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I. THE CORONAVIRUS CRISIS

In addition to its human toll, the coronavirus pandemic has had massive economic effects. It has produced staggering layoffs, millions of claims for unemployment compensation, and unprecedented federal aid. Given these

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economic effects, it is not surprising that the pandemic has also affected the insurance industry. Lloyd's of London has stated that it "expects coronavirus-related losses to the insurance sector to be the largest to date," exceeding $100 billion.[1]

Many businesses affected by the pandemic have turned to their insurers seeking "business interruption" coverage. As its name suggests, this coverage typically reimburses the policyholder for costs incurred when the business is unable to open.[2] The standard form policy for business interruption covers "loss of Business Income" due to suspension of the policyholder's operations "caused by direct physical loss of or damage to property" at an insured premises.[3] Policyholders can also purchase "Civil Authority" coverage, which insures against losses "caused by action of civil authority that prohibits access to" the policyholder's property, so long as, among other things, "[t]he action of civil authority is taken in response to dangerous physical conditions" at neighboring properties.[4] Some policies contain a "Virus Exclusion," which excludes "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[5]

Insurers have denied policyholders' pandemic-related claims, contending that they only have to cover business interruption that results from a "physical injury" and that the damage that results from infestation with the coronavirus or a governmental shutdown order does not constitute "physical injury."[6] Insurers have also cited the virus exclusions in denying coverage.[7]

1. Elliot Smith, *Coronavirus Will Be the Largest Loss on Record for Insurers, Lloyd's of London Says*, CNBC (May 14, 2020), https://www.cnbc.com/2020/05/14/lloyds-of-london-coronavirus-will-be-largest-loss-on-record-for-insurers.html.

2. *See* Insurance Definitions, *Business Income Coverage*, Int'l Risk Mgmt. Inst., Inc., https://www.irmi.com/term/insurance-definitions/business-income-coverage (last visited June 12, 2020) (defining *business interruption coverage* as "commercial property insurance covering loss of income suffered by a business when damage to its premises by a covered cause of loss causes a slowdown or suspension of its operations").

3. The standard form used by the insurance industry for business interruption coverage is ISO Form CP 00 30 10 12 (2011), *available at* https://www.northstarmutual. com/UserFiles/Documents/forms/policyforms/Current/CP%2000%2030%2010%2012.pdf (last visited June 12, 2020).

4. *Id.*

5. ISO Form CP 01 40 07 06 (2006), *available at* https://www.northstarmutual.com/UserFiles/File/forms/policyforms/Current/CP%2001%2040%2007%2006.pdf.

6. *See, e.g.*, Amelia Lucas, *Insurers Are Denying Coronavirus Claims. Restaurants Are Fighting Back*, CNBC (Apr. 20, 2020 12:34 PM), https://www.cnbc.com/2020/04/20/insurers-are-denying-coronavirus-claims-restaurants-are-fighting-back.html.

7. *Id.*

II. LEGISLATIVE RESPONSES TO THE CRISIS

One response to the industry's position has been a plethora of lawsuits by policyholders asserting claims for coverage for business interruption caused by the pandemic. Courts have split on whether these claims are covered.[8]

Another response has been introduction of legislation voiding virus exclusions and/or defining physical injury to include coronavirus. Bills have been introduced in several states that seek to provide relief to policyholders affected by the pandemic.[9] These bills generally provide that, notwithstanding any other law or policy language to the contrary, every insurance policy that insures against loss or damage to property which includes the loss of use and occupancy and business interruption shall be construed to include coverage for business interruption resulting from COVID-19.[10] The bills also typically prevent insurers from relying on virus exclusions in their policies to deny coverage. Finally, many of the bills provide mechanisms for insurers to seek reimbursement from a fund established and managed by the state for losses paid related to COVID-19.[11]

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8. *Compare* Blue Springs Dental Care, LLC v. Owners Ins. Co., Case No. 4:20-cv-00383-SRB (W.D. Mo. Sept. 21, 2020), *available at* https://www.law360.com/articles/1312959/attachments/0 (denying motion to dismiss business interruption claim arising from COVID-19 pandemic), Studio 417, Inc. v. Cincinnati Ins. Co., Case No. 6:20-cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (same), *and* Optical Servs., USA/JCI v. Franklin Mut. Ins. Co., Dkt. No. BER-L-3681-20 (N.J. Super. Ct. Bergen Cty. Aug. 13, 2020) (same), *with* Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co., No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) (dismissing business interruption claim); 10E, LLC v. Travelers Indem. Co., No. 2:20-CV-04418-SVW-AS, 2020 WL 5095587 (C.D. Cal. Aug. 28, 2020) (same); Malaube LLC v. Greenwich Ins. Co., No. 22615-CIV-WILLIAMS/TORRES, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) (same); Diesel Barbershop LLC v. State Farm Lloyds, No. 5:20-CV-461-DAE, 2020 WL 4724305(W.D. Tex. Aug. 13, 2020) (same), Rose's 1 LLC v. Erie Ins. Exch., No. 2020-CA-0024B, 2020 WL 4589206 (D.C. Super. Aug. 6, 2020) (same), *and* Gavrilides Mgmt. Co. LLC v. Mich. Ins. Co., No. 20-258-CB-C30 (Mich. Cir. Ct. July 21, 2020), *available at* https://www.youtube.com/watch?v=Dsy4pA5NoPw &feature=youtu.be (same).

9. *Updated Legal Developments: Federal and State Legislation*, Gilbert LLP, https://www.gilbertlegal.com/updated-legal-developmentsstate-legislation (last modified Sept. 1, 2020). As of September 21, 2020, bills remain pending in Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and South Carolina. *See State Action on Coronavirus (COVID-19)*, Nat'l Conf. State Legislatures (Oct. 6, 2020), https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx.

10. *See Updated Legal Developments*, *supra* note 9.

11. *Id.* Recently, legislation has been introduced in some states that takes a different approach. In New Jersey, for example, in addition to the bill referenced in note 9 *supra*, legislators proposed a bill that authorizes insurers to offer a rider to a business interruption insurance policy, which includes, as a covered peril, coverage for global virus transmission or pandemic, or both. In Washington, D.C., legislation was enacted that tolls the running of all time periods for policyholders to exercise rights under their policies, or D.C. law, during the period of a public health emergency and for ninety days thereafter. *Id.* However, this article focuses on constitutional challenges to the most common form of proposed business interruption legislation, as discussed above.

For example, legislation introduced in South Carolina in April 2020 specifies that an insurer may not deny a COVID-19–related claim for business interruption on account of (a) COVID-19 being a virus, even if the policy excludes losses resulting from viruses; (b) there being no physical damage to the property; or (c) orders issued by any civil authority, or acts or decisions of a governmental entity.[12] In this way, the legislation anticipates (and rejects) potential arguments that would likely be raised by insurers in attempting to deny claims. Significantly, the legislation also permits insurers to seek relief and reimbursement from the state, as in other states' proposed bills.[13]

III. INSURANCE INDUSTRY RESPONSES TO THE PROPOSED LEGISLATION

Predictably, the insurance industry has objected to these legislative proposals. For example, Evan Greenberg, CEO of Chubb, has stated that state governments cannot force insurance companies to cover incidents not included in the policy. "You can't just retroactively change a contract. That is plainly unconstitutional," Greenberg told "Mad Money" host Jim Cramer.[14]

Law firms that defend insurers have similarly argued that the proposed legislation is unconstitutional. As one law firm put it, "This proposed legislation . . . is unfair and is likely unconstitutional, as it appears to run afoul of the Contracts Clause of the Constitution."[15] That Clause prohibits States from "pass[ing] any Law impairing the Obligation of Contracts."[16] The insurer lawyers contend that "the proposed legislation would substantially impair insurance policies, as [it] would operate to rewrite policies to cause them to cover a risk they do not currently cover."[17] While acknowledging that the Supreme Court has upheld state laws that impair contracts, so long as they are reasonably tailored to fulfill a legitimate interest, insurer counsel still contend that the proposed legislation is unconstitutional. Counsel

12. *Id.*

13. *Id.* A copy of this bill is reproduced in an appendix to this article. *See* App. A, *infra*.

14. *See* Tyler Clifford, *Chubb CEO: Forcing Insurers to Pay Pandemic Loss Claims Is 'Plainly Unconstitutional*,' Mad Money CNBC (Apr. 16, 2020 7:10 PM), https://www.cnbc.com/2020/04/16/chubb-ceo-making-insurers-cover-pandemic-losses-is-unconstitutional.html.

15. *See* Thomas S. Schaufelberger & Ian A. Mclin, *State Business Interruption Coverage Bills Likely Contain Constitutional Infirmities*, Saul Ewing Arnstein & Lehr LLP (Apr. 2020), https://www.saul.com/sites/default/files/Insurance_040120.pdf.

16. U.S. Const., art. I, § 10. The full text of Article I, Section 10, Clause 1, is as follows: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

17. Schaufelberger, *supra* note 15.

claim that the proposed laws do not fulfill a legitimate interest because they "arguably benefit[] only a narrow class of businesses; the public at-large is only an indirect beneficiary."[18] And counsel assert that the proposed laws are not "appropriate and reasonable" because they "attempt[] to shift the responsibility of providing financial assistance to small businesses from the government to certain insurance companies."[19]

Similarly, another firm has argued that the proposed legislation is inconsistent with the purpose of the Contracts Clause. In this firm's view, the Clause "was designed to limit the States from enacting retroactive debtor-relief laws" of the sort that were passed in response to the economic depression that followed the American Revolution.[20] According to this firm, "challenges to COVID-19 legislation that retroactively alter the terms of insurance policies to shift the economic burden of the pandemic will likely invoke arguments reminiscent of those serving as the original basis for the Contract Clause."[21]

IV. WHY THE INSURANCE INDUSTRY IS WRONG ABOUT THE CONTRACTS CLAUSE

The arguments that the proposed legislation violates the Contracts Clause are simply mistaken. The purpose, language, and drafting history of the Contracts Clause, as well as the case law interpreting it, all demonstrate that the proposed legislation would be constitutional.

18. *Id.*

19. *Id.*; *see also* Robert F. Callahan, Jr., *Proposed COVID-19 Legislation Thrusts Contract Clause's Original Purpose into Spotlight*, Robins Kaplan LLP (June 8, 2020), https://www.robinskaplan.com/resources/publications/2020/06/proposed-covid19-legislation-thrusts-contract-clauses-original-purpose-into-spotlight; Avi Weitzman & Mark A. Perry, *Constitutional Implications of Government Regulations and Actions in Response to the COVID-19 Pandemic*, 34 Westlaw J. White-Collar Crime (Apr. 16, 2020); Evan M. Tager, Eric A. White & Lawrence R. Hamilton, *Can They Do That? Possible Constitutional Limitations on State Efforts to Require Business-Interruption and Loss-of-Use Carriers to Cover Small Businesses' Losses from COVID-19*, Mayer Brown (Apr. 6, 2020), https://www.mayerbrown.com/en/perspectives-events/publications/2020/04/can-they-do-that--possible-constitutional-limitations-on-state-efforts-to-require-business-interruption-and-loss-of-use-carriers-to-cover-small-businesses-losses-from-covid19; Insurance Coverage and Bad Faith Alert, *New Jersey's Proposed COVID-2019 Business Interruption Insurance Legislation Fails to Socially Distance Itself From Constitutional Prohibitions*, White and Williams LLP (Mar. 19, 2020), https://www.whiteandwilliams.com/pp/alert-5476.pdf?89708.

20. Robert F. Callahan, Jr., *Proposed COVID-19 Legislation Thrusts Contract Clause's Original Purpose into Spotlight*, Robins Kaplan LLP (June 8, 2020), https://www.robinskaplan.com/resources/publications/2020/06/proposed-covid19-legislation-thrusts-contract-clauses-original-purpose-into-spotlight.

21. *Id.*

A. *The Purpose, Drafting History, and Language of the Contracts Clause*

It is true that the Contracts Clause was added to the Constitution to prohibit the sort of debtor-relief laws passed by states in the wake of the Revolution. As the Supreme Court has stated, "[the] primary focus [of the Contracts Clause] was upon legislation that was designed to repudiate or adjust preexisting debtor-creditor relationships that obligors were unable to satisfy."[22] Commentators have agreed that "the Contracts Clause [was] developed in response to debt-relief laws, which frustrated the enforcement of contracts and threatened the rights of many property owners."[23]

The Contracts Clause was modeled after a provision in the Ordinance of the Northwest Territory that stated that "'no law . . . shall in any manner whatever interfere with, or *affect* private contracts.'"[24] Rufus King, one of the delegates to the Constitutional Convention, moved to add a provision to the Constitution using the language of the ordinance.[25] The Convention's Committee on Style changed the language to read, "No state shall pass any . . . laws *altering or* impairing the obligation of contracts."[26] The Convention, however, deleted the words "altering or,"[27] and the final language of the Contracts Clause thus became "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[28]

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22. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502–03 (1987); *accord* Sveen v. Melin, 138 S. Ct. 1815, 1821 (2018); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453–65 (1934) (Sutherland, J., dissenting); Ogden v. Saunders, 25 U.S. 213, 354–55 (1827) (Marshall, C.J., dissenting) (noting that prior to ratification of the Constitution, "[t]he power of changing the relative situation of debtor and creditor, of interfering with contracts . . . had been used to such an excess by the State legislatures, as to . . . destroy all confidence between man and man," "impair commercial intercourse," "threaten the existence of credit," "sap the morals of the people," and "destroy the sanctity of private faith").

23. Frances Petrie, *The Contracts Clause and the Constitutionality of a Model Law Approach to Sovereign Restructuring*, 19 U. Pa. J. Const. L. 1207, 1223 (2017); *see also, e.g.*, Michael Cataldo, *Revival or Revolution: U.S. Trust's Role in the Contracts Clause Circuit Split*, 87 St. John's L. Rev. 1145, 1147 (2013); Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence*, 72 Or. L. Rev. 513, 517–18 (1993); Michael Rappaport, *A Procedural Approach to the Contract Clause*, 93 Yale L.J. 918, 931 (1984); Janet Irene Levine, *The Contract Clause: A Constitutional Basis for Invalidating State Legislation*, 12 Loy. L.A. L. Rev. 927, 928 (1979); Brief of Professor James W. Ely, Jr., as *Amicus Curiae* Supporting Respondent at 5, Sveen v. Melin, 2018 WL 1156617, (U.S. Feb. 27, 2018) (No. 16-1432).

24. *See* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 530 (1987) (quoting An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, 1 Stat. 51 (1789)) (emphasis added).

25. *Id.* at 529.

26. *Id.* at 531–32 (emphasis added).

27. Robert L. Clinton, *The Obligation Clause of the United States Constitution: Public and/or Private Contracts*, 11 U. Ark. Little Rock L. Rev. 343, 345 (1989), *available at* https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1834&context=lawreview; William M. Treanor, *The Case of the Dishonest Scrivener; Gouverneur Morris and the Creation of the Federalist Constitution*, 119 Mich. L. Rev. (forthcoming 2020), *available at* https://scholarship.law.georgetown.edu/facpub/2163.

28. U.S. Const., art. I, § 10.

The language and drafting history thus make clear that not all legislation that "affect[s]," or even "alter[s]," contract terms violates the Constitution.[29] Only those state laws that "impair" the "Obligation" of a promisor are forbidden. Webster's dictionary defines "impair" to mean "to diminish in function, ability, or quality: to weaken or make worse."[30] Dictionaries in use in the time of the Founders employ similar definitions. Samuel Johnson's famous dictionary defines "impair" as meaning "[t]o diminish; to injure; to make worse; to lessen in quantity, value, or excellence."[31] The 1828 edition of Webster likewise defines "to impair" as "[t]o make worse; to diminish in quantity, value or excellence."[32]

Here, the proposed legislation does not relieve the policyholder from a debt, or "diminish" or "weaken" the "obligation" of the policyholder. On the contrary, the policyholder remains obligated to pay premiums and satisfy the other requirements of the policy (e.g., giving timely notice to, and cooperating with, the insurer). Thus, there is no "impair[ment]" of the policyholder's "obligation." Nor is there any "impairment" of the insurer's "obligation." None of the insurer's promises to defend or indemnify claims covered by the policy has been "diminished." (If anything, they have been expanded.) Therefore, the language of the Contracts Clause has not been violated, and the insurers cannot successfully

29. Despite the change in language, Kmiec and McGinnis argue that the Contract Clause reaches any state law that alters contractual obligations. Kmiec & McGinnis, *supra* note 24, at 537–38. But this argument ignores the fact that "[c]onstitutional construction has frequently been aided by an examination of various proposals rejected and language deleted by delegates at the Constitutional Convention." C.J. Antieau, *Constitutional Construction: A Guide to the Principles and Their Application*, 51 Notre Dame Law. Rev. 357, 364 (1971) (discussing numerous cases where the Supreme Court has examined such proposals); *see, e.g.*, Nixon v. United States, 506 U.S. 224, 233 (1993) (in determining that Supreme Court had no power to review validity of procedures followed by Senate in impeaching federal judge, Court relied in part on fact that Constitutional Convention rejected giving impeachment power to judiciary and instead "ultimately decided that the Senate would have 'the sole Power to try all Impeachments.' Art. I, § 3, cl. 6."); Missouri v. Illinois, 180 U.S. 208, 221–24 (1901) (in holding that Supreme Court had original jurisdiction over dispute between two states, Court observed that although original draft of Constitution had given Senate the authority to decide such disputes, revised draft gave authority to the Court).

30. *Impair*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/impair (last visited June 12, 2020).

31. Samuel Johnson, A Dictionary of the English Language 1053 (1755), https://johnsonsdictionaryonline.com/impair-verb-active (last visited June 12, 2020).

32. Noah Webster, An American Dictionary of the English Language (1828), http://websterdictionary1828.com/Dictionary/Impair (last visited June 12, 2020).

Both Johnson's and Webster's dictionaries were cited by the Court in *District of Columbia v. Heller*, 554 U.S. 570, 581, 582, 584 (2008) (interpreting Second Amendment to protect right of individuals to keep and bear arms). *See* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 385–86, 389 (2014) (listing these two dictionaries as among those most frequently cited by the Supreme Court).

