DUQUESNE LAW REVIEW

VOLUME 60, NUMBER 1 WINTER 2022

Duquesne Law Review

Volume 60, Number 1, Winter 2022

Professional Articles

Student Articles

Duquesne Law Review is published in Pittsburgh, Pennsylvania. Correspondence may be addressed to: *Duquesne Law Review*, Duquesne University School of Law, 600 Forbes Avenue, Pittsburgh, Pennsylvania 15282.

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Duquesne Law Review

Volume 60

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Mail-In Voting and the Pennsylvania Constitution

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ABSTRACT

Pennsylvania was at the center of many of the disputes that arose after the hotly contested 2020 presidential election. One of the most significant challenges was a claim that Pennsylvania's newly enacted mail-in voting law violated the state's constitution. Plaintiffs in one lawsuit asked that all mail-in ballots be discarded, which would have shifted Pennsylvania's electoral votes to Donald Trump. When this lawsuit failed, challengers unsuccessfully objected to Congress counting Pennsylvania's electoral votes. A core argument both in court and in Congress was that the Pennsylvania Constitution requires in-person voting except where it specifically provides otherwise. The claim is supported by two older Pennsylvania Supreme Court cases, the more recent of which is nearly a century old.

This Article argues instead that no-excuse mail-in voting is consistent with the Pennsylvania Constitution. The language of the constitution provides the General Assembly ample authority to enact such legislation. Further, the current legislation on mail-in voting differs in crucial respects from the statutes found unconstitutional in the 1862 and 1924 cases. Finally, the constitutional provision on absentee voting does not, as some have argued, render mail-in voting unconstitutional. Instead, it reinforces and confirms the legislature's authority in this regard. The Pennsylvania Supreme Court has refrained from addressing the claim on the merits, thus leaving this important issue unresolved.

INTRODUCTION

In 2019, the Pennsylvania General Assembly enacted sweeping legislation enabling all Pennsylvanians to vote by mail. The legislation, known as Act 77,[1] passed the Republican-controlled legislature with broad bipartisan support and was signed into law by Governor Tom Wolf, a Democrat, on October 31, 2019.[2] The legislation gave the Pennsylvania Supreme Court exclusive jurisdiction to hear a challenge to the Act's constitutionality and provided that any challenges should be brought within 180 days.[3] No such challenge was brought until after the conclusion of the hotly contested November 2020 presidential election.

1. Act of Oct. 31, 2019, No. 77, 2019 Pa. Laws 552.
2. *See infra* notes 24–32 and accompanying text.
3. Act of Oct. 31, 2019 § 13(2), (3).

The election in Pennsylvania was close, and there was a clear partisan split when it came to the method of voting. Joseph R. Biden, Jr. defeated Donald J. Trump by only eighty thousand votes among the approximately 6,836,000 votes cast for the two main candidates.[4] About thirty-eight percent of the votes cast were mail-in or absentee. Biden won by a margin of more than three-to-one among mail-in ballots (nearly two million votes to Trump's nearly 600,000), while Trump won by almost two-to-one among those who voted on election day (approximately 2,731,000 to Biden's 1,409,000).[5] Biden was thus awarded Pennsylvania's twenty electoral college votes on the strength of his large margin among mail-in voters.

After the 2020 election, Act 77 became a focus of efforts to either switch Pennsylvania's electoral votes from Biden to Trump or to discount the state's electoral votes completely. Representative Mike Kelly, a Pennsylvania Congressman, took the first approach. He asked the Pennsylvania Commonwealth Court to exclude all mail-in ballots—which would have resulted in Trump winning Pennsylvania's electoral votes—or, in the alternative, to direct the Republican-controlled Pennsylvania General Assembly to select Pennsylvania's electors.[6] Representative Kelly claimed Act 77 violated the Pennsylvania Constitution, arguing that the constitution requires all voting be done by "offering your ballot in *propria persona* at the polling place on election day" except for those voters the constitution specifically states should be able to vote by absentee ballot.[7] He pointed to two older Pennsylvania Supreme Court cases, the more recent of which was nearly one hundred years old, to support the claim.[8] He argued that mail-in voting would require an amendment to the Pennsylvania Constitution and that Act 77 was void *ab initio*.[9] Judge Patricia McCullough of the Commonwealth

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4. *Pennsylvania Elections – Summary Results*, PA. DEP'T STATE, https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G (last updated Oct. 10, 2021, 2:30 PM).

5. *Id.*

6. Complaint for Declaratory and Injunctive Relief at 22, 24, Kelly v. Commonwealth, No. 620 M.D. 2020, 2020 WL 7224280 (Pa. Commw. Ct. Nov. 27, 2020). Cited documents in this lawsuit are available at http://www.pacourts.us/news-and-statistics/cases-of-public-interest/election-2020/kelly-parnell-frank-kierzek-magee-sauter-kincaid-and-logan-v-wolf-boockvar-pa-general-asssembly-and-the-commonwealth-of-pennsylvania and also are on file with the author.

7. *Id.* at 6.

8. Memorandum of Law in Support of Motion for Emergency/Special Prohibitory Injunction at 4, 6, *Kelly*, 2020 WL 7224280 (discussing Chase v. Miller, 41 Pa. 403 (1862), and *In re* Contested Election in Fifth Ward of Lancaster City, 126 A. 199 (Pa. 1924)).

9. Complaint for Declaratory and Injunctive Relief at 21–22, *Kelly*, 2020 WL 7224280.

Court granted a preliminary injunction.[10] She concluded that the petitioners "appear to have established a likelihood to succeed on the merits because Petitioners have asserted the [Pennsylvania] Constitution does not provide a mechanism for the legislature to allow for expansion of absentee voting without a constitutional amendment."[11] Judge McCullough further concluded: "Petitioners . . . have a viable claim that the mail-in ballot procedures set forth in Act 77 contravene" Article VII, Section 14 on absentee balloting.[12] The Pennsylvania Supreme Court promptly considered the case, vacated the preliminary injunction, and dismissed the petition with prejudice based on the doctrine of laches.[13] Although the court's decision prevented the disenfranchisement of millions of voters, the court left unresolved the core question of whether Act 77 is constitutional because it did not address the issue on the merits.[14]

Efforts then moved to Congress. When Congress reconvened after the awful events of January 6, 2021,[15] Senator Josh Hawley of Missouri joined with members of the House of Representatives to unsuccessfully object to the counting of Pennsylvania's electoral votes.[16] His statements on the floor of the United States Senate echoed Representative Kelly's claims. Senator Hawley stated that the Pennsylvania Constitution had been "interpreted for over a century to say that there is no mail-in balloting permitted except for in very narrow circumstances, which is also provided for in the law."[17]

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10. *Kelly*, 2020 WL 7224280, at *4 (describing injunction entered).
11. *Id.* at *5.
12. *Id.*
13. Kelly v. Commonwealth, 240 A.3d 1255, 1255–57 (Pa. 2020), *cert. denied*, 141 S. Ct. 1449 (2021).
14. The matter very much remains in controversy. After the writing of this Article, a member of the Bradford County Board of Elections filed a case in the Commonwealth Court, challenging the constitutionality of voting by mail in Pennsylvania. *See* Petition for Review in the Nature of a Declaratory Judgment, McLinko v. Commonwealth, No. 244 M.D. 2021 (Pa. Commw. Ct. July 26, 2021). Briefing has also been submitted by the Department of State of Pennsylvania and the Acting Secretary of the Commonwealth. *See* Memorandum in Opposition to Petitioner's Application for Summary Relief and in Support of Respondents' Cross-Application for Summary Relief, McLinko v. Commonwealth, No. 244 M.D. 2021 (Pa. Commw. Ct. Aug. 26, 2021). The Respondents forcefully address the matter at issue in this Article primarily beginning with page 31 of the brief. *Id.* at 31–52. This brief and other materials relevant to the McLinko litigation can be found at https://www.pacourts.us/news-and-statistics/cases-of-public-interest/doug-mclinko-v-commonwealth-of-pennsylvania-dept-of-state-and-veronica-degraffenreid. Whatever the Commonwealth Court decides, an appeal to the Pennsylvania Supreme Court is very likely.
15. S*ee* Jonathan Tamari & Jeremy Roebuck, *The Chaos Inside—From Furious Debate to Diving for Cover*, PHILA. INQUIRER, Jan. 7, 2021, at A1 (describing the breach of the Capitol).
16. 167 CONG. REC. H98 (daily ed. Jan. 6, 2021).
17. *Id.* at S25.

The legislature had acted, he said, "irregardless of what the Pennsylvania Constitution said."[18]

This Article argues that Act 77 is fully consistent with the Pennsylvania Constitution. The claim to the contrary, while not frivolous, is unsustainable. First, unlike the United States Constitution, the Pennsylvania Constitution is not a constitution of enumerated powers but rather one in which all legislative power is granted to the General Assembly. It is thus incumbent on those opposing the constitutionality of Act 77 to identify a clear limitation in the constitution on the legislature's authority to implement mail-in voting. No such limitation exists. Second, the judicial imposition of the in-person voting requirement is based on an incorrect reading of ambiguous language in the Pennsylvania Constitution. Third, Act 77 differs in material respects from the absentee voting statutes found unconstitutional in earlier cases. Finally, the current absentee voting provision in the current constitution differs significantly from the version considered by the Pennsylvania Supreme Court in 1924. The current version does not limit legislative authority to implement mail-in voting, but instead confirms it.

I. ACT 77

Act 77 amended the Pennsylvania Election Code and expanded the availability of mail-in voting for all Pennsylvanians.[19] It "created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day[.]"[20] As further amended in 2020, the Pennsylvania Election Code defines a qualified mail-in elector as any "qualified elector."[21] All qualified electors were able to vote by mail in the 2020 election. Under Act 77, voters can return their ballots in a number of ways. They can mail them or deliver them in person to the county board of elections.[22] The Pennsylvania Supreme Court has held that county boards of elections can also use drop boxes for the return of ballots.[23]

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18. *Id.*

19. *See* 25 PA. CONS. STAT. § 3150.11(a) (providing that a "qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article").

20. Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 352 (Pa. 2020), *cert. denied*, 141 S. Ct. 732 (2021).

21. 25 PA. CONS. STAT. § 2602(z.6).

22. *Id.* § 3150.16(a).

23. *Boockvar*, 238 A.3d at 361 (authorizing use of drop boxes).

Act 77 was broadly bipartisan and passed after careful consideration. Republican Senate Majority Leader Jack Corman expressed his support for the bill during the floor debate. He noted that the legislative process had begun in earnest in 2017 with a series of hearings on the reform and modernization of Pennsylvania elections that extended over twenty-seven months.[24] Representative Bryan Cutler, a Republican and the Pennsylvania House of Representatives Majority Leader, observed that the legislation had not been "written to benefit one party or the other."[25] He noted that it had been developed "over a multiyear period" with input from across the state and "serves to preserve the integrity of every election and lift the voice of every voter in the commonwealth."[26] Senator Lisa Boscola, a Democrat, noted that "[m]aking voting easier for people cannot be bad for our democracy."[27] The legislation "allow[s] a living room or a kitchen table to be a polling place."[28] She observed that providing a no-excuse mail-in option "takes voting to voters instead of making voters come to us . . . . [O]ur democracy will be stronger if more votes are counted."[29] Act 77 was approved by the legislature with broad support. The House of Representatives approved it by a vote of 138 to 61,[30] and the Senate by a vote of 35 to 14.[31] Governor Wolf, a Democrat, signed the bill into law on October 31, 2019.[32]

II. THE PENNSYLVANIA CONSTITUTION GRANTS THE LEGISLATURE AUTHORITY TO ENACT MAIL-IN VOTING

A. A Crucial Difference Between Pennsylvania Constitutional Law and Federal Constitutional Law

The Pennsylvania Constitution contains a far broader grant of legislative authority than does the United States Constitution.

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24. S. 2019-46, 1st Sess., at 1002 (Pa. 2019).

25. Kim Jarrett, *Bill to Make It Easier to Vote in Pennsylvania, Though End of 'Straight Ticket Voting' Irks Some*, CTR. SQUARE (Nov. 1, 2019), https://www.thecentersquare.com/pennsylvania/bill-to-make-it-easier-to-vote-in-pennsylvania-though-end-of-straight-ticket-voting/article_6a15cba4-fc19-11e9-968c-4bdc9aba0696.html.

26. *Id.*

27. S. 2019-46, 1st Sess., at 1000 (Pa. 2019).

28. *Id.*

29. *Id.*

30. H. 2019-64, at 1741 (Pa. 2019) (indicating roll call vote in the House of Representatives).

31. S. 2019-46, 1st Sess., at 1002–03 (Pa. 2019) (indicating roll call vote in the Senate).

32. Press Release, Governor Tom Wolf, Governor Signs Election Reform Bill Including New Mail-In Voting (Oct. 31, 2019), https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/.

Under the United States Constitution, "Congress can pass no laws but those which the Constitution authorizes either expressly or by clear implication; while the [Pennsylvania General] Assembly has jurisdiction of all subjects on which its legislation is not prohibited."[33] The Pennsylvania Constitution, unlike the United States Constitution, "allows the legislature every power which it does not positively prohibit."[34] The "rule of interpretation for the [Pennsylvania] state constitution differs totally from that which is applicable to the constitution of the United States."[35]

Those challenging a Pennsylvania statute's constitutionality bear a "very heavy burden of persuasion."[36] Under Pennsylvania law, "there is a presumption of constitutionality"[37] and a statute will not be held to violate the constitution unless it can be shown to do so "clearly, palpably and plainly."[38] The violation must be such "as to leave no doubt or hesitation in the minds."[39] Any uncertainty should be "resolved in favor of a finding of constitutionality."[40] As the Pennsylvania Supreme Court observed, "ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government, and should never be stricken down by the courts unless in plain violation of the fundamental law."[41]

The "fundamental rule of construction" is that the language of the constitution controls and "must be interpreted in its popular sense, as understood by the people when they voted on its adoption."[42] Accordingly, the next subpart addresses the language of the constitution, which is the "ultimate touchstone" in assessing the constitution's meaning.[43]

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33. Commonwealth v. Hartman, 17 Pa. 118, 119 (1851). *See also* Weister v. Hade, 52 Pa. 474, 477 (1866) (noting well settled nature of the proposition that the Pennsylvania legislature "has jurisdiction of all subjects on which its legislation is not prohibited" by the Pennsylvania Constitution).

34. Ruano v. Barbieri, 400 A.2d 235, 239 (Pa. Commw. Ct. 1979) (citing *Weister*, 52 Pa. at 477).

35. *Hartman*, 17 Pa. at 119.

36. Stilp v. Commonwealth, 905 A.2d 918, 939 (Pa. 2006).

37. Spidle v. Livingston Const. Co., 457 A.2d 565, 567 (Pa. Super. Ct. 1983) (citing Bensalem Twp. Sch. Dist. v. Cnty. Comm'rs of Bucks Cnty., 303 A.2d 258, 262 (Pa. Commw. Ct. 1973)).

38. League of Women Voters v. Commonwealth, 178 A.3d 737, 782 (Pa. 2018).

39. *In re* Canvass of Absentee Ballots of 1967 Gen. Election, 245 A.2d 258, 260 (Pa. 1968) (quoting Land Holding Corp. v. Bd. of Fin. & Revenue, 130 A.2d 700, 706 (Pa. 1957)).

40. *Stilp,* 905 A.2d at 939 (quoting Payne v. Dep't of Corrections, 871 A.2d 795, 800 (Pa. 2005)).

41. Winston v. Moore, 91 A. 520, 522 (Pa. 1914).

42. *Stilp*, 905 A.2d at 939.

43. *Id.*

B. The Plain Language of the Pennsylvania Constitution Supports the Constitutionality of Act 77

The Pennsylvania Constitution includes a broad grant of legislative power, providing that the "legislative power of this Commonwealth shall be vested in the General Assembly."[44] The "power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government."[45] The legislature possesses the power to "pass statutes fixing the manner in which elections shall be conducted."[46] Regarding the orderly exercise of the right to vote, the legislature "must prescribe necessary regulations, as to the places, mode, and manner, and whatever else may be required to insure its full and free exercise."[47] The Pennsylvania Supreme Court implicitly recognized in 1862 that the constitutional grant of legislative authority to the General Assembly empowered that body to enact absentee balloting.[48] The crucial issue thus becomes whether any limitation on that power exists in the constitution.

If there were a constitutional limitation on the legislature's authority to enact mail-in voting, it would presumably be found in Article VII, Section 4, which is captioned in part "Method of Elections." That section provides as follows: "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, [t]hat secrecy in voting be preserved."[49] The section includes one—and only one—stated restriction on legislative authority in this regard, which is that whatever method of voting the legislature adopts must preserve secrecy.[50] As the highest court of New York observed in 1920 when interpreting nearly-identical language in the New York Constitution, the "restriction upon the

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44. PA. CONST. art. II, § 1.
45. *Winston*, 91 A. at 522 (citation omitted).
46. *In re* New Britain Borough Sch. Dist., 145 A. 597, 598–99 (Pa. 1929).
47. Page v. Allen, 58 Pa. 338, 347 (1868).
48. *See* discussion *infra* note 93 and accompanying text.
49. PA. CONST. art. VII, § 4.
50. This provision, adopted in 1901, appears to have been intended to facilitate the use of electronic and mechanical voting machines. *See In re* Contested Election in Fifth Ward of Lancaster City, 126 A. 199, 201 (Pa. 1924) (suggesting the provision on secrecy was "likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law"); S. 1901-2, 1st Sess., at 1543 (Pa. 1901) (statement of Gov. William A. Stone) (describing purpose of the amendment as the "substitution of voting machines for our present system of balloting"). The language, however, is broader than just permitting the use of electronic voting machines.

exercise of legislative wisdom and provision in the matter of elections [imposed by this language] could scarcely be less stringent."[51]

Both the General Assembly and the Pennsylvania Supreme Court have been careful to meet that secrecy requirement. The Pennsylvania Election Code provides for secrecy in mail-in balloting by requiring the use of both an inner envelope marked only as "Official Election Ballot," and a larger envelope.[52] After receiving an official mail-in ballot, the elector is to mark the ballot in secret and seal the ballot in the envelope marked "Official Election Ballot," and then enclose this secrecy envelope within the larger envelope.[53] The Election Code further provides that a ballot should be set aside and declared void if submitted in a secrecy envelope with any "text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference . . . ."[54] The Pennsylvania Supreme Court, in *Pennsylvania Democratic Party v. Boockvar* held that the requirement of submitting a ballot within the larger envelope is mandatory, and failure to comply renders an elector's ballot invalid.[55] Such enforcement was necessary to ensure compliance with the constitutional secrecy requirement.[56]

There are other places we might expect to find a limitation on the legislature's authority to enact mail-in voting if such a limitation existed. We might expect to see it among the "restrictions on legislative power" found in Article III, Sections 28–37 of the constitution.[57] But no such limitation is found there, either. We might also expect to see it among the twenty-eight limitations on governmental authority laid out in Article I of the constitution as the Declaration of Rights.[58] The Declaration of Rights does include a crucial limitation on legislative power in elections, though not on the ability to implement mail-in voting. The Free and Equal Elections Clause in the Declaration of Rights provides that "[e]lections shall be free and equal; and no power, civil or military, shall at any time

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51. Burr v. Voorhis, 128 N.E. 220, 224 (N.Y. 1920) (interpreting language in the New York Constitution that "[a]ll elections by the citizens, except for such town officers as may be law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved").

52. 25 PA. CONS. STAT. § 3150.14.

53. *Id.* § 3150.16.

54. *Id.* § 3146.8(g)(4)(ii).

55. 238 A.3d 345, 378–80 (Pa. 2020), *cert. denied*, 141 S. Ct. 732 (2021).

56. *Id.* at 377 (setting forth the argument that compliance with the secrecy provisions was necessary to avoid violation of the secrecy requirement).

57. PA. CONST. art. III, §§ 28–37 (setting forth several restrictions on legislative authority grouped under the heading "Restrictions on Legislative Power").

58. *Id.* art. I (containing twenty-eight sections designed to protect the "general, great, and essential principles of liberty and free government").

interfere to prevent the free exercise of the right of suffrage."[59] Under this provision, while the General Assembly may regulate elections, those regulations may not render the exercise of the franchise "so difficult and inconvenient as to amount to a denial."[60] Further, this provision requires that "all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth."[61] It was under this provision that the Pennsylvania Commonwealth Court enjoined the implementation of a law requiring voter identification in Pennsylvania, because the legislation did not provide for a "non-burdensome provision of a compliant photo ID to all qualified electors."[62]

Pennsylvania's implementation of mail-in voting is of course not prohibited by the Free and Equal Clause. To the contrary, Act 77 effectuates that provision's directive. The whole purpose of Act 77 was to expand access and make voting easier. Indeed, it was pursuant to this provision that the Pennsylvania Supreme Court in the November 2020 general election extended the deadline for receipt of mailed-in ballots by three days due to postal delays and other concerns.[63]

A few other limitations on elections are set forth explicitly and unambiguously in the constitution. Laws regulating the holding of elections "shall be uniform throughout the state."[64] And while the legislature is able to establish the method for voting, the constitution dictates the date for elections.[65] The Pennsylvania Supreme Court has stated that beyond the limitations specifically set forth on dates and methods, "the Legislature has the power to regulate the details of place, time, manner, etc., in the general interest, for the due and orderly exercise of the franchise by all electors alike."[66]

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59. *Id.* art. I, § 5.

60. De Walt v. Bartley, 24 A. 185, 186 (Pa. 1892).

61. League of Women Voters v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018).

62. Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *18 (Pa. Commw. Ct. Jan. 17, 2014).

63. Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 369–72 (Pa. 2020), *cert. denied*, 141 S. Ct. 732 (2021).

64. PA. CONST. art. VII, § 6. This provision does allow that some laws relating to registration can be enacted for cities only and the Constitution also makes it possible for some, but not all, counties, cities, boroughs, towns or townships to use voting machines or other mechanical devices for tabulating votes. *Id.*

65. *Id.* art. VII, § 2. The General Assembly can, by two-thirds vote in each house, change the date. *Id.*

66. Indep. Party Nomination, 57 A. 344, 345 (Pa. 1904). This opinion includes some language that requires explanation. The court stated that the constitution regulates the time "and, in a general way, the method, to wit, by ballot, with certain specified directions as to receiving and recording it." *Id.* Although this is a 1904 opinion, the Supreme Court appears to be erroneously referencing language that was amended in 1901. The language in effect

The Pennsylvania Constitution also includes a provision setting forth the qualifications for voting. The section is as follows:

> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact. 1. He or she shall have been a citizen of the United States at least one month. 2. He or she shall have resided in the State 90 days immediately preceding the election. 3. He or she shall have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within 60 days preceding the election.[67]

Nothing in this language limits the power of the legislature to select a particular method of voting. The provision simply lists qualifications a voter must possess to be entitled to vote and by its terms does nothing more.

This section limits the legislature's power to some degree, of course. The legislature could not enact legislation that required ninety days' residence in the election district to vote or that permitted someone with only thirty days' residence in the election district to vote because such legislation would be adding to or taking away from the sixty-day qualification set forth in the constitution. This point is illustrated by *McCafferty v. Guyer* in which the Pennsylvania Supreme Court held unconstitutional legislation that barred from voting those who had been deemed deserters from military service.[68] The legislation was not a mere "regulation of the mode of exercise of the right to an elective franchise," which would be constitutional, but a deprivation of the right to vote granted by the constitution.[69] The question posed in the case was: "Can then the legislature take away from an elector his right to vote, while he

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between 1874 and 1901 did include the narrower language the court is referring to but that language was changed in 1901. *See infra* Part III.B.

67. PA. CONST. art. VII, § 1.

68. 59 Pa. 109, 109 (1868).

69. *Id.* at 111.

possesses all the qualifications required by the Constitution?"[70] The court answered no to this question.[71]

Similarly, in *Page v. Allen*, also an 1868 Pennsylvania Supreme Court opinion, the court addressed a registration law that would have had the practical effect of increasing the period of residency.[72] At the time, the constitution provided for ten days' residence in the election district to be eligible to vote. The registration law at issue would have effectively required twenty days' residence because the statute required ten days' residence in order to register and such proof had to be made at least ten days before election day.[73] The court noted that, regarding the orderly exercise of the right to vote, the legislature "must prescribe necessary regulations, as to the places, mode, and manner, and whatever else may be required to insure its full and free exercise."[74] But that power is not unrestricted. The constitutional qualifications to be an elector "are defined, fixed and enumerated" in the constitution.[75] Those qualifications could not be "abridged, added to, or altered by legislation."[76] The registration law was thus unconstitutional.[77]

The Pennsylvania Election Code does not conflict with the qualifications provision of the constitution. Indeed, it defines "qualified mail-in elector" to simply "mean a qualified elector."[78] And "qualified elector" is, in turn, defined as "any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth."[79] As a logical matter, then, there cannot be a conflict.

However, as discussed in the next part of this Article,[80] in a case from 1862 and another from 1924, the Pennsylvania Supreme Court mistakenly and somewhat inexplicably concluded that nestled within this section on qualifications—not in the section on voting methods, not among the listed restrictions on the power of the legislature, not in the Declaration of Rights, and not in the type of clear language we see elsewhere when it comes to elections—is a restriction that the legislature must require in person voting. This supposed restriction, found in the middle of the third listed

70. *Id.*
71. *Id.* at 111–12.
72. 58 Pa. 338, 351 (1868).
73. *Id.* at 351–53.
74. *Id.* at 347.
75. *Id.* at 346.
76. *Id.* at 347.
77. *Id.* at 351–53.
78. 25 PA. CONS. STAT. § 2602(z.6).
79. *Id.* § 2602(t).
80. *See infra* Parts III.A, III.C.

qualification and expressed in highly ambiguous language, is at the core of the argument that mail-in voting is unconstitutional. This Article addresses and refutes that argument.

Additionally, the constitution includes a provision on absentee voting at Article VII, Section 14. That section mandates that the legislature provide a manner, time, and place for voting for several large categories of voters, including those absent from their residence "because their duties, occupation, or business require them to be elsewhere" during an election and those unable to vote at a polling place because of illness or physical disability, observance of a religious holiday, or because of duties as county election workers. The legislature is required to exercise its legislative authority to provide for the return and canvass of their votes in the election district in which they reside.[81] This crucial provision is discussed more fully in Part IV.B.

III. DISCUSSION AND CRITIQUE OF TWO KEY PRECEDENTS

A. Chase v. Miller

The purported requirement of in-person voting originated in the 1862 Pennsylvania Supreme Court case, *Chase v. Miller*.[82] In *Chase*, the court addressed whether absentee votes cast by soldiers should be counted in a district attorney election.[83] The court held that the constitution barred the counting of absentee ballots from soldiers serving in the Civil War who had voted away from their election districts during an election.[84]

Absentee voting by soldiers had been permitted in Pennsylvania since the War of 1812.[85] The 1813 statute permitting such voting provided that so long as soldiers were more than two miles from where they would ordinarily vote, they could exercise their right of suffrage "at such place as may be prescribed by the commanding officer."[86] The captain or commanding officer was to serve as election judge, and after the election was to transmit a return to election officials in the soldiers' home county.[87]

Until 1862 it seemed uncontroversial that the General Assembly possessed authority to provide for this type of voting. In 1861, the

81. PA. CONST. art. VII, § 14.
82. 41 Pa. 403 (1862).
83. *Id.* at 414.
84. *Id.* at 414–15.
85. Act of March 29, 1813, ch. 3769, 1812-1813 Pa. Laws 70.
86. *Id.* § 1.
87. *Id.* §§ 2–3.

Pennsylvania Supreme Court case *Hulseman v. Rems* addressed the decision of election judges to count soldiers' absentee ballots in a municipal election.[88] Although the issue of the statute's constitutionality was not directly raised, the court could not find "any argument" restricting the ability of soldiers to also vote in municipal elections.[89]

This all changed with *Chase v. Miller*. At issue in *Chase* was the validity of the relevant provision of the General Election Law of July 2, 1839 ("1839 General Election Law")[90] under which army volunteers had voted. As with the 1813 legislation, the 1839 General Election Law provided that qualified citizens in military service during the election could "exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop, or company, to which they shall respectively belong, as fully as if they were present at the usual place of election."[91] The question before the court was whether this provision of the 1839 General Election Law was constitutional.

The 1839 law was nearly identical to the one passed during the War of 1812 permitting soldier voting.[92] The 1813 Act had been consistent with the Pennsylvania Constitution, according to the court.[93] The 1790 Constitution in effect in 1813 included the exact same grant of legislative authority to the General Assembly as that found in the current constitution,[94] providing that the "legislative power of this Commonwealth shall be vested in the General Assembly."[95] The key question was thus whether anything had been added to the constitution between 1813 and 1862 that limited the legislature's authority to enact absentee voting. The court found such a limitation in a curious and ambiguous phrase added in 1838.

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88. 41 Pa. 396 (1861).

89. *Id.* at 399.

90. Act of July 2, 1839, No. 192, 1838-9 Pa. Laws 519.

91. *Id.* § 43.

92. *See* Chase v. Miller, 41 Pa. 403, 416 (1862) (noting that the 1839 statute was "virtually a reprint" of the 1813 Act).

93. *Id.* at 417 (observing that to the extent that the 1813 Act gave soldiers serving in Pennsylvania the opportunity to vote when away from their residence on election day, "there was nothing the State Constitution, when the Act of 1813 was passed, which its terms could be thought to contravene").

94. PA. CONST. art. II, § 1 (providing that the "legislative power of this Commonwealth shall be vested in the General Assembly").

95. PA. CONST. of 1790, art. I, § 1 (setting forth quoted language). All prior versions of the Pennsylvania Constitution, as well as amendments to such constitutions, are available on the Duquesne Law School's "Pennsylvania Constitution Website," at https://www.paconstitution.org. The author is grateful for this exceptionally helpful website which includes many other resources on the Pennsylvania Constitution.

The versions of Article III on elections in both the 1790 Constitution (in effect in 1813) and the 1838 Constitution are very similar and consist of three sections. The first section of each version sets forth the qualifications for electors—specifying who has the right to vote.[96] The second section is exactly the same in both versions, providing that "[a]ll elections shall be by ballot, except those in their representative capacities, who shall vote viva voce."[97] The third section, protecting electors from arrest during voting, is also identical.[98] So what language in the constitution changed that would limit the previously held power of the legislature?

The language on voting qualifications changed in two ways. Prior to the amendment, the constitution spoke of a "freeman" having the right to vote, thus barring women from voting. To the shame of Pennsylvania, the 1838 amendments maintained that injustice and added another by incorporating the word "white" in front of "freeman," thus enshrining racism into the Pennsylvania Constitution and depriving Black Pennsylvanians of their right to vote.[99]

The change more relevant to this Article dealt with residency requirements. The 1790 Constitution provided in part that "[i]n elections by the citizens[,] every freeman of the age of twenty-one years, having resided in the State two years next before the election[]" and who had paid state or county tax "shall enjoy the rights of an elector."[100] The 1838 Constitution added a qualification that the elector must have resided "in the election district where he offers to vote, ten days immediately proceeding [sic] such election" to be able to exercise the rights of an elector.[101] The court speculated that this amendment was "probably suggested" by the 1836 registry law for Philadelphia.[102]

The language appears to simply add a requirement of residence in the election district to the requirement of state residence. However, the court read this seemingly straightforward addition as also mandating a particular *method* of voting. The court tied the "offers to vote" language from the district residency qualification into the language in a different section of the constitution at the time

96. *See* PA. CONST. of 1790, art. III, § 1 (setting forth qualifications for voting); PA. CONST. of 1838, art. III, § 1 (same).

97. *Compare* PA. CONST. of 1790, art. III, § 2 (setting forth the quoted language), *with* PA. CONST. of 1838, art. III, § 2 (same).

98. *Compare* PA. CONST. of 1790, art. III, § 3 (protecting electors from arrest during voting), *with* PA. CONST. of 1838, art. III, § 3 (same).

99. PA. CONST. of 1838, art. III, § 1.

100. PA. CONST. of 1790, art. III, § 1.

101. PA. CONST. of 1838, art. III, § 1.

102. Chase v. Miller, 41 Pa. 403, 418 (1862).

providing that elections "shall be by ballot,"[103] and concluded that "[t]o 'offer to vote' by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it."[104]

The court thus read "offers to vote" in the section on voter qualifications as establishing not just a new qualification of residence in the election district, "but a rule of voting also."[105] The required manner to exercise the right to vote, according to the court, was that the voter, "in *propria persona*, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful."[106] A ballot "cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil [sic]."[107] The court stated that the constitution "[never] contemplated any such mode of voting,"[108] even though votes had been cast in this fashion since 1813. The court concluded that army voters had cast their votes outside of their election district and that their votes, and all other votes cast this way in the quarter century since 1838, had been "without authority of law."[109] The court stated that the "offers to vote" language "undoubtedly"[110] carried the meaning the court ascribed to it and that it was guided by the words' "plain and literal import" because that is how the people of Pennsylvania presumably understood them when they adopted the amendment.[111]

The court read too much into this language. First, for the court's assessment to be accurate, Pennsylvania voters considering the proposed amendments to the 1838 Constitution would had to have believed that an amendment framed in terms of listing qualifications a voter needed to exercise the "rights of an elector" also contained within it a required form of voting. They would had to have read the language referring to the "election district where he offers to vote" not as simply identifying the district in which the voter seeks to vote or to have their vote counted, but rather as mandating a required method of voting and as taking away from the legislature a previously held power to determine such method. These

103. PA. CONST. of 1838, art. III, § 2.
104. *Chase*, 41 Pa. at 419.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 422.
110. *Id.* at 419.
111. *Id.*

Pennsylvania voters would had to have concluded that "offers to vote" actually means "offers his vote physically and in person only." Further, they would had to have understood that it meant that this is the only possible way to vote, ever. They would had to have concluded that a change to the permitted form of voting was being made even though the separate constitutional provision on the method of voting was completely unchanged. And they would had to have understood that they were voting to remove the rights of soldiers in the field to vote, and to annul an existing statute providing such a right. It seems quite improbable that ordinary Pennsylvanians would have gleaned all this from the three words "offers to vote" located in the middle of the third listed residency qualification in a section on voting qualifications.

The Pennsylvania legislature, just a few months after the adoption of the amendment, apparently did not share the court's understanding of the language either. The amendments to the Pennsylvania Constitution were approved by the voters of Pennsylvania in October of 1838 and announced in the presence of the members of both houses of the General Assembly on December 11, 1838.[112] Yet, less than seven months later, the General Assembly passed the 1839 General Election Law[113] providing for soldiers to vote by absentee ballot away from their election district of residence.[114] The legislature itself did not feel constrained to adopt in-person voting as the sole method of voting.

The court in *Chase v. Miller* dismissed this seemingly strong evidence of the amendment's meaning. The court noted that the act "was a long one."[115] Additionally, the court implied that the process had been rushed—the revisers of the civil code had drafted the language in 1834 but the legislature had not taken it up until late in the session and approved it on the last day of the session.[116] The legislature had, according to the court, been "careless" and had "hurried" to pass the legislation.[117] The court thus chose not to adopt what has in more recent times been described as a "judicial

112. 13 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG, MAY 2, 1837, 260–62 (1839) (announcement of vote on the amendments to the constitution). The records of the constitutional debates are available on the Duquesne Law School Pennsylvania Constitution Website, at https://www.paconstitution.org.

113. *See Chase*, 41 Pa. at 417 (indicating legislation approved by the General Assembly on June 25, 1839).

114. *See* Act of July 2, 1839, No. 192, 1838-9 Pa. Laws 519 (setting forth language on soldier absentee voting).

115. 41 Pa. at 417.

116. *Id.*

117. *Id.*

presumption that . . . sister branches take seriously their constitutional oaths," but instead to assume the legislators had not considered the 1838 amendments on voting when they enacted a massive piece of legislation on that very issue seven months after the adoption of those amendments.[118]

The debates of the Pennsylvania Constitutional Convention of 1837–1838 also support the conclusion that the language listing qualifications was not intended by the delegates to restrict voting to a particular method but rather to ensure that an elector's vote was counted in the correct district and one to which the elector had a basic connection. The amendment adding the "offers to vote" language was made by Emanuel Reigart, a delegate from Lancaster. Reigart stated "in a few words" why he had made the amendment. He pointed out that the committee of the whole had reported that a voter who, among other things, "shall have been assessed [a tax] at least ten days before the election, shall enjoy the rights of an elector . . . ."[119] Reigart indicated "it was quite obvious to him, that there should be a residence of ten days in the district, required of the man offering to vote."[120] The adoption of Reigart's amendment would, in his view, "settle the difficulty as to residence. A man must have been a resident in the district ten days before he could vote, so that a sufficient time would be allowed for him to be assessed. A residence was obtained by the payment of a tax."[121] The ten-day residency qualification was not about a method or manner of voting but about giving time for a tax assessment and assigning each voter to an appropriate district.

Walter Craig, a Washington County delegate, also spoke to the purpose of the amendment. He observed that without the amendment "no residence will be required, to entitle a man to vote in any district, ward, or borough where he may choose to exercise this privilege."[122] Without the amendment, a voter could pick whatever election district suited the voter. "The object of the amendment is to prevent this amalgamation, so to speak, of electors from different parts of the state; it is to keep within their own proper districts."[123] Each voter could be linked to a single election district for voting purposes and not have their votes counted in any election district

118. Stilp v. Commonwealth, 905 A.2d 918, 938 (Pa. 2006).

119. 9 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG MAY 2, 1837, 296 (1838) (statement of Delegate Reigart).

120. *Id.*

121. *Id.*

122. *Id.* at 300 (statement of Delegate Craig).

123. *Id.*

other than the one to which they are connected by residency. Another delegate, James Biddle from Philadelphia, expressed concern about a single voter casting multiple votes, with "one voter giving in a vote at perhaps one or two wards in the city," which the amendment would help prevent.[124]

Further, in the debate on the amendment there appears to be no discussion of any negative impact the language would have on military voters voting under the then-existing and nearly quarter century old law providing for soldiers to vote away from their district. If this amendment was intended to work such a disenfranchisement, this would presumably have been mentioned and debated. Emanuel Reigart could not have said "this provision could do no possible harm to any human being" as it would indeed harm certain soldiers by disenfranchising them.[125]

B. Amendments After Chase v. Miller

Between *Chase v. Miller* and the next crucial decision in 1924, several constitutional amendments were enacted. Work began immediately after the decision in *Chase* on an amendment to ensure soldiers could vote. Governor Andrew Gregg Curtin explained that the amendment was needed because the Pennsylvania Supreme Court had determined the act providing for soldier voting was unconstitutional because of a "phrase in the constitutional amendments of 1838."[126] This meant the disenfranchisement of thousands, which the governor described as a "hard measure."[127] He recommended that steps be taken promptly to ensure that the soldiers could vote.[128] On February 5, 1863, an amendment was introduced to address the issue and was approved by the citizens of

124. *Id.* at 309 (statement of Delegate Biddle). Given that in-person voting was the norm at the time (absentee voting for soldiers aside), Biddle seems to have assumed the voting would be done in person, observing that "[a]t present, voters have a chance of voting in different wards, but if they are required to have fixed residences, as this amendment proposes, it will be in the power of some one at the polls, to point out where another resides." *Id.* This does not mean that the language requires the continuation of and exclusive use of such a method. If that had been intended, it would have been plainly set forth and not buried in a provision in the residency qualifications. Another delegate, Benjamin Martin of Philadelphia, expressed concern about the ambiguity of the language, noting that the amendment would disfranchise the "mechanical and laboring classes" of society and urged that instead of adopting the amendment, the constitution should "point out clearly and explicitly—without the use of ambiguous language, which may admit of one construction, or may admit of another—what shall entitle a man to vote in the state of Pennsylvania." *Id.* at 304–05 (statement of Delegate Martin).

125. *Id.* at 296.

126. H. Jan. 7, 1863, 1st Sess., at 24 (Pa. 1863) (statement of Governor Andrew G. Curtin).

127. *Id.*

128. *Id.*

Pennsylvania in August 1864.[129] The amendment provided as follows:

> Whenever any of the qualified electors of this commonwealth shall be in any actual military service under a requisition from the President of the United States or by the authority of this commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.[130]

The language setting forth voting qualifications was also amended. By 1924, the reference to "every white freeman" had been replaced by "every male citizen." The "offers to vote" language was slightly tidied up, so in 1924 it stated that the citizen had to "have resided in the election district where he shall offer to vote," and the residency in the district qualification was increased from ten days to two months.[131]

Language added in the 1874 Constitution seemed to undermine the *Chase v. Miller* court's conclusion that the constitution's provision on voting qualifications had created not just voting qualifications but also a requirement as to how that vote must be cast.[132] The relevant provision in the 1874 Constitution began: "Every male citizen, twenty-one years of age, *possessing the following qualifications*, shall be entitled to vote at all elections[.]"[133] The provision listed four qualifications, including: "Third—He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election."[134] It could hardly be clearer that this section deals with qualifications only. In-person voting is simply not a "qualification" that can be possessed by a voter, such as residency in a district. The structure of the section shows that its focus is on voter qualifications, not voting methods.

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129. JOSIAH HENRY BENTON, VOTING IN THE FIELD 197–200 (1915) (describing amendment process).

130. PA. CONST. of 1838, art. III, § 4 (amended 1864).

131. *Id.* art. VIII, § 1 (amended 1901).

132. *See* Chase v. Miller, 41 Pa. 403, 419 (1862) (stating that the amendment created not just a residency requirement as a qualification, but also a rule as to how the right to vote must be exercised).

133. PA. CONST. of 1874, art. VIII § 1 (emphasis added). The provision was also amended in 1901 to subject the right to vote to legislation on registration. PA. CONST. of 1874, art VIII § 1 (amended 1901).

134. PA. CONST. of 1874, art. VIII, § 1.

The separate provision on the method of voting underwent two changes, and the second of these changes also undermined *Chase v. Miller*. The relevant language in 1862—relied on in *Chase v. Miller* and the precise wording of which was essential to the court's holding—provided that all elections were to be by ballot.[135] That language became narrower in 1874, and then broader in 1901. The 1874 Constitution included language that supported the *Chase* court's focus on the physical act of voting. That provision began with the same language that "[a]ll elections by the citizens shall be by ballot."[136] It went on, however, to specifically set forth the permissible method of voting:

> Every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot. Any elector may write his name upon his ticket or cause the same to be written thereon and attested by a citizen of the district. The election officers shall be sworn or affirmed not to disclose how any elector shall have voted unless required to do so as witnesses in a judicial proceeding.[137]

This narrow language was completely changed in 1901. The 1901 amendment, which is the current language, stated that "[a]ll elections by the citizens shall be by ballot or *by such other method as may be prescribed by law*: Provided, [t]hat secrecy in voting be preserved."[138] Gone is the requirement of a physical presentation of the ballot. Indeed, elections need not even be by ballot anymore. While it appears that the purpose of the amendment was to provide for the use of voting machines,[139] the broad language is not limited to that. And to be clear, this section is not the source of the legislature's authority to enact absentee voting—that authority is granted by the broad statement in Article II that the "legislative power of this Commonwealth shall be vested in the General Assembly."[140] But because the language in the 1838 constitution was so essential to the court's holding that offering to vote meant offering to vote by physical presentation of a ballot, the change to that language undermines the court's holding in *Chase v. Miller*. As discussed in the

135. *See* PA. CONST. of 1838, art. III, § 2.
136. PA. CONST. of 1874, art. VIII, § 4.
137. *Id.*
138. PA. CONST. of 1874, art. VIII, § 4 (amended 1901) (emphasis added).
139. *See supra* note 50.
140. PA. CONST. art. II, § 1.

next section, however, the Pennsylvania Supreme Court did not fully appreciate the impact of the change when it next took up the issue in 1924. Instead, it compounded its error from 1862.

C. In re Contested Election in Fifth Ward of Lancaster City

Somewhat surprisingly, neither the 1874 nor 1901 amendments described above had a significant impact when the court next considered the issue in 1924. The court in *In re Contested Election in Fifth Ward of Lancaster City* was again faced with a challenge to absentee voting and again found a statute permitting voting out of the election district unconstitutional.[141] In this case, a number of electors had cast votes in accordance with a 1923 absentee voting statute.[142] That statute made it possible for a duly qualified voter who, because of their duties, business or occupation was unavoidably away from home, to vote outside their election district.[143] Such a voter could apply for and obtain an "official absent voter's ballot."[144] The voter was to appear before an officer authorized to administer oaths and mark the ballot "under the scrutiny" of this officer.[145] The process called for the voter to first display the blank ballot to the officer, then to fill it in in their presence and then to seal it within the appropriate envelopes.[146] The voter was to then return the envelope with the ballot in it by registered mail.[147]

The court noted that an act of the legislature is presumptively valid,[148] but still found the statute unconstitutional.[149] The court determined that *Chase v. Miller* was controlling and quoted at length from that opinion, including language indicating that the constitution requires voting in *propria persona* and that ballots cannot be mailed into the election district.[150] The court observed that the language on qualifications had changed only very slightly and was practically the same in 1924 as it had been in 1862.[151] The minor changes did not change the core point, which was that the 'offer to vote' still had to be in the district where the elector

141. 126 A. 199, 200, 201 (Pa. 1924).
142. *Id.* at 200.
143. Act No. 201 § 1, 1923 Pa. Laws 309.
144. *Id.* § 2.
145. *Id.* § 1.
146. *Id.* § 9.
147. *Id.* § 11.
148. *In re* Contested Election in Fifth Ward of Lancaster City, 126 A. 199, 200 (Pa. 1924).
149. *Id.* at 201.
150. *Id.* at 200 (quoting Chase v. Miller, 41 Pa. 403, 419 (1862)).
151. *Id.* at 201.

resides.[152] The court ignored the clarification in the 1874 Constitution that had explicitly framed Article VIII, Section 1 as a simple list of qualifications to be possessed by an elector.

The court also disregarded the changes made to the constitution's language on voting methods. Had it attended to those changes, the result would have been different. The logic of *Chase v. Miller* went something like this: The constitution requires an elector to "offer to vote." The constitution says that voting must be by ballot. Therefore, the correct inquiry is what it means to offer to vote by ballot, which the court in *Chase v. Miller* concluded meant physical presentation of a ballot. But that same logic could not be applied in the same way in 1924 because the requirement of voting by ballot had been eliminated and replaced with broader language. The "updated" logic should have been: *The constitution requires an elector to "offer to vote." Voting may be by ballot or whatever other method the Legislature selects. Therefore, the key is what it means to offer to vote by whatever method selected by the Legislature.* Instead, however, the court actually seemed to focus on the need for the "personal presentation of the ballot,"[153] even though this had not been the governing language in the constitution since 1901.

The court then turned to the 1864 amendment that allowed soldiers in service outside their election district to vote. The court held that this amendment determined "those who, absent from the district, may vote other than by personal presentation of the ballot[.]"[154] According to the court, "those . . . permitted are specifically named" in the amendment, and the "old principle that the expression of an intent to include one class excluded another has full application here."[155] The amendment provided for voting only by those in military service away from their usual place of election and no others. According to the court, the legislature had no authority to facilitate out-of-district voting for any other group.[156]

That the amendment addressed the voting rights of soldiers explicitly is not surprising. The amendment is best seen as an effort to promptly and precisely undo the damage wrought by the court in 1862 and to restore the state of affairs that existed before that decision. The amendment was a focused and direct rebuke of the Pennsylvania Supreme Court.

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152. *Id.*
153. *Id.* at 200, 201.
154. *Id.* at 201.
155. *Id.*
156. *Id.* at 201.

Further, the "old principle" referred to by the court is far more appropriately applied to the constitutional provision dealing directly with the method of voting. As noted, that language, unchanged since 1901, states that: "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, [t]hat secrecy in voting be preserved."[157] The requirement of secrecy is the only qualification or restriction set forth on the voting method provided by law. If there were others, they would presumably be set forth there as well.[158]

IV. THE CONSTITUTIONALITY OF MAIL-IN VOTING

To recap, the Pennsylvania Constitution grants all legislative power to the General Assembly and there is no clear limitation on the legislature's ability to provide for mail-in voting. The two Pennsylvania Supreme Court precedents relied on by opponents of mail-in voting are premised on a strained interpretation of language in the constitution, reading "offers to vote" and "shall offer to vote" as setting forth a required mode of voting and limiting the power of the legislature.

The interpretation of the constitution in these two cases is untenable for a number of reasons. First, the words "shall offer to vote" simply do not bear the meaning of "shall vote in person at the polling place and by no other means." This conclusion is bolstered by the fact that Article VII, Section 1 is framed as a numbered list of qualifications that an elector must possess in order to vote, and not as a section containing any restrictions on legislative power (which are ordinarily set forth explicitly). The language simply identifies the correct election district in which an elector's vote should be tallied. Second, there is a provision in the constitution on the method for voting and that provision does not require in person-voting. Instead, it includes one restriction on the legislature (that secrecy in voting be provided for) and no other. Third, regulation of elections is a core legislative function. Fourth, the Pennsylvania legislature, just a few months after the amendment was adopted, passed a piece of legislation that provided for voting by absentee ballot for soldiers, showing that the legislature at the time did not interpret the constitution in the manner urged by the Pennsylvania Supreme Court

157. PA. CONST. of 1874, art. VIII, § 4 (amended 1901). The language is identical in the current constitution. PA. CONST. art. VII, §4.

158. The court also expressed some concerns about secrecy in voting. Although the court did not decide the issue, it stated that it "may well be argued" that mail-in voting would result in the disclosure of a vote, "undoubtedly the result if but one vote so returned in a single district." *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. at 201.

decades later. And fifth, the debates of the Constitutional Convention indicate that the concern was ensuring that a vote be counted only in the voter's election district of residence as opposed to limiting legislative power on voting methods.

This Part of the Article presents three additional arguments in support of the constitutionality of Act 77. Part IV.A briefly argues that a 1959 amendment supports the proposition that the reference to an election district in which a voter "shall offer to vote" merely identifies the district in which a voter's ballot should be counted and does not require a particular mode of voting or restrict the legislature's power. Part IV.B discusses key differences between Act 77 and the statutes found unconstitutional in 1862 and 1924, leading to a conclusion that Act 77 is constitutional. Part IV.C sets forth key distinctions between the constitutional provision adopted in 1864 and the current provision on absentee voting.

A. A 1959 Amendment Undermines the Two Key Precedents

A 1959 amendment to the constitution provides some indication that the language "shall offer to vote" does not carry the significance placed on it by the Pennsylvania Supreme Court.[159] The amendment, which set the required residence in the election district at sixty days, addressed a situation in which a Pennsylvania citizen moves from one election district to another within sixty days of the election. Such a citizen would not be eligible to vote in either the old or the new district because they would lack the required sixty-day residency in any election district. The amendment solved this problem by adding an exception to the qualification that a person must reside sixty days in the election district in which they "shall offer to vote." Pursuant to the amendment, an otherwise qualified elector "may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty days preceding the election."[160]

The precise language matters. The Pennsylvania Supreme Court in 1862 and 1924 embraced the notion that the "offers to vote" or "shall offer to vote" language is absolutely essential and establishes a required method of voting. And yet, this exception added in 1959 does not provide that the impacted electors "may offer their vote" in the previous district but simply that they "may, if a resident of Pennsylvania, vote in the election district from which he or she

159. PA. CONST. of 1874, art. VII, § 1 (amended 1959).
160. *Id.*

removed her residence."[161] If the "shall offer to vote" language had the meaning the court assigned to it, it would have been essential to carry it over for these voters as well. Because the reference to an election district in which the elector "shall offer to vote" simply identifies the district in which the elector intends their vote to be counted, it was not necessary to carry the language over. The amendment identifies the relevant voting district in different terms—as the election district from which the elector removed their residence. In other words, repeating the phrase "shall offer to vote" would have been essential if it established a method of voting, but superfluous if it merely identified the relevant election district. The omission of the phrase signals that the latter is the more correct reading. The current constitution includes language that is essentially identical to the 1959 amendment[162] and so calls into question a key underpinning of *Chase v. Miller* and *In re Contested Election in Fifth Ward of Lancaster City*.

B. Relevant Differences Between Act 77 and the Two Statutes Previously Found Unconstitutional

B.1. A Voting Method for Everyone

Act 77 differs materially from the statutes deemed unconstitutional in *Chase v. Miller* and *In re Contested Election in Fifth Ward of Lancaster City*. Act 77 is not a carve-out or an exception for a limited number of voters as was the case with the 1839 and 1923 laws. It is, instead, a new method of voting available to *all* qualified electors in the state and so represents legislative action of a different type and character. The legislative authority granted by Article II, Section 1, more clearly encompasses the General Assembly's power to establish a voting method for all Pennsylvanians as opposed to a method for a subset of voters. The Pennsylvania Supreme Court expressed this idea in a 1904 opinion which recognized that the General Assembly has the "power to regulate the details of place, time, manner, etc., in the general interest and, for the due and orderly exercise of the franchise by *all electors* alike."[163]

Similarly, the constitution requires all election laws be uniform throughout the state.[164] All that is required for uniformity is that persons in the same circumstance be treated alike,[165] and both the

161. *Id.*
162. PA. CONST. art. VII, § 1, cl. 3.
163. Indep. Party Nomination, 57 A. 344, 345 (Pa. 1904) (emphasis added).
164. *See* PA. CONST. art. VII, § 6.
165. Winston v. Moore, 91 A. 520, 524 (Pa. 1914).

1839 and 1923 statutes presumably met that standard. But the Pennsylvania Supreme Court has indicated that the requirement of uniformity goes to "matters of procedure, methods and machinery of voting and like matters with respect to electors and voting."[166] And one key inquiry identified by the court in an earlier case is that uniformity is satisfied when "there is no distinction as to the right of each elector to cast his ballot."[167] In its general uniformity and applicability to all voters in Pennsylvania, Act 77 stands on firmer ground than the earlier statutes.

A broader implementation of mail-in voting also alleviates one of the concerns of the court in *In re Contested Election*. The court had expressed concern that when only a small number of electors use absentee ballots, the danger of compromising secrecy becomes more significant.[168] But with over a third of voters casting their vote by mail in the 2020 election, such a concern is no longer relevant.[169] Increasing the number of such voters is *more* protective of secrecy, not less so.

Finally, the Free and Equal Elections Clause[170] countenances and supports no-excuse mail-in voting. The clause provides, among other things, that "[e]lections shall be free and equal."[171] The clause means "every voter shall have the same right as any other voter"[172] and that "all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters."[173] As noted, the Pennsylvania Supreme Court extended the deadline for receipt of mailed-in ballots by three days under this provision for the November 2020 election.[174]

This is not to say that the Free and Equal Elections Clause requires mail-in voting. Nor does it override clear constitutional requirements for voting. But the clause provides important guidance. As discussed above, where there is ambiguity as to whether a statute is constitutional or not, any doubts should be resolved in favor of constitutionality.[175] Judicial deference should be at its highest

166. Cali v. City of Philadelphia, 177 A.2d 824, 829 (Pa. 1962).
167. *Winston*, 91 A. at 524.
168. *See supra* note 158.
169. *See supra* note 5 and accompanying discussion.
170. PA. CONST. art. I, § 5.
171. *Id.*
172. *Winston*, 91 A. at 522.
173. Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 369 (Pa. 2020) (quoting League of Women Voters v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018)), *cert. denied*, 141 S. Ct. 732 (2021).
174. *Id.* at 371.
175. *See* discussion *supra* Part II.A; *see also* Payne v. Commonwealth Dep't of Corr., 871 A.2d 795, 800 (Pa. 2005) ("Any doubts are to be resolved in favor of a finding of constitutionality.").

when it comes to the legislature's efforts to remove impediments to voting to effectuate the promise and command of a provision in the constitution to make voting more open and to provide all voters the same right to cast their ballot. This is especially true in this context because the right to vote is "fundamental and 'pervasive of other basic civil and political rights . . . .'"[176]

B.2. Voting "In the District"

The most logical reading of voting "in" an election district focuses not on a physical act in a particular location but rather on determining in which district a voter's ballot should be counted. Even the court in *Chase v. Miller* acknowledged this to some degree by stating it might be "defensible" for the legislature to provide for electors to cast their vote in a neighboring election district under certain circumstances.[177] The Pennsylvania Supreme Court, in a somewhat similar context, rejected an overly literal reading of the language "in the election district." In *In re Canvass of Absentee Ballots of 1967 General Election*, the court addressed a challenge to the constitutionality of legislation that provided for the County Board of Elections to canvass absentee ballots.[178] The challengers claimed that because the constitution instructed the legislature to provide a means for the "return and canvass of [absentee] votes in the election district in which [absentee voters] respectively reside," the votes would have to physically be counted in the election districts as the constitution says, and not in a centralized location.[179] The court rejected that argument. It noted that absentee voting is a "salutary feature in our democratic processes of government."[180] The court held that given the complexity of counting ballots in each district as opposed to a central location, the drafters of the constitution did not contemplate that the counting of the votes had to take place, literally, in the election district.[181]

But even assuming that an aspect of physical presence in the election district is called for, Act 77 stands on firmer ground than the previous statutes. Act 77 supports voting in the district in a way those statutes did not. Those statutes established regimes in

176. Banfield v. Cortes, 110 A.3d 155, 176 (Pa. 2015) (quoting Bergdoll v. Kane, 731 A.2d 1261, 1269 (Pa. 1999)).

177. 41 Pa. 403, 424 (1862) (noting a tradition of voters in some areas of Luzerne County voting in nearby election districts which they did not reside).

