one of the top three professional leagues in the world. Such a ranking is reasonable, as the Germans have dominated world soccer for decades. See Bundesliga TV, http://www.bundesliga.de/en/ (last visited May 4, 2011).
353. See id.
354. See id. at 2046-51.
Access to broadband and WLAN technologies has facilitated the development of a strong EII in the Netherlands. The Dutch government, local governments, and private companies have placed a heavy emphasis on implementing broadband technology in the Netherlands, resulting in broadband coverage that is approximately one hundred percent. This dedication has helped the Netherlands surpass other countries in the European Union in the development of broadband. Additionally, the Dutch have utilized three different models to advance the technological infrastructure of their country.

a. Model one: Dutch Government Subsidies

Having access to broadband and WLAN technologies, Dutch governmental bodies and private companies have the luxury of creating a few different models of providing EII service and ISPs to Dutch citizens. In Eindhoven, the local government does not create or maintain the EII infrastructure or provide service via the infrastructure. Instead, private companies are given complete control and authority to compete to improve and manage the EII and service provided on the EII. The local Eindhoven government subsidizes broadband subscriber communities. These subsidies usually cover the cost of a connection and the cost for the community to locate and hire a company to connect fiber cables necessary for a broadband connection, or networking towers for WLAN usage. Thus, using this paradigm, the local government helps support the EII in a monetary fashion, but is not a co-owner of the EII, only a subsidizer. Private enterprises are given authority to compete to develop and provide the necessary hardware, software, and conduits to provide service.
b. Model Two: Local Government Subsidies

The local government in Groningen, Netherlands implements a second model in which it bares the cost and time commitment of developing the entire EII infrastructure, the servers, all fiber optic cable, WLAN towers, and any additional necessary hardware and software. It finances the development of the EII by adding up the costs of the EII development and capitalizing them for many years. The private ISPs then compete to provide service via the publically developed EII. This EII model in Groningen has connected several communities with wireless and broadband means of communication, and as a result, many private companies and individuals are naturally attracted to this area and use the infrastructure along with employees who work in over one hundred and seventy public buildings. Thus, Groningen has realized enormous savings by capitalizing and investing in the EII service expenses. In Groningen, the EII is entirely owned by the public. Private ISPs compete to provide service to the Dutch citizens, who in turn use the EII, and the local government ultimately can earn a large profit from this type of investment partnership.

c. Model Three: Local Government as Co-owner

A third manner in which the Dutch have developed a strong and reliable EII is by having a local government actually invest in and become a co-owner of an EII. The local governments in Rotterdam and Amsterdam implement this type of model. In this model, the local government actually invests in the development of the EII, organizes the implementation of the EII hardware, and gives all willing individuals living in homes and running businesses the option to participate in the network. Essentially, these local governments own and finance the development of the EII, but they do not provide service to the EII. Instead, they allow private ISPs to compete for service.

Allowing the private ISPs to compete for business still promotes a quality product, attracts cutting edge service and quality businesses, lowers costs of ISPs, and attracts intelligent and hardworking citizens. Rotterdam currently has more than 6,750 homes connected via fiber optic cable, and additional homes and businesses are connected via a WLAN service. The Dutch government and its local municipalities implement all three of these models because they believe such privatization of the development of the EII will augment local

363. Id. at 2050.
364. See van Winden, supra note 351, at 2050.
365. Id.
366. Id.
367. See id.
368. Id. at 2050-51.
369. Id.
370. See van Winden, supra note 351, at 2051.
371. See id.
economic development, provide cutting edge broadband and WLAN service, attract and retain companies that provide excellent service to Dutch citizens, and attract intelligent, productive citizens.\(^{372}\)

**D. United States EII Infrastructure**

In order to maintain its position as a global leader in technological advancement, the United States must continually maintain a high functioning and reliable EII. The United States has shown a strong commitment towards maintaining its status as a global technology leader. And in a free, democratic society, it should come as no surprise that transparency and scam protection are cornerstones of the American EII ideal.

Recent United States EII Innovations

The United States EII has come a long way since Tim Berners-Lee initially set the internet in motion, and it is so strong now that it is a world leader in providing free and easily accessible information to its domestic and foreign citizens. For example, Google television, Hulu, and Apple TV now bring television, movies, and other content to users via the internet to any household in America.\(^{373}\) Apple has further revolutionized how individuals seek and find information with its creation of the iPhone and the iPad, where users do not just use browsers, but they interact with application platforms.\(^{374}\) The WC3 technology is currently developing a technology that allows voice recognition with the iPad, other tablets and mobile devices, and via Gmail.\(^{375}\) The Wii and Xbox360 video game consoles also allow individuals to browse the internet and to download specific applications configured for these consoles.\(^{376}\)

The U.S. government has implemented a laissez-faire approach in partnering with private companies to develop several key items that guarantee a strong EII. Over the past two decades, the U.S. has expanded the availability of access points, servers, increased bandwidth, technology outlets, and LAN and WLAN, so that more individuals have access to open, free, or reasonably priced electronic information.\(^{377}\)

a. Moore’s Law is Proven True Again

As the United States has improved its EII by increasing the number of people who have access to technology, its internet users have increased, congruent with

\(^{372}\) See id. at 2049-51.


\(^{374}\) See id.

\(^{375}\) Id.

\(^{376}\) See id. at 26-27.

Moore’s Law.378 Thus, in places like the United States, Japan, and South Korea, citizens’ access to and efficient use of electronic items such as smart phones, iPads and other information tools should increase more quickly with each passing year. For example, in 2000, only forty-four percent of U.S. citizens had access to the internet, which increased to sixty-eight percent of citizens in 2005, and in 2010, seventy-seven percent of Americans had access to the internet.379 This rapid increase in internet access in eleven years depicts the validity of Moore’s Law.

Further indication of how the United States’ EII is becoming sturdier is that broadband access is becoming ubiquitous in metropolitan areas, and in the past two years, has increased the most in rural areas.380 The rural market has produced a sixteen percent increase in broadband access from 2007 to 2009, making it the quickest growing geographic market in the U.S.

The U.S. government and the U.S. private sector took Moore’s Law seriously and designed their EII in a flexible manner so that it could quickly adapt to sudden changes in computer technology.381 Therefore, contributions by government agencies and private ISPs have constructed an EII that allows a company to purchase an iPad or a server that will fill up an entire store room, and this equipment will run efficiently in a specific geographic location.382 When that company decides to relocate to a different geographical location, or it chooses to purchase a new iPad for its employees or a new server the size of a broom closet, it may purchase and implement these technologies without worrying about network configuration problems.383 Such a guarantee of EII configuration with new and older technologies ensures private companies, government agencies, and private individuals that any change in their technology should have no negative impact on their ability to market, distribute, or describe their products.

378. Moore’s Law states that the number of transistors on a chip will double about every two years. Thus, technological development of computers, computer hardware, and software will double approximately every two years. An increasing number of United States citizens should have affordable and efficient access to hardware such as an iPad with the passing of each year.
380. Id.
381. See generally Randy L. Sparks, Building Infrastructure for Ubiquitous Computing, KNOWLEDGE QUEST, Jan.-Feb. 2006, 14, 14.
382. See generally id. at 14-15.
383. Id. Of course a company needs to purchase service from a reliable ISP, as there is no guarantee some ISPs may provide better services than others. Also, with the advent of cloud computing, geographical locations and mortar free offices are frequently implemented. See InfoWorld.com: Cloud computing, http://www.infoworld.com/d/cloud-computing/what-cloud-computing-really-means-031 (last visited May 4, 2011).
b. American EII Regulation

The United States Congress has passed a multitude of laws concerning its EII. One such piece of legislation is 18 U.S.C. § 1030, titled “Fraud and related activity in connection with computers.”384 This legislation prescribes criminal penalties for a private citizen or a government employee who knowingly accesses a computer without authorization, and in the process, knowingly obtains financial information with the intent to defraud.385 Possible punishment includes imprisonment up to twenty years and a fine.386

Many countries around the world have increased transparency in their governments by enacting legislation that allows for the free flow of information, and the United States is no different. The United States’ version of the Freedom of Information Act (“FOIA”)387 was promulgated with the intent of having the American government maintain a subservient role to the individual. This would allow individual citizens to obtain as much information about the government as possible. When FOIA was originally passed in 1966, it was with the intent that citizens had the right to access and become cognizant of government information. Therefore, all that a citizen would have to do to gain access to certain information is make a written request or access it independently. However, some exceptions to FOIA have developed over the years. For example, anything may be kept confidential if the information contained within pertains to national secrets or other classified information.388 Yet, despite these restrictions, citizens of the United States are provided with a wealth of information when compared with a country like Nigeria that may criminally prosecute an individual for garnering and disseminating the number of cups of tea Nigerian government officials consume.

c. 419 Scam Prevention

Another piece of federal legislation promulgated to protect private citizens and government employees states that any person who intentionally intercepts, attempts to intercept, or procures another person to intercept a wire, oral, or electronic communication, or intentionally discloses to another person the contents of any wire, oral, or electronic communication, shall be criminally

385. Id.
386. Id.
388. Id. (Types of classified information include: information related solely to the internal personnel rules and practices of an agency, any information exempted by federal statute, trade secrets, inter agency or intra agency memoranda, personnel and medical files, records or information compiled for law enforcement, information regarding the oversight of an agency responsible for the regulation of a financial institutions, and geological and geophysical data, such as a map).
punished by a fine and imprisonment of no more than five years. These laws prevent many potential criminals from participating in EII fraud similar to Nigeria’s 419 scams or hacking schemes similar to what takes place in China. And unlike citizens in many of these other countries, Americans are provided with quick, free, and easy access to these statutes via numerous electronic sites: GPO access, the Library of Congress’ Thomas, Cornell University Law School Legal Information Institute, and FindLaw. This ubiquitous access to laws that govern their lives allows American citizens to know what to expect from the American legal system. Further, if they violate a law, they can be cognizant of what punishment awaits them. This awareness of the law also augments American citizens in trying not to violate the law, and in general, in improving their trust in the American federal government.

E. Dutch EII Regulations

1. Promote Fair, and Open Access to E-Information

The primary goal of the Netherlands current approach to regulating their EII is to maintain fair, equal, and open access to information. The Netherlands is a nation-state member of the European Union (“EU”), and this fairness and equality approach to content on the internet has evolved since its inception into the EU. In the late nineteen-nineties, the Netherlands’ legislature considered inappropriate or harmful content on the internet to be a matter of personal choice based on one’s beliefs, preferences, and social and cultural traditions. Therefore, content received through a wireless or wired means in one country may be considered criminal, whereas in another country it may be perceived as harmless. The Netherlands government and other EU nations followed a self-

394. Developing a definition of fairness is an ongoing debate in the Netherlands and the European Union, of which the Netherlands is a member country. Also, the debate persists as to whether fairness can ever exist on the internet or on any other entity on which profits are generated, regardless of the regulations promulgated.
397. See Bonnici, supra note 395, at 133.
398. Id.
regulatory approach to policing content placed on the internet and the actions of individual users.\footnote{399}

2. Dutch EII Regulations Invite Economic Development

The primary motive for utilizing a self-regulatory form of policing the internet was economic development in all member nations of the EU.\footnote{400} The majority of member nations believed that creating an electronic environment where information and trade could flow freely, without over-regulation, would foster an environment in which economic markets could thrive, and consumer trust and business development would increase.\footnote{401} This laissez-faire approach to internet regulation is codified in Article 10(2) of the European Convention of Human Rights and Fundamental Freedoms, which declares that democratic societies must be committed to protecting a citizen’s right to freedom of expression.\footnote{402} The approach relies on several key aspects: a hotline provided by the EU to which consumers may report alleged crimes and misuse; internet filters to prevent the flow of information statutorily declared as illegal by the EU (e.g., child pornography); and awareness in segments of the population at high risk of suffering harm from contact with statutorily declared illegal content or actions (e.g., schools, prisons, etc.). Overall, the main idea that percolates from any EU nation-state is that this international conglomerate still aspires for an open access electronic venue for the people: a venue in which users can freely exchange information, entrepreneurs can create viable economic ventures, and governments can disseminate relevant information to citizens.

3. Positive Economic and Psychological Effect of Dutch Infrastructure and Regulations

Due to the decentralized and private citizen/private business focused approach to establishing a solid EII and the logical and effective implementation of cyber regulations, Dutch citizens have benefited from high quality EII service and the creation of new jobs. For example, the price for ISPs has diminished, during the later part of this decade, the EU and the Netherlands have tempered the notion of “complete free flow of information with the introduction of possible net neutrality. Net neutrality argues for all ISPs to be granted the right to give its customers the same internet browsing speeds, regardless of the site a consumer is attempting to view. Most ISPs in the western world currently have legal authority to limit browsing speed to sites that are not economically viable. However, a push for net neutrality, which would require all ISPs to grant the same speed for all consumers to all sites is in progress in Europe and in the United States. The EU has set up a commission called Body of European Regulators of Electronic Communications (BEREC) to study the pros and cons of potential net neutrality laws. This commission is set to give a recommendation about possible net neutrality laws in 2011. See also Europe’s Information Society: Thematic Portal, http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm.

\footnote{399}{See id. at 134.}
\footnote{400}{Id. at 136.}
\footnote{401}{See id.}
\footnote{402}{Id. During the later part of this decade, the EU and the Netherlands have tempered the notion of “complete free flow of information with the introduction of possible net neutrality. Net neutrality argues for all ISPs to be granted the right to give its customers the same internet browsing speeds, regardless of the site a consumer is attempting to view. Most ISPs in the western world currently have legal authority to limit browsing speed to sites that are not economically viable. However, a push for net neutrality, which would require all ISPs to grant the same speed for all consumers to all sites is in progress in Europe and in the United States. The EU has set up a commission called Body of European Regulators of Electronic Communications (BEREC) to study the pros and cons of potential net neutrality laws. This commission is set to give a recommendation about possible net neutrality laws in 2011. See also Europe’s Information Society: Thematic Portal, http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm.}
niche markets have developed (e.g., specific ISPs now serve a certain corporate client), and customers have more choice—which in turn improves the product ISPs provide. The cities in the Netherlands such as Rotterdam, Amsterdam, and Groningen have reported that their models have promoted economic development in several ways. The models have made their cities more attractive to citizens and companies through the use of widely available WLAN and broadband networks, which in turn has promoted competition, leading to lower prices for ISP service; additionally, they have improved economically distressed neighborhoods by offering them cheaper ISP service. Such infrastructure allows virtually all denizens of the Netherlands to access high-speed internet connections for free.

4. WLAN and Broadband Equate to a Boom for the Dutch Economy

The development of WLAN and broadband high-speed internet has also been a boom for the Netherlands economy and for citizen convenience. This pro-private-business approach attracts many intelligent and creative minds from around the world who have opened successful private businesses. Also, this EII has allowed Dutch citizens to purchase needed items quickly and efficiently via electronic methods. For example, many private individuals commence a business in a Dutch city and utilize websites that allow them to advertise, list specific information, provide detailed product catalogs, list prices, and sell and deliver products directly from their website.

The Albert Heijn Example

One of the most effective and profitable uses of the EII in the Netherlands has been to implement hybrid uses of the four above-mentioned website purposes to advertise and sell goods to domestic and foreign customers. For example, one grocery called Albert Heijn, founded in 1887 in Oostzaan, now serves citizens via its brick and mortar stores and via the internet with two separate websites. Albert Heijn offers one website to list its products, services, and prices which generally serve its traditional customers. The customers can view a list of products and become cognizant of what they wish to purchase prior to visiting a brick and mortar store. Additionally, this grocer offers a second

403. See van Winden, supra note 351, at 2046.
404. See id. at 2049-51.
405. Id. at 2051.
407. See id.
408. Id. at 65.
409. Id.
website that serves other geographical areas and nontraditional customers. Such nontraditional customers include elderly or disabled individuals who can order products from Albert Heijn and have these items delivered directly to their residence. This grocer also accepts preorders for items via their nontraditional website for people who often travel by train. By using this nontraditional website, a person on the way to a train station may purchase an item using a mobile device and pick it up when he or she arrives at that particular train station.

Juxtaposing this type of service that is made possible because of the advanced Dutch EII against Nigeria, China, or North Korea’s EIIs, and how it affects private business and customer convenience in those countries, one may deduce that the citizens of these authoritarian ruled countries are being denied access to the convenience and efficiency that citizens of the Netherlands enjoy. Also, these limited EIIs thwart private businesses from making an extra profit because they are not able to offer these services.

5. Dutch EII Allows Entrepreneurs to Set Up a Local Business with Ease

The goals of the Dutch government are to attract private businesses run by honest, competent, and economically minded individuals; synergize social benefits, such as providing free internet access to economically poor neighborhoods; and lower prices while improving the quality of ISPs. Due to this pro-citizen/pro-private business laissez-faire approach to Dutch EII regulation, a person may easily locate and access necessary business forms in electronic format. A citizen can locate forms in several different languages using Dutch governmental websites, which include the following: form instructions, filing fee information, tax information, insurance information, and business planning information. For example, one of these electronic portals called Expatax provides users with easily accessible instructions and forms to assist in setting up a limited liability company. This site further explains in detail the types of liability protection that this type of business entity provides, any mandatory fees, management formation information, and other pertinent information. This site additionally provides a detailed brochure assisting in

412. Id.
413. See van Winden, supra note 407, at 2053.
415. Id.
the formation, management, and dissolution of a limited company in the Netherlands. 417

Providing these tools to the citizens of the Netherlands, and to foreigners who wish to conduct business in the Netherlands, equips these individuals with essential EII tools that can assuage the commencement and management of a business association. Such EII tools allow entrepreneurs to provide cost effective, quality, and beneficial products to the denizens of the Netherlands. Contrasting these tools and the resulting services and products with the lack of the same offered in Nigeria, North Korea, and China, one can easily surmise that having a strong and appropriately regulated EII will produce a stable and thriving economy with high quality and easily acceptable products. This ultimately results in producing citizens of the Netherlands, and foreign individuals who conduct business in the Netherlands, who trust the Dutch government to help maintain and regulate the EII.

F. The Dutch EII Creates Public Trust

Along with synthesizing and offering technology via a well-built, well-maintained EII that promotes prosperity and quality goods and services, the Netherlands’ logical and effective regulation of its EII promotes public trust. One empirical study reveals that the Netherlands is noted as one of the least corrupt countries. 418 This study focused on the qualitative trait of how the Netherlands’ citizens viewed their government: as trustworthy or untrustworthy. 419 The questionnaire used in this study focused on how corrupt Dutch citizens perceived public officials and acts of public administration to be and how any such corruption was addressed. 420 This study defined corruption as public officials “providing, requesting, or obtaining private favors with a view to a person doing or not doing something in their official capacity,” such as bribing someone or being bribed. 421

The study addressed several important questions. Are politicians taking bribes and using EII information in ways counter to what current law dictates, similar to what occurs in Nigeria or China? Was the corruption dealt with effectively in the criminal justice system? Was the corruption diminished by the punishment? 422 Was the internal investigation sufficient to provide significant

419. See id. at 84-85.
420. See id. at 85.
421. Id. at 92.
422. See id. at 85.
evidence to convict and punish a wrongdoer? Or, is such corruption and misuse of information—preventing the public from obtaining uncensored information—an acceptable practice in the Netherlands, as it often is in countries such as Nigeria, North Korea, and China? The study’s results revealed that in the Netherlands the ministries that maintained and operated any government control over the EII had .19 corruption investigations per thousand employees per year during the study’s five-year period. This is remarkably low compared to the apparent widespread corruption in Nigeria, North Korea, and to an extent in China. From 1994 to 2003, half of the cases forwarded to the Public Prosecution Service in the Netherlands regarding a public servant or public administrator had a prosecution initiated and were based at least in part on anti-corruption cases. Once a criminal prosecution is initiated in the Netherlands by the Public Prosecution Service, a conviction is received nine out of ten times. After conviction, the Dutch judicial system consistently imposes punishments similar to those of the United States judicial system, such as community service, fines, or custodial confinement punishment. One may surmise that a higher level of trust exists due to the ostensibly lower amount of government corruption involved in the Netherlands’ maintenance of their EII and the consistent prosecution and punishments of offenders.

If one is looking for corruption involving the EII in the Netherlands, surely one may find it, as there is no crime free utopia on this earth. However, the fact that EII corruption is reported, investigated, and prosecuted—with convictions and punishments when necessary—conveys to the Dutch citizens that its government is helping regulate an EII for the citizens’ benefit. It also communicates that it is not maintaining an EII solely for the government’s benefit, which is ostensibly different than Nigeria, North Korea, and China. This system of order demonstrates that the Dutch government is on notice and will investigate, convict, and punish those government officials who are committing abuses of power that may corrupt the EII. The Dutch citizens are cognizant of this altruistic effort manifested in the Dutch governments’ actions, and in turn, this creates a sense of trust in Dutch citizens toward their government.

G. Effect of the United States EII on Individuals and Business

As a result of the fair and logical regulation of the United States’ solid EII, millions of Americans depend on the American EII for their jobs, health, and

423. See id. at 85-87.
424. See De Graaf, supra note 418, at 85-87.
425. Id. at 87.
426. Id. at 90-91.
427. Id.
428. Id. at 91.
429. See id. at 93.
The American government is also reliant on the EII to distribute information to its citizens. For example, all fifty states and the District of Columbia offer Secretary of State web sites that offer various business forms, election information, or general alerts notifying citizens of possible fraudulent activity occurring in their jurisdiction. Other state governmental websites offer information regarding the state’s Attorney General, state environmental laws, policy, notices and hearings, and services to senior citizens. Other government-managed websites in the United States offer information about current state legislation, including bills, committee reports, legislative hearings and state fiscal reports; national laws, regulations, rules, committee reports, bills, conference reports, and fiscal reports; federal and state court opinions, rules, and dockets; and state and federal statutes, regulations, cases, and other regulatory promulgations.
1. The United States’ EII Promotes Efficient Access to Information

Having electronic access to all of these materials helps individuals reliably and efficiently access documents. For example, an attorney in the United States can gain access to a needed code, case, or legal form within seconds by using one of these websites. Just the same, an individual in the United States may commence, modify, or dissolve a business association in just a few days, whereas it may take agents of a business in Nigeria or China forty or more days to complete such a task. A person hoping to acquire information about child support from a state government website in the United States can do so in a matter of minutes, whereas individuals in Nigeria, China, and the DPRK may never find pertinent information regarding child support. Efficient access to such a breadth of relevant, reliable, and valid information creates trust in one’s government.