"invoke arguments reminiscent of those serving as the original basis for the Contract Clause."[33]

B. *Supreme Court Precedent Construing the Contracts Clause*

In response, the insurers will no doubt argue that, regardless of the purpose, drafting history, and language, the Supreme Court has stated that statutes that increase a party's contractual obligations are every bit as unconstitutional as those prohibited that reduce a party's obligations are.[34] But, as demonstrated below, the insurers' case law arguments fail as well.

1. Development of the Case Law

The range of state legislative actions that can affect existing contractual relationships is broad.[35] For instance, a state statute may render a contract wholly illegal.[36] Or a statute may directly change the term of a contract.[37] But even a law that does not negate a contract or modify a key term can affect the value of a bargain, sometimes in significant ways. A law may indirectly increase the obligation of one party to a contract[38] or diminish the contract's value.[39] Even a law that has nothing to do with either the express terms of the contract or its subject matter can affect the parties' allocation of risk, such as a law that changes the statute of limitations for contract actions.[40]

The Supreme Court has confronted each of these types of state statutes, and commentators have suggested that the Court's treatment of them may be roughly divided into three eras. In the first era, which began with the

33. Robert F. Callahan, Jr., *Proposed COVID-19 Legislation Thrusts Contract Clause's Original Purpose into Spotlight*, Robins Kaplan LLP (June 8, 2020), https://www.robinskaplan.com/resources/publications/2020/06/proposed-covid19-legislation-thrusts-contract-clauses-original-purpose-into-spotlight.

34. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 n.16 (1978) ("The narrow view that the Clause forbids only state laws that diminish the duties of a contractual obligor, and not laws that increase them . . . has . . . been expressly repudiated.").

35. *See* Dolly Wu, *Timing the Choice of Law by Contract*, 9 Nw. J. Tech. & Intell. Prop. 401, 401–02, 406–09 (2011) (discussing examples).

36. *See* Stone v. Mississippi, 101 U.S. 814, 819 (1879) (state statute outlawing lotteries negated state charter that had granted company permission to sell lottery tickets).

37. *E.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1, 3 (1977) (state law abrogated covenant in contract with holders of state bonds); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 416 (1934) (state law modified foreclosure provisions in mortgages).

38. *See*, *e.g.*, Wu, *supra* note 35, at 409 (discussing the example of a contract for the sale of food that is made more burdensome for the seller by the passage of a more stringent food safety law).

39. *See*, *e.g.*, Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837) (after granting charter to one company to build a bridge, state granted charter for building of a competing bridge).

40. *See* James W. Ely, Jr., *Whatever Happened to the Contract Clause?*, 4 Charleston L. Rev. 371, 377 & n.48 (2010) (discussing Contracts Clause cases involving statutes of limitations).

Chief Justiceship of John Marshall (1801–35) and lasted until about 1880, the Court took a very expansive view of the Contracts Clause.[41] Reflecting Marshall's concern with "preserving the security of property and contract rights" and fear that "the unbridled authority of state governments would impair the value of these rights," the Court repeatedly struck down state statutes on the grounds that they impaired pre-existing contracts.[42] In doing so, the Court "invoked the clause to protect land grants, corporate charters, and other types of agreements."[43] Those who advocate restricting the power of state legislatures retroactively to affect pre-existing contract rights frequently rely on cases from this era.[44]

In the second era, approximately1880 until 1934, the Supreme Court gradually acknowledged that that constitutional limitations on impairment of contracts "must be accommodated to the . . . inherent police power [of the State] 'to safeguard the vital interests of its people.'"[45] Though not specifically referenced in the Constitution,[46] a state's "police power" gives legislatures broad leeway to pass laws to protect the public health, safety, and welfare.[47] The classic case is *Stone v. Mississippi*.[48] There, a state statute outlawing lotteries was challenged by a company that had previously obtained a charter from the state to run a lottery. Rejecting the challenge, the Court held that the state's power to shield the public from the evils of gambling took precedence over the contract rights of the lottery company.[49] The Justices sometimes "disagreed over the extent to which states could promote the public welfare," with some believing that the states should be "denied . . . much latitude to regulate contracts under the auspices of a general police power," and others willing to grant states more leeway to legislate in areas states viewed as in the public interest.[50] But over time, the

41. *See* Kmiec & McGinnis, *supra* note 24, at 534.

42. Olken, *supra* note 23, at 523–24.

43. *Id*. at 523 (citing Fletcher v. Peck, 10 U.S. 87 (1810); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819)); *see*, *e.g.*, Brief of Professor James W. Ely, Jr., *supra* note 23, at 11–15 (discussing *Fletcher*, *Dartmouth*, and other Contracts Clause cases).

44. *See* note 43, *supra*.

45. Energy Reserves Grp. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934)).

46. *See* Ely, *supra* note 40, at 382 ("Of course, the Contract Clause makes no mention of an exception for the police power."); Olken, *supra* note 23, at 521 (noting that "the concept of police powers did not really exist when the Constitution was created").

47. *See* Brief of Professor James W. Ely, Jr., *supra* note 23, at 15 ("Initially the police power was understood to encompass measures that directly advanced the public health, safety, or morals.").

48. Stone v. Mississippi, 101 U.S. 814 (1879).

49. *Id*. at 819; *see also* Manigault v. Springs, 199 U.S. 473, 480 (1905) (even if contract for sale of alcohol was permissible when made, state could later prohibit such sales without violating Contracts Clause).

50. Olken, *supra* note 23, at 548.

range of a state's police powers expanded to include a wide variety of laws designed to protect the public.[51]

The police power cases are significant because they establish that states have substantial power to legislate to protect public health and safety, even if legislation affects private contracts retroactively. The courts and commentators who seek to restrict the application of the Contracts Clause often cite cases from this era to justify their expansive view of the police power.[52]

These courts and commentators rely even more heavily on cases decided in the third era, which began with the New Deal. In the 1930s, the Court, faced with the economic exigencies of the Great Depression, construed the police power broadly to uphold state legislation against claims that it impaired contract rights. *Home Building & Loan Association v. Blaisdell*[53] "is regarded as the leading case in the modern era of Contract Clause interpretation."[54] That case involved a challenge to Minnesota's Mortgage Moratorium Law, which the state passed at the height of the Great Depression to give relief to homeowners unable to pay their mortgages. The law authorized local courts to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable." During the extended redemption period, homeowners had to pay their mortgagees the fair-market rental value of the mortgaged property. By its terms the law was to remain in effect "only during the continuance of the emergency and in no event beyond May 1, 1935." A homeowner sought and was granted relief under the act, and the holder of the mortgage appealed, arguing that the law violated the Contract Clause because it impaired the obligation of the mortgage.

In assessing the law's constitutionality, the Court expressly refused to rely on the Framers' original intent in drafting the Contracts Clause. Writing for the Court, Chief Justice Charles Evans Hughes acknowledged that

51. *See id.* ("During the first two decades of the twentieth century the concept of inalienable police powers broadened as Court personnel changed and some of the more progressive justices included economic prosperity and progress as objectives within the sphere of public welfare."); Brief of Professor James W. Ely, Jr., *supra* note 23, at 15 (observing that the scope of the police power doctrine expanded, but criticizing this expansion). Professors Kmiec and McGinnis agree that the second era of Contracts Clause interpretation went from the post-Civil War period until 1934. Kmiec & McGinnis, *supra* note 24, at 534. But, instead of focusing on the police power, they see the cases in this era as reflecting an increased dependence on the doctrine of substantive due process to attack alleged contract impairments. *Id.*

52. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Olken, *supra* note 23, at 548.

53. *Blaisdell*, 290 U.S. 398.

54. United States Trust Co. v. New Jersey, 431 U.S. 1, 15 (1977); *see* Kmiec & McGinnis, *supra* note 24, at 534; Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 735 (1984) (characterizing *Blaisdell* as a "watershed decision . . . on which the modern interpretation of the contract clause rests").

the clause had resulted from "an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations"[55] following the revolution. But, Hughes continued, "full recognition of the occasion and general purpose of the clause does not suffice to fix its precise scope."[56] He likewise rejected the argument that "what the Constitution meant at the time of its adoption it means today."[57] Quoting Marshall, Hughes explained that the Constitution was intended "'to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.'"[58]

Having rejected original intent, the Court looked to the case law under the Contracts Clause, which "put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."[59] Rather, Hughes concluded, the prohibition should be read "in harmony with" the state's police power.[60] This harmonization meant that a state could not "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them," but could make "limited and temporary interpositions with respect to the enforcement of contracts if made necessary by" a natural disaster or "urgent public need . . . produced by . . . economic causes."[61]

Balancing the prohibition of the Contracts Clause against the police power, the Court held the Minnesota statute constitutional. In doing so, the Court emphasized several factors:

- "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community."[62]
- "The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals, but for the protection of a basic interest of society."[63]
- "[T]he relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions."[64]
- "The conditions upon which the period of redemption is extended do not appear to be unreasonable. . . . As already noted, the integrity

55. *Blaisdell*, 290 U.S. at 427 (note omitted).
56. *Id.* at 428.
57. *Id.* at 442–43.
58. *Id.* at 443 (quoting McCulloch v. Maryland, 17 U.S. 316, 415 (1819)).
59. *Id.* at 428.
60. *Id.* at 439.
61. *Id.* at 439–40.
62. *Id.* at 444.
63. *Id.* at 445.
64. *Id.*

of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment if the mortgagor fails to redeem within the extended period are maintained, and the conditions of redemption, if redemption there be, stand as they were under the prior law."[65]

- "The legislation is temporary in operation. . . . [T]he statute . . . could not validly outlast the emergency or be so extended as virtually to destroy the contracts."[66]

Blaisdell is highly significant, because it makes clear that an emergency can justify the retroactive legislative disruption of existing contractual rights, so long as the legislation is temporary in nature and uses appropriate means to achieve legitimate ends. Given the magnitude of the emergency created by the coronavirus pandemic, the importance of *Blaisdell* in determining whether the proposed legislation is constitutional can hardly be overstated.[67]

Subsequent Supreme Court cases went even further than *Blaisdell* in deferring to states' exercise of their police powers. For example, in *City of El Paso v. Simmons*,[68] the Court upheld a Texas law that shortened the period in which defaulting purchasers of land could cure their defaults. Even though there was no emergency and the change in the law was not temporary, the Court found sufficient justification for the law, given the state's desire to stabilize land titles and curb speculation brought about by the prior law's unlimited right to reclaim forfeited land.[69] Likewise, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[70] the Court upheld a Pennsylvania statute that allowed landowners to sue coal companies for environmental damage,

65. *Id.*

66. *Id.* at 447.

67. Some Justices and commentators have argued that *Blaisdell* and its progeny disregard the intentions of the Framers and substitute an unprincipled balancing test. *See Blaisdell*, 290 U.S. at 453–65 (Sutherland, J., dissenting) (arguing that Court's opinion was inconsistent with Framers' intent to hold debtors to their bargains even in economically difficult times); City of El Paso v. Simmons, 379 U.S. 497, 517 (1965) (Black, J., dissenting) (criticizing the majority's balancing test); Sveen v. Melin, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting) (asserting that balancing test "seems hard to square with the Constitution's original public meaning"); Brief of Professor James W. Ely, Jr., *supra* note 23, at 18 (arguing that *Blaisdell* "cut the Contract Clause loose from both the constitutional text and the views of the framers"); Epstein, *supra* note 54, at 735–36 (criticizing *Blaisdell*'s reasoning); Rappaport, *supra* note 23, at 923–24 (arguing that balancing contravenes the Constitutional text and the Framers' intent). *But see* Olken, *supra* note 23, at 551–52, 599–600 (arguing that *Blaisdell* is consistent with, and a natural outgrowth of, the cases that expanded the scope of the state's police powers). Nonetheless, *Blaisdell* remains good law. *See, e.g.*, Energy Reserves Grp. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983).

68. *Simmons*, 379 U.S. 497.

69. *Id.* at 512.

70. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

even though the landowners had waived their right to damages when they conveyed their mineral rights to the coal companies. The Court accepted Pennsylvania's argument that the law was necessary to protect the environment and "refuse[d] to second-guess the Commonwealth's determinations that [the remedies provided by the new statute] are the most appropriate ways of dealing with the problem."[71] Thus, as in City of *El Paso*, the Court focused on the justification for the challenged legislation and the appropriateness of the means chosen by the state to achieve the legislative purpose, rather than on whether there was an emergency or whether the legislation was temporary in nature.[72]

Indeed, there have only been a handful of cases since the New Deal in which the Supreme Court has held that state laws violated the Contracts Clause. In *United States Trust Company v. New Jersey*,[73] a 1962 statutory covenant between New Jersey and New York limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for bonds issued by the Port Authority. In 1974, however, New Jersey and New York passed laws that retroactively repealed the 1962 covenant. The Court held that the 1974 repeal violated the Contracts Clause, relying on the fact that the State was acting in a self-interested manner when it acted to modify a contract to which it was a party.[74]

Allied Structural Steel Co. v. Spannaus[75] involved a Minnesota law that penalized an employer by increasing its pension obligations when it decided to close its Minnesota office and move out of the state. Under the law, a private employer with 100 employees or more (at least one of whom was a Minnesota resident) who provided pension benefits under a plan meeting IRS guidelines had to pay a "pension funding charge" if he either terminated the plan or closed a Minnesota office, unless the funds already in the plan were sufficient to cover full pensions for all Minnesota employees who had worked at least 10 years for the company.[76]

The Court struck down the law as a violation of the Contracts Clause.[77] Unlike the statute in *Blaisdell*, this law "was not even purportedly enacted to deal with a broad, generalized economic or social problem. It did not operate in an area already subject to state regulation at the time the company's

71. *Id.* at 506.

72. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 22 n.19 (1977) (noting cases where Contracts Clause challenges had been rejected even when the legislation was not "adopted pursuant to a declared emergency in the State and strictly limited in duration").

73. *Id.* at 1.

74. *Id.* at 26 (noting that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake").

75. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

76. *Id.* at 238.

77. *Id.* at 250–51.

contractual obligations were originally undertaken . . . ."[78] Moreover, the law "did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively."[79] And, significantly, the law was aimed "not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had[,] in the past[,] . . . establish[ed] pension plans for their employees."[80]

Scholars are divided over whether *U.S. Trust* and *Spannaus* reflect a fourth era in Contracts Clause interpretation.[81] But at the least, these cases indicate that the Court, though generally inclined to defer to state legislative judgments about the need for laws that may affect contracts, will not simply rubber-stamp such laws. To the contrary, where the state is a party to a contract and thus presumably acts in a self-interested manner, legislation that impairs contractual rights will be carefully scrutinized to ensure that the means chosen by the legislature are appropriate to its stated goals. And, likewise, where the legislation affects a narrow group of beneficiaries, as opposed to the general public, it will be carefully examined.

2. The Current Test for Whether a State Law Violates the Contracts Clause

As the preceding history illustrates, the Supreme Court's interpretation of the Contracts Clause has evolved over the years. Nonetheless, certain basic principles may be derived from the cases. These principles have been cited by the Court for at least the past 50 years. First, the Supreme Court has made clear that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law."[82] Even though the language of the Contracts Clause is "facially absolute,"[83] the Clause "is not to be read literally."[84] Rather, so long as the means and ends are appropriate, "[t]he States must possess broad power to adopt general regulatory measures without being concerned the private contracts will be impaired, or even destroyed, as a result."[85]

78. *Id.* at 250 (citation omitted).
79. *Id.*
80. *Id.*
81. *Compare* Kmiec & McGinnis, *supra* note 24, at 534, 544–49 (characterizing these cases as part of a fourth era of Contracts Clause case law), *with* Brief of Professor James W. Ely, Jr., *supra* note 23, at 19 (arguing that *U.S. Trust* and *Spannaus* "were narrow and confusingly reasoned, and the Court soon abandoned any attempt to reinvigorate the Clause").
82. City of El Paso v. Simmons, 379 U.S. 497, 506–07 (1965).
83. Energy Reserves Grp. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983).
84. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502 (1987); *accord* United States Trust Co. v. New Jersey, 431 U.S. 1, 21 (1977) (though Contracts Clause "proscribe[s] 'any' impairment, . . . 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula'").
85. *United States Trust Co.*, 431 U.S. at 22.

The Supreme Court has developed a two-part test to balance the police power against the rights of contracting parties.[86] First, the Court asks whether the challenged statute has actually impaired a contract in a substantial way. If there is a substantial impairment, the Court then asks whether the challenged law used reasonable means to achieve a legitimate state goal. If so, then the law will be upheld. Below, we examine both aspects of this test.

a. *Whether the state law substantially impairs the contract*

For this first prong, "the severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected."[87] In determining the extent of the impairment, the Court considers "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights."[88] The Court also "consider[s] whether the industry the complaining party has entered has been regulated in the past."[89]

b. *Whether the state law reasonably furthers a legitimate goal*

When there is a substantial impairment of contractual obligations, the Court applies the second part of the test, which examines the purpose of the challenged law and the means used to achieve that purpose.[90] The State "must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem . . . . [T]he public purpose need not be addressed to an emergency or temporary situation . . . . The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than provid-

86. Sveen v. Melin, 138 S. Ct. 1815, 1821 (2018).

87. *Energy Reserves Grp.*, 459 U.S. at 411 (citation omitted).

88. *Sveen*, 138 S. Ct. at 1822. In *Sveen*, Mr. Sveen married Ms. Melin. He then purchased a life insurance policy and designated her as the primary beneficiary and his children from a prior relationship as the contingent beneficiaries. Minnesota, where Mr. Sveen and Ms. Melin married, then passed a law saying that designations of spouses as beneficiaries of life insurance policies are automatically revoked upon divorce. Mr. Sveen and Ms. Melin subsequently divorced, and, when he died, she and the contingent beneficiaries raised competing claims to the policy proceeds. The Court ruled for the children, holding that the law worked no substantial impairment on preexisting contract rights. The Court reasoned that the state had determined that a divorcing spouse does not typically wish to keep the ex-spouse as the beneficiary of a life insurance policy and that the law was thus designed to effectuate that presumed contractual intent. *Id*. at 1822–23. The Court further observed that, because divorce courts in Minnesota had always retained discretion to disregard the designation of a beneficiary in dividing marital assets, Ms. Melin had no reasonable expectation that she would not be removed as beneficiary. *Id*. at 1823. And, significantly, the law provided that, if Mr. Sveen had wanted to override the statutory presumption, he was free to redesignate Ms. Melin as the beneficiary "with the stroke of a pen." *Id*.

