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Editors' Introduction

The law is a *hot topic* in 2020—for *everyone,* not just for lawyers. As soon-to-be legal professionals, it is increasingly common to find ourselves on the receiving end of questions from non-lawyer friends and family about topics traditionally reserved for discussion within the legal community. Perhaps by choice—but more likely by necessity—the public seems more attuned than ever to the relevance of the law.

That the law is a conversational undercurrent, however, is no surprise. The publication process of Volume 12, Issue I saw many profound legal and political transgressions, both nationally and on a global scale. These, in turn, have fostered an inherent realization that keen attention not only to power, but to the mechanisms of power, is necessary to keep our leaders in check. In particular, as the abuse of, and disrespect for, basic human rights has devolved, we, as a society, confront the question of whether our systems—those designed to support the vulnerable and disenfranchised—are helping those who most need them.

To illustrate, in the political arena, challenges to executive power have reached an all-time high as sweeping and oppressive immigration policies spotlight a shameless hostility toward members of marginalized communities. Additionally, we grapple with technology as a contrapositive; often a source of endless potential and hope for society, technological advancement might now endanger its very structure. In healthcare, for instance, new technology and innovative systems have prompted multi-generational populations to ask complex questions about whether new solutions will help the sick and vulnerable, or create new barriers to access. Similarly, the criminal legal system often disempowers the accused, while indigent defendants are confronted with the full power of state and federal governments arrayed against them in a broken system.

Northeastern University Law Review (NULR) believes that access to information—and understanding the legality and consequences of that information—is vital to the health of democracy. In particular, such access helps to ensure that there exists an adequate informational and theoretical foundation for these important conversations. Law reviews represent an integral contribution to the furtherance of such discussions, and NULR

diligently marches on to ensure they never dissipate.

NULR also believes that society's reaction to this period of immense political disillusionment will define history's perception of our ever changing era. Thus, NULR seeks to shape society's reaction by sparking conversations about the law, and how it can radically influence the redistribution of power. This influence is of particular import in our tumultuous era of political change, and promotes Northeastern's spirit of practicing and studying law in pursuit of the public interest.

To that end, this issue tackles a variety of important current topics, including access to education, religion, intellectual property, and repercussions of the #MeToo movement. NULR is proud to continue its successful collaboration with the Northeastern Law Center for Health Policy and Law to publish three works from the Center's symposium on healthcare in Volume I: *The Limits of Current A.I. in Health Care: Patient Safety Policing in Hospitals* by Barry R. Furrow, *The Girl with the Cyber Tattoo: Applying a Gender Equity Lens to Emerging Health Technology* by Oliver Kim and Tamara Kramer, and *A Qualitative Study of the Promises and Perils of Medical-Legal Partnership* by Jessica Mantel and Leah Fowler. NULR is also proud to continue publishing student works in print, with Seth Reiner's *Me Too? Incentivising States to Adopt Consent-Based Sex Education*.

In Issue II, NULR will publish its inaugural collection of articles for its Constitution Day series, where Northeastern Professors Claudia Haupt and Michael Tolley will engage in scholarly discourse with Professor Sanford Levinson regarding our conceptions of the Constitution, and our country's founders nearly two centuries later. Additionally, NULR continues to highlight student pieces, featuring an even greater number in Issue II. These include articles by Christie Dougherty, Leeja Miller, and Alaina Gilchrist. These pieces result from the NULR Student Note Program, where Associate Editors partner with Senior Editors to produce original pieces. We are immensely proud of the progress this program has made in these past two years, and look to the future of NULR student note authorship and increased publication with great anticipation.

As NULR closes the 2019-2020 publication cycle, we find it appropriate to reflect on the past several months and anticipate future plans that NULR has in store.

This year we welcomed new faculty advisors, Professor Kara Swanson and Director Sharon Persons, who will be guiding NULR

in the coming years. In addition to their breadth of knowledge and expertise, and the insights they offer, Professor Swanson and Director Persons share NULR's mission of spreading knowledge in pursuit of enhancing informed discussion and promoting positive change. We are excited to see NULR continue to blossom under their sage advisement.

We also celebrate the growth of NULR's two online branches in this publication cycle. First, Extra Legal, NULR's online counterpart for shorter scholarly works, rounded out 2019 with a piece entitled *Can a President Pardon Himself? Law School Faculty Consensus*. In this piece, Dr. Michael J. Conklin reported his February 2019 research regarding legal academia's assessment of presidents' abilities to pardon themselves, with fascinating results. In addition, 2018-2019 NULR Editor-in-Chief Lilian Giacoma contributed a piece to Extra Legal, in which she argued that life in prison without the possibility of parole in the United States is a violation of the Convention Against Torture. Other recent Extra Legal articles further explore the boundaries of executive power, the concept of "digital death," and entheogenic drugs.

Mirroring our print edition's focus, the Online Forum has also overseen the publication of many articles centering on similarly critical topics. Such works include analyses of legislative challenges to life without parole and discussions on the evolution of a corporation's bottom line, the implications of the Cambridge Analytics scandal and surveillance capitalism, and the decryption of smartphones. It also includes a pithy book review about the life of Chief Justice John Roberts, and an explanation of the Massachusetts Supreme Judicial Court's new precedent regarding the now-defunct doctrine of abatement ab initio and the conviction of Aaron Hernandez. We are particularly proud that a majority of these pieces were submitted by students. This is because we believe that developing professionals should feel empowered to research important topics that they are passionate about, and feel confident in sharing their opinions.

The Online Forum has experienced growth beyond its increased publication of traditional blog posts. In 2019, the Online Forum hosted its inaugural blog symposium, entitled *Promises and Perils of Emerging Health Innovations*, which was published in partnership with the Northeastern Law Center for Health Policy and Law's annual conference. As such, the blog symposium provides a post-conference platform for panelists to share short

pieces related to their presentations, as well as other themes discussed throughout the event. The posts from the Winter 2019 Blog Symposium address a number of healthcare related topics, such as prescription drug monitoring, human genome mapping, health privacy and the accessibility of health information, and the implications of medical-legal partnerships.

We are also excited about NULR's plans for the future. NULR is soon hosting its 2020 Spring Symposium entitled *Eyes on Me: Innovation and Technology in Contemporary Times*. Our Symposium Editors continued the tradition of partnering with members of the Law School and the broader legal community to host well-known scholars from across the country. These scholars will lead panel discussions grounded in their areas of expertise; specifically, the intersection of law with the arts, privacy, and innovation. We also look forward to rich discussion on the evolution of technology in contemporary times and the legal implications of such change, particularly given today's pace and political climate. NULR is thankful to our speakers and moderators for their support in furthering these critical conversations.

Looking ahead, NULR hopes to continue its tradition of publishing articles in pursuit of promoting the public interest. In the coming decade, NULR will undoubtedly face novel challenges, the most pressing of which is impending changes to the academic calendar, which will eliminate the Law School's quarter system in favor of a trimester system. To stay relevant, and to use this transition as an opportunity for growth, NULR will necessarily, yet excitedly, evolve. We are confident that our new advisors, Professor Swanson and Director Persons, will effectively lead our successors through this period of change. We look forward to NULR's next phase, in which it will continue to further its mission to provide high quality, diverse content, and remain a mouthpiece for public interest in nationwide communities.

Editorial Board
Northeastern University Law Review

The Limits of Current A.I. in Health Care:
Patient Safety Policing in Hospitals

By Barry R. Furrow*

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I.   INTRODUCTION

The U.S. has over 6,000 hospitals; almost 3,000 are nonprofit, over 1,300 are for-profit, and 1,200 are local, state and federal government owned, and the rest are psychiatric and long-term care hospitals.[1] Many of these hospitals are in one of over 600 health care systems, which provide 88% of the U.S. hospital beds.[2] Hospitals are the major providers of emergency care and highly complicated surgical and other procedures in the U.S.[3] They are also the biggest producers of patient harms.[4]

A fragmented and inefficient hospital industry now faces financial pressures to reduce these harms or suffer both reimbursement penalties and loss of patients due to published hospital rankings and posting of quality scores.[5] With that in mind, hospitals are working to digitize and connect their facilities and hospital systems, and their take-up of data analytic tools will only accelerate to help accomplish this.[6] Growth in the Artificial Intelligence ("AI") health market is expected to reach $6.6 billion by 2021—a compound annual growth rate of 40%.[7] Accenture[8] predicts that by 2021 the health AI market will grow more than 10 fold and that this hospital use of AI could cut U.S. healthcare costs by $150 billion a year by 2026.[9]

The Big Data merchants are loudly touting their wares, promising cost-cutting tools in a low margin, largely non-profit hospital

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1   *See Fast Facts on U.S. Hospitals*, AM. HOSP. ASS'N (Jan. 2019), https://www.aha.org/statistics/fast-facts-us-hospitals.

2   *See* AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, SNAPSHOT OF U.S. HEALTH SYSTEMS, 2016 1 (2017), https://www.ahrq.gov/sites/default/files/wysiwyg/snapshot-of-us-health-systems-2016v2.pdf.

3   Robert E. Suter, *Emergency Medicine in the United States: A Systematic Review*, 3 WORLD J. EMERGING MED. 6 (2012).

4   *See* Barry R. Furrow, *Adverse Events and Patient Injury: Coupling Detection, Disclosure, and Compensation*, 46 NEW ENG. L. REV. 437, 439 (2012) [hereinafter, Furrow 2].

5   Armineh Zohrabian et al., *The Economic Case for U.S. Hospitals to Revise Their Approach to Heart Failure Readmission Reduction*, 6 ANNALS TRANSLATIONAL MED. 298, 5 (2018).

6   *Internet of Things*, ARUBA, https://www.arubanetworks.com/solutions/internet-of-things/ (last visited Sept. 26, 2019).

7   *Artificial Intelligence: Healthcare's New Nervous System*, ACCENTURE 2 (2017), https://www.accenture.com/_acnmedia/PDF-49/Accenture-Health-Artificial-Intelligence.pdf#zoom=50.

8   Accenture is a multinational consulting company with services in strategy, consulting, digital, technology and operations. *Fact Sheet*, ACCENTURE, https://newsroom.accenture.com/fact-sheet/ (last visited Jul. 15, 2019).

9   *Artificial Intelligence: Healthcare's New Nervous System*, *supra* note 7, at 2.

industry where economies of scale are few and reimbursement is often stingy. Big Data does have potential to reduce hospital production of adverse events and costs, while better integrating and streamlining health care.[10] The ability of this technology to be maximally effective, however, is hindered by crude data mining techniques and misguided incentives.

I propose to examine some of the utopian-sounding promises of data analytics ventures and accounting firms. I will consider the current limits of the use of data analytics in hospitals, some other approaches to addressing adverse events in hospitals, and some of the legal implications of Big Data for patient safety and for physicians in an AI-driven workplace.

My perspective is informed by the years I spent on the Board of Directors of a large multi-hospital hospital system. As a board member listening to presentations by consultants from national accounting firms, staff epidemiologists, and accountants, I developed a sense of what Boards of Directors (and top management) consider important: they fret about hospital financial health; they dread the reimbursement penalties and False Claims suits that come their way; and they worry as they listen to consultants predict the arc of U.S. health care. Patient safety is something that Boards and hospital systems always acknowledge as important but too often leave to the Patient Safety Committee or Risk Management as little more than a financial risk problem.

The introduction of more sophisticated AI and data analytics systems in hospitals creates powerful tools to discover and track the systematic causes of patient harms. This AI capability will alter the standard of care in hospitals, potentially allowing for real reduction of adverse events. Hospital systems will have to confront a tectonic shift in their ability to discover adverse events and their causes. With these discoveries will come an intensifying duty to implement policies to reduce such patient harms.

II. DATA ANALYTICS: FROM ADVERSE EVENT SNAPSHOTS TO DEEP LEARNING

Adverse events are as old as medicine itself, and as medicine has become more technologically complex, adverse events have

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10   *See* Wullianallur Raghupathi & Viju Raghupathi, *Big Data Analytics in Healthcare: Promise and Potential*, Health Info. Sci. & Sys. 1, 2 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4341817/pdf/13755_2013_Article_14.pdf.

increased.[11] The federal Agency for Healthcare Research and Quality (AHRQ) defines adverse events as "[a]ny injury caused by medical care."[12] This is a broad definition but perhaps the most useful for purposes of motivating hospitals to do better.[13] AHRQ notes that this definition does not mean negligence but rather "an undesirable clinical outcome," citing as an example pneumothorax from central venous catheter placement, which counts as an adverse event no matter what caused it.[14]

Production of medical adverse events has traditionally focused on the individual physician as the primary causal agent of patient harm.[15] Primary care practice is indeed marked by frequent misdiagnoses that cause harmful delays in treatment and by adverse drug reactions; outpatient care in other specialties can also cause harm.[16] But I will focus more attention on hospitals, the complex institutions where most high-risk care is now delivered.

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11   I have written about the problem of hospital adverse events before and will not cover the same ground here. For more background on the problem, see generally Barry R. Furrow, *Searching for Adverse Events: Big Data and Beyond*, 27 Annals Health L. 149 (2018) [hereinafter Furrow 1]; Furrow 2, *supra* note 4, at 440–41; Barry R. Furrow, *The Patient Injury Epidemic: Medical Malpractice Litigation as a Curative Tool*, 4 Drexel L. Rev. 41, 65 (2011) [hereinafter Furrow 3]; Barry R. Furrow, *Regulating Patient Safety: The Patient Protection and Affordable Care Act*, 159 U. Penn. L. Rev. 1727, 1728 (2011) [hereinafter Furrow 4]; Barry R. Furrow, *Patient Safety and the Fiduciary Hospital: Sharpening Judicial Remedies*, 1 Drexel L. Rev. 439, 458 (2009) [hereinafter Furrow 5]; Barry R. Furrow, *Data Mining and Substandard Medical Practice: The Difference Between Privacy, Secrets, and Hidden Defects*, 51 Vill. L. Rev. 803, 810 (2006) [hereinafter Furrow 6].

12   Agency for Healthcare Research and Quality, *Glossary*, PSNet, https://psnet.ahrq.gov/glossary (last visited Sept. 26, 2019).

13   Some AHRQ examples of such adverse events include pneumothorax from central venous catheter; anaphylaxis to penicillin; postoperative wound infection; hospital-acquired delirium. For a fuller discussion of adverse events and other patient harm descriptors, see generally Furrow 2, *supra* note 4, at 443–44.

14   Agency for Healthcare Research and Quality, *Glossary*, PSNet, https://psnet.ahrq.gov/glossary (click "Adverse Event") (last visited May 23, 2019) [hereinafter AHRQ *Glossary*].

15   Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health System*, 108 Harv. L. Rev. 381, 399. (1994).

16   David E. Newman-Toker et al., *Serious Misdiagnosis-related Harms in Malpractice Claims: The "Big Three" – Vascular Events, Infections, and Cancers*, 6 Diagnosis 228, 233 (2019).

Patient harms in hospitals are often hard to find and always underreported.[17] One journalistic study describes the hospital safety environment as the "Wild West."[18] While marvelous new technological tools are being adopted by hospitals to address this problem, even the best hospitals still generate a high volume of patient harms.[19] Adverse events are predominately produced in hospitals.[20] Makary and Daniel, in a 2016 analysis, "calculated a mean rate of death from medical error of 251,454 a year using the studies reported since the 1999 IOM report and extrapolating to the total number of US hospital admissions in 2013. . . . Comparing our estimate to CDC rankings suggests that medical error is the third most common cause of death in the US."[21]

A 2019 study based on data from Leapfrog, which grades hospitals semi-annually on patient outcomes, concluded that "[t]he number of avoidable deaths per 1,000 admissions ranged from 3.24 lives per 1,000 admissions in 'A' hospitals to 6.21 lives per 1,000 admissions in 'D' and 'F' hospitals. Compared to 'A' hospitals, the differences in the estimated relative risk of an avoidable death is 34.9% higher in 'B' hospitals, 87.7% higher in 'C' hospitals, and 91.8% higher in 'D' and 'F' hospitals."[22]

The authors note that "[i]f hospitals with a grade lower than an 'A' are able to achieve the safety performance of 'A' hospitals, . . .

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17   *See generally* Furrow 2, *supra* note 4 (discussing the evolution of tools to detect adverse events).

18   *See* Eric Nalder & Cathleen F. Crowley, *Patients Beware: Hospital Safety's a Wilderness of Data*, Hous. Chron. (Mar. 22, 2010), http://www.chron.com/news/article/Patients-beware-Hospital-safety-s-a-wilderness-1702575.php (illustrating that hospitals often underreport adverse events and showing that, in some instances, hospitals have missed cases where patients were killed).

19   David C. Classen et al., *'Global Trigger Tool' Shows that Adverse Events in Hospitals May Be Ten Times Greater than Previously Measured*, 30 Health Affairs 581, 581 (2011).

20   René Schwendimann et al., *The Occurrence, Types, Consequences and Preventability of In-hospital Adverse Events – a Systematic Scoping Review*, 18 BMC Health Servs. Res. 521 (2018). For a broader review of the literature on hospital adverse events, see generally Furrow 2, *supra* note 4, at 2.

21   Martin A. Makary & Michael Daniel, *Medical error—the Third Leading Cause of Death in the US*, 353 BMJ 2139, 2140 (2016).

22   Matt Austin & Jordan Derk, Lives Lost, Lives Saved: An Updated Comparative Analysis of Avoidable Deaths at Hospitals Graded by The Leapfrog Group 5 (2019), https://www.hospitalsafetygrade.org/media/file/Lives-Saved-White-Paper-FINAL.pdf.

more than 50,000 patient lives could be saved."[23] And they admit that their data may only represent a subset of potential harms represented by patients, and it may "likely reflect an underestimation of the avoidable deaths in U.S. hospitals."[24]

Hospitals as enterprises are now the primary focus of most complex patient care, the focus of reimbursement for that care, and the proper focus of enterprise responsibility for harms suffered by patients. This focus on hospitals has deep roots in medical epidemiology and the history of biostatistics.

A. A Brief History of Adverse Event Tools

The use of early forms of data analytics to examine patient injury in hospitals is found in the use of statistical analysis based on data collection in order to study patient injury in hospitals. Iatrogenic harm, as it used to be called, was studied systematically by three early pioneers in medical data collection on patient safety: Florence Nightingale, Dr. Ernest Codman, and Dr. Elihu Schimmel. Nightingale was an early biostatistician and epidemiologist whose work on sanitary conditions in hospitals revolutionized early treatment of soldiers during wartime.[25] As early as 1858 she had developed the use of statistical methodology to show the effects of unsanitary conditions in military field hospitals.[26] Her approach laid the groundwork for standard statistical approaches for hospitals. Codman was a Boston physician who, by the 1920s, had become obsessed with collecting data on every patient in the hospital with the goal of learning what worked and what did not—and how doctors contributed to bad outcomes.[27] Schimmel was a Yale Hospital cardiologist who did an early hospital adverse event study using voluntary staff reporting.[28] The tools they developed laid the foundation for modern data analytics applied to health care.

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23   *Id.* at 6.

24   *Id.*

25   *See generally* I. Bernard Cohen, *Florence Nightingale,* 250 Sci. Am. 128, 128–37 (1984) (describing the life and career of Florence Nightingale and the impact of her work in statistical analysis in setting sanitary standards for hospitals).

26   *See* Elaine Larson, *Innovations in Health Care: Antisepsis as a Case Study,* 79 Am. J. Pub. Health 92, 92 (1989).

27   *See* Duncan Neuhauser, *Ernest Amory Codman: American Surgeon,* Encyclopaedia Britannica, https://www.britannica.com/biography/Ernest-Amory-Codman (last visited Nov. 1, 2019).

28   Charles Vincent, Patient Safety 6–7 (2d ed. 2010).

1.   Florence Nightingale: Visualization

Nightingale was a talented and creative statistician who transformed data visualization as well as medical epidemiology. She volunteered as a nurse in the Crimean War, during which she collected extensive data on soldier mortality rates.[29] Her statistical analyses reformed health and data collection in both military and civilian hospitals.[30]

Nightingale transformed data visualization as well as medical epidemiology. She took over nursing operations at a hospital in Turkey during the Crimean War and learned that poor sanitary practices were the main culprit of high mortality in hospitals.[31] She was determined to curb such avoidable deaths. By using applied statistical methods, she made a case for eliminating the practices that contributed to unsafe and unhealthy environments.[32] She developed the polar area graph, a graphic visualization method, to convey information about causes of death during the Crimean War.[33]

Her polar graph had twelve wedges, divided into three colors: blue representing deaths from contagious diseases such as cholera and typhus, red representing deaths from wounds, and black representing deaths from all other causes.[34] A glance at the graph showed that most soldier deaths were from largely preventable contagious diseases rather than from battle wounds.[35] Here we see the use of early data analytics: effective use of meticulous data collection, statistical analysis, and, most importantly, new techniques of visualization to make the data understandable and persuasive to the user.

2.   Ernest Codman: Relentless Data Collection

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29   Louise Selanders, *Florence Nightingale: British Nurse, Statistician, and Social Reformer*, Encyclopedia Britannica, https://www.britannica.com/biography/Florence-Nightingale (last visited Oct. 12, 2019).

30   *See generally* Edwin W. Kopf, *Florence Nightingale as Statistician*, 15 Publ'ns Am. Stat. Ass'n 388, 395 (1916) (emphasizing seven primary tabulation elements of hospital sickness statistics in her paper on Hospital Statistics and Hospital Plans); Jill E. Thomley & Sarah J. Greenwald, Women and Minorities in Mathematics: Florence Nightingale, the Passionate Statistician (2015).

31   Cohen, *supra* note 25, at 131.

32   *Id.* at 132.

33   *Id.* at 133.

34   *Id.* at 129.

35   Elizabeth Fee, *Florence Nightingale and the Crimean War*, 100 Am. J. Pub. Health 1591, 1591 (2010).

Dr. Ernest Codman was a Boston physician whose goal was to learn what professional medical behavior contributed to negative patient outcomes. Codman characterized patient harms due to infections or unnecessary or inappropriate operations as preventable hospital "waste products."[36] He believed that bad patient outcomes could be reduced through relentless data collection and so became obsessed with collecting data on every patient in his hospital (and he used hundreds of handwritten cards toward that end). He developed the concept of the "end result survey"—"[t]hat the Trustees of Hospitals should see to it that an effort is made to follow up each patient they treat, long enough to determine whether the treatment given has permanently relieved the condition or symptoms complained of."[37] His goal was a complete patient record to evaluate, compare, and establish benchmarks for the performance of physicians and hospitals.

Codman laid the foundation for data analytics—a meticulously developed patient medical record, continuous data collection of all facts related to patient care in a hospital, and evaluation of the data with the goal of continuous improvement.[38] He was obsessed with adverse patient outcomes and their elimination.

Codman and Nightingale were pioneers who laid the groundwork for the enterprise of constant data collection, analysis and dissemination of the lessons of those findings, and visualization to strengthen arguments for reform efforts.[39]

3. Elihu M. Schimmel: Hospital Adverse Event Magnitude

Finally, by the 1960s, decades after Codman's earnest haranguing of his colleagues, hospitals and academic medical researchers began to study patient harms in hospitals. E.M. Schimmel's work at Yale Medical School, The Schimmel Report, was

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36   *See* Rajan Madhok, *Crossing the Quality Chasm: Lessons from Health Care Quality Improvement Efforts in England*, 15 BUMC Proc. 77, 77 (2002).

37   Ernest A. Codman, A Study in Hospital Efficiency 6 (1914).

38   Caitlin W. Hicks & Martin A. Makary, *A Prophet to Modern Medicine: Ernest Amory Codman*, BMJ (2013), https://www-bmj-com.ezproxy.neu.edu/content/bmj/347/bmj.f7368.full.pdf.

39   *See Data Utilization Stroke*, Joint Comm'n, https://manual.jointcommission.org/releases/archive/ TJC2010B/DataUtilizationStroke.html (last visited Sept. 26, 2019). Many other patient safety heroes came later, but Nightingale, Codman, and Schimmel were early to the enterprise of hospital harm to patients. *See, e.g.*, E. M. Schimmel, *The Hazards of Hospitalization*, 12 Quality & Safety Health Care 58, 59 (2003).

one of the first sophisticated looks at safety in hospital practice.[40] Schimmel looked at adverse episodes caused by acceptable diagnostic or therapeutic measures intentionally undertaken in the hospital and was surprised to find that 20% of the patients admitted to the medical wards at Yale experienced one or more adverse episodes— some severe—with 16 out of 240 episodes resulting in death.[41]

Schimmel's study revealed that the hospital setting was producing adverse events at a level orders of magnitude higher than previously believed. It also was a special case in which a dedicated surgical staff agreed to voluntary reporting of adverse events; later studies found that reliance on voluntary reporting results in substantial underreporting of those events.[42] Schimmel shocked the hospital world with his revelations of the high level of patient harms. But patient safety reform stalled on the shoals of low levels of adverse event reports. Here we can see how data analytics can provide a tool to circumvent the barriers to effective provider reporting of adverse events.

It has taken an embarrassingly long time for the hospital industry to respond to Codman's entreaties to study patient harms in order to improve patient care, with continual research finding high levels of underreporting of patient harms.[43] It has become clear that better incentives and tools are needed to motivate hospitals with regard to patient safety.[44] The systematic uncovering of adverse events will benefit from the application of data analytics to health care.[45]

B. Modern Data Analytics in Health Care

1. The Power: Expanding Computing Might[46]
Computer processing power and speed have increased by leaps and bounds, replacing slow manual practices with far quicker

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40   Schimmel, *supra* note 39, at 63.
41   *Id.* at 59.
42   *See* Furrow 2, *supra* note 4, at 442.
43   Dep't of Health & Human Servs., Office of the Inspector General, OEI-06-09-00090, Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries (2010).
44   *See* Furrow 3, *supra* note 11, at 65, 91.
45   *Id.* at 72, 85.
46   Tiernan Ray, *Google Says 'Exponential' Growth of AI is Changing Nature of Compute*, ZDNet (Nov. 2, 2018), https://www.zdnet.com/article/google-says-exponential-growth-of-ai-is-changing-nature-of-compute/.

automated data analysis.[47] Faster processing speeds allow the mining of warehouses of patient data from many sources.[48] In the end, data analytics is able to connect three scientific disciplines: statistics, the study of data relationships using numbers; artificial intelligence, the use of software and/or machines that display human-like behaviors; and machine learning or deep learning, the use of algorithms learning from data to make predictions.[49]

Data mining is a problem-solving tool that analyzes existing data in large databases through patterns represented in structures, patterns, or clusters, extracting predictive information and finding hidden patterns that are invisible on a case-by-case basis.[50] It uses specialized software tools based on advanced search algorithms, multiprocessor computers, and massive databases to discover knowledge that is often unexpected.[51] Data analytics technology has become central to most large enterprises as they struggle to keep pace with the masses of big data generated by affordable computing power.[52]

Health care is an obvious candidate for such tools, given the complexity and multiplicity of data sources, the management of complex diseases, and the linkage of government reimbursement to outcomes.

Dating mining is being used, for example, by hospitals to find and prevent Hospital Acquired Conditions ("HACs") to avoid Center for Medicare and Medicaid Services (CMS) financial penalties.[53] Such tracking efforts will increase as (1) hospitals adopt data analytics and (2) ever-expanding federal pay-for-performance programs condition

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47   *Healthcare Analytics*, CONDUENT BUS. SERVS., https://downloads.conduent.com/content/usa/en/ebook/ healthcare-analytics.pdf (last visited Sept. 26, 2019).

48   *Id.*

49   *Data Mining: What it is and Why it Matters,* SAS, https://www.sas.com/en_us/insights/analytics/data-mining.html (last visited May 27, 2019).

50   IAN H. WITTEN ET AL., DATA MINING: PRACTICAL MACHINE LEARNING TOOLS AND TECHNIQUES 5 (Elsevier Sci. & Tech. Books, 3rd ed. 2011).

51   *Dating Mining Concepts,* ORACLE, https://docs.oracle.com/cd/B28359_01/datamine.111/b28129/process.htm# DMCON002 (last visited May 22, 2018).

52   *Big Data Analytics: What It is and Why It Matters*, SAS, https://www.sas.com/en_us/insights/analytics/big-data-analytics.html (last visited Nov. 1, 2019).

53   Jennifer Bresnick, *Using Big Data Analytics for Patient Safety, Hospital Acquired Conditions,* HEALTH IT ANALYTICS (Aug. 6, 2018), https://healthitanalytics.com/features/using-big-data-analytics-for-patient-safety-hospital-acquired-conditions.

larger fractions of a hospital's reimbursement on performance standards for Hospital-Acquired Events. Data analytics can aid clinicians in eliminating adverse events and resulting excessive costs. It can also assist clinicians in determining care plans, for example, based on estimating disease trajectories of cancer patients from unstructured, free text in electronic health records.[54]

2.   The Source: Electronic Health Records (EHRs)

Large quantities of patient data are being generated and stored in data warehouses in the form of electronic health records (EHRs).[55] Such data can be mined for cost-reduction purposes as hospitals are able to identify high-risk patients to reduce emergency department costs, analyze admission rates over short periods to improve staffing and reimbursement, prevent risk of security breaches and fraud, and monitor patients in real time.[56]

Electronic health records (EHRs) have proliferated in the health care industry as the result of federal subsidies. EHRs blossomed with the passage of Obama's Health Information Technology for Economic and Clinical Health (HITECH) Act.[57] The HITECH Act of 2009 was intended to speed up the adoption of electronic health records by hospitals, which had been loitering at about a 10% take-up rate.[58] The Act subsidized adoption costs, provided technical support, and altered reimbursement rules, so long as an adopting physician was able to show "meaningful use" of the EHR system.[59] To meaningfully use an EHR means to use the technology to improve patient care.[60] The Act

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54   Kasper Jensen et al., *Analysis of Free Text in Electronic Health Records for Identification of Cancer Patient Trajectories*, Sci. Reps. (Apr. 7, 2017), https://www.nature.com/articles/srep46226 ("By using these disease trajectories, we predict 80% of patient events ahead in time. . . . We believe that the presented methodology and findings could be used to improve clinical decision support and personalize trajectories, thereby decreasing adverse events and optimizing cancer treatment.").

55   *See* Furrow 1, *supra* note 11, at 449.

56   *Id.*

57   Julia Adler-Milstein & Ashish K. Jha, *HITECH Act Drove Large Gains in Hospital Electronic Health Record Adoption*, 36 Health Affairs 1416, 1418–20 (2017), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2016.1651.

58   *Id.* at 1420.

59   Brian Schilling, *The Federal Government Has Put Billions into Promoting Electronic Health Record Use: How Is It Going?*, Commonwealth Fund, https://www.commonwealthfund.org/publications/newsletter-article/federal-government-has-put-billions-promoting-electronic-health (last visited Sept. 26, 2019).

60   *Id.*

created $30 billion in incentives for the adoption and meaningful use of EHRs.[61] The pressure from the federal government for adoption of EHRs also has created a range of problems with them—lack of standards, poor usability, and poor interoperability, among other problems.[62]

Data mining in health care starts with the EHR. The EHR is essentially a digitized medical chart.[63] EHRs go beyond standard clinical data collected in the provider's office and stored in electronic medical records (EMRs), although the two are often confused by the media.[64] EHRs, unlike EMRs, are designed to reach out beyond the health organization that originally collects and compiles the information; they are built to share information with other health care providers, such as laboratories and specialists, so they contain information from all the clinicians involved in the patient's care.[65] The National Alliance for Health Information Technology states that EHR data "can be created, managed, and consulted by authorized clinicians and staff across more than one healthcare organization."[66] EHRs can be accessed by everyone involved in a patient's care—"including the patients themselves."[67] It is clear that this satisfies the goal of "meaningful use."[68]

Data analytic tools can gather this data and use it in medical decision making and operations. Information in a patient's EHR has information from earlier medical encounters, which is updated when

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61   *Id.*

62   *See* Ross Koppel, *Uses of the Legal System That Attenuate Patient Safety*, 68 DePaul L. Rev. 173 (2019) (discussing the range of problems caused by the rapid diffusion of EHRs, and the limits placed by vendors on their usability and ease of error correction among others).

63   Hilal Atasoy et al., *The Digitization of Patient Care: A Review of the Effects of Electronic Health Records on Health Care Quality and Utilization*, 40 Ann. Rev. Pub. Health 487, 488 (2019).

64   An EMR contains the medical and treatment history of the patients in one practice. EMRs allow clinicians to track data over time; identify which patients are due for preventive screenings or checkups; check how their patients are doing on certain parameters—such as blood pressure readings or vaccinations; and monitor quality of care within the practice. Peter Garrett & Joshua Seidman, *EMR vs EHR – What is the Difference?*, HealthITBuzz (Jan. 4, 2011), https://www.healthit.gov/buzz-blog/electronic-health-and-medical-records/emr-vs-ehr-difference.

65   *Differences Between EHR and EMR*, USF Health, https://www.usfhealthonline.com/resources/key-concepts/ehr-vs-emr/ (last visited Nov. 1, 2019).

66   Garrett & Seidman, *supra* note 64.

67   *Id.*

68   *Id.*

she next interacts with her physician.[69] Lab data, physician notes, and other materials are added as the medical encounter proceeds.[70] Decision support can also be added to the software, including practice guidelines. Algorithms can check for drug interactions, allergies, or other possible risks.[71]

EHRs and EMRs are a significant tool for improving patient safety.[72] Basic applications "can be used to store, organize, and retrieve patients' information," while advanced EMR applications can give general support to healthcare providers and help them "make diagnostic and treatment decisions and other support to health-care providers."[73] These applications include Clinical Decision Support System (CDSS), Computerized Practitioner Order Entry (CPOE), and Physician Documentation (PD).[74]

CPOE requires physicians to directly input orders electronically and may reduce miscommunication errors that could cause preventable adverse events.[75] CPOE systems include or interface with clinical decision support systems of varying sophistication and usually provide access to patient data, real-time feedback regarding the appropriateness of certain orders, formulation of diagnostics or therapy protocols, and clinical guideline adherence.[76]

The benefits of CPOE and PD systems are substantial. A study conducted by Indiana University professors found that CPOE "substantially decreases the occurrence of preventable adverse events as measured by PSIs [Patient Safety Incidents] for simple cases. For example, CPOE is associated with an 11% drop in the probability of experiencing at least one postoperative adverse event for cases with no more than one comorbidity."[77] Additionally, patients diagnosed

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69   Atasoy et al., *supra* note 63, at 488.
70   *Id.*
71   *Id.*
72   Seth Freedman et al., *Information Technology and Patient Health: Analyzing Outcomes, Populations, and Mechanisms*, 4 Am. J. Health Econ. 51, 75 (2017).
73   *Id.* at 54.
74   *Id.* at 52.
75   *Id.* at 57.
76   *Id.*
77   *Id.* at 52.

with more common DRGs[78] experienced a 17% decrease in the probability of an adverse event with the adoption of CPOE.[79]

The authors of this study conclude that CPOEs are powerful tools not only for basic patient data collection but also for decision support in less complex cases with younger patients.[80] Overall, the authors conclude:

> These rules-based protocols, automatic reminders, checklists, and error-checking functions may be expected to have direct impacts on preventable adverse events that patient safety indicators are intended to measure. For example, decision support may prompt physicians to order anticoagulants in order to prevent deep vein thrombosis (measured in PSI 12) among surgical patients, or it may better track IVs used to prevent electrolyte and fluid imbalance that could lead to physiological and metabolic derangement (PSI 10). The core function of PD is to allow the physician to electronically document a patient's conditions and treatments in a systematic, structured manner. PD therefore has the potential to improve patient outcome through better document accessibility, increased legibility, and enhanced communication between practitioners through standard coding.[81]

The study also found a "decreased rate of adverse events for patients with low mortality risk and low severity."[82]

The authors note, however, that *"further improvement in the interoperability of EMR systems and improved ability to take advantage of*

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78 "A Diagnosis-Related Group, abbreviated as DRG, is a system of classifying a patient's hospital stay into various groups in order to facilitate payment of services. The DRG system separates all of the potential disease diagnoses into 20+ body systems, and then subdivides those systems into 450+ groups. Fees are assessed through by factoring the body system and groups affected with the amount of hospital resources required to treat the condition. The result is a fixed rate for patient services known as DRG." They are used to determine how much Medicare pays a hospital for each service provided. *See generally What is a Diagnosis-Related Group, (DRG)?,* Value Healthcare Servs., https://valuehealthcareservices.com/education/what-is-a-diagnosis-related-group-drg/ (last visited Sept. 26, 2019).

79 Freedman et al., *supra* note 72, at 65.

80 *See id.* at 76.

81 *Id.* at 57.

82 *Id.* at 65.

large amounts of data provided by EMR systems are necessary to reap their full benefits."[83]

3.   The Emergence: Data Analytics Power

EHRs are full of "messy" data.[84] "Messy" data in EHRs means that data takes many forms and is hard to read in many cases without natural language processing tools.[85] The data is not clean. Entries are both structured, with a standard vocabulary;[86] and unstructured, with many misspellings.[87] Even the use of synonyms makes searches for a particular condition difficult.[88]

Data analytics provides the computing power and software to sort through this mess. Deep learning and artificial neural networks promise better use of the data locked in EHRs through the use of natural language processing, sequence prediction, and mixed modality data settings.[89] Such systems can handle large volumes of messy data; "neural networks are able to learn representations of the key factors and interactions from the data itself."[90] These tools translate well to healthcare. Deep learning approaches can, in theory, incorporate the entire EHR, including free-text notes, to produce predictions for a wide range of clinical problems and outcomes that outperform state-of-the-art traditional predictive models.[91]

I will review several new research studies that promise new and more effective ways to use EHRs to predict medical adverse events. One promising proposal has been to use EHRs to "simultaneously

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83   *Id.* at 76 (emphasis added).

84   *See* Laura Lovett, *Organizing Messy Data, a Google Developer's View*, MobiHealthNews (June 22, 2018), https://www.mobihealthnews.com/content/organizing-messy-data-google-developers-view.

85   Lauren E. Sweet & Heather L. Moulaison, *Electronic Health Records Data and Metadata*, 1 Big Data 245, 247 (2013).

86   *See* Mary Mosquera, *Single Vocab Standard for Each EHR Reporting Domain Seen as 'Momentous'*, Healthcare IT News (Aug. 18, 2011), https://www.healthcareitnews.com/news/panel-endorses-single-vocab-standard-each-ehr-reporting-domain.

87   Lovett, *supra* note 84.

88   *Id.*

89   Alvin Rajkomar et al., *Scalable and Accurate Deep Learning with Electronic Health Records,* 18 NPG Dig. Med. 1, 1 (2018), https://arxiv.org/pdf/1801.07860.pdf.

90   *Id.* at 1–2.

91   *See* Andrew J. Steele et al., *Machine Learning Models in Electronic Health Records Can Outperform Conventional Survival Models for Predicting Patient Mortality in Coronary Artery Disease,* 13 PLOS One (2018), https://www.biorxiv.org/content/biorxiv/early/2018/01/30/256008.full.pdf.

harmonize inputs and predict medical events through direct feature learning."[92] Direct feature learning is less labor intensive to prepare, using a single data representation of the entire EHR as a sequence of events, allowing for clinical predictions with little additional data.[93] One study's authors claim that this approach "exposes more data with which to make an accurate prediction. For predictions made at discharge, our deep learning models considered more than 46 billion pieces of EHR data and achieved more accurate predictions, earlier in the hospital stay, than did traditional models."[94] The approach used in the study better predicted mortality, unexpected readmission, and increased length of stay.[95]

EHRs can also be used to model predictions of patient safety, operating in real time to identify patients likely to have adverse events during their hospital stay.[96] This model can generate a risk score to categorize patients by risk level, and can be implemented and used within a software application so that patient information can be updated in real time to reflect changes in adverse event risk.[97] The authors claim that "this adverse event risk algorithm can be a valuable tool to support hospital-wide adverse event measurement and documentation as part of holistic patient safety and quality improvement programs to support the safety and reliability of care."[98]

Adverse drug reactions (ADRs) are a third area that benefit from an effective data analytic approach. "According to the World Health Organization (WHO), an adverse reaction to drugs is the

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92   Rajkomar et al., *supra* note 89, at 2 ("We hypothesized that these techniques would translate well to healthcare; specifically, deep learning approaches could incorporate the entire EHR, including free-text notes, to produce predictions for a wide range of clinical problems and outcomes that outperform state-of-the-art traditional predictive models. Our central insight was that rather than explicitly harmonizing EHR data, mapping it into a highly curated set of structured predictors variables and then feeding those variables into a statistical model, we could instead learn to simultaneously harmonize inputs and predict medical events through direct feature learning.").

93   *See id.*; *see generally* Yoshua Bengio, Aaron Courville & Pascal Vincent, *Representation Learning: A Review and New Perspectives*, 35 IEEE Transactions on Pattern Analysis & Machine Learning 1798, 1798 (2013).

94   Rajkomar et al., *supra* note 89, at 4.

95   *Id.* at 4.

96   Michael Li et al., *Identifying Hospital Patient Safety Problems in Real-Time with Electronic Medical Record Data Using an Ensemble Machine Learning Model*, 1 Int'l J. Clinical & Med. Informatics 43, 54, 56 (2018).

97   *Id.* at 54.

98   *Id.*

harmful and unintentional reaction to the use of medications, which occurs at doses normally used in humans for the prophylaxis, diagnosis, or treatment of diseases or to modify a physiological function."[99] Such ADRs are the fifth leading cause of death in the U.S., below heart disease, stroke, cancer, and lung diseases.[100]

ADR reporting systems are often inadequate, underreporting on adverse drug events.[101] These events are, however, critical to detect and report, since many of them are preventable.[102] "The Institute for Healthcare Improvement (IHI) trigger tool is a low-cost, low-tech method for detecting adverse events and adverse reactions through clues (triggers) such as: the use of antidotes, antiemetics, or antidiarrhea agents."[103] A recent study has found that the use of trigger drugs to identify adverse reactions in the emergency department can be used to better understand the adverse drug reactions of patients treated in the ER. Meaningful use of EHRs provides clinically based, high quality metrics that can be captured far more effectively than the billing record, offering an "automated approach as a routine part of the delivery of health care for tracking and potentially identifying adverse events."[104]

This array of recent studies demonstrates that researchers are flocking to AI research, where the payoff from improving current data analytic approaches leads to more effective adverse event discovery. EHRs, even if they are "messy," can now interpret data to capture useful safety metrics to improve hospital quality and reduce adverse events. One sees here the emergence of enterprise tools to assist physicians and hospital administrators in spotting adverse events and even preventing them. The hope is that these data analytic tools can be automated, running in the background and triggering warnings when problems are spotted. This hope must be tempered

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99   Silvana Maria de Almeida et al., *Use of a Trigger Tool to Detect Adverse Drug Reactions in an Emergency Department*, 18 BMC Pharmacology & Toxicology 1, 1 (2017), https://bmcpharmacoltoxicol.biomedcentral.com/articles/10.1186/s40360-017-0177-y.

100   *Id.*

101   *See id.*

102   Corinne M. Hohl et al., *Repeat Adverse Drug Events Associated With Outpatient Medications*, 7 CMAJ Open E446, E448 (2019).

103   *Id.*

104   Kelly April Tyrrell, *Medicare Program to Reduce Hospital-Acquired Conditions Could Be Better*, Hospitalist (Nov. 2014), https://www.the-hospitalist.org/hospitalist/article/122733/health-policy/medicare-program-reduce-hospital-acquired-conditions-could.

by acknowledgment of the limits and the costs of such technologies and more particularly the lack of incentives for hospitals to use them.

III. Patient Safety: Data Analytics Missteps … and Baby Steps

The Institute of Medicine report, *To Err Is Human* (IOM Report), published in 1998, estimated a maximum of 100,000 patient deaths annually occurred due to medical errors.[105] The IOM Report—with its extrapolation of high levels of patient harms—"spurred the development of the Patient Safety Movement, which intensified the search for adverse events and means of preventing them."[106]

Three years later the IOM published *Crossing the Quality Chasm: A New Health System for the 21st Century*, which stressed the importance of health care systems design.[107] It argued that most errors and adverse events in health care are caused by problems with system processes and not provider error.[108] The clear implication is that Codman was right, and it is time to use AI to supercharge the tools for detecting and preventing such errors.

One such tool is the use of automated electronic search strategies. Automated extraction of data from EHRs is a new and sophisticated tool for conducting high-quality retrospective analysis of large patient cohorts.[109] These automated techniques can predict with high accuracy preoperative predictors and identify postoperative complications, such as postoperative myocardial infarction in large cohorts of surgical patients.[110]

CMS and the states have taken an enthusiastic approach to the use of data analytic tools and measures to compare or benchmark hospitals' performances for patient safety.[111] Companies such as

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105 Inst. of Med., To Err Is Human: Building a Safer Health System 28 (Linda T. Kohn et al. eds., 2000) [hereinafter, IOM Report]. The IOM Report suggested a range from 44,000 to 98,000 individuals. *Id.*

106 Furrow 1, *supra* note 11, at 153.

107 *See* Inst. of Med., Crossing the Quality Chasm: A New Health System for the 21st Century (2001).

108 *Id.* at 1–2.

109 Oludare O. Olatoye et al., *Derivation and Validation of an Automated Electronic Search Algorithm to Identify Patients at Risk for Obstructive Sleep Apnea,* 13 Signa Vitae 96 (2017).

110 *Id.*

111 *See generally* Ctrs. for Medicaid & Medicare Servs., Roadmap for Implementing Value Driven Healthcare in The Traditional Medicare Free-for-Service Program 6, https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/QualityInitiativesGenInfo/downloads/VBPRoadmap_OEA_1-16_508.

Conduent's MIDAS+ DataVision[112] provide data analytic software products to health care companies, offering data mining capabilities for large volumes of data.[113] Technological advances in data analytics have manifested through increased computing power through distributed processing; computer systems based on advanced machine learning and probabilistic reasoning (for example, IBM's "Watson");[114] and new ways to visualize data, such as the *BioMosaic* mapping program, being developed by the Centers for Disease Control.[115] While vendors are piling into the field, enthusiasm may have to be tempered by the current shortcomings of AI and its applications.[116]

A.   *Benefit/Cost Ratios: Immature AI*

Over 96% of providers are currently using an EHR.[117] "For many providers, the EHR has become the primary platform for most clinical tasks including documenting patient information, viewing patient history, ordering medications as well as lab and diagnostic tests, viewing results, and communicating with other providers and patients."[118] This creates a dumping ground for data and contributes to the messiness of big data. It suffers from the problems of what Jennifer Bresnick has called the Ten Vs, ten elements of big data that must be processed before results are meaningful.[119] Her list reveals

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pdf (last visited Sept. 12, 2019).

112   *Midas+ DataVision: Full Spectrum Data Management Services*, Midas+ (2011), http://www.midasplus.com/pages/newsandevents/public/ executivesummary_datavision.pdf.

113   The number of vendors is in the hundreds, and they are constantly merging or disappearing. *See generally Top 20 in Healthcare Analytics: In-Depth Guide [2019 Update]*, AIMultiple (Jan. 4, 2019), https://blog.aimultiple.com/ healthcare-analytics-vendors/.

114   *See IBM Watson Health*, IBM, https://www.ibm.com/watson/health/business-need/ (last visited Sept. 11, 2019).

115   U.S. Gov't Accountability Office, GAO-16-659SP, Report to Congressional Addressees, Data and Analytics Innovation: Emerging Opportunities and Challenges 85 (2016).

116   *See* Raghupathi & Raghupathi, *supra* note 10, at 9.

117   Katharine T. Adams et al., *An Analysis of Patient Safety Incident Reports Associated with Electronic Health Record Interoperability*, 8 Applied Clinical Informatics 593, 594 (2017).

118   *Id.*

119   Jennifer Bresnick, *Understanding the Many V's of Healthcare Big Data Analytics: Volume, Velocity, and Variety Are All Vital for Healthcare Big Data Analytics, But There Are More V-Words to Think About, Too*, Health IT Analytics (June 5, 2017), https://healthitanalytics.com/news/understanding-the-many-vs-of-healthcare-big-data-analytics.

the multi-layered task of AI systems in producing useful data as well as the cost and staffing needed to develop an effective AI system in hospitals. She presents a list of ten with questions that describe the task: "Volume – how much data is there?" "Velocity – how quickly is the data being created, moved, or accessed?" "Variety – how many different types of sources are there?"; "Veracity – can we trust the data?"; "Validity – is the data accurate and correct?"; "Viability – is the data relevant to the use case at hand?"; "Volatility – how often does the data change?"; "Vulnerability – can we keep the data secure?"; "Visualization – how can the data be presented to the user?"; "Value – can this data produce a meaningful return on investment?"[120]

The data is a mess, calling for a full spectrum of actions by a range of software tools to produce something useful from a morass of data sources.[121] Healthcare organizations on the hunt for lower costs, better outcomes, and value-based care bonuses have invested heavily in storing masses of data, from customer service call logs and clinical documentation to satisfaction surveys and patient-generated health data from the Internet of Things.[122] Vendors claim they can use their programs of machine learning, artificial intelligence, and semantic data lakes to produce effective clinical decision support and predictive analytics.[123]

The uses for big data are proliferating rapidly as organizations move deeper into population health management and accountable care. The promises are large, but the majority of healthcare organizations struggle to turn big data analytics tools into usable clinical intelligence.

The difficulty comes in part from the nature of the data swamps of health care information technology (IT). First, data has typically been siloed,[124] scattered between the departments of

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120 *Id.*

121 *See* Lauren E. Sweet & Heather Lea Moulaison, *Electronic Health Records Data and Metadata: Challenges for Big Data in the United States,* 1 Big Data 245, 246, 250 (2013).

122 Saiful Islam et al., *A Systematic Review on Healthcare Analytics: Application and Theoretical Perspective of Data Mining,* Healthcare 1, 2, 27-28 (May 23, 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6023432/pdf/healthcare-06-00054.pdf.

123 Quantzig, *Top Benefits of Big Data in the Healthcare Industry,* BusinessWire (Feb. 7, 2018), https://www.businesswire.com/news/home/20180207005640/en/.

124 *See Breaking Down the Silos: How to Achieve EHR Interoperability,* Healthcare Bus. & Tech. (Nov. 13, 2018), https://www.healthcarebusinesstech.com/achieve-ehr-interoperability/.

finance, IT, and quality improvement, among other departments. Patient information turns up in these siloes all over the institution, making it hard to use to improve patient care.[125] EHR technology is at varying levels of interoperability with other health IT within the same provider organization. "[I]n a hospital setting the EHR may not be interoperable with radiology, laboratory, or pharmacy information systems. The EHR also may not be interoperable with health IT at external provider organizations including EHRs at other hospitals and outpatient care facilities, and technology in support services like laboratories."[126]

These deeply entrenched interoperability issues remain unrepaired as hospitals hesitate to spend more resources on data analytics. Industry surveys note significant staffing gaps[127], health data exchange roadblocks[128], and failures of organizational planning[129] that have slowed hospital adoption of effective systems. Clinical data are also flawed by sampling biases; EHR data is collected during health care delivery (e.g., clinic visits, hospitalizations), and this data oversamples sicker populations.[130]

Additionally, qualified data analytics staff are increasingly hard to find and expensive to hire, commanding high salaries.[131] The demands of industry for data analytics staff and top managers is huge, and health care suffers as a result.

Huge investments in AI are being made with the promise of clinical improvements as well as cost reductions. AI technologies require "data storage, data curation, model maintenance and

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125 Jennifer Bresnick, *Turning Healthcare Big Data into Actionable Clinical Intelligence*, Health IT Analytics (May 24, 2017), https://healthitanalytics.com/features/turning-healthcare-big-data-into-actionable-clinical-intelligence.

126 Adams et al., *supra* note 117, at 594.

127 Jennifer Bresnick, *48% of Businesses, Including Healthcare, Face Big Data Skills Gap*, Health IT Analytics (May 8, 2017), https://healthitanalytics.com/news/48-of-businesses-including-healthcare-face-big-data-skills-gap.

128 Jennifer Bresnick, *Data Exchange, Analytics Remain Out of Reach for Many Providers*, Health IT Analytics (Feb. 9, 2017), https://healthitanalytics.com/news/data-exchange-analytics-remain-out-of-reach-for-many-providers.

129 Bresnick, *supra* note 125.

130 Thomas M. Maddox et al., *Questions for Artificial Intelligence in Health Care*, 321 JAMA 31, 31 (2019).

131 Thor Olavsrud, *6 Analytics Trends That Will Shape Business in 2016*, CIO (Jan. 25, 2016), https://www.cio.com/article/3025869/6-analytics-trends-that-will-shape-business-in-2016.html; Jennifer Bresnick, *HIM, Healthcare Analytics Staff Bringing in Big Salaries*, Health IT Analytics (Jan. 2, 2014), https://healthitanalytics.com/news/him-healthcare-analytics-staff-bringing-in-big-salaries.

updating, and data visualization."[132] This does not come cheap and vendors typically overpromise the end results. These tools and related needs may simply replace current costs with different, and potentially higher, costs.[133] Most forms of clinical decision support add to rather than replace the information that clinicians need. Integrating AI into clinical workflow can also have a range of negative consequences that add to adverse event occurrences, such as "significantly increas[ing] the cognitive load facing clinical teams and … higher stress, lower efficiency, and poorer clinical care."[134]

Information technology continues to fall short, in spite of the excitement reflected in vendor marketing.[135]   Peter Pronovost, the former director of the Armstrong Institute for Patient Safety and Quality at Johns Hopkins, notes the limitation of AI adoption to date: "[m]edicine today invests heavily in information technology, yet the promised improvement in patient safety and productivity frankly have not been realized."[136] Money is being spent on data analytic tools that are not addressing key patient safety issues, as I will argue later in the article.

Medicine loves technology. For hospitals, keeping up with the Hopkins and the Harvards drives them toward acquiring new promising technologies even if their clinical effectiveness is unproven. Robotic surgery is one such example, taken up by hospitals without careful financial analysis of its costs and benefits.[137] AI has likewise not been proven to be clinically effective in many clinical applications. An opinion piece published earlier this year frames the issues thusly:

> AI is most likely to succeed when used with high

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132 *See* Cynthia Saver, *How Will Artificial Intelligence Impact Surgical Patient Care*, OR Manager (Apr. 22, 2019), https://www.ormanager.com/will-artificial-intelligence-impact-surgical-patient-care-part-1/.

133 *Id.*

134 Maddox et al., *supra* note 130, at 32.

135 *See* Erin McCann, *Deaths by Medical Mistakes Hit Records*, Healthcare IT News (July 18, 2009), https://www.healthcareitnews.com/news/deaths-by-medical-mistakes-hit-records.

136 *See id.*

137 *See* Christopher P. Childers & Melinda Maggard-Gibbons, *Estimation of the Acquisition and Operating Costs for Robotic Surgery*, 320 JAMA 835, 835 (2019) ("Despite evidence questioning the clinical benefit, the use of the robotic platform for surgical procedures is increasing. No benchmark exists for the cost of acquiring and operating robotic systems, and previous cost evaluations have either omitted key expenses or utilized billing records that do not itemize costs with sufficient granularity.").

quality data sources from which it can "learn" and classify data in relation to outcomes. However, most clinical data, whether from electronic health records (EHRs) or medical billing claims, remain ill-defined and largely insufficient for effective exploitation by AI technologies. For example, EHR data on demographics, clinical conditions, and treatment plans are generally of low dimensionality and are recorded in limited, broad categorizations ([e.g.], diabetes) that omit specificity ([e.g.], duration, severity, and pathophysiologic mechanism).[138]

Another recent report concluded:

Electronic health records have created a host of risks to patient safety. Alarming reports of deaths, serious injuries and near misses—thousands of them—tied to software glitches, user errors or other system flaws have piled up for years in government and private repositories. Yet no central database exists to compile and study these incidents to improve safety.[139]

Critics, faulting a go-slow attitude to buying data analytic systems too early in their maturity, propose the solution of natural language processing to analyze unstructured data, such as clinician notes, to deal with the mess of raw unfiltered data in its myriad forms.[140] "However, many natural language processing techniques are [still] crude and the necessary amount of specificity is often absent from the clinical record."[141] Substantive staff time must be spent entering details into the program before the data analysis can even begin, and staff time is costly, detracting from other operations in a complex hospital.

B. Easy Visible 'Events': Physicians as Targets

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138 Maddox et al., *supra* note 130, at 31.

139 Fred Schulte & Erika Fry, *Death By 1,000 Clicks: Where Electronic Health Records Went Wrong*, Fortune (Mar. 18, 2019), https://fortune.com/longform/medical-records/.

140 Scott H. Lee, *Natural Language General for Electronic Health Records,* 1 NPJ Dig. Med. 63 (2018) (testing a deep learning model to "clean" EHRs).

141 Maddox et al., *supra* note 130, at 31.

Once the physician was legally the captain of the operating room ship, responsible for the nurses and other staff involved in her patient procedures (and keeping the hospital free from liability).[142] Like a ship's captain, she had authority over the surgical enterprise, and was vicariously liable for bad outcomes of surgery.[143]

The captain of the ship doctrine of imputed liability is in serious decline.[144] But the physician is still the natural target of blame regarding patient adverse events in many cases. She diagnoses, operates, does rounds, and generally follows patients through their hospital stay. In spite of the robust patient safety literature on system failures in health care, lawyers first look at physicians for causal factors for infections, surgical mortality, and missed diagnoses. Data analytics promises the ability to spot otherwise invisible causes of adverse events; it may also too easily target the obvious "cause" of such events, the ever present physician.[145] Missed diagnoses, surgical errors, surgical infection rates, and high patient mortality all point to the physician as the primary causal factor in adverse events even though the causes may include poor credentialing decisions, poor physician monitoring, an inadequate nursing staff, or a host of institutional deficiencies that combined to harm the patient.[146]

Consider an early example of hospital data mining, *Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center*.[147] The hospital used the Midas data mining program as a part of the reappointment process, which generated a statistical analysis of outliers in the hospital's physicians' performance, including infection rates flagging outlier physicians.[148] From January 1, 1999, to September 30, 1999, "the appellant physician had a 14% infection rate from one procedure and a 7.9% overall infection rate[, which] was quadruple the national

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142 Mazer v. Lipschutz, 327 F.2d 42, 49 (3d Cir. 1963) (applying Pennsylvania law).

143 *Id.* at 50.

144 S.Y. Tan, '*Captain of the Ship' Doctrine,* Clinical Neurology News (June 14, 2018), https://www.mdedge.com/clinicalneurologynews/article/168209/business-medicine/captain-ship-doctrine.

145 *See* Furrow 1, *supra* note 11, at 153.

146 *Id.* at 152.

147 Unnamed Physician v. Bd. of Tr. of Saint Agnes Med. Ctr., 113 Cal. Rptr. 2d 309 (Cal. Ct. App. 2001).

148 *Id.* at 317, 323. ACS's Midas+ Comparative Performance Measurement System was a performance improvement software application that provided comparative data to over 250 hospitals nationally at the time of this case, with large databases housing over 14 million encounters. *Id.*

rate for physicians in his specialty."[149] His charts were reviewed by an outside reviewer and his staff privileges were limited as a result.[150] The Midas program had identified charts that generated a statistical red flag.[151] In such a case, the advantages in targeting the physician are clear—a program to improve the physician's antiseptic procedures could be implemented. At the other extreme, the physician's privileges could be suspended or even revoked.

It is unclear that such efforts will always result in better patient outcomes. Physicians may develop strategies to defeat data analytics, thereby thwarting efforts at quality improvement. Consider an earlier data-driven strategy—physician "report cards."[152] The study showed the physician report cards, when used to monitor the patients' "diabetes, one of the highest-prevalence conditions in medical practice, were unable to detect reliably true practice differences within the 3 sites studied."[153] The cards were not in fact very helpful.

The study concluded that use of individual physician profiles may create a clinical environment in which physicians can avoid being penalized by avoiding or deselecting patients with high prior cost, poor adherence, or response to treatments.[154] These may not always be easily adopted workarounds, but too sharp a physician-pointed stick may cause physicians to step up their search for ways to minimize any negative results that point to them.

Hospitals too are capable of deflecting negative attention. AI tools undoubtedly can be used positively to spot training flaws, equipment failures, and other limiting factors that led to both hospital and physician errors. Institutional workarounds will be harder to achieve as the Chief Analytic Officer powers up the newest data analytic tools for spotting system problems.

The standard of care for credentialing and retaining physicians has long required hospitals to check on physician performance. It follows, then, that the standard of care applied in liability actions is evolving to require the systematic data collection of outcomes and to monitor regularly the outcomes of individual physicians. "Negligent

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149   Furrow 6, *supra* note 11, at 820.
150   *Id.*
151   *Id.*
152   *See* Timothy P. Hofer et al., *The Unreliability of Individual Physician "Report Cards" for Assessing the Costs and Quality of Care of a Chronic Disease,* 281 JAMA 2098, 2098 (1999).
153   *Id.*
154   *Id.*

supervision" puts the onus on hospitals to use their data analytic systems to move beyond observational reports to the computer tracking of infection rates, high readmissions, and other adverse events by physicians, nurses, surgical teams, and other providers.[155] A system approach aims to design systems by which adverse events are reduced by design, rather than a checklist approach to reduce human errors.[156]

Performance monitoring is required by the Joint Commission,[157] which issued standards in 2010 on medical staff governance to prescribe the relationship between the medical staff, the medical staff's Executive Committee, and the hospital's Board.[158] These standards intensify prospective monitoring of physician quality; one of the standards, for example, specifically provides that the hospital must establish a system for collecting, recording, and addressing individual reports of concerns about individual physicians.[159] The Joint Commission also requires a period of focused review for all new and all renewal privileges for existing providers.[160] The standard requires the medical staff to develop criteria for evaluating the performance of practitioners.[161] It also includes examples of triggering events, such as "infection rates, sentinel events, complaints, or other events that are not sentinel events.[162] The value of data analytic tools for gathering this mandated information is apparent, since spotting triggering events is what data tools are best at.

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155 *See* Furrow 1, *supra* note 11, at 169.

156 Furrow 5, *supra* note 11, at 473.

157 Joint Comm'n, Standards Boosterpak for Focused Professional Practice Evaluation/Ongoing Professional Practice Evaluation (2011), https://www.mc.vanderbilt.edu/documents/CAPNAH/files/Forms/Competency%20Evaluation%20Forms/TJC%20Booster%20Pack%20FPPE-OPPE.pdf [hereinafter Professional Practice].

158 Furrow 1, *supra* note 11, at 169.

159 Professional Practice, *supra* note 157, at 21.

160 *Id.* at 12.

161 *Id.* at 21.

162 *Id.* "A sentinel event is a Patient Safety Event that reaches a patient and results in any of the following:
   • Death
   • Permanent harm
   • Severe temporary harm and intervention required to sustain life
   Such events are called 'sentinel' because they signal the need for immediate investigation and response." *See Sentinel Event Policy and Procedures,* Joint Comm'n (Aug. 8, 2019), https://www.jointcommission.org/sentinel_event_policy_and_procedures/.

Hospitals are increasingly under pressure from multiple sources to track and prevent adverse event creation, as we have discussed above.[163] Federal requirements have also changed hospital-staff relations. For example, under the Medicare Conditions of Participation, federal law requires, among other things, that hospital bylaws reflect the accountability of the medical staff to the hospital governing board or "governing body for the quality of care provided to patients."[164]

Health care data analytics will create benchmarks to review physician performances by providing an aggregate picture of the performance of their peers. "[H]ospitals could use data analytics to generate physician report cards, computer reminders to prescribe evidence-based medicines, or even clinical-decision support tools to help them assess patient risks for blood clots."[165] Once data is available, "hospitals will be forced to develop new strategies of adverse event reduction, from support tools to ways of penaliz[ing] physicians who continue to be poor performers."[166] Precautions are needed in the medical staff bylaws to protect physicians against overzealous penalties or credentialing actions.

Second, peer review immunity statutes, for better or for worse, are already losing some of their protective qualities as data pours out of hospital quality analyses.[167] Data mining means that patterns and variation lead to the discovery of more outliers in every aspect of hospital practice, beyond the obvious adverse mortality and morbidity events created by surgeons. As data analytics relies on

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163 *See* Ziad Obermeyer & Ezekiel J. Emanuel, *Predicting the Future – Big Data, Machine Learning, and Clinical Medicine,* 375 New Eng. J. Med. 1216 (2016).

164 42 C.F.R. § 482.12(a)(5) (2019).

165 Furrow 1, *supra* note 11, at 174.

166 *Id.*

167 All states currently have statutes extending at least some protection to peer review participants in health care institutions. These statutes first make information created in the quality assurance peer review processes confidential, usually insulating it from discovery in litigation and from introduction in evidence. Second, they protect peer review decision makers and persons who provide information to the peer review process from civil liability claims brought by persons who receive negative reviews in the quality assurance process. Finally, a much smaller number of statutes explicitly protect risk management documents from discovery or risk managers from liability. By contrast, risk management information and participants in risk management programs are less likely to be immunized from discovery and use, even if the statute does not specifically exclude such material. *See id.* at 179–80.

algorithmic tools to drive searches, the limits of peer review will become apparent. By operating automatically and always dredging for poor outcomes, these tools, as courts have also begun to notice, are outside the usual peer immunity statutes.[168]

Third, as hospitals acquire and master automated data analytics tools, patient safety administrators may engage in overzealous hunting for "bad docs." The goal of the patient safety movement has been to shift the search for adverse event solutions away from solitary physicians as the cause of adverse events to the operation of the whole hospital enterprise.[169] The law is, however, slow to follow, as it is a laborious common law mechanism that only gradually evolves as 50 states gradually absorb new social and institutional changes.

C. Under the Streetlight: Reimbursement and Ignored Causes

The "streetlight effect" occurs when people only search for something where there is enough light to look.[170] The well-known joke goes as follows:

> Late at night, a policeman finds a drunk man crawling around on his hands and knees under a streetlight. The drunk man tells the officer he's looking for his wallet. When the office asks if he's sure this is where he dropped the wallet, the man replies that he thinks he more likely dropped it across the street. Then why are you looking over here? the befuddled officer asks. Because the light's better here, explains the drunk man.[171]

The Medicare program shines a streetlight in the form of a range of reimbursement tools that aim at adverse events. These pay-for-performance metrics are designed to focus on measurable specific conditions like Hospital Acquired Conditions (HACs), or actions like patient readmissions in order to penalize hospitals and thereby drive Medicare cost down. In an effort to curb MRSA and *C. diff* infection rates nationwide, CMS implemented the HAC

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168 *Id*. at 180.

169 IOM Report, *supra* note 105, at 5.

170 David. H. Freedman, *Why Scientific Studies Are So Often Wrong: The Streetlight Effect,* Discover (Dec. 10, 2010), http://discovermagazine.com/2010/jul-aug/29-why-scientific-studies-often-wrong-streetlight-effect.

171 *Id*.

Rduction Program.[172] Beginning in 2015, payments to hospitals are directly affected by their HAC scores, measured in part by hospital-associated infection (HAI) rates.[173] The HACs have grown into quite a list: HAI's, Central Line-Associated Bloodstream Infection (CLABSI), Catheter-Associated Urinary Tract Infection (CAUTI), Surgical Site Infection (SSI), Methicillin-resistant Staphylococcus aureus (MRSA) bacteremia, and Clostridium difficile Infection (CDI).[174]

Hospitals are also generally scored according to patient outcome measures.[175] These measures include specific *patient safety indicators* (PSIs) divided into two domains; each PSI is scored and averaged to arrive at a composite score for each facility.[176] The first Domain scores hospitals according to reported rates of: accidental punctures or lacerations; falls resulting in hip fractures; iatrogenic pneumothorax; post-operative complications (including acute kidney injury requiring dialysis, pulmonary embolism and DVTs, respiratory failure, sepsis, wound dehiscence); and pressure ulcers.[177]

The second Domain focuses on "standardized infection ratios of central line-associated bloodstream infections (CLABSIs), catheter-associated urinary tract infections (CAUTIs), and surgical site infections (SSIs)."[178] Domain 2 is now the primary source of the hospital score (once MRSA and C. diff infection rates were added in 2017); only 15% of its total HAC Reduction Program score is

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172 *Hospital-Acquired Condition Reduction Program (HACRP)*, Ctr. For Medicare & Medicaid Servs. (July 16, 2019), https:// www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/HAC-Reduction-Program.html.

173 *Id.*

174 *Id.*

175 Agency for Healthcare Research and Quality, Fact Sheet on Patient Safety Indicators, https://www.ahrq.gov/sites/default/files/wysiwyg/professionals/systems/hospital/qitoolkit/combined/a1b_combo_psifactsheet.pdf (last visited Sept. 17, 2019).

176 *Hospital-Acquired Infections and CMS Reimbursement,* Lippincot Solutions, http://lippincottsolutions.lww.com/blog.entry.html/2018/10/23/hospital-acquiredin-fAJF.html (last visited Sept. 17, 2019).

177 *Id.* CMS PSI 90 measure includes the following ten CMS PSIs: Pressure Ulcer Rate, Iatrogenic Pneumothorax Rate, In-Hospital Fall with Hip Fracture Rate, Perioperative Hemorrhage or Hematoma Rate, Postoperative Acute Kidney Injury Requiring Dialysis Rate, Postoperative Respiratory Failure Rate, Perioperative Pulmonary Embolism or Deep Vein Thrombosis Rate, Postoperative Sepsis Rate, Postoperative Wound Dehiscence Rate, Unrecognized Abdominopelvic Accidental Puncture/Laceration Rate.

178 *Id.*

based on Domain 1.[179] This means that considerable reimbursement money is now at stake with the infection scores; facilities with HAC Reduction Program scores greater than the 75th percentile (i.e., the worst scoring facilities) have their payments reduced by one percent when CMS pays hospital claims.[180]

Fix the problem or take a Medicare reimbursement hit, says CMS to thousands of U.S. hospitals.[181] CMS proudly claims that its non-payment policy for HACs, including MRSA and *C. diff* infections, has already saved Medicare almost $350 million each year.[182] However, these figures represent money saved by Medicare, but money lost to hospitals, money that could have been spent on other areas of patient care, considering the high costs of treating both MRSA and *C. diff*. Recent studies found that it takes about $38,500 per patient to treat drug-resistant staph infections (MRSA-related pneumonia) and about $24,205 to treat each person with *C. diff*.[183] The reoccurrence of the *C. diff* infection recurs will add an additional $10,580 in healthcare costs.[184]

179　*Id.*

180　*Id.*

181　Hospital-Acquired Condition Reduction Program Fiscal Year 2020 Fact Sheet, Ctr. for Medicare & Medicaid Servs. (July 2019), https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Downloads/HAC-Reduction-Program-Fact-Sheet.pdf.

182　*Hospital-Acquired Infections and CMS Reimbursement, supra* note 176.

183　UT Sw. Med. Ctr., *Superbug MRSA Infections Less Costly, But Still Deadly*, ScienceDaily (May 15, 2018), www.sciencedaily.com/releases/2018/05/180515131543.htm; Jessica Martin, *Substantial Economic Burden Attributed to Recurrent Clostridium Difficile*, Infectious Disease Advisor (Feb. 21, 2018), https://www.infectiousdiseaseadvisor.com/home/topics/gi-illness/clostridium-difficile/substantial-economic-burden-attributed-to-recurrent-clostridium-difficile/.

184　Jessica Martin, *supra* note 183.

Hospital decisionmakers go where the streetlight shines—CMS penalties, Never Events[185], and *Hospital Compare*[186] metrics. The Chief Executive Officer, the Chief Financial officer, staff, and the hospital's Board of Directors are all obsessed with tangible metrics that affect the financial margins of the most thinly financed hospitals in the United States. The leadership, anxious about spotlighted penalties, understandably expands targeted quality improvement (QI) initiatives aimed at reducing infection rates and improving patient outcomes.

This distortion of QI budgets is a problem created particularly by sharply targeted reimbursement penalties that lack a sound evidentiary foundation of cause and effect, as MRSA and *C. diff* infection rates cannot be directly correlated to the program's non-payment policy or any QI initiatives.[187] In that case, QI money might be better spent on a larger universe of patient safety improvements rather than too narrowly funneled to infection reduction.[188] Evidence of

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185   The term "Never Event" refers to "particularly shocking medical errors—such as wrong-site surgery—that should never occur. Over time, the term's use has expanded to signify adverse events that are unambiguous (clearly identifiable and measurable), serious (resulting in death or significant disability), and usually preventable. Since the initial never event list was developed in 2002, it has been revised multiple times, and now consists of 29 'serious reportable events' grouped into seven categories: Surgical or procedural events, product or device events, Patient protection events Care management events, Environmental events, Radiologic events, Criminal events." 11 states have mandated reporting of these incidents whenever they occur, and an additional 16 states mandate reporting of serious adverse events (including many of the NQF Never Events). *Never Events*, PSNET (Jan. 2019), https://psnet.ahrq.gov/primer/never-events?q=/primers/primer/3.

186   *Hospital Compare*, Ctr. for Medicare & Medicaid Servs. (Oct. 19, 2016), https://www.cms.gov/medicare/quality-initiatives-patient-assessment-instruments/hospitalqualityinits/hospitalcompare.html.

187   Sung-Huei Bae, *Nonpayment Policy, Quality Improvement, and Hospital-Acquired Conditions: An Integrative Review*, 32 J. Nursing Care Quality 55, 58, 59 (2017) (reviewing 14 articles and finding strong evidence that "… the CMS policy has spurred quality improvement initiatives; however, the relationships between the CMS policy and hospital-acquired conditions are inconclusive"). *See also* Teresa M. Waters et al., *Effect of Medicare's Nonpayment for Hospital-Acquired Conditions: Lessons for Future Policy*, 175 JAMA Internal Med. 347, 350 (2015) ("Our findings suggest that the HACs Initiative was associated with at least a 10% reduction in the rate of change in infections (CLABSIs and CAUTIs) but had no effect on the rates of injurious falls or HAPUs.").

188   An excellent survey of the limits of pay-for-performance regulation can be found in Allen Kachalia et al., *Legal and Policy Interventions to Improve Patient Safety*, 133 Circulation 661, 664–65 (2016).

resource misallocation based on poor evidence for these CMS penalty metrics is clear at this point: common measures used by government agencies and public rankings to rate the safety of hospitals do not accurately capture the quality of care provided. A study in *Medical Care* found:

> PSIs and HACs have not been adequately validated compared to chart review and therefore may be subject to coding error. Establishing hospital quality or payment based on unvalidated metrics has consequences for patient safety efforts. These results suggest that unless further development and validation of administrative metrics occurs, widespread implementation of pay-for-performance efforts may not significantly improve patient safety.[189]

The authors of the study found that only one measure out of 21 met the scientific criteria for being considered a true indicator of hospital safety.[190] The researchers analyzed 19 studies conducted between 1990 and 2015 that directly addressed the validity of HACs and PSI measures, as well as information from CMS, the AHRQ and the Maryland Health Services Cost Review Commission's websites.[191] Of the 21 measures developed by the AHRQ and CMS, 16 had insufficient data and could not be evaluated for their validity; only five measures had enough useful information to analyze.[192] Only one measure—measuring accidental punctures or lacerations obtained during surgery—met the researchers' validity criteria.[193]

The measures evaluated in the study are magnified by their use by several public rating systems, including U.S. News and World Report's Best Hospitals, Leapfrog's Hospital Safety Score, and the Center for Medicare and Medicaid Services' Star Ratings. This amplification creates an even brighter streetlight under which

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189　Bradford D. Winters et al., *Validity of the Agency for Health Care Research and Quality Patient Safety Indicators and the Centers for Medicare and Medicaid Hospital-acquired Conditions: A Systematic Review and Meta-Analysis,* 54 Med. Care 1105, 1105 (2016).

190　*Id.* at 1107.

191　*Id.* at 1106.

192　*Id.* at 1107.

193　*Id.*

hospitals search for adverse events, even if the metrics of the HAC and PSI measures are not valid.[194]

The study concluded by calling for a reevaluation of the use of PSIs and HAC measures in public reporting and pay-for-performance. The authors wrote: "Our results suggest that the PSIs and HAC measures may not be valid enough and/or have insufficient data to support their use for these purposes. This is especially true given the potential financial impact these pay-for-performance approaches may have on the narrow financial margins on which most hospitals function."[195]

What are the consequences to hospital staff of the significant allocation of resources to PSI and HAC reimbursement penalties?[196] The findings are a mix of positive and negative; a recent survey of hospital staff found the following changes:

> cultural shifts involving attention, commitment, and support from hospital leadership for patient safety; hiring new staff to assure the accuracy of clinical documentation and POA oversight structures; increased time burden for physicians, nurses, and coders; need to upgrade or purchase new software; and need to collaborate with hospital departments or staff that did not interface directly in the past.[197]

Patient safety became a priority to every hospital, every unit, and every provider, bringing departments together and often fostering teamwork. Many of these actions were indeed productive, as "[m]ost hospital staff shared having greater adherence to evidence-based guidelines (EBGs); new protocols for prophylactic care treatment; and increased focus on prevention (e.g., providing sitters to prevent patient falls; testing for infections at admission); implementation of safety procedures for HAC prevention; changes in testing protocols for urinary tract infections (UTIs); and development of updated protocols and physician guides."[198]

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194   *Id.* at 1106.
195   *Id.* at 1110.
196   Asta Sorensen et al., *HAC-POA Policy Effects on Hospitals, Other Payers, and Patients,* 4 Medicare & Medicaid Res. Rev. E1 (2014).
197   *Id.*
198   *Id.* at E7.

The negatives are also substantial, particularly if the penalties had no effect on HAC reduction. Hospital staff surveyed observed:

> HAC-POA policy implementation resulted in time, personnel, and resource consumption, such as the need to hire clinical documentations specialists or changing the work flows to establish oversight structures, such as second reviews or committees. Changes in hiring practices included increased hiring of clinical documentation specialists.[199]

Physician and nursing staff time was increasingly spent on completing discharge summaries and reconciling POA queries; productivity of clinical staff and coders decreased.[200] New software was required and new policies, including non-billing of preventable HACs.[201] Coding changes required more training and software modification. And so on. Some of these changes may have been intrinsically valuable, but others are a waste of time and money if, as most interviewees reported, few specific changes in HAC incidence patterns at their organizations were observed.[202] The lead author of the study, Bradford Winters, expressed concern that "[t]hese measures have the ability to misinform patients, misclassify hospitals, misapply financial data and cause unwarranted reputational harm to hospitals."[203] The study authors want to see reform of the reimbursement metrics, to encourage systems to use measures that are based in clinical rather than billing data.[204] The chorus of voices in favor of a reboot of HAC and PSI penalties is gaining in volume.[205]

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199   *Id.*

200   *Id.*

201   *Id.*

202   *Id.*

203   Hub Staff, *Common Hospital Safety Measures Are Often Misleading to Public*, Johns Hopkins U. (May 16, 2016), https://hub.jhu.edu/2016/05/16/hospital-safety-measures-accuracy/.

204   Pronovost recently outlined additional fixes that could be implemented by the rating community in a commentary published in the April 2016 issue of JAMA. See Ashish Jha & Peter Pronovost, *Toward a Safer Health Care System*, 315 JAMA 1831 (2016) (designating a separate reporting entity to establish standards for data collection and making funds available for systems engineering research were listed as possible starting points).