2. The United States’ EII Improves Access to Health Care Information

The United States’ open and free (or reasonably priced) internet access has also improved the health care system. Despite recent debates inculcated with animosity and venom regarding U.S. health care, some innovations have improved the health care system. In 2006, approximately eighty-percent of adult users of the internet in the U.S. searched for answers to health care questions online.441 Over half of these searches indicated that the results had a significant impact on the health care decisions individuals made regarding their treatment of an illness.442 Several electronic sites are available for U.S. citizens to locate any of this information such as WebMD,443 the Mayo Clinic,444 and Women’s Health.445 Efficient access to each of these sites empowers Americans to choose doctors with whom they feel comfortable, treat minor symptoms in a cost effective way, locate affordable insurance, and assist in making medical decisions. In contrast, individuals who reside in Nigeria, China, or the DPRK are denied access to a valuable resource because of the lack of access to open and advanced EII.

H. Resulting E-Readiness Score for the United States and the Netherlands

As a result of the advanced EII systems in the United States and the Netherlands, individuals residing in those countries also have access to a

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442. Id.
plethora of information dissemination tools. All of these tools can distribute a wide array of information relating to anything from the legal system to art and culture. Juxtaposed with the underdeveloped, censored EIIs in countries such as China, Nigeria, and the DPRK, the U.S. and Dutch citizens are fortunate to have free and open access to these tools.

Thus, the Dutch and the Americans receive one point on our measurement scale for building and maintaining strong, solid EIIs. They also receive a point for promulgating and applying logical and effective regulations to maintain and advance their EII. Empirical studies show that the Dutch citizens trust their government about as much as individuals are willing to trust their government, whether fatuously or not. Despite some polls showing a general distrust precipitating in Americans of their government in general, most do still heavily trust the national and state governments to create, maintain, and distribute information via an EII. Thus, both countries earn the full possible three points on the e-readiness scale.

VII. CONCLUSION

In conclusion, various e-readiness models have been proposed by scholars. This paper used three factors to measure a nation’s e-readiness: the current state of the nation’s EII, the laws that have been promulgated to regulate the EII, and the resulting level of trust manifested by citizens toward their nation’s government as a result of the EII and the laws that police it. On the three point e-readiness scale proposed, Nigeria and the DPRK received a score of zero due to their archaic EII structure, the whimsical and illogical regulation of their outdated and fragile EII, and the complete lack of trust their citizens convey towards their authoritarian and corrupt governments. Not surprisingly, both of these countries’ soccer infrastructures, FA regulations, and low levels of trust that players and coaches have in their respective FA mirrors the weak EIIs, EII regulations, and low levels of trust that the citizens have in their respective governments and regulation agents.

Japan and South Korea earned all three possible points on the e-readiness scale for their strong EIIs, business-friendly and reformed EII regulations, and the resulting trust created between their citizens and their national governments. The Chinese government, however, continues to hermetically regulate and censor its EII, often encouraging illegal activity on the EII; thus, it is not as progressive as its Asian counterparts. This results in Chinese citizens and potential foreign investors being deterred from trusting the Chinese government

446. See Fetter, supra note 441, at 282 (tools such as online chat, instant messaging, file transfer, blogs, remote access, collaboration software, streaming media, social networking, virtual worlds such as Second Life, and voice over internet protocol).
and its tightly controlled EII. Therefore, China, while still having the potential to have a bourgeoning and economically viable EII, presently earns a score of zero on its e-readiness rating. This e-readiness score relates to how the regulation of China’s soccer FA and its current infrastructure limit China’s current possibility of winning major international tournaments such as the World Cup. In the meantime, the soccer regulations and infrastructures of Japan and South Korea are propelling each of their nation’s national teams toward near-future international soccer success, just as their regulations and EIIs are making them major players in the global economy.

The United States and the Netherlands have built two of the most progressive, open, and economically beneficial EIIs in the world. These EIIs have helped disseminate relevant information in an efficient manner to both citizens and foreign denizens throughout the world. Both countries promulgate logical and enforceable statutes to effectively regulate corruption within their EIIs, and both the American and Dutch judicial systems successfully follow through with prosecutions of criminals. These well-organized EIIs, coupled with reliable and valid EII regulations, synergize a high level of citizen trust that their governments will allow open and quick access to relevant laws, business forms, and other necessary information. This efficient access and high level of resulting trust attracts highly intelligent and productive individuals to open businesses in both countries. Attracting such individuals ultimately raises the standard of living for both countries and provides an economic boom, better products, and a happier citizenry overall. They both earn a score of 3 on the e-readiness scale. Each of these nations’ EIIs mirror their countries’ status in the international soccer arena as well. Thus, this is why the Netherlands were a goal away from a World Cup championship in 2010, and why the United States may be crowned World Cup Champions in 2014 in Brazil.

In the future, the United States and the Netherlands need to continue their progressive synthesis of their EIIs by continuing to include cutting edge technologies in their EIIs and persisting in their promulgation of laws that protect EII users with a genuine interest in bettering their country. The Japanese and South Korean governments should maintain their laissez-faire approach in regulating their EIIs, and China must either emulate the Japanese and South Korean approach, or it will join Nigeria and the DPRK in the EII abyss. The Nigerian and DPRK governments almost certainly will have to undergo a complete regime change to even commence an EII refurbishment. However, until these nations obtain new government leadership, their citizens will continue to languish in an inoperable EII, face capricious regulation, and turn to 419 scams or similar crimes because of the extreme lack of faith in one’s ability to prosper economically, morally, and personally.

Thomas Edge*

I. INTRODUCTION

As the world becomes smaller because of technology, conducting business in different languages becomes more prevalent. Imagine that you have a contract written in a foreign language to sell widgets to a foreign company. Subsequently, the foreign company breaches the contract by failing to pay for the widgets, forcing you to sue in federal court. To win your claim, you must have the contract translated into English so a judge or jury can understand it. Suppose you win your claim, should you have to cover the costs to have the contract translated into English, which could swallow a significant portion of the damage award, or should you be able to shift it over to the losing party as taxable costs? Surprisingly enough, depending on which federal court you are in, the answer to that question may be different.

Rule 54(d) of the Federal Rules of Civil Procedure affords the prevailing party the opportunity to obtain different “costs” from the losing party after a judgment in a federal civil case. Although district courts have the authority to award costs under Rule 54(d), not all expenses in connection with a lawsuit are recoverable. 28 U.S.C. § 1920(6) states that “[a] judge or clerk of any court of the United States may tax as costs the following: . . . (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.”

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1. Mark Young, Coping with a Shrinking Planet, AGENCY SALES, Dec. 2009, at 46, 47.
5. Goluba v. Brunswick Corp. Mercury Marine Div., 139 F.R.D. 652, 654 (E.D. Wis. 1991); see Tuggles v. Leroy-Somer, Inc., 328 F. Supp. 2d 840, 843 (W.D. Tenn. 2004) (stating absent statute or rule to contrary, Rule 54(d) creates presumption that costs in § 1920 should be awarded to prevailing party).
However, United States circuit courts are conflicted as to exactly what is included under the definition of “interpreters.”

The Seventh Circuit and the Sixth Circuit provide the leading case law on determining what the term “interpreters” includes and if it includes document translation. The Seventh Circuit has determined that “interpretation” and “translation” have distinct meanings and the court has declined to award costs for document translation services. The Seventh Circuit relied on what it determined to be the common understanding of an “interpreter” as one who translates the spoken word rather than the written word.

Conversely, the Sixth Circuit held that courts have the authority to “interpret the meaning of items listed in § 1920(6)” and awarded costs for translation of documents necessary for litigation. The Sixth Circuit relied on a dictionary definition of interpret, which defined the term as “to translate into intelligible or familiar language.” The court concluded that “translation” and “interpretation” are interchangeable. Recently, the Ninth Circuit agreed with the Sixth Circuit’s holding to include document translation as costs.

In light of this split, this article discusses the potential benefits as well as potential adverse effects of allowing document translation as a taxable cost under § 1920(6). This article concludes that the better interpretation of § 1920(6) is to follow the Seventh Circuit approach and not allow document translation fees as taxable costs. Lastly, this article suggests that courts, including the Supreme Court, should follow the Seventh Circuit approach until the statute is revised by Congress.

Part II(A) of this article discusses the legislative history of § 1920. Part II(B) discusses the cases that exclude document translation under § 1920. Part II(C) discusses the cases that include document translation under § 1920. Part III(A) analyzes the benefits and disadvantages of including document translations as cost under § 1920(6), along with the extent to which document

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8. Taniguchi, 633 F.3d at 1221.
9. Id. (citing Extra Equipamento, 541 F.3d at 727-28).
10. Id.
11. Id. (citing BDT Products, 405 F.3d at 419.
12. Id.
13. Id.
14. Taniguchi, 633 F.3d at 1221.
15. See infra pp. 17-22.
17. See infra pp. 24-28
18. See infra pp. 8-10.
20. See infra pp. 13-16.
translations should be included.\textsuperscript{21} Part III(B) explains why disallowing the cost of document translations to be recovered under § 1920(6) is the better interpretation.\textsuperscript{22}

\section*{II. Background and Facts}

After a judgment in a federal civil case, costs are allowed to the prevailing party.\textsuperscript{23} Costs include all the expenses of litigation that one party has to pay to the other.\textsuperscript{24} These costs are allowed in federal civil cases regardless of state law limitations\textsuperscript{25} and are payable despite the pendency of any appeal.\textsuperscript{26} While costs will normally be awarded to a prevailing party, costs can be partially or completely denied if the losing party can demonstrate that the prevailing party engaged in misconduct, bad faith, or action worthy of penalty.\textsuperscript{27} To obtain costs other than attorneys' fees in a federal civil case, the prevailing party must make a motion under Rule 54(d).\textsuperscript{28} Although Rule 54(d) does not address a specific time period for making the motion, it must be filed within a reasonable time.\textsuperscript{29}

\begin{itemize}
  \item \textsuperscript{21} See infra pp. 16-24.
  \item \textsuperscript{22} See infra pp. 24-27.
  \item \textsuperscript{23} Fed. R. Civ. Pro. R. 54(d) (“Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”). See also Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598, 603 (U.S. 2001) (citing BLACKS’S LAW DICTIONARY 1145 (7th ed. 1999) that a “prevailing party” as the party in whose favor a judgment is rendered, regardless of the amount of damages awarded); Studiengesellschaft Kohle mbH v. Eastman Kodak Co., 713 F.2d 128, 131 (5th Cir. 1983) (observing that a case must be viewed on the whole to determine the prevailing party whom need not prevail on all the issues to justify the award of costs).
  \item \textsuperscript{24} Arthur L. Goodhart, \textit{Costs}, 38 \textit{Yale L.J.} 849, 849 (1929).
  \item \textsuperscript{25} Abrams v. Lightolier Inc., 50 F.3d 1204, 1223 (3d Cir. 1995) (holding that Rule 54(d) trumps a state’s cost shifting provision with which it conflicts). See Garcia v. Wal-Mart Stores, Inc., 209 F.3d 1170, 1177 (10th Cir. 2000) (Rule 54(d)(1) trumps state cost shifting provision with which it conflicts); Carter v. General Motors Corp., 983 F.2d 40, 43 (5th Cir. 1993) (observing that federal rules displace state statute to the extent that it may limit district court’s Rule 54(d) discretion to award costs); Bosse v. Litton Unit Handling Systems, Div. of Litton Systems, Inc., 646 F.2d 689, 695 (1st Cir. 1981) (observing that federal law governs the taxing of costs under Rule 54(d) in diversity cases).
  \item \textsuperscript{26} See Singleton v. Select Specialty Hospital-Lexington, Inc., 2009 U.S. Dist. LEXIS 48891, at *10 (E.D. Ky. June 10, 2009) (noting that district courts have authority to tax costs after a judgment is entered despite a pending appeal).
  \item \textsuperscript{27} Hudson v. Nabisco Brands, Inc., 758 F.2d 1237, 1242 (7th Cir. 1985) (quoting Delta Air Lines v. Colbert, 692 F.2d 489, 490 (7th Cir. 1982)). See Tuggles v Leroy-Somer, Inc., 328 F. Supp. 2d 840, 845 (W.D. Tenn. 2004) (factors that may overcome presumption in favor of awarding costs include losing party’s good faith, difficulty of case, winning party’s behavior, reasonableness of costs, and indigence of losing party).
  \item \textsuperscript{28} Fed. R. Civ. Pro. 54(d)(1) (“Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”). See also 10-54 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 54.100 (Matthew Bender 3d Ed.).
  \item \textsuperscript{29} 10-54 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 54.100 (Matthew Bender 3d Ed.).
\end{itemize}
and the bill of costs must be verified. As stated, Rule 54(d) is mandatory and creates a “strong presumption” that all costs authorized for payment will be awarded to the prevailing party. As the Supreme Court has held that federal courts are bound by the limitations set out in 28 U.S.C. § 1920, the costs submitted under Rule 54(d) must also fit within the constraints of § 1920.

Although district courts have the authority to award costs under Rule 54(d), not all expenses in connection with a lawsuit are recoverable. Only the costs specifically recognized by federal statute are recoverable. Thus, district courts have no discretion to award costs unless authorized by statutory or contractual provisions. If costs are authorized, then the district court has the discretion to determine the amounts. However, the costs proposed by the winning party should be given “careful scrutiny.” Costs should not only fall under the statute

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30. 28 U.S.C. § 1924 (2006) (“Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.”).

31. Steven C. Bennett, Are E-discovery Costs Recoverable by a Prevailing Party?, 20 ALB. L.J. SCI. & TECH. 537, 539-40 (citing Mathews v. Crosby, 480 F.3d 1265, 1276 (11th Cir. 2007)). See Sally v. E.I. DuPont de Nemours & Co., 966 F.2d 1011, 1017 (5th Cir. 1992) (recognizing a strong presumption to award costs to the prevailing party); Majeske v. City of Chicago, 218 F.3d 816, 824 (7th Cir. 2000) (declaring that Rule 54 creates a heavy presumption in favor of awarding costs); see also Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987) (articulating that the discretion granted by Rule 54(d) is solely a power to decline to tax, as costs, the items enumerated in § 1920); see also Philip M. Payne, Cost in Common Law Actions in the Federal Courts, 21 VA. L. REV. 397, 401-02 (1935) (asserting that the procedural rule mixes the prior practice at law (in which, absent statutory negation, costs were always awarded) with that in equity (with discretionary awards of costs) by creating a presumption for the award of costs but leaving the decision to the discretion of the court).


34. Goluba, 139 F.R.D. at 654.

35. Id. See Crawford Fitting, 482 U.S. at 441-43 (declaring that courts may not award costs that fall outside the statutory categories set in §1920); Lockett v. Hellenic Sea Transp., Ltd., 60 F.R.D. 469, 471 (E.D. Pa. 1973) (Items taxed must be within the expressed language of 28 USCS §1920); see also Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964) (“Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation.”); contra Keith N. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 VAND. L. REV. 1069, 1109-1110 (commenting that expenses for which the fee shifting statute or the definition of costs in 28 U.S.C. § 1920 (2006) do not explicitly provide should nevertheless be shifted as long as they are expenses that an attorney would ordinarily incur in a reasonably efficient effort to prosecute the plaintiff’s case).


37. Id. See also Crawford Fitting, 482 U.S. at 441-45 (stating that courts retain the power to decline to tax as costs items listed in 28 U.S.C. §1920 (2006)).

38. Farmer, 379 U.S. at 234 (reasoning that such a restrained administration of the rule is in harmony with our national policy of reducing the burdensome cost of litigation and any other practice would discourage litigants from bringing lawsuits).
but also be necessarily incurred and not unreasonable. The court’s discretion in the award of costs makes review very narrow, and costs are overturned only when a clear abuse of discretion is established.

Federal statute limits the types of costs that can be shifted from the prevailing party to the losing party. Costs recoverable by a successful litigant are limited to those allowed under § 1920 because the statute defines the “costs” recoverable under Rule 54(d). Subsection six is of particular interest as this article explores a circuit split on determining what exactly falls within the statute as an “interpreter.” Specifically, § 1920(6) states that “[a] judge or clerk of any court of the United States may tax as costs the following: . . . (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.”

The debate centers on whether “interpretation” and “translation” have distinct meanings. Specifically, does “interpret” mean only the act of translating oral speech, or does it include other forms of communication such as

39. Studiengesellschaft, 713 F.2d at, 131 (criticized in Manildra Milling Corp. v. Ogilvie Mills, 76 F.3d 1178 (Fed. Cir. 1996)); See McIlveen v. Stone Container Corp., 910 F.2d 1581, 1583-1584 (7th Cir. 1990) (holding that the district court did not abuse its discretion in denying certain costs that it found to be unnecessary); see Mastrapas v. New York Life Ins. Co., 93 F.R.D. 401, 405-407 (E.D. Mich. 1982) (stating that the taxation of interpreter’s fees was proper when it was reasonably necessary to avoid undue delay and expense at trial in light of plaintiff’s inability to respond to certain questions in English during deposition even though the interpreter’s services were not ultimately utilized); see also Steven C. Bennett, Are E-discovery Costs Recoverable by a Prevailing Party?, 20 ALB. L.J. SCI. & TECH. 537, 546 (observing that the dividing line between “necessary” and “for the convenience of counsel” is not particularly well established).

40. In re Nissan Antitrust Litigation, 577 F.2d 910, 918 (5th Cir. 1978) cert. denied, 439 U.S. 1072 (1979). See Goluba, 139 F.R.D. at 654 (noting that while the district court has considerable discretion in determining whether expenses claimed by the prevailing party are recoverable, such discretion is not unfettered).


43. See Taniguchi, 633 F.3d at 1221. Compare Extra Equipamento, 541 F.3d at 721 (disallowing document translation fees as taxable costs under § 1920(6)), with BDT Products, 405 F.3d at 419 (allowing document translation fees as taxable costs under 28 U.S.C. § 1920 (2006)).


45. Taniguchi, 633 F.3d at 1221, petition for cert. filed, June 6, 2011.
written documents? The U.S. Department of Labor distinguishes interpreting and translating as different professions. Despite this, many courts have allowed for the compensation of interpreters to include those who translate documents. Conversely, other courts, such as the Seventh Circuit, have not.

A. Legislative History

The story of American legal costs starts in England, where for centuries there has been statutory authorization to award expenses. However, costs are not allowed under United States common law. The right of the prevailing party to recover costs was recognized and admitted in the Judiciary Act of 1789 and in numerous acts of Congress that have been passed since. Each of these acts assumes that the costs that have been taxed and usually allowed by the practice of the courts may be recovered.

In 1853, Congress approved a comprehensive measure that set the costs for all federal actions. The 1853 Act specified the costs recoverable in federal litigation. The cost-setting portions were included as §§ 823 and 824. The 1853 Act was carried forward in the Revised Statutes of 1874 and the Judicial

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49. *Extra Equipamento*, 541 F.3d at 721.


51. *Id. See also Arcambel v. Wiseman*, 3 U.S. 306 (1776) (“The general practice of the United States is in opposition [to the award of costs] . . . and it is entitled to the respect of the court, till it is changed, or modified, by statute.”); see also 1 Court Awarded Attorney Fees, P 1.02 (MB).

52. Costs in Civil Cases, 30 F. Cas. 1058, 1059 (C.C.S.D.N.Y. 1852); Federal Judiciary Act of Sept 24, 1789, 1 Stat. 73 §§ 9, 11-12, 20-23.

53. *Id.*


55. *Id.* at 760.

56. *Id.* at 759-62.

57. R. S. § 823 (1874) (“The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their
Code of 1911. Its substance, without any apparent intent to change the controlling rules, was also included in the Revised Code. Some of those provisions survive largely intact in § 1920.

The 1948 Code does not contain the language used in the 1853 Act that, aside from the fees prescribed by the statute, “no other compensation shall be taxed and allowed.” However, nothing in the 1948 Code indicates a congressional intent to depart from that rule. The Supreme Court has established that “the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification.” Accordingly, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that “no change is to be presumed unless clearly expressed.”

However, the principal topic of this article, subsection six, was not added to § 1920 until October 28, 1978. This addition was part of the larger Public Law 95-539, commonly referred to as the “Court Interpreters Act,” which added 28 U.S.C. §§ 1827 and 1828. Since the Court Interpreters Act of 1978, the language of § 1920(6) has remained unchanged. Consequently, none of the circuit courts that have addressed document translation fees as taxable costs discuss the legislative history of § 1920(6).

services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

58. *Alyeska Pipeline*, 421 U.S. at 246-71 (explaining that Revised Stat. §§ 823 and 824 were not repealed by the Judicial Code of 1911 and hence were to “remain in force with the same effect and to the same extent as if this Act had not been passed.” § 297, 36 Stat. 1169. When the Judicial Code was included under Title 28 of the United States Code in 1926, these sections appeared as §§ 571 and 572 with but minor changes in wording, including the deletion from the latter section of the compensation for services rendered in a case which went to the circuit court on appeal or writ of error).


61. *Alyeska Pipeline*, 421 U.S. at 255.


63. *Tidewater Oil*, 409 U.S. at 162 (citing *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957)). See also *Alyeska Pipeline*, 421 U.S. at 246-271 (U.S. 1975) (citing 28 U.S.C. § 1920 (1946 ed., Supp. II), the Reviser’s Note to § 1920 explains the shift from the mandatory “shall be taxed” to the discretionary “may be taxed” as made in view of Rule 54 (d) of the Federal Rules of Civil Procedure, providing for allowance of costs to the prevailing party as of course unless the court otherwise directs).


65. Id.


67. See *Extra Equipamento E. Exportacao LTD. v. Case Corp.*, 541 F.3d 719 (7th Cir. 2008); BDT Products, Inc. v. Lexmark Int’l, Inc., 405 F.3d 415 (6th Cir. 2005); Taniguchi v. Kan Pacific Saipan, LTD., 633 F.3d 1218 (9th Cir. 2011).
B. Excluding Document Translations

In *Extra Equipamento E. Exportacao LTDA., v. Case Corp.*, Extra, a Brazilian distributor, sued Case, a large U.S. manufacturer of farm equipment, in federal court for fraud with jurisdiction based on diversity under 28 U.S.C. § 1332. The alleged fraud stemmed from a contract for settlement and release between Case’s subsidiary, Case Brasil, and Extra after a previous dispute in Brazilian court. Extra contended that by manipulating the corporate distinction between Case and Case Brasil, Case obtained the benefits of the release agreement without honoring the obligations of the release or an oral promise to retain Extra as a distributor for Case Brasil.

