Subjective Feeling or Objective Standard? The Misuse of the Word "Repugnant" in the Model Rules of Professional Conduct

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> Revulsion is not an argument, and some of yesterday's repugnances are today calmly accepted—though, one must add, not always for the better.[1]

ABSTRACT

This Article is about one word. Properly used in American jurisprudence, it describes a statute or judicial decision that conflicts with the meaning and text of the U.S. Constitution. Improperly used, it describes an amorphous feeling that allows lawyers to renounce clients whose actions, cause, or person they dislike.

In constitutional law, the word "repugnant" represents a binary proposition—statutes or judicial decisions are either compatible with or repugnant to the U.S. Constitution. Subjectivity takes a back seat, and the word signifies a conflict between two objects, one (the repugnant object) that by its incongruity must be nullified by the other (the object with which it is inconsistent).

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1. Leon R. Kass, *The Wisdom of Repugnance*, NEW REPUBLIC, June 1997, at 20. Kass claimed that "[r]epugnance is the emotional expression of deep wisdom, beyond reason's power fully to articulate it." *Id.* I initially titled this article "The Folly of Repugnance in The Model Rules" to parody the concept coined by Kass. *See* Leon R. Kass, *The Wisdom of Repugnance*, *in* LEON R. KASS & JAMES Q. WILSON, THE ETHICS OF HUMAN CLONING 3, 19 (1998). The doctrine has been widely criticized. Philosopher Martha Nussbaum characterized it as "disgust-based morality" invoked to justify persecution of minorities and vulnerable people. Martha C. Nussbaum, *Danger to Human Dignity: The Revival of Disgust and Shame in the Law*, CHRON. HIGHER EDUC. (Aug. 6, 2004), https://www.chronicle.com/article/danger-to-human-dignity-the-revival-of-disgust-and-shame-in-the-law/ [https://perma.cc/YZK6-RNN5] ("Fear of a dissident minority often masquerades as moral disapproval.").

In legal ethics, however, "repugnant" connotes "disgust-based morality." Something is repugnant when condemned as repulsive or immoral. A repugnant object, then, is an object with an imputed identity of repulsiveness. The person who feels repulsed is also the one who decides what is repulsive.

When the law imports a standard of repugnance to the representation of human beings, "repugnant clients" lose their identity, their humanity, and their standing under the law. This version of repugnance is often grounded in race, status, disability, sexual orientation, gender, religion, ethnicity, or nationality, thus facilitating systemic racism, antisemitism, transphobia, or any other form of discrimination. At other times, repugnance is touted as a justification for hate directed at the perceived hater, dehumanizing the enemy in whatever form that enemy takes for the one whose repugnance feels morally justified.

The word "repugnant" appears twice in the black letter of the Model Rules of Professional Conduct. In Rule 1.16(b)(4), a lawyer's repugnance for a client's proposed conduct will justify the lawyer's withdrawal from representing the client. In Rule 6.2(c), the lawyer's repugnance for the client or the client's cause will justify the lawyer's flight from an appointed representation. In neither instance is the word necessary to achieve the goal of the Rule. To the contrary, its use invites misapplication. If the standard for repugnance is subjective, it can become arbitrary and self-justifying. If objective, it can drain the lifeblood of the Sixth Amendment. The word "repugnant" does not promote ethical professional conduct but furthers inequality.

This Article demonstrates how the use of the word "repugnant" in the Model Rules represents a diversion from the word's other legal uses and risks inconsistent and emotionally driven application of the Rules. In particular, by using the word "repugnant" to describe the client or the client's "cause," Rule 6.2(c) threatens to undermine the bedrock principle that the accused—popular or unpopular—deserve representation, enabling lawyers to elevate their personal preferences above their professional duty. The word indulges a refusal to bracket the emotionality of moral judgment, contradicting the teaching of Rule 1.2(b) that representing a client does not mean the lawyer endorses the client's views. Worst of all, it invites the possibility of an objectively unrepresentable client.

Although lawyers should not be compelled to represent clients against their will, other provisions in the Model Rules allow lawyers to seek excusal from representation based on conflicts of interest or incapacity. Because it is inapt and superfluous, the word "repugnant" should be excised from the ABA's Model Rules of Professional Conduct.

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INTRODUCTION

> I hope you will accept on faith, without demonstration, that the word "repugnant" is a relatively rare word in legal discourse.[2]

The law is no stranger to disgust.[3] As former Chief Justice Warren Burger famously opined in the landmark obscenity case of *Miller v. California*,[4] a product is obscene if "the average person, applying contemporary community standards," would find it "patently offensive."[5] As much as the human emotion of repugnance is individualized and unique, its appropriateness in any context must be judged *somehow,* and by some general societal standard. Quoting *Webster's International Dictionary*, Justice Burger did just that, reciting the "precise meaning of 'obscene'" as "disgusting to the senses . . . [and] grossly repugnant to the *generally accepted notions* of what is appropriate."[6] Such a standard allowed the Court to define a narrow category of unprotected speech.[7] But what happens when lawyers direct these "generally accepted notions" to their clients? Do the clients, too, become unprotected?

A lawyer's duty of representation should be immune to feelings of personal disgust, even if the two may coexist. Consistent with the original "cab-rank

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2. Noah Feldman, *The Voidness of Repugnant Statutes: Another Look at the Meaning of Marbury,* 148 PROC. AM. PHIL. SOC'Y 27, 31 (2004).

3. *See generally* Nussbaum, *supra* note 1.

4. Miller v. California, 413 U.S. 15, 25 (1973). As of May 27, 2022, this case has been cited 10,292 times. (This number refers to the "citing references" for this case on the Westlaw database.).

5. *Id.* at 20. For a discussion of *Miller* and its relationship to the evolution of disgust and repugnance in the law, see Nussbaum, *supra* note 1.

6. *Miller*, 413 U.S. at 18 n.2 (emphasis added).

7. The trouble is that such standards are difficult to define because community consensus is fluid, even if many would claim they "know it when [they] see it." *See Miller*, 413 U.S. at 39 (Douglas, J., dissenting) (citing Justice Stewart's concurrence in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)); *see also* W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of Modus Vivendi Legal Ethics*, 131 YALE L.J.F. 89, 94–95 (2021) ("One notable problem with wise-counselor legal ethics is its reliance on a singular conception of the public interest or the common good.").

rule,"[8] requiring British barristers to vigorously defend clients assigned to them regardless of the barristers' personal views about the client or the cause, American lawyers should not be permitted to shirk a representation because they feel personally affronted by the client.[9] As Professor Bradley Wendel observed, "arguments for the cab-rank rule trade on an additional tacit empirical premise, that the morally motivated refusals of lawyers to represent clients will coincide sufficiently that certain classes of clients will be harmed."[10]

THE CATEGORY OF THE REPUGNANT CLIENT

Under Model Rule 1.16(b)(4), "a lawyer may withdraw from representing a client if . . . the client insists on taking action that the lawyer considers repugnant."[11] Model Rule 6.2(c) allows a lawyer to avoid an appointed representation if "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."[12] The use of the word "repugnant" in the context of professional responsibility fosters discrimination and moral shunning.[13] Once we have labeled a class of clients repugnant, we might feel justified in abandoning them.[14]

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8. Elliot L. Bien, *Toward A Community of Professionalism*, 3 J. APP. PRAC. & PROCESS 475, 491 (2001) ("[T]he so-called 'cab-rank' rule requires barristers to accept assignments without discrimination.").

9. Robert W. Gordon, *Portrait of A Profession in Paralysis*, 54 STAN. L. REV. 1427, 1429–30 (2002):

> A profession seriously committed to seeing that every side was represented would . . . adopt something like the (widely evaded but still aspirationally vital) British barrister's 'cab-rank rule,' prescribing that lawyers must take on the next client who asks for their services, or at least maintain a rotating pool of lawyers of last resort to take the cases nobody else wants.

Id. At 1430.

10. W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 996 (2006).

11. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2018) [hereinafter MODEL RULES].

12. MODEL RULES R. 6.2(c).

13. *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 630 (1985) ("[W]hile the bar's ethical codes have traditionally proclaimed an obligation to defend the unpopular, establishment lawyers have invoked that mandate more often to justify representing the disreputable wealthy than the discreditable indigent."). *But see* Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, *in* THE GOOD LAWYER 214, 233 (David Luban ed. 1983) (suggesting that moral shunning of Nazis and remorseless murderers is morally justified as long as it is not unlawful).

14. *See* Gordon, *supra* note 9:

> [[L]awyers are also committed to the related norm of nonaccountability–that they are not morally responsible for the actions of clients that they help defend. The main justification for this norm is that everyone is entitled to representation, and that lawyers must not be tarred with the sins of clients, lest that lead them to ignore unpopular clients. Taking on a client should not imply adopting his cause. But this norm, as Rhode says, is coupled with another that deprives it of most of its force: that lawyers may decline clients who are repugnant to them (or for any other reason). In actual effect the norm only encourages lawyers to take on unpopular clients who are also rich; the bar has "generally avoided social pariahs with shallow pockets"—such as African-Americans in the age of Jim Crow or Communists in the 1950s or all but wealthy criminal defendants in any period.

Id.

In a New York Legal Ethics Reporter article titled "How to Deal With the (Truly) Repugnant Client," Professor Gary A. Munneke discussed the possibility that a lawyer can "represent the unpopular client effectively, without necessarily becoming the alter-ego of the client."[15] He provided examples of "categories that can make for repugnant clients," and offered guidance to lawyers and firms tasked with representing them.[16] While Munneke admitted that repugnance is relative and highly subjective, and that "the threshold for repugnancy is a very personal one,"[17] he nonetheless described "repugnancy" as an *attribute* belonging to certain classes of people[18] and declared that, for the scrupulous lawyer, representing them "may prove extremely challenging."[19]

Munneke was careful to leave open the question of a lawyer's duty (and capacity) to represent an unpopular or "repugnant" client.[20] But his treatment of repugnancy as a self-evident attribute inherent to certain groups or classes of clients is troubling. Perhaps even more troubling is the implication that "truly repugnant" clients— "unpopular clients," as he also describes them—might, by virtue of their status or identity, be "impossible to represent."[21]

How, a century after the first ethical rules were codified and the professionalism of the legal field took hold, could one word embed itself in the semantics of legal ethics such that lawyers today might envision the existence of a type or class of person so loathsome as to be intrinsically unrepresentable? The better question is, should loathsomeness of a client's character or conduct have any bearing on the lawyer's duty to represent that client's fundamental rights?

This Article will explore the origin and evolution of the word "repugnant" in the ethics rules, and its current function in Model Rules 1.16(b)(4) and 6.2(c). While the word's legal use has been traced back to the 1500s and the Court of Common Pleas,[22] its particular use in the *Model Rules* has not been fully explored. Over the past four decades, scholars have begun to question and

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15. Gary A. Munneke, *How to Deal with the (Truly) Repugnant Client,* N.Y. LEGAL ETHICS REP. (July 1998), http://www.newyorklegalethics.com/how-to-deal-with-the-truly-repugnant-client/ [https://perma.cc/FZQ8-D4U9].

16. *Id.* (under the rubric of "repugnant clients," Munneke lists "individuals accused of heinous crimes, people who espouse ideologically or socially unpopular views, persons who would ask their lawyer to engage in criminal conduct, and those whose behavior deviates from the norms of society").

17. *Id.*

18. Munneke, *supra* note 15 ("[T]here are several categories that can make for repugnant clients.").

19. *Id.*

20. *Id.* ("The ethical responsibilities for lawyers who have agreed to represent repugnant clients are somewhat hazy.").

21. *Id.* ("Lawyers often encounter clients that seem so repugnant that it's difficult *or impossible* to represent them.") (emphasis added).

22. Feldman, *supra* note 2, at 29–30 (The term "repugnant" was first brought into the legal vocabulary by Lord Coke in the Westminster Court of Common Pleas, who defined a repugnant law as one that is "against common right or reason," and therefore, "void.") (citing Thomas Bonham v. College of Physicians, 77 Eng. Rep. 638, 652 (C.P. 1610)).

deconstruct the term as it is used in the *Model Rules*.[23] Noteworthy among these, Professor Charles W. Wolfram, renowned scholar of legal ethics, took a critical look at the practical and ethical implications of deeming clients or causes repugnant and tested the limits of a lawyer's moral (though legally unenforceable) duty to represent them.[24] In concluding that a lawyer's moral duty to represent "repugnant clients" is "not an unqualified one,"[25] Wolfram compares the lawyer's moral duty to represent clients to a person's moral duty to rescue someone imperiled when no affirmative legal duty would otherwise attach.[26] Wolfram then identifies factors to determine whether the lawyer has a moral or ethical duty to represent a client whose character or cause they find repugnant.[27] These factors include the competence of the lawyer to undertake the representation, social and financial pressures, demands of family, and the "necessitousness"[28] of the client, coupled with the potential for harm to the general public and the lawyer (or rescuer).[29]

But before making a duty determination, Wolfram suggests, we must know what makes someone a "repugnant client."[30] As Professor Barry Sullivan remarks, "If 'repugnance' of a client or cause is to be decisive in extending or withholding the privilege of representation, we must know what it means."[31] But this is where the problem starts: for "[w]hat counts as repugnance?"[32] In searching for some core attributes or elements to identify a repugnant client or cause, empirical questions arise.[33] Can an objective standard for repugnancy exist within

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23. *See, e.g.*, Lewis Becker, *Ethical Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums*, 15 J. AM. ACAD. MATRIM. LAW. 33, 40–41 (1998) (exploring the subjective and objective aspects of the repugnant provision of Rule 1.16(b)(4) and suggesting that courts apply a "reasonable lawyer" standard when considering the merit of a lawyer's petition for withdrawal); Barry Sullivan, *Private Practice, Public Profession: Convictions, Commitments, and the Availability of Counsel*, 108 W. VA. L. REV. 1, 2 (2005) (exploring "whether the decision to refuse representation to the repugnant client is a private decision or, alternatively, one that has public dimensions"); *see also infra* notes 113–17 (examples of lawyers' differing interpretations of the repugnancy provisions in the *Model Rules*).

24. *See* Wolfram, *supra* note 13, at 223.

25. *Id.*

26. *See* Sullivan, *supra* note 23, at 13–14 (2005) (summarizing and explaining Wolfram's rescuer-duty analogy).

27. Wolfram, *supra* note 13, at 229.

28. *Id.* ("Who is a 'necessitous' client? A duty [to represent] lies only where the hurt to the client because of the lack of representation threatens to become severe. A fortiori, the loss to a prospective repugnant client must be even greater.").

29. *Id.*

30. *Id.* at 225 ("First, what makes a client 'repugnant,' and thus serves as a reason for refusing legal assistance to one in need of it?").

31. Sullivan, *supra* note 23, at 14.

32. Wolfram, *supra* note 13, at 225 (see subheading).

33. *Id.* at 226. Wolfram asks,

> [A]re some persons—such as a Nazi, a remorseless murderer, a cold-hearted land speculator, and the like—so pervaded by a repugnant characteristic or character that any legal matter brought to a lawyer by such a client would be properly rejectable, regardless of whether or not it was directly related to the source of the lawyer's abhorrence?

Id.

the framework of the *Model Rules*? And if one exists, as presumed by Rule 6.2(c), how can it be reconciled with the egalitarian notion of "justice for all?"[34]

Conversely, the super-subjectification of repugnancy renders the provisions both trite and absurd.[35] "Certainly not all possible reasons for differing from another person can count as grounds for repugnance."[36] Personal repugnance for a client must become depersonalized. The implication is that what is repugnant to the lawyer is "repugnant to natural justice, equity and good conscience."[37] As such, repugnance is viewed as an objective trait—a "self-defining" state of repugnancy.[38] Wolfram provides some concrete examples of clients whose "repugnance" is taken as "self-evident: the Nazi, the remorseless murderer, or the grasping entrepreneur who makes 'Saturday Night specials.'"[39]

Never mind the inclusion of a "grasping entrepreneur" in the same category of *per se* repugnance as a Nazi and a remorseless murderer.[40] It is rather the idea that there could exist a class or status of client whose "repugnance" is both intrinsic and self-evident that should alarm every legal ethicist and moral philosopher.[41] But Wolfram's reasoning is not so simplistic. In fact, his article speaks not to some *a priori* existence of a "Truly Repugnant Client," but rather, to the power

34. *See* Pledge of allegiance to the flag; manner of delivery, 4 U.S.C. § 4 (2013).

35. Wolfram, *supra* note 13, at 226. In distinguishing between meritorious and inappropriate reasons for declining a representation, Wolfram asserts, "[s]ome reasons [for differing from a client] would have to be rejected as trifling or as the overly judgmental reactions of a senselessly severe moral, political, or aesthetic prudery." *Id.*

36. *Id.* (quotation marks around "repugnance" omitted).

37. *See* Mikano E. Kiye, *The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon,* 15 AFR. STUD. Q. 85, 86 (2015). This phrase is found in Dr. Mikano E. Kiye's study of the "repugnancy tests" in Anglophone Cameroon, where customary or tribal laws are upheld and enforced unless they violate the repugnancy provisions (Section 21(1) of the Southern Cameroons High Court Law (SCHL), established by the British in 1955). *Id.* Although such repugnancy tests occupy an entirely different context than the *Model Rules*, they are instructive here because they have been criticized by historians and scholars of African studies for lacking judicial guidance. *See, e.g.*, G. Ezejiofor, *Sources of Nigerian Law, in* INTRODUCTION TO NIGERIAN LAW 1, 43 (C.O. Okonkwo ed., 1980) (Courts have not developed clear standards for application of the repugnancy tests and have applied the tests "on an ad hoc manner . . . on the basis of their notion of what is fair and just."). As Kiye points out, "There are no clear standards in determining repugnancy and this has led to uncertainty in the application of customary law." Kiye, *supra* note 37, at 85.

38. *See* Wolfram, *supra* note 13, at 225 (providing examples of "self-defining" cases of "repugnancy").

39. *Id.* (borrowing the example of "Saturday Night Specials" from Murray L. Schwartz, *The Zeal of the Civil Advocate, in* THE GOOD LAWYER 150, 165 (David Luban ed. 1983)).

40. Granted, Wolfram rhetorically juxtaposes extreme examples of "repugnant clients" with less egregious ones to explore the limits of a lawyer's impetus to reject clients on grounds of perceived repugnance. *See* Wolfram, *supra* note 13, at 225. As Wolfram also notes, a position that forsakes the "ethically worthless person" "might give insufficient regard to the human dignity even of moral reprobates," a stance so extreme that it "intuitively seems legitimate only with respect to extreme instances of unrepentant moral agents." *Id.* at 229.

41. MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW 84 (2006) (discussing the danger of rationalizing repugnance as a natural response to gross violations of human rights and dignity when "objects of disgust" have historically included powerless people and groups).

of societal presumptions of repugnancy.[42] These "deeply held feelings of repugnance," Wolfram concludes, produce a "de facto kind of extralegal social control" that influences lawyers' professional choices by providing a moral justification for declining a representation.[43] It is this "uniformity in moral judgments"[44] that forms a pseudo-objective standard against which lawyers may assess the prudence of their perceptions of repugnance and, consequently, the likelihood of prevailing in their petitions to terminate (under Rule 1.16) or decline (under Rule 6.2) a representation.[45]

NO LITMUS TEST

If a lawyer's subjective perception of a client or a cause as "repugnant" is to be deemed meritorious, *i.e.*, if it is to be deemed sufficient (under either Model Rule 6.2(c), or under generally accepted morals) to relieve the lawyer of their duty of diligent advocacy, some test or standard needs to be applied to distinguish justifiable withdrawal from mere indulgence. The trouble is that no such test or standard exists,[46] and the word's polysemy[47] makes the task of devising such a standard nearly impossible. Repugnance has no uniform meaning, prompting lawyers to define it as "distaste."[48] The consequence is that a lawyer's perception of a client or cause as repugnant reveals an emotional and deep-seated personal

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42. Wolfram contemplates:

> The refusal of any lawyer to provide assistance to a morally repugnant client takes on the appearance of an exceptional social policy forced upon a person because of rejection of his or her otherwise lawful or at least legally immune (if immoral) actions. It might be objected that the persistent refusal of lawyers to represent such persons places the seriatim, uniform judgment of lawyers in a position of veto over the considered judgment of lawyers in a position of veto over the considered judgment of public officials—those who promulgated the legal right to free speech regardless of its vicious content.

Wolfram, *supra* note 13, at 232.

43. *Id*. at 233.