205   Rishi K. Wadhera et al., *The Hospital Readmissions Reduction Program —Time for a Reboot*, 380 New Eng. J. Med. 2289, 2291 (2019).

The reliance by CMS on flawed metrics is a reminder that neither Pay-For-Performance or Data Analytics are miracle tools. Much work must be done to sort out the validity of reimbursement measures in order to avoid wasting staff time and hospital money.[206]

The push by CMS to rely on Pay-for-Performance tools built on flawed data sources, in order to police hospital care and reduce Medicare costs, has produced "functional stupidity" within organizations.[207] One aspect of this is a lack of *substantive reasoning*.

> This happens when cognitive resources are concentrated around a small set of concerns that are defined by a specific organizational, professional, or work logic. It entails the myopic application of instrumental rationality focused on the efficient achievement of a given end, and ignorance of the broader substantive questions about what that end actually is.[208]

This sounds like a description of reimbursement penalties in the U.S. hospital system.[209] Pay-for-Performance is not producing improvements in patient health, while consuming billions in hospital income.[210]

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206 For another example, see Elizabeth A. Fehlberg et al., *Impact of the CMS No-Pay Policy on Hospital-Acquired Fall Prevention Related Practice Patterns*, 00 Innovation Aging 1, 1 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6002153/pdf/igx036.pdf. ("The CMS no-pay policy increased utilization of fall prevention strategies despite little evidence that these measures prevent falls.").

207 Mats Alvesson & André Spicer, *A Stupidity-Based Theory of Organizations*, 49 J. Mgmt. Stud. 1194, 1199 (2012) ("Stupidity resonates with many anecdotal accounts of organizational life. . . . [S]tupidity needs to be taken seriously, as a part of organizational life. Furthermore, we would claim that stupidity should not just be equated with pathology, irrationality, or dysfunctional thinking which disrupt the smooth functioning of organization life. Rather, stupidity may be actively supported by organizations and may create rather 'functional' outcomes.").

208 *Id.* at 1200.

209 *See* Anita L. Tucker & Amy C. Edmondson, *Why Hospitals Don't Learn from Failures: Organizational and Psychological Dynamics that Inhibit System Change*, 45 Cal. Mgmt. Rev. 55, 68 (2003).

210 Aaron Mendelson et al.*, The Effects of Pay-for-Performance Programs on Health, Health Care Use, and Processes of Care: A Systematic Review*, 166 Ann. Intern. Med. 341 (2017) (concluding that "[i]n the hospital setting, there was low-strength evidence that P4P had little or no effect on patient health

D. Data Analytics and Penalties: Skewed Incentives

Data analytics power coupled with Pay-for-Performance metrics has fueled hospital investment in patient outcome driven quality initiatives.[211] As described above, CMS uses scoring that incorporates rates of preventable conditions, particularly healthcare-associated infections (HAIs).[212] Hospitals in the bottom quartile can see a one percent revenue reduction from Medicare.[213] One study found that excess hospital costs across the 12 HACs that had at least 30 observed adverse HAC outcomes were $2,044,333,067, an average excess hospital cost of $41,917 per HAC patient.[214] Patients who experienced HACs were in the hospital an average of 8.17 days longer than patients who did not experience HACs.[215]

The goal of financial penalties under Pay-for-Performance programs is to better align incentives by encouraging hospitals to consider costs of poor quality in investment decisions. The problem, however, is that CMS penalties do not properly incentivize hospitals in most cases. Other reimbursement sources often offset these penalties, thereby reducing hospital financial incentives to invest in quality improvement.[216] Hospitals, faced with the high costs of infections, have rapidly learned that they can (1) classify patients with complications into higher reimbursing diagnosis-related group DRGs; (2) charge payers for extra days due to complications under per-diem payment systems in use in some states; (3) charge payers for extra days due to complications;[217] or (4) qualify extremely costly cases,

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outcomes and a positive effect on reducing hospital readmissions" and that P4P programs may improve processes of care but "consistently positive associations with improved health outcomes have not been demonstrated in any setting").

211   Catherine C. Cohen et al., *Financial Incentives to Reduce Hospital-Acquired Infections Under Alternative Payment Arrangements*, 39 INFECTION CONTROL & HOSP. EPIDEMIOLOGY 509, 510 (2018).

212   *Hospital-Acquired Condition Reduction Program (HACRP)*, CTRS. FOR MEDICARE & MEDICAID SERVS. (July 16, 2019), https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/HAC-Reduction-Program.html.

213   Melanie Evans, *Half of Hospitals Penalized for Hospital-Acquired Conditions are Repeat Offenders*, MOD. HEALTHCARE (Dec. 10, 2015), http://www.modernhealthcare.com/article/20151210/NEWS/151219988.

214   *Hospital-Acquired Conditions Lead to Avoidable Cost and Excess Deaths*, IBM WATSON HEALTH (2018), https://www.ibm.com/downloads/cas/X97QXLER.

215   *Id.*

216   Cohen et al., *supra* note 211, at 510.

217   *Id.*

under Medicare and other systems, for outlier payments (payments that cover 80% of hospital costs to treat seriously ill patients above a fixed-loss threshold) or stop-loss payments.[218]

One study concluded that such outlier payments reduce hospital safety incentives because hospitals manage to recover a significant portion of the cost of HAIs from payers. The study authors concluded that "[e]ven under the most conservative payment assumptions (all payers pay DRG rates and private payers pay at Medicare rates), hospitals recover from payers one-third to one-half of the cost of HAIs, substantially reducing the incentive to make costly investments in this area."[219]

The result is that not all costs fall on hospitals. Rather, the cost burdens of lower-quality care are shared between providers and insurance payers or patients. This cost-shifting to other payers or patients reduces the incentives for providers to invest in quality. The absorption of financial risk by third party payers lowers the risk acuity of hospital Boards of Directors and upper management of hospitals— if you can pass costs on to others, you are less motivated to worry about those costs.

Data analytics has little relationship to this failure of Pay-for-Performance to improve hospital quality; hospitals must use robust tools to present to CMS their HAIs and PSIs for reimbursement purposes. The data analytics methodology is, however, not designed to search for hospital disincentives to invest in quality in the right places. In other words, AI applications here operate as a dumb statistical tool, ignoring the workarounds provided by a variety of different reimbursement approaches by payers. Hospitals are good at workarounds—they employ smart accountants to hunt for every dime that can be saved.

IV. The Law, The Enterprise, and The Physician: Legal Dimensions of AI Adoption

We have seen some of the problems with the rapid adoption of Big Data techniques to penalize hospitals for readmissions and patient safety indicator problems. The next set of problems involves legal liability rules that may be affected by this adoption of data analytic technologies to police quality and safety in hospitals.

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218   *Id.*
219   *Id.* at 513.

A. Enterprise Responsibility: Expanded Hospital Liability

1. Doctor Targeting

The traditional liability approach to patient injuries, whether in the hospital or outside, has been to focus on the physician.[220] Agency law rules protect the hospital from liability for the acts of doctors who have the legal status of independent contractor.[221] Doctors have therefore been the typical target of adverse event litigation. This legal status allows hospitals to largely avoid liability where specific cases of physician negligence causes severe patient harm. Medical liability principles target the physician in her relationship with a particular patient, without attention to the system and its contribution to patient harm. The status of physicians as independent contractors has been shifting over the past decades to employee status, giving hospitals far more incentive to monitor their physician employee quality.[222]

It is clear that a minority of clinicians are generators of adverse events.[223] For these physicians, data mining should lead to hotspotting, followed by more frequent peer review, or even termination, when the data points to particular outlier physicians as the concentrated sources of patient mortality, readmissions, or other negative outcomes for the hospital.[224] Data tools here provide

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220   Abraham & Weiler, *supra* note 15, at 399.
221   Independent contractor status is a doctrine of agency law. "Hospitals employ nurses, technicians, clerks, custodians, cooks, and others who are clearly employees of the hospital under agency principles. Their terms and conditions of employment are controlled by the hospital, which sets their hours, wages and working conditions. When employees are negligent, the hospital is vicariously liable for their acts as a result of the master-servant relationship of agency law." Physicians on the other hand "have typically been independent contractors rather than employees of the hospital. This legal status means that the hospital is [therefore] not easily targeted as a defendant in a malpractice suit." Only if the doctor whose negligence injured a patient is an employee could the hospital be reached through the doctrine of vicarious liability. *See* BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 283 (8th ed. 2018).
222   *See* Chris Mazzolini, *Employed Physicians Outnumber Independent Physicians for the First Time Ever*, MED. ECON. (May 8, 2019), https://www.medicaleconomics.com/news/employed-physicians-outnumber-independent-physicians-first-time-ever.
223   David M. Studdert & Michelle M. Mello, *In From the Cold? Law's Evolving Role in Patient Safety*, 68 DEPAUL L. REV. 421, 437 (2019).
224   *See* Furrow 2, *supra* note 4, at 170–74.

a powerful spotlight and useful form of targeting on doctors who are flawed performers.[225]

2. Hospital Targeting

Courts began to hold hospitals liable for patient injuries through the doctrine of hospital corporate negligence. The doctrine has been adopted in 30 U.S. states.[226] The doctrine is well summarized by the Pennsylvania Supreme Court in *Thompson v. Nason Hospital*[227] and recognizes the complexity of the modern health care institution and the need to impose a duty that is patient-centered.[228]

Corporate negligence imposes two duties, from an enterprise liability perspective; hospitals have: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; and (2) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients.[229]

Hospitals are generally held to a national standard of care for hospitals of their size and treatment category.[230] The hospital has an obligation to provide surveillance of the quality of patient care within the hospital. Courts have imposed upon hospitals a duty to follow their own internal procedures[231] and to monitor risks to patients created by poor treatment by staff physicians.[232] Hospitals as enterprises have the power to improve patient care.[233] Courts have taken doctrinal steps to reconceive the liability of hospitals as

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225 Studdert & Mello, *supra* note 223, at 433–37, 449–50 (arguing that medical errors can be grouped into three tiers: (1) individual clinicians as primary cause; (2) a combination of individual and system factors; and (3) system errors are dominant; the focus on system errors has distracted from a need to focus on individual physicians, "frequent flyers" who are important causes of patient harms).

226 *See* Larson v. Wasemiller, 738 N.W.2d 300, 306–07 (Minn. 2007) (adopting corporate negligence for Minnesota, the court noted that more than half of the state courts have adopted the tort, and it has support in Restatement (Second) Tort sections such as sections 320 and 411).

227 591 A.2d 703, 707 (Pa. 1991).

228 Casillas-Sanchez v. Ryder Mem'l Hosp., Inc., 960 F. Supp. 2d 362, 366–67 (D.P.R. 2013).

229 *See* Furrow 1, *supra* note 11, at 168.

230 *See, e.g.,* Wansley v. ABC Ins. Co., 81 So.3d 725, 732 (4th Cir. 2011).

231 *See, e.g.,* Williams v. St. Claire Med. Ctr., 657 S.W.2d 590, 594–95 (Ky. Ct. App. 1983).

232 *See, e.g.,* Strubhart v. Perry Mem'l Hosp. Tr. Auth., 903 P.2d 263, 273, 276 (Okla. 1995) (adopting doctrine of independent corporate responsibility).

233 *See* Steele, *supra* note 91; *see generally* Barry R. Furrow, *Enterprise Liability for Bad Outcomes from Drug Therapy: The Doctor, the Hospital, the Pharmacy, and the Drug Firm*, 44 Drake L. Rev. 377, 403 (1996).

enterprises. They have limited the agency law protections of hospitals, recognizing that the public perceives a hospital as a complex entity responsible for care provided and relies on the hospital for this care. They have also developed corporate negligence doctrine as discussed above in the face of evidence that hospitals are in the best position to monitor poor physician performance. And they have expanded the role of hospitals in ensuring the "competency of their medical staffs."[234]

The ease of detection promised by data analytics points to a new standard of care for hospitals—enterprise responsibility for adverse events—beyond the narrow culpability tests of ordinary tort cases.[235] Enterprise liability focuses on the tools a hospital should deploy to spot patient harms. One prime example of enterprise liability grounded in new technologies is the case of *Washington v. Washington Hospital Center*.[236] The plaintiff in the case was a healthy young woman undergoing elective surgery for an abortion and tubal ligation, under general anesthesia.[237] The endotracheal tube was improperly inserted by the physician anesthesiologist.[238] While the surgery was underway it became clear that the patient was not receiving oxygen.[239] She suffered a cardiac arrest and was resuscitated but suffered catastrophic brain injuries and ended up in a persistent vegetative state.[240]

The case turned on the failure of the Washington Hospital Center to have carbon dioxide monitors at the hospitals.[241] By 1986 standards these were relatively new devices mostly used at academic medical centers, and the defendants argued that a national hospital standard of care did not require them to have them; two publications described the use of carbon dioxide monitors as "encouraged" and "emerging."[242] The court noted that "[a] standard of due care, however,

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234 Pedroza v. Bryant, 677 P.2d 166, 170 (Wash. 1984). For further discussion of these ideas, an exhaustive analysis can be found in Barry R. Furrow et al., Health Law (4th ed. 2015).

235 A. Michael Froomkin et al., *When AIs Outperform Doctors: The Dangers of a Tort-Induced Over-Reliance on Machine Learning and What (Not) to Do About It*, 61 Ariz. L. Rev. 33, 34 (2019).

236 579 A.2d 177, 183 (D.C. 1990).

237 *Id.* at 180.

238 *Id.*

239 *Id.*

240 *Id.*

241 *Id.* at 181.

242 *Id.* at 182.

necessarily embodies what a *reasonably prudent* hospital would do []
and hence care and foresight exceeding the minimum required by
law or mandatory professional regulation may be necessary to meet
that standard."[243] Other testimony confirmed that many hospitals
were converting to carbon dioxide monitors by 1987.[244] The adverse
event was preventable by a medical technology already diffusing into
common use in hospitals—it was a breakthrough technology and
one that was not unduly expensive even for hospitals with smaller
budgets than academic medical centers. It worked well at avoiding
anesthesia disasters. The court showed no patience for the hospital's
arguments about the adoption of this new technology.

The second dimension of hospital corporate negligence has
two components that involve the management of physicians: (1) a
duty to select and retain only competent physicians and (2) a duty
to oversee all persons who practice medicine within its walls as to
patient care. Credentialing and retention of hospital medical staff is
the central task of hospitals.[245] The modern hospital must provide
care, support, and service, not just a shell for the physicians to use.[246]
A hospital is thus directly liable for the failure of administrators and
staff to properly monitor and supervise the delivery of health care
within the hospital. A hospital has a non-delegable duty directly to
its patients and is liable for its action or inaction regarding its policies
rather than specific negligent acts of one of its employees.[247] Courts
have held that accreditation standards of the Joint Commission can
establish the standard of care for a hospital, along with state hospital
licensure laws and the hospital's own by-laws.[248]

Most jurisdictions have held hospitals to a duty to take
reasonable steps to insure the competence of members of its
medical staff.[249] While the medical staff is self-governing, the

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243 *Id.*
244 *Id.* at 182.
245 *See* Columbia/JFK Med. Ctr., Ltd. v. Sangounchitte, 977 So. 2d 639, 643–44
      (Fla. Dist. Ct. App. 2008).
246 Alex Stein, *Toward A Theory of Medical Malpractice*, 97 Iowa L. Rev. 1201, 1229
      (2012).
247 Moser v. Heistand, 681 A.2d 1322, 1324–25 (Pa. 1996).
248 Pedroza v. Bryant, 766 P.2d 166, 171 (Wa. 1984); Decker v. St. Mary's
      Hospital, 619 N.E.2d 537, 541–42 (Ill. App. Ct. 1993). *But see* Kadlec Med.
      Ctr. v. Lakeview Anesthesia Assocs., No. 04-0997, 2006 WL 1328872, at *2
      (E.D. La. 2006) (holding that the Joint Commission guidelines do not create
      a cause of action).
249 *See, e.g.*, Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997); *see also* Johnson v.
      Misericordia Cmty. Hosp., 99 Wis. 2d 708, 729–730 (1981); *see also* Fla.

hospital establishes and implements procedures for staff selection and reappointment.[250] A hospital has a duty to investigate the qualifications of medical staff applicants.[251] This duty to investigate is based on a national standard of credentialing practice.[252]

Data analytic tools enlarge a hospital's ability to track physician adverse events and other measures of substandard care. Data analytic tools spot eruptions of patient adverse events[253]; deep learning versions of data analytics can even anticipate and prevent them.[254] Some courts have talked of negligent supervision and negligent credentialing in terms of an affirmative duty to detect problems among physicians.[255] Automatic data analytic tools risk making this a mandatory duty, requiring such tools to be in place. The Joint Commission, the primary accreditor of hospitals, issued standards on medical staff governance in 2010 that prescribe the relationship between the medical staff, the medical staff's Executive Committee, and the hospital's Board.[256] Joint Commission standards have intensified the institutional focus on prospective monitoring of physician quality. One of the Standards, for example, specifically provides that the hospital must establish a system for collecting, recording, and addressing individual reports of concerns about individual physicians.[257]

Consider a patient who undergoes surgery in a hospital performed by Dr. Smith. After the surgery, he suffers a severe infection that proves hard to treat and leaves him with respiratory impairments. The hospital has run data analytics that produce surgical

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Stat. Ann. § 766.110 (West 2009).

250 *See generally Medical Staff Credentialing: Eight Strategies for Safer Physician and Provider Privileging*, VantagePoint (Mar. 26, 2017), https://slidex.tips/download/vantagepoint-medical-staff-credentialing-eight-strategies-for-safer-physician-an.

251 Bell v. Sharp Cabrillo Hosp., 260 Cal. Rptr. 886, 893–94 (Cal. Ct. App. 1989).

252 Lopez v. Cent. Plains Reg'l Hosp., 859 S.W.2d 600, 603 (Tex. App. 1993).

253 Furrow 6, *supra* note 11, at 817–819.

254 David Classen et al., *An Electronic Health Record–Based Real-Time Analytics Program for Patient Safety Surveillance and Improvement*, 37 Health Affairs 1805, 1809 (2018) ("The first focus of this study was the improved detection of safety events, and it found, on average, more than ten times more harms than those found by conventional approaches. Relying on real-time EHR streaming data, this approach allowed for the real-time detection of safety problems, operationally enabling interventions to help patients as these safety problems occurred.").

255 *See, e.g.*, LeBlanc v. Research Belton Hosp., 278 S.W.3d 201, 206 (Mo. App. 2008); Oehler v. Humana Inc., 775 P.2d 1271, 1272 (Nev. 1989).

256 The Joint Comm'n, Requirement, Rationale, Reference 2 (2011).

257 *See* Professional Practice, *supra* note 157, at 21–24.

infection data profiles for all surgeons on the medical staff, and Dr. Smith is at the very bottom of the staff profile.[258] The patient-plaintiff may reasonably argue that the hospital was negligent in failing to scrutinize this doctor's performance during his re-credentialing for retention on the medical staff. Corporate negligence arguably would apply where the hospital fails to use its detailed risk information on its physicians to limit or revoke their staff privileges, or to improve support where deficiencies occur.[259] No particular negligent act has to be proved, but just the outlier.

This is the starting point for real enterprise liability: the hospital should be liable for bad doctors in cases such as this. David Hyman, exploring hospital failures to police "bad doctors" within a hospital, argues as follows: "It also makes sense to dramatically increase the sanctions for entities that help contribute to the problem of bad doctors by turning a blind eye to their misdeeds—or worse still, by encouraging them to move on in exchange for a clean reference. Maybe hospitals should be subject to automatic enterprise liability for the misdeeds of bad doctors."[260] This is a promising idea that deserves more attention.

3. Hospital System Targeting

The expansion of CMS penalties and the diffusion of data analytic tools pressures the hospital to act as a single unit, an enterprise. The annual measurement of levels of PSIs and HACs create penalties past a threshold set by CMS; this is in effect a strict liability system. The "Never Events" that are folded now into HACs were an early form of strict liability in the sense that they were statistical artifacts that combined low probability with severe outcomes. [261] It is the event's occurrence that triggers reimbursement scrutiny; preventability is not a focus of the program.

This version of enterprise liability is the first step in allowing courts to target hospitals for harms suffered by patients. Data mining

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258 A similar situation occurred in Cronic v. Doud, 523 N.E.2d 177, 178–79 (Ill. App. Ct. 1988) (concluding unnecessary surgeries and misdiagnosis by physicians should have been detected by hospital through utilization review because it had data to put it on notice of problem).

259 *See* Furrow 6, *supra* note 11, at 821–22 (describing how a plaintiff can prevail against a hospital on a corporate negligence claim for failing to use information on their physicians).

260 David A. Hyman, *Bad Doctors: Naming and Blaming in a World with Much Less Claiming*, 68 DePaul L. Rev. 263, 270 (2019).

261 *Never Events, supra* note 185.

increases the intensity of hospital targeting, shifting from tracking a particular patient or physician to an overview of the whole population of a hospital over time.[262] Consider this the next level of enterprise liability, adverse event patterns in the hospital generally whatever the cause. IBM cites an example of a Florida hospital where IBM's data mining program revealed that pneumonia patients "who were not given medication immediately upon admittance suffered significantly worse outcomes than those who were."[263]

At another facility, data mining showed that patients with cardiovascular disease were not always prescribed beta-blockers because the discharge process did not include a crucial step to ensure the prescription was ordered; an easy solution, to change work processes, was implemented.[264] These are population-wide shortcomings not focused on the errors of a particular staff physician. The hospital must adopt strategies to induce the whole staff in a given unit such as the Emergency Room to adopt an evidence-based practice.

The use of data tools to improve patient safety is not new. One early hospital user of an adverse event tracking tool in a Salt Lake City hospital was able to increase the number of ADEs identified forty-fold after instituting a new computing system to predict and track errors.[265] "Mandated data mining of hospital and provider records will allow hospitals to detect more adverse events than existing voluntary reporting mechanisms. Everything from surgeons' infection rates to adverse events caused by drugs and medical devices can be tracked; such data mining can then spot anomalous findings like a doctor's high infection rate in patients after surgery."[266]

This tracking and monitoring of adverse events has already shifted the meaning of "adverse event" away from a specific example of patient harm via provider mistake or negligence to a broader meaning of substandard care as measured against a benchmark of hospital rates—for example, high infections rates or mortality of a particular surgical team. CMS's use of HAC and PSI penalties naturally looks at the overall operation of a hospital to assess penalties, and

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262   Furrow 6, *supra* note 11, at 817.
263   *Id*. at 818.
264   *Id*.
265   Scott Evans et al., *Development of a Computerized Adverse Drug Event Monitor*, Proc. Ann. Symp. on Computerized Applications for Med. Care 23, 25 (1991).
266   Furrow 1, *supra* note 11, at 167.

the link between the enterprise and responsibility for bad outcomes has rapidly been pushed by the proliferation of Pay-for-Performance penalties. Hospitals now have enterprise financial responsibility and risk for bad outcomes. The next step is to expand patient safety incident definitions to include a wider range of adverse events, and to design a way to not only penalize hospitals but to compensate patients who suffer adverse outcomes.

B. Enterprises and CMS Requirements of Uniform Standards and Tools

Electronic clinical quality measures (eCQMs) are essential for CMS quality reporting and value-based purchasing programs, and are updated annually with new codes and other corrections.[267] They provide access to real-time data to promote clinical decision support and quality improvement, using detailed clinical data to track treatment outcomes in hospitals and other health care organizations.[268] They are also used to satisfy reporting requirements to CMS, the Joint Commission, and commercial insurers for reimbursement programs based on quality reporting.[269]

Hospitals are accredited by the Joint Commission, which sets regulatory standards for hospital patient care, credentialing, and other hospital functions. The Joint Commission traditionally has not provided guidance on the use and integration of data analytics into the hospital accreditation process. This changed in 2019 when the Joint Commission created and has made available to providers a new platform for clinical quality-based eCQMs, available to providers in any environment where they can generate and use the results continuously.[270] The Clinical Quality Language (CQL) is used by CMS, and the Joint Commission intends this platform to unite quality measurement, clinical pathways, clinical decision support, and more in a single environment.[271]

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267 *eCQM Library*, Ctr. for Medicare & Medicaid Servs., https://www.cms.gov/regulations-and-guidance/legislation/ehrincentiveprograms/ecqm_library.html (last modified Apr. 2, 2019).

268 "Electronic clinical quality measures (eCQMs) use data electronically extracted from electronic health records (EHRs) and/or health information technology systems to measure the quality of health care provided." *eCQMs*, ECQI: Resource Ctr., https://ecqi.healthit.gov/ecqms (last updated Oct. 3, 2019).

269 *Id.*

270 *Id.*

271 Nathan Eddy, *Joint Commission Debuts Hospital Clinical Quality Metrics Platform*,

What should a lawyer make of this? It is a significant move toward standardizing not only EHRs but also data platforms for the modern hospital. The Joint Commission, by adopting the platform and offering it to all accredited hospitals, is setting a standard for the use of data analytics for quality purposes. eCQMs effectively are a mandated tool, setting a baseline for hospitals to be measured against. This is another move toward enterprise responsibility and a uniform national standard of enterprise liability. Delay in adopting a standard of care can lead to liability, as the *Washington v. Washington Medical Center* case illustrates.[272]

V. Patient Safety Goals: A Broader Perspective

Hospitals today face what has been called "confusing complexity—safety initiatives focused on a broad array of specific safety targets with interventions for each one: process standardization, checklists for surgery, bundles for central lines, electronic prescribing and order entry, and medication barcoding."[273] For the hospital statisticians and epidemiologists, there are too many metrics and systems to easily keep track of, as they are of differing validity, and often hard to apply to the clinical setting. Patient safety can be improved, however, by pursuing a number of goals.

A. *Goal 1: Reengineer System Metrics*

The earlier discussion about CMS penalties for HACs and PSIs indicates that these metrics are flawed, not based on good evidence, and need to be re-examined. CMS should take several steps to improve its flawed reimbursement process.[274] First, CMS should "eliminate unnecessary, unreliable metrics from government programs and oversee the development of a standardized set of validated metrics."[275] Second, CMS should create a new standard-setting agency to set accuracy requirements for measure prior to their implementation.[276] Jha and Pronovost suggest a model in the Federal

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Healthcare ITNews (May 16, 2019), https://www.healthcareitnews.com/news/north-america/joint-commission-debuts-hospital-clinical-quality-metrics-platform?utm_source=dlvr.it&utm_medium=twitter.

272   *See supra* notes 236–47 and accompanying text.

273   Tejal K. Gandhi et al., *Patient Safety at the Crossroads*, 315 JAMA 1829, 1829 (2016).

274   Ashish Jha & Peter Pronovost, *Toward a Safer Health Care System the Critical Need to Improve Measurement*, 315 JAMA 1831, 1831 (2016).

275   *Id.*

276   *Id.* at 1832.

Accounting Standards Advisory Board, which sets standards for financial reporting.[277] This model uses professionals to set accounting standards, audit performance, and report on it.[278]

Third, funding should be provided to improve support system engineering.[279] A good example is the checklist intervention that reduced central line infections, which was supported by a large grant from AHRQ.[280] "The [federal] government—the largest payer in health care—needs to fund practically applicable studies on systems engineering to promote efficient, safe health care."[281] Data analytics is only useful if its data bases are solid and valid.

B. Goal 2: Target Adverse Events: Real-time Recognition

Adverse event recording in electronic health records systems is far from uniform.[282] "Uniformity is essential for adequate exchange of information between health professionals and is important with respect to patient safety. Studies looking at incident reporting systems in other industries refer to meaningful feedback information as an important aspect to improve safety."[283]

Data analytics tools developed for hospitals can improve real time detection of adverse events, as several recent studies have concluded. The use of EHRs can improve the detection of preventable adverse events and diagnostic errors.[284] "Previous application[s] have involved a manual review of a large number of patient charts to look for the presence of triggers, followed by a detailed review

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277 *Id.*

278 *Id.*

279 *Id.*

280 *See* Peter J. Pronovost et al., *Fifteen Years After* To Err is Human: *A Success Story to Learn From,* 25 BMJ Quality & Safety 396 (2016).

281 Jha & Pronovost, *supra* note 276, at 1832.

282 Mi Ok Kim et al., *Problems with Health Information Technology and Their Effects on Care and Patient Outcomes: A Systematic Review,* 24 J. Am. Med. Informatics Ass'n 246, 258 (2017) ("We found that use errors that interfered with the receipt of patient information were reported in a majority of studies and were commonly linked to poor training and lack of familiarity with the system. Poor user interfaces also contributed to use errors and were sometimes exacerbated by machine errors.").

283 Sabine E. M. de Hoon et al., *Adverse Events Recording in Electronic Health Record Systems in Primary Care,* 17 BMC Med. Informatics & Decision Making 1, 5 (2017).

284 Viraj Bhise et al., *An Electronic Trigger Based on Care Escalation to Identify Preventable Adverse Events in Hospitalised Patients,* 27 BMJ Quality & Safety 241, 242 (2017), https://qualitysafety.bmj.com/content/qhc/27/3/241.full.pdf.

among triggered records to identify adverse events. Conversely, newly available clinical data from EHRs provide a unique opportunity to select which records to review."[285]

One study sought to leverage EHR data to improve detection of preventable adverse events, including diagnostic errors, on the theory that more efficient methods to measure preventable events could lead to focused learning and quality improvement efforts, help facilitate analysis to understand contributory factors for these events, and help inform interventions for improvement.[286] The approach was based on an "e-trigger and modified review methods, to identify patients with preventable adverse events in inpatient settings."[287] The approach used EHR data and a codified Global Trigger Tool (GTT) algorithm and chart review methodology to increase the yield for preventable events.[288] This tool also identified inpatient diagnostic errors, which other tools were unable to do.[289]

The authors concluded that the EHR data-based trigger and modified review processes were able to "efficiently identify hospitalised patients with preventable adverse events, including diagnostic errors."[290] Fewer records would be needed, helping patient safety improvement efforts; factors contributing to adverse events could help to develop non-punitive solutions; diagnostic errors could be spotted early.[291]

C. Goal 3: Look at the Human Factors[292]

Hospital administrators and trustees have an obligation to promote a safety culture—one where individuals are held accountable for their actions (or failures to act), expected to report errors and near misses, and in which adverse event reports are reviewed and acted upon. The goal is to "prevent recurrence of harmful situations."[293] Many of the adverse event detection proposals, such as the one discussed in the previous section, can spot not only system failures

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285 *Id.* at 241.
286 *Id.* at 242.
287 *Id.*
288 *Id.*
289 *Id.* at 243.
290 *Id.* at 245.
291 *Id.*
292 *See id.*
293 Sonya Collins, *BMJ Analysis Calls Medical Errors Third Leading Cause of Death, Shines New Light on Ongoing Problem*, PharmacyToday 36, 37 (2016), https://www.pharmacytoday.org/article/S1042-0991(16)30526-6/pdf.

but also problem providers. Surgery in particular is team-oriented, and teams can be damaged by toxic surgeons.[294]

A safety culture is hard to develop in a busy hospital, but leaders of the organization have power to guide behaviors and practices within an institution. Trustees need to be educated as a central role in promoting patient safety among other goals.[295] Trustees of Hospitals are becoming a more diverse group, bringing professional training to bear on the operation of a hospital.[296] Their role in shaping hospital culture toward patient safety is a critical one. As trustees become a more professional and expert group, they can remind hospital administrators that patient safety is a central concern, and the obsession with penalty avoidance must be subordinated to constant attention to patient safety in the hospital.[297] This is part of the fiduciary duty of a member of the board of directors of a hospital.

Since the IOM report *To Err is Human*, the hospital industry has claimed to understand the need to spend time and money on creating psychological safety within hospitals. The concept of psychological safety was developed first by James Reasons and expanded by Amy

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294 William O. Cooper et al., *Association of Coworker Reports About Unprofessional Behavior by Surgeons with Surgical Complications in Their Patients*, 154 JAMA Surgery 828, 829 (2019), https://jamanetwork.com/journals/jamasurgery/fullarticle/2736337?utm_campaign=articlePDF&utm_medium=articlePDFlink&utm_source=articlePDF&utm_content=jamasurg.2019.1738 ("Patients whose surgeons had higher numbers of coworker reports about unprofessional behavior in the 36 months before the patient's operation appeared to be at increased risk of surgical and medical complications. These findings suggest that organizations interested in ensuring optimal patient outcomes should focus on addressing surgeons whose behavior toward other medical professionals may increase patients' risk for adverse outcomes.").

295 *See* Ray Valek, *Six Ways a Trustee Can Help Create an Ideal Culture*, AHA Trustee Servs.,https://trustees.aha.org/six-ways-trustee-can-help-create-ideal-culture (last visited Oct. 10, 2019); *See* Evan M. Benjamin, *The Board's Role in Quality and Patient Safety*, Prescriptions for Excellence Health Care, Winter 2013, at 5, https://jdc.jefferson.edu/cgi/viewcontent.cgi?article=1127&context=pehc.

296 *See* Rhoda Weiss, *Communication Strategies—New Styles in Trustee Leadership*, Health Progress (Sept.–Oct. 2004), https://www.chausa.org/publications/health-progress/article/september-october-2004/communication-strategies-new-styles-in-trustee-leadership; *see also* Dave Barkholz, *Healthcare Boards Need More Diversity, but Pace of Challenge Is 'Glacial'*, Mod. Healthcare (June 3, 2017), https://www.modernhealthcare.com/article/20170603/MAGAZINE/170609987/healthcare-boards-need-more-diversity-but-pace-of-change-is-glacial.

297 *See* Valek, *supra* note 297.

Edmundson.[298] It defines four attributes of a safe work environment: "(1) Anyone can ask questions without looking stupid; (2) Anyone can ask for feedback without looking incompetent; (3) Anyone can be respectfully critical without appearing negative; (4) Anyone can suggest innovative ideas without being perceived as disruptive."[299] The health care industry presents the opposite model of a culture that resists open discussion of errors—caused by "a rigid, profession-based hierarchy and a tendency to blame individuals for system-generated mishaps."[300] Codman fought these barriers a hundred years ago in his Boston hospital.

Data analytics does not address core human issues in the delivery of health care, but it can be designed to detect linkages between adverse events and what the scholars of hospitals units call "psychological safety." Studies of team culture have found that "the level of psychological safety in the broader organization will impact project teams' willingness to engage in learn-how."[301] The willingness and ability of members to catch and report drug errors has a strong effect on the positive correlation between error rates and nurse manager coaching, perceived unit performance, and quality of unit relationships. AI can work in tandem with administrators to better detect physician triggers of harm to teams.

D. Goal 4: Price Adverse Events by a Compensation Mechanism

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298   IHI Multimedia Team, *How Can Leaders Create Psychological Safety?*, Inst. for Healthcare Improvement (Feb. 14, 2017), http://www.ihi.org/communities/blogs/how-can-leaders-create-psychological-safety.

299   *Id.*

300   Anita L. Tucker et al., *Implementing New Practices: An Empirical Study of Organizational Learning in Hospital Intensive Care Units*, 53 Mgmt. Sci. 894, 899 (2007).

301   *Id.* The work of Amy Edmondson and her colleagues on team learning is of high relevance to health care, particularly nursing teams. *See* Amy C. Edmonson, *Psychological Safety and Learning Behavior in Work Teams*, 44 Admin. Sci. Q. 350, 355 (1999). For a discussion of leader behaviors associated with high psychological safety, and thus high team learning, see Amy C. Edmondson et al., *Speeding Up Team Learning*, 79 Harv. Bus. Rev. 125 (2001). *See also* Amy C. Edmondson, *The Kinds of Teams Health Care Needs*, Harv. Bus. Rev. (Dec. 16, 2015), https://hbr.org/2015/12/the-kinds-of-teams-health-care-needs; Amy C. Edmondson, *Learning from Mistakes Is Easier Said than Done: Group and Organizational Influences on the Detection and Correction of Human Error*, 32 J. Applied Behav. Sci. 5, 86 (1996), *reprinted in* 40 J. Applied Behav. Sci. 66–90 (2004).

Scholars in the 1970's proposed that hospitals should voluntarily agree to identify, notify, and promptly compensate patients for avoidable injuries, with tort damages limited under most proposals.[302] Claims would be resolved either through courts or arbitration. The plan as proposed would experience-rate insurance premiums paid by providers, in order to create incentives for the providers to improve the quality of care, thereby reducing their exposure for the adverse outcomes listed.[303] Provider experience under the plan would also be used to strengthen peer review within hospitals.[304]

These early proposals from the 1970s have resurfaced and are being tried in modified forms by some hospital systems as a means of controlling damage exposure. The Veteran's Administration has implemented such a program.[305] A hospital using this approach typically adopts several steps. First, a representative discloses adverse events to affected patients and their families.[306] Second, she apologizes on behalf of the institution for causing the adverse event and harms suffered by the patient.[307] Third, she offers compensation where appropriate.[308]

The current trend is toward Communication and Resolution programs (CRP).[309] This approach combines the "early offer" ideas described above with the strategy of full disclosure and apology.[310] The idea is to induce settlements more quickly, including for smaller claims that are never brought by patients. The CRP approach is a far cry from a public patient compensation system, but such CRP programs may offer compensation for smaller claims.

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302 This approach was proposed by Clark Havighurst and Lawrence Tancredi, and was subsequently recommended in Inst. of Med., Fostering Rapid Advances in Health Care: Learning from System Demonstrations 84 (Janet M. Corrigan et al. eds., 2002).

303 Clark Havighurst & Laurence Tancredi, *"Medical Adversity Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance,* 51 Milbank Memorial Fund Q. 125, 129–30 (1973).

304 *See id.* at 126.

305 *See generally* Dep't of Veteran Aff., VHA Handbook 1004.08: Disclosure of Adverse Events to Patients (2018), https://www.ethics.va.gov/Handbook1004-08.pdf.

306 *Id.* at 10.

307 *Id.* at 9.

308 *Id.* at 9, 19.

309 *See* William M. Sage et al., *How Policy Makers Can Smooth the Way for Communication-and-Resolution Programs,* 33 Health Aff. 11, 11 (2014).

310 *See id.* at 11–12.

What needs to be built into the federal reimbursement system is some form of administrative system to compensate for patient adverse events, such as those the Nordic countries have developed.[311] The Institute of Medicine almost two decades ago proposed a system loosely based on the Workers' Compensation model. Under this approach, providers would receive immunity from tort in exchange for "mandatory participation in a state-sponsored, administrative system [established to provide] compensat[ion to patients for] avoidable injuries."[312] The American Medical Association also developed an elaborate proposal in the late 1980s,[313] but to date such state-administered systems have been limited to special categories of injuries, such as brain-damaged infants.[314]

One interesting proposal has come from William Sage and Eleanor Kinney.[315] They proposed in 2008 that Medicare's Quality Improvement Organizations ("QIOs") be tasked with "hearing and resolving cases of patient injury, with mediated discussions, reasonable awards of compensation, and feedback to participating institutional providers regarding the safety and quality of their care."[316] This idea would replace medical malpractice litigation at least for Medicare patients. QIOs focus on the metrics of quality improvement and cost

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311   *See* Kenneth Watson & Rob Kottenhagen, *Patients' Rights, Medical Error and Harmonisation of Compensation Mechanisms in Europe*, 25 Eur. J. Health L. 1, 10 (2018).

312   *See* Inst. of Med., *supra* note 304, at 82.

313   Am. Med. Ass'n, *A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes. A Fault-Based, Administrative System*, 52 Conn. Med. 347 (1988). *See also* Physician Insurers Ass'n of Am., A Comprehensive Review of Alternatives to the Present System of Resolving Medical Liability Claims 125–62 (1989) (outlining four proposals for changes to the judicial compensation system from concerned organizations); Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 Vand. L. Rev. 1365, 1367 (1989) (describing the AMA proposal). *See generally* Eleanor D. Kinney, *Malpractice Reform in the 1990s: Past Disappointments, Future Success?*, 20 J. Health Pol. Pol'y & L. 99, 99–100, 102–10 (1995) (providing a general background on malpractice reforms, especially what she terms a "second-generation" of reforms).

314   For an excellent survey of these proposals, see Paul J. Barringer et al., *Administrative Compensation of Medical Injuries: A Hardy Perennial Blooms Again*, 33 J. Health Pol., Pol'y & L. 275 (2008).

315   Eleanor D. Kinney & William M. Sage, *Dances with Elephants: Administrative Resolution of Medical Injury Claims by Medicare Beneficiaries*, 5 Ind. Health L. Rev. 1 (2008).

316   *Id.* at 7.

reductions, but do offer administrative frameworks within which a fair compensation system could be imbedded.[317]

Political pressure for a government-administered patient compensation system is currently lacking in the U.S. A storm may, however, be brewing. First, hospitals are facing doctrinal movements in state courts to expand their exposure to liability, through corporate negligence doctrine, as we have seen.[318] Courts have become impatient with the halo defense that nonprofit hospitals used to be able to use.[319] Second, the level of adverse events in hospitals seems to be increasing, in spite of Medicare efforts through CMS reimbursement penalties, readmissions, and hospital-acquired conditions.[320] Third, the consumer movement in health care, as seen in patient engagement models and drives toward transparency in hospital billing, is sharpening citizen awareness of system failures in the U.S. health care system.[321] Fourth, the growth in the sheer size of baby boomers retiring into the Medicare system provides fuel for disruptive changes.[322]

VI. Conclusion

CMS has turned hospitals into federal rule-driven engines of reimbursement, with increasing amounts of money at risk with every patient admission. At the same time, data analytics promises remarkable efficiencies in the messy U.S. health care system, but it also carries the real risk of distracting hospitals—blinded by the bright lights of penalties—from the real business of treating patients in a culture in which patient safety is an obsession.

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317   *See* Ctr. for Medicare & Medicaid Serv., Report to Congress The Administration, Cost, and Impact of the Quality Improvement Organization Program for Medicare Beneficiaries for Fiscal Year 2018 1 (2018), https://www.cms. gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/ QualityImprovementOrgs/Downloads/Annual-Report-to-Congress-QIO-Program-Fiscal-Year-2018.pdf.

318   *See supra* notes 229–48 and accompanying text.

319   *See* Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560 (Mo. Ct. App. 2002).

320   *See* Tom Baker & Charles Silver, *How Liability Insurers Protect Patients and Improve Safety*, 68 DePaul L. Rev. 209, 211 (2019) (discussing the ways in which medical malpractice insurers promote patient safety).

321   *See* Julia James, *Health Policy Brief: Patient Engagement*, Health Aff., Feb. 14, 2013, at 1–2.

322   c2b Solutions, Understanding Boomers, a Disruptive Force in American Healthcare 2, 7 (2019).

CMS use of Big Data leaves patients "bare" when it comes to compensating them for infections, patient safety incidents, and other adverse events that have hurt them. The elderly Medicare patients, who have little access to the tort system because of the difficulties of proving substantial damages, are truly lost. The time has come to develop a federal adverse event compensation model that schedules damage payouts, works efficiently through an administrative structure, and thereby creates the financial pressures to force hospitals to pay attention at the highest level to adverse event generation.

Patient safety officers and risk managers have only soft voices at the trustee board table. They need a louder voice to generate more coherent patient safety approaches in the burgeoning hospital systems that have developed around the country in the last decade. Financial risk speaks loudly, and boards of directors do listen.

The Future of Race-Conscious Admissions Programs and Why the Law Should Continue To Protect Them

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I. INTRODUCTION

The race-conscious admissions program at Harvard College has served as a model for admissions programs at private and public universities across the country since as early as 1978, when the Supreme Court of the United States decided *Regents of the University of California v. Bakke*.[1] The Supreme Court has now twice affirmed the constitutionality of race-conscious admissions programs based on Harvard's model,[2] in which Harvard considers the race of its applicants as one factor among many in its holistic consideration of an applicant's traits and characteristics.[3] First, in 2003, the Court in *Grutter v. Bollinger,* upheld the constitutionality of the race-conscious admissions program of the University of Michigan Law School, noting that the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and Section 1981 of the Civil Rights Act of 1866 do not prohibit a university from considering race "as one factor among many"[4] in order to further

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1   Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316–18 (1978) (Powell, J., plurality opinion).

2   *See* Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2214 (2016) (upholding the constitutionality of the University of Texas' race-conscious, holistic admissions program); Grutter v. Bollinger, 539 U.S. 306, 325, 343 (2003) (upholding the constitutionality of the University of Michigan Law School's race-conscious, holistic admissions program).

3   *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 346 F. Supp. 3d 174, 180–83 (D. Mass. 2018) (denying cross-motions for summary judgment) (denying summary judgment for both parties and listing the many undisputed factors Harvard takes into account for each applicant, including "grades, test scores, letters of recommendation, academic prizes, and any submitted academic work"; "involvement in activities during high school and his or her potential to contribute at Harvard outside of the classroom"; "the strength of the applicant's potential contributions to athletics at Harvard, as well as the applicant's athletic activity in high school"; "essays, letters of recommendation, the alumni interview report, personal and family hardship, and any other relevant information in the application"; and "the applicant's 'humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities'") (quoting Local Rule 56.1 Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment on All Remaining Counts ¶¶ 59–60, Students For Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 1:14-cv-14176-ADB, 2019 WL 4786210 (D. Mass. Sept. 30, 2019), *appeal docketed*, No. 19-2005 (1st Cir. Oct. 11, 2019) [hereinafter Harvard Statement of Undisputed Material Facts]).

4   *Grutter*, 539 U.S. at 340. As clarified by the Court, the protections afforded by Title VI of the Civil Rights Act and section 1981 are "co-extensive" with the Equal Protection Clause of the Fourteenth Amendment. *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389–91 (1982).

the "compelling interest in obtaining the educational benefits that flow from a diverse student body."[5] Second, in the 2016 case *Fisher v. University of Texas,* the Court held again that a university's admission program that allows for the consideration of race as part of a holistic review of an applicant's record does not violate the Equal Protection Clause.[6]

Despite the Supreme Court's repeated affirmation of the constitutionality of race-conscious admissions programs, Harvard College [Harvard] and the University of North Carolina [UNC] are currently defending their race-conscious plans in federal court.[7] Both filed by the nonprofit organization that challenged the University of Texas at Austin's race-based admissions program in *Fisher,*[8] the lawsuits against these universities not only challenge the particular admissions policies and procedures in place at these schools, but also argue that any reliance on race should be deemed unconstitutional.[9] It is likely that either or both of these cases will

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5   *Grutter,* 539 U.S. at 343.

6   *Fisher II,* 136 S. Ct. at 2207 ("[T]here is no dispute that race is but 'a factor of a factor of a factor' in the holistic-review calculus." (quoting Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009), *rev'd and remanded,* 570 U.S. 297 (2013))).

7   *See* Complaint, Students For Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 1:14-cv-14176-ADB, 2019 WL 4786210 (D. Mass. Sept. 30, 2019), *appeal docketed,* No. 19-2005 (1st Cir. Oct. 11, 2019) [hereinafter Harvard Complaint]; Complaint, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 14-cv-00954 (M.D.N.C. Nov. 17, 2014), 2014 WL 6386755 [hereinafter UNC Complaint]. The Harvard lawsuit went to trial in the fall of 2018 and Judge Allison D. Burroughs issued a decision in that case on September 30, 2019, upholding the constitutionality of Harvard's program. *Harvard,* 2019 WL 4786210. The UNC lawsuit is currently awaiting trial after the parties' cross-motions for summary judgment were denied on September 30, 2019. Students for Fair Admissions, Inc. v. Univ. of N.C., No. 14-cv-00954, 2019 WL 4773908 (M.D.N.C. Sept. 30, 2019) (denying parties' cross motions for summary judgment). *See also* Brief in Support of Plaintiff's Motion for Summary Judgment, *Univ. of N.C.,* 2019 WL 4773908 (No. 14-cv-00954); Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *Univ. of N.C.,* 2019 WL 4773908 (No. 14-cv-00954) [hereinafter UNC Memorandum of Law].

8   *Fisher II,* 132 S. Ct. at 2207 (plaintiff Abigail Fisher filed suit as a member of and supported by Students for Fair Admissions); *see also About,* Students for Fair Admissions, https://studentsforfairadmissions.org/about/ ("Our mission is to support and participate in litigation that will restore the original principles of our nation's civil rights movement: *A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university.*").

9   *See* Harvard Complaint, *supra* note 7, ¶ ¶ 9, 500 ("There simply is no practical

reach the Supreme Court.[10] In that event, the Court may overturn *Grutter* and the *Fisher* cases and ban the use of race in admissions, given Justice Kavanaugh's recent appointment to the Court and his position that race has no place in admissions decisions.[11] He would join Chief Justice Roberts, and Justices Alito and Thomas, who

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way to ensure that colleges and universities will use race in their admissions processes in any way that would meet the narrow tailoring requirement."); UNC Complaint, *supra* note 7, ¶ ¶ 7, 225 ("Defendants acted under color of law in developing and implementing race-based policies that led UNC-Chapel Hill to deny Plaintiff's members equal protection of the laws and to discriminate against them . . . ."). A third lawsuit challenging a race-conscious admissions program was filed in November 2018 in California state court against the University of California, demanding data from the university that plaintiffs believe would prove that the University of California system considers the race of each applicant even though state law prohibits it. *See* Verified Petition for Writ of Mandate Ordering Compliance with the California Public Records Act; Complaint for Declaratory and Injunctive Relief; Exhibits 1–11 at 2–3, Sander v. Regents of Univ. of Cal., No. RG18928614 (Cal. Super. Ct. filed Nov. 15, 2018) [hereinafter Sander Complaint]; Scott Jaschik, *New Front in Fight Over Affirmative Action,* Inside Higher Ed (Nov. 19, 2018), https://www. insidehighered.com/admissions/article/2018/11/19/new-lawsuit-suggests-u-california-has-been-considering-race-admissions (describing a lawsuit filed in California state court by Richard Sander, Professor of Law at University of California Los Angeles, which suggests that "the university system may well be considering race and ethnicity in admissions, in ways that favor black and Latino students and hurt Asian Americans").

10   *See, e.g.,* Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?,* NY Times Mag. (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/ magazine/affirmative-action-asian-american-harvard.html (noting the "inevitability of an appeal" to the Supreme Court); Melissa Quinn, *Eye on the Supreme Court? Harvard Affirmative Action Case Could Wind Up Before Justices,* Wash. Examiner (Oct. 16, 2018), https://www.washingtonexaminer.com/ policy/courts/eye-on-the-supreme-court-harvard-affirmative-action-case-could-wind-up-before-justices (noting that "court watchers anticipate" that the *Harvard* case will be petitioned to the Supreme Court).

11   *See* Brief of *Amici Curiae* Center for Equal Opportunity, New York Civil Rights Coalition et al. in Support of Petitioner at 14–15, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818) [hereinafter Brief of *Amici Curiae* Center] (stating "the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial classifications"); *see also* NAACP Legal Def. & Educ. Fund, Inc., The Civil Rights Record of Judge Brett Kavanaugh 31 (2018), https:// www.naacpldf.org/wp-content/uploads/FINAL_Report-on-Brett-Kavanaugh_ FINAL_11_22-2.pdf [hereinafter, The Civil Rights Record of Judge Brett Kavanaugh] (noting personal statements Justice Kavanaugh made to the media concerning the 1996 amicus brief he co-authored and filed on behalf of the "anti-affirmative action Center for Equal Opportunity" in *Rice v. Cayetano,* 528 U.S. 495 (2000)).

have consistently stated that race should be considered "only as a last resort" when making admissions decisions.[12] Justice Gorsuch, appointed to replace Justice Scalia, is also expected to vote with these Justices, given that his judicial ideology reflects the ideology of Justice Scalia,[13] who voted with Chief Justice Roberts, and Justices Thomas and Alito, in *Fisher I* and *Grutter*.[14] Although there is no evidence of how Justice Gorsuch would decide a challenge to the use of race in admissions, his decision in *Hobby Lobby v. Sebelius,* made while sitting on the United States Court of Appeals for the Tenth Circuit, places him squarely with the conservative justices on the Supreme Court.[15]

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12   *Fisher II,* 136 S. Ct. at 2221 (Alito, J., dissenting) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 519 (1988) (Kennedy, J., concurring)). *See also Fisher II* at 2215 (Thomas, J., dissenting) ("[A] State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." (quoting Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 397, 315 (2013) (Thomas, J., concurring))). *Accord* Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 315 (2013) (Thomas, J., concurring); Gratz v. Bollinger, 539 U.S. 244, 281 (2003) (Thomas, J., concurring). *See also Fisher II,* 136 S. Ct. at 2243 (2016) (Alito, J., dissenting) (noting that the Court's decision that the university's consideration of race satisfied the constitutional standard was "remarkable—and remarkably wrong"); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J., plurality opinion) (suggesting that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

13   Justice Gorsuch has often been compared to Justice Scalia. *See* Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court,* NAT'L PUB. RADIO, INC., (Apr. 7, 2017), https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court (describing Justice Gorsuch as "a conservative who adheres to many of the same positions that Scalia did" and noting that "[i]ndeed, some believe that Justice Gorsuch will be more conservative").

14   *See Fisher I,* 570 U.S. at 315 (Scalia, J., concurring) ("The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." (quoting Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part))). Justice Scalia did not consider the *Fisher* case when the Court considered it for the second time because he had passed away four months earlier. *See Biography of Former Associate Justice Antonin Scalia,* SUP. CT. U.S., https://www.supremecourt.gov/about/biographyscalia.aspx (confirming his death on February 13, 2016).

15   Hobby Lobby Stores v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.,* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), in which Justice Gorsuch joined the majority of the Tenth Circuit, sitting en banc, holding in favor of the owners of the Christian-based arts and crafts chain, which objected on religious grounds to paying for contraceptives under the Affordable Care Act. The Tenth Circuit's decision was affirmed by the Supreme Court in a decision written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Burwell v. Hobby Lobby Stores, Inc.,

Accordingly, even though the Court has twice upheld the constitutionality of race-conscious programs, the matter of a university's reliance on race to make admissions decisions is anything but settled. Indeed, as Senator Chuck Schumer made clear during the confirmation process of Justice Kavanaugh: "Everything the Supreme Court decides is settled law until it unsettles it. Saying a case is settled law is not the same thing as saying a case was correctly decided."[16] Because of this uncertainty, universities, as well as applicants to those universities, should be prepared for the Court to overturn *Grutter* and the *Fisher* cases, and prohibit any consideration of race in the admissions process.

If the Court decides to prohibit any consideration of race in admissions, enrollment statistics from a number of universities suggest that diversity in their classrooms will decline.[17] This decline

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573 U.S. 682, 687 (2014).

16   Sheryl Gay Stolberg, *Roe is 'Settled Law,' Kavanaugh Tells Collins. Democrats Aren't Moved.*, N.Y. Times, (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/politics/kavanaugh-collins-abortion.html.

17   *See* Brief for the President and the Chancellors of the Univ. of Cal. as Amici Curiae Supporting Respondents at 19, Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016) (No. 14-981) [hereinafter Brief for the President and the Chancellors of the Univ. of Cal.] ("The abandonment of race-conscious admissions policies resulted in an immediate and precipitous decline in the rates at which underrepresented-minority students applied to, were admitted to, and enrolled at UC."); *Accord* Harvard Statement of Undisputed Material Facts, *supra* note 3, ¶ 156 ("If Harvard stopped considering race in the admissions process, the proportion of African-American and Hispanic students in the admitted class would decline dramatically, notwithstanding all the other efforts that Harvard takes to recruit a broadly diverse class."); UNC Memorandum of Law, *supra* note 7, § IID (citing the university expert's evidence that confirmed that the termination of race-conscious admissions programs would cause a decrease in "[d]iversity and [a]cademic [p]reparedness"); Amicus Brief of Brown University, Case Western Reserve University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, George Washington University, Johns Hopkins University, Massachusetts Institute of Technology, Princeton University, Stanford University, University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University in Support of Defendants at 9, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 1:14-cv-14176-ADB, 2019 WL 4786210 (D. Mass. Sept. 30, 2019), *appeal docketed*, No. 19-2005 (1st Cir. Oct. 11, 2019) [hereinafter Brown University Amicus Brief] (citing Martha Minow, *After Brown: What Would Martin Luther King Say*, 12 Lewis & Clark L. Rev. 599, 636 n.192 (2008) (citing studies that show that relying on socioeconomic status alone does not guarantee racial diversity)). *See also* Andy Thomason, *What You Need to Know About Race-Conscious Admissions in 2017,* Chron. Higher

will interfere with the goals of student body diversity, which include "the destruction of stereotypes, the 'promot[ion of] cross-racial understanding,' the preparation of a student body 'for an increasingly diverse workforce and society,' and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.'"[18] The *Grutter* Court recognized the goals to be achieved with student body diversity as "'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"[19] The Court also noted "numerous studies" that show that this diversity "promotes learning outcomes . . . and 'better prepares students . . . as professionals.'"[20]

Thus, the prohibition of race-conscious programs would be disastrous, and, when properly understood, unnecessary because they do not favor minority students in violation of the Fourteenth Amendment, but merely level the playing field for all applicants.[21] As made clear by Justice Powell in *Bakke*, a holistic consideration of an applicant's characteristics that includes race does not lead to an unlawfully discriminatory decision that "aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals."[22] Rather, a race-conscious admissions plan that considers race as a "'factor of a factor of a factor' in [a] holistic-review calculus"[23] places all applicants "on the same footing" in the admissions process and should be upheld.[24]

EDUC. (Aug. 2, 2017), https://www.chronicle.com/article/What-You-Need-to-Know-About/240820 ("[California's] most prestigious public colleges have observed a steady drop in minority enrollment ever since Proposition 209 effectively banned race-conscious admissions . . . in 1996.").

18   Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2211 (2016) (alteration in original) (citation omitted).

19   *Grutter*, 539 U.S. at 330 (citation omitted).

20   *Id.* (quoting Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Brief of the American Educational Research Association]).

21   *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307, 317 (1978) (Powell, J., plurality opinion) (noting that a holistic review of an applicant within a race-conscious admissions program places applicants "on the same footing").

22   *Id.*

23   *Fisher II*, 136 S. Ct. 2198, 2207 (2016) (quoting Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009), *rev'd and remanded*, 570 U.S. 297 (2013)).

24   *Bakke*, 438 U.S. at 317 (Powell, J., plurality opinion); *see also* Appendix to Opinion of Powell, J. at 321–24, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) (Powell, J., plurality opinion) (detailing the Harvard

    In light of the shifting orientation of the Court, this paper reviews the Supreme Court decisions that have examined university admissions programs and considers how a change in that law may affect diversity in college classrooms. Section II reviews the history of the law of Equal Protection, from its application to newly freed slaves after the Civil War to challenges brought by white applicants rejected under race-conscious admissions programs. Section III examines the lawsuits currently challenging race-conscious admissions programs. Section IV discusses the likelihood that the Supreme Court will overrule currently settled law when given the chance to review these lawsuits. Section V discusses the effects that a change in the law will have on university admissions. The paper concludes that, as long as the consideration of race is a part of a holistic consideration of all of an applicant's traits, characteristics, and accomplishments, such consideration assures that all applicants, regardless of race or background, enjoy the same opportunities for admission to higher education.

II. THE HISTORY OF RACE-CONSCIOUS ADMISSIONS PROGRAMS AND THE LAW OF EQUAL PROTECTION

    The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[25] As first construed, the Amendment protected "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him."[26] On its face, however, the Amendment is not limited to the protection of any one race but is rather written "in universal terms, without reference to color, ethnic origin, or condition of prior servitude."[27] Over time, with the influx of "the stock of many lands," the guarantee of equal protection was "extended to all ethnic groups seeking protection from official discrimination."[28]

    College admissions program).
25   U.S. Const. amend. XIV, § 1.
26   *Bakke*, 438 U.S. at 291 (Powell, J., plurality opinion) (quoting Slaughter-House Cases, 83 U.S. 36 (1873)).
27   *Id.* at 293.
28   *Id.* at 292 (citing Hernandez v. Texas, 347 U.S. 475 (1954) (Mexican-Americans); Truax v. Raich, 239 U.S. 33 (1915) (Austrian resident aliens); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Chinese aliens); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (dictum) (naturalized Celtic Irishmen)).

Following the Civil War, Congress enacted the Civil Rights Act of 1866 to protect African-Americans who had recently been freed from slavery.[29] The statute, however, was intended to protect not only those who had formerly been enslaved, but was written broadly, like the Equal Protection Clause of the Fourteenth Amendment, to protect "all persons in the United States in their civil rights" and apply to "every race and color."[30] Justice Powell, writing a century later in *Bakke,* noted that the Supreme Court had already "interpret[ed] the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons" and that "the legislation was specifically broadened in 1870 to ensure that 'all persons,' not merely 'citizens,' would enjoy equal rights under the law."[31] Considering Congress' intent when it enacted the Civil Rights Act of 1964 that built upon the post-Civil War statutes, Justice Powell concluded that the statutory protections included in the 1964 Act reflect those afforded by the Equal Protection Clause of the Fourteenth Amendment and extend to all persons regardless of race or ethnic group.[32]

Relying on these constitutional and statutory guarantees of equal rights, white students have challenged race-conscious admissions programs in suits against some of the nation's most

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29   *See* Civil Rights Act of 1866, ch. 31, § 1, Pub. L. No. 39-3, 14 Stat. 27.

30   McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1976) (emphasis omitted) (quoting Senator Trumbull of Ill., CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866)).

31   *Bakke,* 438 U.S. at 293 (Powell, J., plurality opinion) (quoting Runyon v. McCrary, 427 U.S. 160, 192–202 (1976) (White, J., dissenting)).

32   *See* Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003) (citations omitted) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (concluding that, since the university's admissions program did not violate the Equal Protection Clause of the Fourteenth Amendment, it would not violate Title VI of the Civil Rights Act of 1964 because "Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment" (alteration in original) (quoting *Bakke,* 438 U.S. at 287 (Powell, J., plurality opinion))). *See also Bakke,* 438 U.S. at 284–85, 293–94 (Powell, J., plurality opinion) (discussing the history of the Civil Rights Act and the Fourteenth Amendment's protection of all persons). Currently, Title VI of the Civil Rights Act of 1964 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964 § 101, 42 U.S.C. § 2000d (2012).

prestigious colleges and universities.[33] First, in 1978, Allan Bakke, a white applicant to the University of California Davis School of Medicine, sued the university for maintaining two separate admissions programs, one for white applicants and one for minority applicants, which reserved a pre-determined number of seats specifically for minority applicants.[34] After recognizing a white applicant's right to challenge a race-conscious admissions program, the Court in *Bakke* considered whether the medical school's admissions program that set aside sixteen of one hundred seats specifically for minority applicants violated the Equal Protection Clause of both the California and United States Constitutions and Title VI of the Civil Rights Act of 1964.[35]

Justice Powell, writing for a plurality of a sharply divided Court, cast the deciding vote that the University of California's admissions program violated the guarantee of the equal protection afforded by the Fourteenth Amendment,[36] while acknowledging that an admissions program, narrowly tailored, may consider race as part of a holistic consideration of an applicant's traits, characteristics, and accomplishments.[37] He examined four possible justifications for consideration of race given by the University of California, which included: "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,' . . . (ii) countering the effects of societal discrimination; . . . (iii) increasing the number of physicians who will practice in communities currently underserved; . . . and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."[38] After a review of

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33   *See* Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016) (white female applicant challenging University of Texas' reliance on race in its rejection of her application based on the Equal Protection Clause of the Fourteenth Amendment); *Grutter*, 539 U.S. 306 (white female applicant challenging University of Michigan Law School's reliance on race in its rejection of her application based on the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and section 1981, 42 U.S.C. § 1981); *Bakke*, 438 U.S. 265 (Powell, J., plurality opinion) (white male applicant challenging the University of California Davis School of Medicine's race-based quota system based on the Equal Protection Clause of the state and federal Constitutions and Title VI of the Civil Rights Act of 1964).

34   *Bakke*, 438 U.S. at 272–76, 279 (Powell, J., plurality opinion).

35   *Id.* at 267–68.

36   *Id.* at 320 ("The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment.").

37   *Id.* at 317.

38   *Id.* at 306 (citation omitted).

these four justifications, Justice Powell concluded that the goal of attaining a diverse student body is the only "constitutionally permissible goal for an institution of higher education," given that diversity promotes the "atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education . . . ."[39] Recognizing that student body diversity is a compelling state interest that may justify the consideration of an applicant's race,[40] Justice Powell nevertheless warned that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[41] Indeed, he made clear that "[i]t is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify the use of race.[42] Instead, the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[43]

Defining the parameters for when race may be considered, Justice Powell contrasted the medical school's unconstitutional quota system with Harvard College's race-conscious admissions program that would presumably pass constitutional muster.[44] In contrast to the University of California's reliance on race as a deciding factor, Harvard did not set aside any particular number of seats for minority applicants, nor did it "insulate the individual from comparison with all other candidates for the available seats."[45] Instead, Harvard considered all aspects of the applicants, including "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."[46] According to Justice Powell, the constitutional and statutory guarantees of equal protection do not invalidate an admissions program that "is flexible enough to consider all pertinent elements of diversity in light of the

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39   *Id.* at 311–12 (citation omitted).
40   *Id.* at 320 ("[T]he State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.").
41   *Id.* at 291.
42   *Id.* at 315.
43   *Id.*
44   *Id.* at 316–18.
45   *Id.* at 316–17.
46   *Id.*

particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[47]

Twenty-five years after *Bakke* was decided, the Court embraced Justice Powell's opinion in *Grutter v. Bollinger,* one of the two cases in which the Court re-examined race-conscious admissions plans.[48] The *Grutter* Court considered Justice Powell's opinion "the touchstone for constitutional analysis of race-conscious admissions policies" and acknowledged that "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."[49] Guided by Justice Powell's opinion, the Court in 2003 reviewed the admissions programs for the University of Michigan College of Literature, Science, and the Arts in *Gratz v. Bollinger*[50] and the University of Michigan Law School in *Grutter v. Bollinger*.[51]

In *Gratz v. Bollinger,* the Court held that the University of Michigan's undergraduate admissions program violated the Equal Protection Clause as well as the Civil Rights Act of 1964 because it allowed race to be "'decisive' for virtually every minimally qualified underrepresented minority applicant"[52] by automatically distributing 20 points, or one-fifth of the points needed to guarantee admission, to "every single underrepresented minority applicant."[53] In contrast, in *Grutter v. Bollinger,* the Court decided the admissions program of the University of Michigan Law School did not violate equal protection because it was "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[54]

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47   *Id.*
48   Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the constitutionality of the University of Michigan Law School's admissions program). *See also* Gratz v. Bollinger, 539 U.S. 244, 272 (2003) (deciding that the University of Michigan's undergraduate admissions program violates the Equal Protection Clause for relying on race as a "decisive" factor in the admissions decision).
49   *Grutter,* 539 U.S. at 323 (citation omitted).
50   *Gratz,* 539 U.S. at 273.
51   *Grutter,* 539 U.S. at 334.
52   *Gratz,* 539 U.S. at 272 (quoting *Bakke,* 438 U.S. at 317 (Powell, J., plurality opinion)).
53   *Id.* at 273.
54   *Grutter,* 539 U.S. at 337, 343 ("The importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount.").

Underpinning the *Grutter* decision was the broader question of whether diversity is "a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[55] The Court's decision that diversity is a compelling interest[56] deserves particular attention because the Court relied on it a decade later to decide *Fisher v. University of Texas*.[57] It is this decision that may be overruled by the Court, as it is currently configured, because a majority of the justices are likely to agree with Justice Thomas, who dissented in both *Grutter* and *Fisher II* and made clear his position that student body diversity is not a compelling government interest.[58]

Thus, before considering how the law may change, it is important to understand the basis for the Court's currently settled law. Noting that the case raised a "question of national importance,"[59] the *Grutter* Court held that "the Law School has a compelling interest in attaining a diverse student body."[60] Citing Justice Powell's decision in *Bakke*, the *Grutter* Court further acknowledged that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[61] Having established the legitimacy of this interest, the Court made clear that any classification or decision based on race must be "narrowly tailored" to further it[62] and that the Court would examine any race-based program under the "strictest of judicial scrutiny."[63] Also relying on *Bakke*, the Court in *Gratz* noted that, to be narrowly tailored, a race-conscious plan

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55   *Id.* at 322.
56   *Id.* at 328.
57   Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2205, 2210, 2213 (2016) (reviewing the Court's holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).
58   *Fisher II*, 136 S. Ct. at 2215 (Thomas, J., dissenting) (calling to overrule *Grutter v. Bollinger*, 538 U.S. 306 (2003) and reverse the Fifth Circuit's decision in *Fisher v. Univ. of Tex.*, 758 F.3d 633, 637 (5th Cir. 2014)); *Grutter*, 539 U.S. at 357 (Thomas, J., concurring in part and dissenting in part) (stating with regard to the University of Michigan Law School's interest in its student body diversity that "marginal improvements in legal education do not qualify as a compelling state interest"). *See infra* section IV for a discussion of the current orientation of the Court.
59   *Grutter*, 539 U.S. at 322.
60   *Id.* at 328.
61   *Id.* at 322–23 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (Powell, J., plurality opinion)).
62   *Id.* at 326.
63   Gratz v, Bollinger, 539 U.S. 244, 270 (2003) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995)). *Accord Grutter*, 539 U.S. at 326.

must consider "each particular applicant as *an individual,* assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education."[64] The Court emphasized in *Grutter* that the "importance of this individualized consideration in the context of a race-conscious admissions program is paramount."[65]

In contrast to the plan affirmed in *Grutter,* the University of California's admissions program amounted to a quota system, one that insulated "each category of applicants with certain desired qualifications from competition with all other applicants," and because of this, the *Bakke* Court held that it failed to pass constitutional muster.[66] The college admissions program challenged in *Gratz* also failed because it "automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race . . . ."[67] On the other hand, University of Michigan Law School's race-conscious program in *Grutter* survived constitutional challenge because it allowed the law school to engage "in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[68] The admissions criteria were flexible enough to ensure "that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."[69] In fact, as noted by the Court, "the Law School actually gives substantial weight to diversity factors besides race."[70] Writing for the Court in *Grutter,* Justice O'Connor noted that the "hallmark" of the Law School's policy was "its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'"[71] Importantly, as O'Connor stated, the policy required "admissions officials to evaluate each applicant based on *all* the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the

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64   *Gratz,* 539 U.S. at 271 (emphasis added).
65   *Grutter,* 539 U.S. at 337.
66   *Bakke,* 438 U.S. at 315, 320 (Powell, J., plurality opinion).
67   *Gratz,* 539 U.S. at 270.
68   *Grutter,* 539 U.S. at 337.
69   *Id.*
70   *Id.* at 338.
71   *Id.* at 315 (citation omitted).

Law School."[72]

It is the focus on the individual applicant, rather than the exhaustion of "every conceivable race-neutral alternative" that will satisfy the Court's strict scrutiny.[73] According to the Court, narrow tailoring does not require such exhaustion or force a university to choose between "maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."[74] Instead, as interpreted by the Court most recently in the 2016 case *Fisher II*, discussed below, narrow tailoring requires a "holistic review" of applicants: "a system that [does] not mechanically assign points but rather treat[s] race as a relevant feature within the broader context of a candidate's application."[75]

The Court applied the *Grutter* decision's "narrow tailoring" analysis in *Fisher v. University of Texas* when a white female challenged the constitutionality of the university's admissions program after her application for admission was rejected.[76] The Court considered the case twice, first vacating the Fifth Circuit's decision to uphold the university's race-conscious admissions program and remanding it with the instruction that the appellate court apply the "correct standard of strict scrutiny" to determine whether the University of Texas' race-conscious admissions program was narrowly tailored to accomplish its stated goal of student body diversity.[77] On remand, the Fifth Circuit examined the university's program with "exacting scrutiny" and again found it constitutional.[78] The Supreme Court subsequently reviewed the Fifth Circuit's second decision and agreed that the university's program was narrowly tailored to the university's goal of attaining diversity.[79]

Relying on Justice Powell's decision in *Bakke* and the Court's holdings in *Gratz* and *Grutter*, Justice Kennedy wrote the opinion for the Court in both *Fisher* decisions and articulated in *Fisher II* the "three controlling principles relevant to assessing

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72   *Id.* (emphasis added).
73   *Id.* at 339–40.
74   *Id.*
75   Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2205 (2016).
76   *See id.* at 2207–08; Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 314–15 (2013).
77   *See Fisher I*, 570 U.S. at 303. *See also* Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016).
78   Fisher v. Univ. of Tex., 758 F.3d 633, 637 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016).
79   *Fisher II*, 136 S. Ct. at 2214.

the constitutionality of a public university's affirmative-action program."[80] First, acknowledging that a race-conscious plan must withstand strict scrutiny, Justice Kennedy made clear that a university must "demonstrate with clarity" that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose."[81] Second, Justice Kennedy explained that once a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals."[82] Third, Justice Kennedy observed *Fisher I* "clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals."[83] Additionally, Justice Kennedy acknowledged that a university does not have to exhaust "every conceivable race-neutral alternative" or choose between excellence or its commitment to student body diversity, as the Court had warned in *Grutter*,[84] but made clear that narrow tailoring does "impose 'on the university the ultimate burden of demonstrating' that 'race-neutral alternatives' that are both 'available' and 'workable' 'do not suffice.'"[85]

Applying these three principles to the facts in *Fisher II*, the Court first examined the university's goals, which could not be "elusory or amorphous" but had to be "sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."[86] Examining the record, the Court noted that the university's consideration of race satisfied the first of Justice Kennedy's principles, as it was premised on "concrete and precise goals" that mirrored the compelling interests the Court had identified in its prior cases, including "the destruction of stereotypes, the 'promot[ion of] cross-racial understanding,' the preparation of a student body 'for an increasingly diverse workforce and society,' and the 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.'"[87] The Court also noted that the university's consideration of these facts satisfied Justice Kennedy's second principle by furthering its goal

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80   *Id.* at 2207–08.
81   *Id.* at 2208 (alteration in original) (quoting *Fisher I,* 570 U.S. at 309).
82   *Id.* (quoting *Fisher I,* 570 U.S. at 310–11).
83   *Id.* (citing *Fisher I,* 570 U.S. at 311).
84   Grutter v. Bollinger, 539 U.S. 306, 339 (2003).
85   *Fisher II,* 136 S. Ct. at 2208 (quoting *Fisher I,* 570 U.S. at 312).
86   *Id.* at 2211.
87   *Id.* (alteration in original) (citation omitted).

to provide an environment "that offers a 'robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.'"[88] Because of the way the law governing the University of Texas changed over the course of twenty years, the university was able to satisfy the third principle articulated by Justice Kennedy by producing data from the many years when it considered race, and those years when it was legally prohibited from doing so, in order to convince the Court that the race-conscious plan in effect when the plaintiff was rejected was narrowly tailored to achieve its goals.[89]

Prior to 1996, the University of Texas included race as one factor of the many considered when reviewing applications.[90] It was forced to remove race from the calculus when, in 1996, the United States Court of Appeals for the Fifth Circuit held that any consideration of race violated the Equal Protection Clause of the Fourteenth Amendment.[91] To respond to this change in the law, the Texas Legislature enacted what has been called the "Top Ten Percent" Law, which guaranteed admission to students who graduated from a Texas high school in the top ten percent of their class.[92] Accordingly, in 1998 the University of Texas first began admitting students who qualified for admission under this law and filled the rest of its class without considering the race of the applicants.[93]

Although the law in Texas prohibited the university from considering race in its admissions criteria, the Court in *Fisher II* noted that the supposedly race-neutral "Top Ten Percent Plan" was, in fact, based on a consideration of race.[94] Quoting from Justice Ginsburg's dissent in *Fisher I*, Justice Kennedy noted that race-neutral admissions plans like Texas' "Top Ten Percent Plan" are "adopted with racially segregated neighborhoods and schools front and center stage."[95] Indeed, as Justice Ginsburg stated in her dissenting opinion in *Fisher*

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88   *Id.* (citation omitted).

89   *Id.* at 2205–07 (describing the university's admissions program as "a complex system of admissions that has undergone significant evolution over the past two decades").

90   *Id.* at 2205.

91   *See* Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir. 1996).

92   Fisher II, 136 S. Ct. at 2205; TEX. EDUC. CODE ANN. § 51.803 (West 2019).

93   *Id.*

94   *Id.* at 2213.

95   *Id.* (quoting Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting)).

I, "only an ostrich could regard the supposedly neutral alternatives as race unconscious."[96] Agreeing with Justice Ginsberg, Justice Kennedy observed that "[i]t is race consciousness, not blindness to race, that drives such plans."[97]

Justice Kennedy also noted that percentage plans, even if they can be considered race-neutral, do not serve the goals of a university to select students based on a number of characteristics because percentage plans select students on the basis of class rank alone, and "like any single metric . . . will capture certain types of people and miss others."[98] Indeed, in the words of Justice Kennedy, this single method for selecting the members of a class

> would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.[99]

According to Justice Kennedy, percentage plans also create "perverse incentives" that "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages."[100]

Despite the weaknesses of a percentage plan, the University of Texas filled up to 75% of its seats with students who graduated at the top of their high school classes.[101] Between 1998 and 2003, the

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96   *Fisher I,* 570 U.S. at 335 (Ginsburg, J., dissenting).

97   *Fisher II,* 136 S. Ct. at 2213 (quoting *Fisher I,* 570 U.S. at 335 (Ginsburg, J., dissenting)).

98   *Id.*

99   *Id.*

100 *Id.* at 2214 (quoting Gratz v. Bollinger, 539 U.S. 244, 304 n.10 (2003) (Ginsburg, J., dissenting)).

101 *Id.* at 2206 ("[T]his 75 percent cap, which has now been fixed by statute, means that, while the Plan continues to be referenced as a 'Top Ten Percent

year that the Supreme Court decided *Grutter* and *Gratz* and thereby allowed Fifth Circuit schools to again consider race in their admissions decisions, the University of Texas filled the remaining 25% of its classes without a consideration of race.[102] Following the decisions in *Gratz* and *Grutter*, the university adopted a new admissions program, which included the return to an "explicit consideration of race."[103]

To justify its renewed reliance on race as a factor in its admissions process, the University of Texas had to convince the Court that its new race-conscious admissions program was narrowly tailored.[104] According to the Court in *Fisher II*, narrow tailoring imposes on a university a "heavy burden" to show "that it had not obtained the education benefits of diversity before it turned to a race-conscious plan."[105] To satisfy this burden, the university reviewed enrollment data generated by its race-neutral program,[106] and the evidence it gathered as a result of "months of study and deliberation, including retreats, interviews, [and] review of data," before deciding that the "'use of race-neutral policies and programs ha[d] not been successful in achieving' sufficient racial diversity at the University."[107]

Reviewing the university's evidence, the Court concluded that the University of Texas met its burden through its extensive review of the failed race-neutral program.[108] Specifically, the Court noted the "significant evidence, both statistical and anecdotal," showing "consistent stagnation in terms of the percentage of minority students enrolling at the University" during the time the university was prohibited from relying on race in any way.[109] The Court also noted the negative effects that decreasing racial diversity had on minority students.[110] Specifically, the Court cited the fact that minority students "experienced feelings of loneliness and isolation"

Plan,' a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.").

102 *Id.* at 2205 (citing Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003)).

103 *See* Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 305 (2013); *see also* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

104 *Fisher II*, 136 S. Ct. at 2208.

105 *Id.* at 2211.

106 *Id.* at 2205–06 (alteration in original).

107 *Id.* at 2211 (alteration in original) (citations omitted).

108 *Id.*

109 *Id.* at 2212.

