SPEAK NO EVIL: A LINGUISTICALLY HONEST CURE FOR THE MYTHOLOGICAL PSYCHOLOGY OF APPELLATE ADJUDICATION OF OVERPAYMENTS BY THE DEPARTMENT OF VETERANS AFFAIRS

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INTRODUCTION

> *A sentence uttered makes a world appear; [w]here all things happen as it says they do; [w]e doubt the speaker, not the tongue we hear: [w]ords have no word for words that are not true.*
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> – W.H. Auden[1]

Transformations of societal perceptions into implicit but psychologically powerful legal stimuli are not a recent phenomenon.[2] It is also not a secret that changes in societal linguistic sensitivities may affect not only legal terminology but also the modes of legal analysis.[3] However, one area of American jurisprudence has gone a step further and incorporated a societal perception of "a" claimant that has become incompatible with the terminology used by the governing statutes and regulations, thus prompting adjudicators to seek ways to reach legally correct outcomes while avoiding, substituting, or at the very least diluting this terminology, even though the very same terminology is used in all other areas of jurisprudence, as well as in public speech designed for the most sensitive audiences. This unique area of law addresses overpayments of monetary benefits disbursed by the U.S. Department of Veterans Affairs ("VA"), and this article takes the reader to the adjudicatory gutters of VA law while using, as a

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[1] W. H. AUDEN, *Words*, *in* COLLECTED POEMS OF W. H. AUDEN 624 (1991).

[2] *See*, *e.g.*, Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, at *3 & nn. 15-16 (2005) ("[W]ithin the field of political science, an array of scholars who . . . are not openly affiliated with any social critique of legal doctrine, have conducted empirical research on judicial decision making and have largely concluded that [the U.S. Supreme] Court decisions roughly mirror known public opinion, the views of the democratic branches, and the positions held by powerful social institutions[,] such as corporations and institutions of higher education[.]"); *see also* Bishop v. Smith, 760 F.3d 1070, 1101 n.7 (10th Cir. 2014) (collecting cases that yielded legal changes deriving from shifts in societal perceptions).

[3] *See*, *e.g.*, Bradley A. MacDonald, *What's in a Name?: The Constitutionality of Using Personal Pronouns in Public Schools*, 56 UIC L. REV. 477 (2023) (reflecting on shifts in the models of legal analyses prompted by the use of "chosen pronouns" or "personal pronouns" that the courts also occasionally refer to as "preferred pronouns").

roadmap, an opinion of the U.S. Court of Appeals for Veterans Claims ("Court").[4]

Part I introduces this specialized area of administrative law and traces its societal, legislative, and caselaw origins. Part II examines how the original social virtues of this are of law gave rise to its *sui generis* sensitivities that, in turn, coagulated into mighty psychological barriers. Part III explains how these barriers transformed a simple task of adjudicating a-dime-a-dozen case into a legal voyage that veered the Court into psychologically rugged seas of VA law flowing along treacherous linguistic reefs. Part IV explains the legal structure of these reefs, while Part V tracks the Court's navigational techniques that yielded an opinion amounting to a legal counterpart of Homer's *The Odyssey* in terms of its many obscurities and a precious spark of enlightenment. Building on this spark, Part VI proposes the importation of linguistically neutral legal principles coined by another area of administrative law – the law of securities regulations – to bypass the psychological barriers obstructing intellectually honest adjudication of VA overpayment matters. With that, Part VII takes the proposed solution for a trial run leading, on the one hand, to an assuring legal analysis as to such importation of securities law tests into VA law and, on the other hand, yielding a somber but honorable conclusion about intellectual integrity as the *sine qua non* of any legal adjudication.

I. THE ORIGINS OF THE MYTHOLOGICAL PSYCHOLOGY OF VETERANS LAW

"Myths are a part of every culture in the world and are used to explain natural phenomena [and provide] comfort by giving a sense of order . . . to what can sometimes seem a chaotic world."[5] In that

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[4] *See generally* Hayes v. McDonough, 35 Vet. App. 214 (Vet. App. 2022); *see also infra* note 48. Editor's Note: For infromation regarding the Court, see *About the Court*, U.S. CT. OF APPEALS FOR VETERANS CLAIMS, http://uscourts.cavc.gov/about.php [https://perma.cc/J4NH-N476] (last visited Dec. 13, 2023).

[5] Joshua J. Mark, *Mythology*, WORLD HIST. ENCYCLOPEDIA (Oct. 31, 2018), https://www.worldhistory.org/mythology [https://perma.cc/KM89-R5NG]. "Mythology (from the Greek *mythos* for story-of-the-people, and *logos* for word or speech, so the spoken story of a people) is the study . . . of such stories [that] deal with various aspects of the human condition: good and evil; [. . . cultural values, and traditions[.]" *Id.*

sense, judges are bards of a society's legal culture,[6] especially in common law jurisprudence where the doctrine of *stare decisis*[7] created a "social policy [of] continuity in law . . . rooted in the psychologic[al] need to satisfy [the] reasonable expectations" of society.[8] Indeed, while judicial opinions, like myths, could occasionally be obscure and require a dollop of imagination,[9] they offer invaluable clues as to the legal culture within which they were written[10] since they reflect judicial routes to legal salvation charted between the reefs of implicit societal taboos[11] operating

[6] *See*, *e.g.*, JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 761-806 (Little, Brown & Co. 1973) (reflecting on adjudicators as poets); *see also*, *generally*, James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984) (reflecting on judicial opinions as literature); *accord* Benjamin N. Cardozo, *The Nature of the Judicial Process*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 172 (Margaret E. Hall ed., 1947) (pointing out that adjudicators tend to base their legal conclusions on contemporaneous perceptions of societal values since they do not "stand aloof on . . . distant heights"). Many cornerstones of American caselaw are rooted in judicial realism. *See*, *e.g.*, William E. Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U.L.J. 795, 832 (2004) (observing that Brown v. Bd. of Educ., 347 U.S. 483 (1954), was "grounded in what Cardozo called the method of [then-developing judicial] philosophy," *i.e.*, judicial realism that has reigned in American jurisprudence since the 1950s); *see also* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (relying on Trop v. Dulles, 356 U.S. 86, 101 (1958), to stress that law "must draw its meaning from the evolving standards . . . of a maturing society").

[7] A layperson's understanding of *stare decisis* is that "a previous case or legal decision [would be] taken as a guide for subsequent cases or as a justification." THE OXFORD ENGLISH DICTIONARY AND THESAURUS 1170 (Am. ed. 1996).

[8] Helvering v. Hallock, 309 U.S. 106, 119 (1940). The concept of *stare decisis* emerged in English law of the 12th century, became "a" source of law by the 15th, solidified into a widely accepted legal principle in the 18th, and matured into the current concept of a binding precedent in the 19th century. *See also*, *e.g.*, Raj Bhala, *The Power of the Past: Towards de Jure Stare Decisis in WTO Adjudication*, 33 GEO. WASH. INT'L L. REV. 873, 882 n.18 (2001).

[9] *See generally*, *e.g.*, Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 45 (1998) (analyzing judicial methods used to weed out obscurities that could cause confusion).

[10] *See generally*, *e.g.*, Kenji Yoshino, *What's Past is Prologue: Precedent in Literature and Law*, 104 YALE L.J. 471 (1994) (discussing the relations between *stare decisis*, culture, law as literature, and law in literature).

[11] *Accord* John C. Yoo, *A Critical Look at Torture Law*, L.A. TIMES (June 6, 2004), https://www.latimes.com/archives/la-xpm-2004-jul-06-oe-yoo6-story.html [https://perma.cc/S6ZU-V3QC] (arguing that torture is such a sensitive topic that asking legal questions about torture might be perceived as a psychological taboo).

as unspoken canons of avoidance.[12] Viewed this way, VA law reveals a tendency to sanctify all claimants,[13] regardless of whether they seek VA benefits or oppose VA's recoupment of overpaid U.S. taxpayers' funds.[14] Many pages of the Board of Veterans' Appeals ("Board") decisions,[15] opinions of appellate courts, and legal studies have been dedicated to the well-know, distinctly compassionate, paternalistic nature of this area of law stemming from our national

[12] Perhaps the most known avoidance canon is the one discouraging adjudicators from engaging in judicial review yielding statutory interpretations clashing with a constitutional mandate if a construction consistent with the mandate is feasible. *See*, *e.g.*, William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem,* 86 CORNELL L. REV. 831, 841-44 (2001) (addressing the inadvertent silencing effects of the canon).

[13] *See*, *e.g.*, Hayburn's Case, 2 U.S. 409, 410 n.2 (1792) ("Judges desire to manifest, on all proper occasions and in every proper manner [,] their high respect for the national legislature" that has acknowledged the societal debt to veterans and their survivors/dependents).

[14] In fiscal year 2022, VA had a $336.14 billion allocation, with $184.04 billion allocated for VA monetary benefits. *Department of Veterans Affairs (VA)*, USASPENDING (Sep. 22, 2022), https://www.usaspending.gov/agency/department-of-veterans-affairs?fy=2022 [https://perma.cc/C7KN-GNCS]. While disbursements of these benefits are well publicized, overpayments of these benefits are very common and are virtually never in the news, even though such overpayments are usually in tens of thousands of dollars per person and often in hundreds of thousands per person. *See, e.g.*, *infra* notes 42, 74, 83, 140, 288 (providing examples). VA debtors typically believe that litigating a claim seeking VA monetary benefits and challenging a VA overpayment of such benefits are similar legal processes. However, the former subjects VA to duties to assist and notify under the Veterans Claims Assistance Act of 2000 ("VCAA"), Pub. L. No. 106-475, 114 Stat. 2096 (2000), and no court has suggested that the VCAA applies to overpayment-and-waiver matters. *Accord* Lueras v. Principi, 18 Vet. App. 435, 438 (Vet. App. 2004) (concluding that the VCAA notice requirement is inapplicable to waivers of overpayments that are governed by their own notice provision, which has no duty-to-assist aspect).

[15] While Board decisions are referred to as "opinions" by legal research platforms, e.g., LEXIS, the Board and courts refer to the Board's written dispositions (structured similarly to courts' all-in-one memorandum-opinion-and-orders) only as "decisions." *See*, *e.g.*, Hayes v. McDonough, 35 Vet. App. 214, 216-17 (Vet. App. 2022).

sense of gratitude to and care for veterans, their survivors and their dependents.[16]

[16] Fifteen months after the start of the Civil War, the Act of July 14, 1862, §§ 6-7, 12 Stat. 566, 568 (1862), authorized disability payments to veterans, their survivors, and dependents. "On March 3, 1865, . . . before the Civil War ended, President . . . Lincoln" signed a law to establish the National Asylum for Disabled Volunteer Soldiers, which, in 1873, was renamed the National Home for Disabled Volunteer Soldiers, that evolved into VA in 1930 upon consolidation of the Bureau of Pensions, the National Home for Disabled Volunteer Soldiers, and the U.S. Veterans' Bureau. *VA Healthcare-VISN 4*, VA, https://www.visn4.va.gov/VISN4/about/history.asp [https://perma.cc/7XXY-6WRC]; *see also* Act of July 3, 1930, ch. 863, 46 Stat. 1016 (1930). The paternalism of VA law became evident when Congress adopted the Invalid Pensions Act of 1792, providing "for the settlement of the claims of widows and orphans . . . and to regulate the claims to invalid pensions" for those injured during the Revolutionary War, *see* Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)), and Chief Justice John Jay stressed that "the object[ives] of this [A]ct [were] exceedingly benevolent," *Hayburn's Case*, 2 U.S. at 410 n.2. Thus, all VA agencies of original jurisdiction ("AOJs"), including Regional Offices ("ROs") and the Board of Veterans' Appeals ("Board"), *i.e.*, the appellate-level administrative tribunal vested with quasi-judicial functions, conduct non-adversarial administrative adjudications. *See* 38 U.S.C. § 7104(a) (2022); Sprinkle v. Shinseki, 733 F.3d 1180, 1183-84 (Fed. Cir. 2013) (observing that veterans' claims are developed and adjudicated by VA before proceeding to the Board "to ensure that claimants receive the benefit of this two-tiered review within the agency."); *see also* 38 C.F.R. § 3.103(a) (2022) ("[I]t is the obligation of VA to assist a claimant in developing the facts pertinent to [their] claim and . . . grant[] every benefit that can be supported in law."). Justice Stevens stressed that the paternalistic nature of VA law was such that the government had to protect veterans even "from the consequences of [their] own improvidence." Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 359-62 (1985) (Stevens, J., dissenting); *accord* Henderson v. Shinseki, 562 U.S. 428, 440 (2011) ("[VA laws are] decidedly favorable to [a] veteran."); Shinseki v. Sanders, 556 U.S. 396, 416 (2009) (Souter, J., dissenting) (stressing "Congress's understandable decision to place a thumb on the scale in the veteran's favor"). Not surprisingly, academic publications, Board decisions, and opinions of appellate courts have taken every occasion to discuss, remind, and emphasize the well-known, kind, and paternalistic nature of VA law. *See*, *e.g.*, JAMES D. RIDGWAY, VETERANS LAW: CASES AND THEORY 34, 92, 103-04 (2nd ed., 2022); James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251-52 & n.3 (2010); *see also* Walters, 473 U.S. at 322-23 ("[The government is] the paternalistic protector of claimants.") (citation and internal quotation marks omitted); Robinson v. O'Rourke, 891 F.3d 976, 988 (Fed. Cir. 2018) ("Because of the paternalistic nature of [VA] proceedings, [VA is] required to . . . develop [each] veteran's claim to its optimum.") (citation omitted); *cf.* Name Redacted, No. 09-29 363, 2011 BVA LEXIS 39515, at *8 (B.V.A. Sep. 22, 2011) ("[The judicial] approach [should be] in keeping with the paternalistic nature" of VA law.) The Board redacts the names of cases it adjudicates to protect personal identifiable information of claimants, and all Board decisions are nonprecedential. *See* 38 C.F.R. § 20.1303 (2022).

This sense of emotional indebtedness has so deeply permeated VA law that even the U.S. General Accounting Office criticized the VA for often accepting litigants' financial assertions without verification.[17] By now, such an implied sanctification of "a" claimant has become-second nature to all jurists practicing this area of law, be they attorneys or adjudicators,[18] creating a peculiar psychological side effect.

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[17] *See*, *e.g.*, VETERANS' DISABILITY BENEFITS: IMPROVEMENTS NEEDED TO BETTER ENSURE VA UNEMPLOYABILITY DECISIONS ARE WELL SUPPORTED, U.S. GOV'T ACCOUNTABILITY OFF. 9-10 (July 15, 2015), https://www.gao.gov/assets/680/671904.pdf [https://perma.cc/7J65-U8S2] ("[VA] requires . . . claimants and beneficiaries to provide information on their employment earnings, [and] it places [VA] benefits at risk of being awarded to ineligible veterans by not using third-party data sources to independently verify self-reported earnings. [VA] specialists use information provided by claimants to request additional information from employers . . . [but, if VA] does not receive verification from a veteran's employer . . . , it accepts the veteran's claimed earnings. [VA] previously conducted audits . . . by obtaining income verification . . . from Internal Revenue Service ("IRS") . . . through an agreement with [IRS and Social Security Administration ("SSA")]. However, [VA] is no longer doing so . . . .").

[18] While Board adjudicators are not required to thank a veteran for their military service, expressions of gratitude are common and frequently accompanied by statements of judicial regret for inability to reach a more favorable outcome. *See*, *e.g.*, Names Redacted, No. 16-06 176, 2019 BVA LEXIS 89230, at *11 (B.V.A. Aug. 20, 2019) ("The Board thanks the appellant for the Veteran's honorable service to our country. Although sympathetic to the appellant's situation, service connection for the cause of the Veteran's death is not warranted and the claim must be denied."); Name Redacted, No. 12-06 697, 2018 BVA LEXIS 11649, at *20 (B.V.A. Feb. 6, 2018) (finding that a "claim of entitlement to service connection . . . [could] not be reopened" but pointing out that the "Board thanks the Veteran for her service and wishes that a more favorable outcome could have been reached"). Even more concerningly, it has become not uncommon for the Court to "tweak" both the Board's factual findings and the governing law to generate remands and favorable outcomes where neither the Board's unfavorable factual findings could be labeled an abuse of discretion nor the Court's creative tweaking of unfavorable governing legal authority could reasonably be defined as permissible interpretations. *See*, *e.g.*, Jeffrey D. Parker, *As a Matter of Fact: Reasserting the Role of Basic Facts in Veterans Court Jurisprudence*, 65 ST. LOUIS U.L.J. 291 (2021) (proving illustrations of the Veterans Courts fact deference errors) [hereinafter *Matter of Fact*]; Jeffrey D. Parker, *Thou Shalt Not Review the VA Rating Schedule: Has the Veterans Court Abided by This Subject Matter Prohibition?*, 30 FED. CIR. B.J. 1(2020) (discussing where the Veterans Court goes beyond its subject matter jurisdiction); Jeffrey D. Parker, *Getting the Train Back on Track: Legal Principles to Guide Extra-Schedular Referrals in U.S. Department of Veterans Affairs Disability Rating Claim Adjudications*, 28 FED. CIR. B.J. 175 (2018) (discussing the Veterans Courts expansion of extra-schedular claims).

II. LEGAL VIRTUES THAT INCONSPICUOUSLY BRED AN ADJUDICATORY VICE

As of now, the implied sanctification of "a" VA claimant has reached such a stage that it has become counterintuitive or, at very least, psychologically unsettling for an adjudicator to call out any bridge-too-far legal argument raised by or on behalf of a VA-law claimant.[19] Hence, a polite judicial rebuke, *i.e.*, a comment not infrequent in judicial opinions addressing any other area of law,

[19] In contrast, federal courts of all levels have not been shy to issue opinions referring to counsels' arguments lacking factual support as a bridge-too-far position. Indeed, the author's December 2022 Lexis research reveals over 500 such decisions, with three issued by the U.S. Supreme Court. *See* POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 104 (2014) (plurality opinion); Abramski v. United States, 573 U.S. 169, 206 (2014) (Scalia, J., joined by Roberts, C.J., Thomas, Alito, JJ., dissenting); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 254 (2010) (Scalia, J., concurring). Moreover, courts have called out attorneys' bridge-too-far positions even if the facts at bar were devastating. *See*, *e.g.*, Spady v. Bethlehem Area Sch. Dist., 800 F.3d 633, 640 (3d Cir. 2015) ("We do not deny that . . . this matter present[s] heart-wrenching circumstances. [But, t]o equate the intentional infliction of painful corporal punishment or . . . sexual molestation . . . with a student-athlete's unfortunate accident during wrestling practice or a rare instance of delayed drowning after swim class is a bridge too far."). However, only one of these federal judicial opinions addressed VA law, *see* Jandreau v. Shinseki, 23 Vet. App. 12 (Vet. App. 2009), and the "bridge-too-far" phrase was used by the majority to criticize the dissenting judge, *see id.*, at 18, since it is acceptable for adjudicators of VA-law claims to criticize each other but psychologically unsettling to criticize factually unmoored legal arguments raised by veterans, their survivors, dependents, and even their attorneys.

has become *de facto* blasphemy to VA-law adjudicators,[20] and while an attorney litigating a non-VA-law claim cannot hope for judicial indulgences if (s)he requests the court's definitions of, e.g., negligence in the hope that the definition would prove to be loose enough to allow a recharacterization of her client's reckless or intentional conduct into "well, you know, kinda negligent."[21] An attorney's attempt to inject such an imprimatur of negligence into a litigation of a VA-law claimant who has acted recklessly if not outright intentionally could be made unabashedly since virtually

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[20] The sense of impunity triggered by unbridled judicial leniency breeds abuses of the judicial system. *See*, *e.g.*, Thomas v. Adams, 55 F. Supp. 3d 552, 563-64 (D.N.J. 2014) (pointing out that the decisions in Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Dura Pharms, Inc. v. Broudo, 544 U.S. 336 (2005), were triggered by "a single sentence in Conley [v. Gibson, 355 U.S. 41 (1957)], namely, 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,' . . . [because the sentence] came to be construed as allowing a pleader to avoid asserting any facts. With that, . . . self-serving, conclusory expressions of subjective feeling of injustice/displeasure were transformed into viable 'pleadings.' . . . Once the possibility of commencing a legal action governed by . . . [such a] standard came about, loose pleadings devoid of facts became all too common, . . . swell[ing] judicial dockets and caus[ing] parties who suffered true injuries long delays in vindication of their rights.") (citations and footnotes omitted), *aff'd sub nom.,* Thomas v. Christie, 655 Fed. App'x 82 (3d Cir. 2016). However, while – after *Dura*, *Twombly*, and *Iqbal* had changed the legal landscape – courts began warning attorneys against bridge-too-far arguments in the mainstream legal system, *see*, *e.g.*, Delahoussaye v. Performance Energy Servs., L.L.C., 734 F.3d 389, 393 (5th Cir. 2013) ("This tactic of 'throwing everything at the wall to see what sticks' is not the basis upon which a party [may sue.]"); George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) ("A buckshot complaint that would be rejected if filed by a free person . . . should be rejected if filed by a prisoner."); Murakush Caliphate of Amexem Inc. v. New Jersey, 790 F. Supp. 2d 241, 267 (D.N.J. 2011) ("The undersigned will not sit idly by as this . . . Court is inundated with . . . vexatious litigation arising from whatever [a litigant's] perceived . . . affront *du jour* might be.") (citation, ellipsis, and original brackets omitted), none of these anti-abuse changes have reached VA law.