44. *Id*.

45. Comment 7 to Model Rule 1.16 provides that withdrawal is permitted "if it can be accomplished without material adverse effects on the client's interests." MODEL RULES R. 1.16 cmt. 7.

46. While the concept of a repugnancy standard is nothing new when it comes to validating or abrogating statutes or laws in relation to a supreme doctrine, such as the U.S. Constitution, legal scholars do not agree as to whether a repugnancy standard exists within the context of the *Model Rules*, and if it does, whether it is objective or subjective. *See* discussion *supra* note 23. For example, Lewis Becker suggests that courts apply a "reasonable lawyer" standard when considering the repugnancy provision in Model Rule 1.16(b)(4) as a basis for permissive withdrawal. *See* Becker, *supra* note 23, at 40–41. Other lawyers argue that the standard for repugnancy is inescapably subjective. *See* Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 5 LAW & SOC. INQUIRY 1003, 1009 (1980).

47. *See infra* Part II(A) ("repugnant" historically meant "in opposition to" but eventually acquired a secondary meaning with a subjective flavor of moral distaste).

48. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1094 n.30 (1988) (describing repugnance in the context of the *Model Rules* as "distaste"); *see also* Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 34 n.17 (1926) ("The meaning of repugnant is not clear; it would almost seem that it meant no more than distasteful to the court.").

experience, rather than a detached observation. It is this strong emotional component that is deeply embedded in our socio-cultural understanding of "repugnance" and, if acted upon, undermines a lawyer's ability to competently represent a client.[49]

While the notion of repugnance in legal ethics has been explored tangentially by ethicists and legal scholars with respect to its role in the paradigm of personal morals versus professional duty,[50] the depths of its awkwardness in the *Model Rules* have yet to be fully probed. If there is an objective standard for repugnance, it might not apply with equal force to civil and criminal cases.[51] For a lawyer appointed to represent a criminal defendant, how does an objective standard of repugnance square with the client's right to counsel under the Sixth Amendment,[52] and the ethical duty of lawyers to diligently represent even the most unpopular clients?[53]

Applying an objective standard seems anomalous when the word conveys a subjective experience of distaste. But without an objective standard, it should not matter at all what the client does or who the client is. If the standard is solely subjective, a lawyer might be permitted to withdraw under Rule 1.16(b)(4) for finding the client's insistence on wearing a pink tie "repugnant."[54] And the "pink tie" could be a pretext masking a discriminatory motive.[55] It becomes the court's job to distinguish a lawyer with a good faith petition for withdrawal from one who is simply over-sensitive or self-indulgent.[56] An even more damaging consequence is that a subjective standard under Rule 6.2(c) could allow lawyers to cater to unconscious biases, with parallels to *Batson v. Kentucky*.[57]

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49. Daniel Markovits, *Further Thoughts About Legal Ethics from the Lawyer's Point of View*, 16 YALE J.L. & HUMANS. 85, 104–05 (2004) (lawyers' feelings of repugnance toward a client or a client's course of action cause them to withdraw from a representation prejudicially).

50. *See, e.g.*, *id.*; Nussbaum, *supra* note 1; Wolfram, *supra* note 13; Spiegel, *supra* note 46.

51. *See* Wolfram, *supra* note 13, at 228–31 (suggesting that a lawyer might have a duty to represent the "repugnant client" whose fundamental rights are severely threatened if the client's ideology is not related to the legal claim).

52. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

53. *See* MODEL RULES R. 1.3.

54. A purely subjective standard might resemble a peremptory challenge against a juror where the lawyer would not need to articulate their reasons for declining the representation. The court may never know the lawyer's motivation for rejecting the client. Under a purely subjective standard, the mere admission of strong feelings of repugnance would insulate the lawyer from questioning as to the basis for such repugnance. This could lead to lawyers invoking the repugnancy provisions to withdraw from a representation or decline an appointment for any reason. *See* discussion *infra* note 57 (comparing a subjective standard for repugnance in the *Model Rules* to the problem with peremptory challenges).

55. *See infra* note 57 on pretext.

56. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1065 (1976) ("It might be said that anyone whose conscience is so tender that he cannot fulfill the prescribed obligations of a professional should not undertake those obligations.").

57. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (The Equal Protection Clause forbids State from challenging juror solely on account of race). The *Batson* Court recognized that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* at 96 (citation

Objectivity may not be possible in this context. Even if it were, any attempts to objectively define the "repugnant client" straddle dangerous territory. Even with an objective standard, the emotional and religio-cultural subtext of the word may affect its application and interpretation by the courts, resulting in arbitrary and inconsistent rulings contrary to our concepts of "equal justice under law."[58] Therefore, to facilitate the language of equal justice, and to prevent lawyers from eschewing clients based solely on feelings of aversion to their claims or status, the word "repugnant" should be removed from the *Model Rules*.[59]

This Article will proceed in five parts. Part I will explore the legal, historical, and social precursors to the repugnancy provisions in the ABA's *Model Rules of Professional Conduct,* examining lawyers' interpretations and applications of the concept of repugnancy. Part II will present a brief etymological and hermeneutical study, focusing on the word's dual meanings in literature, philosophy, religion, and law—particularly constitutional law—which predates the inception of

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omitted). For a summary of the criticisms of peremptory jury strikes, see Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 371 (2010); *see also* William T. Pizzi, Batson v. Kentucky*: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 135 (1987) (footnote omitted) ("In the world of peremptory challenges, where it is acceptable to challenge jurors based on hunches, body language, pop psychology, political preferences, and economic status, and where lawyers are encouraged to strike jurors on the basis of their subjective feelings and impulses, there is no content to the notion of a 'neutral explanation.'"). This proposition is also cited in Howard, *supra* note 57, at 371 n.164. Howard also cites to Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 161 (2010) (cited in Howard at 371, n.5). Judge Bennett criticized *Batson* challenges in peremptory jury strikes as failing to uproot implicit bias. *Id*. He writes:

> Because *Batson*'s framework is flawed, it has produced the lingering and tragic legacy that the courts almost always *do not* find purposeful discrimination, regardless of how outrageous the asserted race-neutral reasons are. Although Batson and its progeny purportedly prohibit striking members of a protected class on account of class membership alone, this limitation is easily circumvented if the prosecutor proffers a facially class-neutral justification and the defendant cannot establish purposeful discrimination to the court's satisfaction. Moreover, the Batson challenge process may allow the implicit biases of the judges and attorneys to go unchecked during jury selection.

Id. at 161. As Bennett explains, implicit bias is unconscious bias: "Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement." *Id*. at 149. Along these lines, in a rule change effective January 1, 2022, Arizona became the first state to ban peremptory jury strikes, recognizing that allowing lawyers to reject a juror without providing a non-subjective reason fosters discrimination or unconscious bias. *See* Tom P. Taylor & Tina May (eds.), Brenna Goth (reporter), *Arizona Bans Use of Peremptory Strikes in State Jury Trials*, BLOOMBERG L. (Aug. 30, 2021, 4:01 pm), https://news.bloomberglaw.com/us-law-week/arizona-bans-use-of-peremptory-strikes-in-state-jury-trials [https://perma.cc/GX2V-UTLA].

58. *See* Lillian Gaines, *No Sanctuary for Judges: When Legal Ethics Conflict with Federal Law*, 33 GEO. J. LEGAL ETHICS 485, 498 (2020) ("The ethical obligation to promote equal access to justice is embodied in the disciplinary codes . . . ."); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 91 (2011) (discussing the origin and meaning of "[t]he words 'equal justice under law' [that] were etched in 1935 above the [U.S. Supreme] Court's grand staircase when the building opened").

59. This suggestion finds a parallel with the movement to abolish peremptory jury strikes because they do not account for unconscious or implicit bias. *See* discussion *supra* note 57.

the *Model Rules*. Part III will survey samples of state and federal cases spanning the past forty years that have addressed—directly or indirectly—the concept of repugnancy, whether in the context of the Rules or in general terms. Part IV will demonstrate how the term's inclusion in the *Rules* is detrimental to the doctrine that everyone is entitled to legal representation or is, at best, unnecessary in lieu of other, less subjective rules that permit a lawyer to decline or withdraw from a representation due to conflicts of interest or competency issues. This Article will further argue that the term's moralistic underpinnings are not easily dislodged. Ultimately, reliance on the repugnancy provisions promotes reification of a lawyer's subjective feelings and implies the existence of an objectively unrepresentable client. Finally, the Article concludes that the word "repugnant" should be removed from the *Model Rules*.

I. THE GENERAL EVOLUTION OF THE RULES OF PROFESSIONAL RESPONSIBILITY

More than a century ago, the American Bar Association (ABA) adopted and codified canons of professional ethics to serve as standard guidelines to regulate the lawyer-client relationship.[60] Originally adopted from the Alabama Bar Association's Code of Ethics,[61] which derived in large part from Judge George Sharswood's 1854 treatise on Professional Ethics[62] and David Hoffman's text *A Course of Legal Study*,[63] the first Canons of Professional Ethics were codified by the ABA on August 27, 1908.[64]

The Canons were a product of their times.[65] During the late nineteenth and early twentieth centuries, the rise of industrialized capitalism brought with it an increasing commercialization of legal practice.[66] As more lawyers began working for larger law firms and in corporate law departments, their moral autonomy

60. MODEL RULES preface.

61. *Report of the Committee on Code of Professional Ethics*, 30 ANN. REP. AM. BAR ASS'N 676, 678 (1907) (cited in Altman, *infra* note 63, at 2421 n.169).

62. The treatise by George Sharswood was originally published in 1854 as *A Compend of Lectures on the Aims and Duties of the Profession of the Law*. *See* Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern,* 22 GEO. J. LEGAL ETHICS 3, 25 (2009). The same work was subsequently titled *An Essay on Professional Ethics*. *Id*. For a comprehensive biography of George Sharswood, see Samuel Dickenson, *George Sharswood—Teacher and Friend*, 55 AM. L. REG. 401, 421 (1907).

63. *See also* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2422 (2003) ("David Hoffman (1784-1854), a very successful Baltimore lawyer, also was one of the foremost legal educators of the early American Bar.") (citations omitted). *See generally* DAVID HOFFMAN, A COURSE OF LEGAL STUDY; RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES (1817). For more detailed biographical information, see Michael S. Ariens, *Lost and Found—David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 572 (2014).

64. MODEL RULES preface.

65. *See* Altman, *supra* note 63, at 2401 (detailing the socio-political backdrop at the turn of the twentieth century, marked by "increasingly ascendant bourgeois values during the Gilded Age," as precipitating the first ethical codes).

66. *Id*. at 2405.

seemed in peril.[67] The once venerable legal profession had become, in the eyes of many, a guileful instrument to advance corrupt corporate interests.[68] The public's opinion of lawyers plummeted.[69]

In the summer of 1905, President Theodore Roosevelt delivered a sobering commencement speech at Harvard, his alma mater, in which he criticized members of the legal profession for succumbing to greed in derogation of the true spirit of the law.[70] Elite corporate lawyers ("hired cunning," as President Roosevelt called them) no longer served the public good; they had grown beholden to their wealthy private clients, manipulating the law on behalf of those clients to the detriment of the public's interest and losing their moral integrity in the process.[71]

Shortly thereafter, Henry St. George Tucker, the ABA's president from 1904-05 and Dean of the law school at Columbian University (now George Washington University),[72] reiterated Roosevelt's reproach of the legal profession before the 277 delegates at the ABA's 1905 annual meeting.[73] Comparing lawyers to members of the clergy, he exhorted the delegates "who stand forth clothed in priestly robes, as ministers at the altar of justice" to reinvigorate the ethics of the legal profession.[74] Preaching that lawyers must not sacrifice their morality for pecuniary gain, he encouraged delegates to resist "the temptation to advance a principle for his client or his cause as his own which cannot be defended in the forum of conscience."[75] His impassioned speech, brimming with biblical references, precipitated the genesis of the first Canons.[76]

The following year, the delegates agreed to adopt a professional code of legal ethics, with Tucker serving as chair of the committee.[77] As scholar and attorney James Altman describes, "[t]he Committee intended the A.B.A.'s 'adoption and promulgation of a series of reasonable Canons of professional ethics in the form of a code' to address the problem of commercialism."[78] To accomplish this, the

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67. *Id.* at 2401 ("[Lawyers] should never allow their duties to their clients to obscure or undermine their moral autonomy, or, therefore, their moral accountability."); *see also* WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW AND POWER IN THE NEW SOUTH 33–60, 247–66 (1999) (discussing lawyers' tensions between adhering to moral ideals and maximizing their clients' success).

68. Altman, *supra* note 63, at 2408 (quoting HENRY ST. GEORGE TUCKER, ADDRESS OF THE PRESIDENT, 28 AM. BAR ASS'N REP. 384 (1905), who chastises the lawyer if "by cunning artifice he seeks to conceal the real truth, or by devious methods he seeks to attain immoral ends under legal form").

69. *Id.* at 2405–06 (citing Louis D. Brandeis's "famous address" delivered on May 4, 1905 to the Harvard Ethical Society, in which he criticized "the leading lawyers of the United States" for catering to rich corporations instead of maintaining moral independence and serving as the "peoples' lawyer") (citations omitted).

70. Altman, *supra* note 63, at 2402–07 (citing President Theodore Roosevelt's speech *The Harvard Spirit (June 28, 1905)*, *in* THEODORE ROOSEVELT, IV PRESIDENTIAL ADDRESSES AND STATE PAPERS 407 (1920)).

71. *Id.* at 2405.

72. *Id.* at 2408 n.77.

73. *Id.* at 2407.

74. *Id.*

75. *Id.* at 2408.

76. *Id.*

77. *Id.*

78. *Id.* at 2413 (citations omitted).

Committee relied on three major sources: David Hoffman's *Resolutions*;[79] Sharswood's *Ethics*;[80] and a compilation of codes of ethics originally adopted by the Alabama State Bar Association, and later by ten other states.[81]

Altman asserts that the Canons were "a counter-insurgency by a professional elite aimed at protecting their status from the increasingly ascendant bourgeois values during the Gilded Age and the increasing dominance of the market orientation of twentieth century American capitalism."[82] A return to religious and moral integrity was desired.[83] In fact, Henry Drinker, "the leading twentieth century authority on the Canons,"[84] began his legendary treatise on legal ethics with the proclamation that "[t]he origins of the rules of conduct applicable to lawyers in the practice of their profession, known as legal ethics and legal etiquette, are found in the Ten Commandments."[85]

The Canons sought to strike a balance between zealous advocacy for the client and moral autonomy for the lawyer, with the latter explicitly written into the Rules.[86] The original Alabama Code, for example, was pervaded with religious themes.[87] Section 10 of the Code patently warned, "The attorney's office does not destroy man's accountability to the Creator."[88]

The original canons remained in effect for sixty-two years, until 1970, when the ABA adopted the Code of Professional Responsibility, divided into nine canons.[89] All states adopted these Codes in some form.[90] In 1977, the ABA formed a new commission, chaired by Robert J. Kutak and referred to as the Kutak Commission.[91] It took the Commission six years and several drafts to promulgate the ABA *Model Rules of Professional Conduct*, which the ABA's House of Delegates adopted on August 2, 1983.[92] Over time, new committees have formed, and the ABA has revised and amended what are now the *Model Rules of Professional Conduct*,[93] adopted by most states.[94]

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79. Altman describes David Hoffman's *Resolutions* in great detail, focusing on the distinctly religious tone in Hoffman's ethical imperatives. *Id.* at 2422–46. As Altman expresses, "Hoffman accorded greater priority to the lawyer's own personal views about morality and justice than to his client's interests." *Id.* at 2423 n.178.

80. *Id.* at 2426–36.

81. *Id.* at 2421–22.

82. *Id.* at 2401.

83. *Id.* at 2423 (referencing Susan Carle's description of the original canons as pervaded by a "religious jurisprudence") (citation omitted).

84. *Id.* at 2401–03.

85. Henry S. Drinker, *Legal Ethics,* 297 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 37 (1955).

86. Altman, *supra* note 63, at 2448.

87. *Id.*

88. *Id.*

89. STEPHEN GILLERS, REGULATION OF LAWYERS, 1, 8–9 (11th ed. 2018).

90. *Id.*

91. *Id.* at 8.

92. *Id.*

93. *Id.*; MODEL RULES scope cmt. 16.

94. Every American state has adopted some form of the ABA's mandatory legal ethics requirements. *See Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (March 28, 2018),

Recognizing that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibility to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living," the *Model Rules* purport to offer methods to resolve and balance these tensions.[95] However, to this day, there remains a "lack of clear guidelines from the ABA as to how these provisions [and terms] should be interpreted."[96]

The earlier versions of the rules encouraged lawyers to bracket or disengage their personal feelings in favor of zealously representing clients.[97] This "duty" to advocate for clients—even unpopular ones—with "warm zeal" was once regarded as fundamental to the integrity of the legal profession.[98] Now, however, the exceptions to the zealous advocacy requirement have broadened, offering lawyers additional grounds upon which they may withdraw from a representation.[99] This trend has developed into an approach that validates, rather than subrogates, the lawyer's subjective feelings. This impetus for lawyers to honor, rather than suppress, their feelings of aversion toward a client or a client's cause might portend the end of a more utilitarian approach to representation.[100]

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http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules [https://perma.cc/QS9N-34SU]. New York recently adopted the *Model Rules* after many years of utilizing a separate system of ethical rules for lawyers. *Id.*; *see also* CAL. RULES OF PROF'L CONDUCT (2021) [hereinafter CAL. RULES].

95. MODEL RULES pmbl. cmt. 9.

96. Jane Y. Kim, *Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions*, 38 WASH. U. J.L. & POL'Y 383, 389 (2012).

97. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY EC 2-27 (1980) [hereinafter MODEL CODE] ("History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.").

98. *See, e.g.*, CANONS OF PROF'L ETHICS Canon 15 (1908) [hereinafter 1908 CANONS] ("[A] lawyer owes entire devotion to the interest of the client, *warm zeal* in the maintenance and defense of his rights and the exertion of his utmost learning and ability.") (emphasis supplied).

99. *See generally* ABA Center for Professional Responsibility, *What's the Big Zeal?*, ABA FOR LAW STUDENTS (May 27, 2016), https://abaforlawstudents.com/2016/05/27/whats-big-zeal/ [https://perma.cc/TH8E-6EJ2] ("Efforts to circumscribe the limits of zealous representation have been a constant in the development of legal ethics standards."); *see also* Daniel Harrington & Stephanie K. Benecchi, *Is it Time to Remove 'Zeal' From the ABA Model Rules of Professional Conduct?*, ETHICS & PROFESSIONALISM, AM. BAR ASS'N LITIG. SEC. (May 26, 2021) https://www.jdsupra.com/legalnews/is-it-time-to-remove-zeal-from-the-aba-4010162/ [https://perma.cc/FBK7-PX6X] (proposing elimination of the "zealous advocate" requirement due to its tendency to promote unethical lawyering).

100. Utilitarianism posits that actions are morally good if they result in benefit to the majority and produce happiness. *See* JOHN STUART MILL, UTILITARIANISM 1, 19 (1861) ("A sacrifice which does not increase, or tend to increase, the sum of total happiness, it considers wasted."). This Article uses the word "utilitarianism" in reference to "rule utilitarianism," as distinguished from "act utilitarianism." The former principle posits that adherence to a system of rules, while harmful to some people in the short term, brings the greatest benefit over time. *Id.* The latter is the principle that a moral agent should make decisions and take actions that maximize social benefits balanced against social costs. *See also* Thomas M. Jones & Frederick H. Gautschi III, *Moral Commitment and the Ethical Attorney*, 2 BUS. ETHICS Q. 391, 392 (1992) ("Thus, the moral foundation of attorney morality is rule utilitarianism. Attorneys who follow the rules play their appropriate role in the adversary legal system, which is designed to produce, over time, the greatest net social benefit."). A rule that allows attorneys to defer on a case-by-case basis to their moral convictions, despite their professional duty of impartiality,

A. THE "REPUGNANCY PROVISIONS" IN THE MODEL RULES

The two repugnancy provisions[101] in the Model Rules focus the camera lens on lawyers' *feelings* of "repugnance."[102] Model Rule 1.16(b)(4) provides that "a lawyer may withdraw from representing a client if . . . the client insists on taking action that the lawyer considers repugnant.[103] Model Rule 6.2(c) discourages a lawyer from "seek[ing] to avoid appointment by a tribunal to represent a person except for good cause, such as [when] the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."[104] The repugnancy provisions of the *Model Rules* thus function as exceptions to the general impetus to engage in zealous representation.[105] These provisions have been adopted in many, though not all, of the state bars.[106]

The rules create a safeguard for lawyers.[107] They allow lawyers to terminate a

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would undermine a system of legal ethics founded on rule utilitarianism. *Id.* at 393. Scholars recognize the tension, however, between adherence to the adversarial system's ethical duty and the lawyer's personal moral convictions. *Id.* at 398. And some might argue that the greater good would flourish if lawyers feel supported in leaving a representation when their feelings will compromise their effectiveness, transforming legal ethics from rule utilitarianism into act utilitarianism. *Id.* at 393 ("*Act* and *rule* utilitarianism are mutually exclusive.").