After discovery, Case moved for summary judgment, which was granted along with an award of one hundred sixteen thousand dollars in costs to Case as the prevailing party. On appeal, Extra complained about the costs the district judge awarded, including almost seventy-six thousand dollars in translation fees. The translation costs included costs spent translating exhibits used for deposition, summary judgment, and items on the trial exhibit lists from Portuguese into English. In an opinion by Judge Posner, the Seventh Circuit held that the translation of written documents was not a taxable cost under § 1920(6).

The Seventh Circuit reasoned that an interpreter is commonly understood as a person who translates living speech from one language to another. However, the court noted that an interpreter can be a type of translator, but a translator is not referred to as an interpreter. The court went on to illustrate this by stating that no one would refer to Robert Fagles, who famously made the translations of the Illiad and the Odyssey into English, as an English-language interpreter of these works. The Seventh Circuit further noted the specificity and character of

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69. *Id.*
70. *Id.* at 722.
71. *Id.* at 721, 727.
72. *Id.* at 727.
74. *Extra Equipamento*, 541 F.3d at 728.
75. *Id.* at 727. See Northeast Ohio Translators Association, *The Difference Between Interpreting and Translation*, http://www.notatranslators.org/whatsthedifference.aspx (last visited July 17, 2011) (interpreters deal with spoken language and translate orally, while translators deal with written text, transforming the source text into a comprehensible and equivalent target text).
76. *Extra Equipamento*, 541 F.3d at 727. See, e.g., Yu Cong Eng v. Trinidad, 271 U.S. 500, 508-09 (1926); Gjerazi v. Gonzales, 435 F.3d 800, 807 (7th Cir. 2006); Ememe v. Ashcroft, 358 F.3d 446, 448 (7th Cir. 2004).
77. *Id.* at 727.
§ 1920(6) as a whole made the court reluctant to loosely interpret “interpreters”. 78

Although mindful of the Sixth Circuit’s decision in *BDT Products Inc. v. Lexmark International Inc.*, the Seventh Circuit noted that there is no natural limit on the expense of translators because of the number of documents that can be translated. 79 This is unlike the expense for interpreters, which has a natural limit because of the amount of time witnesses can undergo live examination. 80 Additionally, the court believed that the items allowable under § 1920 as costs were “hodgepodge” and could not find a good reason to stretch the language to include translation costs as costs under § 1920(6). 81 Lastly, the Seventh Circuit reasoned that if the translation of documents were allowed, then a district judge would have to determine whether the translation was necessary, which could become very complex because of the vast amounts of discovery documents in any given case. 82 The court believed that a district judge should not be required to wade into such issues without a clearer directive from Congress. 83 In so ruling, the Seventh Circuit created a split with the Sixth Circuit. 84

Although the Seventh Circuit is the only circuit court not to allow for the recovery of translation costs under § 1920, it is not the only court to do so. 85 In addition to the Seventh Circuit, the District Court for the District of Minnesota, in *Shimek v. Michael Weinig AG*, denied the taxing of costs attributed to translator’s fees. 86 As the prevailing party, Shimek requested that fees for translating exhibit documents from German into English be taxed to the losing party. 87 In denying the costs, the District Court reasoned that although § 1920(6) allows costs for interpreters’ services at trial, no provision in § 1920 covers translation of documents. 88

78. *Extra Equipamento*, 541 F.3d at 727 (observing that the statute refers to “compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under [28 U.S.C. § 1828].”)
79. Id. at 728
80. Id.
81. Id.
82. Id.
83. Id.
84. *Extra Equipamento*, 541 F.3d at 728.
87. Id.
88. Id.
Lastly, some district courts in Florida have not allowed translation costs under § 1920(6). However, the district courts in Florida are split on the issue. This issue is of particular interest in Florida where the 2000 census showed that sixteen percent of the population spoke Spanish, and less than half of that population could speak English "very well." However, as observed in Del. Valley Floral Group, Inc. v. Shaw Rose Nets, L.L.C., the result in these cases depends heavily upon the circumstances of each case. The court went on to elaborate that some of the circumstances presented in this case included the choice to not object to the cost, the amount of the costs, and the expected need from the outset.

C. Including Document Translations

On the other side of the debate, the Sixth Circuit has held that translation fees are included under § 1920(6). In BDT Products, Inc. v. Lexmark International, Inc., BDT Products, a paper handling system designer, disclosed substantial resources in research and design to Lexmark International, a printer manufacturer. BDT Products alleged that it disclosed the information with a reasonable expectation that the manufacturer would not use or develop the technology without a contract between the two entities. The district court granted summary judgment to the printer manufacturer, although it had used the research and designs, because no contract was formed when the information was disclosed. One month later, the prevailing party, Lexmark, submitted its bill of costs under Rule 54(d)(1). Over BDT’s objections, the district court awarded

93. Id.
96. Id. at 884-86.
97. Id. at 888-89.
98. BDT Products, 405 F.3d at 416.
translation cost to Lexmark under § 1920(6) as “costs” in the total amount of 348,303 dollars.99

The Sixth Circuit affirmed, holding that the district court did not abuse its discretion in taxing translation fees as costs.100 The court stated it is generally recognized that courts may interpret the meaning of items listed in § 1920.101 Using this logic, the court reasoned that translation was included under the statute because the dictionary definition of “interpret” expressly includes “to translate into intelligible or familiar language.”102 The court additionally relied on precedent from the D.C. Circuit.103

Similarly, the Ninth Circuit subsequently agreed with the Sixth Circuit that within the meaning of “interpreters” under § 1920(6), the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language.104 In Taniguchi v. Kan Pacific Saipan, LTD., Taniguchi, a professional baseball player in Japan, fell through a wooden deck during a tour of Mariana Resort and Spa, a property owned by Kan Pacific.105 Taniguchi incurred various medical expenses as a result of his injuries and, two weeks after the incident, informed Kan Pacific.106 Additionally, Taniguchi was compelled to cancel contractual obligations, resulting in a loss of income.107 Both parties eventually moved for summary judgment, which the district court granted in favor of Kan Pacific.108 The district court awarded 5,517 dollars of the total 7,732 in costs to Kan Pacific for

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99. Id.
100. Id. at 419. See also Del. Valley Floral Group, Inc. v. Shaw Rose Nets, L.L.C., No. 07-20199-CIV, 2009 U.S. Dist LEXIS 117563 at *13 (S.D. Fla. Nov. 6, 2009) (parenthetically noting the Sixth Circuit holding).
102. Id. (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1182 (1981)). But see Extra Equipamento E. Exportacao LTDA., v. Case Corp., 541 F.3d 719 (7th Cir. 2008) (noting the same dictionary defines “interpreter” [so far as might relate to the statute] as “one that translates; esp: a person who translates orally for persons who are conversing in different tongues”).
103. BDT Products, 405 F.3d at 419 (citing Quy v. Air Am., Inc., 667 F.2d 1059, 1065-66 (D.C. Cir. 1981) (holding that translation services fall within the mean of “interpreters”)). See infra pp. 15-16.
105. Taniguchi, 633 F.3d at 1219.
106. Id.
107. Id.
108. Id.
fees related to the translation of Taniguchi’s contracts and other documents from Japanese into English. 109

The Ninth Circuit concluded that § 1920(6) contemplates an award of costs for translation services and held that the district court acted within its discretion in awarding costs. 110 Although Taniguchi cited 28 U.S.C. §§ 1827 and 1828 to support his argument to not allow translation cost under § 1920(6), the court found it unavailing because costs were awarded pursuant to § 1920(6). 111 In addition to being persuaded by the Sixth Circuit’s reasoning, the court concluded that the common usage of the terms “interpreter” and “translator” does not draw precise distinctions between interpretations involving live speech versus written documents. 112 Furthermore, the court recognized that the Sixth Circuit’s analysis is more compatible with Rule 54 of the Federal Rules of Civil Procedure, which prefers an award of costs to the prevailing party. 113

The Sixth and Ninth Circuit opinions are some of the most recent circuit court opinions regarding § 1920(6), but they are not the only circuits to interpret translation costs as reimbursable costs. 114 The D.C. Circuit ruled that to review written transcripts of recorded depositions in order to complete blanks and fix garbled translations of witnesses made in Vietnamese is work of an “interpreter” for which costs can be awarded under § 1920. 115 The court held that § 1920(6) explicitly authorizes the award of costs for translation. 116 Likewise, the First Circuit held that Rule 34 of the Federal Rules of Civil Procedure provided no basis for an order to pay for translation of all Spanish documents produced in discovery. 117 The court reasoned that whichever party ultimately prevails at the conclusion of the case will be free to apply to district court for reimbursement of its translation expenses as “costs.” 118 Lastly, the Fifth Circuit found the translation of German documents allowable “as of course to the prevailing party”
under Rule 54(d). However, the Fifth Circuit went on to note that these costs could be authorized under subsection four of § 1920.

Additionally, several district courts have ruled the same. For example, a ship’s deck log was written in Greek and translated into English to be understood and used at trial for both parties’ counsel. The court granted translation of the deck log as costs to the prevailing party due to the necessity of the translation.

III. ANALYSIS


In light of this circuit split, let us further discern this issue by analyzing the implications of including document translation fees as taxable costs under 28 U.S.C. § 1920. This section will entail a discussion of the benefits, which include: (1) synthesizing more sensibly with other subsections of § 1920; (2) keeping the prevailing party from having to subsidize a damage award to pay for unaccounted translation fees; (3) providing a fairness similar to that of the egg-shell skull doctrine; and (4) saving time and money. In addition, this section will assess the disadvantages of document translation fee inclusion, which include an increase in litigation, undue penalization of the losing party, and the decreased incentive to reach settlement without litigation in disputes that involve translation fees. Furthermore, this section will examine the extent to which the rule could be extended. By illuminating the possible benefits and disadvantages, this section will show that the disadvantages and consequences of extending § 1920 far outweigh the benefits.

120. Id. See 28 U.S.C. § 1920(4) (allows for the taxation as cost of any “fees for exemplification and costs of making copies of any materials where the copies are necessarily obtained for use in the case”).
123. Id.
125. See infra pp. 17-20.
126. See infra pp. 20-22.
128. See infra pp. 24-27.
1. Benefits

Besides furthering the goals of the fee allocation system by minimizing unjust expenses for a successful litigant, there are several other benefits to allowing document translation costs under the Sixth Circuit view. These benefits include: (1) synthesizing more sensibly with other subsections of § 1920; (2) keeping the prevailing party from subsidizing a damage award to pay for unaccounted translation fees; (3) providing a fairness similar to that of the egg-shell skull doctrine; and (4) saving time and money.

First, allowing translation costs is consistent with other subsections of § 1920 because some of those subsections involve documents. 28 U.S.C. § 1920 already allows for the recovery of costs for making copies and record transcripts. It is more sensible to allow translation fees under § 1920 because each subsection logically synthesizes together as one section.

Second, allowing document translation costs to be taxable under § 1920(6) keeps the prevailing party from subsidizing some and potentially its entire damage award to pay for translation costs incurred during litigation. This works particularly well when the need for translation costs is due to the losing party. However, it could be a double-edged sword if the costs are passed by the prevailing party even when it was the prevailing parties’ actions that created the need for document translation by having documents in a foreign language. Hence, it could create a potentially undeserved and excessive punishment in costs for the losing party.

129. See Christopher R. McLennan, Note, The Price of Justice: Allocating Attorney’s Fees in Civil Litigation, 12 Fl. Coastal L. Rev. 357, 361 (2011) (stating that a fee allocation system should: (1) provide equal access to justice on the merits of the claim, regardless of a litigant’s financial status; (2) allow private litigants to use the courts to institute societal reform; (3) deter abuses of the litigation process; (4) minimize unjust expenses for a successful litigant; and (5) provide clear and manageable guidelines).

130. See infra pp. 17-20.


132. Id.

133. Id. Each of these sections states either printing or copies of items that are typically regarded as documents similar to the documents processed through translations. See also Jeffrey T. Ferriell, UNDERSTANDING CONTRACTS § 8.03 (2nd ed. 2009) (parts of contract are to be interpreted as consistent with each other wherever possible).

134. See McLennan, supra note 129 at 367 (the American Rule fails to fully compensate prevailing parties because they must unjustly pay to receive what they are legally entitled to).

135. See Taniguchi v. Kan Pac. Saipan, LTD., 633 F.3d 1218, 1221 (9th Cir. 2011) (the prevailing party, Kan Pacific was awarded cost for document translations of Taniguchi, the losing party’s baseball contracts).

136. Id. If Taniguchi would have been the prevailing party, under the adopted rule he could have the costs to translate his Japanese baseball contracts unfairly charged to Kan Pacific, who was not a party in those contracts.

137. See supra note 135.
Third, the shift in cost provides fairness similar to that of egg-shell skull doctrine in common law torts. The egg-shell skull doctrine provides that the perpetrator takes his victim as he finds him. Similarly, by including document translations as cost under § 1920, a losing party is liable for consequential document translation costs “as he finds them.” This is regardless of intent or the reasonable foreseeability of the losing party to engage in litigation where document translations would be required. However, the benefit of fairness here is minimal because unlike the egg-shell skull doctrine, where the harm created more than anticipated injuries, the shifting of costs may be unrelated to the injury, let alone unanticipated. Additionally, allowing document translation costs is fair because local court rules may require that all documents be in English.

Lastly, allowing document translation costs saves time and money. Although it is dependent on the amount of information and time needed, translation costs could lower the total amount of litigation costs because it is not as expensive as having an interpreter. The translation of documents is less expensive because depositions or affidavits can be taken in a foreign language, and readily available, inexpensive software can be used to translate the

138. Camille A. Nelson, Considering Tortious Racism, 9 DEPAUL J. HEALTH CARE L. 905, 957 (2005) (the logic of the egg shell skull doctrine may be tied to the notion of corrective justice, as the costs must be borne by one of the two parties, although some scholars believe it is expressly moral as it holds that the innocent plaintiff, however vulnerable or peculiar, should not bear the costs).
140. See Taniguchi v. Kan Pac.Saipan, LTD., 633 F.3d 1218, 1221 (9th Cir. 2011).
141. Nelson, supra note 138 at 953 (stating that the eggshell rule extends tortious liability to situations where the tortfeasor, although foreseeing certain harm, does not foresee the amount or extent of the harm).
142. Id. at 956 (noting that the general policy rational for allowing recovery for such unanticipated aggravated injuries is that judges believe it would be unjust to deny such compensation).
143. Jos Enrico Valenzuela-Alvarado, Federal Civil Rights Act in Puerto Rico, General Pretrial Theory and Praxis in the New Century, 44 REV. JUR. U.I.P.R. 197, 219 (stating that local rules for federal litigation in Puerto Rico require that all documents be translated into English and provide that all fees incurred in the translation of all documents received or filed in the Court shall be taken as costs).
144. For example, a professional court-interpreter in North Carolina gets paid $25-40 per hour, depending on whether or not they are certified. Arianna M. Aguilar, How much should interpreting/translation services cost?, Latino Outreach Consulting, http://www.locnc.com/index_files/howmuch.htm (last visited Aug. 12, 2011). A professional contract or freelance interpreter may charge anywhere from $35-60+/hr, and an interpreting agency typically charges upwards of $60/hr. Id. Whereas the going rate for professional translators near Raleigh, North Carolina is anywhere between .09 and upwards of .21 per word, depending on the length and difficulty of material to be translated, and whether or not you are dealing with an independent translator or a translation agency. Id.
material. If not allowed, savvy lawyers would, instead of translating documents, wait until depositions and trial to have documents read aloud and interpreted to make the fees applicable as taxable costs under § 1920(6). 

2. Disadvantages

Although the benefits of allowing document translation costs seem worthwhile, there are also several drawbacks. One of the main objections is that allowing additional costs will only further exacerbate the negative procedural consequences of unequal litigant wealth. However, there are even more disadvantages in allowing document translation, including: (1) the increase in litigation; (2) the undue penalization of the losing party; and (3) the decrease in incentive to reach settlement without litigation in disputes that include document translation fees.

First, costs increase litigation by making it a more complicated process. Without the additional costs that must be determined, courts can operate more efficiently. Unlike England, the United States does not have specially designed administrative agencies to handle disputes over fees so that secondary fee-shifting litigation does not burden the courts. Determining costs takes time and money, not only for the courts, but for practitioners as well.

147. See infra notes 147-48.
148. William B. Rubenstein, The Concept of Equality in Civil Procedure, 23 CARDOZO L. REV. 1865, 1878 (2002) (further stating that this would happen if a poorer litigant were required to reimburse a richer litigant’s costs, and if poorer litigants (even meritorious ones) were thereby deterred from the adjudicatory process).
149. See infra pp. 21-22.
150. Extra Equipamento E. Exportacao LTDA., v. Case Corp., 541 F.3d 719, 728 (7th Cir. 2008) (reasoning that district judge should not be required to wade into such issues without a clearer directive from Congress).
152. McLennan, supra note 129 at 371.
153. See FED. R. CIV. P. 54 (d); 28 U.S.C. § 1924 (2006) (“Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.”).
Moreover, it creates a simpler system for all to understand and participate in, which is also easier to implement.\textsuperscript{154}

Second, document translation costs may unduly penalize the losing party.\textsuperscript{155} The cost scheme is based on the assumption that the losing party is in the wrong and thus morally culpable in bringing or resisting a lawsuit.\textsuperscript{156} Still, that could easily not be the case based on the actual facts of the case.\textsuperscript{157} The U.S. Supreme Court has stated that “since litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit.”\textsuperscript{158} Not only do taxable costs penalize the losing party, that penalty would be even harsher by including document translation fees.\textsuperscript{159} Additionally, the larger fees created by allowing document translation costs are contrary to the tradition of the shifted costs being an insignificant sum.\textsuperscript{160} The potential increases for abuse of the system, although this may be minimized by the requirement for costs to be “necessary.”\textsuperscript{161}

Third, including translation costs gives litigating parties in disputes that include translation fees even less incentive to reach a settlement without litigation.\textsuperscript{162} For example, in a complex contract dispute, a litigating party may

\textsuperscript{154} Berch, \textit{supra} note 151 at 138 (referencing Appellate Rule 39(a)(4) which contains no default provision and provides that the costs shall be allowed only as ordered by the court).

\textsuperscript{155} Berch, \textit{supra} note 151 at 138 (stating that one authority has noted that shifting costs from the winner to the loser may unduly penalize the losing party).

\textsuperscript{156} Berch, \textit{supra} note 151 at 138 (\textit{citing} Arthur L. Goodhart, \textit{Costs}, 38 \textit{Yale L.J.} 849, 849 (1929)).

\textsuperscript{157} Berch, \textit{supra} note 151 at 138.


\textsuperscript{159} See Extra Equipamentos E Exportacao LTDA., v. Case Corp., 541 F.3d 719, 727 (7th Cir. 2008) (noting that the appellant complained about taxable costs including the court-reporter attendance fees totaling around 8,700 dollars and translation fees of almost 76,000 dollars).

\textsuperscript{160} Fressell v. AT & T Tech., Inc., 103 F.R.D. 111, 113 (N.D. Ga. 1984) (observing that a distinctive characteristic of American litigation is that each party must pay its own fees, often a hefty sum, although the successful party may shift its costs, traditionally an insignificant sum, to the unsuccessful party).

\textsuperscript{161} Baker v. First Tenn. Bank Nat’l Ass’n, No. 96-6740, 1998 U.S. App. LEXIS 5769, at *6 (6th Cir. Mar. 19, 1998) (\textit{citing} Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 642 (7th Cir. 1991)) (In order to award costs to a prevailing party, the court must determine that the expenses are allowable cost items and that the amounts are reasonable and necessary).

\textsuperscript{162} \textit{See} Keith N. Hylton, \textit{Fee Shifting and Incentives to Comply with the Law}, 46 \textit{Vand. L. Rev.} 1069, 1079 (1993) (noting that the British rule raises the stakes, which makes litigation more attractive to the parties when the plaintiff places a higher estimate on the likelihood of winning than does the defendant). Similarly, adding translation costs will raise the stakes, particularly in cases that have significant translation costs, and will likely lead to the same result. \textit{Id. But see} Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons, & Erik Tallroth, \textit{Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims}, 33 \textit{Fla. St. U.L. Rev.} 89 (2005) (explaining how Coursey and Stanley used a set of experiments to simulate the process of bargaining under the threat of trial using three cost-allocation rules and found that subjects settled most frequently under Federal Rule 68, second most under the English Rule, and least of all under the American Rule of cost allocation).
be less willing to compromise and settle because should they prevail, the significant expense of translating the contract documents from another language could be shifted as costs. Even worse, a party could use the expense and ability to shift the costs under the statute as a bartering chip at settlement to significantly increase or decrease the value of litigation.

3. Scope of Translation Costs

Are courts going too far if document translation costs are allowed? How far should document translation fees be extended as taxable costs under § 1920(6)? Are they limited to different languages? What exactly is a different language? Does Klingon count as a different language? Does it only include languages that can be spoken? If so, sign language, which is used by the deaf routinely in court room proceedings thanks to the legislation that created § 1920(6), would be eliminated. What about Braille or Morse code? Could translation costs be extended to different types of computer programming language like HTML, XML, JavaScript, Java or C++? If document translations are allowed as costs, it would disfigure the statutory language and create more problems than solutions.

163. See Hylton, supra note 162 at 1079 (stating the settlement is more likely under the American Rule using the Mause-Shavell Analysis). Hence, it is more likely settlement will be reached if fewer costs are shifted and each litigant pays more of his or her own costs. Id.

164. See also James A. Breslo, Comment, Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis, 86 NW. U. L. Rev. 1130, 1130-31 (1992) (courts and commentators have charged that punitive damage awards give plaintiffs an unjust edge in settlement negotiations).

165. About Klingon, Klingon Language Institute, http://www.kli.org/tlh (last visited June 26, 2011) (stating that Klingon was invented by Marc Okrand, who invented not just a few words, but a complete language with its own vocabulary, grammar, and usage for use in some of the Star Trek movies).

166. See H.R. REP. No. 95-1687, at 4 (1978) (Congressman Fred Richmond commented, “With the deaf community, this communication problem has long been overlooked because it was invisible.”).