[21] *See*, *e.g.*, Colony Ins. Co. v. Mid-Atlantic Youth Servs. Corp., 485 F. App'x 536, 540 (3d Cir. 2012) ("Reckless, malicious, or purposeful . . . activities are not 'negligent' and cannot be considered 'accidents.'").

any argument would be entertained by the Board and the Court earnestly and without even a hint of judicial ire.[22]

Someday, a statistical study might quantify the harmful effects[23] of such an unbridled adjudicatory courtesy imposed upon adjudicators by the morbid gaze of the invisible-to-outsiders other face of the legal Janus that inconspicuously but insidiously materialized on the back of the well-known, official, kind and paternalistic face of VA law.[24] This other face prompts administrative and appellate court judges to expurgate their decisions of any terminology that might be perceived as connoting even the slightest hint of moral judgment[25] since no such a hint

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[22] A frivolous claim differs from a vexatious argument, which is made in the hope to inject an inapposite legal position, although both are subject to FED. R. CIV. P. 11 providing that a court "may sanction attorneys . . . who submit pleadings . . . that contain . . . arguments [without] evidentiary support." *Legal Definition of Sanctions Rule 11: What You Need to Know*, UPCOUNSEL (Nov. 20, 2022), https://www.upcounsel.com/legal-def-sanctions-rule-11 [https://perma.cc/Q4MR-9KDG]. While non-VA courts frequently remind attorneys resorting to unsavory legal practices of the might of Rule 11, *see*, *e.g.*, Marrakush Soc'y v. N.J. State Police, No. 09-2518, 2009 U.S. Dist. LEXIS 68057, at *118, 141 n.2 (D.N.J. July 30, 2009) ("[C]ounsel . . . setting forth claims that their client has no standing to pursue . . . stands to explore the wrath of Rule 11."), no version of Rule 11 exists at the Board level: the sole measure applicable to an attorney engaged in a grievous legal misconduct before the Board is revocation of their authorization to practice before the Board. *See* 38 U.S.C. § 5901 (2021); 38 C.F.R § 14.629 (2022). And while the Court's version of Rule 11 exists, *see* VET. APP. R. 38, the Court, during its entire 25-year history, mentioned the Rule only 10 times and actually resorted to the Rule only four times, *i.e.*, less frequently than every six years and only in those scenarios when frivolous conduct was so undeniably flagrant that the Court's omission to address it would have created an appearance of the Court's undeniable and dangerous bias in favor of abusive litigants.

[23] *Cf. Thomas*, 55 F. Supp. 3d at 563 & nn. 9-11 (noting the operational harm of an overly lenient judicial system).

[24] The well-known face of the kind and paternalistic nature of VA law is demonstrated by its non-adversarial system. *See* Holley v. McDonough, No. 20-0449, 2022 U.S. App. Vet. Claims LEXIS 629, at *21-22 (Vet. App. Apr. 28, 2022); *see also supra* note 16 (detailing the origins of paternalism).

[25] A moral bias in judicial opinions is not uncommon but legally problematic. *See*, *e.g.*, Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1304-05 (2004) ("The challenge for courts . . . stems . . . from judges' inability to point to . . . something other than personal preferences[,] to justify the selection of a particular moral framework . . . [but a] moral prohibition [does] little to demonstrate that [it] reflects [a] . . . reasoned judgment rather than deference to [judicial] likes and dislikes . . . .").

could ever be implied as to those who have been sanctified,[26] even though the very same terminology is still used by the governing statute and regulation,[27] is common in other areas of law[28] and not flinched at even in public speech addressing the most sensitive social topics.[29] It is also this other face of Janus that compels adjudicators to substitute their legally precise but not ear-soothing expurgated language with meek verbiage breeding obscure findings[30] virtuous only for being unamenable to a construction implying…what has become unutterable, *i.e.*, that some VA

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[26] *Accord* Adam Taylor, *Why Mother Teresa Is Still No Saint to Many of Her Critics*, WASH. POST (Sept. 1, 2016, 10:53 AM), https://www.washingtonpost.com/news/worldviews/wp/2015/02/25/why-to-many-critics-mother-teresa-is-still-no-saint [https://perma.cc/Z5YM-WJHK] (addressing views that Mary Teresa Bojaxhiu, canonized as Mother Teresa on October 4, 2016, was not amenable to canonization due to her doubts about divinity).

[27] *See* 38 U.S.C. § 5302(c) (2022); 38 C.F.R. § 1.965(b) (unambiguously contemplating that veterans and their survivors might be imperfect human beings and, thus, could commit fraud, acts of bad faith, and make misrepresentations).

[28] Findings that a debtor committed fraud, acted in bad faith, or made misrepresentations are common not only in criminal and civil litigation, e.g., the law of torts, contracts, negotiable instruments, etc., but also in administrative law. *See, e.g.*, Avant v. Dep't of the Air Force, 71 M.S.P.R. 192, 196 (M.S.P.B. 1996) (finding that public servants committed fraud for personal gain); *see also infra* notes 247-272 and accompanying text (discussing securities law).

[29] *See, e.g.*, Tat Bellamy-Walker, *Black Lives Matter Activists Accuse Executive of Stealing $10 Million in Donor Funds*, NBC NEWS (Sep. 7, 2022, 4:05 PM), https://www.nbcnews.com/news/nbcblk/black-lives-matter-activists-accuse-executive-stealing-10-million-dono-rcna46481[https://perma.cc/CL9B-KYX4] (discussing a fraud-based lawsuit by Black Lives Matter Grassroots against the Black Lives Matter Global Network Foundation).

[30] Societal sensitivity is a moving target, *see, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (noting changes in societal perceptions), and increases in sensitivity may require more complex phraseology, *see, e.g.*, Stuart Heritage, *Do You Speak Woke? A Glossary of the Terms You Need to Know*, MEN'S HEALTH UK (Oct. 25, 2021), https://www.menshealth.com/uk/mental-strength/a38051454 [https://perma.cc/XK257QJM] (detailing expressions that appear progressive but may still be deemed offensive by certain groups).

claimants are not exactly model citizens.[31] If such a statistical study is ever conducted, it might even measure the harm sown by confusion seeded by judicial opinions drafted with an emphasis on courtesy rather than legal precision.[32] However, a long overdue conversation about this disconcerting side-effect of the paternalism, which is the untouchable holy grail of VA law, has finally become feasible upon the Court's issuance of its opinion in *Hayes*.[33]

III. UNREMARKABLE FACTS THAT MORPHED INTO A PSYCHOLOGICAL TRAP

The facts of *Hayes* were simple, even trivial.[34] There, a veteran's elderly widow, *i.e.*, a VA claimant necessarily sympathetic due to her advanced age and loss of her veteran-husband,[35] applied for a VA pension.[36] However, in her initial application and for the

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[31] In the United States, veterans comprise 8% of persons in custody. *See, e.g.*, Jennifer Bronson et al., *Veterans in Prison and Jail*, U.S. DEPT. JUST., OFF. JUST. PROGRAMS, BUREAU JUST. STAT. (Dec. 2015), https://www.bjs.gov/content/pub/pdf/vpj1112.pdf [https://perma.cc/UP8N-LEX5]. While such eight percent could be analogized to 7.6% of veterans in the general population, *see, e.g.*, Jennifer Schultz, *Veterans by the Numbers*, NAT'L CONF. ST. LEGIS. (Nov. 10, 2017), https://www.ncsl.org/blog/2017/11/10/veterans-by-the-numbers.aspx [https://perma.cc/7 XYN-PJDF], the percentage of veterans in custody markedly exceeds that in the emancipated general population since the general population includes minors not amenable to confinement at facilities where veterans, who are necessarily adults, are confined. Therefore, while false arrests and wrongful convictions are indeed a highly unfortunate reality, it appears that a not-insubstantial percentage of veterans cannot qualify as model citizens.

[32] *Cf.* Atilano v. McDonough, 35 Vet. App. 490, 494-96 (Vet. App. 2022) (Toth, J., concurring) (expressing frustration with an odd remand from the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit")).

[33] *See generally* Hayes v. McDonough, 35 Vet. App. 214 (Vet. App. 2022).

[34] *See id.* at 216.

[35] *Accord supra* notes 13, 18 (providing examples of caselaw and scholarly studies of the reverence, sympathy, and sense of guilt for unfavorable outcomes that judges typically feel when addressing VA-law matters, as well as "creative" approaches the Court resorts to provide the litigants with favorable outcomes the Court desires but has no basis to provide in actuality).

[36] *See Hayes*, 35 Vet. App. at 216.

following three and a half years,[37] she did not disclose either her unemployment benefits,[38] or her wages,[39] or her SSA benefits,[40] even though VA application form she had to file and the letters mailed to her by VA thereafter repeatedly stressed that all of her non-VA income and, especially, her wages and SSA benefits, had to be promptly reported so to ensure that VA would correctly determine whether she was and remained entitled to a VA pension and what the amount of her VA pension should be.[41]

Since a model citizen standing in the widow's shoes would have informed VA of every cent of her non-VA income,[42] while

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[37] A notice about a claimant's duty to inform VA of any form of non-VA income is included in VA Form 21P-527EZ, Application for Veterans Pension, that a VA pension applicant is required to file, and the bulk of the Form's Section IX is dedicated to their SSA benefits. *See* Notice to Veteran of Evidence Necessary to Substantiate a Claim for Veteran's Pension Benefits, DEP'T VET. AFF. https://www.vba.va.gov/pubs/forms/VBA-21P-527EZ-ARE.pdf [https://perma.cc/ND5R-N2HR]. The RO also kept sending the widow letters reminding of her obligation to promptly inform VA of any changes in her non-VA income. *See* Hayes v. McDonough, 35 Vet. App. 214, 216 (Vet. App. 2022).

[38] The widow concealed her $17,697 in unemployment benefits. *See* Name Redacted, No. 14-10 754A, 2019 BVA LEXIS 126857, at *2 (B.V.A. Oct. 28, 2019) (the Board decision underlying the Court opinion in *Hayes* and providing a more detailed statement of facts).

[39] The widow concealed her $4,445 in wages. *Id.*

[40] The widow concealed her SSA benefits received at "$850 a month from May [1 to November 30,] 2012, $864 a month from December [1,] 2012, [to November 30, 2013,] and $877 from December 2013 [forward]." *Id.*

[41] *See Hayes*, 35 Vet. App. at 216 (noting that the widow reported to the RO that she was "unemployed [and supported] by family," and that she expected no income for at least a year).

[42] True, some veterans exhibit exemplary honesty and yet get convinced by VA officers to accept VA benefits to which, in reality, these veterans are not entitled. Therefore, later on, these veterans get charged with VA overpayments. *See, e.g.*, Name Redacted, No. 16-36 767, 2022 BVA LEXIS 33076 (B.V.A. Apr. 14, 2022) (noting that a veteran who was not entitled to receipt of a VA pension was talked into accepting it upon being falsely assured by VA officers that the benefits were his VA disability compensation but, later on, the veteran was charged with an overpayment that was recouped through withholdings of his Supplemental Security Income (SSI) benefits, *i.e.*, the sole source of income his family had, inflicting a dire financial injury); *see also infra* notes 68, 82 (summarizing the differences between a VA pension and VA disability compensation and discussing methods of recoupment); *cf.* Rosenberg v. Mansfield, 22 Vet. App. 1, 5 (Vet. App. 2007) (clarifying that the doctrine of equitable estoppel does not apply to VA overpayments since false assurances, even if made by VA officers, cannot bestow an entitlement to VA funds on a beneficiary who has no statutory right to the benefits at issue).

a perpetual charlatan would not have reported even a penny,[43] the inquiry quickly boiled down to what the widow's *mens rea* was that prompted her to invariably conceal of all of her non-VA income, causing the widow's receipt of VA pension for three and a half years without any legal entitlement.[44] These unremarkable facts and legal inquiry would have gone unnoticed in the daily grind of VA cases had the Board found only that the widow acted in "bad faith" and, on this ground only and without mentioning "misrepresentation," declined to address the merits of the widow's claim for a waiver of VA's recoupment of the debt arising from her overpayment.[45] However, the *Hayes* Board stated that the widow's waiver claim should not be addressed on the merits because her failure to report all of her non-VA income was an act of bad faith and, in addition, a misrepresentation.[46] Capitalizing on the word "misrepresentation," the widow's counsel appealed,[47] positing that the Court's definition of non-willfulness was critical for adjudication of the widow's waiver claim.[48] In other words, the counsel position was merely a hope that, if the Court's definition of non-willfulness would prove to be loose enough, then the widow's

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[43] *Cf. infra* note 140 (discussing a case where a veteran fraudulently received $561,725.22 in VA funds).

[44] *See* Name Redacted, No. 14-10 754A, 2019 BVA LEXIS 126857, at *2 (B.V.A. Oct. 28, 2019).

[45] The *Hayes* Board tried its best to avoid focusing on misrepresentation. *See id.* at *2 ("To be clear, the Board is . . . finding that the [widow] misrepresented a material fact . . . and acted in bad faith [even though] the prior decision said [that] it [was] not clear that [she] acted in bad faith [since] that decision was vacated [,] and further review . . . supports a finding of bad faith . . . .").

[46] *See id.* at *2; *see also infra* text accompanying notes 135-149 (discussing the perceptions of legal standards governing fraud, bad-faith, and misrepresentation in VA overpayment-and-waiver matters).

[47] The Equal Access to Justice Act ("EAJA"), Pub. L. 96-481, codified in part at 28 U.S.C. § 2412, obligates VA to pay reasonable attorneys fee and other expenses to prevailing litigants who successfully appeal Board decisions. *See* Sumner v. Principi, 15 Vet. App. 256 (Vet. App. 2001) (en banc); Cullens v. Gober, 14 Vet. App. 234, 237 (Vet. App. 2001) (en banc). Thus, while neither the letter nor the psychology of VA law deters vexatious appeals, the EAJA meanwhile inadvertently incentivizes attorneys to litigate even those claims qualifying as a bridge too far. *Cf. supra* note 17.

[48] For an audio recording of the oral arguments in *Hayes*, see Audio Tape: Oral Arguments/Special Events Audio & Video, U.S. CT. OF APPEALS FOR VET. CLAIMS, http://www.uscourts.cavc.gov/documents/Hayes.MP3 [https://perma.cc/T7JM-32GR] [hereinafter Hearing].

conduct could potentially be recharacterized into "well, you know, kinda non-willful."[49]

Building on this first "if," the counsel then posited that the widow's waiver claim should be remanded to the Board for an adjudication on the merits.[50] Implied in this second step was another hope, *i.e.*, that, if an adjudication on the merits would yield a favorable outcome, the widow would escape VA's recoupment of her debt.[51] Correspondingly, according to the widow's counsel, her financial salvation was a mere definition of non-willfulness away.[52]

In any other area of law, such an exponential chain of speculations would have been swiftly called out[53] by the court with a stern admonishment that an "adjudication cannot rest on any such 'house that Jack built' foundation."[54] However, VA law is a universe of its own,[55] and the position of the widow's counsel had to

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[49] True, attorneys occasionally seek to recharacterize the intentional/reckless conduct of their clients into negligence. *See, e.g.*, Boyles v. Kerr, 855 S.W.2d 593, 603-05 (Tex. 1993) (Gonzalez, J., concurring) (noting that intentional *mens rea* is amenable to a creative recharacterization into negligence since attorneys may allege that a reasonable person standing in the shoes of an intentional wrongdoer would have avoided inflicting intentional harm, and the wrongdoer was merely negligent by not acting as a reasonable person). However, legislators/courts addressing non-VA claims typically refuse to entertain such a creative legerdemain. *See, e.g.*, Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co., 18 Cal. Rptr. 2d 692, 697-700 (Cal. Ct. App. 1993) ("[L]aw . . . do[es] not allow the recharacterization of . . . intentional . . . misconduct [into] negligent or non-willful"); *accord* Linebaugh v. Berdish, 376 N.W.2d 400, 406 (Mich. Ct. App. 1985) (stressing that a wrongdoer cannot recharacterize intentional molestation into a negligent act). Therefore, legal arguments purporting to inject a case with nonexistent facts typically yield a judicial rebuke. *See id.*; *see also* Merritt v. Arizona, No. 21-15833, 2022 U.S. App. LEXIS 22791, at *5 (9th Cir. Aug 16, 2022) ("Occam's Razor is a principle of logic suggesting where evidence can be found; it is not itself a piece of evidence.") (citing, *inter alia*, McSherry v. City of Long Beach, 584 F.3d 1129, 1136 (9th Cir. 2009) (observing that "[s]urmise, conjecture, theory, speculation and an advocate's suppositions [are not] facts and valid inferences") (citation and internal quotation marks omitted)).

[50] Hearing, *supra* note 48 (argument of the widow's counsel).

[51] *Id.*

[52] *Id.*

[53] *See, e.g.*, *McSherry*, 584 F.3d at 1136 (declining to accept self-serving conjecture as valid inferences).

[54] Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 731 (1973).

[55] *Accord* Brown v. Gardner, 513 U.S. 115, 122 (1994) (assessing H.R. REP. No. 100-963, pt. 1, at 10 (1988)); James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135 (2011) (discussing the history of VA law prior to 1988).

be entertained by the Court with the utmost seriousness.[56] What the court stated and omitted to state in response to the counsel's position turned *Hayes* into a psychological gem of VA law by bringing to light the unspoken but mighty clout of the other face of Janus and by lighting up an intuitive route that might lead to psychological salvation.

IV. A SUMMARY OF VETERANS LAW OF PENSIONS, OVERPAYMENTS, AND WAIVERS

But before the reader could venture into the world of VA appellate adjudication,[57] a summary of VA pension law and its busy intersection with VA law of overpayment and waiver is in order.[58] A VA pension is a monetary benefit available to qualified veterans[59] and their survivors[60] if they meet the need-based criteria in terms of their assets and non-VA income.[61] If an applicant's or a current

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[56] *See generally*, Hayes v. McDonough, 35 Vet. App. 214 (Vet. App. 2022) (examining the widow's counsel's legal position as if it was reflective of – rather than divorced from – the Board's legal and factual findings); *cf. Matter of Fact*, *supra* note 18 (discussing the liberties the Court occasionally takes with the Board's factual findings).

[57] Board decisions are appealed to the Court, *see* 38 U.S.C. § 7252; *see also* Prewitt v. McDonough, 36 Vet. App. 1, 9-29 (Vet. App. 2022) (providing different views as to the nature of the mandate vesting the Court with adjudicatory power), then to the Federal Circuit, *see* 38 U.S.C. § 7292 (2022), and, upon a certiorari, to the U.S. Supreme Court as "a matter of . . . judicial discretion," SUP. CT. R. 10.

[58] The intersection does not consume the entire VA pension law since some aspects of pension law are unrelated to overpayments and waivers, *see* Veterans' and Survivors' Pension Improvement Act, Pub. L. No. 95 588, § 306, 92 Stat. 2497, 2508 (1978) (setting forth the currently operating VA pension regime), and a myriad of pension-unrelated scenarios may trigger an overpayment-and-waiver litigation, *see*, *e.g.*, 38 U.S.C. § 5112 (2022); 38 C.F.R. § 3.500 (2022).