101. The Article uses the term "repugnancy provisions" to refer to the two *Model Rules* (Rule 1.16(b)(4) and Rule 6.2 (c)) that feature the word "repugnant" as a basis to terminate or avoid a representation. It appears the term "repugnancy provision" was not originally intended for the legal ethics context, as it refers to clauses (such as those in Anglophone statutory schemes) that allow courts to uphold traditional tribal laws or customs as long as these laws are not "repugnant" to certain core value systems or principles embodied in mainstream law or humanitarian values. *See* Kiye, *supra* note 37, at 86. In these contexts, scholars have questioned why the word "repugnant" would be chosen above more objective-sounding terms to describe mere opposition or incongruity. *Id.* N.S. Peart writes:

> One may well ask why the term "repugnant" was used in preference to a cognate term such as "inconsistent." Many legal systems contain special provisions to regulate the exclusion of certain parts of the law which are in conflict with others. A well-known example is the rule that statutory provisions prevail over earlier ones.

N.S. Peart, *Section 11(1) of the Black Administration Act No. 38 of 1927: The Application of the Repugnancy Clause*, 1982 ACTA JURIDICA 99, 99–100 (W. de Vos et al., eds., 1983).

102. *See* MODEL RULES R. 1.16(b)(4) (use of the subjective word, "considers") and R. 6.2(c) (use of the subjective phrase, "repugnant to the lawyer").

103. *Id.* at R. 1.16(b)(4).

104. *Id.* at R. 6.2(c).

105. *See* Robert P. Schuwerk & Lillian B. Hardwick, *Declining or Terminating Representation*, *in* 48 TEXAS PRACTICE SERIES, HANDBOOK OF TEXAS LAWYER & JUDICIAL ETHICS § 6:15 (2019). *But see* David Luban, Fiduciary Legal Ethics, Zeal, and Moral Activism, 33 GEO. J. LEGAL ETHICS 275, 278 (2020) (recognizing that zeal is no longer an ethical requirement in the black letter text of the current version of the model rules).

106. *See, e.g.*, *Variations of the ABA Model Rules of Professional Conduct, Rule 1.16: Declining or Terminating Representation,* AM. BAR ASS'N (Dec. 11, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_16.pdf [https://perma.cc/KE9T-QGKD]; *Variations of the ABA Model Rules of Professional Conduct, Rule 6.2: Accepting Appointments,* AM. BAR ASS'N. (Sept. 29, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_2.pdf [https://perma.cc/VN7F-7MMH].

107. *See, e.g.*, MODEL CODE EC 2-29, *reprinted in* CTR. FOR PROF. RESP. (AM. BAR ASS'N), A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 at 366–81, 715–18 (Art Garwin ed., 2013).

representation when they feel they cannot fulfill their duties of diligent[108] or zealous representation.[109] If an existing client takes an unexpected or offensive course of action,[110] or if the court appoints a lawyer to represent an unpopular client or cause,[111] a lawyer may seek relief if they find the course of action, or the client, "repugnant."[112] The *Model Rules* provide little explanation, and court precedent offers little guidance, on how to determine when a lawyer is truly hampered by such "repugnance."[113] Moreover, practicing lawyers, academics, and legal scholars differ in their understandings of what constitutes sufficient repugnance to come within the meaning of these rules.[114] The absence of any clear guiding principles or uniform application of a standard for repugnancy makes it difficult for lawyers to know how to proceed.[115]

While some scholars regard the threshold under the repugnancy provisions as high,[116] others have characterized the repugnancy rules as provisions that "would accord lawyers a personal privilege to decline cases and clients they find *distasteful*."[117] Some scholars have indicated that the repugnancy provisions can be invoked based on moral or ideological disagreements.[118] But the question remains whether the mere existence of moral or ideological disagreements should be sufficient to justify withdrawal if these moral differences would not otherwise impact the course of the representation.

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108. *See* MODEL RULES R. 1.3.

109. For the duty of zealous advocacy, see Catherine H. Gibson, *Representing the United States Abroad: Proper Conduct of U.S. Government Attorneys in International Tribunals*, 44 GEO. J. INT'L L. 1167, 1171 (2013) ("The duty of zealous advocacy takes center stage in American ethical rules.") (citing MODEL RULES pmbl.). *See also* Luban, *supra* note 105, at 275.

110. MODEL RULES R. 1.16(b)(4) ("[A] lawyer may withdraw from representing a client if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.").

111. *Id.* at R. 6.2(c) ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as . . . the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.").

112. *Id.* at R. 1.16(b)(4).

113. *See* Alec Rothrock, *Repugnant Objectives*, 41 COLO. LAW. 51, 53 (2012) (discussing how the Model Rules do not define or explain the meaning of "repugnant"); *see also infra* Part III (discussing how courts have not provided a clear standard for interpreting or applying the repugnancy provisions in motions to withdraw from representation or decline a mandatory appointment).

114. *See, e.g.*, Wolfram, *supra* note 13, at 225–26 (questioning what qualifies as repugnant for purposes of declining a representation); Simon, *supra* note 48, at 1094 n.30.

115. *See generally* Kim, *supra* note 96, at 389 ("[E]ach state's piecemeal adoption of the ABA model guidelines and comments, in addition to the lack of clear guidelines from the ABA on how these provisions should be interpreted, raises *more* questions about what the attorney should and can do.").

116. *See, e.g.*, Markovits, *supra* note 49.

117. Simon, *supra* note 48, at 1094 n.30 (emphasis supplied).

118. *See, e.g.*, Luban, *supra* note 105, at 275 ("Ethics rules permit lawyers to withdraw from representation they find morally repugnant."); Harry Anastopulos, *Divorcing DOMA: Internal Law Firm Dynamics and Terminating Representation Under Rule 1.16*, 25 GEO. J. LEGAL ETHICS 415, 417–18 (2012) ("If moral or ideological disagreements exist between attorney and client, the attorney may withdraw under section [1.16](b).").

B. THE ORIGIN OF MODEL RULE 1.16 (B)(4)

> The client cannot be made the keeper of the attorney's conscience.[119]

The Kutak Commission, referenced above, reviewed several amendments to Model Rule 1.16, the rule that addresses a lawyer's responsibilities when declining, withdrawing, and terminating a representation.[120] The ABA House of Delegates considered the Commission's recommendations at the August 1982 ABA Annual Meeting.[121] Among the approved changes was the addition of the repugnancy provision, now Rule 1.16(b)(4).[122] It was originally designated as subparagraph (5), and the language was somewhat different from the current rule; it permitted a lawyer to withdraw from a representation if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[123]

The Rule was originally drafted as part of Model Rule 1.2(c).[124] In 1983, it was proposed by the Indiana State Bar Association as an amendment to Model Rule 1.2(c), regarding the lawyer's right to "limit the objectives of the representation if the client consents after the consultation."[125] The proposed amendment would read as follows:

> A lawyer may limit the objectives of the representation if the client consents after consultation. If a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent, the lawyer may withdraw if doing so can be accomplished without material adverse effect on the interests of the client or as otherwise permitted by Rule 1.6(b).[126]

The sponsor's comment indicated that the sentence had been included in the original 1981 Draft but later deleted in the 1982 Draft.[127] The sponsor recommended that it be reinstated, arguing that its deletion in the later draft "apparently prohibit[s] a lawyer from withdrawing when the client pursues an objective that the lawyer considers repugnant or imprudent."[128]

The proposed language was not reincorporated into Model Rule 1.2(c).[129] However, this language was added in Model Rule 1.16(b)(4), pursuant to a proposal by the Los Angeles County Bar Association at the August 1982 Annual Meeting.[130] Opponents of the word "repugnant" argued that it was superfluous

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119. *Report of the Committee on Code of Professional Ethics*, *supra* note 61, at 701 (cited in Altman, *supra* note 63, at 2448).
120. CTR. FOR PROF. RESP. (AM. BAR ASS'N), *supra* note 107, at 365–68.
121. *Id.*
122. *Id.* at 367.
123. *Id.*
124. *Id.* at 50.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 367.

and redundant, because "the concept of a 'repugnant' objective was already addressed in subparagraph (3), which permitted withdrawal if the client rendered the representation 'unreasonably difficult.'"[131] It appears there were no recorded objections to the word on the basis of its connotations of moral judgment or repulsion. Proponents of the rule argued that this provision was not new, as it had been in the Commission's 1981 version of Rule 1.2, and that "a lawyer should be able to be guided by his conscience when representing a client."[132]

In August 2001 at the ABA Annual Meeting, the Ethics 2000 Commission proposed changes to Rule 1.16.[133] These were adopted as proposed at the February 2002 ABA Midyear Meeting.[134] The repugnancy provision became Rule 1.16(b)(4).[135] The language was repeated in Comment [7] to Rule 1.16, under the subtitle *Optional Withdrawal*.[136] The word "imprudent" was removed, and other language was added.[137] As amended, the new rule provided that a lawyer may withdraw from the representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[138]

The Commission reasoned that changing the wording from "pursuing an objective" to "taking action" broadened the scope to include the objective of the action *and the means by which the client expects the lawyer to accomplish it*.[139] Furthermore, the Commission explained that allowing a lawyer to withdraw anytime a client insisted on an "imprudent" action would permit the lawyer to threaten withdrawal "in almost any dispute."[140] Instead, the Commission added the phrase "or to which the lawyer has a fundamental disagreement."[141] The purpose behind this clause was to permit the lawyer to withdraw "when the disagreement over objectives or means is so fundamental that the lawyer's autonomy is seriously threatened."[142] Rule 1.16(b)(4) was intended to cover situations in which "the insistence by the client that improper or unethical methods or tactics be used by the attorney will justify, and in some cases compel, the attorney's decision to terminate the relationship."[143]

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131. *Id.*
132. *Id.*
133. *Id.* at 376.
134. *Id.*
135. *See generally* MODEL RULES R. 1.16(b)(4).
136. CTR. FOR PROF. RESP. (AM. BAR ASS'N), *supra* note 107, at 381.
137. *Id.*
138. *Id.* at 376.
139. *Id.* at 378.
140. *Id.*
141. *Id.*
142. CTR. FOR PROF. RESP. (AM. BAR ASS'N), *supra* note 107, at 378; *see also* Anastopulos, *supra* note 118, at 417–18.
143. *Termination of Attorney-Client Relationship*, 23 WILLISTON ON CONTRACTS § 62:6 n.21 (4th ed. 1993).

The current Model Rule 1.16(b)(4) has not changed since the adoption of the amended version proposed by the Ethics 2000 Commission in 2002.[144] Aside from a few sparse lines, little is written on the backstory behind the Kutak Commission's decision in 1982 to adopt the provision containing the word "repugnant" and there is not much explanation of the specific legislative intent behind the choice of this word.[145]

But the word "repugnant" certainly existed within earlier versions of the ethics codes. In fact, the original Alabama Code of Ethics employed a "repugnancy" provision similar to 1.16(b)(4).[146] The proposed reasoning behind the Los Angeles County Bar Association's proposal of this provision, "that a lawyer should be able to be guided by his conscience when representing his client," echoes the sentiments of Section 27 of the Alabama Code.[147] As Altman observes in his review of the 1908 Canons of Ethics, "Section 27 of the Alabama Code locates the lawyer's moral autonomy in the freedom of his conscience: '[t]he client cannot be made the keeper of the attorney's conscience in professional matters.'"[148]

The word "repugnant" is found within the language of Section 30 of the Alabama Code, which deals with actions taken during litigation pending trial.[149] The provision reads,

> No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety. In the event that the client "insist[s]' that the lawyer engage in such conduct "repugnant to his own sense of honor and propriety[, then] the attorney should retire from the cause."[150]

The language of the 1907 Alabama Code reveals the intent of the drafters to limit the zealous advocate role by allowing lawyers autonomy to follow their conscience. Moreover, and as distinguished from Model Rule 6.2(c) (discussed below), Model Rule 1.16(b)(4) deals with the lawyer's repugnance for a client's *course of action*. As the notes to the amendments reveal, the rule was changed to "taking action" to broaden it to encompass a client's insistence on an objective *or a means* of undertaking the representation that the lawyer feels is repugnant.[151]

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144. *See* MODEL RULES R. 1.16(b)(4) ("[A] lawyer may withdraw from representing a client if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.").

145. *See* CTR. FOR PROF. RESP. (AM. BAR ASS'N), *supra* note 107, at 376–81.

146. *See Report of the Committee on Code of Professional Ethics*, *supra* note 61, at 702 (cited in Altman, *supra* note 63).

147. For the Code, *see* Altman, *supra* note 63, at 2448.

148. *Id.*

149. *Id.*

150. *Report of the Committee on Code of Professional Ethics*, *supra* note 61, at 702 (cited in Altman, *supra* note 63, at 2449).

151. CTR. FOR PROF. RESP. (AM. BAR ASS'N), *supra* note 107, at 378. The Ethics 2000 Commission replaced "pursuing an objective" with "taking action," so the rule "concerns the client's objectives *or the means of achieving those objectives*." (emphasis supplied). *Id.*

This acknowledgment that a lawyer need not act as the puppet of the client reflected the jurisprudence of the times. As the Supreme Court in *Polk County v. Dodson* opined in 1981 (prior to the Kutak Commission's proposed amendments and their adoption in 1982), "[a]lthough a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy."[152]

C. THE INCLUSION OF "REPUGNANT" IN RULE 6.2(C)

Little legislative history is found on the original inception of the repugnancy provision of Model Rule 6.2(c). It was originally proposed by the Florida Bar, and accepted by voice vote at the 1983 ABA Midyear Meeting.[153] However, language similar to that found in the current Model Rule 6.2(c), though limited to apply to government lawyers only, can be found in a proposal made by the District of Columbia's ABA State Delegate in 1982, to add Comment [7] to Rule 1.2.[154] The proposed amendment, subsequently withdrawn by its sponsor, would have read:

> A government lawyer has an obligation to represent the government and government bodies, officials, enactments, and policies without regard to the lawyer's personal, political, economic, social or moral views. However, if the client or cause to be represented is so repugnant as to be likely to impair the client-lawyer relationship or the ability of the lawyer to represent the client, then the government lawyer has an obligation to resign or seek to be excused from the representation.[155]

The repugnancy provision of Rule 6.2(c) was intended to function as an expansion of the "good cause" exception to the general rule that lawyers may not decline an appointment to represent a client.[156] The Rule did not change throughout subsequent revisions of the *Model Rules*;[157] it remains in effect today.[158] Interestingly, in Comment 2 to Rule 6.2, the repugnancy of a client or cause is classified under the rubric of "an improper conflict of interest," meaning that the conflict is "likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."[159]

A significant difference appears between the original disciplinary rules of the *Model Code*, specifically Rule EC 2-29,[160] and the current Rule 6.2(c).[161] EC 2-

152. Polk County v. Dodson, 454 U.S. 312, 323 (1981) (holding that a lawyer should not "clog the courts with frivolous motions or appeals," even at the behest of his client).

153. CTR. FOR PROF. RESP. (AM. BAR ASS'N), *supra* note 107, at 716.

154. *Id.* at 53. This proposal was made and withdrawn during the 1983 annual meeting.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See* MODEL RULES R. 6.2.

159. CTR. FOR PRO. RESP. (AM. BAR ASS'N), *supra* note 107, at 718.

160. *See* MODEL CODE EC 2-29 (reprinted in CTR. FOR PRO. RESP., *supra* note 107, at 717).

161. *See* MODEL RULES R. 6.2.

29 stated that "when a lawyer is appointed . . . to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons[,] . . . [which] *do not include* such factors as the *repugnance of the subject matter of the proceeding,* [or] the identity or position of a person involved in the case."[162] As a balance, Rule EC 2-30 allowed that "a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."[163]

D. THE LONGSTANDING TENSION BETWEEN PERSONAL MORALS AND PROFESSIONAL RESPONSIBILITY

The "escape clause" provided by Rule 6.2 should never come into play; our personal feelings should never influence our ability to effectively advocate on behalf of a client.[164]

Long before the inception of the original ABA Codes of Ethics, lawyers were encouraged—even required—to sublimate their personal feelings and religious beliefs in furtherance of their professional duty to facilitate the legal process.[165] To zealously defend even society's most unpopular clients, even if such advocacy appears to advance their controversial interests, was considered to be a lawyer's most important ethical responsibility.[166] Thus, in the tradition of zealous advocacy, lawyers assumed the risk of public scorn to preserve liberties that our

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162. CTR. FOR PRO. RESP., *supra* note 107, at 717.

163. *Id*. (emphasis added).

164. Elizabeth E. Wolford, *Repugnant Clients: Every Lawyer's Duty?*, 22 GPSOLO 23, 25, (2005), www.jstor.org/stable/23672922 [https://perma.cc/F8R3-BJ5A].

165. *See* MODEL CODE EC 2-29 (reprinted in CTR. FOR PRO. RESP., *supra* note 107 at 717):

> [When a lawyer is] appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, . . . he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, . . . or the belief of the lawyer regarding the merits of the civil case.

see also Wolford, *supra* note 164; Altman, *supra* note 63, at 2428 ("In Sharswood's view, . . . the accused's right to trial and counsel trumps the lawyer's right to preserve his moral purity, even if the accused is guilty.").

166. *See* Myles V. Lynk, *Representing Unpopular Clients: The Boston Massacre Trials of 1770, in* SUPPLEMENTAL MATERIALS PRO. RESP., L. 638-20394 (2019) ("[It is] the highest calling of our profession, to represent unpopular clients in times of national tumult and public distress."); *see also* David B. Wilkins, *Race, Ethics, and the First Amendment: Should A Black Lawyer Represent the Ku Klux Klan*, 63 GEO. WASH. L. REV. 1030, 1037–38 (1995) (theorizing that the bar would "treat the representation of unpopular clients as a professional honor rather than a mandatory duty" in order to ensure the client's best interest and to respect lawyers' moral autonomy).

adversarial system is intended to protect.[167] As John Adams intimated when defending his decision to represent the British Army officers accused of murder in the infamous Boston Massacre Trials of 1770:

> I had no hesitation in answering that Counsil ought to be the very last thing that an accused Person would want in a free Country. That the Bar ought in my opinion to be independent and impartial at all times and in every Circumstance. And that People whose lives were at stake ought to have the Counsil they preferred.[168]

The lofty ideal exemplified by Adams in 1770 finds support in the "last lawyer in town" theory, which posits that allowing lawyers to pick and choose only likeable clients with favorable ideologies would result in the possibility that a client who needs representation would be left without recourse.[169] As Professor Elizabeth Wolgast writes,

"If lawyers had a duty to select only just causes, then who would represent clients whose causes appear objectionable but are nonetheless legally sound?"[170] In setting aside personal feelings for the sake of preserving the integrity of the adversarial system, the lawyer is regarded as "an instrument of both liberty and political justice."[171]

But, some argue, such noble status comes at a steep price when lawyers feel they must compromise their morals in order to meet the requirements of legal representation for all.[172] The "last lawyer in town" model blanches when juxtaposed with absurd scenarios that imply a lawyer should help a greedy sociopath sue a

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167. The model of absolute loyalty to the client has been immortalized in Lord Brougham's oft-cited speech to the English House of Lords in 1820:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty.

See Altman, *supra* note 63, at 2443 (The speech was given during the trial of Queen Caroline.); MODEL CODE EC 2-27 ("Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse."); *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004) ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to those principles for which we fight abroad.").

168. Lynk, *supra* note 166 (citing 3 LEGAL PAPERS OF JOHN ADAMS at 6 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (alteration omitted)).

169. *See* Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 29 (2003) (discussing the practical inadequacy of the "last lawyer in town" theory and citing Wolfram, *supra* note 13, at 223 (proposing that lawyers have somewhat qualified moral duty to represent repugnant clients)).