89. *Energy Reserves Grp.*, 459 U.S. at 411 (in upholding state legislation that affected price of natural gas against claim that it violated the Contracts Clause, Court relied in part on fact that natural gas industry was regulated by the state).

90. *Sveen*, 138 S. Ct. at 1822.

ing a benefit to special interests."[91] With respect to means, the Court has stated that "the adjustment of 'the rights and responsibilities of contracting parties [must be based] upon reasonable conditions and [must be] of a character appropriate to the public purpose justifying [the legislation's] adoption.' Unless the State itself is a contracting party, '. . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'"[92] However, where "the State's self-interest is at stake," as it is when the State takes on a financial obligation such as a bond covenant, complete deference is not appropriate.[93]

C. *Application of the Case Law to Cases Involving Insurers*

In insurance, as in other areas, state laws can affect contracts in numerous ways. As shown below, the insurance-related cases discuss legislative efforts to regulate premiums, policy terms, and other aspects of the relationship between policyholder and insurer.

Not surprisingly, many of these Contracts Clause challenges involve legislative responses to natural disasters. These cases reject the insurers' Contracts Clause objections and demonstrate the continuing vitality of the Court's statement in 1934 in *Blaisdell* that courts may make "limited and temporary interpositions with respect to the enforcement of contracts" when there is "a great public calamity such as fire, flood, or earthquake."[94]

For example, in *Vesta Fire Insurance Corp. v. State of Florida*,[95] the court upheld Florida's post Hurricane Andrew's remedial legislation that restricted the ability of insurers to withdraw from the residential insurance market. This law provided that, in a twelve-month period, no insurer could cancel or refuse to renew more than 5% of its residential policies in Florida or more than 10% of its residential policies in a single Florida county.[96] Insurers that wished to withdraw from the Florida market entirely attacked the legislation as an impairment of their contractual rights. The court conceded that the legislation substantially impaired the insurers' rights,[97] but nonetheless held the statute constitutional under the second part of the Contracts Clause test. The court found that the state had "demonstrated

91. *Energy Reserves Grp.*, 459 U.S. at 411–12 (citations omitted).

92. *Id.* at 412–13 (citations and notes omitted); *accord United States Trust Co.*, 431 U.S. at 22–23; *see also City of El Paso*, 379 U.S. at 508–09 ("[W]e must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'") (citation omitted).

93. *United States Trust Co.*, 431 U.S. at 26.

94. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 439 (1934).

95. Vesta Fire Ins. Corp. v. Florida, 141 F.3d 1427 (11th Cir. 1998).

96. *Id.* at 1429.

97. *Id.* at 1433 (Under challenged law, insurers "are forced to continue contractual relationships that otherwise, pursuant to the terms of the contracts, could be rightfully terminated.").

a legitimate public purpose: protection and stabilization of the Florida economy, particularly the real estate market."[98] The court further observed that, because the state was not a party to the contracts, it was appropriate to defer to the legislative judgment that the statute was a necessary and reasonable means to achieve that purpose.[99]

Similarly, *State of Louisiana v. All Property & Casualty Insurance Carriers Licensed to Do Business in the State of Louisiana*[100] involved a challenge to legislation enacted to give Louisiana policyholders relief from the devastating effects of Hurricanes Katrina and Rita. After the hurricanes, the state legislature passed laws that extended the statute of limitations for policyholders to sue their insurers for coverage.[101] The court agreed that these changes substantially impaired the contractual relationship between the insurers and their policyholders, reasoning that, when the policies were issued, "[e]ach insurer reasonably expected that damage claims filed after a one year prescriptive period would be [time-barred]."[102] At the same time, the court conceded that, given the heavily regulated nature of the insurance industry, "a change in the prescriptive period was a legal possibility."[103] Balancing these facts, the court concluded,

> the impairments in these cases constitute more than minimal alteration of the insurers' contractual obligations and are therefore of constitutional dimension. However, we also find that the impairments constitute considerably less than total destruction of the insurers' contractual expectations. Consequently, when we inquire into the public purpose underlying the legislation, we will give considerable deference to the legislature's judgment.[104]

Based on the legislative history, the court then held that the statutes' purpose was "to protect the health and general welfare of the citizens of this state affected by Hurricanes Katrina and Rita," a purpose the court found "significant and legitimate."[105] The court went on to find that the legislature had used reasonable means to achieve this purpose. The court noted the heavily regulated nature of the insurance industry, the limited

98. *Id.* at 1434.
99. *Id.*
100. State v. All Prop. & Cas. Ins. Carriers, 937 So. 2d 313 (La. 2006).
101. *Id.* at 320, 321 (describing Act 739, which extended the statute of limitations for claims arising from Hurricane Katrina to September 1, 2007, and Act 802, which "prevents the running of prescription for one year on any claim seeking to recover for loss or damage to property against an insurer on any homeowners' insurance policy, . . . when such loss or damage was caused by or as a result of Hurricane Katrina or Hurricane Rita").
102. *Id.* at 325.
103. *Id.*
104. *Id.* (internal citation omitted).
105. *Id.* at 326.

nature of the extension (only one year), and its limitation to hurricane-related claims.[106]

California's legislative response to the Northridge earthquake of 1994 provides another example. Before the earthquake, fire and property insurance policies required the policyholder to sue within one year of a claim denial.[107] Following the earthquake, the state legislature enacted a law extending the limitations period by a year, provided that the policyholder had notified its insurer about potential earthquake damage and that the claim had not yet been litigated to finality or resolved by a written settlement agreement signed by California counsel.[108]

In *20th Century Insurance Company v. Superior Court*,[109] the policyholder argued that her claim, though filed after the end of the one-year period specified in the policy, was timely under the new statute. The insurer contended that if the policyholder's argument was correct, then the statute violated the Contracts Clause.

The court first examined whether there was a substantial impairment of the insurance policy. "In determining whether legislation amounts to a substantial impairment, one factor to be considered is 'whether the industry the complaining party has entered has been regulated in the past.' Whether the state actively regulates the industry at issue frames the parties' reasonable expectations and minimizes any potential statutory impairment. In California, as in all states, the insurance business 'is a highly regulated industry, and one in which further regulation can reasonably be anticipated.'"[110] Consequently, the court concluded, "insurers should reasonably have expected the California Legislature to enact legislation designed to help insureds affected by the 1994 Northridge earthquake."[111] The court further noted that "[t]he revival of barred claims for one year fails to rise to the level of an impairment of a contract, because it merely affects the remedy for the violation of the contract, not the obligations contained within it."[112]

106. *Id.* at 327.

107. 20th Century Ins. Co. v. Superior Court, 109 Cal. Rptr. 2d 611, 617 (Ct. App. 2001).

108. *Id.* at 624 (quoting statute).

109. *20th Century Ins. Co.*, 109 Cal. Rptr. 2d 611.

110. *Id.* at 628 (internal citations omitted). The court further noted that "[t]he business of insurance is clothed with a public interest, and therefore subject to be controlled by the public for the common good." *Id.* at 625. "Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements. . . . Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust." *Id.* (internal quotation marks omitted) (citation omitted).

111. *Id.* at 629.

112. *Id.* Although the proposed legislation regarding business interruption insurance likely affects more than just a contractual remedy, this fact should not be significant, because the

The court went on to hold that, even if the extension of the statute of limitations did substantially impair a contractual obligation, the legislature had a legitimate public purpose for doing so.[113] Noting evidence that insurers had engaged in sharp practices in evaluating claims arising from the earthquake, the court explained that "[t]he Legislature enacted section 340.9 to alleviate a broad and significant problem caused by the insurers' conduct; to help thousands of policyholders who were misled by the insurers into waiving their right to make claims in a timely manner. This purpose is backed by the power of the Legislature to protect California's citizens and provide for their general welfare and justifies any potential impairment of contract provisions."[114] The court further held that "the revival of the statutory remedy is appropriately limited in time and application. Section 340.9 is only operative for the period of one year, and is limited to claims where the insurers had already been contacted prior to January 1, 2000, to claims not finally litigated, and to claims not settled through a California attorney. Special deference is granted to temporary statutes."[115]

Citing California Supreme Court precedent,[116] the court emphasized that because insurance policies are contracts of adhesion, "statutes pertaining to, and contractual provisions contained within, insurance policies must be construed in light of applicable public policy, promoting the protection of the insured and the public at large. So too, statutes which affect existing insurance contracts, enacted to promote the public interest, are invariably upheld as a reasonable exercise of the State's police power."[117]

These cases make clear that, when a natural disaster occurs that causes great financial hardship to policyholders, legislation designed to address that hardship will be upheld by the courts, even if it alters pre-existing policy rights. In each of these cases, prior to the passage of the statute at issue, the insurer had a clear legal and/or contractual right to cancel its policy (*Vesta*) or to refuse to pay an untimely claim (*All Property & Casualty Ins. Carriers*; *20th Century Ins. Co.*; *Campanelli*). And in each case, a subsequent state law altered that right by restricting the insurer's right to cancel or to rely on a limitations period specified in the policy or in prior state law. The

proposed legislation will likely rise or fall based on the sufficiency of the goal offered by the state as a justification and the means used to achieve that goal.

113. *Id*.

114. *Id*. at 630.

115. *Id*. at 630–31.

116. Barrera v. State Farm Mut. Auto. Ins. Co., 456 P.2d 674 (Cal. 1969); Carpenter v. Pac. Mut. Life Ins. Co., 74 P.2d 761 (Cal. 1937).

117. *20th Century Ins. Co.*, 109 Cal. Rptr. 2d at 626 (internal citation omitted). The Ninth Circuit relied on *20th Century Insurance Company* in upholding the same statute against another Contracts Clause challenge. *See* Campanelli v. Allstate Life Ins. Co., 322 F.3d 1086, 1097–99 (9th Cir. 2003).

courts have upheld these state laws under the Contracts Clause for numerous reasons. These reasons have included (a) the highly regulated nature of the insurance industry, (b) the remedial purpose of the legislation, (c) the presumption that the means used to achieve that purpose are permissible, (d) the existence of emergency conditions created by a natural disaster, or (e) all of the above. As described in the following section, all of these factors are relevant in examining potential Contracts Clause challenges to COVID-19-related legislation.

D. *Application of the Case Law to the Proposed Legislation*

The same result reached in the cases just discussed should apply to the legislation discussed earlier aimed at mitigating the effects of the coronavirus pandemic on policyholders.[118] To begin with, policyholders have an argument that the proposed legislation does not substantially impair contract rights. The insurers that issued business interruption coverage, like those in the cases cited previously, are in a highly regulated industry. Indeed, the heavy degree of regulation of insurance in all states lowers, and arguably defeats, any expectation the insurers may have that their contracts would not be altered by state legislative action, as does the extensive case law approving retroactive modifications of policy provisions.[119]

But even assuming that the proposed legislation substantially impairs existing contracts between insurers and policyholders, there is still no constitutional violation. The proposed legislation has a legitimate purpose: protecting millions of business owners and their customers from the devastating effects of the coronavirus pandemic. Although a natural disaster or other crisis is not required for a state law to withstand attack, the pandemic has created a crisis even more serious than the hurricanes in the insurance cases discussed herein. And the number of beneficiaries of the proposed legislation precludes any suggestion that it its targeted to help only a limited class of beneficiaries.[120]

118. *See* discussion *supra* Section II, and App. A.

119. *See* cases cited *supra* Section IV.C. *see also Auracle Homes, LLC v. Lamont*, 3:20-cv-00829 (VAB), 2020 WL 4558682 at *17 (D. Conn. Aug. 7, 2020) (rejecting Contracts Clause challenge to Connecticut governor's Executive Order, which restricted landlords' ability to evict tenants for failure to pay rent and permitted tenants to use security deposits to pay delinquent rent, because, *inter alia*, landlords were in a highly regulated industry); Elmsford Apt. Assocs., LLC v. Cuomo, No. 20-cv-4062 (JM), 2020 WL 3498456 at *12–15 (S.D.N.Y. June 29, 2020) (to the same effect).

120. The Small Business Administration estimated that, as of 2018, the United States had over thirty million small businesses. *See* U.S. Small Bus. Admin, 2018 Small Business Profile (2018), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf. According to a 2015 survey, approximately one-third of small businesses have business interruption insurance. *See 66 % of Small Businesses Lack Business Interruption Coverage: Survey*, Ins. J. (Sept. 2, 2015), https://www.insurancejournal.com/news/national/2015/09/02/380367.htm. *But see* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250 (1978) (in striking

Nor can there be any doubt that the legislation is rationally related to resolving the crisis created by the pandemic. The legislation seeks to abate that crisis by targeting major victims of the pandemic, i.e., businesses forced to shut down by the coronavirus and the customers that patronize those businesses.

Nonetheless, insurers and their counsel persist in arguing that these laws run afoul of the Constitution. For example, a recent post on the website of one law firm asserts that, "If the States enact legislation requiring existing insurance policies to provide COVID-19 coverage on a retroactive basis, such legislation would likely face a constitutional challenge under the Contract Clause."[121] The post cites a handful of cases that have upheld Contracts Clause challenges to legislation that has retroactively affected previously issued insurance policies.[122] In particular, the post cites two South Carolina Supreme Court cases that held that the retroactive re-definition of a term in an insurance policy violated the Contracts Clause.[123] The post also cites a Wisconsin Supreme Court decision striking down the retroactive extension of a statute of limitations[124] and an Eighth Circuit case holding that a state law could not retroactively redistribute excess reinsurance premiums without violating the Contracts Clause.[125]

These cases, however, are readily distinguishable. First, none of them presented the sort of emergency situation that faces the United States now. Second, even among cases that were decided in the absence of an emergency, the cases cited by Robins Kaplan represent the minority view. As

down law, Court noting that it "was not even purportedly enacted to deal with a broad, generalized economic or social problem").

121. Robert F. Callahan, Jr., *Proposed COVID-19 Legislation Thrusts Contract Clause's Original Purpose into Spotlight*, Robins Kaplan LLP (June 8, 2020), https://www.robinskaplan.com/resources/publications/2020/06/proposed-covid19-legislation-thrusts-contract-clauses-original-purpose-into-spotlight.

122. *See id.* (citing Kirven v. Cent. States Health & Life Co., 760 S.E.2d 794 (S.C. 2014), Harleysville Mut. Ins. Co. v. State, 736 S.E.2d 651 (S.C. 2012), Soc'y Ins. v. Labor & Indus. Rev. Comm'n, 786 N.W.2d 385 (Wis. 2010), and W. Nat'l Mut. Ins. Co. v. Lennes *(In re* Workers' Comp. Refund), 46 F.3d 813 (8th Cir. 1995)).

123. Kirven v. Cent. States Health & Life Co., 760 S.E.2d 794 (S.C. 2014) (noting that statute that defined the words *actual charges* in cancer insurance policies to mean the amounts charged by hospitals, rather than the discounted rates they accepted, violated the Contracts Clause when applied retroactively); Harleysville Mut. Ins. Co. v. State, 736 S.E.2d 651 (S.C. 2012) (legislative act that retroactively defined the term *occurrence* in insurance policies to include construction defects violated the Contracts Clause). The reliance on *Kirven* is ironic, because the insurer took precisely the opposite position in *Lindley v. Life Investors Ins. Co.*, Nos. 08–CV–0379–CVE–PJC & 09–CV–0429–CVE–PJC, 2010 WL 723670 (N.D. Okla. Feb. 22, 2010). There, the statute adopted the insurer's interpretation of the term *actual charges* to mean the discounted rates accepted by the hospital. At the urging of the insurer, the court rejected the policyholder's argument that the application of this statutory definition to pre-existing policies violated the Contracts Clause. *Id.* at *6–8.

124. Soc'y Ins. v. Labor & Indus. Review Comm'n, 786 N.W.2d 385 (Wis. 2010).

125. *W. Nat'l Mut. Ins. Co.*, 46 F.3d 813.

shown earlier, insurance companies have frequently mounted Contracts Clause challenges against legislation aimed at providing relief to policyholders, and have been unsuccessful in the majority of the cases. [126]

V. CONCLUSION

The coronavirus pandemic has created a crisis for policyholders. They purchased business interruption insurance to protect themselves against unexpected closures of their properties. Yet their insurers have refused to cover the current closures. The proposed legislation would provide these policyholders much-needed relief. Though the insurers have argued that such legislation violates the Contracts Clause, the preceding analysis demonstrates that the legislation is entirely consistent with the cases decided under the Clause. In particular, the fact that the insurance industry is heavily regulated in all states means that insurers are on notice that the state laws that govern their policies are subject to change at any time, even retroactively. And the pandemic, with its massive effects on the economy and public health, has created the sort of emergency that courts have recognized as justifying retroactive modifications of contracts. Finally, the means chosen to remedy that emergency are reasonable. For all these reasons, the proposed legislation satisfies the Contracts Clause.

126. *See* cases cited *supra* Section IV.C. In addition, consistent with the Supreme Court cases following *Blaisdell*, two courts have upheld laws extending the statute of limitations for actions against insurers even in the absence of evidence that the laws were designed to respond to a natural disaster. *See* Schniedwind v. Am. Family Mut. Ins. Co., 157 F. Supp. 3d 944, 952–54 (D. Colo. 2016); Serrano v. Aetna Ins. Co., 664 A.2d 279, 287–89 (Conn. 1995). And numerous cases uphold other legislative modifications of insurance policies against Contracts Clause challenges where no emergency was cited to justify the legislation. *See, e.g.*, Farmers Mut. Fire Ins. Co. v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 74 A.3d 860, 874–75 (N.J. 2013) (statute that made solvent insurers pay environmental liabilities before guaranty association, which had succeeded to liabilities of insolvent insurers, did not violate Contracts Clause); Am. Repub. Ins. Co. v. Superintendent of Ins., 647 A.2d 1195, 1197–98 (Me. 1994) (statute that modified pre-existing conditions exclusion in health insurance policies did not violate Contracts Clause); Newman v. Cambridge Mut. Fire Ins. Co., 476 A.2d 113, 117–18 (R.I. 1984) (statute that modified policy's notice of cancellation provision did not violate Contracts Clause); Country-Wide Ins. Co. v. Harnett, 426 F. Supp. 1030, 1035 (S.D.N.Y. 1977) (upholding New York's "no-fault" automobile insurance law against Contracts Clause challenge), *aff'd*, 431 U.S. 934 (1977).