178. 245 A.2d 258, 260 (Pa. 1968).

179. *Id.*

180. *Id.* at 261.

181. *Id.* at 263–64.

which voters would vote outside of their election district and the ballots would then be sent into the election district. The 1839 statute at issue in *Chase v. Miller* made it possible for those in military service to "exercise the right of suffrage at such place as may be appointed by the commanding officer."[182] Although the court discussed the importance of voting in person and being observed by one's neighbors, when the court articulated the actual "rule" set forth by the constitution, it was that the right conferred was the right to "vote in that district."[183] Even the prohibition on votes being sent by "mail or express" seems to focus on votes being cast outside the district and then being sent and certified "into the county where the voter has his domicil [sic]."[184] It was the act of voting in-person outside the district that was at the core of the court's concern. Similarly, in the 1923 law in *In re Contested Election in Fifth Ward of Lancaster City*, the actual in-person voting took place outside of the election district in front of an officer authorized to administer oaths.[185] The key requirement of the constitution, the court indicated, was that the "'offer to vote' must still be in the district where the elector resides."[186]

In contrast, the key innovation of Act 77 is that it permits a new and convenient way of voting for those who are *in* the election district during the election. Consider a typical Pennsylvanian voting under Act 77. This voter would most likely request a ballot which is mailed to their home, located in the election district. They then sit down at the kitchen table in their house (still in the election district) and engage in the actual act of voting by filling out the ballot, sealing it with the secrecy envelope, and completing the required declaration. The marking of the ballot occurred in the election district, exactly as the legislation contemplates (though of course the ballot could be filled out anywhere). As Senator Boscola noted during the debate on the bill, the legislation would "allow a living room or a kitchen table to be a polling place."[187] Unlike the prior statutes, Act 77 is designed to facilitate voting by the prescribed method in the election district.

182. 41 Pa. at 416.
183. *Id.* at 419.
184. *Id.*
185. 126 A. 199, 200 (Pa. 1924); *see* Act No. 201 § 1, 1923 Pa. Laws 309.
186. 126 A. at 201.
187. S. 2019-46, 1st Sess., at 1000 (Pa. 2019).

C. Relevant Differences Between the Current Provision on Absentee Voting and the "Soldier Voting" Provision from the Civil War

The constitution's current language on absentee voting differs materially from the "soldier voting" provision of the constitution construed in *In re Contested Election in Fifth Ward of Lancaster City* in 1924. The 1864 amendment was narrow, applying only to voters "in any actual military service."[188] It provided a qualified right to vote "under such regulations as are or shall be prescribed by law," thus leaving it to the legislature whether to enact such legislation.[189]

The current language on absentee voting, adopted in 1967, is very different both in framing and scope. While the 1864 amendment was directed towards a narrow class of voters to which it granted a conditional right if the legislature chose to act, the current language includes a very broad range of voters and is directed to the legislature as follows:

> Absentee Voting. The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.[190]

This is a mandate. The legislature "shall, by general law, provide a manner . . . time and place" by which specified voters "may vote, and [shall provide] for the return and canvass of their votes in the election district" in which they reside.[191] This is a directive to the legislature to use a presumably existing power (to regulate elections as the legislature sees fit, subject only to constitutional limitations) in order to facilitate voting for the named categories of voters. To the extent the language does impose a limitation on the power of

188. PA. CONST. of 1838, art. III, § 4 (amended 1864).
189. *Id.*
190. PA. CONST. art. VII, § 14(a).
191. *Id.*

the General Assembly, it is simply that the legislature cannot enact a voting system that does not accommodate the specified needs of these voters.

The directive to the legislature that it "shall" do certain things is only a statement of what it must do, not about what else it may do. An 1851 Pennsylvania Supreme Court opinion provides a relevant precedent. In *Commonwealth v. Hartman*, the court addressed a claim that a school law was unconstitutional.[192] The issue in *Hartman* was whether the General Assembly had exceeded its powers by creating a system of general education. Those challenging the constitutionality of the law claimed that the constitution's language on schools included a limitation that the legislature could not exceed.[193] The constitution provided that "the legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the state *in such manner that the poor may be taught gratis*."[194]

The court rejected the argument that this last clause limited the legislature's power to act beyond providing free education for impoverished Pennsylvanians. The constitution instructed what the legislature "shall" do, and so required the legislature "to do thus much, but does not forbid them to do more. If they stop short of that point, they fail in their duty; but it does not result from this that they have no authority to go beyond it."[195] The same principle—that where the constitution mandates action it is not setting a maximum—applies to the language on absentee voting just as well.

The Pennsylvania General Assembly has long understood itself as having authority to, at its discretion, provide absentee voting for citizens beyond those categories explicitly set forth in the constitution. In 1968, just one year after the current absentee voting amendment was approved, the legislature defined "duties, occupation or business" to include vacations and leaves of absence and "also include an elector's spouse who accompanies the elector."[196] Vacations and leaves of absence are a pretty big stretch and "elector's spouse" cannot by any rational means be fit into the language of the constitution. A 1970 Pennsylvania Supreme Court opinion addressed a claim that the inclusion of spouses was unconstitutional as beyond the language of Article VII, Section 14. The court

192. 17 Pa. 118, 119 (1851).
193. *Id.* at 119–20.
194. *Id.* (quoting PA. CONST. of 1838, art. VII, § 1) (emphasis added by court).
195. *Id.* at 120.
196. 25 PA. CONS. STAT. § 2602(z.3).

rejected the claim on the grounds of a lack of standing.[197] There has now been a half-century of elections in which those beyond the scope of groups named in the constitution have cast absentee ballots.

Act 77, far from conflicting with Article VII, Section 14, effectuates that constitutional provision. The constitution directs the legislature to ensure that any voters in the broad categories set forth have a method of voting to meet their needs. The Legislature has chosen to meet that obligation through a sensible means—providing a method of voting that will ensure all those voters will be able to vote by simply making it possible for all voters in the state to vote by mail-in ballot.

That is certainly a reasonable legislative course to implement the mandate and to ensure all are included and facilitated. This is particularly true because the categories of voters in Article VII, Section 14, are broader and vaguer than the carefully delineated category of soldiers in the 1864 Amendment. For instance, the legislature must facilitate absentee voting for electors who cannot go to their polling place because of "illness," which is broad and vague enough to potentially cover all Pennsylvanians fearful of exposing themselves to infection during a pandemic.[198] Similarly, the constitution sweeps broadly when it requires the legislature to provide absentee voting for anyone who "may" be required to be absent on election day (as opposed to those who "will be" or "are" absent) because of their "duties, business or occupation."[199] The term "duties" in particular is extraordinarily expansive.[200] Act 77 thus ensures compliance with the expansive constitutional mandate by extending a convenient method for voting to all Pennsylvanians. The Pennsylvania Supreme Court should have no qualms about affirming the constitutionality of Act 77.

CONCLUSION

Pennsylvania's electoral votes were counted for Joe Biden, but the nation came very close to a much different result in which the votes cast by millions of Pennsylvania's citizens would have been discounted and the choice made by the voters reversed. It is true that Representative Kelly's lawsuit was dismissed with prejudice by the Pennsylvania Supreme Court, but before that happened, a judge on the Pennsylvania Commonwealth Court had ruled largely

197. Kauffman v. Osser, 271 A.2d 236, 240 (Pa. 1970).
198. PA. CONST. art. VII, § 14(a).
199. *Id.*
200. *See* 25 PA. CONS. STAT. § 2602(z.3).

in his favor. Efforts to have Congress disregard Pennsylvania's electoral votes failed as well, but before that happened, 138 members of the House of Representatives and seven senators voted to sustain the objection.[201] In other words, Pennsylvania's electoral votes were in real jeopardy and will potentially remain in doubt unless the matter is fully resolved. That resolution could happen by a clarifying constitutional amendment, but a judicial resolution is more likely.[202] When the Pennsylvania Supreme Court again confronts the issue, as it almost certainly will, given pending litigation, it should directly resolve the matter by finding Act 77 constitutional.

201. 167 CONG. REC. S38 (daily ed. Jan. 6, 2021) (roll call vote in Senate on the same); 167 CONG. REC. H112 (daily ed. Jan. 6, 2021) (roll call vote in House of Representatives on objection to Pennsylvania's electoral votes).

202. Amending the Pennsylvania Constitution requires the proposed amendment be approved by each house of the General Assembly in two consecutive legislative sessions and then approved by the voters. PA. CONST. art. XI, § 1.

An Underestimated Showcase of Student Scholarship: Law School Institutional Repositories

*By Dajiang Nie**

ABSTRACT

Law schools have been using institutional repositories as a showcase for law journals and faculty scholarly achievements for a long time, but law school institutional repositories fail to collect student scholarship regularly. Aspects of law school institutional repositories make no sense when directly benefiting both students and law schools and failing to display student scholarship. This Article examines student scholarship in law school institutional repositories, analyzing its current status, advantages, and keys to success. The Article shows that law school institutional repositories underappreciate student scholarship, and the content of student repositories also lacks diversity. This approach impairs the positive impacts a

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student scholarship repository should have had on student writing and employment, law school admissions and alumni relations. The Article highlights four key points for a successful law student scholarship repository, including the quality of student scholarship, marketing, copyrights, and FERPA compliance. The Article argues, to maximize the positive effects of a law student scholarship repository, law schools must carefully design institutional repositories to expand their content and diversity.

I. INTRODUCTION

Beginning in 2008, law school libraries experimented with the use of open-access institutional repositories to present intellectual achievements of law schools to the general public.[1] After a decade, law school institutional repositories have evolved into an essential electronic resource for most law school libraries.[2] However, law school institutional repositories focus primarily on faculty scholarship and law school journals rather than student scholarship, even though law school institutional repositories should serve students as well.

The purpose of this Article is to examine the necessity of law school student repositories and the several crucial elements in the student repository policy design. This Article argues that expanding the size and diversity of student scholarship collections in law school institutional repositories will benefit both law students and law schools. This Article continues to argue that the law library must carefully tailor institutional repository policy on student scholarship in order to maximize the potential payoff of student repositories.

Part II of this Article first sketches institutional repositories in higher education. Part III examines current law school institutional repositories and student repositories. Part III concludes that law school institutional repositories currently fail to collect student scholarship diligently. It further identifies the fact that law student repositories overlook student scholarship beyond published student notes and writing competition-winning essays even when law school institutional repositories have student scholarship collections.

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1. James M. Donovan & Carol A. Watson, *Citation Advantage of Open Access Legal Scholarship*, 103 LAW LIBR. J. 553, 554 (2011).

2. Kincaid C. Brown, *How Many Copies Are Enough Revisited: Open Access Legal Scholarship in the Time of Collection Budget Constraints*, 111 LAW LIBR. J. 551, 561–62 (2019) [hereinafter Brown, *How Many Copies*].

Part IV contends that student repositories promote student writing and support employment, as well as foster alumni relations and boost admissions for law schools. Finally, Part V raises several critical policy elements in designing a law student repository. In particular, an effective student repository policy must ensure the quality of collected student scholarship, effective outreach to the law school community, and copyright and FERPA compliance. Therefore, this Article concludes that an expanded law student repository, supported by appropriate policy, positively contributes to the success of both law schools and students.

II. THE INSTITUTIONAL REPOSITORY: WHAT IS IT?

In 2003, Clifford Lynch defined institutional repositories as:

> [A] set of services that a university offers to the members of its community for the management and dissemination of digital materials created by the institution and its community members. It is most essentially an organizational commitment to the stewardship of these digital materials, including long-term preservation where appropriate, as well as organization and access or distribution.[3]

Similarly, Raym Crow defines an institutional repository as "a digital archive of the intellectual product created by the faculty, research staff, and students of an institution and accessible to end users both within and outside of the institution, with few if any barriers to access."[4]

Institutional repositories are "critical to developing, managing, and leveraging enterprise-wide digital content and bringing greater value to institutional output,"[5] because they preserve the intellectual output of the institution,[6] offer open access to scholarship,[7] "act

3. Clifford A. Lynch, *Institutional Repositories: Essential Infrastructure for Scholarship in The Digital Age*, 226 ASS'N RSCH. LIBR. 1, 2 (2003).

4. Raym Crow, *The Case for Institutional Repositories: A SPARC Position Paper*, SPARC (Aug. 2002), https://ils.unc.edu/courses/2014_fall/inls690_109/Readings/Crow2002-CaseforInstitutionalRepositoriesSPARCPaper.pdf.

5. Erv Blythe & Vinod Chachra, *The Value Proposition in Institutional Repositories*, 40 EDUCAUSE REV. 76 (2005).

6. James M. Donovan & Carol A. Watson, *Will an Institutional Repository Hurt My SSRN Ranking: Calming the Faculty Fear*, AALL SPECTRUM, Apr. 2012, at 12, 12.

7. Danielle Barandiaran et al., *Focusing on Student Research in the Institutional Repository*, 75 COLL. & RSCH. LIBRS. NEWS 546 (2014).

as a more stable publishing environment,"[8] and promote institutions and scholars.[9]

These appealing qualities quickly captured the attention of law schools. As a result, law school libraries have been developing law school institutional repositories since the early 2000s. Institutional repositories have evolved tremendously among law schools since then. Less than half of law schools were using institutional repositories to disseminate scholarship in 2007.[10] By 2016, at least eighty percent of the top 100 law schools had institutional repositories.[11] In 2020, most law schools had independent law school institutional repositories, though very few still share institutional repositories with their university libraries.[12]

Many law school institutional repositories work similarly. Law librarians manage institutional repositories by designing repository policy, advocating for institutional repositories in the law school community, processing documents into standard formats, adding appropriate metadata to documents, analyzing usage statistics, and provide positive feedback to the law school.[13] Academic law librarians heavily rely on institutional repository platform software, including DSpace and Bepress,[14] to manage and utilize law school institutional repositories.

The size and content of law school institutional repositories vary because the size and mission of each law school is different. For example, Yale Law School Legal Scholarship Repository contains more than seventeen thousand papers that have been downloaded more than thirteen million times worldwide.[15] Some smaller academic law libraries, in contrast, do not even have an institutional repository.[16]

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8. Brown, *How Many Copies*, *supra* note 2, at 562.

9. Donovan & Watson, *supra* note 6.

10. Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think About Legal Scholarship*, 37 N.M. L. REV. 431, 461 (2007).

11. Kincaid C. Brown, *Law School Institutional Repositories: A Survey*, 25 TRENDS INTERACTIVE 21, 21 (2016) [hereinafter Brown, *Law School*].

12. In the Law School Repositories Directory maintained by the Law Repositories Caucus of American Association of Law Libraries, only forty-six law schools do not have a law school institutional repository. *Law School Repositories Directory*, GOOGLE DOCS, https://docs.google.com/document/d/17TYzSttbmsI-37nJ-TIfIUb1C7tJHMmKQXwvdq2g-Ck (last visited Dec. 1, 2020).

13. *See generally* Crow, *supra* note 4.

14. DSpace is a free repository platform, available at https://duraspace.org/dspace/. Bepress is a commercial legal repository platform, available at http://bepress.com/.

15. *Yale Law School Legal Scholarship Repository*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY, https://digitalcommons.law.yale.edu/ (last visited Oct. 11, 2021).

16. *Law School Repositories Directory*, *supra* note 12.

III. STUDENT SCHOLARSHIP IN LAW SCHOOL INSTITUTIONAL REPOSITORIES

Even though law school institutional repositories have made considerable progress over the years, they do not actively collect student scholarship. Other institutional repositories, which do collect student scholarship, often lack diversity in student scholarly writings. First, it is imperative to examine the collections in law school institutional repositories.

Because law schools have different missions, the corresponding missions for the affiliated law school library institutional repositories are also different. The differing missions lead to a difference in content and sophistication of each academic law library institutional repository. However, the content and characteristics of their general coverage are similar from a broader perspective.[17] The conventional approach is to organize the content of a law school institutional repository by author groups and the nature of publications.[18] Consequently, the common collections of a law school institutional repository include law school journals, faculty scholarship, special collections, and student scholarship.

Law school journals are one of the regular collections in law school institutional repositories. Since the turn of the millennium, many law schools have published their journals online, and many of these journals were in the law school's institutional repository.[19] Thirty-five percent of the law journals were in law school institutional repositories in a 2016 survey.[20] Two years later, the percentage rose to forty-three percent.[21] Most law journals are currently open access journals, where users can find the digitized print volumes or the online-exclusive journals on law school institutional repositories. Law schools gradually recognized the value of institutional repositories to law journals. Law school institutional repositories are more stable than web pages, which allows law school journals to have a more stable digital publication platform. Given that the emerging trend in law journal publishing is toward slowly eliminating traditional print journals and increasing electronic

17. Crow, *supra* note 4, at 16 ("The content of an institutional repository is: [i]nstitutionally defined; [s]cholarly; [c]umulative and perpetual; and [o]pen and interoperable.").

18. Betty Rozum & Becky L. Thoms, *Populating Your Institutional Repository and Promoting Your Students: IRs and Undergraduate Research*, *in* MAKING INSTITUTIONAL REPOSITORIES WORK 311, 313 (Burton B. Callicott et al. eds., 2016).

19. Brown, *How Many Copies*, *supra* note 2, at 554; *see also* Yolanda P. Jones, *Libraries Can Help: Institutional Repositories*, 30 T.M. COOLEY L. REV. 253, 253 (2013).

20. Brown, *How Many Copies*, *supra* note 2, at 555.

21. *Id.* at 561.

journals,[22] the importance of a stable publishing platform for an online journal is undeniable. A law school institutional repository is also an excellent showcase to promote new journals at a low cost.[23]

Faculty scholarship is another popular law school institutional repository collection. Unsurprisingly, most faculty scholarship in law school institutional repositories are law journal articles.[24] In addition, law school institutional repositories include other faculty intellectual accomplishments, such as amicus briefs, legislative testimony, and articles in popular media. Collecting faculty scholarship to a law school institutional repository makes faculty scholarship more visible in the digital world, which will eventually help increase faculty citation counts.[25] Outside researchers will also benefit from faculty scholarship in law school institutional repositories because they can find articles more quickly for their research. This is especially important for non-legal researchers and foreign researchers who are not familiar with or do not have access to HeinOnline or other law journal databases.[26]

Special collections are also common in law school institutional repositories. Many law libraries treat an institutional repository as a digital archive platform, a common academic library approach to preserve digitized materials.[27] For example, Texas Tech University Law School Institutional Repository's special collections include the personal collections of retired professors, Texas Administrative Code superseded (restricted access to law school community), Texas Governor Executive Orders, unique bookmarks, and legal

22. Sarah Reis, Deconstructing the Durham Statement: The Persistence of Print Prestige During the Age of Open Access 11 (June 30, 2016) (unpublished manuscript) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2785307) ("Only 27 out of 200—or 13.5%—of the flagship law reviews did not have open and free digital copies of their articles available online.").

23. Jones, *supra* note 19, at 255.

24. *Law School Repositories Directory*, *supra* note 12.

25. *See* Donovan & Watson, *supra* note 6, at 560, 573; *see also* Parker, *supra* note 10, at 466.

26. BePress provides administrators with users' geography statistics. For example, only 54.54% users come from the United States out of 40,225 user sessions of Golden Gate University School of Law institutional repository in 2016. Janet Fischer, *2016 Annual Report for Digital Commons: The Legal Scholarship Repository @ Golden Gate University School of Law*, GGU L. DIGIT. COMMONS (May 3, 2016), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1003&context=reports.

27. See, for example, Yale Law School's institutional repository, which has a special collection American Trials, including digitized monograph. *American Trials*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY, https://digitalcommons.law.yale.edu/amtrials/ (last visited Oct. 11, 2021).

memorabilia.[28] Law school history is also a popular item in special collections, including commencement, recordings of lectures and conferences, photos, information of classes, and awards.[29]

Law student scholarship, however, is a minority collection in institutional repositories. An academic law library, as part of the law school, surely places students as the top priority of law school stakeholders. Law students contribute intellectually to the discipline of law, like graduate students in other disciplines.[30] Nevertheless, law student scholarship is far less significant than other common collections in law school institutional repositories. Of the top one hundred law schools in a 2016 survey, only twenty-seven include independent student scholarship collections in their institutional repositories.[31] Even today, this pattern of law school institutional repositories underestimating student scholarship has unfortunately not made a significant shift,[32] while the percentage of undergraduate and graduate scholarship in university-level repositories has already been considerably high for years.[33]

It is obvious that student scholarship is not prevalent in law school institutional repositories. It is necessary to further examine the student scholarship found in those minority law school institutional repositories which collect student scholarship. There are four categories of student scholarship collected by law school institutional repositories, including student notes, writing competition-winning essays, theses and dissertations, and coursework.

Student notes are routine intellectual achievements of students in law school institutional repositories. Notes and comments are a work of in-depth analysis of legal scholarship written by a law student.[34] Student authorship does not prevent them from being important legal scholarship, as legal researchers and practitioners

28. *Texas Tech Law Special Collections*, TTU DSPACE REPOSITORY, https://ttu-ir.tdl.org/handle/2346/81999 (last visited Oct. 21, 2021).

29. Brown, *Law Schools*, *supra* note 11, at 23–24.

30. Betty Rozum et al., *We Have Only Scratched the Surface: The Role of Student Research in Institutional Repositories*, USU RSCH. & SCHOLARSHIP (Mar. 26, 2015), https://digitalcommons.usu.edu/lib_present/63/.

31. Brown, *Law Schools*, *supra* note 11, at 23.

32. Less than sixty law school institutional repositories nationwide have "student scholarship" or "Theses and Dissertation" collections. *Law School Repositories Directory*, *supra* note 12.

33. Barandiaran et al., *supra* note 7, at 546; *see also* Rozum et al., *supra* note 30.

34. Yale Law Journal defines a Note as a work of legal scholarship that "should advance a particular area of legal scholarship beyond its current state, make a detailed argument, and provide persuasive evidence for each of its conclusions." *Guide to Writing a Note or Comment Based on Summer, Clinical, or RA Work*, YALE L.J., https://www.yalelawjournal.org/files/GuidetoWritingaNoteorCommentBasedonSummerClinicalorRAWork_e855wwei.pdf (last visited Oct. 11, 2021).

frequently cite them in formal legal writings. The best notes or comments are published in a law journal where the author is a member.[35] Because most law school institutional repositories have independent "law school journals" collections, published notes and comments are, in most cases, parts of journal collections of law school institutional repositories. About one-third of law school institutional repositories have independent collections that only include notes and comments to highlight the scholarly achievements of students.[36] Some outstanding examples include the Duke Law Student Paper Series[37] and W&M Law Student Publications.[38]

However, some of these law libraries are not committed to maintaining and improving student notes collection, even if these law school institutional repositories have a dedicated student scholarship collection. Some of them have very few papers within the notes collections.[39] Some law libraries have stopped updating student notes collections for a long time.[40]

A small portion of the law school institutional repositories also include external writing competition award-winning essays to celebrate students' scholarly achievements out of the law school.[41] While law school internal writing competitions are traditionally the major journal editor selection procedure,[42] many external competitions sponsored by organizations around the country award

35. Kristina V. Foehrkolb & Marc A. DeSimone, Jr., *Debunking the Myths Surrounding Student Scholarly Writing*, 74 MD. L. REV. 169, 180 (2014); *see also* Amy R. Mashburn & Sharon E. Rush, *Fostering Student Authorship*, 33 TOURO L. REV. 399, 401 (2017).

36. *Law School Repositories Directory*, *supra* note 12.

37. *Duke Law Student Paper Series*, DUKE L. SCHOLARSHIP DEPOSITORY, https://scholarship.law.duke.edu/studentpapers/ (last visited Oct. 11, 2021).

38. *Student Publications and Awards*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY, https://scholarship.law.wm.edu/studentpapers/ (last visited Oct. 11, 2021).

39. For example. there is no content on Thurgood Marshall School of Law's digital scholarship depository. *Thurgood Marshall School of Law Student Works and Publications*, DIGIT. SCHOLARSHIP @ TSU, https://digitalscholarship.tsu.edu/law_swap/ (last visited Oct. 11, 2021).

40. For example, the most recent student publication in Texas Tech University Law School's online repository was published in the 1980s. *Student Writings*, TTU DSPACE REPOSITORY, https://ttu-ir.tdl.org/handle/10601/1639 (last visited Oct. 3, 2021).

41. For example, William and Mary Law School's Student Award Winning Papers collection also include second place and third place of external writing competitions. *Student Award Winning Papers*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY, https://scholarship.law.wm.edu/awardwinning/ (last visited Oct. 11, 2021); *see also Legal Writing Competition Winners*, AM. U. WASH. COLL. L. DIGIT. COMMONS, https://digitalcommons.wcl.american.edu/stusch_winners/ (last visited Oct. 11, 2021).

42. Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity of America's Law Reviews*, 12 HARV. BLACKLETTER L.J. 59, 75 (1995).

scholarships or cash prizes to the winning students.[43] Law students have a valuable opportunity to demonstrate their excellent legal reasoning and writing skills through formal writing competitions. The fact that law student repositories only collect award-winning essays in writing competitions explains that these student collections are not so robust, given that winning national or regional writing competitions is inherently challenging.

Law school institutional repositories also collect law student theses and dissertations. Most law schools have post-J.D. programs, such as Master of Law (LL.M.) or Master of Comparative Law (M.C.L). Some law schools provide research and academic-based doctorate level degrees, such as Doctor of Judicial Science (S.J.D.).[44] Some law school institutional repositories accordingly collect such articles as part of their collections, including J.S.D. Dissertations Selected,[45] Theses and Dissertations,[46] LL.M. Theses and Essays Student,[47] and Theses and Dissertations.[48] However, theses and dissertations are not popular in law school institutional repositories compared to university-level institutional repositories.[49] Some law school advanced degrees require completing a thesis or a dissertation, but only a small percentage of law school institutional repositories actually maintain a theses and dissertations collection.[50]

The last type of student scholarship is student papers from seminars, clinics, and independent research.[51] Unfortunately, law school institutional repositories fail to collect student coursework routinely. Very few law school institutional repositories cover

43. ABA organizes many nationwide writing competitions with monetary awards. *E.g.*, *Writing Competitions and Contests*, A.B.A. L. STUDENTS, https://abaforlawstudents.com/events/law-student-competitions/writing-competitions/ (last visited Oct. 11, 2021).

44. *LL.M. and Post-J.D. Degrees by School*, A.B.A., https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_school (last visited Sept. 21, 2021).

45. *J.S.D. Dissertations*, UNIV. CHI. L. SCH. UNBOUND, https://chicagounbound.uchicago.edu/jsd_dissertations/ (last visited Oct. 11, 2021).

46. *Theses and Dissertations*, GOLDEN GATE UNIV. SCH. L. DIGIT. COMMONS, https://digitalcommons.law.ggu.edu/theses/ (last visited Oct. 11, 2021).

47. *Student Works & Organizations*, UNIV. GA. SCH. L. DIGIT. COMMONS, https://digitalcommons.law.uga.edu/stu_works/ (last visited Oct. 11, 2021).

48. *Student Scholarship*, MAURER SCH. L. DIGIT. REPOSITORY, https://www.repository.law.indiana.edu/student/ (last visited Oct. 11, 2021).

49. In a 2007 survey, theses and dissertations were the most common materials collected in repositories. Margaret Pickton & Cliff McKnight, *Is There A Role for Research Students in An Institutional Repository? Some Repository Managers' Views*. 39 J. LIBRARIANSHIP & INFO. SCI. 153, 156 (2007).

50. Only eleven law school institutional repositories had a "theses and dissertations" type of collection in 2020. *Law School Repositories Directory*, *supra* note 12.

51. *E.g.*, *Cornell Law School J.D. Student Research Papers*, SCHOLARSHIP@CORNELL L., https://scholarship.law.cornell.edu/lps_papers/ (last visited Oct. 11, 2021).

student coursework.[52] However, some successful examples can inspire law schools about student repository development. The Chapter 11 Bankruptcy Case Studies collection in the University of Tennessee Law School repository includes research papers of law students in a seminar course since 2004.[53] To date, this collection consists of over fifty student papers. Most of them have been downloaded more than one hundred times. Some of them have been downloaded more than eight hundred times. Other outstanding student coursework in law school institutional repositories include coursework for an Attorney for the Child Externship,[54] coursework for a Criminal Defense Clinic,[55] and International Immersion Program Papers.[56]

Examining law school institutional repositories and the student scholarship contained therein reveals two distinctive characteristics of student scholarship in law school institutional repositories. First, student scholarship is not one of the top priorities of law school institutional repositories. Moreover, even in those law school institutional repositories that collect student scholarship, those student scholarship collections focus only on the traditionally well-recognized student scholarship and ignore those writings that carry "less" scholarly value.

Therefore, law student scholarship is divided into two broad categories for a student repository collection. The first category is the shiny formally-published student intellectual attainments traditionally recognized by law schools, including published notes and writing competitions winning essays. The second category is non-formally-published, non-traditional recognized student scholarship, consisting of coursework, unpublished notes, theses, and dissertations. In the few law school institutional repositories that currently have student scholarship collections, the most common collections are remarkably published notes and writing competition-winning essays.

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52. *Law School Repositories Directory*, *supra* note 12.

53. *Chapter 11 Bankruptcy Case Studies*, UNIV. TENN. KNOXVILLE, COLL. L. LEGAL SCHOLARSHIP REPOSITORY, https://trace.tennessee.edu/utk_studlawbankruptcy/ (last visited Oct 11, 2021).

54. *Law Student Publications*, UNIV. BUFF. INST. REPOSITORY, https://ubir.buffalo.edu/xmlui/handle/10477/25128 (last visited Oct. 11, 2021).

55. Sara Alvarez, et al., *Strategies for Emergency Release of Incarcerated People During Covid-19 Outbreak*, LARC @ CARDOZO L. (Mar. 23, 2020), https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1002&context=students-alums-articles.

56. *International Program Papers*, UNIV. CHI. L. SCH. UNBOUND, https://chicagounbound.uchicago.edu/international_immersion_program_papers/ (last visited Oct. 11, 2021).

However, this publication-based approach to student repository collections development is problematic. Published student notes and writing competition winners do not exclusively represent law student academic accomplishments throughout the law school learning experiences. Most students lack a place to "publish" their work even if they finished a qualified academic research paper.[57]

Therefore, the institutional repository of law schools should measure the intellectual value of student publications by the quality of their scholarship, not by their publication status. One of the primary purposes of a law school institutional repository is to exhibit and celebrate the intellectual achievements of the law school, which undoubtedly include not only the scholarly productions of faculty but also student scholarship. Publication status of a student paper is understandably the most intuitive means of safeguarding its quality, but the quality of student scholarship itself is a more appropriate metric for a law student repository collection development.

Students who write formal notes are always in the minority at law schools, and most students do not spontaneously write student notes for the purpose of publication. They write primarily for courses and degree requirements. Specifically, most of them write research papers for seminars or independent study. Other students write theses and dissertations for S.J.D. or LL.M. degree exit requirements.

Furthermore, a significant portion of the unpublished student scholarship is inherently of decent academic quality. Though the dissertations of law school advanced degree programs are not automatically published, they generally hold excellent scholarly value because of the high standard required by those programs.[58] Research papers of seminars and independent study are the most common student writings,[59] because every student is required to attend seminars in 2L and 3L, and some of them take additional independent research. Law school faculty find that some seminar papers are actually of "printable quality."[60] Some courses explicitly require students to write papers with "publishable quality."[61] Considering

57. The term "publish" here is different from the traditional meaning in the law school setting. Here, it means to preserve the work and make it public.

58. Gail J. Hupper, *Educational Ambivalence: The Rise of a Foreign-Student Doctorate in Law*, 49 NEW ENG. L. REV. 319, 357 (2015).

59. Alyson M. Drake, *You Can't Write Without Research: The Role of Research Instruction in the Upper-Level Writing Requirement*, 18 FLA. COASTAL L. REV. 167, 175 (2017).

60. Walter Otto Weyrauch, *Fact Consciousness*, 46 J. LEGAL EDUC. 263, 265–66 (1996).

61. Vicenç Feliú & Helen Frazer, *Embedded Librarians: Teaching Legal Research as a Lawyering Skill*, 61 J. LEGAL EDUC. 540, 556 (2012); *see also* Johanna K.P. Dennis, *The*

the huge pool of student coursework, some of them must be of scholarly quality. Even if these students do not write with the intention of publication, scholarship with sound quality deserves additional academic exposure in a law school institutional repository.

The heavy reliance on publication as the sole criterion of a student repository is also unfair to those students who write formal student notes. Only a fraction of the law school institutional repositories now include student notes, and they only accept published notes. However, the reality is that only a portion of student notes submitted by journal editors are actually published, let alone those written by non-journal editors.[62] In many cases, notes are not chosen for publication due to the limited space in law school journals.[63] Non-membership on law journals can be a barrier to eventual publication as well, even in law journals that accept non-membership notes submissions.[64] Some law journals explicitly do not accept non-member notes submissions.[65] This means that some of the notes are obliterated as if students have never written them, even if students have invested a significant amount of time and effort into writing those notes,[66] when a few of those writings may indeed be of publishable quality.

The long-standing publication-focused law school institutional repository collection development approach renders the student repository severely undiversified. Many qualified but unpublished student scholarship consequently are buried in the school's academic records. In this way, law school institutional repositories are not maximizing their function as a platform for preserving and displaying student intellectual achievements.

In summary, law school libraries should expand their student collections in law school institutional repositories by keenly collecting more published student scholarship and improving student

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Renaissance Road: Redesigning the Legal Writing Instructional Model, 38 S.U. L. REV. 111, 150 (2010).

62. Mashburn & Rush, *supra* note 35.

63. *Id.*

64. Nancy Leong, *A Noteworthy Absence*, 59 J. LEGAL EDUC. 279, 291 (2009).

65. For example, four out of fourteen law reviews in the 2009 survey did not accept non-member notes submissions. *Id.* at 292 n.30. Twenty-five of 196 law reviews clearly state that they accept publications in "home" school journals by non-member students. Nancy Levit et al., Submission of Law Student Articles for Publication 2–3, app. A (August 21, 2021) (unpublished manuscript) http://dx.doi.org/10.2139/ssrn.1656395. Sixty-five percent of journals require journal membership for notes publication. Jennifer C. Mullins & Nancy Leong, *The Persistent Gender Disparity in Student Note Publication*, 23 YALE J.L. & FEMINISM 385, 405 (2011).

66. E. Joshua Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 901–02 (1988) (estimating that a student author will typically spend between 150 and 200 hours working on a note).

repositories' diversity by collecting more non-published student writings. The next part of this Article will discuss the positive impacts of a comprehensive student repository on students and law schools.

IV. BENEFITS OF LAW STUDENT REPOSITORIES

A. Benefits to Student Employment

Student scholarship in law school institutional repositories is a writing sample that students can use directly in their job hunting. According to academic librarians, one of the greatest benefits of institutional repositories is that they serve as a platform for presenting student writing samples to prospective employers.[67]

A writing sample assesses the writing skills of each applicant.[68] Most legal writing samples are analytic works,[69] either practical or more academic pieces. Interviewers do not read the entire writing sample word by word like a professor grading a student essay,[70] since they are looking for applicants' ability to apply laws to facts in an effective and organized manner. However, the writing sample must be "flawless, with no typographical, citation, or other errors."[71] Writing samples cannot give an applicant a significant advantage, but they can ruin a good applicant.[72]

A law school vouchers the quality of student scholarship in a law school institutional repository. To ensure the quality of collections and facilitate the management of institutional repositories, law school libraries rarely allow students to submit articles independently. The student scholarship in a law school repository is selected by the journal editorial board as published notes and comments, or chosen by faculty as outstanding coursework, or automatically selected by pre-established collection development policy (i.e., writing competition winners and dissertations). Therefore, student scholarship in a law school institutional repository, with such a rigid submission process, basically stands for one of a law student's best writing samples.

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67. Rozum & Thoms, *supra* note 18, at 316.

68. Susanne Di Pietro et al., *Judicial Qualifications and Judicial Performance: Is There a Relationship?*, 83 JUDICATURE 196, 197 (2000).

69. Mary Beth Beazley, *How to Read a Writing Sample*, 87 ILL. BAR J. 615, 615 (1999).

70. *Id.*

71. Laurie A. Lewis, *Clerkship-Ready: First-Year Law Faculty Are Uniquely Poised to Mentor Stellar Students for Elbow Employment with Judges*, 12 APPALACHIAN J.L. 1, 26 (2012).

72. *Id.*; *see also* Mashburn & Rush, *supra* note 35, at 404–05.

Student scholarship in a law school institutional repository also saves students time for preparing a writing sample. A law school career office usually has detailed formatting instructions for a writing sample used for a student job interview, such as its length and cover page requirements.[73] Because student scholarship in a law school institutional repository is the final product after a strict editing and selecting process, students can safely and confidently use them as writing samples without further editing. Even if some interviewers have a page limit on writing samples, students can still take the excerpt of the papers from their scholarship archived in the law school institutional repository without much additional editing.

Student scholarship in law school institutional repositories also solves interviewers' access issue to student scholarship. Texas Tech University School of Law had an unusual case in 2020. The Texas Tech Business and Bankruptcy Journal was dismantled in 2019 after articles and student notes had already been chosen for publication, and the editing process had already taken place. All of the authors of this volume were eventually left with a complete journal volume in .pdf format, but this volume was never officially published in print.[74] Therefore, student authors of this volume have severe concerns regarding their notes' accessibility, especially to their future employers.[75] In this case, student authors did not make any mistake but had to suffer the pain of unpublished notes which should have been published. If a law school institutional repository creates a collection for these student notes, interviewers can easily access these unpublished but high-quality and authenticated notes.

Law student writings archived in an institutional repository also help students to prepare for their interviews. An important step in preparing for a job interview is to research the interviewer. If an alumni interviewer publishes articles as a law student, the student interviewee should take the time to read them, as many law school career offices recommend. However, students may lose access to the fee-based databases after graduation,[76] so they cannot even

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73. *See Writing Sample*, CORNELL L. SCH., https://www.lawschool.cornell.edu/careers/students/ResumesAndAppMaterials/writing-sample.cfm (last visited Nov. 4, 2021) [https://web.archive.org/web/20210308123604/]; *see also Texas A&M University School of Law Writing Sample*, TEX. A&M UNIV. SCH. OF L., https://law.tamu.edu/docs/default-source/career-services-documents/writing-sample-2020.pdf (last visited Dec. 28, 2021).

74. See e-mails between Donna Jones, J. Sec'y, Texas Tech, Daijang Nie, Ass't Libr., Texas Tech Sch. of L., Janeen Williams, User Servs. Libr., Texas Tech Sch. of L., and Jonathan Spencer Young (Sept. 9, 2020) (on file with author).

75. *Id.*

76. *Lexis+ Access for Law School Graduates*, LEXISNEXIS, https://www.lexisnexis.com/grad-access/ (last visited Dec. 28, 2021); *Practice-Ready Solutions from Thomson*

access interviewers' articles. What if an alumni interviewer wrote a paper in law school, but it was not officially published? Law school institutional repositories are the answer. If a law school institutional repository includes well-organized and robust student scholarship collections, an interviewee can easily find an interviewers' student scholarship. Therefore, the interviewee may be able to make a more comprehensive research of the alumni interviewer to better prepare for the interview. An interviewee showing that she has read the interviewer's student scholarship, certainly proves that the student is serious about the job.

B. Motivating Students to Write

Law schools are responsible for inspiring students to write as much as possible, rather than unilaterally expecting students to spontaneously recognize the importance of writing. Legal practitioners have real concerns about the writing skills of new graduates.[77] The goal of law school student writing is not to produce perfect work but to improve their writing skills through writing drafts and constant revision. Legal writing, like other professional skills, requires consistent practice.[78] Writing practice demands students' efforts and engagement, which come from delicate programs designed and offered by educators.[79] Beyond law schools' existing efforts, law school institutional repositories encourage students to devote their time and energy to writing, because depositing student work in the law library permanent open-access digital collection is a new incentive for students to write.[80]

Reuters, WESTLAW, https://lawschool.westlaw.com/Marketing/Display/PR/2 (last visited Dec. 28, 2021).

77. In a 2003 survey, 57.3 percent of respondent legal practitioners thought new graduates lack quality writing skills. Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 86 (2003); *see also Hiring Partners Reveal New Attorney Readiness for Real World Practice*, LEXISNEXIS (2015), https://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf.

78. John H. Ridge, *Write to Write*, WYO. LAW., Oct. 2016, at 62.

79. Alexander W. Astin, *Student Involvement: A Developmental Theory for Higher Education*, 40 J. COLL. STUDENT DEV. 518, 522 (2015).

80. Mashburn & Rush, *supra* note 35, at 404–05.

The motivations of law students for writing include meeting course requirements,[81] satisfying law journal requirements,[82] and attracting future employers.[83] Currently, if a law school institutional repository preserves student scholarship, it will prioritize traditional law student academic writing accomplishments, including published notes and comments, as well as winning essays in writing contests. The major incentives for these student authors are to meet journal requirements and add highlights to their resumes. Their work is eventually published. Published notes are part of the official journal, and writing contest winners will also be recognized by the competition organizers. The honor of having their scholarship in the law school institutional repository and the extra academic exposure opportunity, though they are not decisive incentives for those students, will motivate them to write.

However, this additional venue for showcasing scholarship is a strong writing incentive for other law students who do not have the opportunity to publish. When student intellectual achievements are not recognized, it undermines students' academic confidence. Under the expectancy-value theory, the value and probability of success of an achievement determine a student's choice.[84] It is truly disappointing that a note is not published when a student author has invested so much.[85] When students find their time-consuming writings are not appreciated by anyone at all, it is reasonable that they will no longer proactively write outside of the course after balancing the cost of time and minimal extrinsic payoff. Even worse, they may self-question their writing skills or even their competence as a journal editor. Students will also think that the law school only values the academic-shining students and ignores the underrepresented and "average" students.[86] Therefore, a student repository, offering students extra academic exposure opportunities, plays an

81. AMERICAN BAR ASSOCIATION, A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021–2022 § 303(a)(2), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf (last visited Oct. 11, 2021).

82. Nearly all journals require student editors to write scholarly notes with a rigid deadline. Mullins & Leong, *supra* note 65.

83. Andrew Yaphe, *Taking Note of Notes: Student Legal Scholarship in Theory and Practice*, 62 J. LEGAL EDUC. 259, 261 (2012).

84. Jacquelynne S. Eccles & Allan Wigfield, *Motivational Beliefs, Values, and Goals*, 53 ANNUAL REV. PSYCH. 109, 118 (2002).

85. Yaphe, *supra* note 83; *see also* Mashburn & Rush, *supra* note 35, at 401.

86. Based on a study in 2019, LSAT score, undergraduate GPA, and law school rank do not affect student skills improvement in legal writing. Kirsten M. Winek, Writing Like a Lawyer: How Law Student Involvement Impacts Self-Reported Gains in Writing Skills in Law School 93–94 (Aug. 2019) (Ph.D. dissertation, University of Toledo) (on file with author).

important role in enhancing students' academic writing confidence.[87]

Writing-intensive courses and student research papers are recognized as a high-impact activity to student success.[88] An academic law library can contribute to these activities by archiving and publishing them in the law school institutional repository.[89] Academic legal writings of students who do not write a note are usually final papers from advanced writing courses or seminars.[90] This work typically does not have the opportunity to become public. When students know that the best work in the course will be permanently placed in the open-access law school institutional repository, they are awarded with a bonus beyond their course grade. This extra incentive is invaluable to students who do not write a note because they finally have a chance to get their work available to the public.

The additional publication opportunities and the feeling of being valued by the law school that an institutional repository provides are even more valuable to first-generation law students.[91] One of the many challenges that first-generation students face in law school is that they spend more time studying than non-first generation students and less time participating in co-curricular activities.[92] The percentage of first-generation students participating in the law journals is also lower.[93] First, law journal memberships are usually determined by students' existing writing skills and grades, but first-generation students generally have lower academic performance.[94] Furthermore, many first-generation law students cannot spare more time for those co-curricular activities beyond course studying and working for payment out of school.

On the contrary, a decent scholarly paper in a seminar course or an independent study requires neither overall student GPA nor

87. Erin Passehl-Stoddart & Robert Monge, *From Freshman to Graduate: Making the Case for Student-Centric Institutional Repositories*, 2 J. LIBRARIANSHIP & SCHOLARLY COMMC'N 1, 6–7 (2014).

88. Steven I. Friedland, *Rescuing Pluto from the Cold: Creating an Assessment-Centered Legal Education*, 67 J. LEGAL EDUC. 592, 609 (2018).

89. Passehl-Stoddart & Monge, *supra* note 87, at 2.

90. Seventy percent of students write at least one paper of twenty or more pages during the academic year. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, STUDENT ENGAGEMENT IN LAW SCHOOL: PREPARING 21ST CENTURY LAWYERS 10 (2008), https://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE_Annual_Report_2008.pdf.

91. First-generation students are those whose parents have not earned a bachelor's degree. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LOOKING AHEAD: ASSESSMENT IN LEGAL EDUCATION 10 (2014), http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE_2014_AnnualReport.pdf.

92. *Id.* at 11.

93. *Id.*

94. First-generation law students have a "B" average, while other students have a "B+" average. *Id.* at 10.

preexisting good writing skills. Since first-generation law students spend more time studying,[95] as long as faculty determines a paper is the best in a course, the law school institutional repository will collect it. It is not an utterly low standard, but it is a lower bar than formally publishing a note. Therefore, law school institutional repositories give first-generation law students an arena to showcase their academic achievements, which will inspire them to write.

C. Nurturing Alumni Relations

Alumni relations have always been important to law schools, and institutional repositories can play a positive role in developing alumni relations. Law schools receive most of their institutional support from alumni,[96] and stable alumni relations significantly contribute to the success of a law school.[97] They not only support the law school financially and bring their professional experiences back to the law school,[98] but also serve as "advocates and ambassadors" of the law school in their personal and professional community.[99] Furthermore, alumni can be of great help to students in their career, both in mock interviews and the alumni connections in students' employment.

Students are future alumni.[100] As a result, alumni relations begin when students are in law school, not after they graduate from law school.[101] It takes years to build stable and personal alumni relations.[102] Alumni relations are so precious and fragile that it is worthy of consideration by all law school faculty and staff. Law schools' student-centered mission, excellent education, and carefully designed programs cultivate these personal relationships, because of which alumni will gladly accept the law school's invitation to serve in the future.

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95. *Id.*

96. Lawrence Ponoroff, *From Water Closets to Alumni Relations: A Few Reflections on Where the Dean's Time is Most Productively Deployed*, 36 U. TOL. L. REV. 137, 139 (2004).

97. Kenneth C. Randall, *Longevity*, 37 U. TOL. L. REV. 127, 127 (2005).

98. "Alumni represent the main reservoir of a law school's financial support. Many deans will spend almost 40% of their time on development and alumni relations." Gerald T. McLaughlin, *The Role of the Law School Dean as Institutional Veteran*, 31 U. TOL. L. REV. 675, 676 (2000).

99. Ponoroff, *supra* note 96, at 139–40; *see also* Donald G. Gifford, *How Does the Dean Resemble the Islets of Langerhans?*, 31 U. TOL. L. REV. 599, 601 (2000).

100. Christopher W. Nolan & Jane Costanza, *Promoting and Archiving Student Work through an Institutional Repository: Trinity University, LASR, and the Digital Commons*, 32 SERIALS REV. 92, 96 (2006).

101. Jim Rosenblatt, *Lessons Learned by a New Dean*, 36 U. TOL. L. REV. 151, 156 (2004).

102. McLaughlin, *supra* note 98.

Law school libraries have traditionally been active in building alumni relationships, such as creating physical special collections or archives for alumni, accepting and maintaining collections donated by alumni. Some law school institutional repositories have digital collections for alumni. Examples include UW Law School Alumni Photos,[103] University of Michigan Law School Alumni Survey Project,[104] and Alumni Publications.[105] However, the primary object of these collections is alumni donation rather than student scholarship. Even if a small portion of the collection includes scholarship, they are primarily articles produced by alumni after graduation.

Law libraries can contribute more to fostering alumni relations by collecting student scholarship in law school institutional repositories. Some law school libraries have realized that providing writing or publishing assistance to students helps maintain a professional relationship between the law school and the students,[106] but the alumni relations are more than just professional relationships. Law students' personal perceptions of the law school can predict future alumni relations.[107] Many factors can affect a student's perceptions to law school,[108] and law school institutional repositories certainly have a positive contribution to these perceptions.

A law school institutional repository selects and collects student scholarship. It conveys an important and positive message to current students that the law school sincerely values and cherishes them, as evidenced by the willingness to use official institutional resources to perpetuate student scholarship. The law school, in this sense, invests and makes a commitment in the future of alumni relations.[109] It consequently helps students become aware that alumni relationships are not just three years of study in a law

103. *UW Law School Alumni Photos*, UNIV. WISC. L. SCH. DIGIT. REPOSITORY, https://repository.law.wisc.edu/s/uwlaw/page/Alumni-Photos (last visited Oct. 11, 2021).

104. *University of Michigan Law School Alumni Survey Project*, MICH. L. SCHOLARSHIP REPOSITORY, https://repository.law.umich.edu/about.html (last visited Oct. 11, 2021).

105. *Alumni Publications*, DIGITAL COMMONS @ UNIV. BUFF. SCH. L., https://digitalcommons.law.buffalo.edu/alumni/ (last visited Oct. 11, 2021).

106. Mashburn & Rush, *supra* note 35, at 404.

107. David J. Weerts et al., *Beyond Giving: Political Advocacy and Volunteer Behaviors of Public University Alumni*, 51 RSCH. HIGHER EDUC. 346, 352 (2009).

108. *Id.*

109. Caryl E. Rusbult, *Commitment and Satisfaction in Romantic Associations: A Test of the Investment Model*, 16 J. EXPERIMENTAL SOC. PSYCH. 172 (1980) ("[I]ncreases in investment size, decreases in alternative value, and increases in relationship value should increase commitment to an ongoing relationship."). *See generally* D. J. Weerts & J. M. Ronca, *Characteristics of Alumni Donors Who Volunteer at Their Alma Mater*, 49 RSCH. HIGHER EDUC. 274 (2008).

school but lifelong beneficial relationships.[110] Such a sense of belonging leads alumni to become more active in school activities and more likely to support the school.

When academic law libraries are more visible to students by providing them extra support, those libraries are more likely to receive direct support from alumni in the future.[111] An alum would support a unit of her alma mater if she had positive and close experiences with this unit.[112] While the law library is where students spend most of their time during law school and where they have the most contact with the law school outside of the classroom, any library efforts to enhance student-library bonding cannot be ignored. Academic law libraries are always financially vulnerable in law schools since the law library is one of the largest law school expenditures.[113] Any additional alumni support designated to a law library, either monetary or collection donations, will help the law school library. This remains true, especially in light of the budget cuts many law schools have had to make due to the COVID-19 pandemic.[114]

D. Promoting Admissions

Law school student repositories can contribute to law school admissions as well. Laws schools have been attracting applicants in a variety of ways, including delivering quality legal education, offering diverse programs,[115] providing scholarships, and improving bar passage and employment rates through law school multi-department efforts. The role of a law school library in admissions is often just a stop on a law school tour for prospective students. But law school libraries can actually bring their own contribution to admissions with student repositories.

Perspective students will research the target law schools and, due to institutional repositories' open-access nature, have unrestricted access to student scholarship in a law school repository.[116]

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110. Ponoroff, *supra* note 96, at 148.

111. *See* Anne Casey & Michael Lorenzen, *Untapped Potential: Seeking Library Donors Among Alumni of Distance Learning Programs*, 50 J. LIBR. ADMIN. 515, 522 (2010).

112. Weerts et al., *supra* note 107.

113. Taylor Fitchett et. al., *Law Library Budgets in Hard Times*, 103 LAW LIBR. J. 91, 95 (2011).

114. Sarah Martinson, *Law Deans Felt Negative Impacts Of Pandemic, Survey Finds*, LAW360 (Aug. 24, 2021, 4:32 PM), https://www.law360.com/legalindustry/articles/1415639/law-deans-felt-negative-impacts-of-pandemic-survey-finds.

115. Some law schools have joint degree programs (i.e., J.D./MBA) or accelerated programs (i.e., two years J.D. program for foreign attorneys).

116. "Open access and institutional repositories are linked in their interest in making information freely available to the public." Raizel Liebler & Gregory Cunningham, *Can*

Applicants can find student scholarship by simply searching the law school library online. However, in the absence of a law school repository, applicants cannot easily locate and unrestrictedly browse student scholarship from their prospective schools, regardless of whether those student writings are published in law journals or student coursework.[117]

A student repository also allows applicants to obtain additional institutional traits about the law school. Hard information such as law school rankings, employment rates, and bar passage rates are undoubtedly important to students, but some other factors may influence a prospective student's choice of a law school.[118] They also consider soft information such as school culture, alumni network, perceptions on the visiting day, or experience with the admissions office when students make admissions decisions.[119] A student repository demonstrates the school's commitment to supporting student writing and a positive academic climate where students are passionate about writing by providing applicants with tangible proof of the diversified student scholarship.

Faculty mentor or supervise some student scholarship. A student repository can highlight such mentorship and supervision by additional notes in a student repository, such as "supervised by" or "fulfillment of course requirement." Therefore, applicants can also see the close and productive faculty-student interaction when they find such writings.[120] As a result, a student repository creates a motivational inspiration for prospective students beyond the fact-based admission approach.[121] When an applicant has several offers from similar law schools, a student scholarship repository that humanizes the law school and shows the possibility of student success may sway the applicant's decision.

Student repositories also give applicants a chance to learn more about law school writing. Law school writings are different from

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Accessibility Liberate the "Lost Ark" of Scholarly Work?: University Library Institutional Repositories Are "Places of Public Accommodation", 52 J. MARSHALL L. REV. 327, 332 (2018).

117. Student-published notes are usually protected by copyrights law and student coursework is commonly protected by both copyrights law and FERPA. However, once a piece of student scholarship is in a law school institutional repository, it generally means the law library has received essential consent from stakeholders.

118. Mark Klock, *Two Possible Answers to the Enron Experience: Will It Be Regulation of Fortune Tellers or Rebirth of Secondary Liability?*, 28 J. CORP. L. 69, 92 (2002) ("The general idea is that hard information is objectively verifiable fact and soft information is more of a subjective assessment.").

119. *Id.* ("[S]oft information is more of a subjective assessment.").

120. Rozum et al., *supra* note 30, at 804.

121. Gurney Pearsall, *The Human Side of Law School: The Case for Socializing Minority Recruitment and Retention Programs*, 64 J. LEGAL EDUC. 688, 688–89 (2015).

undergraduate writing in many perspectives,[122] so successful undergraduate writing experiences do not guarantee future successful law school writing.[123] Prospective students hence try to find some good student legal writings to gain a broad overview of the law school writings when they are applying for law schools. Student scholarship in a law school institutional repository is carefully selected, so its quality is guaranteed. Applicants can get a broad picture of the requirements for legal writing as opposed to undergraduate writing when reading these works, including "clarity, precision, conciseness, and careful organization."[124] Authentic student scholarship satisfies applicants' curiosity about the expectations of law school writing and relieves their anxiety about legal writing.