170. ELIZABETH H. WOLGAST, ETHICS OF AN ARTIFICIAL PERSON 69 (1992).

171. Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991).

172. *See* DAVID LUBAN, THE ETHICS OF LAWYERS xiii (1994) ("The problematic aspect of lawyers' ethics . . . consists in duties . . . that contradict . . . everyday morality.") (quoted in Daniel Markovits, *Legal Ethics from the Lawyer's Point of View,* 15 YALE L.J., 209, 214 (2003)); *see also* Jones, *supra* note 100, at 398:

> Attorneys *may* be able to numb their consciences with mantras to the effect that the adversary system is justified because it best reveals the truth and best renders justice in the long run. But the

vulnerable party simply because the client is in want of representation and their cause may be legally sound.[173] Daniel Markovits recites this irony bluntly when he remarks, "[The dutiful lawyer] must raise . . . legally available arguments on behalf of his morally undeserving clients."[174] The discomfort felt in these scenarios raises the oft-quoted rhetorical question of Harvard Law Professor Charles Fried: "Can a good lawyer be a good person?"[175]

The *Model Rules* do not equate the lawyer's conscience with the client's identity.[176] As Professor Robert Kuehn articulates, "[T]here is considerable scholarship about a lawyer's duty to represent repugnant clients and about the moral nonaccountability of lawyers for the deeds of their clients."[177] This principle of "moral nonaccountability" was discussed at length by Professor David Luban, as the latter of two standard conceptions of a lawyer's professional role: the former being role obligation, or "the principle of partisanship."[178] Under this twofold model, lawyers may take comfort in knowing that they act morally *because* they provide their clients with zealous and lawful representation,[179] and therefore, at least as the *Model Rules* proclaim, they are blameless.[180] Professor Deborah Rhode attributes this notion to the "codification of 'role-differentiated morality' [that] affords an expedient escape from contexts of ethical complexity."[181] Indeed, Model Rule 1.2(b) assures that ["a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views and activities."[182] Or does it?

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abstract principle of 'justice over time' is likely to ring hollow for many attorneys whose moral lives are lived in the 'here and now' of discreet cases.

Id.

173. Fried, *supra* note 56, at 1086 ("If you are the last lawyer in town, is there a moral obligation to help the finance company foreclose on the widow's refrigerator?").

174. Markovits, *supra* note 172, at 214.

175. Fried, *supra* note 56, at 1074, 1076 ("We must ask then not how a decent lawyer may behave, but whether a decent, ethical person can ever be a lawyer.").

176. MODEL RULES R. 1.2(b).

177. Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417, 420 (2002).

178. David Luban, *Lawyers and Justice*, *in* JAMES E. MOLITERNO, ETHICS OF THE LAWYER'S WORK 59 (2003).

179. *Id.* at 1074 ("The lawyer acts morally because he helps to preserve and express the autonomy of his client vis-à-vis the legal system.") (quoting Fried, *supra* note 56, at 1074); *see also* Jones & Gautschi III, *supra* note 100, at 392 (describing rule utilitarianism).

180. *See* MODEL RULES R. 1.2(b).

181. *See* Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 701 (1981).

182. MODEL RULES R. 1.2(b); *see also,* Michael J. Lockman, *An Ethical Representation of Sovereign Clients in Debt Disputes*, 30 GEO. J. LEGAL ETHICS 73, 102 (2017):

> The *Model Rules* are unequivocal on the question of representing unpopular or repugnant clients or causes: representation does not imply that a lawyer endorses her client's 'political, economic, social or moral views or activities.' The *Rules* note further that representation should not be denied to clients 'whose cause is controversial or the subject of popular disapproval.'

Proponents of the repugnancy provisions in the *Model Rules* might argue that the archaic ideals by which a lawyer is expected to operate no longer comport with the modern reality of strong cultural, social, or political views, disgust at abhorrent conduct, and particularly volatile clients with antagonistic personalities.[183] In fact, Professor Larry O. Natt Gantt has suggested that the repugnancy provisions in the *Model Rules* "highlight the . . . implication that attorneys' internal moral dialogue may be so pervasive that it naturally does affect their professional decisions."[184] For how can a lawyer make altruistic decisions for a client they abhor?[185] As Professor Gary A. Munneke noted, "Lawyers often encounter clients that seem so repugnant that it's difficult or impossible to represent them."[186]

Critics of the moral nonaccountability model argue that lawyers cannot divorce their personal morals from a voluntary decision to represent an immoral client.[187] Under the Hobbesean view, the lawyer, as agent and representative of the client, "becomes an extension of the legal, *and to an extent the moral,* personality of the client."[188] In fact, many ethicists believe that "[v]oluntary acceptance of a client carries with it moral accountability for [both] the means and ends employed in that representation."[189] As a result, some legal scholars and moral philosophers argue that the right to representation should not be absolute.[190] Elizabeth Wolgast articulates this view succinctly when she states: "The system doesn't owe a right to be represented to all claimants."[191] Others worry that such an aphorism raises the question: who decides who is and is not entitled to representation?[192]

While there appears to be no comprehensive study of the organized bar's responses to the repugnancy provisions, a survey of independent articles and comments from lawyers and legal scholars suggests that lawyers have been questioning the use of the word "repugnant" since it emerged in drafts of the Rules in the early 1980s. For example, Professor Mark Spiegel of Boston University, in an article in the *American Bar Foundation Research Journal*, suggested that the "repugnancy provision" be deleted from the *Model Rules*.[193] Spiegel admitted

183. *See generally* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE (2000).

184. Larry O. Natt Gantt II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 376 n.55 (2005).

185. *See* Munneke, *supra* note 15, at 1 ("Arguably, a strong antipathy for the client might induce a mental condition that would make representation of the client difficult.").

186. *Id.*

187. Gerald Postema, *Moral Responsibility in Professional Ethics,* N.Y.U. L. REV. 55, 1, 77 (1980).

188. *Id.* (emphasis added); s*ee also* WOLGAST, *supra* note 170, at 1–18 (describing the Hobbesian view).

189. Schwartz, *supra* note 39, at 151 (quoted in WOLGAST, *supra* note 170, at 70 n.17).

190. *See, e.g.*, WOLGAST *supra* note 170, at 70.

191. *Id.* (citing Wolfram, *supra* note 13, at 227 ("I do not agree that a legal system should be accounted unjust if it leaves unrepresented [a] particular litigant whom no lawyer will represent because of moral objections.")).

192. Emeritus Professor Myles Lynk, Senior Assistant Disciplinary Counsel, District of Columbia Office of Disciplinary Counsel, raised this question during an editing session of this paper.

193. Spiegel, *supra* note 46, at 1009 ("I would suggest that the rules on prudence and repugnance be deleted because they are overbroad and unnecessary.").

that the Rule benefited the lawyer by "protect[ing] his interests in adhering to a set of personal morals."[194] However, in assessing whether the rules disadvantaged the client, Spiegel was more circumspect: "[T]he issue is whether, in an imperfect world, the lawyer's interest in avoiding conduct that he finds imprudent or repugnant should be allowed to override the client's interest in using a lawyer to advance the client's ends."[195]

Referring to "the repugnance standard" as "purely subjective,"[196] Spiegel noted that a more objective sounding phrase, such as "unjust," would be easier to contemplate.[197] As Spiegel suggests, "[I]f justice is at least partially what the legal system is about, there seems something more appropriate about requiring justification in terms of this end than in allowing repugnance to be the justification for denying clients service."[198]

Almost immediately after the repugnancy provisions were codified, lawyers and legal scholars began voicing their concerns over the potential for these rules to promote discrimination against unpopular clients. In 1989, when patients suffering from AIDS were facing immense discrimination, Professor Robert Begg wrote that the repugnancy Rules were "disquieting," giving lawyers "broad mandate to discriminate" against AIDS patients in need of representation.[199] As Begg discussed, "[under the repugnancy provisions,] AIDS-phobia is arguably an acceptable reason for an attorney to reject a client in the United States."[200] Begg feared that allowing attorneys to escape representation on the basis of repugnance would "perpetuate[] a policy which runs contrary to the evolution of a non-discriminatory and open society in the United States."[201]

Concerns similar to those expressed by Begg sounded in articles and opinions from other lawyers and legal scholars.[202] Many feared that the inclusion of the repugnancy provisions in the *Model Rules* gave lawyers almost unbridled discretion to terminate a representation.[203] In 1998, Professor Camille Gear published an article in the *Yale Law Journal* commenting on the impact of lawyers' "moral concerns" on client autonomy.[204] Citing Rule 1.16(b)(4), Gear worried that the lawyer "enjoys almost limitless discretion to end the [attorney-client] relationship on moral grounds."[205] Thus, scholars like Gear understood "repugnance" in this

194. *Id.* at 1008.
195. *Id.* at 1009.
196. *Id.* at 1010.
197. *Id.*
198. *Id.*
199. Robert T. Begg, *Legal Ethics and AIDS: An Analysis of Selected Issues,* 3 GEO. J. LEGAL ETHICS 1, 51 (1989).
200. *Id.* at 6.
201. *Id.*
202. *See, e.g.*, Gordon, *supra* note 9; Wolford, *supra* note 164; Rhode, *supra* note 181.
203. *See, e.g.*, Camille A. Gear, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L.J. 2473, 2473 (1998).
204. *Id.*
205. *Id.* at 2485 n.78.

context as a subjective moral judgment rather than as an objectively reasonable incompatibility with the client's proposed course of action.

Legal scholars continue to grapple with the absence of any statutory or judicial guidance as to the meaning of "repugnant" within the withdrawal and abstention provisions of the *Model Rules*. As Alec Rothrock, former chair of the Colorado Bar Association Ethics Committee, noted:

> The term "repugnant" is not defined in the Rules. The dictionary gives synonyms such as offensive, repulsive, distasteful, or disgusting. The test for determining repugnance is a subjective one. Each time the word "repugnant" appears in the Rules, it is viewed from the lawyer's personal vantage point. Although the Rules do not refer to morality in association with the concept of repugnance, the literature on the subject assumes a moral basis to the lawyer's perception of the action as repugnant.[206]

Elizabeth Wolford criticizes the repugnancy provisions as providing an easy "escape hatch" for attorneys to leave vulnerable clients in the lurch.[207] Like her predecessors, Wolford seems concerned that the repugnancy provisions grant a free pass for attorneys to submit to their internal prejudices when seeking leave to withdraw from a representation.[208] She writes:

> It also seems like too easy a way out for an attorney to decline representation under the theory that he or she cannot advocate zealously on behalf of the client. The ethics rules do provide this easy way out. The ABA Model Rules of Professional Conduct do not require attorneys to take on clients they find "repugnant."[209]

Furthermore, while many legal scholars have criticized the repugnancy provisions as affording too much latitude to lawyers seeking to avoid unpopular or vulnerable clients, others have identified different problems. For example, some scholars have pointed out that the repugnancy provisions are too ambiguous to ensure uniform application, making for vastly disparate outcomes.[210] Attorney Keith Call criticizes the repugnancy provision under 1.16(b), arguing that it is "by nature vague and subject to varying interpretations."[211]

One common sentiment is that the repugnancy provisions actually *encourage* lawyers to avoid unpopular clients. In a 2018 Washington Post opinion article titled, *Even Trump Deserves a Good Lawyer*, Philip Lacovara quotes Model Rule 1.16(b)(4) in reference to the reputational (and pecuniary) risks associated with

206. Rothrock, *supra* note 113, at 53.
207. Wolford, *supra* note 164, at 25.
208. *Id*. at 25.
209. *Id*.
210. *See infra* Part III.
211. Keith A. Call, *Irreconcilable Differences: When Can A Lawyer Terminate Representation Without Cause?*, 30 UTAH BAR J. 32 (2017).

representing Donald Trump.[212] Lacovara paraphrases Rule 6.2(c) to make it seem that the Rule counsels *against* accepting a repugnant client.[213] As he writes, "Although the rules do not force lawyers to take on unpopular clients, they admonish that lawyers should not turn down appointments unless 'the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship.'"[214]

In fact, the Rule does not require lawyers to decline appointments they find repugnant. It simply provides that repugnance affords them the "good cause" exception necessary to decline the representation. Lacovara seems to have paraphrased the Rule as more of a mandatory withdrawal provision than a permissive one. And yet, Lacovara also recognizes that "leaders of the legal profession have regularly and properly reminded lawyers of their duty to take on the defense of the unpopular."[215] "At their best, leaders of the bar are willing to risk financial penalties to make the justice system work. That means admirable lawyers—and their firms—should be prepared to provide counsel to a deeply unpopular client and face the repercussions."[216]

Thus, as affirmed above, the repugnancy rules have inspired a great deal of pushback and confusion, with some legal scholars fearing that the Rules grant lawyers too much latitude to abandon clients.[217]

E. ADOPTION OR REJECTION OF RULES 1.16(B)(4) AND 6.2(C) BY STATE BARS

The Policy Implementation Committee of the American Bar Association's Center for Professional Responsibility publishes charts that show, for each state and attorney-licensing jurisdiction in the U.S., the degree to which they have adopted their own version of each of the ABA Model Rules.[218]

Of the fifty state bars and the District of Columbia Bar, only three jurisdictions have completely removed the word "repugnant" from their state equivalents of Model Rule 1.16(b)(4).[219] The three jurisdictions that have elected not to use the word "repugnant" in this provision are California, New York, and the District of Columbia.[220] D.C. did keep the word "repugnant" when it adopted its version of Rule 6.2(c). While New York and D.C. do not provide extensive discussion about

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212. Philip Allen Lacovara, *Even Trump Deserves a Good Lawyer,* WASH. POST (Mar. 28, 2018, 4:39 PM), https://www.washingtonpost.com/opinions/even-trump-deserves-a-good-lawyer/2018/03/28/83d5772a-32b6-11e8-8bdd-cdb33a5eef83_story.html [https://perma.cc/Q4GZ-CBV8].

213. *Id.* (phrasing the repugnancy provision as a withdrawal mandate).

214. *Id.*

215. *Id.*

216. *Id.*

217. Begg, *supra* note 199, at 16.

218. *See supra* note 45.

219. *See Variations of the ABA Model Rules of Professional Conduct, Rule 1.16: Declining or Terminating Representation, supra* note 106.

220. *Id.*

their decisions to not adopt these provisions, California's State Bar Commission for the Revision of the Rules of Professional Conduct indicated exactly why it continues to reject the repugnancy provisions in California's ethical codes.[221]

1. CALIFORNIA AND MODEL RULE 1.16(B)(4)

California Model Rule 1.16(b)(1) provides that a lawyer may withdraw from representing a client "if the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law."[222]

Additionally, a lawyer may withdraw if "the client by other conduct renders it unreasonably difficult to carry out the representation."[223] Note that California's 1.16(b)(4) is similar to ABA Model Rule 1.16(b)(6).

In the California Rule, both subjective and objective components are treated separately, rather than leaving courts the task of distinguishing between a lawyer's judgment about the repugnance of a client's proposed action, and actions that are objectively "repugnant."[224] The subjective component takes the psychological or mental condition of the lawyer and provides that, in certain circumstances, it may interfere with the lawyer's ability to effectively represent a client.[225] When this happens, a lawyer must withdraw.[226] Such a provision most directly resembles ABA Model Rule 1.16(a)(2), which provides that the lawyer must withdraw from the representation if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."[227]

California's Rules focus on specific *acts* of the client that would render it extremely difficult for the lawyer to continue the representation.[228] These include fraudulent or criminal actions, financial impediments, or even legal arguments that no good faith assessment could justify.[229]

In *United States v. Lopez*, a case where the lawyer withdrew from a representation after a defendant communicated with a co-conspirator's counsel, the Ninth

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221. STATE BAR OF CAL. COMM'N FOR THE REVISION OF THE RULES OF PRO. CONDUCT, COMPREHENSIVE PROPOSED AMENDMENTS TO THE RULES OF PRO. CONDUCT OF THE STATE BAR OF CAL.: RULES AND CONCEPTS THAT WERE CONSIDERED BUT ARE NOT RECOMMENDED FOR ADOPTION 13–14 (2016), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000015097.pdf [https://perma.cc/99GD-94ZL] [hereinafter RULES THAT STATE BAR OF CALIFORNIA DID NOT ADOPT 2016].

222. CAL. RULES R. 1.16(b)(1).

223. *Id.* at R. 1.16(a)(3) (providing in Rule 1.16(a)(3) that a lawyer should withdraw from a representation if "the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively").

224. *Id.* at R. 1.16(b)(8) (mental or physical condition makes it unreasonably difficult); 1.16(b)(4) (client's conduct makes it unreasonably difficult).

225. *Id.* at R. 1.16(b)(8).

226. *Id.*

227. MODEL RULES R. 1.2(a)(2).

228. CAL. RULES R. 1.16(b)(4) (client's conduct makes it unreasonably difficult).

229. *Id.*

Circuit affirmed the nonexistence of a repugnancy provision in California's model rules.[230] In his concurrence, Judge Fletcher wrote, "Notably, although under the ABA Model Rules of Professional Conduct ("ABA Model Rules") an attorney may withdraw from representation if the client 'insists upon pursuing an objective that the lawyer considers repugnant or imprudent,' no comparable provision appears in the California Rules."[231]

Although Fletcher did not speculate as to why California lacked a comparable repugnancy provision, the California Ethics Commissions have stated their reasons unequivocally. In 2017, the California Commission for the Revision of the Rules of Professional Conduct conducted a thorough study of the California Ethics Codes and published its proposals and revisions.[232] In eschewing the repugnancy provisions of the ABA Model Rules 1.16(b)(4) and 6.2(c), the Commission reasoned,

> The Commission is not recommending any version of 6.2 because the Rule is ambiguous in regards to its scope. [The rule] might have the effect of constraining both lawyers and judges in taking a position on a lawyer's refusal to accept an appointment. For example, the Rule includes the concept of a client "whose character or cause the lawyer regards as repugnant," and it is uncertain whether that concept would be workable as a disciplinary standard because the determination of repugnancy would generally be a subjective assessment. In fact, for the same reason, the Commission rejected a similarly subjective Model Rule "repugnant" standard in the recommendation of proposed Rule 1.16, which concerns the termination of the lawyer-client relationship.[233]

A similarly worded rejection of Rule 6.2(c) in 2016 expressed doubt as to whether any court would recognize the subjective standard of repugnancy in the context of the lawyer-client relationship.[234] As the California Commission explained, "For example, the rule includes the concept of a 'repugnant client', and it is uncertain that existing California law or policy recognizes such an assessment."[235]

In a 2010 discussion draft for amendments to its Rules of Professional Conduct, a minority of Commission members cautioned against including the repugnancy provisions.[236] The Commission reported that the repugnancy

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230. *See* United States v. Lopez, 4 F.3d 1455, 1465 (9th Cir. 1993) (Fletcher, J., concurring) (citations omitted).

231. *Id*. at 14.

232. RULES THAT STATE BAR OF CALIFORNIA DID NOT ADOPT 2016, *supra* note 221.

233. *Id*. at 14.

234. STATE BAR OF CALIFORNIA, FINAL REPORT ON RULES AND CONCEPTS THAT WERE CONSIDERED BUT ARE NOT RECOMMENDED FOR ADOPTION (2017) [https://perma.cc/Q4YL-HL6W].

235. *Id*.

236. COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT, PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA (2010) https://www.calbar.ca.gov/Portals/0/documents/publicComment/2010/Revision-Rules-Professional-Conduct-12-Rules_01-11-10.pdf?ver=2017-05-19-142155-420 [https://perma.cc/S5EE-5UGQ] (citing CAL. BUS. & PROF. § 6068(h) (West 2019)).

provision would derogate California's Business and Professions Code § 6068(h), which provides that it is a lawyer's duty "[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or oppressed."[237] In rejecting Rule 6.2(c), the minority explained,

> A minority of the Commission declines to recommend the Rule because it would allow a lawyer to reject an appointment to represent a client the lawyer considers "repugnant" or who is unpopular. The minority notes that lawyers are traditionally obliged to represent people they consider "repugnant." . . . The unpopularity of a client should not permit a lawyer to refuse appointment by a tribunal. An appointed lawyer does not espouse the client or the client's cause.[238]

Although the word "repugnant" is not found within the current version of the California ethics codes,[239] courts in California have held that a lawyer must consider the effects of their personal feelings on the quality of their representation. In *Cunningham v. Superior Court*,[240] the California Court of Appeals ruled that compelling an attorney to provide pro bono representation to an indigent father was a violation of the attorney's right to equal protection under the law.[241] In that case, the lawyer's reason for declining the representation was a refusal to work without pay.[242] However, the California Court of Appeals recognized that the lawyer must evaluate honestly whether the lawyer can competently represent a client.[243] As the Court opined,

> The acceptance of a client by a lawyer involves a complex set of personal and professional judgments. Included in this calculus is the attorney's evaluation of whether he or she harbors any feeling of repugnance for the client.[244]

The overarching theme here is the recognition that repugnance need not be a reason for withdrawal unto itself, but that the intensity of a lawyer's feelings of aversion may inhibit the lawyer's ability to competently represent the client, warranting withdrawal.