APPENDIX A

South Carolina General Assembly

123rd Session, 2019-2020

S. 1188

A BILL

TO AMEND ARTICLE 1, CHAPTER 75, TITLE 38 OF THE 1976 CODE, RELATING TO PROPERTY INSURANCE GENERALLY, BY ADDING SECTION 38-75-70, TO PROVIDE THAT EVERY POLICY OF INSURANCE IN FORCE IN THIS STATE INSURING AGAINST LOSS OR DAMAGE TO PROPERTY, NOTWITHSTANDING THE TERMS OF THE POLICY AND INCLUDING ANY ENDORSEMENT THERETO OR EXCLUSIONS TO COVERAGE INCLUDED THEREWITH, THAT INCLUDES A LOSS OF USE AND OCCUPANCY, OR BUSINESS INTERRUPTION, SHALL BE CONSTRUED TO INCLUDE, AMONG THE COVERED PERILS UNDER THE POLICY, COVERAGE FOR BUSINESS INTERRUPTION DIRECTLY OR INDIRECTLY RESULTING FROM THE GLOBAL PANDEMIC KNOWN AS COVID-19, INCLUDING ALL MUTATED FORMS OF THE COVID-19 VIRUS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Article 1, Chapter 75, Title 38 of the 1976 Code is amended by adding:

"Section 38-75-70. (A) Notwithstanding any provision of law to the contrary, every policy of insurance in force in this State insuring against loss or damage to property, notwithstanding the terms of the policy and including any endorsement thereto or exclusions to coverage included therewith, that includes a loss of use and occupancy, or business interruption, shall be construed to include, among the covered perils under the policy, coverage for loss of use and occupancy, or business interruption, directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Moreover, no insurer in this State may deny a claim for a loss of use and occupancy, or business interruption, with respect to COVID-19, including, but not limited to, attempted insurer denials on account of:

(1) COVID-19 being a virus, even if the relevant insurance policy excludes losses resulting from viruses;

(2) there being no physical damage to the property of the insured or to any other relevant property; or

(3) orders issued by any civil authority, or acts or decisions of a governmental entity.

(B) The coverage required by this section is subject to any monetary limits of the policy and any maximum length of time set forth in the policy.

(C) An insurer that is required to provide coverage to an insured that has filed a claim pursuant to this section may apply to the department for relief and reimbursement from funds collected and made available for such purpose as provided in this section.

(D) The department shall establish procedures for the submission and qualification of claims by insurers that are eligible for reimbursement pursuant to this section. In addition, the department shall establish procedures and standards to protect against fraudulent claims for reimbursement and appropriate safeguards for insurers to use in the review and payment of such claims by their insureds.

(E) The department is authorized to make one or more assessments in each fiscal year against licensed insurers in the State as may be necessary to recover the amounts paid or estimated to be paid pursuant to this section. Any assessment shall be made at a rate and shall be determined and certified by the department as sufficient to recover the amounts paid to insurers pursuant to this section. The amount to be assessed shall be made against all licensed domestic companies and foreign companies in proportion to their net premiums written and annuity considerations in the State as shown in the annual report of each of said insurers filed with the department. The assessment shall reimburse the State for funds appropriated for such reimbursement. Assessments under this section shall be charged to the normal operating cost of each company."

SECTION 2. This act takes effect upon approval by the Governor and shall only apply to policies that are issued to insureds with one hundred fifty or fewer full-time equivalent employees in the State, and that are in force on the effective date of this act or become effective prior to the date on which the Governor's state of emergency declaration expires.

MISFEASANCE, CRIMINAL NEGLIGENCE, AND OFFICIAL LIABILITY

Zia Akhtar

I. INTRODUCTION

Misfeasance is a cause of action in tort instituted in the civil courts of England and Wales against the holders of a public office, based on the allegation that they have misused or abused their power.[1] It can be contrasted with malfeasance where the act of the public official is itself unlawful that leads to the commission of the offence. This element in the commission of this act has been distinguished by the common law courts where it has been found to convict public officials.[2] The issue is of misfeasance of public offi-

1. The tort can be traced back to 1703 in the case of *Ashby v. White* [1703] 92 Eng. Rep. 126, in a ruling by Chief Justice Sir John Holt, who decided that a landowner could litigate against a police officer who had prevented him from voting.

2. In *Daugherty v. Ellis*, 97 S.E.2d 33, 42–43 (W. Va. 1956), the West Virginia Supreme Court of Appeals defined *malfeasance* "as a wrongful act which affects, interrupts or interferes with the performance of official duty; as an act for which there is no authority or warrant of law; as an act which a person ought not to do; as an act which is wholly wrongful and unlawful; as that which an officer has no authority to do and is positively wrong or unlawful; and as the unjust performance of some act which the party performing it has no right, or has contracted not, to do."

LLB (Lon) LLM (Lon) Gray's Inn.

cials, amounting to unlawful behavior, which is determined by the courts once the complaint has been brought to their attention by the authorities. The extent of the breach of the duty of care must be defined to distinguish a tort from the criminal act that arises from aggravated conduct.

An act that constitutes misconduct in public office came to prominence in the findings of the *McPherson Report*, following the murder of the black teenager Steven Lawrence in 1993.[3] His death led to a finding that the Metropolitan Police were guilty of "incompetence [and] institutional racism."[4] The police were criticized in the investigation for not conducting their inquiries in a proper manner based on an allegation of a breach of duty, which was "marred by a combination of professional incompetence, institutional racism and a failure of leadership by senior officers."[5] The lack of due diligence was particularly manifest "in the failure by the police to give any information about the first investigation; the failure to explain why the prosecution was as they saw it 'abandoned'; and why there was a lack of viable evidence."[6]

This incident reaffirmed that the principle required in misfeasance actions is based on a deliberate failure to perform a duty that is likely to injure the public interest. However, before deciding to proceed with a charge of misconduct in public office, the claimant/prosecution should consider whether the acts complained of can properly be dealt with by any available statutory offences.[7] The claims for misfeasance in public office necessarily involve the establishing of bad faith or dishonesty. There is a public policy consideration because if this was not the case, and mere negligence on the part of a public official was sufficient to establish the tort of misfeasance in public office, it is likely that the floodgates of litigation will open.

This article is about defining misconduct of public officials, the scope of the breach of duty, and a comparison between misfeasance and criminal negligence. It provides an analysis of case law in misfeasance in the development of the common-law offence, and gross negligence with a focus on manslaughter. This article will deal with the latest developments and principles that underpin the commission of statutory manslaughter. It considers the distinction between targeted and reckless malice and the definition of misfeasance within the framework of tort and criminal liability.

3. William Macpherson, The Stephen Lawrence Inquiry, Cm 4262-I, London: The Stationery Office, (Feb. 1999), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf.

4. *Id.* ¶ 46.1.

5. *Id.*

6. *Id.* ¶ 42.11.

7. *See, e.g.*, Rowling v. Takaro Props. [1988] AC 473, 502 (Eng.); X v. Bedfordshire Cty. Council [1995] 2 AC 633, 761 (Eng.).

II. LIABILITY IN TORT FOR MISFEASANCE

The original investigation into the Lawrence murder had unsuccessfully concluded that the police caused psychological stress to Duwayne Brooks, the young man who was accompanying the victim at the time of the victim's murder. Brooks brought an action against the Commissioner of Metropolitan Police, fifteen other police officers, and the Crown Prosecution Service (CPS). In *Brooks v. Commissioner of Metropolitan Police*,[8] the claimant alleged that he had suffered post-traumatic stress disorder as a result of his experience during the night of the crime. He sought remedies (1) from the first defendant, the Metropolitan Police Commissioner, on the grounds of negligence, false imprisonment, and misfeasance in public office; and (2) from the other fifteen officers, for breach of statutory duty, namely breaches of Section 20 of the Race Relations Act 1976.[9]

The House of Lords, in giving their judgment, considered the liability of the police and decided unanimously that the only question was whether the Commissioner breached the common duty of care to the respondent. Their Lordships concurred in finding that the criteria were satisfied if the police took reasonable steps to assess whether Brooks was a victim of crime and then to provide him victim-support by taking reasonable steps to afford him protection commonly given to an eyewitness to a serious crime of violence and whether the police did that by acting upon the evidence in a diligent manner.[10]

Their Lordships cited the case of *Hill v. Chief Constable of West Yorkshire*[11] in which the mother of Jacqueline Hill—the final murder victim of Peter Sutcliffe (the Yorkshire Ripper) who had committed thirteen murders and eight attempted murders over a five-year period—sued the West Yorkshire police on the grounds that they had been negligent in their detection of Sutcliffe. Lord Keith of Kinkel held that an action for damages is not considered in the manner in which a criminal investigation is carried out, and a police officer would, as any other person, be liable in tort to a person who is injured as a direct result of his negligence or any act prohibited by statute or common law. However, "no general duty of care [is] owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, [and] there cannot reasonably be imposed upon any police force a duty of care similarly owed to identify and apprehend an unknown one."[12]

8. Brooks v. Comm'r of Metro. Police, [2005] UKHL 24 (Eng.).

9. *Id.* ¶ 10; *see also Police to Compensate Lawrence Attack Survivor*, Guardian (Mar. 19, 2006), https://www.theguardian.com/uk/2006/mar/10/race.world.

10. *Brooks*, [2005] UKHL 24, ¶¶ 12, 14 (Eng.).

11. Hill v. Chief Constable of West Yorkshire [1988] 2 WLR 1049 (Eng.).

12. *Id.* ¶ 62E.

Their Lordships rejected the claim of a breach and gave judgment in favour of the Metropolitan Commissioner. Lord Keith in expounding the leading judgment of the court stated

> The alleged duties of care were undoubtedly inextricably bound up with the police function of investigating crime, which was covered by the principle in *Hill*. Making full allowance for the fact that the instant proceedings were a strike-out application and that the law regarding the liability of the police in tort was not set in stone, the court was satisfied that the duties of care put forward were conclusively ruled out by the principle in *Hill*, as restated, and had to be struck out.[13]

The misfeasance in law has two strands: it can be a criminal breach or a breach based on a civil claim that is based on negligence by a public official. The duties that arise in a criminal breach have been defined in the *Attorney-General's Reference (No.3 of 2003)*[14] where the Court of Appeal defined the elements of the offence of misconduct in a public office as "when a public officer acting as such willfully neglects to perform his duty and/or willfully misconducts himself to such a degree as to amount to an abuse of the public's trust in the officeholder that is without reasonable excuse or justification."[15]

Thus, the Court of Appeal defined the elements of the offence of misconduct in a public office as follows:

(1) a public officer acting as such;
(2) willfully neglects to perform his duty and/or willfully misconducts himself;
(3) to such a degree as to amount to an abuse of the public's trust in the office holder;
(4) without reasonable excuse or justification.[16]

The court stated that "the misconduct complained of must be serious" for the offence to be committed.[17] As to the third element, the offence of misconduct must be to such a degree to amount to an abuse of the trust in the official and the "threshold [necessary to make out the offence] is a high one, requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder."[18] The court identified five relevant factors to be considered in assessing whether the third element of the offence is satisfied in any case, based on the responsibilities of the office

13. *Brooks*, [2005] UKHL 24, ¶¶ 16–23.
14. Attorney General's Reference (No. 3 of 2003) [2004] 2 Cr. App. R. 23 (Eng.).
15. *Id.*
16. *Id.* ¶ 61.
17. *Id.* ¶ 35.
18. *Id.* ¶ 56.

and officer; the importance of the public objects served; the nature and extent of the officer's departure from those responsibilities; the motive with which the officer acted; and the likely consequences of the misconduct.[19]

However, the court also acknowledged that the likely consequences will not always be a significant factor and that it will be necessary in deciding whether the standard of conduct to be expected of the officer and its breach may constitute an offence.[20] The test for determining whether misconduct is sufficiently serious to lead to a criminal conviction is whether it was "to such a degree as to amount to an abuse of the public's trust in the office holder" and whether the likely consequence of the misconduct is merely one of many potentially relevant factors to be considered in assessing whether this test is satisfied. The conduct will often influence the decision if the conduct amounted to an abuse of the public's trust, and it must possess some criminal element, even if serious consequences were not likely. As an example, the court identified "corruption" as a type of conduct that is inherently serious and for which a public official would be criminally liable, irrespective of the likely consequences in any given case.[21]

John Murphy argues that the tort of misfeasance is a practical cause of action and that it serves an important purpose in maintaining public officers to their vocation and accountability.[22] He cites the liability in the tort of misfeasance from two distinct angles; one of which is the rights based theory of Robert Stevens[23] and the other is the corrective justice theory of Ernest Weinrib.[24]

Murphy distills four significant areas of compatibility with these two theories:

> [T]ort does not protect a clearly defined private law right; the fact that its touchstones of liability include concepts that are highly unusual in tort law (such as malice, recklessness and bad faith); the fact that it confounds the

19. *Id.* ¶ 59.
20. *Id.* ¶ 60.
21. *Id.* ¶¶ 56–59.
22. John Murphy, *Misfeasance in a Public Office: A Tort Law Misfit?*, 32 Oxford J. Legal Stud. 51 abstract (2012).
23. Robert Stevens states: "The law of torts is concerned with the secondary obligations generated by the infringement of primary rights. This apparently simple proposition enables us to understand the law of torts (plural) as we find it in the common law." Robert Stevens, Torts and Rights, Oxford Scholarship Online abstract (2009), https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199211609.001.0001/acprof-9780199211609.
24. Ernest Weinrib does not invoke any distributive or redistributive justice consideration, either explicitly or implicitly, and it concerns of corrective justice framework are relevant to tort law and its only relevant consideration. He dismisses deterrence and loss distribution as irrelevant to tort law. Ernest Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 Theoretical Inquiries L. 107 (2001); Ernest J. Weinrib, The Idea of Private Law (1995).

> private/public law dichotomy envisaged by both authors, and the fact that it is both animated by, and makes ready use of, public policy considerations.[25]

This summary implies that the ambiguities are not peculiar to this tort as each features at different points in tort law. The misfeasance for a public office is by no means as hard to define as these theories would infer, and it is unacceptable to suggest that misfeasance was not of much practical effect and ought to be abolished.[26]

The claimant is successful in tort by proving that misfeasance in public office was motivated by malice. In *Three Rivers District Council v. Governor of the Bank of England*,[27] the bad faith of the official was a paramount consideration, provided that the loss arose directly from it. The principle was that a man is presumed to intend the natural and probable consequences of his actions that, in the ordinary course of events, cause injury. Lord Steyn, in giving the leading judgment in the case stated that "a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes. . . . The tort bears some resemblance to the crime of misconduct in public office."[28]

His Lordship held

> The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.[29]

His Lordship stated further that its commission required intent and that mere negligence would not be sufficient and that "reckless indifference" had to be real, not imputed; misfeasance had to be limited to the person who "knowingly took the relevant risk, rather than the person who gave it no thought." There had to be a "balance" between two considerations, which were, on the one hand, public officers must be deterred from deliberately abusing their power, and, on the other hand, they should not "be assailed by unmeritorious actions."[30] There had an equilibrium that to be

25. Murphy, *supra* note 22, at 51.
26. *Id.*
27. Three Rivers Dist. Council v. Governor of the Bank of England [2004] UKHL 48 (Eng.).
28. *Id.* at 190–91.
29. *Id.* at 191.
30. *Id.* at 195.

approximated "higher than foreseeable and lower than foreseen and their Lordships settled for reckless indifference to a probable risk."[31]

His Lordship was also emphatic in rejecting the suggestion that either the claimants or their harm be "proximate."[32] This established a demanding mental element to avoid claims by unmerited litigants for enormous sums, and imposed *locus standi* requirements or special damage not incurred by members of the general public, or membership of a class that the officer had been under an obligation to protect, or a "direct" link between the officer's wrongdoing and the claimant's loss.[33] The manner this had to be achieved was by extending liability for breach if there is a public duty and not a public power. Lord Hobhouse defined the scope of the tort liability by stating that if "a common law duty were required," the misfeasance tort would have been rendered in applicable because such duties come with "their own remedies."[34] His Lordship held that the "abuse of a discretionary power is beyond the reach of the misfeasance tort unless the circumstances were such that, legally speaking, the discretion could in the particular case be exercised in only one way."[35] There were three limbs—"purpose, knowledge, and consciously reckless indifference"—and the concept of subjective recklessness was to be evaluated at the initial and final stages because it amounted to "knowledge" in the commission of the tort, but the term *reckless* is not normally used in relation to this tort; other words are used including "blind disregard." At the first stage of the test, the phrase "without an honest belief in the lawfulness of his conduct" best conveys the requisite state of mind covering both actual knowledge and dishonest disregard. At the last stage, the phrase *wilful disregard* best describes the element of subjective recklessness in the third limb, and the word *risk* is the appropriate word to be used in tandem with it.[36]

His Lordship distinguished the terms used in negligence and misfeasance and "foreseen or foreseeable is to be avoided" because these are "borrowed from the law of negligence" and misfeasance "concerns deliberate acts."[37] In the first step the requirement is "having a specific purpose, a different concept from foresight. In the second limb the concept is acting intentionally with the knowledge that the act will have a particular consequence in the ordinary course. This is like foresight but represents rather a state of mind which colours the intentional or deliberate act."[38]

31. *Id.* at 196.
32. *Id.* at 194–96.
33. *Id.* at 196.
34. *Id.* at 229.
35. *Id.* at 230.
36. *Id.*
37. *Id.* at 231.
38. *Id.*

In Lord Millett's opinion, when the defendant acts from indifference to the likely harm of his actions to the victim, then "the basis of the action lies in the defendant taking a decision in the knowledge that it is in the excess of the powers granted to him and that it is likely to cause damage to an individual or individuals."[39] His Lordship also stated that dishonesty was the central element in "both targeted and untargeted harm" and that "even a deliberate excess of power would not amount to an 'abuse' of power for misfeasance purposes if it was done specifically for the claimant's benefit."[40]

His Lordship held that, for liability to arise, the

> failure to act must be deliberate, not negligent or inadvertent or arising from a misunderstanding of the legal position. In my opinion, a failure to act can amount to misfeasance in public office only where (i) the circumstances are such that the discretion whether to act can only be exercised in one way so that there is effectively a duty to act; (ii) the official appreciates this but nevertheless makes a conscious decision not to act; and (iii) he does so with intent to injure the plaintiff or in the knowledge that such injury will be the natural and probable consequence of his failure to act.[41]

The balance in calculating damages involves bad faith in as much as the public officer lacks an honest belief that his act is lawful. In a civil claim for willful neglect in performance of duty, the issue of public trust is crucial in imputing harm as a consequence of his actions. The court will award exemplary damages in addition to the compensation based on the loss suffered in calculating the loss suffered.