V. KEYS TO BUILDING A LAW STUDENT REPOSITORY

Even though law student scholarship repositories have many benefits, because of its cost to the libraries' human resources,[125] librarians must consider a variety of key issues to ensure the student repository's success, including selecting scholarship, marketing, copyright, and FERPA. Librarians should give especially thoughtful consideration to these factors when selecting non-formally published student work.

A. Selecting Student Scholarship

Law school libraries must determine the scope of student scholarship when designing their student repositories. In academic libraries that collect student papers, there are two completely different approaches. The first approach is to lower the bar of student scholarship to collect more of them, and the other is to set a higher bar to ensure the quality of the collected papers.[126]

The latter approach is more suitable for law school institutional repositories because law school institutional repositories must concurrently balance the inclusiveness and quality of collections. The appropriate standard for selecting student scholarship should not be so unattainably high as to prevent a law student repository from

122. *See generally* MARY BARNARD RAY, THE BASICS OF LEGAL WRITING 8 (rev. 1st ed. 2008).

123. A 2010 survey showed that many students found law school writing much harder than they expected. Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 223, 272 (2010).

124. *Id.* at 258.

125. Nolan & Costanza, *supra* note 100, at 93.

126. *Id.*

achieving its intended goals, but it has to be relatively high enough to ensure the quality of the selected papers.

The only principle that defines an institutional repository's content is whether the payoff and missions of a repository outweigh its disadvantages.[127] Comprehensive student scholarship collections certainly give students "greater exposure to their work,"[128] but is it reasonable that a law school institutional repository lowers the screening standard of student scholarship for the purpose of more academic exposure of student work? The answer is absolutely no.

An appropriate collection standard is necessary for student scholarship to guarantee its quality.[129] If a student repository was to capture most, or even every, student paper without a proper quality standard, it will lose its prestigiousness and become mediocre, making it impossible to distinguish between high-quality and low-quality student scholarship effectively within a law student repository. It will eventually weaken the motivational effect of student repositories on student writing. When students know that their papers will be part of the law school institutional repository regardless of their work quality, collecting student work in an institutional repository will not be an extrinsic motivation for students.[130] Furthermore, when prospective employers and students read the poor writings in a student repository, they will have a negative impression of a student writer or even the law school, which voids the benefits of a student repository for student hiring and law school recruitment.

Failure to ensure student repository quality can also raise faculty's genuine concerns about an institutional repository's effectiveness as a showcase for intellectual achievements.[131] Some academic libraries have tried a more liberal approach to strengthening student scholarship collections' inclusiveness in university repositories by allowing undergraduate students to self-archive almost anything.[132] However, this model requires a dedicated institutional

127. Jean-Gabriel Bankier & Courtney Smith, *Repository Collection Policies: Is a Liberal and Inclusive Policy Helpful or Harmful?*, 41 AUSTL. ACAD. & RSCH. LIBRS. 245, 247 (2010).

128. *Id.*

129. Nolan & Costanza, *supra* note 100, at 93–94 ("[L]ower quality work that might be considered more ephemeral and not worthy of long-term preservation.").

130. *See generally* Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 AM. PSYCH. 71 (2000).

131. Eleta Exline, *Extending the Institutional Repository to Include Undergraduate Research*, 23 COLL. & UNDERGRADUATE LIBRS. 16, 19–20 (2016).

132. Rozum & Thoms, *supra* note 18, at 317.

repository team to safeguard student papers' quality,[133] which is what many law school libraries lack.

Therefore, a reasonable collection development standard of building a law student repository is to include as much student scholarship as possible while ensuring their quality. Since each type of student scholarship is different in nature, there are two ways of guaranteeing their quality: self-vetting and faculty recommendation. Self-vetting student scholarship includes those student writings that have been endorsed through either a formal internal or external selecting process, including published notes, writing competition essays and dissertations.

Law schools traditionally recognize the quality of published student notes and writing contest winners because those students' scholarship has been vetted by the rigorous law review selecting process or contest panel review process.[134] This conspicuous student scholarship is, therefore, the default content for law school student repositories. Teaching faculty or supervising faculty are perfectly qualified to recommend those papers of coursework or independent study to a law student repository.

The next category of law student scholarship is dissertations. S.J.D. programs usually require a degree candidate to complete a doctoral-level dissertation as a condition of graduation. Many law schools ask dissertations to be "worthy of publication,"[135] or even "published before the degree was awarded."[136] This high standard certifies the quality of dissertations.

However, self-vetting student scholarship does not include papers from seminars or independent research, unpublished notes, or theses. Therefore, someone must assess the quality of those student writings because no formal selection process accredits them. Two groups in a law school may be entitled to evaluate those writings' quality: law faculty and law librarians.

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133. *Id.*

134. Roger C. Cramton, *Most Remarkable Institution: The American Law Review*, 36 J. LEGAL EDUC. 1, 9 n.33 (1986) ("[F]ewer than one-half of student editors ever publish a student note . . . ."). Publishing notes is not easy even for student editors. In a study on The Yale Law Journal, the majority of published notes are accepted on resubmission. Dara E. Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology*, 2012 MICH. ST. L. REV. 1693, 1700 (2012). I did not find statistics on external writing competitions, but statewide and nationwide writing competitions are inherently competitive. For example, the student award winning papers collections in William & Mary Law School repository only has less than thirty papers, while the collection covers the period of 1991–2019. *Student Award Winning Papers*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY, https://scholarship.law.wm.edu/awardwinning (last visited Oct. 11, 2021).

135. Hupper, *supra* note 58, at 357.

136. *Id.*

Faculty are better suited than law librarians to measure the value of student scholarship. First, many of these writings are closely related to courses, where faculty closely supervise students through the writing process. Faculty also have more experience and expertise in evaluating student papers than librarians, even though many law librarians have law degrees.[137] Having faculty determine the quality of these student papers also simplifies the student repository workflow. A faculty member has already had a general idea of which paper is the best in quality by carefully reading and grading student essays, so it is unnecessary for law librarians, who already have heavy administrative responsibilities,[138] to read the same papers again. The faculty recommendation model further enhances the faculty-librarian relationship, which is crucial to developing a student repository since faculty play a critical role in selecting student scholarship and promoting student repositories.

Law schools in recent years do not demand a high standard of theses for LL.M. degrees.[139] Moreover, many LL.M. programs are loosening thesis requirements for students to exit the program.[140] LL.M. theses, therefore, do not automatically self-guarantee their high quality. Before a law school institutional repository archives them, faculty, as the supervisors of these theses, are in the proper position to decide their quality.

The last category of student scholarship is unpublished notes. Not being published does not mean that these notes are worthless. Many of them are not selected through the peer-review process due to different reasons discussed in Part III. Such unpublished student notes deserve a second chance at exposure in law school institutional repositories. No one is more qualified than the faculty in a law school to evaluate these notes' quality.

Therefore, law school libraries are capable of safeguarding the quality of student repositories and, at the same time, expanding the diversity of student scholarship collections. The next significant

137. *Become a Legal Information Professional*, AM. ASS'N L. LIBRS., https://www.aallnet.org/careers/about-the-profession/education/ (last visited Oct. 11, 2021). *See also* Mullins & Leong, *supra* note 65, at 410.

138. Carol A. Parker, *The Need for Faculty Status and Uniform Tenure Requirements for Law Librarians*, 103 LAW LIBR. J. 7, 26 (2011).

139. Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 INT'L J. LEGAL INFO. 396, 407 (2007).

140. Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039, 1048 (2002).

element to consider is advertising a student scholarship repository to the law school community.

B. Marketing Student Repository

Promoting student repository to stakeholders is necessary for the success of a student repository,[141] because the institutional repository "is not a concept that immediately sells itself to campus users."[142] As a librarian stated: "Library marketing is outreach . . . . We need to tell people we're here, explain to them how we can help, and persuade them to come in through the doors, physical or virtual."[143] Continuously and effectively marketing is always invaluable, even if the participating parties have already recognized the value of student repositories.[144]

The target groups of student repositories marketing include both faculty and students, as they are both direct stakeholders. Faculty serve as gatekeepers for part of the student scholarship as well as advocate the student repository. Students are the major beneficiaries. Student repository outreach focuses are subsequently different because of their distinct roles and interests in law student scholarship repositories.[145]

Marketing student repositories towards faculty starts with "clearly articulated" educational benefits and institutional benefits.[146] Faculty need to know that they can use student repositories as a vehicle to show students excellent writing samples and inspire them to write in their courses. Faculty will also learn the positive impacts of student repositories on student success and law school success in student engagement, alumni relations, and admissions through such outreach.

Reducing faculty concerns about the student repository is also important in the communication. Common faculty concerns about a student repository include low-quality student papers,[147] the dilution of student papers to faculty scholarship in a law school institutional repository,[148] and the time spent reviewing student papers. A carefully tailored student repository policy can prevent these

141. Passehl-Stoddart & Monge, *supra* note 87, at 8.
142. Nolan & Costanza, *supra* note 100.
143. NED POTTER, THE LIBRARY MARKETING TOOLKIT xiv-xv (2012).
144. Rozum et al., *supra* note 30, at 810. *See also* Exline, *supra* note 131, at 17.
145. ALL-SIS TASK FORCE ON LIBRARY MARKETING & OUTREACH, *Marketing and Outreach in Law Libraries: A White Paper*, 105 LAW LIBR. J. 525, 528 (2013).
146. Simon Canick, *Infusing Technology Skills into the Law School Curriculum*, 42 CAP. U. L. REV. 663, 675 (2014).
147. Passehl-Stoddart & Monge, *supra* note 87, at 9.
148. Bankier & Smith, *supra* note 127; *see also* Exline, *supra* note 131.

potential risks. However, only after a law library clearly explains these concerns to faculty, will they actively participate in a student repository.

Faculty do not have to spend a large amount of time to screen student writings for a student repository. Student scholarship requiring faculty recommendation falls into three categories, as previously discussed: coursework, LL.M. theses, and unpublished notes.

Coursework is similar to LL.M. theses because both are under the responsible faculty's close supervision. Therefore, recommending these two types of student scholarship costs faculty no extra time, because they have already read them in detail when advising or grading them. The total number of unpublished notes waiting for faculty evaluation is essentially not very large. First, most students who write notes are law review editors. They are the super minority of law schools. Though some students out of law journals also write notes, they are the minority of law students as well. Therefore, the authors of notes are the minority in law schools. It is unlikely for those authors to annually produce more than one note. This implies the overall number of student notes is small in each semester. Furthermore, parts of those notes are published and, because of their publication status, they automatically meet the scholarship quality standard as self-vetting student scholarship. After excluding the few published notes from the small number of all student drafted notes,[149] unpublished notes are also small in number.

Student writings will not dilute faculty scholarship in a law school institutional repository. First, student authors are not as productive as faculty. Due to the strict quality control of student writings, faculty scholarship will outnumber student papers accepted in law school institutional repository,[150] even if a student repository emphasizes inclusiveness. Moreover, the work of student and faculty scholarship belongs to different institutional repository collections, so users can clearly distinguish between faculty and student scholarship in a law school institutional repository. Law school librarians will place all faculty scholarship under "faculty scholarship" collections, and all student articles under the "student scholarship" collections. Law librarians will also add metadata to all articles stored in the law school repository, distinguishing student writings from faculty writings and making stored work

149. Cramton, *supra* note 134.

150. After all, the current law school repositories focus on faculty scholarship rather than student scholarship.

searchable. For example, all faculty work will be tagged with "faculty," while all student papers will be tagged with "student."

Encouraging faculty to advertise the student repository directly to students is another crucial component of faculty outreach. The ultimate goal of promoting outreach to faculty about the student repository is to establish a faculty-librarian partnership.[151] Not only do law faculty have stronger academic connections with students, but their advice is more authoritative and persuasive than that of librarians. The "word of mouth" of faculty is the strongest strategy to promote a student repository to students.[152] Ideally, faculty will state explicitly in the syllabus that the best papers will be archived permanently in the law school repository, and students are likely to appreciate this faculty-endorsed program. Getting this extensive faculty support level is undoubtedly difficult, but consistent and successful marketing can achieve this goal.

Promoting a student repository directly to students is equally important. Outreach solely to faculty has been proven ineffective, not to mention that students are the primary beneficiaries of a student repository.[153] Student outreach focuses on the "objective of student success,"[154] including extra publishing opportunities and subsequent employment benefits. As discussed earlier, this additional academic writing exposure may not be attractive for the elite students who have published notes or won writing contests, but such an opportunity is an excellent motivator for the majority and the non-superstar students to write.

Given the different interests and familiarity with the technology between faculty and students, the marketing approaches of a student repository are correspondingly different. There are many ways to advertise the student repository to law students. In addition to formal training workshops, blogs, social media, or even simple brochures can effectively attract students because students can understand the value of student repository more easily than faculty,[155] and students are more receptive to new technologies.[156] More importantly, students are not burdened with extra work because they have to write anyway in law school.

Many informal outreach instruments that work for students are not appropriate for faculty. It is no secret that some law faculty are

151. ALL-SIS TASK FORCE ON LIBRARY MARKETING & OUTREACH, *supra* note 145.
152. *Id.* at 538.
153. Rozum et al., *supra* note 30, at 811.
154. ALL-SIS TASK FORCE ON LIBRARY MARKETING & OUTREACH, *supra* note 145, at 528.
155. Nolan & Costanza, *supra* note 100.
156. Marie Stefanini Newman, *Not the Evil Twen: How Online Course Management Software Supports Non-Linear Learning in Law Schools*, 5 J. HIGH TECH. L. 183, 183 (2005).

lukewarm on new technology. While the reasons vary,[157] the predominant one is their bias against technology.[158] The institutional repository, an emerging technology in academic libraries in recent years, is not an exception. Therefore, marketing the student repository to faculty "must be convincing, well supported, and above all, necessary to accomplish important class-related objectives."[159]

The implication is that the outreach to faculty should be in the workshop-librarian model. The first part is the general "teaching the teacher" workshop,[160] where law librarians introduce the advantages of a student repository to law faculty and answer questions. It is necessary to invite one or two students to explain how a student repository can help them during the workshop, because it will reinforce faculty's interest in the student repository.[161] Inviting students to speak is not difficult because they know the student repository's advantages through the previously targeted outreach.

The second part is a one-on-one consultation for interested faculty. Law faculty have different levels of interest in law library resources,[162] so it is possible that only some of them are genuinely interested in the student repository after the general introduction workshop. Providing them with additional personal follow-up interaction will provide a more comfortable communication channel to faculty who are unwilling to ask questions during the workshop. It will also increase their trust in the student repository and managing librarians.

A small student repository project is important for both faculty-oriented outreach and student-oriented outreach.[163] A "trial-run" version of the student repository, even just a small collection with few papers, helps demonstrate the open-access property, the core attribute of a student repository, to faculty and students. Such a collection makes the student repository more than an abstract concept for both students and faculty. They can personally view the collection, search for and read papers, and get usage statistics.

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157. Some other reasons include "sunk cost" on teaching preparation and fear of technological obsolescence. Geoffrey Christopher Rapp, *Can You Show Me How to ...? Reflections of a New Law Professor and Part-Time Technology Consultant on the Role of New Law Teachers as Catalysts for Change*, 58 J. LEGAL EDUC. 61, 64 (2008).

158. Canick, *supra* note 146, at 675–79.

159. *Id.* at 678.

160. Kristin Anthony, *Reconnecting the Disconnects: Library Outreach to Faculty as Addressed in the Literature*, 17 COLL. & UNDERGRADUATE LIBRS. 79, 89 (2010).

161. *Id.*

162. Sheri H. Lewis, *A Three-Tiered Approach to Faculty Services Librarianship in the Law School Environment*, 94 LAW LIBR. J. 89, 91 (2002).

163. Nolan & Costanza, *supra* note 100, at 97.

C. Copyrights

Copyright is another detailed planning area for a successful law student repository, because due diligence in copyright clearance can substantially reduce the risk of an institutional repository copyright infringement.

Law student scholarship is protected by copyright law regardless of its content and format. Law student scholarship is original work with a high degree of creativity,[164] for which copyright protection automatically arises when students write them without any formal procedure requirement.[165] Simply listing an unpublished student paper in the university library catalog infringes the student author's distribution right.[166] Once a student paper is added to a law school institutional repository, the general public can view it and download it without any restrictions due to the institutional repository's open-access character. However, the right to electronically distribute copies of the copyrighted work to the public and the right to display the copyrighted work to the public belong to the copyright owner.[167] Therefore, identifying the proper copyright owner and obtaining the relevant copyright permissions are prerequisites for including student scholarship in a law school institutional repository.[168] Different student scholarship may have different copyright owners. Either the student author or a third party may have copyrights to a student paper, so the approaches of handling copyright of student scholarship are accordingly different.

Copyright compliance for published student notes is the most complicated among law student scholarship, because different journals have different copyright policies.[169] Law journals publish both student notes and faculty articles, so some copyright compliance procedures in a law school institutional repository policy that work for faculty articles also apply to student notes. Law school institutional repositories generally have four approaches in securing copyrights for faculty articles.

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164. 17 U.S.C. § 102(a).

165. A work is "fixed" when it "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101.

166. Diversey v. Schmidly, 738 F.3d 1196, 1205 (10th Cir. 2013).

167. 17 U.S.C. § 106(3), (5); *see also* MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 519 (9th Cir. 1993).

168. CAROLE L. PALMER ET AL., IDENTIFYING FACTORS OF SUCCESS IN CIC INSTITUTIONAL REPOSITORY DEVELOPMENT 13 (2008).

169. Lawrence J. Trautman, *The Value of Legal Writing, Law Review, and Publication*, 51 IND. L. REV. 693, 759 (2018); *see also* Parker, *supra* note 10, at 469.

The first way is to require a faculty author to sign an institutional repository agreement when the repository collects an article. The agreement states that the author owns the copyrights associated with the article and assigns the related copyrights to the home institution.[170] The institutional repository will only collect articles with such an institutional repository agreement attached. This is the least burdensome for law school libraries, because libraries do not have to proactively investigate copyrights. Unfortunately, this approach is not popular in law school because it adds a burden on faculty and hence is not favorable to long-term faculty-librarian relationships.[171]

Using SHERPA/RoMEO to identify faculty articles' corresponding copyright is currently the dominant practice of handling faculty article copyrights in academic institutional repositories.[172] SHERPA/RoMEO aggregates almost all legal publications' copyright policy,[173] so it simultaneously ensures copyright search accuracy and efficiency. More importantly, it does not impose an additional burden on faculty with copyright confirmation for each article. As a result, law librarians usually understand the related copyright of an article after searching this site. According to the journal's policy, if law librarians decide they can archive an article in the institutional repository, the library will automatically collect it. If a journal has exclusive copyright of distributing and displaying the article to the public, a law school institutional repository will automatically exclude this article from the collection.

The third form of copyright screening is an upgraded version of the second approach. When a journal has exclusive copyright in an article, the librarian will go a further step by asking the journal for copyright permission, rather than stopping there as in the second approach. Although most student-edited journals now no longer hold exclusive copyright to articles,[174] many peer-reviewed for-profit journals still retain exclusive copyright to articles,[175] or

170. Under this model, author is responsible for the copyright clearance. Ann Hanlon & Marisa Ramirez, *Asking for Permission: A Survey of Copyright Workflows for Institutional Repositories*, 11 PORTAL: LIBRS. & ACAD. 683, 691 (2011); *see also* Amanda Rinehart & Jim Cunningham, *Breaking It Down: A Brief Exploration of Institutional Repository Submission Agreements*, 43 J. ACAD. LIBRARIANSHIP 39, 40 (2017).

171. Hanlon & Ramirez, *supra* note 170, at 684 ("[T]he time and effort involved in determining or securing copyright often outweighed IR benefits.").

172. 97.8 percent of respondents relied on SHERPA/RoMEO to verify publisher permissions. *Id.* at 694.

173. SHERPA/ROMEO, https://v2.sherpa.ac.uk/romeo/ (last visited Oct. 11, 2021).

174. Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 385 (2012).

175. Benjamin J. Keele, *Copyright Provisions in Law Journal Publication Agreements*, 102 LAW LIBR. J. 269, 275 (2010).

require several years' embargo period.[176] It leads these journals to either reject copyright requests or require libraries to pay an unaffordable fee for copyright licenses. As a result, even if a law librarian reaches out to publishers for copyright permission, obtaining copyright permission is difficult, not to mention this inquiry communication is always time-consuming.[177]

The last approach, which is also popular in recent years, is the open access policy adopted by Harvard Law School.[178] This approach requires law faculty to grant home institution the copyright to make future articles available to public.[179] Because the university copyright predates the copyright of any future publishers, faculty thus assumes the obligation to negotiate with the publisher to retain such copyrights.[180] Faculty may request a waiver from the open access policy subject to the decision of the law school administration.[181]

By comparing these approaches, a hybrid approach rooted in the institutional repository agreement and complemented by SHERPA/RoMEO is a better practice for a law student scholarship repository, because it ensures copyright compliance accuracy and efficiency. It also creates an additional opportunity to educate students about basic copyright laws in academic publishing.

First, institutional repository agreements are fully feasible for censoring the copyrights of student notes published in student-edited home journals, where most student notes are published.[182] Law school libraries usually work closely with the law school's student-edited journals,[183] so academic law libraries are familiar with home journals' copyright policies. Even if a law librarian has a copyright question about a journal, the communication about copyright within the same institution is much easier and more accurate than

176. For example, De Gruyter requires at least an embargo period of twelve months after publication. *Repository Policy*, DE GRUYTER, https://www.degruyter.com/page/repository-policy (last visited Oct. 11, 2021). Similarly, Wiley requires an embargo period of twelve to twenty-four months. *Author Services*, WILEY, https://authorservices.wiley.com/author-resources/Journal-Authors/licensing/self-archiving.html (last visited Oct. 11, 2021).

177. Lisa Macklin, *Copyright and Institutional Repositories*, *in* THE INSTITUTIONAL REPOSITORY: BENEFITS AND CHALLENGES 99, 106 (Pamela Bluh et al., eds., 2014); *see also* Brianna L. Schofield & Jennifer M. Urban, *Takedown and Today's Academic Digital Library*, 13 I/S: J.L. & POL'Y FOR INFO. SOC'Y 125, 137 (2016).

178. *Open Access and Scholarly Publishing*, HARV. L. SCH., https://hls.harvard.edu/library/for-faculty/open-access-and-scholarly-publishing/ (last visited Oct. 11, 2021).

179. *Harvard Law School Open Access Policy*, HARV. LIBR. OFF. FOR SCHOLARLY COMMC'N, https://osc.hul.harvard.edu/policies/hls/ (last visited Oct. 11, 2021).

180. *Open Access and Scholarly Publishing*, *supra* note 178.

181. *Id.*

182. Only 73 of 196 law reviews clearly state they refuse to accept works by student at other law schools. Levit et al., *supra* note 65.

183. Keele & Pearse, *supra* note 174, at 384–85.

checking with third-party sources. Besides, given that the total number of student notes in law journals is small,[184] the total number of student author agreements is also small. Consequently, it does not create an additional burden for the law librarians.

Furthermore, signing institutional repository agreements is not a burden for students, but rather a valuable opportunity to learn about copyright.[185] Some students do not have academic publishing experience, and others have not ever taken a copyright course. Students will inevitably ask librarians questions about copyright when signing the institutional repository agreements. It is an opportunity for librarians to explain general copyright concepts to students, such as copyrights of student authors and the impacts of depositing papers in an institutional repository on copyright owners. It subsequently turns the institutional repository agreement, which is merely a repository procedural requirement, into a copyright educational component for the student authors.

Third, SHERPA/RoMEO can serve as an effective supplement to the institutional repository agreement. Students are far less likely to publish notes in other non-home student-edited journals and peer-reviewed journals,[186] but it is still possible that a small percentage of student notes are published in these journals. SHERPA/RoMEO ensures that librarians can effectively verify the copyright status of these notes. As previously discussed, there is no need to further request copyright permission after checking with SHERPA/RoMEO, as it is difficult for librarians to obtain copyright permission from those journals.

Two reasons prevent the attractive Harvard open-access model from being applied to student scholarship copyright screening. Such a policy forfeits the opportunity to educate students one-on-one about copyright-related topics. Moreover, it does not apply to student coursework, some of which is subject to FERPA. Because of its homogeneous scope of application, the Harvard open-access policy is not a well-compatible and simple enough copyright screening policy for an institutional repository that should apply to a wide range of student writings.

The copyright issue of writing competition winners is more straightforward. Because writing contests normally only require

184. Deb Ballam, *Editor's Corner*, 36 AM. BUS. L.J. x, xi (1999).

185. Nolan & Costanza, *supra* note 100.

186. The major reason is student-edited journals outnumber peer-reviewed journals. Of the U.S. law journals in the W&L Law Journal Rankings, the total number of student-edited journals is 663, while there are only 295 peer-edited or refereed journals. *Law Journal Rankings*, WASH. & LEE UNIV. SCH. OF L., https://managementtools4.wlu.edu/LawJournals/Default.aspx (last visited Dec. 21, 2021).

the winner to sign a publishing agreement to assign the "right of first publication and the non-exclusive, perpetual right to publish the work" to the contest organizers,[187] the winner in most cases still owns the copyright to the winning paper. It means requiring a student author to sign an institutional repository agreement can ensure copyright compliance for the writing contest-winning paper, as long as the contest organizer has already published the winning paper before.

Other non-formally published student writings are easier to manage.[188] A non-published student paper does not affect its copyrights' validity,[189] including theses and dissertations,[190] unpublished notes,[191] student coursework, or independent research papers.[192] Even if those student writings are under the supervision and guidance of faculty, under most university copyright policy,[193] student authors still own copyrights of those writings.

In some cases, home institutions may own copyrights on student writings, but it is unlikely to affect law student scholarship. First, law student scholarship is not work made for hire. Most law student authors of theses and dissertations, unpublished notes, papers of student coursework, or independent research are consumers of law schools. They use these writings to meet law school academic credits or degree requirements without receiving extra financial support from law schools.[194] Therefore, most law student authors are not in an employment relationship with the university when they write papers, because they are "neither employees nor independent contractors retained by the university."[195] Though some

187. THE ADMIRALTY & MAR. L. COMM., *2020 Law Student Writing Competition, Official Rules*, A.B.A. (2020); *see also American Bar Association Business Law Section 2020-2021 Mendes Hershman Student Writing Contest, Official Rules*, A.B.A. (2020); *Intellectual Property Law*, VA. STATE BAR (2021), https://www.vsb.org/site/sections/intellectualproperty/writing-competition.

188. This is because these are "student-authored works created within a class, or as part of a class assignment for traditional academic purposes." Kurt M. Saunders & Michael A. Lozano, *More Than an Academic Question: Defining Student Ownership of Intellectual Property Rights*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 175, 204 (2018).

189. 17 U.S.C. § 102(a) only requires originality and fixity.

190. Diversey v. Schmidly, 738 F.3d 1196, 1197 (10th Cir. 2013) (holding that a student had stated a plausible claim for relief in a copyright action against his university for infringement of his distribution right to his graduate dissertation).

191. Saunders & Lozano, *supra* note 188.

192. *Id.* at 213.

193. *Id.* at 189–91.

194. The law student scholarship is different with student writings in many other disciplines, where student authors heavily rely on institutional grants for a survey or an experiment, or even are hired as research assistant on a project.

195. Saunders & Lozano, *supra* note 188, at 212. Courts generally apply the common law of agency to determine the employment relationship. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989).

academic institutions have copyright provisions that require students to assign copyright to home universities, such provisions are usually conditioned on students making "substantial use" of the institutional resources.[196] However, law student scholarship is unlikely to significantly use institutional facilities, because those academic writings, at best, use databases and sources provided by the library to which every law student has access.[197]

Because student authors have copyrights over their unpublished scholarship, a written agreement to acquire copyright permission ensures the institutional repository's copyright compliance. Such an agreement also provides the institutional repository a similar copyright screening procedure to the one used for published student notes and writing competition winning papers.

In summary, requiring student authors to sign an institutional repository agreement to transfer the non-exclusive copyright to a law library, which screens papers with questionable copyrights with SHERPA/RoMEO as necessary, is an efficient copyright clearance approach for a law student scholarship repository.

D. FERPA

The last key aspect of a law school student repository is the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA generally protects the privacy of student records. When the full text of student scholarship and certain student information becomes available to the public once they are part of the open-access law school institutional repository, the potential FERPA issue is on the table.

In most cases, FERPA prohibits educational institutions receiving federal funding from releasing student educational records or personally identifiable information from those records without parent's written consent.[198] Since the coverage of "school" is very broad,[199] all U.S. public law schools and many private law schools are subject to FERPA regulation. Moreover, each law student can independently provide a valid FERPA consent, as law schools are postsecondary institutions.[200] The next question about FERPA for

196. Jacob H. Rooksby, *A Fresh Look at Copyright on Campus*, 81 MO. L. REV. 769, 776–77 (2016).

197. Saunders & Lozano, *supra* note 188, at 200.

198. 20 U.S.C. § 1232g(b)(1).

199. Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 ED. L. REP. 469, 470 (2001).

200. 20 U.S.C. § 1232g(d).

a law student repository is whether law student scholarship constitutes educational records.

Educational records, with some exceptions, "contain information directly related to a student" and "are maintained by an educational agency or institution or by a person acting for such agency or institution."[201] Generally, if an educational record contains "personally identifiable information" regarding a student, it will be "directly related" to the student.[202] The word "maintain" means "records will be kept in a filing cabinet in a records room at the school or on a permanent secure database."[203] A "single central custodian" keeps those institutional records.[204] The term "acting for" refers to "agents of the school."[205] No statutory exceptions apply to student scholarship,[206] nor do the cases and statutes clearly explain what type of student scholarship is protected by FERPA.

In the academic setting, many student notes and writing competition winners have an introductory thank-you footnote that mentions some personal information, such as the author's affiliation, e-mail address, and expected graduate date. All of that information is "information directly related to a student." Theses, dissertations, papers of coursework and independent research, and those student writings required for a degree or a course, also contain similar student personally identifiable information.[207] Metadata of student writings may also contain student electronic fingerprints in original documents where student writings are stored. Because anyone can download student scholarship once it is available in a law school open-access institutional repository, those personal digital fingerprints can also cause the leak of student personally identifiable information.

However, published student notes are not educational records. First, student editors are not agents for law schools during the notes review and editing process. The United States Supreme Court in *Owasso Independent School District No. I-011 v. Falvo* found that a student grader at a pre-secondary school was not an agent of the institution, because she learns through the peer grading process as directed by teachers, and she is not "acting for the educational institution in maintaining" the educational records.[208]

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201. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.
202. 34 C.F.R. § 99.3.
203. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 433 (2002).
204. *Id.* at 435.
205. *Id.*
206. 20 U.S.C. § 1232g(a)(4)(B).
207. 34 C.F.R. § 99.3.
208. 534 U.S. at 433–34.

Similarly, student editors are learning through the process of editing articles as part of the law journal course requirement. Second, they are "acting for" the journal to edit articles, not "acting for" the journal or the law school to maintain the articles. Also, those student notes are not physically nor electronically stored by the law school in a central place.[209] Though selected student notes for publication are formally collected by journal secretory "acting for" the law school, they are not "maintained" by the law school. The reason is that they are eventually published, rather than being securely stored in the "central custodian" of the law school.[210] For the same reason, unpublished student notes are never maintained by the institution. Therefore, student notes, whether they are published or not, are not educational records. On the same basis, student writing competition-winning papers are also not educational records, because they are initially maintained by the contest organizer staffs, who are usually not part of the educational institutions. Even if an about-to-be-archived student note is an educational record, the personally identifiable information on the note falls under the category of directory information, such as the student author's name, email address, and class level.[211] Such information "would not generally be considered harmful or an invasion of privacy if the directory information is disclosed" without prior consent,[212] which is different from other highly-sensitive personally identifiable information, like student identification numbers,[213] or grades with names.[214]

Theses and dissertations are traditionally recognized educational records.[215] Academic libraries ordinarily have to request a FERPA waiver to deposit theses and dissertations to the institutional repositories. However, many academic libraries archive and make student theses and dissertations available to the academic community for research purposes. As a result, collecting them in an academic open-access repository does not need student FERPA consent, as long as students have been notified of program

209. *See id.* at 433.
210. *Id.* (Scalia, J., concurring in judgment).
211. 20 U.S.C. § 1232g(a)(5)(A).
212. 34 C.F.R. § 99.3.
213. *Id.*
214. *Protecting the Privacy of Student Education Records*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/pubs97/web/97859.asp (last visited at November 11, 2021).
215. *Department of Education Clarifies Access to Theses*, ALA WASH. OFF. NEWSLINE (Sept. 8, 1993), https://alair.ala.org/bitstream/handle/11213/2452/ALWN237.TXT?sequence=1&isAllowed=y; *see also Follow-Up on FERPA Flap*, ALA WASH. OFF. NEWSLINE (Sept. 1, 1993), https://alair.ala.org/bitstream/handle/11213/2451/ALWN236.TXT?sequence=1&isAllowed=y.

requirements.[216] Research papers of coursework and independent study are also classic educational records.[217] Neither courts nor the Department of Education gives those research papers the same repository archive flexibility of theses and dissertations, so a law school institutional repository must obtain a FERPA waiver from student authors before collecting such student writings.

Some university libraries try to avoid FERPA issues by allowing students to self-archive their work in university institutional repositories. By doing so, students voluntarily waive the FERPA privacy right on their papers. However, it is not a solid option for law school institutional repositories due to other considerations, including quality control and limited library human resources discussed before.

When there is a wide variety of student scholarship in a law school institutional repository, a uniform FERPA compliance approach relieves law librarians' related burden. It should also ensure the institutional repository compliance with FERPA to the greatest extent. Even though some law student scholarship is exempted from or not qualified as educational records in FERPA, some institutions still ask students to give the institution a written FERPA waiver over every piece of student scholarship,[218] by simply adding a FERPA waiver paragraph in an institutional repository agreement.[219] All student scholarship can employ this uniform process. It also guarantees none of the student writings that are or may be subject to FERPA are left out. Therefore, asking student authors for the FERPA waiver in the institutional repository agreement is the current best practice for the student repository FERPA compliance.

VI. CONCLUSION

Student scholarship in a law school institutional repository is not a new concept for academic law libraries. However, law schools fail to appreciate their potential benefits to students and law schools, including supporting student employment and writings in the short term, as well as alumni relations and law school admissions in the long term. Therefore, law school libraries should commit

216. *Id.*
217. *Id.*
218. ISAAC GILMAN, LIBRARY SCHOLARLY COMMUNICATIONS PROGRAMS: LEGAL & ETHICAL CONSIDERATIONS 96 (2013).
219. Marisa Ramirez & Gail McMillan, *FERPA and Student Work: Considerations for Electronic Theses and Dissertations*, 16 D-LIB MAGAZINE (Jan.–Feb. 2010), http://www.dlib.org/dlib/january10/ramirez/01ramirez.html.

themselves to ensuring that students and faculty are actively involved in expanding the size and diversity of a law student repository with a comprehensive and robust student repository policy.

"Thank You for Your Sacrifice": Off-Label Drug Regulation Strategies After the Misuse of Hydroxychloroquine for COVID-19

Erin McCluan, RN, BSN

I. INTRODUCTION

In March 2020, BuzzFeed News reported that a 45-year-old patient with systemic lupus erythematosus ("SLE") was denied her

long-standing hydroxychloroquine ("HCQ") prescription due to the COVID-19 pandemic.[1] Her healthcare network, Kaiser Permanente, informed her that this was necessary to "conserve[] the current supply for those who are critically ill with COVID-19."[2] Disturbingly, Kaiser wrote to the patient, "Thank you for the sacrifice you will be making for the sake of those that are critically ill; your sacrifice may actually save lives."[3]

The patient, Dale, who asked only to be identified by her first name, told BuzzFeed News, "I never agreed to sacrifice my health and possibly my life and cannot believe that I am being forced to do so."[4] She expressed her fear that she is already immunocompromised and that not taking HCQ could result in a lupus flare, increasing her risk of developing serious COVID-related complications.[5]

HCQ is a disease-modifying anti-rheumatic drug ("DMARD") that has been used for decades to treat various otherwise-uncontrollable autoimmune diseases.[6] However, in early March 2020, this once little-known pharmaceutical became a household name after President Donald Trump touted HCQ as a potential "miracle" cure for COVID-19.[7] Trump's enthusiastic endorsement of HCQ gave rise to a firestorm of misinformation, causing an uproar within the scientific community.[8]

Leading infectious disease experts heavily criticized the study that initially suggested HCQ might be effective in treating COVID-19.[9] Critics argued that the reliability of the study was undermined by major methodological flaws, as the "small randomized trial

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1. Tanya Chen & Dan Vergano, *A Woman with Lupus Said Her Health Care Provider is Stopping Her Chloroquine Prescription and Thanked Her for the "Sacrifice"*, BUZZFEED NEWS (Mar. 25, 2020, 1:48 PM), https://www.buzzfeednews.com/article/tanyachen/kaiser-permanente-lupus-chloroquine.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Hydroxychloroquine (Plaquenil)*, AM. COLL. RHEUMATOLOGY, https://www.rheumatology.org/I-Am-A/Patient-Caregiver/Treatments/Hydroxychloroquine-Plaquenil (last updated Apr. 2020); *Hydroxychloroquine (Plaquenil): Benefits, Side Effects, and Dosing*, LUPUS FOUND. AM., https://www.lupus.org/resources/drug-spotlight-on-hydroxychloroquine (last visited Oct. 28, 2021).

7. Joe Palca, *Trump Tells the Story of a 'Miracle' Cure for COVID-19. But Was It?*, NPR (Apr. 7, 2020, 8:35 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/07/829302545/trump-tells-the-story-of-a-miracle-cure-for-covid-19-but-was-it; *see also* Ben Gittleson et al., *Trump Doubles Down on Defense of Hydroxychloroquine to Treat COVID-19 Despite Efficacy Concerns*, ABC NEWS (July 28, 2020, 7:06 PM), https://abcnews.go.com/Politics/trump-doubles-defense-hydroxychloroquine-treat-covid-19-efficacy/story?id=72039824.

8. Colette DeJong & Robert M. Wachter, *The Risks of Prescribing Hydroxychloroquine for Treatment of COVID-19—First, Do No Harm*, 180 [J]AMA INTERN MED. 1118 (2020).

9. *Id.*

suggesting benefit was unblinded, and some patients received concomitant steroids or antivirals."[10] Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, a vocal critic of the study, contradicted President Trump by stating that all "valid" scientific data showed HCQ was not an effective COVID-19 treatment.[11]

Those most impacted by the political rhetoric and misinformation were the patients, like Dale, who take HCQ as an *evidence-based* treatment for their autoimmune diseases.[12] These patients faced drug shortages, supply chain issues, and additional hurdles in getting their prescriptions filled.[13] This was largely due to the eighty-fold increase in HCQ prescriptions from February to March 2020, when a significant number of new HCQ prescriptions were written by practitioners who did not routinely prescribe the medication.[14]

This Article details how a critical lack of regulation over the practice of off-label prescribing ("OLP") resulted in this potentially deadly crisis. Several states reported that health care providers, including dentists and ophthalmologists, illegitimately prescribed HCQ for themselves and their friends and family, or as prophylaxis and treatment for patients with COVID-19.[15] In evaluating key areas of potential oversight, this Article examines the roles of pharmacists, physicians, the United States Food and Drug Administration ("FDA"), and health licensing boards in mitigating a similar crisis in the future. Through the lens of the HCQ crisis, this Article advocates for health licensing boards to implement effective,

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10. *Id.*

11. Berkeley Lovelace Jr., *Dr. Fauci Says All the 'Valid' Scientific Data Shows Hydroxychloroquine Isn't Effective in Treating Coronavirus*, CNBC, https://www.cnbc.com/2020/07/29/dr-fauci-says-all-the-valid-scientific-data-shows-hydroxychloroquine-isnt-effective-in-treating-coronavirus.html (last updated July 31, 2020, 2:39 PM).

12. DeJong & Wachter, *supra* note 8.

13. *Id; see also* Lara Bull-Otterson et al., *Hydroxychloroquine and Chloroquine Prescribing Patterns by Provider Specialty Following Initial Reports of Potential Benefit for COVID-19 Treatment—United States, January–June 2020*, 69 MORBIDITY & MORTALITY WKLY. REP., 1210, 1210 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6935a4-H.pdf; Kaleb Michaud et al., *Experiences of Patients with Rheumatic Diseases in the United States During Early Days of the COVID-19 Pandemic*, 2 ACR OPEN RHEUMATOLOGY 335, 339, 341 (2020).

14. Bull-Otterson et al., *supra* note 13, at 1213.

15. *See* Martha Bebinger, *Why Hoarding of Hydroxychloroquine Needs to Stop*, NPR (Mar. 23, 2020, 4:28 PM), https://www.npr.org/sections/health-shots/2020/03/23/820228658/why-hoarding-of-hydroxychloroquine-needs-to-stop; Topher Sanders et al., *Doctors Are Hoarding Unproven Coronavirus Medicine by Writing Prescriptions for Themselves and Their Families*, PROPUBLICA (Mar. 24, 2020, 9:45 AM), https://www.propublica.org/article/doctors-are-hoarding-unproven-coronavirus-medicine-by-writing-prescriptions-for-themselves-and-their-families*; see also Boards of Pharmacy and Other Actions Relating to COVID-19 Prescribing,* AM. MED. ASS'N., (last updated Aug. 27, 2020, 9:00 AM) [hereinafter *Boards of Pharmacy and Other Actions*], https://www.ama-assn.org/system/files/2020-04/board-of-pharmacy-covid-19-prescribing.pdf.

evidence-based drug regulations to ensure full and uninterrupted access to essential medicines during public health emergencies.[16]

Section II explores the relationship between the FDA and the states regarding the practice of medicine and, by extension, OLP, a widely accepted aspect of medical practice.[17] Section III evaluates current off-label drug regulation strategies and argues that targeted, state-level solutions are the best approach in this context. Section IV details the three categories of state action on HCQ access: (1) states that failed to issue any publicly-available guidance; (2) states that issued prescribing and/or dispensing recommendations to licensees; and (3) states that issued emergency rules explicitly limiting the prescribing and/or dispensing of HCQ. Section V proposes a set of model off-label drug regulations and concludes with a review of potential legal challenges to these regulations.

Although the HCQ crisis has largely dissipated, critical lessons can be drawn from the experience. First, policymakers must understand that social media-driven scientific misinformation has a direct effect on public health.[18] Second, OLP remains largely unregulated, and therefore, patients like Dale are one misinformed social media campaign away from dealing with a similar crisis in the future—an increasingly significant threat due to the rising likelihood of future pandemic events.[19] Third, health licensing boards have the authority to promulgate regulations that ensure access to essential medicines for patients with chronic illness.[20] Accordingly, this Article proposes evidence-based, off-label drug regulation strategies that seek to preserve medical resources for patients with chronic illness without stifling clinical innovation. In striking this delicate balance, health policymakers must implement fact-based

16. *See State Action on Hydroxychloroquine and Chloroquine,* LUPUS FOUND. AM., https://www.lupus.org/advocate/state-action-on-hydroxychloroquine-and-chloroquine-access [hereinafter *State Action on Hydroxychloroquine*] (last updated July 30, 2020); *State Pharmacy Boards Urged to Ensure Availability of Critical Lupus Medicines,* LUPUS FOUND. AM., (Mar. 26, 2020), https://www.lupus.org/news/state-pharmacy-boards-urged-to-ensure-availability-of-critical-lupus-medicines# [hereinafter *State Pharmacy Boards*]; *see also Drug Safety Communication: FDA Cautions Against Use of Hydroxychloroquine or Chloroquine for COVID-19 Outside of the Hospital Setting or a Clinical Trial Due to Risk of Heart Rhythm Problems*, U.S. FOOD & DRUG ADMIN., (July 1, 2020), https://www.fda.gov/drugs/drug-safety-and-availability/fda-cautions-against-use-hydroxychloroquine-or-chloroquine-covid-19-outside-hospital-setting-or [hereinafter *Drug Safety Communication*].

17. Katrina Furey & Kirsten Wilkins, *Prescribing "Off-Label": What Should a Physician Disclose?*, 18 AMA J. ETHICS 587, 592 (2016).

18. *See supra* notes 1–16 and accompanying text.

19. *See* discussion *infra* Section III; *see also* Nita Madhav et al., *Pandemics: Risks, Impacts, and Mitigation*, *in* DISEASE CONTROL PRIORITIES: IMPROVING HEALTH AND REDUCING POVERTY 315, 326 (2017) (Dean T. Jamison et al. eds., 3d ed. 2017).

20. *See* discussion *infra* Section IV. *See generally* WORLD HEALTH ORGANIZATION, WHO MODEL LIST OF ESSENTIAL MEDICINES (2017).

policies to combat the effects of rising anti-science bias and to protect patients like Dale from becoming collateral damage in a political warzone.[21]

II. THE PRACTICE OF OFF-LABEL PRESCRIBING

A. The United States Food and Drug Administration and the Practice of Medicine

The Federal Food, Drug, and Cosmetic Act ("FDCA")[22] is the federal statute that governs, among other matters, how pharmaceutical drugs obtain FDA approval.[23] The FDA approves drugs for specific and intended use for a particular medical condition based upon sufficient evidence that the drug is safe and effective for that condition.[24] The dosage and administration information listed on the drug label reflects the appropriate parameters for the conditions for which the drug has been approved.[25] However, it is common and accepted medical practice for physicians to prescribe medications for so-called "off-label" uses—for medical conditions other than those for which the subject medication was specifically approved by the FDA.[26]

OLP is commonly utilized in specific patient populations such as children and the elderly, groups often excluded from clinical trials, and for patients experiencing life-threatening, terminal, or rare medical conditions for which there are limited or no FDA-approved options.[27] OLP is particularly prevalent, in large part, because "[a]dvances in clinical medical practice often outpace the FDA's ability to approve new drugs or relabel previously approved drugs with new indications[.]"[28] Critics of the FDA lament that the agency "approves only [forty] to [sixty] percent of all drugs submitted for

21. *See* Peter J. Hotez, *Combating Antiscience: Are We Preparing for the 2020s?*, 18 PLOS BIOLOGY e3000683 (2020), https://doi.org/10.1371/journal.pbio.3000683.

22. 21 U.S.C. §§ 301–399i.

23. *Id.* § 321(g), (p); Amy E. Todd, *No Need for More Regulation: Payors and Their Role in Balancing the Cost and Safety Considerations of Off-Label Prescriptions*, 37 AM. J.L. & MED. 422, 423 (2011).

24. 21 U.S.C. § 321(p)(1); Todd, *supra* note 23, at 423–24.

25. *See* 21 C.F.R. § 201.56 (listing requirements for prescription drug labeling); *see also* Rebecca Dresser & Joel Frader, *Off-Label Prescribing: A Call for Heightened Professional and Government Oversight*, 37 J.L. MED. & ETHICS 476, 477 (2009).

26. Furey & Wilkins, *supra* note 17, at 588. Ten to twenty percent of all prescriptions are written off-label. *Id.*; *see also* David C. Radley et al., *Off-Label Prescribing Among Office-Based Physicians*, 166 ARCH INTERN MED. 1021, 1023 (2006) (reporting that twenty-one percent of commonly used medications in the outpatient care setting were prescribed for an off-label use).

27. Furey & Wilkins, *supra* note 17, at 588.

28. *Id.*

review, and it can take six to eight years and approximately $1.7 billion to get a new drug approved."[29]

Importantly, the FDA does not have the authority to regulate the practice of medicine.[30] Rather, states have broad authority to regulate medical practice to protect the health, safety, and welfare of the people.[31] Moreover, Congress has repeatedly opposed the FDA's interference with the practice of medicine, explicitly stating in the 21st Century Cares Act of 2016 that "[n]othing in this subtitle . . . shall be construed to . . . limit the practice of health care."[32]

Accordingly, physicians are free to prescribe drugs off-label based upon their own medical judgment, provided it adheres to the appropriate standard of care.[33] Although physicians are subject to malpractice liability if their conduct falls outside the standard of care and causes a patient harm, many courts have held that physicians do not have to disclose to a patient that they are prescribing a drug off-label.[34] Thus, given the broad latitude afforded to physicians, "[o]nce a drug is FDA-approved for a specific indication, legally it can be used for any indication[.]"[35]

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29. *Id.*

30. *See FDA's Role in Regulating Medical Devices*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/medical-devices/home-use-devices/fdas-role-regulating-medical-devices (last updated Aug. 31, 2018) (emphasizing that the FDA does not have the authority to regulate medical practice); *see also* Wendy Teo, *FDA and the Practice of Medicine: Looking at Off-Label Drugs*, 41 SETON HALL LEGIS. J. 305, 324 (2017) (citing Patricia J. Zettler, *Toward Coherent Federal Oversight of Medicine*, 51 SAN DIEGO L. REV. 427, 446 (2015)); Todd, *supra* note 23, at 424.

31. U.S. CONST. amend. X; *see also* Watson v. Maryland, 218 U.S. 173, 176 (1910) ("[T]he police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872) (reasoning that the states' police powers extend "to the protection of the lives, limbs, health, comfort, and quiet of all persons . . . within the State"); Teo, *supra* note 30, at 324 (citing Zettler, *supra* note 30, at 446); Todd, *supra* note 23, at 424.

32. Pub. L. No. 114-255, § 3043, 130 Stat. 1033 (2016). *See also* Teo, *supra* note 30, at 308 (noting that legislation which preceded the 21st Century Cares Act contained similar language).

33. Dresser & Frader, *supra* note 25, at 476; *see also* Todd, *supra* note 23, at 424.

34. *See, e.g.*, Klein v. Biscup, 673 N.E.2d 225, 231 (Ohio Ct. App. 1996) ("[F]ailure to disclose FDA status does not raise a material issue of fact as to informed consent."); Southard v. Temple Univ. Hosp., 781 A.2d 101, 108–09 (Pa. 2001) (holding that physicians need not inform patients of FDA classification for bone screws, thus precluding informed consent claim). *But see* Richardson v. Miller, 44 S.W.3d 1, 9 (Tenn. Ct. App. 2000) (reasoning that the trial court erred by excluding evidence of drug listing in compendium, finding that information regarding off-label nature of drug is essential in establishing standard of care). *See also* James M. Beck & Elizabeth D. Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 FOOD & DRUG L.J. 71, 91 (1998) ("[N]o appellate cases have held that a physician's failure to disclose that a drug therapy was prescribed off-label violated informed consent.") (quoting William L. Christopher, *Off-Label Drug Prescription: Filling the Regulatory Vacuum*, 48 FOOD & DRUG L.J. 247, 255 (1993)).

35. Furey & Wilkins, *supra* note 17, at 588.

Despite this latitude, there are several general principles that guide the physician's determination of whether OLP is appropriate and within the standard of care.[36] OLP is acceptable "when it is in the best interest of the patient on the basis of credible, published scientific data supporting" the drug's use for the patient's condition.[37] The physician must determine whether the risks of using a medication off-label outweigh the benefits—a delicate balancing that quickly becomes less clear in complex situations or for patients with multiple comorbidities.[38] Physicians are guided by data published in peer-reviewed journals and drug compendia.[39] Through drug compendia, experts deem certain off-label uses as "acceptable" after a review of the clinical data, which ultimately impacts OLP decisions.[40]

Although physicians are expected to adhere to these principles in making evidence-based prescribing decisions, it is clear that some physicians abandoned their professional responsibilities in writing illegitimate prescriptions for HCQ amidst the COVID-19 pandemic.[41] In doing so, these physicians left patients like Dale to suffer and shoulder the consequences of largely unregulated OLP.[42]

B. The Risks and Consequences of Off-Label Prescribing

Despite the prevalence of OLP, a national survey found that a "substantial minority" of physicians erroneously believed that certain off-label drug uses were FDA-approved.[43] Researchers tested physicians on drug-indication pairs—pairs of a particular drug prescribed for a particular condition—and the results demonstrated that physicians were only able to correctly identify the FDA-

36. *See infra* notes 37–40 and accompanying text.

37. Furey & Wilkins, *supra* note 17, at 590.

38. *Id.*

39. *Gain a Solid Understanding of Compendia and its Impact on Patient Access*, FORMULARY WATCH (July 1, 2012), https://www.formularywatch.com/view/gain-solid-understanding-compendia-and-its-impact-patient-access. Drug compendia are summaries of drug information published to outline FDA-approved uses of medications and evaluations of non-FDA-approved uses. *Id.*

40. *Id.*; *see "Off-Label" and Investigational Use Of Marketed Drugs, Biologics, and Medical Devices*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/regulatory-information/search-fda-guidance-documents/label-and-investigational-use-marketed-drugs-biologics-and-medical-devices (last updated May 6, 2020) ("[Physicians] have the responsibility to be well informed about the product, to base its use on firm scientific rationale and on sound medical evidence, and to maintain records of the product's use and effects.").

41. *See generally Boards of Pharmacy and Other Actions, supra* note 15; *State Pharmacy Boards*, *supra* note 16.

42. *See State Pharmacy Boards*, *supra* note 16*; see also* Chen & Vergano, *supra* note 1.

43. Donna T. Chen et al., *U.S. Physician Knowledge of the FDA-Approved Indications and Evidence Base for Commonly Prescribed Drugs: Results of a National Survey*, 18 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 1094, 1096 (2009).

approval status of approximately half (*mean = 55%*) of the drug-indication pairs.[44]

Dr. G. Caleb Alexander[45] explained that "[t]he results indicate an urgent need for more effective methods of informing physicians about the level of evidence supporting off-label drug use—especially for common off-label uses that are ineffective or carry unacceptable risks of harm."[46] Likewise, Dr. Donna Chen[47] emphasized that "[s]ome physicians and health care experts maintain that physicians should know the evidence, not the FDA labeling. However, knowledge about FDA labeling can be important because FDA approval of a drug for a specific indication indicates a clear threshold of evidence supporting that use[.]"[48]

Although physicians frequently rely on evidentiary sources beyond FDA approval to justify writing a prescription off-label,[49] a 2006 study found that nearly seventy-five percent of off-label prescriptions had little or no scientific support justifying its off-label use.[50] Thus, medical and legal scholars have called for efforts "to scrutinize under[-]evaluated off-label prescribing that compromises patient safety or represents wasteful medication use."[51]

The risks and consequences associated with OLP are especially evident in the context of the HCQ crisis. For instance, the FDA released guidance cautioning against the use of HCQ for COVID-19 outside of a hospital setting or a clinical trial due to reports of "serious heart rhythm problems and other safety issues, including blood and lymph system disorders, kidney injuries, and liver problems and failure."[52] This guidance was announced shortly after the FDA revoked the Emergency Use Authorization ("EUA") to use HCQ "to treat COVID-19 in certain hospitalized patients when a clinical trial is unavailable or participation is not feasible."[53] The FDA justified the revocation as follows:

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44. *Id.*

45. Assistant Professor of Medicine, University of Chicago Medical Center.

46. Univ. Chi. Med. Ctr., *Off-label Use Often Not Evidence-Based: Physicians Lack Knowledge of Off-label Drug Use and FDA Approval Status, Study Finds*, SCIENCE DAILY (Aug. 23, 2009), www.sciencedaily.com/releases/2009/08/090821135011.htm.

47. Assistant Professor of Biomedical Ethics, Public Health Sciences, and Psychiatry, University of Virginia.

48. Univ. Chi. Med. Ctr., *supra* note 46.

49. *See* discussion *supra* Section II.A.

50. *See* Radley et al., *supra* note 26, at 1021.

51. Todd, *supra* note 23, at 426 (quoting Radley et al., *supra* note 26, at 1021).

52. *Drug Safety Communication*, *supra* note 16.