168. Jacob C. Herman, Morse Code Resources, VoiceNation, http://www.voicenation.com/resources/general-resources/article-library/morse-code-resources.shtml (last visited Aug 10, 2011) (noting that Morse Code, which was created 160 years ago, transmits information telegraphically by using a sequence of long and short characters that represent letters, numbers, and punctuation).


To determine how far document translation could extend, let’s first look at the definition of what is being translated: language. Webster’s Third New International Dictionary, the same dictionary used by the Sixth and Seventh Circuits, defines language as “the words, their pronunciation and the methods of combining them used and understood by a considerable community and established by long usage.” Additionally, language is defined as “a systematic means of communicating ideas or feelings by the use of conventionalized signs, sounds, gestures, or marks having understood meaning.” By definition, document translation of language may very well include Klingon, which is the language of the aliens in Star Trek, along with Morse code, Braille, and computer programming languages. Each of these languages fits squarely under the second definition as “systematic means of communicating,” and potentially under the first, depending on what constitutes a “considerable community” and “long usage.” Although each of these falls under the definition as languages, should they be included? Regardless, these examples raise the question that if document translation costs are included under § 1920(6), then where should the line be drawn on how far it extends?

B. Solution

The costs included in § 1920 provide the prevailing party with relief that is typically not calculated into damage awards. For this reason, the Sixth Circuit’s approach of allowing the translation of documents to be included as cost under § 1920(6) is valid. Although it is the majority view, courts should join the minority of the Seventh Circuit in its approach of refusing to include

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171. See infra note 172.
177. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1270 (1981).
178. See supra note 176.
180. See McLemor, supra note 129 at 363 (noting that a [fee] system should allow the prevailing party to realize the true benefit of their legal entitlement by minimizing the expenses associated with pursuing or defending a legally justified position).
document translation under § 1920(6).\footnote{Extra Equipamento E. Exportação LTDA., v. Case Corp., 541 F.3d 719, 721 (7th Cir. 2008).} For a court to do otherwise would overturn precedent set by the Supreme Court of not allowing costs outside of the express language of § 1920.\footnote{See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) (“Any argument that a federal court is empowered to exceed the limitations explicitly set out in §1920 . . . without plain evidence of congressional intent to supersede those sections ignores our longstanding practice of construing statutes in pari materia.”).}

Courts should follow the minority approach because, as this article has outlined, the disadvantages of allowing document translation far outweigh the benefits.\footnote{See supra pp. 17-22.} Not only do the harsh results from the costs outweigh the slight benefits, but the challenges and complications of how far to extend document translation further exacerbate the problem.\footnote{See supra pp. 23-24.} Additionally, previous case law from the Supreme Court is consistent with this approach of not allowing document translations to be passed off by the prevailing party as costs.\footnote{See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987); see also Walters v. President & Fellows of Harvard Coll., 692 F. Supp. 1440, 1441 (D. Mass. 1988).} Even the U.S. Department of Labor distinguishes between interpretation and translation.\footnote{See Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook 2010-2011, Interpreters and Translators, http://www.bls.gov/oco/ocos175.htm (last visited July 17, 2011) (Interpreters deal with spoken words whereas translators deal with written words, and each task requires a distinct set of skills).} Lastly, the legislative history and intent of § 1920 shows that document translation fees were not intended to be taxable costs.\footnote{See supra pp. 8-10.} Specifically, Congress has sought to standardize costs by making them uniform and making the law explicit and definite.\footnote{Roadway Express v. Piper, 447 U.S. 752, 761 (U.S. 1980) (citing H.R. REP. NO. 50, at 6 (1852)) (observing that Congress sought to standardize costs in federal courts in order to create uniformity).}

Some attorneys have used §§ 1827 and 1828 to argue for denying document translation costs but have been unsuccessful.\footnote{Taniguchi v. Kan Pac. Saipan LTD., 633 F.3d 1218, 1220 (9th Cir. 2011).} Their arguments are sound because the sections come from the Court Interpreters Act of 1978, which presents the statutory language’s intent to include oral interpreters only.\footnote{See infra p. 26.}

Furthermore, the Court Interpreters Act of 1978, which created subsection six to § 1920, adds support to the argument for not including document translation under § 1920(6).\footnote{See infra p. 26.} The intent, which is plainly stated at the top of the public law for the Court Interpreters Act of 1978, was “to provide more effectively for the use of interpreters in courts of the United States and for other purposes.”\footnote{Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (1978).} Still, the section-by-section analysis of the § 1920(6) legislative
history reveals that it does nothing more than restate the section of the public law which creates § 1920(6).\(^{194}\) In emphasizing the need for legislation, Congressman Fred Richmond noted before the subcommittee that “if language-handicapped Americans are not given the constitutionally established access to understand and participate in their own defense, then we have failed to carry out a fundamental premise of fairness and due process for all.”\(^ {195}\) House Report 95-1687 did state that an original impetus for this legislation was the 2nd Circuit decision that held that the Sixth Amendment of the Constitution requires that non-English speaking defendants be informed of their right to simultaneous interpretation of proceedings at the government’s expense.\(^ {196}\)

Similar to other changes to § 1920 throughout history, inclusion of document translation cost should be left to Congress to decide.\(^ {197}\) Until such a time, the Supreme Court should resolve this conflict to fulfill the legislative intent of “uniformity” across federal courts regarding the application of the statute.\(^ {198}\)

IV. CONCLUSION

A circuit split exists regarding whether document translation fees can be included as taxable costs under “interpreters” in § 1920(6).\(^ {199}\) On one side of the split, the Sixth and Ninth Circuits have interpreted § 1920(6) to include document translation fees as taxable costs under the word “interpreters.”\(^ {200}\) On the other side of the split, the Seventh Circuit has interpreted § 1920(6) to not include document translation as taxable costs.\(^ {201}\)

Despite being the minority approach, the Seventh Circuit approach of not including document translation fees as costs under § 1920(6) should be adopted by the courts for the following reasons.\(^ {202}\) First, by including document translation under § 1920(6), it is likely to increase the amount of litigation in a given case by making it more complex.\(^ {203}\) Second, the additional costs create a potential undue penalty to the losing party.\(^ {204}\) Third, it would be difficult to draw the line of how far document translations, if allowed, could extend without

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\(^{197}\) See Berch, supra note 151 at 137 (stating that leaving costs for Congress to specify may allow for a more robust consideration of the circumstances in which it is appropriate to shift costs between or among the parties).

\(^{198}\) Roadway Express v. Piper, 447 U.S. 752, 761 (U.S. 1980) (citing H.R. REP. No. 50, at 6 (1852)) (observing that Congress sought to standardize costs in federal courts in order to create uniformity).

\(^{199}\) Taniguchi v. Kan Pac. Saipan, LTD., 633 F.3d 1218, 1221 (9th Cir. 2011).

\(^{200}\) Id.

\(^{201}\) Id.

\(^{202}\) See infra notes 204-06.

\(^{203}\) See supra p. 21.

\(^{204}\) See supra p. 21.
a bright line rule. 205 Lastly, denying document translation fees as costs is in line with the legislative intent of the statute and the common meaning of “interpreters.” 206

Traditionally, costs not specifically recognized by statute have not been accepted as costs, and that rule should not change. 207 Although there are some benefits, such as further minimizing the amount a prevailing party has to subsidize a damage award, those benefits are not sufficient to outweigh the disadvantages and consequences of extending § 1920(6). 208 Thus, not allowing document translation fees as costs under § 1920(6) is the better interpretation. 209 Courts faced with the issue should disallow document translation fees as taxable costs under § 1920(6).

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208. See supra pp. 24-26.
ONE SMALL STEP IN MINDSET, ONE GIANT LEAP FOR THE CONSTRUCTION LAW INDUSTRY: HOW THE JUDICIAL STAGE IS SET FOR IPD AND THE ONLY THING MISSING IS WILLING PARTICIPANTS

Zach Peterson*

I. INTRODUCTION

The current debt crisis is a paradigmatic example illustrating the dire consequences of what happens when adversaries are unable to properly collaborate and resolve their differences. Currently, according to the Obama administration and most economists, if the “two sides,” meaning Republicans and Democrats, cannot come to an agreement, the United States – and the world – faces economic catastrophe.¹ The history of negotiations has been plagued with contentious, closed-door meetings, political posturing, frustration and seemingly more public finger-pointing than actual good faith negotiations.² At the heart of the debate are taxes: Republicans want a deficit-reduction package that includes only spending cuts, while Democrats agree with a package, but want to include revenue increases. Neither side has been willing to budge.³

At risk is the financial viability of the United States and unknown repercussions on the global economy.⁴ According to the Obama administration, if the debt ceiling is not increased, the United States will no longer be able to pay its obligations, which may result in default to creditors, the suspension of Social Security checks and other benefits, an increase in interest rates, and a host of other extremely serious and negative economic consequences.⁵ Moody’s, a financial ratings agency, has put the United States’ AAA bond rating under review for possible downgrade as the deadline approaches.⁶

Although the consequences may not be quite as dramatic, the construction industry currently faces a similar problem: adversarial relationships that result in unnecessary disputes, inefficiencies, divergent interests, poor quality, and

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
customer dissatisfaction. These problems all lead to an all-too-familiar outcome – higher costs. According to the U.S. Bureau of Labor Statistics, the construction industry has become less productive since 1964. “It is the only major industry that has failed to reap the benefits of technological advances and improvements in management.” “In contrast, productivity in other industries has doubled over the last forty-five years.” The reason for construction inefficiencies is simple: increasingly complex building structures are being built using outdated construction methods.

In an effort to overcome these inefficiencies, the industry has begun to implement “lean” construction methodologies that eliminate waste and encourage collaboration among team members. Thus, the team members instead focus on optimization of the whole, as opposed to optimization of individual performances and results. Emphasis on cultivating the common good is critical to the success of projects while continuing to push the construction industry forward.

Part II of this article discusses the progression of construction delivery systems, Part III discusses the psychology of change and why people in general typically reject change, Part IV illustrates that the current judicial principles applicable to the construction industry are sufficient to guide integrated project delivery (“IPD”) participants, and Part V analyzes how attorneys and construction participants can overcome old problems and embrace IPD as a solution to those problems.

II. BACKGROUND: THE PROGRESSION OF CONSTRUCTION DELIVERY SYSTEMS

It is no secret that adversarial relationships have plagued the construction industry. Specifically, the construction industry is comprised of project delivery systems that inherently create adversarial relationships among its participants. This leads to inefficiencies and disputes and raises the cost of construction. Over the years, several different approaches – or delivery systems – have developed to combat these problems. Each delivery system has built on its predecessor, and generally involves more collaboration among the parties with the hopes of aligning the participants’ interests and eliminating the adversarial atmosphere.

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8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
A. *The General Adversarial Nature of the Construction Industry*

Any party who has been involved in a typical, highly-fragmented construction project would most likely agree that many disputes arose. Project owners are risk evasive, and contracting parties draft and interpret contract clauses for their own benefit – at the expense of other parties. “Productivity levels are low compared to other industries.” The traditional design-bid-build delivery system influenced public-sector construction project transactions and processes. Unfortunately, purely price-based delivery systems like design-bid-build entice bidders to lower their bids to win contracts, and then rely on change orders to recover their costs. As a result of segmented and sequential delivery systems, contracting parties often work in disjointed relationships, motivated by divergent objectives and hidden agendas. This misalignment of interests among the project’s participants has costly consequences – such as time and cost overruns, poor quality, customer dissatisfaction, lengthy and costly disputes, and disruption of relationships among the contracting parties.

As discussed in Part IV below, the adversarial nature persists for psychological – not legal – reasons. One such reason is the difficulty in trusting another party who has traditionally been an adversary. Therefore, it is important to emphasize the necessity of trust at the start of the partnering process. Such an approach will give “both parties the opportunity to overcome their prejudices and to start a project in a new atmosphere of mutual understanding.” Construction participants know that traditional delivery systems in the construction industry are fundamentally flawed, as evidenced by low rates of productivity, adversarial relationships, frequent disputes, lack of innovation, and inefficiency. “In response, the industry is clamoring for greater collaboration among designers, constructors, and project

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15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
22. Id.
23. Id. at 58-59.
owners.\textsuperscript{25} IPD “and LEAN construction are growing movements that support the contractual relationships and methodologies necessary to promote greater collaboration and trust among the project participants.”\textsuperscript{26}

Fortunately, the current adversarial atmosphere could be different in enlightened private-sector negotiated contracts with selected project teams. The significance of using other selection criteria in addition to price not only redresses the present mismatch between client and contractor perceptions, but also reduces the gap between expected and actual performance.\textsuperscript{27}

**B. The Design-Bid-Build Delivery System: The Model-T of Construction Projects**

The design-bid-build delivery system has been around for many years. A major legal development under this system arose in a 1918 Supreme Court case, United States v. Spearin, which created a common law warranty that the owner warrants that the drawings and specifications are accurate.\textsuperscript{28} This allows contractor-bidders to rely on owner-provided drawings. However, under Spearin, several other issues, like the design versus performance specification distinction, have emerged. The Spearin doctrine is comprised of several exceptions and limitations that create uncertainty among project participants.

1. Design-Bid-Build Introduction

Design-bid-build is the traditional project delivery system.\textsuperscript{29} It is defined by its sequential and highly compartmentalized approach. In design-bid-build, the owner enters into two sequential contractual agreements. The first is between the owner and the design professional, usually a project architect or engineer, and the second is between the owner and the prime contractor.\textsuperscript{30} As its name suggests, design-bid-build breaks down into three distinct phases. In the first phase, design, the design professional prepares comprehensive plans and specifications sufficiently definitive to permit contractors to submit lump-sum price estimates. Next, in the bid phase, the owner submits the plans and specifications to one or more prime contractors who in turn seek prices from subcontractors and submit a final bid to the owner.\textsuperscript{31} In the third phase, build,

\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} United States v. Spearin, 248 U.S. 132 (1918).
\textsuperscript{29} Tyson Building Corporation, Design-Build, Design-Bid-Build and Contract Management - How to select the one that is right for you!, www.tysonbuilding.com/images/SelectingProjectDelivery.pdf (last visited May 19, 2012).
\textsuperscript{30} Id.
\textsuperscript{31} Id.
the winning prime contractor builds the project strictly in accordance with the design professional’s plans and specifications.\textsuperscript{32} Thus, typically a successful design-build project is comprised of the following steps:

Owner selects designer $\rightarrow$ designer designs the facility $\rightarrow$ owner selects a constructor to build the facility $\rightarrow$ constructor builds the facility $\rightarrow$ owner takes possession at substantial completion.

2. The Spearin Doctrine

Under a traditional sequence-based approach to construction projects, the owner will ordinarily hire a designer and supply the resulting drawings to the contractor.\textsuperscript{33} When contractors incur loss or liability due to deficiencies in the design documents, they look to the owner who supplied the documents to make them whole.\textsuperscript{34} Generally, under the Spearin doctrine, the owner is deemed by law to impliedly warrant that the plans and specifications are (1) accurate, and (2) suitable for their intended use.\textsuperscript{35} The owner breaches the first warranty when the actual facts are different from those stated in the design, and breaches the second warranty when the specified design does not permit the contractor to perform within the anticipated time provided for in the contract without extraordinary expenses.\textsuperscript{36} Therefore, a contractor is not liable to the owner for loss or damage that results solely from defects in plans.\textsuperscript{37}

The rationale for imposing the implied warranty obligation on the project owner, as issuer of the design, is that the owner is in control of the design development process. Also, the contractor “has no ability or opportunity to contemporaneously, meaningfully, or otherwise influence the process of design development and is required to construct in strict conformance with the

\textsuperscript{32} Id.

\textsuperscript{33} STUART G.M. STEIN, CONSTRUCTION LAW, 5-61 (Matthew Bender ed. 2005).

\textsuperscript{34} See, e.g., Savage v. E.R. Snell Constr., Inc., 672 S.E.2d 1, 4 (Ga. Ct. App. 2008) (“[A] contractor for the State [of Georgia] engaged in work on a public project is not liable for injury or damage to private property resulting from the work performed unless that damage or injury results from the contractor’s negligence or willful conduct; [however,] a contractor who is an expert in the design of the type of work being done may not ignore defects in the design.”).

\textsuperscript{35} Spearin, 248 U.S. at 136. See also, State Dep’t. of Natural Res. v. Transamerica Premier Ins. Co., 856 P.2d 766 (Alaska 1993).

\textsuperscript{36} See Stein, supra note 33, at 5-4 (describing the second warranty as being of “tremendous economic importance to the contractor . . . ”).

\textsuperscript{37} See, e.g., Travelers Cas. & Sur. of Am. v. United States, 74 Fed. Cl. 75 (2006) (a contractor must fully comply with and follow the design specifications, although faulty, to enjoy the protections of the implied warranty, unless the departure from the specifications is “entirely irrelevant to the alleged defects . . . ”). However, owner liability is not a foregone conclusion under the Spearin doctrine. See, e.g., McGovney & McKee, Inc. v. City of Berea, 448 F. Supp. 1049, 1056 (E.D. Ky. 1978), aff’d 627 F.2d 1091 (6th Cir. 1980) (holding that although the implied warranty applied, the court denied recovery to the contractor because the drawings were not defective and that the contractor was responsible for installing some form of anti-floating device in a concrete tank that had floated out of the ground after sewer construction).
furnished project design." Since the United States Supreme Court decision in 1918, there has been an abundance of precedent applying the Spearin doctrine in public and private settings. There are very few jurisdictions that have refused to apply the Spearin doctrine in its entirety.

As a result, contractors have begun using the owner’s implied warranty of the adequacy of the drawings and specifications both offensively and defensively. For example, the owner may bring suit against a contractor when some aspect of the project fails to perform as required. In Staley v. New, the homeowner-plaintiffs sued the contractor-defendant due to a failure of the radiant heating system. The court found for the contractor because the contractor had complied with the plans and specifications that the owner supplied through its agent. Contractors also use the Spearin doctrine offensively. For example, in Montrose Contracting Co. v. County of Westchester, the plaintiff-contractors bid a sewer construction based on a “free-air” construction method, but it became necessary to build most of the tunnel using a “compressed-air” method, resulting in additional cost of $500,000 to the contractor. The court held that because the contractor was required to build the sewer in a more expensive method than originally intended it was entitled to recovery for that additional work.

38. David J. Hatem, Design Responsibility in Integrated Project Delivery: Looking Back and Moving Forward 14 (January 2008) (unpublished manuscript) (on file with Donovan Hatem LLP); see also Berkel & Co. Contractors v. Providence Hosp., 454 So. 2d 496, 501 n.3 (Ala. 1984) (affirming the well-established proposition that an architect is the agent of the owner and that the owner is responsible for any damages caused by the architect’s deficiencies in supervision and coordination to the extent that other parties are affected thereby); Stein at 5A-4 (“[E]ven in the absence of contractual agency, an architect or engineer has a professional relationship with the client . . . the law expects that a design professional adhere to certain standards of conduct.”).
40. See Stein, supra note 33, at 5-66 (citing Centex Constr. Co. v. James, 374 F.2d 921 (8th Cir. 1967) (applying the Spearin doctrine in a private contract); Laburnum Constr. Corp. v. United States, 325 F.2d 451 (1963) (applying the Spearin doctrine in public contract)).
41. See James E. Harrington, Robert B. Thum & John B. Clark, The Owner’s Warranty of the Plans and Specifications for a Construction Project, 14 PUB. CONT. L.J. 240, 242 (1984) (“Indeed, a very few courts have subscribed to a contrary view that, at least in some situations, the contractor agrees to assume all risks of extra costs stemming from defective specifications simply by submitting his bid.”); see also Dugan & Meyers Constr. Co. v. Ohio Dep’t of Admin. Servs., 113 Ohio St. 3d 226, 2007-Ohio-1687, 864 N.E.2d 68 (2007), on remand, judgment entered, 2007-Ohio-4141 2007 Ohio Misc. LEXIS 270 (Ohio Ct. Cl., July 19, 2007) (in Ohio the Spearin doctrine was not extended to cases involving delay due to changes in the plans).
43. Id. at 894.
44. Id.
45. Montrose Contracting Co. v. Cnty. of Westchester, 80 F.2d 841 (2d Cir. 1936).
46. Id at 842.
47. Id. at 843.

Courts are split in determining a contractor’s obligations based on whether specifications are termed “design” or “performance” specifications. “Design” specifications itemize in precise detail the materials to be employed, whereas “performance” specifications rely more on the contractor’s ingenuity and creativity as to the means and materials of completion, setting forth an objective or performance standard to be achieved. Performance specifications constitute a form of de facto delegation of design responsibility – the design details have not been provided and thus the contractor must perform the design.

This distinction is the heart of the Spearin doctrine and often where disputes are centered. If the specification is “design” the owner bears the cost; however, if the specification is “performance,” the contractor bears the cost. Determining whether a specification is design or performance is fact-intensive and prohibits parties from winning on summary judgment.

For example, in J.L. Simmons Co. v. United States, when the specified techniques in the plans did not perform as required and created additional cost to the contractor, it sought additional time and compensation. The defendant-owner contended that the design was entirely workable and that the contractor should have foreseen the difficulties and that “standard methods of controlling such [soil displacements] were practiced by competent pile driving contractors.” The court disagreed, holding that the design specifications, detailing the specific materials to be employed and the manner in which work was to be performed, carried with them the owner’s implied warranty that, if followed, a satisfactory result would be obtained.

This leads to increased litigation and costs. For example, in Craig Johnson Construction v. Floyd Town Architects, a suit between a contractor and an architect regarding ice buildup on a condominium roof that caused $460,000 in damages. This case is consistent with modern trends under the Spearin doctrine. First, the court noted that the contractor’s proposed jury instruction was incorrect because it did not mention the “contractor’s obligation to respond to any defects the contractor should have noticed.” Second, this

49. Stein, supra note 33, at 5A-55; but see Zinger Constr. Co. v. United States, 807 F.2d 979, 981 (Fed. Cir. 1986) (holding that labels such as “design” and “performance” specifications do not independently create, limit or remove a contractor’s obligations, imputing the meaning to a “reasonably intelligent contractor”).
50. Simmons, 412 F.2d at 1360.
51. Id.
52. Id. at 1374-75.
53. Id. at 1364.
55. Id. at 650.
56. Id. at 653.
case, although never explicitly stating otherwise, recognizes the difference between “design” and “performance” specifications. The jury found that the contractor was ninety percent (90%) at fault because it implemented its own “fixes” to alleged design defects. This gives some insight as to how courts handle the problem of “hybrid” designs that contain both “design” and “performance” specifications. However, this case required a jury verdict (and expert testimony) to apportion liability. Thus, it is a prime example of how application of the Spearin doctrine leaves both parties with uncertainty as to how much liability they will be subject to – and the costs inherent in reaching that decision.