In *Kuddus v. Chief Constable of Leicestershire*,[42] there was a complaint of theft against a police officer who had forged the claimant's signature on what purported to be a withdrawal statement. There was clear impropriety on the part of the police officer. The action was framed purely in misfeasance. On the pleadings, the fact of the forged signature was admitted by the chief constable, as was misfeasance, and no challenge was made to the claim for aggravated damages, in addition to the compensatory damages.

The House of Lords considered an appeal against the strike-out of a claim involving a prayer for exemplary damages. They decided in favour of the appellant and set down an award to include exemplary damages, which is now a precedent for punitive awards in misfeasance actions, where the public official has acted with such malice as to endanger the victim or the victim's interest. Lord Stein held that the conduct amounting to

39. *Id.* at 234.
40. *Id.* at 235.
41. *Id.*
42. Kuddus v Chief Constable of Leicestershire [2001] 2 WLR 1789 (Eng.).

misfeasance "must be actionable per se, it covers a nonactionable breach of statutory duty and decisions contrary to the principle of natural justice."[43]

Given a requirement of a mental element, the officer must have acted in bad faith: the officer must be aware that the act is unlawful or be unconsciously indifferent as to its unlawfulness; mere negligence is not enough. The impact on the complainant was defined by Lord Mackay as arising from

> "targeted malice" where the defendant acts with the purpose of causing harm to the claimant. However, the defendant may also be liable if he is aware that his act will probably, or in the ordinary course of the events, cause injury of the type suffered by the claimant or if the defendant is subconsciously indifferent to the risk. The turning of the blind eye to the aftermath of the misconduct will satisfy this element, but not failure to appreciate the risks of those matters that may lead to the injury."[44]

In *Watkins v. Home Office*,[45] a convicted prisoner serving a sentence of life imprisonment, first in Wakefield Prison and then in Frankland Prison, was engaged in legal correspondence with his advisors on litigation, both actual and contemplated, which he claimed were protected by legal privilege. The claimant argued that staff at both prisons had breached prison rules by interfering with the mail when they were not entitled to do so. He brought proceedings against the Home Office and fourteen named prison officers, claiming damages for misfeasance in public office. Judge Ibbotson, sitting in the Wakefield County Court, found that some officers had wrongly interfered with the respondent's correspondence.[46] However, the judge also stated that most of them had done so without bad faith by invoking the precedence set out in *Three Rivers District Council v. Governor of the Bank of England (No 3)*, which is an essential ingredient of the tort, and so the claim against those officers failed.[47]

The Court of Appeal overruled the lower court, and the case reached the House of Lords where their Lordships found bad faith to be established in the case of three officers, given the issue of legal confidentiality. Lord Bingham stated that the question related to action within the bounds of unlawfulness. One officer was alleged to have breached legal privilege mail; a second officer denied in bad faith that the rule applied to incoming mail; and the third officer had opened two letters marked from the Durham

43. *Id.* ¶ 27.
44. *Id.* ¶ 34.
45. Watkins v. Home Office [2006] UKHL 17 (Eng.).
46. *Id.* ¶ 4.
47. Three Rivers Dist. Council v. Governor of the Bank of England (No 3) [2003] 2 AC 1 ¶ 191. (Eng.).

County Court that were addressed to the respondent to see if they related to the action brought by the respondent against him.[48]

In these three instances, bad faith was established. However, the judge dismissed the respondent's claims against these officers on the ground that misfeasance in public office was not a tort actionable per se and that the respondent had failed to prove any financial loss or any physical or mental injury.[49] The difference between criminal liability and civil liability that leads to a tort of misfeasance is that civil liability involves the commission of a negligent act that is not a result of targeted malice or recklessness in the commission of the offence.

III. SCOPE OF MISFEASANCE BY OMISSION OF DUTY

The breach of duty of care can arise in circumstances of actions by public officials, such as police officers, local authority personnel, or civil servants in public office. The negligence actions in these cases are based on a deliberate failure to perform a duty that is likely to injure the member of the public in the course of a public duty. However, before deciding to proceed with the claim, the prosecution should consider whether the acts complained of can properly be dealt with by any available statutory offences.[50] If another cause of action could provide the court with adequate sentencing powers and permit a proper presentation of the case, then that offence should appear instead on the indictment. The important criteria in a civil law claim are twofold: (1) Do the police owe a general duty of care to apprehend an unknown criminal? and (2) Do the police owe a duty of care to individual members of the public who suffer injuries as a result of the activity of the criminal?[51]

The police are bound by the public law duties, considered above, to act in a particular way, and they can be compelled to act by a mandatory order issued in judicial review proceedings.[52] The individual officers, in their official capacity, are also subject to compulsion by court order issued against the force. A general duty may exist to take care to protect people from injuries caused by other risk sources and is more invasive of freedom than a general duty to take care not to cause injury by one's own action.[53]

48. *Watkins* [2006] UKHL 17 ¶ 26.

49. *Id.* ¶ 27.

50. *See*, *e.g.*, Rowling v. Takaro Props. [1988] AC 473 502(Eng.); X v. Bedfordshire Cty. Council [1995] 2 AC 633, 761(Eng.).

51. In *Hill v. Chief Constable* [1989] AC 53 (Eng.), such a duty was denied. The police were not bound to act positively when they were acting in the course of the execution of their duty.

52. Richard Hyde, *The Role of Civil Liability in Ensuring Police Responsibility for Failures to Act After* Michael *and* DSD, 22 Eur. J. Current Legal Issues (2016).

53. P.J. Fitzgerald, *Acting and Refraining*, 27 Oxford Acad. Analysis 133, 139 (1967); J. Bennett, *Whatever the Consequences*, 26 Oxford Acad. Analysis 83, 94–97 (1966).

The "ideal of the active citizen deploying the law of tort to call errant public servants to account is reinforced by a key institutional safeguard, namely the right to jury trial in cases of malicious prosecution and false imprisonment (the latter tort most likely to be used against the police)."[54] Individuals may pursue an express statutory remedy for omission by the police under the Police Reform Act 2002, amended by the Police Reform and Social Responsibility Act 2011, which gives them the right to complain about police officer conduct. Section 31, subsection 2, in particular, applies to investigation of (1) serious complaints, and (2) conduct matters, which relate to any relevant officeholder.[55]

Yet the other possibility is to bring proceedings under another tort: misfeasance in public office. This general tort covers failures of all public authorities, rather than a specialised regime, for dealing with situations under negligence. Therefore, the lack of an imposition of a duty of care would not override this alternative remedy in tort. It has been argued that "in the formulation of principles applicable for governing public authority negligence liability, one of the difficulties the courts have confronted is that the structure of English law makes it hard to deal with cases which straddle the boundary between the public and private law."[56] It may lead to an order for damages by the court for misconduct in public office, and the evidence must indicate malice. It is a common-law action that is within the power of the courts, and it can be initiated along with such clams in tort as malicious prosecution that can be combined in a civil action.

In *Rees v. Commissioner of Police for the Metropolis*,[57] the victim Daniel Morgan died when he was struck multiple times by an axe to his head. There were unsuccessful inquiries by the police but Gary Eaton, who assisted as an aider and abettor in the offence disclosed that he had knowledge about the murder, and his witness statement led to the indictment of all four defendants. There was possibility of other witnesses to the crime. At the criminal trial, the judge concluded that the police officer involved, Detective Constable (DC) Cook had coerced the testimony of Eaton, excluded it and not proceded to charge one of the defendants. The CPS

54. R. Clayton & H. Tomlinson, Civil Actions Against the Police ¶¶ 3-081 to 3-087 (3d ed. 2004); *see also* Hugh Davies & John Beggs, Police Misconduct, Complaints and Public Regulations (2009).

55. The Police (Complaints and Misconduct) Regulations 2020 allow the Secretary of State to make the Regulations in exercise of the powers conferred by the provisions of the Police Reform Act 2002 specified in Schedule 1 to these Regulations and section 180(1) and (3) of the Policing and Crime Act 2017. Police (Complaints and Misconduct) Regulations 2020 Statutory Instrument 2020 No. 2, legislation.gov.uk/uk/si/2020/2/made.

56. D. Fairgrieve & D. Squires, The Negligence Liability of Public Authorities ¶ 1.09 (2d ed. 2019).

57. Rees v. Comm'r of Police for the Metropolis [2017] EWHC 273 (QB) (Eng.).

later discontinued the case against all the remaining accused, citing the lack of evidence against them.

The four defendants applied for compensation against the police for malicious prosecution and misfeasance in public office of which three were not successful but the fourth, Mr Fillery did succeed in misfeasance and not in malicious prosecution. At a judicial review hearing, Judge Mitting stated the cause of action in misfeasance required two main elements in tort: (1) targeted malice requiring proof of improper motive; and (2) unlawful action where the officer has no honest belief that his actions are lawful. Judge Mitting went on to rule that

> for Cook to be treated as the prosecutor, the law requires to be stated in a manner not established by existing authority. For the Claimants to succeed on this issue, the law must be that an investigator who, by his deliberate conduct in relation to an important element of a case, prevents the independent decision-maker from reaching a fully informed decision, is to be treated for that reason alone as the prosecutor.[58]

His honour determined that the CPS indicted the defendant based on an objective consideration of the evidence. His Honour concluded that, despite the suppression by DCS Cook of facts relevant to Eaton's evidence, they did not invalidate the prosecution against any claimant, besides Mr. Fillery.

It was on these grounds that DCS Cook was not to be treated as the prosecutor that would enable the claims for malicious prosecution against first, second and fourth defendant to succeed. There was no liability for deriving a statement from Mr Eaton and that was within the authority of a police officer despite the fact that a police officer can be liable in tort of misfeasance for misconduct in public office.

In terms of alleged misfeasance, his honour did not accept the Metropolitan Police's contention based on *Calveley v. Chief Constable of the Merseyside Police*,[59] that the officer could exclude liability because he was not exercising a public power such as a constable's common-law and statutory power of arrest or search. He held that "the tort is not confined to the exercise of a common law or statutory power and that misconduct in the performance of police functions is sufficient for the tort; to hold otherwise would create unjustified anomalies in law that should not be tolerated."[60]

Judge Mitting held that the case law establishes that misconduct in the performance of police functions is sufficient for the tort to be committed. In *Cornelius v. London Borough of Hackney*[61] Waller LJ concurred with

58. *Id.* ¶ 146.
59. Calveley v. Chief Constable of the Merseyside Police [1989] 1 AC 1228. (Eng.).
60. *Rees*, [2017] EWHC 273¶ 182 (Eng.).
61. Cornelius v. London Borough of Hackney [2002] EWCA (Civ) 1073 (Eng.).

the judgment in *Elliot v. Chief Constable of Wiltshire Constabulary*,[62] when a police officer supplied details of convictions to the press, but did not act under the auspices of a relevant public power.[63] The judge held that the misfeasance alleged would be arguable on the following basis:

> Police officers have a status at common law, and perhaps statute as well, which is both a privilege and a source of powers and duties. If, in the apparent performance of functions pertaining to their office, police officers commit misconduct, then if the other ingredients of the tort of misfeasance in public office, and in particular the requisite intention to injure and resulting damage, are present, the tort of misfeasance in public office is, in my opinion, made out.[64]

The first cause of action by which the tort can be committed—so called "targeted malice"—requires "proof of an improper or ulterior motive. This is either identical to or so closely similar to the element of malice required to be proved in malicious prosecution as to be indistinguishable. For the reasons given before, it is not made out in this context too."[65]

The second manner of its commission "requires proof that the act is unlawful and that the public officer does not have an honest belief that it is lawful. The act will sometimes be unlawful because it is in excess of powers; but that is not the only way in which a public official can commit an unlawful act."[66] Judge Mitting held that the finding of liability in any case of alleged misfeasance in public office will "necessarily involve an assessment of injury or loss."[67]

Judge Mitting held:

> A police officer who discloses confidential data to a journalist . . . commits a civil wrong under the Data Protection Act 1998 and abuses the authority given to him by his chief constable to gain access to such data. A police officer who interferes improperly with the gathering of evidence for a criminal prosecution may also commit the common law crime of doing an act tending and intended to pervert the course of justice. In any of these cases, the element of unlawful conduct will be made out [based on the malice of the tortfeasor/offender].[68]

If the CPS would have "prosecuted regardless of the misfeasance, no loss is suffered," and the "Court's role is to determine what would have happened 'but for' the misfeasance, assessed on the balance of probabilities."[69]

62. Elliot v. Chief Constable of Wiltshire Constabulary [1996] TLR 693 (Eng.).
63. Elliott v. Chief Constable of Wiltshire [1996] TLR 693 (Eng.).
64. *Rees*, [2017] EWHC 273, ¶ 182; *id.* ¶ 156.
65. *Id.* ¶¶ 183–84.
66. *Id.*
67. *Id.*
68. *Id.* ¶ 184.
69. *Id.* ¶ 193.

In a legal commentary, Oliver Williamson, a public law specialist, argues that the fact that the misfeasance has resulted in the injury is not pertinent because the action would not succeed if there was no causation leading to a loss based on the balance of probabilities.[70]

> [The] issue of malice is a substantial hurdle which will, in all but the most obvious of cases, be difficult for a Claimant to overcome. Even where it is found that the police have "overstepped the mark" to the point of committing a criminal offence and intending to pervert the course of justice, where the officer's state of mind is to bring those he believed to be guilty to justice, that can be sufficient to demonstrate an absence of the malice element.[71]

The extensive protection afforded by public interest is also rejected by Dermot PJ Walsh, who observes as follows:

> In a line of decisions from *Hill v Chief Constable of West Yorkshire*, through *Brooks v Metropolitan Police Commissioner* to *Smith v Chief Constable of Sussex*, the House of Lords has held firmly to the public policy principle affording the police an extensive protection against liability for a negligent failure to prevent crime. Despite prompting by the European Court of Human Rights in *Osman*, and the fact that courts in some other major common law jurisdictions have not followed their lead, their Lordships (with exception of Lord Bingham) have displayed no appetite for a re-think.[72]

The main grounds for Walsh is that the "scope of this duty is 'surprisingly uncertain,' and there appears to be a few limits to its application" and that the "objective of maintaining sound police accountability and justice for victims of police negligence would be better served by combining the 'established proximity and standard of care concepts and the emerging proportionality principle.'"[73] Walsh states that the current public policy approach "may be justified in a case involving minor negligence and harm for the victim" but they could also "equally justify a case involving gross negligence and serious injury," which may be "unconvincing for a victim of a human rights violation resulting from gross negligent police behaviour, to be denied a remedy based on feeble 'defensive practice arguments.'"[74]

Phil Palmer, another academic, supports this contention that the English legal approach to police negligent liability is "highly restrictive" and that the immunity from prosecution continues to be the "default position" where the claimants bring an action for "negligent investigation or a

70. Oliver Williamson, *When Does a Police Officer Prosecute or Commit Misfeasance?* UK Police Law Blog (June 7, 2017), http://ukpolicelawblog.com/index.php/9-blog/129-when-does-a-police-officer-prosecute-or-commit-misfeasance.

71. *Id.*

72. Dermot PJ Walsh, *Police Liability for a Negligent Failure to Prevent Crime: Enhancing Accountability by Clearing the Public Policy Fog*, 22 King's L.J. 27, 29 (Feb. 2011).

73. *Id. at* 42.

74. *Id.*

negligent failure" to protect.[75] The option of seeking the alternative route to liability through the Human Rights Act has been so "narrowly interpreted" by the House of Lords that it makes the probability of a successful action as unlikely in an action in negligence.[76] The outcome is that claimants have difficulty in bringing a successful action, and he advises recourse to the "tort of misfeasance."[77]

IV. TARGETED MALICE AND RECKLESSNESS

An indictment for criminal negligence may be brought if the unlawful act arose from a special duty situation. The law of involuntary manslaughter owes its origins to the notion of gross negligence manslaughter. When tasked to define the terms of involuntary manslaughter, the Law Commission, Legislating the Criminal Code: Involuntary Manslaughter, stated as follows:

> That where a person causes death through extreme carelessness or incompetence, the law of gross negligence manslaughter is applied. Frequently the defendants in such cases are people carrying out jobs that require special skills or care, such as doctors, police or prison officers—without due caution, or who fails properly to look after a dependent person in her care, may be the subject of such a charge. The categories of unlawful act and gross negligence manslaughter are not mutually exclusive; for example, a defendant who unlawfully shoots at a trespasser may be guilty on both counts.[78]

The Law Commission report inferred that the terminology is not mutually exclusive for gross negligence and recklessness but that the judges found the term *gross negligence* cumbersome and that they have used *recklessness* as a synonym, to describe a high degree of negligence.[79] This is now the definition of the criminal act in question and is applied in deducting if the crime has been committed. The *actus reas* of involuntary manslaughter is based on an unlawful killing of a human being, without *malice aforethought*, and is distinguished from voluntary manslaughter by the absence of *mens rea* or intention.