53. *Id*; *see also* 21 U.S.C. § 360bbb-3(c) (providing that an EUA may only be issued if the FDA concludes "that, based on the totality of scientific evidence . . . including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that[:] (A) the product may be effective in diagnosing, treating, or preventing—(i) such disease or

> We made this determination based on recent results from a large, randomized clinical trial in hospitalized patients that found these medicines showed no benefit for decreasing the likelihood of death or speeding recovery . . . . As a result, we determined that the legal criteria for the EUA are no longer met.[54]

Citing the FDA's revocation, the President of the American Medical Association ("AMA"), Dr. Patrice A. Harris, stated that the "[AMA] is calling for a stop to any inappropriate prescribing and ordering of medications, including . . . [HCQ], and appealing to physicians and all health care professionals to follow the highest standards of professionalism and ethics[.]"[55] However, the AMA remained vague on what exactly it considered "inappropriate" prescribing practices to be.[56]

The AMA released a joint statement with the American Pharmacists Association ("APA") and the American Society of Health-System Pharmacists ("ASHSP") "to highlight the important role that physicians, pharmacists and health systems play in being just stewards of health care resources during times of emergency and national disaster."[57] The associations released the statement after becoming "aware that some physicians . . . [were] prescribing . . . [HCQ] for themselves, their families, or their colleagues."[58] These associations "strongly oppose these actions that can lead to supply

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condition . . . and (B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product . . . ."), *quoted in* Denise M. Hinton, *Letter Revoking EUA for Chloroquine Phosphate and Hydroxychloroquine Sulfate*, U.S. FOOD & DRUG ADMIN. (June 15, 2020), https://www.fda.gov/media/138945/download.

54. *Drug Safety Communication*, *supra* note 16; *see Frequently Asked Questions on the Revocation of the Emergency Use Authorization for Hydroxychloroquine Sulfate and Chloroquine Phosphate*, U.S. FOOD & DRUG ADMIN. (June 16, 2020), https://www.fda.gov/media/138946/download.

55. *See Boards of Pharmacy and Other Actions*, *supra* note 15; *see also American Association of Poison Control Centers on Hydroxychloroquine Side Effects*, AM. ASS'N OF POISON CONTROL CTRS. (Mar. 25, 2020), https://piper.filecamp.com/uniq/Klk1IGw3Mzt29mhN.pdf (warning of the "variety of well-known adverse side effects" associated with HCQ, while urging that "[i]t is critical that any use of these medications is coordinated with a treating physician with full understanding of the potential risks and benefits"); *State Pharmacy Boards*, *supra* note 16 (advocating against the "unreasonable prescribing" of HCQ to prevent COVID-19 where "no studies show efficacy for this use").

56. *Boards of Pharmacy and Other Actions*, *supra* note 15; *see also infra* notes 57–62 and accompanying text.

57. *Joint Statement of the American Medical Association, American Pharmacists Association and American Society of Health-System Pharmacists*, AM. MED. ASS'N, (Apr. 17, 2020), https://www.ama-assn.org/delivering-care/public-health/joint-statement-ordering-prescribing-or-dispensing-covid-19 [hereinafter *Joint Statement*].

58. *Id.*

disruptions for patients who need these medicines for chronic conditions."[59]

The joint statement refrained from explicitly instructing physicians not to prescribe HCQ for COVID-19, stating that "[n]ovel off-label use of FDA-approved medications is a matter for the physician's or other prescriber's professional judgment[,]" so long as the decision is made "on an individualized basis with the patient's informed consent" about the associated risks and benefits.[60] This position was tempered by the associations' support for "a pharmacist's professional responsibility to make reasonable inquiries to a prescriber to resolve any questions about a prescription. If a prescription is not for a legitimate medical purpose, it should not be written, and it should not be dispensed."[61] The associations urged that "evidence-based science and practice must guide these determinations."[62]

Although the joint statement only hinted at potential ethical violations in prescribing HCQ for COVID-19 in light of the dearth of evidence that exists for such use, Drs. Colette DeJong and Robert M. Wachter urged physicians to follow the most foundational tenet of medical ethics—"first, do no harm":

> Given the toll of COVID-19, the pressure to do *something* is enormous and understandable. But that must not prompt clinicians to jettison the tenets of evidence-based medicine and the admonition to *do no harm*. As health care providers, we should inform patients about the evidence behind experimental therapies, work to enroll patients in randomized clinical trials, and consider the needs of patients without COVID-19 who may be affected by drug shortages. It is vital that we do not give in to nonevidence-based calls to embrace unproven therapies. Although we may be tempted to bypass enduring principles in this time of uncertainty and fear, the best way to protect patients is to stay grounded in evidence and to fight misinformation.[63]

It appears that most professional associations attempted to appeal foremost to professional ethics and judgment to curb inappropriate HCQ prescriptions.[64] Indeed, the AMA's joint statement

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. DeJong & Wachter, *supra* note 8 (emphasis in original).
64. *See, e.g.*, *Joint Statement*, *supra* note 57.

expressed concern over "confusion that may result from various state government agencies and boards issuing emergency rules limiting or restricting access to [HCQ]" and encouraged these bodies to "emphasize professional responsibility and leave room for professional judgment."[65] Although the joint statement warned that "now is not the time for states to issue conflicting guidance," it also acknowledged the associations' "collective[] support [for] state and federal requirements that direct a prescription must be written only for a legitimate medical purpose."[66]

The associations' vague and inconsistent guidance did very little to assist health care professionals and policymakers in their decision-making processes. The joint statement attempted to appease all stakeholders while strategically avoiding clear and consistent guidance favoring one side over the other.[67] The reality is that states must choose a side: protect patient access by imposing emergency rules restricting inappropriate prescriptions, or favor physician autonomy by issuing prescribing suggestions and recommendations. To be clear, professional associations like the AMA do not have the authority to prevent physicians from prescribing drugs off-label.[68] Nevertheless, the AMA is one of the leading authorities in medicine,[69] and its position on the off-label use of HCQ for COVID-19 is an important one to consider in the development of drug regulation strategies. However, the AMA's apparent preference for states to grant deference to professional judgment, rather than implement emergency rules restricting the nearly unfettered ability to prescribe HCQ off-label, was plainly inadequate.[70]

Inappropriate prescribing of HCQ for COVID-19 resulted in a cascade of failures across the healthcare spectrum. Patients who take HCQ as an evidence-based treatment for their chronic conditions faced restricted access to the drug and additional hurdles in obtaining their prescriptions.[71] Rheumatologists became overburdened with new prior authorization requirements from insurance companies due to the increase in HCQ prescriptions after President

65. *Id.*
66. *Id.*
67. *Id. See also supra* notes 64–66 and accompanying text.
68. *See* Arthur Isak Applbaum, *The Idea of Legitimate Authority in the Practice of Medicine*, 19 AMA J. ETHICS 207, 210 (2017).
69. *See About*, AM. MED. ASS'N., https://www.ama-assn.org/about (last visited Jan. 1, 2021).
70. *See* discussion *supra* Introduction (discussing toll of inappropriate OLP of HCQ on chronic illness sufferers); *see also* Bull-Otterson et al., *supra* note 13, at 1210 (reporting an eighty-fold increase in HCQ prescriptions largely written by non-routine prescribers between February to March 2020 compared to the year prior).
71. *See supra* notes 13–14 and accompanying text.

Trump's endorsement of the drug.[72] In addition, many patients who took HCQ as an ill-advised COVID-19 treatment suffered severe adverse effects with no improvement in the course of their illnesses.[73]

This outcome is a far cry from the bedrock of medical ethics—"first, do no harm."[74] Physicians who contributed to this crisis failed to act as "just stewards" in the face of the COVID-19 pandemic.[75] By disregarding the foundational principle of evidence-based medicine, these physicians exposed not only their own patients to harm, but an entire patient population to preventable harm. Accordingly, it is clear that states must do more to protect patients like Dale from a similar crisis in the future. This will require concrete action from the states beyond mere suggestions or professional recommendations.

III. FEDERAL AND STATE REGULATION OF OFF-LABEL PRESCRIBING

A. Regulation of Off-Label Prescribing Is Best Reserved to the States

Given the FDA's inability to regulate OLP practices of physicians and Congress's clear stance against the federal government's interference with the practice of medicine, state-level solutions are likely to be the best and most efficient solutions in this context.[76] Although efforts to regulate OLP are often criticized as a restriction of physician autonomy,[77] these efforts are well within the states' authority to regulate matters of public health and safety because sufficient access to essential medicines is necessary to protect clinically

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72. *See Prior Authorization Position Statement*, AM. COLL. RHEUMATOLOGY (Mar. 18, 2020), https://www.rheumatology.org/Portals/0/Files/Prior-Authorization-Position-Statement.pdf ("[P]rior authorization requirements . . . create a significant burden on rheumatologists and rheumatology professionals, delay patient care, and may lead to treatment abandonment.").

73. *See supra* notes 52–54 and accompanying text; *see also* Joseph Magagnoli, et al., *Outcomes of Hydroxychloroquine Usage in United States Veterans Hospitalized with Covid-19*, 1 MED. 114, 123 (2020) (finding an increased risk of death associated with COVID-19 patients who were only treated with HCQ).

74. DeJong & Wachter, *supra* note 8.

75. *Id.*

76. *See supra* notes 30–32 and accompanying text.

77. *See* Teo, *supra* note 30, at 324 (citing Ashley Zborowsky, *Rethinking Off-label Regulation in The Wake of* Sorrell v. IMS Health: *Can State Involvement Compensate for Waning State Authority to Curb Commercial Free Speech*?, 13 MINN. J.L. SCI. & TECH. 925, 939 (2012)) ("Many in the medical community . . . feel that the government should not hinder a physician's freedom to practice medicine when using an off-label drug is optimal for patient care.").

vulnerable patients in the midst of a global pandemic.[78] Indeed, the Supreme Court of the United States has long recognized that states may exercise this authority through the adoption of a variety of state laws that regulate the practice of medicine, including licensing requirements for physicians and vaccination laws.[79] Accordingly, states should be involved in OLP regulation because the oversight of medical practice is clearly reserved to the states.[80]

However, state-based regulations will not succeed if states fail to cooperate because residents might choose to travel to neighboring states with fewer restrictions.[81] This is an important caveat to consider because some states permit out-of-state physicians to prescribe within their state without being licensed to practice medicine there.[82] States that prohibit out-of-state prescribing, combined with potential out-of-network health insurance costs, however, may create barriers for patients and physicians looking to access HCQ in states with little to no restrictions on HCQ prescriptions.[83] These issues further support the call for interstate collaboration in the issuance of emergency drug access regulations.[84]

B. Inadequacy of Tort Liability

Tort liability plays a limited role in the HCQ crisis as an OLP regulatory mechanism by providing remedies for injuries suffered by individual claimants.[85] This presents a problem for patients like Dale. Although tort remedies may be available to patients with COVID-19 who suffer harms as a result of taking HCQ off-label,[86] tort remedies via medical malpractice claims are not an option for patients like Dale because they are not the patients of the doctors

78. *See supra* note 31 and accompanying text.

79. *See, e.g.*, Barsky v. Bd. of Regents, 347 U.S. 442, 451 (1954) ("[A] state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing."); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (upholding Massachusetts' vaccination law); *see also* Teo, *supra* note 30, at 324 (citing Lars Noah, *Ambivalent Commitments to Federalism in Controlling the Practice of Medicine*, 53 KAN. L. REV. 149, 159 (2004)).

80. Teo, *supra* note 30, at 324 (citing Todd, *supra* note 23, at 429).

81. Teo, *supra* note 30, at 324–25 (citing Zborowsky, *supra* note 77, at 948).

82. *See* Geoff Neimark, *Boundary Violation*, 37 J. AM. ACAD. PSYCHIATRY L. 95, 95–96 (2009).

83. *See generally* Mila Araujo & Julius Mansa, *How Out of State Health Insurance Works*, THE BALANCE, https://www.thebalance.com/using-your-health-insurance-out-of-state-4170093 (last updated Sept. 30, 2020).

84. *See* text accompanying note 81.

85. Christopher, *supra* note 34, at 261 (criticizing tort law as "unequal to the task of regulating off-label use").

86. *See supra* notes 33–35 and accompanying text (discussing the role of malpractice liability).

writing inappropriate HCQ prescriptions.[87] In the absence of an established doctor-patient relationship, doctors do not owe duties to non-patients.[88]

In some jurisdictions, Dale might be able to sue her pharmacist and pharmacy under theories of negligence or breach of warranty for failing to authorize and fill her HCQ prescription as her physician prescribed.[89] However, even if Dale could pursue a tort-based claim, this is not the appropriate remedy in this context. Regulators are proactive law enforcers, while courts are reactive law enforcers.[90] The latter are unsuited to the task of preventing harm.[91] Approximately 819,906 HCQ prescriptions were dispensed between March and April in 2019, one year prior to President Trump's endorsement of the drug.[92] Assuming these prescriptions were dispensed for a legitimate medical purpose, this figure illustrates that a large number of Americans routinely use HCQ as an evidence-based treatment.[93] Reactionary solutions are inappropriate for such a large class of patients. Therefore, regulators must do more to proactively protect these patients and prevent this crisis from happening again in the future.

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87. The elements of a prima facie case of negligence are: (1) "duty;" (2) "failure to exercise reasonable care;" (3) "factual cause;" (4) "physical harm;" (5) and "harm within the scope of liability." *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 6(b) (AM. L. INST. 2010).

88. *See, e.g.*, Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387, 399 (Ill. 1987) (refusing to extend physician's duty of care to non-patients because "[s]uch a broad duty extended to the general public would expand the physician's duty of care to an indeterminate class of potential plaintiffs").

89. *See, e.g.*, Fagan v. AmerisourceBergen Corp., 356 F. Supp. 2d 198, 212 (E.D.N.Y. 2004) (recognizing that New York pharmacies may be liable for negligence, breach of warranty, or strict liability if a pharmacy fails to fill a prescription as directed by a physician or if the pharmacist knowingly dispenses a drug that is contraindicated for the patient's condition) (citation omitted); Heredia v. Johnson, 827 F. Supp. 1522, 1525 (D. Nev. 1993) ([A] pharmacist must be held to a duty to fill prescriptions as prescribed."); Adkins v. Mong, 425 N.W.2d 151, 152 (Mich. Ct. App. 1988) (holding that pharmacists must "properly fill lawful prescriptions[,]" and will be "held to a very high standard of care in performing this duty and may be held liable in tort for any breach"). *But see infra* notes 119–121 and accompanying text.

90. Katharina Pistor & Chenggang Xu, *Incomplete Law—A Conceptual and Analytical Framework and its Application to the Evolution of Financial Market Regulation* 6 (Colum. L. Sch. Ctr. for L. & Econ. Studies, Working Paper No. 204, 2002), https://scholarship.law.columbia.edu/faculty_scholarship/2429.

91. *Id.* at 77–78.

92. Bull-Otterson et al., *supra* note 13, at 1211; *see also supra* note 7 and accompanying text.

93. Bull-Otterson et al., *supra* note 13, at 1211.

C. State Statutes on Off-Label Drug Use

State statutes on off-label drug use range from insurance mandate statutes that require insurance companies to pay for certain off-label drug uses,[94] to statutes that restrict the off-label use of certain drugs in the interest of public health and safety.[95] For example, in *Cordray v. Planned Parenthood Cincinnati Region*, the Supreme Court of Ohio upheld a state statute prohibiting physicians from prescribing mifepristone to induce an abortion after a pregnancy exceeds forty-nine days on the grounds that the provision reflected the FDA-approved labeling.[96] The Ohio General Assembly enacted this statute after legislators became aware of reports that several women had been injured after taking mifepristone outside of the FDA-approved protocol.[97] Thus, the General Assembly banned all off-label uses of mifepristone "to protect Ohio women from unsafe and ineffective mifepristone protocols."[98]

Like the reports of patient harm that prompted the Ohio General Assembly to enact Section 2919.123, many patients with COVID-19 suffered serious harms as a result of taking HCQ.[99] State intervention is also justified on the grounds that HCQ was deemed an ineffective COVID-19 treatment based upon all "valid" currently available scientific data.[100] Thus, a state statute prohibiting the off-label use of HCQ for COVID-19 outside of a clinical trial or hospital setting, for example, is an evidence-based and appropriate exercise of the states' police powers.[101]

The reality, however, is that such a statute would not be a practical solution during a global pandemic when time is of the essence. The state legislative process is necessarily long and time-consuming.[102] Consequently, patients will be forced to wait for the states to enact these statutes months, and perhaps years, into the pandemic. Alternatively, health licensing boards have the expertise and authority to promptly issue emergency rules consistent with FDA guidance to preserve access to essential medicines and prevent

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94. *See, e.g.*, 215 ILL. COMP. STAT. 5/356z.7; ME. STAT. tit. 24-A, § 2745-F.
95. *See, e.g.*, OHIO REV. CODE ANN. § 2919.123; *see also* Todd, *supra* note 23, at 429.
96. 911 N.E.2d 871, 879 (Ohio 2009) (citing § 2919.123).
97. Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502, 506 (6th Cir. 2006).
98. *Id. See also* Todd, *supra* note 23, at 429.
99. Taft, 444 F.3d at 506. *See Drug Safety Communication*, *supra* note 16.
100. *See supra* notes 9–11 and accompanying text.
101. *See supra* notes 76–80 and accompanying text; *Drug Safety Communication*, *supra* note 16.
102. *See generally Legislative History: PA Legislative Process*, DREXEL UNIV. THOMAS R. KLINE SCH. L., https://drexellaw.libguides.com/c.php?g=366032&p=2473350 (last updated Nov. 30, 2020).

further patient harm.[103] This regulatory approach will ensure that patients receive timely and robust protection.

IV. STATE ACTION ON HYDROXYCHLOROQUINE ACCESS

A. The Role of Health Licensing Boards

As a general rule, administrative agencies are formed to "protect a public interest rather than to vindicate private rights."[104] The essential function of health licensing boards falls squarely within the overarching purpose of administrative law: enforcing and administering laws to protect a public interest—in this case, public health and safety.[105] For example, Pennsylvania's Pharmacy Act provides that the State Board of Pharmacy ("Pennsylvania Board") "shall have the power, *and it shall be its duty* . . . [t]o promulgate rules and regulations to effectuate the purposes of this act and to regulate the distribution of drugs . . . and *the practice of pharmacy for the protection and promotion of the public health, safety and welfare*."[106] This broad provision grants the Pennsylvania Board with the authority and *duty* to regulate the practice of pharmacy[107] for the protection of public health and safety. Thus, the promulgation of emergency HCQ access regulations falls within the scope of this authority.[108]

Likewise, state medical boards are bound by statutes, known as medical practice acts, with the principle goal of protecting the public by ensuring that physicians provide patients with a high standard of care.[109] Through interpretation and enforcement of medical practice acts, state medical boards establish standards for the

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103. *See* discussion *infra* Section IV.A (detailing the role of health licensing boards)*; see also Drug Safety Communication*, *supra* note 16.

104. *Administrative Law*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/administrative_law (last visited Oct. 26, 2020).

105. *See, e.g.*, PA. DEP'T STATE, *Professional Licensing*, https://www.dos.pa.gov/ProfessionalLicensing/Pages/default.aspx (last visited Oct. 26, 2020) (describing the agency's purpose as the "protect[ion of] the health and safety of the public").

106. 63 PA. CONS. STAT. § 390-6 (emphasis added).

107. *Id.* § 390-2(11) (defining "practice of pharmacy").

108. *See* discussion *infra* Section V.B (discussing potential legal challenges to emergency rules issued by health licensing boards); *see, e.g.*, Brighton Pharm., Inc. v. Colorado State Pharm. Bd., 160 P.3d 412, 415, 419 (Colo. App. 2007) (liberally construing pharmacy act and finding that state pharmacy board did not exceed its statutory authority where the board issued a regulation preventing pharmacists from dispensing drugs "if the pharmacist knows or should have known that the order . . . was issued on the basis of an internet-based questionnaire . . . without a valid preexisting patient-practitioner relationship").

109. Drew Carlson & James N. Thompson, *The Role of State Medical Boards*, 7 AMA J. ETHICS 311, 311 (2005).

profession.[110] For instance, in response to the United States' opioid crisis, several state medical boards promulgated rules that restricted excessive opioid prescribing.[111] Similarly, the promulgation of emergency HCQ access regulations is an appropriate exercise of a state medical board's authority.[112]

Health licensing boards are also tasked with the responsibility of determining whether a licensee's conduct warrants suspension or revocation of his or her professional license.[113] A licensee could face disciplinary action for failing to comply with a state rule restricting the prescribing or dispensing of HCQ.[114] However, it remains unclear what the penalties might be because few states have issued information on potential disciplinary action.[115] A licensee would likely not face disciplinary action for prescribing or dispensing HCQ for COVID-19 in states that have issued prescribing suggestions in lieu of explicit rules, as licensees are not necessarily bound by mere recommendations.[116] However, California, a state that issued only guidance to licensees, advised that "inappropriately prescribing or dispensing medications constitutes unprofessional conduct in California."[117] The state reminded licensees that they are "obligated to follow the law, standard of care, and professional codes of ethics in serving their patients and public health."[118]

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110. *Id.*; *see, e.g.*, 63 PA. CONS. STAT. § 422.8 ("[The State Board of Medicine] in the exercise of its duties under this act, shall have the power to adopt such regulations as are reasonably necessary to carry out the purposes of this act.").

111. *See, e.g.*, 18 VA. ADMIN. CODE § 85-21-10-170; *Board of Medicine Regulations on Opioid Prescribing and Buprenorphine*, VA. BD. MED. (Mar. 14, 2017), https://www.dhp.virginia.gov/medicine/newsletters/OpioidPrescribingBuprenorphine03142017.pdf (emphasizing that the Board of Medicine promulgated regulations on opioid prescribing "in response to the escalating opioid crisis in Virginia"). *See generally Pain Management Policies: Board-by-Board Overview*, FED'N STATE MED. BDS., https://www.fsmb.org/siteassets/advocacy/key-issues/pain-management-by-state.pdf (last accessed Feb. 25, 2021).

112. *See, e.g.*, D.S. v. Bd. of Educ. of E. Brunswick Twp., 458 A.2d 129, 132 (N.J. Super. Ct. App. Div. 1983) (reasoning that "[a] grant of authority to an administrative agency is to be liberally construed to permit the agency to accomplish its statutory responsibilities"); Spry v. Miller, 610 P.2d 931, 934 (Wash. Ct. App. 1980) ("Once the legislature has properly delegated rule-making authority to a state agency, that power is liberally construed.") (citation omitted).

113. Carlson & Thompson, *supra* note 109, at 312.

114. *See, e.g.*, *Joint Guidance Regarding Prescribing and Dispensing of Hydroxychloroquine, Chloroquine, and Azithromycin*, S.C. DEP'T LAB., LICENSING & REGUL. (Mar. 25, 2020) ("Physicians should include a bona fide diagnosis on any prescription issued for [HCQ] . . . and *could be subject to discipline* for including an inaccurate diagnosis.") (emphasis added).

115. *See generally Boards of Pharmacy and Other Actions*, *supra* note 15.

116. *See State Action on Hydroxychloroquine, supra* note 16.

117. CAL. STATE BD. PHARMACY, DEP'T CONSUMER AFFS. & MED. BD. CAL., *Statement Regarding Improper Prescribing of Medications Related to Treatment for Novel Coronavirus (COVID-19)*, CAL. ST. BD. PHARMACY (Apr. 1, 2020), https://www.pharmacy.ca.gov/about/news_release/improper_prescribing.pdf.

118. *Id.*

Vague threats of professional ethics violations reinforce the need for explicit state action on HCQ to protect licensees from potential sanctions. Moreover, many states allow pharmacists to refuse to fill prescriptions based upon religious or moral convictions, where there are doubts about the validity of the prescription, or when the pharmacist believes the prescription poses a safety risk.[119] State laws vary considerably in this area,[120] and to add even more ambiguity, general pharmacy laws may be interpreted to require pharmacists to fill prescriptions in the absence of specific laws.[121] Although "refusal to fill" clauses might enable individual pharmacists in certain states to refuse to fill some illegitimate HCQ prescriptions, decisions concerning a historic public health crisis should not have been left to the discretion of an individual pharmacist. The resulting inconsistencies and liability risks were entirely unacceptable for patients and licensees.

B. Pharmacy Policies: Barriers or Solutions?

Nor should HCQ regulation be outsourced to private pharmacy policies, some of which imposed additional barriers on patients with chronic conditions and their providers.[122] Walgreens, one of the largest pharmacy chains in the United States, instituted a fourteen-day limit for all new HCQ prescriptions, a thirty-day supply limit for refills, and reduced ninety-day prescriptions to thirty days.[123] Restricting newly diagnosed but already immunocompromised lupus patients to a fourteen-day HCQ supply was highly burdensome and increased their likelihood of contracting COVID-19 by requiring them to travel outside their homes more often to obtain their prescriptions.[124] Additionally, patients who were prescribed HCQ long before the pandemic began experienced issues obtaining previously approved refills due to overly restrictive pharmacy policies.[125] Nevertheless, individual pharmacists and pharmacies, as key stakeholders in this crisis, should institute appropriate policies that avoid imposing additional barriers on patients like Dale. These

119. *See, e.g.*, 745 ILL. COMP. STAT. 70/4; KAN. STAT. ANN. § 65-1637(n); N.J. ADMIN. CODE § 13:39-7.13; *see also* JODY FEDER ET AL., CONG. RSCH. SERV., RS22293, FEDERAL AND STATE LAWS REGARDING PHARMACISTS WHO REFUSE TO DISTRIBUTE CONTRACEPTIVES 3 (2006).

120. FEDER ET AL., *supra* note 119.

121. *Id.* at 4.

122. Caroline Humer & Manas Mishra, *Pharmacies Set Policies to Stop U.S. Hoarding of Potential Coronavirus Treatments*, REUTERS (Mar. 26, 2020), https://jp.reuters.com/article/instant-article/idUSKBN21C2CQ.

123. *Id.*

124. *State Pharmacy Boards*, *supra* note 16.

125. Michaud et al., *supra* note 13, at 339, 341.

stakeholders must exercise professional judgment in scrutinizing and refusing to fill illegitimate orders within the limits of each states' respective laws in the absence of explicit drug access regulations.

C. Categories of State Action on HCQ

1. States with No Publicly-Available Guidance

A small minority of states failed to issue any publicly-available guidance related to HCQ.[126] This means that (1) there were no limitations on HCQ prescriptions; (2) HCQ could be prescribed for lupus or other conditions, including COVID-19; and (3) prescribers and pharmacists could use their professional judgment in writing and dispensing prescriptions, including limiting refills and access to the medications for certain conditions.[127] The Alabama Board of Pharmacy ("Alabama Board") explicitly stated that it would not issue rules regarding HCQ access after "receiving so many calls asking that [Alabama Board] rule from one perspective or from the opposite perspective regarding the use of [HCQ] for COVID-19."[128] The Alabama Board issued an undated notice to pharmacists stating that it did "not intend to set policy about which drugs you should dispense or about the best decisions for your circumstances."[129] The Alabama Board remarked that there is "no research which provides reliable evidence that these drugs will be successful treatments for COVID-19[,]" but "[p]harmacists have the right to fill prescriptions for drugs written off-label."[130] The Alabama Board cautioned that "[a] written prescription, however, may not be protection for [the pharmacist] if the patient has major problems."[131] Although nothing in Alabama's notice would have prevented patients with chronic illness from obtaining their HCQ prescriptions as they did in the past, the lack of restrictions could have affected Alabama pharmacies and patients in the form of shortages and backorders.[132]

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126. *See generally State Action on Hydroxychloroquine*, *supra* note 16 (indicating that Colorado, Connecticut, Florida, Nebraska, and North Dakota have not issued HCQ regulations or guidance); *see also Boards of Pharmacy and Other Actions, supra* note 15.

127. *State Action on Hydroxychloroquine*, *supra* note 16.

128. *See Hydroxychloroquine (Plaquenil), and Chloroquine Information*, ALA. BD. PHARMACY, https://www.alabamapublichealth.gov/legal/assets/information-pharmacy-032520.pdf (last visited Feb. 1, 2022); *see also State Action on Hydroxychloroquine*, *supra* note 16.

129. ALA. BD. PHARMACY, *supra* note 128.

130. *Id.*

131. *Id.*

132. *See State Action on Hydroxychloroquine*, *supra* note 16.

Other states, including Idaho, Nevada, New York, and Ohio, previously had emergency HCQ access regulations, but have since allowed those regulations to expire.[133] On July 30, 2020, the State of Ohio Board of Pharmacy ("Ohio Board") announced that it would not move forward with proposed Rule 4729:5-5-21 after Ohio Governor Mike DeWine tweeted, "I am asking the @OhioRxBoard to halt their new rule prohibiting the selling or dispensing of hydroxychloroquine [(Plaquenil)] . . . for the treatment or prevention of COVID-19."[134] Ohio's proposed rule would have prohibited pharmacists from dispensing HCQ for the prevention and treatment of COVID-19 outside of a clinical trial, unless approved by the Ohio Board's executive director in consultation with the Ohio Board's president.[135] This rule would have been the most restrictive HCQ regulation issued by a state's health licensing board.[136]

States that failed to issue any publicly-available guidance related to HCQ demonstrated an indefensible absence of leadership. Given the complexity and urgency of the crisis, prescribers and pharmacists required clear guidance from their respective licensing boards regarding their states' positions on HCQ access. States like Alabama, which inexplicably issued a statement regarding its intent not to issue guidance, sent mixed messages regarding pharmacists' liability risks and best practices for dispensing HCQ.[137] States that allowed their rules to expire without issuing any updated guidance after allowing those orders to lapse also failed to protect licensees and the health and welfare of all citizens of their states.[138]

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133. *See, e.g.*, *Emergency Regulation Restricting Prescribing and Dispensing of Hydroxychloroquine and Chloroquine During Novel Coronavirus (COVID-19) Pandemic Has Expired*, NEV. STATE BD. PHARMACY, https://www.medicaid.nv.gov/Downloads/provider/web_announcement_2284_20200821.pdf (last updated Aug. 21, 2020); *see also State Action on Hydroxychloroquine*, *supra* note 16 (specifying which states allowed emergency rules to expire).

134. OHIO BD. PHARMACY, *Requirements for Dispensing or Selling Chloroquine and Hydroxychloroquine in Ohio*, https://www.pharmacy.ohio.gov/Documents/Pubs/Special/COVID19Resources/Requirements%20for%20Dispensing%20or%20Selling%20Chloroquine%20and%20Hydroxychloroquine%20in%20Ohio.pdf; Mike DeWine (@GovMikeDeWine), TWITTER (July 30, 2020, 9:30 AM), https://twitter.com/GovMikeDeWine/status/1288829330974543874.

135. Prescription Requirements for Chloroquine and Hydroxychloroquine, Reg. Ohio (proposed July 20, 2020) (withdrawn July 30, 2020) (to be codified at OHIO ADMIN. CODE 4729:5-5-21), http://www.registerofohio.state.oh.us/rules/search/details/313243.

136. *Compare id.*, *with State Action on Hydroxychloroquine, supra* note 16 (providing summary of every state's response on HCQ).

137. *See supra* notes 128–132 and accompanying text.

138. *See supra* notes 113–121, 129–131 and accompanying text.

2. States with Prescribing and Dispensing Suggestions

The majority of states issued suggestions or recommendations to prescribers and pharmacists in lieu of mandatory rules, generally choosing instead to rely on the professional judgment of licensees.[139] For example, the Indiana Board of Pharmacy and the Medical Licensing Board of Indiana ("Indiana Boards") issued a joint statement addressing the use of HCQ for COVID-19.[140] For prescribers, the Indiana Boards noted that (1) the use of HCQ for COVID-19 prophylaxis was discouraged; (2) prescribers should avoid prescribing HCQ for their friends and family because this may lead to "improper use" and could have a significant impact on the state's supply; (3) prescribers should include a diagnosis code on all prescriptions to avoid delays; and (4) prescribers should consider limiting the amount prescribed "unless . . . deemed medically appropriate."[141]

The Indiana Boards recommended that pharmacists (1) use their professional judgment and verify that newly issued prescriptions are issued for a legitimate medical purpose; (2) contact prescribers to verify the diagnosis for each prescription; and (3) consider limiting the quantity dispensed for use in COVID-19.[142] The Indiana Boards were "not recommending that pharmacies refuse to fill," but recommended that pharmacies "use caution."[143]

Indiana's joint statement mirrored most state guidance in "discourag[ing]" the use of HCQ as a COVID-19 treatment, and although somewhat vague, Indiana's guidance was undoubtedly more comprehensive compared to other states.[144] The Indiana Boards' guidance regarding a pharmacist's refusal to fill, however, failed to provide any additional clarity to an already complex ethical and legal dilemma.[145] For instance, Indiana's advisory opinion could have

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139. *See State Action on Hydroxychloroquine*, *supra* note 16; s*ee also Boards of Pharmacy and Other Actions, supra* note 15.

140. *Joint Statement from the Indiana Board of Pharmacy and the Medical Licensing Board of Indiana*, IND. BD. PHARMACY & MED. LICENSING BD. INDIANA, https://www.in.gov/pla/files/Advisory-Opinion-on-COVID-19-Related-Drugs.pdf (last visited Feb. 1, 2022).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Compare id.*, *with* CAL. STATE BD. PHARMACY, DEP'T CONSUMER AFFS. & MED. BD. CAL., *supra* note 117, *and State Action on Hydroxychloroquine*, *supra* note 16.

145. *See* discussion *supra* Section IV (examining legal and ethical concerns for pharmacists).

been interpreted to suggest that a pharmacist might not have a right to refuse to fill an HCQ prescription.[146]

Indiana's approach also failed to appreciate the realities of day-to-day pharmacy practice. Leaving the decision to dispense HCQ entirely to an individual pharmacist's discretion places additional burdens on pharmacists who already face alarming levels of burnout due to ever-increasing workloads and time constraints.[147] Urging pharmacists to scrutinize and investigate every HCQ prescription that comes through the pharmacy was not a realistic solution, particularly due to the ambiguity of state guidance on HCQ, and the legal complexities regarding a pharmacist's right to refuse and duty to fill.[148] If a state chooses to issue suggestions instead of mandatory rules, state pharmacy boards also should issue a summary of the subject state's laws regarding a pharmacist's ability to refuse to fill a prescription, along with a review of the state's laws on potentially conflicting duties to fill.

California's guidance added even more confusion, however. On April 1, 2020, the California State Board of Pharmacy, Department of Consumer Affairs, and the Medical Board of California issued a joint statement addressing inappropriate OLP and hoarding of "certain medications" in relation to COVID-19.[149] While the statement mentioned emergency restrictions placed on medications in other states, it only mentioned HCQ specifically in the context of the FDA's EUA.[150] By declining to make its stance clear on HCQ access, California left licensees in the dark as to what their respective boards expected of them.[151] Additionally, California's attempt to appeal to professional ethics failed to adequately manage this crisis, particularly from the patient's perspective.[152]

146. *See* Shereen Cox, *To Dispense or Not to Dispense: Lessons to be Learnt from Ethical Challenges Faced by Pharmacists in the COVID-19 Pandemic*, DEV. WORLD BIOETH., 2020, at 1, 7, https://doi.org/10.1111/dewb.12284.

147. Elizabeth H. Padgett & Glenn R. Grantner, *Pharmacist Burnout and Stress*, U.S. PHARMACIST (May 15, 2020), https://www.uspharmacist.com/article/pharmacist-burnout-and-stress.

148. *See supra* notes 113–121, 146 and accompanying text.

149. *See* CAL. STATE BD. PHARMACY, DEP'T CONSUMER AFFS. & MED. BD. CAL., *supra* note 117.

150. *Id.*

151. *See supra* notes 113–121 and accompanying text.

152. *See* Michaud, *supra* note 13, at 335.

3. States with Emergency Rules Restricting the Prescribing and Dispensing of Hydroxychloroquine

A minority of states issued mandatory rules restricting the prescribing and/or dispensing of HCQ for COVID-19.[153] The Lupus Foundation of America observed that the following states took "aggressive action" to preserve the HCQ supply: Arizona, Georgia, Kentucky, Michigan, North Carolina, and Rhode Island.[154] For example, on April 2, 2020, Arizona issued HCQ restrictions for the use of treating or preventing COVID-19.[155] The order required that (1) prescribers include a diagnosis on all prescriptions for the treatment of COVID-19; (2) pharmacists were not to dispense more than a fourteen-day supply with no refills permitted; and (3) the use of HCQ for COVID-19 prophylaxis remained strictly prohibited until such time that peer-reviewed evidence to support that usage became available.[156]

Arizona's order was largely representative of other states' emergency restrictions with one important distinction.[157] The order exempted HCQ prescriptions for patients with non-COVID-19 conditions.[158] In contrast, the Texas State Board of Pharmacy issued a regulation that restricted HCQ prescriptions to a fourteen-day supply unless the patient was previously established on the medication prior to the rule's effective date, regardless of the patient's diagnosis.[159] Other states implemented similar rules.[160] This strategy is problematic, however, because excessive quantity limits are particularly burdensome for and potentially harmful to patients newly diagnosed with lupus or other autoimmune conditions after the emergency rules' effective dates.[161] These policies also create a greater risk of COVID-19 exposure through repeated trips to the pharmacy.[162] Therefore, this Article presents model off-label drug

153. *See State Action on Hydroxychloroquine*, *supra* note 16.
154. *Id.*
155. Office of Governor Douglas A. Ducey, Executive Order 2020-20, Expanding Access to Pharmacies (effective Apr. 2, 2020) https://azgovernor.gov/executive-orders [hereinafter *Arizona Executive Order*] (rescinded).
156. *Id.*
157. *Compare id.*, *with* 22 TEX. ADMIN. CODE § 291.30 (expired July 17, 2020). *See generally State Action on Hydroxychloroquine*, *supra* note 16.
158. *Arizona Executive Order*, *supra* note 155.
159. 22 TEX. ADMIN. CODE § 291.30.
160. *See*, *e.g.*, *Directives from Special Called Board Meeting*, KY. BD. PHARMACY (Mar. 25, 2020), https://pharmacy.ky.gov/Documents/Directives%20from%20KYBOP%20Special%20Called%20Board%20Meeting%20March%2025,%202020.pdf (implementing a ten-day supply limit on all new HCQ prescriptions, regardless of diagnosis). *See generally State Action on Hydroxychloroquine*, *supra* note 16.
161. *See supra* notes 122–125 and accompanying text.
162. *Id.*

regulations to assist health policymakers in creating reasonable prescription restrictions that avoid placing excessive burdens on patients like Dale.

V. PROPOSED STATE REGULATIONS

A. Model Emergency Rules

States that promulgated emergency HCQ regulations, while simultaneously creating additional barriers for patients with chronic conditions, clearly missed the mark. Ideally, states should have implemented rules similar to Ohio's proposed Rule 4729:5-5-21, which would have banned the dispensing of HCQ for COVID-19 outside of a clinical trial, per FDA guidelines, unless approved by the state's pharmacy board.[163] However, most states did not go this far. Indeed, the Ohio Board chose not to move forward with implementing the rule.[164] Therefore, this Section proposes model off-label regulations, using HCQ as an example, by combining the most protective and comprehensive rules implemented by different states.[165]

Model off-label drug regulations must balance the need for clinical innovation and physician autonomy while prioritizing patient safety and ease of access for patients who take essential medicines in their ordinary course of care. In the HCQ context, model regulations are temporary and should remain in effect until (1) the off-label use of HCQ for COVID-19 is supported by sufficient evidence as determined by the states' health licensing boards, and (2) states have developed an action plan to reserve a sufficient HCQ supply for long-term users of the drug.

The Model Rules proposed by this Article are:

(1) A prescriber must attach a patient's positive COVID-19 test result and COVID-19 diagnosis on an HCQ prescription for such treatment.

(2) A pharmacist must not dispense more than a 14-day supply of HCQ for COVID-19 and must not permit a refill for such treatment.

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163. *See* Prescription Requirements for Chloroquine and Hydroxychloroquine, Reg. Ohio (proposed July 20, 2020) (withdrawn July 30, 2020) (to be codified at OHIO ADMIN. CODE 4729:5-5-21), http://www.registerofohio.state.oh.us/rules/search/details/313243.

164. *See State Action on Hydroxychloroquine*, *supra* note 16.

165. *See, e.g.*, *Arizona Executive Order*, *supra* note 155; GA. COMP. R. & REGS. § 480-10-0.38-.22; 216-20 R.I. CODE R. § 6 (effective Mar. 21, 2020).

(3) A licensee must not order or dispense HCQ for COVID-19 prophylaxis until peer-reviewed evidence supporting that usage is available.

(4) Before prescribing HCQ to treat COVID-19, a prescriber must certify that the prescriber has discussed with the patient the risks of off-label use of HCQ for COVID-19.[166]

(5) These Rules do not apply to an HCQ prescription that is ordered to treat a non-COVID-19 medical condition. However, a prescriber must include a patient's non-COVID-19 diagnosis on the HCQ prescription.

(6) This temporary rule is in effect until rescinded.

B. Legal Challenges

Despite the temporary and evidence-based nature of these rules, potential legal challenges are foreseeable. For instance, several Wyoming state lawmakers charged the Wyoming Board of Medicine ("Wyoming Board") with (1) "[i]mproperly banning or prohibiting an otherwise legal medical treatment;" (2) "[i]mproperly limiting Wyoming physicians from exploring possible prescription options for the treatment of COVID-19;" and (3) "[f]ailing, as an agency of the state of Wyoming, in its affirmative duty to defend the health care freedom of Wyoming citizens as required by the Wyoming constitution."[167] These allegations, propounded in a House Joint Resolution, center around purported violations of a provision in the Wyoming state constitution providing that "each competent adult shall have the right to make his or her own health care decisions" and the state of Wyoming "shall act to preserve these rights from undue governmental infringement."[168]

The Wyoming Board released guidance on March 26, 2020 that expressed support for the AMA's call for a stop to the inappropriate use of HCQ and for physicians "to adhere to the standard of care at all times."[169] The statement cautioned that the "[f]ailure to meet the standard of care, inappropriate and . . . overutilization of

166. 216-20 R.I. CODE R. § 6 (requiring the provider to document that the patient was informed of risks associated with off-label use of HCQ). *But see supra* note 34 and accompanying text (explaining the general rule that physicians do not have to disclose to patients that they are prescribing a drug off-label).

167. H.R.J. Res. 2, 66th Leg. (Wyo. 2021).

168. WYO. CONST. art. I, § 38; Wy. H.R.J. Res. 2.

169. *Wyoming Board of Medicine Statement on COVID-19 Prescribing and Conservation of Health Resources*, WY. BD. MEDICINE (Mar. 26, 2020), https://www.wyoleg.gov/2021/Introduced/HJ0002.pdf.

treatments . . . may constitute violations of the Wyoming Medical Practice Act, and will not be tolerated."[170] Some Wyoming lawmakers believe that this guidance is unconstitutional because it "precludes physicians from exploring and utilizing all possible options for treating Wyoming residents for COVID-19 based on the wishes and decisions of Wyoming residents"; "unduly burdens Wyoming residents seeking medical care related to COVID-19"; and "unduly infringes on the right of Wyoming residents to make their own health care decisions."[171]

This challenge is likely to fail because the Wyoming Board's statement did not constitute emergency regulation. It was mere guidance. It was not binding law on Wyoming's licensees. The lawmaker who submitted the resolution even admitted that the statement was not an outright ban, but he argued that it still had "far reaching effects" and vowed to create "a record of how the Wyoming State Legislature interprets the Wyoming Constitution."[172]

Health licensing boards can successfully defend against such a challenge to emergency off-label drug regulations by advancing the following arguments. First, the authority granted to health licensing boards in pharmacy and medical practice acts is often broadly written to allow these bodies to accomplish their statutory objectives.[173] Second, enabling legislation is often liberally construed by the courts for this very purpose.[174] Third, states possess police powers "to protect and promote the health, safety, and morals of the community."[175] Health licensing boards can successfully demonstrate that HCQ access regulations, for example, are promulgated in the interest of public health as an extension of the states' police powers, and thus, are a constitutional exercise of their authority. Lastly, this authority establishes health licensing boards, and not the courts, as the appropriate policymaking bodies under these circumstances.[176] Indeed, some jurisdictions have found that an

170. *Id.*

171. Wy. H.R.J. Res. 2.

172. Morgan Hughes, *Lawmakers Argue Wyoming Board of Medicine Violated State Constitution with Statement on Hydroxychloroquine*, CASPER STAR TRIB., https://trib.com/news/state-and-regional/govt-and-politics/lawmakers-argue-wyoming-board-of-medicine-violated-state-constitution-with-statement-on-hydroxychloroquine/article_fe56bd5e-ac9e-500a-94bc-24196031256f.html (last updated Feb. 11, 2021).

173. *See supra* note 112 and accompanying text.

174. *See, e.g.*, *In re* Adoption of N.J.A.C. 7:15-5.24(b), 22 A.3d 94, 108 (N.J. Super. Ct. App. Div. 2011) ("[T]he grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities.") (citation omitted).

175. U.S. CONST. amend. X; *see supra* note 31 and accompanying text; *see also* INST. MED., COMM. ON SOC. & ETHICAL IMPACTS DEVS. BIOMEDICINE, SOCIETY'S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE 346 (Ruth Ellen Bulger et al. eds., 1995).

176. INST. MED., COMM. ON SOC. & ETHICAL IMPACTS DEVS. BIOMEDICINE, *supra* note 175.

agency's determination is entitled to "great weight" if the agency's "experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute."[177] Accordingly, these legal principles should preclude judicial second-guessing of health licensing boards' policy decisions because the promulgation of emergency drug access regulations during a global pandemic are well within the scope of their authority and expertise.

VI. CONCLUSION

The off-label drug regulation strategies proposed in this Article seek to preserve medical resources for clinically vulnerable patients and protect the public from the harms associated with an unproven therapy. Unfortunately, immunocompromised patients were forced to shoulder the consequences of stockpiling and inappropriate use of HCQ as a COVID-19 treatment, despite the overwhelming amount of evidence against such use.[178] Now and in the future, health licensing boards must make clear to licensees that this conduct is a violation of the bedrock of medical ethics—"first, do no harm."[179]

Even as public interest in HCQ as a COVID-19 treatment declines, reports have emerged that several states are still sitting on millions of stockpiled HCQ doses.[180] Some states are attempting to return the doses back to the original pharmaceutical suppliers,[181] while others claim they are donating their HCQ supplies to the Lupus Foundation of America.[182] Some physicians believe these stockpiled doses will ultimately expire or be discarded.[183] Not only has HCQ stockpiling jeopardized the lives of patients who rely on the drug to manage their chronic conditions, it ultimately cost taxpayers millions of dollars.[184]

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177. Hacker v. State Dep't of Health & Soc. Servs., 541 N.W.2d 766, 773 (Wis. 1995); Ret. Bd. of Taunton v. Contributory Ret. Appeal Bd., 778 N.E.2d 536, 537–38 (Mass. App. 2002).

178. *See supra* notes 70–73 and accompanying text.

179. DeJong & Wachter, *supra* note 8.

180. Elizabeth Cohen & Wesley Bruer, *U.S. Stockpile Stuck With 63 Million Doses of Hydroxychloroquine*, CNN, https://www.cnn.com/2020/06/17/health/hydroxychloroquine-national-stockpile/index.html (last updated June 17, 2020, 10:51 AM).

181. Dylan Goforth, *Oklahoma Trying to Return its $2m Stockpile of Hydroxychloroquine*, FRONTIER (Jan. 26, 2021), https://www.readfrontier.org/stories/oklahoma-trying-to-return-its-2m-stockpile-of-hydroxychloroquine/.

182. Forrest Saunders, *What's Florida Doing with Thousands of Hydroxychloroquine Doses?*, WPTV, https://www.wptv.com/rebound/whats-florida-doing-with-thousands-of-hydroxychloroquine-doses (last updated Feb. 12, 2021, 5:29 PM).

183. *Id.*

184. *Id.*

The HCQ crisis will be seen as a crucial event on the modern pandemic timeline. Indeed, how the states respond to COVID-19 will inform how they respond to pandemics in the future. Population growth, increased urbanization, and climate change are factors that increase the likelihood of a pandemic event.[185] As the global population continues to climb to an estimated 9.7 billion by 2050, infectious disease experts are warning that pandemics will become more common, and "public health systems will have less time to detect and contain a pandemic before it spreads."[186] Consequently, the rise of pandemic events, anti-science bias, and social media misinformation campaigns will serve as a catalyst for health licensing boards to do more to proactively protect the public health and safety of their respective states. Thus, state pharmacy and medical boards are not only in the best position to protect access to essential medicines for patients like Dale, it is their duty to do so. Mere suggestions will not do.

185. Madhav et al., *supra* note 19, at 326.
186. *Id.* (citation omitted).

Time to Follow Florida: Why GINA's Definition of "Genetic Information" Must Change in the Context of Life Insurance

Kathryn Czekalski

I. INTRODUCTION

Many Americans apply for a life insurance policy to protect their spouses and families in the event of an untimely death.[1] What if insurance companies required genetic tests as part of the application process? What if those results were used to exclude applicants or calculate premiums? Can an individual who has taken a

1. For example, in 2021, over fifty percent of Americans owned a life insurance policy. *Life Insurance Ownership in the U.S. 2021*, *STATISTA*, https://www.statista.com/statistics/455614/life-insurance-ownership-usa/ (last visited July 28, 2021).

commercial genetic test, such as the popular 23andMe,[2] be forced to disclose the results to obtain an insurance policy? Surprisingly, genetic discrimination regarding life insurance decisions is currently legal in forty-nine of the fifty states.[3] This Article argues that additional federal legislation to prohibit genetic discrimination, modeled after existing Florida law, is necessary to protect against genetic discrimination involving life insurance.

In the United States, the Genetic Information Nondiscrimination Act of 2008 ("GINA") is the main source for antidiscrimination law surrounding an individual's "genetic information."[4] GINA accomplishes this goal with two main components: Title I and Title II.[5] Title I prohibits health insurance companies from using genetic information to discriminate in issuing health insurance.[6] But that prohibition does *not* extend to genetic discrimination involving life, disability, or long-term care insurance.[7] Title II prohibits employers from using genetic information to discriminate in the employment context.[8]

Between Title I and Title II, GINA has made a bigger impact in the employment context, with a handful of courts finding that employers unlawfully requested or used genetic information to discriminate in employment decisions.[9] However, outside of employment and health insurance, genetic discrimination is not prohibited

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2. 23andMe offers personal genetics services that require submission of a saliva sample that the consumer sends to the lab for analysis. 23ANDME, https://www.23andme.com/howitworks/ (last visited Feb. 25, 2021).

3. Mark A. Rothstein & Kyle B. Brothers, *Banning Genetic Discrimination in Life Insurance – Time to Follow Florida's Lead*, 383 NEW ENG. J. MED. 2099, 2099 (2020).

4. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended at scattered sections of United States Code Titles 26, 29, and 42) [hereinafter GINA].

5. *Id.* §§ 101–102.

6. *Id.* Title I applies to employer-sponsored group health plans and health insurers providing group health coverage. *Id.* § 101. It also applies to individual health coverage. *Id.* § 102. GINA also covers state and local federal government plans, including Medigap. *See* Sonia M. Souter, *GINA at 10 Years: The Battle Over 'Genetic Information' Continues in Court*, 5 J.L. & BIOSCIENCES 495, 500 (2018).

7. Anya E.R. Prince, *Insurance Risk Classification in an Era of Genomics: Is a Rational Discrimination Policy Rational?*, 96 NEB. L. REV. 626, 626 (2018) ("Other insurers, such as life, long-term care, and disability insurers, are exempt from the [GINA].") [hereinafter Insurance Risk Classification].

8. GINA § 202(a); *see* discussion *infra* Section II.

9. *See, e.g.*, EEOC v. Grisham Farm Prods., 191 F. Supp. 3d 994, 998 (W.D. Mo. 2016) (holding that an employment application requiring disclosure of conditions that were not yet manifested constituted unlawful solicitation of information under GINA); Lowe v. Atlas Logistics Grp. Retail Servs. (Atlanta), LLC, No. 1:13-CV-2425-AT, 2015 U.S. Dist. LEXIS 178275, at *8 (N.D. Ga. Sept. 28, 2015) (ordering plaintiffs' employer to pay $600,000 in damages after unlawfully collecting genetic samples under GINA to resolve a workplace dispute). *See also* Souter, *supra* note 6, at 505.

under federal law.[10] To fill this gap, some states have enacted their own legislation to protect against genetic discrimination in many other industries, including non-medical insurance, housing, education, mortgage lending, and even elections.[11]

In addition to problems with GINA's coverage limits, courts have not uniformly interpreted the term "genetic information."[12] Courts have essentially settled on two possible interpretations.[13] One definition interprets the term to mean literally any type of genetic information, while the other definition only considers genetic information that shows the propensity of disease.[14] At the state level, Florida has recently passed a law which applies GINA's antidiscrimination principles to life insurance decisions, but the statute has an even more narrow definition of "genetic information" than GINA.[15] While many genetic antidiscrimination activists are trying to amend GINA to cover more industries like life insurance, a balance must be struck between the interests of the companies writing the policies and those whom they insure.[16]

First, this Article will explore a detailed background of GINA's history, as well as Florida's new law passed in Summer 2020.[17] The Article will analyze how federal genetic antidiscrimination caselaw yields different definitions of "genetic information."[18] The Article will highlight the problems with incorporating those definitions (and Florida's new, narrow definition) into the life insurance context.[19] This Article will conclude with reform proposals to create a sensible approach to prohibiting genetic discrimination in life insurance. Ultimately, this Article proposes that life insurance companies should be prohibited from requiring specific genetic testing (or inquiring about genetic testing) in an application or as part of

10. *See* Souter, *supra* note 6, at 498–99.

11. *See, e.g.*, FLA. STAT. § 627.4301 (2020). *See also* S.B. 559, 2011 Leg., Reg. Sess. (Cal. 2011) (prohibiting genetic discrimination on the basis of genetic information by adding it to the list of characteristics in the Unruh Civil Rights Act).

12. "In the last 10 years . . . the courts have been divided over how to interpret GINA's definition of 'genetic information' . . . ." Souter, *supra* note 6, at 499–500. *See also* discussion *infra* Section II(c).

13. *See* discussion *infra* Section II(c).

14. *See* Souter, *supra* note 6, at 499–500. *See also* discussion *infra* Section II(c).

15. FLA. STAT. § 627.4301 ("'Genetic information' means information derived from genetic testing to determine the presence or absence of variations or mutations . . . in an individual's genetic material or genes that are scientifically or medically believed to cause a disease . . . *which is asymptomatic at the time of testing*.") (emphasis added).

16. *See, e.g.*, Insurance Risk Classification, *supra* note 7, at 627; Rothstein & Brothers, *supra* note 3, at 2100.

17. *See generally* FLA. STAT. § 627.4301.

18. *See* Souter, *supra* note 6, at 499–500.

19. *See* discussion *infra* Section II(c)–(d).

the disclosure process, while allowing insurers to continue asking applicants questions about family history.

II. BACKGROUND

A. Genetic Antidiscrimination Laws at the Federal Level

Before GINA existed, a well-known federal law prohibited the use of genetic information in healthcare decisions, similar to GINA's Title I.[20] Federal protection of genetic information began with the Health Information Portability and Accountability Act ("HIPAA").[21] Enacted in 1996, HIPAA is best known for its medical privacy provisions, not necessarily its impact in genetic antidiscrimination.[22] However, the law aimed to eliminate "job lock," a term given to people who were afraid to leave their employer because the switch in insurance would make them lose coverage or incur long waiting periods due to a preexisting condition.[23] In codifying this aim, HIPAA included regulations regarding what insurers could and could not use to exclude or limit coverage.[24]

HIPAA added Section 702 to the Employee Retirement Income Security Act of 1974, which included a list of "health status-related factors" that group health insurers *may not use* to discriminate against individual participants and beneficiaries.[25] Among the factors is "genetic information,"[26] the definition of which specifies that this term constitutes genetic conditions that have not yet manifested.[27] In other words, if a patient had genetic information in his or her file that did not manifest itself into a diagnosable condition, then that genetic information could not be used to limit or exclude coverage prior to enrollment.[28]

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20. *See* Souter, *supra* note 6, at 498.

21. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of United States Code, Titles 18, 26, 29, and 42) [hereinafter HIPAA].

22. *See* Julie Rovner, *Did the ACA Create Preexisting Condition Protections for People in Employer Plans?*, KHN (May 21, 2019), https://khn.org/news/did-the-aca-create-preexisting-condition-protections-for-people-in-employer-plans/.

23. *See generally* Rebecca Lewin, *Job Lock: Will HIPAA Solve the Job Mobility Problem?*, 2 U. PA. J. LAB. & EMP. L. 507, 507–08 (2000).

24. *See, e.g.*, HIPAA § 702(a).

25. *Id.* § 702(a)(1).

26. *Id.* § 702(a)(1)(F).