110 *Id.*

due to the size of their community at the school and, more specifically, their level of representation in any given class.[111] Additionally, the Court noted the "extensive evidence" indicating the ways that the university tried to attract minority students, including intensifying its outreach programs, creating a number of new scholarships, opening regional admissions centers, and holding "over 1,000 recruitment events."[112] Indeed, as the Court emphasized, "the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review,"[113] but its attempts failed to achieve the diversity capable of "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society."[114] Based on its review of the evidence offered by the university, the Court concluded that "the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors."[115]

Accordingly, the Court accepted the university's justification for reinstituting the consideration of race into its admissions plan and ultimately decided that the plan, based on its individualized consideration of each applicant, was narrowly tailored and, therefore, consistent with constitutional Equal Protection guarantees.[116] Specifically, the Court recognized that once the university factored race back into its consideration of its applicants, race did "not operate as a mechanical plus factor for underrepresented minorities" within the university's new race-conscious calculus.[117] Under the university's reinstituted race-conscious plan, up to 75% of its class was still admitted under the "Top Ten Percent Plan"[118] and, for the remainder of the class, admissions officers reviewed an applicant's essays, letters of recommendation, resumes, writing samples,

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111 *Id.* (citation omitted) (describing the university's "quantitative data" that indicated that when race was not considered "only 21% of undergraduate classes with five or more students in them had more than one African-American student enrolled," and "[t]welve percent of these classes had no Hispanic students").

112 *Id.* at 2213.

113 *Id.*

114 *Id.* at 2211 (alteration in original) (citation omitted).

115 *Id.* at 2213.

116 *Id.* at 2214.

117 *Id.* at 2207.

118 *Id.* at 2206 (noting that the statute capped admissions under the percentage plan to 75% of the class, so students actually have "to finish in the top seven or eight percent of his or her class in order to be admitted under this category").

artwork, and anything else that an applicant might submit, and evaluated the applicant's ability to contribute to the university's student body "based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other 'special circumstances.'"[119] As explained by the Court, these "special circumstances" comprise "the socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race."[120] Finding that race was "but a 'factor of a factor of a factor' in the holistic-review calculus,"[121] the Court held that the university "met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored."[122]

Because the university proved that its race-neutral plan did not achieve its goal of student body diversity and that it "treated race as a relevant feature within the broader context of a candidate's application" as the *Grutter* Court required, [123] the *Fisher II* Court affirmed what the *Grutter* Court made clear: that a university's race-conscious admission program could survive an Equal Protection challenge.[124] Relying on these decisions, public and private universities have considered and continue to consider the race of their applicants.[125] As observed in *Grutter*, universities have modeled their programs on Justice Powell's views on what is

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119   *Id.*

120   *Id.*

121   *Id.* at 2207 (quoting Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009), *rev'd and remanded*, 570 U.S. 297 (2013)).

122   *Id.* at 2214.

123   *Id.* at 2205 (citing Grutter v. Bollinger, 539 U.S. 306, 337 (2003)).

124   *Id.* at 2214–15; *Grutter,* 539 U.S. at 343.

125   *See* Brown University Amicus Brief, *supra* note 17, at 1 (citing Grutter v. Bollinger, 539 U.S. 306 (2003)) (noting that all 16 universities filing the amicus brief, including Brown University, Case Western Reserve University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, George Washington University, Johns Hopkins University, Massachusetts Institute of Technology, Princeton University, Stanford University, University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University, have adopted the "longstanding admissions policies similar to those the Supreme Court upheld in *Grutter v. Bollinger*").

permissible under the Equal Protection Clause.[126] However, as will be discussed, the law's tolerance of these race-conscious programs may be on the wane given the current make-up of the Court and the Justices' conservative viewpoints on the consideration of both race in university admissions programs and affirmative action. The following section discusses the lawsuits that are currently challenging race-conscious admissions programs, followed by an examination of the opinions of those Supreme Court Justices who are likely to speak for a majority of the Court if, and more likely when, the Court considers these challenges.

III. THE CURRENT CHALLENGES TO RACE-CONSCIOUS ADMISSIONS PROGRAMS

Forty-one years ago, Justice Powell singularly identified Harvard's admissions program as one that satisfied the constitutional and statutory guarantees of Equal Protection.[127] Sixteen years ago, the Supreme Court recognized that Justice Powell's opinion has "served as the touchstone for constitutional analysis of race-conscious admissions policies," upon which "[p]ublic and private universities across the Nation have modeled their own admissions programs."[128] Today, however, Harvard is being sued to defend the program that Justice Powell had offered as a guide for constitutionality.[129] Perhaps responding to Justice Alito's call to Asian-Americans to bring a challenge of their own when he noted that the University of Texas' admissions program may actually discriminate *"against"* Asian-American students,[130] Students for Fair Admissions, Inc. (SFFA), a nonprofit organization formed to end race-conscious admissions programs,[131] filed suit on behalf of an Asian-American applicant denied admission to Harvard,[132] alleging that Harvard's race-

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126 *Grutter*, 539 U.S. at 323.

127 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316–17, 321–24 (1978) (Powell, J., plurality opinion).

128 *Grutter*, 539 U.S. at 323.

129 *See Bakke*, 438 U.S. at 316–17, 321–24 (Powell, J., plurality opinion); Harvard Complaint, *supra* note 7.

130 Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2216 (2016) (Alito, J., dissenting).

131 The mission statement of Students for Fair Admissions makes clear that its goal is to end any consideration of race in admissions' decisions: *"A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university." See About,* STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/about/.

132 Harvard Complaint, *supra* note 7, ¶¶ 15, 16.

conscious admissions program violates Title VI of the Civil Rights Act of 1964.[133] In particular, the plaintiffs alleged that Harvard is engaged in "racial balancing"[134] and uses race as more than a "plus factor[,]"[135] and ultimately argued that any consideration of race in the admissions process cannot stand.[136] Specifically, the complaint called for "the outright prohibition of racial preferences in university admissions—period."[137]

Within *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* SFFA argued that Harvard violated Title VI's guarantee of equal protection "for at least four reasons."[138] First, SFFA claimed to have statistical evidence that "reveals that Harvard uses 'holistic' admissions to disguise the fact that it holds Asian Americans to a far higher standard than other students and essentially forces them to compete against each other for admission."[139] Second, SFFA alleged that Harvard is engaging in impermissible racial balancing by admitting "essentially the same percentage of African Americans, Hispanics, whites, and Asian Americans even though the application rates and qualifications for each racial group have undergone significant changes over time."[140] Third, SFFA alleged that "Harvard's racial preference for each student (which equates to a penalty imposed upon Asian American applicants) is so large that race becomes the 'defining feature of his or her application.'"[141] Finally, SFFA asserted that Harvard is using a race-conscious plan when "race neutral alternatives can achieve diversity."[142] Given these allegations of Harvard's practices and the unsupported allegation that these activities are also being conducted "at other schools," SFFA called for the "prohibition" of race-conscious admissions plans.[143]

In defense of the lawsuit, Harvard denied using race as a deciding factor, but instead claimed that it "takes an individualized

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133   *See id.* ¶¶ 9, 429, 444, 448, 457, 467, 490 (citing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (2012)).

134   *Id.* ¶ 6.

135   *Id.* ¶ 7.

136   *See id.* ¶ 9.

137   *Id.*

138   *Id.* ¶ 5.

139   *Id.*

140   *Id.* ¶ 6.

141   *Id.* ¶ 7 (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)).

142   *Id.* ¶ 8.

143   *Id.* ¶ 9.

approach to admissions that accounts for the whole person."[144] Harvard averred that it "considers each applicant's academic, extracurricular, and other accomplishments within the context they were achieved, which includes socioeconomic circumstances, family background, parental education levels and occupation, high school quality and opportunities, geography, and much more."[145] According to its Statement of Undisputed Material Facts, Harvard does not require applicants to disclose their race[146] and when an applicant does disclose it, Harvard's admissions officers do not consider it at all when assessing the "academic, extracurricular, athletic, and personal" ratings of each applicant.[147] When an applicant's race is disclosed, it is considered "as one factor among many in the admissions process"[148] and "it is taken into account only flexibly, not automatically or mechanically."[149]

Harvard also outlined for the court the many steps it has taken to attract a diverse student body in a race-neutral way.[150] Admissions officers recruit in areas that do not typically send students to Harvard and seek first-generation college students.[151] Additionally, Harvard provides an "entirely need-based financial aid program—among the most generous in the country"[152]—to ensure that students from "all socioeconomic circumstances can attend."[153] This lawsuit, heard by a judge, not a jury, went to trial in October 2018, with closing arguments ending on November 2, 2018.[154] On September 30, 2019, the Judge issued her ruling and decided, after a thorough analysis of the evidence produced at trial pursuant to the Supreme Court's strict scrutiny standard, that Harvard's plan is "a

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144   Harvard Statement of Undisputed Material Facts, *supra* note 3, ¶ 25.
145   *Id.* ¶ 27.
146   *Id.* ¶ 18.
147   *Id.* ¶ 118.
148   *Id.* ¶ 117.
149   *Id.* ¶ 120.
150   *Id.* ¶¶ 126–44.
151   *Id.* ¶¶ 128–30.
152   *Id.* ¶ 135.
153   *Id.* ¶ 137.
154   Joan Biskupic, *Harvard Affirmative Action Trial Arguments Come to a Close,* CNN (Nov. 3, 2018), https://www.cnn.com/2018/11/03/politics/arvard-trial-wrap/index.html; Crimson News Staff, *Here's What Happened in the Harvard Admissions Trial Today,* Harv. Crimson (Oct. 16, 2018), https://www.thecrimson.com/article/2018/10/16/what-happened-today/ (noting the trial began on October 15, 2018 and was heard by Judge Allison D. Burroughs).

very fine admissions program that passes constitutional muster."[155] SFFA has appealed the Judge's decision to the First Circuit.[156]

SFFA also sued the University of North Carolina at Chapel Hill (UNC), alleging violations of the Fourteenth Amendment, as well as sections 1981 and 1983 of the Civil Rights Act of 1964, calling for the end of any reliance on race in the same language used in the Harvard complaint.[157] In contrast to the *Harvard* case, which was filed on behalf of an Asian-American student,[158] the UNC complaint alleges that the university discriminated against a white student in favor of minority students.[159] Containing some of the exact language used in the Harvard complaint,[160] the UNC complaint alleges that the university has violated the federal guarantees of Equal Protection for two reasons also articulated in the Harvard complaint.[161] First, in its complaint against UNC, SFFA alleges that the university's "racial preference for each underrepresented minority student (which equates to a penalty imposed upon white and Asian-American applicants) is so large that race becomes the 'defining feature of his or her application.'"[162] Second, SFFA alleges that UNC "is using race in admissions decisions when race-neutral alternatives can achieve

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155   Students For Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 1:14-cv-14176-ADB, 2019 WL 4786210, at *57 (D. Mass. Sept. 30, 2019), *appeal docketed*, No. 19-2005 (1st Cir. Oct. 11, 2019).

156   *See id.*

157   Harvard Complaint, *supra* note 7, ¶ 9; UNC Complaint, *supra* note 7, ¶¶ 7, 198.

158   Harvard Complaint, *supra* note 7, ¶ 16.

159   UNC Complaint, *supra* note 7, ¶¶ 1, 4, 14. Specifically, the complaint alleges a violation of section 1 of the Fourteenth Amendment, as well as violations of section 1981, 42 U.S.C. § 1981, section 1983, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. *See id.* ¶ 8. The claim based on section 1981 was dismissed by stipulation. Joint Stipulation of Voluntary Dismissal ¶ 1, Students for Fair Admission, Inc. v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. Mar. 20, 2015) (No. 1:14-CV-954), 2015 WL 1412976.

160   In both the Harvard and UNC complaints, SFFA alleges, for example, that "[o]nly using race or ethnicity as a dominant factor in admissions decisions could, for example, account for the disparate treatment of high-achieving Asian American and white applicants and underrepresented minority applicants with inferior academic credentials." Harvard Complaint, *supra* note 7, ¶ 7; UNC Complaint, *supra* note 7, ¶ 4–5.

161   UNC Complaint, *supra* note 7, ¶¶ 4–5. *See also* Harvard Complaint, *supra* note 7, ¶¶ 7–8.

162   UNC Complaint, *supra* note 7, ¶ 4 (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)). *See also* Harvard Complaint, *supra* note 7, ¶ 7 (quoting *Grutter*, 539 U.S. at 337) (forming the equivalent of SFFA's allegations surrounding racial preference in their UNC Complaint).

diversity."[163] UNC disagreed with both assertions, arguing that it

> considers every applicant for admission holistically, as an individual, taking into account academic achievement and other characteristics that suggest an applicant could meaningfully contribute to the campus community. If voluntarily disclosed by the applicant, the University may consider race and ethnicity as one factor among many in its holistic review.[164]

Furthermore, UNC avers that it "does not consider candidates of different racial backgrounds in separate groups; assign points or automatic plus factors to candidates because they are of a particular race; or use racial targets or quotas of any kind."[165] As defined by UNC, diversity includes "all of the ways in which people differ" and "fosters a campus community that differs in a wide variety of ways, including social backgrounds, economic circumstances, philosophical outlooks, life experiences, perspectives, beliefs, expectations, and aspirations."[166] Like Harvard,[167] UNC has defended the suit by focusing on the educational benefits of a diverse student body, its reliance on race as only one part in a holistic consideration of an applicant's record, and the university's attempts to achieve student body diversity in a race-neutral way.[168] This lawsuit is in the pre-trial stage, with the parties' cross-motions for summary judgment denied by the Judge on September 30, 2019.[169]

In addition to the Harvard and UNC lawsuits, a University of California at Los Angeles (UCLA) professor has sued the University of California, claiming that the university considers race in its admissions decisions despite California's 1996 prohibition of the

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163 UNC Complaint, *supra* note 7, ¶ 5. *See also* Harvard Complaint, *supra* note 7, ¶ 8 (forming the equivalent of SFFA's allegations surrounding race neutral alternatives in their UNC Complaint).
164 UNC Memorandum of Law, *supra* note 3, at 1.
165 *Id.*
166 *Id.* at 6 (citations omitted).
167 Harvard Statement of Undisputed Material Facts, *supra* note 3, ¶¶ 82–84.
168 UNC Memorandum of Law, *supra* note 3, at §§ I–II.
169 Students for Fair Admissions, Inc. v. Univ. of N.C., No. 14-cv-00954 (M.D.N.C. Sept. 30, 2019), 2019 WL 4773908 (denying parties' cross-motions for summary judgment).

consideration of race in admissions programs.[170] Professor Richard Sander, who studies the use of race in university admissions,[171] sought data from the university about the applicants for admission, the offers made to those applicants, and the bases on which the university decided to make those offers.[172] He originally sought the data pursuant to the California open records statute.[173] However, his request was denied and Professor Sander filed suit.[174] The suit is currently in the pre-trial stage,[175] but when asked for a reaction to the suit, a spokesperson for the University of California denied that the university considers race at all, stating that "[n]either race, ethnicity nor gender factor into U.C.'s holistic admissions policy."[176]

Although the University of California lawsuit is narrowly focused, the outcome of the *Harvard* and *UNC* cases may determine the fate of race consciousness in university admissions programs. These lawsuits challenge directly the Supreme Court's prior decisions that race may be considered as long as race is considered as part of a holistic consideration of an applicant's traits and characteristics.[177] If the United States Supreme Court agrees to hear either of the lawsuits, it is likely that the Court will overrule its well-settled precedent and prohibit all consideration of race in admissions, as

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170 Sander Complaint, *supra* note 9, at 2; Jaschik, *supra* note 9 (describing lawsuit filed in California state court by Richard Sander, Professor of Law at University of California Los Angeles, alleging that "the university system may well be considering race and ethnicity in admissions, in ways that favor black and Latino students and hurt Asian Americans"). *See also* CAL. CONST. art. 1, § 31 ("The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

171 *See infra* notes 244–50 and accompanying text for a discussion of Professor Sander's position on race-conscious plans.

172 Sander Complaint, *supra* note 9, at 2–3; Jaschik, *supra* note 9; *see also* Anemona Hartocollis, *With Echoes of Harvard Case University of California Faces Admissions Scrutiny*, N.Y. TIMES (Nov. 15, 2018), https://www.nytimes.com/2018/11/15/us/university-of-california-admissions.html.

173 Sander Complaint, *supra* note 9, at 2–3; Jaschik, *supra* note 9; CAL. GOV. CODE § 6250 (West 2019) ("In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.").

174 Sander Complaint, *supra* note 9, at 3–4; Jaschik, *supra* note 9.

175 *See* Sander Complaint, *supra* note 9.

176 Hartocollis, *supra* note 172.

177 Harvard Complaint, *supra* note 7, ¶¶ 3–4, 7; UNC Complaint, *supra* note 7, ¶¶ 3–4.

discussed in the following section.

IV. SIGNALS THAT THE LAW MAY CHANGE

In July 2018, the Trump Administration rescinded the guidelines for using race-conscious admissions programs and called for a race-blind approach.[178] This change, by itself, will have little impact on the course taken by colleges and universities, given both the limitations on the power of the Executive Branch to effectuate such a change and the position taken by the United States Secretary of Education, who stated publicly that the "Supreme Court has determined what affirmative action policies are constitutional, and the Court's written decisions are the best guide for navigating this complex issue. Schools should continue to offer equal opportunities for all students while abiding by the law."[179]

That law, however, is likely to change.[180] Although *Grutter* and *Fisher II* established the constitutionality of a narrowly tailored race-conscious admissions plan, the Court in both cases warned of the limitations of these holdings.[181] In *Grutter,* Justice O'Connor acknowledged that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."[182] Accordingly, the Court upheld the University of Michigan Law School's admissions program but made clear that "race-conscious admissions policies must be limited in time" and have a "logical end point."[183] Notably, the *Grutter* Court predicted in 2003 that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[184] The Court identified other jurisdictions that had already prohibited the

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178 Letter from Kenneth L. Marcus, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., & Eric S. Dreiband, Assistant Attorney Gen., U.S. Dep't of Justice, to Colleague (Dec. 21, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf [hereinafter Dear Colleague Letter]; Erica L. Green et al., *Trump Officials Reverse Obama's Policy on Affirmative Action in Schools,* N.Y. Times (July 3, 2018), https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html.

179 Green et al., *supra* note 178.

180 *See* Quinn, *supra* note 10.

181 Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (predicting the end of the need to consider race); Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2208 (2016) (limiting the holding to the facts of the case).

182 *Grutter,* 539 U.S. at 341–42 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

183 *Id.* at 342.

184 *Id.* at 343.

reliance on race, including California, Florida, and Washington, and instructed universities that continued to consider race to study what universities in these jurisdictions were doing to achieve student body diversity and "draw on the most promising aspects of these race-neutral alternatives as they develop."[185]

Thirteen years after *Grutter*, the Court in *Fisher II* reiterated the importance of examining all possible ways to foster student body diversity but stopped short of putting a fixed end point on the consideration of race.[186] Instead, Justice Kennedy called on the University of Texas "to engage in constant deliberation and continued reflection regarding its admissions policies."[187] He instructed the university "to assess whether changing demographics

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185   *Id*. at 342. California was the first state to ban the consideration of race in university admissions programs, prohibiting the state from granting "preferential treatment" on the basis of "race, sex, color, ethnicity, or national origin" in public employment, education, or contracting. CAL. CONST. art. 1, § 31. Governor Jeb Bush banned the consideration of race in Florida through executive order, prohibiting "preferences in the admissions process for applicants on the basis of race, national origin, or sex." FLA. ADMIN. CODE ANN. r. 6C-6.002(3)(c) (repealed 2011). Voters passed a similar ban in Washington. *See* WASH. REV. CODE § 49.60.400(1) (2019) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, [or] national origin . . . in the operation of public employment, public education, or public contracting."). However, on April 28, 2019, the Washington State legislature voted to remove the ban. *See* 2019 Wash. Sess. Laws 160. According to its terms, the new law, which would take effect a year after its enactment, would restore "affirmative action into state law without the use of quotas or preferential treatment," *id*. at § 2, and would make clear that decisions may not be made solely on race or other protected classifications. *Id*. at § 3(11)(d). Just as voters passed the ban currently in place, they can vote again to keep it in place by voting to repeal the newly-enacted law. *See, e.g., Join Referendum Measure 88 Signature Drive and Put I-1000 on the Ballot*, WA ASIANS FOR EQUAL. (Apr. 29, 2019), https://waasians4equality.org/2019/04/29/join-referendum-88-signature-drive-and-put-i-1000-on-the-ballot/?fbclid=IwAR2MYgjsjNyp1dT5YKbkcpALpXWehsQX3xCFpU7XY6VddEXRXb7_klB7Rk (inviting the public to sign a petition to repeal the new law). Since *Grutter v. Bollinger*, 539 U.S. 306 (2003), was decided, five other states have also banned the consideration of race in admissions including: Arizona, ARIZ. CONST., art. II, § 36A; Michigan, MICH. CONST. art. 1, § 26; NEB. CONST. art. I, § 30; New Hampshire, N.H. REV. STAT. ANN. § 187-A:16-a (2019); and Oklahoma, OKLA. CONST. art. II, § 36A.

186   Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2214 (2016) (calling universities "laboratories for experimentation" (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring))).

187   *Id*. at 2215.

have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary."[188]

Although he did not make any firm prediction as to when a consideration of race would no longer be necessary, Justice Kennedy may have done more to unsettle the law than to clarify it. He described the admissions program at the University of Texas as *"sui generis"* because it blended a holistic consideration of an applicant with a percentage plan.[189] Moreover, in *Fisher II*, Justice Kennedy wrote the opinion for a closely divided Court, where he issued the deciding vote and was joined by Justices Ginsburg, Breyer, and Sotomayor,[190] while Chief Justice Roberts, as well as Justices Thomas and Alito, dissented.[191] Given the split of opinions among the justices, the position of each justice is considered separately below.

A. *Justice Gorsuch, Replacing Justice Scalia*

Justice Scalia died before the decision in *Fisher II* was rendered.[192] Had he participated in the decision, he likely would have sided with the dissent in voting to ban any consideration of race in university admissions, as he made clear in *Grutter,* and again in *Fisher I,* his position that the "Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."[193] Justice Scalia concurred in the Court's opinion in *Fisher I* only because the petitioner "did not ask us to overrule Grutter's holding that a 'compelling interest' in the educational benefits of diversity can justify racial preferences in university admissions."[194] It is likely that Justice Gorsuch, appointed to replace Justice Scalia and "widely seen as Scalia's intellectual and stylistic heir," will

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188   *Id.* at 2214–15.

189   *Id.* at 2208.

190   *Fisher II* was decided by a 4-3 vote, with Justices Ginsburg, Breyer, and Sotomayor joining the Court's opinion written by Justice Kennedy and Justice Kagan not participating in the decision. *See id.* at 2204–05.

191   Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016) (Thomas, J., dissenting); Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198 (2016) (Alito, J., dissenting).

192   *See Biography of Former Associate Justice Antonin Scalia,* Sᴜᴘ. Cᴛ. U.S., https://www.supremecourt.gov/about/biographyscalia.aspx.

193   Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 315 (Scalia, J., concurring) (quoting Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part)).

194   *Id.* (quoting Transcript of Oral Argument at 8–9, Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297 (2013) (No. 11-345)).

vote in the same manner as Justice Scalia.[195] Even though he has not expressed an opinion on race-conscious admissions programs, Justice Gorsuch authored the Tenth Circuit's decision in *Hobby Lobby v. Sebelius,* which reinforced his reputation as a conservative jurist.[196] As such, he will likely vote with Chief Justice Roberts and Justices Alito and Thomas who have already expressed their opposition to race-conscious plans, as discussed below.[197]

B.   Justice Kavanaugh

Justice Kavanaugh, whose appointment adds a fifth conservative voice to the Court, has, in contrast to Justice Gorsuch, written on race-conscious governmental action.[198] Before Justice Kavanaugh was appointed to the Supreme Court, he co-authored a brief in support of the plaintiff in the 1996 Supreme Court case *Rice v. Cayetano,* which challenged a Hawaii law allowing only "Hawaiians" or "native Hawaiians" to vote for trustees for the Office of Hawaiian Affairs, a government agency responsible for overseeing state land.[199] He wrote the brief on behalf of the Center for Equal Opportunity, whose "anti-affirmative action" position was clear.[200] In the brief,

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195   Greg Johnson, *Is Neil Gorsuch a Good Role Model for Legal Writers? Yes and No.,* 43 Vt. B.J. 27 (Fall 2017). *See also* Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court,* Nat'l Pub. Radio (Apr. 7, 2017) (describing Justice Gorsuch as "a conservative who adheres to many of the same positions that Scalia did" and noting that "some believe that Gorsuch will be more conservative."), https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court.

196   See Hobby Lobby Stores v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.,* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), in which Justice Gorsuch joined the majority of the Tenth Circuit, sitting en banc, holding in favor of owners of the Christian-based arts and crafts chain, which objected on religious grounds to paying for contraceptives under the Affordable Care Act.

197   The Tenth Circuit's decision in *Hobby Lobby Stores v. Sebelius* was affirmed by the Supreme Court in a decision authored by Justice Alito and joined by Chief Justice Roberts as well as Justices Scalia, Kennedy, and Thomas. Hobby Lobby Stores v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 687 (2014).

198   *See* Brief of *Amici Curiae* Center, *supra* note 11 (brief co-authored by Justice Kavanaugh when he served as attorney to plaintiff); *see also,* The Civil Rights Record of Judge Brett Kavanaugh, *supra* note 11, at 30–32 (discussing Justice Kavanaugh's writings on race-conscious governmental action).

199   Brief of *Amici Curiae* Center, *supra* note 11, at 1–4.

200   The Civil Rights Record of Judge Brett Kavanaugh, *supra* note 11, at 31.

Justice Kavanaugh wrote that the Equal Protection Clause allows for the consideration of race in a government program only "rarely" and noted that such a classification will be upheld only if supported by "extraordinary justification."[201] Any sort of government-sanctioned discrimination, like "societal discrimination," the brief contended, is "too 'amorphous' a concept of injury to qualify as a 'compelling interest.'"[202] While it may be argued that he was only expressing the views of his client by writing this brief, Justice Kavanaugh's subsequent statements on the record to support this position remove any doubt surrounding his position on consideration of race in governmental programs.[203] In what the NAACP called a "media blitz to support the brief," he made clear that any governmental consideration of race is unconstitutional, stating on the record that the plaintiff's challenge in *Rice v. Cayetano* "is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government."[204]

Accordingly, it appears clear that Justice Kavanaugh will vote with Chief Justice Roberts and Justices Thomas and Alito, who concluded in *Fisher II* that the University of Texas' race-conscious admissions program could not survive strict scrutiny and that any consideration of race in an admissions decision will be constitutional "only as a 'last resort,' when all else has failed."[205]

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201 Brief of *Amici Curiae* Center, *supra* note 11, at 4, 14–15, (citing Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979)) (noting that Hawaii's racial voting qualifications are "presumptively invalid" under *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), and stating "the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial classifications").

202 Brief of *Amici Curiae* Center, *supra* note 11, at 16 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1989) (O'Connor, J., plurality opinion)).

203 *See* THE CIVIL RIGHTS RECORD OF JUDGE BRETT KAVANAUGH, *supra* note 11, at 31 (citing Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So.*, WALL ST. J. (Sept. 27, 1999), https://www.wsj.com/articles/SB938365458335869648).

204 Warren Richey, *New Case May Clarify Court's Stand on Race*, CHRISTIAN SCI. MONITOR, Oct. 6, 1999, https://www.csmonitor.com/1999/1006/p3s1.html (quoting Kavanaugh's prediction).

205 Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2221 (2016) (Alito, J., dissenting) (quoting *City of Richmond*, 488 U.S. at 519 (Kennedy, J., concurring in part and dissenting in part)).

C. *Justice Thomas*

Dissenting in *Fisher II* and writing separately from the other dissenting Justices, Justice Thomas was emphatic in his position that university admissions programs cannot consider race.[206] In his dissent, Justice Thomas repeated what he had stated in *Fisher I* and *Gratz*, that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."[207] According to Justice Thomas, the Court need not even reach the question of whether a university's race-conscious program is narrowly tailored because student body diversity is not a compelling government interest at all.[208] Justice Thomas would allow for the possibility of the consideration of race only "to remedy discrimination for which [the government] was responsible" and "to provide a bulwark against anarchy . . . or to prevent violence."[209] Giving no weight to the Court's repeated confirmation in *Bakke*, *Grutter*, and *Fisher I* and *II* that the attainment of student body diversity is a compelling interest,[210] Justice Thomas dismissed any argument for a race-conscious admission system as nothing more than a "'faddish theor[y]' that racial discrimination may produce 'educational benefits.'"[211] Accordingly, Justice Thomas stated in no uncertain terms that he "would overrule *Grutter*."[212]

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206 *Fisher II,* 136 S. Ct. at 2215 (2016) (Thomas, J., dissenting).

207 *Id*. (quoting Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 327 (2013) (Thomas, J., concurring)). *See also Fisher I*, 570 U.S. at 315 (Thomas, J., concurring); Gratz v. Bollinger, 539 U.S. 244, 281 (2003) (Thomas, J., concurring).

208 *See* Grutter v. Bollinger, 539 U.S. 306, 357 (2003) (Thomas, J., concurring in part and dissenting in part) (stating with regard to the University of Michigan Law School's interest in its student body diversity that "marginal improvements in legal education do not qualify as a compelling state interest"). *See also, Fisher II,* 136 S. Ct. at 2215 (Thomas, J., dissenting) (calling to overrule *Grutter v. Bollinger*, 539 U.S. 359 (2003) and reverse the Fifth Circuit's decision in *Fisher v. Univ. of Tex.*, 758 F.3d 633, 643 (5th Cir. 2014)).

209 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 771 (2007) (Thomas, J., concurring) (quoting *Grutter*, 539 U.S. at 359 (Thomas, J., concurring in part and dissenting in part)).

210 *Fisher II,* 136 S. Ct. at 2210; *Fisher I,* 570 U.S. at 310; *Grutter*, 539 U.S. at 328 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) (Powell, J., plurality opinion).

211 *Fisher II,* 136 S. Ct. at 2215 (Thomas, J., dissenting) (quoting *Fisher I,* 570 U.S. at 327 (Thomas, J., concurring)).

212 *Id.* (citing *Grutter,* 539 U.S. at 343).

D. Justice Alito

Justice Alito was not as quick as Justice Thomas to dismiss all race-conscious admissions programs, but he made clear in his dissent in *Fisher II* that a university is not entitled to the Court's deference on a decision to use race to serve its educational goals.[213] Applying the Court's holding in *Fisher I*, Justice Alito noted that to satisfy the Court's strict scrutiny, the university was required "to show that its use of race and ethnicity in making admissions decisions serves compelling interests and that its plan is narrowly tailored to achieve those ends."[214] In Justice Alito's opinion, the University of Texas showed neither.[215] The University of Texas defined its educational goals to include "the destruction of stereotypes, the promot[ion of] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry."[216] Acknowledging that these may be "laudable goals," Justice Alito concluded that the university's interest in attaining these goals does not amount to a compelling interest because the goals "are not concrete or precise, and they offer no limiting principle for the use of racial preferences."[217] He also challenged the university's claimed interest in avoiding "'feelings of loneliness and isolation' among minority students[,]" dismissing it as a "vague interest" that "cannot possibly satisfy strict scrutiny."[218]

In light of these pronouncements, it appears unlikely that any race-conscious plan would satisfy Justice Alito's brand of strict scrutiny.[219] Specifically, Justice Alito stated the types of students that the Court identified as important for any student body to attract, including "the star athlete or musician[,]" "the talented young biologist[,]" and "the student whose freshman-year grades were poor[,]" could be attracted "without injecting race into the process."[220] Despite all of the evidence on the record of what the

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213 *Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting).
214 *Id.*
215 *Id.* at 2223.
216 *Id.* (alteration in original) (quoting *Fisher II*, 136 S. Ct. at 2211 (majority opinion)).
217 *Id.*
218 *Id.* at 2235 (quoting *Fisher II*, 136 S. Ct. at 2212 (majority opinion)).
219 *See id.* at 2235–36 (detailing Justice Alito's extensive analysis of the University of Texas' admissions program).
220 *Id.* at 2237 (quoting *Fisher II*, 136 S. Ct. at 2213 (majority opinion)).

University of Texas had done to achieve classroom diversity without consideration of race,[221] Justice Alito believed that it could have done more, "such as intensifying its outreach efforts, uncapping the Top Ten Percent Law, or placing greater weight on socioeconomic factors."[222]

In Justice Alito's opinion, the University of Texas "failed to provide any evidence whatsoever that race-conscious holistic review will achieve its diversity objectives more effectively than race-blind holistic review."[223] Given such an opinion, it was inevitable that he would decide that the University of Texas' program could not "satisfy the heavy burden imposed by the strict scrutiny standard."[224] Justice Alito ends his dissent with an emphatic statement that the Court's decision upholding the constitutionality of the university's consideration of race was "remarkable—and remarkably wrong."[225]

E. Chief Justice Roberts

As Chief Justice Roberts joined Justice Alito's dissent in *Fisher II*,[226] it is likely that he will vote alongside Justice Alito in the next case that challenges a race-conscious admissions program. Chief Justice Roberts has expressed his position on the use of race in his writing of a plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, which struck down a race-conscious plan that assigned children to particular schools so as to balance the schools' racial make-up and avoid segregated schools.[227] Chief Justice Roberts stated in no uncertain terms that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[228] Unless a school district had previously sanctioned racial segregation and still suffered "the vestiges of past segregation," the only constitutional way, according to Chief Justice Roberts, "to achieve a system of determining admission to the public schools on a nonracial basis . . . is to stop assigning students on a racial basis."[229]

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221 *See supra* notes 105–15 and accompanying text.
222 *Fisher II*, 136 S. Ct. at 2236 (Alito, J., dissenting).
223 *Id.* at 2237.
224 *Id.*
225 *Id.* at 2243.
226 *Id.* at 2215.
227 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J., plurality opinion).
228 *Id.*
229 *Id.* at 747–48 (Roberts, C.J., plurality opinion) (quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300–01 (1955)).

F.   The Current Majority of the Court

Accordingly, based on their previously expressed opinions, Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh are likely to vote together and decide that race-conscious admissions programs violate Equal Protection guarantees if/when the *Harvard* and *UNC* cases reach the Supreme Court. The next section discusses the effects that a change of the law will have on university admissions and argues that the constitutional and statutory guarantees of Equal Protection should not prohibit the consideration of race. Race-conscious plans that consider race as one factor of many do not disadvantage any individual or group, but assure that all applicants, regardless of their race or background, enjoy the same opportunities for admission to higher education.

V.   AN ARGUMENT FOR RETAINING RACE AS A "FACTOR OF A FACTOR OF A FACTOR"

Universities have repeatedly raised concern, based on a review of their enrollment statistics, that classroom diversity will suffer if race cannot be considered in the admissions process.[230] The record compiled in the *Fisher* cases, as well as the *Harvard* and *UNC* cases, is replete with data showing that race-neutral admissions programs reduce student body diversity.[231] Studies of African-American and Hispanic enrollment across University of California campuses since consideration of race was disallowed have shown a "precipitous decline."[232] Furthermore, the University of California's efforts to increase diversity through a variety of race-neutral initiatives failed to yield results, proving that the University's

> many years of effort and experimentation with a wide variety of race-neutral approaches demonstrates that, at least under current circumstances in California, highly competitive public universities cannot maintain historic levels of diversity within their student bodies—much less reflect in their student bodies a growing state population of underrepresented

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230   *See* sources cited *supra* note 17.

231   *See* sources cited *supra* notes 17–20, 104–07.

232   Brief for the President and the Chancellors of the Univ. of Cal., *supra* note 17, at 19; *see also* Thomason, *supra* note 17.

minorities—using only race-neutral methods.[233]

Like the University of California, after extensive study of its admissions data, Harvard concluded that its outreach and other race-neutral programs have not ensured student body diversity.[234] Indeed, Harvard found that "no combination of race-neutral practices would practicably allow it to achieve the educational benefits of a diverse student body without unacceptable cost to other important educational and institutional objectives."[235] Several other universities have come to the same conclusion, based on their individual outreach and enrollment experiences.[236] Despite the universities' agreement, based on their respective admissions data, that race is a necessary ingredient in admissions programs, Justice Thomas maintains his position that race should be irrelevant to an admissions decision by relying on the record developed in California, which banned the consideration of race in university admissions since 1996.[237] Looking at actual enrollment of minority students between the effective date of the ban and 2002, while *Grutter v. Bollinger* was being litigated, Justice Thomas noted that minority enrollment at the law school at University of California, Berkeley, actually increased by two, from 48 to 50 African-American and Hispanic students.[238] He described this change as proof that the "sky has not fallen" and that universities "have satisfied their sense of mission without resorting to prohibited racial discrimination."[239] Justice Thomas also warned that considering the race of applicants

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233 Brief for the President and the Chancellors of the Univ. of Cal., *supra* note 17, at 3–4, 22.

234 Harvard Statement of Undisputed Material Facts, *supra* note 3, ¶¶ 156–212 (enumerating the methods taken to attract minority students without regard to race and the reasons why those methods are not, alone, sufficient to guarantee diversity).

235 *Id.* ¶ 164.

236 *See* Brown University Amicus Brief, *supra* note 17, at 1, 8–9 (filed on behalf of sixteen universities speaking with "one voice"); *see also* UNC Memorandum of Law, *supra* note 17, at 4 ("[T]he record shows that no race-neutral alternatives could advance the University's mission about as well, at tolerable costs.").

237 *See* Cal. Const. art. 1, § 31 ("The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."); Grutter v. Bollinger, 539 U.S. 306, 367 (2003) (Thomas, J., concurring in part and dissenting in part).

238 *Grutter,* 539 U.S. at 367 (2003) (Thomas, J., concurring in part and dissenting in part).

239 *Id.*

"taints the accomplishments of all those who are admitted as a result of racial discrimination" as well as "the accomplishments of all those who are the same race as those admitted as a result of racial discrimination."[240] According to Justice Thomas, when minority students graduate and "take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement."[241] It is Justice Thomas' position that "there is no evidence that [minority students] learn more at the University" to which they are admitted under a race-conscious admissions program "than they would have learned at other schools for which they were better prepared" and that "[i]ndeed, they may learn less."[242] Thus, he concluded, "the University's racial tinkering harms the very people it claims to be helping."[243]

The UCLA Law School Professor Richard Sander who is challenging the University of California's admissions practices,[244] has labeled this argument against any reliance on race as the "mismatch" theory of affirmative action.[245] As Sander has described it, the premise of the theory is that "if there is a very large disparity at a school between the entering credentials of the 'median' student and the credentials of students receiving large preferences, then the credentials gap will hurt those the preferences are intended to help."[246] He argues that race-based affirmative action programs "often fail[] to match students with the academic environments that are most likely to foster their success."[247] As a result, "affirmative

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240 Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 333 (2013) (Thomas, J., concurring).

241 *Id.* at 334 (alteration in original) (quoting *Grutter*, 539 U.S. at 373 (2003) (Thomas, J., concurring in part and dissenting in part)).

242 *Id.* at 332.

243 *Id.* at 334.

244 Sander Complaint, *supra* note 9; Scott Jaschik, *supra* note 9 (describing lawsuit filed in California state court by Richard Sander, Professor of Law at University of California Los Angeles, that alleges that "the university system may well be considering race and ethnicity in admissions, in ways that favor black and Latino students and hurt Asian Americans.").

245 Kylie Rahl, *Racing to Neutrality: How Race-Neutral Admissions Programs Threaten the Future Use of Race-Based Affirmative Action in Higher Education*, 49 Tex. Tech. L. Rev. Online Edition 109, 142 (2017) (citing Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, Atlantic (Oct. 2, 2012), http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/).

246 Richard H. Sander, *A Reply to Critics*, 57 Stan. L. Rev. 1963, 1966 (2005).

247 Rahl, *supra* note 245, at 142 (alteration in original) (quoting Richard Sander,

action students [are] at risk for receiving much lower grades than other students whose race was not a factor in admissions" and may consequently find themselves "ranking near the bottom of the class, and dropping out."[248]

While the mismatch theory has gained some traction, it produced "strong reactions from the academic legal community" who question the theory "on a number of different bases, from the methods to the sample size to the resulting effects."[249] Indeed, current and prospective Harvard students noted in an amicus brief filed in support of Harvard College in the recently-decided suit against it that "the consensus of empirical scholars over the past seventeen years is that students of color attending universities with race-conscious admissions programs achieve *higher* grades, graduate at *higher* rates, and secure greater earnings than their peers at less selective schools."[250]

In addition, 16 universities, large and small from across the country, have spoken with "one voice" in their amicus brief in the *Harvard* case to make clear that race-neutral approaches to admissions decisions do not provide them "with 'workable means' to attain 'the benefits of diversity' they seek."[251] Moreover, the universities note that it is "artificial to consider an applicant's experiences and perspectives while turning a blind eye to race," because, for many applicants, "their race has influenced, and will continue to influence, their experiences and perspectives."[252] Indeed, the universities

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A Collective Path Upward: Working Smarter and Cooperatively to Improve Opportunity and Outcomes, in The Future of Affirmative Action: New Paths to Higher Education Diversity After Fisher v. University of Texas 217 (Richard D. Kahlenberg ed., 2014)).

248   Rahl, *supra* note 245, at 142.

249   Brief Amicus Curiae of Pacific Legal Foundation in Support of Plaintiffs and Appellants at 14, Sander v. State Bar of Cal., 237 Cal. Rptr. 3d 276 (Ct. App. 2018) (No. A150625) (citing to a number of articles challenging the soundness of the "mismatch" theory of affirmative action).

250   Brief of Student Amici Curiae in Support of Defendant's Motion for Judgment on the Pleadings on Counts IV and VI at 3, Students For Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 1:14-cv-14176-ADB, 2019 WL 4786210 (D. Mass. Sept. 30, 2019), *appeal docketed*, No. 19-2005 (1st Cir. Oct. 11, 2019) (citing Brief of Empirical Scholars as *Amici Curiae* in Support of Respondents at 14–16, Fisher v. Univ. of Tex. (*Fisher I*), 133 S. Ct. 2411 (2013) (No. 14-981)).

251   Brown University Amicus Brief, *supra* note 17, at 1, 9 (quoting Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2212 (2016)).

252   *Id.* at 5.

recognize that "race [does] matter[]"[253] and they stress that to acknowledge this is "to acknowledge forthrightly that for many reasons race continues to shape the backgrounds, perspectives, and experiences of many in our society," including their students.[254] To give meaning to a "truly individualized assessment for many applicants," the universities insist that it would be "entirely antithetical to this approach to ignore a facet of an applicant's identity that may, to that individual, play an essential role in shaping his or her outlook and experience."[255] UNC has acknowledged the same, based on a study done by an independent researcher who concluded that "there is no race-blind alternative available to UNC that could be used, even in some practical combination with another alternative, that would allow UNC to maintain its current level of academic preparedness and racial diversity."[256]

Given the evidence offered by the universities themselves, it is worthy to note that the Supreme Court has itself recognized empirical data suggesting that the benefits of racial diversity are "substantial."[257] The *Grutter* Court noted that ensuring student body diversity through a holistic consideration of an applicant's traits, which would include race, "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[258] According to the *Grutter* Court, these benefits are "'important and laudable[]' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"[259] The Court also noted "numerous studies" that illustrate that this "student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'"[260]

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253   *Id.* at 5, 11 (alteration in original) (quoting Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

254   *Id.*

255   *Id.* at 11–12.

256   UNC Memorandum of Law, *supra* note 17, at 23 (citation omitted).

257   Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

258   *Id.* (alteration in original) (citation omitted).

259   *Id.* (citation omitted).

260   *Id.* (citing Brief of the American Educational Research Association, *supra* note 20, at 3; William G. Bowen & Derek Bok, The Shape of the River (1998); Diversity Challenged: Evidence on the Impact of

Finally, and perhaps most importantly, considering race in the admissions process does not give preferential treatment to any applicant, but instead ensures "the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[261] As made clear by Justice Powell in *Bakke,* a holistic consideration of an applicant's characteristics and traits that includes race does not lead to an admissions decision that "aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals."[262] Rather, student body diversity "is a composite of the backgrounds, experiences, achievements, and hardships of students to which race only contributes."[263] Indeed, a race-conscious admissions plan that considers race as one factor of many will be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them *on the same footing* for consideration . . . ."[264] Understood properly, therefore, race-conscious admissions programs do not favor minority students but instead level the playing field for all students applying for admission to higher education institutions.[265]

VI. CONCLUSION

Despite the current orientation of the Supreme Court and the concern over any reliance on race in governmental programs, the constitutional and statutory guarantees of equal protection should not prohibit the consideration of race in university admissions programs. The lawsuits against Harvard College and the University of North Carolina will provide the Court with the opportunity to

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AFFIRMATIVE ACTION (Gary Orfield ed., 2001); COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES (Mitchell J. Chang et al. eds., 2003)).

261   Nancy Zisk, *Embracing Race-Conscious College Admissions Programs: How* Fisher v. University of Texas at Austin *Defines "Affirmative Action" as a Holistic Approach to Admissions that Ensures Equal, Not Preferential Treatment*, 100 MARQ. L. REV. 835, 857 (2017) (quoting *Grutter,* 539 U.S. at 340).

262   Regents of Univ. of Cal. v. Bakke, 438 U.S. at 307, 317–18 (1978) (Powell, J., plurality opinion).

263   Fisher v. Univ. of Tex., 758 F.3d 633, 643 (5th Cir. 2014), *aff'd,* 136 S. Ct. 2198 (2016).

264   *Grutter,* 539 U.S. at 334 (emphasis added) (quoting *Bakke,* 438 U.S. at 317 (1978) (Powell, J., plurality opinion)).

265   *Bakke,* 438 U.S. at 317 (noting that a holistic consideration of an applicant within a race-conscious admissions program places applicants "on the same footing").

overturn currently settled law and prohibit any consideration of race in the admissions process; and, if it does, the evidence strongly suggests that student body diversity will decline. This decline will detrimentally affect the quality of higher education and have far-reaching effects beyond the classroom because, in the words of the *Grutter* Court, the benefits of student body diversity "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[266]

Accordingly, race-conscious admissions plans that consider race as a "'factor of a factor of a factor' in [a] holistic-review calculus"[267] should be upheld.[268] As long as the consideration of race is a part of a holistic consideration of all of an applicant's traits, characteristics, and accomplishments, such a consideration only levels the playing field and assures that all applicants, regardless of race or background, enjoy the same opportunities for admission to higher education.

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266   *Grutter*, 539 U.S. at 330.
267   Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2207 (2016) (quoting Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009), *rev'd and remanded*, 570 U.S. 297 (2013)).
268   *Grutter*, 539 U.S. at 334. *See also, Bakke* 438 U.S. at 317.

Fair Use and Machine Learning

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I.   INTRODUCTION

Commentators have long discussed whether artificial intelligence could perform legal reasoning; some projects have attacked specific legal domains.[1] For decades, artificial intelligence in general was more important theoretically than practically. Machine learning, however, has in recent years shown tremendous practical progress.[2] That progress stems partly from new algorithms but also from the tremendous increase in computing resources and availability of large data sets, which have given life to decades-old theoretical work. At the same time, the domains proving most amenable to machine learning have been quite different than legal reasoning. Such areas as machine vision, internet searching, language translation, handwriting recognition,[3] credit scoring, email spam detection and viewing recommendations[4] are relatively focused compared to legal reasoning, which is free-ranging, semantic and conceptual. This paper explores whether the surprising success of machine learning might extend to using those techniques to apply copyright's fair use doctrine.

There would be a beaten path to the maker of software that could reliably state whether a use of a copyrighted work was protected as fair use. The question, "Is this fair use?" arises millions

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1   *See* Stephen M. McJohn, *Review of Artificial Legal Intelligence*, 12 Harv. J.L. & Tech. 241, 244 (1998) ("Thus, there have been a number of projects that claim some progress toward automating legal reasoning. This naturally raises the question, to what extent do the programs actually model the task at issue, or, alternatively, succeed in producing results similar to human decisions?").

2   This paper relies heavily on Pedro Domingos, The Master Algorithm (2015); Ian Goodfellow et al., Deep Learning (2016); Aurélien Géron, Hands-On Machine Learning with Scikit-Learn & Tensorflow (Nicole Tache et al. eds., 1st ed. 2017).

3   *See* Yann LeCun et al., Machine learning in handwriting, http://yann.lecun.com/exdb/mnist/ (last visited Sept. 24, 2019) (a training database for "teaching" computers how to understand handwriting); Niek Temme, *Using TensorFlow to Create Your Own Handwriting Recognition Engine*, Business Analytics: Harnessing the Value of Information (Feb. 21, 2016, 7:24PM), https://niektemme.com/2016/02/21/tensorflow-handwriting/; Shan Carter et al., *Four Experiments in Handwriting with a Neural Network*, Distill (Dec. 6, 2016), http://distill.pub/2016/handwriting/; Alexander Mordvintsev & Abid K., *OCR of Hand-written Data Using kNN*, OpenCV-Python Tutorials (2013), http://opencv-python-tutroals.readthedocs.io/en/latest/py_tutorials/py_ml/py_knn/py_knn_opencv/py_knn_opencv.html.

4   Goodfellow et al., *supra* note 2, at 445–82 (discussing applications of deep learning, such as computer vision, speech recognition, natural language processing and recommender systems).

of times a day. A student using block quotes in a paper, a playwright parodying a blockbuster movie, an activist passing on someone else's video of a campaign speech, a fan posting a song on YouTube and a documentary filmmaker using old news stories, all could benefit if software could give an accurate prediction if they were infringing or making fair use.[5] From the copyright holder's point of view, a novelist who sees her work copied into fan fiction (with advertising), a photographer whose work is picked up without permission by major sites, and a music company that sees its songs posted on YouTube might likewise wonder if fair use applied. In the most likely application, sites that host user content, like YouTube or Twitter, could use such a fair use daemon to help deal with the multitude of postings each day. In addition, Google Translate's most recent incarnation uses machine learning to produce accurate translations between languages.[6] An able fair use analyzer would be useful in many contexts.

Fair use determinations must consider four broad factors in light of a vast[7] amount of case law which has flowed in various directions over time. Today's software could not replicate the process that an experienced lawyer would use to assess a case.[8] But it is well worth exploring how one might try to use machine learning on fair use. First, the exercise of looking at how specific machine learning algorithms might be used in fair use analysis can show which sorts of algorithms might ultimately be best suited to the task.[9] Second,

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5   Presently, for many potential fair uses, the default is that the site may block the work, even if it qualifies for fair use. *See generally* Natalie Marfo, *Playing Fair: Youtube, Nintendo, and the Lost Balance of Online Fair Use*, 13 Brook J. Corp. Fin. & Com. L. 466 (2019).

6   Yongui Wu, et al., *Google's Neural Machine Translation System: Bridging the Gap between Human and Machine Translation* 20 (2016), https://arxiv.org/pdf/1609.08144v1.pdf.

7   Vast in the sense of case law to research, not in the sense of Big Data, as discussed below.

8   Niva Elkin-Koren, *Fair Use by Design*, 64 UCLA L. Rev. 1082, 1095 (2017) (citing Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. on Telecomm. & High Tech. L. 101, 110-11 (2007)) ("Skeptics believe that fair use analysis cannot be automated. One concern is that it involves a high degree of complexity, which requires discretion while weighing each of the four factors in light of the purpose of copyright law.").

9   Considering how such algorithms might work can also bear on the consideration that fair use programs might replicate implicit or explicit biases in the design of the software. *See* Dan L. Burk, *Algorithmic Fair Use*, 86 U. Chi. L. Rev. 283, 285 (2019) ("Consequently, it may seem desirable to incorporate fair use metrics into copyright policing algorithms, both to

examining how machine learning might fit fair use analysis can be a useful way of studying how fair use analysis itself works in actuality.

Third, software will likely be used anyway to, in effect, make fair use determinations. We can see that by comparison with a related issue: whether material potentially infringes copyright. As with fair use, today's software is not ready to make the initial, subtle determination of whether a copyright has been infringed. That determination requires considering whether original expressive material has been copied (or adapted, distributed, performed, or displayed). For example, to see if a song posted on YouTube potentially infringes (i.e. without even considering whether the post is fair use), one would have to identify original elements in the copyrighted work that were copied into the accused copy, and then filter out any non-protected elements that were copied, such as non-original elements copied from still other works, or non-protected ideas (ideas may be copied without infringing copyright). Notable recent music copyright cases such as the *Blurred Lines* case[10] show how difficult that assessment can be.

Assessment of potential infringement is a subtle analysis. Nevertheless, *in effect,* most copyright infringement analysis today is done automatically by software. Copyright holders use software to crawl the web, search for copies of their works, and generate take-down notices – thereby making implicit infringement determinations, but bluntly, without actually considering such questions as originality or the non-protection of ideas, let alone fair use. This brute force approach may be accurate in the majority of cases, but it is harsh in some. YouTube likewise relies on automated processes. YouTube allows copyright holders to submit works to YouTube's Content ID System. When a work is uploaded to YouTube, it is compared to the Content ID database, and if identified as infringing, the copyright

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protect against automated over-deterrence, and to inform users of their compliance with copyright law. In this paper I examine the prospects for algorithmic mediation of copyright exceptions, warning that the design values embedded in algorithms will inevitably become embedded in public behavior and consciousness."). The potential use of AI for legal decision-making raises philosophical and jurisprudential issues. *See* Lawrence B. Solum, *Artificially Intelligent Law,* BioLaw J. - Rivista di BioDiritto 58-61 (April 14, 2019), http://dx.doi.org/10.2139/ssrn.3337696; Rebecca A. Williams, *Rethinking Deference for Algorithmic Decision-Making* 2-3 (Aug. 31, 2018) (unpublished research paper) (available at http://dx.doi.org/10.2139/ssrn.3242482).

10   *See* Williams v. Gaye, 885 F.3d 1150, 1172 (9th Cir. 2018) (upholding jury finding of infringement in controversial music copyright case).

holder is given the choice between taking the work down or allowing it to remain in place with advertising revenue going to the copyright holder. In many online contexts, then, whether copyright infringement has occurred is implicitly decided by software – not as a judicial matter, but as a practical one. Online services also have incentive to assess whether a posting is not infringement, but fair use. This may allow users to post more material, which may make the service more attractive to users. It may help the services respond with more nuance to take-down orders generated automatically by copyright holders.

This paper explores whether fair use determinations are amenable to machine learning. In short, fair use is too complicated and nuanced, and involves such a broad range of subject matter like music, video, literature, and far more, to simply write a program to handle it. Machine learning has successfully seen computers teach themselves to identify spam emails, recognize objects in images and video, translate languages, and play chess. This paper surveys the leading schools of machine learning and how each may have advantages and disadvantages in dealing with fair use. It may be that fair use machine learning in early generations may have some success by looking at a few statistically, if not necessarily legally, relevant factors. This paper further suggests that whether later generations can make finer discriminations may depend on the progress of machine learning, and related disciplines in computer science, in identifying concepts and representing knowledge. Ironically, some of that work may stem from knowledge engineering, the branch of artificial intelligence that has been somewhat eclipsed by the spectacular achievements of machine learning in recent years. This paper also touches on possible legal issues with using machine learning to apply fair use (e.g., whether automated analysis of fair use is inconsistent with the case-bound analysis required by courts, and possible application of the recent data protection regulations in Europe), including by private actors such as sites that host user-posted content.

II. ARTIFICIAL INTELLIGENCE: FROM KNOWLEDGE ENGINEERING TO MACHINE LEARNING

Discussions of artificial intelligence came considerably earlier than even the most rudimentary electronic computer. Alan Turing established the basic mathematical principles of computing, most notably with the concept of a Turing machine, a theoretical prototype of today's programmed devices, and his proofs on the

limits on computability.[11] Turing also explored theoretically whether machines could think like humans, formulating what Turing called the "Imitation Game," and what everyone else has called the "Turing Test," broadly understood as whether a machine could carry on a conversation sufficiently intelligently to be indistinguishable from a human. Once electronic computers were developed, programmers worked at, among many other things, using that modest computing power to do tasks the way that a human did them. "Artificial Intelligence" became one, ill-defined area of computer science. No single definition can capture the variety of projects. Some consider AI the attempt to do with computers what humans do with their brains. A useful way of defining AI is "that it consists of finding heuristic solutions to NP-complete problems."[12] In other words, some mathematical problems can be solved and checked. Those can be written in computer programs. Some mathematical problems are so complex that we cannot even check if a proposed solution is correct. In the middle are NP-complete problems, which are too complex to solve even with gigantic computer resources, but where a proposed solution may be checked.[13] Humans are good at approximating solutions to some such problems, like driving a car without exactly figuring out all the practically infinite physics problems. AI can be considered the endeavor to likewise formulate approximations to such problems with computers. Measuring the capabilities of computers against humans has become less important as it becomes clearer that computers accomplish tasks in much different ways, however comparison to humans is still relevant in many cases. Whether self-driving cars should be permitted might depend, in part, on how well they perform compared to human

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11   On whether Turing's Halting Problem places theoretical limits on the ability to use artificial intelligence to analyze legal problems, see Jeffrey M. Lipshaw, *Halting, Intuition, Heuristics, and Action: Alan Turing and the Theoretical Constraints on AI-Lawyering*, 5 Savannah L. Rev. 133, 147 (2018) (footnotes omitted) ("In the abstract, then, any modern digital computer that runs on stored programs is a universal Turing machine. Kearse, if it were to exist in the foreseeable future, would be a Turing machine and quite capable. But it would also be subject to the mathematical constraints of a Turing machine, namely, the inability to determine for *every* program that it might run whether it would, on one hand, complete that program and generate an answer, or, on the other hand, get stuck in a loop.").

12   Domingos, *supra* note 2, at 33.

13   Other NP-complete problems include "the shortest route to visit a set of cities, the best layout of components on a microchip, the best placement of sensors in an ecosystem . . . and (most important) your Tetris score." *Id.*

drivers. But the central questions now might be simply how and whether machines perform tasks, and what safeguards might be appropriate.

AI can usefully be divided into two approaches: machine learning and knowledge engineering.[14] Machine learning includes such areas as neural networks. The human brain learns with networks of neurons, although it remains disputed how it learns and the extent to which knowledge and abilities are "hard-wired" from birth.[15] This question prompted researchers to try to develop electronic networks that could learn. The Perceptron was a very notable early example, which "was simple, yet it could recognize printed letters and speech sounds just by being trained with examples."[16] However, others proved mathematically that the Perceptron would be unable to learn some things, most notably the XOR operation, a basic logical operation dear to the hearts of computer scientists.[17] With these apparent limitations on the capabilities of networks to learn, research in that area faltered.

For a period of time, AI research's center of gravity shifted to the other approach: knowledge engineering – the idea that programs would be written to accomplish tasks previously reserved to humans.[18] One set of such programs has been called Symbolic AI, including programs that could prove mathematical theorems or play a decent game of chess, which could be expanded to the extent that reasoning was based on logic and symbols. Another category was the expert system.[19] This approach was to carefully observe how a human expert in a particular domain accomplished a task, then write a program that followed that approach step-by-step. Early hopes for this approach, however, were not realized. The theorem-proving approach proved limited to circumscribed areas like mathematics, because real-world applications required the need for implicit knowledge about the world[20] and for robust

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14   *See id.* at 102–04.
15   *See generally* STEVEN PINKER, THE BLANK SLATE (2003).
16   DOMINGOS, *supra* note 2, at 100.
17   *Id.* at 100–01 (discussing MARVIN L. MINSKY & SEYMOUR A. PAPERT, PERCEPTRONS (1969)).
18   *Id.* at 101.
19   On the efforts to build expert systems in law, see RICHARD E. SUSSKIND, EXPERT SYSTEMS IN LAW (1987).
20   Note that although machine learning has found many useful applications, these issues remain at the frontiers of artificial intelligence research. *See* GOODFELLOW ET AL., *supra* note 2, at 486 (emphasis removed) (first citing

reasoning which allowed for fuzzy concepts. Building expert systems similarly turned out to require much more than could be specified in a program.[21] Experts may follow a series of steps, but also employ a great deal of background knowledge and make judgements much more flexibly than the steps of an algorithm.[22] There were heroic efforts to compile the sort of background factual knowledge that humans use.[23] The Cyc project attempted to simply catalog as many facts as possible about the world.[24] After bloating with new facts for over thirty years, Cyc still has yet to achieve even commonsense reasoning.[25]

In the field of law, early projects in applying artificial intelligence techniques to legal reasoning followed a similar arc. Case-based reasoning systems sought to find weights of various factors identified in case law and use those to predict future cases or formulate arguments.[26] Expert system projects arose, such as

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Roberto Navigli & Paola Velardi, *Structural Semantic Interconnection: A Knowledge-Based Approach to Word Sense Disambiguation*, 27 IEEE Transactions on Pattern Analysis & Machine Intelligence 1075, 1075–86 (2005); then citing Antoine Bordes et al., *Joint Learning of Words and Meaning Representations for Open-Text Semantic Parsing*, 22 Proc. of Machine Learning Res. 127 (2012)) (discussing the challenge of knowledge representation and "word-sense disambiguation . . . which is the task of deciding which sense of a word is the appropriate one, in some context.").

21   Domingos, *supra* note 2, at 89–90 ("In the 1970s, so-called knowledge-based systems scored some impressive successes, and in the 1980s they spread rapidly, but then they died out. The main reason they did was the infamous knowledge acquisition bottleneck: extracting knowledge from experts and encoding it as rules is just too difficult, labor-intensive, and failure-prone to be viable for most problems. Letting the computer automatically learn to, say, diagnose diseases by looking at databases of past patients' symptoms and the corresponding outcomes turned out to be much easier than endlessly interviewing doctors.").

22   *See id.* at 90.

23   *Id.* at 35.

24   *Id.*

25   *Id.* ("Thirty years later, Cyc continues to grow without end in sight, and commonsense reasoning still eludes it. Ironically, Lenat has belatedly embraced populating Cyc by mining the web, not because Cyc can read, but because there's no other way.").

26   *See* McJohn, *supra* note 1, at 242–43 ("Anne Von der Lieth Gardner's GP program attempted to use previous cases to distinguish easy from hard cases in the area of contract law . . . . The Norwegian Research Centre for Computers and Law developed SARA, an attempt to model the differing weights given to relevant factors in applying legal norms . . . . Kevin Ashley's HYPO system used a database of some thirty cases to compare a case to precedent cases, examining whether similarities existed with respect to given factors . . . ."

the use of ten key questions to determine the ownership of found property.[27] Other projects sought to develop formal representations of legal concepts in such areas of the law as tax and negotiable instruments.[28] As in AI generally at the time, the early projects were seen as stepping stones toward future, practical applications of artificial intelligence.[29] The greatest value of the projects may have been in identifying the aspects of legal reasoning which put it beyond the artificial intelligence techniques of the day: legal reasoning is ill-defined, complex and context-dependent, and deals with rules and cases that are vague and inconsistent.[30] As with case-based reasoning and expert systems in other areas, these projects did not lead to others with anything like human-level performance.[31] As the author of a book on expert systems in law later recognized, in the legal area software became useful not for legal reasoning, but to automate lower-level tasks, such as document searching and preparation, albeit with sophisticated technology.[32] That trend has continued until today, where technology in legal practice is geared toward areas like document identification in discovery and provision of forms (legal forms have long constituted the most useful knowledge-based

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(footnote omitted)).

27   McJohn, *supra* note 1, at 243 ("Alan Tyree's FINDER program sought to automate the analysis of deciding whether a found piece of property belonged to its finder by asking ten key questions and attempting to determine the result of the case from the answers.").

28   *See* McJohn, *supra* note 1, at 243 (discussing L.T. McCarty's TAXMAN program and Carole Hafner's LIRS project).

29   Edwina L. Rissland, *Artificial Intelligence and Law: Stepping Stones to a Model of Legal Reasoning*, 99 Yale L.J. 1957, 1980 (1990) ("Legal reasoning is complex. Our current AI models, albeit too simple, are but steps to more subtle and complete models, and at each step we understand more."). As the author of the landmark TAXMAN project put it: "In general, then, the detailed analysis of the TAXMAN system has tended to support what should surely be a lawyer's intuition: that the current TAXMAN paradigm fails to capture many of the significant facts about the structure of legal concepts and the process of legal reasoning . . . . Although we would ultimately come to the conclusion, not unlike the lawyer's intuition, that nothing as complex as legal reasoning could ever be represented in a computer program, I believe it would be possible to sketch out a formal computer model somewhat more realistic than the current version of TAXMAN." L. Thorne McCarty, Reflections on Taxman: An Experiment in Artificial Intelligence and Legal Reasoning, 90 Harv. L. Rev. 837, 892–93 (1977).

30   *See* McJohn, *supra* note 1, at 250–51.

31   Rissland, *supra* note 29, at 1980.

32   *See* McJohn, *supra* note 1, at 253.

expert system for lawyers).[33] Technology-assisted review ("TAR") is now standard in litigation: "the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it."[34]

Meanwhile, in artificial intelligence research generally, the artificial neural network approach found new life.[35] The technique of backpropagation overcame the limits of the Perceptron.[36] Rather than simply training the outer layer of a network, in backpropagation errors are communicated to the lower layers, so that inner nodes of the network adjust. A node that contributed to a correct classification may be reinforced so that it becomes more influential in later decisions. A node that contributed to an error may conversely get less weight. Networks were trained to accomplish numerous tasks, showing the potential of learning.[37] At the same time, these projects were more narrowly focused. Rather than attempting to create a broad-ranging intelligent machine, networks were designed to learn quite specific tasks.

Machine learning's successes were not in domains similar to legal reasoning, so the growth in machine learning has not been matched with a resurgence in applying those techniques to legal reasoning. Instead, machine learning has found broad applications

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33   *See, e.g.*, Pamela Radford, *Harnessing Technology During Discovery*, 82 Advocate *39, *40 (2018) ("A second product like iControl's Envise or BrainSpace 6 is the leap or 'predictive coding' piece. Those tools use 'active' machine learning technology, sometimes referred to as 'Continuous Active Learning' (CAL) which feeds the 'review' software what it learns. Using only the passive learning technology will get you to the same result in document review, but adding true 'active learning' gets you to the finish line faster and using less resources."); Harry Surden, *Machine Learning and Law*, 89 Wash. L. Rev. 87, 87–88 (2014) ("It misses a class of legal tasks for which current AI technology can still have an impact even given the technological inability to match human-level reasoning . . . this Article will suggest that there may be a limited, but not insignificant, subset of legal tasks that are capable of being partially automated using current AI techniques despite their limitations relative to human cognition.").

34   Rio Tinto P.L.C. v. Vale S.A., 306 F.R.D. 125, 127 (S.D.N.Y. 2015).

35   Goodfellow et al., *supra* note 2, at 17 ("In the 1980's, the second wave of neural network research emerged in great part via a movement called connectionism or parallel distributed processing . . . . The connectionists began to study models of cognition that could actually be grounded in neural implementations . . . .")

36   *See id.* at 18.

37   *See id.* ("During this time, neural networks continued to obtain impressive performance on some tasks.").

in legal practice beyond abstract legal reasoning. In discovery, for example, machine learning can be used to detect patterns that are likely to produce documents responsive to requests.[38] Rather than simple key word searches, which depend on the party thinking of all the words that might relate, a machine learning system might produce a more robust set of responsive documents.[39] Machine learning is finding a place in empirical research about the legal system itself. One study had considerable accuracy in predicting dissents, using such factors as the length of the opinion, the number of citations and voting valence among judges.[40]

At present, machine learning techniques have the definite advantage over knowledge engineering, in purely engineering terms. Machine learning has shown greater capabilities and is more widely deployed, at least in areas that might be considered artificial intelligence. There may also be policy reasons to prefer machine learning. Knowledge engineering seeks to write programs that mimic the practices of experts. It may yet prove feasible to build an expert system for fair use, coding how a judge might apply the various rules (statutory and case law) comprising fair use. But, in an area as vague and flexible as fair use, that may hazard replicating the biases of the system designer.[41] To the extent machine learning extracts patterns from decided cases, that may be less of a hazard, although constructing a machine learning system requires human steps that will also introduce bias.

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38   *See, e.g.*, Radford, *supra* note 33, at 40 ("A second product like iControl's Envise or BrainSpace 6 is the leap or 'predictive coding' piece.").

39   *See id.* ("Using only the passive learning technology will get you to the same result in document review, but adding true 'active learning' gets you to the finish line faster and using less resources.").

40   Shivam Verma et al., *The Genealogy of Ideology: Predicting Agreement and Persuasive Memes in the U.S. Courts of Appeals, in* Sixteenth International Conference on Artificial Intelligence and Law 253 (2017), https://dl.acm.org/citation.cfm?id=3086512&picked=prox ("We employ machine learning techniques to identify common characteristics and features from cases in the US courts of appeals that contribute in determining dissent. Our models were able to predict vote alignment with an average F1 score of 73%, and our results show that the length of the opinion, the number of citations in the opinion, and voting valence, are all key factors in determining dissent.").

41   *See* Burk, *supra* note 9, at 283 (warning that to the extent it is possible to "incorporate fair use metrics into copyright policing algorithms," that "the design values embedded in algorithms will inevitably become embedded in public behavior and consciousness").

III. FAIR USE AND ITS COMPLEXITIES

The Copyright Act states a four-factor rule for fair use:

107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[42]

At first blush, the rule might seem designed for machine learning: a binary classification (fair use or not fair use), based on four factors. But, like all legal rules, the dynamics of the provision are more complex. As applied by the courts, fair use has many complicating, sometimes confounding, aspects.

Each of the factors has been interpreted to bring in different, sometimes conflicting, policies. The first factor, purpose of the use,

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42   17 U.S.C. § 107 (2012).

calls for the court to ask whether the use falls into a favored category (the preamble specifically identifies some: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research").[43] Beyond the specific activity, the underlying purpose must also be considered ("including whether such use is of a commercial nature or is for nonprofit educational purposes").[44] Many of the categories favored in the first question (criticism, comment, news reporting, teaching, scholarship, research) are commercial, and so fall into the disfavored category in the second question.

In addition to the categories stated in the statute, courts have classified the purpose of the use in various respects. A long-standing distinction was between reproductive uses (merely making a copy) and productive uses (using the copyrighted work as a basis for another work, or simply using the copyrighted work in a valuable manner, to some courts).[45] In recent years, courts have differentiated between "transformative" and non-transformative uses.[46] The Supreme Court adopted the approach in *Campbell*,[47] holding that fair use was favored because the rap parody version of the country song *Pretty Woman* transformed the work. "Transformative" before too long became almost a magic word, with courts applying the term to uses that did not change the form of (transform) the work, but rather used the work in a different way. The Second Circuit noted several uses deemed transformative which did not adapt the original into a

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43   *Id.*

44   *Id.*

45   Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 San Diego L. Rev. 61, 93 (1998) ("Courts have also used fair use in a more subtle way to balance the incentives of copyright by distinguishing between 'productive' and 'reproductive' uses. A reproductive use simply makes copies that compete with the copies authorized by the copyright holder. Where a use is productive, however, defendant goes beyond copying to contribute some independent value.") (footnotes omitted).

46   Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 Colum. J.L. & Arts 445, 447 (2008) (footnotes omitted) ("In *Campbell v. Acuff-Rose Music*, the Supreme Court, relying on a 1990 law review article by Judge Pierre Leval, suggested that an important factor to consider in whether a use was fair was whether the second use was 'transformative' – whether it 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.' Although some uses are more appropriately considered with regard to whether they are 'transformative' than others, the term has since become as fundamental a part of any fair use analysis as the statutory language itself.").

47   Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587 (1994).

new, creative form: "scanning books to create a full-text searchable database and public search function (in a manner that did not allow users to read the texts) . . . copying works into a database used to detect plagiarism . . . displaying tiny, low-resolution "thumbnail" reproductions of art works to provide links serving as Internet pathways to the appropriate websites containing the originals . . . and copying by one who has acquired the right to view the content of a telecast to enable a single, non-commercial home viewing at a more convenient time."[48]

Another dimension (quite literally, if we are to discuss applying machine learning to fair use) on "the purpose and character of the use" is whether an expressive use triggers considerations of First Amendment protections. The Supreme Court has effectively constitutionalized fair use. *Eldred* held that Congress did not run afoul of the First Amendment in retroactively extending the terms of existing copyrights in 1998,[49] although that would keep works out of the public domain longer, thereby restricting the ability of others to use those works expressively. One rationale was that the Copyright Law contains "built-in" First Amendment protections, namely fair use and the nonprotection of ideas.[50] Along those lines, courts consider First Amendment interests in fair use,[51] such as using protected works to criticize public officials.[52]

The second factor, the nature of the copyrighted work, likewise has prompted a variety of judicial approaches.[53] Courts regularly differentiate between works with thick and thin copyright protection.[54]

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48   Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 660–61 (2d Cir. 2018) (citations omitted).

49   Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

50   *Id.* at 219–20.

51   *See, e.g.,* Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n of Ohio, 15 F.3d 559, 562 (6th Cir. 1994) ("This contrast with commercial activity helps show that the purpose and character of HCF's use is far removed from that which the copyright law centrally protects and instead falls within the realm of the designated fair use purposes. The document was used primarily in exercising HCF's First Amendment speech rights to comment on public issues and to petition the government regarding legislation.").

52   See Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (holding that use of a modified picture of mayor used on T-shirt was fair use).

53   Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005,* 156 U. Pa. L. Rev. 549, 610 (2008) (footnote omitted) ("Factor two instructs courts to consider 'the nature of the copyrighted work.' The data with respect to factor two are seemingly as ambiguous and open to interpretation as the statutory language itself.").

54   *See, e.g.,* Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 87 (2d

Copyright protects only the original expressive elements of a work.[55] A work may be composed largely of non-protected elements.[56] Software, mainly functional, qualifies for copyright protection as a literary work,[57] perhaps to the surprise of literature professors. A database is composed of nonoriginal and so nonprotected facts, but may have the necessary creativity for copyright protection by virtue of a creative selection, arrangement or coordination of those facts.[58] Such thinly protected works are more subject to fair use on the theory that the use is largely exploiting unprotected aspects of the work. In a subset of those cases, copying may be done in order to extract unprotected elements from a work, such as where software is copied to reverse-engineer its functionality[59] or where a database is copied to copy its unprotected facts.[60] The nature of the work can be characterized in other ways. *Harper & Row*[61] put considerable weight on the fact that the work copied, the autobiography of former United States President Gerald Ford, was soon to be published, so the copier in effect appropriated the right of first publication (not a right that appears in the Copyright Act).

   The third factor sounds simply quantitative, and so readily amenable to machine learning: "the amount and substantiality of

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Cir. 2014) ("As relevant here, this factor requires us to consider the extent of Swatch's copyright in the recording—the 'thickness' or 'thinness' of Swatch's exclusive rights—as well as whether or not the recording had been published at the time of Bloomberg's use.").

55   *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344 (1991).

56   *See, e.g., Swatch Grp.*, 756 F.3d at 89 ("[E]ven within the field of fact works, there are gradations as to the relative proportion of fact and fancy. One may move from sparsely embellished maps and directories to elegantly written biography. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case." (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985))).

57   17 U.S.C. § 101 (2012).

58   *See Feist Publications*, 499 U.S. at 344–45.

59   *See, e.g.,* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1514 (9th Cir. 1992).

60   Assessment Techs. of Wis., LLC v. WIREdata, Inc., 350 F.3d 640, 645 (7th Cir. 2003) ("Similarly, if the only way WIREdata could obtain public-domain data about properties in southeastern Wisconsin would be by copying the data in the municipalities' databases as embedded in Market Drive, so that it would be copying the compilation and not just the compiled data only because the data and the format in which they were organized could not be disentangled, it would be privileged to make such a copy, and likewise the municipalities.").

61   *Harper & Row*, 471 U.S. at 569.

the portion used in relation to the copyrighted work as a whole."[62] In many cases, it is.[63] Where the defendant copies the entire work, fair use is less likely, and where the defendant copies only a small portion, fair use is more likely.[64] But the courts have introduced many qualitative elements into consideration of this factor. The Supreme Court cases contrast. In *Sony*, the defendants copied the entire television programs at issue, but fair use nevertheless applied.[65] In *Harper & Row*, the Nation magazine copied only a few pages of former President Gerald Ford's biography, but fair use did not apply: the Nation had copied "the heart of the book," the few pages where Ford described how he came to pardon his predecessor, Richard Nixon.[66] In addition, courts consider not just the amount copied, but how well that amount corresponds to the favored use.[67]

The last factor is "the effect of the use upon the potential market for or value of the copyrighted work."[68] This factor sounds quantitative, redolent of micro-economics and finance. But courts again bring in many qualitative considerations. On its face, the factor presents a conundrum. One reading of the factor could make fair use redundant. Fair use, by definition, applies to unauthorized uses. Without fair use, such users would have to seek a license from the copyright holder. That being the case, every such use could negatively affect the potential market for the work. So if the copyright holder and potential user were in a position to negotiate, the use without authorization must have denied the copyright holder potential revenue. There could be some cases where the copyright holder and potential user were not in a position to negotiate. In particular, if the

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62   17 U.S.C. § 107(3).

63   *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202, 221 (2d Cir. 2015) ("A finding of fair use is more likely when small amounts, or less important passages, are copied than when the copying is extensive, or encompasses the most important parts of the original.").

64   *Swatch Grp.*, 756 F.3d at 89-90 (quoting Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998)) ("In general, 'the more of a copyrighted work that is taken, the less likely the use is to be fair.'").

65   Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984) (holding that fair use could apply even though the entire works were copied).

66   *Harper & Row*, 471 U.S. at 564–65 ("The portions actually quoted were selected by Mr. Navasky as among the most powerful passages in those chapters.").

67   Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587 (1994) (quoting *Harper & Row*, 471 U.S. at 564) (internal quotations omitted) ("[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech but not in a scoop of a soon-to-be-published memoir.").

68   17 U.S.C. § 107(4) (2012).

transactions costs of the negotiation were greater than the potential value to the user, then the transaction would not occur.[69] So, fair use could authorize such uses. But those uses are also so inconsequential that litigation to enforce the copyright would likewise be not worth it. Thus, fair use would be reduced to inconsequential cases that would be unlikely to make it to court. Fair use would also shrink as new licensing techniques developed.

Courts have neither followed that narrow approach nor resolved the underlying conundrum. Rather, courts follow a number of approaches in considering whether and to what extent there is a loss of market or value.[70] *Campbell* held that certain losses would not be cognizable.[71] If a parody or a review was such effective criticism that it led to fewer sales of the work, that would not be a cognizable loss of market.[72] Similarly, where copying was done to reverse engineer a product by copying its nonprotected functional aspects, the introduction of a competing product would not represent a cognizable loss to the copyright holder. *Campbell* also recognized that certain losses would not count, where the copyright holder would not have taken advantage of them.[73] If the copyright holder of *Pretty Woman* would not have authorized a rap parody version, then that illusory lost licensing opportunity would not weigh against fair use.[74]

In addition to the varied interpretation of each factor, the factors are applied interdependently. *Campbell* held that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[75] Where the use is noncommercial, there may be a greater burden for a party to show loss to its market.[76] Where the

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69   *See generally* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Colum. L. Rev. 1600, 1601 (1982).