2. NEW YORK AND MODEL RULE 1.16(B)(4)

New York also excluded the word "repugnant" from its 1.16(b)(4) equivalent, changing the wording to read "fundamental disagreement."[245] Like California,

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237. *Id.*
238. *Id.*
239. *See generally* CAL. RULES.
240. 177 Cal. App. 3d 336, 338 (1986).
241. *Id.*
242. *Id.*
243. *Id.* at 355.
244. *Id.*
245. *See Variations of the ABA Model Rules of Professional Conduct, Rule 1.16: Declining or Terminating Representation*, *supra* note 106.

New York also includes a section on mandatory withdrawal or abstention from a representation.[246] However, the word "repugnant" does appear in the New York Rules of Professional Conduct in Comment [6] to New York Rule 1.2, on limiting the scope of representation.[247] The Comment reads, "[T]he terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly, or that the lawyer regards as repugnant or imprudent."[248]

Again, repugnance here falls into the category of the scope of representation, rather than permissive or mandatory withdrawal. And "repugnant" is relegated to the Comments, rather than the black letter provisions of the ethics rules themselves.

3. DISTRICT OF COLUMBIA AND RULE 1.16(B)(4)

The District of Columbia also excluded the word "repugnant" from Rule 1.16 (b)(4), electing instead to include other language of Model Rule 1.16(b)(6) providing that a lawyer may withdraw when the representation "has been rendered unreasonably difficult by the client."[249] The D.C. Rules, in another subparagraph to its Rule 1.16, permits withdrawal when "obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult."[250] D.C. employs, in its Comment [2] to its Rule 1.2, the same language found in New York's Comment [6], stating that a lawyer may choose to limit the scope of their representation of a client by excluding actions that the lawyer deems "repugnant or imprudent."[251]

The D.C. Bar's Comment [3] to its Rule 1.2 echoes the sentiment expressed by the New York Bar in its Comment [5] to its Rule 1.2.[252] The D.C. version reads, "Legal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval."[253] We see again that the concept or feeling of repugnance does not enter as a justification for withdrawal.

4. OTHER STATES

Other state bars contain a permissive withdrawal provision that retains the word repugnant, mirroring Model Rule 1.16(b)(4).[254] Eight states continue to also

246. *Id.*
247. N.Y. RULES OF PROF'L CONDUCT R. 1.2, cmt. 6 (2019) [hereinafter N.Y. RULES].
248. *Id.*
249. D.C. RULES OF PROF'L CONDUCT R. 1.16 (2019) [hereinafter D.C. RULES].
250. *Id.*
251. D.C. RULES R. 1.2, cmt. 2 (2019).
252. D.C. RULES R. 1.2, cmt. 5 (2019).
253. D.C. RULES R. 1.2, cmt. 3 (2019).
254. *See generally Variations of the ABA Model Rules of Professional Conduct, Rule 1.16: Declining or Terminating Representation*, *supra* note 106.

retain the word "imprudent" in their versions of Model Rule 1.16(b)(4).[255] The Ethics 2000 Commission later removed the word from the Rules because, as expressed in the Commission Reporter's Explanation of Changes,

> Allowing the lawyer to withdraw merely because the lawyer believes that the client's objectives or intended action is "imprudent" [implied that a lawyer could] threaten to withdraw in order to prevail in almost every dispute with a client, thus detracting from the client's ability to direct the course of the representation.[256]

5. STATE ADOPTION OF THE LANGUAGE OF RULE 6.2(C)

The jurisdictions that have adopted Rule 6.2 have retained Rule 6.2(c).[257] North Carolina, Kansas, California and New York have not included a Rule 6.2 provision at all.[258] The rule's spirit, however, is preserved in other rules.[259] New York, for example, has maintained Rule 6.2 merely as a placeholder, without yet incorporating any of the language of the ABA's Rule 6.2.[260] As identified in Simon's Annotated New York Rules of Professional Conduct, the Statement of Client Rights that New York lawyers are required to post in their offices pertains to both paying and court-appointed clients: "You may not be refused representation on the basis of race, creed, color, age, religion, sex, sexual orientation, national origin or disability."[261]

Such a statement underlines the importance of a lawyer's duty to ensure that discriminatory motives do not motivate requests to decline appoints. But Simon's Annotated New York Rules suggests that "[p]erhaps New York's Courts will one day revisit the issue and adopt a version of ABA Model Rule 6.2."[262]

State bar committees have not necessarily challenged or addressed the relevance of the repugnancy provision in Model Rule 6.2(c)—at least not in any

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255. *See id.* (The state bars that opted to retain the word "imprudent" in their version of Rule 1.16(b)(4) are Alabama, Florida, Georgia, Kansas, Minnesota, Tennessee, Texas and Virginia.)

256. CTR. FOR PRO. RESP., *supra* note 107, at 374–75.

257. *See generally Variations of the ABA Model Rules of Professional Conduct, Rule 6.2: Accepting Appointments,* AM. BAR ASS'N. (Sept. 29, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_2.pdf [https://perma.cc/3EQS-F8A9].

258. *See Professional Standards, New York Rules of Conduct*, N.Y. ST. BAR ASS'N (April 1, 2021), https://nysba.org/app/uploads/2021/05/Rules-of-Professional-Conduct-as-amended-04072021.pdf [https://perma.cc/2XLP-QNBW].

259. *See, e.g.*, N.C. RULES OF PROF'L CONDUCT R. 1.16 (2003), https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-116-declining-or-terminating-representation/ [https://perma.cc/NQ29-WAE8] [hereinafter N.C. RULES].

260. SIMON'S N.Y. RULES OF PROF'L CONDUCT § 6.2:1 (2019) ("New York's Courts have not adopted any version of Rule 6.2, but the Courts reserved the rule number to avoid disrupting the harmony between New York's rule numbers and the ABA's rule numbers for the rest of the rules in Article 6. Hence, Rule 6.2 is marked "Reserved," thus leaving the option of adopting ABA Model Rule 6.2 or some variation on it in the future. For now, the rule number is just a placeholder.").

261. *Id.*

262. *Id.*

public forum.[263] Even if they have, it appears that courts have either accepted their proposed recommendations without issue, or simply declined to adopt them, as in the case of New York and California.[264]

II. DEFINING "REPUGNANT": ETYMOLOGY, APPLICATION, AND "MEANING AS USE"

> One cannot guess how a word functions. One has to *look* at its application and learn from that. But the difficulty is to remove the prejudice which stands in the way of doing so.[265]

The word "repugnant" in the *Model Rules* is both purposeful and outcome determinative.[266] Therefore, an understanding of its definition and scope is necessary for its proper application. But the *Model Rules* and the drafters' notes have never defined it.[267] When a word appears undefined within a statute or rule, and there is no clear legislative intent behind its inclusion, the word is generally interpreted according to its common and contemporary meaning at the time the statute was enacted.[268]

The notion of repugnance is not new to law or ethics, and the word "repugnant" embodies a complex etymological and social history.[269] Understanding its historical and current usages informs an understanding of its effect in the context of the *Model Rules*.[270]

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263. *See Variations of the ABA Model Rules of Professional Conduct, Rule 6.2: Accepting Appointments, supra* note 106.

264. *See supra* text accompanying notes 230 & 254.

265. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 340 (G.E.M. Anscombe et al. trans., rev. 4th ed. 2009).

266. For the proposition that every word in a statute or rule is intended by the drafters to serve a purpose, see Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is a 'cardinal principle of statutory construction' that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (citations omitted).

267. *See, e.g.*, Rothrock, *supra* note 113, at 53 ("The term "repugnant" is not defined in the Rules.").

268. *See, e.g.*, Wisconsin Central Ltd. v. United States, 138 S. Ct. 2067 (2018) ("'A fundamental canon of statutory construction' [is] that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'"); *see also* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018) ("When we speak of ordinary meaning we are asking an empirical question–about the sense of a word or phrase that is most likely implicated in a given linguistic context.") (paraphrasing Judge Posner's framing of "ordinary meaning" in United States v. Costello, 666 F.3d. 1040, 1044 (7th Cir. 2012)).

269. *See* Nussbaum, *supra* note 1.

270. *See* Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1385 (2014) ("The text of course must be understood in terms of the original public meaning of its words and phrases, in the linguistic, social, and political contexts in which they were written: history and context illuminate textual meaning."); *see also* JAMES BARR, THE SEMANTICS OF BIBLICAL LANGUAGE 1, 26 (Oxford University Press, 1961) (discussing philologists' theories that "the structure and perhaps the vocabulary of a language determines the lines of thought of those using it") (citation omitted).

A. ETYMOLOGICAL ROOTS

The word "repugnant" comes from the French "repugn," and has historically embodied two concurrent meanings.[271] It was defined as early as 1385, borrowed from the Old French *repugnant*.[272] Its Latin root is *repugnantem* (nominative *repugnāns*) meaning "contradictory, opposing."[273] It is a present participle of *repugnare,* which means "to resist, to fight back, to oppose, to disagree, to be incompatible with," from *re-* "back" + *pugnare* "to fight" (from the root peuk—"to prick.").[274] In 1777 it began to be defined both as "objectionable" and "distasteful."[275] The meaning of strong dislike, distaste, or aversion was first recorded in 1643.[276]

B. POLYSEMY AND AMBIGUITY

While dual meanings and several connotations of repugnance abound in legal literature and in moral philosophy, the term "repugnant," in all contexts, is a relational (rather than an absolute general) term.[277] Linguistic philosopher Willard Van Ornman Quine explains the difference between relational terms and absolute terms as follows: "Whereas an absolute general term is simply true of an object *x,* and of an object *y,* and so on, a relative term is true rather of *x* with respect to some other object *z* (same or different), and of *y* with respect to *w*, and so on."[278]

This distinction is important because, as Quine observes, "Commonly the key word of a relative term is used also *derelativized,* as an absolute term to this effect: it is true of anything *x* if and only if the relative term is true of *x* with respect to at least one thing."[279] Therefore, though its semantic function cannot

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271. *Repugnant*, in OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (1996) [hereinafter *Oxford Definition*] ("contrary or contradictory to . . . ; distasteful to . . . .").

272. *Repugnant*, *in* THE CHAMBERS DICTIONARY OF ETYMOLOGY (2018) ("About 1385 *repugnaunt* contrary, contradictory, opposing, antagonistic. . .") [*Chambers Definition*]; *Oxford Definition*, *supra* note 271 ("contrary or contradictory *to* . . . ; distasteful *to* . . .").

273. *Oxford Definition*, *supra* note 271.

274. *Id.*

275. *Chambers Definition*, *supra* note 272 ("About 1385 *repugnaunt* contrary, contradictory, opposing, antagonistic"); *Oxford Definition*, *supra* note 271 ("contrary or contradictory *to* . . . ; distasteful *to*").

276. *Oxford Definition*, *supra* note 271.

277. Michael H. Shapiro, *I Want a Girl (Boy) Just Like the Girl (Boy) That Married Dear Old Dad (Mom): Cloning Lives*, 9 S. CAL. INTERDISC. L.J. 1, 294 n.15 (1999):

> The "repugnance" family of terms has several meanings, all suggesting that they refer to relational concepts requiring, for completeness, phrases of the sort "Xing is repugnant to Professor Y." Of course, the repugnance relationship can hold between various sorts of entities, such as persons, processes, and moral and other theories. In a well worked out propositional system, the repugnance relation presumably would be reflected in the derivation of contradictory statements, or possibly an account of why someone, given his personally held theories and his makeup, would react negatively to the stimulus provided by the thought of human cloning. "Human cloning is repugnant to Jones" or "Human cloning is repugnant to all properly formed human moral systems" would be typical examples.

278. W.V. QUINE, WORD AND OBJECT § 22 "Relative Terms: Four Phases of Reference" 105 (2013).

279. *Id.* at 106.

be absolute, when repugnance is used in the context of the *Model Rules*, it implies an existing *repugnant object,* without which it would lose its relational meaning and become an abstract general term. In this way it becomes derelativized. The assumption at issue is that a "truly repugnant" client, cause, or action can exist independently of its subject-perceiver.

In the case of the repugnancy provisions, the relation between the subject-perceiver and the object-perceived is implied. Some scholars have examined repugnance from the subjective standpoint of a feeling of aversion.[280] The Oxford English Dictionary defines "repugnance" as both a "[c]ontradiction [and] inconsistency[, and also] . . . strong dislike, distaste, antipathy, or aversion;" and "repugnant" as "[d]istasteful or objectionable . . ., [e]xciting distaste or aversion; offensive; loathsome; repulsive."[281]

Today, the word "repugnance" is defined by *Merriam Webster Dictionary* as synonymous with "aversion, disgust, distaste, horror, loathing, nausea, repulsion, and revulsion."[282] Meanwhile, the *Pocket Oxford American Dictionary* defines "repugnance" as "great disgust."[283] This definition makes it more likely that lawyers would interpret the Rules as having subjective standards.

C. THE WORD "REPUGNANT" IN CONSTITUTIONAL LAW

> Laws which are repugnant to the Constitution are absolutely null and void.[284]

The principle of repugnancy in constitutional law predates the *Model Rules*.[285] As Chief Justice John Marshall declared in *Marbury v. Madison*, "[A] law repugnant to the constitution is void."[286] The repugnancy standard evolved as a method of identifying and abrogating laws or enactments that opposed the Constitution. Later, the repugnancy standard was applied to newly established laws that conflicted with earlier versions or enactments.[287] When two equally weighted statutes were deemed "repugnant" to one another, the general rule was that the newer law

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280. Shapiro, *supra* note 277, at 295 n.15 (defining "repugnant" as "aversion").

281. *Repugnance*, POCKET OXFORD AMERICAN DICTIONARY AND THESAURUS (3d ed. 2010) [hereinafter *Pocket Oxford Definition*] ("Great disgust").

282. *Repugnance*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/repugnance [https://perma.cc/CE57-PRA8] ("They felt nothing but repugnance for the group's violent history.").

283. *See Pocket Oxford Definition*, *supra* note 281.

284. *See* McCulloch v. Maryland, 17 U.S. 316, 436 (1819).

285. Constitutional law arguably began with the Constitution, and with the seminal case of *Marbury v. Madison*, 5 U.S. 137 (1803). The *Model Rules* first took form in 1908. *See* MODEL RULES preface.

286. Marbury v. Madison, 5 U.S. 137, 180 (1803):

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. The rule must be discharged.

Id.

287. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 236–37 (2000).

would supersede the old.[288] "As William Blackstone summarized the principle, 'where words are clearly repugnant in two laws, the later law takes place of the elder: *leges posteriores priores contrarias abrogant* is a maxim of universal law, as well as of our own constitutions.'"[289]

As Professor Caleb Nelson explains, "When two statutes were 'repugnant' within the meaning of the rule, it would have been logically impossible for courts to follow both; courts that gave effect to one would not be giving effect to the other."[290] In the language of constitutional law, "repugnant" was synonymous with "contradictory."[291]

> Thus, Samuel Johnson defined "repugnant" to mean "contrary" and "repugnantly" to mean "contradictorily"; his definition of "contrary" included both "contradictory" and "repugnant," while his definition of "to contradict" included "to be contrary to" and "to repugn." As Johnson confirmed elsewhere, to say that two things were "contrary" or "repugnant" was to say that one implied "the negation or destruction of the other." Blackstone agreed that two legal rules were not *contrariae* or "repugnant" if "both may stand together."[292]

In constitutional law, we understand three things from the word "repugnant": (1) its referent is an object, whether tangible or intangible (a doctrine, a body of law, a congressional enactment, a viewpoint, and so forth); (2) the object's repugnancy is relational (it is inconsistent with something else); and (3) the next step after identifying the object's repugnancy is to refute it or deprive it of legal force, rendering it void.[293] Thus, the word serves two functions in the context of constitutional law: it serves to identify "what the law is,"[294] (that to which the offending statute or law is repugnant) and to nullify what it is not (the repugnant law).

The legal dictionaries that developed alongside the early jurisprudence of the Supreme Court define "repugnant" as "inconsistent with," or "opposed to."[295] For example, the concept of "repugnancy" is defined in *Bouvier's Law Dictionary* in the context of repugnancy in pleadings.[296] The term denotes inconsistency in

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288. United States v. Tynen, 78 U.S. 88, 92 (1870).

289. Nelson, *supra* note 287, at 236; *see also*:

> When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first . . . .

Tynen, 78 U.S. at 92.

290. Nelson, *supra* note 287, at 236–37.

291. *Id.*

292. *Id.*

293. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void.").

294. *See id.* ("It is emphatically the province and duty of the judicial department to say what the law is.").

295. *See supra* notes 289–290.

296. John Bouvier, *Repugnancy*, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 359 (11th ed. 1839).

statements of material fact that would vitiate the pleadings.[297] *Black's Law Dictionary* defines the word "repugnant" as "inconsistent or incompatible with."[298]

Legal historians have identified the significance of the word "repugnant" in statutory interpretation dating from English law.[299] As Professor Noah Feldman commented, "I want to draw attention to the use of two crucial words . . ., words that resonate deeply within the history of statutory interpretation in English law, and that therefore open up for us a world of Marbury's intellectual antecedents. Those words are 'repugnant' and 'void.'"[300]

Even before *Marbury v. Madison,* the word had been used both synonymously and causally linked with the word "void."[301] As Feldman observed: "The relation of the two words is essentially causal: a law that is repugnant to the Constitution is therefore void. This voidness is not merely verbal. It has practical effects."[302]

Noteworthy is the utter absence of the abstract word "repugnance"—as distinct from the subjective adjective "repugnant"—in both *Black's Law Dictionary* and *Bouvier's Law Dictionary*. The concept of "repugnancy" in constitutional law contexts is strictly objective and depersonalized; and the law dictionaries do not entertain, as a legal concept, an individual's personal experience of repugnance.[303]

D. REPUGNANCY IN BIBLICAL CONTEXTS

The use of the word "repugnant" in some biblical translations is informative. In these sources, it carries connotations of spiritual impurity, ungodliness, wickedness, rottenness, and defilement.[304] The semantics of the word in biblical sources involves a subjective-relational structure, i.e., "repugnant to God," as in,

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297. *Id*. Bouvier defines repugnancy:

> REPUGNANCY, *in pleading,* is where the material facts stated in a declaration or other pleading, are inconsistent one with another; for example, where in an action of trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place, for the completion of a house then lately built; this declaration was considered bad, for repugnancy; for the timber could not be for the building of a house already built. Repugnancy of immaterial facts, and what is merely redundant, and which need not have been put into the sentence, and contradicting what was before alleged, will not, in general, vitiate the pleading.

Id. (citation omitted).

298. *Repugnant*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Inconsistent or irreconcilable with; contrary or contradictory to <the court's interpretation was repugnant to the express wording of the statute>.").

299. Feldman, *supra* note 2, at 29.

300. *Id*.

301. *Id*.

302. *Id*.

303. *See generally id*. (no mention of subjective distaste).

304. For the link between repugnance and biblical themes of original sin, see NUSSBAUM, *supra* note 41, at 82–83 ("Kass must think that disgust has a divine origin, or is in some way fortunately implanted by a wise teleology of nature, in order to curb the 'willfulness' that the Judaeo-Christian tradition equates with original sin.").

"repugnant to the lawyer."[305] The idea that those whose natures or actions are repugnant to God are stripped of God's protection finds a parallel to the idea that clients whose natures or actions are "repugnant to the lawyer" are stripped of legal protection.[306]

Some biblical translations use the English word "repugnant," with some translators defining the original Hebrew word *tā'ab*, as "abhorrence," and its derivative form *tô'ēbāh* as "abhorrent" or "repugnant."[307] That which is "abhorrent to God" becomes at once repulsive.[308] In some of the dominant English translations we find the word "repugnant" taking on the same rhetorical function: as an expression of moral disgust or a commentary on the intrinsic ungodliness of a person or deed.[309]

This relational structure is one-sided: the repugnance is often felt or experienced by someone who is superior to the person or experience they find repugnant.[310] This results in a corresponding damnation, falling from the grace of God—an existential dissolution.[311]

> But the thought of striking out against Mordecai alone was *repugnant* to him, for he had been informed of the identity of Mordecai's people. So Haman sought to destroy all the Jews (that is, the people of Mordecai) who were in all the kingdom of Ahasuerus. —*Esther* 3:6 (NET).[312]

In this context, the word "repugnant" denotes the state of finding others repulsive or offensive. Although the sentence could take on an implied meaning of repugnance as opposition to a personal moral code, this verse likely assumes the reader will interpret "repugnant" in the sense of a subjective impression of aversion.