27. *Id.* § 701(b)(1)(B).

28. This is a key distinction. For example, a woman may test positive for the gene that has mutations associated with a high risk of breast cancer. However, she does not have breast cancer simply because she has a gene that tends to indicate a higher rate of eventual diagnosis. Therefore, under the HIPAA protections only, she could not be excluded from or reduced to limited coverage on her employer-sponsored plan based on this gene mutation

By the mid-2000s, following scientific innovation in the study of genomics, most states enacted laws prohibiting genetic discrimination in health insurance.[29] HIPAA, however, preempted state genetic discrimination laws regarding employer-sponsored group health insurance plans.[30] While HIPAA prohibited genetic discrimination in these plans, it did not prevent insurers from *asking* for genetic information or *demanding* genetic tests.[31] Additionally, HIPAA did not apply to individual health insurance plans or non-employer plans.[32]

Thus, with relatively little protection at the federal level outside of this narrow HIPAA provision,[33] Congress heeded the demand from the genetic testing companies for more comprehensive federal legislation and enacted GINA in 2008.[34] GINA's model encompassed a complete ban on using genetic information to discriminate in health insurance and employment.[35] Results of an individual's genetic tests can yield information about gene mutations, hereditary traits, and even asymptomatic disease.[36] This information is extremely personal, warranting protection at the federal level.[37]

GINA's Title I amended federal laws to extend antidiscrimination requirements to health insurers providing group health insurance

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without an actual breast cancer diagnosis. *See generally BRCA: The Breast Cancer Gene*, NAT'L BREAST CANCER FOUND., https://www.nationalbreastcancer.org/what-is-brca (last visited Feb. 25, 2021) (explaining the BRCA mutation and detection methods).

29. Mark A. Rothstein, *Is GINA Worth the Wait?*, 36 J.L. MED. & ETHICS 174, 174–75 (2008).

30. *Id.* Employer sponsored plans are by far the most popular in the United States, with almost sixty percent of the nonelderly United States population participating in an employer-sponsored plan in 2008. Matthew Rae et al., *Long-Term Trends in Employer-Based Coverage*, HEALTH SYS. TRACKER (Apr. 3, 2020), https://www.healthsystemtracker.org/brief/long-term-trends-in-employer-based-coverage/. So, it is unsurprising that HIPAA chose only to cover this source of health insurance. However, the number of people relying on employer-sponsored plans was and is declining. *Id.*

31. Souter, *supra* note 6, at 498 n.21.

32. *Id.*

33. In 2000, an executive order prohibited genetic discrimination in federal employment. Rothstein, *supra* note 29, at 175. The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 [hereinafter ADA], prohibited discrimination based on disabilities, but subsequent Supreme Court decisions made it very clear that the ADA was to be construed narrowly and would not apply to asymptomatic genetic discrimination. Rothstein, *supra* note 29, at 175.

34. The lobbyists that were in favor of GINA were genetics researchers, biotech companies, pharmaceutical companies, and the genetic testing companies because all of their efforts and developments would be fruitless if people were afraid to undergo genetic testing due to potential discrimination. Rothstein, *supra* note 29, at 176.

35. *See* Anya E. R. Prince, *Political Economy, Stakeholder Voices, and Saliency: Lessons from International Policies Regulating Insurer Use of Genetic Information*, 5 J.L. & BIOSCIENCES 461, 462–63 (2018) [hereinafter International Genetic Information Policies].

36. *See Genetic Testing FAQ*, NAT'L HUMAN GENOME RSCH. INST., https://www.genome.gov/FAQ/Genetic-Testing (last updated Feb. 13, 2019).

37. *See id.*

or individual health insurance.[38] It imposes a ban on genetic discrimination by proscribing what constitutes discriminatory uses of "genetic information."[39] The Act defines "genetic information" as "information about (i) such an individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual."[40] GINA prohibits requesting, requiring, or even purchasing someone's genetic information for underwriting.[41] Additionally, health insurers may not require insureds or their family members to undergo genetic testing.[42]

Likewise, Title II also describes the discriminatory uses of genetic information as they apply to employment decisions.[43] Employment decisions include "hiring; discharging; determining compensation, terms, conditions, and privileges of employment; or limiting, segregating, or classifying an employee in ways that could deprive the employee of employment opportunities or 'adversely affect the status of the employee' based on genetic information."[44] GINA also prohibits employers from acquiring genetic information, meaning that, generally, employers cannot "request, require, or purchase" an employee's genetic information.[45] Notably, GINA does not apply to private employers with fewer than fifteen employees.[46]

GINA yielded robust standards in some areas, like employment law.[47] It also created more questions about what constitutes "genetic information."[48] GINA's protections also do not extend beyond health insurers, and thus exclude long-term care, disability, and life insurers.[49] Despite these gaps, many hailed GINA as a modern civil rights act.[50] Senator Ted Kennedy called GINA the "first civil rights

38. Souter, *supra* note 6, at 500–01. GINA included the same stipulation for employer-sponsored health plans, though already covered by HIPAA. *Id.* at 500.

39. *Id.*

40. GINA § 201(4)(A)(i)–(iii).

41. Souter, *supra* note 6, at 501.

42. *Id.*

43. *Id.*

44. *Id.* at 501–02 (quoting GINA § 202(b)).

45. GINA § 202(b). Some exceptions are noted, such as for wellness programs that ask for voluntary information that employers will not see unless it is anonymous. GINA § 202(b)(1)–(5).

46. Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008, EQUAL OPPORTUNITY EMP. COMM'N (Nov. 9, 2010) https://www.eeoc.gov/laws/guidance/questions-and-answers-small-businesses-eeoc-final-rule-title-ii-genetic-information.

47. *See* EEOC v. Grisham Farm Prods., 191 F. Supp. 3d 994, 997–98 (W.D. Mo. 2016). This case is discussed in-depth in Section II(c)(i), *infra*.

48. *See* Souter, *supra* note 6, at 499–500.

49. Insurance Risk Classification, *supra* note 7, at 626.

50. Souter, *supra* note 6, at 496.

bill of the new century of the life sciences."[51] Indeed, this legislation was a major milestone in protecting Americans, but several states have since passed more limits on genetic discrimination.[52]

B. State Regulations Regarding Use of "Genetic Information" in Life Insurance

GINA purposely did not encompass other forms of insurance, such as life insurance.[53] Life insurance is a type of insurance that pays a death benefit to an insured's beneficiaries.[54] An insured guarantees coverage amounts by paying a premium, which is determined by a number of factors such as age, health status, personal and family medical history, lifestyle, environmental exposures, and other factors.[55] Genetic information has been available for life insurance companies to utilize when issuing policies, but Florida is making significant changes in this regard.[56]

Contemporaneously, several experts have conducted studies to argue that federal genetic antidiscrimination laws should extend to other areas, such as life insurance.[57] In fact, studies have shown that the fear of genetic discrimination has inhibited individuals from undergoing recommended testing.[58] Another study showed that twenty-five percent of people who elected not to participate in genetic sequencing research cited fear of discrimination by life insurance companies.[59]

Florida recently emerged as a genetic antidiscrimination leader. In Summer 2020, Governor Ron DeSantis signed House Bill 1189, which amended a Florida statute that regulates genetic information for health insurance purposes.[60] The amended statute changed existing law[61] to extend genetic discrimination protections to life

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51. *Id.*
52. *See* Rothstein & Brothers, *supra* note 3, at 2100.
53. Souter, *supra* note 6, at 499 n.26 (citing Sarah Zhang, *The Loopholes in the Law Prohibiting Genetic Discrimination*, ATLANTIC (Mar. 13, 2017), https://www.theatlantic.com/health/archive/2017/03/genetic-discrimination-law-gina/519216/).
54. *Industry Overview: Life Insurance*, VALUE LINE, https://www.valueline.com/Stocks/Industries/Industry_Overview__Life_Insurance.aspx (last visited Feb. 24, 2021).
55. *Id. See also* Rothstein & Brothers, *supra* note 3, at 2100.
56. *See* Souter, *supra* note 6, at 498; Rothstein & Brothers, *supra* note 3, at 2100.
57. *See* International Genetic Information Policies, *supra* note 35, at 466.
58. *Id.* at 467 n.32.
59. Rothstein & Brothers, *supra* note 3, at 2100.
60. John Haughey, *Florida Becomes First State to Enact a DNA Privacy Law, Blocking Insurers from Genetic Data*, CTR. SQUARE (July 1, 2020), https://www.thecentersquare.com/florida/florida-becomes-first-state-to-enact-dna-privacy-law-blocking-insurers-from-genetic-data/article_19acb7fc-bbe2-11ea-a88d-bf2dbe8939af.html.
61. FLA. STAT. § 627.4301 (2020).

insurance.[62] Specifically, the law "prohibit[s] life insurers . . . from canceling, limiting, or denying coverage, or establishing differentials in premium rates based on genetic information under certain circumstances."[63] These "certain circumstances" include underwriting and issuing policies,[64] and explicitly exclude official diagnoses made based on the results of a genetic test.[65] The law also provides that life insurers "may not require or solicit genetic information, use genetic test results, or consider a person's decisions or actions relating to genetic testing in any manner for any insurance purpose."[66]

Substantively, Florida's law is more narrowly defined than GINA in its statutory definition of "genetic information."[67] House Bill 1189 defines "genetic information" as:

> [I]nformation derived from genetic testing to determine . . . [the existence of] genes that are scientifically or medically believed to cause a disease, disorder, or syndrome, or are associated with a statistically increased risk of developing a disease, disorder, or syndrome, which is asymptomatic at the time of testing.[68]

Notably, the law excludes questions regarding family history from this definition.[69] House Bill 1189 is the first law to outright *prohibit* the use of genetic information in life insurance and long-term care in the United States.[70] Other states have imposed limited protections on genetic information.[71] For example, Colorado has banned the use of genetic information in long-term care insurance but not in life insurance.[72] Additionally, California prohibits the use of genetic information in a coverage decision where a denial would discriminate against unaffected carriers of genes for recessive disorders; and Vermont prohibits life insurers conditioning a policy on genetic testing, even though insurers may utilize clinical

62. *Id.*
63. H.B. 1159, 2020 Leg., Reg. Sess. (Fla. 2020).
64. FLA. STAT. § 627.4301(2)(a).
65. *Id.* § 627.4301(2)(d).
66. *Id.* § 627.4301(2)(b).
67. *Compare id.* § 627.4301(1)(a) *with* Souter, *supra* note 6, at 502 (discussing the definition of "genetic information" from GINA).
68. FLA. STAT. § 627.4301(1)(a).
69. *Id.* § 627.4301(1)(a) ("Such testing does not include . . . questions regarding family history.").
70. Rothstein & Brothers, *supra* note 3, at 2099.
71. International Genetic Information Policies, *supra* note 35, at 469.
72. *Id.*

genetic test results in underwriting.[73] However, no state had ever banned the use of genetic discrimination in life insurance prior to Florida.[74]

The Florida law will impact a small number of people with certain genetic conditions, particularly those with fatal, adult-onset diseases without a documented family history, who would have undoubtedly experienced discrimination with genetic test results indicating as much before applying for a policy.[75] In the greater context, many people with a significant likelihood of developing certain forms of cancer or heart disease will not have reluctance to undergo genetic testing to improve their prognoses because life insurance companies can no longer use that information to withhold coverage.[76]

C. The Split: What is "Genetic Information"?

GINA is the rare type of preemptive antidiscrimination legislation enacted before discrimination was widespread or practical, and it came to fruition mostly because of what was unknown and feared.[77] Despite little evidence to support its enactment, GINA has spurred several court decisions, mostly in the employment discrimination context.[78] Courts have adopted two different interpretations of the meaning of "genetic information."[79] This has resulted in an inconsistent application of the federal law, with future courts potentially facing a choice to adopt one of these definitions.[80]

1. The Textual Approach

The most infamous case concerning genetic discrimination in the employment context is *Lowe v. Atlas Logistics Group Retail Services*

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73. Rothstein & Brothers, *supra* note 3, at 2100.
74. *Id.* at 2099.
75. *Id.* at 2100.
76. *Id.* For example, Myriad Oncology offers genetic testing to "aid in identifying ovarian cancer patients with positive homologous recombination deficiency (HRD) status, who are eligible" for treatment with "targeted therapy" with certain medications associated with a better prognosis. *Germline Testing*, MYRIAD ONCOLOGY, https://myriad-oncology.com/mychoice-cdx/germline-testing/ (last visited Feb. 25, 2021).
77. *See generally* Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 441, 443 (2010) ("While some examples do exist, both GINA's advocates and adversaries agreed that scant evidence indicated a significant history of genetic-information discrimination."). *See also* Souter, *supra* note 6, at 498.
78. Souter, *supra* note 6, at 505. A handful of these cases will be discussed in Section II(c)(i)–(ii), *infra*.
79. *Id.* at 506.
80. *See id.*

(Atlanta), LLC, otherwise known as the "Devious Defecator Case."[81] Atlas Logistics Group Retail Services (Atlanta), LLC ("Atlas"), owned a warehouse where it stored products to be sold at grocery stores.[82] In the storage space, an unknown employee began "habitually defecating," requiring products to be destroyed.[83] After an internal investigation, a supervisor suspected two employees, Lowe and Reynolds. [84] Atlas required the men to submit their DNA to a third-party lab for comparison with the fecal matter.[85] Neither suspect was a match.[86]

Lowe and Reynolds subsequently sued Atlas in the United States District Court for the Northern District of Georgia, alleging that Atlas violated GINA.[87] At issue were the parties' different definitions of "genetic information."[88] Lowe and Reynolds argued that when Atlas required them to undergo DNA collection by swabbing their mouths, the company took prohibited "genetic information" consistent with GINA's statutory definition.[89] Conversely, Atlas argued that the DNA obtained from the employees was not "genetic information" as defined by GINA.[90] In Atlas's view, "genetic information" was only "information related to an individual's propensity for disease."[91] Both parties moved for summary judgement.[92]

The court analyzed GINA's definition of "genetic information," and determined that "information about . . . [an] individual's genetic tests" was "unambiguous."[93] Additionally, the court examined how GINA defined "genetic test," which is "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes."[94] The court concluded that by GINA's own definitions, the DNA samples clearly fell within the meaning of "genetic information" because the lab analyzed

81. 102 F. Supp. 3d 1360 (N.D. Ga. 2015); Souter, *supra* note 6, at 515 (quoting Gina Kolata, *'Devious Defecator' Case Tests Genetics Law*, N.Y. TIMES (May 29, 2015), https://www.nytimes.com/2015/06/02/health/devious-defecator-case-tests-genetics-law.html).

82. *Lowe*, 102 F. Supp. 3d at 1361.

83. *Id.*

84. *Id.* at 1362–63.

85. *Id.* at 1363.

86. *Id.*

87. *Id.* Lowe and Reynolds first filed discrimination charges with the EEOC, but the EEOC dismissed the charges and made no finding that Atlas violated GINA. *Id.* at 1363–64. They were entitled to file suit within ninety days of the EEOC's findings, which they did. *Id.* at 1364.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1365.

94. *Id.*

Lowe's and Reynolds's DNA in a way that detected genotypes and mutations.[95]

The court rejected Atlas's interpretation of "genetic information" under GINA.[96] In its own interpretation of the statute, the court examined GINA's legislative intent, and found that GINA's purpose was "to 'establish a national and uniform basic standard' of unacceptable use of genetic information in health insurance and employment[.]"[97] The court explained that the legislators understood that not all genetic tests indicate propensity for disease, and they refused to narrow the definition despite this knowledge.[98] Ultimately, the court found the narrower definition urged by Atlas unpersuasive and declined to adopt it.[99] Thus, relying only on the broad, "unambiguous" statutory definition in its application of the law, the court held that Atlas had violated GINA and was liable to Lowe and Reynolds.[100] After the trial on damages, the court ordered Atlas to pay Lowe and Reynolds $300,000 each.[101]

Similarly, in *EEOC v. Grisham Farm Products*, the court followed the broad statutory definition in its application of GINA's definition of "genetic information," just as the court did in *Lowe*.[102] In this case, Phillip Sullivan ("Sullivan") applied to Grisham Farm Products' ("Grisham Farm") warehouse job-listing by downloading the application from the company website.[103] The application required him to answer forty-three questions about his health history.[104] Included in the questions was whether Sullivan had "consulted a healthcare provider within the past twenty-four months regardless of whether he had been diagnosed with a particular condition, or [sought] advice, diagnosis or treatment from a healthcare provider."[105]

Sullivan did not complete or submit the application and notified the Equal Employment Opportunity Commission ("EEOC"), where he then filed a charge of discrimination.[106] Among Sullivan's claims was that Grisham Farm violated GINA, and he moved for

95. *Id.*
96. *Id.* at 1366.
97. *Id.* at 1367 (quoting 42 U.S.C. § 2000ff).
98. *Id.* at 1368.
99. *Id.* at 1369.
100. *Id.* at 1370.
101. Lowe v. Atlas Logistics Grp. Retail Servs. (Atlanta), LLC, No. 1:13-CV-2425-AT, 2015 U.S. Dist. LEXIS 178275, at *8 (N.D. Ga. Sept. 28, 2015).
102. 191 F. Supp 3d 994, 997 (W.D. Mo. 2016).
103. *Id.* at 995.
104. *Id.*
105. *Id.* (internal quotations omitted).
106. *Id.*

judgement on the pleadings.[107] The court referred to GINA's statutory language in stating that the prohibition against requesting genetic information extended to employment applications that request "information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information."[108]

Based on its reading of the statutory language, the court determined that the questions asking whether the applicant had consulted a health care provider could require disclosure of preventative care for asymptomatic disease.[109] The court used an example of an applicant who had preventatively consulted with their physician to get genetic testing due to a family history of breast cancer.[110] A required disclosure of such information would be a direct violation of GINA.[111] As a result, the court granted summary judgement in favor of Sullivan and ordered Grisham Farm to pay $5,000 in damages for the violation of GINA.[112]

The textual approach tracks the statutory text, and courts *only* look to the statutory definitions of GINA to determine whether information constitutes "genetic information."[113] If the information falls into any of the enumerated categories in GINA, the statute applies regardless of whether the information would be used to predict the "propensity of disease."[114] This approach is more akin to a strict-liability theory in determining what constitutes "genetic information."[115] Other cases have also followed this framework under various sets of facts.[116] However, this analysis has coexisted with a

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107. *See id.* at 995–97 ("A motion for judgment on the pleadings will be granted 'where the moving party has clearly established that no material issue of fact remains and the moving party is entitled to judgment as a matter of law.'") (quoting Waldron v. Boeing Co., 388 F.3d 591, 593 (8th Cir. 2004)).

108. *Id.* at 997.

109. *See id.*

110. *Id.* at 998.

111. *Id.*

112. *Id.* The damages were calculated based on Sullivan's "failure to gain employment, inconvenience, embarrassment, and loss of enjoyment of life." *Id.* at 995.

113. The term "textual approach" is apt because courts following *Lowe* have not examined GINA's legislative intent and relied only on the broad statutory definition that *Lowe* ultimately endorsed. *See id.* at 997. Thus, this term describes the way courts determine whether certain data constitutes genetic information, *not* the process the *Lowe* court utilized in deciding to apply only the broad statutory definition. *Id.*

114. *See generally* Lowe v. Atlas Logistics Grp. Retail Servs. (Atlanta), LLC, 102 F. Supp. 3d 1360, 1365–66 (N.D. Ga. 2015).

115. *See* Souter, *supra* note 6, at 511 (discussing the implications of considering family medical history as "genetic information" as a matter of law).

116. *See, e.g.*, Montgomery v. Union Pac. R.R. Co., No. CV-17-00201-TUC-RM, 2018 U.S. Dist. LEXIS 198593, at *9 (D. Ariz. Nov. 21, 2018) (concluding that an employer unlawfully requested genetic information in a medical history form that did not include "instructions to redact family history"); Jackson v. Regal Beloit Am., Inc., No. 16-134-DLB-CJS, 2018 U.S.

stricter definition of "genetic information," termed here the predictive value definition.[117]

2. The Predictive Value Approach

The backstory surrounding the seminal case for the predictive value definition of "genetic information" is substantially less humorous than its counterpart in *Lowe*. In *Poore v. Peterbilt of Bristol, L.L.C.*, plaintiff Mark Poore ("Poore") was employed by Peterbilt of Bristol, L.L.C. ("Peterbilt") from 2005 to 2010.[118] While employed, he received health insurance coverage for himself and his family.[119] Following an acquisition by new owners, Poore's office manager required him to fill out a health insurance form concerning his family's medical conditions and medications.[120] Poore's wife was diagnosed with multiple sclerosis, which he disclosed.[121] Shortly thereafter, the office manager asked Poore follow-up questions regarding Poore's wife's diagnosis, including when she had been diagnosed and her prognosis.[122] Three days later, Peterbilt terminated Poore without "sufficient explanation."[123]

Poore filed suit against Peterbilt for discrimination, and among his claims was an assertion that Peterbilt had violated GINA by collecting genetic information.[124] Peterbilt moved to dismiss the alleged GINA violation for failure to state a claim.[125] The court looked to GINA's statutory definition of "genetic information," as well as the language that stipulates that it is illegal for an employer to "discharge[] any employee, or otherwise discriminate against any employee . . . because of *genetic information with respect to the employee*."[126] The court also referred to the EEOC's clarification that "'manifestation of a disease or disorder in family members' refers to an employee's 'family medical history.'"[127]

Dist. LEXIS 103682, at *15-16 (E.D. Ky. Jun. 21, 2018) (determining that a physician performing an employment-related medical exam unlawfully requested genetic information by requesting medical records that "contained protected genetic information in the form of her family history") (internal quotations omitted); Punt v. Kelly Servs., No. 14-cv-02560-CMA-MJW, 2016 WL 67654, at *13 (D. Colo. June 6, 2016) (holding that familial cancer constitutes genetic information because it "is the type of genetic information implicated by GINA").

117. Souter, *supra* note 6, at 506.
118. 852 F. Supp. 2d 727, 729 (W.D. Va. 2012).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 730–31 (emphasis in original) (quoting 42 U.S.C. § 2000ff-1(a)).
127. *Id.* at 730.

In addition to construing the statute, the court examined the legislative intent of GINA.[128] Unlike the *Lowe* case, the *Poore* court utilized this information to *narrow* the definition of "genetic information."[129] Specifically, the court cited congressional reports in formulating its rule:

> Congress included family medical history in the definition of "genetic information" because it understood that employers could potentially use family medical history "as a surrogate for genetic traits." . . . However, the fact that an individual family member merely has been diagnosed with a disease or disorder is not considered "genetic information" if "such information is taken into account only with respect to the individual in which such disease or disorder occurs and not as genetic information with respect to any other individual."[130]

Ultimately, the court analyzed Poore's wife's diagnosis to have "no predictive value with respect to Poore's genetic propensity to acquire the disease[,]" and so Peterbilt did not violate GINA.[131] Therefore, the court dismissed Poore's GINA claims.[132]

In a scholarly analysis of the difference between the court's reasoning in *Poore* and the broader definition of "genetic information," Sonia Souter notes that there is "logic to the *Poore* opinion."[133] In fact, it does make sense that one spouse's medical history is not indicative of the other's propensity for disease. However, Souter points out that the *Poore* court did not consider the meaning of "family members" as it relates to GINA's definition of "genetic information."[134] Souter argues that Poore's wife was a "family member" and her diagnosis was a "manifested condition," covered under GINA's definition of "genetic information."[135]

The *Poore* decision, according to Souter, laid the groundwork for the "two-tiered interpretative approach" that other courts followed.[136] Souter defines the approach as "a determination of (1) whether a manifested disease or disorder exists in a family member and (2) whether information about a family member's disease or

128. *Id.*
129. *Id.* at 731.
130. *Id.* at 730–31 (citations omitted) (quoting H.R. Rep. No. 110-28, pt. 2, at 27 (2007)).
131. *Id.* at 731.
132. *Id.*
133. Souter, *supra* note 6, at 507.
134. *Id.*
135. *Id.* at 508.
136. *Id.*

disorder is 'taken into' account in determining whether the employee has a propensity for disease."[137]

Evidence of this problematic test is more readily apparent in *Maxwell v. Verde Valley Ambulance*.[138] In this case, Matthew Maxwell ("Maxwell") worked for Verde Valley Ambulance Company ("VVAC") from 2005 to 2011.[139] Prior to working for VVAC, Maxwell suffered a serious leg injury in a motorcycle accident, which became an issue when VVAC moved to a new building with stairs.[140] VVAC required Maxwell to undergo a medical evaluation to determine if he was disabled.[141] VVAC received a copy of the evaluation, which included Maxwell's disclosure of a family medical history, on which Maxwell had indicated that his grandfather had cancer.[142] The medical evaluation deemed Maxwell was not disabled due to his leg injury, and VVAC terminated Maxwell two days later.[143]

Maxwell filed discrimination charges with the EEOC and alleged that VVAC violated GINA by "requiring him to disclose 'genetic information' in his family medical history[.]"[144] On cross-motions for summary judgment, the court had to decide whether Maxwell's disclosure of his grandfather's cancer constituted "genetic information" under GINA.[145]

The court first analyzed the statutory language, noting that the prohibition on employers requesting genetic information extended to the employee and family members of the employee.[146] However, the court relied on *Poore*, appealing to GINA's intention to "prohibit employers from making a 'predictive assessment concerning an individual's propensity to get an inheritable genetic disease or disorder based on the occurrence of an inheritable disease or disorder in [a] family member.'"[147] Using the test from *Poore*, the court rejected the strict liability theory present in the textual approach and denied both motions for summary judgment.[148] In its analysis, the court reasoned that nothing in the record showed that VVAC had

137. *Id.*
138. No. CV-13-08044-PCT-BSB, 2014 U.S. Dist. LEXIS 127370 (D. Ariz. Sept. 11, 2014).
139. *Id.* at *3–6.
140. *Id.*
141. *Id.* at *6.
142. *Id.* at *38–39.
143. *Id.* at *6–7.
144. *Id.* at *40.
145. *Id.* at *40–41.
146. *Id.* at *41–42.
147. *Id.* at *47 (alteration in original) (quoting Poore v. Peterbilt of Bristol, L.L.C., 852 F. Supp. 2d 727, 730 (W.D. Va. 2012)).
148. *Id.* at *48–49.

"taken into account" Maxwell's disclosure of his grandfather's cancer in the decision to fire him.[149]

This case is at odds with the textual approach to determine the scope of "genetic information" because here, there is "genetic information" that is potentially predictive of an employee's propensity for disease.[150] Cancer can have a genetic component.[151] This is different from *Poore*, where the plaintiff's wife's diagnosis could not predict his future health.[152]

D. Florida's Definition of "Genetic Information"

Although there is not yet any case law from Florida's new life insurance regulation, the Florida legislature's choice in defining genetic information strongly indicates that it has chosen to adopt the predictive value definition of "genetic information."[153] The main difference between Florida's and GINA's definitions of "genetic information" is that Florida defines the term as the "results of predictive genetic tests" for an individual only.[154] GINA includes a family member's genetic tests and manifested conditions in its definition, which Florida specifically excludes.[155] Florida's definition also only covers genetic information in relation to genetic test results.[156] Even the predictive value cases discussed in this Article did not make such a distinction, as the *Maxwell* case could have ruled the other way if the employer had "taken [it] into account."[157]

Even though Florida appears to have selected the predictive value definition to guide its life insurance companies, other states have adopted the textual approach for their genetic antidiscrimination laws.[158] For example, California has adopted nearly an

149. *Id.* at *48.
150. Souter, *supra* note 6, at 511.
151. *Id.*
152. *See id.* Other courts have also signaled they would endorse *Poore*. *See, e.g.*, Gibson v. Wayfair, Inc., No. 4:17-2059, 2018 U.S. Dist. LEXIS 107425, at *11 (S.D. Tex. June 27, 2018) (citing *Poore*'s definition of genetic information in dictum); Green v. Whataburger Rests. LLC, No. 5:17-CV-243-DAE, 2018 U.S. Dist. LEXIS 240112, at *2 (W.D. Tex. Feb. 22, 2018) (suggesting in dictum that *Poore*'s tiered framework applied and that a plaintiff must show that genetic information has predictive value to prevail on a GINA claim).
153. Rothstein & Brothers, *supra* note 3, at 2099.
154. *Id.*
155. FLA. STAT. § 627.4301(1)(a); *cf.* Souter, *supra* note 6, at 502 ("genetic information" is "information about (i) such an individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual").
156. Rothstein & Brothers, *supra* note 3, at 2099.
157. *See* Maxwell v. Verde Valley Ambulance, No. CV-13-08044-PCT-BSB, 2014 U.S. Dist. LEXIS 127370, at *47 (D. Ariz. Sept. 11, 2014).
158. *See* California Genetic Information Non-discrimination Act (CalGINA), S.B. 559, 2011 Leg., Reg. Sess. (Cal. 2011).

identical definition to GINA in its own genetic antidiscrimination legislation.[159] Without much case law at the state level, it is difficult to predict where exactly a state like California might fall in its state-protected industries.[160]

III. ANALYSIS

Even though only one state currently prohibits the use of genetic information in life insurance underwriting, many states have considered legislation regarding such a ban, and others will likely do so in the future.[161] Regardless of whether the path forward is at the state or federal level, Florida's recent passage of House Bill 1189 shows that this is not just a hypothetical situation anymore.[162] The issue presented in *Poore* is not neatly applicable due to the nature of life insurance, because life insurance policies insure against the death of an individual, so only factors that describe that risk would be appropriate to include in underwriting, as opposed to information about an individual's family members.[163] Thus, genetic information about a spouse would not yield any predictive genetic information about an individual in the life insurance context and is therefore unlikely to be present as an issue here.[164]

However, the "two-tiered" or predictive value approach adopted by courts following the *Poore* opinion, such as that used in *Maxwell*, is relevant in the application and underwriting of life insurance policies.[165] If future legislatures were to adopt Florida's ban on life insurers' use of genetic information but continue to utilize GINA's definition of "genetic information," it may be more difficult for life insurance companies to accurately capture risk without violating the statute, making this an unlikely path.[166]

Thus, if genetic antidiscrimination proponents want to increase protection at the federal level, there must be some acquiescence to Florida's apparent adoption of the predictive value approach. To demonstrate the importance of amending GINA's definition of

159. *Id.*

160. *See generally* Tyler Wood, *Genetic Information Discrimination in Public Schools: A Common-Sense Exception*, 49 U. PAC. L. REV. 309, 310 (2018) (applying facts from a key discrimination case in the context of CalGINA to explore the law's scope).

161. *See* International Genetic Information Policies, *supra* note 35, at 469.

162. FLA. STAT. § 627.4301.

163. International Genetic Information Policies, *supra* note 35, at 465 ("In order for insurers to use a risk factor in underwriting, they must be able to show a correlation between the risk factor and increased cost to the insurer.").

164. *See* Poore v. Peterbilt of Bristol, L.L.C., 852 F. Supp. 2d 727, 731 (W.D. Va. 2012).

165. *See* Maxwell v. Verde Valley Ambulance, No. CV-13-08044-PCT-BSB, 2014 U.S. Dist. LEXIS 127370, at *1 (D. Ariz. Sept. 11, 2014).

166. *See* International Genetic Information Policies, *supra* note 35, at 469.

"genetic information" for life insurance specifically, this Article will now use the facts from the *Grisham Farm* and *Maxwell* cases as a framework for exploring the limits of legislation like Florida's House Bill 1189, which bans the use of certain genetic information by life insurance companies.[167] Despite both of these cases occurring in the employment context, the cases' underlying facts are easily adapted to the life insurance framework because both plaintiffs were required to disclose information by form to employers.[168] For this analysis, this Article assumes that the life insurance legislation mirrors Florida's statutory language, except that the definition of "genetic information" will be identical to the definition in GINA.

A. Comparative Analysis of Both Definitions in the Life Insurance Context Under GINA

Suppose that a working mother of two applies for a life insurance policy in a state where such a life insurance genetic nondiscrimination statute has been enacted. In the insurance policy application, one of the required questions is whether the woman has "consulted a healthcare provider within the past 24 months, regardless of whether [s]he had been diagnosed with a particular condition, or [sought] advice, diagnosis or treatment from a healthcare provider[.]"[169] In this scenario, the woman has a family history of breast cancer, and she has taken a genetic test where she tested positive for BRCA1 and BRCA2 mutations that indicate that she is at a higher risk for developing breast cancer.[170] However, she has no diagnosis of breast cancer and no precursory conditions that qualify as a manifestation of disease.[171]

The woman's answer to this question may reveal her genetic test results and any preventative measures taken against developing breast cancer in the future.[172] For example, if the woman has consulted with her physician about scheduling earlier testing or even

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167. *See Grisham Farm Prods.,* 191 F. Supp. 3d at 995; *Maxwell*, 2014 U.S. Dist. LEXIS 127370, at *3–6.

168. *Grisham Farm Prods.*, 191 F. Supp. 3d at 995; *Maxwell*, 2014 U.S. Dist. LEXIS 127370, at *39.

169. *Grisham Farm Prods.,* 191 F. Supp. 3d at 995 (internal quotations omitted).

170. *See generally Can I Lower My Risk of Breast Cancer?*, AM. CANCER SOC., https://www.cancer.org/cancer/breast-cancer/risk-and-prevention/can-i-lower-my-risk.html (last visited Feb. 26, 2021).

171. *See, e.g.*, *Atypical Hyperplasia of the Breast*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/atypical-hyperplasia/symptoms-causes/syc-20369773 (last visited Feb. 26, 2021) (listing symptoms and complications).

172. This is consistent with how the *Grisham Farm* court interpreted the employer's questionnaire with the same question. 191 F. Supp. 3d at 997.

preventative surgery, she would be obligated to disclose such information under the hypothetical form.[173]

If the jurisdiction where this situation occurred adopted the textual definition of "genetic information," the woman could challenge the form under the strict-liability type approach under GINA (or the hypothetical state law following GINA).[174] The life insurance company would be free to collect information not prohibited by statute. But the company could not collect family history of manifested conditions, genetic test results, or actions relating to those results.[175] This approach robustly protects applicants and insureds because it is a blanket-ban on the collection or solicitation of genetic information.

Even if this jurisdiction chose not to follow the textual definition, the woman would still have recourse for potential discrimination, with one key difference. Under the predictive value approach, courts typically use what Sonia Souter has dubbed the "two-tiered interpretative approach," where courts may determine whether a family member has a manifested genetic disease and whether the disease was "taken into account" with respect to the individual.[176] With the genetic information limits under GINA's definition, life insurers are unlikely to require further distillation of the applicant's own genetic susceptibility to breast cancer without a *physical diagnosis*.[177] Thus, the statute would protect the woman as to her personal genetic test results, but not as to her family history of breast cancer.[178] To be actionable under GINA, as demonstrated in *Poore* and *Maxwell*, the woman would need to prove that her genetic information was "taken into account" with respect to her insurance policy.[179]

Suppose a life insurance application required disclosure of a family medical history, as is often the case.[180] In this woman's situation, she would be obligated to disclose her family history of breast cancer. Maybe her mother died from it or contracted it during her

173. *See, e.g.*, *Grisham Farm Prods.*, 191 F. Supp. 3d at 998.

174. This broad definition of genetic information mirrors what Sonia Souter argues occurs when courts "simply examine whether the information in question falls within the definitional language of GINA." Souter, *supra* note 6, at 513.

175. FLA. STAT. § 627.4301(2)(b) ("[L]ife insurers . . . may not require or solicit genetic information, use genetic test results, or consider a person's decisions or actions relating to genetic testing in any manner for any insurance purpose.").

176. Souter, *supra* note 6, at 508.

177. *Id.*

178. *Id.*

179. *See* Maxwell v. Verde Valley Ambulance, No. CV-13-08044-PCT-BSB, 2014 U.S. Dist. LEXIS 127370, at *48 (D. Ariz. Sept. 11, 2014); Poore v. Peterbilt of Bristol, L.L.C., 852 F. Supp. 2d 727, 731 (N.D. Va. 2012).

180. Rothstein & Brothers, *supra* note 3, at 2100.

lifetime, making the existence of an immediate family member's disease incontrovertible. However, according to the two-tiered approach, the life insurance company would be unable "take into account" whether the applicant would have the *propensity* for the familial disease. The applicant would thus have the same premium as an identical candidate without the family history of breast cancer.

Conversely, to prove malfeasance on the insurer's part with the inclusion of this information, the applicant would need to demonstrate that the insurer did, in fact, take this information into account.[181] This puts a high burden on any potential plaintiff to prove that genetic information that was legally obtained was illegally used in the calculation of an insurance premium.[182] Unless a new version of a potential statute shifted the burden to the insurance company to show the policy took no genetic information into account, plaintiffs are essentially out of luck.

Either approach, textual or predictive value, provides too quick of a punishment for life insurers or impracticable lawsuits for insureds or applicants. This makes reform at the federal level difficult without considering a third option.[183] Legislatures must strike a balance with the interests of applicants and life insurance companies while also being realistic with what exactly "genetic information" means.

B. Why Genetic Antidiscrimination Advocates Should Urge Legislatures to Adopt Florida's Definition in the Life Insurance Context

Both judicial definitions of "genetic information" under GINA in the hypothetical analysis above exclude crucial aspects of risk classification that are very important to the nature of life insurance.[184] Although many advocates in favor of strict genetic antidiscrimination laws include family history as "genetic information," it should be excluded for the purpose of reform.[185] Advocates should clearly signal to legislatures what exactly it is that they want life insurance companies to exclude.

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181. *See Maxwell*, 2014 U.S. Dist. LEXIS 127370, at *48.

182. Souter, *supra* note 6, at 511–12 (discussing the *Poore* test and how its holding affects other cases).

183. *See generally* Insurance Risk Classification, *supra* note 7, at 634–38 (discussing the implications of a total ban on genetic information in the insurance context).

184. *Id.*

185. *See, e.g.*, Souter, *supra* note 6, at 511.

This Article argues that advocates should take the position that insurance companies should be prohibited from requiring or inquiring about genetic testing in an application or as part of the disclosure process, while allowing insurers to continue asking applicants questions about family history. Banning genetic testing in the risk classification process for life insurance is a reasonable measure other countries and the state of Florida have taken.[186] Excluding family medical history from "genetic information" allows advocates to focus more on the particularly troubling aspects of life insurers' use of genetic test results, such as tangible economic harm and stigmatization against individuals with certain genetic traits.[187]

This economic harm may affect, for example, those with a predisposition for Alzheimer's or a genetically-linked cancer, who are denied insurance or offered higher premiums based on genetic test results that indicate propensity for these diseases.[188] Without reform and as genetic testing becomes more affordable, accessible, and advanced, these insurance companies may inadvertently create what Anya Prince refers to as a "genetic underclass."[189] Denying policies or forcing sky-high costs on individuals because of pre-defined and unchangeable traits is not only unjust, but it echoes an ugly past of eugenics and forced sterilization.[190] Furthermore, allowing genetic testing within these types of insurance policies will harm society by encouraging those with certain genetic conditions to forgo testing needed for treatment or prevention in fear of this discrimination.[191] Moreover, this effect reverberates in genetic research, where individuals may decline to participate for the same reasons.[192]

In particular, allowing insurers to utilize family medical history may result in actuarial calculations that can benefit the insured.[193] For example, not all breast cancers are hereditary; in fact, most are not.[194] Without further knowledge of the applicant's specific genetic predisposition for this type of cancer, it may be an unpredictable

186. Insurance Risk Classification, *supra* note 7, at 638 ("For example, Austria, France, and Sweden all bar life insurers from using genetic test results in risk classification.").

187. *See id.* at 636.

188. *Id.*

189. International Genetic Information Policies, *supra* note 35, at 467.

190. Insurance Risk Classification, *supra* note 7, at 636.

191. *Id.*

192. *Id.* at 636–37.

193. *See* Laura Adams, *Life Insurance and Medical History Facts that You Don't Know*, HUFFPOST (Apr. 28, 2017, 11:37 AM), https://www.huffpost.com/entry/life-insurance-and-medical-history-facts-that-you-dont_b_59035fe4e4b05279d4edbb64.

194. *Genetics*, BREASTCANCER.ORG, https://www.breastcancer.org/risk/factors/genetics (last modified Apr. 21, 2021) ("About 5% to 10% of breast cancers are thought to be hereditary, caused by abnormal genes passed from parent to child.").

statistic for determining whether an applicant is even at risk for a hereditary form of cancer.[195] Including a healthy family history or family history that can be explained by an individual's behavioral choices also benefits the applicant with a potentially lower risk.[196] Not without a downside, the exclusive definition would potentially include conditions such as Huntington's Disease ("HD"), where inheritability from a parent with the condition is fifty percent.[197]

However, from the insurer's perspective, if the small number of people who test positive each year for these adult on-set neurodegenerative diseases were to purchase these life insurance policies, this would negatively affect policy holders who have to pay increased premiums to make up for the risk the insurance company takes on with these legal changes.[198] Furthermore, unless the insured's family history has a highly penetrant and fatal disease like HD, family history may not have that much of an impact on a policy holder.[199]

Finally, genetic test results yield far more personal information than a family history.[200] Because family history is self-reported, it may be of limited value for insurers to rely on to accurately calculate risk.[201] However, genetic test results can reveal intimate information such as mental illness or incurable disease.[202] This is an extreme invasion of privacy that an individual should never be required to disclose.[203] This is especially true considering that the genetic testing that is currently available is "remarkably unpredictive" and varies in relevance for risk classification.[204] Thus, to ensure privacy to the individual and prevent economic and social harms based on immutable traits, removing family history from "genetic information" in the context of life insurance is the best path

195. *See* Insurance Risk Classification, *supra* note 7, at 657 (discussing penetrance estimates among various genetic conditions).

196. *See* Adams, *supra* note 193 ("Insurers will look at how much a family history of cancer can be attributed to genetics and how much to lifestyle choices. For instance, if your mother developed lung cancer because she smoked a pack of cigarettes a day, your insurer might not ding you if you are a non-smoker.").

197. Insurance Risk Classification, *supra* note 7, at 655–56.

198. *Id.*

199. *Id.* at 655 ("Family history, however, is a notoriously inaccurate and imprecise risk prediction tool due, in part, to patients' potentially incomplete knowledge or misunderstanding of diagnoses.").

200. *See generally id.* at 636 ("[G]enetic tests have the potential to disclose highly personal information about one's self and family, such as a predisposition to a mental illness or an incurable, degenerative disease.").

201. *Id.* at 655.

202. *Id.* at 636.

203. *Id.*

204. *Id.* at 655–56.

forward to achieve change in genetic antidiscrimination laws at the legislative level.

IV. CONCLUSION

With the innovative field of genomics, the healthcare profession has increased access and improved outcomes of detecting and treating various genetic conditions. However, these great achievements must not become overshadowed by the misuse of information about personal, immutable characteristics in industries such as life insurance. Banning life insurance companies from requiring genetic testing in an application or as part of the disclosure process is the best balance to strike between protecting insureds while still considering the insurance companies' function.

Continuing to include questions about family history gives insurers a way to calculate some risk without worrying about strict liability under a GINA-like law and without having the data to discriminate based on extremely personal and unchangeable genetic information. Florida has shown that this is a path forward where this compromise is available, and other states and Congress should consider making a similar change to continue to protect against genetic discrimination.

Putting the "P" in PFA: The Electronic Monitoring of Protection From Abuse Respondents in Pennsylvania

Cameron Kehm

INTRODUCTION

Domestic violence violently claimed Alina Sheykhet's life, despite alleged "protection" from a Protection from Abuse Order ("PFA").[1] Far from being an exception, Alina's story is yet another example among many cases that show how traditional protective order

1. *See* Megan Guza, *Pitt Student Alina Sheykhet's Case Reveals Limitations of PFA Orders*, TRIB LIVE (Oct. 12, 2017, 5:30 PM), https://archive.trib live.com/local/pittsburgh-allegheny/pitt-student-alina-sheykhets-case-reveals-limitations-of-pfa-orders/ [hereinafter Guza, *Pitt Student Alina Sheykhet*].

systems fail those who need protected most.[2] However, Alina's Law can protect PFA holders through a new remedy: the electronic monitoring of PFA respondents.[3] Although Alina's Law failed to make it out of committee consideration during the 2019–2020 term,[4] with three modifications, legislators can reintroduce Alina's Law in a passable form that would protect Pennsylvania's most vulnerable citizens.

Part I of this Article relays Alina's Story and domestic violence statistics for Pennsylvania and the United States. Part II discusses Pennsylvania's current PFA system and the underlying problems associated with similar systems. Part III introduces and supports Alina's Law with case law and programs currently active in other states. Finally, Part IV suggests amendments to Alina's Law, including: (1) rethinking the design of an electronic monitoring device; (2) incorporating a factor test to inform judicial discretion; and (3) addition of a cost provision.

I. BACKGROUND

A. Alina Sheykhet's Story

In the fall of 2017, Alina Sheykhet transferred to the University of Pittsburgh's main campus to pursue a doctorate in physical therapy.[5] After transferring to the main campus, Alina ended a troubled relationship with her long-term boyfriend, Matthew Darby.[6] Alina's friends noted that Darby's actions towards Alina were possessive and abusive throughout their relationship.[7] Darby would "flip out" on Alina over trivial matters, steal her phone to "unlike" any pictures of other men she had "liked" on social media, and would attempt to control what clothes Alina wore.[8] Additionally, Alina admitted that Darby physically abused her several times

2. *See generally* Katie Zezima et al., *Domestic Slayings: Brutal and Foreseeable*, WASH. POST (Dec. 9, 2018), https://www.washingtonpost.com/graphics /2018/investigations/domestic-violence-murders/.

3. *See generally* H.B. 588, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

4. *Id.*

5. *Alina's Story*, ALINA'S LIGHT, https://alinaslight.com/alinas-story/ (last visited Oct. 24, 2020).

6. Harry Shukman & Erica Spaeth, *I Said Goodnight to My Best Friend and the Next Morning I Found Her Dead*, THE TAB (Oct. 12, 2017), https: //thetab.com/us/pitt/2017/10 /12/alina-sheykhet-7060.

7. *Id.*; Harriet Sokmensuer, *Pitt Student, 20, Allegedly Murdered by 'Possessive' Ex had 'Chop and Stab' Wounds to Head and Face*, PEOPLE (Jan. 22, 2018, 6:14 PM), https://people.com/crime/alina-sheykhet-alleged-murder-possessive-ex/ [hereinafter Sokmensuer, *Pitt Student, 20*].

8. Shukman & Spaeth, *supra* note 6.

during their relationship.[9] After their breakup, Alina blocked Darby's telephone number because he would incessantly call Alina "upwards of 20 times" per day, even if Alina did not answer.[10] Finally, on September 17, 2017, Alina met with Darby in a public place to tell him that it was over and "that they had no future."[11]

However, Darby refused to cease his abusive behavior, and after midnight on September 20, 2017, Darby climbed the gutter of Alina's Oakland home, smashed a window, entered, and walked into Alina's bedroom.[12] Alina, asleep at the time, awoke to find Darby in her bedroom, causing her to scream for help.[13] Alina and her housemates confronted Darby, who refused to leave the house, resulting in a 911 call that led police to arrest and charge Darby with criminal trespass.[14] Alina filed a police report documenting the break-in, stating that Darby broke into her house because she tried to cut off communication with him.[15] The police report also described previous occurrences of Darby abusing Alina, including "[g]rabbing, pushing, emotional abuse, jealousy, [and] controlling [behaviors]."[16]

On September 21, 2017, Alina filed for a PFA petition against Darby.[17] During the hearing, the judge voiced his concern for Alina's safety and his opinion that Darby was dangerous.[18] The judge granted Alina a temporary PFA against Darby and set a final court date for October 5, 2017.[19] However, the authorities never served Darby with the temporary PFA order.[20] Because the temporary PFA's faulty service postponed the hearing, Alina, accompanied by her parents, went to the police station to request that

9. *Id.*
10. *Id.*
11. Paula Reed Ward, *Heartbroken Parents of Slain Pitt Student Lament PFA System Flaws*, PITTSBURGH POST-GAZETTE (Nov. 17, 2017, 9:49 PM), https://www.post-gazette.com/local/city/2017/11/17/Alina-Sheykhet-Matthew-Darby-homicide-PFA-University-of-Pittsburgh-Oakland/stories/201711170222.
12. *Court Transcript Shows Judge's Grave Concern for Murdered Pitt Student's Safety*, CBS PITTSBURGH (Oct. 11, 2017, 8:28 PM), https://pittsburgh.cbslocal.com/2017/10/11/court-transcript-pitt-student-murder-pfa/ [hereinafter *Judge's Grave Concern*]; Shukman & Spaeth, *supra* note 6.
13. *Judge's Grave Concern*, *supra* note 12; Shukman & Spaeth, *supra* note 6.
14. Sokmensuer, *Pitt Student, 20*, *supra* note 7.
15. Shukman & Spaeth, *supra* note 6.
16. *Id.*
17. Ward, *supra* note 11.
18. *Judge's Grave Concern*, *supra* note 12.
19. Ward, *supra* note 11.
20. *Id.*

officers serve Darby with the PFA.[21] This time, the authorities served Darby with the PFA on October 5, 2017, at his workplace.[22]

On the night that Darby murdered Alina, Alina sent a text message to a friend stating, "I cannot believe [Darby] wasn't given this PFA sooner. He could have come to my house and done something to me. I am so thankful he didn't hurt me."[23] This haunting message foreshadowed the terrible events that followed. In the early hours of October 8, 2017, Darby broke into Alina's house for the second time and murdered Alina while her housemates slept.[24]

Hours later, Alina's parents arrived at Alina's house to pick her up for a breast cancer charity event.[25] Alina's parents believed that she was still asleep until Alina did not unlock or answer her bedroom door after five minutes of knocking.[26] It was only when Alina's father broke down the door that they discovered their daughter lying in a pool of her own blood, face mutilated beyond recognition.[27] By this time, Darby had fled. He deposited the clawed hammer and knives he used to murder Alina in a sewer grate and discarded her cellphone on Interstate 76, twenty-five miles outside Pittsburgh.[28] Alina's phone records later revealed that Darby tried calling Alina five times between 4:00 AM and 5:00 AM on the morning he murdered her.[29]

Three days later, police found and arrested Darby in Myrtle Beach, South Carolina.[30] Darby eventually pled guilty to first-degree murder to avoid the death penalty, as well as "burglary, theft, trespassing and possessing an instrument of crime in connection with [Alina's murder]."[31] The court sentenced Darby to life in prison without the possibility of parole.[32]

According to court documents, this was not Darby's first arrest for violence against women.[33] In February of 2017, "Darby was charged with rape, sexual assault, aggravated indecent assault,

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21. *Id.*
22. *Id.*
23. Shukman & Spaeth, *supra* note 6.
24. Guza, *Pitt Student Alina Sheykhet*, *supra* note 1.
25. Shukman & Spaeth, *supra* note 6.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Megan Guza, *Matthew Darby Sentenced to Life in Prison for Killing Pitt Student Alina Sheykhet*, TRIB LIVE (Oct. 17, 2018, 11:00 AM), https://archive.triblive.com/local/pittsburgh-allegheny/matthew-darby-sentenced-to-life-in-prison-for-killing-pitt-student-alina-sheykhet/ [hereinafter Guza, *Matthew Darby Sentenced*].
31. *Id.*
32. *Id.*
33. Sokmensuer, *Pitt Student, 20*, *supra* note 7.

and additional charges for acts against a different ex-girlfriend."[34] In that case, Darby called his ex-girlfriend thirty-three times until she agreed to see him, claiming that he "wanted to apologize for his past actions."[35] Upon meeting with his ex-girlfriend and learning that she was dating again, Darby "grabbed [his ex-girlfriend's] private area over her clothes and said, '[t]his is mine, understand? It's always going to be mine.'"[36] Darby then proceeded to sexually assault and rape his ex-girlfriend.[37] In another case, Darby intended to plead guilty to charges of corruption of minors and simple assault for the assault of a seventeen-year-old girl less than one week before Alina's murder.[38]

Alina Sheykhet's story is a tragedy, and the grotesque nature of Darby's abuse of Alina may seem unparalleled. Unfortunately, Alina's story is but one in the much larger domestic violence epidemic that plagues the Commonwealth of Pennsylvania and the United States.

B. Domestic Violence Statistics

The term "domestic violence" (used interchangeably with "intimate partner violence") describes any of the following acts done by a current or former partner or spouse: physical violence, sexual violence, threats of physical or sexual violence, psychological or emotional harm, or stalking.[39] On average, more than ten million women and men are physically abused by an intimate partner in the United States every year.[40] "In 2018, domestic violence accounted for 20% of all violent crime" in the United States.[41] Additionally, one in three women and one in four men have experienced

34. Harriet Sokmensuer, *College Student's Ex-Boyfriend Urged to Turn Himself in to Police After She Was Found Dead by Her Dad,* PEOPLE (Oct. 10, 2017, 4:39 PM), https://people.com/crime/lawyer-slain-pittsburgh-college-student-alina-sheykhet/ [hereinafter Sokmensuer, *College Student's Ex-Boyfriend*].

35. Guza, *Pitt Student Alina Sheykhet*, *supra* note 1.

36. Sokmensuer, *College Student's Ex-Boyfriend*, *supra* note 34.

37. *Id.*

38. Guza, *Matthew Darby Sentenced*, *supra* note 30.

39. *See Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/index.html (last visited Oct. 9, 2020); *Overview of Intimate Partner Violence*, NAT'L INST. OF JUST. (Oct. 23, 2007), https://nij.ojp.gov/topics/articles/overview-intimate-partner-violence.

40. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *Fact Sheet*, https://assets.speakcdn.com /assets/2497/domestic_violence_and_economic _abuse_ncadv.pdf (last visited Oct. 24, 2020) [hereinafter *Fact Sheet*].

41. *Id.*

some form of physical violence by an intimate partner.[42] One in four women and one in ten men have been victims of physical violence, sexual violence, or stalking by an intimate partner in their lifetime.[43] An intimate partner has stalked one in seven women and one in eighteen men "to the point in which they felt very fearful or believed that they or someone close to them would be harmed or killed."[44] Further, one in ten women has been raped by an intimate partner.[45] Finally, more than twenty thousand phone calls are placed daily to domestic violence hotlines nationwide.[46]

The domestic violence epidemic harms not only the health and well-being of Americans, but also the United States economy. Domestic violence victims miss eight million paid workdays per year,[47] and between twenty-one and sixty percent of victims lose their jobs due to the abuse they incur.[48] These and other factors result in domestic violence costing the United States $8.3 billion per year.[49]

In Pennsylvania alone, local domestic violence programs help ninety thousand victims and their children find safety every year.[50] "One in four women and one in seven men in Pennsylvania experienced severe physical violence by an intimate partner."[51] Over 1,600 Pennsylvanians lost their lives to domestic violence in the past decade,[52] with 112 victims dying in 2019 alone.[53] The domestic violence victims who have lost their lives include men and women of all ages, races, religions, and sexual orientations.[54] Further, the estimated lifetime economic burden of domestic violence in Pennsylvania is $156 billion.[55]

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42. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, *National Statistics*, https://ncadv.org/statistics (last visited Oct. 24, 2020) (including a range of physically violent behaviors such as slapping, shoving, and pushing) [hereinafter *National Statistics*].

43. *Fact Sheet*, *supra* note 40 (including impacts such as safety concerns, PTSD, injury, or need for victim services).

44. *National Statistics*, *supra* note 42.

45. *Id.* (excluding male victim statistics due to a lack of data).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. PA. COAL. AGAINST DOMESTIC VIOLENCE, https://www.pcadv.org/ (last visited Oct. 24, 2020) [hereinafter PA. COAL. AGAINST DOMESTIC VIOLENCE].

51. PA. COAL. AGAINST DOMESTIC VIOLENCE, *Statistics*, https://www.pcadv.org/about-abuse/domestic-violence-statistics/ (last visited Oct. 24, 2020) [hereinafter *Statistics*].

52. PA. COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 50.

53. PA. COAL. AGAINST DOMESTIC VIOLENCE, *Fatality Report* 2019, https://www.pcadv.org/wp-content/uploads/2019-Fatality-Report-web.pdf (last visited Oct. 24, 2020) (including only cases where arrests have been made, leaving the true death toll unknown).

54. *Id.*

55. *Statistics*, *supra* note 51.