70   Beebe, *supra* note 53, at 621 ("Factor four provides the analytical space for this balancing test to occur, and the various doctrinal propositions under factor four are merely there to tilt the scales one way or the other.").

71   *Campbell*, 510 U.S. at 591–92.

72   *Id.*

73   *Id.* at 592.

74   *Id.* at 592–94.

75   *Id.* at 579.

76   Zahr K. Said, *Foreword: Fair Use in the Digital Age, and* Campbell v. Acuff-Rose *at 21*, 90 Wash. L. Rev. 579, 582 (2015) ("[*Campbell*] reversed the momentum created by two key presumptions in prior case law, namely that commercial uses were presumptively unfair, and that plaintiffs were allowed to presume harm when defendants' uses were commercial.").

use is commercial, some loss may be presumed. The amount of the work copied may be excusable depending on the nature of the use, especially if the amount is geared toward the amount necessary to make such a use.[77] Which factors are most important is quite unsettled. The law review article that inspired *Campbell* to look to the "transformative" use referred to the first factor as "the soul of fair use,"[78] while courts sometimes refer to the fourth factor, effect on the market, as the most important factor.[79]

As a legal rule, Section 107 does not guide the decision maker. It simply states that fair use is not infringement, and that the court should consider four factors. The rule does not state how the factors should be weighed. Nor does it state whether additional factors may be considered, although the factors may be read broadly enough to accommodate almost any fact or consideration a court wishes to include. Discerning how courts have in fact applied those factors is the strength of machine learning.

Likewise, machine learning can discern patterns (although sometimes unreliably), which may be apt to address doctrinal uncertainty. Fair use has been considered unpredictable; in Judge Learned Hand's words, "the issue of fair use . . . is the most troublesome in the whole law of copyright."[80] Whether a proposed use qualifies for fair use is often an uncertain decision. As Professor Madison put it, "twenty-five years after the doctrine was codified in the Copyright Act of 1976, courts are no closer to a meaningful understanding of the doctrine than Congress appeared to be at the time of the law's enactment."[81] Other commentators have found

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77   Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984) ("Moreover, when one considers the nature of a televised copyrighted audiovisual work, see 17 U.S.C. § 107(2), and that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced, see id., at § 107(3), does not have its ordinary effect of militating against a finding of fair use.").

78   Said, *supra* note 76, at 581–582 ("The Court had relied on Judge Pierre N. Leval's seminal Harvard Law Review article, *Toward a Fair Use Standard*, to articulate a framework for assessing the reason for a defendant's use of plaintiff's work. . . . He has referred to the factor one analysis as 'the soul of fair use.'").

79   Beebe, *supra* note 53, at 617 ("Of the opinions following *Campbell*, 26.5% continued explicitly to state that factor four was the most important factor.").

80   Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam opinion attributed to Judge Learned Hand).

81   Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L.

more regularity in fair use case law. Professor Samuelson found fair use "more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or what this Article will call policy-relevant clusters."[82]

Fair use cases often involve disagreement even between the judges. The first two fair uses cases to reach the Supreme Court in modern times did not yield an opinion because the Justices split 4-4.[83] Of the three key Supreme Court cases to follow, the court was divided: 5-4 in *Sony*,[84] 6-3 in *Harper & Row*,[85] and a unanimous opinion in *Campbell*.[86] Reversals are frequent in fair use cases.[87] To use examples of key recent fair use cases: in *Cambridge University Press*[88] (on whether course packs are fair use), the panel reversed the trial court and then reversed it again when the case returned after remand; in *Cariou*[89] (whether painting on photographs, termed by some "appropriation art," is fair use), the Second Circuit reversed with respect to most of the images at issue; in *Oracle v. Google* (whether it was fair use for Google to copy application programming interfaces of Java), a case with "huge stakes" for the software industry,[90] the Federal Circuit reversed a jury verdict of fair use.[91]

Rev. 1525, 1549 (2004).

82   Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2541–42 (2009) ("The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and privacy and autonomy interests of users.").

83   Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1106–07 (1990) (discussing Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975) and Columbia Broad. Sys. v. Loew's, Inc., 356 U.S. 43 (1958)).

84   Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417.

85   Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

86   Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

87   An empirical study found, however, no disparity between reversal rates in fair use cases compared to other areas of the law. Beebe, *supra* note 53, at 554.

88   Cambridge Univ. Press v. Albert, 906 F.3d 1290, 1293–1302 (11th Cir. 2018).

89   Cariou v. Prince, 714 F.3d 694, 695, 699, 712 (2d Cir. 2013) ("Prince is a well-known appropriation artist. The Tate Gallery has defined appropriation art as 'the more or less direct taking over into a work of art a real object or even an existing work of art.'").

90   Timothy B. Lee, *Google asks Supreme Court to overrule disastrous ruling on API copyrights*, Ars Technica (Jan. 25, 2019), https://arstechnica.com/tech-policy/2019/01/google-asks-supreme-court-to-overrule-disastrous-ruling-on-api-copyrights/.

91   Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1186–87 (Fed. Cir. 2018) ("Because we conclude that Google's use of the Java API packages was

None of those cases ruled categorically on the practice at issue, meaning that fair use may, to some undetermined extent, apply to course packs and appropriation art. Notably, a thorough empirical study of fair use cases determined that "the lower courts repeatedly and systematically inverted Supreme Court dicta to favor the defendant, so that if the Court stated, for example, only that 'not *x*' favors the plaintiff, the primary lesson the lower courts would draw from this is that '*x*' favors the defendant."[92] There are differences in how the various federal circuits apply fair use. The Seventh Circuit rejected other circuit's broad reading of "transformative."[93] Whether fair use protects uses to exploit the functional aspects of software has yielded an apparent divide.[94]

The reported cases indicate that fair use is uncertain.[95] But the reported cases are not a random sample of fair use cases. Rather, they represent cases where the parties had incentive and resources to litigate the case to judgment and appeal. It may be that the reported cases are those where the application was sufficiently unpredictable such that the parties' predictions differed. Plaintiff thought fair use would not apply, defendant thought it would, and

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not fair as a matter of law, we reverse the district court's decisions denying Oracle's motions for JMOL and remand for a trial on damages.").

92   Beebe, *supra* note 53, at 556.

93   Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (citing Cariou, 714 F.3d at 706) ("We're skeptical of *Cariou's* approach, because asking exclusively whether something is 'transformative' not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every 'transformative use' can be 'fair use' without extinguishing the author's rights under § 106(2)."); *see also* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 240 (2019) ("Nonetheless, it is difficult to say with confidence that transformative use is an improvement over its ancestors. While the new label has harmonized fair use rhetoric, it falls short of streamlining fair use practice or increasing its predictability.").

94   *Compare* Sony Comput. Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 608 (9th Cir. 2000) (holding fair use authorized copying of code to reverse engineer functional aspects) *and Oracle*, 886 F.3d at 1200 (holding fair use did not authorize copying of application programming interfaces of Java done to facilitate interoperability).

95   The extent of that uncertainty is subject to disagreement. *See* Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 85 (2012) ("The final, and perhaps most important contribution of this Article is that it offers considerable evidence against the oft-repeated assertion that fair use adjudication is blighted by unpredictability and doctrinal incoherence.").

both chose litigation (in the face of the other parties' resistance to settling the dispute), because of their different assessments. Cases where fair use clearly does not apply may be less likely to make it to court, because defendants will cave. Conversely, where fair use applies, plaintiffs will not go to court. But that game-theoretical explanation is slightly undercut by the fact that copyright cases are rarely single issue cases. Defendant is likely to argue that the work does not qualify for copyright, that plaintiff lacks standing to enforce the copyright, that there is no proof that defendant copied, that defendant copied only non-protected elements, that there were no damages from defendant's copying and that fair use protected defendant. Where fair use is often only one of many issues in litigation, the predictability of its application may only be a minor factor in whether the parties pursue the case or settle. It remains to be seen whether fair use case law does in fact have regular patterns that guide its application. Machine learning may be one way to find that out.

IV. RENDERING DATA FOR FAIR USE MACHINE LEARNING

Machine learning techniques, with some notable exceptions, rely on data.[96] Key questions in applying machine learning to address fair use issues are what data to employ and how to prepare it. A number of sources could supply data. There are hundreds of reported judicial opinions on fair use. But using those to train software to predict fair use raises a number of issues. Comparison to a prototypical[97] machine application can highlight the issues.

A textbook example of machine learning is image classification. A project to recognize pictures of cats is a classic.[98]

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96   *See, e.g.*, Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. Pa. L. Rev. 871, 880 (2016) ("'Machine learning' is part of a nest of concepts in the artificial intelligence arena, including 'data mining,' 'knowledge discovery in databases,' and 'big data,' that are often used interchangeably and confusingly in academia, government, and popular media.").

97   Abdellatif Abdelfattah, *Image Classification using Deep Neural Networks*, Medium (July 27, 2017), https://medium.com/@tifa2up/image-classification-using-deep-neural-networks-a-beginner-friendly-approach-using-tensorflow-94b0a090ccd4 ("We will build a deep neural network that can recognize images with an accuracy of 78.4% while explaining the techniques used throughout the process.").

98   *See, e.g., id.* (teaching example of deep neural network to recognize pictures of cats).

The project might start with a database of, say, 60,000 images.[99] The images would be tagged in advance, labeled as containing cats or not containing cats. The images would then be preprocessed to yield a form more convenient for machine learning.[100] Two common ways would be to convert the image to greyscale (a numerical range from white to black) or RGB values (giving the combination of red, green, and blue).[101] The network would be trained on a subset of the images (or in sequence on smaller subsets, to reduce the computational demands) and then tested against a subset not used in training.[102] If the accuracy is not satisfactory, adjustments could be made and training repeated until a satisfactory level of accuracy is met. Presented with a new image, the network would classify it as a picture with or without a cat, perhaps with an assessment of probability.

Where machine learning algorithms typically run on many thousands, if not millions, of examples, the reported fair use cases may prove to be a rather sparse data set.[103] Examples for a data set of fair use cases could be compiled with some imagination. Google sometimes presents a CAPTCHA to a user, showing several images and requiring the user to check a box for each image that contains a certain image, like a stop sign.[104] That may be a security measure, but the classification may also be used in Google's image recognition[105] or self-driving car endeavors. For fair use, every take-down notice presents a possible example. Although the take-down sender has implicitly labeled it as not fair use, it could also be seen as an unlabeled example. The take-down procedure also

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99   *Id.*

100   *See* Géron, *supra* note 2, at 59–68 (discussing preparing the data for machine learning).

101   Abdelfattah, *supra* note 97.

102   Géron, *supra* note 2, at 29, 49–50 ("When you estimate the generalization error using the test set, your estimate will be too optimistic and you will launch a system that will not perform as well as expected. This is called *data snooping bias*.").

103   *Cf.* Beebe, *supra* note 53, at 550 (discussing an empirical study that found 306 "reported federal opinions that made substantial use of the section 107 four-factor test for fair use through 2005").

104   *See* Dennis Goedegebuure, *You Are Helping Google AI Image Recognition*, Medium (Nov. 29, 2016), https://medium.com/@thenextcorner/you-are-helping-google-ai-image-recognition-b24d89372b7e.

105   *Id.* The author heard a discussion of this at a talk by Jonathan Frankle, Machine Learning and Neural Networks for Lawyers, Talk at the Boston University School of Law and Hariri Institute for Computing (Oct. 31, 2018).

allows the poster of content to require that the material be put
back up, pending resolution of the case. So a smaller number of
take-down/put-back-up examples could be grist for the data base.
YouTube now largely channels copyright holders to use YouTube's
Content ID system as an alternative to statutory take-down notices.
That system, and others like it, could likewise present a rich vein
of examples. Any site that has human moderators, vetters, or other
supervisors deciding whether to take down user content could be
a source of decisions on fair use, although the quality associated
with those samples would depend on such things as whether the
humans in question had training in the law or fair use specifically.
Getting those examples would not be easy, requiring cooperation
from the sites, which in turn could depend on the input of many
constituencies and consideration of legal issues, including whether
fair use authorized all that copying, distribution and adaptation of
copyrighted works. With some investment and preprocessing of
data, services like Amazon's Mechanical Turk could be used to have
nonlawyers classify cases as fair use or not fair use, or even to create
the cases. Those would not be borderline cases if the classifiers did
not have whatever fine legal reasoning skills might be required to
apply fair use. But a trove of clear cases could be helpful in training
a machine learning program.[106] In some respects, easy cases may be
better than close cases for programs to "learn" from.

Additional examples may be generated by automated means,
termed "dataset augmentation."[107] In image classification, for

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106 Other sources of data for legal applications may be unearthed with creativity.
     The Learned Hands project of Suffolk University Law School's Legal Innovation
     and Technology (LIT) Lab and the Stanford Legal Design Lab, created a data
     set for classification machine learning on spotting legal issues from "75,000
     legal questions posted on Reddit . . . dealing with family, consumer, criminal
     and other legal issues." Jason Tashea, *New Game Lets Players Train AI to Spot
     Legal Issues*, A.B.A. J. (Oct. 16, 2018), http://www.abajournal.com/news/
     article/new_game_lets_players_train_ai_and_close_the_justice_gap.

107 Goodfellow et al., *supra* note 2, at 240, 259–60; *see also* E. Alpaydin &
     Fevzi Alimoglu, *Pen-Based Recognition of Handwritten Digits Data Set*, Univ.
     Cal. Irvine Mach. Learning Repository, https://archive.ics.uci.edu/
     ml/datasets/Pen-Based+Recognition+of+Handwritten+Digits (last visited
     Jun. 30, 2019) ("We create a digit database by collecting 250 samples from
     44 writers. The samples written by 30 writers are used for training, cross-
     validation and writer dependent testing . . ."); Mike Szczys, *Machine Learning
     Lets Micro Decode Your Handwriting*, Hackaday (May 3, 2012), https://hackaday.
     com/2012/05/03/machine-learning-lets-micro-decode-your-handwriting/
     ("This rig will take the letters you write on the touchpad using a stylus and
     turn them into digital characters. The system is very fast and displays near-

example, one image can be used to generate multiple examples by cropping the same image at different locations[108] or with "random translations, rotations, and in some cases, flips of the input."[109] Machine learning itself may generate additional examples.[110] If a system has learned to identify features (such as concepts or classes of objects), then a *generative model* can produce new, different examples sharing the same features[111] but in a different arrangement.[112] For

perfect recognition. This is all thanks to a large data set that was gathered through machine learning.").

108   Goodfellow et al., *supra* note 2, at 459–60.

109   *Id.*

110   Generative machine learning can be used to make examples more like reality. *Cloud Machine Learning Engine*, Google, https://cloud.google.com/ml-engine/ (last visited June 30, 2019) (quoting Mathias Ortner) ("Google Cloud Machine Learning Engine enabled us to improve the accuracy and speed at which we correct visual anomalies in the images captured from our satellites. It solved a problem that has existed for decades. It will allow Airbus Defence and Space to continue to provide unrivaled access to the most comprehensive range of commercial Earth observation data available today.").

111   Alex Graves, *Generating Sequences with Recurrent Neural Networks*, Univ. Toronto at 1–2 (June 5, 2014), https://arxiv.org/pdf/1308.0850.pdf; *see also Recurrent Neural Network Handwriting Generation Demo*, https://www.cs.toronto.edu/~graves/handwriting.html.

112   *See* Goodfellow et al., *supra* note 2, at 540–43. In general, the ability of machine learners to generate new works raises the issue, whether those works are copyrightable and who would own the copyright. *See* Nina I. Brown, *Artificial Authors: A Case for Copyright in Computer-Generated Works*, 20 Colum. Sci. & Tech. L. Rev. 1, 5–6 (2018) (presenting "an argument for recognizing copyrights in computer-generated works"); Lin Weeks, *Media Law and Copyright Implications of Automated Journalism*, 4 N.Y.U. J. Intell. Prop. & Ent. L. 67, 93 (2014) ("Where a strict moral conception of copyright might assert that all Polaroid photographs owe dependency to Edwin H. Land,104 or that the creator of an algorithm has a claim in everything that algorithm output, our current pecuniary conception values the promulgation of technologies into more and newer works."); Jessica Fjeld & Mason Kortz, *A Legal Anatomy of AI-generated Art: Part I*, Harv. J. L. & Tech.: JOLT Dig. (Nov. 21, 2017), https://jolt.law.harvard.edu/digest/a-legal-anatomy-of-ai-generated-art-part-i; Daniel J. Gervais, *The Machine as Author*, Iowa L. Rev. (forthcoming 2019) (manuscript at 283, 285) (on file with authors); Jane C. Ginsburg & Luke Ali Budiardio, *Authors and Machines* (Colum. Pub. L. Res., Paper No. 14-597, 2018). The technology also raises issues of false works. *See* Mark Gibbs, *Machine Learning and Forgery*, Network World (Aug. 19, 2016), http://www.networkworld.com/article/3109557/software/machine-learning-and-forgery.html ("A new algorithm from University College London researchers creates forged handwritten text that never was . . ."); Douglas Harris, *Deepfakes: False Pornography is Here and the Law Cannot Protect You*, 17 Duke L. & Tech. Rev. 99 (2019). *But see* Alex Hern, *Google Says Machine Learning is the Future. So I Tried it Myself: If Deep Learning Will Be as Big as the Internet, It's Time for Everyone*

lawyers, this reminds us of the Socratic approach of slightly changing the facts of hypotheticals, but also reminds us of the need to develop systems that can identify facts and legal concepts within source material.

If the data available for fair use is somewhat limited, that increases the importance of considering the various algorithms discussed below. Where there is a huge amount of data to train the algorithm, then the various types of machine learning algorithms tend to approach the same level of performance, at least in theory.[113] With smaller data sets, the type of algorithm becomes more important.[114]

In the abstract, fair use is a classification problem: case of fair use or not fair use? But the data are less squarely defined. An image classifier is trained on a set of images, then attempts to classify images, all presented in the same format. A fair use case could be in any media (images, songs, pantomimes, architectural blueprints, etc.). Fair use does not depend only on examining the work. Rather, it would involve comparing the relevant work to the copyrighted work (what elements were used and were those elements themselves protected by copyright), then considering a number of factors extrinsic to the work (the purpose of the use, the effect on the market). In addition, fair use depends on comparison to precedent, so the learner could be trained on the facts in the case law. In short, the potential data to be considered are much more variegated than the typical machine learning application.

One key determination might be at what level of abstraction we define the features for the program to operate on.[115] One could think of fair use determinations as strictly comparing the instant case to the factors as determined in other cases. In other words, a case presenting the same set of factors should be decided the same way as precedent cases presenting the same set of factors. At the

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to Start Looking Closely at It, THE GUARDIAN (Jun. 28, 2016), https://www. theguardian.com/technology/2016/jun/28/google-says-machine-learning-is-the- future-so-i-tried-it-myself (discussing an unsuccessful attempt to use machine learning, trained with vast amounts of The Guardian, to synthesize possible headlines from a "parallel universe").

113 *See* GERÓN, *supra* note 2, at 23 (discussing Michele Banko & Eric Brill, *Scaling to Very Very Large Corpora for Natural Language Disambiguation* and Peter Norvig et al., *The Unreasonable Effectiveness of Data*).

114 *Id.*

115 *See generally* ALICE ZHENG & AMANDA CASARI, FEATURE ENGINEERING FOR MACHINE LEARNING: PRINCIPLES AND TECHNIQUES FOR DATA SCIENTISTS (Rachel Roumeliotis & Jeff Bleidel eds., 2018).

other end, viewing fair use as ultimately a determination on the facts of particular cases, one could disregard the factors and concentrate solely on the facts. If a case is most similar to a precedent case on similar *relevant* facts, then it should be decided in the same way. The second approach would likely require a larger set of features to accommodate the broad range of fact settings in fair use cases.

One reason to define the features broadly is to avoid the hazard of *overfitting*. Overfitting, in machine learning as in statistics, occurs when the learner fits the function to the data, only too well.[116] The concept of overfitting is quite similar to the hazard in legal reasoning of tying a rule too closely to the facts of a case. For example, if a learner were trained only on music cases, including *Campbell*, it could include in its function that one required element is that the work be a musical work. One guard against overfitting is to include more examples in training. Another is testing the function against other test examples.[117] The model would fail when tested against examples where fair use applied in non-music cases. Another way to guard against overfitting is simply to use fewer features. If all the example cases happened to be music cases but that element was not included as a feature (or inferable from other features), then overfitting to music would be much less likely.[118]

Another way to reduce the number of dimensions is to preprocess the data. Unsupervised machine learning may be used to find clusters, which can be used as the data for supervised machine learning, such as classification.[119] It may become possible to use machine learning to put the examples into categories, such as the elements of the relevant works, upon which other programs may learn to classify the examples.[120] Copyright law itself supplies the relevant principles, like Learned Hand's abstractions test, used to determine whether a second author copied unprotected ideas or protected expression:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit

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116 Gerón, *supra* note 2, at 26–28.

117 *See, e.g., id.* at 29 ("The only way to know how well a model will generalize to new cases is to actually try it out on new cases.").

118 *Id.* at 302–10 (discussing techniques to avoid overfitting).

119 Domingos, *supra* note 2, at 211 ("Machine learners call this process dimensionality reduction because it reduces a large number of visible dimensions (the pixels) to a few implicit ones (expression, facial features.").

120 *Id.* at 210.

equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' [sic] to which, apart from their expression, his property is never extended.[121]

Hand's characterization is echoed by the use of machine learning to group data into conceptually linked groups. Unsupervised learning can be used to find clusters within material, which in turn can be treated as objects which can be grouped into more abstract clusters.[122] The technique is already used in "topic extraction," to find the themes being discussed in a collection of text documents,[123] which would be a start toward characterizing the components of legal documents like judicial opinions.

Data may also be stored in more efficient structures, depending on its characteristics. A technique with resonance for legal reasoning is "distributed representation."[124] Rather than identifying each feature independently, features can be identified by a set of shared attributes. "Cat" and "dog" are quite different but can be associated by a number of shared attributes (fur, four legs, etc.).[125] Legal reasoning often depends on finding the similarities between fact patterns, and so would seem amenable to that sort of representation. In particular, fact patterns (or policy issues) may be similar in the sense of "family resemblance," where there is no common core that two items share, but rather overlapping characteristics.[126]

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121 Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (citing Holmes v. Hurst, 174 U.S. 82, 86 (1899); Guthrie v. Curlett, 36 F.2d 694, (2d Cir. 1929)).

122 Domingos, *supra* note 2, at 210.

123 *See* Andreas C. Müller & Sarah Guido, Introduction to Machine Learning with Python: A Guide for Data Scientists 131 (Dawn Schanafelt ed., 2017) ("Here, the task is to find the unknown topics that are talked about in each document, and to learn what topics appear in each document.").

124 *See, e.g.,* Goodfellow et al., *supra* note 2, at 548–54.

125 *Id.* at 550.

126 *See* Lawrence B. Solum, *The Unity of Interpretation,* 90 B.U. L. Rev. 551, 551–78 (2010) (discussing legal philosopher Ronald Dworkin's use of "family

A number of projects, including in areas other than machine learning, have attempted to structure legal material in a way that would facilitate computer processing at a higher conceptual level. It might be possible to render data into useful forms for processing by using tagging, which could be done, in turn, by software.[127] Research projects have attempted such tagging at a conceptual level, which would both make the tag's features for learning and also reduce the number of features, by combining similar facts into a single concept.[128] Cases could be annotated, ideally by automated means, to provide a common data structure.[129] In the area of contracts,

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resemblance," which comes from Ludwig Wittgenstein's, *Philosophical Investigations*).

127 Kyoko Sugisaki, *Supertagging for Domain Adaptation: An Approach with Law Texts, in* Sixteenth International Conference on Artificial Intelligence and Law, *supra* note 40, at 249 ("Abstract: In this paper, we present a German supertagger that analyses syntactic functions in linear order. We apply a statistical sequential model, conditional random fields (CRF), to Swiss law texts, in a real world scenario in which the training data of the domain is missing. We show that the small amount of in-domain training data that was informed by linguistic hard and soft constraints and domain constraints achieved a label accuracy of 90% in the domain data, thus outperforming state-of-the-art parsers.").

128 *See* Matthias Grabmair et al., *Introducing LUIMA: An Experiment in Legal Conceptual Retrieval of Vaccine Injury Decisions Using a UIMA Type System and Tools, in* Fifteenth International Conference on Artificial Intelligence and Law 69 (2015), https://dl.acm.org/citation.cfm?id=2746090 ("This paper presents first results from a proof of feasibility experiment in conceptual legal document retrieval in a particular domain (involving vaccine injury compensation). The conceptual markup of documents is done automatically using LUIMA, a law-specific semantic extraction toolbox based on the UIMA framework. The system consists of modules for automatic sub-sentence level annotation, machine learning based sentence annotation, basic retrieval using Apache Lucene and a machine learning based reranking of retrieved documents. In a leave-one-out experiment on a limited corpus, the resulting rankings scored higher for most tested queries than baseline rankings created using a commercial full-text legal information system."); *see also* Milagro Teruel et al., *A Low-Cost, High-Coverage Legal Named Entity Recognizer, Classifier and Linker, in* Sixteenth International Conference on Artificial Intelligence and Law, *supra* note 40, at 9–18 ("In this paper we try to improve Information Extraction in legal texts by creating a legal Named Entity Recognizer, Classifier and Linker. With this tool, we can identify relevant parts of texts and connect them to a structured knowledge representation, the LKIF ontology.").

129 *See, e.g.,* Vern R. Walker et al., *Semantic Types for Computational Legal Reasoning: Propositional Connectives and Sentence Roles in the Veterans' Claims Dataset, in* Sixteenth International Conference on Artificial Intelligence and Law, *supra* note 40, at 217–26 (2017) ("This paper

efforts have been made to identify common elements which would facilitate creation of software to handle such matters as drafting and interpretation,[130] although presently the wide variation in language makes the job of annotation best handled by humans, which is laborious.[131] Professor McCarty, long a leader in artificial intelligence and the law, has suggested that the building blocks of legal reasoning may be identified through machine learning, analogous to how machine learning has mimicked the way human vision identifies objects, such as faces.[132]

Another question would be whether the facts used to make the prediction of fair use should be limited to legally relevant facts. Political scientists have had considerable success in predicting the outcome of Supreme Court cases by considering such factors as ideological direction (liberal or conservative) of the lower court ruling and the general nature of the case – factors which the Court

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announces the creation and public availability of a dataset of annotated decisions adjudicating claims by military veterans for disability compensation in the United States. This is intended to initiate a collaborative, transparent approach to semantic analysis for argument mining from legal documents.").

130   *See* Kathryn D. Betts & Kyle R. Jaep, *The Dawn of Fully Automated Contract Drafting: Machine Learning Breathes New Life into a Decades-Old Promise,* 15 Duke L. & Tech. Rev. 216, 227 (2017).

131   *See* Silviu Pitis. *Methods for Retrieving Alternative Contract Language Using a Prototype, in* Sixteenth International Conference on Artificial Intelligence and Law, *supra* note 40, at 277; Sugisaki, *supra* note 127, at 249 ("Under these circumstances, the best approach is the manual annotation of a large amount of new domain data in which a parser can be trained. However, this is also the most cost-intensive solution."); Matías García-Constantino et al., *CLIEL: Context-Based Information Extraction from Commercial Law Documents, in* Sixteenth International Conference on Artificial Intelligence and Law, *supra* note 40, at 79; Illias Chalkidis, Ion Androutsopoulos & Achilleas Michos, *Extracting Contract Elements, in* Sixteenth International Conference on Artificial Intelligence and Law, *supra* note 40, at 19.

132   *See* L. Thorne McCarty, *How to Ground A Language for Legal Discourse in A Prototypical Perceptual Semantics,* 2016 Mich. St. L. Rev. 511, 526 (2016) ("We can now address the title of this talk: *How to Ground a Language for Legal Discourse in a Prototypical Perceptual Semantics.* Specifically, we will see how to use the machinery of manifold learning and deep learning to define a *semantics* for a logical language. Why do I call this a 'prototypical perceptual semantics'? Well, it's a *prototypical* semantics because it is based on my model of prototypical clusters, as we will see. Why is it a prototypical *perceptual* semantics? Well, notice that our primary examples are drawn from the field of image processing, and therefore, if we can build a logic on these foundations, we will have a plausible account of how human cognition could be *grounded* in human perception.").

itself would of course deem irrelevant.[133] If the purpose is to predict how a court would decide a fair use case, then similarly one might include factors with no legal relevance but which have been shown to have predictive value. That, however, would make the potential facts include not just the relevant works and the fair use case law, but facts about the case law. Some statistical approaches would remain within the boundaries of judicial opinions, although relying on features that are not relevant to the legal analysis of fair use. For example, one project sought to use an even sparser statistical approach, examining whether the waxing and waning of "mimetic" phrases in judicial opinions might be used to predict likelihood of dissents.[134] Use of such "predictive analytics," rather than legal analysis, to predict cases may, however, undercut the value of the rule of law.[135]

The sources of data would include reported fair use cases. But that might be insufficient for some varieties of machine learning, reflecting a general need in machine learning. For many techniques, a machine learner can learn only with training examples. A cat-recognizing learner needs oodles of pictures, some of cats, some not, each labeled. Those thousands or millions of pictures need to be obtained. That may be done with web-crawling software[136] (although

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133 *See* Theodore W. Ruger et al., Essay, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1150 (2004) ("For every argued case during the 2002 Term, we obtained predictions of the outcome prior to oral argument using two methods--one a statistical model that relies on general case characteristics, and the other a set of independent predictions by legal specialists. The basic result is that the statistical model did better than the legal experts in forecasting the outcomes of the Term's cases: The model predicted 75% of the Court's affirm/reverse results correctly, while the experts collectively got 59.1% right.").

134 Verma et al., *supra* note 40, at 253 ("In addition to the dissents, we analyze the notion of memetic phrases occurring in opinions - phrases that see a small spark of popularity but eventually die out in usage - and try to correlate them to dissent.").

135 Frank A. Pasquale & Glyn Cashwell, *Prediction, Persuasion, and the Jurisprudence of Behaviourism*, 68 U. TORONTO L.J. 63 (2018).

136 *See* Elkin-Koren, *supra* note 8, at 1095–96 ("Another concern is that algorithms that analyze fair use will fail to process information that is external to the content itself. For instance, determining the nature of use may require external information and additional analysis of facts. Yet, algorithms could be programmed to extract and analyze data from external sources. For instance, educational use might be determined based on tagging the nature of the user. A program could detect the type of user (e.g., educational institution, governmental agency) based on the domain name (e.g., .edu, .gov) or by

that raises the issue of whether fair use protects making copies of images to use in machine learning).[137] The pictures also have to be labeled. That cannot be done automatically if no cat-recognizing learner has been built yet. The common alternative is simply to have humans view the pictures and label them, a labor-intensive process. Machine learning is often cited for its potential to displace humans from repetitive jobs, but it is also creating many repetitive jobs with its need for labeled data.[138]

The ultimate question may be whether fair use via machine learning is a project more like Cyc or like Google Translate. Cyc attempted to support knowledge engineering by building a database with as many facts as possible about the world, only to find the store of facts inexhaustible.[139] Google Translate took on machine translation, which might seem to require an equally daunting task: taking on all the possible sentences which might talk about facts (and much more).[140] It turned out that dealing with the meaning of sentences was unnecessary.[141] Google Translate, trained on a vast corpus of translations conveniently compiled by the United Nations in the course of its affairs, handles translation an entire sentence at a time, having learned on previous sentence translation.[142] A legal

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checking registration in external databases.").

137 *See* Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 Wash. L. Rev. 579, 622–25 (2018) (arguing that fair use should apply because "[u]sing copyrighted works as training data for AI systems is highly transformative"); Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 Colum. J.L. & Arts 45, 97 (2017) (discussing policy arguments on both sides of the issue of whether fair use should protect the use of copies of work during machine learning).

138 Matthew Hutson, *The Future of AI Depends on a Huge Workforce of Human Teachers*, Bloomberg L. (Sept. 7, 2017), https://www.bloomberg.com/news/articles/2017-09-07/the-future-of-ai-depends-on-a-huge-workforce-of-human-teachers ("For an autonomous car to recognize pedestrians and stop signs, it's typically fed thousands or millions of photos, all hand-labeled. To nail a conversation, a digital assistant needs to be told over and over when it's failed. And so Rubin spends 10 to 30 hours a week on her phone or computer evaluating search results and chat retorts through a site called Clickworker. . . . All together, more than 1 million people around the world are chipping in, one click at a time.").

139 Domingos, *supra* note 2, at 35 ("Thirty years later, Cyc continues to grow without end in sight, and commonsense reasoning still eludes it. Ironically, Lenat has belatedly embraced populating Cyc by mining the web, not because Cyc can read, but because there's no other way.").

140 *See* Wu, *supra* note 6, at 2, 20.

141 *Id.* at 13, 17–18.

142 *See* Gideon Lewis-Kraus, *The Great A.I. Awakening: How Google Used Artificial*

case is not as modular as a task in translation because the sentences are interdependent. The question will be whether the necessary features for machine learning can be extracted from legal texts (or from examples of fair use in other media, like images).[143] The domain of law faces an issue recognized to be one of the key areas of machine learning research, which is finding a way to represent semantic knowledge: in technical terms, a "research frontier is to develop embeddings for phrases and for relations between words and facts."[144] The succeeding sections rest on the hopeful assumption that some progress will be made in providing the data necessary for using machine learning in the context of legal reasoning.[145]

V. SUPERVISED LEARNING WITH NEURAL NETWORKS: LEARNING TO RECOGNIZE FAIR USE

Following the classification by Professor Domingos,[146] machine learning can be divided into several schools.[147] The school presently making the most notable progress, artificial neural networks

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Intelligence to Transform Google Translate, One of Its More Popular Services – and How Machine Learning is Poised to Reinvent Computing Itself, N.Y. Times (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/magazine/the-great-ai-awakening.html.

143 As an indication of the pervasive issue of extracting conceptual information from legal texts, see Call for Participation: Competition on Legal Information Extraction/Entailment (COLIEE), Int'l Conf. on Artificial Intelligence & L., https://nms.kcl.ac.uk/icail2017/cfcoliee.php (last visited Oct. 2, 2019) ("There are two tasks in the competition. One is to extract articles from Japanese civil codes which contribute to solving a bar exam yes/no question; the second task is to check entailment of a question from given civil code article(s). We also provide various NLP tools' outputs for training data to help your information retrieval and textual entailment.").

144 Goodfellow et al., supra note 2, at 484.

145 Note that judicial reform could improve the availability of data generally in the legal system. See David Colarusso & Erika J. Rickard, Speaking the Same Language: Data Standards and Disruptive Technologies in the Administration of Justice, 50 Suffolk U.L. Rev. 387, 388 (2017) ("[E]stablishing data standards for electronically sharing information across the justice system would propel existing technological innovations to greater prominence and effectiveness.").

146 See generally Domingos, supra note 2.

147 One could divide machine learning more broadly, such as between instance-based and versus model-based learning. Géron, supra note 2, at 17. The former "learns the examples by heart, then generalizes to new cases using a similarity measure." Id. The latter builds "a model of these examples, then use[s] that model to make predictions." Id. at 18. One can see the analogy to legal reasoning, which can be viewed as case-based or as applying general rules which may be derived from cases or set out in statutes.

(including deep learning), is an approach inspired by the networks of neurons comprising the brain, although now they are "generally not designed to be realistic models of biological function."[148] A connected network of virtual nodes is adjusted to respond to experience: "[b]y adding more layers and more units within a layer, a deep network can represent functions of increasing complexity."[149] Such deep learning has found successful application in a number of areas, such as machine vision,[150] speech recognition,[151] handwriting recognition[152] and natural language processing.[153] Deep learning networks are in broad use in a number of other fields, potentially anywhere there is ample data.[154]

      The model receives a set of input values and gives a set of output values.[155] The weights of the various nodes are adjusted until the desired output values for each input are received.[156] Just how to adjust those weights, of course, is the key to whether the network can learn as intended.[157] The first wave of network learners, in the 1950s and 1960s, including the Perceptron, went under the name of "cybernetics."[158] The leading algorithm employed was "stochastic gradient descent."[159] Gradient descent has been compared to

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148 GOODFELLOW ET AL., *supra* note 2, at 13.

149 *Id.* at 166.

150 *Id.* at 452–57.

151 *Id.* at 458–60.

152 Stephen Wu & Justin Churchill, *Touchpad Figure Recognition*, CORNELL U. ELECTRICAL & COMPUTER ENGINEERING (Spring 2012), http://people. ece.cornell.edu/land/courses/ece4760/FinalProjects/s2012/shw46_jec324/ shw46_jec324/index.html ("Our project implements a touchpad input system which takes user input and converts it to a printed character. Currently, the device only recognizes the 26 letters of the alphabet, but our training system could be easily generalized to include any figure of completely arbitrary shape, including alphanumerics, punctuation, and other symbols.").

153 GOODFELLOW ET AL., *supra* note 2, at 461–477.

154 One commentator listed inspirational deep learning applications: "1. Colorization of black and white images. 2. Adding sounds to silent movies. 3. Automatic machine translation. 4. Object classification in photographs. 5. Automatic handwriting generation. 6. Character text generation. 7. Image caption generation. 8. Automatic game playing." Jason Brownlee, *8 Inspirational Applications of Deep Learning*, MACHINE LEARNING MASTERY (July 14, 2016), https://machinelearningmastery.com/inspirational-applications-deep-learning/.

155 DOMINGOS, *supra* note 2, at 108.

156 *Id.*

157 *Id.* at 109–11.

158 GOODFELLOW ET AL., *supra* note 2, at 13–15.

159 *Id.* at 15.

descending from a mountain.[160] If the hiker takes the steepest path down from any given point, she will continue to descend the mountain to the bottom, unless stuck in local minimum, a spot from where all paths go up.[161] The second wave, "connectionism," overcame limitations of the first wave, linear models.[162] Back-propagation techniques adjusted for errors throughout the network, allowing networks to learn more complex functions.[163] Distributed representation permitted more efficient representation of concepts within networks and gave greater power to compare multiple attributes of concepts.[164] The third wave, deep learning, uses some new software techniques, such as "greedy layer-wise pretraining," to create deeper networks with greater learning power.[165] But the new deep learning networks continue to use decades-old techniques such as gradient descent and back-propagation.[166] Much of the increased power of machine learning in this era of deep learning comes from the general development of computer network capability and deployment, along with availability of much larger sets of data.[167] Datasets used to train networks are exponentially larger than in past decades. The Street View House Numbers dataset, for example, includes over 600,000 images, and other datasets include up to "tens of millions of examples."[168] The computing resources devoted to deep learning are correspondingly extensive, both with respect to hardware[169] and software to run training software over a large

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160 Domingos, *supra* note 2, at 291–92.

161 *Id.* at 110.

162 Goodfellow et al., *supra* note 2, at 14–15, 18.

163 *Id.* at 15–18 (noting limitation of linear models and development of backpropagation).

164 *Id.* at 150, 541.

165 *Id.* at 18–19.

166 *Id.* at 14–15, 18–19.

167 *See, e.g., id.* at 461 (discussing how increases in computing resources enables improvements in using neural nets in speech recognition: "Later, with *much larger and deeper models* and much larger datasets, recognition accuracy was dramatically improved by using neural networks to replace [Gaussian Mixture Models] for the task of associating acoustic features to phonemes.").

168 *Id.* at 19–22.

169 *See id.* at 445–47 ("Because the size of neural networks is of paramount importance, deep learning requires high performance hardware and software infrastructure."). Goodfellow describes progress from using fast central processing unit implementation to use of graphics processing units (GPUs). *Id.* ("Together, this results in graphics cards having been designed to have a high degree of parallelism and high memory bandwidth," which fit well with the needs for deep learning.).

network of computers.[170]

A network responds to training examples and responds with its output to the classification question (such as "cat," or "not cat"). The network then receives feedback on whether the response was correct and adjusts its internal weights accordingly. When the network is performing with the training examples to a satisfactory level, it can then be tested on a different set of examples. This reconfiguration of the network can be seen several different ways. In one sense, the network has adjusted in response to feedback on its performance, hence it has "learned." Put in terms of mathematics (which can be seen as the art of detecting patterns), the network now has determined responses to various types of examples, so it has configured a function. Put another way, the network has reified an algorithm to perform that function, so the network has written a computer program. This characterization captures one great advantage of machine learning: rather than having a person write a program to recognize pictures of cats (which may be too detailed a task for humans), the network itself writes the program, in a sense.

The program will not mirror the human thought process – that is well-illustrated by the concept of "generative adversarial networks."[171] Suppose a network has attained a high success rate on identifying pictures of cats. Another machine learning program could run on the output of the cat classifier, identify which features it deems salient, and produce "adversarial examples."[172] It might take a picture of a cat and change only a few key pixels so that a human would still readily identify it as a picture of a cat. The cat classifier would be fooled by the small change to classify it as not a picture of a cat. Generative adversarial networks remind us that machine learning may accomplish certain tasks with high proficiency, but that does not mean it has formed robust human concepts like "cat" applicable in many contexts.[173]

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170 *See id.* at 448–49 ("In many cases, the computational resources available on a single machine are insufficient. We therefore want to distribute the workload of training and inference across many machines.").

171 *Id.* at 546–47 ("In this approach, a generative model is trained to fool a feedforward classifier.").

172 *Id.* at 268–69.

173 Generative adversarial networks pose practical security and reliability issues for the use of machine learning, and software generally, in a number of contexts. *See* Cory Doctorow, *Generative adversarial network produces a "universal fingerprint" that will unlock many smartphones*, Boing Boing (Nov. 15, 2018) (citing Philip Bontrager et al., DeepMasterPrints: Generating

Neural networks in the brain inspired, by analogy, artificial neural networks.[174] There is another analogy between the idea of a network learning through exposure to examples, with feedback, and the process of the common law. Edward Levi's classic *An Introduction to Legal Reasoning* described the course of common law rule development as courts formulating rules to explain the outcomes of cases such that a rule could be altered when it could no longer yield a just result, and so would be changed accordingly.[175] That resonates with the process of artificial neural networks, when the feedback from the outcome causes the nodes in the network to change their weights until gradually the outcome may be different from a similar case. Ronald Dworkin has likewise described the concept of the common law gradually adjusting as it is challenged by case after case.[176] As some legal theorists view jurisprudence, drawing on the work of John Rawls, an ideal judge considers all relevant matter until the judge reaches a state of reflective equilibrium.[177] An artificial neural network can be trained until it reaches a state of equilibrium with the training set of cases. In fair use in particular, the broad four-factor rule requires cases to give it content.

One issue would be acquiring sufficient cases to train the network. Deep learning has achieved impressive results in part due to the use of big data sets: "[a]s of 2016, a rough rule of thumb is that a supervised deep learning algorithm will generally achieve acceptable performance with around 5,000 labeled examples per

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MasterPrints for Dictionary Attacks via Latent Variable Evolution (2018)), https://boingboing.net/2018/11/15/masterprints.html.

174 *See, e.g.*, Goodfellow et al., *supra* note 2, at 13 (internal citation omitted) ("Some of the earliest learning algorithms we recognize today were intended to be computational models of biological learning, i.e. models of how learning happens or could happen in the brain . . . While the kinds of neural networks used for machine learning have sometimes been used to understand brain function, they are generally not designed to be realistic models of biological function.").

175 Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 501–03 (1948).

176 *See* Michael Gentithes, *Precedent, Humility, and Justice*, 18 Tex. Wesleyan L. Rev. 835, 891 (2012) (citing Ronald Dworkin, Law's Empire 400 (1986)) ("This claim is, of course, largely similar to the argument that the rules of society 'work themselves pure' through common law judicial decision making.").

177 Lawrence B. Solum, *Legal Theory Lexicon 069: Reflective Equilibrium*, Legal Theory Blog (May 15, 2011) https://lsolum.typepad.com/legal_theory_lexicon/2011/05/legal-theory-lexicon-069-reflective-equilibrium.html.

category, and will match or exceed human performance when trained with a dataset containing at least 10 million labeled examples."[178] The lower threshold of 5,000 examples might be met simply by using reported fair use cases augmented as discussed above, but would fall short of the 10 million required to match human performance. For some purposes, "acceptable performance" could suffice where the stakes are relatively low. In addition, human performance might not be as high a standard in classifying fair use cases as in, say, recognizing pictures of cats or celebrities. Humans appear to have a natural facility for recognizing faces. With fair use, as noted above, humans often disagree.

Assigning weight to cases used to train the network presents another issue. *Sony*, *Harper & Row*, and *Campbell* are just three of thousands of reported Supreme Court cases, but they are the governing precedent on how to interpret fair use. Other cases from the lower courts, in legal theory, simply serve to interpret the big three – or if they precede the big three, have diminished precedential value, because a subsequent Supreme Court case would have more precedential value than an earlier lower court opinion. That is viewing things through the lens of jurisprudence. One could also view the reported cases as simply a sample of how judges view fair use, as a means to predict the outcome of future cases. Through that lens, the big three might be accorded more weight but would not dominate. Indeed, perhaps some lower court case better predicts how fair use will be applied in the future.

Along the same lines, one could argue about whether certain cases should be excluded from the sets, either as training examples or test examples. The lower court opinions reversed by the Supreme Court would seem inapt examples to train our fair use learner. Less clear would be the many district court opinions that have been reversed by courts of appeals. Some of those very likely might have been affirmed by a different set of judges. Along the same lines, one could select a good number of fair use cases, especially predating *Sony* that might be decided differently today.

As noted above, a challenge for using machine learning in fair use (or any legal domain including cases) is likely to be the curse of dimensionality – the considerable number of variables that could enter into legal analysis. Networks do have some techniques to

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178   Goodfellow et al., *supra* note 2, at 19–20; *see also* Frank Fagan, *Big Data Legal Scholarship: Towards a Research Agenda and a Practitioner's Guide,* 20 Va. J. L. & Tech. 1 (2016) (discussing applications of big data in the law).

reduce dimensionality. One of the most powerful is the autoencoder. An autoencoder takes a set of inputs and puts out the same set of inputs – which sounds pretty mundane.

> The key is to make the hidden layer much smaller than the input and output layers, so the network can't just learn to copy the input to the hidden layer and the hidden layer to the output, in which case we may as well throw the whole thing out. But if the hidden layer is small, something interesting happens: the network is forced to encode the input in fewer bits, so it can be represented in the hidden layer, and then decode those bits back to full size.[179]

Autoencoders thus find more efficient ways to represent data. They find many uses in machine learning and have independent applications in other areas, such as data compression.[180] In natural language processing, an area which will be required to use judicial opinions as data, networks have used autoencoders in such applications in as word embeddings, machine translation, document clustering, sentiment analysis and paraphrase detection.[181]

Autoencoders can be stacked on top of each other, so that each one uses the output of the previous autoencoder. The first autoencoder can encode features at one level of abstraction, meaning the next autoencoder can encode features slightly more abstract. In image recognition, one level could be edges, one could be edges that are part of facial features, the next could be entire features like noses or mouths, and the top layer could identify entire faces. Indeed, the Google Brain network used stacked autoencoders and other network components to recognize cats.[182] By analogy (while recognizing the gulf between these domains), autoencoders could be used to

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179 DOMINGOS, *supra* note 2, at 116.

180 *Cf.* Cory Doctorow, *Compression Could be Machine Learning's "Killer App,"* BOING BOING (Oct. 18, 2018) https://boingboing.net/2018/10/18/narrative-sensors.html.

181 *See* Venkata Krishna Jonnalagadda, *Sparse, Stacked and Variational Autoencoder*, MEDIUM (Dec. 5, 2018) https://medium.com/@venkatakrishna. jonnalagadda/sparse-stacked-and-variational-autoencoder-efe5bfe73b64; *see also* Müller & Guido, *supra* note 123, at 131–32 ("*Clustering algorithms*, on the other hand, partition data into distinct groups of similar items.").

182 DOMINGOS, *supra* note 2, at 117; Gideon Lewis-Kraus, *The Great A.I. Awakening*, N.Y. TIMES (Dec. 14, 2016) https://www.nytimes.com/2016/12/14/magazine/the-great-ai-awakening.html.

recognize the features of fact patterns.

Another technique that could deal with abstraction is the convolutional neural network. Convolutional neural networks can abstract local features from examples.[183] The best-known application of convolutional neural networks may be in recognizing items in images.[184] Fair use analysis, as noted above, necessarily requires taking bare facts and reducing them with abstractions in order to apply the factors.

Evaluating the performance of the software would be both vital and vexing. Whether a use is fair use or not is often subject to disagreement.[185] In law, the assessment goes beyond the result to evaluating the reasoning supporting the result. One of the greatest policy issues with machine learning is that many (not all, as discussed below) algorithms are black boxes.[186] A network has been reconfigured, effectively writing an algorithm to classify examples, but the algorithm is far too complicated to simply read and evaluate. Some applications apply several machine learning algorithms to the same problem,[187] and then seek the best answer by comparing the

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183 *See* Sean Gerrish, How Smart Machines Think 135–39 (2018).

184 *See, e.g.*, *id.* at 135 ("This pattern – convolutional layers followed by fully connected layers – turns out to be very common in networks used for image recognition.").

185 Some have called in general for more rigorous evaluation of AI and the law projects. *See* Jack G. Conrad & John Zeleznikow, *The Role of Evaluation in AI and Law*, 15 Int'l Conf. on Artificial Intelligence & L. Proc. 181, 181–86 (2015); *compare* Richard Tromans, *France Bans Judge Analytics*, Artificial Law. (June 4, 2019) https://www.artificiallawyer.com/2019/06/04/france-bans-judge-analytics-5-years-in-prison-for-rule-breakers/ ("In a startling intervention that seeks to limit the emerging litigation analytics and prediction sector, the French Government has banned the publication of statistical information about judges' decisions – with a five year prison sentence set as the maximum punishment for anyone who breaks the new law."), *with* Daniel L. Chen, *Machine Learning and the Rule of Law*, 2019 Santa Fe Inst. Press (forthcoming) https://ssrn.com/abstract=3302507 ("Predictive judicial analytics holds the promise of increasing the fairness of law.").

186 McJohn, *Artificial Legal Intelligence*, *supra* note 1, at 244 ("Applied to the legal domain, a neural network would give a result without the reasons for it – a 'black-box' approach that fits poorly with the need for justifications in the legal world."); *see also* Roger A. Ford & W. Nicholson Price II, *Privacy and Accountability in Black-Box Medicine*, 23 Mich. Telecom. & Tech. L. Rev. 1, 18–21 (2016).

187 *See* Géron, *supra* note 2, at 181–83 (discussing Ensemble Learning); Goodfellow et al., *supra* note 2, at 452 (discussing "mixture of experts" approach).

various answers from the several algorithms, which would make it even more opaque as to what the cause of the result was.[188] The potential of undisclosed bias is pervasive in machine learning (indeed, machine learning necessarily requires some bias, in a statistical sense, in the data)[189] and other software. It has been raised in areas from credit-scoring to criminal sentencing. Bias can enter in through the operation of the algorithm (such as incorporating biases in the data) but also through the human-guided process of bringing machine learning to bear on a program. The software is not simply set loose. Rather, the software may be trained on a set of data, then the performance will be evaluated[190] and improvements sought.[191] The evaluation by humans can allow for some biases to creep in.

This area is one of intense interest, and means to make algorithms more transparent may be in the making. But until then, deployment of a fair use algorithm in some contexts (such as where it prevented material from being publicly disseminated) without grounds would raise considerable questions (especially if the government were involved).

One related network learning technique deserves mentioning. Perhaps the greatest difficulty in applying machine learning to the domain of law, as discussed above, is the need for sufficient data and for that data to come in a form amenable to the various techniques of machine learning. Neural networks in particular function better the greater the number of training examples are available.[192] A recent

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188   *See* DOMINGOS, *supra* note 2, at 237 ("As it turns out, it's not hard to combine many different learners into one, using what is known as metalearning. Netflix, Watson, Kinect, and countless others use it, and it's one of the most powerful arrows in the machine learner's quiver.").

189   *See id.* at 64 ("Tom Mitchell, a leading symbolist, calls it 'the futility of bias-free learning.' In ordinary life, *bias* is a pejorative word: preconceived notions are bad. But in machine learning, preconceived notions are indispensable; you can't learn without them.").

190   *See* GÉRON, *supra* note 2, at 71–74 (giving practical example of evaluation of a machine learning model's performance).

191   *See, e.g., id.* at 253–306 (chapter on Model Evaluation and Improvement). As the comic xkcd put it:
   "This your machine learning system?
   Yup! You pour the data into this big pile of linear algebra, then collect the answers on the other side.
   What if the answers are wrong?
   Just stir the pile until they start looking right."
   Randall Adams, *Machine Learning,* XKCD, https://xkcd.com/1838/.

192   *See, e.g.,* GERRISH, *supra* note 183, at 143 ("As a result, they ended up with 2,000 times the amount of training data they started with, or about 2 billion

project, published in the journal Science in December 2018, provided an important exception to that rule.[193] Computer programs have been superior to humans in playing chess for many years now.[194] In general, those programs – such as the IBM's Deep Blue that defeated chess champion Gary Kasparov in 1997 – relied on learning using many thousands of human-played games as examples, along with heuristics programmed in.[195] AlphaZero, by contrast, was given no more domain knowledge than the rules of chess.[196] It generated its own example games. As Deep Mind put it:

> To learn each game, an untrained neural network plays millions of games against itself via a process of trial and error called reinforcement learning. At first, it plays completely randomly, but over time the system learns from wins, losses, and draws to adjust the parameters of the neural network, making it more likely to choose advantageous moves in the future.[197]

After about nine hours of training, AlphaZero was superior to any other computer chess program. "In one game, AlphaZero made a bold bishop sacrifice, sometimes used to gain positional advantage, followed by a queen sacrifice, which seemed like a colossal blunder until it led to a check mate many moves later that neither Stockfish nor humans saw coming."[198]

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images with which to train their network. If they hadn't augmented their training data like this, they would have needed to use a much smaller—and less expressive—network.").

193 *See generally,* David Silver et al., *A General Reinforcement Learning Algorithm that Masters Chess, Shogi, and Go Through Self-Play*, 362 Science 1140 (Dec. 7, 2018).

194 *See generally,* Monty Newborn, Kasparov versus Deep Blue: Computer Chess Comes of Age (1997).

195 *Id.*

196 David Silver et al., *Shedding New Light on the Grand Games of Chess, Shogi and Go*, DeepMind (Dec. 6, 2018), https://deepmind.com/blog/alphazero-shedding-new-light-grand-games-chess-shogi-and-go/.

197 Terrence J. Sejnowski, The Deep Learning Revolution 20 (2018).

198 *Id.* (the author commented wryly, "[t]he aliens have landed and the earth will never be the same again"); *see also Blame it on the Robot?*, Mich. Tech. L. Rev., https://mttlr.org/2017/10/blame-it-on-the-robot/ (discussing earlier work on AlphaGo); Cade Metz, *DeepMind Can Now Beat Us at Multiplayer Games, Too*, N.Y. Times (May 30, 2019) https://www.nytimes.com/2019/05/30/science/deep-mind-artificial-intelligence.html.

So in some domains, the sheer power of deep learning may suffice, without the need for training examples.[199] It is difficult, however, to see how that would translate to the domain of fair use analysis. In chess, the rules of chess are given as the sole knowledge. That is sufficient for the network to play games according to those rules, to determine which side wins the game according to those rules, and to give itself feedback. If the only input were the rules of fair use, Section 107 of the Copyright Statute states the four-factor rule, but not in a manner that determines how to apply it. Nor could a program use the section to generate training examples. The rules of cases are not built-in to Section 107 nor do they flow from it automatically. But such pure reinforcement learning is still in early days. Perhaps it could operate with relatively small data sets, which would address one of the issues in adapting machine learning to legal reasoning.

VI. GOOD NEIGHBORS MAKE GOOD ANALOGIES

Neural networks have great power in classifying, but present considerable issues with respect to using them in fair use. Another set of machine learning algorithms rely on the concept of analogy, a basic reasoning process used in legal analysis as well.[200] The nearest neighbor approach, a standby of the analogy approach, simply attempts to identify, from the set of previous cases, which one is most similar to the present case.[201] More broadly, the approach may identify the most similar cases (k-nearest neighbors, meaning the k most similar cases) and use a statistical median of them. Netflix, for example, might attempt to predict a viewer's preferences by finding another viewer with the most similar viewing history and then offering a film the second viewer liked. To match a face in a database of images (such as Facebook might compile), it simply looks for the closest match.[202] One great advantage of the nearest neighbor approach is that it is "lazy."[203] Rather than training a network by

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199   Note that Deep Mind, although relying on deep learning, could be viewed as unsupervised machine learning, where the algorithm is not given a specific goal, as opposed to the supervised learning algorithms that, for example, classify examples into predefined categories.

200   *See* DOMINGOS, *supra* note 2, at 178–202 (discussing analogical reasoning in machine learning); Cass R. Sunstein, *On Analogical Reasoning Commentary*, 106 HARV. L. REV 741 (1993) (discussing analogical reasoning in legal reasoning).

201   DOMINGOS, *supra* note 2, at 179–86.

202   *Id.* at 179–80.

203   *Id.* at 179–82.

exposing it repeatedly to examples, a nearest neighbor algorithm simply searches a database of examples to find the nearest match. The technique also does not require the enormous datasets on which the most sophisticated neural networks rely.

Such an algorithm could be used in a number of ways to apply fair use. The most straightforward approach would be to predict whether a case was fair use by simply relying on whether the most similar case had been held to be fair use. Nearest neighbor here gives two related advantages. There is no time spent training, although an algorithm must be crafted that can rapidly search through the database.[204] By the same token, there is no need to implicitly form a general model[205] about what is or is not fair use, rather simply to rely on the closest match. Different weights can also be assigned to the cases in running the program: "examples closest to the test example should count for more."[206] Fair use has been notoriously resistant to general characterization. But finding a close case may often resolve an issue in satisfactory fashion. Other areas of law with flexible rules might likewise be subject to this approach.

The success of this approach would depend critically on the features chosen to match. Not all facts in a case are equally relevant. An advantage of nearest neighbor is the savings in training a network (or using it where training a network would be impracticable). In balance, the feature engineering cannot rely on the network determining which features are determinative or how they should be weighed. Moreover, among the various machine learning algorithms, nearest neighbor is especially likely to be slowed by numerous features in the data, because it must search the entire database and compare with each of those features.[207] So selecting a spare number of features to compare would be necessary, by eliminating features of little relevance or finding a way to combine related features.[208] Preprocessing the data would be key to determining the predictive power of the program.

In some applications, that might not be as imposing a task as would appear at first. To use nearest neighbor to reach a legal

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204 *Id.* at 179–80.
205 *Id.* at 179 ("If you want to learn to recognize faces and have a vast database of images labeled face/not face, just let it sit there. Don't worry, be happy. Without knowing it, those images already implicitly form a model of what a face is.").
206 *Id.* at 183.
207 *Id.* at 186.
208 *Id.* at 186–89.

conclusion as to sets of facts, would require first determining the characteristics of facts that would be considered, and processing both the sample cases and the case to be decided into those parameters. As noted above, that is not something any existing application can do. But, per the Netflix example, if all that is required is a prediction of the case (as opposed to legal analysis), then a simpler approach might have acceptable accuracy. To figure out what films might appeal to someone compared to other viewers, we might consider an unmanageable set of facts: their personality, their taste in entertainment, their sense of humor. But an acceptable predictor might consider no facts about the person, rather simply their viewing history, and look for another person with a similar viewing history. It might be that in predicting whether a user is posting material protected by fair use, comparing their posting history to a user (or set of k users) with a similar history might yield an acceptable prediction.

The lazy learning nature of nearest neighbor also might enable its use at early stages of fair use analysis, in finding relevant cases. Presented with a fact pattern, a lawyer or judge will wonder whether there were other fair use cases involving the similar subject matter (be it course web pages, marching band music, fan fiction, etc.) or similar questions about the interplay between factors (where the disfavored use may have somehow increased the market for the work). Nearest neighbor could be used in such a way that relevant features were chosen at run time and so used as a research tool or otherwise to find related precedent. That would depend on the data being compiled in a manner amenable to such flexible searching.

A more complex method of analogy in machine learning is the use of support vector machines (SVM). SVMs work, in essence, by drawing lines between sets of cases.[209] A SVM can separate cases in a two-dimensional graph by drawing a line, in three dimensions by drawing a plane, in four dimensions by drawing a hyperplane, and so on.[210] Legal reasoning often turns on the similar concept of drawing a line between cases (and other geometric analogies like not letting open the floodgates or letting things down a slippery slope). Like legal categorization, SVM's can handle outlier or mislabeled cases, simply by tolerating some error – drawing the line in a way that leaves some examples sitting in the wrong class.[211] Likewise,

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209   *See* GÉRON, *supra* note 2, at 145–67.
210   *See id.* at 147–67.
211   *See id.* at 147.

fair use case law contains cases that were wrongly decided, or at least contrary to the present law of fair use.

The question whether machine learning algorithms in the analogy camp are most useful in legal applications may depend on a basic inquiry that remains as yet unsettled in jurisprudence (and psychology, and biology, and philosophy, etc.). To what extent does human reasoning depend on reasoning by analogy? There is a great deal of literature on reasoning by analogy, but no basic agreement even on such matters as what reasoning by analogy is and whether it limits or enables reasoning.[212] A useful way to think about reasoning is the framework of deduction, induction and abduction, from philosopher and logician Charles Sander Peirce.[213] To adapt one of Peirce's examples: if all the beans in a bag are blue, and a bean is from the bag, *deductive* reasoning (logical reasoning to certain conclusions) tells us the bean is necessarily blue. If all the beans we have drawn from another bag are green, *inductive* reasoning (generalizing from examples) suggests that the next bean will probably be green. If all the beans in another bag are pink, and there is a pink bean lying near the bag, *abductive* reasoning ("interference to the best explanation")[214] suggests that the bean came from the bag.[215] The modes of reasoning vary as to reliability and productivity. Deductive reasoning is completely reliable, but has lower productivity, because it cannot give new knowledge beyond what can be logically inferred from given premises. Inductive reasoning may be fairly reliable, but even with many examples may yield an untrue result. The sun comes up in the east every day, but some day will not. A turkey is fed by the farmer every day – until Thanksgiving comes.[216] Induction

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212 *See, e.g.,* STEVEN PINKER, THE STUFF OF THOUGHT 253–59 (2007) (discussing various camps on whether analogy constrains or enables human reasoning).

213 *See* Stephen M. McJohn, *On Uberty: Legal Reasoning by Analogy and Peirce's Theory of Abduction,* 29 WILLAMETTE L. REV. 191, 192–93 (1993) [hereinafter McJohn, *Peirce*].

214 Lawrence Solum, *Legal Theory Lexicon: Inference to the Best Explanation (Abduction),* LEGAL THEORY BLOG (Feb. 17, 2019), https://lsolum.typepad.com/ legaltheory/2019/02/legal-theory-lexicon-inference-to-the-best-explanation-abduction.html.

215 McJohn, *Peirce, supra* note 213, at 197–98 ("Thus, where induction simply infers that characteristics of a sample will apply to the whole (inferring a general law from particulars), abduction infers an explaining hypothesis from a body of data (what Peirce termed inferring cause from effect): Induction classifies, abduction explains.").

216 DOMINGOS, *supra* note 2, at 61 (discussing Bertrand Russell's view on the

is productive in a limited way, generalizing from new examples. Abduction is the most productive form of reasoning, generating hypotheses that may constitute new knowledge.[217] But abduction is also the least reliable. Those pink beans may come from somewhere else. Many scientific hypotheses must be discarded, as must many daily explanations.

Peirce's framework is useful, but not fully established. We use induction widely, but philosophers, most notably Hume and Popper, have shown that induction lacks the sort of solid demonstration of deductive logic.[218] Abduction has received even less definition or justification. Abduction seems to capture a basic human reasoning ability. Even cognitive tasks that may be unconscious, such as visual perception, involve making small abductive inferences[219] but how we do it or what its logical structure is are yet to be elucidated. The overall framework is nevertheless a useful way to think about reasoning.

Analogical reasoning can be seen as a mixture of induction and abduction.[220] Analogies between closely similar examples (such as two factually similar cases) seem like induction. Analogies between rather different examples (cases with similarities at a more conceptual level) seem more like hypotheses. Whether algorithms that depend on similarity, like nearest neighbor, are useful in fair use will depend on whether that sort of similarity does play a reliable role in fair use. It could be (and courts insist on the fact-bound nature of fair use and its resistance to "mathematical" formulation) that abduction's leap of insight must always be available. It may be that machine learning algorithms can go beyond the sort of mechanical analogy making of nearest neighbor, into the creative hypothesis-formulation of abduction. But that would raise the issue of reliability.

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problem of induction).

217 *See* McJohn, *Peirce, supra* note 213, at 200, 202 ("Abduction is synthetic, seeking to form general laws and bring order to apparently disconnected ideas. An abductive inference provides a way to see order and unity in what was previously confusing.").

218 Leah Henderson, *The Problem of Induction*, Stan. Encyclopedia Phil., https://plato.stanford.edu/entries/induction-problem/ (last updated Sept. 21, 2019).

219 *See* McJohn, *Peirce, supra* note 213, at 203 ("Under Peirce's view, we use abduction in all types of cognition, from the commonplace to the most abstract. He regarded the extreme case of abduction to be the interpretation inherent in the perceptive judgment.").

220 *See id.* at 209.

People make hypotheses with ease, but many of those turn out to be inaccurate. Some sort of check would have to be built in to software that approached that same terrain.

VII. DECISION TREES – TRANSPARENT LEARNERS

A decision tree provides a model of decision-making analogous to a flow chart. To give an unusually clear-cut example, a decision tree could classify animals with such questions as: does it have a backbone? Does it have fur? Does it give birth to live young? The decision tree classifies the example according to its features and returns a marsupial, or in a different path, a grass. The decision tree can be built by classifying the data to create the branches of the trees. The algorithm chooses a likely feature, uses it to divide the set, then uses another feature to divide the set, then continues the process until a maximum chosen depth is reached or there remains no feature that can reliably divide the set.[221] A set of cases may not divide perfectly into nodes at the ends of the decision tree branches. The tree can still be used to estimate the probability that an example belongs in a particular category by using the ratio of classes that end up in a particular node.[222] For example, Microsoft's Kinect video game controller uses a decision tree to "figure out where various parts of your body are from the output of its depth camera; it can then use their motions to control the Xbox game console."[223]

A decision tree could conceivably track the factors identified by the Copyright Act and big three fair use judicial decisions: Is the use commercial? Is the use transformative? Is there a negative effect on the market? Was the work unpublished? Different features might be used on various branches. The tree would be reliable if it produced leaf nodes[224] with reliable classification. That would mean that fair use cases could be broken into sets, such as that a noncommercial, transformative, no-negative-market-effect use was usually fair, even

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221   Géron, *supra* note 2, at 171 ("Once it has successfully split the training set in two, it splits the subsets using the same logic, then the sub-subsets and so on, recursively. It stops recursing once it reaches the maximum depth (defined by the max_depth hyperparameter), or if it cannot find a split that will reduce impurity.").

222   *Id.* ("A Decision Tree can also estimate the probability that an instance belongs to a particular class k: first it traverses the tree to find the leaf node for this instance, and then it returns the ratio of training instances of class k in this node.").

223   Domingos, *supra* note 2, at 88.

224   A leaf node is the end of a decision branch. *Id.* at 86.

if the copied work was unpublished. Alternatively, features could be defined by the facts of cases: Is the work software? Was the use reverse-engineering? Did defendant obtain the work lawfully? These categories might yield predictive classes. Features beyond the record of the case could have predictive value. A Decision tree built from statistics drawn from "six observable characteristics," such as circuit of origin and general legal area of a case, had a higher success rate in predicting affirmance or reversal in Supreme Court cases than a panel of legal experts (although the experts' predictions of the votes of individual judges were slightly better).[225]

Decision trees have a great advantage for use in the legal domain. A difficult policy issue with machine learning and much other software is the black box problem: programs make decisions or predictions without stating the underlying reasoning.[226] A complex neural net may classify examples from a set of data but will not state the reasons why. Decision trees, by their very nature, provide the structure of the decision process.

> For example, if a neural network says that a particular person appears on a picture, it is hard to know what actually contributed to this prediction: did the model recognize that person's eyes? Her mouth? Her nose? Her shoes? Or even the couch that she was sitting on? Conversely, Decision Trees provide nice and simple classification rules that can even be applied manually if need be[.][227]

If machine learning could produce a reliable decision tree for fair use, then, it would have perfect transparency.[228]

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225   Andrew D. Martin et al., *Competing Approaches to Predicting Supreme Court Decision Making*, 2 Persp. on Pol. 761 (2004). The characteristics used were "(1) the circuit of origin for the case; (2) the issue area of the case, coded from the petitioner's brief using Spaeth's protocol; (3) the type of petitioner (e.g., the United States, an injured person, an employer); (4) the type of respondent; (5) the ideological direction of the lower court ruling, also coded from the petitioner's brief using Spaeth's protocol; and (6) whether or not the petitioner argued the constitutionality of a law or practice." *Id.* at 762.

226   *See, e.g.*, Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 Harv. J.L. & Tech. 889, 907 (2018) ("To be sure, we may be able to tell what the AI's overarching goal was, but black-box AI may do things in ways the creators of the AI may not understand or be able to predict.").

227   Géron, *supra* note 2, at 170.

228   Note that multiple decision trees may be used, which improves the overall predictive power, in the Random Forest technique. The use of many trees,

"*If*", because the decision tree, compared to other algorithms, is more demanding in the form of data on which it can operate. For example, "the main issue with Decision Trees is that they are very sensitive to small variations in the training data."[229] Whatever the features are for legal data, they may be subject to variation. A case could be decided differently. A use might be considered transformative or not depending on which circuit's law applies. The reliance on reasoning by analogy between the facts of cases introduces flexibility, but also complicates categorization. The characterization of features in the training data – a key issue for machine learning and the law generally – is especially acute given the somewhat brittle nature of decision trees, compared to neural networks, with their gradual adjustment to the data.

Having said that, the method compensates by offering the ability to use probabilities. If the cases can be sorted into different nodes, then the decision process would predict whether the case is fair use but qualify that prediction with a probability by comparison with other cases generally sharing the same set of attributes.

Decision trees, then, have the disadvantage of being especially dependent on data with features amenable to classification, and sensitivity to small variation. That might render them unfit for handling fair use generally until efforts to preprocess legal data are more successful (whether by tagging or finding attributes by clustering or other approaches). But decision trees have the advantage of transparency, along with the option of predicting by probability. That could mean that they could be deployed in narrowly defined areas even before the battles with data are won. An automated fair use check for music uploads, for example, might have good predictive power with some definable features drawn from the case law (is the work copyrighted, how much is uploaded, does the uploader have a history of infringement, what is the difference between the works, if any). The algorithm would no doubt make errors, but the transparency of decision trees would make them more easily subject to dispute, such as in a counter-takedown process.[230] If a post was

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however, greatly reduces the ability to trace the decision-making process. *See id*. at 181, 189–90.

229   *Id*. at 177.

230   Section 512 of the DMCA provides internet service providers immunity from copyright infringement by their users, provided the internet service provider, among other things, has a system in place to respond to takedown notices from copyright owners and counter takedown notices from the user that posted the content. *See, e.g.*, Kathleen O'Donnell, *Lenz v. Universal Music Corp.*

taken down, the poster could get notification along with the specific reasons why the post was taken down. Although lawyers might recoil, the notice could even contain a probability determination ("It is our experience that 85% of similar posts are infringing."). The poster could then have an opportunity to respond. Decision trees may prove to have practical value in lower stakes, repeat player settings.

VIII. UNSUPERVISED LEARNING: PATTERN DETECTION

Supervised machine learning is used to classify examples into pre-determined categories, such as potentially classifying examples as fair use/not fair use. The algorithm "learns" to detect patterns correlated to the specified classification. Unsupervised machine learning, by contrast, leaves it to the algorithm to find patterns of any sort, to see if useful information can be gained. Data mining is the classic example, where unsupervised learning is used on a large body of data to find patterns. Unsupervised machine learning might likewise reveal some useful patterns within fair use. As noted above,[231] unsupervised machine learning can find clusters in data and even operate on those clusters to find more abstract clusters.[232] Unsupervised machine learning may detect patterns: for example, "principal component analysis," used for determining which aspects of data contribute most to its distribution, can identify the factors that carry the greatest weight in functions.[233] A similar algorithm "has a surprising ability to zero in on the most important dimensions of complex data."[234] It might show which factors have the biggest say in fair use – and whether those factors are the ones that the courts expressly consider.

A common view is that fair use is replete with fact-specific case law rather than common principles.[235] Under this view, some

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and the Potential Effect of Fair Use Analysis Under the Takedown Procedures of § 512 of the DMCA, 2009 DUKE L. & TECH. REV., 1, ¶10, ¶15 (2009).

231 *See* discussion of using unsupervised machine learning to preprocess data *supra* notes 20–21.

232 DOMINGOS, *supra* note 2, at 210.

233 *Id.* at 213–214 (using the example of examining the locations of businesses to find the underlying pattern, that they were arranged in proximity to the principal street in a town).

234 *Id.* at 217 (discussing Isomap, "[o]ne of the most popular algorithms for nonlinear dimensionality reduction").

235 *See, e.g.,* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) ("While the doctrine's attention to context has many salutary attributes, it is

cases might be clearly fair use (quoting a few lines in a book review) or clearly not fair use (selling unauthorized copies of movies for sheer profit) but the cases in the middle are not reliably predictable. A refined version is that fair use, as legal doctrine, may be incoherent,[236] but may be more predictable when analyzed in light of social and cultural patterns.[237] Others argue that fair use is no less predictable than other areas of case-bound law.[238]

There are several types of patterns which might be disclosed. It could be that the four factors, as elucidated by the courts, are applied in a consistent fashion, even if the language of the various judicial opinions masks that somewhat. As noted above, fair use cases may divide not so much by the four statutory factors but by "policy-relevant clusters."[239] It could also be the case that legal doctrine is vague enough to lack consistent predictive power, but that underlying social and cultural patterns drive the application of fair use in a consistent manner.[240] Other patterns might also be found. Reading fair use cases (as with many intellectual property cases) raises questions about such issues as home-town advantage.

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so case-specific that it offers precious little guidance about its scope to artists, educators, journalists, Internet users, and others who require use of another's copyrighted expression in order to communicate effectively.").

236 Madison, *supra* note 81, at 1586–87 ("[T]he Supreme Court's formal jurisprudence has encouraged the courts of appeals, and presumably the district courts following their lead, to abstract the fair use inquiry to the point of incoherence").

237 *Id.* at 1622 ("I review what social and cultural patterns are and describe how an emphasis on those phenomena can be reconciled with the language of the current fair use statute. The second section below compares the generalized patterns model developed in the first section and applies it more broadly to fair use case law since enactment of the current copyright statute.").

238 Samuelson, *supra* note 82, at 2541–42 (footnote omitted) ("[F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or what this Article will call policy-relevant clusters. The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and privacy and autonomy interests of users.").

239 *Id.*

240 Madison, *supra* note 81, at 1622 ("I review what social and cultural patterns are and describe how an emphasis on those phenomena can be reconciled with the language of the current fair use statute. The second section below compares the generalized patterns model developed in the first section and applies it more broadly to fair use case law since enactment of the current copyright statute.").

An adaptation of a Manhattan-centric cover of *New Yorker* magazine, used as an advertisement for the film *Moscow on the Hudson*, failed to find support in fair use – when the case was decided in Manhattan, in the Southern District of New York.[241]

For fair use – and legal scholarship generally – the prospect of detecting patterns is of great interest. As noted above, legal reasoning relies on analogy, and yet the nature of analogical reasoning is elusive. Identifying the patterns that correspond to what judges and lawyers deem to be strong analogies could throw a lot on analogical reasoning. It could also bring yet another round of legal realism by showing what is going on underneath the hood of the legal engines of reasoning. That said, we must recall that one of the great challenges of machine learning is detecting patterns that do not correspond to any real phenomenon, such as overfitting the data to develop descriptions that are actually too complex. If patterns are detected, whether indicating legal, social, or cultural patterns, then appropriate skepticism should apply. The finding of patterns is a suggestion, not a determination: "It's even been said that *data mining* means 'torturing the data until it confesses.'"[242] With fair use in particular, the perhaps limited number of cases available to train the network may raise the risk of error.[243] As with other forms of machine learning, a detected pattern can be tested against sets of data other than the training set to see if the same pattern is found.[244] Unsupervised learning is often used as an exploratory approach, that may be a fruitful source of hypotheses, but those hypotheses must be further tested.[245]

IX. MECHANICAL FAIR USE PROHIBITED?

Legal issues may arise with the implementation of a fair use algorithm, especially depending on its specific deployment (who uses it and for what purpose, whether it simply is a research tool or effectively makes a decision, and who is affected by the use).

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241 Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706, 714 (S.D.N.Y. 1987).

242 DOMINGOS, *supra* note 2, at 72–73.

243 *See* GÉRON, *supra* note 2, at 22–23.

244 DOMINGOS, *supra* note 2, at 75 ("So how do you decide whether to believe what the learner tells you? Simple: you don't believe anything until you've verified it on data that *the learner didn't see.*").

245 Müller & Guido, *supra* note 123, at 132 ("As a consequence, unsupervised algorithms are used often in an exploratory setting, when a data scientist wants to understand the data better, rather than as part of a larger automatic system.").

Two issues are particularly worth noting. In addition to technical considerations of using machine learning to assess fair use, it is at least possible that legal considerations could limit the practice. A recent Eleventh Circuit case, *Cambridge University Press v. Patton*, squarely held that it was error for a court to rely on a "mathematical formula" to assessing the factors in fair use.[246] The court emphasized, as have others, that "fair use is not a mechanical determination."[247] Read for everything it's worth, that would bar machine learning assessment of fair use, at least by judges.

Machine learning is the implementation of statistics on a large scale. It may remain a moot point until judicial decisions are handed over to computers. More realistic is whether such a bar could extend to private parties. The Digital Millennium Copyright Act gives internet service providers immunity for infringement by their users, provided, among a number of conditions, that the service providers set up a process to respond when copyright owners send take-down notices.[248] A copyright claimant may send a take-down notice only in good faith.[249] The *Lenz* case notably held that a take-down could

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246   Cambridge Univ. Press v. Albert, 906 F.3d 1290, 1300–01 (11th Cir. 2018) ("As the Supreme Court has explained and as we reiterated in Cambridge II, 'the four statutory factors may not be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.' We emphasized that 'fair use is not a mechanical determination,' and that a court must 'weigh[] ... the four factors in light of the facts of a given case,'. To be sure, the district court described its arithmetic weights as 'initial' and 'approximate,' and it stated that it would 'adjust[]' them when it found a 'noteworthy strength or weakness' among the factors. But the district court made such adjustments only four times, each time to bolster the importance of the third factor's weighing against fair use. And, on those four occasions, the district court did nothing to adjust the other factors in the overall fair-use calculus. We conclude that the district court's quantitative rubric was an improper substitute for a qualitative consideration of each instance of copying in the light of its particular facts.") (quoting Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1260 (11th Cir. 2014)).

247   *Id.* The decision can also be seen as addressing the question, whether fair use analysis can be structured with specific rules applicable to common fact settings. *See* Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 163–65 (2017) ("Can fair use be rulified in this manner? A recent Eleventh Circuit decision brought this issue to the forefront of legal discourse. In Cambridge University Press v. Patton, the court repudiated the attempt made by the lower court to offer a rule-like elaboration of fair use in the context of an educational e-reserve system.") (citation omitted).