[59] A veteran is eligible for a VA pension if (s)he served during a period of war, see *Eligibility for Veterans Pension*, U.S. DEP'T OF VETERANS AFFS. (Oct. 12, 2023) https://www.va.gov/pension/eligibility [https://perma.cc/9UE7-2NCZ] (listing qualifying periods of war), that resulted in their discharge from service under conditions other than dishonorable, plus (s)he is either 65 years old or totally and permanently disabled due to conditions that may but do not need to be attributable to service. *See* 38 C.F.R. §§ 3.271, 3.272, 3.274, 3.275, 3.276, 3.278, 3.279 (2022).

[60] A veteran's surviving spouse is eligible for a VA pension if the veteran served during a period of war, *see, e.g.*, *Eligibility for Veterans Pension*, U.S. DEP'T OF VETERANS AFFS. (Oct. 12, 2022), https://www.va.gov/pension/eligibility [https://perma.cc/8P9Z-U7X5] (listing qualifying periods of war), for at least 90 days, was discharged under conditions other than dishonorable, and – at the time of death – was entitled to a VA disability compensation or pension. *See* 38 U.S.C. § 1541(a) (2022).

[61] *See* 38 U.S.C. §§ 1521(a), (j), 5312 (2022); 38 C.F.R. §§ 3.3(a), 3.23(a) (2022).

VA pensioner's non-VA income is equal to or exceeds the maximum annual pension rate ("MAPR")[62] applicable to their familial and medical circumstances in terms of dependent(s), housebound status, and need for aid and attendance,[63] (s)he is only eligible but not entitled to VA pension until their financial/dependency/medical circumstances so change[64] that they fall within the asset and MAPR requirements.[65] In that sense, VA pension scheme is fair[66] in a fashion similar to Rawls' veil-of-ignorance[67] since a VA pensioner receives their full MAPR amount if (s)he does not have much assets to dip in and lacks any non-VA income.[68] Conversely, if (s)he does

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[62] MAPR amounts are reset by VA yearly for a period from December 1 of the resetting calendar year to November 30 of the following calendar year and reflects a cost-of-living adjustment ("COLA").

[63] *See Pension*, U.S. DEP'T OF VETERANS. AFFAIRS (Mar. 18, 2014), https://www.benefits.va.gov/PENSION/rates_veteran_pen12.asp [https://perma.cc/DAU8-SQ4C] (explaining how to calculate MAPRs as to the December-2012-to-November-2013 COLA year and offering links to other historic MAPRs); *see also* 38 C.F.R. §§ 3.256, 3.277 (2022).

[64] *See* Name Redacted, No. 210125-135524, 2022 BVA LEXIS 7260 (B.V.A. Feb. 10, 2022) (offering an example of the calculative process).

[65] "Net worth" does not include the value of a pensioner's/applicant's primary residence that does not exceed two acres, *see* 38 C.F.R. § 3.275(b) (2022), but it includes all other liquid assets, *see* 38 C.F.R. § 3.275(d) (2022). Prior to October 18, 2018, VA assessed net worth on a case-by-case basis but, effective October 18, 2018, VA adopted a cut-off net-worth limit of $123,600 that has been upwardly adjusted for COLA ever since and began utilizing the three-year-look-back rule to prevent fraudulent asset transfers. *See* 38 C.F.R. §§ 3.274(a), 3.276(a)(7) (2022).

[66] *See generally*, Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits, 83 Fed. Reg. 47246 (Sept. 18, 2018) (detailing public policies underlying the need determination).

[67] John B. Rawls argued:

> '[P]rinciples of justice" are those rules that people would consent to be governed by if situated at their original position, *i.e.*, behind a hypothetical "veil of ignorance" where "no one knows his[/her] place in society, . . . class position or social status[,] nor . . . his[/her] fortune in the distribution of natural assets and abilities, . . . intelligence [and] strength[.]

See JOHN RAWLS, A THEORY OF JUSTICE 12 (1971) (alternation in orginal).

[68] Unlike VA compensation rates (that are not need-based and, instead, compensate veterans for their loss of earning capacity due to service-connected disabilities, *i.e.*, physical and/or mental conditions) that are monthly, VA pension rates are annual, and while a VA pension is paid monthly, these payments are merely 12 equal installments into which the annual rate is subdivided. *See 2023 VA Pension Rates for Veterans*, U.S. DEP'T OF VETERANS. AFFAIRS (Nov. 29, 2022), https://www.va.gov/pension/veterans-pension-rates [https://perma.cc/E7HT-7DZE] (reflecting only annual rates).

not have much assets to dip in but has such an income, then the amount of her VA pension is equal to that (s)he is short of to reach her MAPR.[69] Predictably enough, if a VA pension applicant fails to report or underreports their non-VA income,[70] and the VA, blissfully unaware of such underreporting receipts,[71] cannot factor them into its calculation, the pensioner is overpaid.[72] The overpayment keeps accruing month after month[73] until the VA finally obtains accurate information about the pensioner's non-VA income (e.g., from the SSA or IRS)[74] and recalculates the pension entitlement both prospectively, *i.e.*, by reducing or eliminating

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[69] *See id.* (providing simple calculative examples).

[70] The aspect of a VA beneficiary's obligation to inform VA of a financially relevant development is examined by the sole-administrative-error test which, if both prongs are met, invalidates overpayments as improperly created. Under the test, the debtor should establish that: (a) her actions/failure to act neither caused nor contributed to the creation of the overpayment; and (b) (s)he neither subjectively knew nor should have objectively known that the overpaid funds were paid in error. *See* 38 U.S.C. § 5112(b)(9), (10) (2022); 38 C.F.R. § 3.500(b)(2); *see also* Jordan v. Brown, 10 Vet. App. 171 (Vet. App. 1997).

[71] *Accord supra* note 17 and accompanying text (noting VA's nonchalant approach to income verification); *see also infra* note 74 (recent changes in the VA system of income verification that invite income underreporting).

[72] An impression that a VA pension was overpaid is not necessarily reflective of reality since the pensioner's unreimbursed medical expenses ("UME") should be reported to VA upon conclusion of the calendar year at issue and, being reduced by five percent of the amount of their MAPR, should be deducted from their countable income received during that calendar year, which may eliminate the overpayment. *See*, *e.g.*, Name Redacted, No. 210125-135524, 2022 BVA LEXIS 7260 (B.V.A. Feb. 10, 2022) (detailing the calculative process and explaining the UME adjustment).

[73] The overpayment period is typically the critical factor in terms of the overpaid amount, *i.e.*, a typical challenge attacks the beginning and/or the end dates of this period. *See infra* note 88 (listing the types of challenges that could be raised in a VA overpayment-and-waiver matter).

[74] Occasionally, information about a VA pensioner's income comes to VA from the pensioner himself/herself upon their filing of VA Form 21P-0510. Eligibility Verification Report ("EVR"), https://www.vba.va.gov/pubs/forms/VBA-21P-0510-ARE.pdf [https://perma.cc/BJY4-8E4F]. However, such a filing is no longer required. Thus, if a pensioner files their VA Form 21P-0510 voluntarily, the filing could be evidence of good faith unless shown to be an act of deceit. *See*, *e.g.*, Name Redacted, No. 20-12 383, 2021 BVA LEXIS 48208 (B.V.A. Mar. 1, 2021) (reviewing a case of the veteran who receive $141,770 in VA pension for 20 years, all while filing yearly EVRs concealing his ownership of cockfighting and gambling businesses, the veteran's prosecution for these activities, and his ownership of a 134-acre real estate).

future disbursements,[75] and retroactively,[76] *i.e.*, to charge him/her with an overpayment and attempt to recoup the resulting debt.[77] Once a VA pensioner is duly charged,[78] (s)he may seek a waiver of this recoupment.[79]

If their waiver claim is denied,[80] the VA Debt Management Center (DMC), effectively acting as a fear-inducing agent for

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[75] A prospective recalculation may result in a finding that, given a pensioner's current income, (s)he is not entitled to any VA pension, but it is common for disentitled VA pensioners to maintain that they were not overpaid because they were entitled to "a" VA pension in the past. *Accord* Hearing, *supra* note 48 (argument of the widow's counsel conceding her current/prospective ineligibility but maintaining that she might have been entitled to "a" VA pension for an unspecified brief moment in the past).

[76] An overpayment, by definition, cannot be prospective since VA actions creating overpayments are necessarily retroactive. 38 U.S.C. § 5112; 38 C.F.R. § 3.500.

[77] The procedural due process involved in charging, *i.e.*, creating an overpayment consists of the following steps: (a) an RO issues of a proposal notice stating facts and law, and informing the debtor of their right to reply; (b) the RO issues a notice of final action based on the proposal and reply, if any, and then calculates the debt amount; and (c) the Debt Management Center (DMC) issues a demand letter informing the debtor of this amount and their right to seek a waiver of the recoupment of the debt, plus the period of limitations to seek such a waiver. *See* 38 C.F.R. § 1.911(d) (2022); *accord* Veterans Benefits and Transition Act of 2018, Pub. L. No. 115-407, § 504(b), 132 Stat. 5378 (2018) (setting forth due process guarantees).

[78] *See supra* note 77 (summarizing the procedural due process associated with charging an overpayment).

[79] Although VA generates forms for almost any occasion, there is no VA form to request a waiver of the recoupment of an overpayment debt. *See Find a VA Form*, U.S. DEP'T OF VETERANS. AFFS. (Oct 12, 2022), https://www.va.gov/find-forms [https://perma.cc/4UKC-6DSV] (Editor's note: a VA Claimant will be prompted to enter a keyword, form name, or number to view available forms. As of December 13, 2023, entering "waiver of recoupment" generated six no applicable options, viewable here: [https://perma.cc/KF97-6VFY]). The lack of such a form is intentional since any written statement from a debtor revealing their desire for a waiver is sufficient. *Accord* Named Redacted, No. 17-04 746, 2020 BVA LEXIS 35015 (B.V.A. Apr. 28, 2020) (relying on Edwards v. Peake, 22 Vet. App. 57, 59 (Vet. App. 2008) (to point out that a VA debtor is neither expected nor required "to use the magic word of waiver"). VA debtors often use, *i.e.*, *VA Form 21-5655 Financial Status Report* (FSR) (last updated Dec. 2023) https://www.va.gov/vaforms/va/pdf/VA5655.pdf [https://perma.cc/DF36-3LG2], to request waivers plus signal that VA's recoupment of their debts would cause them financial hardshipthat they might meet one of the elements of the equitable waiver analysis. *See infra* note 283 (explaining the concept of financial hardship as used for the purposes of such an analysis).

[80] The issue of timeliness of a waiver claim is procedural, *see infra* note 89 (detailing the limitations period), while the debtor's eligibility to a waiver is a substantive legal test, and the waiver analysis on the merits is a substantive equitable test, *see infra* text accompanying notes 100-101, 280-286 (summarizing the eligibility test and the merit analysis).

collection,[81] begins the recoupment process.[82] The debtor, understandably unhappy with the prospect of having future VA pension benefits reduced by incremental withholdings toward this recoupment[83] (or with the prospect of having the recoupment conducted by other and harsher means),[84] challenges the creation of the overpayment and/or the denial of waiver claim

[81] Although VA general law is paternalistic as to applicants seeking benefits, VA overpayment law lacks paternalism because, in such matters, VA acts as a plaintiff on behalf of U.S. taxpayers whose funds were overpaid and should be recouped. Accordingly, VA must collect overpayment debts aggressively. *See* 38 C.F.R. § 1.910 (2022).

[82] VA executes recoupment through incremental withholdings from debtors' future monetary VA benefits, if any, *see* 38 U.C.S. § 5314 (2022); 38 C.F.R. § 1.912(a) (2022), or by garnishing debtors' wages, SSA or SSI benefits, tax refunds, and/or by placing liens on private property, commencing foreclosures of real estate, etc., if no future VA benefits appear forthcoming at the time of recoupment, *see* 38 C.F.R. §§ 1.911, 1.917, 1.922, 1.950 (2022).

[83] A debtor's overpayment might be substantial, e.g., the widow in *Hayes* owed $35,970, *see* Name Redacted, No. 14-10 754A, 2019 BVA LEXIS 126857, at *1 (B.V.A. Oct. 28, 2019), and DMC's methods of debt recoupment are non-appealable compromises, *see* Vet. Aff. Op. Gen. Couns. Prec. 4-2003 (2003), https://www.va.gov/ogc/opinions/2003precedentopinions.asp [https://perma.cc/GPN4-K45U]. Unfortunately, DMC often negotiates these compromises in a fashion debtors perceive as ultimatums. *See, e.g.*, Name Redacted, No. 19-15 833A, 2022 BVA LEXIS 29158, at *9 (B.V.A. Apr. 28, 2020).

[84] *See* Name Redacted, No. 16-36 767, 2022 BVA LEXIS 33076 (B.V.A. Apr. 14, 2022) (providing an example of the devastation caused by DMC's recoupment conducted by garnishment of a veteran's SSI benefits, which left him and his three children literally starving after the veteran's wife, the sole bread-winner in the family, passed away); *see also* Name Redacted, No. 19-09 954, 2020 BVA LEXIS 72014 (B.V.A. July 2, 2022) (addressing DMC's attempt to foreclose the house of a single mother, a VA debtor who asked VA to "have mercy on [her] house, which was her [and her small son's] only [asset, and] it was an old house [already] subject to various liens").

administratively, *i.e.*, at an agency of orginal jurisdiction (AOJ),[85] and then by appealing to the Board.[86] Then, (s)he may appeal to the proper federal courts.[87]

Notably, more often than not, litigation of a VA overpayment-and-waiver matter runs on two barely related tracks since a VA regional office ("RO") adjudicates challenges to the creation of overpayments by applying substantive legal tests,[88] while the VA Committee on Waivers and Compromises (COWC) adjudicates

[85] An appeal of an AOJ's decision is commenced by a Notice of Disagreement (NOD) received by the AOJ within one year from the date of the notice of the decision, *see* 38 U.S.C. § 7105 (2022); 38 C.F.R. § 3.2500 (2022). The first NOD form, VA Form 21-0958, was adopted in April 2013 (until then, a debtor could file any statement as an NOD, given rise to a popular but true joke that even a writing on a paper napkin could qualify as an NOD). *Accord* Fenderson v. West, 12 Vet. App. 119 (Vet. App. 1999). Upon receipt of that NOD, the AOJ would issue a Statement of the Case (SOC), *see* Manlincon v. West, 12 Vet. App. 238 (Vet. App. 1999), and a dissatisfied litigant could file VA Form 9, a so-called substantive appeal to the Board or utilize any other VA form to operate as a substantive appeal, provided that the intent to appeal was discernable from such a filing. However, on February 19, 2019, the Veterans Appeals Improvement and Modernization Act, Pub. L. No. 115-55, 131 Stat. 1105 (2017), substituted mandatory SOCs with non-mandatory preliminary steps, *see* 38 C.F.R. §§ 3.2501, 3.2601 (2022), and replaced VA Forms 9 & 21-0958 with a single VA Form 10182, *see About VA Form* VA10182, U.S. DEP'T OF VETERANS AFFS. (June 10, 2022), https://www.va.gov/find-forms/about-form-10182/ [https://perma.cc/59NJ-7WWW]. For VA Form 10182, see *Decision Review Request: Board Appeal (Notice of Disagreement)*, U.S. DEP'T OF VETERANS AFFS., (last visitied Oct. 13, 2023, 3:45 AM), https://www.va.gov/vaforms/va/pdf/VA10182.pdf [https://perma.cc/4VGV-JH9R].

[86] While litigants often end up confused by VA forms, filing of an incorrect VA form is not a jurisdictional barrier. *See* Hall v. McDonough, 34 Vet. App. 329, 333 (Vet. App. 2021). Further, the Board deems an appeal properly pending if the AOJ/Board led the litigant to believe that their appeal was pending, even if the appeal had procedurally critical defects. *See* Percy v. Shinseki, 23 Vet. App. 37, 47 (Vet. App. 2009).

[87] *See supra* note 47 (detailing the EAJA effect); *see also supra* note 57 (detailing the appeal process of a VA-law case).

[88] A challenge to a debt arising from a VA overpayment may encompass up to three claims, *i.e.*, a substantive and/or procedural challenge to the propriety of the creation of the overpayment, a challenge to the validity of its amount, and a claim for a waiver of the recoupment of the resulting debt. *See* Johnson v. Wilkie, No. 19-5789, 2020 U.S. App. Vet. Claims LEXIS 1205, at *5 (Vet. App. June 25, 2020) (summarizing this well-established point).

waivers by conducting the equitable analysis on the merits.[89] And, in addition to making the threshold determination as to the timeliness of a waiver claim and the ultimate equitable waiver analysis on the merits,[90] COWC is also required to determine, as an intermediary step, whether the waiver analysis on the merits is altogether permissible.[91]

This duality of law and equity,[92] once injected at the COWC level, persists throughout the life of the case,[93] making administrative judges of the Board and Article I and III judges of appellate courts wear two different hats: first the hat of an adjudicator at law and then that of an adjudicator in equity.[94] Correspondingly, a VA debtor who has just failed to prevail on their challenges to the propriety of the creation of an overpayment gets a

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[89] As to challenges to the creation of an overpayment and/or to the validity of its amount, the RO is the AOJ, but the Committee on Waivers and Compromises (COWC) is the AOJ for the purposes of a waiver claim. However, ROs' and COWC's decisions addressing the same overpayment are almost always challenged in a single appeal to the Board. Since ROs and COWC adjudicate the timeliness of their respective claims, including limitation periods and equitable tolling, all AOJs try their hand in law and equity. *See*, *e.g.*, Aldridge v. McDonald, 27 Vet. App. 392, 393 (Vet. App. 2015) (addressing a non-waiver appeal); *see also* Barger v. Principi, 16 Vet. App. 132 (Vet. App. 2002) (addressing a waiver appeal).

[90] A debtor's filing of an FSR is optional, *i.e.*, a waiver cannot be denied because no FSR was submitted. However, a debtor has only 180 days from the date of the issuance of the notice as to the amount of debt owed to apply and have the waiver claim received by DMC/RO. 38 U.S.C. § 5302(a) (2022); Narron v. West, 13 Vet. App. 223, 228 (Vet. App. 1999). The beginning and end dates of the 180-day period can be altered if the debtor shows that, due to an error committed by VA or a postal service, *i.e.*, a matter outside their control, receipt of the notice of the debt amount was delayed. *See* 38 U.S.C. § 5302(a); 38 C.F.R. § 1.963(b)(2) (2022).

[91] *See* 38 U.S.C. § 5302(c); 38 C.F.R. § 1.965(b) (2022).

[92] In VA overpayment-and-waiver matters, a substantive adjudication at law precedes that in equity, *i.e.*, the Board must adjudicate all challenges to the creation of the overpayment and the validity of its amount prior to reaching the waiver claim. *See* Schaper v. Derwinski, 1 Vet. App. 430, 437 (Vet. App. 1991) (effectively setting forth a VA version of the prudential doctrine of prematurity that was articulated for constitutional purposes in Heck v. Humphrey, 512 U.S. 477 (1994), and should not be confused with the doctrines of standing and ripeness).

[93] The waiver analysis on the merits is eliminated only if a debtor withdraws appeal of their waiver claim or *ab initio* appeals only the creation and/or amount of overpayment. 38 U.S.C. § 7105; 38 C.F.R. § 19.55.

[94] *See Schaper*, 1 Vet. App. at 437.

de facto second bite of the apple[95] since (s)he might still escape DMC's recoupment by prevailing on the merits of their waiver claim.[96] But, to determine whether the waiver analysis on the merits is altogether permissible, appellate adjudicators, just like COWC, must walk the path from the world of law into that of equity.[97]

And while this path is not particularly narrow,[98] it covers analogously the VA version of river Styx that, in Greek mythology, separated the dead from the living.[99] Befittingly, the path into the world of the equitable waiver analysis on the merits is guarded by the VA counterpart of the mythological three-headed Cerberus[100] that only allows entry to those whose hands have not been soiled by three mortal sins, *i.e.*, fraud, bad faith, and more-

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[95] *See* 38 U.S.C. § 5302(a) ("There shall be no recovery of payments or overpayments . . . of any benefits [disbursed] under [VA] laws . . . whenever [it is] determine[d] that recovery would be against equity and good conscience . . . ."); Cullen v. Brown, 5 Vet. App. 510, 512 (Vet. App. 1993); 38 C.F.R. §§ 1.962, 1.963(a) (2022).