II. PROTECTION FROM ABUSE ORDERS IN PENNSYLVANIA

A. Protection From Abuse Orders ("PFAs")

Pennsylvania provides relief to domestic violence victims through Title 23, Chapter 61, of the Pennsylvania Consolidated Statutes.[56] Under Section 6102, certain acts between "family or household members, sexual or intimate partners, or persons who share biological parenthood" constitute "abuse."[57] The occurrence of at least one of the following acts, with or without a deadly weapon, constitutes "abuse": (1) causing or attempting to cause bodily injury, rape or sexual assault, or incest; (2) "placing another in reasonable fear of imminent serious bodily injury;" (3) inflicting false imprisonment; (4) physically or sexually abusing minor children; or (5) "knowingly engaging in a course of conduct or repeatedly committing acts toward another person," including stalking, under circumstances which place the person in reasonable fear of bodily injury.[58]

If any of the aforementioned abusive acts occur, the abuse victim may seek protection from a court order for both the victim and the victim's minor children.[59] A Pennsylvania court may grant a PFA, which is a judge-signed order that commands the abuser to cease the abuse.[60] Pennsylvania offers three different types of PFAs: (1) emergency orders; (2) *ex parte* temporary PFAs; and (3) final PFAs.[61] The type of PFA available to an abuse victim depends on the protection the judge believes necessary and the procedural stage of the PFA process.[62]

A PFA may contain various protections for abuse victims, including provisions that order the abuser not to contact, "abuse, harass, stalk, threaten, or attempt or threaten to use physical force against" the abuse victim or the victim's minor children.[63] Additionally, a PFA may remove the abuser from the home where the abuser and abuse victim shared occupancy, award temporary child custody or temporary visitation rights, or order the abuser to relinquish the abuser's firearms to enforcement and prohibit the abuser from

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56. *See* 23 PA. CONS. STAT. §§ 6101–22 ("Protection from Abuse").
57. *Id.* § 6102.
58. *Id.*
59. *Id.* § 6108.
60. *Id.*; *Legal Information: Protection from Abuse Orders*, WOMENSLAW.ORG, https://www.womenslaw.org/laws/pa/restraining-orders/protection-abuse-orders-pfa#node-35198 (last updated Feb. 5, 2020).
61. *Legal Information: Protection from Abuse Orders*, *supra* note 60 (discussing the different PFA types).
62. *Id.*
63. *Id.*; 23 PA. CONS. STAT. § 6108(a)(1)–(7).

acquiring new firearms.[64] Finally, a PFA may order the abuser to pay financial support to the abuse victim or the victim's minor children, order the abuser to pay for reasonable losses resulting from the abuse, or grant any other appropriate relief the abuse victim requests.[65]

If the abuser violates a PFA, the abuse victim may file an Indirect Criminal Contempt Complaint, and the court may issue a warrant for the abuser's arrest.[66] Once police arrest the abuser, the abuser must appear before a judge in a contempt hearing.[67] If the judge holds that the abuser violated the PFA, the abuser may be: (1) incarcerated for up to six months; (2) fined up to $1,000; or (3) imposed with an order the judge deems necessary.[68]

B. The Problems with PFAs

While at least one study has suggested that some abuse victims who obtain protective orders may see an eighty percent reduction in police-reported physical violence,[69] the current protective order system shows several indications of failure.[70] First, protective orders alone are not enough to deter abusers due to abuser psychology and limited consequences for violators.[71] Studies show that abusers violate anywhere from 25% to 67.6% of protective orders.[72] A collaborative study conducted by the National Institute of Justice and the Centers for Disease Control found that, of the women who sought a temporary protective order, 67.6% of rape victims, 50.6%

64. *Legal Information: Protection from Abuse Orders*, *supra* note 60; 23 PA. CONS. STAT. § 6108(a)(1)–7).

65. *Legal Information: Protection from Abuse Orders*, *supra* note 60; 23 PA. CONS. STAT. § 6108.

66. Pa. Legal Aid Network, *Protection from Abuse*, PA.LAWHELP.ORG, https://www.palawhelp.org/resource/protection-from-abuse-7 (last updated Mar. 16, 2020).

67. *Id.*

68. *Id.*

69. Victoria L. Holt et al., *Civil Protection Orders and Risks of Subsequent Police-Reported Violence*, 288 JAMA 589 (2002); *see also* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 313 (6th ed. 2016) (excluding victims who only obtained temporary orders).

70. *See generally* Robin L. Barton, *Do Orders of Protection Actually Shield Domestic Violence Victims?*, THE CRIME REPORT (Jan. 23, 2018), https://thecrimereport.org/2018/01/23/do-orders-of-protection-actually-shield-victims/.

71. *See generally* PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 52 tbl.19 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf; Nicole Allaband, Note, *Using Electronic Monitoring to Enhance the Protection Offered by Civil Protection Orders in Cases of Domestic Violence: A New Technology Offers New Protection*, 24 RICH. J.L. & TECH., no. 3, 2018, at 3; Barton, *supra* note 70.

72. TJADEN & THOENNES, *supra* note 71; Allaband, *supra* note 71.

of physical assault victims, and 69.7% of stalking victims reported that the abuser violated the order.[73]

The fundamental flaw with protective orders is that the acts of abuse that protective orders seek to protect abuse victims from are already illegal, showing an abuser's willingness to violate the law.[74] Thus, expecting an abuser to start obeying the law when commanded to do so by a protective order, which many people view as a powerless "piece of paper," is naive.[75] Further, penalties for violating protective orders are usually negligible compared to those incurred when an abuser is found guilty of abuse crimes.[76] Imposing an additional, softer standard upon an abuser does not deter the abuser from committing a crime.[77]

Second, seeking a protective order can lead to an increase in the frequency or intensity of the abuse.[78] Countless resources for abuse victims seeking to leave their abusive partners stress the importance of having an "escape plan" due to the heightened risk of abuse when the abuse victim leaves their abuser.[79] For example, some studies show up to a quadrupling of psychological abuse during the period of a temporary protection order.[80] Additionally, approximately twenty-one percent of victims have experienced an escalation in abusive behavior after the issuance of a protective order in cases where stalking occurred.[81] In many cases, the abuser murders the abuse victim after the issuance of a protective order in retaliation.[82]

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73. TJADEN & THOENNES, *supra* note 71.

74. Barton, *supra* note 70.

75. *Id.*

76. *Id.*

77. *Id.* (contrasting the results of civil order violations to criminal acts).

78. *Id.*; Misha Valencia, *When a Restraining Order Fails, a GPS Tracker Can Save Lives,* N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/opinion/domestic-violence-ankle-bracelet.html (citing K.A. Vittes & S.B. Sorenson, *Restraining Orders Among Victims of Intimate Partner Homicide*, 14 J. INT'L SOC'Y FOR CHILD & ADOLESCENT INJ. PREVENTION 191 (2008), http://dx.doi.org/10.1136/ip. 2007.017947).

79. *See generally Will My Abuser Retaliate?*, DOMESTICSHELTERS.ORG (June 17, 2016), https://www.domesticshelters.org/articles/protection-orders/will-my-abuser-retaliate; *How to Get Out of an Abusive Relationship*, HELPGUIDE, https://www.helpguide.org/articles/abuse/getting-out-of-an-abusive-relationship.htm (last updated Sept. 2020).

80. Christopher T. Benitez et al., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCH. L. 376, 382 (2010).

81. *Will My Abuser Retaliate?*, *supra* note 79 (noting that physical abuse happened seventeen percent of the time); *see also* Vittes & Sorenson, *supra* note 78 (showing that one-third of intimate partner homicide victims were murdered within one month of receiving their protective orders).

82. *See generally* Zezima et al., *supra* note 2 (describing data and specific instances of former partners murdering abuse victims after the issuance of a protective order).

Third, approximately half of the people murdered by an intimate partner were "protected" by multiple protective orders.[83] If a single protective order actually protected abuse victims, logically, multiple orders should form a more robust protection for abuse victims. However, the data shows that even multiple orders and compounding punishment cannot solve the underlying ineffectiveness of PFAs.[84]

Finally, even though protective orders often contain "no contact" provisions, approximately half of the victims who receive protective orders are stalked by their abuser.[85] "[N]o contact provisions can be difficult to enforce because the abuser is usually intimately familiar with the survivor's routine."[86] After receiving a protective order, women stalked by their abusers reported being more afraid of future harm, experiencing more abuse-related distress, and enduring more violence and property damage.[87] It is clear that protective orders, including Pennsylvania's PFAs, are insufficient to protect abuse victims, leading to women not seeking these orders or, after seeking them, still being subjected to severe, if not lethal, abuse.[88]

III. ALINA'S LAW: ELECTRONIC MONITORING AS A SOLUTION

A. Alina's Law – PA H.B. 588

After Alina's death, her parents, Yan and Elly, pursued Alina's dream to change the PFA system by advocating for vital legislation to support PFAs.[89] In February 2019, legislators introduced House Bill 588, known as Alina's Law, [90] which sought to amend Title 23 of the Pennsylvania Consolidated Statutes by: (1) introducing a

83. Vittes & Sorenson, *supra* note 78.

84. *Id.*

85. Nikki Hawkins, *Perspectives on Civil Protective Orders in Domestic Violence Cases: The Rural and Urban Divide*, NAT'L INST. JUST. J., June 2010, at 6.

86. Allaband, *supra* note 71.

87. Hawkins, *supra* note 85.

88. *See generally Alina's Story*, *supra* note 5; Megan Guza, *Woman Killed in East Liberty Had PFA Against Suspected Shooter*, TRIB LIVE (Nov. 12, 2020, 10:52 AM), https:// triblive .com/local/woman-killed-in-east-liberty-had-pfa-against-suspected-shooter/; Barbara Miller, *Four Women Sought Protection from Man Accused in Mount Gretna Murder-Suicide*, PENNLIVE, https://www.pennlive.com/midstate/2015/09/four_women_sought_protection_f.html, (last updated Jan. 5, 2019, 1:12 PM).

89. Amy Wadas, *'A Heart Broken Mother': Murdered Pitt Student's Family Gathers in Harrisburg to Push for PFA Reform*, CBS PITTSBURGH (Jan. 14, 2020, 11:57 AM), https://pittsburgh.cbslocal.com/2020/01/14/alina-sheyket-law-harrisburg-rally-pfa-reform/; Ward, *supra* note 11 ("If I only had a chance, I would change the system.").

90. H.B. 588, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019). *See generally* 23 PA. CONS. STAT. §§ 6102, 6108.

definition for "electronic monitoring device" to section 6102(a); and (2) granting a judge the discretion to permit the electronic monitoring of PFA respondents under section 6108(a).[91]

First, Alina's Law would have added a definition for "electronic monitoring device" to section 6102(a).[92] Alina's Law defined an "electronic monitoring device" as "a device that enables the location of a person wearing the device to be monitored through use of a global positioning system and related technology."[93] By design, the electronic monitoring device "actively and continuously monitors, identifies, and reports [the PFA respondent's] location data within a 100-mile radius [of the PFA holder]."[94] The electronic monitoring device would permit Pennsylvania law enforcement to "receive, record and securely and confidentially retain location data indefinitely."[95] The device is worn around the PFA respondent's wrist or ankle and requires specialized equipment to remove.[96]

Second, Alina's Law would have granted abuse victims further protection by modifying section 6108(a) to allow judges the discretion to impose electronic monitoring upon PFA respondents.[97] Alina's Law stated that if a judge finds that a respondent presents a "substantial risk of violating the final [PFA] or committing a crime against the victim punishable by imprisonment," then the judge may require the respondent to wear an electronic monitoring device as part of the PFA.[98] If so ordered, the electronic monitoring device monitors the respondent's location relative to all abuse victims seeking protection.[99] The court then determines the distance from all persons seeking protection from abuse and specific locations where the respondent must refrain.[100] Additionally, Alina's Law generally requires the court to order the respondent to wear the electronic monitoring device for the entirety of the final PFA's duration.[101] Finally, the court may only order the electronic monitoring device's removal before the final PFA's expiration for good cause.[102]

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91. Pa. H.B. 588 §§ 1, 2. *See* 23 PA. CONS. STAT. §§ 6102, 6108.
92. Pa. H.B. 588 § 1; *see* 23 PA. CONS. STAT. § 6102.
93. Pa. H.B. 588 § 1.
94. *Id.*
95. *Id.*
96. *Id.* (alerting authorities when someone attempts to wrongfully remove the device).
97. *Id.* § 2.
98. *Id.*
99. *Id.* § 1.
100. *Id.*
101. *Id.*
102. *Id.* (requiring the PFA holder to be notified upon the device's removal).

Although Alina's Law had bipartisan support in Pennsylvania's legislature,[103] it faced opposition from dissenters opposed to its current form.[104] Civil liberties advocates opposed Alina's Law and similar measures, claiming that laws requiring the electronic monitoring of PFA respondents are equivalent to a house arrest sentence without a criminal conviction.[105] The American Civil Liberties Union and others who oppose Alina's Law claim that the bill would be an "extraordinary restriction on someone's liberty without due process."[106] Some members of the Pennsylvania legislature shared the opposition's hesitation, and thus Alina's Law failed to make it out of consideration during the 2020 term.[107] However, this Article posits that Alina's Law can be reimagined to accomplish its mission in a more palatable form, thus succeeding if reintroduced.

IV. SUPPORTING ALINA'S LAW

A. Constitutional Compliance

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"[108] Essentially, the Fourth Amendment protects one's reasonable expectation of privacy.[109] The United States Supreme Court has stated that "the Fourth Amendment's protection extends beyond the sphere of criminal investigations[.]"[110]

However, there are numerous exceptions to the protections the Fourth Amendment guarantees.[111] First, although the Supreme

103. *Id.* (displaying sponsorship from both Democrats and Republicans).

104. Deb Erdley, *Advocates Push for Alina's Law for Additional Protections in Domestic Abuse*, TRIB LIVE (Jan. 14, 2020, 5:21 PM), https://triblive.com/local/westmoreland/advocates-push-for-alinas-law-for-additional-protections-in-domestic-abuse/.

105. *Id.*

106. Wesley Venteicher, *ACLU Objects to Pennsylvania's Protection-From-Abuse Monitoring Proposal*, TRIB LIVE (Dec. 15, 2017, 7:24 PM), https://archive.triblive.com/news/pennsylvania/aclu-objects-to-pennsylvanias-protection-from-abuse-monitoring-proposal/.

107. Pa. H.B. 588; *see also* H.B. 1747, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021) (reintroducing Alina's Law in substantially the same form as the prior version and thus will likely fail for the same reasons).

108. U.S. CONST. amend. IV; United States v. Jones, 565 U.S. 400, 404 (2012); *see also* Terry v. Ohio, 392 U.S. 1, 9 (1968) (emphasizing that only "unreasonable searches and seizures" are forbidden by the Fourth Amendment).

109. *Jones*, 565 U.S. at 406–07; Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

110. Grady v. North Carolina, 575 U.S. 306, 309 (2015) (quoting City of Ontario v. Quon, 560 U.S. 746, 755 (2010)) ("[T]he government's purpose in collecting information does not control whether the method of collection constitutes a search.").

111. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 408 (2005); United States v. Jacobsen, 466 U.S. 109, 123 (1984); United States v. Place, 462 U.S. 696, 707 (1983); *Terry*, 392 U.S. at 9.

Court recognized that the Constitution guarantees certain fundamental liberties, such as an individual's right to personal privacy[112] or the freedom of movement,[113] the Fourth Amendment *does* permit "reasonable" restrictions on liberty.[114] The government may infringe upon fundamental rights if: (1) due process is provided, and (2) the government's interest outweighs the individual's interest and the risk of erroneous deprivation of the right.[115] Examples of permissible government intrusion include Pennsylvania's ability to electronically monitor certain parolees who pose a risk to public safety,[116] and California's ability to electronically monitor sex offenders for life.[117]

Second, if official conduct does not "compromise any legitimate interest in privacy," there is no "search" under the Fourth Amendment.[118] For instance, any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest."[119] This general rule is how the Supreme Court reasoned that using a narcotics-detection dog generally does not rise to the level of a "constitutionally cognizable infringement."[120] The Court also noted in *United States v. Place* that it was "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[121] Thus, the Court would likely hold that other investigative means that are similarly limited are not impermissible searches.

Due to Global Positioning System ("GPS") technology's novelty, there is relatively little case law discussing how the Fourth Amendment governs GPS tracking.[122] However, a few important decisions

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112. Roe v. Wade, 410 U.S. 113, 155 (1973) *modified,* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

113. Saenz v. Roe, 526 U.S. 489, 499 (1999).

114. Allaband, *supra* note 71, at 12.

115. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); *Roe*, 410 U.S. at 155; Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

116. *Parole Board Begins Using GPS Technology to Monitor Offenders, Continues Efforts to Increase Public Safety and Modify Offender Behavior*, PA. PRESSROOM (Oct. 31, 2013), https://www.media.pa.gov/Pages/Probation-and-Parole-Details.aspx?Newsid=12.

117. *See generally* CAL. PENAL CODE § 3004(b).

118. Illinois v. Caballes, 543 U.S. 405, 408–09 (2005) (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)).

119. *Caballes*, 543 U.S. at 408–09.

120. *Id.* at 409 (finding that a canine sniff of a vehicle during a valid traffic stop was constitutional); United States v. Place, 462 U.S. 696, 707 (1983) (holding that the limited disclosure of information from a canine sniff is not a search).

121. *Place*, 462 U.S. at 707.

122. *GPS Location Privacy*, NAT'L COORDINATION OFF. FOR SPACE-BASED POSITIONING, NAVIGATION, & TIMING, https://www.gps.gov/policy/privacy/ (last modified Dec. 11, 2020).

regarding GPS tracking show that GPS tracking of a PFA respondent may not be an inherently unconstitutional search.[123] In *United States v. Jones*, the Supreme Court held that the government's installation of a GPS device on a vehicle and the use of that device to monitor the vehicle's movements constituted a "search."[124] The Court applied the general rule that a "search" within the original meaning of the Fourth Amendment occurs if the government obtains information by physically intruding on a constitutionally protected area.[125] However, the Court emphasized the importance of "obtain[ing] information" in tandem with a trespass to qualify as a "search."[126]

The Supreme Court expanded upon its holding in *Jones* in the 2015 case, *Grady v. North Carolina*.[127] In *Grady*, the Court held that the "[t]ime-correlated and continuous tracking" of the geographic location of an individual constituted a Fourth Amendment search.[128] Like the measures proposed by Alina's Law, the monitoring program in *Grady* was civil in nature, and used the same "continuous" monitoring proposed by Alina's Law.[129] Again, the Court noted that a "search" occurred after a GPS monitoring system was unreasonably affixed to the respondent because the state intruded upon the respondent's body to obtain information.[130]

Current case law suggests that, while Alina's Law in its current form may violate the Fourth Amendment, the law's underlying mission can be executed in a manner compliant with the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution.[131] The "active and continuous" GPS monitoring language currently in Alina's Law would likely be analogous to *Grady's* GPS monitoring program, rendering it unconstitutional.[132] However, modifying Alina's Law to narrowly limit when and how the

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See generally Global Positioning System History, NASA, https://www.nasa.gov/directorates/heo/scan/communications/policy/GPS_History.html (last updated Aug. 7, 2017) (explaining the history of GPS technology).

123. *See generally* United States v. Jones, 565 U.S. 400 (2012); Grady v. North Carolina, 575 U.S. 306 (2015).

124. *Jones*, 565 U.S. at 404–05.

125. *Id.* at 406–08.

126. *Id.* at 407; *Grady*, 575 U.S. at 309.

127. *Grady*, 575 U.S. at 309.

128. *Id.* at 310 (specifying that the search also had to be "unreasonable" for a Fourth Amendment violation).

129. *Id.* at 310; H.B. 588 § 1, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

130. *Grady*, 575 U.S. at 309.

131. *Id.*; Illinois v. Caballes, 543 U.S. 405, 408–09 (2005); United States v. Place, 462 U.S. 696, 707 (1983). *See also Alina's Law*, ALINA'S LIGHT, https://alinas light.com/alinas-law/ (last visited Oct. 10, 2021).

132. Pa. H.B. 588 § 1; *see also Grady*, 575 U.S. at 310.

government obtains information from a GPS tracker, similar to a canine sniff, would yield a constitutional balance between constitutional protections and the law's mission.

A device and software can easily be designed to allow the government to obtain information only upon the respondent's violation of the PFA.[133] Unlike in *Jones* and *Grady*, a search would not occur until the government attempted to obtain information upon the respondent's violation of the PFA.[134] This conduct is similar to a canine sniff because it reveals no information about the respondent unless there is a violation, meaning that no reasonable or "legitimate" expectation of privacy has been violated.[135] After a violation, the transmission of location data would not constitute a search because a PFA respondent would have no "legitimate" expectation of privacy when violating a PFA, similar to concealing contraband.[136]

The opposition to Alina's Law highlights that Pennsylvania courts disagree with the Supreme Court and hold that a canine sniff of a person is a search under Article 1, Section 8 of the Pennsylvania Constitution.[137] Thus, in Pennsylvania, law enforcement must have probable cause before a canine sniff of a person may occur.[138] However, even in Pennsylvania, canine sniffs may be deployed to discover narcotics in a *place* on a reasonable suspicion basis, so long as the police are lawfully present in the place where the search is conducted.[139] Applying this distinction to the electronic monitoring program in the modified version of Alina's Law where location data transmits only upon violation of the PFA, the "search" would more closely resemble a search of a *place* than a search of a *person*. The information received would pertain to the restricted area per the PFA, not to the respondent or anything attached to the respondent that would violate a reasonable expectation of privacy.

Further, the modified version of Alina's Law proposed by this Article would not constitute an unconstitutional seizure of a person. PFA proceedings are conducted by a court, and remedies are ordered by a judge, which satisfies the due process requirement for limiting fundamental liberty.[140] Also, the government's interest in

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133. *See* discussion *infra* Subsection IV(A).
134. *Grady*, 575 U.S. at 309; United States v. Jones, 565 U.S. 400, 407–08 (2012).
135. *Caballes*, 543 U.S. at 408–09; *Place*, 462 U.S. at 707 (1983).
136. *Caballes*, 543 U.S. at 408–09; *Place*, 462 U.S. at 707.
137. PA. CONST. art. I, § 8; Commonwealth v. Martin, 626 A.2d 556, 559 (Pa. 1993).
138. *Martin*, 626 A.2d at 560.
139. *Id.*; Commonwealth v. Johnston, 530 A.2d 74, 77 (Pa. 1987); Commonwealth v. Diaz, 659 A.2d 563, 567 (Pa. Super. 1995).
140. H.B. 588 § 2, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); *see also* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

protecting its citizens from severe bodily harm or death dramatically outweighs the PFA respondent's interest and the risk of erroneous deprivation of the right not to have to wear what is essentially just a bracelet unless a violation occurs.[141]

Finally, because the judge's informed decision to order GPS monitoring would be based on a list of empirical factors,[142] it is improbable that a respondent would be "erroneously deprived" of the right to be free from wearing the monitor. Even if the argument is made that the respondent was erroneously deprived of a right, the government's interest outweighs the respondent's right to be free from the deprivation for the same reasons listed above.[143] Because Alina's Law can be modified to only allow the transmission of location data after a PFA violation and because the respondent's right to be free of wearing an inactive device (until a violation) is outweighed by the government's right to protect its citizens, Alina's Law does not inherently violate the Fourth Amendment nor Pennsylvania's Constitution.

B. Statutes in Other States

The increasing number of states codifying laws that allow GPS monitoring in domestic violence cases shows that Alina's Law can work.[144] At least twenty-six states statutorily authorize the use of GPS monitoring for tracking offenders "charged or convicted with" domestic violence-related crimes or violating protective orders,[145] and at least eight states have introduced similar laws.[146] While most states only permit the GPS monitoring of abusers "charged or convicted of" domestic violence based crimes, at least three states, including Louisiana, Ohio, and Washington, have legislation

141. City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (suggesting that circumstances involving imminent loss of life are sufficient to outweigh liberties). *See generally* CAL. PENAL CODE § 3004(b) (valuing citizens' rights to be safe from sex offenders more than sex offenders' rights to not be electronically monitored).

142. *See* discussion *infra* Subsection IV(B).

143. Edmond, 531 U.S. at 44. *See generally* CAL. PENAL CODE § 3004(b).

144. *See generally* CYNTHIA L. BISCHOF MEM'L FOUND., http://www.cindysmemorial.org/?page_id=288 (last visited Jan. 23, 2020).

145. *Id.* (including Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, North Dakota, Oklahoma, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin as of 2015). *See generally* CAL. PENAL CODE § 136.2; OHIO REV. CODE ANN. § 2903.214.

146. *See* CYNTHIA L. BISCHOF MEM'L FOUND., *supra* note 144 (including Hawaii, Iowa, Maine, New Jersey, New Mexico, New York, North Carolina, and Pennsylvania).

similar to Alina's Law (in its current form) that allow the electronic monitoring of protective order respondents.[147]

In 2003, Louisiana instituted a pilot program to study the impact of domestic violence abusers' electronic monitoring and further violence prevention.[148] In 2020, the Louisiana Legislature sought to reenact the program permanently due to its success.[149] To prevent acts of domestic violence, a Louisiana court may order a respondent to a temporary restraining order, protective order, preliminary or permanent injunction, or court-approved consent agreement to submit to electronic monitoring.[150] However, the domestic abuse victim must consent to the use of electronic monitoring of the respondent.[151] Louisiana's electronic monitoring program provides that the respondent must wear the monitoring device at all times, and authorities must install equipment in the respondent's home to monitor their compliance.[152] The domestic violence offender must pay the cost of the electronic monitoring.[153] When the domestic violence offender is within a certain distance of the protected person, the device must alert the domestic violence victim and the appropriate law enforcement agency.[154]

As of April 8, 2019, Section 2903.214 of the Ohio Revised Code Annotated permits an Ohio court to order the electronic monitoring of a protection order respondent as a form of relief if the petition contains: (1) an allegation that, at any time before the filing of the petition, the respondent "engaged in conduct that would cause a reasonable person to believe that the health, welfare, or safety of the person to be protected was at risk"; (2) a description of the nature and extent of the conduct; and (3) an allegation that the respondent continues to endanger the person obtaining protection.[155] If the court considers a petition including the above-mentioned criteria and, *sua sponte* or after finding upon clear and convincing evidence that the petition is with merit, then the court may order that the respondent be electronically monitored for a period of time and

147. *See generally* LA. STAT. ANN. § 46:2143; OHIO REV. CODE ANN. § 2903.214; WASH. REV. CODE § 26.50.060.
148. LA. STAT. ANN. § 46:2143.
149. H.B. 727, 2020 Leg., Reg. Sess. (La. 2020) (operating for over 17 years).
150. LA. STAT. ANN. § 46:2143.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. OHIO REV. CODE ANN. § 2903.214 (amended in 2009 to provide electronic monitoring relief to PFA petitioners).

under the terms and conditions that the court determines are appropriate.[156]

If the court orders the electronic monitoring of the respondent, the appropriate law enforcement agency must install the electronic monitoring device and monitor the respondent.[157] Unless the court determines that the respondent is indigent, the court must order the respondent to pay the cost of the installation and monitoring of the electronic monitoring device.[158] If the court determines that the respondent is indigent, the cost of the installation and monitoring of the electronic monitoring device may be paid out of funds from the reparations fund created pursuant to section 2743.191 of the Ohio Revised Code.[159]

Finally, as of January 1, 2021, Washington also allows courts to order a respondent to submit to electronic monitoring.[160] Electronic monitoring under the Washington statute may be either active or passive GPS monitoring.[161] The order for electronic monitoring must specify who will provide the electronic monitoring services and the terms governing performance.[162] Additionally, Washington allows the order to require the respondent to pay the costs of the monitoring, although courts will consider the ability of the respondent to pay these costs.[163]

Other states' willingness to adopt laws with analogous provisions to Alina's Law shows that Alina's Law is beneficial to the safety of states' most vulnerable citizens. In the case of Louisiana's law, not only did the pilot program run successfully for almost twenty years, by approving the law for full-time implementation, the Louisiana Legislature again deemed their law's provisions constitutional.[164] Additionally, the fact that the electronic monitoring programs within the three above-mentioned statutes survived revisions in different jurisdictions (three different states and federal circuits) for so long shows that there is likely consensus among jurisdictions

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. WASH. REV. CODE § 26.50.060(j). *See* Muma v. Muma, 60 P.3d 592, 594 (Wash. Ct. App. 2002) (showing electronic monitoring of PFA respondents has been the practice in Washington since at least 2002).
161. WASH. REV. CODE. § 26.50.060(j) (incorporating the definition from WASH. REV. CODE § 9.94A.030 into § 26.50).
162. *Id.*
163. *Id.* (suggesting a court may grant leniency to indigent respondents).
164. *See generally* LA. STAT. ANN. § 46:2143; La. H.B. 727 (La. 2020).

regarding the constitutionality of similar laws.[165] Thus, by implementing a law allowing protective order respondents to be electronically monitored, Pennsylvania would join the growing number of states taking the proper steps to protect their most vulnerable citizens.[166]

V. AMENDMENTS TO ALINA'S LAW

While Alina's Law could overcome a Fourth Amendment and Pennsylvania Constitutional challenge, that does not mean the bill is perfect in its current form. Despite other states' willingness to enact similar laws, Pennsylvania legislators and activist organizations likely opposed the bill's "actively and continuously monitor[]" language for the same reasons as the *Grady* court.[167] Additionally, the protection afforded by Alina's Law is indisputably strong by design because the protection is there to stop abusers from causing further harm that civil orders and the law alone would not stop.[168] However, just as some people believe that the current PFA system is weaponized,[169] such a powerful program would likely make more people concerned about the possible "weaponization" of PFAs if PFA remedies included electronic monitoring. Finally, the opposition to Alina's Law might challenge any reintroduction of Alina's Law by asking who would bear the burden of the costs associated with Alina's Law, which they would portray as impractically expensive.

Accordingly, for Alina's Law to pass in the future, the bill will likely require some modifications and additions. First, to refute the opposition's Fourth Amendment arguments once and for all, the electronic monitoring device's design and function must be reworked so that the program does not constitute a possible Fourth Amendment violation. Second, Alina's Law requires a provision to

165. LA. STAT. ANN. § 46:2143 (in effect since 2003); OHIO REV. CODE ANN. § 2903.214 (in effect since 2009); WASH. REV. CODE § 26.50.060(j); *Muma*, 60 P.3d at 594 (showing that Washington's electronic monitoring program has been in effect since at least 2002).

166. *See generally* LA. STAT. ANN. § 46:2143; OHIO REV. CODE ANN. § 2903.214; WASH. REV. CODE § 26.50.060.

167. H.B. 588, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019). *See* Grady v. North Carolina, 575 U.S. 306, 310, 311 (2015); discussion *supra* Subsection IV(A) (discussing the *Grady* Court's rationale).

168. *See generally* Pa. H.B. 588.

169. *See generally Using a Protection Order as a Weapon*, DIVORCE LAWYERS FOR MEN, https://www.divorcelawyersformen.com/blog/protection-order-abuse-washington/#:~:text=Protection%20Orders%20Can%20Be%20Used%20as%20Weapons%20Against%20Innocent%20Men&text=The%20problem%20is%20that%20an,home%20and%20restrained%20from%20returning (last visited Jan. 23, 2021) (suggesting that judges order protective orders without abusers "doing anything wrong"); *Use of an "Order of Protection" as a Tactical Weapon*, CIYOU & DIXON, P.C. (Apr. 9, 2015), https://www.ciyoudixonlaw.com/criminal-law/protective-orders-criminal-law/use-of-an-order-of-protection-as-a-tactical-weapon/.

ensure that it is impossible for a person to "weaponize" the protections contained in Alina's Law. A solution already adopted by social services, law enforcement, and courts is to incorporate a factor test for the court to use when deciding whether to impose electronic monitoring on a PFA respondent.[170] Third, Alina's Law requires a cost provision similar to the provisions contained in the Louisiana, Ohio, and Washington statutes to address who will handle the costs of the electronic monitoring program.[171]

A. Rethinking Device Design

While Alina's Law seeks to accomplish the necessary goal of providing meaningful protection for abuse victims, the use of a device that "actively and continuously" monitors the respondent is not the best way to achieve this goal.[172] Electronic monitoring of this nature exposes many things about the respondent's daily habits that the government has no interest in knowing. Thus, it can hardly be said that such a program would be "narrowly tailored" or balance the government's and respondent's interests.[173] Additionally, active monitoring is only effective if an administrator continually monitors the location of offenders.[174] Active monitoring is costly and relies on the government to enforce protective orders.[175] However, a different kind of monitoring and monitoring device can accomplish the same end with different, Fourth Amendment-friendly means, while also giving the PFA holder the ability to protect themselves.

Alina's Law should utilize an electronic monitoring device that provides information as narrowly as a canine sniff[176]— a device that only reveals location data after the respondent violates the PFA. This ideal device would have a "heartbeat" code that signals it is still functional and has not been tampered with but does not transmit any location data.[177] The device would not actively transmit the

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170. *See generally* Jacquelyn C. Campbell, *Danger Assessment*, JOHNS HOPKINS UNIV., https://www.dangerassessment.org/About.aspx (last visited Jan. 23, 2021).

171. LA. STAT. ANN. § 46:2143; OHIO REV. CODE ANN. § 2903.214; WASH. REV. CODE § 26.50.060.

172. Pa. H.B. 588 § 1; *see also Grady*, 575 U.S. at 310–11.

173. *Id.*; Kyllo v. United States, 533 U.S. 27, 36–37 (2001).

174. *Types of GPS Monitoring*, CYNTHIA L. BISCHOF MEM'L FOUND., http://www.cindysmemorial.org/?page_id=278288 (last visited Jan. 23, 2020).

175. *See id.* (insinuating added expense due to more personnel and computing power required).

176. *See* Illinois v. Caballes, 543 U.S. 405, 408–09 (2005); United States v. Place, 462 U.S. 696, 707 (1983).

177. *See generally Heartbeat*, PCMAG, https://www.pcmag.com/encyclopedia/term/heartbeat (last visited Jan. 23, 2021); *How Heartbeats Work in Operations Manager*, MICROSOFT,

respondent's location data until the respondent violates the PFA by coming within the enumerated distance in the PFA.

While such a device and software has yet to be created and applied in this specific context, the idea is relatively simple to conceptualize. This version of electronic monitoring would work by first having the PFA holder consent to downloading an application onto their phone that connects to the respondent's monitoring device, similar to a smartwatch's functions.[178] The application on the PFA holder's phone would run in the background and create a geofence around the PFA holder (so long as they carried their phone with them).[179] This allows the PFA holder to go about their daily life without leaving the zone of protection associated with a stationary geofence. Stationary monitors like those used in Louisiana would also be placed in the PFA holder's home and place of work to ensure the respondent did not stake out these locations while the PFA holder was away.[180] Both the application and home monitors would be programmed to recognize the respondent's device.

When the respondent violates the PFA by coming within the enumerated distance of any of the monitoring devices, the device worn by the respondent would start transmitting the respondent's location data to authorities. That device and the app on the PFA holder's phone would alert the authorities that the respondent violated the PFA. Additionally, the app on the PFA holder's phone would produce a loud noise and generate a message for the PFA holder. The message would state: "[Respondent's name] has violated the PFA by coming within the enumerated distance. Please seek out other people for your safety and call the authorities." The respondent would also receive a message on their device, or the respondent's monitor would vibrate to alert the respondent that the PFA had been violated and to leave the prohibited area. Authorities would then use the location data in the subsequent PFA violation hearing to determine whether the violation was intentional.

The above-described electronic monitoring method is superior to the method currently proposed in Alina's Law because it warns the

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https://docs.microsoft.com/en-us/system-center/scom/manage-agent-heartbeat-overview?view=sc-om-2019 (last visited Jan. 23, 2021) (explaining how a "heartbeat" works in a Microsoft system and showing that a "heartbeat code" only conveys device functionality and nothing more).

178. *See generally* Robert Valdes & Nathan Chandler, *How Smart Watches Work*, HOWSTUFFWORKS, https://electronics.howstuffworks.com/gadgets/clocks-watches/smart-watch.htm (last updated Feb. 11, 2021).

179. *See generally* Sarah K. White, *What is Geofencing? Putting Location to Work*, CIO (Nov. 1, 2017), https://www.cio.com/article/2383123/geofencing-explained.html (explaining "Geofence" technology).

180. *See* LA. STAT. ANN. § 46:2143.

abuse victim and allows them to seek safety, provides evidence of a violation that can be used in later court proceedings, and is far cheaper.[181] Traditional monitoring programs still rely on authorities to enforce them, which is not guaranteed in the realm of protective orders.[182] Like the programs in Louisiana and Washington, the new program allows the PFA holder to take steps to ensure their own safety by giving the PFA holder an essential warning.[183] This program also removes the possibility of a PFA violation hearing ending with a miscarriage of justice for either party, because the location data transmitted to authorities after a violation paints a clear picture of what actually happened. Finally, this program is less costly than "active and continuous" monitoring because it does not require paying for constant monitoring and location data is only collected and stored when a violation occurs.[184] Thus, the only costs in this program are set up and maintenance of the software and hardware, as opposed to the additional cost of law enforcement's time.

B. Incorporating a Factor Test to Inform Judicial Discretion

The current iteration of Alina's Law provides that the court may require the PFA respondent to wear an electronic monitoring device "if the [respondent] is found to present a substantial risk of violating the final [PFA] or committing a crime against the victim punishable by imprisonment."[185] This provision is problematic because it lacks a uniform definition and transparency regarding the court's analysis when deciding when a PFA respondent "presents a substantial risk."[186] While abuse victims seek PFAs as a last resort for protection,[187] a common misconception is that people unqualified to receive a PFA use the PFA system as a weapon against their intimate partner.[188] Thus, it is crucial to ensure that the public knows that this remedy offered under Alina's Law will not be "weaponized." Alina's Law must include a list of factors to aid courts in their

181. *See* H.B. 588 § 2, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

182. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 749 (2005) (finding the consequences of violating a protective order sufficient, despite police's failure to act after a violation before respondent committed three murders and suicide).

183. *See generally* LA. STAT. ANN. § 46:2143; WASH. REV. CODE. § 26.50.010 (incorporating § 9.94A.030(24)(b)'s definition of "electronic monitoring").

184. *Types of GPS Monitoring*., *supra* note 174.

185. H.B. 588 § 2, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).

186. *Id.*

187. WEISBERG & APPLETON, *supra* note 69, at 314.

188. *Id.* (dismissing the myth that women apply for protective orders to gain advantage in custody cases).

analysis and to show the legislature and public that electronic monitoring will only be ordered on just grounds.

While it may seem impossible to deduce which PFA respondents present a substantial risk to abuse victims, an empirically validated measure of danger and lethality exists.[189] The Danger Assessment Instrument, developed by Dr. Jacquelyn Campbell ("Dr. Campbell") of Johns Hopkins University School of Nursing, is an evidence-based assessment for measuring a victim's risk of homicide or severe physical violence.[190] Many states already use the Danger Assessment Instrument as their best practice standard and now require or encourage its use by police, prosecutors, court personnel, and service providers.[191] Additionally, the Violence Against Women Act ("VAWA") Reauthorization Act acknowledged the Danger Assessment Instrument as the pinnacle of "evidence-based" indicators used in assessing the risk of intimate partner homicide.[192] Incorporating the factors that the Danger Assessment Instrument enumerates as posing a "high-lethality" probability will aid in court analysis and satisfy the public's concerns.[193]

The Danger Assessment Instrument marks several factors as high lethality predictors of intimate partner homicide or severe physical abuse.[194] These include: prior history of domestic violence with or without a weapon, prior history of particular forms of violent sex,[195] firearm possession, threats to kill, stalking, recent separation, and pet abuse.[196] For example, Dr. Campbell's work revealed that a woman whose abuser used a weapon to threaten or assault her was twenty times more likely than other women to be murdered.[197] In fact, the mere presence of a gun in a home where the abuse occurred increased the likelihood of an abused women's murder by a factor of six times.[198] Additionally, women murdered by an intimate partner were forced to have sex at rates up to 7.6 times more than other women and were 9.9 times more likely to be choked.[199] Furthermore, women whose abusers threatened them

189. *See generally* Campbell, *supra* note 170.
190. WEISBERG & APPLETON, *supra* note 69, at 344–45.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 344 (including "choking" and "forced sex").
196. *Id.* at 343–45.
197. *Id.* at 344.
198. *Id.*
199. *Id.*

with murder were fifteen times more likely than other women to be murdered.[200]

Incorporating the Danger Assessment Instrument into Alina's Law as a factor test to inform judges' decision-making serves several valuable purposes. First, the Danger Assessment Instrument removes a lot of guesswork and impulsive decision-making on the judge's part. This allows for consistency across decisions, for all judges will be using the same set of factors to decide whether to order GPS monitoring. Second, adoption of the Danger Assessment Instrument will remove the concern that GPS monitoring granted in a PFA could be weaponized, for the judge would only issue the order after determining that the allegations asserted by the PFA holder were credible. If judges are able to justify the order of electronic monitoring by pointing to enumerated, empirically derived factors that warranted such an order, it would be harder to argue that a PFA was weaponized. Finally, law enforcement and legal institutions already utilize the Danger Assessment Instrument, so continuing to utilize it keeps standards consistent across disciplines.[201]

C. Addition of a Cost Provision

Finally, including a cost provision in Alina's Law not only assures the Pennsylvania legislature and the opposition that the electronic monitoring program is sustainable, it makes Alina's Law seem more desirable compared to the societal costs of continued domestic violence at the levels incurred today.[202] For instance, Louisiana's statute orders the domestic violence offender to pay for the cost of electronic monitoring.[203] Additionally, in Ohio, the protective order respondent must pay the cost of installing any monitoring devices and the cost of monitoring unless the court determines that the respondent is indigent.[204] If the court determines that the respondent is indigent, Ohio pays the cost of the installation and monitoring out of a fund known as the Ohio Crime Victims Compensation Program.[205] Ohio's attorney general may promulgate rules to govern payments made from the fund, including reasonable limits on the total cost paid per respondent and the amount of money allocated

200. *Id.*
201. *Id.* at 345.
202. *See* discussion *supra* Subsection I(B).
203. LA. STAT. ANN. § 46:2143(C).
204. OHIO REV. CODE ANN. § 2903.214(N)(1).
205. *Id.* (capping the total amount of costs paid pursuant to this section out of the fund at $300,000 per year). *See generally* OHIO REV. CODE ANN. § 2743.191.

to each county.[206] Finally, Washington's statute may require the respondent to pay for the costs of the electronic monitoring after considering the respondent's ability to pay for the monitoring.[207]

The above-mentioned statutes show that even though Pennsylvania would incur some initial costs when implementing Alina's Law, the state could share those costs with respondents.[208] Additionally, if the respondent cannot afford to help cover costs, the court could order the respondent to perform community service so that the state recaptures some of the costs associated with covering the respondent's share.

More importantly, any cost that Pennsylvania incurs by implementing Alina's Law is offset by the relief Pennsylvania gains from the burdensome societal costs of domestic violence. According to United States Department of Justice statistics, incarcerating one inmate costs $62 per day.[209] GPS monitoring costs about $10 per day.[210] Because Alina's Law only applies to abusers who are highly likely to continue abusing their partners, electronic monitoring serves to prevent the eventual incarceration of that individual. As stated above, PFAs are only effective for three years absent an extension.[211] Thus, even if Pennsylvania has to pay the cost for a percentage of respondents, keeping the abuse victim safe for three years for $10 per day is far less expensive than incarcerating the abuser for years at $62 per day.[212]

Providing victims with actual protection also means that abuse victims miss fewer workdays and are more productive because they are not constantly worrying about their abuser confronting them unexpectedly.[213] Further, because the rate of PFA respondent incarceration would decrease, fewer accused abusers would be deprived of the opportunity to work, which adds value to Pennsylvania's economy.[214] Thus, Alina's Law would benefit immensely from including a cost provision to explain how electronic monitoring of certain PFA respondents would be covered and what societal costs are avoided through such monitoring.

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206. OHIO REV. CODE ANN. § 2903.214(N)(2).
207. WASH. REV. CODE § 26.50.060(j).
208. *See id.* § 26.50.060; LA. STAT. ANN. § 46:2143; OHIO REV. CODE ANN. § 2903.214.
209. *Types of GPS Monitoring.*, *supra* note 174.
210. *Id.*
211. *Legal Information: Protection From Abuse Orders*, *supra* note 60.
212. *Types of GPS Monitoring.*, *supra* note 174.
213. PA. COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 50.
214. *See* discussion *supra* Subsection I(B) (proposing that higher incarceration rates contribute to the detrimental effect domestic violence has on the economy).

CONCLUSION – A DIFFERENT ENDING TO ALINA'S STORY

With the modifications proposed by this Article, Alina's Law could have yielded a very different outcome in Alina Sheykhet's case. After examining Darby's troubled history and threatening behavior through the lens of the Danger Assessment Instrument contained within Alina's Law, the concerned judge could have acted upon his concerns for Alina's safety by ordering Darby to submit to electronic monitoring. Even if Darby was not deterred by being monitored, the recommended program would have notified Alina long before Darby entered her house. An alarm from Alina's smartphone would have woken Alina and notified her of the violation. Alina and her roommates would have been ready to confront Darby until the police arrived to arrest him. Alina would have survived, and the monitoring would not have unreasonably infringed upon Darby's Fourth Amendment rights. This outcome can be a reality for countless abuse victims if Pennsylvania adopts Alina's Law with the modifications.[215]

Alina's Law is an essential piece of legislation that Pennsylvania must pass to ensure the protection of its citizens and society.[216] Domestic violence's social and economic costs are too high to delay the implementation of effective countermeasures any longer.[217] Alina's Law, with the aforementioned modifications, is the effective countermeasure Pennsylvania needs to save lives and relieve the state of the burdens caused by domestic violence, without overstepping reasonable protections of Fourth Amendment liberties. Therefore, to put the "protection" back into "protection from abuse," Pennsylvania must adopt Alina's Law and the electronic monitoring of high-risk PFA respondents.

215. H.B. 588 §§ 1, 2, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019).
216. *Id.*; *Alina's Story*, *supra* note 5.
217. PA. COAL. AGAINST DOMESTIC VIOLENCE, *supra* note 50.

Triaging *Lomax*: An Urgent Proposal for Legislative Reform to Restore Judicial Protection in American Prisons

*Alexis B. Thurston**

> "Remember those in prison as though you were in prison with them, and the mistreated as though you yourselves were suffering bodily."—Hebrews 13:3

I. INTRODUCTION

In a 2003 study of trends in inmate litigation before and after the enactment of the Prison Litigation Reform Act ("PLRA"), Harvard Law School Professor Margo Schlanger described the PLRA's administrative exhaustion requirement as "the statute's most

* Duquesne University School of Law, J.D. 2022; University of Pittsburgh, B.A. Economics, B.A. Communications, 2019; Editor-in-Chief, Duquesne Law Review Volume 60. Thank you to my faculty advisor, Professor Richard Heppner, for his professional guidance in this piece. I also extend my sincerest gratitude to the Duquesne Law Review Volume 60 staff for their assistance in the editing process. Finally, I recognize my utmost appreciation for my father, mother, and sisters, and their unconditional love and support.

damaging component."[1] Almost two decades later, in June of 2020, the United States Supreme Court indirectly strengthened the administrative exhaustion requirement through its ruling in *Lomax v. Ortiz-Marquez*.[2] In *Lomax*, the Court found that all dismissals of inmate litigation resulting from the failure of an incarcerated plaintiff to adhere to the exhaustion requirement would count as "strikes" against the plaintiff's opportunity to access federal courts in the future.[3]

Since its enactment in 1996, the PLRA has been the subject of extensive scholarship regarding its effects on the ability of incarcerated litigants to bring grievances to federal court.[4] Many scholars agree that the PLRA is in need of reconsideration. Suggestions range from enacting standards for increased oversight of prison conditions to judicially administered exceptions to some of the Act's requirements.[5] However, despite Professor Schlanger's assertion about the considerable negative implications of the PLRA's administrative exhaustion requirement on court access for prisoners, scholarship focusing narrowly on the requirement is more limited.[6] Furthermore, it is necessary to re-examine the administrative exhaustion requirement in the wake of the *Lomax* decision because it has pushed the requirement even further into the foreground of barriers to court access for prisoners. On a broader scale, the year 2020 brought a renewed public interest in issues concerning criminal justice and incarceration, creating the perfect backdrop for a

1. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1650 (2003) [hereinafter Schlanger, *Inmate Litigation*].

2. 140 S. Ct. 1721 (2020) (holding that cases dismissed for failure to exhaust count as a strike against plaintiffs' access to relief from court costs).

3. *Id.* at 1727; *see also* Jimmy Hoover, *New Hurdle Emerges for Pro Se Prisoners*, LAW360 (June 14, 2020, 8:02 PM), https://www.law360.com/access-to-justice/articles/1281993/new-hurdle-emerges-for-pro-se-prisoners.

4. *See, e.g.*, Allen E. Honick, *It's "Exhausting": Reconciling a Prisoner's Right to Meaningful Remedies for Constitutional Violations with the Need for Agency Autonomy*, 45 U. BALT. L. REV. 157, 187 (2015) (examining the shortcomings of the exhaustion requirement and suggesting a judicially applied exceptions doctrine for overcoming barriers to court access); Allison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 576–77 (2014) (examining jurisprudential problems with the PLRA which cause obstructions to remedying constitutional violations and suggesting a judicially applied exceptions doctrine as a solution); Schlanger, *Inmate Litigation*, *supra* note 1, at 1557 (using statistics to examine the impact of the PLRA on filings by incarcerated plaintiffs).

5. Honick, *supra* note 4, at 158; Mikkor, *supra* note 4, at 576.

6. *But see* Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What it Means and What Congress, Courts, and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483, 486 (2001); Honick, supra note 4, at 156; Mikkor, supra note 4, at 573.

reconsideration of what is arguably one of the most influential pieces of legislation regarding incarcerated citizens in modern history.[7]

This Article will expand upon Professor Schlanger's assertion that the administrative exhaustion requirement of the PLRA is the legislation's most dangerous component and will call upon Congress to remove the requirement. Part II.A explores the history of the provision and suggests that the prevailing "tough on crime" sentiment of the 1990s still plays a key role in upholding exceptionally stringent barriers to court access against incarcerated people. Part II.B discusses relevant administrative exhaustion caselaw. Part II.C discusses how the barriers imposed by the PLRA are particularly harmful to impoverished plaintiffs, who make up a majority of the prison population. Part II.D explains how the decision in *Lomax* underscored the cyclical nature of harms against prisoners posed by the PLRA.

Part III discusses the merits of removing the exhaustion requirement altogether. Part III.A outlines how the administrative exhaustion requirement is especially susceptible to disorganization and bias, which arbitrarily grants greater court access to some inmates over others. Part III.B discusses how the *Lomax* decision accentuates this bias and arbitrariness. Part III.C controverts arguments in favor of the administrative exhaustion requirement. Part III.D discusses why legislative intervention is the only remaining option for generating impactful change to the PLRA. Finally, this Article concludes with a call for legislators to set aside longstanding political hostilities toward incarcerated people in order to foster equal and just access to federal courts.

II. BACKGROUND

A. Tough on Crime: The Birth of the PLRA

The PLRA was enacted by the United States Congress in 1996 as an effort to curb the perceived barrage of inmates filing frivolous

7. *See, e.g.*, Mark Berman & Tom Jackman, *After a Summer of Protest, Americans Voted for Policing and Criminal Justice Reform Changes*, WASH. POST (Nov. 14, 2020, 8:00 AM), https://www.washingtonpost.com/national/criminal-justice-election/2020/11/13/20186380-25d6-11eb-8672-c281c7a2c96e_story.html (discussing how the 2020 election results reflected American support for criminal justice reform particularly in state and local races); Ryan Williams, *Why Mass Incarceration is Looming as a Campaign Issue*, BLOOMBERG (Aug. 16, 2020, 12:00 AM), https://www.bloomberg.com/news/articles/2020-08-16/why-mass-incarceration-is-looming-as-a-campaign-issue-quicktake (discussing candidate positions on mass incarceration and prison reform as a burgeoning voter interest in the 2020 election).

lawsuits in federal court.[8] The legislation includes a variety of provisions aimed at limiting incarcerated litigants' claims against the correctional institutions where they serve their sentences.[9] One such provision is a limitation on permissible complaints to only those which plead that the plaintiff suffered physical injury in a correctional institution, also known as the "physical injury requirement."[10] This requirement bars incarcerated people from making claims against their correctional institutions that allege mental or emotional injury, with an exception only for such injuries arising out of a sexual assault.[11] The PLRA also imposes a limitation on recovery of attorney's fees by plaintiff's counsel and requires that up to twenty-five percent of the attorney's fees be subtracted from the plaintiff's monetary settlement.[12] The administrative exhaustion requirement mandates that incarcerated plaintiffs fully exhaust all available administrative grievance processes set forth by the prison prior to filing a lawsuit against that facility.[13] If an incarcerated litigant fails to exhaust the administrative process, or if he fails to properly follow the prison's procedure in presenting his grievances, then the court will dismiss his claim.[14]

The enactment of the PLRA was a distinct pivot from the decades of judicial and legislative progress in recognizing rights for incarcerated people.[15] Prior to the PLRA, inmate civil rights litigation brought crucial issues regarding the conditions of federal prisons to the attention of legislators and the courts, thus opening the door for improvement in the treatment of prisoners.[16]

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8. Stacey Heather O'Bryan, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1189 (1997) (citing a statement from Senator Dole introducing the PLRA on the Senate floor in 1995).

9. 42 U.S.C. § 1997e.

10. *Id.* § 1997e(e).

11. *Id.*

12. *Id.* § 1997e(d)(2) (providing that no more than 25% of a monetary judgment can be applied toward the payment of attorney's fees, and that if attorney's fees are awarded against the defendant, they may not exceed 150% of the plaintiff's monetary recovery); *see also* Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey*, and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 204–05 (2015).

13. 42 U.S.C. § 1997e(a), (b).

14. *See* Gray Proctor, *Ngo Excuses: Proving, Rebutting, and Excusing Failure to Exhaust Administrative Remedies in Prisoner Suits After* Woodford v. Ngo *and* Jones v. Bock, 31 HAMLINE L. REV. 471, 476 (2008).

15. Honick, *supra* note 4, at 159.

16. *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH 7–8 (June 16, 2009), https:// www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states [hereinafter *No Equal Justice*] (discussing the Supreme Court case *Hutto v. Finney,* 437 U.S. 678 (1978), among others, in which the Court was made aware of treacherous conditions in a state prison through action by incarcerated plaintiffs);

Despite the positive impact of inmate litigation on improving human rights in federal prisons, this legislative pivot occurred due to pressure on politicians to embrace "tough on crime" rhetoric and accompanying legislation in the mid-1990s.[17] The "War on Drugs"—a decades-long escalation in federal drug enforcement and drug sentencing guidelines—generated a great deal of public support due to widespread concern over the possibility of civil unrest perpetrated by drug-addicted criminals.[18] Public support for a crackdown on crime perpetuated a disdain for those labeled "criminals," and support the rights of incarcerated people against this backdrop diminished.[19]

Lawmakers capitalized on this political environment by introducing measures to limit the ability of incarcerated litigants to advocate for improvements to their conditions through the court system.[20] For example, Senator Newt Gingrich advocated for "commonsense legal reform" to eliminate "excessive legal claims, frivolous lawsuits, and overzealous lawyers" alongside a call for swifter executions in death penalty cases, longer prison sentences, an increase in prison facilities, and an expansion of the police force.[21] Similarly, in introducing the PLRA on the Senate floor in 1995, Senator Orin Hatch stated, "[i]t is past time to slam shut the revolving door on the prison gate and put the key safely out of reach of overzealous [f]ederal courts."[22] The PLRA was also introduced in the wake of the infamous Violent Crime Control and Law Enforcement Act of 1994.[23] This legislation responded to the public desire for a crackdown on violent crime with a nearly twenty-five billion dollar allocation of funds to prisons, police departments, and crime prevention.[24]

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see also Hoover, *supra* note 3 ("The Journal of the Academy of Psychiatry and the Law has recognized that 'the provision of comprehensive correctional mental health care is largely the result of successful litigation from prisoners.'").