> Look, their prosperity [is] not in their hands; the schemes of [the] wicked are *repugnant* to me —*Job* 21:16 (LEB).[313]

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305. *See* Shapiro, *supra* note 277, at 294 n.15.

306. *See* STEPHEN D. RENN, EXPOSITORY DICTIONARY OF BIBLE WORDS, WORD STUDIES FOR KEY ENGLISH BIBLE WORDS BASED ON THE HEBREW AND GREEK TEXTS 1, 1–2, 6 (2005).

307. *Id.* at 1–2, 6 (defining the Hebrew word *tā'ab* as repulsion and abhorrence, and its derivative *tô'ēbāh* as "abhorrent and repugnant"). Renn explains the sense of the word "abhorrent" or "repugnant" as involving abhorrence from the vantage point of God, such as "God's abhorrence," and observing that "[t]hose who are abhorred by God in either a relative or absolute sense find themselves beyond the sphere of covenant blessing." *Id.* at 2.

308. *See id.*

309. *See id.* at 6.

310. *Id.* (explaining that "[t]he ethical meaning [of repugnance] is far more common, referring in general to God's response of extreme loathing of Israel's covenant disobedience" and "unlawful sexual practices"); *see also id.* at 1 (describing the original Hebrew word for "repugnance" as "refer[ring] to God's abhorrent disdain of both the wickedness of his people [ ] and of corrupt humankind in general").

311. *Id.* at 1–2.

312. *Esther* 3:6 (NET). *But see Esther* 3:6 (NKJV) (translating the word as "disdained").

313. *Job* 21:16 (LEB). *But see Job* 21:16 (NKJV)(translating the word as "far from").

In the above verse, the placement of "repugnant" in proximity to the word "wicked" portrays the subjective experience of offensiveness or loathsomeness. Such subjectivity is de-personalized as an *a posteriori* response to an intrinsically "repugnant" entity or state. Note the function of the word "repugnant" in each of the following Biblical passages.

> Achish came to trust David completely. He thought, "He's made himself so *repugnant* to his people that he'll be in my camp forever." —*1 Samuel* 27:12 (MSG).[314]
>
> And when you are gone, your name will become a curse—a *repugnant* byword—to My chosen people; The Eternal God will put you to death and call His servants by a new name altogether. —*Isaiah* 65:15 (VOICE).[315]
>
> Were they ashamed because they did what was *repugnant* to God? They were not ashamed at all! They don't even know how to blush! Therefore they'll fall with those who fall. When I punish them, they'll be brought down, says the LORD. —*Jeremiah* 6:15 (ISV).[316]
>
> [A]nd then come to stand before me in this house that is called by my name and say, "We're delivered so we can continue to do all these things that are *repugnant* to God?" —*Jeremiah* 7:10 (ISV).[317]
>
> They built the high places of Baal that are in the Hinnom Valley in order to sacrifice their sons and daughters to Molech something that I didn't command, nor did it ever enter my mind for them to require this utterly *repugnant* thing and lead Judah into sin. —*Jeremiah* 32:35 (ISV).[318]
>
> But nothing that defiles or profanes or is unwashed shall ever enter it, nor anyone who commits abominations (unclean, detestable, morally *repugnant* things) or practices falsehood, but only those whose names are recorded in the Lamb's Book of Life. —*Revelation* 21:27 (AMP).[319]

The biblical phraseology of "repugnant" conveys a sense of moral condemnation or disgust, which likely contributes to a reading of the legal term "repugnant" as necessarily involving moral offense or outrage rather than the milder sense of contrariness.[320] Long before its inclusion in the *Model Rules*, the word "repugnant" signaled a sense of moral and spiritual inferiority.

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314. *1 Samuel* 27:12 (The Message). *But see I Samuel* 27:12 (NKJV) (emphasis added) (translating the word as "abhor").

315. *Isaiah* 65:15 (The Voice). *But see I Samuel* 27:12 (NKJV) (emphasis added).

316. *Jeremiah* 6:15 (International Standard Version) (emphasis added). *But see Jeremiah* 6:15 (NKJV) (emphasis added) (translating the word as "abomination").

317. *Jeremiah* 7:10 (International Standard Version) (emphasis added). *But see Jeremiah* 6:15 (NKJV) (emphasis added).

318. *Jeremiah* 32:35 (International Standard Version) (emphasis added). *But see Jeremiah* 6:15 (NKJV) (emphasis added).

319. *Revelation* 21:27 (Amplified Bible) (emphasis added). *But see Jeremiah* 6:15 (NKJV) (emphasis added).

320. *See* RENN, *supra* note 306, at 6.

E. DIVISIVE, CONDEMNING RHETORIC IN THE ELIZABETHAN PERIOD: REPUGNANT AS VILE

In 1550, John Knox, leader of the Reformation in Scotland who was a pastor of the English church and a translator of the Geneva Bible,[321] published a pamphlet aimed at denouncing Queen Mary (1515–1558) and attributing the brutal persecution of Protestants to the reign and power of women.[322] In 1558, Knox anonymously published *The First Blast of the Trumpet Against the Monstrous Regiment of Women*, which described the reign of women as "repugnant to nature," "vile," "frenetic," and as against the natural order.[323]

> To promote a woman to bear rule, superiority, dominion, or empire above any realm, nation, or city is repugnant to nature, contumely to God, a thing most contrarious [contrary] to his revealed will and approved ordinance, and, finally, it is the subversion [ruin] of good order, of all equity and justice.[324]

Here we see the word in the context of political upheaval, to incite revolt and the overthrow of the monarchy. The passages bear a tone of disdain. The use of the word "repugnant" was intentionally provocative: it demanded action. The action demanded by the term "repugnant," much as in the context of constitutional law, is that its referent (the "repugnant" thing) be rejected, removed, or overthrown, to make room for its superior replacement (that esoteric state, law, doctrine, or divine being, against which it appears repugnant).

F. CONTEXTUALIZING "REPUGNANT"

Common words often take on new and specialized meanings in legal contexts, and these meanings can vary considerably within different areas of law, and even different sections of a statute.[325] As reiterated by the Supreme Court in *Yates v. United States*, "The plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole."[326] Thus, there are etymological, biblical, and historical references to consider when we use the word

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321. Hardin Craig, Jr., *The Geneva Bible as a Political Document*, 7 PAC. HIST. REV. 40, 42 (1938).

322. JOHN KNOX, THE FIRST BLAST OF THE TRUMPET AGAINST THE MONSTROUS REGIMENT OF WOMEN (1558). *See generally* MARVIN A. BRESLOW, THE POLITICAL WRITINGS OF JOHN KNOX (1985).

323. *See* KNOX, *supra* note 322.

324. *Id.* (bracketed commentary in original).

325. *See* Yates v. United States, 574 U.S. 528, 537 (2015) ("Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.").

326. *Id.* (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

"repugnant" in a legal context. The legal contexts in which the word signals detached opposition are those of constitutional law and statutory interpretation.[327]

Beyond the specific language of the *Model Rules*, the word "repugnant" has been widely regarded as derogatory. Professor Susan Harding treats it as a dualistic concept rooted in religious fundamentalism.[328] Fundamentalism in this context can be understood as a dogmatic belief by practitioners of a given religion that they are the "exclusive possessors of religious truth."[329] Such a position naturally excludes and dehumanizes anyone who does not share the same belief system.

The word's vagueness transcends cultures and doxographies. In her study of the "repugnancy tests" in Anglophone Cameroon, Dr. Mikano Kiye comments on the word's dictionary definition as "highly distasteful or offensive,"[330] but admits that the legal standards for determining repugnancy are unclear.[331] This lack of clear standards, Kiye argues, derives from the language of Section 27(1) of the Southern Cameroons High Court Law, 1955 statute, which states that customary laws should be deemed repugnant if they offend "natural justice, equity or good conscience."[332] The problem with the word "repugnant" when applied in this context is that it requires courts to decide what constitutes "natural justice" and to abrogate any law that does not accord with that concept. And while the legal framework within the context of the *Model Rules* differs widely from that of Anglophone Cameroon, the problem of applying the repugnancy provision is equally pervasive. This is due in large part to the moralistic implications of the word, which has evolved to reflect moral judgments.[333]

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327. In a recent case about a gestational agreement involving a same-sex couple, the Supreme Court of Utah noted the term's ambiguity and emphasized that it was only using the word to mean "in opposition to" the "statute." The Court clarified:

> It is important to explain the meaning of the word "repugnant" in the statutory phrase "repugnant to the context of the statute." Although the term "repugnant" is often used to describe matters that are "distasteful, objectionable, or offensive," when used in a statutory context, "repugnant" generally is defined as "[i]nconsistent or irreconcilable with," or "contrary or contradictory to," . . . . We have repeatedly applied this latter meaning of the term when dealing with statutes repealed by implication. We likewise apply the same meaning here.

In re Gestational Agreement, 449 P.3d 69, 73 n.4 (Utah 2019) (citations omitted).

328. Susan Harding, *Representing Fundamentalism: The Problem of the Repugnant Cultural Other*, 58 SOC. RES. 373 (1991).

329. Bob Plant, *Wittgenstein, Religious "Passion," and Fundamentalism*, 41 J. RELIGIOUS ETHICS 280, 297 (2013).

330. Kiye, *supra* note 37, at 89.

331. *Id*.

332. *Id*. at 87.

333. *See* Rothrock, *supra* note 113, at 53.

III. HOW COURTS HAVE TREATED THE CONCEPT OF REPUGNANCY

> Immorality, then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral.[334]

In contexts outside of the *Model Rules*, courts have often used the term "repugnant" to convey what is morally reprehensible or shameful. For example, in the 1955 case of *Emery v. Emery*, the California Supreme Court used the word to mean "unacceptable" or "shameful."[335] A 1957 New York Court of Appeals opinion joined the words "repulsive and repugnant" in an appositive phrase condemning secret interception of confidential attorney-client communications.[336] In 1986, the United States Supreme Court invoked the benign constitutional law definition of "incompatibility" by declaring punishments that violate "evolving standards of decency" "repugnant" to the Eighth Amendment,[337] but later referred to forbidden punishments as "repugnant to the conscience of mankind," implying moral disgust.[338] In 1995, a South Carolina federal court equated "repugnant" with distasteful, commenting, "It is hard to imagine a more repugnant or unsympathetic client to put before a jury."[339] A 1981 Indiana court used the term to mean "odious," admonishing an attorney who "sought to exploit the attorney-client relationship for his own personal physical pleasure," and calling "conduct of this ilk" "particularly repugnant."[340]

In a 2019 medical malpractice case, the Sixth Circuit dissent used "repugnant" to mean unwanted or disagreeable, commenting that "[a]ny attorney would find [certain behaviors] to be a repugnant invasion of the attorney-client relationship.[341]

In 2013, a defendant accused of molesting his friend's ten-year-old daughter sought on cross-examination to impeach the girl's credibility, claiming that he wished "to substantively prove that she [his accuser] was a repugnant person in support of his opinion that she was repugnant."[342] The Washington Court of Appeals denied the defendant's request, stating it was "dubious that there is a character trait of repugnance."[343]

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334. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 15 (1959).

335. Emery v. Emery, 289 P.2d 218, 224 (Cal. 1955) ("While it may seem repugnant to allow a minor to sue his parent, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent's willful or malicious misconduct.").

336. Lanza v. New York, 143 N.E.2d 773, 777 (N.Y. 1957).

337. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

338. *Id.* at 105 (quoting Palko v. Connecticut, 302 U.S. 319, 323 (1937)).

339. Lucas v. Guyton, 901 F. Supp. 1047, 1052 (D.S.C. 1995).

340. *In re* Adams, 428 N.E.2d 786, 787 (Ind. 1981).

341. EMW Women's Surgical Ctr. v. Beshear, 920 F.3d 421, 460–61 (6th Cir. 2019) (Donald, J., dissenting).

342. State v. Harrelson, No. 30917-7-III, 2013 WL 6670581, at *2 (Wash. App. Dec. 17, 2013).

343. *Id.* (citation omitted). The statement here is profound, even when considered in the context in which it arose. The defendant in a child molestation proceeding referred to his young victim as "repugnant," intending to attack the victim's character. Not surprisingly, the court rejected this attempt. If, instead, the accused child

As found in court holdings, the general sense of the word "repugnant" shares definitional similarities both in meaning and application. And yet, when it comes to the repugnancy provisions in the *Model Rules*, courts have generally sought to limit lawyers' abilities to withdraw from a representation by assuring they do not prejudice the client.[344]

In the 1990s, the Board of Professional Responsibility of the Tennessee Supreme Court indicated that an attorney's deeply held beliefs about abortion were insufficient grounds to terminate the attorney's representation of minors seeking abortions.[345] The Board concluded that "[a]s to the reasons for seeking withdrawal, the [Tennessee] Supreme Court reiterated that it would have scant sympathy for an attorney who sought to avoid representation merely because the defendant's cause was unpopular, or because the crime of which he was accused was distasteful."[346]

At the other pole, the United States Court of Appeals for the Seventh Circuit encouraged pro-life attorneys to avoid undertaking representation of pro-choice litigants because of the intensity of their feelings of repugnance.[347]

In 2005, a Delaware family court declined to grant a lawyer's petition to withdraw from a representation even though the client "harassed, annoyed, cursed, threatened and [had] been otherwise disruptive of [the lawyer's] office staff, as well as towards [the lawyer] on the telephone," and "refused to heed the [lawyer's] recommendations." [348] By contrast, in a 2006 case, attorneys were permitted to withdraw when the client's behavior influenced the objectives of the litigation and the lawyers felt "unwilling to advance the client's repugnant, imprudent and unreasonable divorce objectives."[349]

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molester had been characterized as repugnant, the court might not have made the same comment. In any case, the context of this case does not detract from the broad applicability of the court's statement, that "repugnance" is doubtfully a "character trait."

344. *See infra* text accompanying notes 345, 350–56 (counseling against withdrawing for repugnance when clients are prejudiced).

345. Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 640–41 (1997) (discussing Tenn. Bd. Pro. Resp. Formal Op. 96-F-140 (1996)).

346. *Id.* at 641.

347. *Id.* at 642 (discussing Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1137 (7th Cir. 1983)).

348. *In re* Div. of Family Servs. v. M.P., No. CS03-07191, 2005 WL 3508335, at *1 (Del. Fam. Ct. May 25, 2005).

349. Tompkins v. Women's Cmty., No. 06-C-0078-S, 2006 WL 850645, at *1 (W.D. Wis. Mar. 31, 2006) (quotations omitted); *see also* Skorychenko v. Women's Cmty., No. 06-C-0078-S, 2006 WL 6005804, at *3 (W.D. Wis. Mar. 28, 2006):

> On October 19, 2005 Andrew W. Schmidt agreed to represent plaintiff in her divorce action. He was her counsel of record until December 28, 2005. After plaintiff threatened to sue defendant Schmidt he moved to withdraw as her counsel. His motion was granted on December 27, 2005 by the Marathon County Circuit Court.

Id.

In a 2012 capital murder case in Arizona, defense attorneys sought leave to withdraw under Rule 1.16(b)(4) because they found the client's insistence on accepting the death penalty "morally repugnant."[350] The Arizona Supreme Court held that the trial court properly directed the attorneys to remain on the case[351] because the "lawyers were ethically required to abide by [their client's] decision."[352] The court stressed that under the Criminal Rules, the ABA Model Rules were merely "guidelines and not requirements,"[353] and that the "lawyers were ethically required to abide by [their client's] decision."[354]

Almost a decade earlier, lawyers in Delaware moved to stay a capital murder defendant's execution despite the defendant's express desire to welcome the death penalty.[355] The Delaware Supreme Court reminded the attorneys of their duty to respect their client's decision regarding the objectives of the representation but suggested that, rather than moving forward without their client's authorization, they should have sought leave to withdraw under the repugnancy provision.[356] Citing the Delaware equivalent to Model Rule 1.16(b)(4), the court held that a lawyer could seek leave to withdraw when the client's decision to accept the death penalty triggered strong emotional resistance, as long as the client's interests would not be prejudiced.[357] The court reasoned that while

> the deliberate decision of a defendant to accept the death penalty . . . is not, in itself, an irrational act . . . [a]n attorney who is unable in good conscience to represent a client intent upon achieving such an objective, or to whom the death penalty is "repugnant," may seek leave to withdraw from the representation if the client's interests would not be prejudiced thereby.[358]

In a 2020 case, the Eleventh Circuit held that a client's actions, including begging the lawyer for loans and filing bar complaints against the lawyer, "made [the lawyer's] representation of [that client] untenable and . . . pressured [the lawyer] to engage in behavior that would violate the rules of the Florida Bar."[359] The

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350. State v. Hausner, 280 P.3d 604, 630–31 (Ariz. 2012) (finding that trial court did not abuse its discretion when refusing to grant leave to withdraw from the representation because the lawyers are bound by EC 1.2(a): "a lawyer shall abide by a client's decisions concerning the objectives of representation.").

351. *Id*.

352. *Id*. at 630.

353. *Id*. ("The ABA Guidelines are, under our Criminal Rules, guidelines and not requirements. . . . ER 1.16 (c) provides that '[w]hen ordered to do so by a tribunal, a lawyer shall continue the representation notwithstanding good cause for terminating the representation.'").

354. *Id*.

355. Red Dog v. State, 625 A.2d 245, 246 (Del. 1993).

356. *Id*. at 247 ("A defendant's wish to forego further appeals and accept the death penalty, like other decisions relating to the objectives of litigation, is essentially that of the client, whose decision the attorney must respect.").

357. *Id*.

358. *Id*.

359. Portnoy v. United States, 811 F. App'x 525, 532 (11th Cir. 2020).

Court held that "good cause existed for [the lawyer] to withdraw," in part because the client was not prejudiced and had five months to obtain substitute counsel.[360]

These cases illustrate the high degree of judicial discretion afforded Rule 1.16 (b)(4), and the vast disparity in its application.[361] In the context of Rule 1.16(b) (4), the standards governing the obligation of a lawyer to overrule his personal feelings in favor of his client's objectives remain nebulous.[362] If the standards for what constitutes a repugnant course of action under Rule 1.16(b)(4) are unclear, the standards for what qualifies as a "repugnant" client or cause under Rule 6.2(c) are even murkier.[363] In spite of this confusion, the word "repugnant" exists in the *Model Rules* without an internal definition, as if the word carries no ambiguity and can be effectively administered by the courts. But history, language, and the law provide no clear, consistent guidance on what it means. Without such guidance, courts are constrained to apply the word's common definition,[364] which renders the provision even more problematic.[365] It is no wonder that courts, especially appellate courts, are reluctant to define a limited standard of application.

IV. ANALYSIS: THE "REPUGNANT" CLIENT AS FLOATING SIGNIFIER

> [T]here is a marked revival of the idea that disgust and shame are reliable and valuable forces on which law may rightly be based, but little sustained critical scrutiny of such ideas.[366]

Inclusion of the word "repugnant" in the *Model Rules of Professional Conduct* creates an *aporia* in legal ethics. First, no actual definition of "repugnant" has been provided by the ABA in any edition of the *Model Rules* or in the Comments to the Rules, as adopted by the House of Delegates.[367] While the term

360. *Id.*

361. *See supra* notes 348–349 (two cases within one year of each other with opposite results).

362. *See supra* Parts I and III.

363. For example, in *People v. Sweet*, a lawyer sought leave to withdraw, invoking both Rule 1.16(b)(4) and Rule 6.2(c), and arguing that "Rule 6.2 provided that a lawyer should not seek to avoid the appointment to represent a person, except for good cause, such as when representing the client will likely violate the Illinois Rules of Professional Conduct or when 'the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or lawyer's ability to represent the client.'" 87 N.E.3d 926, 930 (Ill. App. Ct. 2017). The defendant later claimed ineffective assistance of counsel, claiming his lawyer's motion to withdraw revealed her feelings of repugnance for the defendant and constituted a "per se conflict of interest." *Id.* at 934. The Court of Appeals held that counsel's trial strategy did not constitute ineffective assistance of counsel because her claimed feeling of "repugnance" was based on the defendant's posttrial actions, rather than on his identity as a child murderer. *Id.* at 936.

364. Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) ("[A] 'fundamental canon of statutory Construction' [is] that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'").

365. . *See* Plucknett, *supra* note 48, at 34 ("The meaning of repugnant is not clear; it would almost seem that it meant no more than distasteful to the court.").

366. Nussbaum, *supra* note 1.

367. *See generally* MODEL CODE Canon 2 EC 2-29 (reprinted in CTR. FOR PROF'L. RESP., *supra* note 107, at 365–68).

"repugnant" is not defined therein, Comment [2] to Model Rule 6.2(c) provides that a lawyer's perception of a client as repugnant may, in certain circumstances, constitute "good cause" to decline to represent an unpopular client.[368] But aside from alluding to repugnancy of a client or a cause as a potential conflict of interest, the *Model Rules* are silent as to an explicit definition of the term. Additionally, this Article finds no state bar or decisions with precedential authority to have expressly defined the term within the context of the ethics rules.[369]

The lack of a nuanced definition within the context of the ethics rules is understandable, because to define it more narrowly would be to give the term a fixed objective existence, limiting it to a particular set of attributes. Doing so would remove the relationality of the term and transform it into a general abstract word with a defined, and therefore limited, scope and application.[370] Yet the word itself cannot be defined on its own, for its meaning is contingent upon the object with which it is paired.[371]

Compare the word's usage in constitutional law, where the standard *is* objective.[372] Repugnant finds its referent in anything that a court deems to be irreconcilable with an externally existing and uniformly recognized doctrine.[373] Thus, in constitutional law, the term serves as a placeholder that derives its application from being compared to its antithesis, namely, a superior doctrine of law. An Act deemed by a court of competent jurisdiction to be incongruent with established doctrines or principles of law is repugnant.[374] Determination of its repugnancy

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368. MODEL RULES R. 6.2 cmt. 2:

> For good cause, a lawyer may seek to decline an appointment to represent a person . . . whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, . . . or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship.

369. This Article found no such case in a years-long, intensive Westlaw search and hypothesizes that no such case exists. That said, the Article hesitates to render so broad and sweeping an assertion as to preclude the possibility that a binding court has expressly defined "repugnant" within the context of the *Model Rules* somewhere within the past 40 years. The Article invites its readers to investigate further and try to disprove its hypothesis.

370. *See generally* QUINE, *supra* note 278, at § 26 ("vagueness").

371. *See* WITTGENSTEIN, *supra* note 265, at ¶ 340.

372. *See* Feldman, *supra* note 2, at 29.

373. Marbury v. Madison, 5 U.S. 137, 138 (1803) ("An act of congress repugnant to the constitution cannot become a law.").

374. 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question *on the ground of its being repugnant to the Constitution, treaties, or laws of the United States*, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id. (emphasis supplied); *see also* 36 C.J.S. *Federal Courts* § 338 (2019) ("One of the bases for certiorari to review a state court judgment is that the validity of a statute of any state has been drawn in question as being repugnant to the Constitution, treaties, or laws of the United States.").

results in abrogation of the offending act or law.[375]

Whereas, in constitutional law, the purpose of the repugnancy test is to maintain the supremacy of the Constitution and reject any law that would threaten to undermine it, in legal ethics, such semantics are problematic. And yet, the syntax is almost identical: A law repugnant to the Constitution is void. A client repugnant to the lawyer is avoidable. "A law that is repugnant to the Constitution is void *ab initio*. It has no validity. *It is not law at all*."[376] A client who is repugnant to a lawyer is void of representability. They have no validity. They are not a client at all. Another way to put it is that a lawyer who harbors repugnance for their client cannot do their job because they have become a void advocate.[377]

In the context of legal ethics, repugnant cannot (and should not) be defined as a term in its own right; therefore, it only bears relational existence and lacks an intrinsic meaning. Because "repugnant" is devoid of its own referent, it acquires its meaning in relation to some other object in the clause, which *would* need to be defined.

Here, a lawyer may seek leave to abandon a client if they can show that the client's proposed action is repugnant *to them* under Rule 1.16(b)(4). Or a lawyer can refuse an otherwise obligatory representation by showing a court that the client or the cause is repugnant *to them* under Rule 6.2(c). In either case, the variable subject is the lawyer; the floating signifier is "repugnant"; and the control object is the client, the client's conduct, the cause, or some combination of the three.

There does not appear to be a judicial standard or test to determine when a lawyer may invoke the "repugnant" provisions, and under what circumstances the lawyer may be granted leave to decline or withdraw from a representation for this reason. In fact, a California Practice Guide on Professional Responsibility specifically cautions lawyers against crying repugnancy frivolously.[378] The guidance warns,

> ***CAUTION***: Unsupported claims of "financial hardship," "too busy" or "repugnant client" are likely to antagonize the judge who appointed you. If you frequently appear in front of this judge, you may want to forego such claims. If you decide to pursue the challenge, come prepared with declarations *stating facts* showing appropriate grounds for declining the appointment.[379]

This encouragement to "state facts" showing appropriate grounds for declining appointment means that, even under a wholly subjective standard, courts need to ensure that the lawyer is not using this provision as an "escape hatch."[380] However, under other provisions, it may not be necessary for the lawyer to

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375. *Marbury*, 5 U.S. at 180 ("[A] law repugnant to the constitution is void.").

376. Feldman, *supra* note 2, at 36.

377. The term "void advocate" was suggested by immigration attorney Karina Ordonez.

378. *Accepting or Rejecting Employment*, *in* CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY ch. 8 (emphasis added).

379. *Id.*

380. *See* Simon, *supra* note 48, at 1094 n.30.

provide details explaining the lawyer's reason to withdraw. As Model Rule 1.16, Comment [3] states:

> When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. . . .The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. *The lawyer's statement that professional considerations require termination of the representation should be accepted as sufficient*.[381]

In the absence of any established guidelines for applying the repugnancy provisions, they can become arbitrary. When a lawyer seeks leave to withdraw from a representation or decline an appointment under the repugnancy provisions, courts must engage in some sort of analysis to determine whether the lawyer should be permitted under the applicable rule to withdraw from or decline the representation. There are three ways a court can assess the rule's applicability: either under a wholly subjective standard; a wholly objective standard; or a standard that contains both subjective and objective components such as the "reasonable person" standard in tort law. Any of these methods of assessment would at best render the rules themselves superfluous and, at worst, effectively negate the foundational principles of legal ethics by severely prejudicing vulnerable clients.

A. REPUGNANCE AND DISGUST: A DESCRIPTIVE OR A NORMATIVE CLAIM?

The utility of repugnance (or disgust) as a descriptor has been the subject of scholarly debate for decades.[382] One theory posits that repugnance is an innate safeguard against corruption and sin.[383] This notion was coined by Leon Kass in "The Wisdom of Repugnance" as a critique of cloning.[384] But the view of repugnance as passive rather than creative assumes an inherently existing natural evil or "repugnant object," something to be shunned and avoided. Martha Nussbaum warns that the reification of the repugnant object can easily transform into a justification for social evils (such as genocide) rather than an instrument to detect them.[385] Similarly, under the "social contagion theory" model of disgust, claims

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381. MODEL RULES R. 1.16 cmt. 3 (emphasis added).

382. *See, e.g.*, Robert W. Fischer, *Disgust as Heuristic*, 19 ETHICAL THEORY MORAL PRAC. 679 (2016) (explaining and critiquing "social contagion view" of disgust and evaluating the emotion's social function).

383. *See* Kass, *supra* note 1.

384. *Id.*

385. *See* NUSSBAUM, *supra* note 41, at 81–82.

> So far then, Kass has not convinced us that disgust is reliably correlated with serious violations of human rights and dignity . . . But what about other former targets of widespread repugnance, such as Jews, or mixed-race couples, or the novels of James Joyce and D.H. Lawrence? Will Kass say that these earlier instances of disgust contained wisdom?

Id.

of repugnance can be characterized as either "descriptive" or "normative."[386] As Philosopher Robert Fischer explains, "The descriptive claim concerns what disgust tracks—namely, negatively perceived contagion. The normative claim is that negatively perceived contagion is *evidence of wrongness*."[387]

Under the descriptive model, repugnance is the symptom of socially embedded norms and simply detects social contagion.[388] A lawyer's repugnance would be seen as a perception of something that is socially taboo or unpopular.[389] Under the normative model, however, the lawyer's repugnance would be seen as an ascertainment of the repugnant character of an object.[390]

The normative standard is more dangerous. It implies that the lawyer feels repugnance for the client because the client, the cause, or the client's action, *is repugnant,* and therefore, impossible for the lawyer to represent. The normative claim projects a judgment of right or wrong onto an external object, then misperceives that judgment as if it were self-verifying. In other words, the person who feels repugnance toward a client will misperceive the client as inherently "repugnant," failing to recognize that such a character trait is a conceptual imputation. By contrast, the descriptive claim does not concern itself with the nature or essence of the person. Rather, it represents collectively held societal norms.

Under the U.S. Constitution, a person charged with a crime has a Sixth Amendment right to counsel.[391] Allowing a lawyer appointed to represent a criminal defendant to decline such an appointment on the ground that the "client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client" undermines the spirit of the Sixth Amendment.[392] One might also wonder how proponents of Rule 6.2(c) can expect the attorney to make split-second judgments about a client or cause with whom they are unfamiliar. Since Rule 6.2(c) applies to declining an appointed representation, the lawyer would need to show that they find the client or cause repugnant either before or soon after they have been appointed, without knowing anything about the client other than their age, race or ethnic background, gender, perhaps religion, and the nature of the criminal charges against them. Basing a finding of repugnance on such criteria defeats the purpose of appointing

386. *See* Fischer, *supra* note 382, at 682.

387. *Id.* (emphasis added).

388. *Id.*

389. *See id.*

390. *See id.*

391. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

392. MODEL RULES R. 6.2(c); *see id.*

counsel for clients whose "cause is unpopular."[393] By contrast, Rules 6.2(a) and (b) and Comment [2] to Rule 6.2 set forth other criteria for declining an appointment that are objective and not normative: they characterize the lawyer, not the client.[394] Thus, for example, declinations are appropriate when representing the client is likely to result in a violation of the *Rules of Professional Conduct*—when, for example, the lawyer cannot handle the matter competently, or when the representation is likely to result in an improper conflict of interest—or violation of other law, or when the representation is likely to result in an unreasonable financial burden on the lawyer.[395]

Rule 1.16(b)(4) applies when the lawyer has some preexisting relationship with the client and seeks leave to withdraw when they find the client's conduct reprehensible.[396] A November 2020 article in Bloomberg Law titled, *'Repugnant' Conduct Allows Bannon Lawyer to Quit, Rules Say* claims that Ethics Rule 1.16(b)(4) allowed "Steve Bannon's lawyer to drop him."[397] The article highlights a growing belief among some legal ethicists that "[t]he concept of repugnance exists to protect the client."[398] Such a platitude might seem comforting to lawyers who want to believe that dumping a client they deem repugnant is ultimately in that client's best interest. But this implies that a lawyer who condones the client's actions or worldview would serve the client's interests better. Such a position ignores Rule 1.2(b)'s clear statement that a lawyer's representation of a client does not represent an endorsement of the client's views.

The only issues considered when contemplating withdrawal of representation should be whether the lawyer is competent to undertake the representation, whether there is financial burden, or whether the representation would involve a conflict of interest in violation of the rules.

On the other hand, in certain circumstances, unless a lawyer is ethically permitted to decline a case, they face the dilemma of not being able to zealously represent a client with whom they fundamentally disagree, in violation of Rule 1.3 and legally enforceable duties.[399] Attorneys who feel they cannot reconcile their

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393. *See* MODEL CODE CANON 2, EC 2-27 ("Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.").

394. *See* MODEL RULES R. 1.16(a)–(b) & R. 1.16 cmt. 2.

395. *See id.* at R. 1.16(a) ("[A] lawyer shall not represent client . . . if: (1) representation will result in violation of the rules . . . or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged.").

396. *See id.* at R. 1.16(b)(4).

397. *See* Melissa Heelan, *'Repugnant' Conduct Allows Bannon Lawyer to Quit, Rules Say*, BLOOMBERG LAW (Nov. 9, 2020, 5:30pm), https://news.bloomberglaw.com/us-law-week/repugnant-conduct-allows-bannon-lawyer-to-quit-rules-say [https://perma.cc/B8PU-THND].

398. *Id.* (quoting Arthur D. Burger, chair of Jackson & Campbell's Professional Responsibility Washington, D.C. Practice Group).

399. *See* Cunningham v. Superior Ct., 222 Cal. Rptr. 854, 865 (Cal. Ct. App. 1986). In ruling it a violation of equal protection to compel lawyers to represent indigent clients without compensation, the California Court of Appeal noted that this mandatory pro bono requirement may in fact injure the efficacy of the representation.

> If we require attorneys to work without compensation, we may unwittingly create a form of second-class representation in some cases. Surely, this is not what the Supreme Court had in mind

personal feelings of repugnance with their professional duties to their client find themselves in a legal and moral quandary.[400] They risk affronting the court in deference to their morals, or offending their morals at the cost of placating the court.[401] In some cases, attorneys who are unable to withdraw from a case they find repugnant risk disadvantaging the client.[402] As Daniel Markovits reminds us, "It is hornbook law that under the ABA Model Rules of Professional Conduct, '[a] lawyer may not sabotage a client's lawful case because . . . the lawyer considers the cause repugnant.'"[403]

Even if it is the lawyer's intention to sabotage a client's case, such efforts often backfire. If individuals who have committed heinous crimes can overturn their convictions on procedural technicalities deriving from ineffective assistance of counsel, justice is denied to victims.[404] To avert such results, the rules carve out appropriate exceptions that require or permit a lawyer to decline or withdraw

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when it ruled that paternity and support matters involve issues of constitutional magnitude, and thereby require the appointment of counsel.

Id. (citing Salas v. Cortez, 593 P.2d 226, 234–35 (Cal. 1979)).

400. This quandary is grossly expressed in the tensions between anti-discrimination rules and the duty of zealous advocacy:

> By strict interpretation of the rules, a lawyer could not withdraw from a case if the basis for that withdrawal was the fact that the client falls within one of those classes of persons as defined under the [anti-discrimination] rules. It is important to note, however, that by complying with the anti-discrimination rules a lawyer could find herself in violation of other ethics rules. . . . [I]f the lawyer attempts to withdraw because she cannot represent the client as required under the code, and the reason for her failure to provide the appropriate representation is that she finds the client repugnant because the client is a member of one of the classes identified in the anti-discrimination rules, she violates the anti-discrimination rules. Clearly, this places the lawyer in an awkward position. She is "damned if she does, and damned if she doesn't."

Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 12–13 (1993).

401. *See id*. at 12–13, 15.

402. *See Cunningham*, 222 Cal. Rptr. at 867 ("The conscripted attorney may provide representation out of fear of the consequences of refusal, rather than because of a belief that the client's case has merit.").

403. Markovits, *supra* note 172, at 215 (quoting GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 6.2, at 6-5 (3d ed. 2001)).

404. The Ninth Circuit habeas case of *Jones v. Shinn* exemplifies this dilemma. 943 F.3d 1211, 1216 (9th Cir. 2019). In *Jones*, the defendant was convicted of brutally raping and killing his 4-year-old stepdaughter. *Id*. at 1215–16. The Arizona Supreme Court affirmed his conviction and sentences, finding the evidence on the record sufficient to support a guilty verdict. *Id*. Jones petitioned for federal habeas review under the theory of ineffective assistance of counsel, arguing that defense counsel failed to meet with Jones enough times to adequately prepare for trial and failed to seek a mistrial after three jurors saw him in handcuffs. *Id*. at 1218. The Ninth Circuit affirmed the District Court's decision to grant habeas and release Jones from custody unless the state initiates new trial proceedings. *Id*. at 1236. While the record contained overwhelming circumstantial evidence as well as expert testimony linking Jones to the rape and murder, his counsel's failure to advance a diligent defense prevented the prosecution's evidence from succeeding. *Id*. at 1235. Ultimately, an attorney who finds his client repugnant may indeed serve justice best if he wages a full and exhaustive defense. *See id* at 1215–1236.

from a representation because of a conflict of interest or similar ground other than repugnance.[405]

B. THE IMPOSSIBILITY OF A REASONABLENESS INQUIRY

Any court tasked with deciding whether to grant a lawyer's request to withdraw from or decline to accept a representation under Rules 1.16(b)(4) or 6.2(c) must assess the reasonableness of such a request. To do so, a court might need to evaluate the rule in accordance with a test or standard. The following analysis tests and rejects three standards for interpreting Rules 1.16(b)(4) and 6.2(c): (1) a wholly subjective (discretionary) standard, (2) a wholly objective standard, and (3) a standard that contains both a subjective and objective component.

1. SUBJECTIVE TEST

The word "repugnant" implies a personal, subjective experience.[406] Courts interpreting "repugnant" in the context of the *Model Rules* must assess the rule's applicability on a case-by-case basis. If the standard is solely subjective, then courts need not evaluate the client, the client's conduct, or the cause when making their determinations. The lawyer would only need to convince a court that they *feel, perceive, or experience* the client (Rule 6.2(c)), the client's conduct (Rule 1.16(b)(4)) or the client's cause (Rule 6.2(c)) as repugnant.[407] At that point, the court must either accept the lawyer's assertion of repugnance or simply disregard the lawyer's objections and direct the lawyer to nonetheless represent the client.

If a court could apply a subjective standard to the repugnancy provisions, it would follow that any lawyer could be granted leave to withdraw or decline a representation simply on the basis of a successful showing of strong *feelings* of repugnance. The objective character of the client or the cause becomes irrelevant in a wholly subjective test. If it *is* relevant, it is relevant only insofar as it is defined as irreconcilable with the lawyer's personal morals or sensibilities.

The logical absurdity of a wholly subjective standard invites the following hypothetical: B is a lawyer representing Client A. A insists on wearing a plaid tie with a striped shirt to court the day of the hearing. B has a strong aversion to mixing plaids with stripes. Her mother was a famous fashion designer who used to berate her terribly when she wore the two patterns together. B finds A's insistence upon such wardrobe so "repugnant" that she seeks leave to withdraw. Should a court grant leave under 1.16(b)(4)? On the one hand, a court might recognize that this subjective experience of "repugnance" is so idiosyncratic to B that A should have little trouble finding a suitable lawyer to take B's place.

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405. *See* MODEL CODE CANON 2, EC 2-29.
406. *See, e.g.*, Spiegel, *supra* note 46.
407. *See* Rothrock, *supra* note 113, at 53.

On the other hand, many would argue that a court would never grant such a request if it is so facially unreasonable. But can subjective feelings be judged under a reasonableness standard in this context? If so, then who decides what subjective feelings or experiences are valid, and what should be dismissed as silly or unimportant? If making rules of reasonableness in subjective experience is too risky, not making any rules is riskier because anything can qualify. The mere advancement of a strong subjective belief should carry presumptive weight in courts and, thus, a subjective test would require courts to attach liberal and broad standards around these provisions, always granting leave to withdraw or never granting it at all.

But no legal test can be purely subjective because all legal conclusions are evaluated in comparison to a rational principle.[408] A wholly subjective test would lead to arbitrary enforcement.[409] Moreover, it would empower lawyers to surrender to their personal feelings at the expense of their duties of zealous advocacy.[410]

Furthermore, a subjective test would allow a court to grant leave to withdraw without cause.[411] Since the reasonableness of the repugnant feeling (objective component) is not to be considered in the subjective test, it matters not what the cause of the lawyer's feelings are or whether such feelings are rational. The focus is the force of the feelings themselves, and not their object. A subjective test fails because it lacks any reasonableness component. It would follow that any lawyer could be granted leave if they can convince a court of their strong feelings of aversion.

If a court is to apply a wholly subjective test that looks at the intensity of the lawyer's experience of repugnance and not at the object of such repugnance, then the Rule becomes superfluous because the lawyer is claiming either conflict of interest under Rule 1.7 or mental (or emotional) incapacity to represent the client diligently or competently under Rules 1.1 and 1.3.[412] The subjective test for repugnancy is encompassed within Rule 1.16(a)(2). If the lawyer is claiming a need to withdraw because their feelings of repugnance or moral indignation would interfere with their ability to perform in the client's best interest, then they need not label anyone repugnant. They can simply invoke Rule 1.16(a)(1).