[96] While VA debtors often believe that the grant of a waiver claim erases the debt, such a grant merely bars DMC's recoupment but does not eliminate other consequences. This is so because, unlike properly paid VA benefits, waived debt amounts are taxable and should be paid taxes on as part of the debtor's taxable income during the calendar year of the waiver grant. Accordingly, a waived amount might occasionally place a debtor's combined income into a higher tax bracket, sometimes leaving them financially worse off than had their waiver claim been denied. However, in Waterhouse v. Principi, 3 Vet. App. 473, 475 (Vet. App. 1992), the Court observed that tax consequences are inherently speculative due to being subject to offset and, therefore, cannot be the sole basis bestowing subject matter jurisdiction, at least for the purposes of appeals to the Court.

[97] The statute and regulation entitling the Board to conduct its equitable waiver analysis on the merits are unique, *see* 38 U.S.C. § 5302(a); *Cullen*, 5 Vet. App. at 512; 38 C.F.R. §§ 1.962, 1.963(a), since they are an exception to the Board's lack of equitable power, *see* Vet. Aff. Op. Gen. Couns. Prec. 17-95 (1995), https://www.va.gov/ogc/opinions/1995precedentopinions.asp [https://perma.cc/CD5K-KFDN], because, as to any non-waiver claim, only a court, utilizing its inherent power, or the Secretary of VA may order equitable relief, *see* 38 U.S.C. § 503(a) (2022) (addressing the Secretary's authority); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (addressing the power of courts).

[98] *See*, *e.g.*, Reyes v. Nicholson, 21 Vet. App. 370, 376 (Vet. App. 2007) ("Congress intended to mandate a higher standard of culpability to deny [a] waiver.") (citation and internal quotation marks omitted).

[99] "Styx, in Greek mythology, [was] one of the rivers of the underworld ['populated' by ghostly deceased, and t]he word [']styx[']mean[t] 'shuddering' [to] express[] loathing of death." Eds. Encyclopaedia Britannica, *Styx*, BRITANNICA (Sep. 15, 2022) (alteration in original), https://www.britannica.com/topic/Styx-Greek-religion [https://perma.cc/U5TP-NGKC].

[100] "A three-headed . . . dog named Cerberus, guard[ed] the . . . shore of Styx, ready to devour living intruders or ghostly fugitives." *See* ROBERT GRAVES, *The Gods of the underworld, in* THE GREEK MYTHS 139 (Rick Riordan contributor, 3d combined ed. 2012).

than-non-willful misrepresentation underlying the creation of their overpayments (with each head of the VA Cerberus hunting for its own mortal sin).[101] Therefore, a VA debtor seeking a waiver must establish that their already-dead-at-law case might still be entitled to a chance at a legal anastasis in equity[102] because (s)he is entering the world of equity with sufficiently clean hands.[103] However, unfortunately for adjudicators, the doctrine of clean hands,[104] as materialized in VA overpayment-and-waiver law, builds on the statutory and regulatory terminology that, by now, has become psychologically incompatible with the indiscriminative sanctification of "a" VA claimant.[105]

The original doctrine of clean hands, imported into American jurisprudence as part of English legal heritage, was coined by chancery courts[106] that used the concept of fairness to ensure that law would remain perceived as just.[107] Fairness, an offshoot of

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[101] *See* 38 U.S.C. § 5302(c); 38 C.F.R. § 1.965(b).

[102] *See supra* text accompanying notes 95-96 (explaining the second-bite-of-the-apple effect of a waiver claim).

[103] The concept of "clean hands" has become such an indelible part of American jurisprudence that federal courts habitually refer to it even in matters not implicating equity. *See*, *e.g.*, Oguachuba v. INS, 706 F.2d 93, 99 (2d Cir. 1983) (observing that, "[i]n classic equity terms, [the plaintiff] is without clean hands" in an immigration-law matter); Bar Bea Truck Leasing Co. v. United States, 4 C.I.T. 137, 138 (Ct. Int'l Trade 1982) (noting, in an international-trade-law matter, that a plaintiff's "hands are very far from clean," and "[o]n this score alone, [the plaintiff's actions] make an award unjust").

[104] Perhaps adopting Henry L. Menken's sarcastic view that "it is a sin to believe evil of others, but it is seldom a mistake," H.L. MENCKEN, A MENCKEN CHRESTOMATHY 443 (1982), the doctrine of "clean hands" is often referred to as that of "unclean hands," *see*, *e.g.*, T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. DAVIS L. REV. 1827, 1827-28 (2018).

[105] *See supra* note 26 (discussing the incompatibility of sanctification and disapproval).

[106] *See*, *e.g.*, Thomas O. Main, *ADR: The New Equity,* 74 U. CIN. L. REV. 329, 345-46 n.60 (2005) (quoting George Tucker Bispham, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 1 (11th ed. 1931) (1874), for the observation that "[e]quity is that system of justice which was developed in and administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction.").

[107] *See generally*, *e.g.*, Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 CAP. U.L. REV. 483, 485-89 (1997).

natural law[108] popularized by St. Thomas Aquinas' *Summa Theologiæ*,[109] in turn, built on the Aristotelean idea of *epikeia*,[110] *i.e.* the notion that justice reflects the virtue of a legal system[111] since law is expected to express moral principles of life.[112] Therefore, the version of fairness coined by English chancery drew a qualitative distinction between pure accidents[113] and events

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[108] *See* Vellinga v. Vellinga, 442 N.W.2d 472, 475-76 (S.D. 1989) ("The development of equity in Roman law was necessitated by judicial procedure so rigidly formalized . . . that the slightest error was fatal. The fixed [*formulæ* that] produced injustice were tempered by Roman . . . application of . . . *lex natura*[*æ*], or morality [since, w]henever an adherence to the old *jus civile* would do a moral wrong, and produce a result . . . *inaequum*[], the *praetor*, conforming . . . his decision to the law of nature, provided a remedy . . . . Gradually[,] . . . the modes in which he would thus interfere, grew . . . more common . . . , and thus a body of moral principles was introduced into the Roman law [as] *aequitas* . . . ." (citing 1 POMEROY'S EQUITY JURISPRUDENCE § 3, ⁋ 4, and § 8, ⁋⁋ 12-13 (5th ed. 1941))); *see also infra* note 110 (discussing the Greek roots underlying of the Roman *æquitas* concept).

[109] *See*, *e.g.*, ST. THOMAS AQUINAS, SUMMA THEOLOGIÆ (Laurence Shapcote trans., Aquinas Inst. Stud. Sacred Doctrine, ebook reprint 2012).

[110] *See*, *e.g.*, LAWRENCE JOSEPH RILEY, THE HISTORY, NATURE AND USE OF EPIKEIA IN MORAL THEOLOGY 137 (Bros. Hermenegild TOSF ed., Cath. Univ. Am. Press 1948) (2013) (explaining that *epikeia* was the Aristotelian idea of the "corrective usage" of laws required because laws cannot have guidance for every possible contingency, while the intuitive concept of justice always provides guidance); *accord* Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 845-49 (1999) (pointing out that equity derives from natural law that evolved from St. Aquinas' application of Aristotelian philosophy).

[111] As humanity matures, the task of tracing key moral principles in law becomes harder because "[t]oo many contemporary lawyers buy into the notion that law is not justice nor inquiry into truth, but a mere mechanism for dispute resolution." Robert C. Cumbow, *Educating the 21st Century Lawyer*, 32 IDAHO L. REV. 407, 410 (1996).

[112] *See*, *e.g.*, Sean Coyle, *Natural Law and Goodness in Thomistic Ethics*, 30 CAN. J.L. & JURIS. 77, 82 (2017).

[113] The original meaning of "accident" required a showing that the actor was "utterly without fault," *i.e.*, an "inevitable accident" during which "an unintentional harm occasioned without [the actor's] negligence," but the concept evolved and eventually became consumed by the *mens rea* of negligence. *See*, *e.g.*, Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575, 576-77 (1994) (tracing the roots of "accident" to Weaver v. Ward, Hob. at 134, 80 Eng. Rep. at 284 (1616)).

evincing a claimant's fraud or their "thing of confidence,"[114] *i.e.*, the wrongs not attributable to just life or god,[115] and obligated a chancellor to act – back then, only on his, not her – morality and common sense[116] to bar a "wicked" claimant[117] from recovering the

[114] The phrase "thing of confidence" is a legal misnomer: it should be "thing of [no] confidence" because it implies a "breach of confidence," *i.e.*, a concept traced to *Prince Albert v. Strange*, 41 Eng. Rep. 1171 (Ch. 1849), which addressed a breach of transactional trust. Elaborating on the same, another English case observed that the "equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of 'use, confidence or trust;' and a couplet, attributed to Sir Thomas More, Lord Chancellor, avers that [t]hree things are to be hel[d] in Conscience: Fraud, Accident and [all] things of Confidence." Coco v. A.N. Clark Ltd., RPC 41 Ch. at 46 (1969) (quoting More's couplet replicated in H. ROLLE, ROLLE'S ABRIDGEMENT vol. I, 374 (1668)).

[115] *See* Norman J. Finkel, *But It's not Fair!: Commonsense Notions of Unfairness*, 6 PSYCH. PUB. POL'Y. & L. 898, 945 (2000) (analyzing events that people tend to blame God or Life for because the events appear contrary to key moral principles).

[116] The first appointment of a female English judge occurred only in 1946, *see* Patrick Polden, *The Lady of Tower Bridge: Sybil Campbell, England's First Woman Judge*, WOMEN'S HISTORY REVIEW, 505-26 (2006), *available at* https://www.tandfonline.com/doi/abs/10.1080/09612029900200218[https://perma.cc/M7QN-T96F] , *i.e.*, chancellors acted exclusively on "his" vision of conscience for about five centuries since the English chancery "began to develop in the 15th century," Eds. Encyclopædia Britannica, *Chancery Division*, BRITTANICA (Nov. 7, 2022), https://www.britannica.com/topic/Chancery-Division [https://perma.cc/R8KTU9ZZ], yielding gender bias imported into American equity, *see*, *e.g.*, Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 731 (1990) ("[A]lmost unlimited judicial discretion [tends to] lead[] to arbitrary results [due to] gender bias.").

[117] Since the adjective "wicked" was frequently used in medieval England to define a person engaged in a conduct revealing culpable *mens rea*, *see*, *e.g.*, SHAKESPEARE SELECT PLAYS, MACBETH 46 (W.G. Clark and W.A. Write eds., 1871, *reprint from* the 1623 First Folio) ("By the pricking of my thumbs, Something wicked this way comes"), https://www.google.com/books/edition/Macbeth/2WJ9x_PVVOQC?hl=en&gbpv=1 [https://perma.cc/DT3B-HFWV], the adjective was incorporated by medieval English law into the concept of inequity, *see* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 244-46 (1765-69 Facsimile ed., U. Chicago Press, 1979). However, the phrase "wicked plaintiff" first appeared in American legal literature only in the 20th century. *See* Edward Avery Harriman *Ultra Vires Corporate Leases*, 14 HARV. L. REV. 332, 384 (1901).

losses (s)he had sustained due to their own wrongful conduct.[118] And, since original English equity was indelible from a chancellor's personal vision of "thing of confidence,"[119] the U.S. Supreme Court adopted this tradition[120] and analogously left it to trial-level adjudicators to goal-post, on a case-by-case basis, where each litigant's culpability reached such a "wickedness" that it barred judicial remedy.[121] However, naturally wary of judicial bias and activism[122] that could recharacterize an accident into a "thing of confidence," or vice-versa,[123] legislators and agencies alike

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[118] *See generally*, *e.g.*, C. Scott Pryor*, Third Time's the Charm: The Coming Impact of the Restatement (Third) Restitution and Unjust Enrichment in Bankruptcy*, 40 PEPP. L. REV. 843 (2013) (detailing equity as encompassing non-monetary remedies in addition to monetary damages). In a modern layperson's parlance, the losses experienced by such a "wicked" plaintiff reflect the plaintiff's morally deserved "bad karma." *See*, *e.g.*, United States v. Kieu Minh Nguyen, 246 F.3d 52, 54 & n.3 (1st Cir. 2001) (addressing the defendant's position that the victim had to "get what [was] coming" being "beset by bad karma [due to the victim's] evil deed[s]").

[119] *See supra* notes 105-114 and accompanying text (tracing the development of the concept of legal equity from antiquities to English chancery).

[120] *See* Gaines v. Chew, 43 U.S. 619, 647-50 (1844) (tying equity fostered by English chancery to the vision of equity in American jurisprudence).

[121] *Accord* GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 3-4 (1982) (observing that the U.S. Supreme Court favors unfettered judicial discretion as to equity matters); *accord* Am. Ins. Co. v. Lucas*,* 38 F. Supp. 896, 921 (W.D. Mo. 1940) ("A court of equity is so [z]ealous in guarding itself against [wicked plaintiffs] that it will, *sua sponte*, apply the maxim [of 'clean hands'] whenever it discovers the unconscionable conduct."), *aff'd sub nom.,* Am. Ins. Co. v. Scheufler, 129 F.2d 143 (8th Cir. 1942); *see also supra* note 103 (noting judicial tendency to resort to or at least reference equity even in matters of pure law).

[122] *See*, *e.g.*, Bruce Green & Rebecca Roiphe, *Judicial Activism in Trial Courts*, 74 N.Y.U. ANN. SURV. AM. L. 365 (2019) (analyzing the roots and manifestations of judicial activism and its perceived overlap with political bias).

[123] Unfortunately, allegations of judicial activism are often framed in terms that could be perceived as politically influenced. Moreover, while expressed in nearly identical terms, accusations of letting wrongdoers to go scot-free tend to characterize judicial opinions as liberal activism, while accusations of throwing the book at insufficiently culpable defendants tend to characterize judicial opinions as conservative activism. *Compare* Turner v. United States, 396 U.S. 398, 426 (1970) (Black, Douglas, JJ., dissenting) (objecting to an affirmance of penal conviction and stating, "I wholly . . . reject the so-called 'activist' philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of 'fairness and decency'"), *with* Boumediene v. Bush, 553 U.S. 723, 806, 850 (2008) (Roberts, C.J., Scalia, Thomas, Alito, JJ., dissenting) (opining that constitutional privileges should be inapplicable to foreigners held outside the U.S. borders because a "principle applied only when unimportant is not much of a principle at all, and charges of judicial activism are most effectively rebutted when courts . . . are following normal practices. . . . The Nation will live to regret what the Court has done today").

rushed to ease the arduous burden of judicial conscience searching by enacting statutes[124] and promulgating regulations[125] to streamline equitable findings.[126] Once this codification tide reached the VA overpayment law,[127] the VA three-headed Cerberus was born.[128] However, as it is not uncommon with written criteria designed to inspire morality,[129] the legal provisions defining the heads of the VA Cerberus, *i.e.*, fraud, bad faith, and misrepresentation,[130] differ in terms of their descriptive precision.[131] Indeed, even though the concept of fraud has already enjoyed an ample share of descriptions,[132] including during two and a half millennia since it had entered Roman law[133] (which, in turn, had built on actions *in rem* perfected in ancient Greece during the

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[124] *See generally, e.g.*, Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996) (examining the relation between legislators and the judiciary).

[125] *See*, *e.g.*, Paul J. Larkin, Jr., *Agency Deference After Kisor v. Wilkie*, 18 GEO. J.L. & PUB. POL'Y 105, 120-23 (2020) (discussing the powers of courts and federal agencies against the backdrop of a VA litigation).

[126] *Cf.* Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 283-89 (examining the regulatory boundaries of equity).

[127] Originally, the codification trend of VA equity relevant to waiving the recoupment of VA overpayments materialized in 38 U.S.C. §§ 1666, 1766, *repealed by* Veterans' Readjustment Benefits Act, Pub. L. 89-358, §§ 3(a)(3), 4(a), 80 Stat. 23 (1966).

[128] *See* 38 U.S.C. § 5302(c); 38 C.F.R. § 1.965(b).

[129] Legislative/executive desire to instill morality through law is common in many areas of law. *See generally*, *e.g.*, Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007) (analyzing morality in intellectual property law); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111 (1999) (examining morality in family law).

[130] *See* 38 U.S.C. § 5302(c); 38 C.F.R. § 1.965(b).

[131] *See generally*, *e.g.*, Sara Gold, *Does Dilution "Dilute" The First Amendment?: Trademark Dilution and the Right to Free Speech After Tam and Brunetti*, 59 IDEA (FRANKLIN PIERCE CENT. INTELL. PROP. L. REV. 2019) 483, 509-10 (pointing out certain laws are intentionally broadly stated because they seek to advance government interests).

[132] *See* First State Bank of Miami v. Fatheree, 847 S.W.2d 391, 395 (Tex. App. 1993) ("[I]t is the generally accepted rule that there can be no all-embracing definition of fraud, but that each case must be considered upon its own peculiar facts."); Clayton A. Morton & Tyler G. Doyle, *The Applicability of the Crime-Fraud Exception in Fraudulent Transfer Cases: Does a "Fraud" by Any Other Name Smell as Sweet?*, 60 S. TEX. L. REV. 655, 671 (2000) (assessing various attempts by federal courts and six state courts to define fraud).

[133] *See generally*, *e.g.*, Thomas C. Grey, *Symposium*: *Accidental Torts*, 54 VAND. L. REV. 1225, 1269 n.132 (2001) (discussing the history of fraud as a Roman-law concept viewed through Oliver Wendell Holmes Jr.'s vision of jurisprudence).

preceding millennium and a half),[134] the VA Office of General Counsel (OGC)[135] still felt compelled to explain that a waiver analysis on the merits should not be denied based on a debtor's fraud unless the evidence of fraud was overwhelming.[136] To put it in terms of Greek mythology, a denial of the waiver analysis on the merits is warranted only upon a finding that the evidence of the debtor's fraud reveals a conduct akin to the antics of Apate, the Greek goddess of deceit known for clouding the minds of her naïve victims and then happily throwing sharp daggers into their invitingly vulnerable backs.[137] Given that the OGC's definition of fraud yields an image incompatible with that of a sanctified litigant,[138] the Board adjudicators of overpayment cases avoid using the word "fraud," at least in its undiluted form, as if it were a branding iron.[139] Correspondingly, they examine the facts of their cases through the blurrier but a bit more courteous lenses of "bad faith" and "misrepresentation." Unfortunately, by now, the psychology of VA law has reached such a tipping point that the phrase, "bad faith," has also lost its original meaning, *i.e.*, that the

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[134] *See generally*, *e.g.*, Max Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109 (1931) (tracing Greek roots of the Institutes of Justinian, a portion of the Byzantian Corpus Juris Civilis that codified Roman law); Deirdre Dionysia von Dornum, *The Straight and the Crooked: Legal Accountability in Ancient Greece*, 97 COLUM. L. REV. 1483, 1489-90 & nn. 37-43 (1997) (noting the changes in societal attitude toward fraud as fomenting the transition from Draco's Athenian legal code, 621 B.C.E., to Solon's legal code, 594 B.C.E.).

[135] OGC's precedential opinions are binding on the Board. *See* Hornick v. Shinseki, 24 Vet. App. 50, 52-53 (Vet. App. 2010).

[136] *See* Vet. Aff. Op. Gen. Couns. Prec. 4-85 (Sept. 16, 1985) (cited in Name Redacted, No. 00-11 585, 2001 BVA LEXIS 28759, at *11 (B.V.A. Apr. 17, 2001), upon being referred to as VAOPGCPREC 4-85) (since the Board has adopted the Court's unique method of citing OGC's precedential opinions).

[137] *See*, *e.g.*, *Apate*, THE APPENDIX TO THE HANDBOOK OF THE MARVEL UNIVERSE (June 1, 2019), http://www.marvunapp.com/Appendix8/apateolympian.htm [https://perma.cc/C5R2-2BQB]; Aaron J. Atsma, *Apate*, THEOI PROJECT (Nov. 7, 2022), https://www.theoi.com/Daimon/Apate.html [https://perma.cc/X7T7-9JLD].

[138] *Accord* Taylor, *supra* note 26 and accompanying text (discussing the incompatibility of sanctification and disapproval).