17. Schlanger, *Inmate Litigation*, *supra* note 1, at 1567 (discussing the political background against which the PLRA was formed); Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 154 (2015) [hereinafter Schlanger, *Trends*] (discussing the PLRA's impact on successful inmate civil rights litigation).

18. *A Brief History of the Drug War*, DRUG POL'Y ALL., https://drugpolicy.org/issues/brief-history-drug-war (last visited Feb. 19, 2021).

19. Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1214 (2020).

20. Schlanger, *Trends*, *supra* note 17, at 155 ("The PLRA was motivated in large part by Republican discontent with plaintiffs' successes in [inmate] litigation.").

21. 140 CONG. REC. H1720 (daily ed. Sept. 22, 1994) (statement of Rep. Newt Gingrich).

22. Schlanger, *Inmate Litigation*, *supra* note 1, at 1565–67.

23. H.R. 3355, 103d Cong. (1994).

24. H.R. 3355, 103d Cong. (1994); Bill Mccollum, *The Struggle for Effective Anti-crime Legislation—An Analysis of the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 561, 563–65 (1995).

In understanding the political context and harsh rhetoric from which the PLRA was born, it becomes clear why the legislation has continued to generate such unrelenting outcomes for prisoners attempting to bring grievances against correctional institutions in federal court.[25] The legislation was intended to be punitive when it was adopted almost thirty years ago, and the sentiment has not changed.[26] The following section provides a judicial history of what this Article argues is the most unrelenting provision of the PLRA—the administrative exhaustion requirement.

B. A Closer Look at the Exhaustion Requirement

An inmate's failure to exhaust all available administrative remedies under the PLRA is an especially common reason that inmate litigation is dismissed—far more common than bringing a frivolous or malicious claim on its merits.[27] Accordingly, the administrative exhaustion requirement is an extensively litigated provision of the PLRA.[28] In *Booth v. Churner*, one of the earliest instances of administrative exhaustion litigation, the United States Supreme Court considered whether an incarcerated plaintiff should be required to exhaust the prison's administrative process if the plaintiff's complaint requested only money damages, and the administrative process would not provide monetary relief.[29] The Court ruled against the incarcerated plaintiff, and found that the Congressional intent behind the PLRA was that prisoners exhaust the administrative processes available to them regardless of whether it provided the remedy sought.[30]

Five years after the *Booth* decision, the Supreme Court revisited the administrative exhaustion requirement in *Woodford v. Ngo*.[31] The incarcerated plaintiff in *Woodford* missed the prison administration's fifteen-day deadline to file a grievance and was therefore

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25. *See* Schlanger, *Trends*, *supra* note 17, at 157 (showing that federal court filings by incarcerated plaintiffs remain at lower levels than prior to the PLRA).

26. *See* Macfarlane, *supra* note 19, at 1213–18.

27. Schlanger, *Inmate Litigation*, *supra* note 1, at 1649 ("The PLRA's exhaustion requirement has emerged as the highest hurdle the statute presents to individual inmate plaintiffs.").

28. Macfarlane, *supra* note 19, at 1208 (referring to the administrative exhaustion requirement as "the most extensively litigated aspect of the PLRA"); *see infra* notes 29–38 and accompanying text.

29. 532 U.S. 731, 734 (2001).

30. *Id.* at 740–41 ("Congress's imposition of an obviously broader exhaustion requirement makes it highly implausible that it meant to give prisoners a strong inducement to skip the administrative process simply by limiting prayers for relief to money damages not offered through administrative grievance mechanisms.").

31. 548 U.S. 81, 83–84 (2006).

denied relief.[32] When the plaintiff's subsequent administrative appeal was denied, he filed a complaint against the prison in federal court, arguing that administrative procedures should be considered "exhausted" for the purposes of the PLRA whenever they are no longer available.[33] The Court rejected this argument, and found that administrative remedies must be *properly* exhausted in order to satisfy the PLRA exhaustion requirement.[34] According to the Court's understanding of the legislative intent behind the PLRA, missing a deadline implies a plaintiff has failed to *properly* exhaust the prison's administrative remedies.[35]

Finally, in 2007, the Supreme Court was asked to decide whether an incarcerated plaintiff must plead administrative exhaustion in his complaint.[36] In a rare decision favoring the incarcerated litigant, the *Jones v. Bock* Court held that the administrative exhaustion requirement must be treated as an affirmative defense.[37] It reasoned that no provision of the PLRA can be interpreted to require plaintiffs to demonstrate or plead exhaustion in their complaints.[38] Instead, the prison bears the burden of pleading that a plaintiff has not properly exhausted every administrative requirement prior to filing in federal court when arguing that the plaintiff's claim should be dismissed.[39] It should be noted, however, that a defendant facility's failure to file a motion to dismiss does not always save the plaintiff from dismissal.[40] Unlike in standard proceedings, a judge can dismiss an incarcerated plaintiff's claim *sua sponte*, or without a motion from the defendant, if the judge finds that the plaintiff failed to state a claim or that the claim was malicious or frivolous.[41]

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32. *Id.* at 87.
33. *Id.* at 88.
34. *Id.* at 93.
35. *Id.* at 95 (reasoning that Congress could not have intended otherwise, because under a less restrictive interpretation an incarcerated litigant could simply bypass administrative remedies by intentionally filing a late grievance).
36. Jones v. Bock, 549 U.S. 199 (2007).
37. *Id.* at 216. *But see* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1723 (2020) (finding against incarcerated plaintiffs by applying the "three-strikes" provision, a rule that limits funding assistance for incarcerated litigants, to all dismissals); Woodford v. Ngo, 548 U.S. 81, 95 (2006) (ruling against the incarcerated plaintiff in holding that missing a deadline will disqualify a claimant for lack of "proper" administrative exhaustion); Booth v. Churner, 532 U.S. 731, 734 (2001) (finding against the incarcerated plaintiff by holding that the plaintiff must exhaust all administrative requirements even when seeking relief that is not offered in the administrative process).
38. *Jones*, 549 U.S. at 216.
39. *Id.* at 212; Proctor, *supra* note 14, at 474.
40. Macfarlane, *supra* note 19, at 1209.
41. *Id.* Judges cannot dismiss *sua sponte* for failure to exhaust administrative requirements. *See Jones*, 549 U.S. at 214.

C. Risks to Indigent Plaintiffs from the PLRA

The PLRA severely limits the ability of all incarcerated plaintiffs to raise their concerns in federal court, and the barriers to court access it poses for indigent plaintiffs specifically are especially stringent.[42] The PLRA complicates an incarcerated plaintiff's ability to receive *in forma pauperis* ("IFP") status.[43] IFP status is available to both incarcerated and non-incarcerated indigent plaintiffs.[44] A non-incarcerated plaintiff seeking IFP status must submit an affidavit certifying that they are unable to pay court filing fees, and in turn may be eligible to have the fees completely waived.[45] Incarcerated plaintiffs, however, are not eligible for a complete fee waiver under the PLRA.[46] Rather, for an incarcerated plaintiff, IFP status means that they will be permitted to pay in monthly installments automatically deducted from their prison accounts, instead of paying the full filing fee upfront.[47]

Imprisoned litigants are further penalized if a court dismisses their complaint on three or more occasions.[48] This provision is commonly referred to as the "three strikes rule."[49] Under the "three strikes rule," a prisoner who has had a complaint dismissed three or more times because it was "frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted" will be ineligible for IFP status and required to pay all fees in full at the time of filing.[50] The only exception to this rule arises where a court determines that a prisoner is "under imminent danger of serious physical injury" and thus in serious need of assistance with funding.[51]

IFP status is crucial for many imprisoned litigants as it is often incredibly difficult, if not impossible, for prisoners to produce a $350 federal court filing fee in full.[52] Data from the Bureau of Justice Statistics demonstrates that the median pre-incarceration incomes

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42. *See* Schlanger, *Inmate Litigation*, *supra* note 1, at 1628.

43. IFP status is a position in which indigent litigants are permitted to disregard filing fees and court costs in proceeding with their claim. *See* Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1485–86 (2019).

44. *Id.* at 1491.

45. 28 U.S.C. § 1915(a)(1). *See also* Hammond, *supra* note 43, at 1491 (explaining the "scrivener's error" in section (a)(1) of the legislation).

46. 28 U.S.C. § 1915(b)(1).

47. *Id.*

48. *Id.* § 1915(g).

49. *See* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1723 (2020).

50. 28 U.S.C. § 1915(g).

51. *Id.*

52. Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act's 'Three Strikes Rule,' 28 U.S.C. § 1915(G)*, 28 CORNELL J.L. PUB. POL'Y 207, 236–37 (2018).

of incarcerated people is well below the median incomes of non-incarcerated people.[53] These statistics demonstrate that a majority of incarcerated people were already impoverished before they entered the prison system, and are therefore unlikely to have access to financial resources from the outside with which they are able to fund legal endeavors.[54] This, coupled with the fact that inmates working within prisons are paid mere cents on the dollar, illustrates how difficult it is for many incarcerated litigants to pay the requisite filing fees to make a complaint in federal court without access to IFP status.[55]

D. Lomax's Harsh Realities

The restrictions imposed by the PLRA operate cyclically. Incarcerated plaintiffs struggle to obtain representation because they generally have access to fewer financial resources than those who are not incarcerated,[56] and the PLRA limits the availability of attorney's fees which discourages attorneys from accepting prisoner cases even with a contingent fee agreement.[57] As a result, incarcerated people are often forced to represent themselves in civil cases, despite having limited knowledge of the law or its systems.[58] Because *pro se* litigants often struggle to navigate complex administrative requirements, draft pleadings, and make strategic legal decisions, their claims are frequently dismissed, whether without prejudice due to a procedural defect such as a failure to exhaust, or with prejudice due to a lack of merit.[59] This cycle repeats until the

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53. Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html (demonstrating that the median pre-incarceration income for incarcerated men was $19,650 in 2014 as compared to the median income of non-incarcerated men at $41,250).

54. *Id.*

55. Charles Decker, *Time to Reckon with Prison Labor*, YALE INST. FOR SOC. AND POL'Y STUDIES, https://isps.yale.edu/news/blog/2013/10/time-to-reckon-with-prison-labor-0 (last visited Oct. 16, 2020) (reporting that federal inmates earn twelve to fourteen cents per hour for jobs within prisons).

56. *See* Rabuy & Kopf, *supra* note 53, at 2.

57. *See* Sarah B. Schnorrenberg, *Mandating Justice:* Naranjo v. Thompson *As a Solution to Unequal Access to Representation*, 50 COLUM. HUM. RTS. L. REV. 260, 296 (2019); *see also* Hill, *supra* note 12, at 204–05 ("[W]e are aware that [the PLRA] will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims . . . .") (quotation omitted).

58. *See* Schlanger, *Inmate Litigation*, *supra* note 1, at 1609 ("Nearly all the cases in the inmate federal civil rights docket are litigated pro se—far more than in any non-prisoner part of the docket.").

59. Schlanger, *Trends*, *supra* note 17, at 164 tbl.3 (displaying data from 2012, illustrating that 84.9% of all judgment dispositions in prisoner civil rights cases are pre-trial decisions for defendants); *see also* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1726 (2020) ("[C]ourts can

incarcerated plaintiff has three claims dismissed, or, as the courts refer to it, "three strikes."[60] At that point, the plaintiff is no longer eligible for IFP status, and has very few, if any, means for recompense for injustices committed against them in prison facilities.[61]

Until June of 2020, federal courts could carve out a small exception to the three-strikes rule to provide a bit of leniency for prisoners bringing poorly pled but meritorious prisoner civil rights claims.[62] Prior to the recent unanimous Supreme Court decision in *Lomax v. Ortiz-Marquez*, some federal courts would not recognize a dismissal without prejudice as a "strike" against the plaintiff.[63] The *Lomax* decision, however, held that the plain language of the PLRA is determinative of a finding that *all* dismissals of incarcerated plaintiffs' claims count as strikes against the litigant, whether they are with or without prejudice.[64] In a footnote to the opinion, Justice Kagan clarified "the provision does not apply when a court gives a plaintiff leave to amend his complaint."[65] The Court reasoned that because the same suit continues when a plaintiff is given leave to amend, no dismissal has occurred and the three-strikes rule does not apply.[66]

Clearly, this decision will have monumental consequences for *pro se* imprisoned litigants who attempt to try civil claims. A significant number of dismissals without prejudice in prisoner litigation cases are a result of procedural issues—such as a failure to exhaust administrative remedies—and the *Lomax* decision now jeopardizes the ability of these plaintiffs to maintain the filing status that they require to bring even meritorious claims before the court.[67] This is

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. . . conclude that frivolous actions are not 'irredeemably defective,' and thus dismiss them without prejudice.").

60. Schlanger, *Inmate Litigation*, *supra* note 1, at 1649–50 (discussing the impact of the three-strikes rule on repeat litigants).

61. 28 U.S.C. § 1915(g) (indicating that litigants may be eligible for IFP status regardless of the number of dismissals that they have accumulated if it is determined that they are in immediate danger of serious physical harm); *see also* Schlanger, *Inmate Litigation*, *supra* note 1, at 1652 ("Thus, an inmate's failure to comply with any applicable grievance rules . . . may well disqualify an eventual federal lawsuit no matter how constitutionally meritorious.").

62. Hoover, *supra* note 3.

63. *See, e.g.*, *id.* (indicating that the Third and Fourth Circuit Courts were generally more "prisoner-friendly" in their exhaustion holdings while the Tenth Circuit was generally the opposite); McLean v. United States, 566 F.3d 391, 394 (2d Cir. 2009) ("The main issue before us today is whether a dismissal without prejudice for failure to state a claim counts as a strike under §1915(g). We hold that it does not.").

64. *Lomax*, 140 S. Ct. at 1724.

65. *See id.* at 1724, n.4.

66. *Id.*

67. Schlanger, *Inmate Litigation*, *supra* note 1, at 1652; *see also* Hoover, *supra* note 3 ("But in other cases, courts will dismiss cases with the expectation that prisoners will refile [after they have exhausted].").

directly contrary to the legislative intent behind the PLRA, which is to deter *frivolous*, or, in other words, non-meritorious lawsuits from prisoners.[68] There is ample suggestion from legal scholars that the PLRA and the procedures that surround it, are in need of significant amendment.[69] However, in light of the especially harsh new reality for incarcerated litigants caused by the decision in *Lomax*, there must be an immediately effective—and yet realistic—step taken by the legislature to ensure that incarcerated people are able to bring meritorious claims before the federal judiciary.[70] The remainder of this Article recommends that the administrative exhaustion requirement of the PLRA must be completely removed to protect the rights of incarcerated people and allow meritorious claims to be heard.

III. REMOVING THE EXHAUSTION REQUIREMENT

The administrative exhaustion requirement is strikingly dangerous because it requires an incarcerated litigant to abide by the rules of his adversary before he can access federal court.[71] While this provision is alarming on its face, it is especially problematic considering that incarcerated people are "arguably the most unpopular and politically vulnerable bloc of American citizens."[72] Additionally, members of marginalized communities are incarcerated at exceedingly high rates, which may lead to double bias, both against an individual's status as an inmate and against the that individual's race, gender, religion, or sexual orientation.[73] American prisons are also strained due to overcrowding, resulting in little focus

68. *See* 141 CONG. REC. 27,042 (1995) (statement of Sen. Orin Hatch) ("I do not want to prevent inmates from raising legitimate claims . . . this legislation will, however, go far in preventing inmates from abusing the federal judiciary system.").

69. *See, e.g.*, Broc Gullet, *Eliminating Standard Pleading Forms that Require Prisoners to Allege their Exhaustion of Administrative Remedies*, 2015 MICH. ST. L. REV. 1179 (2015); Hill, *supra* note 12, at 176 (arguing that prisoners subject to the PLRA should be appointed lawyers for civil suits); *No Equal Justice*, *supra* note 16, at 5 (recommending that the requirement that courts dismiss claims for failing to exhaust be replaced by a requirement for temporary stay, that prisoners be permitted to bring claims for mental and emotional abuse, and that juveniles be exempt from PLRA requirements); Samuel B. Reilly, *Where is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of The Prison Litigation Reform Act's "Three Strikes Rule"*, 70 EMORY L. REV. 755, 795 (2021) (arguing for streamlined judicial interpretation of the PLRA's three strikes rule in order to maintain the constitutionality of the provision).

70. *See* Mikkor, *supra* note 4, at 577 (discussing the need for immediate reform of the PLRA to ensure access to federal courts for incarcerated plaintiffs).

71. *See* Schlanger, *Inmate Litigation*, *supra* note 1, at 1628.

72. Macfarlane, *supra* note 19, at 1214 (quoting Geraldine Doetzer, *Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth*, 14 WM. & MARY J. WOMEN & L. 363, 374–75 (2008)).

73. Hill, *supra* note 12, at 186.

from staff on anything but maintaining order.[74] Considering this in conjuncture with the potential for bias both from prison administrators and the judiciary, it is clear that the administrative exhaustion requirement generates far too many opportunities for federal court access to be arbitrarily denied to incarcerated litigants.[75]

A. Inconsistency, Complexity, and Bias in Prisons

One glaring issue with the administrative exhaustion requirement is that disparities in prison administrative procedures create arbitrary and inconsistent barriers for who is allowed to access federal court.[76] Grievance processes and administrative procedures vary by institution and are therefore extremely difficult for incarcerated people to navigate.[77] A study performed by the Michigan Law Prison Information Project reveals notable disparities between prisons in almost all aspects of the grievance process.[78] For example, there is significant variance in the process by which each institution requires a grievance be initiated.[79] A majority of institutions require that individuals attempt to come to an informal resolution of their grievance with prison staff before moving on to the formal grievance process.[80] However, there is disparity in the necessary steps for an inmate to certify that he has attempted and failed to come to an informal resolution with staff in order to initiate the formal complaint process.[81] In addition, prisons vary in their handling of potential retaliation from staff members arising from the informal complaint process in cases of abuse.[82]

When informal resolution fails, the steps for initiating a formal complaint vary significantly as well.[83] Many prisons provide grievance forms to inmates, but differ in whether those forms are available in general access areas such as common rooms and housing

74. Derek Gilna, *GAO Report Finds Federal Prison Overcrowding Accelerates*, PRISON LEGAL NEWS (Sept. 6, 2016), https://www.prisonlegalnews.org/news/2016/sep/9/gao-report-finds-federal-prison-overcrowding-accelerates/.

75. *See* Mikkor, *supra* note 4, at 579–85 (discussing bias within prisons in conjuncture with the administrative exhaustion requirement); *see* discussion *infra* Sections III.A, III.B.

76. *See* PRIYAH KAUL ET AL., PRISON AND JAIL GRIEVANCE POLICIES: LESSONS FROM A FIFTY-STATE SURVEY 3–4 (2015) (analyzing and summarizing prison grievance procedures across all fifty states and the federal system).

77. *Id.*

78. *Id.*

79. *Id.* at 11.

80. *Id.*

81. *Id.* at 11–12.

82. *Id.* (providing that some facilities have implemented policies to exempt prisoners from filing informal complaints in abuse cases to avoid retaliation, while other facilities simply implement anti-retaliation provisions in their grievance policies).

83. *Id.* at 13–18.

units, or whether they must be directly requested from staff.[84] Other institutions do not provide forms at all, but rather require the incarcerated person to initiate his grievance according to strict procedural guidelines.[85] Furthermore, there is significant variance in the amount of time that an individual has between the occurrence prompting his grievance and the deadline for initiating the grievance process.[86] Some prisons allow up to a year after the occurrence to initiate a grievance, while others allow as little as two days.[87]

Given the variety of prison administrative requirements, following the process for relief can be extremely confusing for individuals who have been transferred from one prison to another, an increasingly common occurrence as prison populations increase and facilities are overcrowded.[88] Incarcerated people who have re-entered the system at a different facility are disadvantaged by these inconsistencies as well.[89] This confusion could result in missed deadlines or improperly completed grievance forms, which would lead a court to conclude that administrative remedies were not "properly" exhausted.[90] This conclusion would result in a dismissal of the claim and a "strike" under *Lomax*.[91] Furthermore, the strict guidelines set forth by prison administration for initiating grievances alone could discourage incarcerated people from pursuing the exhaustion process, especially in the case of single-instance occurrences of abuse.[92] None of these issues have any relevant bearing on whether an individual's central grievance is worthy of being heard in federal court, but nevertheless they create stringent and irregular barriers

84. *Id.* at 13.

85. *Id.* (providing an example of the West Virginia requirement that all complaints be initiated on 8.5 x 11-inch paper with writing on only one side, affixed with a single staple and folded only to the extent necessary to fit into a number 10 envelope, as well a requirement from Indiana that prisoners refrain from using legal terminology in their grievance).

86. *Id.* at 22.

87. *Id.*

88. *See* HOLLY KIRBY, LOCKED UP AND SHIPPED AWAY: INTERSTATE PRISON TRANSFERS AND THE PRIVATE PRISON INDUSTRY, GRASSROOTS LEADERSHIP (2003).

89. *See* BUREAU OF JUST. STATS., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) (2018), https://www.bjs.gov/content/pub/pdf/18upr9yfup0514_sum.pdf (showing that over eighty percent of state prisoners released from prison were re-arrested within nine years, and that the longer an individual is out of prison prior to re-arrest, the higher the likelihood is that they are re-arrested outside of their original arresting state).

90. Woodford v. Ngo, 548 U.S. 81, 95 (2006) (finding that a missed deadline must lead to a conclusion that administrative relief was not properly exhausted and must therefore result in a dismissal).

91. *See id.*; Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1724 (2020).

92. KAUL, *supra* note 76, at 3 (suggesting that the exhaustion requirement may create incentive for prisons to create particularly burdensome administrative processes in order to discourage initiation of prisoner grievances); Mikkor, *supra* note 4, at 576.

to court access as described above.[93] Removing the administrative exhaustion requirement from the PLRA would make disparate administrative processes between prisons irrelevant to discerning whether an incarcerated plaintiff's claim should be heard in federal court.[94] Thus, there would be a more level playing field for inmates across prison systems.

In addition to being complicated and inconsistent, the administrative exhaustion requirement advances pre-existing biases against incarcerated people.[95] This bias functions against incarcerated people as a general class, and more specifically against incarcerated people who are also members of marginalized communities, whether due to race, ethnicity, gender, or sexual orientation.[96] Courts have historically given extreme deference to prison administrations.[97] In the past, the sentiment supporting this degree of deference was that if the judiciary and prison administrators did not form a united front, incarcerated people would become "embolden[ed] . . . to disrespect and disobey their keepers."[98] The holding in *Bell v. Wolfish* further embedded the practice of deference to prison administration into judicial precedent, finding that conditions imposed on inmates would be upheld so long as they were "reasonably related" to the government interest of keeping order in prisons.[99] Courts also generally assume, apparently without further inquiry, that administrators implement grievance procedures within their facilities with the goal of reaching acceptable solutions to inmate grievances.[100]

Because there is an established precedent for deferring to prison administrators in matters of prison conditions, incarcerated plaintiffs suffer negative bias from the court system when bringing

93. *See* 42 U.S.C. § 1997e(c) (establishing that the relevant standard for whether a grievance should be heard in federal court is that a stated claim is not frivolous or malicious).

94. *See* KAUL, *supra* note 76, at 3 (discussing the negative impact of disparate administrative procedures on inmate litigation).

95. *See* Mikkor, *supra* note 4, at 574 (discussing anti-prisoner bias in the Supreme Court's PLRA exhaustion jurisprudence).

96. Hill, *supra* note 12, at 185–94 (discussing the further marginalization of minorities in prison).

97. James E. Robertson, *The Jurisprudence of the PLRA: Inmates as "Outsiders" and the Countermajoritarian Dilemma*, 92 J. CRIM. L. & CRIMINOLOGY 187, 194–95 (2002) (relating the practice of judicial deference to prison administration back to the "hands off" approach of the post-Lochner era).

98. *Id.*

99. 441 U.S. 520, 540 (1974); Robertson, *supra* note 97, at 196.

100. Mikkor, *supra* note 4, at 594–95 (discussing the *Woodford v. Ngo* decision, where the Court determined that internal grievance procedures provide prisons with "a fair opportunity to correct their own errors," while citing no evidence that grievance systems actually serve this function).

claims against their correctional facilities.[101] This disincentivizes prison administrators from structuring their internal grievance procedures with the goal of resolving issues raised by inmates.[102] Instead, prison administrators are incentivized to complicate their internal grievance procedures in order to discourage inmates from filing grievances, and to make it near impossible for them to "properly" exhaust.[103] In doing so, administrators use the bias against incarcerated litigants perpetuated by judicial precedent in combination with the administrative exhaustion requirement to effectively shield their correctional institutions from liability to inmates who have suffered harm.[104] Removing the administrative exhaustion requirement from the PLRA would be extremely effective in ending this practice, because it would allow incarcerated plaintiffs to bring their grievances directly before a federal court without giving their adversaries the power to prevent the litigation from ever occurring.[105]

Another example of the serious potential for access to federal courts to be tainted by bias arises from the presence of implicit bias by prison staff against incarcerated people of different races, religions, genders, abilities, and sexual orientations.[106] This is a significant issue, as racial minorities, LGBTQ+ individuals, and people with psychological disabilities have a statistically higher chance of being incarcerated than individuals not encompassed by those identities.[107] Recently, conversations about race and incarceration have been prominent in the political mainstream.[108] The relationship between race and prison is often addressed in terms of

101. *See generally* Robertson, *supra* note 97, at 190 (suggesting that courts are failing to properly exercise judicial scrutiny with regards to inmate litigation due to their propensity to defer to prison administration).

102. Mikkor, *supra* note 4, at 574.

103. *Id.* at 583–84 (providing examples of correctional institutions changing their internal grievance procedures after the enactment of the PLRA such as reducing filing times and creating different sets of rules for grievances directed toward supervisory staff).

104. *Id.* at 578.

105. *Id.* at 579–80.

106. David Eichert, *Disciplinary Sodomy: Prison Rape, Police Brutality, and the Gendered Politics of Societal Control in the American Carceral System*, 105 CORNELL L. REV. 1775, 1785 (2018) (describing a prisoner's account of being accosted by a prison guard's racist and homophobic slurs); Hill, supra note 12, at 189 (discussing how LGBTQ+ prisoners suffer sexual violence at "two to three times that of the general population"); Mikkor, supra note 4, at 586–87 (discussing how prisoners with mental illness or other diminished capabilities may be rendered incapable of completing requisite administrative procedures); *Allegations of Racist Guards are Plaguing the Corrections Industry*, S. POVERTY L. CTR. (Dec. 6, 2000), https://www.splcenter.org/fighting-hate/intelligence-report/2000/allegations-racist-guards-are-plaguing-corrections-industry [hereinafter *Racist Guards*].

107. Hill, *supra* note 12, at 186.

108. *See* Williams, *supra* note 7.

overarching, structural issues, such as the mass over-incarceration of Black citizens.[109] It has also been examined on a more focused scale, as demonstrated by findings that overt racism affects individual correctional officers and other prison officials.[110] Concerns about racial bias in prison intersect with concerns about homophobia, transphobia, and sexual discrimination.[111]

Prison administrators and correctional officers have a great deal of say in whether those incarcerated at their facilities are able to complete the requisite administrative procedures for a court to consider that they have "properly" exhausted under the PLRA.[112] In addition to manipulating internal grievance procedures in order to create stringent complications for prisoners attempting to access federal courts,[113] correctional officers and prison staff may also target individuals for retaliation in the event that they do manage to submit a grievance.[114] The presence of biased ideologies and behaviors in correctional officers and other prison staff may therefore result in marginalized prisoners not only being mistreated at higher rates, but also being afforded even fewer opportunities to present their grievances in federal court than their non-marginalized counterparts.[115] Although removal of the administrative exhaustion requirement will certainly not completely resolve the issue of mistreatment and bias against marginalized individuals in correctional facilities, it will at least help ensure that these individuals are better protected by the judicial system from additional harm by correctional institutions.[116]

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109. *See, e.g.*, Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANN. REV. L. & SOC. SCI. 433, 433 (2020) (explaining how mass incarceration arose in response to the racial politics of the Civil Rights Movement); Elizabeth Jones, *The Profitability of Racism: Discriminatory Design in the Carceral State*, 57 U. LOUISVILLE L. REV. 61, 61–62 (2018) ([F]oundations of . . . [the American] legal system . . . are by design predicated on practices of dehumanization and legal detentions of people of color for the continued generation of profit.").

110. *Racist Guards*, *supra* note 106; Eichert, *supra* note 106, at 1783.

111. Eichert, *supra* note 106, at 1783, 1785 (describing how negative perceptions about LGBTQ+ individuals contribute to acts of sexual violence perpetrated against the community in prison and providing Bureau of Justice statistics indicating that prison staff perpetrate over half of all alleged sexual assault in prison); Hill, *supra* note 12, at 189 (describing sexual violence against LGBTQ+ inmates).

112. Mikkor, *supra* note 4, at 574.

113. *Id.*

114. *See* Eichert, *supra* note 106, at 1785 (describing a first-hand account of grievance retaliation by prison staff).

115. See Robertson, *supra* note 97, and Mikkor, *supra* note 4, for discussion on overbroad judicial deference to prison administration.

116. *See* Mikkor, *supra* note 4, at 576.

B. Footnote Four: Judiciary Bias and the Lomax Decision

The decision in *Lomax v. Ortiz-Marquez* adds to these concerns about the potential for incarcerated plaintiffs to face arbitrary inconsistency and/or bias when attempting to bring their grievances to federal court.[117] The *Lomax* Court found that, under the administrative exhaustion requirement of the PLRA, incarcerated plaintiffs who have had three claims dismissed from federal court will be ineligible for IFP status, regardless of whether the claim was dismissed without prejudice.[118] In a footnote to her opinion, Justice Kagan clarified that this provision does not apply where a judge decides not to dismiss, but rather gives the incarcerated plaintiff leave to amend his complaint.[119] Presumably, Justice Kagan added this footnote to attempt to preserve some degree of leniency for litigants with meritorious claims who would be unable to refile their claim after dismissal due to ineligibility for IFP status.[120]

Although the footnote may have the potential to alleviate some of the harsh consequences of the *Lomax* decision, the Court failed to consider that this footnote opens the door for further inconsistency in determining who is afforded access to federal court.[121] The opinion provides no mandatory guideline for when a judge should dismiss without prejudice with the expectation that a plaintiff will refile upon exhaustion, and when a plaintiff should be given leave to amend.[122] The decision to give leave to amend is left solely to the discretion of individual judges, who are not immune from personal bias and who have the potential to allow that bias to impact their decisions from the bench.[123] Just days after the *Lomax* decision was published, scholars were already expressing their concerns about the decision, the confusing footnote, and possibly another circuit

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117. Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1727 (2020) (holding that all dismissals for failure to state a claim shall count toward a "strike" under the PLRA).

118. *Id.*

119. *Id.* at 1724, n.4 (although *Lomax* was a unanimous decision, Justice Clarence Thomas did not join in this footnote).

120. Hoover, *supra* note 3.

121. *Lomax*, 140 S. Ct. at 1724, n.4 (introducing the opportunity for courts to give leave to amend rather than dismissing claims without elaborating on circumstances where this opportunity should be granted).

122. *Id.*

123. Hellen Hershkoff, *Some Questions About #MeToo and Judicial Decision Making*, 43 HARBINGER 128, 133–36 (2019) (discussing gender bias in the judiciary); Michelle Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 137 (2013) (exploring the potential in judiciary decision-making for bias against parties of lower socioeconomic class); Gregory S. Parks, *Judicial Recusal: Cognitive Bias and Racial Stereotyping*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 681, 682–83 (2015) (discussing how cognitive racial bias functions in judicial decision-making).

split.[124] Removing the administrative exhaustion provision from the PLRA altogether would alleviate these concerns and significantly decrease the likelihood of federal court access being restricted by judicial bias.

C. Rebutting Arguments in Favor of Administrative Exhaustion

Despite the rampant potential for inconsistency, bias, and harm resulting from the administrative exhaustion requirement, there appears to be hesitation within the legal community about doing away with the provision altogether.[125] Even those that recognize the probability of the administrative exhaustion requirement causing undue harm to incarcerated plaintiffs shy away from removing the requirement from the PLRA because of the long-held stereotype of inmates as naturally over-litigious.[126] Opponents argue that although the legislation is in need of reform, incarcerated plaintiffs nevertheless require some sort of restrictive legislation.[127] However, a more nuanced review of statistics regarding prisoner litigation indicates that the notion of over-litigious, spitefully-filing prisoners is something of a legal myth, originating in the chambers of the United States Senate in 1995 and pervading scholarship and legislation through present day.[128]

The PLRA was passed at the behest of conservative legislators who argued that incarcerated people were maliciously filing frivolous lawsuits and placing unneeded strain on the court system.[129] Prison litigation was presented as though each new complaint was more ridiculous than the last, with senators presenting stories before Congress of lawsuits resulting from an inmate receiving

124. Hoover, *supra* note 3 (quoting Professor Molly Manning's prediction that the Court's footnote is "going to cause more circuit splits and more confusion").

125. *See, e.g.*, Hill, *supra* note 12, at 184 (advocating for court-appointed civil counsel to aid incarcerated plaintiffs in navigating PLRA restrictions rather than removing any provision or overturning the legislation); Honick, *supra* note 4, at 158 (advocating for the implementation of judicial exceptions to the exhaustion requirement as well as independent oversight for prison officials rather than removing the exhaustion requirement); Mikkor, *supra* note 4, at 576 (advocating for judicially administered exceptions to the exhaustion requirement rather than removing the provision).

126. *See* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1776 (2003) ("Let us be candid. There is no denying that frivolous suits make up a large number—even a fairly large percentage—of the claims brought by inmates . . . ."; *see also* Beth Prager, *Exhaustion of Administrative Remedies and the Prison Litigation Reform Act*, 99 ILL. BAR J. 526, 527 (2011) ("The number of cases prisoners file in federal district courts is startling.").

127. *See* Mikkor, *supra* note 4, at 576; Roosevelt, *supra* note 126, at 1776.

128. *See* Schlanger, *Inmate Litigation*, *supra* note 1, at 1565–66 (quoting Senator Orin Hatch's speech introducing the PLRA on the Senate floor).

129. *Id.*; Macfarlane, *supra* note 19, at 1214 (quoting Senator Orin Hatch and Senator Bob Dole's criticism of inmate litigation while introducing the PLRA on the Senate floor).

crunchy rather than creamy peanut butter from commissary, concerns about mind control devices, or not being invited to a pizza party.[130] Senator Orin Hatch went so far as to describe inmate litigation as "another kind of crime committed against law abiding citizens."[131]

Conveniently, these senators did not mention that the subject matter of inmate litigation prior to the PLRA far more often pertained to serious civil rights violations.[132] For example, some early studies reported that almost forty percent of the federal inmate litigation docket pertained to cases arising from assaults against prisoners and disparate access to medical care.[133] Furthermore, proponents of the PLRA often fail to account for the fact that inmates are wholly at the mercy of the government in every aspect of their lives, and therefore any issues that arise regarding their living quarters, food, mail, etc., becomes an issue for a federal court.[134] Therefore, comparing federal court filings by incarcerated people against federal court filings by non-incarcerated people is not a fair representation of the litigiousness of people who are imprisoned.[135] In her research on litigation by incarcerated plaintiffs, Professor Schlanger found that non-incarcerated litigants file in *state* court so frequently that even if incarcerated plaintiffs filed the same amount of cases in state court as they did in federal court, the total number of filings by incarcerated people would be approximately equal to that of non-incarcerated people.[136]

Based on this information, it is difficult to understand how one could earnestly posit that the administrative exhaustion requirement serves to deter frivolous and malicious inmate filing.[137] From the statistics presented by Professor Schlanger, it appears that the issue with inmate litigation is not that the claims are more frivolous or malicious than non-inmate claims, or even that they are being

130. Macfarlane, *supra* note 19, at 1215 ("Though prisoner civil rights claims can, and often do, speak to issues like religious discrimination, prison violence, and denial of essential medical care, the litigation was belittled, reduced to complaints about peanut butter sandwiches and haircuts."); Schlanger, *Inmate Litigation*, *supra* note 1, at 1568–69.

131. Macfarlane, *supra* note 19, at 1215.

132. Schlanger, *Inmate Litigation*, *supra* note 1, at 1570–73 (comparing studies on the subject matter of inmate litigation).

133. *Id.* at 1571, n.48.

134. *Id.* at 1574.

135. *Id.* at 1576.

136. *Id.*

137. O'Bryan, *supra* note 8, at 1189 (quoting Senator Bob Dole in describing the purpose of the PLRA as "an effort to address the alarming explosion in the number of frivolous lawsuits filed by [s]tate and [f]ederal prisoners").

filed at exceedingly high rates.[138] Rather, the issue appears to be simply that the claims are being filed by inmates, a class of individuals that are widely disfavored publicly and politically.[139] The fact that incarcerated people are widely disfavored is not a legitimate reason to maintain a legislative provision as harmful as the administrative exhaustion requirement.[140]

D. Removal as the Best Route for Immediate Justice

Prison litigation statistics indicate that incarcerated plaintiffs file at a rate similar to their non-incarcerated counterparts,[141] and that a majority of their claims more often revolve around their civil rights and conditions of their confinement rather than the frivolous suits cherry-picked by PLRA-friendly senators.[142] Nevertheless, it is clear that a sudden complete and total recall of the PLRA would cause an influx of additional litigation.[143] Unfortunately, our federal court system is currently unequipped to handle such a significant increase in caseload.[144] This Article proposes the removal of the administrative exhaustion requirement to remedy the unacceptable bias and inconsistency faced by incarcerated litigants.[145] However, this proposal would leave other provisions, such as the three-strikes rule, in place to discourage and deter genuinely frivolous filings by incarcerated litigants, to the extent that they do occasionally occur.[146] This is not to suggest that provisions other than

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138. Schlanger, *Trends*, *supra* note 17, at 157 (demonstrating only 10.2 out of 1000 prisoners filed a federal civil rights case in 2012—that is, 0.01% of prisoners).

139. *See generally* Macfarlane, *supra* note 19, at 1186 (discussing at length the ways in which the PLRA "codifies animus" against incarcerated people).

140. Macfarlane, *supra* note 19, at 1187 ("Justice burdened by onerous process can also be justice denied.").

141. Schlanger, *Inmate Litigation*, *supra* note 1, at 1576.

142. *Id.* at 1571.

143. Schlanger, *Trends*, *supra* note 17, at 157 (indicating a marked decrease in inmate federal civil rights filings after the enactment of the PLRA, suggesting that removing the legislation would cause an uptick in filings once again).

144. *See* Andrew Kragie, *Reps Want to Add Lower Court Judges, But Divided on How*, LAW360 (Feb. 24, 2021, 4:51 PM), https://www.law360.com/articles/1358026/reps-want-to-add-lower-court-judges-but-divided-on-how; (discussing potential legislative solutions for overburdened federal courts); Renato Mariotti, *Stuck in an Overwhelmed Legal System: Civil Suits, Criminal Defendants, and Trump's Tax Returns*, POLITICO (Mar. 20, 2020, 5:50 PM), https:// www.politico.com/news/magazine/2020/03/20/stuck-in-an-overwhelmed-legal-system-civil-lawsuits-criminal-defendants-and-trumps-tax-returns-139579 (providing insight on how the coronavirus pandemic and current political events have negatively impacted the operations of the court system).

145. *See* Macfarlane, *supra* note 19, at 1213 (discussing bias against incarcerated people); Mikkor, *supra* note 4, at 574 (summarizing the potential for bias resulting from the exhaustion requirement).

146. 28 U.S.C. § 1915(g) (exempting prisoners who have filed frivolous claims from securing IFP status).

the administrative exhaustion requirement are not similarly harmful to incarcerated people or that the overall goal of the legislature should not be to eventually overturn the PLRA altogether.[147] However, the extreme risk for pervasive bias to result in the dismissal of otherwise meritorious cases should motivate legislators to repeal the administrative exhaustion requirement in order to provide immediate relief to incarcerated plaintiffs who have been unfairly shut out of federal court.[148]

It has been suggested that legislative action is not the most effective way to enact change to the PLRA.[149] The argument is that a judicially applied exceptions doctrine is a more effective remedy to the harms caused by the PLRA because Congress is unlikely to take up the cause of prisoners due to political and public unpopularity of the topic.[150] This is a strong argument, because prisoners are in fact an unpopular class, which often results in legislative and judicial decisions that have negative impacts on incarcerated people.[151] However, the *Lomax* decision, as well as earlier PLRA decisions, have demonstrated that the judiciary has very little inclination to make exceptions to or uphold creative applications of the administrative exhaustion requirement due to the clear, controlling statutory language of the PLRA.[152] Furthermore, recent cultural shifts regarding the general public's understanding of mass incarceration may influence lawmakers to look beyond the traditional animus held toward prisoners in pursuit of re-election.[153] In whole, it is up to Congress to loosen the PLRA's grip on incarcerated plaintiffs to ensure fair and just access to federal court for all.

IV. CONCLUSION

The PLRA has had a devastating impact on the ability of incarcerated people to bring grievances regarding the conditions of their

147. *See, e.g.*, O'Bryan, *supra* note 8 (discussing how restrictions imposed on inmates by the PLRA from bringing suits alleging non-physical harm severely limits the number of inmate claims that reach federal court); *see also No Equal Justice*, *supra* note 16 (discussing the dangers of the attorney's fee provision and the applicability of the PLRA to juveniles).

148. Schlanger, *Inmate Litigation*, *supra* note 1, at 1652 (discussing the dangers of the exhaustion requirement to constitutionally meritorious claims).

149. Mikkor, *supra* note 4, at 576–77.

150. *Id.*

151. *See generally* Macfarlane, *supra* note 19.

152. Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1724 (2020) ("This case begins, and pretty much ends, with the text of Section 1915(g)."); Booth v. Churner, 532 U.S. 731, 738–41 (2001) (explaining how the statutory language directly controls judicial decision-making regarding the administrative exhaustion requirement).

153. *See* Williams, *supra* note 7.

incarceration before a federal court.[154] The most devastating provision of the PLRA, the administrative exhaustion requirement, has served to exclude countless meritorious inmate claims from federal court, leaving incarcerated plaintiffs little to no reprieve for harms committed against them in correctional institutions.[155] In the years since the legislation was enacted, both the judiciary and the legislature have upheld strict interpretations of the administrative exhaustion requirement despite the glaring potential for bias and inconsistency from both prison administration and the judiciary in executing the provision.[156]

The recent Supreme Court decision *Lomax v. Ortiz-Marquez* tightened the padlock on the courthouse door for incarcerated plaintiffs by holding that all dismissals for failure to exhaust administrative remedies count as a "strike" against the plaintiff's access to already sparse financial relief from filing fees.[157] Congress must act immediately to remedy this grave injustice, which leaves incarcerated people vulnerable to mistreatment with no means of judicial relief. This Article proposes removal of the administrative exhaustion requirement from the PLRA because it is fraught with bias and inconsistency and has the most detrimental effect on meritorious claims by incarcerated plaintiffs.[158] It is past time for lawmakers to set aside historical hostilities toward incarcerated citizens and legislate for equal access and justice for all.

154. Schlanger, *Trends*, *supra* note 17, at 158.
155. Schlanger, *Inmate Litigation*, *supra* note 1, at 1650.
156. *See Lomax*, 140 S. Ct. at 1724; Woodford v. Ngo, 548 U.S. 81, 83–84 (2006); *Booth*, 532 U.S. at 740–41.
157. 140 S. Ct. at 1723.
158. Schlanger, *Inmate Litigation*, *supra* note 1, at 1652.

Feres Lives: How the Military Medical Malpractice Administrative Claims Process Denies Servicemembers Adequate Compensation

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"The report of my death was an exaggeration." — Mark Twain, 1897

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I. INTRODUCTION.

For more than seventy years, active-duty members of the United States armed forces injured by the negligence of military medical practitioners have been denied redress in the federal courts for their injuries. Surviving spouses, children, and probate estates have been turned away from the courthouse. The United States Supreme Court has justified this practice in a series of cases interpreting the Federal Tort Claims Act ("FTCA"),[1] a partial waiver of the federal government's sovereign immunity to suits sounding in law. These precedents—collectively called the *Feres* doctrine—are a judicial invention constructed from a complex and opaque series of arguments about the structure of the federal system of statutory compensation for servicemembers.[2] The arguments often ignore the plain meaning of the broad, sweeping language of the FTCA, and have been criticized as internally incoherent, and productive of absurd and unfair results.[3]

Thus, many commentators celebrated when Congress enacted legislation in 2019 authorizing the Department of Defense to evaluate and settle servicemembers' military medical malpractice claims through an administrative claims process.[4] But to eulogize *Feres* would be premature. This Article argues that aside from the simple fact that servicemembers still may not sue for their injuries in federal court, there is good reason to think that the claims process will produce inadequate compensation for servicemembers and have the latent effect of insulating and entrenching the *Feres* doctrine for many years to come.[5]

Part II.A gives a brief account of American sovereign immunity jurisprudence and the enactment of the FTCA, and Part II.B explains the development of the Supreme Court's *Feres* doctrine. Part II.C describes a recent legislative effort to overturn the *Feres* Doctrine and the 2019 enactment of an administrative claims process for servicemember military medical malpractice claims. Then, Part III addresses critical analyses of the Court's *Feres* doctrine jurisprudence, considers certain positive aspects of the administrative claims legislation, and criticizes its shortcomings. Finally, Part IV

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1. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–2680.

2. *See generally* John B. Wells, Comment, *Providing Relief to the Victims of Military Medicine: A New Challenge to the Application of the Feres Doctrine in Military Medical Malpractice Cases*, 32 DUQ. L. REV. 109, 110–17, 124–29 (1993) (explaining the origin of the Feres doctrine and arguing that it should not apply in cases of military medical malpractice).

3. *See, e.g.*, United States v. Johnson, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting).

4. *See infra* Part III.B.

5. *See infra* Part III.C.

proposes judicial and legislative solutions that aim to mitigate the substantive unfairness faced by servicemembers injured by military medical malpractice and makes several recommendations for scholars and activists concerned with that unfairness. Part V provides brief concluding remarks.

II. BACKGROUND

A. Sovereign Immunity and the Federal Tort Claims Act

The doctrine of sovereign immunity posits that a sovereign power cannot be sued in its own court unless the sovereign consents to the suit.[6] The Framers of the United States Constitution were familiar with the doctrine—which has its origin in traditional English law[7]—and they wrote or argued on various occasions that it was incorporated in the structure of the Constitution as to the state governments.[8] Justice Joseph Story wrote in 1840 that the federal government retained immunity through the structure of its Article III grant of jurisdiction to the federal courts because the federal judicial power over "controversies to which the United States shall be a party" applies only to actions where the United States is a plaintiff.[9] The Supreme Court has since approved of this view.[10]

Narrowly-tailored exceptions to the federal government's immunity have existed as early as 1855, but personal injury tort claims remained mostly barred for most of the country's history.[11] In the nineteenth and early twentieth centuries, Congress provided limited remedies including a system of private bills to compensate

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6. *See generally* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 440 (2005) (describing the origins and basic premises of American federal sovereign immunity doctrine).

7. The King's immunity was in part a consequence of the English view that a lord should not sit in judgment of a claim against himself. *See generally* Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 395 (2005) (explaining the historical origins of sovereign immunity doctrine in English law).

8. *See* Sisk, *supra* note 6, at 443; *see also, e.g.*, THE FEDERALIST NO. 81, at 5 (Alexander Hamilton) (McLean ed., 2020) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT.") (emphasis in original).

9. U.S. Const. art. III, § 2, cl. 1; JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 332, at 199 (1840).

10. *See* United States v. Lee, 106 U.S. 196, 239 (1882) (explaining that the United States cannot be sued except when authorized by an act of Congress).

11. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 530–31, 533–34 (2008). Congress waived sovereign immunity over contract and federal statutory claims in 1855, and admiralty claims in 1920. *Id.* In 1882, the Supreme Court recognized a constitutional ejectment claim against federal agents in possession of private real property. *Lee*, 106 U.S. at 218, 220–21 (citing U.S. CONST. amend. V).

personal injury claims.[12] But private bills were inefficient, and Congress was especially hesitant to grant bills to a particular class of claimants—persons injured while serving in the United States armed forces.[13] Congress justified this practice on the ground that various administrative settlement schemes existed specifically to compensate servicemembers.[14] However, the remedies awarded by those schemes were often inadequate as compared to those available in tort.[15]

Finally, in 1946, Congress enacted the FTCA, a limited waiver of the federal government's sovereign immunity that, for the first time, granted the federal courts exclusive subject matter jurisdiction over certain tort claims against the federal government.[16] It authorized the courts to decide:

> [C]ivil actions on claims against the United States . . . for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred.[17]

The FTCA also permitted federal agencies to evaluate and settle tort claims administratively,[18] and imposed a requirement that FTCA claimants exhaust those administrative remedies before suing in federal court.[19] Congress expressly excluded "claim[s] arising out of the combatant activities of the military . . . during time of war,"[20] and "claim[s] arising in a foreign country" from the waiver of sovereign immunity.[21] Despite this broad language, federal courts were initially hesitant to interpret the FTCA with the full breadth possible under the statutory text.[22] Instead, they followed the common law doctrine that "statutes in derogation of sovereign

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12. *See* Note, *Military Personnel and the Federal Tort Claims Act*, 58 YALE L.J. 615, 617–18 (1949) [hereinafter *Military Personnel*].
13. *Id.* at 618 n.12.
14. *See, e.g.*, Military Personnel Claims Act, 59 Stat. 225 (1945) (authorizing settlement of small claims by servicemembers, but precluding recovery for personal injury or wrongful death "incident to . . . service").
15. See *Military Personnel*, *supra* note 12, at 620 n.23.
16. 28 U.S.C. §§ 1346, 2671–2680.
17. *Id.* § 1346(b).
18. *Id.* § 2672.
19. *Id.* § 2675.
20. *Id.* § 2680(j).
21. *Id.* § 2680(k).
22. *See Military Personnel*, *supra* note 12, at 615.

immunity must be strictly construed,"[23] and FTCA military plaintiffs suffered for it.[24]

B. Feres Jurisprudence and Rationales

Three years after the FTCA was enacted, the Supreme Court considered the question of servicemembers' FTCA claims for the first time in *Brooks v. United States*.[25] Scholars predicted that the Court would interpret the FTCA to categorically include servicemembers' claims.[26] The plaintiffs, Welker Brooks and his brother Arthur Brooks (through his estate), were active duty servicemembers.[27] While on leave away from base, the brothers rode in an automobile with their father James Brooks along a public highway in North Carolina.[28] As the Brooks' vehicle navigated an intersection, a United States Army truck driven by a civilian Army employee struck the Brooks' vehicle on its side, killing Arthur Brooks and grievously injuring Welker and James Brooks.[29] Welker Brooks and the estate of Arthur Brooks filed FTCA claims.[30]

Critically, the Supreme Court granted certiorari to resolve the narrow question of servicemembers' ability to sue for "injuries not incident to their service."[31] Noting the absence of any statutory language expressly excluding claims by servicemembers, the Court held that servicemember plaintiffs were not categorically barred from bringing FTCA claims.[32] The Court reasoned that the inclusion of the "combatant activities" and "foreign country" exceptions[33] and the legislative history of the FTCA[34] suggested that Congress

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23. *Id. See generally* SHAMBIE SINGER & NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 62:1 (8th ed. 2018), Westlaw (database updated Nov. 2021) (explaining that a court will interpret a statute to waive sovereign immunity only to the extent that the plain language clearly expresses an intention to consent to suit and liability).

24. *See, e.g.*, Long v. United States, 78 F. Supp. 35, 37 (S.D. Cal. 1948) (finding that civilian War Department driver who deviated from normal route and caused a car accident was not acting in scope of employment for FTCA purposes); *see also Military Personnel*, *supra* note 12, at 615 n.2.

25. 337 U.S. 49, 50–51 (1949).

26. *See Military Personnel*, *supra note* 12, at 618.

27. *Brooks*, 337 U.S. at 50–51.

28. *Id.* at 50.

29. *Id.*

30. *Id.*

31. *Id.* at 50. The "incident to service" distinction was a product of pre-FTCA military claims practice. *See* Military Personnel Claims Act, 59 Stat. 225 (excluding claims for injuries "incident to . . . service").

32. *Brooks*, 337 U.S. at 51.

33. 28 U.S.C. § 2680(j), (k).

34. "There were eighteen tort claims bills introduced between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the

had affirmatively contemplated FTCA claims by servicemembers, and intended to include them in the waiver of sovereign immunity.[35] It therefore allowed the Brooks' claims to proceed.[36]

One year after concluding that servicemembers could sue for injuries incurred not "incident to service,"[37] the Court confronted what it characterized as the inverse question in *Feres v. United States*.[38] The Court considered whether "claimant[s who], while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces" could state claims under the FTCA.[39] *Feres* involved three consolidated cases, all featuring negligence claims by or on behalf of servicemembers who were on active duty when they were injured: LT Rudolph Feres was killed in a barracks fire; Arthur K. Jefferson, an enlisted U.S. Army soldier, had a towel marked "Medical Department U.S. Army" removed from his abdomen eighteen months after surgery by military doctors; LTC Dudley R. Griggs died due to alleged "negligent and unskillful treatment received by army [*sic*] surgeons."[40] The Supreme Court unanimously held that the plaintiffs could not state FTCA claims because their injuries "[arose] out of or [were] in the course of activity incident to service."[41]

Departing from its textual approach in *Brooks*,[42] the *Feres* Court explained its decision in terms of three interpretive policy rationales. The first rationale was the only one based on the text of the FTCA: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ."[43] The Court interpreted this language to mean that an FTCA claim may proceed only if the relationship between the plaintiff and the federal government is analogous to a relationship between private persons where precedent indicates tort liability may exist.[44] Considering the government in its whole military capacity, the Court concluded that no analogous precedent for private

present Tort Claims Act was . . . introduced, the exception concerning servicemen had been dropped." *Brooks*, 337 U.S. at 51–52.

35. "It would be absurd to believe that Congress did not have the servicemen in mind . . . when this statute was passed." *Id.* at 51.

36. *Id.* at 54.

37. *Id.* at 50, 54.

38. 340 U.S. 135, 138 (1950).

39. *Id.* (quoting *Brooks*, 337 U.S. at 52) ("This is the 'wholly different case' reserved from our decision in [*Brooks*].").

40. *Id.* at 136–37.

41. *Id.* at 146.

42. *See Brooks*, 337 U.S. at 51 (interpreting textual provisions of the FTCA).

43. 28 U.S.C. § 2674; *Feres*, 340 U.S. at 141; *see also* 28 U.S.C. § 1346(b)(1) (using similar language about parallel private liability).