The test for criminally negligent manslaughter was considered by the House of Lords in *R v. Adomako*.[80] In this case, an anaesthetist failed to identify during an eye operation that a ventilating tube had become

75. Phil Palmer, *Can the Police Ever Be Liable for Negligent Investigation or a Failure to Protect?*, 1 Int'l J. Pub. L. & Pol'y 100 (2011).
76. *Id.*
77. *Id.*
78. Law Commission 237: Legislating the Criminal Code: Involuntary Manslaughter (1997), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc237_Legislating_the_Criminal_Code_Involuntary_Manslaughter.pdf.
79. *Id.* ¶¶ 3.7–3.13.
80. R v. Adomako [1995] 1 AC 171 (Eng.).

disconnected. The patient suffered a cardiac arrest and could not be revived. The doctor was charged with manslaughter on the grounds of being grossly negligent in failing to respond to the emergency. Lord MacKay stated:

> The ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established then the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. That will depend on the seriousness of the breach of duty committed by the defendant in the circumstances in which the defendant was placed when it occurred.[81]

According to the book *Smith and Hogan on Criminal Law*, the terms *recklessness* and *gross negligence* denote the "fault" required for involuntary manslaughter.[82] However, after *Adomako*, gross negligence is sufficient but not necessarily required for a manslaughter conviction. It has been decided in the Court of Appeal that in a case of deliberate risk taking, it was acceptable to instruct the jury on the presence of recklessness; and the need of proving "an obvious risk of serious harm from the defendant's conduct, objectively assessed, and an indifference to that risk on the part of the defendant or foresight thereof" in addition to "a determination nevertheless" to undertake the risk.[83]

The prosecutions of healthcare professionals for manslaughter following fatal mistakes are rare, and, although such cases are unusual, their tendency to challenge the basis of liability has often led them to the appeal courts and into law reports as leading authorities on manslaughter.[84] This view was affirmed by the Court of Appeal in *R v. Misra*,[85] where the appeal of two junior doctors who failed to diagnose and manage a patient with a post-operative infection was dismissed. The court considered that the law of gross-negligence manslaughter was compliant with legal certainty:

> Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime, any conviction for it would be unsafe. That said, however, the requirement is for sufficient

81. *Id.* ¶¶ 86–87.

82. David Ormerod & Karl Laird, Smith and Hogan's Criminal Law 644–45(14th ed. 2015); *see also* A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan & G.J. Virgo, Simester and Sullivan's Criminal Law: Theory and Doctrine 422–23 (6th ed. 2016).

83. R v Lidar [2000] 4 Archbold News 3, ¶ 50 (Eng.).

84. *See* Anthony Arlidge, *Criminal Negligence in Medical Practice*, 1 Medico-Legal J. 3, 13 (1998); Jeremy Horder, *Gross Negligence and Criminal Culpability*, 47 Univ. Toronto L.J. 495 (1997); *see also Adomako* [1995] 1 AC 171.

85. R v. Misra [2004] EWCA (Crim) 2375, ¶¶ 34–35.

> rather than absolute certainty. . . . Moreover, there is a distinction to be drawn between undesirable, and in extreme cases, unacceptable uncertainty about the necessary ingredients of a criminal offence, and uncertainty in the process by which it is decided whether the required ingredients of the offence have been established in an individual case.[86]

The test for liability was modified by the Court of Appeal in *R v. Rose*[87] where the defendant optometrist was accused of gross negligence manslaughter after (1) failing, without good reason, to properly examine the back of the deceased's eyes during his sight test as she was required to do so by reason of her statutory duty of care, and (2) in not referring him for urgent medical attention after the crucial findings of damage to the retina that she should have viewed.

The court established a five-stage test: (1) duty of care; (2) negligent breach; (3) reasonably foreseeable that the breach gave rise to a serious and obvious risk of death; (4) breach caused the death; and (5) the circumstances of the breach were exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.[88] Lord Justice Levison ruled:

> What a reasonably prudent optometrist would or should have known at the time of the breach was that, if he had not carried out a proper examination of the back of the deceased's eyes, there would have remained the possibility that signs of potentially life-threatening disease or abnormality might have been missed. However, that was not enough to have founded a case of gross negligence manslaughter since there had to have been a "serious and obvious risk of death" at the time of breach.[89]

Accordingly, the judge had erred in rejecting the defence's submissions of "no case to answer."[90] For the same reasons, the judge's direction to the jury regarding foreseeability also suffered from the same error. He should not have directed the jury that, when considering whether there had been a "serious and obvious risk of death," they had to consider whether the risk would have been obvious to a reasonably competent optometrist with the knowledge that the defendant would have had if she had not breached her duty.[91] The defendant's serious breach of duty was in the judge's view "a matter for her regulator, in the context of this case[;] however, it does not constitute the crime of gross negligence manslaughter."[92]

86. *Id.* ¶ 64.
87. R v. Rose [2017] EWCA (Crim) 1168 (Eng.).
88. *Id.* ¶ 77.
89. *Id.* ¶ 86.
90. *Id.* ¶ 93.
91. *Id.* ¶ 94.
92. *Id.* ¶ 95.

The academic Hannah Quirk argues:

> [I]n previous cases of gross negligence manslaughter, a reasonably foreseeable (i.e., objective) risk of death that was both 'obvious' and 'serious' had to be proved (in addition to the other elements of the offence). The advancement that Rose has made to the jurisprudence is a requirement that, in determining the answer to this test, retrospective hindsight is irrelevant. The reasonably prudent person in the defendant's situation does not have any knowledge that the defendant would have had, but for the breach. There has long been concern about an apparent increase of investigations and prosecutions of health-care professionals for gross negligence manslaughter.[93]

Quirk states further:

> [T]he optometrist's failure should be characterised as gross negligence and therefore as a crime. This characterization will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon her, involving, as it must have done, that a risk of death to the patient was such that it should be judged criminal.

V. STATUTORY NEGLIGENCE AND MISFEASANCE

Charges for a statutory breach may be brought when gross negligence leads to a fatality. Under the Health and Safety at Work Act (HSWA) 1974, the objective of protecting people, other than those employed at work, arises from risks to health and safety stemming "in connection with the activities of persons in employment."[94] Section 7 of the Act lays down the general duties of duty of each employee at work, who is expected:

- to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and
- as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to cooperate with him so far as is necessary to enable that duty or requirement to be performed or complied with.

Thus, the HSWA requires employers to conduct themselves in such a way as to ensure, so far as is reasonably practicable, that those within the working environment, either employed or members of the public, are not

93. Hannah Quirk, *Sentencing White Coat Crime: The Need for Guidance in Medical Manslaughter Cases*, 2013 Crim. L. Rev. 871; *see also* Philip White, *More Doctors Charged with Manslaughter Are Being Convicted, Shows Analysis*, 2015 Brit. Med. J. 351.

94. Health and Safety at Work Act § 1 (1)(b).

exposed to risks to their health or safety. This mandate means the Prison Service has to ensure not only the safety of its officers but also the prisoners in their care.

The risks include those attributable to "the manner of conducting an undertaking" under HSWA Section 3, which may affect people other than those who are employed at work. Section 3 sets out the scope of the liability, which requires authorities to take account of health and safety procedures to ensure effectiveness, capability, health and safety expertise, economy, and efficiency. Under this section, authorities must investigate the probable cause of a significant contributory factor to the injury or risk complained of and must determine the presence of a high level of risk that the Health and Safety Executive (HSE) needs to investigate in the interests of justice. The section also addresses whether the authority involved made adequate use of resources when considered against the level of public concern, and, if not, then the authority is liable.[95]

Section 3 seeks to determine if the death was the "probable cause of, or a significant contributory factor to, the injury or risk complained," which could lead to prosecution.[96] In such circumstances, the HSE must first consider investigating the existence—past or present—of a high level of risk or the need to act in or investigate the interests of justice. Any criminal or other proceedings instigated are based on a punitive action taken against a duty-holder following a decision that needs to be impartial, justified, and procedurally correct.

In the aftermath of the London bombings in July 2005, the police force had shot an innocent Brazilian electrician who was mistaken for a fugitive terrorist. In *R (on the application of da Silva) v. DPP*[97] the police officer was held to be in breach of Section 3 (1) of the HSWA and found guilty of endangering the public over the fatal killing. The jury found that Cressida Dick, the assistant commissioner of the force who led the operation, bore no personal liability after she had been accused by the prosecutors of

95. The Health and Safety Executive Safety statement, which has been developed in accordance with the Code for Crown Prosecutors, makes clear that HSE expects enforcing authorities to exercise discretion/judgment in deciding when to investigate or what enforcement action may be appropriate. David Humphreys, Health and Safety Commission Review of Section 3 of the Health and Safety at Work Act 1974 (HSWA) 1–7 Sept. 24, 2002), corporateaccountability.org.uk/dl/Public Safety/HSCOct02.pdf.

96. Under the principle established in the House of Lords case of *R v. Associated Octel Ltd.* [1996] 4 All ER 846 (HL), http://www.publications.parliament.uk/pa/ld199697/ldjudgmt/jd961114/octel01.htm, the crucial question in establishing liability under Section 3 is whether "the activity in question can be described as part of the employer's undertaking." It imposes a duty upon the employer himself, defined by reference to a certain kind of activity, namely, the conduct by the employer of his undertaking. Whether a particular activity is part of the conduct of the undertaking is determined by the facts of each case and if the duty-holder can exercise control over both the conditions of work and where the activity takes place.

97. R (on the application of da Silva) v. DPP [2006] EWHC 3204 (Admin) (Eng.).

failing to keep control of her officers. The police force was fined a sum of £175,000, along with £385,000 costs, for causing the death at the Stockwell underground station.

However, the outcome in the case would not entitle "the family, which is prevented from relying on the statute by HSWA 1974, s 47(1)—which declares that failure to comply with any of the general duties in Sub sections 2 to 9 shall not be construed as conferring a right of action in any civil proceedings."[98] When the family of the dead Brazilian individual appealed to the European Court of Human Rights on account of a possible breach of Article 2, Right to Life. Under the European Convention of Human Rights, the claim was rejected by the European Court of Human Rights.[99] The Court ruled that all the reports about the actions of the police officers "carefully examined the subjective reasonableness of their belief that Jean Charles de Menezes was a suicide bomber who might detonate a bomb at any second."[100]

There has been a transformation in the approach of the courts in dealing with the issues that arise where the prosecution was brought for generic and policy failures and for operational mistakes. This transformation affects adjudging future emergency operations based on the criteria whether the authority considered all reasonably practical measures in ensuring health and safety. The difference has led to a reappraisal of the grounds for the decision in the *Hill v Chief Constable of West Yorkshire Police* case.

In new proceedings brought against the same police force that was the appellant in *Robinson v Chief Constable of West Yorkshire*,[101] the appellant, Mrs. Robinson, a frail seventy-six year old walking along the street in the city center was confronted by undercover officers from West Yorkshire Police, who were preparing to arrest a suspected drug dealer, the defendant Williams who was in the vicinity in the same location. Mrs. Robinson, who was one of the pedestrians walking along the path, went by Williams into the officers' direct line of sight. The officers grabbed Williams, who resisted arrest, resulting in a struggle, and the officers and the suspect fell on top of Mrs. Robinson.

The police were exonerated at both the first instance, but the judge held that the officers had acted negligently and identified that, as Mrs. Robinson was an elderly lady, there was a plausible risk that she would be injured due to her being in nearness to the altercation. The judge stated he was

98. Kevin Willianson, *Could the Family of Jean Charles De Menezes Succeed in a Civil Action for Damages Against the Police? Kevin Williams Investigates*, New Law J. (June 12, 2007), newlawjournal.co.uk/content/compensating-tragedy.

99. Armani de Silva v UK (App. No 5878) 8/2016 (Strasbourg), https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-161975%22].

100. *Id.* ¶ 253.

101. Robinson v. Chief Constable of West Yorkshire [2018] UKSC 4 (Eng.).

bound by the decision in *Hill*, which conferred on the police an immunity against claims in negligence. At the Court of Appeal, the cause of action did not come under the exceptions outlined in the *Hill* case and was dismissed. When the appeal was heard at the Supreme Court, the decision was reversed in favour of the appellant, Mrs. Robinson. Their Lordships restored the trial judge's ruling that the officers had behaved without care and were negligent.

Lord Reed stated that the ruling in Hill must now be read in conjunction with the principles in the new judgment. His Lordship ruled:

> The case of Hill is not authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. On the contrary, the liability of the police for negligence or other tortious conduct resulting in personal injury, where liability would arise under ordinary principles of the law of tort, was expressly confirmed. . . . In short, Mrs Robinson was injured as a result of being exposed to the very danger from which the officers had a duty of care to protect her.[102]

Lord Mance held:

> Of course, where action is brought on the basis of physical harm done by positive act of the police, it will succeed, but only if negligence is proved. As Lord Reed explains, policing may sometimes involve unavoidable risk to individuals.[103] It may very often involve extremely delicate balancing of choices. Crowd control, hostage situations, violent outbreaks of crime, and the allocation of scarce resources where there are large numbers of persons with the potential to offend, even at the terrorist level, are simply examples. Sometimes, decisions may have to be made under extreme pressure; at other times, they may remain very difficult notwithstanding time for analysis, and there may be a high level of risk that they turn out to be wrong. The question is always not whether, with hindsight, the decision was wrong, but whether, in all the circumstances, it was reasonable.[104]

The landmark Supreme Court judgment has overridden the established "*Hill* principle"; in actions taken in the course of suppressing crime, the police owe no duty of care to members of public. There is a duty of care related to injuries sustained in the course of operational duties. The judgment is likely to have an impact on the ability of potential claimants to bring legal actions against the police in negligence and in misfeasance. This ruling thus overrules the assumption that there is no general duty of care owed by the police to apprehend an unknown criminal as a matter of public policy. It indicates that the police not are immune from allegations of negligence arising from their investigation and apprehension of criminals.

102. *Id.* ¶ 75.
103. *Id.*
104. *Id.* ¶ 121.

VI. DISTINCTION BETWEEN TORT AND CRIMINAL NEGLIGENCE

The grounds of misfeasance in criminal law have been defined by case law, and it is dependent on formulation by the courts. It is not a statutory offence, and it has been reliant on the judge-made sources and the precedent-based offences that are applied to varying situations that give rise to criminal liability and a civil wrong in tort that raises the issue of monetary damages. This liability is not limited to cases involving attempted financial gain and may be of any willful abuse of a public position; examples include wilful excesses of official authority; 'malicious' exercises of official authority; wilful neglect of a public duty; intentional infliction of bodily harm, imprisonment, or other injury upon a person; and frauds and deceits.[105] This offence can also apply in other cases of official misconduct, such as redrawing constituency boundaries for electoral gain by the head of an elected local Council.[106] The legal academic Simon Parsons observes that misfeasance consists of elements of criminal conduct that are ambiguous and bring uncertainty to the legal process. He categorizes them as a wide range of offences that include non-feasance, misfeasance, frauds and deceits, malfeasance, and oppression This view has gained currency because, as noted, the crime of misfeasance has not been defined precisely as to its terms and remains a common-law offence.[107]

The Joint Committee on the Draft Corruption Bill 2002–03 considered misfeasance in their report and found that "the draft bill does not contain a statutory offence of misuse of public office."[108] However, as a civil wrong, the offence must include a determination of liability that has a high threshold. The difference is that the malice was targeted malice, but reckless malice arises if the recklessness was deemed to be subjective, arising when a defendant would have foreseen the consequence of his actions. An element of "corruption" arises in some types of conduct that are inherently serious and possess a criminal liability, regardless of the outcome of the action.

Colin Nicholas and his co-authors state as follows:

> [C]onsequence . . . is not an element of the offence; but is, rather, a factor going to culpability or seriousness. Thus, in the case of an obviously serious

105. Misconduct in Public Office Crown Prosecution Service, 16 July 2018, cps.gov.uk /legal-guidance/misconduct-in- publicoffice.

106. In *Porter v. Magill* [2001] UKHL 67 ¶ 57(Eng.), the House of Lords held that the test for determining whether misconduct is sufficiently serious to pass the threshold for a criminal conviction is "to such a degree as to amount to an abuse of the public's trust in the office holder"; the likely consequences of the misconduct is merely one of many potentially relevant factors to be considered in assessing whether this test is satisfied.

107. Simon Parsons, *Misconduct in a Public Office—Should It Still Be Prosecuted?*, 76 J. Crim. L. 179 (2012).

108. Joint Committee on the Draft Corruption Bill, Paper 157, HC 705 (2002–03), https://publications.parliament.uk/pa/jt200203/jtselect/jtcorr/157/157.pdf.

> breach [of duty], such as corrupt behaviour, it may not be necessary to have regard to consequences. . . .[109]

The legal academic Mark Aronson has undertaken a comparative analysis of the laws of misfeasance that apply in the jurisdictions of Australia, New Zealand, England, and Canada, and he affirms the tort's expansion beyond the familiar administrative law context of abuse of public power, to abuse or misuse of public position.[110] He states that the act of misfeasance must, at the very least, have been recklessly indifferent as to whether a public official was exceeding or abusing the public power or position and thereby risking harm. This interpretation is in accordance with the criminal law requirement that there should be a *mens rea* in the criminal offence of misconduct in public office.

Aronson questions the capacity of the "recklessness" element to constrain claims for indeterminate sums by a vast array of claimants, of whom some may have been only secondary or tertiary victims of the public official's misconduct. He draws a comparison with the crime of misfeasance because misconduct in public office is a common-law indictable offence with a long history and *obiter dicta* in case law.[111] He compares the criminal liability to the tort liability of the offence:

> Clearly, there are differences between the tort and the crime—for example, the crime is a conduct offence, whilst the tort requires both conduct and material damage. There has nevertheless been some cross-referencing in some of the recent tort judgments to their relatives in criminal cases, and some of the recent criminal judgments concerning the common law offence have returned the compliment. The context was a debate as to the meaning of reckless indifference. The House of Lords in *R v Caldwell 106* had elided criminal negligence with criminal recklessness by ruling that a person could be criminally reckless if they had given no thought whatsoever to a particular and objectively obvious circumstance or risk. Lord Steyn refused in *Three Rivers* to import that precedent across to the misfeasance tort, and gave the broadest of hints that *R v Caldwell* needed overruling, an event that occurred just four years later.[112]

The issue of culpability in misfeasance needs to be considered in a more assiduous manner. It requires a tougher and more stringent test for officers to be brought and a more transparent justice system. Their omissions and negligent acts have to be dealt with more proactively so that due process can be commenced and upheld in an expeditious manner.

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109. Colin Nicholls, Tim Daniel, Alan Bacarese & John Hatchard, Corruption and Misuse of Public Office ¶¶ 3.23, 3.58 (2d ed. 2011).

110. Mark Aronson, *Misfeasance in Public Office: A Very Peculiar Tort*, 35 Melbourne Univ. L. Rev. 1 (2011).

111. *Id.*

112. *Id.* at 14.