Further, in A.G. Cullen Construction, Inc. v. State System of Higher Education, the contractor sued the owner for contract damages. This case raised the interesting issue of whether an owner’s inclusion of a specific window-manufacturer in the plans constituted a “design” or “performance” specification. The plaintiff-contractor in this case sued the owner because the window-manufacturer did not produce its product in a timely fashion. The court held that because the contract had discretion to use any window-manufacturer, and was not limited to the two options in the plans, the specification was a “performance” specification, barring the contractor’s claim. This case illustrates the heightened standard that courts place on contractors, evidenced by the court stating, “A.G. Cullen possessed the right to enforce its agreement with Weather Shield by insisting on timely performance or terminating the agreement.”

b. Traditional Limitations on the “Spearin” Doctrine

Contractors may trump the Spearin doctrine by expressly warranting the performance of their work. Often times, the contract between the contractor and the owner will contain a performance guarantee that trumps the owner’s implied warranty. The original Spearin Court stated that general disclaimers requiring a contractor to visit a site, review plans and inform themselves of the

57. Id.
58. Id. at 651.
59. See also W. H. Lyman Constr. Co. v. Gurnee, 475 N.E.2d 273 (Ill. App. Ct. 1985) (holding that the contractor was liable because the owner provided a performance specification and the contractor deviated from the plans and installed bricks and other materials instead of the concrete called for in the contract).
61. Id. at 1152.
62. Id. at 1158.
63. Id.; see also Aquatrol Corp. v. Altoona City Auth., 296 Fed. Appx. 221 (3d Cir. 2008) (holding a sub-contractor liable because it was required under the contract to make the owner’s computer system Y2K compliant, which constituted a performance specification notwithstanding that the owner provided a recommendation for the upgrade specifications).
requirements of the work do not overcome the Spearin doctrine. Thus, the issue is determining whether an express warranty is sufficiently specific to defeat the owner’s implied warranty. For example, in City of Orlando v. H.L. Coble Construction Co., the plaintiff-owner sued the defendant-contractor, alleging that the contractor had breached its performance warranty in the contract. The contractor had constructed the plant in accordance with the detailed plans and specifications, but the incinerator as constructed did not meet the performance warranty. The contractor raised the Spearin doctrine in defense, but the court held that the doctrine is not applicable when the contractor expressly warrants against the defects alleged.

Some cases create higher risk for contractors under the Spearin doctrine. In Three Way, Inc. v. Burton Enter., the contractor sued the owner for the value of its services or specific performance. Following trial, the court ordered specific performance but extended the implied duty of workmanship to include a requirement that the contractor warn the owner of any design defects.

The court’s holding in Three Way, Inc. is somewhat contrary to Greenbriar Digging v. South Central Water, in which the court held that a contractor’s guarantee against defects in workmanship would not trump the owner’s implied warranty as to the adequacy of the plans. But if, under Three Way, Inc., the workmanship duty includes the duty to warn, it is unclear how a court would treat a contractor’s guarantee against defects in workmanship under the Three Way, Inc. holding – would it trump the owner’s implied warranty and

64. City of Orlando v. H.L. Coble Constr. Co., 282 So. 2d 25 (Fla. Dist. Ct. App. 1973); see also Thomas & Marker Constr. Co. v. Wal-Mart Stores, Inc., No. 3:06-cv-406, 2008 WL 4279860 (S.D. Ohio 2008) (holding that the Spearin doctrine does not apply to private contractual settings, reasoning that the Ohio Supreme Court had never applied it to a case involving private entities). Further, in the alternative, if the Spearin doctrine applied, the court found that the owner’s specific disclaimers, with regard to subsurface soil conditions, overcame the implied warranty.

65. Id. at 25; see also Thomas & Marker Constr. Co. v. Wal-Mart Stores, Inc., No. 3:06-cv-406, 2008 WL 4279860 (S.D. Ohio 2008) (holding that the Spearin doctrine does not apply to private contractual settings, reasoning that the Ohio Supreme Court had never applied it to a case involving private entities). Further, in the alternative, if the Spearin doctrine applied, the court found that the owner’s specific disclaimers, with regard to subsurface soil conditions, overcame the implied warranty.


67. Id. at 27.


69. Id. at 222.

70. Id.


72. Id. at *3; see also S. Elec. Corp. v. Utils. Bd., 643 F. Supp. 2d 1302 (S.D. Ala. 2009).
thus give rise to potential contractor liability? This creates uncertainty as to the validity of contractual provisions under Spearin.\textsuperscript{73}

Notwithstanding the Spearin doctrine, some courts hold that a contractor impliedly assumes responsibility for design. Even a half-decade ago, courts were cognizant of the potential harshness of an absolute application of the Spearin doctrine. Accordingly, even in the absence of an express contractual agreement whereby the contractor assumes responsibility for the design, courts have implied such a responsibility. This makes it more difficult for contractors to willfully ignore potential design errors in the early stages of a project and fall back on the Spearin doctrine later.\textsuperscript{74} For example, in Wunderlich Contracting Co. v. United States,\textsuperscript{75} the plaintiff-contractor sued the defendant-owner for delay damages because the project took an additional 318 days past the original 540 days allocated in the contract.\textsuperscript{76} The court acknowledged that the design contract contained a “large number of errors,” but held that these errors, given the scope and complexity of the project, were not unreasonable.\textsuperscript{77} Further, the court found that the contractor knew that performance could only have been completed in 540 days under ideal conditions.\textsuperscript{78} The contractor did not exercise the option of longer performance time; instead it elected to enhance its competitive position by saving the required penalty sum and thereby willingly assumed the substantial risk of completing the project within the tight deadline.\textsuperscript{79} Consequently, the court held that the owner had not breached its implied warranty.\textsuperscript{80}

Often, owners will seek to shield themselves from liability under the Spearin doctrine by expressly disclaiming the owner’s implied warranty as to the plan and specifications. Parties to a contract can agree to disclaim the owner’s warranty that the law would otherwise imply. For example, in Mooney’s v. South Dakota Department of Transportation,\textsuperscript{81} the plaintiff-contractor argued that the defendant-owner created an implied warranty of accuracy by providing pit test data in the bid information, but the contract

\textsuperscript{73.} Sunland Constr. Co. v. City of Myrtle Beach, No. 4:05-cv-1227, 2008 WL 5378246 (D.S.C. 2008) (holding against the contractor on the implied warranty issue, finding that the plans were not defective and that the owner and engineer disclaimed the implied warranty because an owner/architect can effectively disclaim the owner’s implied warranty unless the owner has affirmatively misrepresented the information in the plans or specifications).

\textsuperscript{74.} A natural consequence of courts assuming this responsibility is to encourage contractors to provide input during the design stage. See Stein, supra note 33, at 5A-36 (noting that the means and methods of construction are best left to trade people who are traditionally more familiar with these functions).

\textsuperscript{75.} Wunderlich Contracting Co. v. United States, 351 F.2d 956 (Ct. Cl. 1965).

\textsuperscript{76.} Id. at 964.

\textsuperscript{77.} Id.

\textsuperscript{78.} Id.

\textsuperscript{79.} Id.

\textsuperscript{80.} Id.

\textsuperscript{81.} Mooney’s, Inc. v. S.D. Dep’t of Transp., 482 N.W.2d 43 (S.D. 1992).
stated that the owner “does not guarantee the quantity or quality of the material” and that “interested contractors should investigate the area before considering it for bidding purposes.”

The court held that, absent misrepresentation or fraud, no implied warranty arises when the owner, in good faith, presents all the information it has to the contractor.

c. Other Problems Under Spearin

Apportioning liability among the parties is another problem under Spearin. For example, Bunkers v. Jacobson involved a contract to construct a new home where the contractor sued the owner and the owner counterclaimed for defective work. After a bench trial, the trial court awarded the owner $64,834.93. The South Dakota Supreme Court reversed on damages: roof - $12,870; water - $35,911.58; and reduced the drywall damages by fifty-percent (50%).

This South Dakota Supreme Court ruled in favor of the contractor based on expert testimony provided by the homeowner. Further, the court allocated an additional twenty-five percent (25%) of damages against the contractor, even though the cause of the harm was “iffy and unknown.” This creates uncertainty in damage awards and boils down comparative fault principles into a “battle of the experts,” which is costly to all parties involved.

Another problem under Spearin is that courts, perhaps without expressly stating, are holding contractors to a higher standard of care. The problem is determining how much “due diligence” a contractor is required to undertake to reduce the chances that the court will bar its claim under the Spearin doctrine. The case law is inconsistent at best. For example, in Home Furniture v. Brunzell Construction, in holding for the contractor, the court highlighted the contractor’s testimony:

“And my answer was always the same: ‘You have an architect. He designed the building. We are only building it. You ask him,’ because we don’t like to put ourselves in the position where we are telling the owner things to do. We are only builders.”

82. Id. at 46.
83. Id.
85. Id. at 735.
86. Id.
87. Id. at 741-43.
88. Id.
89. Id. at 743.
Further, in KGM Contractors, Inc. v. Cass County,91 the Minnesota Court of Appeals affirmed a $300,000 award to the contractor on the basis that the plans did not show the actual location of underground utilities even though the location should have been “obvious” to the bidders, concluding that both the owner and the contractor were negligent.92 Also, in Sherman v. Ohio Department of Administrative Services,93 the Ohio Court of Appeals held that, even though the contractor did not dispute the trial court’s finding that it failed to conduct a reasonable pre-bid site investigation, the contractor was not precluded from recovering based on its differing site conditions claim because the uncontradicted testimony indicated that a pre-bid inspection would not have revealed the differing subsurface conditions.94

However, in Fabi Construction Co. v. Secretary of Labor,95 the D.C. Circuit Court of Appeals agreed with the Occupational Safety Health Review holding that “while the contractor may lack the engineering expertise to overrule or ignore the shop drawings, to hold that he must slavishly follow them ignores the fact that the contractor has practical experience in the field and is in a position to know when the shop drawings are contrary to generally accepted practice.”96 Also, in Martin K. Eby Construction Co. v. Jacksonville Transportation Authority,97 the federal Florida District Court held that a contractor has an affirmative duty to act as a “reasonably prudent contractor” during the bidding phase, which may include visiting the site and making the owner aware of potential problems in the design prior to submitting its bid, and failure to do so will preclude the contractor from recovering under the Spearin doctrine.98

The design-bid-build delivery system led to the development of the Spearin doctrine, which has led to inconsistent results and uncertainty. As a result, the design-build delivery system emerged.

C. The Design-Build Delivery System: An Inadequate Solution

The design-build project delivery system involves a single contract for both design and construction services rather than one contract for design and
another for construction.\textsuperscript{99} The system combines the design responsibility of
the design professional and the building function of the prime contractor into a
single role.\textsuperscript{100} Thus, typically a successful design-build project is comprised
of the following steps:

- The owner selects a design-build entity to design and build the facility
- The contractor in the design-build entity provides constructability
  input to design and constructs the facility as the design becomes
  available \textsuperscript{101}
- The owner takes possession of the facility at substantial
  completion.

According to the Design-Build Institute of America, more than forty-
percent (40\%) of non-residential design and construction in the United
States is completed through the design-build delivery system.\textsuperscript{102} Unlike the
traditional design-bid-build method of project delivery, design-build allows an
owner to contract with one entity that provides both design and construction
services.\textsuperscript{103} Most design-build projects are led by contractors, who in turn
hire a design professional such as an architect or professional engineer to design
the project with the guidance and input of the contractor.\textsuperscript{104} Proponents of
design-build assert that owners can avoid responsibility conflicts for
unanticipated problems that typically occur between the contractor and
designer on a traditional project.\textsuperscript{105}

Today, most owners favor the design-build project delivery method over
traditional delivery systems such as the design-bid-build method.\textsuperscript{106} In the
traditional “design-bid-build” project delivery method, when problems arose
on a project, the architect, construction manager, and contractor usually tried
to shift the blame onto other parties, resulting in a costly and adversarial
process. The design-build model, at least in theory, creates a “single point of
responsibility” in the designer-builder to which the owner can look for
liability.\textsuperscript{107} Furthermore, owners prefer the design-build delivery system
because it essentially eliminates the owner’s implied warranty as to the plan
and specifications (under the Spearin doctrine) because the owner is not

\begin{itemize}
\item \textsuperscript{99} Timothy N. Toler, \textit{Design-Build vs. Traditional Construction: Risk and Benefit Analysis}, 5
  (unpublished manuscript) (on file with Toler & Hanrahan LLC).
\item \textsuperscript{100} \textit{Id.}
\item \textsuperscript{101} \textit{Id. at 6.}
\item \textsuperscript{102} \textit{Id. at 2.}
\item \textsuperscript{103} \textit{Id. (this is referred to as “single point responsibility”).}
\item \textsuperscript{104} However, the contractor may have an in-house design professional or a joint venture with a
designer. Further, an owner may contract with a designer-led entity that contracts with a contractor
for construction services. \textit{Id.}
\item \textsuperscript{105} Toler, \textit{supra} note 101, at 2 (citing Bruner and O’Connor, 2006 Construction Review,
  Construction Briefings No. 2007-1 at 30 (January 2007)).
\item \textsuperscript{106} See, \textit{e.g.}, Mortenson Construction, The State of Design Build (December 2010) (noting the
  significant decrease in popularity in traditional design-bid-build projects).
\item \textsuperscript{107} See generally, Stein, \textit{supra} note 33, at 1:3.01[4][c].
\end{itemize}
issuing the plans. Thus, the owner is not responsible for any design defects. Additionally, the design-build method encourages collaboration because the contractor works closely with the design professional throughout the project.

Although design-build may be a popular approach compared to design-bid-build, it merely shifts the focus of the problem and does not attempt to solve inherent flaws in construction project delivery from the core. Consequently, many owners should be, and are, hesitant to fully embrace design-build. In the design-build method, owners lose an enormous amount of control over the quality and design of the entire project, which may be especially troublesome for experienced or technically savvy owners. Additionally, an owner is disadvantaged during construction because it does not have an architect-agent to represent its interests when problems arise because under design-build, unlike design-bid-build, the architect is part of the contractor’s team – not the owner’s. Consequently, design-build’s advantages might only apply to projects that have little aesthetic concerns, where performance requirements can be quantified largely in terms of production or output, such as prisons and dormitories.

As one commentator explains, “the design-build” contract is only as good as the performance requirements, which are the requirements the owner articulates at the beginning of the project, on which the contract is based.” However, even for owners willing to relinquish design input, shielding themselves from design liability is even more difficult. “Where the owner has performed some design work upon which the design/builder relies (even if the latter assumes responsibility for the design work), questions can arise as to whether the owner impliedly warrants the adequacy of the design criteria furnished to the design/builder.” Simply put, the Spearin doctrine emerges

109. Toler, supra note 99, at 6 (asserting several other benefits to design-build including higher quality, innovation, collaboration, cost-effectiveness and continuity).
110. Stein, supra note 33, at 1:3.01[4][c].
111. Id.
112. According to Stein, projects conducive to design build are ones not sensitive to aesthetic concerns and in which engineering concerns dominate over architectural ones, such as industrial plants, and when the owner’s requirements can be clearly stated because there exists objective performance criteria that are readily understood by the industry.
113. Stein, supra note 33, at 1:3.01[4][c].
114. Broadly speaking, even on its face this seems problematic. Very few projects, especially today when we are increasingly building structures under extremely difficult site conditions, are “cut and dry,” prohibiting an owner from adequately articulating what he or she wants and then recuse him or herself from further design involvement.
115. BOCL at § 9:90. See also Toler supra, note 99 (explaining that under the Spearin doctrine the owner may still be responsible for preliminary design criteria or other design documentation or data the owner or its representatives furnish to the design-builder).
yet again, and a cautious owner would be quick to recognize that it has given up design control while remaining liable for design defects. Thus, the risks of control outweigh the alleged reward of eliminating liability under the Spearin doctrine.116

1. Design-Build Case Law Illustrating Its Inadequacy

Case law illustrates that design-build does not eliminate the litigation costs associated with design-bid-build project delivery.117 For example, in In re Donahue Electric, the contractor appealed the denial of its claim for an equitable adjustment of the costs that resulted when the boiler Donahue claimed was prescribed by the specifications in its contract could not properly operate.118 The government denied liability on the ground that the contract was a design-build contract, thus making Donahue entirely responsible for properly sizing the boiler.119 The court ruled that specific quantities and sizes set forth in the specifications placed the risk of design deficiencies on the owner.120 Thus, the Veteran Administration assumed the risk and warranted the accuracy of the specifications with regard to the boiler output.121 The court found that Donahue reasonably relied on the boiler specification.122

Thus, although in theory a design-build delivery system shifts the risk to the design-contractor, in this case the owner was found liable for extra costs incurred from a defective design, despite the owner’s attempt to shield itself from liability by marking the original drawings it produced “for information only.”123 When an owner sets forth performance specifications for the design-builder, as it must, the design-builder assumes the risk. Here, because the owner provided “specific requirements” (“design” specifications under Spearin case law), the owner remained at risk for deficient design relating to those specific requirements.124 This raises the same issue as in Spearin cases – when is the owner’s specification more “performance” (no liability) or more “specific” (liability)?125

116. From the owner’s perspective, the Spearin doctrine rearing its ugly head in design-build eliminates a prime reason for electing design-build to begin with. Thus, a reasonable owner understanding that it might be liable for design defects may prefer the design-bid-build, where at least he has more control over the design for which he might be liable.
118. Donahue, 2002 WL 31927907.
119. Id.
120. Id. at *14.
121. Id.
122. Id.
124. Id.
125. But see In re Fire Security Systems, Inc., 2002 WL 1979118 (August 16, 2002). In this case, the owner provided a preliminary set of drawings for the contractors to use in bidding the
Under a typical design-build contract the owner provides a performance requirement – in one case – stripping existing paint to re-coat a steel bridge – and the designer-builder contracts to perform that requirement, and is at risk for cost overruns. In R.J. Wildner Contracting v. Ohio Turnpike Commission, however, the court ruled in favor of the contractor because the owner did not disclose the “abnormally thick” thickness of the paint. Determining that paint is “abnormally thick” is a factual issue subject to intense debate (and costly expert testimony regarding industry standards), and, at a minimum, will prohibit an owner from obtaining summary judgment. It is also noteworthy that the contract required that the contractor perform a reasonable site inspection, but this (much like the general disclaimers to inspect the site in Spearin case law) did not shield the owner from liability.

2. Design-Build Conclusion

Although currently popular, the design-build project delivery method is not new, and only provides a half-hearted solution to the traditionally adversarial construction process. However, it has gained popularity among owners because it provides a “single point of responsibility” and provides a faster, more seamless delivery method. Notwithstanding this admitted progression, the design-build does not solve the root of the problem, but merely shifts the focus of the inquiry from looking to the owner for recovery to seeking recovery from the contractor. Design-build preserves the adversarial system between the parties and while increasing collaboration between the contractor and the design professional, leaves the owner in the dark, only to hope that he is happy once the project has been completed.

Conversely, as the next section will illustrate, IPD is a truly novel project delivery system, albeit based on familiar notions of collaboration, that not only encourages all parties involved in the project to collaborate, but provides early financial incentivization to do so. Unlike design-build, IPD is not a disguised project. Further, the owner provided drawings were inaccurate, but the court held for the owner because it essentially disclaimed any responsibility and required the contractor to verify the drawings. Thus, this case is somewhat inconsistent with the previous because here the court does not allow the same level of contractor reliance on the owner’s supplied drawings, notwithstanding that in both cases the owner provided drawings were “specific.” The court reasoned that the owner provided drawings were only intended to place all bidders on equal footing and thus were adequate, but for fabrication, the contractor had an independent duty to “take its own measurements.”

127. Id.
128. Id.
130. See Toler, supra note 99 (providing an excellent discussion of the historical roots of the design-build method, which date back to 40 B.C.).
131. Id.
132. In reality, the owner’s more likely response is “this is not what I ordered.”
risk reallocation tool that shifts the brunt of the risk from one party to another, but recognizes that true collaboration is only achieved when all parties, including the owner, collectively share the risks and rewards and provide input that results in superior and safer designs, faster completion time and fewer disputes.

D. LEED and IPD System

Lean project delivery is a construction management model inspired by the Toyota Production System ("TPS"). TPS focuses on eliminating problems before they occur by encouraging workers to immediately report problems and stop production. This boosts employee’s morale because employees are given more control over production. TPS is driven by the belief that the processes drive the results – not the other way around. This method seeks out the root of the problem so that it can be evaluated and corrected accordingly.

Lean project delivery embraces cooperation by forming a team in which the architect, builder and all other critical players in the project are treated as equals on a single team in the pursuit of shared goals. However, lean project delivery, more than any other delivery system, requires a change in mindset from typical construction practices. Lean project delivery depends on the involved parties’ understanding that rewards and compensation are tied to the value of the completed project as a whole – not just one part. Individual participants in the project are expected to help their counterparts solve their problems and vice versa.

As discussed earlier in Part II-A, the construction industry has not traditionally focused on cooperation and teamwork. However, the trend is moving away from this adversarial approach. The design-build approach fuses the builder and the designer into one entity that collaborates on the design and construction, but with minimal input from the owner. IPD takes the final logical step by aligning the interests of the design professional, the contractor and the owner through total collaboration and teamwork.