44. *Feres*, 340 U.S. at 142.

tort liability existed.[45] The Court tacitly acknowledged the absolutizing character of its analysis:

> [I]f we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability. In the usual civilian doctor and patient relationship, there is of course a liability for malpractice . . . . But the [Government's] liability . . . here is that created by 'all the circumstances[.]'[46]

But the Court provided no citation for the "*all* the circumstances" language,[47] which does not appear in the statutory text,[48] and it did not explain why this standard applies with such force only in cases involving servicemember plaintiffs.[49]

Second, the Court opined that the FTCA's requirement that courts apply state tort law indicated that Congress intended to exclude claims "incident to service" from its waiver of sovereign immunity.[50] Under this "distinctively federal character" rationale, the Court reasoned that federal law should generally govern the government-servicemember relationship,[51] and that subjecting servicemembers who cannot control where they are stationed to heterogenous state law would constitute poor public policy.[52] Those servicemembers, the Court wrote, cannot "limit the jurisdiction in which it will be possible for federal activities to cause [them] injury."[53] This unfairness, the Court concluded, was evidence that Congress had not intended to authorize FTCA claims by active duty servicemembers.[54]

Finally, the Court found that claims "incident to service" should be excluded because servicemembers can generally obtain some measure of no-fault compensation under several statutes that authorize administrative payments to servicemembers.[55] Congress has enacted a patchwork of non-adversarial statutory benefit schemes to compensate servicemembers and their families for

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45. *Id.*
46. *Id.*
47. *Id.* (emphasis added).
48. The statutes contemplate the United States as an indeterminate "private tortfeasor" under "like" circumstances. 28 U.S.C. §§ 1346(b)(1), 2674.
49. *See, e.g.*, United States v. Muniz, 374 U.S. 150, 152–53 (1963) (permitting FTCA suits by federal prisoners).
50. *Feres*, 340 U.S. at 146.
51. *Id.* at 143–44.
52. *Id.* at 142–43.
53. *Id.*
54. *Id.* at 146.
55. *Id.* at 145.

injuries and death that occur during military service, many of which were already in place when *Feres* was decided.[56] The Veterans Benefits Act ("VBA") is the primary vehicle for compensating a servicemember who suffers a service-connected injury.[57] The VBA compensates a servicemember who becomes disabled or whose disability is aggravated by an injury sustained while a member of the uniformed services, notably including injuries caused by military medical treatment.[58] By contrast, the Military Claims Act ("MCA")[59]—the primary vehicle for compensating a servicemember's ordinary personal injury claim—expressly bars any claim for an injury incurred "incident to service," thus excluding claims arising from military medical treatment.[60] Observing that the text of the FTCA did not specify how or whether an FTCA judgment was to be adjusted against statutory compensation,[61] the Court concluded that because the policy of the FTCA was to "extend a remedy to those who had been without,"[62] Congress must not have intended to create an additional remedy for servicemembers.[63]

The Court ultimately distinguished the *Feres* cases from *Brooks* on the grounds that the *Feres* plaintiffs' injuries had occurred "incident to service."[64] But the Court did not explain how it distinguished between plaintiffs in the Brooks' position—on active duty furlough, driving along a public highway away from base[65] and deemed to be "under no orders or duty and on no military mission,"[66]—and a plaintiff in Arthur K. Jefferson's position—active duty and not on furlough, but anesthetized, and undergoing non-

56. *See, e.g.*, 38 U.S.C. §§ 1301–1323 (dependency and indemnity compensation for service-connected deaths); *id.* §§ 1501–1562 (pension for non-service-connected disability or death or for service); *id.* §§ 1701–1754 (hospital, nursing home, domiciliary, and medical care); *id.* §§ 1901–1988 (life insurance).

57. *See id.* §§ 1101–1163.

58. *Id.* § 1110. When a former servicemember files a VBA claim, the Veterans Administration considers medical evidence provided by the veteran and either denies the claim or assigns the veteran a disability rating based on the severity of the disability and certain other considerations. *See* 38 C.F.R. §§ 4.1–4.31. If accepted, the veteran then receives a monthly payment based on the disability rating according to a statutorily-fixed schedule. For example, a disability rating of 10% corresponds to a monthly payment of $123, a disability rating of 20% corresponds to a monthly payment of $243, and so forth. 38 U.S.C. § 1114.

59. *Id.* §§ 2731–2740.

60. *Id.* § 2733(b)(3). The MCA replaced the Military Personnel Claims Act, which was in place at the time *Feres* was decided, and which provided substantially the same relief. 59 Stat. 225 (1945).

61. Feres v. United States, 340 U.S. 135, 144 (1950).

62. *Id.* at 140.

63. *Id.* at 144.

64. *Id.* at 146.

65. Brooks v. United States, 337 U.S. 49, 50 (1949).

66. *Feres*, 340 U.S. at 146.

combat-related surgery.[67] Whereas the active duty servicemembers in *Brooks* could have been recalled to active duty at a moment's notice, Jefferson was not competent to perform any duty, no matter how urgent the order.

Four years later, the Supreme Court considered the scope of the "incident to service" standard in *United States v. Brown*.[68] The plaintiff, Peter Brown, had injured his knee while on active duty and received treatment from military doctors, had been honorably discharged, and had subsequently received negligent medical treatment at a veteran's hospital, causing "serious[]" and "permanent[]" damage to the nerves in Brown's leg.[69] In a brief opinion, the Court noted the rules announced in *Brooks* and *Feres*[70] and held that because Brown had alleged that the government negligence occurred only after he was discharged, his injury was not "incident to service," and his FTCA claim could proceed.[71]

Though *Brown* could be read as an indication that the Court would apply the "incident to service" standard more leniently, it did just the opposite.[72] In subsequent decisions, the Court repeated and amplified dicta in *Brown* to entrench the judicial prohibition on "incident to service" FTCA claims.[73] Discussing the law of *Feres*, the *Brown* Court wrote:

> The peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [FTCA] were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read the [FTCA] as excluding claims of that character.[74]

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67. *Id.* at 137.
68. 348 U.S. 110, 112 (1954).
69. *Id.* at 110–11.
70. *Id.* at 111–12.
71. *Id.* at 112.
72. *See, e.g.*, United States v. Johnson, 481 U.S. 681, 690–91 (1987) (emphasizing military discipline rationale in analysis of *Brown*, 348 U.S. at 112); United States v. Shearer, 473 U.S. 52, 57 (1985) (quoting military discipline dicta in *Brown*, 348 U.S. at 112); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977) (disclaiming any FTCA case that would require "second-guessing [of] military orders").
73. *Brown*, 348 U.S. at 112; *see also* cases cited *supra* note 72 (focusing on the novel military discipline rationale first introduced in *Brown*).
74. *Brown*, 348 U.S. at 112.

But the *Feres* Court had not actually made this argument.[75] *Brown* thus introduced military discipline as a new and independent rationale for the *Feres* doctrine.[76]

For the next half century, federal courts applied the *Feres* doctrine strictly and developed a jurisprudence based on duty status and the three-part rationalization synthesized in the original *Feres* trilogy.[77] By 1977, the military discipline rationale had replaced the private parallel liability rationale in the Supreme Court's *Feres* analysis. This effectively severed the doctrine from any basis in the FTCA's positive statutory text.[78] That year, the Court held in *Stencel Aero Engineering Corp. v. United States* that a fighter jet parts manufacturer could not maintain an indemnity claim against the government after it was sued by a Missouri Air National Guard pilot who was injured while ejecting from his fighter jet.[79] In addition to elevating the military discipline rationale, the *Stencel* Court recast *Feres*'s emphasis on alternative compensation as implicating the mere *availability* of no-fault statutory compensation rather than the FTCA's lack of a clear adjustment clause.[80]

The policy confusion continued in *United States v. Shearer*[81] and *United States v. Johnson*.[82] In *Shearer*, the phrase "incident to service" appeared only once,[83] and the Court stated that "*Feres* seems best explained by . . . the effects of the maintenance of such suits on discipline . . . ."[84] In a footnote, the *Shearer* Court described the distinctively federal character and alternative compensation rationales as "no longer controlling."[85] By contrast, the *Johnson* Court asserted that it "ha[d] never deviated" from the "incident to service" standard,[86] and that the distinctively federal character, alternative compensation, and military discipline rationales controlled in cases implicating the *Feres* doctrine.[87]

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75. *Compare id. with* Feres v. United States, 340 U.S. 135, 141–42 (1950), *and* Brooks v. United States, 337 U.S. 49, 52 (1949).

76. *See Johnson*, 481 U.S. at 694 (Scalia, J., dissenting).

77. *See id.* at 692; *Shearer*, 473 U.S. at 57; *Stencel*, 431 U.S. at 673.

78. *Stencel*, 431 U.S. at 671–72.

79. *Id.* at 673.

80. *Compare id.* at 673 ("[T]he military compensations scheme provides an upper limit of liability for the Government as to service-connected injuries."), *with Feres*, 340 U.S. at 144 ("The absence of [a clause adjusting these two types of remedy] is persuasive that there was no awareness that the [FTCA] might be interpreted to permit recovery for injuries incident to military service.").

81. 473 U.S. at 57, 58 n.4.

82. 481 U.S. 681, 686 (1987).

83. 473 U.S. at 57.

84. *Id.* (quoting United States v. Muniz, 374 U.S. 150, 162 (1963)).

85. *Shearer*, 473 U.S. at 58 n.4.

86. *Johnson*, 481 U.S. at 686.

87. *Id.* at 689–90.

In a harsh dissent joined by three other Justices, Justice Scalia characterized the Court's *Feres* jurisprudence as materially unfair and inconsistent with the text of the FTCA.[88] Justice Scalia would have found that Congress did intend the FTCA to extend its waiver to "incident to service" claims because, in addition to *not* specifically excluding such claims, Congress *did* specifically exclude certain discrete categories of injuries that would ordinarily apply to certain servicemember claims.[89] Moreover, a strict interpretation of the parallel private liability requirement—the only *Feres* rationale based in the FTCA's text—would make several of the FTCA's enumerated exceptions superfluous.[90] Thus, Justice Scalia would have held that the exclusion of certain discrete categories of "incident to service" claims demonstrated Congress' intention to permit "incident to service" claims under the FTCA generally.[91]

Johnson marked the last time the Supreme Court entertained a serious challenge to the substance of its *Feres* doctrine.[92] Despite—or perhaps because of—the Court's extensive but opaque treatment of *Feres* over the years, the lower federal courts have come to apply a virtually *per se* prohibition on servicemember FTCA claims based on active duty military status at the time of the injury.[93] Although the lower courts generally retain and utilize the "incident to service" language, they often give only brief attention to the question of what actually constitutes activity "incident to service."[94] With the possible exception of the Fifth Circuit, the courts tend to avoid the question altogether.[95] For a servicemember victim of military medical malpractice, *Feres* therefore operates as a complete bar

88. *Id.* at 692, 703.

89. *Id.* at 693 (citing Brooks v. United States, 337 U.S. 49, 51(1949)).

90. "[P]rivate individuals typically do not, for example, transmit postal matter, 28 U.S.C. § 2680(b), collect taxes or customs duties, § 2680(c), impose quarantines, § 2680(f), or regulate the monetary system, § 2680(i)." *Id.* at 694 (Scalia, J., dissenting).

91. 28 U.S.C. § 2674; *Johnson*, 481 U.S. at 694–95.

92. *Johnson*, 481 U.S. 681.

93. *See, e.g.*, Stephenson v. Stone, 21 F.3d 159, 162 (7th Cir. 1994) (dismissing FTCA claim by survivors of servicemember who was killed by Army sergeant against whom decedent was expected to testify, because "a servicemember's injury is incident to . . . service whenever the injury is incurred while . . . on active duty or subject to military discipline"); Loughney v. United States, 839 F.2d 186, 188 (3d Cir. 1988) (holding that FTCA suit on behalf of active duty servicemember who suffered post-operative respiratory arrest and coma following surgery was barred by *Feres* because "[i]t is simply the military status of the claimant that is dispositive"); Torres v. United States, 621 F.2d 30, 32 (1st Cir. 1980) (barring former servicemember's FTCA claim for Army's negligent failure to classify his discharge as "honorable," because "discharge is incident to every soldier's military service").

94. *See* cases cited *supra* note 93.

95. Parker v. United States, 611 F.2d 1007, 1013–14 (5th Cir. 1980) (applying three-factor test considering duty status, situs of injury, and activity at time of injury to find that servicemember's death in off-reservation automobile accident caused by fellow soldier was not "incident to service").

against FTCA suit unless the servicemember was already discharged from the service when injured.

C. Recent Legislative Effort to Overturn Feres, and the National Defense Authorization Act of 2020

In recent decades, members of Congress have proposed legislation on several occasions that would overturn the *Feres* doctrine as applied to medical malpractice claims.[96] Most recently, the SFC Richard Stayskal Military Medical Accountability Act of 2019 ("SFC Richard Stayskal Act") would have overturned *Feres* in medical malpractice cases and precluded adjustment of damage awards to account for military life insurance payments.[97] SFC Richard Stayskal is a former U.S. Army Green Beret whose military doctors failed to properly diagnose a tumor on his lung, resulting in the progression of Stayskal's illness into stage four terminal lung cancer.[98] Because Stayskal's active duty status barred him or his estate from bringing an FTCA claim, Stayskal petitioned Congress for a legislative remedy.[99] The SFC Richard Stayskal Act gained the support of various members of Congress of both major political parties, but it also faced staunch opposition.[100] By late 2019, it was apparent that the stand-alone legislation would not be enacted.[101]

In a compromise, legislators aligned with the Department of Defense approved an amendment to the National Defense Authorization Act for Fiscal Year 2020 ("NDAA") that would authorize the Department of Defense to receive and settle military medical

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96. *See* Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. (2009); H.R. 1478, 111th Cong. (2009); *see also* H.R. 6093, 110th Cong. (2008); H.R. 2684, 107th Cong. (2001); H.R. 3407, 102d Cong. (1991); S. 347, 100th Cong. (1987); H.R. 1054, 100th Cong. (1987); S. 489, 99th Cong. (1985); H.R. 3174, 99th Cong. (1985).

97. SFC Richard Stayskal Act of 2019, S. 2451, 116th Cong. (2019); H.R. 2422, 116th Cong. (2019). The provision against adjustments would have been in keeping with the common law rule that compensatory tort damages are generally not adjusted to account for benefits the plaintiff has received from collateral sources. *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (AM. L. INST. 1979).

98. J.D. Simkins, *This Green Beret is Battling Cancer—And the Government—After Army Medical's 'Gross Malpractice'*, ARMY TIMES (Nov. 7, 2018), https://www.armytimes.com/news/your-army/2018/11/07/this-green-beret-is-battling-cancer-and-the-government-after-army-medicals-gross-malpractice/.

99. Roxana Tiron & Travis J. Tritten, *Deadly Tumors, Surgical Lapses: Troops Court Trump in Bid to Sue*, BLOOMBERG GOV'T (July 30, 2019, 12:00 AM), https://about.bgov.com/news/deadly-tumors-surgical-lapses-troops-court-trump-in-bid-to-sue/.

100. Matt Grant, *Bill That Would Give Soldiers Right to Sue Government for Medical Malpractice Stalls in Senate*, FOX46 CHARLOTTE (Oct. 15, 2019, 12:06 AM), https://www.fox46.com/news/bill-that-would-give-soldiers-right-to-sue-government-for-medical-malpractice-stalls-in-senate/. In a rare move, the Department of Defense publicly opposed the legislation when it was introduced. *Id.*

101. *Id.*

malpractice claims through an in-house administrative process.[102] The amendment would leave the general *Feres* bar intact, but add a formal avenue for servicemembers to present their claims for consideration apart from the statutory benefits to which they were already entitled.[103] Congress passed the NDAA with the administrative process amendment, and President Donald Trump signed it into law on December 20, 2019.[104] The amendment was codified at 10 U.S.C. § 2733a, Chapter 163 "Military Claims," and expanded the provisions of the MCA—not the FTCA.[105]

In permissive language, the statute states that the "Secretary [of Defense] may allow, settle, and pay a claim against the United States for personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider."[106] The alleged negligence must have occurred in the scope of the health care provider's employment,[107] and must have occurred at a covered medical facility.[108] The statue defines "Department of Defense health care provider" as "a member of the uniformed services, civilian employee of the Department of Defense, or personal services contractor of the Department . . . [,]"[109] and "covered medical facility" is defined elsewhere in Title 10.[110] A servicemember must present a claim in writing to the Department of Defense "within two years after the claim accrues,"[111] and it must be otherwise barred under other applicable law, viz., the *Feres* doctrine.[112] Attorney's fees are not recoverable,[113] and attorneys are prohibited from charging their clients certain fees.[114] Again in permissive language, the statute provides that the Department of Defense may pay up to $100,000 on any meritorious claim, and may refer any excess amount to the Department of the Treasury for payment.[115] The statute also requires the Department of Defense to promulgate

102. Pub. L. No. 116–92 § 731, 133 Stat. 1198 (2019).
103. Id.
104. Pub. L. No. 116–92.
105. *See* discussion *supra* Part II.B (discussing the MCA and other statutory compensation schemes available to servicemembers).
106. 10 U.S.C. § 2733a(a).
107. *Id.* § 2733a(b)(2).
108. *Id.* § 2733a(b)(3).
109. *Id.* § 2733a(i)(2).
110. *Id.* § 1073d(b)–(d).
111. *Id.* § 2733a(b)(4). *See generally* 51 AM. JUR. 2D *Limitations of Actions* §§ 130, 160, Westlaw (database updated Nov. 2021) (describing accrual and the "discovery rule").
112. 10 U.S.C. § 2733a(b)(5).
113. *Id.* § 2733a(c).
114. *Id.* § 2733a(g).
115. *Id.* § 2733a(d).

regulations implementing the administrative process,[116] including uniform standards for evaluating claims based on the FTCA law of negligence in a majority of states.[117] The Department of Defense promulgated an interim final rule containing these regulations on June 17, 2021.[118] Finally, the statute imposes an annual reporting requirement whereby the Department of Defense must submit certain data and information about the claims it has processed in the previous year to the Senate and House Committees on Armed Services.[119]

III. ANALYSIS.

A. Inequity and Incoherence in Feres Jurisprudence

A servicemember injured in service of the United States should have the right to seek redress in federal court if the injury was proximately caused by the negligence of the United States government. The unfairness of the *Feres* doctrine in military medical malpractice cases is well documented, and the *Feres* rationales have been thoroughly excoriated by scholars and judges alike.[120] To revive these arguments at length would exceed the scope of this Article. But it bears repeating that *Feres* regularly visits cruel results upon servicemembers and families who have already experienced immense tragedy.[121] Such was the case of U.S. Navy LT Rebekah Daniel, who died in 2014 after receiving negligent natal care at a military hospital.[122] The Court of Appeals for the Ninth Circuit wrote:

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116. *Id.* § 2733a(f)(2)(A).

117. *Id.* § 2733a(f)(2)(B).

118. Medical Malpractice Claims by Members of the Uniformed Services, 86 Fed. Reg. 32, 194 (June 17, 2021) (to be codified at 32 C.F.R. pt. 45).

119. 10 U.S.C. § 2733a(h).

120. *See, e.g.*, Daniel v. United States, 139 S. Ct. 1713 (2019) (Thomas, J., dissenting) (quoting United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting)); Andrew F. Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1518 (2019); Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 40 (2007); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 12 (2003).

121. *See, e.g.*, Kelly v. United States, No. 19-cv-00978-BAS-AHG, 2020 WL 6074113, at *1, *6 (S.D. Cal. May 22, 2020) (declining to hear FTCA claim by estate of U.S. Navy seaman Antonio Contreras, who suffocated to death as a result of internal bleeding shortly after receiving military treatment for nasal dyspnea); Bosh v. United States, No. C19-5616 BHS-TLF, 2019 WL 6115016, at *1–2, *5 (W.D. Wash. Sept. 12, 2019) (dismissing U.S. Army soldier Emel Bosh's FTCA claim for injuries and expenses incurred as a result of compelled administration of anthrax vaccine).

122. Daniel v. United States, 889 F.3d 978, 980 (9th Cir. 2018) (affirming dismissal of FTCA claim by Rebekah Daniel's widower), *cert. denied*, 139 S. Ct. 1713.

> Lieutenant Daniel served honorably and well, ironically professionally trained to render the same type of care that led to her death. If ever there was a case to carve out an exception to the *Feres* doctrine, this is it. But only the Supreme Court has the tools to do so.[123]

The Supreme Court denied certiorari.[124]

Justice Scalia's observation that "nonuniform recovery cannot possibly be worse than (what *Feres* provides) [sic] uniform nonrecovery" is near tautological.[125] The statutory benefits otherwise available to servicemembers for medical malpractice injuries "incident to service" are inadequate.[126] This is particularly troubling because, at present, adverse military medical events appear to be increasing in frequency,[127] and the Department of Defense lacks a coherent understanding of the extent of the deficiencies in its medical system.[128] Because "medical care provided to servicemembers is conducted . . . in modern medical centers[,] there should be no military-related reason . . . why they would not be able to sue should their care deviate from the standard of care."[129]

B. Progress and Positive Reception of Administrative Medical Malpractice Claims Process for Servicemembers

The new military medical malpractice administrative claims process has been praised by some as a "step in the right direction" toward ensuring that servicemembers are equitably compensated when they are injured by negligent medical care.[130] For the first time, a servicemember who has suffered military medical malpractice may present his or her claim to a federal office statutorily

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123. *Daniel*, 889 F.3d at 982.

124. Daniel v. United States,139 S. Ct. 1713 (2018).

125. *Johnson*, 481 U.S. at 695–96 (Scalia, J., dissenting).

126. See Hugh B. McClean, *Delay, Deny, Wait till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 283–85 (2019); Brou, *supra* note 120, at 45–48.

127. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-378, DOD HEALTH CARE: DEFENSE HEALTH AGENCY SHOULD IMPROVE TRACKING OF SERIOUS ADVERSE MEDICAL EVENTS AND MONITORING OF REQUIRED FOLLOW-UP 9 (2018).

128. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-574, DEFENSE HEALTH CARE: EXPANDED USE OF QUALITY MEASURES COULD ENHANCE OVERSIGHT OF PROVIDER PERFORMANCE (2018).

129. Callum D. Dewar et al., *The Changing Landscape of Military Medical Malpractice: From the Feres Doctrine to Present*, 49 NEUROSURGICAL FOCUS, 2020, at 1, 2, https://doi.org/10.3171/2020.8.FOCUS20594.

130. Patricia Kime, *A Dent to Feres: Troops to Be Able to File Claims—But Not Sue—For Medical Malpractice*, MIL. TIMES (Dec. 11, 2019), https:// www.militarytimes.com/news/pentagon-congress/2019/12/11/a-dent-to-feres-troops-to-be-able-to-file-claims-but-not-sue-for-medical-malpractice/; *see also* Pub. L. No. 116-92 § 731, 133 Stat. 1198.

authorized to evaluate and settle the claim on its merits without strict consideration for the servicemember's disability status.[131] The medical malpractice statute does not overturn the *Feres* doctrine, but some commentators—including one Congressional sponsor—have nevertheless declared "victory" for proponents of the SFC Richard Stayskal Act.[132] Others have gone so far as to incorrectly state that the *Feres* doctrine has been repealed as to medical malpractice claims.[133]

For proponents of the *Feres* doctrine, the administrative claims process is a compromise that crafts a remedy where one was lacking, and also accounts for the concerns they cite to rationalize the doctrine.[134] The process preserves the uniform, non-adversarial nature of military compensation,[135] and avoids placing servicemembers and their commanders on opposite sides of contentious litigation.[136] The statute demonstrates legislative sympathy for the notion that the government should fairly compensate injured servicemembers through an expansion of legal remedies.[137] And, federal courts might take this as a signal to interpret and apply their *Feres* jurisprudence more sympathetically to plaintiff servicemembers.[138]

C. Problems with Administrative Process for Military Medical Malpractice Claims

Despite the praise and tepid gains occasioned by the medical malpractice statute, the administrative claims process fails to meaningfully remedy the injustices of the *Feres* doctrine. The evaluation

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131. 10 U.S.C. § 2733a.

132. Press Release, Jackie Speier, Congresswoman, Rep. Speier Applauds Partial Feres Fix in NDAA Conference Report to Allow Compensation for Victims of Medical Malpractice (Dec. 10, 2019), https://speier.house.gov/2019/12/rep-speier-applauds-partial-feres-fix-in-ndaa-conference-report-to-allow-compensation-for-victims-of-medical-malpractice; Ella Torres, *Terminally Ill Green Beret Wins Victory in Battle to File Claim Against Military for Alleged Malpractice*, ABC NEWS (Dec. 11, 2019, 12:41 PM), https://abcnews.go.com/Politics/terminally-ill-green-beret-wins-victory-battle-file/story?id=67630964.

133. *See, e.g.*, David J. Halberg, *Military Families Can Now Sue for Medical Malpractice*, HALBERG & FOGG PLLC (Jan. 6, 2020), https://www.southfloridainjurylawyerblog.com/military-families-can-now-sue-for-medical-malpractice/.

134. *See generally* Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393 (2010) (arguing in favor of the *Feres* doctrine).

135. 10 U.S.C. § 2733a(f)(2)(B).

136. *Feres Doctrine—A Policy in Need of Reform?: Hearing Before the Subcomm. on Mil. Pers. of the H.R. Comm. on Armed Serv.*, 116th Cong., 123 (2019) (statement of Paul Figley, former Deputy Director, Torts Branch, Civil Division, United States Department of Justice).

137. *See* 165 CONG. REC. H10085 (daily ed. Dec. 11, 2019) (statement of Rep. Jackie Speier) ("After 70 years, we have tackled the Feres doctrine . . . to provide justice and compensation for medical malpractice performed at noncombat settings.").

138. *See* Dewar et al., *supra* note 129, at 3 ("[T]his new administrative claims process . . . could represent the first step toward more drastic changes.").

process is inherently biased, and the amount and availability of compensation under the statute are limited in scope. Worse, the existence of an alternative compensation system will entrench the *Feres* doctrine by structurally and doctrinally insulating it from judicial review and criticism.

1. Limited Scope

The new legislation only permits the Department of Defense to compensate claims for negligence committed by a "Department of Defense health care provider"[139] in a "covered military medical treatment facility."[140] A "covered" facility means a medical center, hospital, or ambulatory care center maintained by the Department of Defense.[141] Thus, a servicemember may not file a claim for an injury incurred at a facility maintained by the Department of Veterans Affairs ("VA"), or resulting from the negligence of a civilian employee or contractor of the VA.[142] Congress has imposed this obscure limitation even though active duty servicemembers are eligible for—and regularly do receive—treatment at VA health care facilities.[143] Moreover, the VA provides extensive practical training to inexperienced medical students and trainees.[144] At least one commentator has expressed concern that the claims process therefore excludes the servicemembers who may be most at risk of medical negligence, and most in need of a legal remedy.[145]

2. Structural Inadequacy

The claims process will not consistently provide adequate compensation to the servicemembers who are eligible to file a claim. Critical parts of the statute are written in permissive language, the statute gives the Department of Defense broad discretion to regulate the standards by which claims will be evaluated, and the

139. 10 U.S.C. § 2733a(a), (b)(2), (c).
140. *Id.* § 2733a(b)(3).
141. *Id.* § 2733a(i)(2), 1073d(b)–(d).
142. *See* Daniel Perrone, *The Feres Doctrine: Still Alive and Well After the 2020 National Defense Authorization Act?*, JURIST (Mar. 14, 2020, 1:00 PM), https://www.jurist.org/commentary/2020/03/daniel-perrone-feres-doctrine-ndaa/.
143. *See id.*; *VA & TRICARE Information*, DEP'T VETERANS AFFAIRS, https://www.va.gov/VADODHEALTH/TRICARE.asp (last visited Jan. 10, 2021).
144. "In Academic Year 2017, 43,565 medical residents, 24,683 medical students, 463 Advanced Fellows, and 849 dental residents . . . and students received some or all of their clinical training in VA." *Medical and Dental Education Program*, DEP'T VETERANS AFFAIRS, https://www.va.gov/oaa/gme_default.asp (last visited Jan. 10, 2021); *see* Perrone, *supra* note 142.
145. *See* Perrone, *supra* note 142.

Department of Defense is too deeply conflicted to evaluate these claims in an objective, disinterested manner.[146]

Under a plain language interpretation of the medical malpractice claims statute, the Department of Defense is merely *authorized* to compensate servicemembers who file meritorious claims.[147] The statute provides that the Department "*may* allow, settle, and pay a claim against the United States" for medical malpractice "incident to the service" of a servicemember.[148] Then, the statute clarifies that such "[a] claim *may* be allowed, settled, and paid . . . only if" certain requirements are met.[149] Another subsection states that the Department of Defense "*may* pay the claimant $100,000 . . . ."[150] By contrast, the word "shall" is used merely to impose requirements about reporting,[151] promulgation of implementing regulations,[152] and attorney's fees.[153]

The Department of Defense can also mitigate its own liability through its near-total regulatory and administrative control of the claims evaluation process.[154] The evaluative standards must be consistent with the law "in a majority of States,"[155] but there is no uniform state law rule for determining a physician's standard of care for purposes of medical malpractice.[156] "Medicine is an inexact science and eminently qualified physicians may differ as to what

146. 10 U.S.C. § 2733a(a), (b), (d)(1).

147. In modern statutory construction, "may" ordinarily indicates that the subject is authorized—not required—to take an action. *See* Opati v. Republic of Sudan, 140 S. Ct. 1601, 1609 (2020) (quoting Halo Electronics, Inc. v. Pulse Electronics, Inc., 136 S. Ct. 1923, 1931 (2016)) (indicating that use of "may" in a remedial statute "'*clearly* connotes discretion'") (emphasis in original)). "May" has sometimes been interpreted to mandate action by a public official. *See, e.g.*, John T. v. Marion Indep. School Dist., 173 F.3d 684, 688 (8th Cir. 1999) (applying Iowa law) (giving mandatory effect to clause following other mandatory language in statute that created legal right in student to an educational interpreter which "*may* be provided on nonpublic school premises") (emphasis added). However, the presumption of mere permissiveness is especially strong where, as here, Congress has used both "may" and "shall" at different places in the same statute. *See, e.g.*, Lopez v. Davis, 531 U.S. 230, 241 (2001) (holding that use of "may" and "shall" in same criminal statute indicated congressional intent that "may" denote discretion, and "shall" denote mandate). Moreover, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Peña, 518 U.S. 187, 192 (1996). *See also* SINGER & SINGER, *supra* note 23, at 1.

148. 10 U.S.C. § 2733a(a) (emphasis added).

149. *Id.* § 2733a(b) (emphasis added).

150. *Id.* § 2733a(d)(1) (emphasis added).

151. *Id.* § 2733a(e), (h).

152. *Id.* § 2733a(f).

153. *Id.* § 2733a(c)(2), (g).

154. *Id.* § 2733a(f).

155. *Id.*

156. *See generally* STEVEN E. PEGALIS, 1 AM. L. MED. MALPRACTICE § 3.3, Westlaw (database updated June 2021).

constitutes a preferable course of treatment."[157] Out of concern for isolated rural practitioners, the traditional rule therefore held that a physician's standard of care was determined by the "accepted medical practices in [the physician's] community."[158] Today, "probably a majority" of states have adopted a reasonably-prudent-professional standard, but variety remains the rule.[159] The military health system is composed of 475 medical centers, hospitals, and medical clinics of various sizes and levels of service.[160] Physicians at lower-capacity facilities—especially those which are geographically isolated or ill-equipped—may have less experience performing certain medical procedures, and would thus be less skillful than their counterparts in larger facilities.[161] Out of the same concern that inspired the traditional "locality" rule, the Department of Defense is therefore incentivized to mitigate its liability by tacking the standard of care to the "lowest common denominator" of care that abides in these marginal facilities.[162]

The interim final rule promulgated by the Department of Defense appears to leave space for this sort of hedging. Indeed, the rule provides that the professional duty of a military physician is that which obtains in a "comparable clinical setting[,]"[163] and that the "standard of care in the military context may be impacted by the particular setting and the availability of resources in that setting."[164] Ambiguously, the rule also provides that the standard of care is "based on . . . national standards, not the standards of a particular region, State or locality."[165] This language creates ample room for creative interpretation by claims evaluators.

Furthermore, the claims statute requires the Department of Defense to establish only an administrative appeals process,[166] and the interim rule provides that administrative determinations under the

157. Fitzgerald v. Manning, 679 F.2d 341, 347 (4th Cir. 1982) (quoting Rogers v. Okin, 478 F. Supp. 1342, 1385 (D. Mass. 1979)) (applying Virginia law).

158. Stuart M. Speiser et al., 4 AM. L. TORTS § 15:18, Westlaw (database updated March 2021).

159. *Id.*

160. *MHS Facilities*, MIL. HEALTH SYST., https://www.health.mil/I-Am-A/Media/Media-Center/MHS-Health-Facilities (last visited Jan. 13, 2021); *Military Hospitals and Clinics*, TRICARE, https://www.tricare.mil/FindDoctor/AllProviderDirectories/Military.aspx (last visited Jan. 13, 2021).

161. *See* Steven Sternberg & Lindsay Huth, *Safety in Numbers: Low Volumes at Military Hospitals Imperil Patients*, U.S. NEWS & WORLD REP. (Apr. 19, 2018, 12:00 PM), https://www.usnews.com/news/national-news/articles/2018-04-19/patient-shortage-erodes-military-surgeons-skills-preparedness-for-war.

162. *Id.*

163. 32 C.F.R. § 45.6(b).

164. *Id.*

165. *Id.*

166. 10 U.S.C. § 2733a(f)(2)(A)(iii).

claims process are "final and conclusive" and not subject to judicial review.[167] The Supreme Court has held that courts should generally defer to administrative determinations,[168] and the lower federal courts have repeatedly upheld similar "final and conclusive" determinations under other provisions of the MCA against due process challenges.[169] Therefore, a servicemember claimant who is unjustly denied an adequate administrative remedy will have no recourse in the Article III courts. An administrative appeals process raises the same fairness concerns as the claims process itself. The statute simply does not provide an adequate safeguard against arbitrary or deficient factual or legal determinations. For these reasons, the Department of Defense has substantial ability to mitigate its own liability under the claims process.

Relatedly, the Department of Defense is too irreconcilably conflicted to fairly adjudicate servicemembers' military medical malpractice claims. It has financial and public relations interests in denying claims and limiting compensatory awards.[170] It was obvious to the thirteenth century English who crafted the early sovereign immunity doctrine that a conflicted party cannot reasonably sit in judgment of itself, and it is still obvious today.[171]

The Department of Defense operates on a budget,[172] and, like other federal agencies, is subject to internal rationalizing forces that tend toward the efficient—if not equitable—use of agency resources.[173] Ordinarily, a federal agency is not financially deterred from awarding a sizeable administrative remedy because agency monetary judgments, awards, and settlements are most often paid not from an agency's own limited appropriations, but from the Judgment Fund.[174] The Judgment Fund is a permanent appropriation available to all federal agencies that is not subject to regular

167. 32 C.F.R. § 45.14(a).

168. Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 791 (1985) (finding that former civilian employee of the Navy, who was discharged for disability and alleged that his administrative disability claim was improperly denied on factual grounds concerning the degree of his disability, was not entitled to judicial review of determination except for constitutional matters).

169. *See, e.g.*, Hata v. United States, 23 F.3d 230, 234 (9th Cir. 1994); Rodrigue v. United States, 968 F.3d 1430, 1435 (1st Cir. 1992); Broadnax v. United States Army, 710 F.2d 865, 867 (D.C. Cir. 1983).

170. 10 U.S.C. § 2733a(d)(1).

171. *See* Seidman, *supra* note 7, at 423–24.

172. *See, e.g.*, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

173. *See generally* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015) (describing how agency leaders can direct administrative outcomes by utilizing a variety of organizational methods).

174. See Timothy A. Furin, *An Overview of the Judgment Fund and How Its Availability Can Impact Claim Settlements*, ARMY LAW., 2019 no. 3, at 31–32.

congressional reauthorization.[175] A judgment, award, or settlement is eligible for payment from the Judgment Fund if it is authorized by statute, is final, is monetary, and may not legally be paid from any other source of agency funds.[176]

The medical malpractice statute, however, authorizes the Department of Defense to pay up to $100,000 on a meritorious claim before Judgment Fund monies become available.[177] Compare this with the case of an FTCA administrative settlement. A federal agency is authorized to pay only up to $2,500 from the agency's own funds to satisfy an administrative FTCA settlement.[178] Judgment Fund monies are therefore available to pay the majority of most FTCA settlements. As a practical matter, the award and payment of medical malpractice administrative claims are for the Department of Defense a zero-sum proposition. Any potential award must be offset by a cut in another more-favored area. Worse, the Department of Defense's reported inability to accurately predict the upper limit of its potential liability under the claims statute creates an intense financial motive to prudently—but unfairly—limit awards today out of fear that it will face unforeseen liability tomorrow.[179]

Finally, the Department of Defense—always a recruiter—has a public relations interest in limiting damage awards. "The Department of Defense is more dependent upon public opinion than are other governmental agencies,"[180] and it is already facing recruiting shortages."[181] There has been little research specifically examining the connection between litigation and military recruitment in the United States, but unfavorable public opinion about other factors has been found to negatively impact recruitment efforts.[182]

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175. *Id.*

176. 31 U.S.C. § 1304(a). *See* Furin, *supra* note 174, at 32.

177. 10 U.S.C. § 2733a(d)(1).

178. 28 U.S.C. § 2672.

179. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-378, DOD HEALTH CARE: DEFENSE HEALTH AGENCY SHOULD IMPROVE TRACKING OF SERIOUS ADVERSE MEDICAL EVENTS AND MONITORING OF REQUIRED FOLLOW-UP (2018) (adverse medical events in military system increasing); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-574, DEFENSE HEALTH CARE: EXPANDED USE OF QUALITY MEASURES COULD ENHANCE OVERSIGHT OF PROVIDER PERFORMANCE (2018) (oversight of military health system deficient).

180. Curt Nichols, *Public Opinion and the Military: A Multivariate Exploration of Attitudes in Texas*, 43 J. POL. & MIL. SOCIO. 75, 77 (2015).

181. *See* Dennis Laich, *Manning the Military: America's Problem*, MIL. TIMES (July 22, 2019), https://www.militarytimes.com/opinion/commentary/2019/07/23/manning-the-military-americas-problem/.

182. *See, e.g.*, Joseph Williams & Kevin Baron, *Military Sees Big Decline in Black Enlistees: Iraq War Cited in 58% Drop Since 2000*, BOS. GLOBE (Oct. 7, 2007), http://archive.boston.com/news/nation/articles/2007/10/07/military_sees_big_decline_in_black_enlistees/; Damien Cave, *Growing Problem For Military Recruiters: Parents*, N.Y. TIMES (June 3, 2005),

Moreover, involvement in adverse litigation negatively impacts the reputations and public perception of other institutions like corporations.[183] It is therefore reasonable to conclude that high-profile medical malpractice awards highlighting the incompetence of Department of Defense health care providers could hurt recruitment efforts. The Department of Defense cannot eschew its reporting responsibilities under the claims statute, but it can control its disposition and awards on individual claims, and will therefore be rationally inclined to deny and limit awards whenever possible.[184]

3. Chilling Effect on Judicial Review and Criticism of the Feres Doctrine

The medical malpractice administrative claims process will entrench the *Feres* doctrine in two ways. First, it presents an additional structural barrier to appellate review of the doctrine. Second, it will be used as a rationalizing device for proponents of the *Feres* doctrine to argue that because a remedy is already available to an injured servicemember, adversarial Article III adjudication is therefore unnecessary.[185] It is *non-legislation*—legislation that signals a political priority or sympathy and alters the existing legal framework, but which latently limits the effect of the legislation, or prevents other progressive changes from being implemented. With non-legislation, a legislator can signal his or her sympathy for a favored policy position without fully committing his or her political capital to legislation that is disfavored by political donors or party elites.[186] By enacting an administrative claims process, Congress

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https://www.nytimes.com/2005/06/03/nyregion/growing-problem-for-military-recruiters-parents.html.

183. *See, e.g.*, Michael Hadani, *The Reputational Costs of Corporate Litigation: Long-Term Reputation Damages to Firms' Involvement in Litigation*, 24 CORP. REPUTATION REV. 234, 243 (2021), https://doi.org/10.1057/s41299-020-00106-0.

184. *See* 10 U.S.C. § 2733a(e), (h).

185. *See supra* Part II.B (examining the alternative compensation rationale in the *Feres* trilogy).

186. Consider the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010) ("ACA"). With Democrats firmly in control of Congress, President Barack Obama was under pressure to enact comprehensive health care reform. Many liberal pundits urged a system of single-payer health insurance, while conservative pundits intensely opposed the idea. *Compare* Paul Krugman, *Why Americans Hate Single-Payer Insurance*, N.Y. TIMES (July 28, 2009, 11:45 AM), https://krugman.blogs.nytimes.com/2009/07/28/why-americans-hate-single-payer-insurance/ (advocating for single-payer health insurance), *with* Alan B. Miller, *Medicare for All Isn't the Answer*, WALL ST. J. (Aug. 12, 2009, 7:30 PM), https://www.wsj.com/articles/SB10001424052970204251404574344342571670158 (advocating against single-payer health insurance). Instead, Congress enacted a market-oriented reform which notably did not establish a public health insurance option. *See* James Taranto, *ObamaCare's Heritage*, WALL ST. J. (Oct. 19, 2011), https://www.wsj.com/articles/SB10001424052970204618704576641190920152366. The ACA was *non-legislation*

has satisfied its patrons in the national security establishment, and secured praise in the national press, and perhaps a stay on the *Feres* matter.[187]

First, the claims process will insulate the *Feres* doctrine from judicial review by decreasing opportunities for courts to consider servicemembers' medical malpractice claims.[188] Such claims would ordinarily face dismissal under *Feres*, but the mere presence of the question in federal dockets increases the chance for reversal.[189] Because administrative determinations under the claims process are not subject to judicial review, cases that might otherwise occasion the Supreme Court's reconsideration of the *Feres* doctrine will instead be funneled into a procedural dead end.[190]

The claims process also imposes a burdensome filing procedure on claimants. Although "[a]ny written claim will suffice,"[191] a claimant must collect and produce an assortment of items including a factual indication of the conduct that caused the claimant's injury, a demand for a sum certain, the claimant's signature, and, unless the negligence is obvious, an affidavit stating that the claimant "consulted with a health care professional who opined that a [Department of Defense] health care provider" negligently caused the injury.[192] If the claimant is represented by an attorney or other representative, the claimant must provide various affidavits regarding the representation.[193] Although the rules do not require a claimant to submit an expert report with an initial claim, the Department of Defense may subsequently require the claimant to provide an expert report at the claimant's expense within ninety days,

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because it signaled sympathy for expanding health care coverage and modified the existing legal framework, but left the broader system of private health insurance intact. See tabular data for 2013 to present in *Health Insurance Coverage of the Total Population*, KFF, https://www.kff.org/other/state-indicator/total-population/ (last visited Jan. 16, 2021); Gary Claxton et al., *Health Benefits in 2018: Modest Growth in Premiums, Higher Worker Contributions At Firms With More Low-Wage Workers*, 37 HEALTH AFFS. 1892, 1893 exh.1 (2018). In the 2020 Democratic presidential primary, former Vice President Joe Biden opposed further health insurance reforms, arguing that the ACA is an adequate alternative. *See* Jacob Pramuk, *Biden Argues "Medicare for All" Supporters Want to Get Rid of Obamacare*, CNBC (last updated July 15, 2019, 3:08 PM), https://www.cnbc.com/2019/07/15/biden-unveils-health-care-plan-to-expand-obamacare-hits-medicare-for-all.html.

187. *See, e.g.*, Dave Phillipps, *U.S. Troops Could Soon Be Able to Sue Over Medical Blunders*, N.Y. TIMES (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/us/military-lawsuit-malpractice-feres.html; Steve Sternberg, *Military Can No Longer Avoid Medical Malpractice Claims*, U.S. NEWS & WORLD REP. (Dec. 19, 2019), https://www.usnews.com/news/health-news/articles/2019-12-19/military-can-no-longer-avoid-medical-malpractice-claims.

188. *See, e.g.*, cases cited *supra* notes 168, 169.

189. *See, e.g.*, cases cited *supra* notes 168, 169.

190. *See supra* text accompanying notes 166–69.

191. 32 C.F.R. § 45.4(a).

192. *Id.* § 45.4(b).

193. *Id.*

or else forfeit the claim.[194] Moreover, a claimant bears the burden of proving its claim, but the rules do not provide a claimant the right to conduct a compulsory discovery process beyond the claimant's own medical records.[195]

A defect in the initial claim procedure may be fatal to a claim.[196] Because an FTCA plaintiff must exhaust all administrative remedies in order to obtain federal subject matter jurisdiction,[197] the administrative claims process may therefore become a procedural trap, a graveyard for claims which—if put before the right Court—might otherwise inspire a change to the Court's *Feres* doctrine.

Finally, the existence of a claims process tailored specifically for military medical malpractice claims will serve as a rhetorical device to excuse and legitimize the ongoing denial of fair servicemember access to the courts. The Supreme Court—as the only nominally non-political branch of the federal government—is frequently faced with the uncomfortable task of passing judgment on matters where the letter of the law or the mere prospect of adjudication by an unelected body runs counter to the government or Court's interests. Professor Alexander M. Bickel has suggested that the Court's practice of avoiding so-called "political questions"[198] is an exercise in prudence concerned with the Court's institutional legitimacy.[199] Adjudicating servicemember tort claims—although not technically a political question—has always been regarded as a burdensome, thankless, and sometimes uncomfortable duty.

Until 1946, a petition on Congress for a private bill of relief was the primary means by which a private person could seek tort compensation from the government.[200] The system was inefficient,

194. *Id.* §§ 45.4(d), 45.12(c).

195. *Id.* § 45.4(d), (e).

196. *See, e.g.*, McNeil v. United States, 508 U.S. 106, 113 (1980) (dismissing procedurally defective FTCA claim that was filed without assistance of counsel); Bialowas v. United States, 443 F.2d 1047, 1049–50 (3d Cir. 1971) (dismissing FTCA claim because plaintiff-at-trial failed to cure defects on SF 95 submitted to Post Office Department).

197. 28 U.S.C. § 2675; *see, e.g.*, Boseski v. N. Arlington Mun., 621 Fed. App'x 131, 136 (3d Cir. 2015) (holding that former U.S. Army soldier who reported alleged sexual assault to superior officer but did not file claim with Department of Defense had not exhausted administrative remedies, therefore "the District Court correctly dismissed her FTCA claims with prejudice, as 'forever barred'").

198. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found[, inter alia:] [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . .").

199. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 125–26, 183–84 (1962).

200. *See supra* Part II.A.

often resulted in arbitrary judgments, and was roundly abhorred by legislators themselves: then-Congressman John Quincy Adams once pejoratively quipped that compensating private persons was "judicial business."[201] It seems unlikely, then, that the federal judiciary, with its focus on judicial economy and efficiency,[202] celebrated its acquisition of this new species of tort law. Indeed, these claims place the federal courts in the uncomfortable position of adjudicating questions about the actions of other governmental departments.

In this light, the *Feres* doctrine—with its shifting rationales and emphasis on alternative compensation—seems rationally tailored to the task of sidestepping the awkward duty of adjudicating servicemember FTCA claims.[203] By enacting the military medical malpractice *non-legislation*, Congress spares the federal courts the unwanted task of denying these claims and puts the unfairness and incoherence of *Feres* out-of-sight and perhaps out-of-mind. The bitter pill of denying servicemembers access to the courthouse for injuries entirely beyond their control goes down easier when the judge can cite a compensation scheme—inadequate though it may be—that has been specially enacted to compensate the very sort of injury complained of. The burden is passed along to the Department of Defense, and all parties—Congress, the federal courts, and the Department of Defense—may take satisfaction with this simulacrum of justice. All parties, except for the injured servicemember.

IV. PROPOSAL

The United States Supreme Court should reconsider and overturn its judicial *Feres* doctrine, which holds that servicemembers may not sue under the FTCA for injuries that occurred "incident to service."[204] There are compelling reasons to overturn the *Feres* doctrine for all applications,[205] but the Court should at the very least overturn the doctrine as to military medical malpractice claims, where its application is unambiguously unfair and incoherent.[206] The Court has not reconsidered the *Feres* doctrine in any depth

201. *See* Figley, *supra* note 136, at 398–99.

202. *See generally* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. PA. J. CONST. L. 377, 382 (2003).

203. *See supra* Parts II.B, II.C.

204. Feres v. United States, 340 U.S. 135, 146 (1950).

205. The *Feres* doctrine has been criticized for its use in cases of alleged sexual misconduct, for example. *See* Comment, Chelsea M. Austin, *Who's Got Your Six? Ramifications of the Court's Refusal to Define "Incident to Service" in the Feres Doctrine on Military Sexual Assault Survivors*, 2018 MICH. ST. L. REV. 987, 1012 (2018).

206. *See supra* Part III.A.

since *Johnson* was decided in 1987.[207] In that case, Justice Scalia wrote for a four-Justice dissent that *Feres* was "wrongly decided," and that he would reverse the doctrine to permit servicemember FTCA suits.[208] Aside from curtly applying the *Feres* doctrine in one other case,[209] and denying several petitions for certiorari that would raise the issue,[210] the Court has not revisited the doctrine in over three decades. None of the Justices who sat on the *Johnson* Court remain on the Court today.[211] Justice Thomas has clearly indicated his willingness to overturn the doctrine.[212] And, Justice Amy Coney Barrett—the newest Justice on the Court—is a self-described textualist,[213] an opponent of strict application of *stare decisis*,[214] and has been described as Justice Scalia's "heir."[215] Although it is hard to know how all the Justices might rule in a case actually applying the *Feres* doctrine today, the question is ripe for consideration.

If the Supreme Court is unwilling to reconsider and overturn the *Feres* doctrine as applied to military medical malpractice, Congress should reintroduce and enact an amended version of the SFC Richard Stayskal Act. Like the original, the amended SFC Richard Stayskal Act would expressly authorize the federal courts to hear and decide FTCA claims by servicemembers injured as a result of military medical malpractice and would proscribe adjustment of damages for such claims to account for awards under the military's

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207. 481 U.S. 681 (1987).

208. *Id.* (Scalia, J., dissenting).

209. *See* United States v. Stanley, 483 U.S. 669, 683–84 (1987) (extending *Feres* doctrine to exclude *Bivens* action for injury "incident to service").

210. *See* Doe v. United States, 141 S. Ct. 1498 (2021), *denying cert. to* 815 Fed. App'x 592 (2d Cir. 2020); Daniel v. United States, 139 S. Ct. 1713, *denying cert. to* 889 F.3d 978 (9th Cir. 2019); Lanus v. United States, 570 U.S. 932, *denying cert. to* 492 Fed. App'x 66 (11th Cir. 2012); Matthew v. Dep't of Army, 558 U.S. 821, *denying cert. to* 311 Fed. App'x 409 (2d Cir. 2009); Costo v. United States, 534 U.S. 1078 (2002), *denying cert. to* 248 F.3d 863 (9th Cir. 2001).

211. *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Oct. 30, 2020).

212. *See Doe*, 141 S. Ct. 1498 (Thomas, J., dissenting); *Daniel*, 139 S. Ct. 1713 (Thomas, J., dissenting); *Lanus*, 570 U.S. 932 (Thomas, J., dissenting).

213. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 BOS. U. L. REV. 109, 121 (2010) (explaining that textual statutory construction produces a more faithful interpretation than substantive canons of construction).

214. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COL. L. REV. 1011, 1012–13 (2003) (arguing that inflexible application of *stare decisis* may unconstitutionally bind litigants through *de facto* preclusion, because subsequent litigants were not party to the action setting the precedent). Justice Barrett's textualism and opposition to strict *stare decisis* suggest an openness to considering a plain-meaning interpretation of the *Feres* doctrine.

215. Justice Barrett also notably served as law clerk for Justice Scalia. Michael Tarm, *Amy Coney Barrett, Supreme Court Nominee, Is Scalia's Heir*, ASSOC'D PRESS NEWS (Sept. 26, 2020), https://apnews.com/article/election-2020-ruth-bader-ginsburg-chicago-us-supreme-court-courts547b7de5b6ebabedee46b08b5bb37141.

group life insurance policy.[216] But, for interpretive clarity, the legislation's grant of subject matter jurisdiction should be revised:

> A person may sue the United States under this chapter for damages for personal injury or death incident to the service of a member of the Armed Forces arising out of a negligent or wrongful act or omission in the performance of a medical, dental, or related health care function (including a clinical study or investigation). A person may only sue under this section if the medical, dental, or related health care function was provided at a covered medical treatment facility by a person acting within the scope of that person's office, employment, or assignment at the direction of the Government of the United States. A claim under this section is exclusive of any other civil action or proceeding by reason of the same subject matter against the person (or the estate of the person) whose act or omission gave rise to the action or proceeding.[217]

Congress should expand the grant of subject matter jurisdiction by defining "covered medical treatment facility" to mean not only facilities maintained by the Department of Defense,[218] but also those maintained by the Department of Veterans Affairs.[219]

Alternatively, if Congress does not overturn the *Feres* doctrine in its medical malpractice application, then it should amend the current administrative claims statute to make several improvements. First, Congress should replace the permissive language described in Part III.C.2, *supra*, to mandate—rather than merely permit—compensation of claims on the merits. The revised statute should provide in pertinent part that the Department "*shall* allow, settle, and pay a claim against the United States"[220] and, that the Department "*shall* allow, settle, and pay a claim . . . only if" the statutory requirements are met.[221] Congress should also amend the statute to provide that the Department of Defense will not be charged with evaluating these claims. Instead, an entity that is better situated

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216. *See* S. 2451 § 2; H.R. 2422 § 2.

217. *Compare* this text, *with* unrevised text at S. 2451 § 2(a) *and* H.R. 2422 § 2(a). *See generally* ROBERT J. MARTINEAU & MICHAEL B. SALERNO, LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH (2005) (providing conventions for clear legislative and rule drafting).

218. *See* S. 2451 § 2(a); H.R. 2422 § 2(a) (defining "covered military medical treatment facility" as a facility described at 10 U.S.C. § 1073d(b), (c), or (d), *viz.*, a military medical center, hospital, or ambulatory center).

219. Perrone, *supra* note 142.

220. *Compare* this text, *with* unrevised text at 10 U.S.C. § 2733a(a).

221. *Compare* this text, *with* unrevised text at 10 U.S.C. § 2733a(b).

to exercise disinterested judgment over these claims should perform that task—perhaps a panel of medical experts employed by the Department of Justice with short, rotating tenures.

Like the proposed SFC Richard Stayskal Act legislation, the administrative claims statute should be amended to increase its scope of coverage. The definition of "covered military medical treatment facility" should be expanded to include facilities maintained by the Department of Veterans Affairs, and the proviso that the negligent or wrongful act be committed by "a Department of Defense health care provider" should be amended with the language "a person acting within the scope of that person's office, employment, or assignment at the direction of the Government of the United States."[222] For good measure, Congress should also specify that "personal services contractors, such as the medical residents, students[,] and fellows receiving their training in VA facilities" are included in the sweep of this language.[223]

To remove any incentive for the Department of Defense to interfere with the fair administration of claims, Congress should eliminate the subsection of the claims statute providing that the Department of Defense must pay up to $100,000 on a meritorious claim before Judgment Fund monies become available to satisfy the remainder of the award.[224] Instead, Judgment Fund monies should be made available to cover all or most of any award granted under the claims process. To protect against deficient judgments, Congress should create a right of appeal to a federal district court for review of administrative determinations of fact and law. Finally, Congress should specify that presentment of a claim under the administrative process satisfies the FTCA requirement that a prospective medical malpractice plaintiff exhaust available administrative remedies in order to state an FTCA claim.[225]

Failing an overturn of the *Feres* doctrine for medical malpractice applications, legal scholars and commentators should closely monitor the Department of Defense's annual reports to the Congressional Armed Services committees, which are required under the medical malpractice statute until 2025.[226] Researchers should conduct empirical studies to estimate and compare—based on available data—the expected number and dollar amount of awards under the process with those actually awarded. This research should include

222. *See* 10 U.S.C. § 2733a(a), (b)(3); Perrone, *supra* note 142.
223. Perrone, *supra* note 142.
224. *See* 10 U.S.C. § 2733a(d).
225. *See* 28 U.S.C. § 2675.
226. *See* 10 U.S.C. § 2733a(h).

both an econometric element and a qualitative element based on claimant interviews. An independent factfinding function aimed at constructing comprehensive case studies of claimants' injuries and interactions with the claims process would also be useful. If it appears that the Department of Defense may be improperly denying claims or issuing deficient damage awards, researchers should present this data to Congress and make it available to law firms that frequently litigate in military, veterans, and medical malpractice tort law. Scholars should also encourage attorneys who do choose to litigate in this area to responsibly challenge the constitutional adequacy of the claims process claims on their clients' behalf.

V. CONCLUSION.

The *Feres* doctrine is more alive than ever. The newly established administrative claims process cracks open one door to injured servicemembers' recovery, but the courthouse doors remain firmly shut, and the prospect of alternative compensation under the claims process—the product of carefully tailored *non-legislation*—will be used as a legitimizing device to justify the *Feres* doctrine's continued application in military medical malpractice cases. The claims process is a poor substitute for careful consideration by an Article III court applying the accumulated wisdom of the common law of torts. It is a mere simulacrum of justice where the party facing liability also serves as judge, witness, and jury. The men and women who serve in this country's armed forces simply deserve better. Congress and the federal judiciary should resist the suggestion that the claims process constitutes an adequate alternative system of compensation and should instead reconsider and overturn the *Feres* doctrine as applied in medical malpractice cases. The specter of *Feres* will continue to haunt our country's moral conscience until they do.

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Volume 60 Number 1 DUQUESNE LAW REVIEW Pages 1-200 WINTER 2022