VII. CONCLUSION

The action for misfeasance was virtually defunct in England by the beginning of the last century. The interpretation of "malice" in England in the early actions for misfeasance was based on officials aiming actions against plaintiffs, with every intention of harming plaintiffs for reasons that the officials must have known were unlawful. The issue of compensation was very compelling in such circumstances, and it would be arduous for the claimant to be able set out such malice and also to prove it.

As a public law remedy, misfeasance actions contain the elements of tort that are hard to prove, and government actions that are driven by good faith will not give rise to actions, even if the exercise of power is invalid. But the machinery of justice in the United Kingdom has suffered adversely at times from the mistakes of officials, arising from their negligence. It may lead to exoneration of the public officers and a lack of prosecution and disciplinary proceedings within the organisation, which have no public bearing. The *MacPherson Report* in the aftermath of the public inquiry into the handling of the *Lawrence* murder case inferred that the officials escaped liability from what appeared to be a case of gross negligence.

The House of Lords defined liability of the police as to their duty of care in *Brooks v. Commissioner of Metropolitan Police* and restricted it to a duty to protect the victim, to record their testimony, and to carry out the investigation diligently. It did not extend to exercising a duty to not cause psychiatric harm if a consequence of the incident. There was no misfeasance in this case where the police force was exonerated for any negligence for which they may been liable in the investigation of the offence. However, the recent case law suggests that police will no longer enjoy blanket immunity from being sued for negligent acts committed while conducting their operations, and this possibility may come to play in negligence and in misfeasance.

The tort of misfeasance is based on common law, and its boundaries are defined by the court on a case-by-case basis. Its scope is made up of judicial reasoning contingent on the misconduct of the public officials in the course of their duty. Ultimately, a need exists for a statutory definition of misfeasance to bring all the strands together and to make a clear definition to separate the tort from criminal liability. The actions stem from a breach of a duty of care by the public official who then acts with malice that is reckless or intentional and which causes damage that leads to criminal liability.

DEFINING CIVILITY AS AN ATTORNEY

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The notion of civility is a frequent topic when discussing trends within the legal profession. As early as law school, law students are taught to follow the ABA's *Model Rules of Professional Conduct* and the ethical obligations that come with taking the oath of professionalism as an attorney. Yet, the term *civility* is not defined within any legal statutes or guidelines. This article will address what civility means within the legal profession and the fine line between zealous advocacy and acting without civility. This article will discuss specific examples of incivility within the legal profession and provide guidance on how best to handle disagreements or aggressive communications with clients, opposing counsel, and outside parties. Finally, the article will examine incivility in email communications and note how the shift toward remote proceedings during the COVID-19 pandemic has created new potential pitfalls of which attorneys should be aware to ensure civility while practicing.

I. CIVILITY DEFINED

According to the *Merriam-Webster Dictionary*, the term *civility* is defined as "civilized conduct" or "a polite act or expression."[1] *Oxford Dictionary* defines the term as "[f]ormal politeness and courtesy in behaviour or speech" or "[p]olite remarks used in formal conversation."[2] These definitions are helpful in understanding the mechanics of the term, but what exactly falls within the purview of acting with civility?

The *Model Rules of Professional Conduct* require that attorneys be fair to opposing counsel, refrain from engaging in prejudicial conduct toward the administration of justice, and maintain the decorum of the tribunal.[3] In addition, some states and local bar associations have adopted their own standards for civility that are more specific than the Model Rules.[4] For example, California has adopted *Attorney Guidelines of Civility and Professionalism*, which is a set of voluntary guidelines and goals regarding best practices of civility in the legal profession.[5] The District of Columbia Bar has adopted *Voluntary Standards for Civility* for attorneys to use as a guide

1. *Civility*, Merriam-Webster.com, www.merriam-webster.com/dictionary/civility (last visited Apr. 4, 2019).

2. *Civility*, Oxford Dictionary, https://en.oxforddictionaries.com/definition/civility (last visited Apr. 4, 2019).

3. *Incorporating Civility into Your Law Practice*, FindLaw, https://practice.findlaw.com/practice-guide/incorporating-civility-into-your-law-practice.html (last visited Apr. 17, 2019).

4. *Id.*; *see also Professionalism Codes*, Am. Bar Ass'n (last updated Mar. 2017) (listing specific civility standards by state), www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.

5. State Bar of Cal., Civility Toolbox (2009), www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf (last visited Apr. 17, 2019).

for acting with civility in their legal practice.[6] New York also has adopted *Standards of Civility* as well as *Rules of Professional Conduct*.[7]

The most common themes of state civility codes include

> (1) recogniz[ing] the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions; (2) be[ing] respectful and act[ing] in a courteous, cordial, and civil manner; (3) be[ing] prompt, punctual, and prepared; (4) maintain[ing] honesty and personal integrity; (5) communicat[ing] with opposing counsel; (6) avoid[ing] actions taken merely to delay or harass; (7) ensur[ing] proper conduct before the court; (8) act[ing] with dignity and cooperation in pre-trial proceedings; (9) act[ing] as a role model to the client and public and as a mentor to young lawyers; and (10) utiliz[ing] the court system in an efficient and fair manner.[8]

Some states have adopted oaths of office for new attorneys that address civility. For example, as of May 1, 2014, new attorneys in California must swear that they will "strive to conduct [themselves] at all times with dignity, courtesy, and integrity."[9] Indiana's oath goes further, requiring attorneys to affirm that they will, among other things, "maintain the respect due to courts of justice and judicial officers" and "abstain from offensive personality."[10]

Civility is indeed an important concept within the legal profession that should be considered when acting as an advocate and counsel. In its simplest terms, *civility* can be defined as acting with formal politeness and courtesy when communicating or working with opposing parties, opposing counsel, clients, and outside parties.

II. ACTIONS NOT RISING TO THE LEVEL OF CIVILITY

Although the term *civility* is used often, some common misconceptions exist as to what constitutes civility when it comes to conducting business within the legal profession. First, civility is not the same as having good manners.[11] Good manners could be considered a component of acting

6. *Voluntary Standards for Civility*, D.C. Bar, www.dcbar.org/bar-resources/legal-ethics/voluntary-standards-for-civility (last visited Apr. 17, 2019).

7. N.Y. State Unified Court Sys., Rules of Professional Conduct and New York State Standards of Civility (May 1, 2013), www.nysba.org/WorkArea/DownloadAsset.aspx?id=55797 (last visited Apr. 17, 2019).

8. Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 Gonz. L. Rev. 99, 109 (Nov. 2, 2011).

9. Supreme Court of California, "*Civility*" *Oath Rule Adopted by Supreme Court* (May 1, 2014), https://www.courts.ca.gov/documents/sc14-May_1.pdf (last visited Aug. 5, 2020).

10. Ind. Admission and Discipline Rules, r. 22.

11. Jayne R. Reardon, *Civility as the Core of Professionalism*, Am. Bar Ass'n (Sept. 19, 2018), www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon.

politely or courteously, but this alone does not constitute acting with civility. It is one thing to be a polite person; it is another to act politely when dealing with difficult clients or opposing counsel in an adversarial environment. Although it may be considered uncivil to act with impoliteness, the concept of being polite is not the only component to achieving civility within the profession.

Second, civility is not demonstrated merely by showing amity toward those with whom an attorney interacts in practice: "Civility compels us to show respect even for strangers who may be sharing our space, whether in the public square, in the office, in the courtroom, or in cyberspace."[12] The absence of criticism toward another, however, does not necessarily mean that an attorney is acting with civility.[13] Attorneys can act with civility as long as they do not vocalize their criticism of another person. Yet, civility is more focused on professionals' conduct than on their negative or critical behavior toward someone else. Just because attorneys do not have critical thoughts against another does not mean that they are acting with civility. Conversely, just because attorneys have critical thoughts against another does not mean that they are acting without civility. Interactions and conduct—not thoughts or feelings—are the measures of civility.

Finally, attorneys are not necessarily acting with civility because they are in agreement with others. Rather, "underlying the codes of civility is the assumption that people *will disagree*."[14] Indeed, the legal profession is adversarial in nature, as it is based on disagreement when it comes to advocating for opposite sides of a case. Opposing parties can act with civility toward one another while disagreeing on their theories of liability or fault within a case, or even on procedural issues. Thus, civility does not mean agreeing with someone; instead, civility is the ability to act with politeness and professionalism when two parties disagree.

III. CIVILITY IN THE LEGAL PROFESSION

As referenced above, many states have adopted their own mandatory or voluntary standards of civility to practice within the legal profession. In addition to these standards, ethical obligations exist by which all attorneys must abide to practice law.

A. *Model Rules of Professional Conduct*

One of the requirements for practicing law is passing the Multistate Professional Responsibility Examination (MPRE), an exam designed to measure

12. *Id.*
13. *Id.*
14. *Id.*

knowledge and understanding of established standards related to an attorney's professional conduct. Each state has adopted a minimum score that an aspiring attorney needs to achieve on the exam to be admitted to that state's bar.

The MPRE tests knowledge of the *Model Rules of Professional Conduct*. The Model Rules are adopted, in one form or another, by each state to ensure that attorneys are held accountable for acting in a professional manner. These rules specifically identify the key concepts of professionalism and ethical standards that attorneys must follow.

Although *civility* is not defined expressly in the Model Rules, several specific rules pertain to civility among attorneys within the profession. For instance, Rule 3.3 requires an attorney to act with candor toward the tribunal and to avoid knowingly making false statements, failing to disclose controlling legal authority, and knowingly offering false evidence.[15] Similarly, Rule 8.2 instructs that an attorney shall not make false or reckless statements concerning the qualifications or integrity of a judge or other adjudicatory or public legal officer.[16] Rule 3.5(d) requires an attorney to refrain from engaging in conduct intended to disrupt a tribunal.[17] Rules 4.1 through 4.4 require truthful communication between parties and opposing counsel, and acting appropriately when communicating or dealing with unrepresented or third parties.[18] In addition, supervisory attorneys or partners within a law firm are held to additional specific standards of conduct under the Model Rules.[19] Rule 8.4(d) explains that attorneys engage in professional misconduct when they engage in conduct that is prejudicial to the administration of justice. This is a wide-reaching violation that reasonably can be applied to all sorts of uncivil conduct.[20] In sum, these rules touch on civility and govern attorneys' ethical responsibilities in their legal practices.

B. *Zealous Advocacy Versus Acting Without Civility*

The *Model Rules of Professional Conduct* and the states' adopted rules or guidelines on civility contain the standards of conduct that attorneys are expected to follow. Nevertheless, attorneys may be tempted to violate these underlying principles when endeavoring to act as zealous advocates for their clients. One important question that arises when analyzing professionalism in the practice of law is this: "How can an attorney act with zealous advocacy for his or her client while also acting with civility?"

15. Model Rules of Prof'l Conduct r. 3.3 (Am. Bar Ass'n 2016).
16. *Id.* r. 8.2.
17. *Id.* r. 3.5(d).
18. *Id.* r. 4.1–4.4.
19. *Id.* r. 5.1.
20. *Id.* r. 8.4(d).

The Model Rules specifically endorse zealous advocacy. In particular, the comments in Rule 1.2 state that an attorney

> should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to a lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.[21]

The concept of zealous advocacy often serves as a source of inspiration, rather than an obstacle. Because of the adversarial nature of the legal system, in which attorneys argue on behalf of their clients and support their arguments with valid and persuasive legal theories, a client's position often becomes a personal and deeply held belief of the attorney.

For this reason, when advocating on their clients' behalf, attorneys easily can get caught up in vigorously arguing that their particular viewpoint is the most correct and reasonable. This juncture is where things can become tricky: it can be challenging to act as a strong advocate while also acting with the required civility. The *Model Rules of Professional Conduct* address this problem (although without specifically using the term *civility*):

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.[22]

Although these rules are informative, the question remains: "What are the limits of zealous advocacy?" In other words, when has counsel gone too far in challenging a court's ruling or an opponent's position? Although the Model Rules offer no specific definition of or standards for civility within the legal profession, they do offer guidance on the line between zealous advocacy and failing to act with civility. For example, Model Rule 3.4 states that an attorney should act with fairness and courtesy to opposing parties and counsel by not unlawfully obstructing access to evidence, not falsifying evidence, not knowingly disobeying obligations under the rules of the court, and not making frivolous discovery requests.[23] This rule promotes acting with civility toward opposing parties and counsel in the context of trial procedures, but the concept of civility also is applicable *in all other practices of law*, including negotiating corporate transactions and mediating settlement agreements prior to trial.

Model Rule 8.4(d), which characterizes acts that are prejudicial to the administration of justice as professional misconduct, also helps attorneys

21. *Id.* r. 1.2 cmt. 1.
22. *Id.* r. 1.3 cmt. 1.
23. *Id.* r. 3.4.

determine whether an act of zealous advocacy is civil.[24] For example, while a zealous advocate may be tempted to make sharp comments in response to a perceived injustice thrust upon her client, she should first consider whether those comments amount to a legitimate, defensible legal position or are merely a reflexive attack. If they are the former, and the attorney exercises care in choosing her language, then the attorney can act as a zealous advocate while maintaining civility. If they are the latter, and the attorney fires off an inflammatory outburst without restraint, then the zealous advocate's conduct may be prejudicial to the administration of justice: the conduct serves no purpose but to disparage counsel, a party, or a tribunal. In that case, while the attorney may believe she is merely acting as a zealous advocate, she is acting without civility. Framing civility in this context can help attorneys avoid professional discipline because Rule 8.4(d) is traditionally a catchall violation on which disciplinary authorities rely to punish bad acts that do not fall under other, more specific ethics rules.

Clearly, no single definitive answer exists to the question of the line between zealous advocacy and incivility. Zealous advocacy does not require incivility. Attorneys always should consider how they would like to be treated and perceived. Clients, judges, and opponents will notice the difference between professional zealous advocacy that is tempered and reasonable and attorneys who are difficult, rude, inconsiderate, overly critical, or condescending. An attorney who is not only a zealous advocate for clients, but also kind, considerate, and reasonable will reap the benefits of that conduct in the legal community and at the courthouse.

IV. CONSEQUENCES FOR ACTING WITHOUT CIVILITY

Judges are becoming increasingly inclined to sanction attorneys who clearly act without civility or professionalism. The purpose of these sanctions, which vary in severity, can include monetary penalties or even suspensions to deter this type of behavior within the profession.

A. *Identifying Misconduct Under the Model Rules*

Although civility is not mentioned explicitly in the *Model Rules of Professional Conduct*, Model Rule 8.4 outlines what constitutes professional misconduct.[25] Actions that constitute misconduct include violating the Model Rules; committing a criminal act; engaging in conduct that counts as discrimination or harassment; engaging in dishonesty or deceit; and engaging in conduct that is prejudicial to the administration of justice.[26] Additionally,

24. *Id.* r. 8.4(d).
25. *Id.* r. 8.4.
26. *Id.*

attorneys engage in professional misconduct when they state or imply that they have the "ability to improperly influence a government agency or official to achieve results that violate the [Model Rules]" and for attorneys to help a judge in conduct that breaches judicial conduct rules.[27] Although these illustrations are the listed actions that constitute misconduct, judges and state bars may deem it necessary to impose sanctions or take other disciplinary measures for actions not specifically listed within this Rule or any of the Model Rules.

B. *Examples of Sanctions for Uncivil Conduct*

Courts recognize the importance of civility within the legal profession, and courts in every jurisdiction have the power to impose sanctions or disciplinary measures to deter inappropriate conduct within the profession. A few recent examples of sanctions imposed for incivility vary from purely monetary sanctions to suspension from the practice of law.

1. Monetary Sanctions

Monetary sanctions have been invoked nationwide and range from small compensatory fees to tens of thousands of dollars for especially egregious conduct. For example, a magistrate judge in California imposed a monetary sanction against an attorney for her inflammatory outburst toward opposing counsel during a deposition.[28] In that case, the attorney defending the deposition felt insulted by the deposing attorney and responded by directing expletives toward him and intentionally spilling her coffee in his direction.[29] The attorney refused to take responsibility or genuinely apologize for her inappropriate conduct.[30] The attorney's actions were relayed to the magistrate judge presiding over the case, and the judge imposed a $250 sanction for damages caused during the deposition.[31]

Likewise, a magistrate judge ordered New York City to pay deposition costs when its attorney made 600 objections during an eight-hour deposition of a city police officer.[32] Despite the court's telephonic instructions to the attorney during the deposition to keep her objections "short and concise," to only object to the form of the question, and to ask the court reporter to mark questions to which she objected, rather than instructing

27. *Id.*
28. Joe Mullin, *Judge Sanctions Lawyer for Splashing Opposing Counsel with Iced Coffee*, ARS Technica (Jan. 30, 2017), https://arstechnica.com/tech-policy/2017/01/tech-startups-lawyer-sanctioned-for-throwing-coffee-during-deposition.
29. *Id.*
30. *Id.*
31. *Id.*
32. Debra Cassens Weiss, *Judge Sanctions New York City After Lawyer Makes 600 Objections in One Deposition*, Am. Bar J. (May 17, 2017), www.abajournal.com/news/article/judge_sanctions_city_for_lawyers_plethora_of_deposition_objections.

the witness not to answer, the attorney continued making speaking objections. The attorney further directed the witness not to answer questions and threatened to walk out of the deposition.[33] The magistrate judge recognized that the plethora of descriptive objections during this deposition was an unnecessary waste of time and resources for all parties involved and may have influenced the witness's answers. Therefore, the judge ordered the city to pay the full costs of the deposition.[34]

In Illinois, a U.S. district judge imposed sanctions that included payments and mandatory anger-management training when an attorney made false accusations and carried out an unhinged attack on an expert witness.[35] The attorney claimed, for example, that the plaintiff's automobile odometer expert fabricated a report and damaged property in another case, anonymously faxed him a newspaper article that was aimed at intimidation, and lied about having a son named Luke.[36] The attorney also repeatedly attacked and insulted opposing counsel in emails and at depositions, and "was occupied with his cellular phone and made several audible exasperated sighs during the course of [a] hearing as the testimony was being presented."[37] Noting the attorney's history of unprofessional conduct in state courts, the U.S. district judge assessed a $50,000 sanction, ordered the attorney to attend anger management training, and referred the attorney to the district court's ethics committee.[38] The attorney's defense was that "he just represents his clients very aggressively."[39] Clearly, the judge believed the attorney's conduct went *far beyond* the bounds of zealous advocacy and into the realm of unprofessional incivility.