[139] *See*, *e.g.*, Jason R. Steffen, *A Kantian & Communicative Approach to Criminal Adjudication*, 71 SYRACUSE L. REV. 1333, 1363 n.87 (2021) (conceding a civil defendant's societal stigma ensuing from a judicial finding that (s)he was at fault).

debtor engaged in deception to unduly receive funds at U.S. taxpayers' expense.[140]

Instead, the phrase, "bad faith," has become perceived as a hint of moral judgment because the word "bad," unless used in a positive colloquial idiom[141] unsuitable for a judicial opinion,[142] implies, well… nothing good.[143] And while in any other area of jurisprudence, such a hint of moral judgment would be common, if not outright expected, where an adjudicator is called to address an act of bad faith,[144] an adjudicator's very thought of using the word "bad" in the same sentence with the word "veteran" or the phrase "veteran's surviving spouse," is a *faux pas*[145] of such a magnitude that this very thought immediately materializes the other face of Janus hiding behind the well-known paternalistic face of VA law. Invisible to others, this morbid other face hovers over

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[140] VA funds are supplied by the U.S. Department of Treasury that obtains them from taxpayers, and the regulation defines "bad faith" as an "unfair or deceptive dealing by one who seeks to gain thereby at another's expense," *i.e.*, as a conduct "undertaken with intent to seek an unfair advantage, with knowledge of the likely consequences, and [that] results in a loss to the government." 38 C.F.R. § 1.965(b)(2); *accord* Name Redacted, No. 08-03 564A, 2020 BVA 20-052785 (B.V.A., Aug. 10, 2020) (finding that, by manufacturing false medical and business records, a veteran embezzled $561,725.22 from VA).

[141] "[B]ad isn't always a bad thing[;] . . . using bad as a word of approval started in the 1890s and was popularized in the 1920s." *Not All Bad: 7 Ways "Bad" Can Be Good*, DICTIONARY.COM (Jan. 22, 2019), https://www.dictionary.com/e/when-bad-really-means-good/ [https://perma.cc/U2AE-AZ44] [hereinafter *Not Bad*] (noting that the word "badass" is a compliment, and expressions "bad boy," "bad liar," and "badly enough," have positive connotations in certain contexts).

[142] Colloquial idioms are rare in judicial opinions and, if used, come with extenuations. *See*, *e.g.*, Tolfree v. Wetzler, 22 F.2d 214, 218 (D.N.J. 1927) ("The solicitor, to drop into the vernacular, . . . ha[s] been 'a glutton for punishment.'").

[143] *See Not Bad*, *supra* note 141 ("The word 'bad' is well, just that. Its original meaning is still the most common one . . . : 'not good in any manner or degree.'").

[144] *See*, *e.g.*, Fink v. Gomez, 239 F.2d 989, 994 (9th Cir. 2001) (noting that "bad faith" includes "recklessness when combined with an additional factor such as . . . an improper purpose"); *accord* In re Intelligroup Sec. Litig., 527 F. Supp. 2d 262, 383 (D.N.J. 2007) (quoting a tongue-in-cheek Shakespeare-based admonishment in Kaplan v. U.S. Off. of Thrift Supervision, 104 F.3d 417, 423 (D.C. Cir. 1997), for an observation that "the key deficiency of [p]laintiffs' [counsels'] pleadings [is that they] offer the reader the degree of factual precision equal to that of the famous line 'Something is rotten in the state of Denmark'").

[145] *See* Taylor *supra* note 26 and accompanying text (discussing the incompatibility of sanctification and disapproval).

the adjudicator's keyboard[146] staring at him/her with a heavy gaze reminding the adjudicator about the first unwritten rule of VA legal writing, *i.e.*, that – unless the record demonstrates that the debtor's conduct is indistinguishable from the antics of Apate – no language that could be perceived as conveying even the slightest hint of moral judgment about a veteran or their surviving spouse may escape the exorcism by edit.[147]

Hence, a Board adjudicator pondering over which of the three heads of the VA Cerberus to invoke in order to decline the waiver analysis on the merits tends to resort to the last option, *i.e.*, misrepresentation, since it appears innocent enough.[148] And why not? After all, even a small child caught munching a cookie commits misrepresentation if (s)he cutely reports to an inquisitive parent that the child has been chomping down an apple.[149] However, the

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[146] Judicial self-restraint might be praised or condemned, *compare* Ronald Kahn, *Pluralism, Civic Republicanism, and Critical Theory*, 63 TUL. L. REV. 1475 (1989) (criticizing judicial self-restraint as an undue delegation of moral decision-making to local communities that might choose Platonian preference for a greater good for a greater number of people instead of Kantian protections of an individual), *with* Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105 (2009) (praising judicial self-restraint as fidelity to law). However, a version of judicial self-restraint yielding a tendency to self-censor the actual letter of law in order to uphold its spirit is a uniquely VA-law phenomenon.

[147] *Accord* Reyes v. Nicholson, 21 Vet. App. 370, 377-78 (Vet. App. 2007) ("[I]t is . . . the Board's responsibility to clearly articulate its reasons and bases for finding [bad faith since such a finding could only be made upon considering] the level of the [debtor's] education, the existence of any language barriers, any assistance [(s)he] had in completing income-reporting forms, information submitted to any other federal agency requiring income reporting . . . , and any statements from friends and family members regarding the [debtor's] knowledge and intent in attempting to comply with the [VA] requirements by reporting [their] income . . . .").

[148] *See* 38 U.S.C. § 5302(c); 38 C.F.R. § 1.965(b).

[149] *See* Eileen Kennedy-Moore, *Why Kids Lie and What to Do About It*, PBS KIDS FOR PARENTS (OCT. 16, 2015), ("'Did you eat the . . . cookie?' you demand of your child. 'No,' your child answers, around a mouthful of cookie crumbs. Lying is common among children. . . . [A] study . . . found that 96 percent of young children lie [frequently]. Four-year-olds lie . . . every two hours, and six-year-olds lie . . . every hour."), https://www.pbs.org/parents/thrive/why-kids-lie-and-what-to-do-about-it [https://perma.cc/NK5H-S3ZR].

somber reality of law is that legal timidity always comes at a price, and VA law is no exception.[150]

Therefore, once a finding of fraud or bad faith is courteously repackaged by an adjudicator into misrepresentation, this courteous bundle begins a life of its own and transforms into a legal counterpart of the Trojan horse[151] since it looks harmless[152] because all the "badness" is now hidden inside,[153] but this badness waits to jump out and slaughter the adjudicator's decision on appeal[154] given that the repackaged bundle begs the rhetorical question, "why, oh why, in the name of all mythological heroes who escaped

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[150] *See* Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1628-29 (1988) (alteration in original) ("[A] judge needs . . . moral courage and integrity, . . . the ability to strike balances between activism and restraint, daring and humility, vision and caution. . . . [(S)he also] needs to be slightly schizophrenic [since] a person with the required wisdom and integrity is unlikely to be self-restrained . . . ; a person with this deep sense of responsibility is unlikely to bend uncritically to what [(s)]he may see as absurd . . . .").

[151] The phrase "[t]rojan horse" implies a device appearing both attractive and harmless. *See* Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 78-79 (2001) (describing a Trojan horse "computer virus [as a tempting feature that, once acted upon,] causes unexpected and, for the victim, undesirable development . . .").

[152] *See* HOMER, THE ODYSSEY, *Demodocus Sings of the Fall of Troy*, Bk VIII 469-520 (A.S. Kline trans., Poetry in Translation 2004) ("The Trojans themselves had dragged [the wooden horse with soldiers hiding inside it] into the citadel. . . . For it was [Troy's] destiny to be destroyed when the city accepted that . . . horse . . . ."), https://www.poetryintranslation.com/PITBR/Greek/Odyssey8.php [https://perma.cc/M9XS-D8PG].

[153] Two decades prior to *Hayes*, *e.g.,* the Court firmly refused to entertain an argument that a debtor's conduct was just a tad more grievous than a non-willful misrepresentation. *See* Baker v. West, No. 97-160, 1999 U.S. Vet. App. LEXIS 206, at *5-6 (Vet. App. 1999) (declining to credit the debtor's "contention that she did not know that she had to report the omitted income" since the RO had "informed [her] on numerous occasions that she had to report any income"). However, the beginning of the 21st century has had more impact on the societal linguistic sensitivities than the preceding millennia. Correspondingly, while the *Baker* Court upheld the Board's conclusion that the debtor's misrepresentation was sufficiently grievous for "a plausible basis in the record [to uphold] [….] that . . . [debtor] had knowingly misrepresented her . . . income[,]" the *Hayes* Court applied the very same standard of review but invested pages to merely state that "the Board still provided sufficient explanation for its findings to permit effective review by the Court[.]" *Compare*, *e.g.*, *Baker*, 1999 U.S. Vet. App. LEXIS 206, at *4, *6 (alteration in orginal) (citing another source), *with* Hayes v. McDonough, 35 Vet. App. 214, 221 (Vet. App. 2022) (holding the Board's conclusions satisfactory under 38 U.S.C. § 7104(d)).

[154] *Accord* Hearing, *supra* note 48 (argument of the widow's counsel).

death of funeral pyres to be anastasised for eternity,[155] did this heartless adjudicator deny this pitiful and not-all-that-wicked debtor the waiver analysis on the merits if even this cruel adjudicator himself/herself conceded that the debtor committed… well, you know, a misrepresentation, that might have been only an incy-wincy more grievous than an adorable fib of a small child?"[156] Like classic Greek tragedies,[157] the answer to this rhetorical question is complicated by the fact that, among the VA Cerberus' three heads, the misrepresentation one is the least defined,[158] *i.e.*, the regulations merely state that misrepresentation bars the waiver analysis on the merits if a statement/omission at issue was made as to a material fact[159] and more-than-non-willfully,[160] *i.e.*, due to something "more than [the claimant's] non-willful[ness] or mere inadvertence."[161] While this regulatory language is in harmony with the distinction between accidents and "things of confidence" drawn since chancery courts,[162] the enabling statute adds another dollop of complication because, in sync with the Supreme Court's preference to leave equitable goal-posting to

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[155] *Accord* Joshua J. Mark, *The Death of Hercules in The Life of Hercules in Myth & Legend*, WORLD HIST. ENCYCLOPEDIA (July 23, 2014), https://www.worldhistory.org/article/733/the-life-of-hercules-in-myth—legend [https://perma.cc/V34G-7N7Z] (describing Hercules' survival of funeral pyre and his anastasis).

[156] *See* Kennedy-Moore *supra* note 149 (detailing the statistical commonality of lying among small children).

[157] *Agonia*, Greek for "contests," *i.e.*, Attic public debates that shaped the style of Greek tragedies, which typically included tormenting deaths and gave rise to the modern meaning of the word "agony," could be analogized to litigations over concepts potentially requiring linguistic interpretations. *See* Adi Parush, *The Courtroom as Theater and the Theater as Courtroom in Ancient Athens*, 35 ISRAEL L. REV. 118, 125-26, 133-34 (2001).

[158] *Compare* 38 C.F.R. § 1.965(b)(1) *with* 38 C.F.R. § 1.965(b)(1); *cf*. Vet. Aff. Op. Gen. Couns. Prec. 4-85.

[159] 38 C.F.R. §§ 1.962(b),1.965(b) (2022).

[160] 38 C.F.R. § 1.962(b).

[161] *Id.*

[162] *See supra* notes 113-15 and accompanying text (detailing the vision of equity in English chancery courts).

triers of fact[163] (*i.e.*, Board administrative judges[164]), the statute is utterly silent as to what misrepresentation is or is not.[165]

As an ensnaring Siren,[166] this statutory silence lures a debtor precluded from the waiver analysis on the merits by the Board's finding that their overpayments arose from their own misrepresentation to assert that the misrepresenting was… well, you know, kinda non-willful[167] and surely less culpable than the devious more-than-non-willful misrepresentation the statute had envisioned.[168] Once made, this assertion immediately materializes the other face of Janus who, gleefully giggling, prompts the debtor's counsel to request the Court's definition of non-willfulness.[169] And – although such a request unabashedly shows that the debtor now seeks to have their bad faith that had been courteously repackaged by the Board into "a" misrepresentation recharacterized into a *bona fide* non-willful misrepresentation,[170] the obvious fact that the counsel seeks to inject the debtor's litigation with a *mens rea* wholly inapposite to the circumstances of the debtor's case would be left conveniently unnoticed by the Court[171] because, by then, the other face of Janus has already moved its morbid gaze to the judges of the Court, prompting them to earnestly ponder over whether they need a definition of non-willfulness to adjudicate a case of textbook willfulness.[172] Moreover, even though the feat of

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[163] *See supra* text accompanying notes 113-121 (comparing the vision of equity by the U.S. Supreme Court to that held by English chancery courts).

[164] Factual findings made by the Board should not be disturbed unless the Court establishes that the findings were "plainly erroneous." Reyes v. Nicholson, 21 Vet. App. 370, 377 (Vet. App. 2007); *but see Matter of Fact*, *supra* note 18 (addressing the Court's occasionally substantial liberties with the Board's factual findings), *see also infra* note 189 (providing a recent example of such liberties that, unfortunately, have become more frequent as time went by).

[165] 38 U.S.C. § 5302(c).

[166] "In Greek mythology, the Siren is a half-bird, half-woman creature that uses their enticing songs to lure sailors to the rocky shores and their subsequent demise." Bruce Meredith & Mark Paige, *Reversing* Rodriguez*: A Siren Call to a Dangerous Shoal*, 58 HOUS. L. REV. 355, 360 (2020) (citation omitted).

[167] Hearing, *supra* note 48 (argument of the widow's counsel).

[168] *Accord* Hayes v. McDonough, 35 Vet. App. 214, 218 (Vet. App. 2022).

[169] Hearing, *supra* note 48 (argument of the widow's counsel).

[170] *Id.*

[171] *But see supra* note 19 (discussing judicial response to analogous arguments raised in non-VA matters).

[172] *See generally*, *Hayes*, 35 Vet. App. at 219.

defining the Jersey barrier[173] that would separate non-willfulness from willfulness is a yet-to-be sung Herculean Labor,[174] the morbid gaze of Janus would also bar the Court from stating that no interpretative feats are needed here:[175] since the word "misrepresentation" was just a polite misnomer, and the facts of the case are so filled with the debtor's bad faith that their conduct qualifies as more-than-non-willful regardless of where non-willfulness ends and more-than-non-willfulness begins.[176] Instead, the Court would embark on a legal Odyssey in the hope to defeat all the badness that is now hiding inside the Trojan horse of the Board's misnomer while the Court navigates the psychologically rugged seas of VA law flowing along its treacherous linguistic reefs.[177]

V. A JUDICIAL VOYAGE OF MANY OBSCURITIES AND A SPARK OF ENLIGHTENMENT

A counterpart of Homer's original, *Hayes* is a ballad recorded during such an Odyssey.[178] Thus, although drafted by one of the

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[173] The phrase "Jersey barrier" refers to concrete or plastic barriers that firmly separate highway traffic. *See generally*, *e.g.*, *How Jersey Barriers Got Their Name: The Birth and Evolution of Today's Highway Barricades*, OTW SAFETY JOURNAL, https://otwsafety.com/blog/how-jersey-barriers-got-their-name (last visited Dec. 10, 2022) [https://perma.cc/6U8D-ZLSB].

[174] *Cf.* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1256 n. 184 (1985) (discussing the labors of judicial interpretation).

[175] *See generally*, *Hayes*, 35 Vet. App. at 220-21 (investing an extensive analysis to establish, without expressly stating, that systemic concealment of various types of income, if done month after month, is a conduct that human psyche cannot harmonize with non-willfulness).

[176] *Accord supra* note 153 (providing an example of the Court's declining willingness to call out factually unhinged legal arguments).

[177] *Cf. Hayes*, 35 Vet. App. at 218-21 (packing the Court's decision with obscurities in order to avoid stating the regretful but nonetheless inescapable fact that the widow was… well, a liar).

[178] *See id.* (demonstrating that, just like Odysseus, the Court could spend the bulk of its voyage wandering, interpreting obscure omens, and testing approaches that kept proving insufficient one after another until the Court feels that enough words have been written to finally write the sole completely unambiguous word: "AFFIRM[ED]").

best bards of VA jurisprudence,[179] *Hayes* is jam-packed with boustrophedonic obscurities.[180] Since those who write clearly have readers, while those who write obscurely have commentators,[181] *Hayes* entices a reader into deciphering the Court's ballad by translating its Homeric Greek passages[182] into mundane, psychologically uncharged legal English.

On its first read, *Hayes* appears bland, creating a false impression that the Court skittishly focused on the facts of the case,[183] thus implicitly signaling that no general rule was

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[179] Judge Joseph L. Toth authored the *Hayes* opinion. *See id.* While excellent opinions penned by Judge Toth are too numerous to mention, the majority opinion in Rosinski v. Wilkie, 32 Vet. App. 264, 265-76 (Vet. App. 2020), exemplifies his ability to address complex overpayment matters with utmost clarity, his dissent in Huerta v. McDonough, 34 Vet. App. 76, 83-84 (Vet. App. 2021), verifies his readiness to call things as they are, *accord* Anna Kapellan, *Equal Convincingness as a Potential Prerequisite to Auer Deference*, VETERANS L.J. 32 (Vol. II, 2021) (discussing the thoughtful analysis provided by Judge Toth in *Huerta*), and his concurrence in Atilano v. McDonough, 35 Vet. App. 490, 494-96 (Vet. App. 2022), demonstrates courage few judges have ever exhibited. Correspondingly, the ambiguities in *Hayes*, 35 Vet. App. 214, signify that the unique, Janusian psychology of VA law – rather than the lack of legal, literary, or analytical brilliance, or adjudicatory courage – is the ill that breeds obscurities.

[180] "[U]sually associated with ancient Greek, boustrophedonic writing" is a stochastic method of inscription since it "could be written every which way – up and down, right to left, left to right – [and] also with alternate lines having reversed word order, so you read from left to right on one line and right to left on the next." Michael Quinion, *Boustrophedonic*, WORLDWIDEWORDS (Mar. 7, 1998), https://www.worldwidewords.org/weirdwords/ww-bou1.htm [https://perma.cc/5SGV-YUMS]; *see also* Fredrik Thomasson, *Justifying and Criticizing the Removals of Antiquities in Ottoman Lands: Tracking the Sigeion Inscription*, 17 INT'L J. CULT. PROP. [XXX], 493-517 (2010) ("[…]boustrophedon [looks] as the ox plows [in the sense that it is] starting [the first line] from left to right, with the next line following on from right to left [and so forth][.]").

[181] *See* Giovanni Gaetani, *The Noble Art of Misquoting Camus – From Its Origins to the Internet Era*, *in* J. CAMUS STUD. 37, 48 n.40 (Peter Francev ed. 2015), (replicating the usually simplified quote in its French original and, as done here, the English translation of Camus' sardonic observation, "Ceux qui écrivent obscurément ont bien de la chance: ils auront des commentateurs. Les autres n'auront que des lecteurs, ce qui, paraît-il, est méprisable," *i.e.*, "Those who write obscurely are very lucky: they will have commentators. The rest [of us] will only have readers, which[,] in my opinion,] is despicable." (quoting ALBERT CAMUS, 4 ŒUVRES COMPLÈTES 1087 (2013)).

[182] *Cf.* Anna North, *Historically, Men Translated the Odyssey. Here's What Happened When a Woman Took the Job*, VOX (last visited Nov. 20, 2017) (discussing the difference in perceptions conveyed by translators who were all male and a new take that was offered by the first female translator who construed many symbolic passages differently), https://www.vox.com/identities/2017/11/20/16651634/odyssey-emily-wilson-translation-first-woman-english [https://perma.cc/W764-6HTF].

[183] *See Hayes*, 35 Vet. App. at 216-18.

feasible.[184] The second reading of *Hayes* is similarly insipid since it offers merely a trite prudential lesson[185] that, if a debtor's statements/omissions cannot effortlessly be analogized to Apate's antics,[186] a thumbnail waiver analysis on the merits should be the solution because even a rudimentary denial on the merits offers peace of mind to the debtor,[187] enables their counsel to sift through the Board's findings to their heart's content,[188] and gives courts a nail to hang their hats on.[189]

The third reading of *Hayes* reveals that the Court sought to find its way of dropping "misrepresentation" right at the doorstep of "bad faith" by *de facto* merging them into a single *mens rea*[190] even though – during the *Hayes* oral arguments – the Court itself insisted that "fraud," "bad faith," and "misrepresentation" designated three different *mentes reæ*, each corresponding to its own head of the VA Cerberus.[191] Rowing back on its initial position, the Court stated that the analysis of the widow's waiver claim on

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[184] *Accord id.* at 221 ("[T]he Board still provided sufficient explanation for its findings to permit effective review by the Court . . . .").