248   *See* 17 U.S.C. § 512(c) (2012).

249   *Id.* On automated copyright enforcement generally, see Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN.

be sent in bad faith if there was a failure to consider whether the material was posted as fair use.[250]

One might argue then, that *Cambridge University Press*'s disapprobation of a mathematical approach to fair use might mean that using machine learning to vet take-down notices before sending would be bad faith. Take-down senders, attempting to monitor and protect thousands of copyrighted works, are hardly to be held to the same standard as federal judges deciding individual cases. But there would be a requirement that the software meet some standard of assessing fair use, as opposed to a mere formality.[251] At a deeper level, a network trained on many cases to discern and classify examples of fair use is different than the approach disavowed in *Cambridge University Press*. There (at least in the appellate court's view), the trial court set mechanical numbers to weigh the various factors and applied them to the instances before it, without consideration of the interaction of the factors and the goals of fair use.

A network trained on cases to classify examples would necessarily have discerned in case patterns how those factors are interrelated. As opposed to mathematically applying preset weights, ignoring the policies of fair use, a reliable classifier would mathematically have adjusted the weights within the network to continue applying those policies as previous cases have (for better or worse). Nor is using machine learning on a problem a mechanical process. As with other software, the performance and modelling of a machine learner is evaluated and then the software adjusted to attempt to improve performance.[252] It would seem that automated fair use need not be mechanical and so could be consistent with fair use jurisprudence, notwithstanding the protean nature of fair use.

Another possible issue is the use of personal data. The European Union's General Data Protection Regulation ("GDPR") raised substantially the regulations of data online, prompting websites to modify their processes such that websites now tell us they use cookies and often ask for our consent, as many of us have by now experienced.[253] The GDPR restricts automated decisions

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Tech. L. Rev. 473 (2016).

250   *See* Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015).

251   An analogous issue is whether "machine opinion evidence," the output of neural networks, should be admissible as evidence. *See generally* Curtis E.A. Karnow, *The Opinion of Machines*, 19 Colum. Sci. & Tech. L. Rev. 136 (2017).

252   *See, e.g.,* Géron, *supra* note 2, at 253–311 (chapter on Model Evaluation and Improvement).

253   *See* Sean O'Brien, *GDPR: Don't Forget to Bring a Towel*, Boing Boing (May

concerning individuals based on data,[254] albeit with numerous expansive exceptions.[255] The regulation is in early days, so its scope and exceptions remain to be fleshed out.[256] It may well be that the GDPR does not come into play, where decisions are made automatically and may involve some personal data but are not in the nature of profiling, where the data is used to make decisions about the individual[257] (automated decision-making about whether a post by an internet user was fair use would likely focus on the use itself, and not the post, thereby avoiding the sort of user profiling that likely triggers the GDPR).[258] But the copyright holders have been successful in persuading the European Union to tighten restrictions

25, 2018), https://boingboing.net/2018/05/25/gdpr-dont-forget-to-bring-a.html.

254   Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1, 46 (EU) ("The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.").

255   Maja Brkan, *AI-Supported Decision-Making Under the General Data Protection Regulation*, *in* Sixteenth International Conference on Artificial Intelligence and Law, *supra* note 40, at 3–4 (2017) ("The GDPR, in its Article 22, prohibits automated individual decision making, including profiling. On the first impression, it seems that this provision strongly protects individuals and potentially even hampers the future development of AI in decision-making. However, it can be argued that this prohibition, containing numerous limitations and exceptions, looks like a Swiss cheese with giant holes in it.").

256   *See, e.g.*, Lilian Edwards & Michael Veale, *Slave to the Algorithm? Why a 'Right to an Explanation' Is Probably Not the Remedy You are Looking For*, 16 Duke L. & Tech. Rev. 18, 20–21 (2019) ("There has been a flurry of interest in a so-called 'right to an explanation' that has been claimed to have been introduced in the General Data Protection Regulation (GDPR).").

257   On legal responsibility for AI decisions more broadly, see Ignacio N. Cofone, *Servers and Waiters: What Matters in the Law of A.I.*, 21 Stan. Tech. L. Rev. 167, 170 (2018) ("Who should be responsible for accidents caused by self-driving cars? Who owns the copyright over work created by an algorithm? Do algorithms have free speech? Can an A.I. agent be responsible for a crime? Can it be an accessory to a crime?").

258   *Cf.* Maja Brkan, *AI-Supported Decision-Making Under the General Data Protection Regulation*, *in* Sixteenth International Conference on Artificial Intelligence and Law, *supra* note 40, at 6 ("These examples demonstrate that the provision of the Data Protection Directive seemed to focus mostly on instances of profiling based on automated processing of data, not including other types of automated decision-making involving processing of personal data.").

on even linking to copyrighted content, to the extent that Google may shut down Google News in some European countries.[259] Future copyright legislation in Europe and elsewhere may take on the question of automated assessment of fair use.[260] In some contexts, safeguards should be in place to protect against the particular vagaries of machine learning.

X. INTELLECTUAL PROPERTY DOMAINS AMENABLE TO MACHINE LEARNING

Thinking about how various machine learning approaches would apply to fair use raises a question about whether other areas of intellectual property might be more or less suitable domains. Two possible applications seem to have more bounded data structures, which might make using machine learning more realistic.

Patent law, in general, could seem even iffier for machine learning, with its preference for strictly defined, concrete inventions.[261] Machine learning, however, can learn to classify by using examples.[262] Patent law, in a sense, defies categorization. A claimed invention must be deemed patentable or not; this is a classification problem. The standard for patentability (unlike copyright, trademark, or any other type of intellectual property) requires novelty and nonobviousness.[263] In short, every patentable invention, by the standard of patentability, should be something unique. Classification programs should be able to deal with unprecedented examples. But a patentable invention should be not

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259   Cory Doctorow, *We lost the fight for balance in the EU's Copyright Directive, but here's what we won*, Boing Boing (Apr. 18, 2019), https://boingboing. net/2019/04/18/we-fight-on.html; *see also* Paris Martineau, *The UK's Tech Backlash Could Change the Internet*, Wired (Apr. 9, 2019), https://www.wired. com/story/uk-tech-backlash-could-change-internet/.

260   As Danny O'Brien, international director of the Electronic Frontier Foundation (a digital rights nonprofit group that opposed the bill) and opponent of the bill, said about proposed (as yet unsuccessfully) strict online copyright rules in Europe, "[t]here's no way that those algorithmic filters are going to be able to decide that something is fair use, parody, a meme or a mash-up." Adam Satariano, *Tech Giants Win a Battle Over Copyright Rules in Europe*, N.Y. Times (July 5, 2018), https://www.nytimes.com/2018/07/05/business/eu-parliament-copyright.html.

261   *See* Alice Corp. v. CLS Bank Int'l, 573 U.S. 1090, 222–25 (2014) (limiting patents on abstract inventions, particularly applicable to software inventions).

262   *See, e.g.*, Géron, *supra* note 2, at 79–102 (chapter on classification using machine learning).

263   35 U.S.C. § 103 (2012).

just unprecedented (novel) but also significantly different from any previous invention (nonobvious).

In another respect, however, patent law channels inventors toward structuring data in a way that copyright does not. An author gets copyright automatically upon creating a work,[264] and may choose to register the work by filling out a form and depositing copies of the work.[265] An inventor, however, is entitled to a patent only if she (or, more commonly, her patent lawyer) drafts patent claims which distinctly claim the invention and differentiate it from previous technology.[266] That previous technology may be described in publications, in products or services available to the public, or – in the most commonly applied category – the claims of previous patents in relevant technology.[267] When patent examiners consider whether a claimed invention is new and nonobvious, the examiner looks primarily, often exclusively, at the claims of previous relevant patents.[268] A patent claim is one sentence long, albeit often one horrifically complex, opaque sentence.[269]

The determination of patentability, then, often consists of comparing the inventor's one-sentence-long claim to other patent claims. That is more bounded than fair use, which involves

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264 17 U.S.C. § 102(4)(a) (2012) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

265 *Id.* § 408 ("At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.").

266 *See* 35 U.S.C. § 102(b) (2012).

267 *See id.* § 102(a).

268 *See, e.g.*, Jie Qi et al., *Prior* Art, PATENT PANDAS, https://patentpandas. org/resources/prior-art (last visited Oct. 14, 2019) ("Even though prior art officially comes in many forms, patent examiners pretty much only look at existing patent and patent applications for prior art.").

269 *See, e.g.*, Stephen Schott, *An Appeal to the New Patent Office Director: Repeal the Single Sentence Rule*, PATENTLY-O (Sept. 18, 2009), https://patentlyo.com/ media/docs/2009/09/schott.sentence.patentlyo.pdf ("But after all this careful work, the drafter may be left with an impenetrable sentence of a length not seen since Matthew begatted Jesus's lineage back to Abraham.").

comparing two works to each other. Copyrighted works can be thousands of sentences, or musical notes, or pixels. Fair use can require comparing one type of work to another, such as the unauthorized use of unpublished letters to a biography about their author, or a play to a movie. So patentability will at least work with more structured data. The claim will likely be a sentence never before used, though linguistics tells us this of perhaps all sentences.[270] Perhaps surprisingly, most sentences in this paper may never have been written before. Yet Google Translate, which now operates on the sentence as the basic unit to translate,[271] could render a fairly good Chinese translation. Whether a sentence claims a patentable invention is quite a different task, but one that would seem to be in the class of engineering problems, as opposed to mere speculation.

The legal determinations of patentability in general are no less complex, raising such abstract issues as patentable subject matter, which in turn requires considering the boundaries of such concepts as abstract ideas, laws of nature, and natural phenomena. These can be skirted, however. One could limit the question to novelty and nonobviousness, thereby leaving out questions of patentable subject matter. Or one could simply not try to define those abstract categories, rather considering only whether the claim at issue was more similar to claims deemed patentable or not.

Not surprisingly, there have been some reported attempts to use machine learning in patent drafting.[272] After looking at the related issues in fair use, it seems likely that machine learning will be most useful where the focus is on patent claims and where the claims are relatively similar, such as where an improvement is made in a well-defined area of technology. Machine learning may be less useful where the differences in claims are more abstract. The flip side

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270   *See* Steven Pinker, The Language Instinct: How the Mind Creates Language 22 (1994) ("[Noam] Chomsky called attention to two fundamental facts about language. First, virtually every sentence that a person utters or understands is a brand-new combination of words, appearing for the first time in the history of the universe.").

271   *See* Wu, *supra* note 6.

272   *See* David Hricik, *Machine Aided Patent Drafting: A Second Look*, Patently-O (Aug. 25, 2017), https://patentlyo.com/hricik/2017/08/machine-patent-drafting.html; Ben Hattenbach & Joshua Glucoft, *Patents in an Era of Infinite Monkeys and Artificial Intelligence*, 19 Stan. Tech. L. Rev. 32, 35 (2015) ("Cloem is attempting (*not* satirically, it appears) to use brute-force computing to mechanically compose text for thousands of patent claims covering potentially novel inventions and also to generate defensive publications to prevent others from obtaining patent protection in the same field.").

of patent protection relying on verbal claims is that quite different sectors of technology may fall within a broadly worded patent claim. A patent on an invention to report falls by elderly people was infringed by the Wii video game controller, because both relied on using an accelerometer to detect rapid downward movement.[273] It is unlikely that a claim drafted for the Wii would have been verbally similar to the fall-detector claim. In the same vein, a basic problem with software patents is that broad attempts to claim software inventions yielded claims that subsequently could be read to cover technology well beyond the real scope of the first inventor's invention.

Trademark registration also offers an interesting possibility. One of the two most common reasons a trademark application is rejected by the United States Patent and Trademark Office (USPTO) is that the applicant's mark is too similar to a previously registered mark: in trademark parlance, the applicant's mark is likely to cause confusion with the registered mark.[274] If there is a likelihood of confusion, the mark will be denied registration.[275] Like fair use, likelihood of confusion is a multi-factor test: whether two marks are likely to be confused depends on such matters as how similar the two marks are and how distinctive the marks are, but also how close in the market the marks are, how well known they are, and how sophisticated relevant consumers are.[276] In some respects, however, it is more bounded. First, unlike fair use, likelihood of confusion has a standard, if a fuzzy one: whether the proffered mark is likely to cause confusion. Second, the consideration by the USPTO is more limited than the consideration of similar issue in trademark litigation. If a mark holder sues for trademark infringement, they must prove likelihood of confusion in the marketplace context, considering the actual uses of the two marks.[277] The USPTO limits

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273   *See* Joe Mullin, *Jury Finds Nintendo Wii Infringes Dallas Inventor's Patent, Awards $10M*, Ars Technica (Sept. 1, 2017), https://arstechnica.com/tech-policy/2017/09/jury-finds-nintendo-wii-infringes-dallas-inventors-patent-awards-10m/.

274   *See* U.S. Patent & Trademark Office, *Possible Grounds for Refusal of a Mark* (July 11, 2016), https://www.uspto.gov/trademark/additional-guidance-and-resources/possible-grounds-refusal-mark ("The USPTO may be required to refuse registration of your mark on numerous grounds. The most common are: Likelihood of Confusion . . . .").

275   *Id.*

276   *See id.*

277   *See, e.g,* Viacom Int'l v. IJR Capital Invs., L.L.C., 891 F.3d 178, 198 (5th Cir. 2018) (analyzing likelihood of confusion between Krusty Krab restaurant and

its consideration to the categories of use defined in the trademark application (although other factors may permit consideration of real-world facts).[278] So rather than facts about the markets in which the marks operate, the analysis considers the numerical category of registration. The overall analysis is even more circumscribed by the examples considered. Where fair use compares two works, and patent law compares two complex claims, likelihood of confusion in trademark compares two marks. Of the many factors, the similarity of the two marks has been described as the most important factor.[279]

A likelihood of confusion program could be quite useful. Trademark searching is somewhat an art, rather than a science, and such a program would be a useful tool. The imperfections of machine learning might also be quite bearable in the search context. A prospective mark user would get some guidance as to whether their proposed mark would pass muster but need not place great reliance on the program's output. In particular, even if a false positive meant that the applicant needlessly abandoned their plans to use the mark and sought another, that may not be a great loss, if used at the stage before marketing and other trademark-related investment. Other marks are available and a rose by any other name would smell as sweet.[280]

However, a program based simply on the trademark register would only address one part of considering use of a mark. Unregistered marks may also have validity and priority against subsequent marks. Amazon.com learned this when it had to contend with the unregistered mark for Amazon Books, which might have had priority, limited to its area of actual use in

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fictional Krusty Krab restaurant of SpongeBob SquarePants cartoon show).

278   TMEP § 1207.01(a)(iii) (Oct. 2018), https://tmep.uspto.gov/RDMS/TMEP/current#/current/TMEP-1200d1e1.html ("Reliance on Identification of Goods/Services in Registration and Application: The nature and scope of a party's goods or services must be determined on the basis of the goods or services recited in the application or registration.").

279   *Cf.* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 Calif. L. Rev. 1581 (2006) (finding that similarity of marks is the greatest factor in infringement likelihood of confusion cases).

280   The supply of potential trademarks is not unlimited. *See* Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion,* 131 Harv. L. Rev. 945, 951 (2018) ("Specifically, the data present compelling evidence of substantial word-mark depletion, particularly with respect to the sets of potential marks that businesses prefer most: standard English words, short neologisms that are pronounceable by English speakers, and common American surnames.").

Minneapolis.[281] Amazon settled that suit, and other companies have had to adjust after adopting marks only to learn later that a confusingly similar mark had priority.[282] A learner trained only on the trademark register would not take them into consideration.

XI. CONCLUSION

Applying machine learning to fair use faces considerable hurdles. Fair use has generated hundreds of reported cases, but machine learning works best with examples in greater numbers. More examples may be available, from mining the decision-making of websites, having humans judge fair use examples just as they label images to teach self-driving cars, and using machine learning itself to generate examples. Beyond the number of examples, the form of the data is more abstract than the concrete examples on which machine learning has succeeded, such as computer vision, viewing recommendations, and even in comparison to machine translation, where the operative unit was the sentence, not a concept that could be distributed across a document. But techniques presently in use do find patterns in data to build more abstract features, and then use the same process to build more abstract features. It may be that such automated processes can provide the conceptual blocks necessary.

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281   *Bookstore Battles Internet Amazon Over Use of its Name: Amazon Bookstore Inc. v. Amazon.com Inc.*, 2 Andrews Computer & Online Indus. Litig. Rep. 5 (1999) ("Amazon Bookstore, a Minneapolis bookstore that caters to women, seeks both injunctive relief and damages for what it says is Amazon.com's 'unauthorized and improper use' of the trademark 'Amazon.'").

282   Amy Goetzman, *The Stuff of Herstory: Original Amazon Bookstore to Close*, MinnPost (June 5, 2008), https://www.minnpost.com/arts-culture/2008/06/stuff-herstory-original-amazon-bookstore-close/ ("The real Amazon received a small cash settlement from the online store, and used the money to keep the business going a little longer."); Keith Bradsher *Apple Settles an iPad Dispute in China*, N.Y. Times (July 2, 2012), https://www.nytimes.com/2012/07/02/business/global/apple-settles-an-ipad-trademark-dispute-in-china.html ("A Chinese provincial court said on Monday that Apple had settled a lawsuit there by agreeing to pay $60 million for the legal rights to use the iPad trademark in China, according to Xie Xianghui, a lawyer for the Chinese company involved."); Timothy O. Stevenson, *The Importance of Trademark Clearance Searches in Brand Development*, Martindale (Feb. 27, 2015), https://www.martindale.com/intellectual-property-law/article_Smart-Biggar-Fetherstonhaugh_2193454.htm ("Only then did the agency discover that Motel 6 in fact owns a registered trademark in Canada for 'We'll leave the light on for you,' and consequently the slogan in the Yukon tourism commercials was quickly changed to 'Come to my Yukon - We'll light the way.'").

In addition, tools drawn from knowledge engineering (the branch of artificial intelligence that of late has been eclipsed by machine learning) may extract concepts from such data as judicial opinions. Such tools would include new methods of knowledge representation and automated tagging.

If the data questions are overcome, machine learning provides intriguing possibilities, but also faces challenges from the nature of fair use law. Artificial neural networks have shown formidable performance in classification. Classifying fair use examples raises a number of questions. Fair use law is often considered contradictory, vague, and unpredictable. In computer science terminology, the data is "noisy." That inconsistency could flummox artificial neural networks, or the networks could disclose consistencies that have eluded commentators. Other algorithms such as nearest neighbor and support vectors could likewise test the consistency of legal reasoning by analogy. Decision trees may be simpler than other approaches in some respects but could work on smaller data sets (addressing one of the data issues above) and provide something that machine learning problematically lacks: transparency. Decision trees disclose their decision-making process, where neural networks are opaque black boxes. Finally, unsupervised machine learning could be used to explore fair use case law for patterns, whether they be consistent structures in its jurisprudence, or biases that have played an undisclosed role.[283] Any possible patterns found should be treated as possibilities, pending testing by other means.

It may well be that early generation fair use algorithms are like spam filters or machine translation. Such software does not read and interpret the meaning of the text at issue, rather it relies on the power of networks to find statistical linkages that permit high-probability assessment of results. Whether later generations of software will be able to conduct fair use assessments in the same manner that lawyers do depends on the improvement of machine learning in identifying abstractions and representing knowledge.

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283 Potential bias is a pervasive issue in the applications of machine learning and data. *See, e.g.*, Charles A. Sullivan, *Employing AI*, 63 Vill. L. Rev. 395, 397 (2018) ("Alternatively, the data may be accurate as far as it goes but problematic insofar as it incorporates prior discrimination, as when past performance evaluations are tainted by conscious or unconscious bias."); Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. Pa. L. Rev. 633 (2017). On the other hand, algorithms may avoid human biases. *See* Cass R. Sunstein, *Algorithms, Correcting Biases*, 86 Soc. Res. 499 (2019).

Me Too? Incentivising States to Adopt Consent-Based Sex Education

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I. INTRODUCTION

In November 2018, Columbia University published a study showing that students who received formal sex education before entering college that included training in refusing unwanted sex were half as likely to be assaulted as those who had not.[1] That study claims to be the first to research sex education's effect on sexual violence instead of its impact on pregnancy or HIV prevention.[2] A different study, conducted by Planned Parenthood in 2015, shows confusion around the definition of sexual consent itself:[3] it found that 19% of people strongly agreed that not saying "no" indicated consent for more sexual activity, whereas 20% of people strongly disagreed with that statement,[4] and that while 88% of people polled wanted to incorporate instruction on "how to ask for consent" in high school programming, only 21% of students reported learning that information while in high school themselves.[5] The study similarly showed that 97% of people want how to say "no" to sex to be taught in high school, but only 33% of students report learning it.[6]

Sandwiched between these two studies came TIME Magazine's "Person of the Year." [7] Each year, TIME selects the person (or people) that it believes had the largest influence on society in the previous twelve months.[8] In 2017, TIME named "The Silence Breakers" as its Person of the Year, representing those who were "part of a movement that has no formal name."[9] Across the world,

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1   Lauren Camera, *Teaching Kids How to Say 'No' Before College Lessens Risk of Sexual Assault in College*, US News (Dec. 11, 2018), https://www.usnews.com/ news/education-nws/articles/2018-12-11/teaching-kids-how-to-say-no-before-college-lessens-risk-of-sexual-assault-in-college; John S. Santelli et al., *Does Sex Education Before College Protect Students from Sexual Assault in College?*, PLOS ONE 2, 10 (Nov. 14, 2018), https://journals.plos.org/plosone/article/ file?id=10.1371/journal.pone.0205951&type=printable.

2   *See* Santelli et al., *supra* note 1, at 3.

3   *See generally* Planned Parenthood, PPFA Consent Survey Results Summary 1–4 (2015), https://www. plannedparenthood.org/files/1414/6117/4323/Consent_Survey.pdf?_ ga=2.112271492.106958524.1537919340-229398651.1537919340.

4   *Id.* at 1.

5   *Id.* at 3.

6   *Id.* at 3.

7   Stephanie Zacherek et al., *The Silence Breakers*, TIME, http://time.com/time-person-of-the-year-2017-silence-breakers/ (last visited June 29, 2019).

8   Time Staff, *Everything You Need to Know About TIME's Person of the Year*, TIME, https://time.com/4586372/time-person-of-the-year-facts/ (last updated Dec. 11, 2018).

9   Zacherek et al., *supra* note 7.

that movement is called #MeToo, #BalanceTonPorc, #YoTambien, #Anna_kaman, and other similar variations, all denouncing the same behavior: sexual harassment and assault.[10] Described as "one of the highest-velocity shifts in our culture since the 1960s," the #MeToo movement has given voice to many, and represents the beginning of a national acknowledgement of the prevalence of sexual misconduct in today's society.[11]

Comprehensive sex education–which takes a broad view of sex education and differs from what many states currently have in place[12]–could, by addressing confusion about consent and sexual misconduct, be a powerful tool for combatting sexual harassment and assault in the United States. Its goal is to teach a wide range of subjects, including "sexual anatomy and physiology, reproduction, contraception and abstinence, sexually transmitted infections, sexual communication, relationship development and maintenance, masturbation, and homosexuality."[13] Central to comprehensive sex education is the concept of "age-appropriate information," which implies that that certain sexual knowledge is necessary to enable children to mature properly.[14] It promotes positive and healthy views of sex and is structured so that children continually learn and build upon their past knowledge, beginning with small, simple topics such as kissing,[15] and evolving into more robust discussions about healthy relationships.[16]

Unfortunately, not all states require that schools offer any kind of sex education to their students. Exacerbating this problem is the fact that the federal government has traditionally had very little power to act in the education sphere, making a national

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10   *Id.*

11   *See* Edward Felsenthal, *The Choice*, TIME, http://time.com/time-person-of-the-year-2017-silence-breakers-choice/ (last visited June 29, 2019).

12   For example, states that do not require their programs to be medically accurate would not fall under this definition. Additionally, schools that teach abstinence-only sex education fall well short of being considered "comprehensive."

13   Tiffany Jones, *A Sexuality Education Discourses Framework: Conservative, Liberal, Critical, and Postmodern*, 6 AM. J. SEXUALITY EDUC. 133, 146 (2011).

14   *Id.*

15   *See id.*

16   *See* FoSE, NATIONAL SEXUALITY EDUCATION STANDARDS 33 (2012), http://www.futureofsexed.org/documents/josh-fose-standards-web.pdf (by twelfth grade students should be discussing healthy and safe relationships and what consent means).

solution nearly impossible.[17] However, the passage of the No Child Left Behind Act (NCLB) taught the country that it is possible for the federal government to play a larger role in education. While a new federal education law has since replaced NCLB, that Act laid the groundwork for a future in which the federal government may intervene in important issues to education. Given the seriousness of issues surrounding sexual misconduct and the lack of state intervention, sex education is primed for a federal solution.

This article will examine how the federal government can play a role in advancing sex education that includes consent education in public schools across the United States. First, it will discuss the need for the federal government to intervene. Next, it will discuss the historical role the federal government has played in education, and the methods the federal government has used to influence state education law. Lastly, this article will address how the federal government could induce states to enact sex education guidelines within the parameters of the Constitution and what that inducement would look like.

II. THE NEED FOR A FEDERAL SOLUTION

In response to growing awareness of widespread sexual misconduct in recent years, the nation has seen an emergence of programs designed to educate the next generation of youth on healthy relationships and bystander intervention.[18] Since 2011, colleges have tried countless ways to combat sexual misconduct on their campuses, ranging from online training modules to theater productions demonstrating the importance of consent.[19] The responsibilities colleges and universities have pursuant to Title IX may be why sexual misconduct prevention methods have been able to take center stage at the higher education level. For example, Title IX coordinators are required to address patterns of sex discrimination and its effects on campus climate.[20] Though colleges continue to address issues regarding sexual assault and misconduct, there has

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17   *See infra* Section III.

18   *Prevention Strategies*, CDC, https://www.cdc.gov/violenceprevention/sexualviolence/prevention.html (last updated Feb. 26, 2019).

19   *See* Beth Howard, *How Colleges Handle Sexual Assault in the #MeToo Era,* U.S. News (Oct. 1, 2018), https://www.usnews.com/education/best-colleges/articles/2018-10-01/how-colleges-handle-sexual-assault-in-the-metoo-era.

20   U.S. Dep't of Educ., Office of Civil Rights, Dear Colleague Letter: Title IX Coordinators 3 (2015), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.

been a growing recognition that education geared toward preventing sexual misconduct needs to start taking place before students reach the college level.[21]

Some argue that students' views on sex and healthy relationships are already established by the time they get to college.[22] This concern may be warranted: according to the Center for Disease Control's most recent study on risky youth behaviors, 39.5% of high school students had sex in 2017, which, while down from 47.8% in 2007, indicates that a large portion of high school students have sexual interactions prior to college.[23] In addition, among those victims of sexual violence, physical violence, or stalking by an intimate partner, 26% of females and 15% of males experienced some form of violence before the age of 18.[24] Furthermore, one in four girls and one in six boys will experience sexual abuse as a child.[25] Together, these statistics suggest that sexual assault is a problem requiring attention well before students reach college campuses.

Unfortunately, many students across the country are not getting the kind of sex education that would help foster a healthy discourse on sexual misconduct and consent before they enter college.[26] Only 24 states and the District of Columbia currently mandate any kind of sex education.[27] Only 13 states require that, when provided, instruction must be medically accurate.[28] This means that even the local school districts that decide to teach sex education do not have to ensure that the information they give to

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21   *See, e.g.,* Anya Kamenetz, *Should We Teach About Consent in K-12? Brett Kavanaugh's Home State Says Yes,* NPR (Sept. 28, 2018), https://www.npr.org/2018/09/28/652203139/should-we-teach-about-consent-in-k-12-brett-kavanaughs-home-state-says-yes.

22   Paul R. Abramson & Leif Dautch, *Waiting Until College to Teach About Affirmative Consent is Too Late,* LA Times (Nov. 23, 2014), https://www.latimes.com/nation/la-oe-abramson-affirmative-consent-20141124-story.html.

23   *Fewer U.S. High School Students Having Sex, Using Drugs,* CDC, https://www.cdc.gov/media/releases/2018/p0614-yrbs.html (last updated June 14, 2018).

24   *Preventing Teen Dating Violence,* CDC, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/teendatingviolence/fastfact.html (last updated Mar. 12, 2019).

25   *Get Statistics,* NSVRC, https://www.nsvrc.org/node/4737 (last visited June 29, 2019).

26   *See generally, Sex and HIV Education,* Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education (last updated June 1, 2019).

27   *Id.*

28   *Id.*

their students is accurate.[29] Though the Center for Disease Control states that many adolescents engage in sexual behaviors that can result in negative sexual health outcomes and recommends that 16 sex education topics be taught in high school and middle school to help reduce those risks,[30] only 45.5% of high schools and 17.1% of middle schools teach all 16 topics.[31] Even arguably less controversial topics, such as how to create and sustain healthy and respectful relationships, are not being taught in some areas of the country. To illustrate two of the most egregious examples, only 24.2% of middle schools in Arizona, and fewer than half of high schools in Oakland, California, teach students anything about healthy relationships.[32] A potential solution to this problem is a grant program designed to create common sex education standards across states. Under such a program, grants would function as inducements for schools to adopt comprehensive, medically accurate sex education policies that include providing consent education and minimizing the knowledge gap that currently exists in terms of formal comprehensive sex education.

While outside the limited scope of this article, state sex education laws and policies have not been immune from constitutional challenges. The plaintiffs bringing these challenges largely consist of parents who claim free exercise rights, or a right to raise their children how they see fit.[33] Courts analyzing these claims under rational basis review have generally rejected these parents' arguments and allowed schools to provide sex education programs.[34] Some courts have even been willing to uphold sex education programs when using strict scrutiny to analyze these claims.[35] Even

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29   *See What's the State of Sex Education in the U.S.?*, Planned Parenthood, https://www.plannedparenthood.org/learn/for-educators/whats-state-sex-education-us (last visited June 29, 2019) ("Although almost every state has some guidance on how and when sex education should be taught, decisions are often left up to individual school districts.").

30   *See* Zewditu Demisse et al., School Health Profiles 2014 3, 16-17 (2015), https://www.cdc.gov/healthyyouth/data/profiles/pdf/2014/2014_profiles_report.pdf.

31   *Id.* at 16.

32   *Id.* at 88, 97.

33   1 Ronna Greff Schneider, Education Law § 1:12 (2018).

34   *See, e.g.,* Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2002); Parker v. Hurley, 474 F. Supp. 2d 261, 273–74 (D. Mass. 2007).

35   Citizens for Parental Rights v. San Mateo Cty. Bd. of Educ., 124 Cal. Rptr. 68, 83 (Cal. Ct. App. 1975) (finding that the state had a compelling state interest in education that justified burdening parents' free exercise rights).

where schools have taken the greatest action against parental rights, such as requiring students to attend sex education programs *and* electing not to notify parents of the program, courts have ruled in favor of the school's interest in educating children.[36] Therefore, if the federal government can induce states to start enacting sex education laws and policies, it seems likely that courts will uphold them as constitutional, even if they require student attendance.[37]

III. HISTORY OF FEDERAL INVOLVEMENT IN EDUCATION

When it comes to public education, the United States of America is unique from most other countries in that it has 50 distinct state systems, all of which vary from one another significantly in terms of policy, instead of a national education system.[38] Traditionally, regulating public elementary and secondary education has been within the domain of local municipal governments, with little to no involvement by the federal government.[39] The Tenth Amendment, which leaves those powers not explicitly delegated to the federal government to the states,[40] is responsible for this dynamic. Notably, the word "education" does not appear once in the Constitution.[41] Accordingly, the federal government played little if any role in education for most of American history.[42]

This changed in 1965 when the Johnson Administration passed the largest and most expensive federal education law in American History: the Elementary and Secondary Education Act (ESEA).[43] ESEA created a series of federally funded education programs and provides general funds for schools to be able to purchase items such

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36   *See, e.g.*, Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 529–30, 533–34 (1st Cir. 1995).

37   For a more thorough analysis of state sex education laws, see Validity of Sex Education Programs in Public Schools 82 A.L.R.3d 579, § 3.

38   Patrick McGuinn, *From ESEA to NCLB, in* The Every Student Succeeds Act 13, 13 (Frederick M. Hess & Max Eden eds., 2017)

39   *Id.*

40   U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); McGuinn, *supra* note 38, at 13.

41   Dustin Hornbeck, *Federal Role in Education Has a Long History,* Conversation (Apr. 26, 2017), http://theconversation.com/federal-role-in-education-has-a-long-history-74807 (stating the Tenth Amendment is the reason that the national government does not have authority in creating school systems).

42   McGuinn, *supra* note 38, at 13.

43   *Id.* at 15.

as school supplies.[44] The largest portion of ESEA, Title I, allocates money to school districts based on the poverty level of their student population.[45] Over the years, Congress has reauthorized ESEA under different names.[46] Both the infamous No Child Left Behind Act (NCLB) passed in 2001 under the Bush Administration,[47] and the Every Student Succeeds Act (ESSA) passed in 2015 under the Obama Administration,[48] are reiterations of ESEA. Throughout the intervening years, the federal government's authority in education matters has expanded and contracted.[49]

The federal government's authority over education reached its peak with the passage of NCLB, which presented a radical shift from the 1965 ESEA.[50] It transformed the federal government from a passive actor in education to a major factor in almost every state's policy decisions.[51] NCLB focused on school accountability and conditioned the receipt of federal funds on the states' adoption of academic standards guiding their curricula, as well as a testing and accountability system aligned with those standards.[52] While states could choose their own standards, they had to issue report cards outlining student proficiency, thereby giving the government an indication of which states were failing to meet their proficiency targets.[53] If schools did not comply with these conditions, they could face sanctions, including the withholding of federal funds.[54] As this article will later discuss, the threat of sanctions opened the door for the federal government to further dictate what states taught in the classroom and serves as a model for how comprehensive sex

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44   John W. Calhoun, *The Elementary and Secondary Education Act and the Establishment Clause*, 9 Val. U. L. Rev. 487, 488 (1975).

45   *Id.*; *see* Nat'l Educ. Ass'n, Trump/DeVos Budget Request, FY 2019 1–2 (2018), https://www.nea.org/assets/docs/Trump_DeVos-FY9-Budget-Request-for-ESSA-Programs.pdf.

46   *See ESEA Reauthorization Update*, Hunt Inst. 1 (2016), http://www.hunt-institute.org/wp-content/uploads/2016/01/Update_ESEAReauthorization_Final_ForWeb.pdf.

47   *Id.*

48   *See* McGuinn, *supra* note 38, at 13.

49   *Id.* at 14.

50   *See id.* at 26.

51   Christopher Cross, The Evolving Role of the Federal Government in Education 1 (2005), http://images.pearsonassessments.com/images/nes_publications/2005_02cross_513_1.pdf.

52   *See* McGuinn, *supra* note 38, at 26–27.

53   *See id.* at 26.

54   *Id.* at 27.

education can be taught in all 50 states.

The punitive nature of NCLB was evident from its provisions. If a school was not reaching the proficiency levels outlined by NCLB and its state, it could potentially be closed and reopened as a charter school so the state could continue to receive federal funding.[55] The Act had a lofty goal of 100% proficiency in math and reading by 2014.[56] As states began falling behind their goals, they were forced to seek waivers from the Department of Education to ensure they would still receive federal funding.[57] As this article will later discuss, these waivers allowed the federal government to impose more of its agenda on the states.[58]

After increasing public pressure, Congress replaced the controversial NCLB with the newest reauthorization of ESEA, ESSA, in 2015.[59] NCLB, as the previous version of ESEA, was technically past due for reauthorization between 2007 and 2015, yet remained in effect during that time.[60] After multiple failed attempts to reauthorize a new version of the Act, President Obama took matters into his own hands by issuing an executive order offering waivers to states that would excuse them from their duties under the overdue Act.[61] Those waivers eventually became unnecessary when Congress enacted ESSA. Where NCLB punished underperforming schools, ESSA allows states to identify underperforming schools and ensure that they receive extra support.[62] ESSA has been described as

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55 *See* Alyson Klein, *No Child Left Behind: An Overview*, EdWeek (Apr. 10, 2015), https://www.edweek.org/ew/section/multimedia/no-child-left-behind-overview-definition-summary.html.

56 Anya Kamenetz, *It's 2014. All Children Are Supposed to Be Proficient. What Happened?*, NPR (Oct. 11, 2014), https://www.npr.org/sections/ed/2014/10/11/354931351/it-s-2014-all-children-are-supposed-to-be-proficient-under-federal-law.

57 Jeffery R. Henig et al., *From NLCB to ESSA, in* The Every Student Succeeds Act 29, 38–39 (Frederick M. Hess & Max Eden eds., 2017).

58 *Id.*

59 The Understood Team, *The Difference Between the Every Student Succeeds Act and No Child Left Behind*, Understood, https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/the-difference-between-the-every-student-succeeds-act-and-no-child-left-behind (last visited Sept. 12, 2019).

60 *See* Lauren Camera, *No Child Left Behind Has Finally Been Left Behind*, U.S. News (Dec. 9, 2015) https://www.usnews.com/news/articles/2015/12/09/congress-replaces-no-child-left-behind-shifts-power-to-states.

61 *See* Henig et al., *supra* note 57, at 38–39.

62 Am. Fed'n of Teachers, Every Student Succeeds Act 2, https://www.aft.org/sites/default/files/essa_accountability.pdf (last visited June 29,

"giv[ing] power back to the states."[63]

It is important to note that the federal government has never been allowed to dictate "curriculum," or how local schools teach certain information.[64] In fact, the Department of Education Authorization Act explicitly states that the Department cannot create programs that exercise control over the curriculum of schools.[65] Thus, the federal government's role in education is primarily one of funding.[66] While the federal government is not allowed to mandate that schools adopt certain curricula, it has sought to influence schools' curriculum decisions through funding.[67] This has left courts to determine what exactly the federal government can do in education without infringing on states' rights.[68]

IV. THE OBAMA ADMINISTRATION AND THE COMMON CORE

The most high-profile example of the federal government seeking to influence states' curricula was the Obama administration's push for states to adopt the Common Core State Standards (CCSS or "the Common Core"). The Common Core is a set of academic standards that outline what students should know at the end of each grade, from kindergarten to 12 Grade.[69] These standards were

2019).

63   Press Release, U.S. Dep't of Educ., Devos to State Chiefs: We Can, We Must do Better for Students (Mar. 2, 2018), https://www.ed.gov/news/press-releases/devos-state-chiefs-we-can-we-must-do-better-students; Naomi Shelton, *Equity v. Equality*, Nat'l Newspaper Publishers Ass'n (Jan. 8, 2019), https://nnpa.org/essa/equity-v-equality/.

64   *See The Federal Role in Education*, U.S. Dep't of Educ., https://www2.ed.gov/about/overview/fed/role.html (last updated May 25, 2017) ("It is States and communities, as well as public and private organizations of all kinds, that…develop curricula."); *see* David A. Gamson et al., *The Elementary and Secondary Education Act at Fifty: Aspirations, Effects, and Limitations*, Russel Sage Found. J. Soc. Sci., Dec. 2015, at 2, https://www.jstor.org/stable/pdf/10.7758/rsf.2015.1.3.01. pdf?refreqid=excelsior%3Ac2e32d6379aea26473465c0e808af86a.

65   20 U.S.C. § 3403(b) (2012).

66   *See The Federal Role in Education*, *supra* note 64. The federal government only accounts for approximately 8% of total spending on elementary and secondary education in the country. *Id.*

67   *See* Grace Rubenstein, *Race to the Top: What It Means for Real Students*, Edutopia (Aug. 25 2010), https://www.edutopia.org/blog/race-to-the-top-impact-on-students.

68   *See, e.g.*, Jindal v. U.S. Dep't of Educ., No. 15-534-SDD-RLB, 2015 WL 5474290, at *7 (M.D. La. Sept. 16, 2015).

69   *About the Standards*, Common Core St. Standards Initiative, http://www.corestandards.org/about-the-standards/ (last visited June 29, 2019). The Common Core Standards arose from years of work by private non-profits

developed by state governors and superintendents.[70] The Obama administration, seeking to have states use these standards but lacking the authority to create a federal curriculum, could only incentivize states to adopt them.[71] The two main ways the government incentivized states to adopt CCSS were (1) by making the adoption of the standards a potential prerequisite for obtaining waivers from NCLB mandates; and (2) by creating a funding program called Race to the Top (RTTT), in which states could earn points for adopting common education standards shared by a consortium of other states to compete for grant money from the federal government.[72] The federal government might model a plan to incentivize states to adopt comprehensive sex education laws and policies after the Obama Administration's efforts to incentivize states to adopt the Common Core.

Such a plan would likely be subject to the same court challenges that the Obama Administration's program faced. When the Common Core lost popularity, Governor Bobby Jindal of Louisiana sued the Department of Education in *Jindal v. U.S. Department of Education* in his official capacity as governor, challenging the validity of both conditional waivers and RTTT under ESEA and arguing that they were unconstitutionally coercive under the Constitution's Spending Clause.[73] The *Jindal* court ultimately upheld both the waiver program and RTTT as valid under those provisions.[74] The *Jindal* decision suggests that efforts by the federal government to incentivize states to adopt comprehensive sex education policies through both the use of conditional waivers and a program similar to RTTT could withstand a constitutional challenge. However, RTTT ultimately provides the better blueprint for standardized comprehensive sex education because the conditions that allowed for conditional waivers to be successful are no longer present.

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and state education department, contrary to the belief the federal government developed these standards. Tom Kertscher, *How Much Is the Federal Government Involved in the Common Core School Standards?*, POLITIFACT (Oct. 24, 2013), https://www.politifact.com/wisconsin/statements/2013/oct/24/sondy-pope/how-much-federal-government-involved-common-core-s/.

70   Neal McCluskey, *Getting the Common Core (and Federal) Facts Right*, CATO INST. (Mar. 15, 2016), https://www.cato.org/blog/getting-common-core-federal-facts-right.

71   *See* Kertscher, *supra* note 69.

72   *Id.*

73   *See generally Jindal*, 2015 WL 5474290.

74   *Id.* at *5–9.

A. Conditional Waivers

Under ESEA, states could apply to be excused from the penalties associated with NCLB failures.[75] As mentioned earlier, many schools were failing to meet their NCLB requirements, so much so that in 2011 Secretary of Education Arne Duncan estimated that 82% of schools could fail under NCLB that year.[76] When seeking a waiver from the penalties, states had to agree to adopt standards "common to a significant number of States."[77] This led to most states adopting CCSS in order to obtain waivers.[78]

Governor Jindal's arguments attacking the statutory authority for these waivers centered on a textual reading of ESEA. Governor Jindal argued that the federal government violated ESEA's provision which stated that "[a] State shall not be required to submit . . . standards to the Secretary [of Education for approval]"[79] because it required state governments to adopt the Common Core Standards in order to obtain a waiver.[80] The *Jindal* court reasoned, however, that the Department of Education did not require that states adopt "specific elements" of content standards, or that they use "specific assessment instruments" as a condition of ESEA flexibility.[81] For example, if there were other standards "common to a significant amount of states," Louisiana could adopt those instead. In fact, other states did choose "Option B," which meant they had to commit to adopting "college and career ready standards in at least reading/language arts and mathematics that have been approved and certified by a State network of Institutions of Higher Education."[82] Notably, both CCSS and Option B require approval by a consortium outside the federal government.[83] The court elaborated that Louisiana could

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75   *Id.* at *9.

76   Press Release, U.S. Dep't of Educ., *Duncan Says 82 Percent of America's Schools Could "Fail" Under NCLB this Year* (Mar. 9, 2011), https://www.ed.gov/news/press-releases/duncan-says-82-percent-americas-schools-could-fail-under-nclb-year.

77   *Jindal*, 2015 WL 5474290, at *10.

78   *See* Caitlin Emma, *The Price of Common Core Repeal*, Politico (Aug. 28, 2014), https://www.politico.com/story/2014/08/oklahoma-common-core-no-child-left-behind-waiver-110421.

79   20 U.S.C. § 6311(b)(1)(A) (2012).

80   *Jindal*, 2015 WL 5474290, at *9.

81   *See id.*

82   *Id.* at *15.

83   *Development Process*, Common Core St. Standards Initiative, http://www.corestandards.org/about-the-standards/development-process/   (last

not show that the Department of Education forced it to remove or add "specific elements" of its content standards; instead, it found that waiver flexibility was contingent on the standards being "common to a significant number of States," which did not direct any particulars of the state's curriculum.[84] The court did not elaborate further as to what "specific elements" of content standards means, but it presumably can be understood as meaning that the program did not prescribe standards on a granular level that controlled the day to day operations of the school.

The court also rejected Jindal's argument that the waivers were unconstitutionally coercive under the Spending Clause. Governor Jindal claimed that "forced choice is not choice."[85] Courts will uphold an exercise of Congress's spending power long as four elements are satisfied: (1) the spending power promotes the general welfare; (2) the conditions of the funding are unambiguous; (3) the program relates to a federal interest; and (4) the program abides by other constitutional limitations.[86] While acknowledging that NCLB's high standards pressured schools to obtain waivers, the court found they were not unconstitutionally coercive.[87] It found that the waivers were a benefit, not a penalty, and that states were free to choose not to apply for them, making the waivers a valid exercise of federal authority.[88]

The argument that a federal program can be coercive under the Spending Clause arises from dicta in the Supreme Court's decision in *South Dakota v. Dole*, which stated that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[89] There is no commonly used elemental test to determining coercion,[90] and the argument never held weight until *National Federation of Independent*

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visited June 29, 2019). CCSS was approved by the National Governors Association for Best Practices and the Council of Chief State School Officers. *Id.* By definition, Option B would have to be certified by States as well.

84   *See Jindal*, 2015 WL 5474290, at *10.

85   *Id.* at *14.

86   *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

87   *Jindal*, 2015 WL 5474290, at *14.

88   *Id.*

89   *Dole*, 483 U.S. at 211 (quoting Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

90   *See* Kevin McNiff, Note, *The Use of Federal Grant-Making Power to Expand State and Local Procurement Coverage Under the Transatlantic Trade and Investment Partnership*, 44 PUB. CONT. L.J. 327, 345 (2015).

Businesses v. Sebelius in 2012, where the Supreme Court struck down a federal funding program as coercive for the first time.[91] In *Sebelius*, the federal government sought to withhold funding for Medicare if states did not adopt Medicaid expansion under the Affordable Care Act (ACA).[92] In striking down the law, the Court distinguished its ruling from that in *Dole* by claiming that the ACA and Medicare were two separate programs, and that threatening funding for one (Medicare) based on the adoption of the other (ACA) is a retroactive condition and outside the purview of Spending Power.[93] It also noted that the funding at issue was over ten percent of the state's budget, compared to just under 0.5% in *Dole*.[94]

The difference between *Dole* and *Sebelius* is important when it comes to the introduction of waivers for sex education because, if the waiver system were framed incorrectly, a court could strike it down as coercive. However, it is unlikely that a court would find a waiver program to be coercive, as its intent would be to help states *save* money by avoiding sanctions that would have already been prescribed by statute.[95] In addition, a waiver program for sex education would be both authorized by ESEA, and related to ESEA's own funding scheme, as long as it mirrored the Common Core waiver format. This would be unlike *Sebelius*, where the program was authorized under the Affordable Care Act, but targeted funds from Medicaid, which the court held was a separate program.[96]

Unfortunately, flexibility waivers are an unlikely avenue for incentivizing states to mandate that public schools provide students with comprehensive sex education. This is because ESSA replaced NCLB, and as a result, measures giving more funding to struggling schools replaced the sanctions that gave rise to a waiver program in the first place. If, however, the next reauthorization of ESEA brings back punitive sanctions (and thus the need for waivers), the federal government could implement a waiver program and condition waivers on the adoption of consent-based sex education standards, upon which the next section will elaborate.

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91   Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580–81 (2012); Patrick Haney, *Coercion by the Numbers: Conditional Spending Doctrine and the Future of Federal Education Spending,* 64 Case W. Res. L. Rev. 577, 577 (2013).

92   *Sebelius,* 567 U.S. at 581.

93   *Id.* at 582–85.

94   *Id.* at 581–82.

95   Jindal v. U.S. Dep't of Educ., No. 14-534-SDD-RLB, 2015 WL 5474290, at *14 (M.D. La. Sept. 16, 2015).

96   *Sebelius,* 567 U.S. at 582–85.

B. Race to the Top

The second method with which the Obama Administration chose to incentivize states into adopting Common Core Standards was through RTTT.[97] RTTT was a grant program funded by the omnibus recession legislation in 2009.[98] The omnibus legislation gave broad discretion to the Department of Education to create a state incentive grant program,[99] and it was through this authorization that RTTT was born.[100] RTTT awarded grants on a competitive basis, and its stated purposes ranged from achieving improvement in student outcomes to ensuring student preparation for success in college and careers.[101] States were graded out of 500 possible points, and those that earned the most points received grants.[102] A state could win up to 40 points by adopting common standards (of which CCSS was the only readily available set of standards) to achieve these goals.[103] While receiving 40 points was not dispositive, all states that received RTTT funding had in fact adopted the Common Core.[104]

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97   *See Jindal*, 2015 WL 5474290, at *2.

98   Race to the Top Fund, 74 Fed. Reg. 59688, 59688 (Nov. 18, 2009).

99   American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 14006(b), 124 Stat. 115, 283 (2009) ("The Secretary shall determine which States receive grants under this section, and the amount of those grants, on the basis of information provided in State applications under section 14005 and such other criteria as the Secretary determines appropriate, which may include a State's need for assistance to help meet the objective of paragraphs (2), (3), (4), and (5) of section 14005(d)."); *see also id.* § 14005(d) (stating as its objectives (1) achieving equity in teacher distribution; (2) improving the collection of data, standards and assessments; and (3) supporting struggling schools).

100   Race to the Top Fund, 74 Fed. Reg. at 56988.

101   *Id.* A full list of purposes of the program include: "encourage and reward States that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in four core education reform areas- (a) [a]dopting internationally benchmarked standards and assessments that prepare students for success in college and the workplace; (b) [b]uilding data systems that measure student success and inform teachers and principals about how they can improve their practices; (c) [i]ncreasing teacher and principal effectiveness and achieving equity in their distribution; and (d) [t]urning around our lowest-achieving schools." *Id.*

102   *See* Grover J. "Russ" Whitehurst, *Did Congress Authorize Race to the Top?* Brookings (Apr. 27 2010), https://www.brookings.edu/opinions/did-congress-authorize-race-to-the-top/.

103   *See id.*

104   Jindal v. U.S. Dep't of Educ., No. 14-534-SDD-RLB, 2015 WL 5474290, at *7

In his lawsuit against the Department of Education, Governor Jindal argued that because every state that received funding adopted the Common Core, RTTT violated the Education Acts' prohibition of federal control over curriculum.[105] Jindal claimed that RTTT's award of bonus points for adopting the Common Core Standards was, in reality, an effort by the federal government to prescribe a curriculum.[106] The *Jindal* court disagreed, stating that while standards inform curriculum, they are not themselves curriculum.[107] The court drew the distinction between "standards" and "curriculum" by opining that "content standards represent the 'goals' whereas curriculum represents the 'means' of achieving the goals."[108] For example, CCSS sets out a standard of students being able to "add and subtract within 5" after completing Kindergarten.[109] As the court explained, the above standard does not set out *how* students go about understanding that material; "[s]imply put, if a [Local Education Agency (LEA)] wishes to teach math skills by counting fingers and toes or by using flash cards or some other means, such is the sole choice and prerogative of the LEA."[110]

The court also rejected Jindal's argument that the grant program was unduly coercive under the Tenth Amendment, and that the Department of Education exceeded its discretionary authority in creating the qualifications for the grant.[111] Citing *Dole*, the court noted that it is within the government's spending power to create funding incentives for states to act in accordance with federal policies.[112] The fact that Louisiana voluntarily opted into the Common Core in order to receive funding weighed heavily against the notion that the program was coercive.[113] In addition, the court noted that the Common Core Standards, while the only eligible standards "in the pipeline" when states were applying for RTTT funding, were not

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(M.D. La. Sept. 16, 2015); *see* Whitehurst, *supra* note 102.

105   *See generally id.* at *6–7.
106   *Id.* at *6.
107   *Id.* at *7.
108   *Id.* at *8.
109   Common Core Standards Initiative, Common Core Standards for Mathematics 11 (2010), http://www.corestandards.org/wp-content/uploads/Math_Standards.pdf.
110   *Jindal*, 2015 WL 5474290, at *8.
111   *See id.* at *5, *12 n.110.
112   *Id.* at 10; *See* South Dakota v. Dole, 483 U.S. 203, 211-12 (1987) (holding that conditioning highway funds to states on the basis of those states adopting a drinking age of 21 was constitutional).
113   *Jindal*, 2015 WL 5474290, at *11.

mandated by the grant and that a state could have adopted any common standards.[114] The court reasoned that following the path of least resistance (i.e., adopting standards already in existence) does not mean that a state was coerced into using that path.[115]

Any sort of comprehensive sex education grant program would likely pass the coercion test, as it does not take away funding from states, but rather gives states an opportunity to obtain extra funds. In *Dole,* the funds that states did not receive for failing to adopt the federal policy consisted of less than 0.5% of their total budget.[116] If a grant program was introduced with the same or similar funding ratios as Race to the Top, then noncompliance with the grant would only amount to losing 0.45% of a state budget, almost identical to the law deemed permissible by the *Dole* court.[117]

The most likely avenue for incentivizing states to adopt comprehensive sex education standards is similar to how RTTT grants incentivized states to adopt the Common Core. If broad discretionary funding is once again given to the Department of Education, then a competitive grant program that focuses on healthy and safe relationships could serve as a catalyst for national sex education standards. While RTTT certainly drew its critics, there remains little doubt over its effectiveness.[118] A final report by the nonprofit EducationNext went on to describe the results of RTTT:

> [E]vidence suggests that by strategically deploying funds to cash-strapped states and massively increasing the public profile of a controversial set of education policies, the president managed to stimulate reforms that had stalled in state legislatures, stood no chance of enactment in Congress, and could not be

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114   *Id.*

115   *Id.*

116   Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581–82 (2012).

117   Using Rhode Island as an example. *See* Joseph Conaty, Race to the Top Award Letter (Sept. 10, 2010), https://www2.ed.gov/programs/racetothetop/phase2-awards/rhode-island.pdf (9,375,000 annual award); *Rhode Island State Budget (2010-2011),* BALLOTPEDIA (last updated 2011), https://ballotpedia.org/Rhode_Island_state_budget_(2010-2011) (2.1 billion spent on education).

118   *See generally* William G. Howell, *Results of Obama's Race to the Top,* EDUCATIONNEXT (Fall 2015), https://educationnext.org/files/ednext_XV_4_howell.pdf.

accomplished via unilateral action.[119]

In fact, between 2001 and 2008, states had only enacted about ten percent of education policies that were later encouraged by RTTT.[120] Between 2009 when RTTT was announced and 2014 when the program ended, states enacted 68% of those same education policies.[121] That five-year span shows just how effective a targeted funding program can be in motivating states to adopt policies. However, even states that never applied for the grants enacted 56% of RTTT policies.[122] This might be because the weight of the government at least makes states discuss the policies, which itself can lead to their adoption in many scenarios. Roughly 81% of state legislators stated that RTTT had at least some impact on the education policy deliberations in their state, with about 33% of state legislators stating that its impact was "massive" or "big."[123]

Many schools cannot afford to turn down federal money in any capacity, as the last decade has seen a slash in state funding compared to pre-recession numbers.[124] Providing states with extra money contingent on the adoption of certain standards has been shown to work in the past with RTTT, and courts have held that it is within the federal government's powers to do so. The main drawback to this solution is that it requires that additional dollars go to education. However, relative to the Department of Education's total budget, a small amount of money could go a long way. Consider that RTTT received around $6.4 billion over the course of five years, money which was used to help overhaul many states' education systems.[125] In 2017, the discretionary funding awarded to the Department of Education was $69.4 billion.[126] If that budget is

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119   *Id.* at 58.

120   *Id.* at 62.

121   *Id.*

122   *Id.* at 63 (88% of policies were enacted in states which did receive a grant).

123   *Id.* at 65.

124   Michael Leachman et al., *A Punishing Decade for School Funding*, Center on Budget & Pol'y Priorities (Nov. 29, 2017), https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding.

125   Lauren Camera, *Federal Education Funding: Where does the Money Go?*, U.S. News (Jan. 14, 2016) https://www.usnews.com/news/blogs/data-mine/2016/01/14/federal-education-funding-where-does-the-money-go; *see generally* Howell, *supra* note 118 (RTTT resulted in many states adopting those policies).

126   *Budget Fact Sheet*, USDOE (2017) https://www2.ed.gov/about/overview/budget/budget17/budget-factsheet.pdf.

replicated over 5 years, then $6.4 billion represents barely more than one percent of the budget.[127]

While it may make sense financially, a grant program faces the issue of what the federal government could tie the grants to that would both create better sex education policies at the state level and avoid prescribing a curriculum. The government would have to condition the receipt of these funds on the adoption of standards, which are broad in nature. For example, in RTTT, the funds were not explicitly tied to the Common Core, but rather to "common standards" that were the result of participating in a "consortium of States."[128] It is unclear, however, what degree of specificity the government can permissibly use in establishing standards. While the federal government never required states to adopt CCSS, the court in *Jindal* stated that even if it had, that would not have amounted to an impermissible federally prescribed curriculum.[129]

V. THE SEX EDUCATION EQUIVALENT TO RACE TO THE TOP

The most effective way to get schools to adopt a uniform, comprehensive sex education program would be to dictate to states what learning outcomes their curriculum must address through a grant program. The standards would be grade appropriate and states would have the power to determine the means of making sure students achieved those outcomes. Much like how those outside the federal government, such as governors and school officers, developed the Common Core Standards,[130] non-profits have developed the National Sex Education Standards (NSES), which provide detailed learning outcomes for each grade through a comprehensive sex education lens.[131] The goal of the standards is to provide clear

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127 69.4x5=347. 6.4/347= .018.

128 *See* Dep't of Educ., Scoring Rubric 2, 7 https://www2.ed.gov/programs/racetothetop/scoringrubric.pdf (last visited Sept. 19, 2019).

129 *Id.* at *8 ("The weight of reliable evidence established that content standards and aligned assessments represent the skills to be mastered and/or concepts to be learned by a student while the curriculum is made up of 'how' teachers will go about conveying information that produces mastery. Even if the Court agreed with Jindal's assertion that the DOE ostensibly mandates the adoption of the CCSS, there is no evidence in the record establishing that the CCSS is the DOE's forced choice of a particular curriculum. Simply put, if a LEA wishes to teach math skills by counting fingers and toes or by using flash cards or some other means, such is the sole choice and prerogative of the [Local Education Agency].").

130 *Development Process, supra* note 83.

131 *What is FoSE,* Future of Sex Educ., http://www.futureofsexed.org/about.

expectations about what students should know at the end of certain grade levels (second, fifth, eighth, and twelfth).[132]

Like CCSS, NSES does not contain detailed, day-to-day curriculum, but instead provides broad learning outcomes.[133] For example, the Common Core Standards provide that, by the end of the second grade, "students should be able to explain how images in an informational text contribute to its meaning."[134] Similarly, NSES states as one of its learning expectations that, by the end of the second grade, students should be able to "[d]escribe the characteristics of a friend."[135] The Common Core's standard for sixth-graders states that students "should be able to build a coherent analysis of a text, citing evidence to back up their arguments."[136] Likewise, pursuant to NSES, students need to be able to "[d]efine sexual consent and explain its implications for sexual decision-making" at the end of 12th grade.[137] CCSS and NSES are legally similar in that neither should be construed as a curriculum; and if courts follow the dicta in *Jindal*,[138] it may be permissible for the government to explicitly tie state education funding to the adoption of NSES.

To make such a grant program more palatable to the states, the federal government could potentially tie funding to the number of NSES outcomes a state adopts. This would allow states that do not want to teach certain topics to opt out without forfeiting their eligibility for at least some federal funding. For example, if schools do not want to teach about the difference between gender identity, gender expression, and sexual orientation (seven states have laws

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html (last visited June 29, 2019) (The nonprofits include: Advocates for Youth, Answer, and the Sexuality Information and Education Council of the U.S.).

132   FoSE, *supra* note 36, at 9, 11.
133   *See generally id.*; Catherine Gewertz, *The Common Core Explained*, Educ. Week (Sept. 30, 2015), https://www.edweek.org/ew/issues/common-core-state-standards/?cmp=cpc-goog-ew-topics&ccid=topics&ccag=common+core&cckw=common%20core%20standards&cccv=content+ad&gclid=EAIaIQobChMI0_HJ08Pf3wIV4f_jBx3bdAN5EAAYASAAEgLDZfD_BwE.
134   Gewertz, *supra* note 133.
135   FoSE, *supra* note 36, at 12.
136   Gewertz, *supra* note 133.
137   FoSE, *supra* note 36, at 33.
138   Jindal v. U.S. Dep't of Educ., No. 14-534-SDD-RLB, 2015 WL 5474290, at *7 (M.D. La. Sept. 16, 2015) ("However, even if the Court assumes that the ONLY way a State could succeed in its quest for federal RTT dollars was to adopt the CCSS and aligned assessments, the evidence presented does not demonstrate that the Plaintiff is substantially likely to prove that the CCSS and aligned assessments constitute curriculum or programs of instruction.").

prohibiting the inclusion of LGBTQ topics in schools),[139] they could still attain some funding for teaching other topics, such as safe and healthy relationships. The federal government could even weigh the adoption of certain outcomes differently, giving a higher percentage of overall money to outcomes that the federal government and citizens feel most strongly about (such as the ability to define consent).

The dicta in *Jindal* explains that even if the Department of Education required adoption of CCSS, the standards would not violate education laws because they cannot be considered curriculum.[140] However, the opinion seemingly contradicts this point when it discusses a prohibition on the approval of content standards by the federal government.[141] In that part of the opinion, it seemed vital to the *Jindal* court that states had an option to choose which standards they would adopt to satisfy the grant's goals.[142] Therefore, if courts push back on the idea of assigning a particular group of content standards to states, the federal government could create a broader directive by allowing states more choices in what standards they ultimately adopt. In RTTT, the government simply required states to create standards that were common to other states.[143] When thinking about sex education in a broad sense, the government could require states to create sex education programs that provide medically or scientifically accurate information and that are common to a significant number of states.[144] A potential problem with this approach is states that refuse to instruct on sex education topics, like contraceptives, could band together to come up with their own standards—ones that do not provide a comprehensive sex education program—while still satisfying the requirements of the grant.

Of course, as this would be a competitive grant, the federal government would not be required to give funding to states who band together in this way but whose standards do not align with

139 *State Totals Scorecard*, HRC.org (2018), https://assets2.hrc. org/files/assets/resources/SEI-2018-NationalScorecard.pdf?_ ga=2.100417182.1853828138.1554138580-811607147.1554138580; FoSE, *supra* note 36, at 26 (learning outcome for 8th graders).

140 *Jindal*, 2015 WL 5474290, at *7, *8.

141 *See id.* at *6, *9.

142 *Id.* at *9.

143 *See id.* at *10.

144 As noted earlier, only 13 states currently require medically accurate information in their sex education programs. *See Sex and HIV Education*, *supra* note 26.

other federal goals. For example, RTTT had four broad goals of: (1) adopting international bench marks; (2) building data systems, (3) increasing teacher effectiveness, and (4) turning around low achieving schools.[145] In creating a comprehensive sex education grant program, the government would likely remain able to provide some broad goals to ensure states could not circumvent the purpose of the grant by simply banding together to resist it. Some potential goals could be reducing teen dating violence or creating sexual harassment and assault awareness. While litigation surrounding the federal government's role in inducing states to adopt certain education policies is scarce, portions of the *Jindal* opinion suggest that the federal government has some authority to indirectly mold curriculum through content standards.[146]

VI. CONCLUSION

Issues surrounding sexual assault and harassment dominate today's headlines.[147] While institutions of higher education have taken a leading role in facilitating conversations about these issues,[148] students should be engaged in these conversations before entering college. Almost half of high school students are engaging in sexual conduct,[149] and only 13 states require medically accurate information in sex education.[150] A 2019 pilot study on the status of sex education in the United States found that only two of the 18 states surveyed explicitly mention sexual consent in their standards.[151] The knowledge gap is clear. Though states would be acting within their constitutional authority in teaching children about sex and dating

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145   Race to the Top Fund, 74 Fed. Reg. at 56988.

146   *See generally Jindal*, 2015 WL 5474290.

147   *See, e.g.*, Chris Baynes, *Judge Who Gave Lenient Sentence to Sex Attacker Brock Turner Fired from Job Coaching Tennis to Schoolgirls*, Indep. (Sept. 13, 2019), https://www.independent.co.uk/news/world/americas/brock-turner-judge-fired-tennis-coach-schoolgirls-aaron-persky-.a9103661.html; Jessica Ravitz, *Their Sexual Assaults Happened Decades Ago. Now Women See Kavanaugh's Accusers Come Forward and Wonder If They Could do the Same*, CNN (Sept. 27, 2018), https://www.cnn.com/2018/09/26/health/sexual-assault-reporting-kavanaugh/index.html.

148   *See* Howard, *supra* note 13.

149   *Fewer U.S. High School Students Having Sex, Using Drugs, supra* note 23.

150   *Sex and HIV Education, supra* note 26.

151   Malachi Willis et al., *Sexual Consent in K-12 Sex Education: An Analysis of Current Health Education Standards in the United States*, 19 Sex Educ. 226, 226 (2019), https://www.tandfonline.com/doi/pdf/10.1080/14681811.2018.1510769?needAccess=true.

violence, many have opted not to. This neglect of state duty to educate children on subjects so important to their health and safety leaves the door open for a federal solution.

The Common Core attempted to address education inequalities in the United States. However, the need for the federal government to incentivize states to adopt common sex education standards is arguably more urgent than the need for the federal government to develop common math standards. In implementing a grant program, the federal government would place itself in a position to dramatically decrease the rate of sexual assault among young Americans. The federal government used its funding powers to influence state policy regarding academic standards with the Common Core; now it is time it does so to promote comprehensive sex education.

A QUALITATIVE STUDY OF THE PROMISES AND PERILS OF MEDICAL–LEGAL PARTNERSHIPS†

Jessica Mantel* and Leah Fowler**

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I.   INTRODUCTION

Efforts to better individuals' health and reduce health disparities have traditionally focused on improving both access to high-quality health care and personal health behaviors. A large body of literature, however, shows that social, economic, and environmental factors also significantly impact health.[1] Growing recognition of the influence of these variables on wellbeing has resulted in the health care system moving beyond the conventional biomedical model of care to one that integrates the biomedical and social determinants perspectives. To address the so-called social determinants of health, many providers have added social workers, community health workers, and patient navigators[2] to their health care teams.[3] A more complete approach to health care, however, also requires addressing those social determinants of health with legal underpinnings, especially for low income populations and other vulnerable groups.

Low income individuals and other vulnerable populations often face legal issues that adversely impact their health. For example, housing code violations may cause or exacerbate respiratory conditions, domestic violence may lead to repeated emergency room visits, and those denied public assistance may lack funding for needed medications or healthy foods.[4] Medical-legal partnerships (MLPs)

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1   *See* David A. Asch & Kevin G. Volpp, *What Business Are We In? The Emergence of Health as the Business of Health Care*, 367 New Eng. J. Med. 888, 888 (2012) ("[A]n enormous body of literature supports the view that differences in health are determined as much by the social circumstances that underlie them as by the biologic processes that mediate them."); *see also* John V. Jacobi, *Multiple Medicaid Missions: Targeting, Universalism, or Both?*, 15 Yale J. Health Pol'y L. & Ethics 89, 97 (2015) ("[Nonmedical factors] can be more powerfully determinative of the health of a population than the delivery of traditional health services.").

2   Patient navigators help "guide a patient through the health care system," helping patients make medical appointments, communicate with their health care providers, and obtain financial, legal, and social support. National Institutes of Health, National Cancer Institute, NCI Dictionary of Cancer Terms, https://www.cancer.gov/publications/ dictionaries/cancer-terms/def/patient-navigator (defining patient navigator).

3   *The Need*, National Center for Medical Legal Partnership, https:// medical-leglpartnership.org/need/ (stating that as the health care workforce seeks to tackle social problems, "patient navigators, social workers, and others have become fixtures on the health care team").

4   *See* Bharath Krishnamurthy et al., *What We Know and Need to Know about Medical-Legal Partnership*, 67 S.C. L. Rev. 377, 383 (2016) (showing that several studies have found that MLP programs have reduced emergency department visits

allow the health care system to address health-harming legal needs (HHLNs) by integrating legal services with health care services.[5]

An MLP is a partnership between a health care provider and a legal services provider. The MLP's medical partner identifies patients with HHLNs and then connects them to legal services by referring them to the legal partner. MLP legal partners provide a range of legal services that support patient-clients' access to available government services and legal protections.[6] For example, MLP attorneys may counsel those who have been denied health insurance coverage or public benefits such as Medicaid and Social Security Disability Income (SSDI).[7] MLP attorneys also help individuals enforce their legal rights under anti-discrimination, housing, employment, and education laws.[8] MLP attorneys may obtain protective orders against abusive partners or assist with family law and estate planning matters such as divorce, guardianship, and powers of attorney.[9] Some MLP attorneys also provide legal aid to individuals with immigration and creditor/debtor issues.[10] In addition to providing legal services to referred patients, the legal partner may train the medical partner's support staff in using available legal resources,[11] such as how to effectively navigate the application and appeals process for public

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for asthma patients following housing interventions, improved pregnancy outcomes, and lowered rates of abuse); *see also How Legal Services Help the Health Care System Address Social Needs*, National Center for Medical Legal Partnership, https://medical-legalpartnership.org/response/i-help/ [hereinafter *How Legal Services Help*].

5   Omar Martinez et al., *Bridging Health Disparity Gaps through the Use of Medical Legal Partnerships in Patient Care: A Systematic Review*, 45 J. of L., Med. & Ethics 260, 260 (2017).

6   Caitlyn Weiss & Jonathan Pyle, *Addressing the Social Determinants of Health by Placing Legal Advocates in Community Health Centers*, 28 Soc. Innovations J. (2016), http://www.socialinnovationsjournal.org/social-issues/95-health/2184-addressing-the-social-determinants-of-health-by-placing-legal-advocates-in-community-health-centers.

7   U.S. Dep't. of Just., Civ. Legal Aid 101, https://www.justice.gov/atj/civil-legal-aid-101 (last updated Oct. 21, 2014); How Legal Services Help, *supra* note 4.

8   *See* U.S. Dep't of Just., *supra* note 7.

9   *See id.*

10   *See id; see also Directory of Medical-Legal Partnership Programs*, American Bar Association, https://www.americanbar.org/groups/probono_public_service/projects_awards/medical_legal_partnerships_pro_bono_project/directory_of_programs/ (last visited Nov. 19, 2019).

11   *See* Krishnamurthy, *supra* note 4, at 379.

benefits like food stamps.[12]

MLPs' structures and operations vary tremendously. In some MLPs, the medical and legal partners have limited interaction beyond the initial referral of patients with HHLNs.[13] At the other end of the spectrum lie MLPs that integrate the provision of legal services with other clinical and nonclinical services offered to patients, with the attorney working collaboratively with clinicians and staff as part of a coordinated, interdisciplinary team of professionals.[14] MLPs also vary across other aspects of their operations, such as their processes for screening for HHLNs[15] and their use of electronic health records (EHR) systems for sharing patient-client information.[16]

The attorneys, physicians, social workers, and other professionals participating in MLPs can offer instructive insights to those developing new MLPs or restructuring existing partnerships. Missing from the MLP literature, however, are empirical studies that describe the experiences of MLP professionals operating under different structures and processes. This Article fills this gap by presenting key findings of qualitative interviews with a range of professionals participating in MLPs. Informed by the frontline experiences of these professionals, the Article provides a richer understanding of some of the strategic decision points facing those establishing or modifying an MLP, including the factors that influence a medical and legal partners' operational and structural decisions. The Article also highlights concerns and difficulties MLPs encounter and various strategies for overcoming some of these challenges.

In addition to providing guidance to both existing MLPs and those forming new MLPs, our findings illuminate the debate on whether current legal and ethical rules—rules developed for a world where medical and legal professions operate in separate silos—make

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12   *See id.* at 380 (presenting a table with potential MLP interventions, such as "[s]ecure housing subsidies, protect against utility shut-off" and "[a]ppeal denial of food stamps, health insurance").

13   *See* Jessica Mantel & Renee Knake, *Legal and Ethical Impediments to Data Sharing and Integration Among Medical Legal Partnership Participants,* 27 ANNALS OF HEALTH L. 183, 188 (2018).

14   *See id.*

15   *See* Jennifer Trott & Marsha Regenstein, *Screening for Health-Harming Legal Needs,* NATIONAL CENTER FOR MEDICAL LEGAL PARTNERSHIP 1 (2016), https://medical-legalpartnership.org/wp-content/uploads/2016/12/Screening-for-Health-Harming-Legal-Needs.pdf.

16   *See* JANE HYATT THORPE ET AL., INFORMATION SHARING IN MEDICAL-LEGAL PARTNERSHIPS: FOUNDATIONAL CONCEPTS AND RESOURCES 7 (2017).

sense for settings that integrate health care and legal services. Our future research will explore this important normative issue, as well as provide more particularized findings on some of the promises and perils of the MLP model.

This Article proceeds in three parts. Part I describes our research study, including who we interviewed and the topics about which we inquired. Part II highlights key decisions facing those forming MLPs or modifying existing MLPs, namely the degree of integration between the medical and legal partners, methods for identifying patients with HHLNs and referring them for legal services, and the process for sharing patient-client information between the medical and legal partners. For each issue, Part II highlights the different approaches taken by MLPs and factors shaping an MLP's choice among alternative options. Part III then examines several challenges confronting MLPs—building support for the MLP among the medical partner's leadership and staff, generating data that helps the MLP secure long-term financing and continuously improve its services, and successfully connecting patients with HHLNs to legal services—and describes potential strategies for overcoming these difficulties.

II. THE RESEARCH STUDY

In the fall of 2018 and winter of 2019, we conducted 25 phone interviews with 31 professionals participating in MLPs.[17] These professionals included MLP attorneys involved in both management and direct patient-client representation, physicians, social workers, patient navigators, hospital general counsel, and administrators. Interviewees represented a diverse group of MLPs from all regions of the United States. Their partnerships operated in large cities as well as rural communities and towns of fewer than 60,000 people. The MLPs served a broad range of patient populations' newborns and their families, low income patients with chronic conditions or complex diseases (e.g., HIV, sickle cell anemia), patients with mental health or substance abuse problems, pregnant women, and communities with large immigrant populations. Some focused exclusively on one population while others served diverse patient populations or operated across multiple clinical sites. Given the diversity in populations served, the MLPs addressed a wide range

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17   This research was done with approval from the University of Houston Institutional Review Board.

of HHLNs, including, but not limited to, housing and utilities issues, access to public benefits, immigration issues, expungement of criminal records, employment discrimination, domestic violence, specialized education services, custody and guardianship issues, and estate planning. Areas of representation were limited depending on funding structure,[18] the terms of the arrangement between the medical and legal partners, and the MLP attorney's expertise. With limited exceptions, the MLPs do not accept fee-generating cases or handle malpractice matters. For legal matters beyond the scope of the legal partner's services, MLP attorneys typically referred a patient-client to other attorneys.

The MLPs' medical partners represented a range of provider types and clinical settings. Some have long-term relationships with their patients while others operate in emergency room or inpatient settings with unscheduled or temporary treatment relationships. Other clinical partners treat patients on an interim basis, enrolling patients for intensive, highly-coordinated care for a short time period before transitioning them to more traditional care settings. The medical partners included federally qualified health centers (FQHCs) and other primary care settings, emergency departments, inpatient hospital departments, and rehabilitative settings. The nature of these providers' practices also varied. Some providers offer highly integrated care that address a broad range of clinical and nonclinical needs, utilizing a diverse team of health care professionals and nonclinicians to do so. These providers often assigned patients, or families to patient navigators or case managers, who both serve as liaisons between the patient and other members of the care team and coordinate the clinical and nonclinical services provided to patients. In contrast, other providers operated in less integrated environments or offered a narrower range of clinical and nonclinical services.

The type of legal services provided also varied across the MLPs we interviewed. While the majority of MLP attorneys worked in legal aid organizations, some were based in law school clinics or

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18   Certain statutory and regulatory restrictions are present in all legal partners funded by the Legal Services Corporation (LSC) limiting the type of cases and clients eligible for representation. *See generally* 45 C.F.R. § 1609.2(a) (2018) (prohibiting fee generating cases); 45 C.F.R § 1626 (2018) (restricting legal assistance to aliens); 45 C.F.R § 1613 (2018) (restricting legal assistance with respect to criminal proceedings); and 45 C.F.R § 1611 (2018) (limiting on financial eligibility).

employed directly by the medical provider. Some MLPs also utilized the services of law students and/or pro bono attorneys, though none of the MLPs interviewed relied solely on these sources of legal representation.

Our interviews explored several aspects of MLPs' activities.[19] Interviewees were asked to describe the patient population served by their MLP and their processes for screening patients for HHLNs. We also inquired about their MLPs' data sharing practices, including the type of patient-client information shared between the medical and legal partners, the manner in which partners shared patient-client information, and the process for obtaining patient-client consent/ authorization. In addition, interviewees discussed the degree to which their MLP integrates legal services with clinical and other nonclinical services, and the benefits and challenges of integration. Interviewees also were asked to describe any other challenges encountered by their MLP, including cultural barriers to providers partnering with attorneys, difficulties securing funding for the MLP, and patient-client attrition. Interviewees also discussed whether their MLP conducts research on the MLP's impact on patient health, health care costs, and other outcomes. Finally, many interviewees shared strategies adopted by their MLPs for overcoming challenges facing their MLP.

Our analysis is subject to several limitations. The sample size of this study is small and may not be representative of the full range of current MLPs, particularly given the highly-customized nature of MLPs. Moreover, the individuals we interviewed are overwhelmingly supportive of MLPs' mission, potentially creating bias in the results. Additionally, our interviewees disproportionately represented the legal side, and consequently the perspective of physicians and other members of the clinical team are underrepresented in our data. Despite these limitations, several common themes and best practices emerged, which will be discussed below.

III. MLP'S STRUCTURE AND OPERATIONS: KEY DECISIONS POINTS

In the MLP world, one size clearly does not fit all. The operational choices made by medical and legal partners depend on a range of factors, including each partner's culture, values, and resources. In this Part we describe some of the key structural and

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19   Interview Guide on file with the authors.

operational decisions each MLP must make and the factors that influence an MLP's choice among alternative options. Specifically, this Part discusses how MLPs differ on the degree of integration between the medical and legal partners, their processes for referring patients with HHLNs to legal services, and the types of patient-client information shared between the medical and legal partners and the manner for doing so.