133. J OSEPH A. C LEVES, JR. & JOHN F. MICHEL, LEAN PROJECT DELIVERY: A WINNING STRATEGY FOR CONSTRUCTION AND REAL ESTATE DEVELOPMENT 1 (Grant Thornton).
134. Id. at 2.
135. Id.
136. Id.
137. Id.
138. Id.
139. J OSEPH A. C LEVES, JR. & JOHN F. MICHEL, LEAN PROJECT DELIVERY: A WINNING STRATEGY FOR CONSTRUCTION AND REAL ESTATE DEVELOPMENT 3 (Grant Thornton).
140. Id. at 1.
141. Id.
1. IPD & The Owner’s Implied Warranty (Spearin Doctrine)

In a collaborative IPD context, the rationale for the application of the Spearin implied warranty obligation is called into question. This is because the contemporaneous and potentially influential and meaningful role of the constructor – and/or its trade subcontractors – in the design development process. Design collaboration might provide a legitimate rationale to reduce defective risk exposure among contracting parties, and might serve as the basis for significant curtailment of the Spearin implied warranty doctrine. Consequently, some contractors may worry that IPD will eliminate their liability shield – in the form of the Spearin doctrine, depending upon how the IPD contract is drafted and what specific input or design liability the contractor has undertaken for itself or its subcontractors. However, even though design professionals are not directly a party to implied warranty claims, there is a strong likelihood that such claims involving the design professional’s services might give rise to indemnification or contribution claims by the owner against the design professional. Thus, as one commentator advocates, IPD contractual limitations on the implied warranty obligation of the owner should serve, directly and indirectly, to limit and manage professional liability exposure to the design professional.

2. With Risk Comes Reward

As IPD gains more traction, commentators are looking more closely at the legal issues this innovative approach raises. “As the contractor and chief trades participate in design, they run the risk of assuming some design responsibility.” “Insurance companies are developing IPD-specific products to cover this risk, but have yet to issue such policies.” “Proficient use of 3D design models reduces design errors, yet in human hands will never be infallible.”

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144. See also Hilger, supra note 143.
145. Hatem, supra note 142, at 163. Further, because of the general erosion of the privity requirement, contractors are able to assert a valid cause of action directly against the architect based on a breach of professional duty.
146. Id.
148. Id.
149. Id.
150. Id.
Both sides have a stake in the other’s performance by sharing in financial incentives and risks, even if neither incurs direct liability outside of traditional spheres of risk, mistakes by the other can reduce the incentive pool and diminish everyone’s profit.\(^{151}\) Although other areas exist where IPD’s departure from traditional practice can take parties outside safe harbors well defined by legal doctrine, the same can be said of any new approach that drastically alters scopes of responsibility.\(^{152}\) The realignments, which IPD engenders, are a necessary step in the elimination of waste in at is currently a very wasteful industry.\(^{153}\) However, “[e]ffective legal drafting and an “eyes wide open” approach should go a long way towards mitigating the perceived risks and fulfilling the promise of IPD.”\(^{154}\)

Building on teamwork, IPD takes cooperation to the next level.\(^{155}\) “The owner, designer, builder and all other critical players in the project are treated as equals on a single team.”\(^{156}\) “These various players focus on reliability in meeting the commitments they make on a project.”\(^{157}\) “When more companies reliably meet their commitments, the overall project will proceed more smoothly.”\(^{158}\) “This avoids the inefficiencies that result when individual team members look only to their individual productivity and profit at the expense of the group.”\(^{159}\) Fortunately, as designers engage more in the construction process, their traditional aversion to participating in the means and methods erodes.\(^{160}\)

IPD provides the greatest opportunity for the team to positively influence design, schedule and costs.\(^{161}\) Unlike with traditional delivery methods, design team members are available throughout the project to answer questions and provide feedback to the contractor and trades.\(^{162}\) With an integrated team approach, risk to the overall project and to individual team members is reduced.\(^{163}\)
III. THE PSYCHOLOGY OF CHANGE

"Security is mostly a superstition. It does not exist in nature, nor do the children of men as a whole experience it. Avoiding danger is no safer in the long run than outright exposure. Life is either a daring adventure, or nothing."\(^{164}\)

A. Leadership and Change

"Effective change management is not about managing change it’s about managing the psychological process people go through during change."\(^{165}\) Some people may find change difficult to accept because generally human beings like to feel in control, which results in people confronting uncertainty at deep emotional levels.\(^{166}\) "The famous family therapist Virginia Satir; stated that the biggest barrier to her clients making successful changes in their life was the strong human need for familiarity."\(^{167}\) As a result of this understandable human reaction, people can resist change.\(^{168}\) "Some of the reasons for this are: fear of losing their job, fear of losing status, an inability to see the need for the change, an unfavorable view of the person leading the change, not being consulted about the change, the perception that change will create more work, negative influence from other people in the organisation [sic] about the change."\(^{169}\) Leaders must understand and consider this psychology when consulting their clients.\(^{170}\)

"The transition curve is a psychological journey that people often travel along during a time of significant or major change."\(^{171}\) This behavior has been observed in commercial environments and in non-commercial environments alike.\(^{172}\) "There are four key stages along a ‘U’ shaped “curve” of energy and morale."\(^{173}\) "The model divides the ‘U’ into [four] quadrants."\(^{174}\)

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166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
173. Id.
174. Id.
Quadrant 1: Denial – in the early stages of change they will often be shocked and appear to withdraw and deny the change.\textsuperscript{175} People often adopt a “business as usual” mindset and their attention will be focused on the past because this provides safe and familiar feelings.\textsuperscript{176} At this stage energy and morale starts to dip.\textsuperscript{177} During this early stage leaders should ensure that they: ensure that people affected by the change know what is happening, when it is going to happen and why it is happening; explain what to expect; keep people informed and updated on a regular basis; hold informal one-on-one discussions with the team; allow people time to understand what is going on and allow them time to consider what this means to them; and make the change seem real with relevant examples and illustrations.\textsuperscript{178}

Quadrant 2: Resistance – People transition from denial to outright resistance as they accept the reality of change.\textsuperscript{179} Initially people may be angry with others and later with themselves.\textsuperscript{180} People may begin to blame others and become anxious, this sometimes will lead to apathy and feelings of depression.\textsuperscript{181} People may develop attitudes and behaviors of non-cooperation, along with a drop in commitment and energy.\textsuperscript{182} “They often become guarded and will not disclose how they are feeling.”\textsuperscript{183} Additionally, people may resist the change as just another fad leading to an “[i]t’ll never work here” attitude, causing people to become cynical, and/or put on a brave face.\textsuperscript{184} Eventually people will reach the bottom, or trough (“pit of despair”), of the transition curve where energy is at its lowest.\textsuperscript{185} “It can be tempting to push ahead with the change process and get it implemented.”\textsuperscript{186} “However, allowing people time to consider what is happening and providing the right level of support to them will pay dividends in getting the change effectively implemented.”\textsuperscript{187} During this second stage leaders should ensure that they: listen to people’s concerns about the change; acknowledge people’s

\begin{itemize}
\item \textsuperscript{175} Simon Hazeldine, \textit{Leadership \& the Psychology of Change}, http://www.simonhazeldine.co.uk/leadershipandthepsychologyofchange.html (last visited May 19, 2012).
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Simon Hazeldine, \textit{Leadership and the Psychology of Change}, http://www.simonhazeldine.co.uk/leadershipandthepsychologyofchange.html (last visited May 19, 2012).
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Simon Hazeldine, \textit{Leadership and the Psychology of Change}, http://www.simonhazeldine.co.uk/leadershipandthepsychologyofchange.html (last visited May 19, 2012).
\end{itemize}
feelings; empathize with the people involved; provide encouragement; and provide support. 188

Quadrant 3: Exploration – “[a]t this stage people have become resigned to the change but may not have accepted it.” 189 Energy will start to build as people travel up the transition curve, but true acceptance will not come until a later stage. 190 People may start to over-prepare because of feelings of confusion and even chaos. 191 During this third stage leaders should ensure that they: harness the energy; focus their team and concentrate on priorities; provide training; set short, term goals; encourage brainstorming and other methods to solve problems associated with implementing the change; and planning what needs to be done. 192

Quadrant 4: Commitment – as people continue their journey along the transition curve their energy and enthusiasm continues to build. 193 “People will start to take responsibility and will cooperate.” 194 “The over preparation of the previous stage will lead to a more balanced and considered co-ordination of activity.” 195 During this fourth stage leaders should ensure that they: develop and communicate long-term goals; focus on building the new teams; and acknowledge and reward people’s contribution. 196

“As a leader it is important to understand the stages that people will go through during change.” 197 “And by flexing and altering your behaviour [sic] appropriately you will be making a powerful contribution to the required change being accepted and then implemented effectively.” 198 “Change will be an on-going reality for the modern leader and as a result learning how to lead it effectively is an essential skill.” 199

As a leader of change it is important to understand that commitment to a new future vision will take time to build. 200 “It is important for a leader to modify their behaviour [sic] when people are going through each of the four

188. Id.
189. Id.
190. Id.
191. Id.
192. Id.
194. Id.
195. Id.
196. Id.
197. Id.
198. Id.
200. Id.
stages.”\textsuperscript{201} “It should be noted that people move through the transition curve at different speeds and a one-size-fits-all approach to leading change is simply not appropriate.”\textsuperscript{202}

B. Trust & Fear

Often it is difficult for us to trust someone we do not know or someone we know who has disappointed us once.\textsuperscript{203} It is difficult to make the first step to a trustful relationship. This is because of “the paradox of trust.”\textsuperscript{204} “Simply stated, before you are trusted, you first must trust others.”\textsuperscript{205}

Human relationships rely on trust, it is a valuable intangible good – hard to gain but easy to destroy – creating a situation of potential disappointment. Taking the first step to a trustful relationship is difficult, but it may be the only way to build trust in the other party.\textsuperscript{206} It is important to understand that the other party likely harbors the same concerns and fears, but will not venture the first step.\textsuperscript{207}

However, fear can paralyze us and keep us in one comfort zone because we fear the perceived discomfort that comes with change.\textsuperscript{208} Fear is one of our most powerful emotions\textsuperscript{209} because we fear that change may open a “Pandora’s Box” of change.\textsuperscript{210} “And while it can serve as a vital protector in some situations (i.e., running away from a real threat), it can be a crippling obstacle when it keeps us from reaching our goals.”\textsuperscript{211}

IV. THE JUDICIAL STAGE OF IPD IS SET

Despite lawyers’ understandable caution in approaching IPD because it is devoid of case law directly interpreting it, or an established insurance product to fall back to, the established legal principles framing the construction industry are sufficient to encompass potential issues arising from IPD projects.

\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Busch, supra note 22, at 58.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{208} Robert Wilson, Change Please, The Main Ingredient (March 24, 2010), http://www.psychologytoday.com/blog/the-main-ingredient.
\textsuperscript{209} Sherrie Bourg Carter, Why We Dread (and so often fail) to Change, HIGH OCTANE WOMEN, (July 9, 2011), http://www.psychologytoday.com/blog/high-octane-women/201107/why-we-dread-and-so-often-fail-change.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
Case law has implicitly embraced IPD, formal contracts exist and insurance companies are currently developing products to insure IPD participants.

A. Case Law Illustrating That Current Legal Principles Are Sufficient to Govern IPD

Although IPD is new, it is predominately based on contract law, which has been around for more than a hundred years and provides adequate guidance applicable to an IPD setting. Case law has subconsciously embraced IPD. For example, in Larchmont Nurseries, Inc. v. Daly, the contractor sued the owner for payment of services. The court awarded the contractor damages, even though the contractor damaged the owner’s property, because the contractor notified the owner of potential design errors, but the owner ignored the warnings and instructed the contractor to build per the plans, which the contractor did. This case provides incentive for a contractor to bring up potential design errors before building begins – as they would in an IPD setting.

Additionally, in Martin K. Eby v. Jacksonville, the contractor sued the owner for extra compensation for expenses incurred in completing the project through wet terrain. After a nine-day bench trial (and several expert witnesses) the court ruled in favor of the owner. It explained that “[t]he purpose of the rule requiring contractors to bring obvious or actually perceived problems to the owner’s attention is twofold:

First, it protects the integrity of government procurement by ensuring that all bidders bid upon the basis of the same terms and specifications, and that no contractor takes advantage of a government drafting error. Second, it promotes the efficient administration of government contracts by encouraging contractors to raise potential problems before the fact, and generally requires less time and effort, thereby reducing the likelihood of extra-cost claims on the project and expensive and time-consuming litigation.

Notably, this is a more recent case and this court made it clear that contractors cannot blindly rely on drawings provided by the owner. Instead, the contractor has an affirmative duty to act as a “reasonably prudent contractor” during the bidding phase, which may include visiting the site and making the owner aware of potential problems in the design prior to

213. Id.
214. Id.
216. Id.
217. Id.
218. Id. at 114-115.
submitting its bid. Failure to do so will preclude the contractor from recovering under the Spearin doctrine.

B. Standard Form Contracts Designed Specifically to Govern an IPD Project

There are currently two well-known form contracts specifically designed for IPD projects. Each is different, but both provide, at a minimum, a jumping-off point for a talented contract-drafting lawyer to protect his or her client’s interests.

1. AIA-C181 (2009)

AIA Document C191-2009 is a standard multi-party agreement for IPD through which the owner, architect, contractor, and perhaps other key project participants execute a single agreement for the design, construction and commissioning of a project. The AIA C191 requires the Parties to develop a risk matrix. The matrix identifies “the principal risks of planning, designing, constructing, and commissioning the Project and determines primary responsibility for managing each risk identified . . . . Each risk, unless mutually agreed otherwise, will be primarily managed by the person or entity best able to control the risk. The risk matrix shall be a project management tool only and it shall not be incorporated into the Agreement.”

Article 8 provides that parties using the C191-2009 shall “waive all claims against each other . . . .” This broad statement is rife with exceptions, most significantly the following: (1) claims arising out of a Party’s willful misconduct; (2) claims arising out of any express warranty obligations (such as the Contractor’s warranty that its Work will conform to the Contract Documents); (3) claims arising out of any express indemnification obligations set forth in the Contract Documents; (4) claims for failure to procure the insurance required under the Contract Documents; and (5) claims to the extent insurance proceeds are available through insurance expressly required under the Contract Documents. The last exception regarding insurance proceeds is significant. For example, because the Architect is required to obtain professional liability insurance, the Architect will be at risk for professional liability claims from the parties to the contract as well as to third parties.

221. See AIA, supra, note 202 at Art. 8, §§ 8.1.1-.3; 8.1.4-.7.
222. See AIA, supra, note 220 at Article 7, § 7.2.1; AIA, supra, note 220 at Article A14, § A.14.1.1.9.
“The other Parties shall be entitled to rely on the accuracy and completeness of information furnished by the Owner.” At first glance, this would appear to create an express owner warranty as to the design documents. However, the design documents are not listed as information and services that the owner is required to provide. Most likely, this provision is designed to eliminate the informational advantage that an owner of a piece of property has over the other parties involved in a construction project.

The C191 serves to maintain that the architect is at risk for professional liability claims from the parties to the contract and to third parties because the waivers do not apply “to the extent insurance proceeds are available through insurance expressly required under the Contract Documents.” Further, similar to the ConsensusDOCS 300, the C191-2009 provides that the Contractor must promptly report to the Parties any nonconformity discovered by or made known to the contractor.

It appears that the AIA C191-2009 seeks to eliminate, or at least mitigate, the Spearin doctrine. The default rule is that Parties will waive claims against each other, and the only exceptions speak to express provisions in the contract. This is especially true given that C191-2009 indicates that non-parties can rely on the design professional’s drawings and have a direct cause of action against the architect or engineer, unless an exception applies.

2. ConsensusDOCS 300

ConsensusDOCS 300 is a tri-party agreement that requires the owner, designer, and constructor to sign the same agreement. “This contractual structure binds them to collaborate in the planning, design, development, and construction of the project along with a sharing of project risks and rewards different than a traditional contract.” Under ConsensusDOCS 300, parties may choose to allocate their liability exposure in two ways. The first is to

224. AIA C191-2009, Exhibit A General Conditions, Article A2, § A.2.2.1.3.
225. Victor O. Schinnerer & Co., A Brief Comparison of AIA C191-2009 with ConsensusDOCS 300, GUIDELINES FOR IMPROVING PRACTICE (2010) (the author also notes that many insurance claims are precluded because of specific mutual waiver of consequential damages). Regarding insurance, both ConsensusDOCS 300 and AIA C191-2009 exempt claims that can be paid through insurance.
226. AIA, supra note 220, at Exhibit A General Conditions, Article A2, § A.2.4.4.4.
228. Id. See also 3.8.2 PROJECT RISK ALLOCATION Subject to Article 11, the Parties agree to allocate project risk as follows: (Select One):

  1 SAFE HARBOR DECISIONS For those Project risks arising from collaboratively reached and mutually agreed-upon Project decisions made by the Management Group (Safe Harbor Decisions), the Parties agree to release each other from any liability at law or in equity for any non-negligent act, omission, mistake or error in judgment, whether negligent or not, acting in good faith, in performing its obligations under this Agreement except to the
agree to release each other from liability for Safe Harbor Decisions.\textsuperscript{229} Safe Harbor Decisions are decisions that the Management Group collaboratively reached and mutually agreed-upon. Unfortunately, the ConsensusDOCS provides no formula to determine what constitutes a Safe Harbor Decision. The second choice is to hold the other parties fully liable for their own negligence and breaches of contract and warranty.\textsuperscript{230} The parties can limit the Constructor’s liability, however, this limitation does not apply to the extent that the constructor is reimbursed pursuant to his insurance policy.

The ConsensusDOCS 300 recognizes that the Designer must work collaboratively with the other members of the CPD Team, while retaining overall responsibility for the Project Design.\textsuperscript{231} The “Designer is responsible for the completeness and accuracy of the design.”\textsuperscript{232} Nonetheless, the ConsensusDOCS 300 provides that the Constructor and other Subcontractors must promptly notify the Management Group if they discover any errors, omissions, or inconsistencies in the design documents.\textsuperscript{233} The Management Group will then look to the Designer to take action.\textsuperscript{234} Furthermore, Section 6.15 of the Consensus Docs requires the Constructor to advise the Designer if it is actually aware that the design does not apply with codes, laws, or regulations of the applicable jurisdiction.\textsuperscript{235}

\begin{itemize}
\item[\textsuperscript{229}.] See Perlberg, supra note 227, at 6 (stating that “[t]he goal of creating safe harbor for decisions is to strongly encourage creative and innovative approaches to address project issues by providing a shield if those attempted solutions do not succeed”).
\item[\textsuperscript{230}.] Id.
\item[\textsuperscript{231}.] ConsensusDOCS 300, Standard Form of Tri-Party Agreement for Collaborative Project Delivery, ConsensusDocs Art. 6 § 6.1 (2007), krex.k-state.edu/dspace/bitstream/2097/8554/3/ConsensusDOCS%20300.pdf.
\item[\textsuperscript{232}.] Id. at Art. 6 § 6.15.
\item[\textsuperscript{233}.] Id. at Art. 6 § 6.6.
\item[\textsuperscript{234}.] Id. at Art. 6 § 6.6.
\item[\textsuperscript{235}.] Id. at Art. 6 § 6.15.
\end{itemize}
If the parties elect the traditional risk allocation, it appears that the traditional owner’s implied warranty still applies. The Constructor and the Subcontractors are required to promptly notify the Management Group of any design errors. Failure to do so would result in negligence or breach of contract and might prohibit the Constructor or Subcontractor from recovering based on an implied assumption of responsibility of design.\(^{236}\) However, under the Safe Harbor Decision elective, this is probably not the case, unless the parties acted willfully or in bad faith in its act or omission.

The Safe Harbor provision is most consistent with IPD’s approach of not suing your collaborative team members.\(^{237}\) However, it should be noted that costs covered by insurance are excluded by either the traditional or safe harbor approach.\(^{238}\) “Insurance is generally thought of as a mechanism to decrease the adversarial nature of construction by allowing participants to distribute their costs for coverage as part of regularly anticipated project costs.”\(^{239}\)

V. A CALL TO CHANGE: THE ONLY MISSING ASPECT OF IPD IS WILLING PARTICIPANTS

A. IPD & Trust

“The core premise of Lean Project Delivery is intensive collaboration based on trust.”\(^{240}\) “Critical to its successful implementation is free flowing communication between team members.”\(^{241}\) “Construction and design participants are brought into the project at the beginning of the design.”\(^{242}\) “This allows critical dialogues to take place during design rather than later, when changes become more expensive.”\(^{243}\) “This collaboration is the antithesis of traditional methods, where silos of responsibility isolate and allegedly protect parties from risk.”\(^{244}\) “The seminal contract for lean projects, the Tri-Party Agreement, allows parties the option of choosing to waive liability amongst themselves for decisions reached collaboratively.”\(^{245}\) “Such a provision is starkly at odds with the traditional “fault-based” programs under which projects are insured.”\(^{246}\)

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236. See section I.C.2.
238. Id.
239. Id.
241. Id.
242. Id.
243. Id.
244. Id.
245. Id.
B. IPD is Not for the Weary

“Despite its advantages, IPD does have some drawbacks.” 247 “The process is unfamiliar for owners and requires the parties to trust each other.” 248 As much of the literature addressing IPD notes, IPD contracts have not been tested in court, which elevates the legal risk to IPD participants. 249 Another hurdle for IPD is the idea that the language contained in its contracts amounts to nothing more than unenforceable, “fluff” language. 250 This language aims in an obvious effort to engender a spirit of cooperation similar to the “partnering” agreements in the early 1980s. 251

“The contractors in an IPD environment run the risk of assuming some design responsibility, and, at a very minimum, the contracts usually are set up to share financial risk of the project; the risk could include, to some extent, design deficiencies.” 252 “In addition, contractors may, depending on the language of the contract, absorb liability for the design they contribute as well as the liability for the design contributors of their subcontractors.” 253 Although some “commentators and proponents of IPD seem to think the problems associated with design will be discovered through the use of BIM, the sleeping dragon may very well be the overreliance on computer models and not enough human input.” 254

“The makeup, experience, and personalities of the contractor’s team also need to be evaluated.” 255 “These individuals should be interviewed to assess their abilities, experience and compatibility with the owner.” 256 “The owner should pay close attention to their ability to listen, communicate and follow through.” 257 “Once the contractor and its team have been selected, the parties need to sign a contract before work begins.” 258 “The contract needs to specify that the contractor’s project manager cannot be changed without the owner’s consent.” 259

248. Id.
250. Id.
251. Id.
252. Id.
253. Id.
254. Id.
256. Id.
257. Id.
258. Id.
259. Id.
Notwithstanding the risks, IPD is a worthwhile delivery system that all construction participants should, at a minimum, investigate.\textsuperscript{260} New is not necessarily bad.\textsuperscript{261} The same could have been said for design-build contracts when they first emerged.\textsuperscript{262} Further, the lack of judicial precedent on a particular subject will give a skilled and savvy attorney a clear slate to educate the judicial community on what the language means or should mean.\textsuperscript{263}

\section*{C. The Lawyer as the Vehicle of Change}

Lawyers have always been counselors to their clients, not merely hired guns. Of course clients value a lawyer’s legal advice, but the best attorneys offer more than a quick legal conclusion and corresponding citation. The best attorneys are advocates for their clients that can overcome not only the legal hurdles their clients face, but the emotional roller-coaster that a typical laymen, even one more familiar with the law, experiences throughout a major project like the ones in the construction industry. As such, the lawyer is capable, and should be the “leader” discussed earlier in the four quadrants of coping with change. The lawyer can be the steadfast force that helps the client-owner or contractor cope with tackling a new construction project delivered under IPD. The lawyer can be the objective light cast upon the client that may ignorantly reject IPD out of fear. The lawyer can harness the energy that comes with a client understanding IPD and its benefits and starting to become excited at the notion. Lastly, the lawyer can signify the client’s commitment to IPD through quality drafting to help a client meet his or her goals. And after the project is complete, the lawyer can help the client maintain and build on those relationships formed throughout the IPD process for future successful and prosperous projects and relationships.