[185] *Cf.* HOMER, THE ODYSSEY, *Odysseus Tells His Tale: Punishment from Zeus*, Bk XII: 374-453 (scoffing at pointless recitals of what has already been told since "[i]t's a tedious thing to re-tell a plain-told tale"), https://www.poetryintranslation.com/PITBR/Greek/Odyssey12.php [https://perma.cc/2U53-F6BV].

[186] *See supra* notes 147 and accompanying text (detailing the rationale for explanations provided by the Board).

[187] *Accord* Sharp v. Shulkin, 29 Vet. App. 26, 31 (Vet. App. 2017) (further elaborating on the rationale for the "reasons and bases" requirement).

[188] *Cf.* Hearing, *supra* note 48.

[189] *See infra* notes 280-286 and accompanying text (detailing the elements of the waiver analysis on the merits). Notably, while the Board's equitable waiver analysis on the merits eases the Court's review, it offers no protection to the Board since a remand upon finding that the Board "insufficiently explained" the bases for its decision has become such a darling of the Court that a representative appealing a Board decision may succeed at asserting insufficiency of explanation regardless of how thorough the Board's explanation was. *Compare* Named Redacted, No. 13-34 081A, 2016 BVA LEXIS 4116 (B.V.A. Dec. 28, 2016) (stating that "[n]either the facts of this case nor the Veteran's allegations raise the issue of extraschedular consideration"), *with* Moran v. Wilkie, 31 Vet. App. 162, 164 (Vet. App. 2019) (issuing a remand in the same case upon claiming that the Court was "unable to determine whether the Board found the [extraschedular] issue not reasonably raised, or . . . reasonably raised").

[190] To stress its "bad faith" finding, regardless of using the word "misrepresentation," the Board emphasized, "that the [widow's] failure to report all her income on her initial application and update VA as her income increased constituted willful misrepresentation *and bad faith*." Name Redacted, No. 14-10 754A, 2019 BVA LEXIS 126857, at *2 (B.V.A. Oct. 28, 2019) (emphasis added).

[191] *See* Hearing, *supra* note 48 (initial observations by Toth, J.).

the merits should have been "barred because [she had] misrepresented . . . her income [doing] so in bad faith."[192] Therefore, the Court acknowledged the widow's bad faith courteously repackaged by the Board into misrepresentation and *de facto* ruled on her bad faith[193] by trying to spread just enough finding of "badness" over her "misrepresentation" without putting too much spotlight on her dishonesty.[194]

At its fourth reading, *Hayes* becomes entertaining since it reveals what happens when the Court itself writes under the morbid gaze of the Janus' other face.[195] Specifically, the Court had to reflect on the widow's counsel's two assertions.[196] One was that, since the statute did not define misrepresentation, the statutory silence had to mean that the word "misrepresentation" should have been construed in accord with its dictionary's meaning:[197] as a statement/omission made with intentional or reckless, or negligent *mens rea*.[198] The counsel's other assertion, made simultaneously with the foregoing, was that the Board erred by excluding the negligent *mens rea* from its application of the implementing regulation.[199]

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[192] Hayes v. McDonough, 35 Vet. App. 214, 215 (Vet. App. 2022).

[193] *See id.*

[194] Since the difference between the Court's conclusion that the widow "misrepresented . . . her income [doing] so in bad faith," *see id.*, and the Board's finding that the widow's conduct "constituted willful misrepresentation and bad faith," *see* Names Redacted, No. 14-10 754A, 2019 BVA LEXIS 126857, at *2 (B.V.A. Oct. 28, 2019), is semantic at best, it is dubious that the Board's future use of the Court's language, even if replicated verbatim, would deter vexatious appeals analogous to *Hayes*.

[195] *See Hayes*, 35 Vet. App. at 218-19.

[196] *See* Hearing, *supra* note 48 (argument of the widow's counsel).

[197] *Id*.

[198] *Id.*; *see also Hayes*, 35 Vet. App. at 218. Simply put, the widow's counsel's assertion mixed a teaspoon of the Chevron, U.S.A., Inc. v. NRDC, Inc., 67 U.S. 837 (1984), powder into a bucket of the Auer v. Robbins, 519 U.S. 452 (1997), brew but nonetheless labeled the resulting potion a *Chevron* challenge. *See infra* note 200 (discussing the constitutional law error made by the widow's counsel).

[199] *See Hayes*, 35 Vet. App. at 218-19.

While the first of these assertions was merely bewildering,[200] the second was striking since the joint effect of both assertions rendered the counsel's arguments against the widow's legal interests. Indeed, since the counsel sought to recharacterize the widow's intentional/reckless failure to inform VA of any form of her non-VA income into non-willfulness, the widow could prevail only had the Board: (a) excluded the negligent *mens rea* from its reading of the regulation; and (b) bought the counsel's recharacterization in order to avail the widow to the waiver analysis on the merits.[201] However, the Board did the former but not the latter,[202] meaning that the widow's counsel had no reason to complain about the Board's regulatory construction: since that construction was in her favor. Conversely, had the Board included negligent *mens rea* into its regulatory reading of "misrepresentation," as the widow's counsel sought on appeal to the Court, the widow would have been barred from the waiver analysis on the merits regardless of whether the Board bought or rejected her counsel's argument that the widow's conduct was "kinda non-willful."[203] Notably, had an attorney litigating any non-VA matter raised a legal argument against their client's interests, the court would be quick to politely ridicule the incongruity,[204] while the client would have expressed their gratitude for the counsel's ingenuity in a legal malpractice

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[200] The "difference between *Chevron* and *Auer* [is in] the distinction between an agency's informal interpretations of its own regulations" for the purposes of applying its own regulations, "which are entitled to *Auer* deference," and the agency's interpretation of the enabling statutory mandate for the purposes of assessing whether the agency's implementing regulation, as drafted, not as applied, is "entitled to *Chevron* deference." Go v. Holder, 744 F.3d 604, 612 (9th Cir. 2014) (original brackets, citations, and internal quotation marks omitted). "[T]he rigors of rulemaking are pertinent to . . . why, in the context of an agency's statutory interpretation, courts . . . apply principles of *Chevron* deference. [But], once an agency has undertaken careful deliberation about how best to effectuate statutory policies during the demanding process of promulgating regulations," *i.e.*, during administrative notice-and-comment process yielding a regulation, "it makes sense to demand less formality of an agency's subsequent interpretation of its own regulation[,]" and this is why, "in the latter context, the principles of *Auer* deference are appropriate." *Id.*

[201] *See Hayes,* 35 Vet. App. at 219; *but see* Hearing, *supra* note 48 (argument of the widow's counsel).

[202] *See generally*, Named Redacted, No. 14-10 754A, 2019 BVA LEXIS 126857, at *2 (B.V.A. Oct. 28, 2019).

[203] *Accord* 38 C.F.R. § 1.962(b).

[204] *See* Delahoussaye v. Performance Energy Servs., L.L.C., 734 F.3d 389, 393 (5th Cir. 2013).

suit.[205] However, since – in the universe of VA law – an attorney may raise any "bridge-too-far" argument,[206] the *Hayes* Court avoided a blunt discussion of the counsel's self-defeating position and, instead, merely stated:

> [V]eterans law defines . . . "willful misconduct" [as] "an act involving conscious wrongdoing or known prohibited action" that "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." . . . And, [here,] the Board found that [the widow] acted with this level of culpability; however, it makes little sense to challenge VA for arriving at this decision to deny waiver based on a *more claimant-protective* standard than a presumably less restrictive standard that would construe any inaccurate statement as a misrepresentation even if it was resulted from inadvertence [.][207]

A baffled reader may decipher this Homeric passage and distill the conclusion that the widow's counsel's assertions were against her legal interests only upon pondering at length over why, on earth, the Court's "more claimant-protective" phrase was italicized.[208] The reader's bewilderment would be especially appropriate because the Court also omitted to expressly deny the counsel's request to define where non-willfulness ends and willfulness begins. Instead, the Court produced four boustrophedonic sentences, reading:

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[205] *See generally*, Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689 (2006) (discussing deviations from professional responsibility amounting to legal malpractice); *accord* Barth v. Reagan, 139 Ill. 2d 399, 407-08 (1990) (collecting cases of malpractice so evident that even a layperson could recognize its actionable nature).

[206] *See generally*, Hearing, *supra* note 48 (argument of the widow's counsel); *accord supra* notes 18-21 and accompanying text (noting the *carte blanche* enjoyed by VA-law attorneys raising bridge-too-far arguments).

[207] Hayes v. McDonough, 35 Vet. App. 214, 219-20 (Vet. App. 2022) (emphasis in original).

[208] *Id*.

> [(1)] In the general hierarchy of mental states, the "descending order of culpability" runs as follows: . . . specific intent[], knowledge, recklessness, and negligence. [(2)] Willfulness [is] near the top of this hierarchy. [(3)] "In common usage[,] the word 'willful' is considered synonymous with . . . 'intentional' . . . and, although it has not . . . been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent." . . . [(4) T]he term "willful" employs a higher state of culpability than . . . "intentional," one that requires . . . actual knowledge that [the] conduct violates the law.[209]

As it happens with legal findings drafted under the morbid gaze of the other face of Janus, these four sentences bread confusion, not clarity. The first, listing the descending *mentes reæ* as "intent[], knowledge, recklessness, and negligence,"[210] if read jointly with the third one (informing a reader that the word "willful . . . refer[red] to conduct that [was] not merely negligent"), ended up implying that all three *mentes reæ* of intent, knowledge, and recklessness were willful, and only negligence was non-willful.[211]

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[209] Hayes v. McDonough, 35 Vet. App. 214, 219 (Vet. App. 2022) (emphasis in original).

[210] *Id.* (citing United States v. Bailey, 444 U.S. 394 (1980)). In *Bailey*, the Supreme Court stressed that, even "[i]n the case of most crimes, 'the limited distinction between knowledge and purpose has not been considered important.'" *Bailey*, 444 U.S. at 404 (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978)). With that, the *Bailey* Court clarified that a "specific intent" stood for a premeditated state of mind, while "knowledge" stood for the *mens rea* where a wrongdoer knew, with a substantial degree of certainty, the likely outcome of their action, but (s)he did not act with premeditation. *See id.*

[211] *Hayes*, 35 Vet. App. at 219 (quoting McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988)). Since the premeditated-*mens-rea* inquiry cannot exist in non-criminal matters, the *McLaughlin* Court clarified that – in such non-criminal matters – the word "willful" designates the state of mind corresponding to the *mens rea* of intent in criminal matters. *See McLaughlin*, 486 U.S. at 133. Thus, under the *McLaughlin* guidance, the *Hayes* Court should have arrived at the hierarchy of negligence-recklessness-willfulness. Instead, the *Hayes* Court not only created a hybrid by mixing non-criminal and criminal-law *mentes reæ*, hatching a non-existent scale of four *mentes reæ*, but also expanded the *mens rea* of willfulness to encompass both a premeditated intent inapplicable to non-criminal matters and recklessness that cannot be qualified as willfulness. *See Hayes*, 35 Vet. App. at 219-20; *see also infra* note 212 (discussing the error as to recklessness); *accord infra* note 219 and accompanying text (detailing how the Court separated willfulness from the Court's hierarchical scale).

True, this statement would not have been entirely intolerable had the Court stopped at that, although the Court's qualification of recklessness as a willful *mens rea* was indeed puzzling.[212] However, apparently wary of even a possibility of implicitly hinting that the widow was a willful wrongdoer (ah, unthinkable!), the Court interlaced its first and third sentences with the second and fourth ones.[213]

The second sentence sought to dilute this hint of moral judgment by stressing that the *mens rea* of "[w]illfulness [was] near the top" of the Court's four-*mens-rea* negligence-recklessness-knowledge-intent hierarchical scale,[214] *i.e.*, that the widow was not necessarily the worst sinner.[215] However, because the Court did not clarify what "top" it had in mind (*i.e.*, whether that "top" covered just intent, or both intent and knowledge,[216] or even intent, knowledge, and recklessness), the reader was left to understandably wonder if the top might consume the entire upper three-quarters of the Court's scale.[217] But even this oddity would not be fatal had the Court skipped its fourth sentence, *i.e.*, the one that placed "willfulness" above the *mens rea* of "intent,"[218] thus

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[212] True, since the *Hayes* Court was rowing its trireme toward a distinction between willfulness and non-willfulness, it was not entirely unreasonable for the Court to subdivide its hierarchical scale of *mens rea* into negligence and everything-that-is-not-negligence (*i.e.*, recklessness and more culpable *mens rea*), labelling the latter as many shades of willfulness. However, "cases have recognized [that] deliberate ignorance, . . . known as willful blindness, is categorically different from [both] negligence or recklessness. . . . A willfully blind defendant is one who took *deliberate* actions . . . . A reckless defendant is one who merely knew of a substantial and unjustifiable risk that [their] conduct was criminal." United States v. Heredia, 483 F.3d 913, 918 n.4 (9th Cir. 2007) (alternation in original) (citations omitted).

[213] *See Hayes*, 35 Vet. App. at 219.

[214] *Id.*

[215] *Accord supra* text accompanying notes 16, 18, 20 (noting the psychological uniqueness of VA law).

[216] Such a construction would be consistent with the *Hayes* Court's reliance on *McLaughlin*, 486 U.S. at 133, since the *mens-rea* hierarchy in *McLaughlin* had only three *mentes reæ*. *See McLaughlin*, 486 U.S. at 133.

[217] *See Hayes*, 35 Vet. App. at 219.

[218] *See id.*

putting the precedents the Court relied upon on their head[219] and demolishing the hierarchal scale the Court just built. Indeed, given that the Court placed willfulness expressly above intent, and willfulness was also the unspecified top of the Court's hierarchical scale,[220] the Court's fourth sentence blew this top off, separating it from the scale, and left the surviving ruins (that still included *mentes reæ* of "intent" and "knowledge") to remain less-than-willful for posterity.[221]

Therefore, psychologically speaking, the fourth reading of *Hayes* reveals that, just like administrative judges of the Board, the Court judges are inescapably human,[222] and – under the morbid gaze of Janus – even the most sage and eloquent bards lose their bearings.[223] Plus, as the icing on this hierarchical cake, neither

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[219] To arrive at its uncanny "willful-means-higher-than-intentional" conclusion, the Court cited *Vestal v. Dep't of Treasury*, 1 F.4th 1049 (Fed. Cir. 2021), that relied on *Jerman v. Carlisle*, 559 U.S. 573 (2010). *See Hayes*, 35 Vet. App. at 219. However, neither the Supreme Court in *Jerman* nor the Federal Circuit in *Vestal* stated what the Court ascribed to them. *Jerman* clarified the distinctions between two actions that are taken intentionally if one is taken with malice, giving rise to punitive damages, and the other is intentional but not malicious, yielding liability without punitive damages. *See* 559 U.S. at 583. In *Vestal*, the Federal Circuit cited *Jerman* for the observation "that '*even in the criminal context*, reference to a[n] . . . intentional violation . . . has not necessarily implied a defense for legal errors.'" 1 F.4th at 1056 (emphasis in original) (quoting *Jerman*, 559 U.S. at 582-85 (citation omitted)). Further, the Federal Circuit in *Vestal* stressed that "willful" and "intentional" had different meanings since "intentional" was a component of "willful." *See id.*; *accord supra* note 211 (discussing *McLaughlin*, 486 U.S. at 133). Thus, unlike *Hayes*, *Vestal* was consistent with the Supreme Court's decisions in *Bailey* and *McLaughlin* because the Federal Circuit recognized that the *mens rea* of specific intent corresponded to a premeditated state of mind and required at least the *mens rea* of knowledge, but not vice-versa. *See Vestal*, 1 F.4th at 1056. And since the *mens rea* of knowledge corresponds to willfulness in non-criminal matters, *see*, *e.g.*, *McLaughlin*, 486 U.S. at 133, the *mens rea* of specific intent imposes a higher burden-of-proof than willfulness, but not vice-versa. It follows that the Court's statement that "the term 'willful' employs a higher state of culpability than the word 'intentional,'" *Hayes*, 35 Vet. App. at 219 (quoting *Vestal*, 1 F.4th at 1055-56), was literally opposite to the precedents the Court relied upon.

[220] *See Hayes,* 35 Vet. App. at 219.

[221] *Id.*

[222] *See, e.g.*, Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 43 (2002) ("Judges bridged the gap between law and society by giving expression to the fundamental principles of society. And judges are responsible for the common law's provision of fitting solutions to life's changing needs. Naturally, over the years, judges ma[k]e mistakes.").

[223] *See supra* note 179 (noting the striking difference between Judge Toth's judicial legacy as a whole and the opinion he penned in *Hayes*).

during the scale's construction nor upon its demise did the Court address the fact that the regulation, actually, does not speak in terms of "willfulness."[224] Rather, it speaks in terms of "more than non-willfulness,"[225] hence implying that there is a precious strip of *mens rea* wedged between pure non-willfulness and true willfulness,[226] and the adjective for this yet-to-be-defined wasteland is "more-than-nonwilful" since it bars the waiver analysis on the merits once the debtor walks sufficiently far into its marshy, slurpy, everglades-like rim of the swamp that qualifies as full-fledged willfulness.[227] Had it been otherwise, the jaw-breaking "more-than-non-willful" construction would be superfluous since the word "willfulness" would do the trick even better.[228]

However, just when the reader feels cornered by the many obscurities of *Hayes*, the spark of enlightenment of a single word lights up the road to legal salvation,[229] revealing that there is no need for the Court to reinvent the wheel because a test for "more

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[224] *See* 38 C.F.R. § 1.962(b).

[225] *See id.*

[226] *See id.*

[227] Analysis of the specific facts at bar is indispensable in overpayment-and-waiver matters, but the analysis: (a) should be limited to whether the debtor's conduct falls within the near-swamp marshy *mens rea* stretching between willfulness and nonwillfulness; and (b) requires no finding that the debtor fully entered the willfulness swamp. And since the term "willful" may, but not must, encompass the *mens rea* of recklessness in non-criminal matters, *see*, *e.g.* Baylor v. Mitchell Rubenstein & Assocs., P.C., 857 F.3d 939, 951-52 (D.C. Cir. 2017) (reviewing a debt collection case where a cautious trial court excluded the *mens rea* of recklessness from the meaning of the term "willful"), it appears self-evident that a regulation speaking in terms of more-than-non-willfulness is triggered upon a showing of recklessness.

[228] While the rules of statutory and regulatory constructions differ, *see supra* note 200 (detailing the difference),

> [T]o the extent possible, the rules of statutory construction require courts to give meaning to every word and clause in a statute.' . . . And 'courts must reject [those] interpretations that would render portions of [the provision] surplusage.' . . . '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'

See United States v. Fernandez, Nos. 19-15044;19-15165, 2022 U.S. App. LEXIS 23350, at *9 (11th Cir. 2022) (alteration in orginal) (quoting Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transp. Inc., 522 F.3d 1190, 1195 (11th Cir. 2008); Russello v. United States, 464 U.S. 16, 23 (1983)).

[229] *See infra* text accompanying notes 232-237.

than non-willfulness" could be imported from another area of law.[230] This spark of intuition shows up only on the last read of *Hayes* and, like Midas' perilous gold, it is reserved only for those initiated who can touch it safely.[231]

Specifically, relying on *Rehaif v. United States*, *i.e.*, a Supreme Court's criminal-law opinion,[232] the Court stated that "the whole point of a scienter requirement is that a claimant not be penalized for 'otherwise innocent conduct'" since "the scienter element regarding a representation's truth is presented as a range, so a 'misrepresentation' can occur when a false statement is made intentionally or negligently, knowingly or recklessly."[233] True, since the beyond-a-reasonable-doubt burden of proof applicable in criminal law[234] is light years away from the uniquely watered down version of the equipoise standard governing the bulk of VA matters,[235] the Court's reliance on a criminal-law opinion was probably not the best choice, especially given that the Court managed to state that there could be such a legal creature

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[230] The value of judicial intuition cannot be overstated. *See*, *e.g.*, R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1420 (2006) (analyzing the many positives and a few negatives of the truth that "[d]eciding judicial cases inescapably requires the exercise of intuition").