A. Degree of Integration

MLPs vary in the degree to which the partners integrate their medical, social, and legal services.[20] Under what we refer to as the referral model, the medical partner connects patients with HHLNs to the legal partner, but limits any subsequent interaction with MLP attorneys to providing supporting documentation for medical expertise on legal cases with a medical component.[21] Apart from this assistance on legal matters with a medical component, the medical partner and legal partner operate in largely separate silos. In contrast, under the highly-integrated MLP model, the MLP attorney works collaboratively with the medical partner's clinicians and staff to jointly address patients' clinical and non-clinical needs.[22] For example, the MLP attorney may round with clinicians or attend interdisciplinary care team meetings, with participants collectively discussing an individual's clinical, social, and legal needs. An MLP attorney also may confer informally with other care team members or participate in joint visits to a patient's home.[23] Among the MLPs we interviewed, some followed the referral model, some the highly-integrated model, and others fell somewhere in-between. Below we discuss similarities and differences between the two models and considerations that guide a partnership's choice of which model to adopt.

Interviewees reported that both the referral and highly-integrated models promote better and more efficient communications between attorneys and clinicians as compared with a traditional legal

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20   *See* THORPE ET AL., *supra* note 16, at 5–6.

21   For example, a clinician may provide a letter supporting a disabled minor's claim for an Individualized Education Plan under the Individuals with Disabilities Education Act.

22   *See* Mantel & Knake, *supra* note 13, at 188–89 (describing the integrated, multi-disciplinary MLP model).

23   *See* Interview with Attorneys, Medical-Legal Partnership (on file with authors) (describing the various ways in which MLP attorneys and other care team members collaborate).

practice, particularly in legal matters with a medical component.[24] MLP attorneys who participate in highly-integrated MLPs, however, highlighted additional ways in which collaborating with other care team members enhances their delivery of legal services. First, the MLP attorneys frequently rely on the medical partner's staff to gather supporting documentation or assist the patient-client in doing so. For example, if the MLP attorney needs the patient-client's electric bill or information about their work experience, a social worker or community health worker may help the patient-client gather the information.[25] Second, if the MLP attorney has been unable to connect with a patient-client, the attorney will enlist the assistance of other care team members who may be in contact with the individual or have ideas on to how to reach them.[26] Finally, other care team members can give the MLP attorney a fuller understanding of the patient's needs and challenges, information that then shapes the attorney's expectations and interactions with the patient-client. For example, a physician we interviewed commented that alerting the MLP attorney about a patient-client's agoraphobia helped the attorney understand that the patient was unable to travel to the attorney's office and needed to be seen in her home.[27] Similarly, a patient navigator explained that she lets the MLP attorney know when a patient-client is dealing with another crisis and thus unable

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24   Attorneys routinely call upon physicians and other clinicians to provide evidence or expertise in support of legal matters with a medical component. Several MLP attorneys commented that the clinicians affiliated with an MLP are more likely than their non-MLP colleagues to provide prompt assistance when requested to do so. As explained by one MLP attorney we interviewed:

> I will say, just in my personal experience, I was doing special ed[ucation] work even before I joined our MLP and was often trying to track down physicians of my clients' children, and had just the hardest time doing that. It was such a difference when I joined our MLP and had the buy-in from physicians. It was so much easier to communicate with them, they would get back to me. . . . It was a game changer in practicing special ed[ucation] law.

Interview with Attorney, Medical-Legal Partnership (on file with authors).

25   *See* Interview with Physician, Medical-Legal Partnership (on file with authors) (explaining how the medical partner utilizes the relationship with the patient to support the MLP attorney, such as working with the patient to access an electric bill or information about their job).

26   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) ("We go back to the medical team and try to come-up with other ways to find the client and to connect with them.").

27   *See* Interview with Physician, Medical-Legal Partnership (on file with authors).

to deal with any legal issues.[28] Information of this type supports MLP attorneys tailoring their provision of legal services to where the patient-client is at, and not where the attorney assumes them to be.

Collaboration between the MLP attorney and other care team members not only improves the attorney-client relationship, but also supports other aspects of the MLP's activities. Importantly, MLP attorneys who participate in rounds or care team meetings commented that those discussions facilitate their identifying HHLNs overlooked by the medical partner's clinicians and staff.[29] These discussions also provide an opportunity for the attorney to offer specific guidance to other care team members about HHLNs impacting patients' health.[30] Likewise, "trading information back and forth" between the MLP attorney and other care team members facilitates team-based problem-solving that capitalizes on the diverse skills across the care team.[31] Finally, in more integrated care environments, the

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28   As explained by the patient navigator,

   [S]ometimes when you have the mentality as a [lawyer], you only thinking about what is the need, what is supposed to happen. . . . But sometimes we kind of slow down and meet with the family. . . . I think it's good to let the lawyer know that now they kind of have to step out away from the family. Sometimes I have to let them know, you know, Mom is having this emotional crisis right now. She's not ready to talk. Can you give us a little bit of time? And like they understand now. Before it was like, we're calling [the patient-client], no answer.

   Interview with Patient Navigator, Medical-Legal Partnership (on file with authors).

29   As one MLP attorney we interviewed commented, "[care team] meetings are a really good source of information that can help me identify any needs that might have been missed . . . ." Another MLP attorney similarly commented that she attends care team meetings so she can "identify legal issues that the team's not necessarily identifying . . . ." Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

30   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) (commenting that when she attends team meetings, "[w]ithin those conversations there are often legal issues that we're discussing or maybe that [the case manager's] handing over to us. I'm also there to identify legal issues that the team's not necessarily identifying or just to chime in as needed.").

31   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) ("[W]e think that if we're trading information back and forth . . . it feeds what everybody means to do, what role everybody needs to play."). Echoing this comment, another MLP attorney stated "We are committed to an integrated care model and how are we going to improve the communication and the use of everyone's expertise in a more efficient and comprehensive way. . . . [W]e were always consulting on each other's cases and identifying problems that needed to be solved by a different licensure." Interview with Attorney, Medical-Legal Partnership (on file with authors).

information sharing between the MLP attorney and other care team members also conforms to patient expectations that their care team will broadly share information with one another,[32] sparing patients from having to repeat information to different care team members.[33]

Despite the potential advantages of greater integration, various considerations lead many partnerships to elect the referral model. Our research suggests that medical partners are more open to the highly-integrated MLP model when their clinicians and staff already work collaboratively to address patients' clinical and non-clinical needs. This integrated care model is more common in the primary care setting, where the provider generally has a continuous relationship with the patient and may coordinate care for multiple clinical conditions.[34] Clinicians and staff in these settings often view the MLP attorneys as simply an extension of the existing interdisciplinary care management team.[35] In contrast, we found that the referral model was common for MLPs based in clinical settings that do not have a long-term relationship with patients, such as inpatient hospital departments and emergency rooms.[36] Relative to

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32   As reported by an MLP attorney:
       Most of the time our clients expect and assume that there is wide sharing between their care team members. . . . I think almost never has it been a client who is saying to me, "I don't want you to tell anybody this. I'm going to tell you, but don't tell my doctor or don't tell my behavioral health person or whatever." It's usually the other way around. Like, I'm saying, "I haven't told anyone." They're like, "Why not?"
       Interview with Attorney, Medical-Legal Partnership (on file with authors).
33   As explained by an MLP attorney from a highly-integrated care setting, "some patients really embrace it as they enjoy the team-based approach where all the information is being shared and they like not having to tell their story again and again to different people." Interview with Attorney, Medical-Legal Partnership (on file with authors).
34   For example, the MLPs we interviewed that have adopted the highly-integrated care model include primary care clinics that care for patients with complex chronic conditions, pediatric rehabilitation, and newborn patients whose families are low-income.
35   For example, a physician we interviewed who oversees a highly integrated practice commented that the legal services provided by the MLP attorney "help people do better" and therefore "in essence . . . fall[] under care management." Interview with Physician, Medical-Legal Partnership (on file with authors).
36   One group of MLP professionals with whom we conducted interviews described the challenges of program presence in emergency room settings and work with indigent or behavioral health clients as being particularly challenging given their housing and communication instability and other

the primary care setting, these shorter-term clinical settings typically address a narrower range of clinical and non-clinical needs.

Some MLPs adopt the referral model over the highly-integrated model because of unease among the medical partner's clinicians, staff, and administrators. Although providers have grown accustomed to including social workers, community health workers, and similar non-clinicians on their care teams, adding attorneys to the team is something new and therefore may cause hesitation. One physician we interviewed commented on this phenomenon: "There's definitely been cultural barriers [to adopting the highly-integrated model]. . . . [O]ur highly integrated model ruffled a lot of feathers because it's new."[37] Similarly, one attorney we interviewed noted that the attorneys in her MLP experienced "pushback at some treatment team meetings from some of the clinicians who were there," with the clinicians asking "Why are you here? Are you sure you're allowed to be listening [in] on this conversation?"[38] This resistance to integrating the MLP attorney into the care team may stem from malpractice liability concerns, a general mistrust of attorneys, or skepticism of the MLP's mission and value.[39] These concerns can be overcome by building a culture of support for the MLP as described below in Part III.A.

Finally, resource constraints on legal partners may limit their capacity to participate in the highly-integrated MLP model. Many of the MLP attorneys we interviewed commented that the demand for their legal services often exceeds their capacity.[40] Attorneys stretched thin with individual client matters simply may not have the time to participate in rounds, care team meetings, joint home visits, or other collaborative activities.[41] Moreover, some interviewees opined that rounding with clinicians can be a waste of time.[42] Other

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competing concerns. *See* Group Interview with Service Providers, Medical-Legal Partnership (on file with authors).

37   Interview with Physician, Medical-Legal Partnership (on file with authors).

38   Interview with Attorney, Medical-Legal Partnership (on file with authors).

39   *See infra* Section IV.A.

40   *See* Interviews with Attorney, Medical-Legal Partnership (on file with authors).

41   *See* Group Interview with Attorneys, Medical-Legal Partnership (on file with authors) (stating that they previously participated in team meetings, but "[t]hat has changed" because the benefits of attending were "not enough to justify us spending hours and hours a week away from casework in these meetings. . . . We just didn't find it was a great use of our time.").

42   *See* Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

attorneys observed that maintaining an office at the clinical site, while supporting greater integration between the medical and legal partners, made them too available to patient-clients and providers, which prevented them from completing legal work related to client representation.[43]

B. Connecting Patients to Legal Services

MLPs differ both in their methods for identifying patients with HHLNs and their processes for referring patients for legal services. These differences are described below.

1. Identifying Patients with Health–Harming Legal Needs

Medical providers are well-positioned to identify their patients' HHLNs. Providers' in-person, one-on-one interactions with patients facilitate detecting when social determinants adversely impact patients' health.[44] In addition, patients' trust in providers promotes sharing sensitive information about their legal needs, such as whether they are facing eviction, fearing deportation, or experiencing financial hardship or domestic violence.[45] Not surprisingly then, interviewees generally reported that responsibility for performing the initial screening for HHLNs lies with the MLP's medical partner.[46]

MLPs vary as to whether they use a screening tool to flag HHLNs, such as a questionnaire or checklist, or instead rely on free-form conversations with patients. Many medical partners that use

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43   *See* Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

44   *See* Russell L. Gruen, Steven D. Pearson & Troyen A. Brennan, *Physician-Citizens—Public Roles and Professional Obligations*, 291 J. Am. Med. Ass'n 94, 95 (2004) ("[Providers] are ideally placed, and perhaps uniquely so, to observe the health effects of socioeconomic factors or detect when such factors compromise their patients' care.").

45   *See* Marcia M. Boumil et al., *Multidisciplinary Representation of Patients: The Potential for Ethical Issues and Professional Duty Conflicts in the Medical-Legal Partnership Model*, 13 J. of Health Care L. & Pol'y 107, 111 (2010) ("Patients trust medical providers with personal information and may speak to them about financial hardships, troubled relationships, and other socioeconomic stressors. This trust facilitates the identification of health-related social problems.").

46   *See* Interviews with Attorneys, Medical-Legal Partnership (on file with authors). One MLP attorney we interviewed, however, reported that her law school-affiliated MLP has law students meet with pediatric patients' families to discuss their legal needs. *See* MLP attorney interview on file with the authors.

questionnaires or checklists to detect HHLNs simply incorporate questions related to HHLNs into their broader screening for social determinants of health.[47] One interviewee reported that her MLP's screening tool also includes an open-ended question asking whether the patient would like to speak to a lawyer. She explained that "[t]he reason we included that is because there could be reluctance on the part of the patient to actually talk about a potential legal problem with the medical worker."[48] Interviewees participating in MLPs that reject screening tools stated that the flexibility of free-form discussions allows them to gain a more nuanced understanding of patients' HHLNs. As explained by one interviewee, "[w]here some models use a form or a checklist, our view is that's only as good as that piece of paper, not necessarily as robust as having people really understand what you're looking for . . . ."[49] These MLPs instead rely on the experience of their clinicians and staff, who are trained by the MLP attorneys on spotting HHLNs.[50]

Beyond the initial screening process, most MLPs employ additional methods for identifying patients with HHLNs. Many MLPs encourage all clinicians and frontline staff to look for HHLNs and refer patients in need of legal services to the MLP attorneys.[51] In addition, rounds and care team meetings provide attending MLP attorneys an opportunity to identify HHLNs overlooked by the medical partner's clinicians and staff.[52] Nevertheless, as described above, not all MLP attorneys we interviewed favored attending rounds or care team meetings.[53] In lieu of attending care team meetings, some MLP attorneys instead review care team members' meeting notes or confer with others who attended about potential

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47   *See* Interviews with Medical-Legal Partners (on file with authors).

48   Interview with Attorney, Medical-Legal Partnership (on file with authors).

49   Interview with Attorney, Medical-Legal Partnership (on file with authors).

50   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors).

51   One MLP attorney discussed the ongoing process of encouraging physicians to screen for HHLN, noting, "We talk so much about screening in MLP, and how do we get doctors to screen for social determinants of health? Well, part of that is not about having a form filled out by a patient . . . . It's about having those intimate conversations with your patients and picking up your head, and looking them in the eye, and having those conversations. But the doctors aren't going to feel like they can do that unless someone trains them to do that." Interview with Attorney, Medical-Legal Partnership (on file with authors).

52   *See supra* note 29 and accompanying text.

53   *See supra* note 41 and accompanying text.

HHLNs.[54]

2. The Referral Process

Once a patient has been identified as having a HHLN, the medical partner will refer the patient for legal services (with written or verbal patient consent). Commentators have noted that vulnerable patient populations often have difficulty navigating the legal process and may fall through the cracks if they must affirmatively reach out to the MLP attorney.[55] For this reason, all MLPs we interviewed save one have the MLP attorney reach out to the patient rather than expecting the patient to contact the MLP attorney.[56] One MLP attorney we interviewed, however, explained that her predecessor decided to put the onus on patients to reach out to the attorney because this helped ensure that those who became clients were truly invested in their legal case.[57]

When medical partners refer patients to an MLP attorney,

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54   As one group of MLP attorneys explained:
    [W]e try to check in either at the beginning or the end of the treatment team meeting and talk to the social worker assigned to that unit to say, "Hey, did you pick-up any issues this week? Anything stick out in your mind that you want to talk about? Anything come-up that may be a good referral that you haven't yet decided on, or you haven't moved on yet, and you want to know some additional information?"
    Group Interview with Attorneys, Medical-Legal Partnership (on file with authors). An MLP attorney who attends some but not all care team meetings similarly reported that she will check the notes for any missed meetings. Interview with Attorney, Medical-Legal Partnership (on file with authors).

55   *See* Mantel & Knake, *supra* note 13, at 189.

56   As one MLP attorney explained, "given the patient population, we decided that us reaching out to the patient, rather than waiting for the patient to connect with us, made more sense." Another MLP attorney similarly commented that with "anything that is a hand-off that puts the burden on the patient to follow-up, there's attrition . . . ." Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

57   As this MLP attorney explained:
    [It is difficult] getting good buy-in for the case when the patients themselves were not identifying that this was something that they wanted help with. . . . A doctor or an attorney could think, "Well, their child needs an IEP at school, but is the parent gonna have time in their life to really address that issue?" Then, [the attorney] was finding that the case wasn't going well or [there] wasn't good engagement by the client in the case. But … if the client was the one identifying, you know, "I have time and this is an issue that's important for me to deal with right now, so I'm gonna get in contact with this MLP attorney to resolve this issue," … that [attorney] was getting better engagement.
    Interview with Attorney, Medical-Legal Partnership (on file with authors).

they typically provide the attorney with only "bare bones" information—the patient's name, contact information, and perhaps a high level description of the HHLN (e.g., patient facing eviction, patient denied SSDI, special education case).[58] Among the medical partners that use a screening tool, some will share the screening tool results with the MLP attorney.[59] None of our interviewees, however, reported that they share detailed medical information with the MLP attorney when making the initial referral, though some interviewees noted the importance of relaying medical information relevant to the timing or urgency of the HHLN, such as an advanced pregnancy.[60]

While some interviewees reported that their MLP's medical partner refers patients via a paper referral,[61] others send referrals through their Electronic Health Record (EHR).[62] Those moving from a paper to electronic process explained that the former was more cumbersome and difficult, and therefore a potential impediment to making referrals to the legal partner.[63] Those who favor sending referrals for legal services through the EHR also emphasized the convenience of aligning the process with how providers make other patient referrals, such as referrals to specialists. As one MLP attorney explained, her MLP initially used a paper process for referrals, but

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58   *See* Interviews with Medical-Legal Partners (on file with authors).

59   *See* Interviews with Medical-Legal Partners (on file with authors).

60   *See* Interview with Attorney, Medical-Legal Partner (on file with authors) ("Yes [medical information is included in the referral] if there is something relevant, so this happens a lot with Medicaid referrals, so I will often get a referral form that says, 'This patient is pregnant, and due in 5 weeks, and she's been off benefits, and she needs to get back on benefits,' so they have a Medicaid issue, but there is something that's tying it to their health concern.").

61   Paper referrals refers to a written referral delivered by hand or scanned and then delivered by fax or email. *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) ("Through all of our other [MLPs], we do have a paper referral system.")

62   Those making referrals through the EHR either send a formal referral through the EHR in the same manner as referrals made to health care specialists or use the EHR's messaging function to email the MLP attorney. *See* Interview with Attorney, Medical-Legal Partnership (on file with authors).

63   As explained by one interviewee:
      [A paper process was] more difficult for our folks who do the referrals to actually stop and take the time to write down on a piece of paper, a form and then get that off to the partner. . . . The process was cumbersome, and it just seemed like when we went to [electronic medical records] the mind set was, oh this is easier so I'll do it more often.
      Interview with Medical-Legal Partner (on file with authors).

"the providers pushed backed and said 'But for any other referral we would just put it in through the EHR, so we think we should be able to do that for referral[s] for legal services as well,' and so that's what we do."[64] Despite the potential benefits of sending referrals through the EHR, some MLPs utilize paper referrals because the medical partner's EHR system lacks the capacity to make electronic referrals for legal services or cannot limit the MLP attorney's EHR access to only the referral orders.[65] Medical partners also may be uncomfortable with giving the MLP attorney access to the EHR.[66]

Lastly, some MLPs supplement their process for identifying and referring patients with HHLNs with marketing materials that encourage self-referrals. Specifically, some MLPs advertise their services directly to patients through brochures or posters in the hopes that patients with HHLNs will reach out to the legal partner.[67] In addition to increasing the number of patients reached by the MLP, those who self-refer for legal services may be more engaged in their legal case and thus more responsive to their attorney's outreach efforts and requests for information.[68]

C. Sharing Information across the Partnership

All of the MLPs we interviewed share patient-client information between the medical and legal partners. Our research, however, reveals wide-variation regarding the type of information each partner shares with the other and the manner for doing so, including whether the MLP attorney has access to and can communicate legal information through the EHR. Various considerations influence an MLP's information sharing practices, including the degree of integration between the medical and legal partners, privacy concerns, and capacity and resource constraints.

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64   Interview with Attorney, Medical-Legal Partnership (on file with authors).

65   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) (noting that the EHR system used by the medical partner "is not as sophisticated, I'll say, or at least we've been told that they just do not have the capacity to do orders through the EMR or limit access for the MLP attorney there to see just a referral order").

66   *See infra* note 96 and accompanying text.

67   Interview with Staff Member, Medical-Legal Partnership (explaining that his hospital "started to promote [the MLP] throughout the hospital with posters and advertising so that the patients themselves are aware that this service exists, and they perhaps can then initiate [getting legal services].").

68   *Cf. supra* note 56 (commenting that those who reach out directly to an MLP attorney are more engaged in their legal case).

In addition, professionals participating in MLPs must ensure that their use and disclosure of patient-client information complies with applicable legal and ethical obligations.

The medical profession has long been committed to keeping patients' information confidential,[69] a commitment embodied in their rules of professional conduct.[70] State and federal privacy laws also obligate health care professionals to protect the confidentiality of patients' health information. At the federal level, the federal privacy regulations issued under Health Insurance Portability and Accountability Act of 1996 (HIPAA)[71] regulate the use and disclosure of patient information.[72] Known as the HIPAA Privacy Rule, these regulations allow providers to use or disclose patients' individually identifiable health information, or protected health information (PHI), without patient authorization only for designated purposes, such as treatment, payment, health care operations, and certain law-enforcement or public health activities.[73] When a provider seeks to

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69   *See* Mary Anderlik Majumder & Christi J. Guerrini, *Federal Privacy Protections: Ethical Foundations, Sources of Confusion in Clinical Medicine, and Controversies in Biomedical Research*, 18 Am. Med. Ass'n J. of Ethics 288, 288 (2016) ("The importance of privacy and confidentiality to the practice of medicine has been recognized from ancient times to the present"). This central tenet of medicine promotes the proper diagnosis and treatment of patients' conditions by encouraging patients to share sensitive information with their medical providers. *See* Mantel and Knake, *supra* note 13, at 192. Respecting patients' privacy also protects an individual's interest in controlling who learns her personal information, while protecting her from the social, economic, and legal harms that can flow from the disclosure of personal information. *See* Anderlik Majumder & Guerrini, *supra*, at 289.

70   Am. Med. Ass'n, *Code of Medical Ethics Opinion 3.2.1*, https://www.ama-assn. org/delivering-care/confidentiality (last visited Apr. 28, 2018).

71   Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–91, 110 Stat. (1936) (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

72   45 C.F.R. §§ 106.103, 164 (2018).

73   45 C.F.R. § 160.103 (2018) (stating that HIPAA protects protected health information (PHI), or all "individually identifiable health information" held or transmitted by a provider, health plan, health care clearinghouse, or their business associates. "Individually identifiable health information is information, including demographic data," that "relates to the [individual's] past, present or future physical or mental health or condition[,] the provision of health care to [the] individual[,] or the past, present or future payment for the provision of health care to [the] individual," if such information "identifies the individual[] or if there is a reasonable basis to believe [it] can be used to identify the individual."); 45 C.F.R. § 164.502(a) (2018).
      When a provider discloses PHI for a permitted purpose, he or she generally may not disclose any PHI beyond the minimum amount of information

use or disclose PHI for purposes not otherwise permitted under the HIPAA Privacy Rule, the patient (or their authorized representative) must authorize the use or disclosure in writing.[74] Although some legal commentators have argued that MLPs' activities should be considered "treatment" or "health care operations" under HIPAA, and that patient authorization therefore is not required, this interpretation remains untested.[75] For this reason, most medical providers participating in an MLP only share patient information with their legal partner if the patient authorizes the disclosure.[76]

Like health professionals, attorneys also have a professional obligation to keep client information confidential. Under the American Bar Association (ABA) Model Rule of Professional Conduct 1.6, a version of which has been adopted in all United States jurisdictions, attorneys may not disclose client information except with the client's informed consent, as necessary to represent the client and facilitate resolution of the client's legal matter, or under very narrow exceptions, such as prevention of imminent death or substantial bodily harm, or pursuant to a court order.[77] This obligation applies to any and all information revealed during and relating to legal representation, beginning when the client first seeks

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necessary to accomplish the intended purpose. 45 C.F.R. § 164.502(b) (2018). However, this limitation does not apply to disclosures from a provider to a second provider for treatment purposes or for disclosures required by state or federal law.

74   45 C.F.R. § 164.508 (2018).

75   *See* THORPE ET AL., *supra* note 16, at 11–12 (discussing "treatment" and "healthcare operations" disclosures by MLPs). The general counsel for a hospital that we interviewed agreed with this interpretation of HIPAA, commenting as follows:

> HIPAA has a big exception, as you know for treatment, payment, and hospital operations, and discharge planning . . . . There's a bell curve in how lawyers interpret HIPAA and the fear some lawyers have of HIPAA violations, and I'm at the far end of that. I think it's treatment. I think if you can articulate a reason that it's treatment, I think it is.

Interview with hospital general counsel, Medical-Legal Partnership (on file with the authors).

76   All of the individuals we interviewed indicated that their MLP's medical partner obtains written or verbal authorization prior to sharing individually identifiable information with the legal partner. *See* Interviews with Medical-Legal Partners (on file with authors)

77   *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2017) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [certain narrow exceptions].").

legal advice.[78]

Relatedly, the attorney-client privilege is an evidentiary privilege that protects certain communications between the lawyer and the client from being introduced into evidence during trial.[79] This protection, however, applies only when the attorney-client communication is made with an expectation of confidentiality.[80] Consequently, the protection is lost if the client waives confidentiality[81] or, in most instances, if the client or the client's lawyer discloses the information to a third party.[82] Both the obligation to maintain confidentiality and the attorney-client privilege promote effective legal representation by encouraging open and honest communication between attorneys and their clients.[83]

Although compliance with these legal and ethical obligations is an ever-present concern for MLP partners and their employees, as described below, the MLP community has reached different conclusions as to their specific legal and ethical obligations when sharing patient-client information.

1.   Sharing Medical Records and Supporting Medical Documentation

Outside the MLP context, attorneys frequently seek medical records and supporting letters from providers when a client's case includes a medical component. For example, an attorney may request a client's medical records to support the client's claim that they are disabled. HIPAA permits the disclosure of protected health information to the attorney as long as the patient-client has

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78   *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. (AM. BAR ASS'N 2017).

79   *See* UNIFORM RULES OF EVIDENCE ACT 5, 84 § 502(b) (2005) (protecting the disclosure of information exchanged between clients and attorneys "for the purpose of facilitating the rendition of . . . legal services").

80   *See* UNIFORM RULES OF EVIDENCE ACT 5, 84 § 502(a) (2005) (stating that the attorney-client privilege applies only to attorney-client communications made with the expectation of confidentiality).

81   *See* FED. R. EVID. 502(a).

82   *See also* Mantel and Knake, *supra* note 13, at 198.

83   MODEL RULES OF PROF'L CONDUCT r. 1.6 cmts. (AM. BAR ASS'N 2017). ("The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.").

authorized the disclosure in writing.[84] An MLP arrangement does not alter this practice. MLP attorneys similarly seek medical records and other documentation from the medical partner when relevant to the legal matter. Our interviews, however, reveal that the manner for sharing medical records and other patient information varies across MLPs.

Today, most providers maintain their patients' medical records[85] electronically in their EHR.[86] Many providers generally limit direct access to their EHR to their employees and some volunteers. However, some interviewees reported that their MLPs grant the MLP attorneys read and write access to patients' electronic records, with some allowing and encouraging attorneys to enter legal "chart notes" directly into the EHR.[87]

Interviewees highlighted several benefits of granting MLP attorneys direct access to medical records through the EHR. Attorneys granted access to the EHR can download or print needed medical records, eliminating the costs and administrative burdens associated with formal records requests.[88] In contrast, attorneys who must formally request a client's medical records must wait days if not weeks for the records, which delays progress in the client's case.[89] Attorneys with access to the EHR also can personally verify

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84   *See* 45 C.F.R. § 164.508 (2018), *supra* note 74 and accompanying text (explaining HIPAA's requirements).

85   The term "medical record" means the documentation of healthcare services provided to an individual. The legal health record identifies the information that "constitutes the official business record of an organization for evidentiary purposes" as defined by the organization. The designated record set is broader and encompasses all protected health information. Under HIPAA, individuals have a right to information included in the designated record set. 45 C.F.R. § 164.501 (2018) (defining "designated record set"); *Fundamentals of the Legal Health Record and Designated Records Set*, Am. Health Info. Mgmt Ass'n, http://library.ahima.org/doc?oid=104008#.XHG0yMBKjIU (last accessed February 23, 2019).

86   An electronic health record (EHR) is a digital version of a patient's medical chart. *See* Sharona Hoffman, Electronic Health Records and Medical Big Data 4 (2016). An EHR's functions also include facilitating communication between team members, promoting patient education and supporting patient access to their own records, streamlining administrative processes, and supporting reporting and management of specific public health activities. *See id.* at 10-11.

87   Interviews with Medical-Legal Partners (on file with authors).

88   *See* Interviews with Attorneys, Medical-Legal Partnership (on file with the authors).

89   For example, an MLP attorney without access to the EHR noted that difficulties

facts relevant to a client's case, thereby avoiding having to reach out to the medical partner's clinicians and staff for confirmation. For example, one attorney commented that when the state threatened action against her client based on her understanding of the relevant facts, she was able to quickly verify that the state's information was incorrect and issue a prompt response to the state.[90] Another MLP attorney commented that information she accesses through the EHR helps her better understand her client's legal needs. As she explained, "the more you know the better job we can do."[91] A second attorney similarly emphasized the value of having access to all information in the EHR, noting that those records may include relevant documents such as a patient's individualized education plan.[92] Others echoed these statements, calling access to the EHR a "game changer" and "like gold."[93]

In contrast to those who expressed enthusiasm for granting attorneys access to the EHR, some MLP attorneys questioned the value of doing so. One attorney with access to the EHR commented that it has been of little benefit to her practice: "I never use it. I never have any need to. I mean, I have used it maybe on one occasion for a Social Security case and that's it. . . . Otherwise, the substance is just not stuff that I need." Another attorney similarly commented that "it's been pretty easy" to obtain relevant patient information directly from the clinicians or social workers.[94] She added that "the EHR would just be confusing, there'd be a lot of irrelevant information, I just don't think it would be helpful."[95] These views, however, were in the minority among the MLP attorneys we interviewed.

Despite the potential benefits of granting MLP attorneys

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in obtaining timely medical information can jeopardize a client's maintaining public benefits or delay their obtaining public benefits.

90 *See* Interview with Attorney, Medical-Legal Partnership (on file with the authors).

91 Interview with Attorney, Medical-Legal Partnership (on file with the authors).

92 *See* interview with Attorney, Medical-Legal Partnership ("[Access to the EHR is] amazing because sometimes in there are outside documents, they'll actually have a copy of the IEP, the full individual evaluation already scanned into the medical chart. So we can look at that if we have an education issue or again for social security or for our guardianship cases. It's just kind of just a blanket resource for us. Everything is there.").

93 Interviews with Attorneys, Medical-Legal Partnership (on file with the authors).

94 *See* interview with Attorney, Medical-Legal Partnership (on file with the authors).

95 Interview with Attorney, Medical-Legal Partnership (on file with the authors).

access to the EHR, not all medical partners are comfortable doing so. One physician we interviewed described his administration's reservations as follows:

> The hospital system doesn't want a lawyer looking in the medical record. Concerns about confidentiality, concerns about HIPAA. How do we train them? How do we protect the information so that it doesn't get out into the wrong hands and end-up being some kind of suit against us? We've never done it before. No one else does it in the world. You name it, they got an excuse.[96]

In contrast, one physician we interviewed was dismissive of such concerns and pointed to attorney's professional integrity as a reason they would not access the records of patients who were not their clients:

> If [attorneys] can't follow [HIPAA], you should just prosecute them to the fullest extent of the law like you would with any other physician, and there's no reason not to say, well they could do something wrong. Anyone could do something wrong, so it's like you could sue anybody about anything, but that doesn't mean it should be a barrier.[97]

Another physician also noted that the medical partner can track which patient records are accessed by the MLP attorney and thereby flag inappropriate access.[98] In addition, some medical partners have granted attorneys electronic access only to the records of patients who have authorized such access, with attorneys' access to other patients' records blocked.[99]

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96   Interview with Physician, Medical-Legal Partnership (on file with authors).

97   Interview with Physician, Medical-Legal Partnership (on file with authors).

98   *See* interview with Physician, Medical-Legal Partnership ("It just requires people to get their heads around the lawyer had to be trusted enough to not be snooping [in the electronic health record]. . . . [W]e can tell if you've been snooping. . . . We can track access easily.").

99   Other MLP attorneys have access to all patient records in the EHR, but some commented that they do not access the records of non-clients, citing HIPAA and their professional integrity as reasons they do not do so. *See* interviews with Attorneys, Medical-Legal Partnership (on file with the authors).

Interviewees also cited logistical and technological considerations as a barrier to granting MLP attorneys access to the EHR. Screening for HHLNs or granting attorneys access to the EHR may necessitate reconfiguring EHR systems. Competing information technology needs, however, often take precedence over MLP needs.[100]

MLP attorneys without access to the EHR must request medical records from the medical partner. In addition, attorneys with access to the EHR may, in some cases, need the medical partner to provide the medical records in an alternative format or with a business records affidavit that conforms to applicable evidentiary requirements.[101] Attorneys we interviewed highlighted two challenges associated with attorneys requesting medical records from the medical partner. First, the legal partner may be billed for the cost of producing the medical records,[102] especially if the medical partner uses an outside vendor to manage medical records requests.[103] Second, the turnaround time for medical records requests can be weeks.[104]

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100   To illustrate this point, one interviewee generally lamented on the technological needs of MLPs being a lower priority for the medical partner:

> Until the Joint Commission comes along and says, "You will make sure that every single patient's been screen[ed] for health-harming legal needs and it's documented and follow-up was documented," if that happens, then it'll get built into the Epic record pretty quickly. Until then, we are at the bottom of the list when it comes to, and I'm just being frank here, when it comes to making those types of modifications.

Interview with Administrator, Medical-Legal Partnership (on file with authors).

101   For example, medical records that will be admitted as evidence in court must be furnished in the manner in which they are kept in the usual course of business with an affidavit from the custodian of record. Fed. R. Evid. 803(6).

102   *See infra* note 109 (explaining HIPAA's rules regarding fees for production of medical records).

103   The cost of obtaining medical records can be a significant cost for the legal partners, as illustrated by the experience of an attorney practicing in a law-school-based medical legal partnership:

> We had a situation come up where we needed medical records, and the people who do the medical records offsite gave us a $2,000 bill for these records. And we're like, you know, "We're a nonprofit organization. We don't have $2,000 to cover these records requests." So, sometimes that can be challenging, mitigating the cost associated with records requests.

104   *See* U.S. Dept. of Health & Human Servs., Privacy and Security Solutions for Interoperable Health Information Exchange Reports on State Medical Record Access Laws, app. A, tbl. A-3

MLP attorneys we interviewed identified several approaches for overcoming the time and cost challenges of requesting medical records. One legal partner secured a "backdoor" arrangement that allowed its attorneys to bypass submitting requests through the outside records management vendor and instead submit requests through the internal medical records department.[105] Other MLP attorneys reported that their medical partners agreed to waive fees, cover the outside records management vendor's charges, or negotiate with the outside vendor for special rates.[106] Providing the medical partner with data on the legal partner's costs and its impact on their ability to meet demand for their legal services may help persuade the medical partner to find a workable solution.[107] Finally, some MLP attorneys have the patient-client request their medical records,[108] as under HIPAA and HITECH patients have the right to request copies of their medical information and cannot be charged

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(2009), https://www.healthit.gov/sites/default/files/rules-regulation/appa-3.pdf (summarizing maximum turnaround times under state law for patient records requests).

105 As explained by the MLP attorney,

> [T]he problem was that when we would request records, they would go automatically to the contract records management company. . . . Then, once it was sort of going through that system, they apply charges automatically. So [sic], I set up . . . a meeting with health information management at [the medical partner] and worked out a system where we basically just have a contact in the medical records department who we can work with to bypass the standard process. And they're provided to us free of charge.

Interview with Attorney, Medical-Legal Partnership (on file with authors). One interviewee commented via email, however, that some providers may be reluctant to allow backdoor arrangements because they rely on their medical records vendor or department to ensure compliance with the providers' policies regarding what specific information to include when disclosing patient's medical records and to track disclosures to third parties as required under the HIPAA Privacy Rule. *See* Email from Attorney to Authors, Medical-Legal Partnership (on file with authors).

106 *See* interview with Attorney, Medical-Legal Partnership ("So, with [one of our clinical partners], we do have the backdoor medical records request arrangement. It's fast. It's free. We upload the release of information, and then we're able to get the records request done like basically immediately, and for free, which is great.").

107 *See* Interview with Attorney, Medical-Legal Partnership (on file with authors). ("I would say the best way to engage with those health systems is to use your data, and to say how many cases are you not able to take because you're having to fund the records requests, right? Like, so how much of an FTE could you fund with the amount you're paying for records.").

108 Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

more than a "reasonable, cost-based fee" for the copies.[109]

2. Support from Care Team Members in Non–Medical Legal Matters

MLP attorneys who participate in more integrated MLP models commented that they frequently receive support from other care team members when rendering legal services to patient-clients. Importantly, other care team members may help the attorney and patient-client gather information relevant to the legal matter.[110] This assistance typically requires the attorney and non-attorney to share information "back and forth."[111] Specifically, the attorney will explain to the non-attorney the information she needs and its relevance to the patient-client's case, while the non-attorney will share relevant information gathered from the patient-client, the medical partner's files, or third parties. In addition, other care team members may share with the attorney information about a patient-

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109   45 C.F.R. § 164.524 (West 2019). Under guidance offered by the U.S. Department of Health and Human Services, the fees charged to individuals for the labor costs of copying their medical records can be based on the provider's actual labor costs, average labor costs as reflected in a fee schedule, or a flat fee not to exceed $6.50. *See* U.S. Dept. of Health & Human Servs., Individuals' Rights Under HIPAA to Access their Health Information, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html#maximumflatfee. Notably, these requests often must be made by patients themselves (or their personal representative) in order for these cost limitations to apply. Courts have held that the definition of "individual" does not include legal representation for purposes of records requests. *See* Webb v. Smart Document Sols., LLC, 499 F.3d 1078 (9th Cir. 2007) (holding that "the HIPAA regulations require the reduced rate only when the individual himself requests the records" and that designated agents, such as personal attorneys, do not count as an "individual" in order to obtain the reasonable cost-based fee specified in 45 CFR 164.524(c)(4))*;* Bocage v. Acton Corp., No. 17-cv-01201-RDP, 2018 WL at *6-7 (N.D. Ala. Feb. 14, 2018) (holding that "a legal representative who requests an individual's protected health information (and is not a personal representative of the individual) is not entitled to the fee limitations imposed under HIPAA," noting that "attorneys are not subject to the HIPAA and HITECH Act fee limitations"). *But see* Rios v. Partners in Primary Care, No. 18-CV-00538-FB, 2019 WL 668509, at *13-14 (W.D. Tex. Feb. 15, 2019) (holding that when an individual or personal representative submits a request accompanied by a letter signed by the individual patient requesting the records from their health care providers and designating their attorneys as the recipients of the protected health information, the fee-restrictions should apply).

110   *See Interview with Physician, supra* note 25 and accompanying text.

111   Interview with Attorney, Medical-Legal Partnership (on file with authors).

client's physical health or emotional or social needs in order to help the attorney better understand the patient's challenges.[112] The MLP attorney and other care team members also may share information when attempting to locate individuals who have not responded to the MLP attorney's outreach.[113]

As noted above, the patient's prior written authorization allows the medical partner's clinicians and staff to disclose protected health information to the MLP attorney without running afoul of HIPAA.[114] Moreover, the ethical rules governing physicians, social workers, and other health professionals permit the disclosure of patient information with the individual's consent.[115] Accordingly, the medical partner's clinicians and staff may share confidential information for the purpose of supporting the MLP attorney's legal representation of the patient-client provided the patient-client has authorized the disclosure.

From the attorney side, the legal significance of the back and forth between the MLP attorney, other care team members, and the patient-client is less clear. In general, communications between the attorney and individuals retained by the attorney or between the third parties and the client are privileged when made in confidence for the purpose of obtaining legal advice.[116] Relatedly, communications

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112 *See Interview with Physician, supra* note 27 and accompanying text; *see also Interview with Patient Navigator, supra* note 28 and accompanying text.

113 *See Interview with Attorney, supra* note 26 and accompanying text.

114 45 C.F.R. § 164.508 (2018) (explaining HIPAA's requirements).

115 Am. Med. Ass'n, *Code of Medical Ethics Opinion 3.2.1*, https://www.ama-assn.org/delivering-care/confidentiality (last visited Apr. 28, 2018); Louis Snyder Sulmasy et al., *American College of Physicians Ethics Manual*, Annals of Internal Med. Jan. 2019, at S5, S5 ("The physician should not release a patient's personal medical information (often termed a "privileged communication") without that patient's consent."); Natl. Ass'n of Soc. Workers, *Ethical Standards, 1.07 Privacy and Confidentiality*, https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English (last visited June 13, 2019); and Am. Nursing Ass'n., *Code of Ethics for Nurses With Interpretative Statements, Provision 3.1, Protection of the Rights of Privacy and Confidentiality*, https://www.nursingworld.org/coe-view-only (last visited June 13, 2019).

116 *See, e.g.,* United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961); Gerrits v. Brannen Banks of Florida, Inc., 138 F.R.D. 574, 577 (D. Colo. 1991) ("Although the attorney-client privilege may sometimes extend to communications to accountants or other experts providing assistance to an attorney, the communication must be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only professional service, or if the advice sought is the professional's rather

between third parties and attorneys have been deemed privileged when the third parties "act as conduits of information between the attorney and the client"[117] or otherwise facilitate communications between the attorney and client.[118] When other care team members gather information relevant to the legal representation, arguably their communications with the patient-client and MLP attorney fall within these privileged scenarios. Some courts, however, have taken a narrow view of when communications between a third party and the attorney and/or client are privileged.[119] Accordingly, uncertainty surrounds the question of when the attorney-client privilege applies to the back and forth communications between the MLP attorney and other care team members, as well as communications between other care team members and the patient-client. We note, though, that none of the MLP attorneys we interviewed discussed this issue.

3. Case Updates

Many MLP attorneys share with the medical partner basic information about patient-clients' legal issues. For example, attorneys often update the medical partner on whether they met with a patient referred for legal services, whether the individual was accepted as a client, and if not, the reason(s) why an individual did not become a client.[120] Some MLP attorneys also inform the medical partner of

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than the lawyer's, no privilege exists.").

117 Heather A. Wydra, *Keeping Secrets Within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client*, 62 Fordham L. Rev. 1517, 1542-42 (1994).

118 *See, e.g.,* SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467 (E.D. Pa. 2005) (holding that communications between the attorney and third-party consultants, as well as communications between the consultants and the client, were privileged because the client retained the consultants to assist it in obtaining facts and information necessary for the provision of legal advice and assistance). *Cf.* The Restatement (Third) of the Law Governing Lawyers § 70, cmt. f (Am. Law Inst. 2000) (attorney-client privilege applies when a third party is needed to help a client "communicate effectively with the lawyer or to understand and act upon the lawyer's advice.").

119 *See, e.g.,* Baxter Travenol Laboratories, Inc. v. Abbott Laboratories, No. 84 C 5103, 1987 WL 12919 (N.D. Ill. June 19, 1987) (requiring that a non-attorney be under "the direct supervision of the attorney" in order to be an agent of the attorney); Dublin Eye Assoc., P.C. v. Mass. Mut. Life Ins., Co., 957 F.Supp.2d 843 (E.D. Ky. 2013) (no privilege because third party's role was not considered indispensable); Banco do Brasil, S.A. v. 275 Washington Street Corp., No. 09-11343-NMG, 2012 WL 1247756 (D. Mass. Apr. 12, 2012) (third party was not "necessary" to the attorney).

120 Not all patients referred for legal services become clients of the legal partner.

any additional HHLNs identified by the attorney beyond the need that triggered the referral. MLP attorneys also often share the steps undertaken to address a patient-client's HHLNs (e.g., filed appeal of public benefits denial, drafted living will), and the resolution of the legal issue (e.g., obtained protective order against abusive partner, eviction stayed). We refer to this information as "case updates." Our interviews revealed variation across MLPs on the extent to which the MLP attorneys provide case updates to the medical partner and the manner for doing so. Below we discuss the considerations that influence whether and how MLP attorneys share case updates.

Most interviewees had a positive view of providing the medical partner with case updates. Some clinicians commented that case updates impact their clinical care decisions.[121] Receiving case updates also facilitates the medical partner's clinicians and staff supporting the MLP's activities. For example, a patient navigator stated that receiving weekly updates on her patients from the MLP attorney helps her identify issues needing her follow-up,[122] such as nudging a patient to respond to an MLP attorney's outreach efforts or assisting a patient with gathering information needed by the attorney.[123] The

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Some individuals may not meet the legal partner's eligibility criteria, others may not respond to the MLP attorney's outreach efforts, some individuals' legal needs can be addressed by giving them brief, general advice, and some are referred to other attorneys.

121 As explained by one physician who favors case updates:

What I do need to know about from the medical side is how is this person working towards a better housing solution, or how is this person working towards a better benefits solution, because that directly impacts on my care over the patient. For instance, if a person who has an extensive debt is at risk of losing housing, I'm probably not going to prescribe the latest expensive analog insulin for their diabetes, because that's going to only add to the issue.

Interview with Physician, Medical-Legal Partnership (on file with authors). Another physician gave a habitability example to show how knowledge of the status of legal matters can impact clinical care decisions:

Whether or not we get the apartment remediated or a patient moved, and then being able to relay that information back to the physician could potentially help with the kind of plan for that asthmatic. Meaning that you may want to look at more pulmonary function testing when they're in that environment that's not got a trigger to the asthma all the time. That could ultimately lead to a reduction in the number of medications they use.

Interview with Physician, Medical-Legal Partnership (on file with authors).

122 *See generally* interview with Patient Navigator, Medical-Legal Partnership (on file with authors).

123 *See supra* text accompanying notes 25–28 (discussing how the medical partner

medical partner may also need case updates, particularly the ultimate resolution of the patient-client's legal matter, in order to track the MLP program's success for internal programmatic or funding purposes.[124] Receiving case updates directly from the MLP attorney also ensures that the medical partner's clinicians and staff have accurate information, as patient-clients sometime mischaracterize the MLP attorney's guidance or legal representation.[125]

Nevertheless, some interviewees expressed reservations about MLP attorneys sharing case updates with the medical partner's clinicians and staff. Concerns about waiving attorney-client privilege, coupled with a general desire to respect client confidentiality, lead some MLPs to place "firewalls" between the legal partner and medical partner.[126] As explained by the general counsel of a hospital in which the medical team does not receive case updates from the legal partner: "I think the sensitivity of this is that this is still new, and I think the attorneys [are] concerned about what they should be disclosing and what they shouldn't [be]."[127]

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can support the legal representation of patients); *infra* notes 231–232 and accompanying text (discussing how the medical partner can help MLP attorneys connect with patients referred to them with HHLNs).

124 One MLP attorney we interviewed stated that although they were reluctant to disclose to the medical partner client-identifying information, the medical partner needed the information to track each patient-client's success as part of assessing the MLP's overall success. *See* Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

125 One MLP attorney explained the phenomenon of patients providing incorrect information on their legal matters as follows:

> [The medical partner] would hear back from clients, "Oh, the attorneys did nothing for me," when in fact we've given them the legal advice and maybe told them there was no case, unfortunately. Or they'd say, "Oh, my attorney is doing nothing with me right now," and in reality we're taking the case; we're waiting a year for the hearing or something.

See Interview with Attorney, Medical-Legal Partnership (on file with authors).

126 *See* Interview with Physician, Medical-Legal Partnership (on file with authors) ("The lawyer [contacts the patients]. That's one of the firewalls we had to put up. Multiple, multiple firewalls.").

127 Interview with Hospital General Counsel, Medical-Legal Partnership (on file with authors). Another attorney similarly cited her professional obligations, as well as time constraints, as a reason for not providing case updates: "And you know, because of our attorney-client privilege, we just don't do that. We tell our patients that they are welcome to speak with their medical provider about their case if they wish and that status of it, but we, frankly we don't have time to make those reports, even if the client permitted it." Interview with Attorney, Medical-Legal Partnership (on file with authors).

The type of clinical setting also can impact whether the MLP attorneys share case updates with the medical partner. Whereas providers who have an ongoing relationship with patients typically value case updates, those treating patients on an interim basis may have less need for this information. As explained by one MLP attorney who does not "give up too much information back to providers":

> [M]ost of the time, the providers aren't that interested. Simply because of the volume of patients they're dealing with, and we're not . . . a primary care provider or someone who has a long-term relationship or an ongoing relationship with the patient. So, a lot of folks are in the emergency room, they're being stabilized in the psych unit, and then they're gone, right? So we don't get a lot of questions from providers.[128]

Consequently, MLP attorneys are less likely to share frequent case updates with inpatient hospital departments, emergency departments, and rehabilitative hospitals.

Some MLP attorneys also may hesitate to share case updates with the medical partner given the administrative challenges of obtaining informed consent from the patient-client. As noted above, the ABA's Model Rules of Professional Conduct 1.6 permit an attorney to disclose confidential client information if the client gives informed consent.[129] A client's consent is deemed "informed" only if the attorney "has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[130] According to several of the MLP attorneys we interviewed, explaining to patient-clients the potential risks and benefits of sharing otherwise privileged information with the medical partner can be complex and time-consuming.[131] Although

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128   Interview with Attorney, Medical-Legal Partnership (on file with authors).

129   *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N, 2014) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [certain narrow exceptions].").

130   MODEL RULES OF PROF'L CONDUCT r. 1.0 (AM. BAR ASS'N, 2014) (defining "informed consent").

131   One MLP attorney in a highly-integrated care setting described the informed consent process by noting that it was comprehensive and took considerable

none of the MLP attorneys we interviewed cited these challenges as deterring them from sharing case updates, this may not be the case for other MLP attorneys. Indeed, one MLP attorney we interviewed speculated that "there is anticipatory fatigue around what it actually takes to secure professionally responsible levels of consent" from the client, and that some MLP attorneys therefore may be reluctant to do so.[132]

Among those MLPs that share case updates with the medical partner, the onus of obtaining the patient-client's consent typically falls on the MLP attorneys. Some MLP attorneys, however, rely on the medical partner to obtain the patient-client's consent.[133] To the extent the medical partner's staff does not adequately communicate to the patient-client the risks associated with sharing case updates, the patient-client's consent may not be truly "informed." No interviewees, however, raised this concern.

When the MLP attorney shares case updates with the medical partner, the attorney-client privilege no longer applies to the disclosed information.[134] This creates future risk for the patient-client, as shared information that might otherwise have been protected could be used as evidence against them.[135] For this reason, the MLP attorneys we interviewed reported that they are quite mindful of their professional obligations and limit the shared information to basic, non-sensitive information that will be helpful to the medical partner. As explained by one MLP attorney we interviewed:

time:

> We have an extensive conversation [with the client] about what attorney-client confidentiality is, that's not something that most people actually have a good handle on. We talk about doctor-patient confidentiality and about how those are different. We talk about although doctor-patient confidentiality probably applies to attorneys at least in this setting, I don't think attorney-client confidentiality applies to physicians, so we talk about that as well. We have an extensive disclosure upfront that's facilitated by an abbreviated version on paper but there is a conversation that happens with every patient and we give them levels of involvement, that they're able to choose how much team work do you want, how much information sharing do you want.

See Interview with Attorney, Medical-Legal Partnership (on file with authors).

132   Interview with Attorney, Medical-Legal Partnership (on file with authors).

133   *See* Interviews with Medical-Legal Partners (on file with authors).

134   Thomas E. Spahn, Attorney-Client Privilege: Ensuring Confidentiality, (Thomson Reuters, Practical Law Practice Note 5-502-9406, 2019).

135   *See* Mantel & Knake, *supra* note 13, at 198.

[F]or a patient who's specifically consented to the release, I will share information that's helpful to the care team. . . . But I always keep it as brief as possible. . . . You know typically again we're talking about an update on public benefits eligibility or an update on where things stand in an eviction case. So stuff that's not particularly sensitive.[136]

Disclosing even minimal client information to the medical partner, however, is not without some risk, as the shared information no longer enjoys attorney-client privilege. For example, the fact that a patient-client faces possible eviction or lives in substandard housing could be used against the patient-client in a concurrent or future child custody dispute. Attorneys who share case updates, however, often commented that in most client matters they consider this risk to be minimal.[137]

MLP attorneys that provide case updates to the medical partner typically do so using the latter's EHR system, rather than relying on phone, email, fax, or paper.[138] For example, an MLP attorney may alert other care team members through the

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136 Interview with Attorney, Medical-Legal Partnership (on file with authors). Another MLP attorney similarly stated that "we're super sensitive to what we feel we should or shouldn't say based on attorney-client privilege and just practice issues around case handling . . . ." Interview with Attorney, Medical-Legal Partnership (on file with authors).

137 For example, one MLP attorney stated as follows:
> So, I am mindful of [the attorney-client privilege] when I share information, and I try very hard to not get into the weeds or the facts on anything . . . . But in terms of it waiving any confidentiality, it's not a concern of mine. It's also just, I mean, I am very practical . . . My co-counsel are oftentimes state agencies who just don't care to do any discovery at all and just want to make me go away, so it is really hard for me to envision a scenario where opposing counsel would try to use waiver of privilege in a case against me. I just can't foresee an issue. Really, I'm mindful of it, but I don't worry about it, if that makes sense.

Interview with Attorney, Medical-Legal Partnership (on file with authors). Another MLP attorney we interviewed similarly explained that she "used to do complex litigation and you always worry about opening the door [to waiver of attorney client-privilege] if you share the information, but you don't really [in] most of the cases we have, have those kinds of concerns." Interview with Attorney, Medical-Legal Partnership (on file with authors).

138 *See* Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

EHR's secure messaging function that she has met with a patient and accepted her case. Several interviewees commented on the convenience of communicating through the EHR, particularly given the clinician's and staffs' familiarity and comfort with this mode of communication.[139] One interviewee further noted that alternative modes of communication such as email are not reliably used by clinicians.[140] Having "an immediate feedback loop"[141] also cuts-down on clinician and staff frustration from not knowing what happened with a patient referred for legal services, a noted barrier to building trust between the MLP partners.[142] Incorporating case updates in the EHR also reminds clinicians and staff to follow-up with the patient-client about their HHLNs.[143]

Some MLPs, however, questioned the benefits of communicating through the EHR. One physician-champion commented that case updates could be shared through alternative modes of communication.[144] Some attorneys also expressed concern

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139   For example, a physician commented that "what's nice is that through this secure messaging portals, we don't have to deal with faxing and emailing through a regular email server." Another physician noted that "providers rely on the medical record as a source of communication with any other consulting services, and legal partners are no different than any other consulting service." *See* Interviews with Physicians, Medical-Legal Partnership (on file with authors).

140   *See* Interview, Medical Legal Partner (on file with authors) ("The clinical staff are really not in email that much, so the more we could do in the EHR, I think the better.").

141   Interview with Attorney, Medical-Legal Partnership (on file with authors).

142   As explained by one physician:
      The best possible scenario would be [the attorney's] ability to look in the medical record and document within it what's going on. So get your screening forms sent to some kind of inbox, be able to access that screening form and do a consultation and then be able to document in that on an ongoing basis. Because one of the biggest things we get back from the physicians are, "We send you patients and we never know what happened to them."
      Interview with Physician, Medical-Legal Partnership (on file with authors).

143   As explained by one physician:
      [Information in the record] helps give me a reminder, so when I see the patient back [I can say], "Hey, you spoke to [the MLP attorney] about X, Y, and Z, what happened with this?" And if the matter's resolved, fantastic. And if it's not, then it could at least prompt me, "Hey […] let's make another referral and see if [the MLP attorney] and her team can optimize this."
      Interview with Physician, Medical-Legal Partnership (on file with authors).

144   One MLP physician-champion described the decision not to include attorney communications in the EHR. The physician explained:

that their electronic communications are discoverable or might be included in medical records disclosed to outside parties.[145] Nevertheless, most of the MLP attorneys who share case updates with the medical partner use the EHR to do so.

4.   Special Considerations

As discussed above in Subpart A, some MLP attorneys engage in frequent communications with other care team members on how best to jointly meet their patient-clients' needs. These back and forth dialogues raise unique challenges for the MLP attorney and other care team members regarding compliance with the legal and professional rules governing disclosure of patient-client information.

Interviewees reported that other care team members generally do not have need for client information beyond basic case updates.[146] However, some interviewees commented that at times sharing client information beyond case updates could prove helpful to other team members and promote the goal of holistic, coordinated care. For example, when a patient-client is receiving behavioral health care, sharing with the therapist certain details about the legal case may facilitate the therapist addressing any stress arising from the patient-client's misinterpretation or misunderstanding of the progress of their legal matter.[147] The attorney also may learn

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On the healthcare side, normally, if I make a referral to a surgeon, I want to know that the patient made it there, I want to see what the surgeon and the patient discuss, and I want to see what the follow-up is. I think initially, we were thinking, maybe, "Why is that any different for a legal person who's been fully consented [to] as part of the healthcare team?" But, I think we realized that we just don't need the level of detail that seeing a health specialist would require for a patient's charts. We went back to this internal messaging piece, which seems to work pretty well.

Interview with Physician, Medical-Legal Partnership (on file with authors).

145   *See* Interviews with Attorneys, Medical-Legal Partners (on file with authors).

146   For example, a physician interviewee stated that knowing whether the MLP attorney is addressing a patient's HHLN "would be sufficient information to know that things were happening." Interview with Physician, Medical-Legal Partnership (on file with authors). MLP attorneys echoed these comments, reporting that "almost never do we have the clinical side saying 'I wish [the MLP attorneys] told us more'" and that clinicians and staff "seem pretty satisfied" with receiving case updates only. Interview with Attorney, Medical-Legal Partnership (on file with authors).

147   As explained by one MLP attorney we interviewed:

[The therapist] is getting in a session, I'm really stressed about blank and blank, and whatever the legal problem is [the patient] is sharing

of challenges plaguing the patient-client that other care team members could help address, such as difficulties caring for other family members.[148] Despite the potential value of sharing more detailed client information with other care team members, the MLP attorneys we interviewed generally stated that they refrain from sharing specific client information with the medical partner.[149]

Conflicting mandatory reporting obligations also deter some MLP attorneys from sharing with the medical partner evidence of abuse or domestic violence. In most states, health care providers and social workers must report to law enforcement suspected abuse or domestic violence for certain individuals under their care, such as children or the elderly.[150] With the exception of a few states, attorneys are exempt from these obligations.[151] Although some states permit attorneys to report their suspicions of abuse, [152] attorneys may elect not to do so in order to preserve attorney-client confidentiality and their client's trust.[153] Accordingly, while information about suspected abuse of domestic violence could be helpful to other members of the care team, MLP attorneys may refrain from sharing this information so as not to trigger the medical partner's mandatory reporting obligations.[154]

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the play-by-play as part of a therapy session. . . . Sometimes the therapist will say, "Hey, this came-up in session. The client described this and I just want to understand so that I can help with expectations. Or I'm not sure I understand the timeline." . . . [The therapist is] just trying to figure out is the recitation that the patient just gave, is that actually what's going on?

Interview with Attorney, Medical-Legal Partnership (on file with authors).

148 *See infra* note 149 and accompanying text (describing the parenting challenges faced by a disabled client).

149 *See* Mantel & Knake, *supra* note 13, at 199.

150 *See, e.g.,* Boumil et al., *supra* note 45, at 124–27 (describing mandatory reporting laws for different professions in the United States).

151 *See* Model Rules of Prof'l Conduct r. 1.6(a) (Am. Bar Ass'n, 2014); *see also* Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting,* 13 Clinical L. Rev. 659, 694–97 (2007).

152 *See* Model Rules of Prof'l Conduct r. 1.6 (Am. Bar Ass'n, 2014) (permitting a lawyer to disclose confidential client information as necessary "to prevent reasonably certain death or substantial bodily harm").

153 *See* Thomas E. Spahn, *Elder Abuse and Child Abuse: Ethics Rules in Common,* 25 Experience 47 (2015); Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency,* 11 Geo. J. Legal Ethics 509 (1998).

154 *See* Mantel and Knake, *supra* note 13, at 200. For example, if a patient-client reveals to the attorney that she has physically abused a family member and the

Finally, our interviews revealed that information about a patient-client's legal issues often finds its way into the EHR, even if the MLP attorney does not enter this information directly. For example, communications between the MLP attorney and other care team members may be reflected in the latter's case notes or a clinician may comment in a patient's chart that the patient has been referred to an MLP attorney for specified HHLNs.[155] Some interviewees expressed concern that this information might be disclosed to other providers or outside parties as part of a routine release of a patient's medical record or if such records are subpoenaed.[156] In addition to implicating privacy concerns, one interviewee added that disclosure of this information could harm the patient-client's legal interests if the information is incorrect, misleading, or alludes to weaknesses in the patient-client's case.[157]

IV. MLP CHALLENGES

Despite the wide variation in responses, interviewees identified some common challenges facing their MLPs, as well as potential strategies for overcoming them. Specifically, this Part discusses three general themes our interviewees emphasized for developing and sustaining a successful MLP: building broad support from the medical partner's leadership, clinicians, and staff; producing data that supports the MLP improving its operations and securing stable, long-term funding; and lowering barriers to connecting patients with HHLNs to legal assistance.

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attorney suspects that this may be due to a behavioral health issue, sharing this information with other care team members could facilitate securing behavioral health care for the patient-client. However, not wanting to trigger the medical partner's mandatory reporting requirements, the attorney may choose not to disclose the abuse to the other care team members. *See id.*

155   Several MLP attorneys we interviewed commented that they have seen included in a patient's medical records the attorney's name or information about the attorney's advice to or representation of the patient-client. *See* Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

156   *See* Interviews with Attorneys, Medical-Legal Partnership (on file with authors).

157   For example, one MLP attorney recounted a case where she feared that the physician interpreting a lab result would, following a discussion of the case with the attorney, include a written note in the patient's record indicating that the patient's disability claim likely would be denied, and that this note would be seen by the Social Security Administration when they reviewed the patient's medical records. *See* Interview with Attorney, Medical-Legal Partnership (on file with authors).

A. *Building a Culture of Support for the MLP*

According to the National Center of Medical Legal Partnerships, a common barrier to an MLP's long-term success is uneven partner engagement stemming from inconsistent support for the MLP within the medical partner organization.[158] Our research similarly reveals the importance of broad support for the MLP at all levels, from frontline practitioners to institutional leadership. Some medical partners fully embrace the MLP concept from the get go, particularly if staff and administrators appreciate the link between social determinants and patients' health.[159] Within other medical partners, however, wide-spread acceptance of the MLP concept cannot be achieved without first addressing the concerns of certain stakeholders.[160]

Physicians and other clinicians frequently eye attorneys and the legal system through a lens of distrust. This wariness stems largely from providers' concerns about medical malpractice lawsuits that question their professional judgment and integrity.[161]

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158   *See* National Center for Medical Legal Partnership, The Medical-Legal Partnership Toolkit: Phase I: Laying the Groundwork, 10 (2015) [hereinafter NCMLP Toolkit] (profiling the struggles of an MLP).

159   An MLP attorney noted:

> I think [the success of the referrals] is number one the culture at [the clinical partner], and maybe this is the case at other FQHCs, I don't know, but I think it's definitely the culture at [the clinical partner] that all of the providers are aware of these [social determinants of health]. They're trained in these concepts, not by me, so by someone else. They're all kind of really interested in social justice issues and using medicine as a vehicle for social justice. That's just part of the culture at [the clinical partner], so it's very easy for the MLP to kind of fit into that model.

Interview with Attorney, Medical-Legal Partnership (on file with authors). Notably, some interviewees identified FQHCs as natural MLP partners given their appreciation of and commitment to the social determinants of health. *See* Interviews, Medical-Legal Partnership (on file with authors).

160   One MLP managing attorney who reflected on the process of starting an MLP commented that a meeting with the general counsel of the clinical partner was not done due to "any nervousness or anxiety, but just more of a, 'Let me understand how this works.' She had questions about how involved does the hospital's legal department get in the MLP, those type of things. So, we tried to educate […] before really diving deep into the planning." Interview with Attorney, Medical-Legal Partnership (on file with authors).

161   *See generally* James D. Reschovsky & Cynthia B. Saiontz-Martinez, *Malpractice Claim Fears and the Costs of Treating Medicare Patients: A New Approach to Estimating*

Within the MLP context, physicians and other clinicians may fear that sharing medical records with MLP attorneys or physically embedding attorneys within the clinical setting will result in the patient-client suing the provider for malpractice, a concern often shared by administrators. For example, one attorney we interviewed explained that her attempts to expand the MLP into the partner hospital's inpatient departments raised risk management concerns: "I think that was something that threw up a lot of alarm bells for them in terms of sort of deepening the integration so that I'm in the hospital more and providing services in the hospital. And that . . . opened a can of worms in terms of liability concerns."[162]

Interviewees stated, however, that the distrust between providers and attorneys can be overcome. Several interviewees reported that they addressed the medical partner's risk management concerns in the memorandum of understanding (MOU) between the clinical and legal partners. Specifically, their MOUs include a prohibition on the MLP attorneys accepting cases that may be adverse to the medical partner's interests, including malpractice claims.[163] MLP attorneys also regularly remind clinicians of the MOU's limitation in order to allay their malpractice concerns.[164]

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the Costs of Defensive Medicine, 53 Health Serv. Res. 1498 (2018) (explaining that physicians' concerns about medical malpractice lawsuits are significant); see also interview with Physician, Medical-Legal Partnership (on file with authors) ("[H]istorically, the relationship between physicians and lawyers has been adversarial and that has taken a very long time to get over.").

162 Interview with Attorney, Medical-Legal Partnership (on file with authors). Another MLP similarly commented on the medical partner's liability concerns: "The one thing that also made [development of the MLP last so long was that] they were concerned about having a lawyer on site. Like most healthcare providers, they were afraid I was going to sue them for malpractice." Interview with Attorney, Medical-Legal Partnership (on file with authors); see generally Elizabeth Tobin-Tyler, Allies Not Adversaries: Teaching Collaboration to the Next Generation of Doctors and Lawyers to Address Social Inequality, 11 J. Health Care L. & Pol'y 249 (2008) (discussing the challenges of physician-lawyer collaborations).

163 Interview with Attorney, Medical-Legal Partnership (on file with authors) ("We have MOUs, memorandums of understanding, between Legal Aid and our healthcare partners. In each one it specifically says the MLP attorneys will not take cases adverse to our medical partner. Medical malpractice is just outside of Legal Aid's priorities, to begin with, but if there was some other issue that was adverse to the medical partner, the MLP attorneys would not take those cases.").

164 As explained by one MLP attorney:
      I think that doctors just are afraid to be deposed. They're just afraid

In addition to liability concerns, clinical staff often are skeptical of the MLP's mission and value, skepticism that in part stems from a limited understanding of what attorneys do (beyond suing doctors) and how their services can help patients.[165] The literature on MLPs emphasizes the crucial role played by an individual champion within the medical partner in lowering this cultural barrier,[166] and our research confirms this. The individual champion—typically a physician or other member of the clinical care team—educates other clinicians as to the impact of unmet legal needs on patients' health and the value of addressing those needs through an MLP.[167] As one attorney we interviewed commented:

> [W]e were very fortunate that the lead doctor, the doctor that was really championing the MLP, and some of the other staff were strong advocates. . . . [A]t first [the] medical staff was reluctant, but as it

> to go on record as having said anything, and I just, I've only been successful, . . . I think, just in diligence and in trying to have the conversation and be really candid, and say, "Look, this is what it is. This is what it's not gonna be." I frequently have to tell people, "We don't do malpractice. We're not allowed to do malpractice. It's contrary to our MOU to do anything that would implicate you, the medical partner, as having done something wrong. We're only trying to bring about positive outcomes for your clients."

Interview with Attorney, Medical-Legal Partnership (on file with authors). Interestingly, although the MOUs typically do not preclude the MLP attorneys from referring malpractice cases to other attorneys, no interviewee identified this as a barrier to building trust between the MLP partners.

165 *See* Interview with Physician, Medical-Legal Partnership (on file with authors) ("Physicians don't have a clue what lawyers do. . . . I sort of know what they do. But I think for the most part we don't know what they really do other than defend criminals and you know do tax law. But how you as a physician, or how I, as a physician could view a lawyer helping is outside of our typical scope of thinking and/or training."); s*ee also* Edward G. Paul et al., *The Medical-Legal Partnership Approach to Teaching Social Determinants of Health and Structural Competency in Residency Programs*, 92 Acad. Med. 292, 295 (2017) ("Most physicians have a limited understanding of what lawyers do in the context of health, public policy, and assisting patients in need.").

166 *See* Paul et al., *supra* note 165, at 292, ("At least one member of the [medical] faculty must serve as a "medical champion" for the MLP."); NCMLP Toolkit, *supra* note 158, at 15 ("It is important to identify an individual champion and to understand where that champion lives within the hierarchy of their home institution.").

167 *See* Paul et al., *supra* note 165, at 295 (explaining that the physician-champion "educates the residents, staff, and institutional leadership about the value of the partnership").

got on people began to get excited and the problem became we don't have the resources to serve all the clinics.[168]

One MLP attorney emphasized, however, that the MLP champion must commit sufficient time and resources to promoting the MLP; otherwise, the MLP may be unable to overcome clinician's mistrust.[169]

Although a champion helps promote a culture of support for the MLP within the medical partner, interviewees also stressed the necessity of strong backing from the organization's leadership. As summarized by one attorney, "whatever success we've had in the program, to a large degree, can be attributed to the active and enthusiastic cooperation with the hospital on the admin[istrative] side."[170] In particular, several interviewers commented that building an MLP is a time-intensive process, one more likely to succeed if the medical partner's leadership is willing to dedicate both time and resources to the MLP's activities and to troubleshoot any problems as they arise.[171]

Interviewees noted that a medical partner's leadership shows greater willingness to support the MLP when they appreciate the partnership's potential to improve patients' health.[172] Fortunately, many health administrators strongly support the MLP concept and offer their full support for the MLP from the beginning, especially in environments in which social justice and the social determinants of health are part of the broader organizational culture;[173] others, however, must be convinced of an MLP's value by the individual champion and/or the legal partner.[174] One MLP attorney also reported

168   Interview with Attorney, Medical-Legal Partnership (on file with authors)

169   *See* interview with Attorney, Medical-Legal Partnership (on file with authors). ("[T]he medical director kind of agreed to be the champion, in MLP lingo, and she thought she might be able to spend two to four hours a week doing stuff related to the clinic. It turned out that that was not possible for her. So that ended up being one of the reasons why […] [w]e left that as a partner site. […] We were only there for a year.").

170   Interview with Attorney, Medical-Legal Partnership (on file with authors).

171   Interview with Medical-Legal Partner (on file with authors).

172   Interviews with Medical-Legal Partners (on file with authors).

173   *See* Interview with Attorney, *supra* note 159 (quoting MLP attorney on the importance of the medical partner's culture and its interest in social justice issues).

174   By contrast, one attorney offered that uniform acceptance of a collaborative approach to patient care makes teamwork and buy-in seamless. As she

that educating the medical partner's leadership about competitors' MLPs can help persuade them of an MLP's value.[175]

Broad acceptance of the MLP among other members of the clinical care team—social workers, nurses, case managers, community health workers—also promotes the model's success, especially when non-physicians perform critical roles in support of the MLP.[176] As explained by one attorney we interviewed:

> [E]arly on, we made it a point to make sure that the idea of a medical-legal partnership, and the needs that our patients have relative to that, that we disseminated that information to a broad group of people within the hospital. Nurses, social workers, physicians, administrators, senior leadership, you name it. And so, that was sort of the mindset at the time, let's really make sure that we've communicated this concept, otherwise it's going to be really challenging from the standpoint of changing culture.[177]

Accordingly, those championing the MLP should communicate early and often with staff across the medical partner.

Several interviewees also emphasized the importance of involving all relevant stakeholders within the medical partner in the MLP's formation, including clinicians, social workers, case managers,

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explained:
> Yeah, I think the number one thing is that everyone is aligned around the same goal and that we're not having to convince different parts of our entity that this is a good model. It's given that we've got lawyers. We've got doctors. We've got behavioral health folks and that's what we have and these are the tools that we're going to use to try to improve patient health and wellness and reduce health disparities and that we're going to use people's skills and expertise and hope to use them to promote good efficiencies across the care team and frankly to promote morale.

Interview with Attorney, Medical-Legal Partnership (on file with authors).

175   *See* Interview with Attorney, Medical-Legal Partnership ("[W]hat really put the top leadership over the edge in terms of giving me their wholehearted and enthusiastic support, was when I mentioned that their competitor hospitals were already doing this, and had been doing this for quite some time . . . .").

176   For example, in many MLPs, non-physician staff assume primary responsibility for screening patients for HHLNs, referring those patients to the MLP attorneys, and consulting with the attorneys as needed.

177   Interview with Attorney, Medical-Legal Partnership (on file with authors).

and administrators.[178] Importantly, an inclusive planning process lessens the risk that conflicting priorities and expectations within the medical partner will undermine support for the MLP, particularly with respect to funding and compliance with internal policies.[179] In addition, an inclusive planning process supports the development of effective work flows and the necessary documents (screening tools, MOUs, etc.). While these meetings may occur more frequently during the MLP planning phase, continued stakeholder meetings can help troubleshoot problems and prevent challenges before they arise.[180]

Finally, some interviewees noted that an MLP attorney's ongoing physical presence at the medical partner's clinical or administrative site, either on a part-time or full-time basis, helps build mutual trust and support for the MLP. As explained by one MLP attorney,

> I think one of the benefits of having the embedded [legal] staff is the mutual trust that develops between the medical clinical staff and the attorney that's assigned to it. I think it also helps improve the situation that the attorney is a person, not just somebody at the end of the online referral folder or at the end of this telephone. . . . I think it helps the

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178 One attorney described the membership of recurring stakeholder meetings, stating that the physician-champion and a planning attorney from the community attended, as well as "representatives of the clinics [such as] case workers, social workers, administrative staff, and of course the [MLP] attorney." Interview with Attorney, Medical-Legal Partnership (on file with authors). *Cf.* NCMLP Toolkit, *supra* note 158, at 3 ("Intrepid and passionate leaders seeking to implement an MLP can only succeed when they engage front-line practitioners AND administration in this endeavor at the earliest phases.").

179 *Cf.* Interview with Attorney, Medical-Legal Partnership (on file with authors) ("I wasn't super pleased about how it was working out, just because it didn't really feel like I had the support from the other side. And there didn't seem to be independent interest in pursuing that support, like getting a grant to buy out some of the medical director's time, or things like that.").

180 *See* Interview with Managing Attorney, Medical-Legal Partnership (on file with authors) ("The idea was to work out all the issues that needed to be worked out in order to go live. The health screening tool, the consent form, the HIPAA training, the flow of information, the training of all the involved staff. After it went live the reason for the meetings went to: how is it going? What isn't working? What's working? What needs to be improved? What would be a good addition? It's just to nurture the MLP and to help it grow.").

medical community and it helps the attorney to all identify as, 'Hey, we're here together and we're all in this together. We have different roles but we're all working for the same goal.'[181]

Another MLP attorney similarly commented that her regular onsite presence "makes a huge difference" in breaking down barriers with the medical partner's clinician and staff, as it "get[s] them used to the idea of an attorney being around" rather than the attorney being "an afterthought."[182]

B. Data Collection and Analysis for Quality Improvement and Funding

Interviewees agreed that demonstrating value through outcomes research was important for both ensuring an MLP's efficient operations and securing sustainably funding.[183] However, as we describe below, MLPs vary in the extent to which they collect, analyze, and use data.

Our interviews revealed that successful MLPs continuously evolve in response to feedback, changing priorities, and technological developments. Several interviewees emphasized that data collection and analysis play an important role in this quality improvement process. In particular, data on patient referrals can help ensure that patients referred to MLP attorneys are likely to benefit from the referral and accept legal assistance. For example, data on patient referrals may identify a pattern of inappropriate referrals by one or more clinicians or staff (e.g., referred patients are above the income limits for legal services, referred patients do not have a need that can be addressed through legal interventions). Analysis of the data also may reveal referring patterns that can support targeted training

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181 Interview with Attorney, Medical-Legal Partnership (on file with authors).

182 Interview with Attorney, Medical-Legal Partnership (on file with authors). Others noted the need to establish the right amount of physical presence, as being too accessible can impede productive work time or result in wasted resources. One attorney described the decision to move offices after the determination that being too accessible to clinicians and patient-clients prevented casework. In reflecting on the decision to move the location of her office, the attorney stated "I definitely am not physically there in the way that they would just come and knock on my door and ask me a quick question. So I don't get as many sometimes of the quick questions as I would've if I was over there, but it helps me to manage my flow." Interview with Attorney, Medical-Legal Partnership (on file with authors).

183 *See* Interviews with Medical-Legal Partners (on file with authors).

and education of the medical partner's clinician and staff designed to increase the volume and quality of MLP referrals.[184] Notable, using data to promote higher quality patient referrals and lower patient-client attrition improves the efficiency of an MLP's operations, often a fundamental goal given MLPs' resource constraints.[185]

In addition to supporting an MLP's quality improvement activities, collecting and analyzing data may help an MLP secure sustainable funding. The MLP literature repeatedly highlights the struggles MLPs face securing long-term funding,[186] and many interviewees confirmed that finding sustainable funding is one

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184   As explained by one MLP attorney:

    [One MLP administrator] really likes the data, she really likes to see it and we work a lot to figure out how we can improve the efficiency of our MLP. Our MLP has grown so large that, and our funding is really limited and so, we're really focused on that efficiency part. And so [our MLP administrators on the medical-partner side] really like to see those numbers and where the numbers are coming from and where we can focus our training.

Interview with Attorney, Medical-Legal Partnership (on file with authors). Another MLP attorney explained that data on unmotivated patient-clients, or patients who failed to follow through on their referral for legal services, led the MLP to modify its training programs for clinicians and staff on HHLNs and supporting legal services. *See* interview with Attorney, Medical-Legal Partnership (on file with authors).

Our findings are consistent with other research demonstrating the value of using data about program shortcomings to assist in quality improvement efforts. *See* Jennifer Trott & Marsha Regenstein, Screening for Health-Harming Legal Needs, Medical Legal Partnership Measurement Series, 8 (2016) (discussing a case study in which the MLP improved training, added screeners, and put attorneys on-call to meet with patients on site at the time of referral); Megan Sandel et al., *Medical-Legal Partnerships: Transforming Primary Care by Addressing the Legal Needs of Vulnerable Populations,* 29 Health Aff. 1697, 1701 (2010) ("Those physicians with lower screening rates were given one-on-one training. Case-based conferences and preclinic conferences were also offered during this period. The goal of 90 percent screening at well-child visits was reached by week [35] after both group training and individual feedback sessions, although ongoing quality improvement is still needed.").

185   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) ("As funding is always an issue, we are also trying to work with the folks making referrals to become more efficient. And that's one of those things that targeted training that I referenced earlier is specifically designed around.").