\section*{VI. CONCLUSION}

The construction industry has been plagued by adversarial relationships that have resulted in unnecessary disputes, inefficiencies, divergent interests, poor quality and customer dissatisfaction. The United States faces the same inherent problem in reaching a conclusion regarding the national debt crisis – adversarial relationships that prohibit parties from good faith negotiations that will benefit the whole. However, with collaboration and a system like IPD, which provides financial and other incentives for collaboration, we can fix

\begin{itemize}
  \item \textsuperscript{260} \textit{Id.}
  \item \textsuperscript{261} Joseph Cleves, \textit{How to Control An Owner’s Risk in Construction}, \textsc{The DBL Law Blog} (January 27, 2010), \url{http://www.dbllaw.com/2011/01/control-owners-risk-in-construction/}.
  \item \textsuperscript{262} \textit{Id.}
  \item \textsuperscript{263} \textit{Id.}
\end{itemize}
both problems. Lawyers can be the vehicles of change to stimulate this collaboration.
COURT-SANCTIONED GOVERNMENT OVERREACH:
THE SUPREME COURT’S RECENT DECISION IN
ASHCROFT V. AL-KIDD

Jeremiah Schlotman*

I. INTRODUCTION

In post-9/11 United States, there has seemingly been a constant battle
between those lining up on the side of national security and those advocating in
defense of civil liberties. Indeed, there are large numbers of American citizens
who are perplexed or even outraged by the willingness of some attorneys to
undertake pro bono representation of suspected terrorists. However, in spite of
the attractiveness of simplified labels of national security versus civil liberties or
pro-defense versus appeasers, the reality is complicated. There is, and always
has been, a balancing act between constitutional protections and national
security concerns. There are myriad issues that arise in this context, and they are
all the more sharpened in a post-9/11 world.

This paper will focus on the recent Supreme Court decision in Ashcroft v. al-
Kidd,¹ arguing that the decision legitimizes the idea that the Warrant Clause of
the Fourth Amendment is inapplicable to material witness warrants and thereby
sets a potentially dangerous precedent that Congress can legislate around the
right to be free from unreasonable searches and seizures. Part II provides
background and facts pertaining to both material witness warrants and relevant
Fourth Amendment jurisprudence. Part III analyzes the Supreme Court decision
in Ashcroft v. al-Kidd and its implications. Part IV considers alternatives to the
approach currently employed by the United States government in its attempt to
further its legitimate aim of combating terrorism. Ultimately, it argues that a
judicial solution is necessary.

II. MATERIAL WITNESS WARRANTS UNDER 4TH AMENDMENT JURISPRUDENCE

The first Judiciary Act of 1789 authorized the detention of material
witnesses.² The Act stated: “[C]opies of the process [against the person
accused] shall be returned as speedily as may be into the clerk’s office of such
court, together with the recognizances of the witnesses for their appearance to

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1. 131 S. Ct. 2074 (2011).
2. Judiciary Act, ch. 20, § 33, 1 Stat. 73, 91 (1789).
testify in the case; which recognizances the magistrate before whom the
examination shall be, may require on pain of imprisonment." This material
witness statute was the codification of “the long established rule in English Law,
in effect when the United States became a nation,” that the Government (or
upon motion by the defendant) had the authority to arrest an individual because
her testimony was material to a trial. Since the initial enshrinement of English
common law into American statutory law, detention of material witnesses has
existed in some statutory form either as federal statutes or under the Federal
Rules of Criminal Procedure.

Federal Rule of Criminal Procedure (FRCP) 46(b), adopted in 1946,
provided for the granting of bail for a witness whose testimony was material in a
criminal proceeding. As a result of the adoption of FRCP 46(b), federal
statutory authority providing for the arrest of material witnesses was repealed in
1948. Although FRCP 46(b) did not mention the arrest of a material witness,
and the legislative history of the 1948 Act of Congress which repealed the statute
that granted authority to arrest material witnesses mentioned the effect of FRCP
46(b) on the decision to repeal the statutory authority, the Ninth Circuit Court of
Appeals held that the power to arrest a material witness arose “by implication"
from FRCP 46(b) and the Bail Reform Act enacted in 1966. Indeed, the

5. Cochran, Material Witness Detention at n. 9 (2010) (“The duty was imposed in criminal cases by the Second Act of Philip and Mary in 1555, which enabled the Crown to bind over witnesses (defendants did not gain the ability to compel witnesses until the late 1600's), and in civil cases in 1562 by the Statute of Elizabeth.”) (parenthetical in original) (citing Stacey M. Studnicki & John P. Apol, Witness Detention and Intimidation: The History and Future of Material Witness Law, 76 St. John's L. Rev. 483, 487-88 (2002) [hereinafter Witness Detention and Intimidation]).
6. Fed. R. Crim. P. 46(b) (amended 1966) (The relevant provision read: “(b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.”).
8. Bacon, 449 F.2d at 938 (noting, inter alia, that the uninterrupted history of the authority to arrest material witnesses when justice so requires; the “strong suggestion that Congress thought the repealed provisions were superseded” by FRCP 46(b); the fact that 18 U.S.C. § 3149, part of the Bail Reform Act, explicitly stated that the FRCP had the “force and effect of statutes, and supersede all prior conflicting laws;” and the long history of arrests of material witnesses in English history, which the United States inherited, all mitigated in favor of holding FRCP 46(b) and § 3149 together to grant the authority to arrest material witnesses, especially since, without the authority to arrest, the power of courts to grant bail for witnesses and to set conditions of release for witnesses held for an unreasonable amount of time would amount to a nullity, i.e., courts would lack the
constitutionality of the material witness statute promulgated in the Judiciary Act of 1789 “apparently ha[d] never been doubted.” And all fifty states have statutes providing for the detention of material witnesses.

The current version of the federal material witness statute came into existence under the Bail Reform Act of 1984, which amended the Bail Reform Act of 1966. The Bail Reform Act of 1984 made two major changes to the previous version of the material witness statute. First, the new statute provided that the “material witness be treated in accordance with section 3142 (pertaining to the release or detention of a defendant pending trial), [which] permits the judge to ‘order the detention of the witness if there were no conditions of release that would assure [the] appearance [of the witness].’” The other significant change “was to finally grant the court specific authority to arrest the witness.”

With the explicit statutory authority, courts no longer needed to rely on the Ninth Circuit’s *Bacon v. United States* interpretation that the authority to arrest a material witness arose “by implication” from FRCP 46(b) and the Bail Reform Act of 1966. The Bail Reform Act of 1984 provided in relevant part:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness

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11. *Bacon*, 449 F.2d at 939.
17. *Bacon*, 449 F.2d at 938. It should be noted, however, that in the nearly thirteen years between the decision in *Bacon* and passage of the explicit authorizing language found in the Bail Reform Act of 1984, the Ninth Circuit’s decision was not questioned by either the Supreme Court or any federal courts; in fact, it was widely cited in support of the proposition that courts could authorize the arrest of material witnesses if justice so required. Indeed, it has only been distinguished twice—by Washington state courts—and the first instance did not occur until 1996 in *State v. Nelson*, 914 P.2d 97, 101 n. 23 (Wash. Ct. App. 1996), the second time being *State v. Fisher*, 35 P.3d 366, 375-76 (Wash. 2001) (en banc), and only disagreed with once, in *United States v. Awadallah*, 202 F. Supp. 2d 55, 63 (S.D.N.Y. 2002).
may be delayed for a reasonable period of time until the deposition of
the witness can be taken pursuant to the Federal Rules of Criminal
Procedure.18

The first major change is noteworthy.19 Section 3142 deals with treatment of a
defendant pending trial.20 Thus, “[u]pon appearance before a judicial officer,” a
material witness, upon order of the judicial officer, will be (1) released on
personal recognizance or upon execution of an unsecured appearance bond; (2)
released on a condition or combination of conditions; (3) temporarily detained to
permit revocation of conditional release, deportation, or exclusion; or (4)
detained.21 Bringing the material witness statute in line with 18 U.S.C. § 3142
cured ambiguity regarding the release of a material witness under the repealed
statute.22 However, the revision “also opened the door to the potential abusive
treatment of material witnesses, since witnesses now can be treated in the same
manner as a criminal defendant.”23

FRCP 46 was amended each time the Bail Reform Act was amended in order
to conform to the material witness statutes contained therein.24 Thus, FRCP 46
charges the court with the responsibility of supervising the detention of any
person held as a material witness within its district to eliminate unnecessary
detention.25 Additionally, a government attorney must report biweekly to the
court regarding any person held as a material witness for more than ten days, and
the attorney must state the reasons justifying the prolonged detention.26 The
reporting requirement aligns with the legislative history of the Bail Reform Act
of 1984, which contained the statement: “the Committee stresses that whenever
possible, the depositions of such witnesses should be obtained so that they may
be released from custody.”27

In practice, it was common to attain warrants for the arrest of a material
witness.28 The Bacon court did “not decide whether, if ever, a material witness
may be arrested and detained with probable cause but without a warrant,”29 as
that issue was not before the court, but rather held that in order for a material
witness arrest warrant to issue, the party seeking the warrant must demonstrate

19. Id.
22. Studnicki & Apol, Witness Detention and Intimidation, supra note 5, at 493.
23. Studnicki & Apol, Witness Detention and Intimidation, supra note 5, at 493. (citing 18
U.S.C. § 3144 (2006)).
27. Studnicki & Apol, Witness Detention and Intimidation, supra note 5, at n. 54 (citation
omitted).
28. Studnicki & Apol, Witness Detention and Intimidation, supra note 5, at 497.
29. Bacon, 449 F.2d at 943.
probable cause to believe that the “specific criteria” in the statute are satisfied. That is, “[b]efore a material witness arrest warrant may issue, the judicial officer must have probable cause to believe (1) that the testimony of a person is material and (2) that it may become impracticable to secure his presence by subpoena.”

In the case of a grand jury witness, the Bacon Court held that “a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy criterion (1) . . . because of the special function of the grand jury; it has exceedingly broad powers of investigation, and its proceedings are secret,” and there is therefore no realistic manner for a court to assess whether criterion (1) is satisfied. However, “as to criterion (2), sufficient facts must be shown to give the judicial officer probable cause to believe that it may be impracticable to secure the presence of the witness by subpoena. Mere assertion will not do.”

The issue of warrantless arrests of material witnesses has never been addressed by the Supreme Court, and though there is a paucity of case law on the subject, there are divisions among several courts. In White v. Gerbitz, the Sixth Circuit upheld a Tennessee law that permitted the warrantless arrest of material witnesses as long as it is supported by probable cause. Similarly, the court in State v. Hand, after emphasizing the long history of the importance of witness testimony to judicial proceedings, observed that the material witness statutes lacked any mention of the need to attain a warrant before arresting a material witness. Here, the court consequently looked to common law; since no “New Jersey court of higher jurisdiction had expressly applied or approved [the] common law rule [regarding arrest of material witnesses] and the rule had not been declared by legislative enactment,” the court primarily looked at public policy in determining whether the common law regarding the warrantless arrest of material witnesses should be continued. As a result, the court “construe[d] the common law to be that a peace officer may arrest without a warrant when he has a reasonable basis or probable cause to believe a person is a necessary and material witness to a crime punishable by imprisonment for more than one year and that person might be unavailable for service of subpoena.”

30. Id. (relying on Giordenello v. United States, 357 U.S. 480, 485 (1958)).
31. Id. (internal quotation marks omitted) (relying on former Fed. R. Crim. P. 46(b) and former 18 U.S.C. § 3149 (repealed 1984)).
32. Id.
33. Id.
34. See Studnicki & Apol, Witness Detention and Intimidation, supra note 5, at 507-10.
35. 892 F.2d 457 (6th Cir. 1989).
36. Id. at 460.
38. See id. at 892.
39. Id. at 893.
40. Id.
41. Id. at 893-94.
42. Id. at 895.
In the more recent case of *State v. Hernandez-Lopez*, 43 the Iowa Supreme Court, so that it would “comport with constitutional principles,” 44 construed the state’s material witness statute requirement that a police officer believe a material witness “might” become unavailable to mean that the officer has probable cause to believe that the material witness will be unavailable for trial. 45 The court declared its preference that officers attain arrest warrants from a neutral magistrate. However, it recognized that there may be exigent circumstances that make attainment of an arrest warrant impracticable. 46 Thus the court subjected arrestees under the material witness statute to the same standards, at least procedurally, as those arrested without a warrant based on suspicion of criminal wrongdoing.

The Fourth Amendment and Warrantless Arrests

If asked whether a police officer could arrest an individual without a warrant, most laypersons would probably say yes. There is plenty of case law from the highest court in the nation which supports the proposition that a police officer may make a warrantless arrest of an individual whom she suspects of criminal wrongdoing if there is probable cause for the arrest. 47 This is because an unbending requirement that police officers attain a warrant before effectuating an arrest “would constitute an intolerable handicap for legitimate law enforcement.” 48 In determining whether probable cause existed for an arrest, courts apply a totality-of-the-circumstances approach regardless of the arrest being warrantless. 49

Indeed, the Supreme Court has expressly validated statutes that authorize the warrantless arrest of an individual whom there is probable cause to arrest, even when it is practicable to secure a warrant. 50 In *Watson*, the Supreme Court overturned the Ninth Circuit’s ruling that “notwithstanding . . . [the reliability of

43. 639 N.W.2d 226 (Iowa 2002).
44. Id. at 239.
45. Id.
46. Id. at 242 (citing *Hand*, 242 A.2d at 895).
47. See *Carroll* v. United States, 267 U.S. 132, 138 (1925); see also *Brinegar* v. United States, 338 U.S. 160, 165, 175-76 (1949) (stating that the “Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable . . . . On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause,” and “[p]robable cause exists where ‘the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed’) (parentheticals omitted) (quoting *Carroll*, 267 U.S. at 162); see also *Gerstein* v. Pugh, 420 U.S. 103, 113-14 (holding that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest,” but only for the initial arrest when securing the arrest warrant is “practical”) (emphasis added).
the informant and the existence of probable cause for arresting Watson [for possession of stolen mail], the . . . arrest [was] unconstitutional because the postal inspector had failed to secure an arrest warrant although he conceded he had time to do so." In reversing the Ninth Circuit, the Court explained that the relevant statute

expressly empowers the Board of Governors of the Postal Service to authorize Postal Service officers and employees performing duties related to the inspection of postal matters to make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.52

In this case, the Board of Governors of the Postal Service had in fact promulgated regulations that authorized warrantless arrests by Postal Service employees.53 Furthermore, Congress had historically authorized, by statute, various federal officers to make warrantless felony arrests as long as there was probable cause.54 “Moreover, there is nothing in the Court’s prior cases indicating that under the Fourth Amendment a warrant is required to make a valid arrest for a felony. Indeed, the relevant prior decisions are uniformly to the contrary.”55 Thus, although the Postal Inspector conceded he had time to attain a warrant, the Court evaluated not whether there was time to attain a warrant, but rather if there was probable cause to make a warrantless felony arrest.56

Therefore, “because the ultimate touchstone of the Fourth Amendment is reasonableness[,] . . . the warrant requirement is subject to certain reasonable exceptions,”57 and one of these is a warrantless search or seizure authorized by “an Act of Congress, especially when it turns on what is reasonable.”58 The only area approximating an exception to this Fourth Amendment rule is the home. 59 In Payton, the Supreme Court held “that the Fourth Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest.”560 Indeed, the Court overturned the decision of the Court of Appeals of New York, which had relied

51. Id. at 414.
52. Id. at 415 (citing 18 U.S.C. § 3061(a)(3) (2006)).
53. Id.
54. Id. (noting that United States Marshals, agents of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Secret Service, and the Customs Service all have statutory authority to make warrantless arrests as long as there is probable cause to do so).
55. Id. at 416-17.
56. Watson, 423 U.S. at 417.
58. Watson, 423 U.S. at 416.
60. Id. at 576.
upon a settled New York statute that granted police officers authority to make warrantless arrests in the homes of suspects. The Supreme Court reasoned that while the Fourth Amendment protects individuals’ privacy in numerous settings, privacy is at its highest in the home. The Court noted that a fundamental principle of the Fourth Amendment is that searches and seizures inside a home without a warrant are presumptively unreasonable, and declared that “the Fourth Amendment has drawn a firm line at the entrance to the house.” At the end of the day, however, even the home is subject to a mere reasonableness standard. That is, the Court has held that probable cause accompanied by exigent circumstances make warrantless searches and seizures within an individual’s home reasonable searches and seizures.

In order to determine whether a search or seizure by a government actor is reasonable, courts, regardless of the actor’s state of mind, determine whether an objective evaluation of the circumstances justifies the search or seizure. The Court has held “that the Fourth Amendment’s concern with reasonableness allows certain actions to be taken in certain circumstances, whatever the subjective intent.”

III. ASHCROFT V. AL-KIDD AND ITS REPERCUSSIONS

In its recent decision in Ashcroft v. al-Kidd, the Supreme Court addressed the question of “whether a former Attorney General enjoys immunity from suit for allegedly authorizing federal prosecutors to obtain valid material-witness warrants for detention of terrorism suspects whom they would otherwise lack probable cause to arrest.” This paper will not address at length the absolute immunity and qualified immunity analyses undertaken by the Court, but rather will examine its Fourth Amendment holding and the accompanying implications. That being said, it is true that the question of Attorney General Ashcroft’s immunity vel non from suit depends on the Fourth Amendment question. That is, if Ashcroft violated al-Kidd’s Fourth Amendment rights through pretextual use of the material witness statute, and it was clearly established that such use was violative of al-Kidd’s Fourth Amendment rights, then Ashcroft was subject to a lawsuit for money damages by al-Kidd.

The Court held unanimously that Ashcroft was entitled to qualified immunity because al-Kidd’s right to be free from pretextual use of the material witness statute was clearly established.

61. Id. at 590.
62. Id. at 586 (internal quotation marks omitted).
63. Id. at 590.
64. See King, 131 S. Ct. at 1856; see also Payton, 445 U.S. at 590.
67. 131 S. Ct. 2074 (2011).
68. Id. at 2079.
70. Justice Kagan took no part in the consideration of the case.
witness warrant was not “clearly established” at the time Ashcroft allegedly promulgated the policy. However, the Court split five to three on al-Kidd’s Fourth Amendment claim on the merits. Justices Ginsburg, Sotomayor, and Breyer did not join the majority’s opinion “because it unnecessarily resolve[s] [a] difficult and novel questio[n] of constitutional . . . interpretation that will have no effect on the outcome of the case.”

The majority, meanwhile, reached the merits of al-Kidd’s claim because although it required “expending ‘scarce judicial resources’ to resolve [a] difficult and novel question[] of constitutional or statutory interpretation that will ‘have no effect on the outcome of the case,’” it disagreed with the Ninth Circuit’s constitutional analysis and holding and therefore sought to “reverse [the Ninth Circuit’s] erroneous judgment [in order to] ensure that courts do not insulate constitutional decisions at the frontiers of the law from [the Supreme Court’s] review or inadvertently undermine the values qualified immunity seeks to promote.” The result was the five-justice majority’s holding “that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive.”