[231] *See*, *e.g.*, Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 688-89 (1999) (summarizing the Midas myth and analogizing it to interdisciplinary studies of law and economics that require a specialized background).

[232] *See* Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019).

[233] Hayes v. McDonough, 35 Vet. App. 214, 219 (Vet. App. 2022) (quoting *Rehaif*, 139 S. Ct. at 2195).

[234] *In re* Winship, 397 U.S. 358, 363-64 (1970) (citations omitted) ("The [beyond-a] reasonable-doubt standard plays a vital role in the American scheme of criminal procedure" since "a person accused of a crime would be at a severe disadvantage . . . amounting to a lack of fundamental fairness[] if [(s)]he could be . . . imprisoned for years on the strength of the same evidence as would suffice in a civil case . . . . Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.").

[235] Short of narrow exceptions, VA law utilizes the equipoise burden of proof, and § 5107(b) provides that, where the evidence is at least in an approximate – even if not exact – balance, such evidence warrants a favorable finding. *See* 38 U.S.C. § 5107(b) (2022). The approximation aspect effectively means that a litigant with evidence supporting their claim at about forty-seven to forty-eight percent prevails. *See* Lynch v. McDonough, 999 F.3d 1391, 1394 (Fed. Cir. 2021) (holding that "the benefit-of-the-doubt rule may be triggered in situations other than equipoise of the evidence).

as "negligent scienter," *i.e.*, a species of *mentes reæ* unknown to jurisprudence.[236] However, the Court's mere use of the word "scienter" turned *Hayes* into a gem of VA law because scienter has been exhaustively detailed in a century-old area of administrative law where scienter reigns supreme: the law of securities regulations.[237]

VI. SECURITIES-LAW SCIENTER TESTS BEGGING IMPORTATION INTO VETERANS LAW

The word "scienter" came into English jurisprudence in the late XII or early XIII century, when traces of the Roman Law of Twelve Tables began bubbling up in medieval English legal

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[236] European civil law built on the Code Napoléon and German Kodex, *see Napoleonic Code [A]pproved in France*, HISTORY (Nov. 20, 2022), https://www.history.com/this-day-in-history/napoleonic-code-approved-in-france; David Schmid, *(Do) We Need a European Civil Code (?)*, 18 ANN. SURV. INT'L & COMP. L. 263 (2012)), knows no "negligent scienter." Same as common law jurisprudence, civil law recognizes only criminal negligence, *i.e.*, an objective test having nothing to do with the non-criminal-law concept of scienter that uses a subjective test. *Compare* Elonis v. United State, 575 U.S. 723, 738-39 (2015) (clarifying that a criminal negligence inquiry looks into "whether a reasonable person [standing in the shoes of the defendant] would have recognized the harmfulness of [the defendant's] conduct"), *with* Universal Health Servs. v. United States, 136 S. Ct. 1989, 1996 (2016) ("The Act's scienter requirement . . . mean[s] that a person has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information.") (citations and internal quotation marks omitted).

[237] "The current federal securities laws were developed in the wake of the 1929 stock market crash, which resulted in the Great Depression . . . [ensuing from] widespread . . . fraud . . . [since t]he stock was . . . sold . . . with little disclosure of relevant information . . . , leading to a speculative frenzy." Lynnise E. Phillips Pantin, *What's Wrong with Jumpstart(ing) Our Business Startups (JOBS) Act?*, 16 N.Y.U. J.L. & BUS. 185, 186-87 (2019). "As a result, Congress enacted the Securities Act of 1933 . . . and the Securities Exchange Act of 1934." *Id.* at 187-88 (referring to Pub. L. No. 73-22, 48 Stat. 74 (1933), and Pub. L. No. 73-291, 48 Stat. 881 (1934), codified as amended at 15 U.S.C. §§ 77a, 78a (2017), and implemented in C.F.R. Title 17 (2022)). Therefore, securities law focuses on disclosure of information material as to a particular transaction. *See*, *e.g.*, Henry T.C. Hu, *Disclosure Universes and Modes of Information: Banks, Innovation, and Divergent Regulatory Quests*, 31 YALE J. ON REG. 565, 586-90 (2014).

studies[238] correlating the already common adjective "wicked" with the *mens rea* of "scienter."[239] Notably, during the Roman Republic, *i.e.*, until 27 B.C.E.,[240] the word "scienter" meant only "skillfully" or "expertly," with no morally negative connotations.[241] However, during the Roman empire that followed,[242] the word transformed first into "knowingly" or "consciously,"[243] and then into what is familiar to us now: a "guilty mind"[244] indicating that a wrongdoer should be held accountable for their conduct not in a vacuum but

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[238] *See* Amir Aaron Kakan, *Evolution of American Law, from its Roman Origin to the Present: Our Legal Roots Can Be Traced to Ancient Rome*, 48 ORANGE CNTY. LAWYER 31, 32-35, 34-38 (2006) (noting that "the Tables differentiated between intentional and accidental crimes . . . [reflecting] the concept of *Mens Rea,*" and tracing the percolation of Roman law into English common law from "55 B.C.E. [when], as a part of his campaign at the Gulls, Julius Caesar attempted to conquer England"); *accord* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1059 (2012) (defining Roman-law "focus on scienter [as] an outgrowth of the idea that fraud [was] at the heart of moral turpitude" but noting that English courts expanded the meaning of scienter so to "not limit [its] use of the scienter test to fraud cases").

[239] *See* Christo Lassiter, *Lex Sportiva: Thoughts Towards a Criminal Law of Competitive Contact Sport*, 22 ST. JOHN'S J.L. COMM. 35, 83 & n. 211 (2007) ("[D]ue to the influence of [the Roman Catholic] canon[s] . . . , *mens rea* [of] scienter referred to the evilness or 'actual wickedness' of the actor"); *see also* OLIVER WENDELL HOLMES, THE COMMON LAW 54, 75 (Little, Brown & Co. 1881) (observing that certain forms of conduct could evince "actual wickedness"); *accord Morissette v. United States*, 342 U.S. 246, 252 (1952) (noting that courts, for various "purposes . . . , have devised working formul[æ, *i.e.*, terms that were] not scientific . . . [but implied] 'fraudulent intent' . . . [and] 'scienter' . . . to signify an evil purpose or mental culpability").

[240] "The Roman Republic describes the period in which the city-state of Rome existed as a republican government (from 509 B.C.E. to 27 B.C.E.) . . . ." *Roman Republic*, NAT. GEO. (Nov. 15, 2022), https://education.nationalgeographic.org/resource/roman-republic/ [https://perma.cc/D5AM-5RC3].

[241] The word "scienter" stemmed from the Latin adverb "scientē" ("knowingly, consciously, skillfully, expertly") that had derived from "sciō" ("to know") and "sciēns" ("knowledge"). *See* Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27, 33 (2d Cir. 1976); BLACK'S LAW DICTIONARY, 1463 (9th ed. 2009); WEBSTER'S THIRD NEW INT'L DICTIONARY 2032 (Philip Babcock Gove ed., 1971).

[242] *See* Eds. Encyclopaedia Britannica, *Roman Empire*, BRITANNICA (last updated Nov/ 25, 2023), https://www.britannica.com/place/Roman-Empire [https://perma.cc/L53C-DKAP].

[243] *See*, *e.g.*, 1 HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND ANTONINES, 385-86 (1902) (C.J. Clay *et al*, eds., Cambridge Univ. Press, photo. reprint 1974).

[244] *See*, *e.g.*, United States v. Skinner, 536 F. Supp. 3d 23, 45 (E.D. Va. 2021) ("Many cases on this subject use [the phrase] guilty mind [and the word] scienter interchangeably to represent the general requirement that a person know their conduct could be illegal.").

through the prism of their conduct-preceding and conduct-contemporaneous thoughts.[245]

Oddly enough, the meaning of scienter has not markedly changed since the Roman empire and, two millennia later, the Supreme Court reiterated that scienter was a mental state revealing "intent to deceive, manipulate, or defraud."[246] Thus, securities law has long established that it was illegal to make untrue statements of material facts (or to omit stating material facts necessary to make other statements – or silence – not misleading) in light of the circumstances under which the statement/omission was made.[247] Consequently, in securities-regulation law, an aggrieved party that has experienced a financial loss due to a statement/omission made by an "issuer"[248] is entitled to monetary damages if the statement/omission was materially misleading[249] plus the aggrieved party had relied on it to their

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[245] *See id.*; *cf.* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 342-43 (1998) (tracing the effects of the Roman Empire's vision of scienter on modern law); *cf.* Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 521 & n.207 (1994) (discussing the Roman-law-influenced distinction between scienter and perjury).

[246] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 185 & n.12 (1976) (detailing many shades of scienter in the main text but stressing, in the footnote, that any shade requires a *men rea* other than negligence).

[247] *See*, *e.g.*, *In re* Intelligroup Sec. Litig., 527 F. Supp. 2d 262, 282-91 (D.N.J. 2007) (analyzing the statutes, regulations, and caselaw of securities law to systemize methods establishing that a statement or omission was made with scienter).

[248] While securities law usually means a juridical entity "issuer" that generated the securities or quasi-securities financial instruments in dispute, securities law also uses the noun "issuer" to refer to officers of such a juridical entity or to a private proprietor, especially in the context of a private placement. Thus, a reference to an "issuer" as the person who generated the statement(s) underlying loss of funds allocated to VA is easily importable into VA law as a reference to a debtor who concealed information from VA. *Accord* SEC v. Gen. Audio Inc., 32 F.4th 902, 940 (10th Cir. 2022) (addressing statements made by corporate officers); *In re* Synchronoss Secs. Litig., 705 F. Supp. 2d 367 (D.N.J. 2010) (same).

[249] *See*, *e.g.*, *Intelligroup*, 527 F. Supp. 2d at 291 (providing examples); *see also infra* notes 271-272 and accompanying text (discussing materiality).

financial detriment,[250] and, but of course, if the statement or omission at issue was made with scienter.[251]

Since securities law recognizes that scienter is based on a wrongdoer's *mens rea*,[252] and it might be difficult for an aggrieved party to prove such *mens rea* with direct evidence,[253] securities law permits an inference of scienter.[254] An inference could be drawn in two ways: by evidence of the issuer's "motive and opportunity" to commit the wrong at issue[255] or by "circumstantial evidence of either recklessness or conscious behavior" on the part of the issuer.[256] When the aggrieved party "employ[s] the 'motive and opportunity' method", (s)he must establish a nexus between the

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[250] *See id.* at 291-94 (detailing methods to meet the reliance requirement). In VA overpayment-and-waiver law, the reliance aspect precedes the waiver analysis, *see* Schaper v. Derwinski, 1 Vet. App. 430, 437 (Vet. App. 1991), because the former is an implied part of the sole-administrative-error test, *i.e.*, the analysis addressing challenges to the creation of an overpayment and focusing on the causation of the overpayment, *see supra* note 70 (stating both prongs of the test). Due to the other prong of the sole-administrative-error test, even if VA somehow disbursed overpaid funds without relying on the debtor's statement/omission that qualified as fraud, bad faith, or misrepresentation for VA purposes, the receipt of VA funds that (s)he subjectively knew were disbursed in error already renders the debt properly created. *See generally*, Dent v. McDonald, 27 Vet. App. 362 (Vet. App. 2015) (providing an example of subjective knowledge of wrongful receipt). While the sole-administrative-error test overlaps with the balance-of-fault element of the waiver analysis on the merits, *compare supra* note 70 (detailing the former), *with infra* note 283 (detailing the latter), the balance-of-fault element can be reached only if the debtor clears the threshold hurdles of 38 U.S.C. § 5302(c) and 38 C.F.R. § 1.965(b), *see Schaper*, 1 Vet. App. at 437.

[251] *See*, *e.g.*, *Intelligroup*, 527 F. Supp. 2d at 282-91 (detailing the scienter requirement).

[252] *See*, *e.g.*, Ponce v. SEC, 345 F.3d 722, 731 (9th Cir. 2003) (citation omitted) ("[The *mens rea* of] recklessness satisfies [the] scienter requirement.").

[253] "In 'most cases in which [a wrongdoer's] state of mind is at issue, it may be near impossible to establish the requisite *mens rea* through direct evidence,' and therefore proof must be inferred from circumstantial evidence instead." United States v. Vega, 826 F.3d 514, 523 (D.C. Cir. 2016) (quoting United States v. Schaffer, 183 F.3d 833, 843 (D.C. Cir. 1999)); *accord* Thomas v. Adams, 55 F. Supp. 3d 552, 574 n.22 (D.N.J. 2014) ("[T]he draftors . . . did not expect the litigants to scavenge through dumpsters . . . or . . . sit in front of their computers in a hope for an email sent in error" to obtain evidence as to wrongdoers' *mentes reæ*).

[254] *See*, *e.g.*, *Intelligroup*, 527 F. Supp. 2d at 283-85 (collecting inference cases).

[255] *See id.* at 283-84 (observing that "'[m]otive entails allegations that the individual . . . stood to gain in a concrete and personal way from [their] false or misleading statements and wrongful nondisclosures'") (quoting Wilson v. Bernstock, 195 F. Supp. 2d 619, 633 (D.N.J. 2002), and relying on, *inter alia, In re* Advanta Corp. Sec. Litig., 180 F.3d 525, 535 (3d Cir. 1999)).

[256] *See*, *e.g.*, *Advanta*, 180 F.3d at 534.

issuer's actions and motive by demonstrating that the issuer: (1) benefitted in a concrete and personal way from the wrongful statement/omission;[257] (2) engaged in a deliberate or at least consciously-registered behavior when making the statement/omission;[258] and (3) either: (a) knew the relevant facts, or (b) had access to information that showed or strongly suggested that the statement/omission would yield an inaccurate picture in the mind of a reasonable audience, or (c) failed to check available relevant information that the issuer had to monitor to ensure that their statement/omission would not mislead a reasonable audience.[259] Alternatively, the aggrieved party may simply detail "the who, what, when, where, and how"[260] as evidence of the issuer's scienter, allowing the trier of fact to circle back to the "motive and opportunity" method by piecing the whole picture together[261] upon utilizing the trier-of-fact's common sense in the "I know it when I see it" fashion,[262] *i.e.*, essentially the same reasoning the *Hayes* Court used.[263]

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[257] *See*, *e.g.*, *In re* PDI Sec. Litig., No. 02-211, 2006 U.S. Dist. LEXIS 80142, at *21-22 (D.N.J. Nov. 2, 2006) (citing Glickman v. Alexander & Alexander Servs., No. 93 Civ. 7594, 1996 U.S. Dist. LEXIS 2325, at *36 (S.D.N.Y. Feb. 27, 1996), for the observation that there should be a "coherent nexus between the alleged fraudulent conduct and its alleged purpose").

[258] *See*, *e.g.*, *Advanta*, 180 F.3d at 525; *accord In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1417 (3d Cir. 1997) (citing Dileo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir. 1990), and quoting Acito v. IMCERA Group, Inc., 47 F.3d 47, 53 (2d Cir. 1995) (observing that scienter is established either "by alleging facts establishing [a] motive to commit fraud and an opportunity to do so or facts constituting circumstantial evidence of either reckless or conscious misbehavior.") (internal quotation marks and citation omitted)).

[259] *See*, *e.g.*, Novak v. Kasaks, 216 F.3d 300, 311 (2d Cir. 2000); Wachovia Equity Sec. Litig. v. Wachovia Corp., 753 F. Supp. 2d 326, 348 (S.D.N.Y. 2011); *Wilson*, 195 F. Supp. 2d at 633.

[260] *Advanta*, 180 F.3d at 534 (quoting *Dileo*, 901 F.2d at 627).

[261] *See*, *e.g.*, *Dileo*, 901 F.2d at 627.

[262] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (acknowledging the difficulty in defining but not in recognizing obscenity).

[263] *See* Hayes v. McDonough, 35 Vet. App. 214, 221 (Vet. App. 2022).

And, mindful that a misrepresentation might be made not only as to the present or past, but also as to the future,[264] securities law coined a test for scienter as to forward-looking projections.[265] As to such projections, an issuer is deemed not to act with scienter if: (a) (s)he identifies a forward-looking statement as such[266] or couches it in terms clearly revealing its forward-looking nature to a reasonable audience;[267] plus (b) generates such a projection without actual knowledge that the projection is false or could mislead a reasonable audience;[268] and (c) if a forward-looking projection becomes untrue, the issuer promptly makes a curative statement apprising the affected audience of this previously unforeseen development.[269] Finally, just like VA law bars

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[264] The distinction between statements as to past, present, and future projections might be less than crystal clear and, thus, require an extra step in judicial analysis. *See*, *e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1, 17 n.9 (1949) (citations omitted) ("[A] forecast of future earnings is subject to inaccuracy resulting both from the difficulty of discounting the non-recurrent circumstances [that affected] past earnings [and a future] forecast [since] past earnings can be used as a basis of [projections] only on the assumption that they [would] continue . . . .").

[265] Earnings projections are the most common form of forward-looking statements. *See*, *e.g.*, *In re* Cutera Sec. Litig., 610 F.3d 1103, 1108 (9th Cir. 2010). In securities law, the requirements to avoid liability for presently made forward-looking projections are set forth in the safe-harbor provision of the Private Securities Litigation Reform Act of 1995, codified at 15 U.S.C. § 78u-5(c) (2022). *See*, *e.g.*, *In re* IKON Off. Sols., Inc., 277 F.3d 658, 673 (3d Cir. 2002) (citing Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978), for the observation that a "mere second-guessing of [forward-looking] calculations will not suffice"). That said, § 78u-5 safe harbor does not alter the materiality aspect since the materiality inquiry is what a reasonable person standing in the shoes of the issuer at the time when the projection was made would have deemed material as to the reasonably foreseeable future, *see*, *e.g.*, *Cutera*, 610 F.3d at 1108-11, especially since the meaning of the word "earnings" encompasses any form of receipts, e.g., income derived from investment, manufacturing, trade, sales of inventory, etc., *see*, *e.g.*, Collmer v. U.S. Liquids, Inc., 268 F. Supp. 2d 718, 728-29 (S.D. Tex. 2003); Johnson v. Tellabs, Inc., 262 F. Supp. 2d 937, 941 (N.D. Ill. 2003).

[266] *See* 15 U.S.C. § 78u-5(c)(1)(A)(i).

[267] *See id.* ("[A] forward-looking statement [must be] accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.").

[268] *See* 15 U.S.C. § 78u-5(c)(1)(B)(i) ("[I]f [a forward-looking statement is] made by a natural person, [it cannot be] made with actual knowledge by that person that the statement was false or misleading . . . .").

[269] *See*, *e.g.*, *In re* Landry's Seafood Rest., Inc., No. H-99-1948, 2001 U.S. Dist. LEXIS 26592, at *48 (S.D. Tex. Feb. 19, 2001) (finding that scienter was adequately pled since the issuer "admitted . . . closely monitor[ing the] sales data, labor, and [market] trends on a daily, weekly, and monthly bases" but did not inform investors of the widening gap between the projections and market trends).

the waiver analysis on the merits only if the debtor's fraud, or bad faith, or misrepresentation affects a fact material to VA's payment of monetary benefits, securities law also perceives scienter as closely intertwined with materiality.[270] Hence, securities law clarifies that materiality depends not on the literal truth of a statement (or omission, which, by definition, has no literal truth),[271] but on a reasonable audience's ability to be accurately informed of the state of relevant events (the test referred to as a the "total mix' of information or the "mosaic representation thesis").[272]

These tests coined by securities law beg importation into VA overpayment-and-waiver matters not only because of the *Hayes* Court's brilliant – albeit seemingly merely intuitive – hint that the word "scienter" might be the key, and its definitions might be borrowed from another area of law,[273] but also because the robust, century-old legal tests of securities law seamlessly fit into VA law

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[270] *See*, *e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730-31 (1975).

[271] *Accord* Operating Loc. 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt. LLC, 595 F.3d 86, 92 (2d Cir. 2010) ("The veracity of [an] omission is measured not by its literal truth . . . .") (citations omitted).