186   *See, e.g.,* Dayna Bowen Matthew, The Law as Healer: How Paying for Medical-Legal Partnerships Saves Lives and Money 5 (2017); *see also* Joanna Theiss et al., Building Resources to Support Civil Legal Aid Access in HRSA Funded Health Center 3 (2016).

of their MLP's greatest challenges.[187] Because few legal partners can fully fund their MLPs' activities given shrinking civil legal aid budgets,[188] many MLPs initially rely on grants from philanthropic organizations or government agencies.[189] These grants often prove temporary, however, as most grant funders expect MLPs to develop long-term financing strategies that make them less reliant on grant funding.[190] As explained by one MLP expert, initial grant funding is "best seen as a bridge toward increased investment from the health care side,"[191] a sentiment echoed by some interviewees.[192] Some MLPs also rely on funding from the medical partner, although not all medical partners are able or willing to contribute toward their MLPs given competing demands on their limited financial resources.[193]

Regardless of the source of an MLP's funding, interviewees agreed that funders increasingly expect MLPs to demonstrate their value with data evidencing their positive impact. For example, grants

187 For example, in discussing the funding challenges facing his MLP, one physician commented that it's the "[m]ain issue that we're having right now." Interview with Physician, Medical-Legal Partnership (on file with authors).

188 Theiss et al., *supra* note 186, at 7 (stating that resources from the civil legal side "have been overleveraged, and in fact shrinking").

189 *See id.* at 3, 7 (stating that although early funding strategies include resources from civil legal aid agencies and law schools, "[h]ealth centers have primarily relied on philanthropic investments to increase civil legal aid capacity and sustain the legal staffing that is at the core of an effective MLP"). Some MLPs we interviewed reported that they obtain funding from state Medicaid programs or local health departments. See Interviews with Medical-Legal Partners (on file with authors).

190 *See* Theiss et al., *supra* note 186, at 3. Indeed, one interviewee stated that his MLP lost its external grant when the funder concluded that the medical partner should fund the MLP. *See* Interview with Physician, Medical-Legal Partnership (on file with authors).

191 Theiss et al., *supra* note 186, at 7.

192 Some interviewees added that medical partners should fund their MLP because the MLP attorney's legal services are no different than the care management provided by social workers, patient navigators, and other care team members addressing the social determinants of health. As one physician commented:

> We'd like to find a way to keep from going from grant to grant to grant. . . . [M]y view is that the health system can easily write a job description, and include somebody with legal background into a care management infrastructure, and fund it like that, because I think what [the MLP attorney] does, busting through these issues related to housing and benefits, is to help us get people out of the hospital, so they're not in as long. They help people do better . . . . In essence, to me, it falls under care management.

Interview with Physician, Medical-Legal Partnership (on file with authors).

193 *See* Interviews with Medical-Legal Partners (on file with authors).

can require outcomes data as a condition for continued funding. Alternatively, outcomes data may convince the medical partner to fund an MLP after the initial grant funding ends. Demonstrating the MLP's value may become particularly important should changes in leadership or financial pressures cause the medical partner to look for places to cut its budget. Some interviewees therefore suggested tracking outcomes and producing regular reports for medical partners even in the absence of a requirement to do so.[194] As one MLP attorney commented, "something that has really helped our MLP survive was the fact that from the very beginning, we started collecting data and trying to show our healthcare provider the benefit of legal services to their patients."[195]

When evaluating an MLP's outcomes for purposes of securing funding, an MLP should be mindful of the outcomes most valued by their funder. These may differ from the outcomes typically tracked by civil legal aid organizations. Traditionally, civil legal aid organizations define success based on the volume of individuals with successful resolution of their legal cases. For example, a civil legal aid organization may track the number of individuals obtaining public benefits, avoiding eviction, or securing an individualized education plan (IEP). While funders may value positive legal outcomes for their own sake, many place greater emphasis on whether the MLP's activities ultimately improve patients' physical and mental health, lower health care costs, or increase the provider's revenues. For example, funders may value legal interventions that keep patients out of the emergency room or secure insurance coverage for outstanding medical bills. Medical partners in particular may want the MLP to show a financial return on their investment. As one physician observed, "it's always going to come down to a number, and the currency that we deal with in America is in fact currency."[196]

Although interviewees recognized that financial and health

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194   One attorney who produced quarterly reports notes that it is part of a broader effort to be seen as a valuable service to the medical partner. In the interview, this attorney stated as follows:

> They [medical partners] say that they enjoy reading [the quarterly report]. I think we're still just kind of a fanciful notion to them. We're not a surgeon. I don't think we're even a social worker in their mind. So, they're sweet and kind about it. Our job is to just keep trying to prove the case to them and to take us seriously.

Interview with Attorney, Medical-Legal Partnership (on file with authors).

195   Interview with Attorney, Medical-Legal Partnership (on file with authors).

196   Interview with Physician, Medical-Legal Partnership (on file with authors).

outcomes research could support their MLP securing long-term funding, some MLPs do not conduct any data analysis beyond documenting legal outcomes. For some, this is a result of lack of time and personnel with relevant expertise. As one MLP attorney lamented, "I have a public health degree. I get it, you're supposed to track. If you track it, they'll fund it. [But] I have a to-do list in front of me on direct client work, [so] it just doesn't get done."[197] For other MLPs, privacy concerns lead the medical and/or legal partners to resist linking their individually identifiable patient-client information with their partner's data.[198]

　　　Finally, those with no formal requirement to report outcomes noted that this can be a disincentive to engage in data analysis, even if doing so might help with funding. As one attorney noted, "the [medical-legal partnership] right now is unfunded, so we haven't pulled numbers for that for a while. We haven't had reports to write or anything. Of course, if we pulled numbers, maybe we would be funded, but that's always a struggle."[199]

　　　Some MLPs we interviewed have overcome resource challenges and privacy concerns by partnering with academic institutions to conduct outcomes research, as these institutions can provide the required skills and resources and will abide by the strict privacy protocols required by Institutional Review Boards.[200] Other MLPs address their need for data analysis expertise through their

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197　Interview with Attorney, Medical-Legal Partnership (on file with authors).

198　As explained by one MLP attorney:
　　　　We didn't feel we could share any information about the client's legal problem including whether the client wanted [the attorney] to pursue the legal issue without the client's permission. That was a challenge to iron out because of course, rightfully so, [the medical partner] need[s] to track the success of the product but we're not wanting to give them client-identifying information.
　　　Interview with Attorney, Medical-Legal Partnership (on file with authors). Another MLP attorney similarly commented that outcomes research "requires some access to the electronic medical records, as well as our case management records, and we're just not there yet." Interview with Attorney, Medical-Legal Partnership (on file with authors).

199　Interview with Attorney, Medical-Legal Partnership (on file with authors).

200　*See, e.g.,* Interviews with Medical-Legal Partners (on file with authors) Additional benefits of these partnerships include training and educational opportunities for students, who can assist in data collection and analysis. *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) ("I mean we have a relatively large university here and we have talked about leaning on its students for lots of resources like data, getting a student intern to come in and help us with data analysis.").

hiring decisions. For example, one MLP we interviewed directly employs a data analyst to assist with tracking outcomes, citing this role as essential to their operations.[201] Another MLP attorney in a management position noted that an attorney candidate's passion for outcomes research was a significant factor in their hiring her.[202]

Issues with the relevant data also may confound MLPs' efforts to conduct outcomes research. Inconsistencies in how clinicians, staff, and attorneys record patient-client information in the legal or medical record systems may produce non-standardized data sets. On the clinical side, referring clinicians and staff may be inconsistent in how they enter a legal referral into the medical record, which can create challenges when conducting a retrospective chart review.[203] Similarly, inconsistent tracking of legal information and persistent questions about how to analyze and link legal data to health outcomes plague legal partners. However, some interviewees cited web-based legal management tools like LegalServer[204] or frameworks like CHART-IT[205] as potential solutions, although other

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201   Interview with Attorney, Medical-Legal Partnership (on file with authors).

202   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) ("We hired our MLP attorney because she just loves that stuff [outcomes research]. So, she's got a bunch of reports she can do, charts, she can do all kinds of things."). In contrast, another MLP attorney stressed that data analysis is better achieved by partnering with other professionals with relevant expertise, noting that "We're lawyers, we're not researchers, so we wouldn't know where to start with that." Interview with Attorney, Medical-Legal Partnership (on file with authors).

203   As noted by an MLP attorney:

> I think mostly it's just that there's no enforcement or oversight, so nobody has to, nobody's being held accountable to, so [entering information about referrals into the electronic record] just doesn't happen. I think that we've had a lot of conversations about why it would be helpful if people did, because we would like to, at some point, be able to go in and track what a true reach has been, and for doctors to be able to begin to make some connection between when, "I make the referral and it goes well, and I know that I've made the referral," or, "I've gotten confirmation that the referral was accepted, that I see X outcome." I think people get it conversationally, but in practice, I don't think so. And again, I don't have access to the records, so I can't even say how frequently, if at all, it's happening, but my guess is that it's not really happening at all.

Interview with Attorney, Medical-Legal Partnership (on file with authors).

204   LegalServer, https://www.legalserver.org/features (last visited Nov. 20, 2019).

205   Keegan Warren-Clem et al., *CHART-IT or Capturing Health – An Attorney Reporting Tool for Impact Tracking*, Med. Legal P'ship of S. Ill. (May 2016), https://

interviewees noted there exists disagreement about how to report legal outcomes and their health impact.[206]

Some interviews also reported that the presence of multiple confounding variables makes it exceedingly difficult to quantify the impact of legal interventions at both the individual and population levels. Specifically, for MLPs participating in highly integrated, multidisciplinary environments, isolating the impact of the MLP's legal services from other clinical and social services may be impossible.[207] And while this challenge could be overcome by conducting randomized controlled trials, doing so implicates ethical considerations for those who want MLP services available to all patients receiving care in the same clinical setting.[208] Some

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www.ruralhealthinfo.org/assets/541-1591/929-chart-it-health-impacts-white-paper.pdf.

206   For example, one attorney commented on her MLP's decision to move away from CHART-IT in favor of other, standardized codes:

> That decision was also facilitated by some pushback that that particular white paper got from the public health community in terms of the way that they felt public health research should be done. . . . We are using instead legal services problem codes . . . so those are words, you know, obtained Medicare coverage, assisted tenant with increasing the habitability of their living conditions or whatever, these are standardized lists. We've stepped away from [CHART-IT] not because we think it's wrong but just because there really are some standardized systems that I think are harder for folks to pushback against.

Interview with Attorney, Medical-Legal Partnership (on file with authors).

207   As a physician practicing in a complex care setting explained:

> We thought a lot over the past few years about how do we identify how [the MLP attorney] adds to those metrics or what is her value, trying to get at the ROI for her actual work, and, we're finding that really hard to tease out. Because it's so highly integrated, it's hard to know. In reality, I don't think it even makes a lot of sense to determine the benefit of the care that we provide from an entire team sampling.

Interview with Physician, Medical-Legal Partnership (on file with authors). Another physician in a complex care setting similarly commented "[i]t's hard to isolate the effect of the MLP; it's also hard to isolate the effect of the complex care program." Interview with Physician, Medical-Legal Partnership (on file with authors).

208   As one physician explained, teasing out the impact of the MLP attorney's services would require a randomized control trial where patients are randomized into groups eligible for legal interventions and groups not eligible, and "that brings up a whole 'nother [sic] concept of, is that even ethical of not?" Interview with Physician, Medical-Legal Partnership (on file with authors).

interviewees, though, reported that their MLPs are conducting randomized controlled trials to explore the impact of legal interventions on outcomes such as reduced stress, anxiety, and depression.[209]

Given the challenges of conducting outcomes research, MLPs have developed other means of demonstrating value. In lieu of research, some interviewees reported that they rely on anecdotal evidence demonstrating the value of the MLP's legal services, such as cases where addressing patients' legal needs directly improved their health.[210] Anecdotes of legal services resulting in coverage for clinical care that otherwise would go uncompensated can prove especially persuasive to medical partners seeking a return on their MLP investment. For example, one MLP attorney described a case where "[t]he patient was approved [by Medicaid following an appeal] for the outstanding medical bill of over $230,000," an amount that was "a huge result" for the medical partner-hospital and more than covered the partnership's cost.[211] These high-dollar anecdotes, however, may be more common in hospital settings with costly inpatient care than in less-costly primary care settings or outpatient clinics.[212]

In addition to using anecdotal evidence, champions of MLPs also can point to a small but growing body of empirical research documenting MLPs' positive impacts. Studies have shown that MLP services improve physical and mental health by lowering stress levels and improving patient adherence,[213] reduce emergency department

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209 *See* Interviews with Medical-Legal Partners (on file with authors).

210 For example, one MLP attorney commented that she repeatedly uses a particularly compelling anecdote as her "big story" to illustrate the importance of her MLP's work. *See* Interview with Attorney, Medical-Legal Partnership (on file with authors).

211 Interview with Attorney, Medical-Legal Partnership (on file with authors).

212 *See* Interview with Attorney, Medical-Legal Partnership (on file with the authors) (commenting on the smaller medical bills incurred at FQHCs as distinguished from the hospital setting).

213 *See generally* Dayna Bowen Matthew, *Medical-Legal Partnerships and Mental Health: Qualitative Evidence That Integrating Legal Services and Health Care Improves Family Well-Being,* 17 Hous. J. Health L. & Policy 339 (2017) (reporting that families who received MLP services stated during interviews some level of relief from stress and consequently improved social capacity); *see also* Jack Tsai et al., *Medical-Legal Partnerships at Veterans Affairs Medical Centers Improved Housing and Psychosocial Outcomes for Vets,* 36 Health Aff. 2195 (2017) (describing where MLPs implemented by several Veterans Affairs medical centers showed that those who access legal services through the MLP had significant improvements in mental health); Jennifer Rosen Valverde et al., *Medical-Legal*

visits and inpatient admissions,[214] and increase use of preventive care.[215] In addition, several studies document benefits to patients beyond improvements in their physical and mental well-being, such as improved access to food and income supports,[216] improvements

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Partnership Impact on Parents' Perceived Stress: A Pilot Study, 45 Behav. Med. 70, 77 (2018) (describing how, following an MLP intervention, parents reported improvements in perceived stress); *Medical-legal partnerships*, County Health Rankings & Roadmaps, http://www.countyhealthrankings.org/take-action-to-improve-health/what-works-for-health/policies/medical-legal-partnerships (last visited Nov. 20, 2019) (summarizing findings from studies on MLPs).

214 *See generally* Robert Sege et al., *Medical-Legal Strategies to Improve Infant Health Care: A Randomized Trial*, 136 Pediatrics 97 (2015) (finding that the infants in families receiving MLP services were less likely to have visited the emergency department by 6 months); Jeffrey Martin et al., *Embedding Civil Legal Aid Services in Care for High-Utilizing Patients Using Medical-Legal Partnership*, Health Affairs: Health Affairs Blog (Apr. 22, 2015), https://www.healthaffairs.org/do/10.1377/hblog20150422.047143/full (reporting that pilot study of high-need, high-use patients found that addressing patients' civil legal problems reduced inpatient and emergency department use, as well as overall health care costs); Mary O'Sullivan et al., *Environmental Improvements Brought by the Legal Interventions in the Homes of Poorly Controlled Inner-City Adult Asthmatic Patients: A Proof-of-Concept Study*, 49 J. of Asthma 911 (2012) (MLP interventions to force landlords to provide better living conditions had fewer emergency department visits and hospitalizations post-intervention than pre-intervention).

215 *See generally* Sege et al., *supra* note 214 (finding that healthy newborns in low-income families with access to MLP services had an increase in use of preventive health care).

216 *See id.* at 102-03 finding families of healthy newborns with access to MLPs has greater access than control groups to food resources and incomes support programs, including local food pantry programs, Supplemental Nutrition Assistance Program (SNAP), and Transitional Aid to Families with Dependent Children); Melissa Klein et al., *Doctors and Lawyers Collaborating to HeLP Children—Outcomes from a Successful Partnership Between Professions*, 24 J. of Health Care for the Poor & Underserved 1063 (2013) (MLP in three pediatric primary care centers serving high-risk populations helped patients recover nearly $200,000 in back benefits); Robert Pettignano et al., *Can Access to a Medical-Legal Partnership Benefit Patients with Asthma who Live in an Urban Community?*, 24 J. of Health Care for the Poor & Underserved 706 (2013) (during seven-year study period, Children's Healthcare of Atlanta's MLP helped families receive $501,209 in financial benefits); Dana Weintraub et al., *Pilot Study of Medical-Legal Partnership to Address Social and Legal Needs of Patients*, 21 J. of Health Care for the Poor & Underserved 157 (2010) (finding that over the 36-month study period, families who received medical-legal services in a pediatric setting had increased utilization of food and income supports).

in housing,[217] and reduced energy insecurity.[218] The MLP literature also includes several profiles of medical partners that saw a positive return on their MLP investment from dollars recovered for clinical services that otherwise would not have been provided or would have gone unreimbursed.[219] One physician interviewee commented that additional research showing that MLPs improve patient health outcomes could increase support for MLPs: "We would be a lot better off only because I think our healthcare partners would accept the fact that [a] medical-legal partnership is a positive thing."[220]

C. Barriers to Connecting Patients with Attorneys

Interviewees repeatedly commented that MLP attorneys fail to connect with a high percentage of patients identified as having health-harming legal needs, an issue that in our view has received too little attention by the MLP community. Our research identifies several reasons for this problem. MLP attorneys report that they sometimes have trouble finding a patient, as those facing housing or financial insecurity often change phone numbers or addresses.[221]

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217   *See generally* Tsai et al., *supra* note 213 (two-year study finding that veterans who accessed MLPs had greater improvements in housing than those who did not access MLPs).

218   *See* Sege et al., *supra* note 214 at 102-03 (finding families of healthy newborns with access to MLPs has greater access than control groups to low-income utility discount or shut-off prevention programs); Daniel Taylor et al., *Keeping the Heat on for Children's Health: A Successful Medical-Legal Partnership Initiative to Prevent Utility Shutoffs in Vulnerable Children*, 26 J. of Health Care for the Poor & Underserved 676 (2015) (finding that MLP interventions improved medical need utility certifications, preventing utility shut-offs for 396 families).

219   *See generally* James Teufel et al., *Rural Medical-Legal Partnership and Advocacy: A Three-Year Follow-up Study*, 23 J. Health Care for Poor & Underserved 705 (2012) (finding that over the three-year study period, a rural hospital's medical-legal partnership resulted in the hospital making a 319 percent return on its investment by recovering dollars for previously unreimbursed clinical services).

220   Interview with Physician, Medical-Legal Partnership (on file with authors). *But see* Bowen Matthew, *supra* note 186 (observing that the challenge of securing sustainable funding persists despite mounting peer-reviewed empirical evidence demonstrating the benefit of MLPs on financial and health outcomes).

221   One attorney explained the challenges of serving specific vulnerable populations, noting that, "a large number of our patient population are indigent, or homeless, or have cellphones that are constantly changing. And so, Legal Aid, they have a follow-up process that they have in place to get in touch with these patients by phone, by mail, and they continue to try."

Some patients decline legal services because they are overwhelmed by competing needs or struggling with mental health issues.[222] Patients also may mistrust the legal process or fear that they will incur adverse consequences if they take legal action. For example, patients may be reluctant to pursue a housing claim because they fear their landlord will terminate their lease or raise their rent.[223] Other patients living in areas with limited available housing may be reluctant to pursue these claims because they have nowhere else to go and fear homelessness.[224] MLPs also make fewer connections when there are delays in contacting referred patients.[225] Finally, the

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Interview with Attorney, Medical-Legal Partnership (on file with authors).

222   As explained by one [MLP attorney] we interviewed:

> [I]f someone's referred and doesn't follow-up, often it's because they're overwhelmed, they're really depressed and are struggling with following through with anything. . . . I think it's just that in the completely overwhelming assortment of life challenges that folks are dealing with they just can't even, they're just not able to turn their attention to a legal need.

Interview with Attorney, Medical-Legal Partnership (on file with authors). Similarly, another MLP attorney we interviewed commented that if a patient has "a higher need, they are not connecting. Whether that's like I don't have time-off from my job to barely come to the doctor's so I'm not actually going to take the time to go to one more service." Interview with Attorney, Medical-Legal Partnership (on file with authors).

223   *See* Interview with Patient Navigator, Medical-Legal Partnership (on file with authors) (discussing reasons why a patient may decline a referral for legal services); s*ee also* Dana Weintraub et al., *Pilot Study of Medical-Legal Partnership to Address Social and Legal Needs of Patients*, 21 J. of Health Care for the Poor & Underserved 2, 163 (2010) (noting that "taking up legal action was perceived as too risky given potential unfavorable ramifications, particularly in of the area of housing violations and landlord issues.").

224   An MLP patient coordinator reflected on this specific challenge by recalling a time in which a patient-client declined assistance on a housing issue:

> Right now, the housing crisis that we have here in [our geographic area] is horrible. So a lot of people sometimes don't really want to move from where they are. You have to move very far away to find affordable housing.… I had a few [patient-clients], I have actually one, she said, "No, it's alright [I don't want to pursue my housing issue]. I mean, I don't pay too much rent. I'm already used to putting cartons in the windows. But because if they kick me out, I don't know where am I [going to] go."

Interview with Patient Coordinator, Medical-Legal Partnership (on file with authors).

225   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) (discussing the challenges of meeting initial high demand for MLP services and commenting that "[p]art of the problem and part of the loss is because it took a little too long to get to some of those folks").

legal partner may be unable to provide legal services to patients who do not meet applicable eligibility criteria, such as income limits or citizenship requirements.[226]

Several interviewees discussed methods used by their MLPs to increase the likelihood the MLP attorney finds a patient referred for legal services. One MLP attorney stated that her medical partner obtains alternative phone numbers from patients, as well as addresses where the attorney can send a letter. The attorney explained that this gives her multiple points of contact, which has increased the number of referred patients successfully contacted by her.[227] Some medical partners give patients referred for legal services a postcard with the MLP attorney's name and contact information, which allows a patient to contact the attorney directly if the patient's phone number changes or she does not hear from the attorney.[228] In these circumstances, providing the attorney's phone number in advance also increase the chance a patient-client will not ignore the call due to an unknown or unfamiliar number.[229] When MLP attorneys fail to

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226 *See, e.g., supra* note 18 (describing the eligibility restrictions imposed under federal law by the Legal Services Corporation).

227 *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) (reporting that obtaining alternative phone numbers and addresses where the MLP attorney can send a letter has "increased the number of cases").

228 *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) (reporting that patients referred for legal services are given the MLP attorney's contact information, "[s]o if they don't hear from us, or if we're trying to reach a number that no longer works, they still have our information and can get in touch with us").

229 An MLP attorney described the information provided to help create a sense of comfort in the patient-clients regarding next steps as follows:

>   [W]e wanted to see if there was anything we could do to address a no show, no contact, so we created a document for care coordinators to give to the patients when they were signing the release of information, and kind of summary of their health-harming legal need, that had the staff attorney's name, the phone number, and a very brief roadmap of what was gonna happen. So it was like, "Within 48-hours this person, from this phone number, will be calling you, so if you see this phone number show up on your phone that's who it is. It's going to be about the referrals from your care coordinator on your health-harming legal need," so that I think has gone a long way to helping people answer the phone, 'cause I know even when I see a phone number that I don't recognize I'm reluctant to answer the phone. I think our patient-clients even more so, so I think giving them that kind of prompting, ahead of time, with the timeline of when to expect the call has been really helpful in keeping that number fairly low.

>   Interview with Attorney, Medical-Legal Partnership (on file with authors).

reach a patient referred for legal services, other members of the care team may help the attorney connect with the patient.[230] Finally, for patients discharged from the medical partner to alternative clinical settings or homeless shelters, building relationships with these organizations can help the MLP attorney locate and connect with the patients.[231]

Trusted care team members can play a crucial role in helping patients overcome their fears or wariness about attorneys and the legal process, a frequent cause of patient-client attrition. For example, a patient navigator we interviewed helps patients understand who the MLP attorney is, that during their initial meeting the attorney and patient are "only talking" so that the attorney can give the patient advice, and that the attorney will not take any action without the patient-client's approval.[232] In other words, she explains to her patients that the MLP attorneys "are here only to support you and help you."[233] After receiving these reassurances, patients initially reluctant to meet with MLP attorneys often agree to do so.

Our research also reveals that MLPs have greater success connecting patients to legal services when they build on the medical partner's existing processes and patient's trust in the provider. Some partnerships purposefully create the appearance that the MLP attorneys' services are part of the continuum of patient services offered by the medical partner. For example, one MLP we interviewed assigned the MLP attorney a phone number similar to the medical partner's phone number. Because patients often recognize the phone number, they are more likely to "answer the phone and be a lot more responsive."[234] Another hospital likewise lists a hospital phone

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230 *See* Interview with Attorney, Medical-Legal Partnership (on file with authors) ("We go back to the medical team and try to come-up with other ways to find the client and to connect with them.").

231 For example, one MLP attorney we interviewed commented that her MLP has "worked with residential treatment centers, [because] patients are being discharged to residential treatment centers. So, we have intentionally grown some relationships with them, so that the lawyers can reach out, and get in touch with patients who are in some of those facilities." Interview with Attorney, Medical-Legal Partnership (on file with authors).

232 Interview with Patient Navigator, Medical-Legal Partnership (on file with authors) ("[L]egal is not going to do nothing if you don't approve [it] to them. You [are] only talking and you [are] only getting advice.").

233 Interview with Patient Navigator, Medical-Legal Partnership (on file with authors).

234 Interview with Social Worker, Medical-Legal Partnership (on file with authors).

number as the MLP's phone number, with calls then forwarded to the legal partner's office; the MLP attorneys also have email addresses within the hospital's email system.[235] Having the medical partner's schedulers call patients and schedule their appointment with the MLP attorney similarly builds on patients' familiarity with their providers.[236]

Physical integration of an MLP attorney into the clinical setting also increases the likelihood of patient engagement.[237] Embedding the MLP attorney in the clinical setting signals to patients that the legal services are integrated with the services offered by the medical partner. In addition, the attorney's onsite presence increases accessibility, with some patients connected to legal services the same day they are flagged as having a HHLN. As explained by an MLP attorney we interviewed:

> [T]he attorney for the MLP needs to be onsite and to be accessible at the time a client's being interviewed [by the medical partner] so there would be less loss of clients. . . . [I]f the attorney's embedded they're there when the client, the patient, is interested in talking about the problem. . . . Sometimes if you don't catch them at the moment that they're ready to deal with a particular issue, then you're not going to catch them at a later point in time.[238]

Scheduling a legal consultation during a patient's next

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235   *See* Interview with Attorney, Medical-Legal Partnership (on file with authors).

236   An MLP attorney whose MLP uses the medical partner's schedulers explained the benefits of doing so as follows:
      [I]t's the same schedulers that they're used to talking to that call and schedule a legal appointment just like they would schedule a medical appointment. . . . That has actually been one thing that's really helped with making that connection.
      Interview with Attorney, Medical-Legal Partnership (on file with authors).

237   As one interviewee put it, when the MLP attorney is physically present, "the more connections you make, the stronger the likelihood of patient engagement and actual retention or connection to that service." Interview with Attorney, Medical-Legal Partnership (on file with authors).

238   Another MLP attorney similarly emphasized the importance of quickly connecting patients to legal services: "I think our experience has been trying to connect people same day in the moment, like I'm going to walk you to the lawyer's office . . . to make sure that you connect on that issue." Interview with Attorney, Medical-Legal Partnership (on file with authors).

visit to the medical partner also increases patient engagement by simplifying the process for meeting with the MLP attorney.[239]

For legal partners that are unable to embed their attorneys in the clinical setting on a full-time basis, interviewees identified alternative strategies for connecting with patients during their clinical visits. Some interviewees commented that MLP attorneys may consult with patients during the patients' medical visits via video conferencing, although none of the MLPs we interviewed do so.[240] Like other attorneys in private practice, MLP attorneys also conduct many aspects of the legal representation over the phone. Using law students or paralegals to conduct the initial legal services consult on-site at the medical partner also expands the legal partner's capacity to see patients the day they request legal services or during their next visit for clinical care.[241]

Some MLP attorneys we interviewed commented that they must turn away patients referred to them who do not meet the legal partner's eligibility criteria (e.g., low household income, U.S. citizenship). To avoid these limitations, some MLPs find alternative funding sources that do not impose any eligibility criteria.[242] Other

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239   One MLP attorney we interviewed emphasized this point:
    [W]e just really leaned into the processes and, as much as we can, the workflow that exists rather than making this some kind of special thing that requires and feels like, for the patient, that it's going to require a whole lot of effort.
    Interview with Attorney, Medical-Legal Partnership (on file with authors).

240   *See* MLP attorney interview on file with the authors ("No, we did not video conference. I think that's a tactic to be considered if the lawyer is not embedded.").

241   For example, the clinical professor for a law school MLP explained that she schedules law students to be present whenever the clinic is seeing patients, as this allows for a legal services consult "as a part of the outpatient visit." Interview with Attorney, Medical-Legal Partnership (on file with authors). Another attorney noted that a paralegal hire was necessary to contact patients after the initial screening initiative resulted in an unmanageable volume. The attorney noted "[At the beginning] everybody was a first-time client. Our attorney was overwhelmed with referrals. . . . It was very hard for us to get out from underneath all the initial referrals, to make all those client contacts at once." *See* interview with Attorney, Medical-Legal Partnership (on file with authors).

242   For example, one legal aid attorney we interviewed explained that her MLP avoids eligibility restrictions by obtaining funding from third parties: "[A]ll of our funders have said, 'Do not screen for income eligibility or resources or whatever else, we want you to help our patients. We're serving them all so can you all do the same.'" Interview with Attorney, Medical-Legal Partnership (on file with authors).

MLPs broaden the scope of available legal services by including a range of legal organizations in the partnership. For example, one physician we interviewed explained that his provider not only contracts with a legal aid organization, but also partners with additional organizations that can assist those patients legal aid must turn away.[243] These strategies allow the MLP to open its doors to all (or most) patients with HHLNs.

V.   CONCLUSION

Across the country, attorneys and health care professionals are joining forces to address legal problems that adversely impact patients' health. Integrating medical and legal services holds tremendous potential for improving patients' health, particularly the health of more vulnerable populations. Yet bringing together two professions that traditionally have operated in separate silos also raises complex issues and illustrates the difficulties of applying pre-existing legal and medical paradigms to innovative, holistic care delivery models. Drawing on the real-world experiences of attorneys, physicians, social workers, and other professionals participating in medical-legal partnerships, this Article explores the promises and perils of MLPs. The wisdom shared by our interviewees provides important insights on the strategic decision points and challenges facing new and existing MLPs, as detailed in Parts II and III.

The insights shared by the MLP professionals we interviewed also promotes more informed discussion of important issues facing the MLP community. Specifically, our research confirms that securing sustainable funding is, for many MLPs, one of their greatest challenges. The long-term viability of the MLP model therefore depends on developing innovative payment models that provide MLPs with sustainable financing. Procuring broad support for these payment reforms from policymakers and the health care sector, however, may require additional data evidencing MLPs' positive

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243   In response to a question about restrictions to representation, one physician explained that by partnering with multiple legal partners, it reduces the number of patient-clients that must be turned away based on funding restrictions. This MLP physician elaborated, stating, "That's why we have four legal partners. I think the main thing we don't take is really criminal cases because none of the civil agencies do criminal cases. We pretty much do everything else. We haven't encountered a situation yet that I know of that between the four they can't handle it." Interview with Physician, Medical-Legal Partnership (on file with authors).

impact on patients' health. For this reason, the MLP community should expand their efforts to track the legal and health outcomes of their services and integrated, team-based care models, and produce regular reports and studies demonstrating their value.

The experiences of MLP professionals also informs the debate on whether current privacy laws and standards of professional conduct rules—developed for a world where medical and legal service providers operated separately—make sense when medical and legal professionals work together. MLPs cannot achieve their full potential if participating professionals do not freely share relevant patient-client information. We therefore asked interviewees whether current legal and ethical obligations hinder communication across their medical and legal partners. To our surprise, many interviewees reported that their professional obligations rarely pose a barrier to the medical and legal partners' collaborative efforts to improve patient-clients' health. Nevertheless, professional obligations lead some MLPs to limit the legal and medical information shared across the partners. This finding suggests that changes to the legal and ethical rules governing MLP professionals may be warranted, especially the rules regulating attorneys. For example, the rules governing the attorney-client privilege could be modified to allow MLP attorneys to share client information with the medical partner without waiving the privilege.

Lastly, the issues broached in our interviews raise larger questions about the MLP attorney's professional identity and independence within health care settings that offer services beyond traditional medicine. For example, comments questioning the utility of MLP attorney's accessing the EHR or participating in care team meetings may reflect a more traditional view of attorneys and providers operating separately from one another rather than collaboratively as part of a multidisciplinary team. Embedding attorneys in health care settings also may raise concerns about professional conflicts of interest should an attorney's fiduciary obligations to a client conflict with the provider's interests or professional ethics, particularly if the medical partner finances the MLP. These issues may become of greater concern if more partnerships adopt the highly-integrated MLP model.

The operational issues and policy implications raised by our research warrant further study and discussion to ensure that the MLP model fulfills its potential to improve patients' health. More generally, the experiences of those integrating legal and medical services offer

important lessons on the promises and perils of unconventional partnerships to address the social determinants of health. As such, MLPs may serve as a blueprint for future collaborations seeking to integrate non-clinical services into the health care setting.

Bad History, Bad Opinions: How "Law Office History" is Leading the Courts Astray on School Board Prayer and the First Amendment

By Andrew L. Seidel*

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The last two years have seen an explosion of judges and lawyers adopting flawed history in cases involving prayer at public school board meetings. At least eleven federal circuit court judges have written or joined opinions relying on fallacious history that they have accepted and repeated without question.

This article traces that now pervasive bad history—"law office history"—to a single amicus brief written by the Family Research Council. I examine the history and find that it has no factual basis. I then look at the wider use of law office history in cases involving the First Amendment religion clauses, focusing on the original Supreme Court case to elevate history over legal principle, Marsh v. Chambers. *I conclude with suggested fixes. This article seeks to correct serious errors in the academy and to stop judges from employing self-interested, counterfactual history, which reflects poorly on our legal system. I wrote this article while litigating (and winning) the school board prayer case before the Ninth Circuit.*

I.   INTRODUCTION

Judges and lawyers are not historians. When we start relying on history to argue and decide cases, proper scholarly and historical methods can get sacrificed on the altar of outcome. "Law-office history" is a term coined by historian Alfred H. Kelly in 1965 to describe history as written by legal advocates rather than dispassionate scholars—history that is manipulated and cherry-picked to achieve a legal end.[1] The courts are rife with law office history, particularly in cases involving religion and the government. As Professor Steven K. Green wrote nearly 15 years ago, "since 1947 lawyers and judges have used history with abandon to justify their arguments and decisions about the proper relationship between church and state."[2] The last two years have seen an explosion of judges and lawyers adopting severely flawed law office history— traced to a single, highly-biased source—in cases involving prayer at public school board meetings.

When the Supreme Court upheld prayer at legislative meetings in the face of a First Amendment Establishment Clause challenge, it did so on the basis of the practice's historical pedigree.[3] The Court explained in *Marsh v. Chambers* that the prayers dated back

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1   *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 Sᴜᴘ. Cᴛ. Rᴇᴠ. 119, 119–58.

2   Steven K. Green, *Bad History: The Lure of History in Establishment Clause Adjudication,* 81 Nᴏᴛʀᴇ Dᴀᴍᴇ L. Rᴇᴠ. 1717, 1717–18 (2006).

3   Marsh v. Chambers, 463 U.S. 783 (1983).

to the First Continental Congress. This is a curious and problematic historical argument because when that body met, the colonies had not even declared independence from England, let alone written the Constitution that, by design, would separate state and church. The six-judge *Marsh* majority did not apply any constitutional test, but simply concluded that, because the framers hired a chaplain to pray around the time that they drafted the First Amendment (not when it was ratified or had legal effect), they must not have thought it a violation of the Constitution. Legal principle was set aside in favor of history, something Justice William Brennan and Thurgood Marshall highlighted in their dissent: "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."[4]

The *Marsh* decision was based on "what historians properly denounce as 'law office history,' written the way brief writers write briefs, by picking and choosing statements and events favorable to the client's cause."[5] Those seeking to breach the "wall of separation between Church [and] State,"[6] or working to tear it down altogether, are eager to expand the *Marsh* historical exception because the exception is more malleable than that metaphorical wall, even though the Supreme Court adopted the wall metaphor in 1878, and employed it in 1947, 1948, 1961 (three times), 1962, 1963, 1968, 1973, 1977, 1982, and again and again in countless concurrences, dissents, and lower court opinions.[7]

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4   *Id.* at 800–01.

5   Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 842 (1986).

6   The wall metaphor comes from Thomas Jefferson's January 1, 1802 letter to the Danbury Baptists. Jefferson wrote: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State. [A]dhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties." Thomas Jefferson, *To the Danbury Baptist Association* (Jan. 1, 1802), *in* The Papers of Thomas Jefferson, Volume 36: 1 December 1801 to 3 March 1802, at 258 (Princeton University Press, 2009), https://jeffersonpapers.princeton.edu/selected-documents/danbury-baptist-association-0.

7   *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122–23 (1982); Wolman v. Walter, 433 U.S. 229, 236 (1977),

Law office history is by definition self-interested and used to argue a point, not to expound historical truth.[8] When judges employ tactics that appear self-interested, it reflects poorly on the entire judiciary and our legal system. In our common law system, which relies on precedent, law office history can have other devastating consequences. Once a historical claim makes it into a court's opinion, it is more apt to be accepted uncritically as true and repeated by other judges. The higher the court, the more authority the repetition is given. And, like a children's game of telephone, subsequent repetitions are likely to lose nuance or detail, or even change the meaning. That is precisely what is happening right now with the history of prayer at school board meetings. Lawyers and judges have been uncritically repeating historical claims that lack any evidentiary or factual basis.

This article traces that increasingly common modern claim— that there is a history of school board prayer in America—back to a single amicus brief authored by a notoriously conservative, anti-LGBT, Christian nationalist organization, the Family Research Council (FRC).[9] Cases involving school board prayer are ongoing and arguments of a circuit split could land the issue before the Supreme Court in the near future.[10] The question then is whether one biased

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overruled by Mitchell v. Helms, 530 U.S. 793 (2000); Comm. For Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 761 (1973); Epperson v. Arkansas, 393 U.S. 97, 106 (1968); Sch. Dist of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (less explicitly than elsewhere); Engel v. Vitale, 370 U.S. 421, 425 (1962); Torcaso v. Watkins, 367 U.S. 488, 493 (1961); Braunfeld v. Brown, 366 U.S. 599, 604 (1961); McGowan v. Maryland, 366 U.S. 420, 443 (1961); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211 (1948); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); Reynolds v. United States, 98 U.S. 145, 164 (1878).

8   Allen Guelzo wrote in the introduction of his award-winning Abraham Lincoln biography, "nor is it going to be claimed here for the sake of difference that Lincoln was a philosopher, a theologian, a mystic (all of which have been tagged on Lincoln for reasons that have more to do with self-interested authors than with Lincoln)." Allen C. Guelzo, Abraham Lincoln: Redeemer President 19 (2002).

9   Brief of Amici Curiae Family Research Council & Louisiana Family Forum – Attorneys Resource Council in support of Defendants-Appellants' Supplemental Brief for Re-Hearing En Banc, Doe v. Tangipahoa Par. Sch. Bd., 478 F.3d 679 (5th Cir. 2007) (No. 05-30294) [hereinafter FRC Brief].

10   *Compare* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017) (approving school board prayer practice), *with* Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1152 (9th Cir. 2018), *petition for review en banc denied*, 910 F.3d1297 (9th Cir. Dec. 26,

organization's woefully inadequate historical account will supplant reasoned legal argument when such a case comes before the highest court in the land.

Before tracing this historical claim about school board prayer to that brief (Section 3), I will lay out the legal landscape of legislative and school board prayer (Section 2). Next, I examine precedent to determine what evidence might be required in order to prove that there is, in fact, a history of prayer at school board meetings (Section 4). The article then critically examines the historical claims in that progenitor amicus, which is seriously wanting in scholarship and legitimate support for the historical claim it makes (Section 5). It will become clear that none of the evidence it offers shows that there is a history of school board prayer; quite the opposite in fact. Finally, I turn to the law office history in *Marsh* and conclude with some suggestions for curing this legal ailment (Sections 6 and 7).

An investigation into the propriety of using law office history to decide constitutional questions is more important now than ever before. In June 2019, for the first time ever, the Supreme Court applied this flawed historical approach to a state-church question outside the legislative prayer context when it decided the Bladensburg Cross case, and allowed a government-maintained, 40-foot concrete Christian cross to remain on government property because it had been there for 90 years.[11] The Court favorably invoked the law office history approach to First Amendment questions as laid out in *Marsh* and *Town of Greece v. Galloway*.[12] In other words, rather than curtailing the use of this flawed, manipulable inquiry, the Court is expanding it.

II. THE LEGAL LANDSCAPE OF LEGISLATIVE AND SCHOOL BOARD PRAYER

The modern debate over history in cases involving the Establishment Clause stems from the Supreme Court's 1983 decision in *Marsh v. Chambers*, which held that the Nebraska legislature's opening prayers did not violate the First Amendment's Establishment Clause.[13]

In so doing, and unlike every other Establishment Clause

2018) (holding school board prayer practice unconstitutional).

11   *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2078, 2084, 2087, 2089 (2019).

12   *See id.* at 2087–88.

13   Marsh v. Chambers, 463 U.S. 783, 791 (1983).

decision, *Marsh* abjured the defining principle of Establishment Clause jurisprudence: "[T]he principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.'"[14] As Justice Brennan wrote in his dissent: "[I]f the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."[15] *Marsh* abandoned legal principle, granting government prayer constitutional immunity because it pre-dated the First Amendment.

However the courts may be trending now,[16] this method—if it can be called a method—makes the case an outlier, and a heavily criticized outlier at that. Professor Michael McConnell's criticism of *Marsh* is accurate and devastating:

> *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.[17]

Within two years of *Marsh*, first in 1985 and then again in 1987, the Court declined to extend this "nod to history" approach to the public school context. In *Wallace v. Jaffree*, the Court recognized

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14   McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

15   *Marsh,* 463 U.S. at 796 (Brennan, J., dissenting).

16   *See, e.g., Am. Legion*, 139 S. Ct. 2067.

17   Michael McConnell, *On Reading the Constitution*, 73 Cornell L. Rev. 359, 362 (1988). *Marsh* has been criticized from all directions. *See, e.g.,* Laurence Tribe, American Constitutional Law § 14–15, at 1288–89 (2d ed. 1988); Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. Kan. L. Rev. 285, 335 n.144 (1994) (criticizing a historical approach of constitutional interpretation as weak). "The Supreme Court's decision in *Marsh* lasted less than ten pages and can be summarized as follows: 'The founders did it. Everyone since them has done it. No one is abusing it. Therefore it is constitutional.'" Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. Miami L. Rev. 713, 723 (2009) (quoting Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 Cal. L. Rev. 293, 338 (1993)).

that there is no long, unbroken history of prayer in public schools or school boards.[18] Two years later, in *Edwards v. Aguillard*, the Court explicitly found that *Marsh*'s rationale was based entirely on the historical context:

> The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.[19]

In these two cases, the Supreme Court treated government-organized prayers in a school context differently than government-organized prayer at the state legislature. The resulting clash of the hybrid issue—prayer at school board meetings—was inevitable.

Two circuit court decisions examined prayer at school board meetings after *Marsh*: *Indian River School District v. Doe* in the Third Circuit and *Coles v. Cleveland Board of Education* in the Sixth Circuit. Both circuits held that the *Marsh* exception did not apply to school board prayers. Relying heavily on the facts of the cases, the courts found that the context of school board prayers was more like that of prayer in public schools, not like prayer at a state legislature. In *Coles,* the "realities" of school board meetings dictated the holding: "These meetings are conducted on school property by school officials, and are attended by students who actively and regularly participate in the discussions of school-related matters."[20] Other important factors included involuntary student presence at and participation in the meetings,[21] the school-related purpose of school board meetings,[22]

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18   Wallace v. Jaffree, 472 U.S. 38, 80 (1985).

19   Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987).

20   Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 381 (6th Cir. 1999).

21   Doe v. Indian River Sch. Dist., 653 F.3d 256, 264–65, 276 (3d Cir. 2011) ("It is true that attendance at the Indian River School Board meetings is not technically mandatory. Nevertheless, the meetings bear several markings of 'involuntariness' and the implied coercion that the Court has acknowledged elsewhere.").

22   *Id.* at 277–79; *Coles,* 171 F.3d at 381 ("What actually occurs at the school board's meetings is what sets it apart from the deliberative processes of other legislative bodies. Simply stated, the fact that the function of the school board is uniquely directed toward school-related matters gives it a different type of 'constituency' than those of other legislative bodies—namely, students.").

the presence of a student representative sitting on the school board,[23] the student disciplinary action the board takes at the meetings,[24] and the fact that the meetings often take place on school property.[25]

Interestingly, neither the parties nor the amici in either *Coles* or *Indian River* tried to argue that there was a long and unbroken history of school board prayer in this country. They certainly argued that *Marsh* should encompass school board prayers, but nobody attempted to make the argument that, historically, school boards prayed. This is especially remarkable in *Indian River*, which featured amici from some rather notorious historical revisionists including Wallbuilders, the outfit run by David Barton,[26] and the Foundation for Moral Law, run by disgraced Alabama judge Roy Moore.[27] It was

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23   *Indian River,* 653 F.3d at 277; *Coles,* 171 F.3d at 372.
24   *Indian River,* 653 F.3d at 264; *Coles,* 171 F.3d at 383.
25   *Indian River,* 653 F.3d at 278; *Coles,* 171 F.3d at 385–86 (noting the importance of government control over content).
26   Along with the Congressional Prayer Caucus Foundation, Wallbuilders is the main driving force behind Project Blitz. *See* Frederick Clarkson, *"Project Blitz" Seeks to Do for Christian Nationalism What ALEC Does for Big Business,* Rewire News (Apr. 27, 2018), https://rewire.news/religion-dispatches/2018/04/27/project-blitz-seeks-christian-nationalism-alec-big-business/. It is an organization committed to twisting history in order to sell a false narrative based on Christian exceptionalism and Barton is a disgraced wannabe-historian. Nate Blakeslee, *King of the Christocrats,* Tex. Monthly, Sep. 2006, https://www.texasmonthly.com/articles/king-of-the-christocrats/.   Barton never apologized after getting caught repeatedly lying about earning a Ph.D. in history. *See, e.g.,* Mark Woods, *Did These Top Evangelicals Really Earn Their PhDs?,* Christian Today (Oct. 10, 2016) https://www.christiantoday.com/article/did-these-top-evangelicals-really-earn-their-phds/97596.htm (after it was revealed that Barton's degree came from a school with no history program: "Barton has not commented, and did not return requests for clarification from Christian Today."). He wrote a book, aptly titled *The Jefferson Lies,* that was so divorced from reality that the book's own publisher pulled it from bookstores after noting that "basic truths just were not there." *See, e.g.,* Elise Hu, *Publisher Pulls Controversial Thomas Jefferson Book, Citing Loss of Confidence,* Nat'l Pub. Radio (Aug. 9, 2012), https://n.pr/33Crrpc (the publisher noted that "There were historical details — matters of fact, not matters of opinion, that were not supported at all."). That year, a poll by the History News Network concluded that the book was "the least credible history book in print." David Austin Walsh, *What is the Least Credible History Book in Print?,* Hist. News Network (July 16, 2012), https://historynewsnetwork.org/article/147149. Undeterred, Barton shamelessly continues to sell this deceitful book, now published by Wallbuilders itself. That the Wallbuilders brief failed to argue for this history is telling.
27   This brief argues that the *Marsh* "analysis is fundamentally flawed" because it relied on history: "*Marsh* failed to offer the consistently applied principle of

not until after these cases refused to expand *Marsh* that a history of school board prayer was first argued.

After those two decisions, the Supreme Court handed down *Town of Greece v. Galloway*. *Town of Greece* dealt with prayers at town council meetings and reinforced, but did not expand, *Marsh*. *Marsh* had been applied beyond the state legislature session before the Court decided *Town of Greece*, though importantly never to a school or school board.[28] *Town of Greece* also specifically distinguishes school settings:

> This case can be distinguished from the conclusions and holding of *Lee v. Weisman,* 505 U.S. 577 (1992). There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. *Id.,* at 592–594; see also *Santa Fe Independent School Dist.,* 530 U.S., at 312. . . . Neither choice represents an unconstitutional imposition as to mature **adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."**[29]

While government prayer advocates have argued for an expansion of the historical exception laid out in *Marsh* and *Town of Greece,* courts have refused to apply the exception beyond its specific context of state and local legislatures. For instance, the following government-organized religious rituals have not been upheld:

- prayers at city-organized memorial or holiday events,

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the text of the First Amendment and instead simply analogized by historical examples." Brief Amicus Curiae of Foundation for Moral Law, on Behalf of Appellees, Doe v. Indian River School District, 653 F.3d 256 (3rd Cir. 2011) (No. 10-1819).

28   *See* Pelphrey v. Cobb Cty., 547 F.3d 1263, 1275–76 (11th Cir. 2008) (applied to county commission); Simpson v. Chesterfield Cty. Bd. of Supervisors, 404 F.3d 276, 278 (4th Cir. 2005) (applied to a county board of supervisors); Snyder v. Murray City Corp., 159 F.3d 1227, 1228 (10th Cir. 1998) (applied to a city council).

29   Town of Greece v. Galloway, 572 U.S. 565, 590 (2014) (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983)) (emphasis added).

such as Memorial Day or Veterans' Day;[30]
- prayers that advance one faith;[31]
- prayers at dinner at a state military college;[32]
- prayers at school faculty meetings and in-service training;[33]
- prayers at state courts;[34]
- prayers in the school context;[35]
- prayer breakfasts;[36]
- prayer vigils;[37]
- religious speakers at police department events;[38]
- prayers at school board meetings.[39]

Despite the long history of courts refusing to expand the *Marsh* exception to the public school context, change may be coming to school board prayer law.[40] In the two most recent cases to involve school board prayer—both reaching the federal appellate level and both post-*Town of Greece*—judges claimed that there is a history of school board prayer sufficient to justify extending the historical exception to school boards.

III. THE CLAIM THAT THERE IS A LONG HISTORY OF SCHOOL BOARD PRAYER IN AMERICA TRACES BACK TO A SINGLE AMICUS BRIEF AUTHORED WITH NO HISTORICAL EXPERTISE.

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30   Hewett v. City of King, 29 F. Supp. 3d 584, 630 (M.D.N.C. 2014).

31   Wynne v. Town of Great Falls, 376 F.3d 292, 302 (4th Cir. 2004).

32   Mellen v. Bunting, 327 F.3d 355, 369–70 (4th Cir. 2003).

33   Warnock v. Archer, 380 F.3d 1076 (8th Cir. 2004).

34   N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1152–53 (4th Cir. 1991).

35   Lee v. Weisman, 505 U.S. 577, 596–97 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Wallace v. Jaffree, 472 U.S. 38 (1985).

36   Newman v. City of East Point, 181 F. Supp. 2d 1374, 1378–80 (N.D. Ga. 2002).

37   Rojas v. City of Ocala, 315 F. Supp. 3d 1256, 1278 n.16 (M.D. Fla. 2018).

38   Milwaukee Deputy Sheriff's Ass'n v. Clarke, 588 F.3d 523, 525–26 (7th Cir. 2009).

39   Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 371 (6th Cir. 1999); Doe v. Indian River Sch. Dist., 653 F.3d 256, 275 (3d Cir. 2011); Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1142 (9th Cir. 2018).

40   The Supreme Court recently demonstrated its willingness to expand the flawed historical analysis approach outside the prayer context in *Am. Legion v. Am. Humanist Ass'n,* discussed further below. *See generally Am. Legion,* 139 S. Ct. 2067.

One attorney arguing in favor of school board prayer cited a "long established historical practice of using prayer to begin school-board meetings" to justify his argument.[41] A straight line can be drawn from this post-*Town of Greece* argument that a history of school board prayer exists to a single law review article. Quite a few judges on the Fifth and Ninth Circuits—the only two circuits to have taken up the issue after *Town of Greece*—have written opinions stating that the history exists. All the history in those opinions eventually traces back to the same article, *Prayer Is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings,* which was penned by a rising third-year law student, Marie Wicks.[42]

Solely on the basis of Wicks's article, the Fifth Circuit accepted, at least to a certain extent, that a history of school board prayer exists in *American Humanist Association v. McCarty* in 2017.[43] That case initially challenged prayers at school board meetings; however, just prior to litigation the school board adopted a new policy that created a forum for a single student to deliver a personal message of their choosing—prayer, poem, or otherwise—at the board meeting.[44] This change could have shifted the panel into deciding the case on free speech grounds—the panel could have decided that the board had opened a forum for student expression—but the panel still looked to history.

As they were bound to do, Circuit Judges Smith, Clement, and Southwick agreed that the Supreme Court relied on history to uphold legislative prayer in *Marsh*.[45] The challengers agreed too, but argued that the school district's "invocation policy does not fit within the legislative-prayer exception because it lacks a 'unique history.'"[46] The panel both agreed and disagreed. Writing for the unanimous panel, Judge Smith recognized that the Supreme Court denied the existence of a history of school board prayers because free education did not exist at the time of the founding.[47] He "nonetheless" held that there was a dispositive, or at least probative, history "dating

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41   Appellants' Reply Brief at 14, *Chino Valley*, 896 F.3d at 1132.
42   Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 527 n. 15 (5th Cir. 2017); Am. Humanist Ass'n v. Birdville Indep. Sch. Dist., 138 S. Ct. 470 (2017).
43   *McCarty*, 851 F.3d at 525–27.
44   The suit was filed in May 2015, and, according to the 5th Circuit, the change was made in March 2015. *Id.* at 523, 524 n. 5.
45   *Id.* at 525–26.
46   *Id.* at 527
47   *Id.*

from the early nineteenth century, as at least eight states had some history of opening prayers at school-board meetings."[48] Eight states. Remember that number. To support this historical claim, Judge Smith cited only the Wicks law review article, *Prayer Is Prologue*.[49]

Other courts have not been convinced to adopt Wicks's history. In *Bormuth v. County of Jackson*, the Sixth Circuit characterized the Fifth Circuit panel's decision in a parenthetical as "applying *Town of Greece* to prayers before school boards," on the basis of "tradition."[50] However, as we have seen, before *Town of Greece*, the Sixth Circuit had refused to apply *Marsh*'s historical analysis to prayers offered at public school board meetings and instead applied the *Lemon* test.[51] Despite this characterization of *Town of Greece*, it did not revisit that earlier decision in *Bormuth*.[52]

In the 2018 *Chino Valley* case, which I litigated,[53] the Ninth Circuit distinguished the Fifth Circuit's *McCarty* decision on several factual bases and struck down bible-reading, proselytizing, and prayer by school board members at school board meetings.[54] The two cases were factually dissimilar. While *McCarty* involved what was essentially a free speech forum for students to say what they wanted, prayer or otherwise, *Chino Valley* featured board members overtly preaching and proselytizing alongside prayers—to "everyone who does not know Jesus Christ . . . go and find Him," urged one school board member.[55] The school board meetings in *Chino Valley* resembled a church service and there were reports of how the local mega-church, active in conservative politics, had captured the school

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48   *Id.* (citing Marie Elizabeth Wicks, *Prayer Is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & Pol. 1, 30–31 (2015)). The Fifth Circuit emphasized history in the next two sentences as well. *Id.* at 527 nn.16, 17.

49   *McCarty,* 851 F.3d at 527 n.15.

50   Bormuth v. Cty. of Jackson, 870 F.3d 494, 505 (6th Cir. 2017), *cert. denied sub nom.* Bormuth v. Jackson Cty., 138 S. Ct. 2708 (2018), *reh'g denied,* 139 S. Ct. 47 (2018).

51   Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 379–83 (6th Cir. 1999).

52   *Bormuth,* 870 F.3d at 505 n.4. This is to say, the Sixth Circuit did not revisit *Coles* in *Bormuth*.

53   Along with David Kaloyanides and FFRF's Legal Director, Rebecca Markert. *See* Fee Order, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425).

54   *Chino Valley,* 896 F.3d at 1132, 1133, 1144, 1152.

55   *Chino Valley,* 896 F.3d at 1140.

board.[56] The *Chino Valley* prayers followed the Pledge of Allegiance and occurred immediately before student performances for the board and the board's recognition of student achievement. Any students that wanted recognition, to perform for their community, or to sit on the board were present during those prayers.

The *Chino Valley* panel focused on these facts, though the school board's advocates repeatedly invited the Ninth Circuit panel to adopt the history of school board prayer in the Wicks article during both written and oral argument. In briefing, the Chino Valley School Board argued: "Undoubtedly, there is a long established historical practice of using prayer to begin school-board meetings."[57] The board cited *McCarty* for this claim, which in turn cites the Wicks law review article.[58] The reliance on Wicks was more explicit in oral argument. Judge Wardlaw asked the board at oral argument: "[W]hat record evidence do you have that invocations at school board meetings are embedded in the history and tradition of our country?... What historic evidence do you have?"[59] The board's counsel noted that both the board and an amicus cited in their respective briefs a law review article "that goes through a long history and identifies a significant history of invocations in school board settings."[60] He reiterated this on rebuttal.[61] The article referred to was, of course, Wicks's article.

It was not just the Chino Valley School Board and a single amicus, but *all* the board's amici that relied on the history in the Wicks article to make the historical argument that *Marsh* should apply to school boards. Three of the four amici cite the Wicks article by name; the fourth quotes *McCarty* (which cited Wicks) and some

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56   Amy Julia Harris, *Megachurch Helps California School Board Blur Church-State Divide*, Reveal News (Apr. 29, 2015), https://www.revealnews.org/article/megachurch-helps-california-school-board-blur-church-state-divide/; Amy Julia Harris, *School Board's Lawyers In Prayer Fight Have Ties To Mega-Church Pastor*, Reveal News (Mar. 11, 2016), https://www.revealnews.org/blog/school-boards-lawyers-in-prayer-fight-have-ties-to-mega-church-pastor/.

57   Appellants' Reply Brief at 14, *Chino Valley*, 896 F.3d at 1132.

58   *Id.* ("Based on the history of legislative-prayer in general, and prayer at the opening of school-board meetings in particular, the fifth circuit rejected the argument that the Birdville Independent School District was required to demonstrate its own 'unique history'. *McCarty*, 851 F.3d at 527-28.")

59   Oral Argument at 8:21, *Chino Valley*, 896 F.3d 1132, https://www.youtube.com/watch?v=4TNeKJMNEkE.

60   *Id.* at 9:48.

61   *Id.* at 43:50.

of the examples that appear in the Wicks article.[62]

The Congressional Prayer Caucus Foundation, a *Chino Valley* amicus and one of the three purveyors of the Christian nationalist legislative push named Project Blitz,[63] points to Wicks's article and, in particular, the Fifth Circuit's reliance on that article, to argue that "the constitutionality of school board prayer is supported by the historical pedigree . . . of these prayers."[64] The Prayer Caucus Foundation then praised Wicks as "intellectually honest about the historical record: prayer at school boards has a strong historical pedigree."[65] Its point being that the Fifth Circuit "was correct to take note of school board prayer's long-standing pedigree."[66]

The American Center for Law and Justice dubs Wicks a "scholar"[67] and the Justice and Freedom Fund cites her favorably.[68] Finally, the Alliance Defending Freedom, while not citing Wicks specifically, quoted *McCarty*, which in turn relies on Wicks,[69] and cites a few of Wicks's historical examples, including the Pennsylvania and Iowa examples debunked in Section 5 below.[70]

The Ninth Circuit panel rejected these historical proffers: "The history of public schools in the United States, and their intersection with the Establishment Clause, does not support the application of the *Marsh-Greece* exception to the practices of public school boards, including school-board prayer."[71] The Chino Valley

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62   Amicus Curiae Brief for All. Defending Freedom in Support of Chino Valley Unified Sch. Dist. Bd. of Educ., et al., Urging Reversal at 9–11, *Chino Valley*, 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425) [hereinafter ADF Amicus]; Brief of amicus Curiae, the Am. Ctr. for Law & Justice, in Support of Defendants-Appellants and Urging Reversal at 19–20, 24, *Chino Valley*, 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425) [hereinafter ACLJ Amicus]; Brief of Amicus Curiae of the Cong. Prayer Caucus Found. In Support of Appellant Urging Reversal at 8–9, *Chino Valley*, 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425) [hereinafter CPCF Amicus]; Brief of Amicus Curiae Justice and Freedom Fund in Support of Defendants-Appellants at 19, *Chino Valley*, 896 F.3d 1132 (9th Cir. 2018) (No. 16-55425) [hereinafter JFF Amicus].

63   Clarkson, *supra* note 26.

64   CPCF Amicus, *supra* note 62, at 8.

65   *Id.* at 9.

66   *Id.*

67   ACLJ Amicus, *supra* note 62, at 19.

68   JFF Amicus, *supra* note 62, at 19.

69   ADF Amicus, *supra* note 62 at 9 ("dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings.").

70   *Id.* at 9–10.

71   Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of

School Board's request for an en banc rehearing was denied, but eight judges dissented from the denial, including Judge O'Scannlain who, as a senior judge, cannot vote on calls for rehearing cases en banc or formally join a dissent from failure to rehear en banc, but who wrote his own dissent anyway.[72] One section of the dissent focuses on history, charging that the panel "cursorily concludes that a historical analysis shows that an opening prayer at school board meetings does not fit within our nation's legislative prayer tradition" and calling that conclusion "absurd."[73] In that section, the eight judges repeated the Fifth Circuit's historical malpractice, writing, "[i]n fact, as our sister circuit has observed in considering the applicability of the tradition, 'dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings.'"[74] Eight states.

All eleven federal appellate judges[75] who have concluded that there is a substantial history of school board prayer cited the eight states figure from Marie Wicks's article. These judges are not alone. According to Wicks, Justice Kagan has expressed interest in the article.[76] Wicks's article has driven the post-*Town of Greece* argument that there is a history of school board prayer. This, in itself, is remarkable. First, at the time of writing her article, Ms. Wicks was not a lawyer or a historian, but a rising third-year law student with a Bachelor of Arts in International Studies and French.

Wicks's legal analysis of school board prayer in the wake of *Town of Greece* generally is reasonable, but she also makes bold and,

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Educ., 896 F.3d 1132, 1147–48 (9th Cir. 2018).

72   Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 910 F.3d 1297, 1298 (9th Cir. 2018) (O'Scannlain, J., opinion respecting denial of rehearing en banc). The dissents to the en banc were striking in how little they reflected the facts of the underlying case. None of the judges even mentioned that, in addition to overtly sectarian prayers, the school board itself also read the bible aloud and proselytized to students and the audience, urging them to convert. The second dissent, which discussed the panel's application of the *Lemon* test, stated that the "panel held that a nonsectarian prayer or invocation before the Chino Valley Unified School District of Education Board ("the Board") meeting violates the Establishment Clause under *Lemon*." The panel never even uses the words "sectarian" or "nonsectarian" and held instead that the Board's prayer *policy* violated *Lemon*, a small but significant distinction.

73   *Id*. at 1302–03.

74   *Id*. at 1303 (citing Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 527 (5th Cir. 2017).

75   *McCarty*, 851 F.3d at 527; *Chino Valley*, 910 F.3d at 1304–09.

76   *See* Wicks, *supra* note 48, at 1 n. introductory footnote.

as we shall see, unsupportable historical claims: "In addition to the broader history of legislative prayer, school boards have enjoyed a more specific historical tradition of invocations at the start of meetings."[77]

The second reason the influence of this article is remarkable is because Wicks purports to prove that historical tradition in a single paragraph. On the basis of this one paragraph, Wicks concludes: "To the extent that an argument for school board prayer can be made based upon its historical tradition, these records show that school boards have long been solemnizing the beginning of their meetings with a brief invocation."[78] Even more remarkably, that lone paragraph includes no original scholarship or research. Instead, Wicks repeatedly cites an amicus brief by the Family Research Council and regurgitates the historical sources cited in the brief.[79]

Before looking at that brief, let's summarize: The Ninth Circuit en banc dissenters relied on the Fifth Circuit panel, which in turn cited Wicks's article for the proposition that there is a history of school board prayer. The article contains a single paragraph on this history and was written by a law student with no historical expertise. The student, in turn, cribbed the analysis from an amicus brief. At no point in this chain has a serious scholar or historian vetted the claim, but it nevertheless appears in several opinions, including a controlling opinion by a three-judge panel of the Fifth Circuit. It gets much worse when we turn to the original brief itself.

The FRC brief at the root of these historical claims was written for the *Tangipahoa* school board prayer case.[80] Two Doe students and their parent challenged prayers at school events, including prayer at school board meetings, eventually the only outstanding issue that needed a ruling. The district court found that school board prayers were outside *Marsh* and struck them down.[81] The Fifth Circuit panel assumed but did not decide that the school board could theoretically avail itself of *Marsh's* protection, but that its prayers still violated *Marsh,* and so struck them down anyway.[82] The school board asked

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77   *Id.* at 30–31.
78   *Id.* at 31.
79   *Id.* at 30–31 (citing FRC Brief, *supra* note 9).
80   *Id.*
81   Doe v. Tangipahoa Par. Sch. Bd., 473 F.3d 188 (5th Cir. 2006), *vacated en banc,* 494 F.3d 494 (5th Cir. 2007); Doe v. Tangipahoa Par. Sch. Bd., No. Civ.A. 03-2870, 2005 WL 517341 (E.D. La. Feb. 24, 2005).
82   Doe v. Tangipahoa Par. Sch. Bd., 473 F.3d 188, 202, 205 (5th Cir. 2006), *vacated en banc,* 494 F.3d 494 (5th Cir. 2007).

for an en banc rehearing[83] and it was at that point that the FRC and Louisiana Family Forum submitted their amicus brief.

The substance of the brief is less than eight pages and is poorly researched. It was solely authored by Joshua Carden. After homeschooling, Carden attended two highly religious Christian schools: Dallas Baptist University, receiving a Bachelor of Arts in Political Science, and then the law school founded by televangelist Pat Robertson, Regent University Law School.[84] Carden once worked at the Alliance Defending Freedom, an organization dedicated to promoting Christianity and which submitted an amicus brief citing Wicks in the *Chino Valley* case.[85] At the time Carden authored

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83   Doe v. Tangipahoa Par. Sch. Bd., 494 F.3d 494, 496 (5th Cir. 2007) (en banc).

84   Joshua Carden, LINKEDIN, https://www.linkedin.com/in/joshua-carden-2960ab1; Regent University's "vision is to be the most influential, Christian, transformational university in the world. MISSION[:] Regent University serves as a center of Christian thought and action to provide excellent education through a biblical perspective and global context equipping Christian leaders to change the world." *Vision & Mission*, REGENT UNIV., https://www.regent.edu/about-regent/vision-mission/ (last visited Oct. 5, 2019). Regent Law's honor code states: "[I]t is imperative that Regent University faculty, staff, and students conduct themselves in a Christ-like and professional manner, and maintain an exemplary and involved lifestyle. Regular church and chapel attendance, and participation in activities of the Regent community and its founding organization, are encouraged for students and expected for faculty and staff." *Statement of Faith & University Honor Code and Standards of Personal Conduct*, REGENT UNIV. SCH. L., https://www.regent.edu/acad/schlaw/admissions/honorcode.cfm (last visited Oct. 5, 2019). Regent Law also partners closely with the American Center for Law and Justice (who dubbed Wicks a "scholar," see above), Jay Sekulow's Christian nationalist outfit. Sekulow is himself a Regent graduate. ACLJ is listed as a "center" of the university. REGENT UNIV., https://www.regent.edu/school-of-law/centers-initiatives/ (last visited Oct. 5, 2019). *See also About Jay Sekulow*, ACLJ, https://aclj.org/jay-sekulow (last visited Oct. 5, 2019). The vision of Dallas Baptist University is "[b]uilding a great Christian university that is pleasing to God by producing Christ-centered servant leaders who are transforming the world" and its chosen "theme scripture" is Jeremiah 29:11-13. *Mission Statement*, DALLAS BAPTIST UNIV., https://www.dbu.edu/about/mission (last visited Oct. 5, 2019).

85   *See Joshua W. Carden, Attorney at Law*, CARDEN L. FIRM, http://www.cardenlawfirm.com/bio (last visited Oct. 7, 2019). Under the "Professional Memberships and Activities," it is noted that Carden is an "Allied Attorney of the Alliance Defending Freedom" and a former "Blackstone Fellow," which is a program managed by ADF. *See Blackstone Legal Fellowship*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/training/blackstone (last visited Oct. 7, 2019). ADF is dedicated to this mission: "The legal system, which was built on a moral and Christian foundation, had been steadily

the FRC brief in March 2007, he was a solo practitioner. Now, he practices employment law. He has no formal background in history or historical research.[86] In other words, Carden was a prime candidate to author a brief brimming with law office history. Unsurprisingly, when he wrote this brief for the FRC, he cherrypicked history to promote a specific religious agenda.

The sole and explicit purpose of FRC's amicus brief was to show that there was a history of school board prayer that brought the practice under the protection of *Marsh*:

> This brief – short in length and narrow in scope – targets only the conclusory statement by Plaintiff Doe that "there is no such historical acceptance of prayer for school board meetings." Doe's statement is absolutely wrong and should be ignored by this Court in its analysis and application of *Marsh*. As will be demonstrated, school boards and prayer enjoy a long-standing relationship. . . . To aid the Court in its historical analysis, Amici provides the following detailed examples from **eight states** that support the historicity of school board prayer.[87]

The conclusion is clear in what it seeks to prove, if not in the evidence it proffered:

> The most cursory examination of history's archives reveals the long-standing historical connection between school boards and religion in general, and opening prayer in particular. . . . Amici urges this Court to allow the time-honored tradition of the Tangipahoa Parish School Board's opening prayer to continue.[88]

This amicus brief provides the origin myth for the history of

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moving against religious freedom, the sanctity of life, and marriage and family. And very few Christians were showing up in court to put up a fight." *Who We Are*, Alliance Defending Freedom, https://www.adflegal.org/about-us (last visited Oct. 7, 2019); ADF Amicus, *supra* note 62.

86   Carden, *supra* note 84.

87   FRC Brief, *supra* note 9, at 3 (internal citations and brackets omitted) (emphasis added).

88   *Id.* at 11.

school board prayer. Eleven federal circuit court judges relied on a single paragraph in a law student's article, which itself is a repackaged amicus brief so deficient that it exemplifies the very worst of law office history. Eleven circuit court judges used this law office history to argue for expanding *Marsh* and *Town of Greece* to an entirely new arena—essentially arguing that this history trumps the protections embedded in the First Amendment—and a fair examination of that history shows that it simply does not exist.

Before we dive into that law office history, let us lay out ground rules for what would constitute historical evidence that would bolster the claim that there is a history of school board prayer in America.

IV. WHAT EVIDENCE WOULD SHOW A HISTORY OF SCHOOL BOARD PRAYER?

For the evidence to show a history of school board prayer that would be useful or legally significant under the *Marsh-Town of Greece* rubric, those cases tell us that it would have to show three things:

First, prayers. Simple religiosity of board members or ties to clergy or even bible reading in schools managed by the board would not be useful. Religiosity is irrelevant; religious people fulfill government roles and offices all the time without abusing those offices to promote or impose their personal religion. If religiosity were the key, it would have been enough for the *Marsh* Court to have pointed out that some of the framers of the First Amendment were religious men or that the first speaker of the House was a minister.[89] It was not. Nor would devotional bible reading, government-organized prayer, and teaching religious doctrine as truth in the public schools be useful evidence, especially since each is unconstitutional.[90] Prayers are a must-have.[91]

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89   Frederick Muhlenberg was a Lutheran minister. Robert V. Remini, The House: The History of the House of Representatives 15 (Harper Collins, 2007).

90   Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 290 (2000); Edwards v. Aguillard, 482 U.S. 578, 597 (1987); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

91   *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786–91 (1983) ("The opening of sessions of legislative and other deliberative public bodies with prayer"; "[T]he Continental Congress . . . adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain"; "Clearly the men who wrote the First Amendment Religion Clauses did not view . . . opening prayers

Second, school boards. The bodies saying the prayer need to be school boards or the antiquarian equivalent.[92] We can be charitable here, as there is no long history of public education requiring school boards at all. But there needs to be some sort of official government status to the praying entity, otherwise the First Amendment would not apply. For instance, a private meeting of people who think education is important or a private celebration at a church or a board governing a private school are not analogs that support the school board prayer historical argument. At a bare minimum, the purported school board must be made up of government officials bound by the Establishment Clause of the First Amendment, otherwise it would not be relevant to the constitutional analysis.

Third, the evidence needs to be reliable and accurate. This should go without saying, but it is one of the primary dangers of law office history. The historical record relied on must be accurate, verifiable, stable, and based on methodology that does not involve, for instance, simply locating keywords such as "prayer" or "invocation" in books that date to the 1800s and deal with education.

Only examples of school board prayer that check all three of these boxes should make the cut. Then, once all such examples have been collected, they can be measured against the *Marsh* standard: the history of the prayer cannot be sporadic, it needs to be an "unambiguous and unbroken history of more than 200 years . . . ."[93] Under the *Marsh* rationale, it should date back to the founding. After all, *Marsh* is based on the idea that the framers of the First Amendment saw no First Amendment problem with the prayers and that rationale does not apply if the practice was instituted after the time any particular amendment was framed. There might be a weak argument to be made for a practice dating back to the birth of a state constitution, but however far back it goes, it needs to show, the

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as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption"; "[L]egislative prayer presents no more potential for establishment.").

92   In *Marsh,* it was not just prayer, but *legislative* prayer that was critical. *See, e.g., id.* at 792 ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.").

93   *Id.* at 792, 795.

Supreme Court explained, an "unbroken practice."[94]

In short, to show a history of school board prayer of the kind used in *Marsh* and *Greece*, researchers would need to show: **a long, unbroken, and unambiguous history of prayer (not simply religion), at meetings of official government bodies that manage public schools.**

V.   EXAMINING THE ALLEGED HISTORY OF SCHOOL BOARD PRAYER IN DEPTH

While the Ninth Circuit rejected the Fifth Circuit's claim that there is a history of school board prayer and refused to extend *Marsh-Town of Greece*, the historical claim itself was not fully examined. Commenters have posited that even the Fifth Circuit may have "sens[ed] the weakness of this argument."[95] That may be true, because the historical claim crumbles under scrutiny.

A.   The Wicks article and Family Research Council amicus do not, on their face, show that "eight states" have a history of school board prayer. At best, they claim five.

Without even examining the underlying historical record, nearly half of the history can be knocked away. Wicks claims that "[a]t least eight states demonstrate historical records of prayers that were recited during school board meetings, dating back to the early 19th century. These states include Pennsylvania, Massachusetts, Iowa, Missouri, North Carolina, Wisconsin, Michigan, and New York."[96] (Interestingly, none of those states were involved in any of the litigation the FRC amicus has tainted.[97])

The FRC amicus, *the only source on which Wicks relied*, does not say this. It discusses those eight states, but does not claim that the final three — New York, Michigan, and North Carolina — have a

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94   "The unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat 'while this Court sits.'" *Id.* at 795 (quoting Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).

95   Phillip Buckley, *We Call Them School Boards for a Reason: Why School Board Prayer Still Violates the Establishment Clause*, 8 OXFORD J.L. & RELIGION 1, 15 (2018).

96   Wicks, *supra* note 48, at 30.

97   Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018) (involving California); Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017) (involving Texas); FRC Brief, *supra* note 9 (involving Louisiana).

history of school board prayer. At most, those three states have "[c]onnections [t]o [r]eligious [e]xpression," but no evidence of school board prayer.[98] These "connections" turn out to be things such as a request for clergy to discuss "the need for improved public schools," clergy attending meetings of teachers associations, and the phrase "trustees of the Gospel and school lots" appearing in old records, which supposedly shows a "connection between school boards and people of faith."[99] So when Wicks claimed eight states had a history of school board prayer, she was wrong. And yet that "eight states" error gets repeated, without examination, by the Fifth Circuit and dissenting Ninth Circuit judges.

With just a cursory review of the amicus, without even digging into the history, three of the eight pillars of the historical school board prayer argument fall because they did not involve prayers at all. One need not look and see if the prayers were part of a long, unbroken history or to see if the prayers were delivered at a government body because there were no prayers. On their face, the Wicks article and the FRC amicus fail to show a history of eight states having school board prayer. At best, and again without examining the history to see if it is akin to *Marsh*, only five states are left. However, when all eight states are examined, as they are below, none are left.

1. Michigan

The historical evidence for school board prayer in Michigan, according to the FRC and Wicks, is that, circa 1842, "[i]n Detroit, the state board of education asked clergy to assist by speaking from the pulpit to raise awareness of the need for improved public schools."[100] This has nothing to do with prayer. FRC offers a second piece—hiring a preacher to be a teacher—that fails for the same reason.[101] Neither involves any meeting of a government entity or a prayer.

Obvious issues aside, this first piece of "evidence" is even

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98   FRC Brief, *supra* note 9, at ii.

99   *Id.* at 9–11.

100   *Id.* at 10 (citing Sister Mary Rosalita, Education in Detroit Prior to 1850, at 325 (1928)).

101   FRC Brief, *supra* note 9, at 10 ("Detroit School Board hired an Episcopalian clergyman, W.C. Monroe, to teach the lone African-American School in the city"). Rosalita, *supra* note 100, at 339. FRC's single paragraph on the history of school board prayer in Michigan is two sentences with two citations. The brief is rife with innuendo and history that has no probative value.

more problematic because the cited source does not back up this assertion. The original source FRC miscites[102] is a book by a Catholic nun, Mary Rosalita, and the call for clergy assistance is not as clear as FRC makes out. In the context of a discussion about Detroit's nascent public school system, Rosalita wrote, "[t]he clergy were asked to assist by exhortations from the pulpit."[103] Rosalita does not clarify *who* asked for help, and the context does not lead to an inference that it was, as FRC claims, the board of education that did so. The state board of education is mentioned in a footnote to this passive sentence, but only as unrelated testimony to the superiority of Catholic schools.[104]

Rosalita herself does not cite an original source for the claim that the clergy were asked to help but she might be referring to the *Detroit Board of Education Introductory Report* (1842), which she cited two pages earlier.[105] Apparently, physical copies of this report exist in only two libraries and it took me months to track down a copy, far longer than an attorney with a typical amicus brief deadline.[106] In other words, it is very unlikely FRC sought out this report to see if the Board of Education did, indeed, ask for help.

If FRC had done so, it would have seen a desperate board

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102   FRC cites to page 323. The information about asking clergy for help is on page 325. Compare, Rosalita, *supra* note 100, at 323, *with* Rosalita, *supra* note 100, at 325.

103   Rosalita, *supra* note 100, at 325.

104   *Id.* Rosalita wrote: "The Report from the Detroit Board of Education to the Superintendent of Public Instruction, Francis Shearman, in referring to the educational situation of 1841, has this to say: 'From these statistics disclosed at the time, it appeared that there were then in the City twenty-seven English schools, one French and one German school, but all of them exceedingly limited in numbers and scarcely deserving the name of schools, except the one with Ste. Anne's (Catholic) Church, which embraced nearly all of the children of Catholic families then resident in the city.'" *Id.*

105   *Id.* at 323 (citing Detroit Bd. of Educ., The Introductory Report of the Board of Education for the City of Detroit Together with the Rules and Regulations under the Organization: Accompanied by the Law Establishing Free Schools: March 1842 (Bagg & Harmon 1842)). This cite appears two pages before the clergy ask and Rosalita does clearly point to this Introductory Report as the source for that call.