In the course of arriving at its holding, the majority distinguished City of Indianapolis v. Edmond, on which the court of appeals principally relied, and al-Kidd’s argument based on Whren. At the appellate level, the Ninth Circuit applied Edmond, rather than Whren, because the Government lacked probable cause of any criminal wrongdoing on the part of al-Kidd and therefore instead preventively detained al-Kidd under the material witness statute in order to investigate al-Kidd’s suspected terrorist ties. “[P]rogrammatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion. Accordingly, Whren does not preclude an inquiry into programmatic purpose in such contexts.” On appeal, the Supreme Court held this view to be “mistaken, [for i]t was not the absence of probable cause that triggered the invalidating-purpose inquiry in Edmond. To the contrary, Edmond explicitly said that it would approve checkpoint stops for ‘general crime control purposes’ that were based upon merely ‘some quantum of individualized suspicion.’” The Court then

71. al-Kidd, 131 S. Ct. at 2085, 2087 (Ginsburg, J., concurring), see also id. at 2089 (Sotomayor, J., concurring).
72. Id. at 2089-90 (Sotomayor, J., concurring) (internal quotation marks and citation omitted).
73. Id., 131 S. Ct. at 2080.
74. Id.
75. Id. at 2085.
76. 531 U.S. 32 (2000).
78. See al-Kidd v. Ashcroft, 580 F.3d 949, 968 (9th Cir. 2009).
79. Id. (quoting Edmond, 531 U.S. at 45-46).
80. al-Kidd, 131 S. Ct. at 2081 (quoting Edmond, 531 U.S. at 47).
distinguished the case before it by emphasizing the fact that al-Kidd was detained as a material witness pursuant to a warrant issued by a neutral magistrate, which, in the Court’s view, established that there was individualized suspicion to detain al-Kidd.81

The majority similarly dismissed al-Kidd’s argument that courts ignore subjective intent only if the Government detains an individual based upon probable cause to believe that the individual is guilty of a violation of the law.82 The majority declared al-Kidd’s reading of Whren and related cases to be too narrow,83 and clarified that in Whren, the Court “referred to probable cause to believe that a violation of the law had occurred because that was the legitimating factor in the case at hand. But the analysis of [its] opinion swept broadly to reject inquiries into motive generally.”84 Because al-Kidd was detained pursuant to a warrant issued by a neutral magistrate, i.e., based on individualized suspicion, the majority found it of no import whether Ashcroft or the specific government agent requesting the arrest warrant had an improper motive. Indeed, the majority opined that al-Kidd, because the process was subjected to the judgment of a neutral magistrate, was afforded more protections than those subjected to warrantless searches and seizures under the standards found in Whren,85 Devenpeck v. Alford,86 Terry v. Ohio,87 and United States v. Knights,88 where searches or seizures were upheld as constitutional.89

Finally, the majority gave short shrift to al-Kidd’s argument that the seizure of his person belongs in the category of the “special needs” cases.90 Because the Government seized al-Kidd without probable cause that he had violated the law, al-Kidd argued that the “special needs” cases apply rather than Whren; that is, the subjective intent of the government actor does matter.91 “A judicial warrant and probable cause are not needed where the search or seizure is justified by special needs, beyond the normal need for law enforcement.”92 However, as already discussed, the Court held that Whren “swept broadly to reject inquiries into motives generally.”93 Moreover, the Court held that the special needs and

81. Id. at 2082.
82. Id.
83. Id.
84. Id.
86. 543 U.S. 146 (2004).
87. 392 U.S. 1 (1968).
89. al-Kidd, 131 S. Ct. at 2082 (noting that in Whren and Devenpeck, the Court “declined to probe the motives behind seizures supported by probable cause but lacking a warrant approved by a detached magistrate,” and that in Terry and Knights the Court “applied an objective standard to warrantless searches justified by a lesser showing of reasonable suspicion”).
90. See id. at 2080-81.
92. al-Kidd, 131 S. Ct. at 2081.
93. Id. at 2082.
administrative search cases were inapplicable because “[t]he Government [sought] to justify the arrest of [al-Kidd] on the basis of a properly issued judicial warrant.” 94 The majority was sure to emphasize that the exceptions to the objective Fourth Amendment inquiry were “limited exceptions.” 95

IV. ALTERNATIVE JUDICIAL SOLUTIONS IN THE WAR ON TERROR

Although it was unnecessary to resolve the novel constitutional question of whether the Government is permitted to use the material witness statute to preventively detain terrorism suspects even though it lacks probable cause to believe they are or have engaged in criminal activity, 96 the Court reached the merits and effectively upheld the constitutionality of the material witness statute. 97 The Court’s decision in al-Kidd was the first time the Supreme Court addressed the constitutionality of the pretextual use of the material witness statute, since 9/11 “courts ha[d] permitted this troubling investigative tactic.” 98 Only one court upheld a challenge to the material witness statute; in United States v. Awadallah, 99 the district court judge held that the statute only applied to criminal proceedings and not to grand jury investigations. Judge Sheindlin arrived at this conclusion because grand jury investigations are shrouded in secrecy, which was contrary to the Bacon court’s holding that, precisely because grand jury investigations are secret, a court must take a responsible government official at her word that a witness’s testimony is material. 100 However, Judge Sheindlin reasoned that if a judge abdicates their role by delegating her authority to the government, they read the materiality requirement out of the statute. 101 Nonetheless, Judge Sheindlin’s holding was not cause for optimism, and it certainly was not an indication that “courts’ attitudes [were] changing.” 102

Courts have routinely issued material witness arrest warrants at the request of the government, even in cases such as al-Kidd where the requesting government official withheld important information from the magistrate judge that would have likely militated against the issuance of an arrest warrant. 103 Indeed, the majority begins its analysis with the assumption that the material witness warrant was valid. However, al-Kidd’s case is fraught with factual

94. Id. at 2081.
95. Id.
96. See al-Kidd, 131 S. Ct. at 2080, 2087 (Ginsburg, J., concurring), 2089 (Sotomayor, J., concurring).
97. See generally Watson, 423 U.S. 411 (1976) (noting that Congress frequently authorizes warrantless searches and seizures, which is acceptable as long as it is reasonable within the meaning of the Fourth Amendment).
100. See supra text accompanying note 31.
102. Levenson, supra note 98, at 1224.
103. See al-Kidd, 131 S. Ct. at 2088 (Ginsburg, J., concurring).
difficulties. The “majority assumes away these factual difficulties[,] . . . [which] point[s] to the artificiality of the way the Fourth Amendment question has been presented to this Court and provide[s] further reason to avoid rendering an unnecessary holding on the constitutional question.”

“The groundwork for using material witness warrants to effect preventive detention was laid in the Salerno decision,” which was a continuation of the Supreme Court’s recognition of the validity of congressional statutes authorizing warrantless searches and seizures. In Salerno, the majority stated:

[The Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest. For example, in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous. Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons.]

The majority pointed to several cases in which the Supreme Court applied this “balancing test.” In Salerno, the respondents challenged their pretrial detention pursuant to an order of a judge, which, in turn, was based on the likelihood of future dangerousness of the respondents pursuant to the Bail Reform Act. The majority rejected this challenge and stated that even accepting respondents’ “‘general rule’ of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial,” there are many cases that represent “a sufficient number of exceptions to the rule that the congressional action challenged here can hardly be characterized as totally novel.” Given the number of exceptions, the majority characterized this as “the well-established authority of the government, in special circumstances, to restrain individuals’ liberty prior to or even without criminal

104. Id. at 2090 (Sotomayor, J., concurring).
106. Levenson, supra note 98, at 1225.
108. Levenson, supra note 98, at 1225 (quoting Salerno, 481 U.S. at 748).
109. Salerno, 481 U.S. at 748-49 (citing Ludecke v. Watkins, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens during time of war), Moyer v. Peabody, 212 U.S. 78 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection), Carlson v. Landon, 342 U.S. 524 (1952); Wong Wing v. United States, 163 U.S. 322 (1896) (finding no absolute constitutional barrier to detention of resident aliens pending deportation proceedings); Addington v. Texas, 441 U.S. 418 (1979) (detention of mentally unstable individuals deemed to be a danger to the public); Jackson v. Indiana, 406 U.S. 715 (1972); Greenwood v. United States, 350 U.S. 366 (1956) (detention of dangerous defendant who becomes incompetent to stand trial); Gerstein v. Pugh, 420 U.S. 103 (1975) (detention of individual suspected of crime until a neutral magistrate determines whether probable cause exists); Bell v. Wolfish, 441 U.S. 520 (1979) (incarceration of individual deemed a flight risk until trial)).
111. Salerno, 481 U.S. at 749.
112. Id.
trial and conviction.” In any Fourth Amendment “balancing,” a court weighs the government’s interest against the individual’s interest in liberty. The majority wrote that, “[w]e do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government’s interest is sufficiently weighty, be subordinated to the greater needs of society.”

To be sure, the discussion in Part I regarding the historical significance of witness testimony and the codification of material witness detention during the United States’ nascence illustrates that there is more than enough ammunition for one to argue that the government’s interest (and that of the public) “is sufficiently weighty” to tip the balance against the individual’s “strong interest in liberty.” The application of a judicial balancing test reflects the need to be responsive to the ever-changing needs of society, which the government is entrusted to protect. Yet the ad hoc nature of this test allows the judiciary to declare any specific situation to entail an interest weighty enough to outweigh an individual’s interest in liberty. The uncertainty and fear characteristic in our age of terrorism leaves individuals’ strong Fourth Amendment interest in liberty particularly susceptible to subjugation to the government’s national security interest in protecting the very existence of its citizens. It would take a principled judiciary to give the “individual’s strong interest in liberty” its proper weight, especially when popular opinion and the political branches react powerfully to acts of terrorism.

Notwithstanding the overreaching of the al-Kidd Court, there is a glimmer of hope—the opinion never once mentions the term “absolute immunity.” The government argued extensively, in both its briefs and at oral argument, that seeking a material witness warrant is a prosecutorial function and Attorney General Ashcroft was therefore entitled to absolute immunity. The

113. Id.
114. Id. at 750.
115. Id. at 750-51.
116. Perhaps it should come as no surprise that Chief Justice Rehnquist delivered the majority opinion in Salerno. Then-Justice Rehnquist delivered the opinion of the Court in New York v. Quarles, 467 U.S. 649 (1984), in which the five-justice majority carved out a “public safety” exception to the rule enunciated in Miranda v. Arizona, 384 U.S. 436 (1966). It is certainly possible to declare that public safety, i.e., “the greater needs of society,” to use Salerno language, outweighs an individual’s right to be Mirandized in any given set of facts—it is an exception that clearly has the potential to swallow the rule. Likewise, in light of Salerno it is difficult to conceive of situations wherein Congress lacks the power to authorize warrantless searches and seizures (outside of the most egregious examples). Indeed, as long as statutes are couched in terms of “public safety” or “national security,” what recourse is available for individuals to vindicate their “strong interest in liberty”?
117. Salerno, 481 U.S. at 750.
118. See al-Kidd, 131 S. Ct. 2074.
government contended that seeking a material witness warrant is “intimately associated with the judicial process,” and “[i]t is quintessentially a prosecutorial function to obtain these warrants and has been for – for hundreds of years . . .”

Nevertheless, the Court focused its analysis on whether Ashcroft was protected by qualified immunity, and did “not address the more difficult question whether he enjoy[ed] absolute immunity.” It is interesting and unclear why the Court avoided the absolute immunity question—at oral arguments, Acting Solicitor General Katyal noted that the Supreme “Court has historically [addressed first whether absolute immunity applies], probably for reasons of constitutional avoidance, to not reach constitutional questions if there’s [sic] an absolute immunity question.” Whatever the Court’s reasons for instead grounding its judgment in a qualified immunity analysis (and thereby deciding the novel constitutional question presented), by doing so, it left the government’s post-9/11 use of the material witness statute subject to judicial scrutiny, an extremely important safeguard in a democratic society.

One could argue that there is possibly another ray of hope: the al-Kidd Court “reserv[ed] the possibility that probable cause for purposes of the Fourth Amendment’s Warrant Clause means only probable cause to suspect violation of a law.” Specifically, the Court stated:

> It might be argued, perhaps, that when, in response to the English abuses, the Fourth Amendment said that warrants could only issue “on probable cause” it meant only probable cause to suspect a violation of law, and not probable cause to believe that the individual named in the warrant was a material witness. But that would make all arrests pursuant to material-witness warrants unconstitutional, whether pretextual or not—and that is not the position taken by al-Kidd in this case.

This language suggests that material witness warrants are amenable to future constitutional attack. However, it is difficult to envision the Court, should it hear the issue in the relatively near future, holding “all arrests pursuant to material-witness warrants unconstitutional, whether pretextual or not” after deciding in al-Kidd that the pretextual use of valid material witness warrants is constitutional.

Moreover, a general constitutional challenge to material witness warrants could have the consequence of placing material witness warrants outside the realm of the Warrant Clause of the Fourth Amendment. In other words, “[i]f material witness warrants do not qualify as “Warrants” under the Fourth

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120. Transcript of Oral Argument, supra note 119, at 6-7.
121. al-Kidd, 131 S. Ct. at 2085.
123. al-Kidd, 131 S. Ct. at 2086 (Kennedy, J., concurring).
124. Id. at 2084-85.
125. Id. at 2085.
Amendment, then material witness arrests might still be governed by the Fourth Amendment’s separate reasonableness requirement for seizures of the person.”

This could create a perverse reality wherein law enforcement, in order to apprehend an individual suspected of committing a crime, must demonstrate probable cause in order to arrest her, while the government merely needs to meet the threshold of “reasonableness” in order to attain a warrant for a witness’s arrest and indefinite detention. Thus, the liberty of the suspected criminal is more sturdily bulwarked against constitutional violations than that of a mere witness. Additionally, in his dissent in *Salerno*, Justice Marshall warned of the danger of allowing the political branches of the federal government to legislate indefinite detention into existence. At the time, the case was the first of its kind to wind its way to the Supreme Court, but both the statute at issue in *Salerno* and the material witness statute in *al-Kidd* are “statute[s] in which Congress declares that a person innocent of any crime may be jailed indefinitely.”

In spite of the safeguards within the material witness statute itself, the potential for abuse of a statute permitting the government to indefinitely detain an individual is too great. Indeed, “[s]uch statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution.”

One need not look beyond the facts in the *al-Kidd* case to see that this is true. The risk of a repeat of the *al-Kidd* facts is especially great when the judiciary is required to accept the government at its word that a witness’s testimony is material.

The question then becomes one of finding a solution. The federal government is entrusted with the protection of national security, and is empowered to enact legislation and promulgate executive orders to this end. However, it is axiomatic that the federal government can only do so to the extent permitted by the Constitution. Thus, in the run-of-the-mill law enforcement context, a police officer, subject to limited exceptions, lacks the authority to search or seize an individual absent probable cause of criminal wrongdoing. This follows from the mandates of the Fourth Amendment, and the Supreme Court has held as much on numerous occasions. Yet material witness warrants, as Justice Kennedy suggests in his concurrence, may be outside the scope of the

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126. Id. at 2086 (Kennedy, J., concurring).
128. Id.
131. *al-Kidd*, 131 S. Ct. at 2088-89 (Ginsburg, J., concurring) (noting that the government misrepresented the facts to the magistrate to obtain a material witness warrant and subsequently incarcerated al-Kidd “in high-security cells lit 24 hours a day, strip-searched and subjected [him] to body-cavity inspections on more than one occasion, and handcuffed and shackled [him] about his wrists, legs, and waist”).
132. *Bacon*, 449 F.2d at 943. Indeed, this reality deteriorates what protections there are in the statute in the first place.
Warrant Clause. The implications of this suggestion are potentially vast. The standard may be mere “reasonableness,” rather than probable cause. The government would then yield the power to preventively detain individuals beyond the material witness context so long as the particular preventive detention is “reasonable.” Reasonableness would likely be measured by constitutional balancing. 

While this approach seems sensible, it subjects individuals’ strong liberty interests to the caprices of society and the government. Salerno serves as a good example - the Bail Reform Act of 1984 permitted a court to order that an arrestee, i.e., an individual not yet convicted of any crime, be detained while waiting for the trial process to wind its way to a close. A court could order this detention if it was satisfied that the government demonstrated by clear and convincing evidence “that no release conditions will reasonably assure . . . the safety of any other person and the community.” The Court held that the government’s interest in preventing crime and thereby protecting the community was sufficiently weighty to overcome the arrestees’ liberty interest. It was careful to couch its holding as a “carefully limited exception.” Nonetheless, once a “limited” exception is born, it is there waiting to be expanded. It can also lead to an emboldened Congress and legislatures around the country, leading to a proliferation of preventive detention statutes—as long as the interest is weighty enough to overcome the constitutional interest of the detained. As Justice Marshall pointed out, the protection and welfare of society is a common refrain used to justify the actions of totalitarian police states.

Ideally, the Supreme Court would scale back the innumerable exceptions to the Fourth Amendment, recognizing that “sometimes we must pay substantial social costs as a result of our commitment to the values we espouse.” Salerno dealt with the preventive detention of individuals, though innocent of any crime, deemed dangerous. In addition to this “limited exception,” there is the exception of the preventive detention of material witnesses. And the al-Kidd Court upheld the Attorney General’s use of the statute for the purpose of criminal investigations rather than that for which the statute was intended. While this approach may arguably make for more judicially manageable standards, it incentivizes disingenuous government practices. It leads to practices “fraught

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133. *al-Kidd*, 131 S. Ct. at 2086 (Kennedy, J., concurring).
134. *Id.*
135. See, e.g., *Salerno*, 481 U.S. at 748-49 (noting that government’s interest in community safety outweighed individual’s liberty interest).
136. *Id.* at 781.
137. *Id.*
138. See *id.* at 749-50.
139. *Id.* at 755.
142. *Id.* at 767.
with danger of excesses and injustice.” Indeed, it lends credibility to those that have historically argued that Fourth Amendment protections primarily protect criminals—if preventive detention, e.g., civil commitments or material witness warrants, is outside the Fourth Amendment probable cause requirement, innocent, everyday individuals are subject to the “reasonable” whims of government action. Yet suspected criminals would benefit from the elevated and familiar probable cause standard.

On the other hand, if the Court holds that different types of preventive detention are subject to the probable cause of criminal wrongdoing standard, it would hold government actors to a higher standard. At a minimum, the Supreme Court could require the government to demonstrate that it has probable cause to believe that statutory requirements of preventive detention are met. In this way, even if preventive detention statutes are found to be constitutional, the government would have to meet the adapted probable cause standard before a neutral magistrate. Alternatively, the Court could recognize that, in the Fourth Amendment context, national security concerns are distinct from run-of-the-mill law enforcement, which means that the government is not permitted to defend its tactics in the war against terrorism by using arguments developed in the Fourth Amendment criminal law enforcement context. However, the al-Kidd Court allowed the federal government to couch its argument in Fourth Amendment jurisprudence from the criminal law enforcement context, even though Ashcroft detained al-Kidd for national security reasons. Because the government continues to justify its practices in the name of national security, the Court will eventually be forced to confront the Fourth Amendment issues prevalent in the war against terrorism; it will not do to continue to pretend that the government’s interest in criminal law enforcement is the same as its interest in protecting national security. In the future, as cases make their way up the judicial ladder, the Supreme Court, although tempted to adhere to the familiar criminal law

143. Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950).
144. al-Kidd’s counsel argued that the Fourth Amendment only permits pretextual detention of individuals by government actors if there is probable cause of criminal wrongdoing. That is, there are two layers: 1) the reason why a law enforcement officer restrains the liberty of an individual, and 2) the true purpose behind why the officer restrained the individual. Mr. al-Kidd argued that the first layer must satisfy probable cause of criminal wrongdoing. See, e.g., Whren, 517 U.S. 806 (1996). Thus, because pretextual detention of an individual as a material witness could never meet this standard, al-Kidd argued that the government violated his constitutional rights. The Supreme Court rejected this argument. To be clear, al-Kidd was not conceding that the material witness statute was itself constitutional. To make his argument, he assumed the constitutionality of the statute. Transcript of Oral Argument, supra note 119, at 30.
145. See Cochran, Material Witness Detention, supra note 3, at 21-22 (arguing that the concept of “probable cause” is applicable to the material witness context, i.e., probable cause to believe that the witness’s testimony is material and that securing that witness’s testimony is not practicable).
146. To ensure governmental accountability and compliance with constitutional safeguards, the Bacon standard, which allows the government to merely assert that a grand jury witness’s testimony is material, would have to be rejected. This is what Judge Sheindlin did in Awadallah, 202 F. Supp. 2d 55, and it is the only way to check potential government abuses.
enforcement Fourth Amendment jurisprudence, should squarely address to what extent national security justifies searches and seizures and thereby develop its jurisprudence in this area.

While judicial recognition of the need to increase Fourth Amendment protections would be the most effective way to protect individuals’ liberty interests, it may also be the most improbable. Even if a plaintiff successfully challenged the constitutionality of a preventive detention statute, such as the one at issue in al-Kidd, it would take years, possibly decades, to receive a favorable judgment. Indeed, the Supreme Court may not even hear any such case until the courts below have dealt with the issue at length. This reality militates in favor of a legislative solution. Courts should not shirk their responsibility to protect the Constitution and faithfully apply the protections it contains. Yet if they fail to do so, a debate in the halls of Congress would at least force the government to stop hiding behind pretext. At a minimum, it would have to squarely face American citizens and residents and explain what it is doing to their constitutional rights in the name of national security.

The decision in al-Kidd demonstrates that, “[i]n the name of security, we have pushed the legal envelope by using laws that were created for other purposes to assist in detaining perceived enemies.” Abdullah al-Kidd’s “ordeal is a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times.” It is undeniable that the nation’s security is a legitimate interest; however, “we would be wise to heed Justice Marshall’s warning: ‘the coercive power of authority to imprison upon prediction . . . [poses a danger] to the cherished liberties of a free society.’”

It is not the intention of this article to cast dire predictions of impending totalitarianism. But it is paramount to remember that many societies in the past were relatively free and tranquil before the establishment of police states in their countries. Our constitutional protections have always separated us from those regimes and restrained government excess and power. Americans undoubtedly expect the United States government to protect the nation from threats to national security, but they also expect it to do so in a manner respectful of the Constitution. Many police states were safe from threats, both from within and without. The United States has numerous tools to keep its people safe in a constitutionally permissible fashion.

In sum, national security is a legitimate governmental objective. Yet it cannot be allowed to trample constitutional guarantees at will. Courts should not

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147. This is especially true depending on the procedural posture of the case.
148. See, e.g., Cochran, Material Witness Detention, supra note 3, at 38.
149. Levenson, supra note 98, at 1225.
150. al-Kidd, 131 S. Ct. at 2089 (Ginsburg, J., concurring).
151. Levenson, supra note 98, at 1226 (quoting Salerno, 481 U.S. at 766 (1987) (Marshall, J., dissenting)).
be complicit in the government’s use of national security as justification to enact and execute any program and policy it wants. Many judges recognize this. And it is why Judge Sheindlin, in the Southern District of New York, refused to order the detention of Awadallah based upon the mere assertion of the government that his testimony was material. And it is also why it is important that individuals continue to mount constitutional attacks to preventive detention statutes. The Supreme Court has eroded Fourth Amendment protections over the last quarter century, yet legal challenges take some time to reach the Supreme Court; and the Court’s membership changes over time. Additionally, a growing consensus in the judiciary of the need to remain vigilant in the post-9/11 era could lead to a positive result at the Supreme Court. As the federal government continues to engage in questionable practices in the name of national security, more information regarding these practices will come to light. It is true that public debate in Congress would force the political branches to flesh out the merits and drawbacks of particular policies and tactics and come to a deliberate conclusion. This would certainly be a step forward; however, political branches are myopic and often full of double-speak and mistruths, while only concerned with winning the next election.

Thus, the judiciary will likely be the creator of a thoughtful and constitutional balance. The Supreme Court can be complicit in the federal government’s attempt to circumvent constitutional protections, as it did in *Plessy v. Ferguson*152 Or it can discharge its duty to assess the constitutionality of legislation and strike it down where appropriate, in the face of opinion polls and political sentiment to the contrary, as it did in *Brown v. Board of Education*153 or *Plyler v. Doe*.154 Indeed, when expedience makes defense of constitutional guarantees too costly for the political branches, the courts stand as the last safeguard against government overreach. Fear and insecurity in the age of terrorism can make it politically unpopular to defend civil liberties. That is why it is important that individuals and advocates continue to bring constitutional challenges to the federal government’s practices and force courts to reconcile those practices with the principles upon which the United States was founded.

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