[272] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *In re* PDI Sec. Litig., No. 02-211, 2006 U.S. Dist. LEXIS 80142, at *27 (D.N.J. Nov. 2, 2006). The concept of materiality cannot be distilled into a bright-line test, *see*, *e.g.*, Shapiro v. UJB Fin. Corp., 964 F.2d 272, 281 (3d Cir. 1992); Ganino v. Citizens Utils. Co., 228 F.3d 154 (2d Cir. 2000); rather, it is necessarily determined in context, *see*, *e.g.*, Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) (finding an intermediary's conflict of interest immaterial); Wilensky v. Digital Equip. Corp., 903 F. Supp. 173 (D. Mass. 1995), *aff'd in part, rev'd in part on other grounds*, Shaw v. Digital Equip. Corp., 82 F.3d 1194 (1st Cir. 1996) (finding a marketing strategy immaterial); *accord* Carter-Wallace, Inc. v. Hoyt, 150 F.3d 153 (2d Cir. 1998) (concluding that a departure from generally accepted accounting principles is immaterial).

[273] *See* Hayes v. McDonough, 35 Vet. App. 214, 219 (Vet. App. 2022); *see also supra* note 230 (acknowledging the value of judicial intuition).

of overpayment and waiver.[274] And, critical here, the word "scienter" is technical enough to be perceived as legalese, not as an expression of an adjudicator's personal moral judgment.[275] Therefore, the adoption of "scienter" as a universal benchmark, *i.e.*, as the trunk equally supporting all three heads of the VA Cerberus, would allow the Board and the appellate courts to finally stop juggling the psychologically charged fire torches of "fraud," "bad faith," and "misrepresentation" and, in a judicial dispassionate manner, merely state that – once the scienter tests are met – the debtor's conduct bars the waiver analysis on the merits because such a conduct was, at the very least, more than non-willful[276] (and, potentially, even more culpable, but the precise magnitude of their culpability need not be established).[277]

Notably, such a scienter benchmark is in perfect harmony with the "principles of equity and good conscience" governing the waiver

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[274] This is particularly so because securities law requires a "strong inference" of scienter to find that the issuer's conduct violated the law. *See*, *e.g.*, Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 314 (2007) ("It does not suffice that a reasonable factfinder plausibly could infer . . . the requisite state of mind. Rather, . . . competing inferences . . . [must be drawn since an] inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the [issuer's] conduct. [Therefore, to] qualify as 'strong,' . . . an inference of scienter must be . . . at least as compelling as any opposing inference of nonfraudulent intent."). This additional dollop of protection reflected in the demand for a "strong" inference derives from the FED. R. CIV. P. 9(b) requiring allegations of fraud to be pled with particularity, *see*, *e.g.*, *In re* Rockefeller Ctr. Props. Secs. Litig., 311 F.3d 198, 216 (3d Cir. 2002) (discussing particularity), thus being consistent with both the uniquely diluted equipoise standard of review predominant in VA law and the OGC's cautionary approach to fraud.

[275] *See*, *e.g.*, *Scienter*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/scienter (last visited July 8, 2023) [https://perma.cc/CFE7-XWGV] (defining scienter as "knowledge of the nature of one's act or omission or of the nature of something in one's possession that is often a necessary element of an offense"); *see also Scienter*, DICTIONARY.COM, https://www.dictionary.com/browse/scienter (last visited July 8, 2023) [https://perma.cc/H3M8-ZCY9] (stressing that "scienter" is a legal "standard of guilt"); *accord Scienter*, WIKIPEDIA, (Dec. 27, 2022, 8:30 AM), https://en.wikipedia.org/wiki/Scienter [https://perma.cc/D3E9QWFK] (informing laypersons willing to consult a non-professional online source that "scienter . . . is a legal term for intent or knowledge of wrongdoing").

[276] *See supra* text accompanying notes 253-71 (explaining the methods to establish the more-than-non-willful nature of a conduct under the securities-law tests).

[277] *But see supra* text accompanying notes 213-20 (explaining the danger of conflating different *mentes reæ*).

analysis on the merits.[278] The merits test obligates both COWC and the Board to consider all relevant equitable considerations[279] and includes such inquiries as whether the debtor's fault outweighed VA's fault in terms of causing the creation of the overpayment (the balance-of-fault element),[280] whether the debtor's failure to make restitution would result in their unfair gain (the unjust-enrichment element),[281] whether the debtor has changed their position for the worse in reliance on the stream of income (s)he derived from VA benefits (the reliance element),[282] whether VA's recoupment of the debt would deprive the debtor of basic life necessities (the financial-

[278] 38 U.S.C. § 5302(a) and 38 C.F.R. § 1.962 prohibit recoupment of an overpayment debt if it would be against the principles of "equity and good conscience" since equity might constrain the governmental power to collect debts. *Accord* 38 C.F.R. § 1.965(a) ("[E]quity and good conscience means arriving at a fair decision between the obligor and the Government . . . ."); *cf.* Edwards v. Peake, 22 Vet. App. 57, 60-61 (Vet. App. 2008) (VA law obligates adjudicators to address a waiver claim sympathetically); Barbara A. Cherry & Steven S. Wildman, *Preventing Flawed Communication Policies by Addressing Constitutional Principles*, 2000 L. REV. M.S.U.-D.C.L. 55, 58 (2000) ("[R]estraints on arbitrary government action [are] essential in creating an environment conducive [to societal long-term goals].").

[279] *See infra* note 285 (citing cases clarifying that the regulatory list of waiver elements is not exhaustive); *see also supra* note 274 (explaining that the tests coined by securities law provide heightened protection against judicial bias).

[280] *See* 38 C.F.R. § 1.965(a)(1), (2) (addressing this *de facto* single waiver element as if it were a two-part inquiry).

[281] *See* 38 C.F.R. § 1.965(a)(5). This consideration looks at whether it was the debtor or an unrelated third party who received and made use of VA funds. *Cf.* Shephard v. Shinseki, 26 Vet. App. 159, 162, 167-68 (Vet. App. 2013) (noting that the veteran testified that her ex-husband had declared bankruptcy after withdrawing and spending the entire $63,749.21 which VA had erroneously deposited on their joint bank account taking advantage of the veteran's incarceration that rendered her unable to remove him from the bank account).

[282] *See* 38 C.F.R. § 1.965(a)(6). This consideration looks at whether the debtor took a loan/mortgage, or forfeited an employment opportunity, etc., in reliance on their stream of VA income without knowing that this stream would be subject to any recoupment of overpayment debt. *Cf.* Larsen v. Brown, No. 94-804, 1996 U.S. Vet. App. LEXIS 598 (Vet. App. Aug. 6, 1996) (addressing a debtor's harried sale of property at a reduced price because the debtor was counting on income from VA).

hardship element),[283] whether recoupment would nullify the objectives of the underlying VA benefits (the nullification element),[284] and so forth, as the facts of the case might require.[285] After each element is allocated its own weight on a case-by-case basis, all equities are placed on the scales of Themis, the Greek goddess of justice who blindfolded herself to ensure fairness.[286]

Relevant here, the first element, *i.e.*, the balance-of-fault inquiry,[287] loosely implicates the doctrine of "clean hands" since it

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[283] *See* 38 C.F.R. § 1.965(a)(3). This aspect is often misunderstood since debtors tend to equate changes in their pre-recoupment lifestyle with financial hardship. However, hardship arises only if they are "deprived of basic food (meaning, a sufficient amount of nutritious food to prevent malnourishment), basic shelter (in the sense of not going homeless or having to live in a public shelter), basic clothes (in the sense of being protected from the elements), and reasonable access to medical care." *See* Name Redacted, No. 220207-219532, 2022 BVA LEXIS 56915 (B.V.A. July 18, 2022) (alternation in orginal); *accord* Cullen v. Brown, 5 Vet. App. 510, 512 (Vet. App. 1993) (noting that basic clothing and medical care qualify as basic life necessities).

[284] *See* 38 C.F.R. § 1.965(a)(4). Since the nullification element looks at the goals of a particular VA benefit at issue, goals are benefit specific. The goal of VA compensation is to ensure that a veteran and his family have the standard of living comparable to that of an average person and his or her family who reside in the same community, but such a person has no functional impairment in earning capacity attributable to service-connected disabilities. *See* 38 U.S.C. § 101(2); 38 C.F.R. § 3.12 (2022). The goal of VA pension is to ensure that veterans and their survivors are not deprived of basic life necessities. *See*, *e.g.*, Faust v. West, 13 Vet. App. 342, 356 (Vet. App. 2000) (stressing that, if an applicant has income exceeding the poverty level, (s)he is not entitled to a VA pension).

[285] The regulatory list of waiver elements is not exhaustive. *See* Ridings v. Brown, 6 Vet. App. 544, 546 (Vet. App. 1997); *accord Cullen*, 5 Vet. App. at 512 (pointing out that a failure to address relevant considerations simply because they are not listed in the regulation yields a deficient judicial analysis); 38 C.F.R. § 1.965(a).

[286] Originally, justice was correlated with a superhuman ability to see, not with being blindfolded or blind, but this perception changed from despise to veneration. *See* Judith Resnik & Dennis Curtis, *Re-Presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts*, 24 YALE J.L. & HUM. 19, 55 (2012) (noting the societal shift from equating blindness or being voluntarily or involuntarily blindfolded with intellectual ignorance to belief that sightless seers were "visionaries whose insights [came] from sources other than their eyes").

[287] *See* 38 C.F.R. § 1.965(a)(1), (2).

looks at the nature and impact of the debtor's conduct.[288] Therefore, if an overpayment arose from a heavily-scienter-laden conduct,[289] the balance-of-fault element is necessarily weighty and, almost always, tilts the balance of equities against the debtor's waiver claim.[290] Hence, the scienter test could operate as a *de facto* short-cut to the culminative balance-of-equities moment, *i.e.*, it could be a VA version of Rule 56 of the Federal Rules of Civil Procedure retailored for VA overpayment-and-waiver matters.[291]

VII. THE EASE OF USING SECURITIES-LAW SCIENTER TESTS IN VETERANS LAW

Since "the proof of the pudding is in the eating,"[292] the proposed scienter cure should be tasted just to ensure the quality of the proposed solution. If applied to *Hayes*,[293] it yields two scenarios. First, the widow could have completed her VA pension application (stating that her income was zero and nothing would be coming for at least a year) when she was already in receipt of wages and/or

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[288] In non-VA cases, the lack of clean hands by both parties often yields a contributory negligence inquiry. *See generally*, Stephen D. Juge & Van R. Boyette, *Comparative Negligence in the United States–The Advent of Its Adoption in Louisiana*, 51 TUL. L. REV. 1217, 1265-66 (1977). In sync, wrongful actions by both a debtor and VA may yield a partial waiver of recoupment. *See, e.g.*, Named Redacted, No. 200826-107237, 2022 BVA LEXIS 12165, (B.V.A. Feb. 3, 2022) ("[T]he evidence establishes that [a VA beneficiary's] failure to make restitution as to the entire overpayment debt in the amount of $20,938.38 would result in an unfair gain, while the recoupment of . . . $7,537, accompanied by a waiver of a portion of . . . $13,401.38, would not.").

[289] *See supra* note 274 (discussing the requirement of a strong inference of scienter in securities law).

[290] *Accord* 38 C.F.R. § 1.965(a); *see also* Senin v. Nicholson, No. 03-1524, 2005 U.S. App. Vet. Claims LEXIS 208, at *10 (Vet. App. 2005) ("A waiver of indebtedness is rarely, if ever, an accounting task with a single correct answer. Rather, it requires the balancing of abstract equities where the Board is required to reach a fair decision.") (citation omitted).

[291] *See* FED. R. CIV. P. 56(a) (pointing out that summary judgment is warranted if "there is no genuine dispute as to any material fact," and the moving party (in VA overpayment law, it would be VA) is entitled to judgment in its favor "as a matter of law," even though the presiding court views all evidence in the light most favorable to the nonmoving party (in VA overpayment law, it would be the debtor)); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

[292] Harmelin v. Michigan, 501 U.S. 957, 992 (1991).

[293] *See* Hayes v. McDonough, 35 Vet. App. 214 (Vet. App. 2022).

SSA benefits and/or unemployment.[294] Since the widow's application and her following three and a half years of silence were relied upon by VA to its detriment in terms of figuring out the widow's entitlement to a VA pension, calculating its amount, and disbursing taxpayers' funds,[295] the widow's failure to report this non-VA income was material.[296]

Plus, she benefitted in a concrete and personal way from her omission to the tune of $35,970.[297] And, since the widow either knew about her wages, SSA benefits, and unemployment undisclosed to VA or, at the very least, had access to information about these streams of income, there is a strong inference of her scienter.[298] Therefore, the waiver analysis of the merits had to be barred by the widow's more-than-non-willful conduct, meaning that

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[294] A non-gig-industry employment yields payroll checks at the end of each pay period, although there might be a lag. Alison Doyle, *When You Can Expect to Get Your First and Last Paycheck*, THE BALANCE (June 25, 2022), https://www.thebalancemoney.com/when-you-can-expect-to-get-your-first-and-last-paycheck-2060057[https://perma.cc/XKU4-SBSN]. Absent eligibility problems, an unemployment claim yields the first check within a few weeks after the claim. Aaron Hotfelder, *How Long Does It Take to Receive My Unemployment Benefits?*, NOLO (last visited Dec. 9, 2022), https://www.employmentlawfirms.com/resources/employment/unemployment/how-long-does-it-take-to-receive-my-unemployment-benefits [https://perma.cc/7LHT-4Z7G]. It takes about "six weeks to process an application" for SSA benefits. *See* Oliver Povey, *How Long Does It Take to Start Receiving Social Security Benefits After Applying?*, AS (Dec. 11, 2021), https://en.as.com/en/2021/12/11/latest_news/1639226253_075143.html [https://perma.cc/ 62E8-3KD6].

[295] *See supra* text accompanying notes 72-74 (explaining the process of debt accrual). Until December 2012, VA pension applicants and pensioners had to submit their yearly EVRs used by VA to determine their entitlement. *See VA, SSA and IRS Cut Red Tape for Veterans and Survivors*, VA PUB. & INTERGOV'L AFFS. (Dec. 20, 2012), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2414[https://perma.cc/XCJ8B4BM]. Because the widow in *Hayes* was overpaid during the March-2009-to-December-2013 period, *see* Name Redacted, No. 14-10 754A, 2019 BVA LEXIS 126857, at *2 (B.V.A. Oct. 28, 2019), she either submitted at least one false EVR or failed to comply with her EVRs obligations for three and a half years.

[296] *See* 38 U.S.C. § 1521; 38 C.F.R. §§ 3.23(a), 3.271; *accord* Cutler v. Derwinski, 2 Vet. App. 336, 337 (1992) (citing 38 U.S.C. § 1503 and 38 C.F.R. §§ 3.252(b), (c), 3.260, 3.262(b), (i), in connection with a materiality inquiry).

[297] *See* 2019 BVA LEXIS 126857, at *1.

[298] *See supra* note 274 (discussing the requirement for a strong inference of scienter in securities law).

the Board's denial of the waiver analysis on the merits was correct,[299] same as the Court's affirmance of this analysis.[300]

Alternatively, the widow might have had no income whatsoever and even no reason to expect any income when she filed her initial application for a VA pension, e.g., she was yet to seek a job and to apply for SSA and unemployment benefits, and truly believed that her non-VA income was and would remain zero for at least a year.[301] However, once she received wages and/or SSA benefits, and/or unemployment, each such development obligated her to disclose this income to VA, and yet she still took no curative action.[302] It follows that the widow's conduct once again created a strong inference of scienter,[303] and the waiver analysis on the merits was properly denied by the Board,[304] warranting the Court's affirmance.[305] The end.

CONCLUSION

Had the Board and the Court applied the securities-law scienter tests to *Hayes*, both would have reached the outcomes they reached without repackaging anything into something else and, critical here, without proliferating boustrophedonic obscurities caused by the unique linguistic sensitivities of VA law.[306] True, the task of writing a few paragraphs of the alternative *Hayes* analyses at the end of Part VII was particularly easy because they were

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[299] *See generally* 2019 BVA LEXIS 126857 (evidence considere supports a finding of bad faith).

[300] *See generally*, Hayes v. McDonough, 35 Vet. App. 214 (Vet. App. 2022).

[301] Since there is a lag in payments of wages, unemployment benefits, and SSA benefits, *see supra* note 294, it cannot be completely ruled out that the widow in *Hayes* applied for a VA pension during a period when she had no income whatsoever and was having *bona fide* doubts about any non-relative-based source of her future income.

[302] *See supra* notes 38-40, 270.

[303] *See supra* notes 270, 275 and accompanying text.

[304] *See generally*, 2019 BVA LEXIS 126857, at *2.

[305] Hayes v. McDonough, 35 Vet. App. 214, 221 (Vet. App. 2022).

[306] While the psychology of collective punishment has been well studied, *see*, *e.g.,* Andrea Pereira & Jan-Willem van Prooijen, *Why We Sometimes Punish the Innocent: The Role of Group Entitativity in Collective Punishment*, NAT'L LIBR. MED. (May 3, 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5933726 [https://perma.cc/WQY8-TFR9], the ostensible danger of instilling public cynicism about those veterans and their survivors who deserve public veneration through wholesale sanctification of all veterans and their survivors, including those deserving public disdain, has been ignored by academia.

written not only in retrospect[307] but also for an academic publication,[308] not a judicial decision amenable to appeal.[309] However, the difference between academic freedoms and the realities of adjudication[310] is what makes *Hayes* so precious: it provided an opportunity to begin a long-overdue conversation about the indivisibility of well-known positives and elusive but equally mighty negatives of the psychology of VA law, bringing to light the simple truth that, in the daily grind of adjudication, the joy of judicial compassion and the jeer of judicial aversion should come with the same linguistically honest self-restraint because – in poetry, in law, or in life itself – a single word may create a turmoil out of timidity[311] without even offering a *Hayes*-like chance for an insight by inadvertence.[312] Conceivably, it means that the only rule all adjudicators should remember is that "[s]yntactically, though, it must be clear; [o]ne cannot change the subject half-way

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[307] *Accord* Jeffrey L. Reed, *Under a Microscope? Show Them the Data*, 33 FED. SENT'G. REP. 250 (2021) (comparing the complexities of adjudicating cases with the ease of hindsight criticism); Scott P. Johnson, *The Influence of Case Complexity on the Opinion Writing of the Rehnquist Court*, 25 OHIO N.U. L. REV. 45 (1999) (comparing the complexity of pre-adjudicatory uncertainties to the misleading simplicity of completed judicial decisions).

[308] *See*, *e.g.*, Sharona Aharoni-Goldenberg & Gerry Leisman, *Balancing Clashing Scholars' Academic Freedoms*, 38 TOURO L. REV. 121, 134-35 (2022) (detailing the professional, ethical, and societal limitations on academic freedoms).

[309] *See*, *e.g.*, Kathleen M. O'Malley, Patti Saris & Ronald H. Whyte, *A Panel Discussion: Claim Construction from the Perspective of the District Judge*, 54 CASE W. RES. L. REV. 671 (2004) (addressing appeal-related concerns of trial-level judges); Daniel J. Knudsen, *Institutional Stress and the Federal District Courts: Judicial Emergencies, Vertical Norms, and Pretrial Dismissals*, 2014 UTAH L. REV. 187, 212 (2014) (discussing judicial productivity concerns).

[310] *Accord* Atilano v. McDonough, 35 Vet. App. 490, 494 (Vet. App. 2022).

[311] *See*, *e.g.*, Ira P. Robbins, *"And/Or" and the Proper Use of Legal Language*, 77 MD. L. REV. 311 (2018) (reviewing the pitfalls associated with the coordinating alternative conjunction "and/or"); Doug Karpa, *Loose Canons: The Supreme Court Guns for the Endangered Species Act in National Association of Home Builders v. Defenders of Wildlife*, 35 ECOLOGY L.Q. 291, 300 (2008) ("[Once] the meaning of the regulation was changed by the insertion of one word, 'discretionary,' . . . a new limitation . . . was born"); *accord* Lackland H. Bloom*, Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 379 n.489 (1985) (quoting manuals and textbooks addressing avoidance of defamation litigation and guiding that "Precisely – that is the way words should be used"; "Your words must . . . convey the correct meaning"; "Imprecision creates confusion and misunderstanding"; "Each word you choose carries with it a sort of halo of related ideas"; "Precision is essential to total fairness").

[312] *See* Hayes v. McDonough, 35 Vet. App. 214, 219 (Vet. App. 2022).

through; [n]or alter tenses to appease the ear: [a]rcadian tales are hard-luck stories too."[313]

[313] Yes, still W. H. AUDEN, *Words*, *in* COLLECTED POEMS OF W. H. AUDEN 624 (1991).