2. Suspension from the Practice of Law

Beyond monetary sanctions, judges can suspend one's license to practice for uncivil conduct. For example, in the Illinois case discussed above, that state's supreme court suspended the attorney's license to practice law until a further order pending the outcome of an investigation into his conduct, because he "engaged in conduct that threatens irreparable injury to the public and to the orderly administration of justice."[40] In addition to the

33. *Id.*
34. *Id.*
35. Debra Cassens Weiss, *Lawyer Is Sanctioned $50K for Alleged 'Inappropriate Diatribes' and 'Unhinged Attack' on Expert*, Am. Bar J. (Mar. 29, 2018), www.abajournal.com/news/article/lawyer_is_sanctioned_50k_for_alleged_inappropriate_diatribes_and_unhinged_a.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. Jason Meisner, *Joel Brodsky's Law License Suspended by Illinois Supreme Court "Until Further Order*," Chi. Trib. (June 19, 2019), https://www.chicagotribune.com/news/criminal-justice/ct-lawyer-joel-brodsky-suspended-20190619-2bpxl7u3crdctjnhrlrnqmwvhq-story.html.

United States district court case in which the attorney was sanctioned $50,000 and ordered to attend anger-management training, Illinois disciplinary authorities also examined the attorney's history of sending vitriolic and insulting emails to opposing counsel and others in several other cases in rendering their decision to suspend the attorney.[41]

In another recent case, the New York Appellate Division, First Department, panel issued a four-month suspension from the New York Bar and one year of mandatory counseling for a prominent real estate attorney who acted with "inappropriate litigation behavior" on at least two separate occasions.[42] On the first occasion, the attorney walked into an arbitration and began taking photos of a testifying witness, threatened to publish the photos, swore at the witness, and even told the witness "you should be ashamed of yourselves."[43] On another occasion, the attorney told a tenant in his client's building to commit suicide, swore at him, threatened to report him to prosecutors, and threatened that the tenant would be "paying for this heavily" for the rest of his life.[44]

The Supreme Court of South Carolina imposed a ninety-day suspension and required an uncivil attorney to complete a legal ethics and professionalism program.[45] The attorney's client, a church, received a town notice requesting compliance with town zoning laws.[46] The attorney responded to the notice in a letter, sent to both his client and the town manager, that insulted the town manager's intelligence, questioned whether he had a soul, and derogatorily referred to the city as "pagans."[47] The Supreme Court of South Carolina reprimanded the attorney for his uncivil actions, following a modern trend in that state to encourage civility and punish incivility.[48]

In addition to uncivil statements made to or about parties, witnesses, and opposing counsel, reckless accusations questioning the impartiality of judges can also result in lengthy suspensions. In Florida, the state's supreme court ordered a two-year suspension for an attorney's rude and antagonistic behavior throughout a civil case.[49] The attorney falsely accused both

41. *Id.*

42. Jack Newsham, *First Department Suspends Adam Leitman Bailey for 4 Months*, N.Y.L. J. (Apr. 2, 2019), www.law.com/newyorklawjournal/2019/04/02/first-department-suspends-adam-leitman-bailey-for-four-months.

43. *Id.*

44. *Id.*

45. G.M. Filisko, *You're Out of Order! Dealing with the Costs of Incivility in the Legal Profession*, Am. Bar J. (Jan. 1, 2013), www.abajournal.com/magazine/article/youre_out_of_order_dealing_with_the_costs_of_incivility_in_the_legal.

46. *Id.*

47. *Id.*

48. *Id.*

49. Samson Habte, *Lawyer's 'Appalling' Incivility Warrants Tougher Sanction Than What Bar Sought*, BNA (Nov. 20, 2013) (subscription-only access available on the Bloomberg Law website).

an assigned judge and a mediator of harboring an improper bias toward the plaintiff; repeatedly disparaged opposing counsel, a respected elderly attorney who was suffering through serious health issues; and disrupted several court hearings by yelling at judges and acting disrespectfully.[50] Although some may have considered this a severe punishment, the Florida Supreme Court noted that the attorney committed multiple violations of the state's rules of professional conduct, acted unprofessionally and inappropriately on several occasions, and refused to cooperate with disciplinary authorities.[51]

Similarly, the Louisiana Supreme Court issued a suspension of one year and one day for an attorney who accused a trial judge of intentionally altering a recording of a hearing where the audio was spliced at the moment when the judge was discussing her connection with the opposing party.[52] The sanctioned attorney even asserted that the appeals court was covering up the trial judge's actions.[53] The state's supreme court determined that the attorney knew or should have her statements were false and therefore violated Model Rule 8.2. That rule states, in pertinent part: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."[54] Two of the seven justices dissented from the majority, however, and would not have imposed professional discipline. One justice acknowledged the attorney's lack of professionalism but cited the "prized American privilege to speak one's mind . . . on all public institutions"; the other justice argued that the suspension could discourage whistleblowers from coming forward.[55] While attorneys at times may feel justified in harboring concerns about judicial bias, they should take great care to ensure their concerns are well-founded before expressing them and always do so in a civil and professional manner.

These are just a few examples of the sanctions imposed by judges and state bars acting to prevent attorney incivility. The sanctions are crafted to discourage inappropriate and unprofessional behavior. Attorneys must act strategically with civility and professionalism when serving as an advocate and counselor. Of course, attorneys must always be mindful of their actions when representing themselves, their law firms, and their clients.

50. *Id.*
51. *Id.*
52. David L. Hudson, Jr., *How Far Can Criticism of Judges Go Under Ethics Rules?*, Am. Bar J. (Dec. 1, 2016), https://www.abajournal.com/magazine/article/criticism_judges_ethics_rules.
53. *Id.*
54. *Id.*
55. *Id.*

C. *Appellate Court Review and Adjustment of Sanctions*

The New York Supreme Court, Appellate Division, often reviews decisions made by the referee of a Sanction Hearing to determine whether the sanctions or disciplinary measures administered were appropriate under the circumstances. The Supreme Court of New York has held: "On a motion to affirm a referee's report and recommendation, this Court must review the Referee's report and determine whether the Referee properly found, 'by a fair preponderance of the evidence, each essential element of the charge[s].'"[56] There are numerous examples of the Supreme Court of New York analyzing Attorney Grievance Committee's decisions in the ensuing Sanction Hearings to ensure that proper and consistent sanctions are imposed for attorney misconduct.[57]

For example, in In re *Zappin*, the court affirmed the referee's order to disbar an attorney who continuously violated multiple rules of professional conduct and performed several egregious acts of misconduct over a four-year period. Some of these actions included

> his repeated acts of domestic violence toward his wife; his false testimony at the custody trial; his introduction of falsified evidence in the form of altered text messages; his presentation of misleading testimony through his expert witnesses; his flouting the directives of three judges; his setting up of a fake website about the attorney for the child in the custody action and posting derogatory messages about her on it. . . .[58]

The *Zappin* court agreed with the referee that it was appropriate to order disbarment according to the guidelines and disciplinary precedent set in the jurisdiction.[59]

The court in In re *Giorgini* reevaluated a referee's public censure sanction and determined that the attorney should instead be suspended from practicing law for three months.[60] The violating attorney's disciplinary proceedings resulted from affirmations that he filed in support of motions for reargument in two separate cases, each of which made "derogatory, undignified and inexcusable" statements about the presiding justice's character and reasoning.[61] Notably, the attorney refused to express remorse for his disrespectful tone, instead blaming the justices for his improper conduct.[62]

56. *In re* Zappin, 73 N.Y.S.3d 182, 186 (App. Div. 2018) (citing N.Y. Comp. Codes R. & Regs. tit. 22, § 1240.8(b)(1)).
57. *See*, *e.g.*, *id.* at 187; *In re* Foo, 72 N.Y.S.3d 249, 250 (App. Div. 2018); *In re* Steinberg, 90 N.Y.S.3d 39, 43 (N.Y. App. Div. 2018).
58. *Zappin*, 73 N.Y.S.3d at 187.
59. *Id.*
60. *In re* Giorgini, 84 N.Y.S.3d 153, 156 (App. Div. 2018).
61. *Id.* at 156.
62. *Id.*

Multiple counts were evaluated by the court, the Attorney Grievance Committee, and the referee for the Sanction Hearing. Following jurisdictional precedent, the court ultimately concluded that a more severe sanction was warranted in light of the attorney's specific misconduct.[63]

Of course, courts understand that the severity of disciplinary sanctions must be appropriate and reasonable for the identified misconduct and will reduce an overly harsh sanction. The panel of judges in In re *Steinberg* denied the suggested two-year suspension for an attorney in conformity with precedent within the jurisdiction.[64] The attorney was sanctioned for filing a frivolous pro se lawsuit and for sending an inappropriate four-page ex parte email to the justice presiding over a separate case that criticized the justice's rulings and asserted that the justice should voluntarily recuse himself.[65] Although the attorney was found guilty of violating multiple rules of professional conduct, the court determined that the proposed two-year suspension was too severe under the circumstances and reduced his suspension to one year.[66]

Furthermore, notwithstanding the sanctions imposed on an attorney in another jurisdiction, the Supreme Court of New York will impose sanctions that its judges believe are appropriate under the particular circumstances. For instance, a New York court held that a public censure was appropriate for an attorney who made statements to a social worker while at a crowded courthouse in British Columbia, even though the attorney was suspended for two weeks and issued a fine in British Columbia under that jurisdiction's rules of professional conduct.[67] In imposing the censure rather than the suspension, the New York court held that the actions performed by the attorney in British Columbia did not constitute misconduct that required more severe sanctions than a public censure in the New York.[68]

The cases above exemplify the analysis that courts use to administer the most appropriate sanctions or disciplinary actions for practicing attorneys. From these selections and the sanctions enforced, a clearer picture begins to develop of what constitutes sanctionable incivility in the legal profession and how far beyond the fine line that distinguishes permissible zealous advocacy from incivility courts consider the actions of these attorneys. The goal for attorney disciplinary bodies is to deter inappropriate behavior without imposing sanctions that are too severe for the misconduct performed. The goal for attorneys should be to learn from these examples,

63. *Id.*
64. *In re* Steinberg, 90 N.Y.S.3d 39, 43 (App. Div. 2018).
65. *Id.* at 42.
66. *Id.* at 43.
67. *In re* Foo, 72 N.Y.S.3d 249, 250 (App. Div. 2018).
68. *Id.*

take care not to conflate zealous advocacy with incivility, and develop an appreciation for practicing in what is a naturally adversarial profession, with courtesy and respect for all.

V. THE REMOTE WORK ENVIRONMENT AND THE FUTURE OF CIVILITY

Over the last few decades, technology has fundamentally changed the way attorneys practice law. Email exchanges have become the central medium by which both attorneys and their clients communicate, resulting in more frequent, and often less measured, interactions. In addition, the recent COVID-19 pandemic has required a rapid shift away from traditionally in-person legal work, including depositions, mediations, and hearings, to remote means. Today's attorneys must be especially cognizant of conducting themselves with civility in virtual, as well as in-person, interactions.

A. *Civility in Email Communications*

Email exchanges are often an essential source of evidence in civil lawsuits. A client's off-the-cuff email can have unintended and outsized consequences when presented out of context during the course of litigation. The same can be said for email exchanges between counsel, their opponents, and their clients, with the relative ease and speed of email communications often manifesting in terse language that can appear unprofessional. At their worst, frustrated email exchanges can devolve into incivility and result in sanctions for their authors.

An attorney is not immune from sanctions for sending uncivil emails just because his or her opponent "started it." In Florida, a series of back-and-forth personal attacks in emails between opposing counsel resulted in disciplinary proceedings and sanctions for both attorneys in *Florida Bar v. Mitchell*[69] and *Florida Bar v. Mooney*.[70] In the most egregious example of incivility in those cases, Mr. Mitchell used his knowledge that Mr. Mooney's son has a birth defect to insult Mr. Mooney in email exchanges that initially addressed simple scheduling issues.[71] Mr. Mooney responded by calling Mr. Mitchell inappropriate names, among other things.[72] The Florida Bar filed complaints against *both* attorneys for violating two Rules Regulating the Florida Bar: Rule 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice) and Rule 4-8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial

69. Florida Bar v. Mitchell, 46 So. 3d 1003 (Fla. 2010).
70. Florida Bar v. Mooney, 49 So. 3d 748 (Fla. 2010).
71. *See* Complaint, Florida Bar v. Mitchell, TFB No. 2009-10,487(13C), Supreme Court of Florida.
72. *See* Complaint in *Mooney*, TFB No. 2009-10,745(13C), Supreme Court of Florida.

to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic).[73] Ultimately, the Supreme Court of Florida suspended Mr. Mitchell from the practice of law for ten days and ordered him to attend an anger management workshop and pay nearly $2,000 in costs.[74] The Supreme Court also publicly reprimanded Mr. Mooney and ordered him to pay nearly $2,500 in costs.[75]

In *Mitchell* and *Mooney*, the offending attorneys were sanctioned for attacking each other personally and unprofessionally. Disparaging emails need not be personal in nature to be uncivil, however: unfounded inflammatory comments criticizing opposing counsel's work and motivations are also uncivil and can subject attorneys to discipline, even if those comments relate to disputed issues in litigation. In one example, after taking over the representation of a formerly pro se mother in a paternity action in Indiana, an attorney was disciplined in In re *Halpin* for, inter alia, accusing opposing counsel of fraud, deceit, and trickery in filing the lawsuit in a certain venue and refusing to transfer to another.[76] Further, the attorney threatened to file a disciplinary action against opposing counsel and criminal charges against the putative father unless counsel agreed to transfer venue.[77] In addition to violating Indiana Rule of Professional Conduct 8.4(d) (conduct prejudicial to the administration of justice), the Indiana Supreme Court held that the attorney failed to comply with his oath of office by "acting in an offensive manor," and suspended him for sixty days.[78]

Unfounded accusations against judges can also provide grounds for professional discipline—even when expressed only in private emails. In In re *Ogden*, an Indiana attorney representing a decedent's child in an estate case was brought up on disciplinary charges in part for criticizing a judge's handling of the matter in private emails.[79] The attorney alleged in email correspondence to his client's mother that the judge "committed malfeasance in the initial stages of the administration of the Estate by allowing it to be opened as an unsupervised estate, by appointing a personal representative with a conflict of interest, and by not requiring the posting of a bond," even though the judge was not yet presiding over the estate at that time—"a fact

73. *See* Complaint in *Mitchell*, *supra* note 71; Complaint in *Mooney*, *supra* note 72.
74. *See Mitchell*, 46 So. 3d 1003.
75. *See Mooney*, 49 So. 3d 748.
76. *In re* Halpin, 53 N.E.3d 405, 406 (Ind. 2015).
77. *Id.*
78. *Id.*
79. *In re* Ogden, 10 N.E.3d 499 (Ind. 2014).

[that the attorney] could have easily determined."[80] As a result of his false private statements, the Indiana Supreme Court suspended the attorney for thirty days and ordered him to pay one half of the costs and expenses of his disciplinary proceedings.[81]

These disciplinary cases demonstrate that emails can have real consequences for attorneys who fail to express themselves with civility. Whether personal or professional, uncalled-for email attacks on opposing counsel or judges are uncivil and can result in suspension from the practice of law in especially grievous circumstances.

B. *Civility During Video Proceedings*

Since the onset of the COVID-19 pandemic in the United States, temporary court closures and rule changes have resulted in the rise of remote proceedings—an entirely new mode of practice for many attorneys that presents its own unique set of challenges. Attorneys must hold themselves to the same standards of civility in remote interactions that they do in person.

The same rules and disciplinary caveats governing civility described above apply to remote proceedings: Attorneys should always act with formal politeness and courtesy toward opposing counsel, judges, deponents, and other parties during video and/or remote conferences: inflammatory, unprofessional speech has no place. An additional wrinkle presents itself when an attorney appears for a hearing or deposition on video, rather than in person as private comments and interactions can inadvertently be transmitted and become public. In a crowded courtroom or conference room, it is relatively easy to determine whether an attorney's quiet comments to his co-counsel, his client, or himself can be heard by others. By contrast, it can be difficult for an attorney sitting with his client in front of a computer to distinguish what is being picked up by the computer's microphone and to keep track of whether he is muted. A discourteous comment about opposing counsel, a party, or the court during an active proceeding, when transmitted, is an act of incivility, even if it the transmission is unintentional.

To ensure that they are practicing with civility, attorneys who are new to remote conferencing should strive to conduct themselves as though they are in full view and earshot of opposing counsel and the court during all remote hearings and depositions. As attorneys become more familiar with the technology, they, like new attorneys in court for the first time, will develop confidence with the practice's evolving norms and learn how to carry themselves comfortably during remote proceedings without any additional danger of incivility.

80. *Id.* at 500–02.
81. *Id.* at 502.

VI. CONCLUSION

An attorney's professional conduct goes hand in hand with that attorney's reputation for excelling in practice. In today's world, "one uncivil outburst may haunt an attorney for years; and reputations may be built and destroyed quickly."[82] Clients and others notice an attorney's communication style and respect for the client, other parties and attorneys, and the court. Any person who has contact with an attorney can comment on that attorney's performance and professionalism through social media forums or on websites that specifically rate and rank attorneys. Research shows that attorneys who exhibit civility and professionalism receive higher ratings and are viewed as more effective lawyers.[83] Thus, incivility, in all likelihood, will have an adverse effect on an attorney's reputation. Accordingly, all attorneys should focus a portion of their efforts on increased civility in the profession.

Attorneys should practice the old adage of treating others how they would want to be treated. Today's world facilitates greater client influence and requires increased transparency from attorneys. Thus, civility and demeanor are more important than ever in building relationships; credibility in legal practice and the courtroom; reputations; and job satisfaction; and, of course, in avoiding disciplinary measures. The legal profession requires civility and professionalism, but attorneys also should embrace civil behavior because it is the right thing to do and can help to reignite not only the quality of service and justice that should be expected, but also the respect and reputation that the rule of law and the legal profession deserve.

82. *See Reardon*, *supra* note 11.
83. *Id.*