For the same reasons outlined above, if a lawyer can claim that their personal experience of a client or cause is so repugnant that it would interfere with their ability to competently represent that client, the rule is already subsumed in Rule

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408. *See id.*

409. The problem with words such as "repugnance" or "annoyance" is that their interpretation depends on a wholly subjective standard. Therefore, enforcement becomes arbitrary. In the United States Supreme Court case of *Grayned v. Rockford*, the Court reiterated a rule that found an ordinance "impermissively vague because enforcement depended on the completely subjective standard of 'annoyance.'" 408 U.S. 104, 113 (1972).

410. For "the duty of zealous advocacy," see Gibson, *supra* note 109, at 1171.

411. *See* peremptory jury challenge in discussion *supra* notes 54, 56–58.

412. *See* MODEL RULES pmbl., R. 1.7, 1.1 & 1.3.

6.2(a) because the lawyer would not be able to be competent (Rule 1.1) or diligent (Rule 1.3) or because the lawyer experiences a conflict of interest (Rule 1.7).[413]

Therefore, at best, under a subjective test Model Rules 1.16(b)(4) and 6.2(c) are unnecessary and superfluous. At worst, their inclusion could severely prejudice vulnerable clients if the standard is too arbitrary and the emphasis on subjective feelings grows to outweigh the insistence upon unbiased representation.

2. OBJECTIVE TEST

One might argue that the validity of a lawyer's perceptions of repugnancy can be established by comparison to a third entity. For example, the word "repugnant" follows a wholly objective standard in the context of constitutional law. The test in constitutional law is easy: if an act can be reconciled (and harmonized) with the Constitution or its principles therein, then it stays. If not, it is labeled "repugnant to the Constitution" and abrogated or dismissed.[414]

Here, however, the subjective semantics within the rules themselves automatically preclude a wholly objective test because they denote a lawyer's perceptions, not some objective phenomenon. Perceptions are decidedly subjective; furthermore, "repugnant" as a feeling or reaction is compared with a dynamic variable (the lawyer) and not a fixed control group (a statute, text, or legal principle). Since "repugnant" is a relational term,[415] it lacks an intrinsic objective meaning and therefore cannot be assessed under a solely objective standard.

3. PARTIALLY SUBJECTIVE AND PARTIALLY OBJECTIVE TEST

This third standard is the most logical way to interpret and apply the two repugnancy provisions in the *Model Rules*. But even this option ultimately fails, as shown below. Per the subjective/objective test, a court must do more than assess whether a lawyer *truly* feels repugnance to the client or the cause. The court must also look at the client, the cause, or the client's conduct to determine whether the lawyer's reaction to these is reasonable under the circumstances.

If the court makes a reasonableness determination, then the court should grant that lawyer leave to withdraw (or decline) because a reasonable lawyer in this lawyer's position would also find the client or cause (or course of action) repugnant. If a court grants leave under such circumstances, then the court has just objectivized the unpopular client and rendered it *reasonable* for a similarly positioned lawyer to withdraw or decline representation. Therefore, to grant withdrawal or dismissal under either Rule 1.16(b)(4) or 6.2(c) would erode the foundational principles upon which the entire doctrine of legal ethics is built. It would mean that vulnerable clients and unpopular clients—clients with "repugnant" characteristics—could be regularly deprived of equal representation.

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413. *See id.* R. 1.7; *see also id.* at R. 1.1, 1.3 & 6.2(a).

414. *See supra* Part II (describing the semantic function of "repugnancy" in constitutional law).

415. *See generally* QUINE, *supra* note 278.

Assume that a court examined the client or the cause and determined that the lawyer is not reasonable in finding these repugnant. Then the court would not grant withdrawal or dismissal but for the same reasons as above: the client is now deemed objectively *non-repugnant*. Again, unpopular clients are excluded. Moreover, the rule becomes useless because it fails to serve its purpose: a lawyer still *feels* the same way toward the client but, since the court has determined that such feelings are objectively unreasonable, the lawyer must persist. Why not seek withdrawal or dismissal under other provisions, as these do not purport to measure a lawyer's subjective experience against a client's objective moral status? Either the repugnancy provision fails to protect the client, or it fails to protect the lawyer, or it does nothing at all. The following table illustrates the effect of applying "repugnant" under either standard.

Repugnant meaning	**Opposition**	**Abhorrence**
Subjective Rule	No standard; personal to lawyer	No standard; personal to lawyer
Objective Rule	Class of clients presumptively denied legal support	Class of clients presumptively given restricted access to justice

C. WHY REMOVE THE VESTIGIAL ORGAN?

When a bodily organ serves no function and is neither painful nor inflamed, the general approach is to let it be. One argument against disturbing the repugnancy provisions in the Model Rules would be desuetude. As demonstrated above, many courts have ruled on Rule 1.16(b)(4) motions to withdraw, but none have categorically ruled an action to be so intrinsically repugnant that a client is left without recourse. Normally, the inquiry rests on the degree of prejudice the client would suffer if the attorney were granted leave to withdraw.[416] As for Rule 6.2(c) motions, normally these decisions are made in chambers and are seldom recorded unless there are issues on appeal, such as questions implicating equal protection.[417]

Courts must make ad hoc determinations, considering the totality of the circumstances. Courts weigh a balance of factors, namely, risk of client prejudice, risk of harm to the public, risk of the lawyer being unable to advocate for their client effectively, and prior good faith efforts to mitigate such repugnance.[418] Some courts have granted attorneys' motions to withdraw under the repugnancy

416. *See supra* Part III.
417. *Cf.* Cunningham v. Superior Court, 222 Cal. Rptr. 854, 865 (Cal. Ct. App. 1986).
418. *See supra* Part III (on the balancing of factors).

standard, while others have denied such requests, finding that the risk of harm to the client outweighed the lawyer's discomfort.[419] The outcomes have differed, and there is no uniform standard. However, all courts seem relatively capable of assessing the totality of the circumstances and ruling prudently on a case-by-case basis.

This rightly invites the question: If courts are serving the function of gatekeepers, filtering out unreasonable or discriminatory claims of repugnance and dissuading lawyers from abusing these provisions, then what harm is there in keeping them in the *Model Rules*? And if they have remained in the Rules since the early 1980s, wouldn't we feel confident knowing that the dire consequences predicted by legal scholars, such as the demise of equal protection, remain largely hypothetical?

In addition to judicial safeguards, the Rules are kept in check by other Rules that provide lawyers with leave to withdraw from a representation (or decline appointment) if doing so would not render the client without recourse.[420]

Not a great deal of data has been published on the topic of how the repugnancy provisions have influenced court decisions or prejudiced clients' rights. Much of the harm discussed may be hidden or unrecorded. Regardless, the cultural and popular understanding of these repugnancy provisions is that they condone political or moral condemnation.[421] The *Washington Post* article referenced above reflects this position.[422] The repugnancy provisions should be expunged from the *Model Rules* because of the risk they pose. Courts can only do so much to avoid enforcing rules that have not been repealed through proper channels.[423]

> [W]hile a statute judicially may be given a restricted meaning on sound doctrines of statutory construction, courts remain reluctant to repeal a statute because of its unpopularity or unsuitability to modern social and economic conditions.[424]

The mere inclusion of the repugnancy provisions might promote selective picking and choosing of clients based on ideological or positional criteria. An article in the October 2021 edition of the Arizona Attorney magazine encourages lawyers to manifest their "dream clients" by "[c]onsider[ing] developing client personas as ideal client archetype(s)."[425]

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419. *See supra* Part III.

420. *See supra* Part III.

421. *See supra* notes 241–45 and accompanying text.

422. *See* Lacovara, *supra* note 212.

423. *See* NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 23:26 (7th ed. 2020).

424. *Id.*

425. Juda Strawczynski, *Cultivate Your Innovation Mindsets to Build Your Future Practice Today*, ARIZ. ATT'Y, Oct., 2021, at 30 ("finding your dream clients using client personas").

Of course, in private, civil litigation, lawyers have a right to choose who they represent.[426] Some might fear that removing the repugnancy provisions in the *Model Rules* would deprive attorneys of the possibility of withdrawing from or declining to take a case when their feelings of repugnance are overpowering.

Others argue that forcing lawyers to represent clients who they find repugnant may result in ineffective or client-sabotaging representation.[427] A 2012 study in the *Yale Law Journal* found that public defenders who voluntarily undertake to defend indigent clients are more likely to advocate effectively than high profile private lawyers who are compelled to accept appointments against their will.[428]

In league with these concerns, some fear that elimination of the repugnancy provisions in the *Model Rules* would impede lawyers' moral autonomy, effectively forcing them to represent clients whose cause or status they find morally reprehensible.[429] Not so. Even without the repugnancy provisions, the *Model Rules* provide a mandatory withdrawal provision when the lawyer's mental or psychological biases render them incapable of providing effective assistance, or where the representation is likely to impose an undue financial burden on the lawyer.[430] In addition, both Rule 1.16 and 6.2 permit a lawyer to decline or withdraw from a representation if the representation would cause the lawyer to violate any of the other *Rules of Professional Conduct* such as, for example, Rule 1.1 ("Competence"), Rule 1.3 ("Diligence"), Rule 1.7 ("Concurrent Conflicts of Interest"), and Rule 1.9 (Successive Conflicts of Interest").[431]

Rule 1.16(a)(1) rests on an objective standard, namely that the client's actions or the course of action the client wishes to take are at odds with the *Model Rules*.[432] Rule 1.16(a)(2) focuses more on the subjective aspect: the lawyer may withdraw when their "mental condition materially impacts the lawyer's ability to represent the client."[433] In other words, the presence of Model Rules 1.16(a)(1)

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426. *See* Wolfram, *supra* note 13, at 215; *see also* Teresa Stanton Collett, *The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?*, 40 S. TEX. L. REV. 137, 138 (1999) ("Currently, American law imposes no general duty on lawyers to accept representation of prospective clients absent court appointment.").

427. *See* Markovits, *supra* note 172, at 293 (discussing the view that application of Model Rule 6.2(c) is only appropriate when the lawyer's feeling of repugnance is of debilitating intensity).

428. SIMON'S N.Y. RULES OF PROF'L CONDUCT, *supra* note 260, at § 6.2:1. ("*Are public defenders more effective than appointed lawyers?* Are indigent criminal defendants better off with a public defender or with appointed counsel?"). In James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012), the authors claim that in Philadelphia, public defenders have been far more effective than appointed counsel. For example, the article reports that—when compared to appointed counsel—public defenders in Philadelphia (a) reduce their clients' murder conviction rate by 19%, (b) lower the probability that their clients receive a life sentence by 62 percent, and (c) reduce overall expected time served in prison by 24 percent. *Id*. at 154.

429. *See* Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 645 (1997).

430. MODEL RULES R. 1.16(a)(2).

431. *Id*. at R. 1.16(a)(1).

432. *Id*. (representation in violation of the law or Rules).

433. *Id*. at R. 1.16(a)(2).

and (2) renders Model Rule 1.16(b)(4) unnecessary, notwithstanding the fact that the provisions of Rule 1.16(a) are mandatory—the lawyer "shall not represent" or "shall withdraw"—while the provisions of Rule 1.16(b) are permissive and discretionary.[434]

Thus, under such a perspective, the inquiry is whether the lawyer's aversion has become so overwhelming as to constitute either a conflict of interest or influence the lawyer's mental condition to such a degree that it disadvantages the client.

D. A TWO-STEP APPROACH TO ADDRESSING FEELINGS OF REPUGNANCE

The approach to addressing repugnance could proceed in two different ways: Under the first method, the attorney takes ownership of their feelings and perceptions and makes a concerted effort to constrain these feelings. They remind themselves of the principle of Model Rule 1.2(a) and recognize that they are defending the person's *rights*, not the person.[435] Particularly in the context of Rule 6.2(c), a lawyer who feels repugnance toward a client or a cause should remind themselves that they have a duty to uphold the integrity of the justice system and that zealous representation of a client's constitutional rights does not make them inseparable from their client. Under the second method, the lawyer decides they are unable to constrain their feelings of repugnance. They then seek leave to withdraw, but they need not cite repugnance as the ground upon which to base their withdrawal.

How, then, does the attorney accomplish their objective of discharge without violating the ethical principles? There is more than one path. The path of invoking the repugnancy provisions requires extra steps that force the attorney to shine a spotlight on the repugnant nature of the client or the cause, bringing it to the court's attention in a rather unpleasant manner. At this point, morale is already low. The client is likely aware of their attorney's feelings. The court is now informed of the client's "repugnancy," and is forced to consider it under a reasonableness inquiry. This is the root of the problem. The entire inquiry would be unnecessary if the attorney took a different path to discharge. For example, Rule 1.16(a)(2) mandates that a lawyer withdraw if their physical or mental condition materially impairs their ability to represent the client.[436] The Rules do not elaborate on what conditions might qualify as such an impairment. A lawyer who experiences feelings of repugnance toward a client might argue that their strong feelings impact their mental condition. In this way, the client is left untouched by a repugnancy judgment and no presumption of unworthiness for representation would attach. Finally, the simplified approach to withdrawal or recusal compels the lawyer to reach within and assess their own capabilities without drawing the client's shortcomings into the equation.

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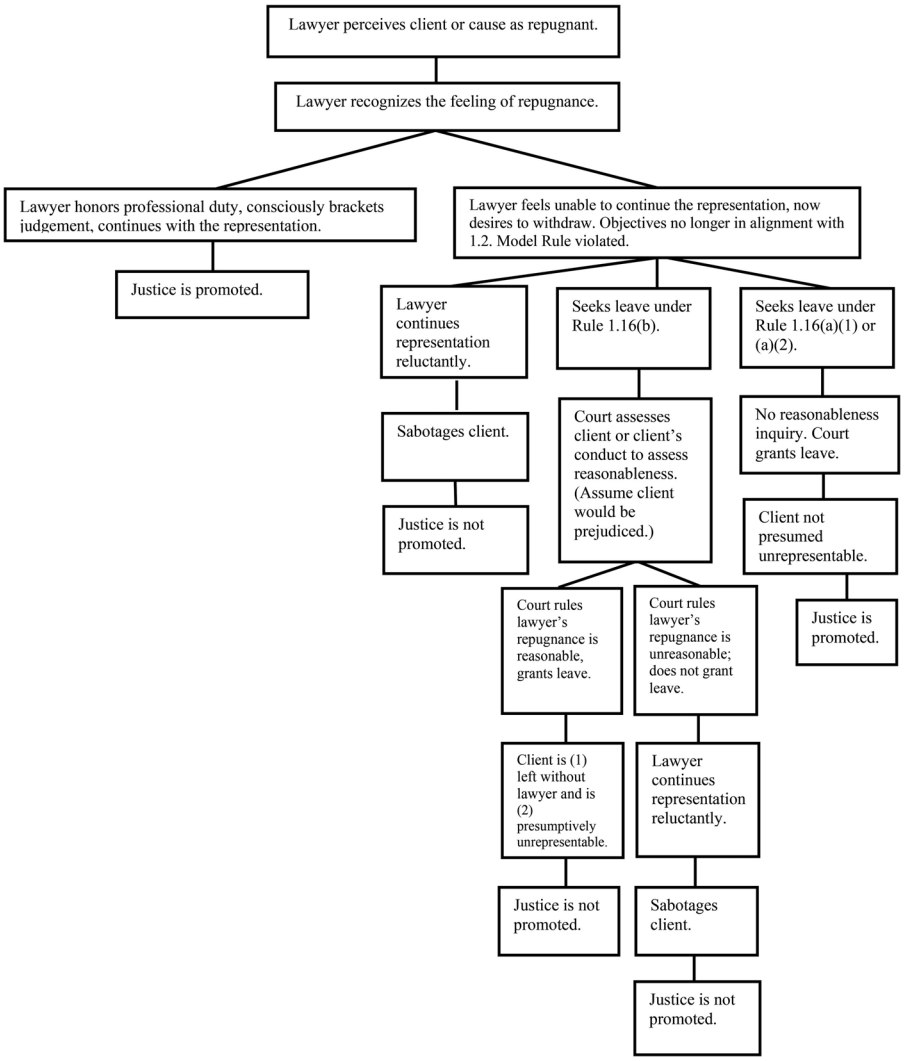
434. *Id*. at R. 1.16(b) (use of the permissive phrase "may withdraw").
435. *Id*. at R. 1.1 & 1.2.
436. *Id*. at R. 1.16(a)(2).

E. FLOW CHART



As visualized above, the problem with invoking repugnancy as a reason for excusal is that its very invocation violates other Rules. When a lawyer places their moral judgment of a client or a cause above their professional duty to represent the client, they have ignored Model Rule 1.2(b) and created a conflict of interest under Mode Rule 1.7(a)(2).[437] By characterizing the client as unrepresentable, the lawyer is saying they cannot represent the client, as this "will result

437. *Id*. at R. 1.7(a)(2) (conflict of interest exists if there is "significant risk" that representation of a client will be "materially limited" by a "personal interest of the lawyer").

in violation of the rules of professional conduct."[438] There is no need to resort to Rule 1.16(b)(4). Moreover, under Rule 6.2(c), reification of the client as repugnant, and therefore unrepresentable, is a violation of Rule 1.2 because it implies that the lawyer believes their representation of the client to be akin to an endorsement of the client's views or activities.[439]

For these reasons, the ABA should eliminate the word "repugnant" from Model Rule 6.2(c), as any aversion to the client or the cause so intense that it impedes the lawyer's resolve may qualify under other Rules. The ABA should also eliminate the word "repugnant" from Model Rule 1.16(b)(4) insofar as it adds nothing to the provision not already encompassed in the concept of "fundamental disagreement."[440]

CONCLUSION

The *Model Rules* permit an attorney to withdraw from a representation when the client insists on taking actions that the lawyer considers "repugnant," or to refuse appointments when the client or cause is "repugnant" to the lawyer. The semantics of both provisions call for an extroversive focus on the repugnance of a client or a client's actions—rather than an introspective focus on the lawyer's honest assessment of their emotional and psychological capacity to competently represent their client. The existence of the repugnancy provisions in the *Model Rules* creates the perverse impression that repugnancy can be imputed to a client, then used as an escape hatch to shirk the duty of equal representation. Repugnancy is a relative term that demands a subjectivity inapposite to the *Model Rules*.

In some legal contexts, such as constitutional law, "repugnant" has a clear, consistent, objective meaning. It denotes "clear violation" or an "incompatibility" between a statute and the Constitution. However, in the wider legal context, as well as in general spoken English, the word has diverse meanings, with diverse senses ranging from mere opposition to moral reprehensibility and disgust.

This polysemy creates too much uncertainty in the sensitive domain of a lawyer's refusal to represent a client. Access to justice for all is a cornerstone of the bar, but the use of the word "repugnant" in the *Model Rules* gives attorneys great leeway to indulge their repulsions and abandon clients. The implications are that a lawyer's feeling of repugnance must be measured in proportion to its object (its repugnancy), resulting in certain classes of people being accepted as objectively unrepresentable. Courts cannot and should not formulate an objective standard

438. *Id.* at R. 1.16(a)(1) (lawyer "shall" withdraw if representation will result in violation of the rules).

439. *See id.* at R. 1.2(b) (lawyer's representation of a client does not constitute an endorsement of client's social views or activities).

440. *See id.* at R. 1.16(b)(4) (containing the term "fundamental disagreement" in the permissive withdrawal provision).

for determining the conditions under which attorneys may abandon representation due to subjective feelings of repugnance.

This is not to say that attorneys should accept all cases and clients that elicit their feelings of disgust, revulsion, or opposition, as those feelings may hamper the efficacy of the representation in ways akin to conflicts of interest (Rule 1.7) or render the lawyers incapable of effective, diligent representation (Rule 1.3). The *Model Rules* already provide for permissible and sometimes mandatory withdrawal when conflicts of interest or other problems threaten to undermine the competency or diligence of the representation. Thus, at best, the repugnant provisions are superfluous and confusing. At worst, their mere presence in the Rules provides attorneys with a nuclear option, fueled by the illusion of objective repugnance. Although lawyers should be permitted to withdraw in the narrow situations when their feelings of "repugnance" eclipse their duties to effectively further their clients' interests, this can be accomplished using other provisions. The ABA should eliminate the repugnancy provisions to prevent lawyers from damaging the principle of equal representation.