106   According to WorldCat.org, which is, of course, not exhaustive. *The Introductory Report of the Board of Education of the City of Detroit, together with the rules and regulations under the organization: accompanied by the Law Establishing Free Schools: March, 1842,* WORLDCAT, http://www.worldcat.org/oclc/17595742 (last visited Oct. 14, 2019) (listing available library copies of the report).

writing a saccharine yet heartfelt appeal for improved public schools. Amid a storm of hyperbole about the terrible state of the public schools and the board's need for assistance, the report rhetorically asks, "What shall we do?"[107] The report seeks to "rouse" *all* citizens to do all they can, including "the liberal minded and generous spirits who adorn our city," "the palladium of liberty and conservator of free institutions, the public press," "our mothers, our sisters, our wives and our daughters,"[108] and yes, the clergy:

> Let there be public meetings and public lectures upon the system of education which we shall propose, and let the voice of our clergy ring out from their sanctuary with earnest distinctness in aiding us to open up the way for the introduction of a more glorious light, inviting all to the great feast of intelligence and freedom.[109]

Read in context, this is a flowery call to action. It is rhetoric, not a formal request of assistance from a school board to the clergy, as the FRC brief suggests. This report even undercuts FRC's more general point, that there exists "long-standing historical connection between school boards and religion in general."[110] Later in the report, the board explained "that nothing of a sectarian character will be permitted to intrude itself into these schools, through books or otherwise."[111] The board was also intent on keeping religious schools and religion separate from the public schools in other ways, to avoid confusion, distress, and destruction. In the report, it wrote:

> Religion has its teachers and its separate houses of instruction, open like ours to all who choose to come.... [B]ut no . . . religious sect, must attempt to interfere in our arrangements with their special tenets, nor cross the thresholds of these institutions with any other

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107 Detroit Bd. of Educ., The Introductory Report of the Board of Education for the City of Detroit Together with the Rules and Regulations under the Organization: Accompanied by the Law Establishing Free Schools: March 1842, at 3 (Bagg & Harmon 1842)[hereinafter Detroit Report].

108 *Id.*

109 *Id.*

110 FRC Brief, *supra* note 9, at 11.

111 Detroit Report, *supra* note 107, at 8.

intent than to aid us in the performance of our duty. Whilst we hold sacred their high province, they must respect ours, and they should give us credit for this explicit determination, which is made and should be announced to avoid the confusion and distress which have grown out of improper influences that have been exerted in other cities and states to an extent in some instances totally destructive to *any* system of *scientific and moral education* whatever.[112]

So, from the outset, we see no evidence of school board prayer in Michigan and FRC advances weak historical evidence in sloppy statements. It gets worse.

2. New York

The New York history is just as tenuous. Again, no actual evidence of prayer is mentioned.

In 1789, the New York legislature passed an act for the sale of state lands that required a surveyor general to set aside two lots in each township, one for gospel purposes and one for school purposes.[113] The trustees of the gospel and school lots were just that: trustees of those two plots of surveyed land. They collected rent from tenants that went into a town school fund, which the trustees doled out to support the schools and the gospel. Today, the latter would be understood as unconstitutional.[114]

The FRC argued that an 1846 statute "notes that each town superintendent now has the school-related powers formerly held by each town's 'trustees of the Gospel and school lots'" and that "[t]he concept of a direct linkage between school superintendents and the Gospel demonstrates the historical connection between public schools and religion in New York."[115] But FRC fails to disclose that the 1846 statute it cited actually *abolished* the office that it claims

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112 *Id.*

113 Samuel Sidwell Randall, The Common School System of the State of New-York 5, 132 (1851) https://archive.org/details/cu31924032513412/page/n7.

114 Randall, *supra* note 113, at 132–33 (1851). *See also* Everson v. Bd. of Educ., 303 U.S. 1 (1947); Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664 (1970); Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Locke v. Davey, 540 U.S. 712 (2004).

115 FRC Brief, *supra* note 9, at 11 (citing Statutes of the State of New York Relating to Common Schools 9 (C. Van Benthuysen 1847).

provided a direct link between schools and the "gospel": "The office of trustees of the Gospel and school lots in the several towns in this state, is hereby abolished; and the powers and duties now by law conferred and imposed upon said trustees, shall hereafter be exercised by the town superintendent of common schools."[116] Even if this were somehow relevant, this law proves that the history of this potential connection was far from "unbroken."

Instead of citing historical examples of school board prayers to show a history of school board prayers, FRC cited a law that mentioned an office that hinted at a link between religion and education without realizing or deliberately concealing that the statute actually abolished the office that supposedly proved the link. This does not prove a long, unbroken history of school board prayer.

3. North Carolina

Wicks and the FRC both claim that 17 attendees to an educational meeting in North Carolina were "ministers of the gospel." Wicks adds that "a large proportion of the teachers were preachers."[117] One need not even track down the original source to see that this has no bearing on a long, unbroken, unambiguous history of school board prayer. The claim is not that there was prayer, only that some attendees at one particular educational meeting were preachers. That is neither shocking nor relevant, and is entirely consistent with a separation of church and state that prohibits prayer at school board meetings.

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116 Statutes of the State of New York Relating to Common Schools 9 (C. Van Benthuysen 1847), https://books.google.com/books?id=Yw08sJDnpegC; *See also* Emerson W. Keyes, Laws of New York Relating to Common Schools 176 (1879), https://books.google.com/books?id=ocgSAAAAYAAJ&pg=PA176.

117 Wicks, *supra* note 48, at 31 n. 189; *Id.* at *9–10 (quoting M.C.S. NOBLE, A HISTORY OF THE PUBLIC SCHOOLS OF NORTH CAROLINA 175 (1930)) ("Sixty-five of the delegates were women and seventeen were ministers of the gospel – a matter of statistics which shows that . . . a large proportion of the teachers were preachers."); FRC Brief, s*upra* note 10, at 9–10:

   In M.C.S. Noble's *A History of the Public Schools of North Carolina,* Chapel Hill: The University of North Carolina Press (1930), the author records that the Boards of County Superintendents throughout the state were required to send two delegates each to the state-wide meeting in 1859. *Id.* at 175. Seventeen of those delegates were "ministers of the gospel" (*Id.*), again demonstrating the historical, direct connection between school boards and people of faith.

Even so, the FRC's history is not forthright because it portrays the meeting as official, mandatory, and statewide. The original source does not support this claim. It refers to a "State Educational Convention"[118] whose members met at annual meetings around the state. Other sources call this association an "organization for the teachers," what we might call a teacher's association today. It was "officially known as the 'Educational Association of North Carolina'" and was open to anyone concerned about education.[119] One source described some of the attendees as "friends of education."[120] FRC's original source noted that the association did *not* include many public school teachers: "Evidently there were very few common school teachers present . . . ."[121] However, the association "counted among its members private school teachers, common school teachers, common school officials, college professors, lawyers, doctors, editors, politicians, and business men . . . enlisted in the cause of education whether public, private, or denominational."[122] The very purpose of the association according to the source FRC cites was to unite the "friends and supporters *outside* the teaching profession."[123]

The organization eventually became an official government body, but not during the time period cited by FRC.[124] And it did not exist not for long. As the FRC source noted, "the Association met from year to year until it died under the pressure of the times during the closing days of the Civil War."[125] More importantly, FRC actually mentions the official government body, the Board of County Superintendents, but passes over this mention without comment, instead holding up this private association to the court.[126]

"Other annual meetings of the association before the collapse

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118 M. C. S. Noble, A History of the Public Schools of North Carolina 168, 175 (1930).
119 Edgar W. Knight, Public School Education in North Carolina 176 (1916) https://babel.hathitrust.org/cgi/pt?id=mdp.39015016896436;view=1up;seq=190.
120 *Id.*
121 Noble, *supra* note 118, at 175.
122 *Id.* at 170.
123 *Id.* at 168 (emphasis added).
124 It became an official body by an act of the legislature on February 23, 1861. Knight, *supra* note 119, at 176 n.1. That is two years after the 1859 meeting FRC cites.
125 Noble, *supra* note 118, at 170. The Civil War ended when Robert Lee surrendered to Ulysses S. Grant at Appomattox on April 9, 1865.
126 FRC Brief, *supra* note 9, at 10.

of the Confederacy were held," including "in Newbern, in 1859."[127] The FRC brief focuses on that one specific meeting, the "Newbern Meeting," the fourth annual gathering of the Convention.[128] That meeting took place on June 14, 1859 at 8 p.m. and involved 238 delegates attending from 38 counties.[129] In her article, Wicks claims that "a large proportion of the teachers [present] were preachers."[130]

Lawyers are also not statisticians, but one need not be a mathematician to reject Wicks's conclusion that "a large proportion of the teachers were preachers." Seventeen out of 238 delegates is not a "large proportion" to begin with—only about 7 percent—and on top of that, not all of the attendees were public school teachers: "[V]ery few common school teachers [were] present."[131] Even were this statistical tidbit important to show a history of school board prayer, there is no reason to believe that any of the "very few common school teachers" were also ministers.[132]

FRC also suggests that this was not just an official government meeting, but also mandatory: "[T]he author records that the Boards of County Superintendents throughout the state were *required* to send two delegates each to the state-wide meeting in 1859."[133] This "two required delegates" claim and its implication are deceptive. In truth, the source FRC cites tells a different story. Because there were "very few" teachers present at the Newbern meeting—the meeting FRC cites—the association voted on a resolution "requesting" that each school board, in the future, send "two representatives" to meetings of the association.[134] The school boards appear to have declined.[135] FRC implies that attendance at this meeting was required by the government, when in fact, so few government representatives were present that the private association decided to ask the government for help and was rebuffed. The "state-wide" aspect of this meeting is an oversell. Delegates came only from about 44 percent of counties—38

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127 KNIGHT, *supra* note 119, at 176.
128 FRC Brief, *supra* note 9, at 10.
129 *Id.*; NOBLE, *supra* note 118, at 170.
130 Wicks, *supra* note 48, at 31 n.189.
131 NOBLE, *supra* note 118, at 175.
132 *Id.*
133 FRC Brief, *supra* note 9, at 9–10 (emphasis added).
134 NOBLE, *supra* note 118, at 175.
135 The attendance at the next meeting was the smallest ever (85), again with very few teachers even though they chose a day on which the common schools were closed so teachers might attend. NOBLE, *supra* note 118, at 178. The next convention had fewer still; only 51 attended. *Id.* at 179.

of the 86 North Carolina counties that existed in June of 1859.[136]

So there are significant problems with the veracity of FRC's portrayal of this piece of evidence, even if the evidence were probative. The North Carolina association was a group of people interested in both public and private education, not government officials required to attend or bound by the Establishment Clause of the First Amendment. The meetings did not have official government status. Much like the Congressional Prayer Caucus Foundation is not actually part of Congress, the State Education Convention was not an arm of the state.

In summary, the best evidence of school board prayer in North Carolina offered by Wicks and FRC is that, for about a decade, there existed an organization concerned with public, private, and denominational education, to which any member of the public could be a member, and, at its annual convention in 1859, that organization counted 17 ministers among its 238 delegates. This is so far removed from a long, unambiguous, and unbroken history of school board prayer as to be utterly unrelated to the question.

4. Missouri

The Missouri evidence at least centers on an "invocation," according to the FRC. Wicks cites FRC and FRC has one paragraph of four lines that cites an 1860 source — *Sixth Annual Report of the Superintendent and Secretary to the Board of St. Louis Public Schools* — that mentions an invocation: "After the invocation, offered by the Rev. Mr. Weaver, the exercises consisted of the reading of the reports by the Superintendent. . . ."[137] That short quote fails to set the stage for the invocation, with the book title alone offering the only context to infer that this was indeed a prayer at a local school board meeting. But, as the actual text shows, it was not.

The "report" was delivered to what may sound like a school board. However, the reported invocation occurred at the "closing exercises of the Night Schools . . . at the High School hall."[138] Attendees

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136 Noble, *supra* note 118, at 175; *North Carolina County Formation*, State Library N.C., https://statelibrary.ncdcr.gov/ghl/genealogy/nc-county-formation (last visited Feb. 5, 2019).

137 Wicks, *supra* note 48, at 30 (citing the FRC brief rather than a specific source); FRC Brief, *supra* note 9, at 9 (citing Ira Divoll & C. P. E. Johnson, Sixth Annual Report of the Superintendent and Secretary to the Board of St. Louis Public Schools 41 (1860), https://archive.org/details/annualreportboa01diregoog/page/n240).

138 Ira Divoll & C. P. E. Johnson, Sixth Annual Report of the

included all the students from the different schools, their teachers, and a wider audience. The honored guests on the dais included "[m]ost of the members of the School Board, and many persons who had been invited for the occasion."[139] In other words, this would be today something closer to a graduation ceremony, *not* a school board meeting. While invocations may have been typical for such closing ceremonies back then, the Supreme Court has been unequivocal that such prayers are unconstitutional.[140] This context, ignored or intentionally buried by FRC, shows an unconstitutional prayer that does nothing to bolster the argument for a history of *school board* prayer.

In researching this article, it became increasingly clear that the FRC's historical methodology consisted of searching old reports for keywords such as "prayer," "invocation," and the like. Employing a similar search of a compendium of every annual report of the Superintendent and Secretary to the Board of St. Louis Public Schools covering years 1859 through 1867 comes up with this single mention of prayer and one other.[141] The Fifth, Eighth, Tenth, Eleventh, Twelfth, and Thirteenth annual reports have no prayers

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SUPERINTENDENT AND SECRETARY TO THE BOARD OF ST. LOUIS PUBLIC SCHOOLS 41 (1860), https://archive.org/details/annualreportboa01diregoog/page/n240.

139   *Id.*

140   Lee v. Weisman, 505 U.S. 577, 598–99 (1992).

141   The Seventh Annual Report, covering 1860–1861 had one similar prayer that occurred at closing ceremonies:

> EXHIBITION OF THE EVENING SCHOOLS.
> The closing exercises of these schools took place the last night of the session, the 3lst of January, in the High School Hall. Besides the teachers and scholars of the evening schools, there were present the members and officers of the Board of Public Schools, and a large number of ladies and gentlemen, who manifest a lively interest in this department of public instruction — altogether filling the Hall to its greatest capacity.
> The Hon. Washington King, Chairman of the Evening School Committee, presided. The exercises opened with prayer by the Rev. Galusha Anderson, after which the Superintendent read various reports concerning the schools, and made such explanatory statements as the occasion called for.

> IRA DIVOLL & M.C. JENNINGS, SEVENTH AND EIGHTH ANNUAL REPORTS OF THE SUPERINTENDENT AND SECRETARY TO THE BOARD OF ST. LUIS PUBLIC SCHOOLS 26 (1862), https://archive.org/details/annualreportboa01diregoog/page/n322.

or invocations. If anything, this evidence cuts against the argument that there is a history of school board prayer justifying an expansion of *Marsh-Town of Greece* because it shows that prayers rarely occurred (only twice), not at school board meetings, and not in ways that were constitutional.

5. *Pennsylvania – Family Research Council Example #1*
In their attempt to establish a history of school board prayer in Pennsylvania, FRC and Wicks both lift a line from the 1820 "Second Annual Report of the Controllers of the Public Schools of the First School District of the State of Pennsylvania":

> Desirous, notwithstanding, of being ever mindful that human exertions for advancing the welfare of mankind, can only prove availing through the interposition, and blessing, of the beneficent Ruler of all things, it is incumbent upon us to commend these humble efforts, and purposes, to the favour of Heaven.[142]

There are at least three problems with this example. First,

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142 Wicks, *supra* note 48, at 31 n.186:

> *Id.* at *4 ("Desirous, notwithstanding, of being ever mindful that human exertions for advancing the welfare of mankind, can only prove availing through the interposition, and blessing, of the beneficent Ruler of all things, it is incumbent upon us to commend these humble efforts, and purposes, to the favour of Heaven." (quoting SECOND ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST SCHOOL DISTRICT OF THE STATE OF PENNSYLVANIA 7 (1820))).

> FRC Brief, *supra* note 9, at 4:

> The Controllers of the Public Schools in Philadelphia, Pennsylvania were not shy about including the text of their prayers in the actual minutes of their meetings. For example, consider the *Second Annual Report of the Controllers of the Public Schools of the First School District of the State of Pennsylvania*, Philadelphia: Board of Control (2d ed. 1820). The February 1, 1820 entry contains the following prayer:
> Desirous, notwithstanding, of being ever mindful that human exertions for advancing the welfare of mankind, can only prove availing through the interposition, and blessing, of the beneficent Ruler of all things, it is incumbent upon us to commend these humble efforts, and purposes, to the favour of Heaven. Id. at 7.

even if this were a prayer, and perhaps some consider it so, it is in a written report, not spoken at a school board meeting in front of attendees.[143] In 1818, the state legislature passed a law to provide for the education of children in Philadelphia, particularly indigent children, at the public expense. The city and county of Philadelphia became that First School District. Through an overly complicated selection process, the Controllers then operated something like a school board.[144] The 1818 law required the Controllers to publish an annual statement in February detailing their expenses and the number of children in the schools.[145] The quoted sentence appears in the Controller of the Public Schools for the First School District's second report.[146] That is a mouthful, but the report itself is fairly short. It lists the number of students at each school, breaks down the cost of education for each child, and, toward the end, hits some lofty notes in lengthy sentences on the purpose of education that precede the "beneficent Ruler" quote, which concludes the report. Although this school board appears to have met regularly and was required to do so, FRC does not argue that those meetings had prayer, citing this written report instead.[147]

Secondly, it is unclear that this is a "prayer" in the vein of *Marsh* or *Town of Greece*. An argument can be made both ways. It's certainly not spoken. And, importantly, we cannot know that the author intended the flourish to be something more—that he intended it to be a prayer at all.

Thirdly, if this is considered a prayer, prayers happened

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143 Roberts Vaux, Second Annual Report of the Controllers of the Public Schools of the First School District of the State of Pennsylvania 7 (1820), https://goo.gl/9dLBH4.

144 John Trevor Custis, The Public Schools of Philadelphia: Historical, Biographical, Statistical 9 (1897).

145 "An act to provide for the education of children at public expense within the city and county of Philadelphia, approved March 3, 1818," Acts of the General Assembly of the Commonwealth of Pennsylvania 126 (Harrisburg, Authority 1818), ("Sect. 7. . . . That the said controllers shall meet at least quarterly, and may call special meetings whenever the same may be deemed expedient. They shall keep regular minutes of all their proceedings, and shall keep regular books of accounts, which shall be examined and settled annually by the auditors of the county, and shall publish a statement in the month of February in every year of the amount of expenditure, and of the number of children educated in the public schools.").

146 Roberts Vaux, *supra* note 143, at 7.

147 Acts of the General Assembly of the Commonwealth of Pennsylvania, *supra* note 145, at 126; Roberts Vaux, *supra* note 143.

rarely. One prayer a year hardly proves the long, unbroken history that the example is proffered to bolster. This is especially true when the single annual "prayer" was intermittent and eventually dropped altogether. The author of the report, Roberts Vaux, was a champion of public schools, judge, philanthropist, and Quaker. In the next annual report, Vaux tones down the concluding "prayer," writing that the goals of education "can only be accomplished through the blessing and protection of All Bountifull Goodness."[148] The fourth report concludes with a nod to "Divine Providence"[149] and the fifth report mentions the "favour of the parent of mercies."[150]

The FRC brief includes all these quotes, citing the second, third, fourth, and fifth reports.[151] FRC does not cite the first or sixth reports because they do not contain any language that can be even be argued to be a prayer.[152] Neither do later reports.[153] Vaux died in 1836 and his replacement, Thomas Dunlap, was sporadic too, writing in

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148 Roberts Vaux, Third Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 6–7 (Philadelphia, 1821), https://hdl.handle.net/2027/chi.098201080.

149 Roberts Vaux, Chamber of the Controllers, Fourth Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 8 (Philadelphia, 1822), https://hdl.handle.net/2027/uc1.a0004904660?urlappend=%3Bseq=53.

150 Roberts Vaux, Chamber of the Controllers, Fifth Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 10 (Philadelphia, 1823), https://hdl.handle.net/2027/uc1.a0004904660?urlappend=%3Bseq=73.

151 FRC Brief, *supra* note 9, at 4–5; Roberts Vaux, *supra* note 148, at 6–7 ("Recurring to the highly interesting duties especially devolved upon them, the Controllers again solicit the co-operation of their constituents in the advancement of purposes so certainly identified with the welfare of this great community, the perfection of which, however, they know can only be accomplished through the blessing and protection of ALL BOUNTIFULL GOODNESS."); Roberts Vaux, *supra* note 149, at 8 ("above all the favour of Divine Providence."); Roberts Vaux, *supra* note 150, at 10 ("the all-sufficient favour of the PARENT OF MERCIES.").

152 *See* Roberts Vaux, First Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania (Philadelphia, 1819), https://hdl.handle.net/2027/chi.098201022?urlappend=%3Bseq=3; Roberts Vaux, Sixth Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania (Philadelphia, 1824), https://hdl.handle.net/2027/uc1.a0004904660?urlappend=%3Bseq=95.

153 *See, e.g.,* Roberts Vaux, *Twelfth Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania* (1830), *in* The Register of Pennsylvania 154–56 (Samuel Hazard ed., 1830), https://goo.gl/5jLLfD.

the twenty-first report that "Heaven will continue to smile upon the undertaking . . ."[154] but, for instance, omitting such mentions from the twenty-second report.[155]

No such language appears in any annual reports after the twenty-sixth.[156] There is a rare passing mention of religion or a god, but the real substance of the reports often undercuts the claims about a history of prayer. The twenty-sixth annual report includes a December 9th, 1834 resolution that bears tangentially on this argument.[157] In it, the Board of Controllers of the public schools condemns religious exercise, religious books, or religious lessons in the public schools and declares them illegal.[158] The board did so for

154 Thomas M'Kean Pettit, Memoirs of Roberts Vaux 26 (Philadelphia, 1840), https://books.google.com/books?id=w4jtG7MHI6cC; Thomas Dunlap, Twenty-First Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 11 (n.p. 1839), https://hdl.handle.net/2027/chi.098201145?urlappend=%3Bseq=14.

155 *See* Thomas Dunlap, Twenty-Second Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 11 (Philadelphia, 1840), https://hdl.handle.net/2027/chi.098201145?urlappend=%3Bseq=40.

156 The 26th through 49th annual reports do not mention religious invocations or prayers. *See* Hathi Trust Digital Library, https://catalog.hathitrust.org/Record/008696942 (scroll to "Viewability" and click "Full View" to see each annual report organized by date) (last visited Oct. 16, 2019). Most of the reports from 1838 (21st) through 1912 (94th) are searchable, and do not mention religious invocations or prayers. *See* Hathi Trust Digital Library, https://goo.gl/yejmme (scroll to "Viewability" and click "Full View" to see each annual report organized by date) (last visited Oct. 16, 2019).

157 Henry Leech, Twenty-Sixth Annual Report of the Controllers of the Public Schools of the First District of the State of Pennsylvania 5–6 (Philadelphia, Mifflin & Parry 1844), https://hdl.handle.net/2027/nyp.33433076014004?urlappend=%3Bseq=13.

158 Other than using the bible as a textbook taught "without note or comment," as was typical at the time. *Id.* at 4. Dated June 30, 1844, the report was issued smack in the middle of the Philadelphia Bible Riots, which occurred in two spurts, in early May and early July of that same year. The resolution itself did not precipitate the riots and is from a decade earlier, but had it been stronger (had it even halted using the bible as a textbook "without note or comment") it might actually have stopped the riots. The disagreement between Irish Catholic immigrants, who wanted to read the Douay Bible, and Protestants, who preferred the King James Version, was fanned into a combustible controversy that led to the Bible Riots. *See generally* Vincent P. Lannie & Bernard C. Diethorn, *For the Honor and Glory of God: The Philadelphia Bible Riots of 1840,* 8 Hist. of Educ. Q. 44, at 47–48 (1968). To be fair, it was not just the Board of Controllers' exception that allowed for Bible-reading

reasons we would recognize today, including that parents have the right to direct their children's religious education and ample means to do so, that it would be impossible for the state to select a religion appropriate to all citizens in such a diverse community, and that preventing religious indoctrination by the government violates no one's rights:

> *Whereas,* The Controllers have noticed, that the practice exists in some of the schools of introducing religious exercises, and books of a religious character, which have not been recommended or adopted by this Board, in the lessons prepared for the use of the scholars; and believing the use of such exercises or books may have a tendency to produce an influence in the schools of a sectarian character,
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> . . .
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> *Resolved,* That the Constitution of the State of Pennsylvania, which has provided for the establishment of public schools, has also wisely guaranteed the right of all to worship God according to the dictates of their conscience; and as the parents of children have both by law and nature the guardianship of them during their minority, so they alone are responsible for the effects of such guardianship; and their right to impress the minds of their children with such views of a religious nature as they, may think most important, ought not to be interfered with, especially by a body exercising its authority by virtue of the laws of the Commonwealth.
>
> . . .
>
> [W]hilst this Board is convinced of the utter impossibility of adopting a system of religious instruction that should meet the approbation of all religious societies, they are equally satisfied no injury need result to the pupils from confining the instruction in our schools to the ordinary branches of elementary education; inasmuch as ample facilities for religious improvement are presented for the choice

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without comment, but also the 1838 state law that kept the bible in the public schools, that inevitably led to divineness, rancor, and eventually violence. *Id.*

of parents or guardians in Sabbath schools, and other establishments for that purpose, which are organized and supported by various religious communities.

. . .

[A]nd in prohibiting the introduction of religious forms in [public schools], this Board will invade the rights of *none,* but on the contrary, by so doing, will maintain the rights of *all*—and therefore

Resolved, That this Board cannot but consider the introduction or use of any religious exercises, books or lessons into the public schools, which have not been adopted by the Board, as contrary to law; and the use of any such religious exercises, books or lessons, is hereby directed to be discontinued.[159]

This was written fourteen years after that non-prayer was included in the second annual report and belies the erroneous narrative that is popular in some quarters and which holds that religion was "pushed" out of the schools by the Supreme Court in the mid-Twentieth century.[160] The FRC itself promotes this

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159   Leech, *supra* note 157, at 5–6.

160   There is a temporal tie between this resolution, Vaux, and *Vidal v. Girard's Executors*, a Supreme Court case beloved by Christian nationalists like those at FRC for its lines about teaching the Bible and this, "a Christian country." Vidal v. Girard's Ex', 43 U.S. 127, 198–200 (1844). Stephen Girard was one of the richest Americans ever and an atheist. He died in December of 1831. Vaux was chosen, along with two others, to manage the Girard Trust in September 1832. Joseph J. McCadden, Education in Pennsylvania 1801-1835 and its Debt to Roberts Vaux 138–39 (1937). In this capacity, Vaux "was called upon to help organize the educational institution that was to be founded for orphans under the provisions of the will of Stephen Girard." *Id.* Girard left "$10,000 to the Comptrollers of the Public Schools for the City and County of Philadelphia in his will." Stephen Girard, *The Will of the Late Stephen Girard, Esq., in* Biography of Stephen Girard, with his Will Affixed 1, 2 (1832). The first of these resolutions is from December of 1834, shortly after Girard's death and after his will presumably began to pay dividends for the community.

That will became the subject of the *Vidal v. Girard's Executors* case and became famous because Girard included provisions that set up a huge trust to start a college and then banned clergy from teaching or visiting the school. *Id.* at 12. Daniel Webster argued in the Supreme Court to overturn Girard's will. Girard was an open atheist and Webster saw the case as "a defense of Christianity against the inroads of paganism and infidelity." Cheesman A. Herrick, Stephen Girard, Founder 154 (1923). As one president of Girard College

narrative, publishing a sample sermon meant to help Christians "Have Maximum Patriotic Impact."[161] In that sermon, FRC dates the decline of America to the Supreme Court's removal of religion from the public schools in 1962:

> Unfortunately, the U.S. Supreme Court has ignored the original intent of the Founding Fathers, trashed four centuries of America's Judeo-Christian heritage, and turned a statement in one of Jefferson's private letters on its head in declaring a two-way "Wall of Separation" between church and state.
>
> The Result: Black robed tyrants feel compelled to remove all religious influences from public institutions. The High Court outlawed public prayer in the schools in 1962, out went public Bible reading in 1963, and in 1980, down came the Ten Commandments from school house walls! This agenda of radical secularization has not only been zealously prosecuted by the activist courts, but by extension, the various public entities, school boards, educators, and teachers.[162]

We can see from this 1834 resolution—and from all the FRC's examples—that it is actually the FRC that is twisting and

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and Girard biographer observed a century later, "[a] study of Webster's argument in the Girard Will case shows that, realizing he had a weak case in point of law, he made a bold attempt to go outside of the law and to substitute for legal arguments what has well been termed 'an impassioned appeal to emotion and prejudice.'" *Id.* While outside the scope of this article, it seems possible that Girard, or the provisions of his will, or simply the influence of his a-religious generosity, may have influenced the Board of Controllers' resolutions.

161   This sermon appears at least twice on the FRC website and on other websites with thanks given to FRC. The likely author is Kenyn Cureton, as it appears in his FRC manual. Kenyn Cureton, Family Research Council, Culture Impact Team Resource Manual: How to Establish a Ministry at Your Church 121–30 (2011). As a stand-alone essay it appears on FRC's website in a 10-page PDF. *Christian Citizenship Sunday: How You Can Have Maximum Patriotic Impact*, Family Research Council, https://downloads.frc.org/EF/EF12C62.pdf. *See also* Frederick Clarkson, *A Manual to Restore a Christian Nation that Never Was*, Pub. Eye Q., Winter 2018, at 17–23.

162   Cureton, *supra* note 161, at 128.

distorting history.

6. Pennsylvania – Family Research Council Example #2

FRC makes a second argument about Pennsylvania school board prayers, again citing a written report: Rev. Gilbert Morgan's 1837 *Report on Public Instruction in Pennsylvania*. Morgan was a clergyman who flitted from school to school.[163] At or near the time he authored the report, he was president of Western University, which would become the University of Pittsburgh, but his "term was short and unsuccessful; he could not manage an effective compromise in the eternal conflict between theoretical and practical education. The state did not give money, nor did the city, nor did the alumni, nor did the community. By 1837 only two professors remained . . ."[164]

In this instance, there is no argument that the report included a prayer. It did not. According to FRC:

> In his *Report* . . . Rev. Gilbert Morgan states that the members of the state board of education "should be a fair representation of the geographical divisions of the State, and <u>what is more important, of the great religious communities of the people</u>." *Id.* at 18 (emphasis added). Clearly, the religious connection with the state board is not only assumed – it is mandated. The state board also resolved to "solicit the hearty cooperation of the clergy of all denominations in promoting the general objects of this Report; and, that a copy be transmitted to every clergyman in the State." *Id.* at 4.[165]

Morgan recommended two things in his report: "a plan for a Teacher's Seminary [school] and for a Board of Public Instruction."[166]

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163 At the time he authored this report, he was at Western University (which became the University of Pittsburgh), and prior to that, he was at Union College in Schenectady, New York. Robert C. Alberts, Pitt: The Story of the University of Pittsburgh, 1787–1987, at 17 (1986). After less than two years at Western, he "accept[ed] a position in North Carolina in a school for young ladies." *Id.* at 18.

164 Alberts, *supra* note 163, at 18.

165 FRC Brief, *supra* note 9, at 5 (citing Gilbert Morgan, Report on Public Instruction in Pennsylvania (1836), https://books.google.com/books?id=5VNJ9fVqOjUC).

166 Morgan, *supra* note 165, at 5.

It was presented at a public meeting in Philadelphia and other meetings around the state.[167] The Philadelphia meeting adopted the main recommendations in the report, including creating a Board of Public Instruction, a state level body tasked with dealing with the broad strokes of the state's education.[168] The Board of Public Instruction would have "duties which the legislature will transfer to their board" and which deal mostly with higher education.[169] The report itself was clear, this delegation of power "implies no intermeddling with the internal management committed to local boards," essentially saying that a board or legislature at this level "cannot give advice, suggest improvements, [or] point out evil tendencies"[170] as it is too far removed from local boards.

Morgan's report listed seven duties of the board,[171] none of which were religiously-based, and suggested characteristics it should possess, including permanent board members, who were "a fair representation of the geographical divisions of the State, and what is more important, of the great religious communities of the people."[172] Although the FRC brief implies that inculcating religion was the goal of this inclusion, a full reading of the report shows this was actually intended to ensure that the interests of the diverse schools in the state were represented.

At the time the report was written, Pennsylvania was unique in its religious, ethnic, and linguistic diversity. Regarding religion, "[b]y the eve of the American Revolution . . . Pennsylvania was home to an

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167 James Pyle Wickersham, A History of Education in Pennsylvania 614 (1886) ("[M]eetings were subsequently held at Harrisburg, Pittsburgh and other places, to forward the project.").

168 Morgan, *supra* note 165, at 3 ("[W]hile we do not mean to express our judgment upon every suggestion contained in the details of the Report, we do give our unqualified sanction and strongest recommendation to the establishment of a Board of Instruction . . . .").

169 *Id*. at 16.

170 *Id*.

171 *Id*. at 16–17.

172 *Id*. at 18 ("Its members should be a fair representation of the geographical divisions of the State, and what is more important, of the great religious communities of the people. These have appropriated their own earnings to found and cherish the colleges. The constitution, charters and laws all claim for these communities equal privileges. There is no way of educating the people by repelling those who alone can render that education sure and favourable to public virtue. The policy of the State is to make the best of all we have, to distribute funds in proportion to the people benefitted, and to require like responsibility in the universal success of the public system.").

extraordinarily diverse number of congregations, including Lutheran (142), German Reformed (126), Presbyterian (112), Quaker (64), Mennonite (64), Baptist (24), Anglican Episcopalian (24), Moravian (13), Roman Catholic (11), Methodist (7), and Jewish (2)."[173] No other colony "had such a mixture of languages, nationalities, and religions. Dutch, Swedes, English, Germans, Scotch-Irish, Welsh; Quakers, Presbyterians, Episcopalians, Lutherans, Reformed, Mennonites, Tunkers, and Moravians, all had a share in creating it."[174] The report explains in its very first paragraph that it was motivated in part to weave these diverse threads into a unified tapestry by "bringing separate languages and divided communities into one homogeneous and educated commonwealth."[175]

Though the major recommendations were adopted, the report had no recognizable impact. In one exhaustive, nearly 700-page history of Pennsylvania schools published in 1886, it gets a paragraph that does not even mention the proposed board.[176] No Board of Public Instruction was formed and, obviously, there were no prayers at the meetings it did not have. The report's other significant recommendation—a seminary or normal school for teachers—was not implemented until the surge in interest in education in the 1850s at about the same time the state formed the public education system, some 20 years after the report.[177]

Morgan's report consisted of recommendations, which had little to no impact, and the FRC brief built that into a religious connection with the state board that was "mandated." This is representative of FRC's brief, building up nothing in an attempt to show a history that does not exist. And because this is simply false, it actually disproves the FRC argument.

7. Massachusetts – Family Research Council Example #1
Wicks gives a single example of a Massachusetts prayer:

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173   William C. Kashatus, *William Penn's Legacy: Religious and Spiritual Diversity*, 37 Pa Heritage Mag. 2 (2011).

174   Sydney George Fisher, The Making of Pennsylvania, at iii (8th ed 1908).

175   Morgan, *supra* note 165, at 5. This is also why the author suggested having college presidents on the board: "They represent every portion of the State, and in a very just proportion the religious communities." Morgan, *supra* note 165, at 18–19.

176   Wickersham, *supra* note 167, at 614.

177   *Id.* at vi. The Department of Common Schools was created 20 years later. *Id.* at 345–46.

In Massachusetts, the *Common School Journal* for the year 1842 explained that public school boards in Massachusetts could have clergymen as members.[178]

The Wicks citation reads:

Id. at *6 (citing *Fifth Annual Report of the Secretary of the Board of Education,* 4 COMMON SCH. J. 321, 323 (1845) (stating that the State Normal School at Bridgewater dedication ceremony began after a reverend delivered an introductory prayer)).[179]

Something was lost in the translation from the FRC amicus brief to the Wicks article. The FRC brief reads:

The Common School Journal for the Year 1845, Volume VII, Edited by Horace Mann, Secretary of the Massachusetts Board of Education, Boston: William B. Fowle and N. Capen (1845), records that the dedication of the State Normal School at Bridgewater proceeded "[a]fter an introductory prayer by the Rev. Joseph Allen. . . ." *Id.* at 280. That same ceremony also included "the singing of another original hymn" (*Id.*), and "prayer by the Rev. Mr. Gay" (*Id.* at 281).[180]

The citations do not agree in volume, year, or page numbers.[181] It is hard to know where to look. But even if one looks in both places, neither of those poorly-cited sources mention the dedication ceremony for the State Normal School at Bridgewater, let alone a prayer at that ceremony.[182] That is because the new State Normal

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178   Wicks, *supra* note 48, at 31.
179   *Id.* at 31 n.187.
180   FRC Brief, *supra* note 9, at 6.
181   Wicks cited volume 4, whereas FRC cited volume 7. In her text, Wicks referred to the 1842 journal, but cited to the journal published in 1845. FRC cites the 1845 journal in both. Wicks cites pages in the 320s while FRC cites pages in the 280s. Wicks, *supra* note 48, at 31; FRC Brief, *supra* note 9, at 6.
182   The report of this prayer cannot be found in either of the sources cited. The *Fifth Annual Report* contains a report from the Bridgewater Normal School, but that report is not on the school's dedication. 4 THE COMMON SCHOOL JOURNAL FOR THE YEAR 1842, at 314 (Horace Mann ed., Boston, William

Schoolhouse at Bridgewater was dedicated *after* those sources were published, on August 19, 1846.[183] The dedication ceremony of that new schoolhouse *is* recorded in *The Common School Journal for the year 1846*.[184] This appears to be the ceremony to which FRC and Wicks meant to refer.[185] The ceremony, which was very clearly not

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B. Fowle and N. Capen 1842). The *Fifth Annual Report* does not mention anything about a prayer at a dedication ceremony anywhere. Not on page 323, not on any page, and not in any version of the report. *See, e.g.,* 7 The Common School Journal For the Year 1845, at 61 (Horace Mann ed., Boston, William B. Fowle and N. Capen 1845), https://hdl.handle.net/2027/uiug.30112041478428?urlappend=%3Bseq=300; 4 The Common School Journal For the Year 1842, at 314 (Horace Mann ed., Boston, William B. Fowle and N. Capen 1842), https://goo.gl/9rrDQC; *Report on the Bridgewater Normal School, in* Fifth Annual Report of the Board of Education Together with the Fifth Annual Report of the Secretary of the Board 11 (1842), https://goo.gl/RVXenT.

There is no record of a dedication of the Bridgewater Normal School in the Fifth Annual Report. The Common School Journals cited in this section can all be found on the Hathi Trust Digital Library. *The Common School Journal*, Hathi Trust Digital Library, https://catalog.hathitrust.org/Record/000045540. The same holds true for Volume VII of *The Common School Journal for the Year 1845*. No record of any prayer or dedication ceremony at page 280 or 281. No record of a prayer at a dedication ceremony on any page. 7 The Common School Journal For the Year 1845, at 61 (Horace Mann ed., Boston, William B. Fowle and N. Capen 1845), https://hdl.handle.net/2027/uiug.30112041478428?urlappend=%3Bseq=300.

183 8 The Common School Journal For the Year 1846, at 280 (Horace Mann, ed., Boston, William B. Fowle 1846), https://hdl.handle.net/2027/mdp.39015014701950?urlappend=%3Bseq=290.

184 *Id.* at 273–88. The dedication ceremony appears on 280–88, and the moments Wicks and FRC meant to cite appear at 280–81.

185 Here is what it says:

It was just the day for comfort and enjoyment, and there was abundance of both. Early in the morning, two or three hundred of the present and past pupils of the school had collected, with an unusually large number of the friends of education from every part of the State. The Governor was there, the Hon. Mr. Bates, and the Rev. Mr. Hooker, of the Board of Education, and many clergymen, teachers, and professional gentlemen, whom I will not attempt to name. The new schoolroom was filled with pupils, but the procession of invited guests and citizens was ingeniously squeezed in. *After an introductory prayer by the Rev. Joseph Allen, of Northborough, and the singing of an ode, written for the occasion, we believe, by the Rev. Mr. Rodman,*—and well written and well sung it was, — the Hon. Mr. Bates delivered the Dedicatory Address, in which the argument for the necessity of Normal Schools was irresistibly enforced, by the necessity of general education in a

a school board meeting, included parades, toasts, three speeches, including one by the governor, and the dedication of a new building. Gov. John Reed, the hundreds of students and alumni, guests, and Horace Mann all attended.[186] Citing to prayer at a one-time event does not suggest that prayer was typical at school board meetings, let alone part of a long, unbroken history. If anything, it shows FRC could not unearth a long history of prayer at school board meetings.

This should raise serious red flags about the quality of the historical research. Both Wicks and FRC failed to cite to a source that made their point. FRC missed the volume number and year by a hair (it was VIII, not VII, and it was 1846, not 1845). Wicks noticed and tried to correct FRC's error, but got farther away from the original source.[187]

Wicks pulled, or tried to pull, a single Massachusetts example from the FRC's brief, but FRC cited three more examples that must be examined.

8.   Massachusetts – Family Research Council Example #2

The FRC's second example strengthens the suspicion that their primary research methodology involved locating old books

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land so free as ours, — the necessity of a *good* education, — and the consequent need of competent and accomplished teachers, — men trained to the work, as men are trained to all other professions.

After the singing of another original hymn, the Governor addressed the pupils in the plain, unostentatious, but earnest and feeling manner peculiar to him ; and we mistake if he ever did a better day's work in his life. By advice, by encouragement, by examples, he urged them to prosecute in earnest the all-important work they had undertaken ; and the eager attention of the young teachers is the only guaranty needed to insure a faithful recollection of the latter, and a devoted carrying out of the spirit of the Governor's exhortations.

The procession was then re-formed, and proceeded to the new meeting-house, where, after prayer by the Rev. Mr. Gay, an address was delivered by Amasa Walker, Esq., at the request of the Bridgewater Normal Association. . . . Although the third address, of an hour's length, to which the audience had listened, it was heard with pleasure, and spoken with effect.

The company, enlivened by an excellent band of music, then marched to the Town Hall, where a sumptuous collation was prepared for all the pupils and their numerous guests.

   Id. at 280–81 (emphasis added).

186   *Id*. at 280–82.

187   FRC Brief, *supra* note 9, at 6; 8 The Common School Journal For the Year 1846 (Horace Mann, ed., Boston, William B. Fowle and N. Capen 1846); Wicks, *supra* note 48, at 31 n.187.

using certain keywords (board, education, meeting, school) and then searching those books for prayer keywords (prayer, reverend, invocation). This example is from a small volume that recorded "proceedings" from a "meeting" about equal "school" rights, a meeting that included a "prayer" and a "benediction." The FRC brief declares:

> Another Boston transcript, *Triumph of Equal School Rights in Boston: Proceedings of the Presentation Meeting held in Boston, Dec. 17, 1855* (1856), states, "Prayer was offered by Rev. Charles W. Upham (editor of *The Christian Watch-man*,) after which the President briefly addressed the assembly. . . ." *Id.* at 2. The document also records, "The benediction was then pronounced by Rev. L.A. Grimes, and the exercises terminated." *Id.* at 24.[188]

This example centers on some fascinating and often overlooked history. William Cooper Nell was an African American author and abolitionist.[189] He studied law and could have been a lawyer, but he refused to take an oath to uphold the U.S. Constitution because of its pro-slavery articles. For a time, he published *North Star*, Frederick Douglass's paper. After decades of work, he scored a major victory on April 28, 1855, when the Massachusetts legislature abolished segregated schools, fulfilling Nell's childhood resolution, according to one biographer.[190] The Supreme Court handed down *Dred Scott* twenty-three months later, but in the interim, the black citizens of Massachusetts celebrated Nell and his major victory.

The source the FRC cites is an example of such a celebration. This was not a school board meeting. This was "a meeting of colored citizens of Boston" held "for the purpose of presenting a testimonial to Mr. WILLIAM C. NELL, for his disinterested and untiring exertions in procuring the opening of the public schools of the city to all the children and youth within its limits, irrespective of complexional differences."[191]

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188 FRC Brief, *supra* note 9, at 6. *See* original source cited *infra* note 190.
189 Robert P. Smith, *William Cooper Nell: Crusading Black Abolitionist*, 55 J. Negro Hist. 182–84 (1970) www.jstor.org/stable/2716420.
190 *Id.* at 186–96.
191 Triumph of Equal School Rights in Boston: Proceedings of the Presentation Meeting held in Boston, Dec. 17, 1855,

The celebration "was held in the Southac Street Church," which "was crowded by a finely-appearing and evidently intelligent audience, all of whom appeared to take a lively interest in the proceedings."[192] Nell was escorted in with an honor guard, the meeting was called to order, and officers were chosen. Flowers were presented, plaudits bestowed, more flowers presented, followed by an elegant gold watch inscribed with a tribute, an address by Nell, who was followed by two attorneys, and then William Lloyd Garrison and Charles Lenox Redmond.[193] The cited benediction terminated the meeting, but there's a postscript noting that, the next morning, Harriet Beecher Stowe presented Nell with an inscribed copy of *Uncle Tom's Cabin*.[194]

This was a celebration of desegregation in a church, not a school board meeting. This is a group of private citizens getting together to celebrate a monumental achievement. It had no government authority or imprimatur. The meeting was in no way bound by the First Amendment. Interesting history? Absolutely. Useful history to further the argument that school board prayer is commonplace in American history? Not at all.

9. Massachusetts – Family Research Council Example #3

FRC's next example comes from an unnamed article or excerpt, again from Horace Mann's *Common School Journal*, that, according to FRC, "contemplates that school boards – referred to as 'school committees' – could have actual clergymen as members."[195] Even assuming that this formulation of the unnamed article were true, it does not prove the school board prayer point. It is irrelevant to the question at hand. If, instead, clergymen were *prohibited* from serving on school boards, this would run afoul of the Constitution.[196]

Besides, the truth of this claim is dubious, or at least difficult to verify thanks to FRC's rough scholarship and law office history. The original cited source does not contain anything similar to FRC's

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at 1 (Boston, R.F. Wallcut 1856) https://hdl.handle.net/2027/miun. abj5662.0001.001?urlappend=%3Bseq=1.

192 *Id.*

193 *Id.* at 1–24.

194 *Id.*

195 FRC Brief, *supra* note 9, at 6 ("*The Common School Journal for the Year 1842, Volume IV*, Edited by Horace Mann, Secretary of the Massachusetts Board of Education, Boston: William B. Fowle and N. Capen (1845) contemplates that school boards . . . .").

196 *See* McDaniel v. Paty, 435 U.S. 618, 629 (1978).

claim. FRC cited *"The Common School Journal for the Year 1842,* Volume IV, Edited by Horace Mann . . . (1845) . . . at 323."[197] But clergy are not mentioned within a hundred pages of the cited page of Volume IV (which was published in 1842, not 1845), and two of the rare mentions of clergy in that volume, point out that American clergy support state-church separation.[198]

Perhaps FRC intended to cite the volume actually published in 1845, which was Volume VII? Unfortunately, no mention of clergy appears on the cited page of Volume VII.[199] The report that appears on that page contains no real discussion of who should sit on school committees; however, two pages later, it discusses the qualities of good school masters and clergy do pop up. According to the report, a good school master:

> [S]hould be acquainted with the scholars, should visit them at their home, and show an affectionate, parental interest in their welfare. Surely he may be likened to a clergyman in this; that his power depends not more upon the intelligent performance of his public and required duties, than on the thousand attentions that are prompted by the law of love.

The same page mentions "clergymen" once more: "But the old proverb is true in reference to teachers as well as clergymen, 'Like priest, like people.'"[200] The point is, at most, that good schoolmasters

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197   FRC Brief, *supra* note 9, at 6. This may also account for the error in Wicks citation, as she may have conflated this citation with the earlier one. Wicks, *supra* note 48, at 31 n.187.

198   4 The Common School Journal For the Year 1842, at 224 (Horace Mann, ed., Boston, William B. Fowle and N. Capen 1842), https://babel. hathitrust.org/cgi/pt?id=uiug.30112108066629&view=1up&seq=234. ("English clergy believe in the union of church and state,– that is, that the civil arm should uphold and enforce ecclesiastical authority. But the Episcopal church in this country believe no such thing."). *See also id.* at 222. While "committees" are discussed on pages 322–26, they do not appear to be official school boards but rather groups of concerned citizens. *Id.* at 322–26. For instance, on page 323, they are described as "the friends of education, assembled from the vicinity, have invariably been consulted as to the topics for discussion, and through the medium of a committee have generally proposed them." *Id.* at 323. Clergy are nowhere to be found in the discussion of these committees. *Id.* at 322–26.

199   *Id.* at 323.

200   *Id.* at 325.

have similarities to good clergy.

Given what we have seen of FRC's lax methodology, it seems possible that these two mentions of clergymen on page 325 (not 323) of Volume VII (not IV) tripped FRC up. I cannot find another example that goes to FRC's argument.[201] Whatever the case, this is the "scholarship" federal courts relied on to help prove a history of school board prayer.

10. Massachusetts – Family Research Council Example #4

The American Annals of Education was an educational journal filled with articles, textbook reviews, proposed reforms, stories, letters, poetry, criticism, and more. The wide-ranging collection of ephemera centering on education rose to prominence in the 1830s. As its final Massachusetts example, FRC cites to an "approving reprint of an article" in the 1837 *Annals*.[202] According to FRC, this source asserts that "'commissioners' of the schools should 'rigidly inspect the teacher's method of bringing the great truths of Christianity to bear on the minds and hearts of his pupils.' A failure to do so was taken as a violation of the commissioner's oath of office."[203]

First, again, this has nothing to do with school board prayer. It is an obscure reference to a questionable, at best, and likely unconstitutional suggestion. The *Annals* reproduced, as one of its many items in this particular 500-plus-page volume, an anonymous

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201 Except perhaps 7 THE COMMON SCHOOL JOURNAL FOR THE YEAR 1845, at 1 (Horace Mann, ed., Boston, William B. Fowle and N. Capen 1845). Here, the publishers address the reader and they do state, "Next to teachers, the clergymen of our State have taken the most active part in behalf of our schools." *Id.* They go on to note, "...induced many of them . . . add[ed] the duties of a school committee man to the already onerous duties of the pastoral office." *Id.* at 2. And while this goes better to Wicks's and FRC's parenthetical point, it appears on pages 1–2 and seems too far removed from their intended citation, being off by three full volumes and more than 300 pages. FRC Brief, *supra* note 9, at 6; Wicks, *supra* note 48, at 31 n.187.

202 FRC Brief, *supra* note 9, at 7.

203 *Id.*

> *The American Annals of Education and Instruction for the Year 1837, Volume VII*, Conducted by Wm. A. Alcott, Boston: Otis, Broaders & Co. (1837), in an approving reprint of an article from 1799, notes that the "commissioners" of the schools should "rigidly inspect the teacher's method of bringing the great truths of Christianity to bear on the minds and hearts of his pupils." *Id.* at 110. A failure to do so was taken as a violation of the commissioner's oath of office. *Id.* at 136.

pamphlet that was originally "written by a citizen of Pennsylvania" and published in Philadelphia.[204] Why FRC chose to cite the Pennsylvania pamphlet in the Massachusetts section is a mystery, other than perhaps because the *Annals* was published by a Boston printer and FRC's methodology was so poor. The *Annals* presents the pamphlet with little discussion, other than to point out that the prejudices and motivations of an anonymous author cannot be known.[205]

In the *Annals,* the anonymous excerpt concludes about 25 pages before the mention of a violation of a commissioner's oath of office and that mention comes in an entirely different article, an article about resolutions passed by teachers in Maine, not Massachusetts.[206] As one would expect from a collection such as the *Annals,* it features quite a few intervening articles, including thoughts on "Public Institutions for Destitute Children," the "Honor Due to Aged Teachers," a fictional conversation between two new graduates, and answers to questions about writing desks, among other notes.[207] The business about the oath occurred at the Penobscot Association of Teachers meeting held in Exeter, Maine; the teachers passed thirteen resolutions and the eighth appears to be what drew FRC's eye (or keyword search):

> 8. That our Superintending School Committees violate their oaths, in permitting teachers of doubtful *morals* or *qualifications,* to engage in schools under their supervision, and that it is exceedingly desirable that they should understand the branches of education upon which they "certify" teachers "well qualified."[208]

FRC's description—that failing to "rigidly inspect teacher's

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204 7 American Annals of Education and Instruction for the Year 1837, at 103 (William A. Alcott & William C. Woodbridge, eds. 1837), https://books.google.com/books?id=iQwCAAAAYAAJ; *see also* A Citizen of Pennsylvania, Thoughts on the Condition and Prospects of Public Education in the United States 34 (Philadelphia, A. Waldie 1836), https://books.google.com/books?id=hCmcAAAAMAAJ.

205 7 American Annals of Education and Instruction for the Year 1837, at 103 (William A. Alcott & William C. Woodbridge, eds. 1837), https://books.google.com/books?id=iQwCAAAAYAAJ.

206 *Id.* at 111, 136.

207 *Id.* at 111–36.

208 *Id.* at 136.

method of bringing the great truths of Christianity to bear on the minds and hearts of his pupils" was viewed as a violation of their oath—is completely unsupported.[209] The claim can only be seen as dishonest or willfully ignorant. And if it was simply failing to read the pages between keywords, it should never have been submitted to a federal court, to whom we attorneys owe a duty of candor.

11. Iowa

Here, FRC cites the Board of Education of the State of Iowa's 1859 resolutions to invite several local clergymen to open the sessions with prayer and thank them for doing so, and lists "seventeen recorded instances of prayer."[210] This, finally, begins to resemble a claim that would support a history of school board prayer; but the body referred to here was not a local school board. It is a division of the state legislature, more akin to a committee.

This body dealt with state-level matters, not the day-to-day nitty-gritty of local school boards. There is no evidence that students or even citizens attended the meetings. The presiding officer was the lieutenant governor, the governor was an *ex officio* member, the state constitution set the time and place of its first meeting and the General Assembly set the time and place for subsequent meetings.[211] The group met in the Senate Chamber of the capitol building in Des Moines. Members of this state board were sworn in by the state chief justice, and they met during a single month for a maximum of 20 days each year. Interestingly, this board met during December. It worked a full day on Friday, December 24, reconvening for an evening session that began at 7p.m., and began working again on Saturday, December 25, Christmas, at 9a.m.. This board dealt with statewide legislation, the courts, and state universities. It even set up subcommittees "[o]n Revision . . . On Judiciary . . . On School District Organization and Elections . . . On State University . . . On

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209   FRC Brief, *supra* note 9, at 7.

210   *Id*. ("*The Journal of the Board of Education of the State of Iowa, At Its Second Session, December, A.D. 1859*, Des Moines: John Teesdale, State Printer (1860), alone records the following two resolutions and seventeen recorded instances of prayer."). Wicks, *supra* note 48, at 31 n.188 ("Brief of Amici Curiae, *supra* note 184, at *8 ('*Resolved*. That the several clergymen of this city be invited to open our sessions by prayer, in such order as the President of the Board may think proper.' (quoting JOURNAL OF THE BOARD OF EDUCATION OF THE STATE OF IOWA, AT ITS SECOND SESSION, DECEMBER, A.D. 1859, 5 (1860))).").

211   *See* IOWA CONST. of 1857, art. IX.

Printing . . . On Engrossed Bills . . . On Enrolled Bills."[212]

The "long, unbroken history" is not here. The very first meeting of that body was not during the colonial or founding era, as in *Marsh,* but in 1858, a generation after the framers and more than a decade after Iowa achieved statehood.[213] Most importantly, this body was abolished in 1864, having existed for less than a decade.[214] So what limited value these prayers had for school board history, they cannot be said to be long or unbroken. They are a historical aberration.

12. Wisconsin

FRC cites prayers at the second and third days of the Board of Regents of Normal Schools and concludes, on this basis, that, "[c]learly, Wisconsin was not opposed to Board members praying at meetings."[215]

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212   *See* Iowa Const. of 1857, art. IX; The Journal of the Board of Education of the State of Iowa, At Its First Session 3 (Des Moines, John Teesdale, State Printer 1858) https://goo.gl/SmQpcC.

213   *See* Marsh v. Chambers, 463 U.S. 783 (1983); The Journal of the Board of Education of the State of Iowa, *supra* note 211.

214   *See* 1864 Iowa Acts 53.

215   FRC Brief, *supra* note 9, at 10:

> In the *Proceedings of the Board of Regents of Normal Schools and the Regulations Adopted at Their First Meeting Held at Madison, July 5, 1875,* Madison: Atwood & Rublee (1857), the entry for the "Second Day" records that the meeting was "opened with prayer by Rev. A. Brunson." *Id*. at 6. The entry for the "Third Day" notes that the meeting was "opened with prayer by Doct. Cook." *Id*. at 11. Of special note is Dr. Cook's capacity as a member of the Board of Regents and part of one of its special committees. *Id*. at 5–6, 10. Clearly, Wisconsin was not opposed to Board members praying at meetings.

> There is a minor error in the FRC cite. The proceedings of a board that met in 1875 could not have been printed in 1857. A rather obvious but understandable error. FRC accidentally transposed the final digits on the meeting year in the title it cited, which should have been 1857, not 1875. The citation on page iii of the FRC brief also lists the incorrect year in the title. Wicks corrected the mistake in the title.

> Wicks, *supra* note 48, at 31 n.190:

> > *Id*. (citing PROCEEDINGS OF THE BOARD OF REGENTS OF NORMAL SCHOOLS AND THE REGULATIONS ADOPTED AT THEIR FIRST MEETING HELD AT MADISON, JULY 15, 1857, 6 (1857)).

As with the Iowa citation above, this body is not akin to a local school board but is essentially a committee of the state legislature dealing with higher education. Until 1971, there were two Boards of Regents in Wisconsin. Both dealt strictly with higher education, college-level and above. The first was the Regents of the University of Wisconsin, the flagship school in Madison. The second was the Board of Regents of Normal Schools, which managed state universities and colleges outside Madison that awarded degrees in education; it managed the schools that taught teachers. The systems merged in 1971.[216]

The differences in the structure and duties of the Board of Regents of Normal Schools and local school boards are significant. The Board of Regents of Normal Schools was a state-level body, organized directly by the legislature, that reported to the governor, and oversaw optional higher education, not mandatory public education.[217] Students wishing to attend normal schools had to apply for admission; the Wisconsin state treasurer was treasurer of that board; courses at the schools it managed included lectures on advanced subjects such as "chemistry, anatomy, physiology, astronomy, the mechanic arts, agriculture;" and the purpose of normal schools was partly to mint new teachers for the public schools.[218]

More importantly than its structure, there is no evidence to show that the Board of Regents has the long, unbroken history of prayer required by *Marsh*. Wicks cites this same information, citing the FRC brief, for the proposition that "minutes from board meetings dating back to 1857 denote opening prayers, as well as the names of the reverends that delivered them, including some members of the board themselves."[219] That is quite a leap from the less definite claim in the FRC amicus, which cites only two examples of prayer:

> [T]he entry for the "Second Day" records that the meeting was "opened with prayer by Rev. A.

216　*See* Univ. of Wis., 2017-18 Fact Book 2 (2019). *See generally,* Albert Salisbury, Historical Sketch of Normal Instruction in Wisconsin (n.p., 1893), https://books.google.com/books?id=n8qgAAAAMAAJ.

217　1866 Wis. Sess. Laws 160–65 (incorporating the board of regents of normal schools in Section 14, for example); *See* Univ. of Wis., 2017-18 Fact Book 3 (2019).

218　1866 Wis. Sess. Laws 164–65.

219　Wicks, *supra* note 48, at 31.

Brunson." The entry for the "Third Day" notes that
the meeting was "opened with prayer by Doct. Cook."
Of special note is Dr. Cook's capacity as a member
of the Board of Regents and part of one of its special
committees.[220]

Two prayers do not constitute a long, unbroken history. And
in fact, FRC starts by citing the second day because no prayer was
recorded on the first.[221] Brunson, who gave the prayer on the second
day, was a member of the board, representing Prairie Du Chien. He
also chaired the rules committee, which proposed rules that were
adopted on the second day. The rules do not include a daily prayer in
the order of business or any other rule.[222] The third day began with
a prayer by Cooke, who represented Appleton. The board voted to
adjourn later that day. They met for those three days only.[223]

The next *Board of Regents of Normal Schools* report to the
governor (1859), its second annual report, does not mention any
prayers.[224] Cooke of Appleton was still on the board, having been
re-appointed after his commission expired in 1858, but Brunson
of Prairie Du Chien was not; his commission expired in 1859.[225]
Perhaps Brunson, the Methodist minister who gave the prayer just
before he presented his proposed rules and served as chairman on
the first day, was the driving force behind the prayer and it fell out of
favor without his presence.[226] Or perhaps the prayers happened but
were not worth mentioning. Or perhaps there were no more prayers.
History is ambiguous as to why the prayers were abandoned; the
history of the prayers themselves is clear and short. Those were the

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220 FRC Brief, *supra* note 9, at 10 (citations omitted).

221 Public Documents of the State of Wisconsin, Being the
     Biennial Reports of the Various State Officers, Departments
     and Institutions app. at Document O (Madison, Atwood and Rublee
     1885).

222 *Id.*

223 *Id.* "Cooke" is the proper spelling.

224 *See* Bd. Of Regents, Second Annual Report of the Board of
     Regents of Normal Schools of the State of Wisconsin, 2nd Sess.,
     (1859), https://books.google.com/books?id=0K5I8OZT4TMC.

225 *Id.* at 5; Public Documents of the State of Wisconsin, Being the
     Biennial Reports of the Various State Officers, Departments
     and Institutions app. at Document O (Madison, Atwood and Rublee
     1885).

226 *See generally* Ella C. Brunson, *Alfred Brunson, Pioneer of Wisconsin Methodism*, The
     Wis. Mag. Hist., Dec. 1918, at 129–48.

only times this board prayed.

The Wisconsin Historical Library at the State Historical Society in Wisconsin has the proceedings of this Board of Regents, some in heavily-battered volumes.[227] These are not annual reports, but meeting minutes of the times the board met, usually for a few days a few times a year. The daily business nearly always began the same way: a call to order, roll called and recorded, minutes of previous meeting approved, and then usually a report is read or officers elected. In one particularly exciting meeting, no secretary was present so "Regent A.D. Andrews was designated to act as Secretary *pro tem.,* and called the roll of members."[228] I could find no prayer in any of the proceedings from 1874 (the earliest available) through 1920. A search of the University of Wisconsin Board of Regents archival meeting minutes, which stretches from 1921 through 1991 failed to reveal any prayers or invocations.[229] The merged Board of Regents does not currently pray, according to its meeting minutes.[230]

FRC cites the nascent Board's first annual report, which happened to include the minutes. In later years, reports and minutes were kept separately. The reports from 1859 through 1922,[231] including the seven reports immediately following FRC's prayer report, were found at the Wisconsin Historical Society, the University of Wisconsin, or online. None show prayers at the school board meetings. William Harold Herrmann's thousand-page, two-volume opus of a doctoral dissertation, *The Rise of the Public Normal School System in Wisconsin,* only mentions prayers in relation to a famous

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227   Proceedings of the Bd. of Regents of Normal Schools (Wis. 1874-1892); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1893-1898); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1898-1904); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1905-1909); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1910-1916); Proceedings of the Bd. of Regents of Normal Schools (Wis. 1916-1920).

228   Bd. of Regents, Abstract of Proceedings of the Board of Regents of Normal Schools 1 (Madison, n.p., 1885).

229   University of Wisconsin Board of Regents Collection, http://digicoll.library.wisc.edu/UWBoR/Search.html.

230   University of Wisconsin System Board of Regents Meeting Materials, https://www.wisconsin.edu/regents/meetingmaterials/.

231   The annual reports published in 1859 through 1865 constituted the Second annual report through Eighth annual report, and the annual reports published in 1879 through 1882 were unnumbered. Annual reports were not published from 1866 through 1878 and/or could not be located. From 1882 through 1922, biennial reports were issued (the 1st Biennial Report was for the years 1882-1884; the 20th biennial report was for the years 1920-1922).

1890 Wisconsin case striking them down in the public schools.[232] Newspaper accounts of early meetings of the Board fail to mention prayers.[233]

In short, from the beginning of this body through the present, there is no evidence of prayers other than the two mentioned by FRC. Two prayers at hundreds of meetings. That is it. If one is looking to history as a guidepost, this history points away from prayers. Wisconsin's history of injecting religion into mandatory public education for younger citizens does little to support the historical arguments. In that rather famous 1890 case brought by Catholic families and students—Justice Brennan cited it in his *Schempp* opinion[234]—the Wisconsin Supreme Court ruled that the Wisconsin Constitution prohibited bible readings in the public schools:

> The only object, purpose, or use for taxation by law in this state must be exclusively secular. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the state, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter into our common schools, they would be destroyed.[235]

B. The Family Research Council history proves precisely what it is meant to disprove: there is no history of school board prayer.

If we apply the evidence offered by FRC and Wicks to the rubric presented in Section 3 to determine if the evidence shows a history of school board prayer in any legally significant way, it fails mightily. The third aspect of that rubric—the accuracy and validity of their evidence—is nonexistent. In various places, FRC and Wicks are guilty of citing the wrong pages, years, and volumes of sources (Michigan, Massachusetts #1 and #3); citing private meetings as

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232 2 William Harold Herrmann, The Rise of the Public Normal School System in Wisconsin 364–69 (1953).

233 *Action of the Normal School Regents*, Wis. State J. (Apr. 12, 1860), https://newspaperarchive.com/madison-wisconsin-daily-state-journal-apr-12-1860-p-1/; *Normal School Department*, Wis. State J. (Jul. 18, 1863).

234 Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 292, 275 n.51 (1963) (Brennan, J., concurring).

235 State *ex rel*. Weiss v. Dist. Bd. of Sch. Dist. No. 8 of Edgerton, 44 N.W. 967, 981 (1890) (Orton, J., concurring).

though they are government meetings to which the separation of state and church would apply (North Carolina, Massachusetts #2); treating entirely different works that happen to appear in the same volume as if by one author with one theme (Massachusetts #3); failing to track down original sources for factual statements (Michigan); citing parts of a statute without mentioning other parts that directly contradict the proposition for which it is cited (New York); fudging the numbers (North Carolina); conflating requests with requirements (North Carolina, Pennsylvania #2); misstating a call for diversity and representation as a mandatory connection to religion (Pennsylvania #2); citing prayers at bodies that were defunct a few years later (North Carolina, Iowa); and citing two errant prayers in 150 years as the norm, rather than the exception (Wisconsin). The underlying methodology appears to have been a keyword search designed to bolster the end result, rather than an honest historical investigation of the claim.

Most of their evidence does not even involve prayers, failing the first prong. Only a few of the cited examples truly have prayers akin to those that are the subject of modern litigation (Missouri, Massachusetts #1 and #2, Iowa, and Wisconsin). In Missouri and Massachusetts, the prayers were not even at school board meetings, but at one-off school and community events or a private meeting of private citizens.

That leaves FRC with only its Iowa and Wisconsin examples, which at least involve prayers at a government body that can be called a school board (even if at a higher, state legislature level). But both examples are still incredibly weak because the prayers were short-lived. Iowa's board disbanded after a few years and Wisconsin's board prayed twice the first three days it met but never again in its hundreds of meetings.

Not a single piece of evidence the FRC amicus and the Wicks article present meets the requirements for showing a long unbroken history of prayer at school board meetings, as the *McCarty* court claimed. Instead, they show the opposite. The examples reveal only sporadic, isolated mentions of prayers in documents that deal with education—often only tangentially—and prove nothing like a long, unbroken history, let alone an unbroken history dating to the founding or even to the creation of the public educational system. In an ultimate irony, the history in the amicus at the root of this claim actually *disproves* the point the Fifth Circuit, Wicks, FRC, and the Ninth Circuit en banc dissenters were trying to make. FRC did

not just swing at the school board prayer pitch and miss, the bat came back around and hit it in the head.[236] FRC inadvertently proved that there is no history of school board prayer. In the end, the few oblique references show that school board prayer is a practice that barely registered in the historical record. The conclusion that school board prayer has a history akin to the history posited in *Marsh* must be rejected.

VI. LAW OFFICE HISTORY IN MARSH

The fallacious school board prayer history—and that it was adopted by so many judges at such a high level—highlights the problem with *Marsh*'s historical approach. Where legal principles are meant to be inflexible to ensure justice regardless of sex, race, religion, sexual orientation, wealth, and more, history is malleable. The legal principle at issue in *Marsh* would have required striking down the prayers. That principle is the separation of state and church: "Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped."[237] Instead, *Marsh* downplayed some aspects of our history while accentuating others, an error some justices repeated when rehashing *Marsh* in the Bladensburg Cross decision in 2019.[238] This allowed the Court to circumvent that wall and the legal principle it represents. There is no history of school board prayer, but even if there were, that history should not control the outcome when a clear legal principle exists, even if the outcome of a case might be politically unpopular.

It is worth looking deeper at the *Marsh* decision because the historical gerrymandering the majority employed is fundamentally flawed, as is the decision. The history presented in *Marsh* is not as deficient as the FRC or Wicks history of school board prayer that is gaining popularity in the courts. However, *Marsh* still sets a low bar for what constitutes acceptable historical analysis.

The simple truth is that *Marsh* was wrongly decided—and

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236   *See, e.g., David Wright Hits Himself With Bat While Swinging In Mets-Braves Game (VIDEO)*, Huff. Post (Jul. 25, 2013, 3:41 PM), https://www.huffingtonpost.com/2013/07/25/david-wright-hit-bat-himself-head_n_3654121.html. David Wright is an all-star, but here, he swung hard and the bat broke and hit him in the back of the head. That he hit into a double-play makes the metaphor more apt.

237   Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948).

238   *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2078, 2084, 2087, 2089 (2019).

therefore *Greece* and the Bladensburg cross case were too.[239] In particular, *Marsh's* history is unsound. The Court missed significant facts and distorted others. *Marsh* relied on congressional chaplaincies but overlooked the divisiveness that office engendered. *Marsh* relied on the First Congress's approval of chaplaincies to discern the framers' intent, but ignored framers' stated legal opinions against government prayer. *Marsh* relied on colonial prayers that were given years before the Constitution and First Amendment were adopted, but minimized the fact that the framers did not pray during the Constitutional Convention. In other words, the *Marsh* majority used law office history to reach a result and then it characterized that cherry-picked history as "unambiguous."[240]

The *Marsh* majority opinion omitted history.[241] For instance, *Marsh* concluded that the framers did not "perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church,"[242] but John Quincy Adams wrote that people believed *precisely* that in 1821:

> Mr. Sparks, the Unitarian['s], . . . election as to the House of Representatives . . . has been followed by unusual symptoms of intolerance. Mr. Hawley, the Episcopal preacher at St. John's Church, . . . preached a sermon of coarse invective upon the House, who, he said, by this act had voted Christ out-of-doors; and he enjoined upon all the people of his flock not to set their feet within the Capitol to hear Mr. Sparks. . . . Patterson, a member from the State of New York, moved that the House should proceed to the choice

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239   The arguments that follow appeared for the first time in the Freedom From Religion Foundation brief to the Supreme Court in *Town of Greece*. Brief for Freedom from Religion Foundation as Amicus Curiae Supporting Respondents, Town of Greece v. Galloway, 572 U.S.565 (2014) (No. 12-696), 2013 WL 5348583. I was the brief's primary author, especially for the historical analysis recapitulated here, but it was a team effort. Rebecca Markert, Patrick Elliott, and Elizabeth Cavell provided invaluable insight and Richard Bolton acted as counsel of record (I was not admitted to the Supreme Court bar at the time).

240   Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 842 (1985); *see also* McCreary v. ACLU of Ky., 545 U.S. 844 (2005); Marsh v. Chambers, 463 U.S. 783, 792 (1983).

241   *See, e.g.*, Christopher C. Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary L. Rev. 1171, 1173 (2009) (noting that the majority's history "does not really capture the whole story.").

242   *Marsh*, 463 U.S. at 793.

of another Chaplain.[243]

John Quincy Adams was writing after the founding, but even earlier chaplain elections were divisive, including some congressmen voting for Thomas Paine, one of the leading critics of religion, to take up the post.[244] This divisiveness is certainly worthy of mention and was known to the *Marsh* Court.

Law office history often omits history, but it also minimizes and misconstrues it to reach incorrect conclusions. *Marsh* relied almost exclusively on two misconstrued historical facts: (a) the First United States Congress approving a bill for congressional chaplains and (b) a colonial tradition of prayer, including prayer at the First Continental Congress.[245]

1. Marsh *relied on the First Congress approving chaplaincies to discern their views on government prayer, but ignored the framers' stated legal opinions against government prayer.*

The Supreme Court is rightfully fond of citing James Madison. When deciding *Marsh*, it had access to Madison's *Detached Memorandum*, which condemns congressional chaplains and prayers, stating: "The establishment of the chaplainship to [Congress] is a palpable violation of equal rights, as well as of Constitutional principles."[246] Madison was equally critical of "[r]eligious proclamations" by the government, calling them "shoots from the same root."[247]

The *Marsh* majority relegated Madison's legal opinion opposing chaplains to a footnote on an unrelated sentence disposing of opposition to prayer at the Continental Congress.[248] It is not just that the Court discounted Madison's legal opinion, which might be forgivable, but the *Marsh* majority selectively filtered Madison's opinion, ignoring his legal analysis on government chaplains while

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243 5 John Quincy Adams, Memoirs of John Quincy Adams 458–59 (Philadelphia, Charles Francis Adams, ed., 1875).

244 Theodore Dwight, President Dwight's Discussions of Questions discussed by the Senior Class in Yale College, in 1813 and 1814, at 114, 229 (New York, 1833).

245 *Marsh,* 463 U.S. at 787–88, 790, 794.

246 Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 Wm. & Mary Q. 534, 558 (1946).

247 *Id.* at 560.

248 *Marsh,* 463 U.S. at 791 n.12.

citing his vote on, and passage of, a general appropriations bill that included chaplains.[249] The bill approved chaplains, but was not about chaplains—it authorized salaries for government officials, including salaries for those voting on the bill.[250] The *Marsh* majority cites this bill and Madison's vote even though Madison specifically condemned the chaplaincy section, writing later that "it was not with my approbation, that the deviation from it took place in [Congress] when they appointed Chaplains, to be paid from the [National] Treasury."[251]

Partly from passage of the appropriations bill, the *Marsh* majority concluded that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer."[252] That is a dubious oversimplification. It is also possible that Congress acted in simple self-interest. The men voting on the bill had been serving at their own expense and were probably focused on the salaries attached to their positions rather than the legality of a chaplaincy buried in the fourth of seven sections of the bill. This interpretation agrees with other facts, such as the poor attendance for the prayers: the Reverend Ashbel Green, "one of the chaplains for eight years from 1792 on, complained of the thin attendance of members of Congress at prayers. He attributed the usual absence of two-thirds to the prevalence of freethinking."[253] (That poor attendance continues to this day. While it cannot be seen on C-SPAN, attendance is abysmal at the daily prayers in the House and Senate. U.S. Rep. Mark Pocan said that during the opening prayers, the House is "pretty much an empty room.")[254]

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249   Though, admittedly, also doing so in a footnote. *Id.* at 788 n.8.

250   Act of Sept. 22, 1789, ch. 17, 1 Stat. 70; 1 ANNALS OF CONG. 950 (1789) (Joseph Gales ed., 1834) (referring to "The Appropriation bill…").

251   Letter from James Madison to Letter to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND PRIVATE CORRESPONDENCE, INCLUDING LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED, 1819–1836, at 100 (Gaillard Hunt ed., 1910) [hereinafter Letter from James Madison to Edward Livingston].

252   *Marsh*, 463 U.S. at 791.

253   ANSON PHELPS STOKES & LEO PFEFFER , CHURCH AND STATE IN THE UNITED STATES 457 (rev. one-vol. ed. 1950).

254   During a televised interview, the author asked Rep. Pocan, "How many actually sit through the prayers?" He responded, "It's done at the opening of the session, but that's not when you're there unless you're there to deliver a one-minute or a five-minute speech that we often start sessions, no one's in the room. So it's pretty much an empty room." Andrew Seidel, Annie Laurie

Or perhaps the First Congress "saw no real threat to the Establishment Clause" because they did not look for one. The First Congress approved chaplains and prayers without vetting them through the First Amendment, which would not have any legal effect for another two years. Those founders who did consider the legality of government prayer came down against it.

The vote on the appropriations bill that the *Marsh* majority found so significant was followed by a debate on government prayer, specifically presidential thanksgiving proclamations. Those opposing government prayer appealed to the Constitution and the law; those in favor of prayer relied on "holy writ," the Bible, and prayers at the Continental Congress. Much like the divided Court in *Marsh*, one side cited legal principles, the other tradition and religion. Thomas Tucker (S.C.), who spoke out against government prayers, thought:

> [T]he House had no business to interfere in a matter [prayer] which did not concern them. Why should the President direct the people to do what, perhaps, they have no mind to do? . . . it is a business with which Congress have nothing to do; it is a religious matter, and, as such, is proscribed to us.[255]

Roger Sherman (Conn.) countered Tucker with the Bible, he "justified the practice of thanksgiving . . . as warranted by a number of precedents in holy writ; for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple."[256] The only other speaker in favor, Elias Boudinot (N.J.), who would later help found the American Bible Society, relied on pre-Constitutional "precedents from the practice of the late Congress," a mistake *Marsh* repeated.[257] Madison, as we have seen, opposed government prayers and the chaplaincies as constitutional violations.

Madison and Tucker are the only framers in the congressional debates *Marsh* cited to consider the legality or constitutionality of government prayer. Both thought it unconstitutional. *Marsh's*

Gaylor, interview with Mark Pocan, *Freethought Matters* (produced by the Freedom From Religion Foundation, aired nationally November 17, 2019), https://youtu.be/4vph3C_IaZk.

255 1 Annals of Cong. 950 (1789) (Joseph Gales ed., 1834).

256 *Id.*

257 *Id.*

historical conclusion that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause" is wrong.[258]

2. *Marsh's reliance on pre-Constitutional prayers is illogical and historically inaccurate.*

Like Elias Boudinot, *Marsh* relied on the Continental Congress's prayers to uphold the current practice.[259] The *Marsh* majority based its constitutional interpretation on prayers given fifteen years before the Constitution was ratified. The colonies had not declared independence and were still part of Great Britain and its established church. The prayers' legality could not possibly be determined when the document, legal system, and country constraining them had not yet been established.

Second, the pre-Constitutional prayers were not an outpouring of piety; they were a political expedient. John Adams recorded the prayers as a political calculation. He wrote that during dinner with Samuel Adams and fellow-delegate Joseph Reed, Reed said "[w]e never were guilty of a more Masterly Stroke of Policy, than in moving that Mr. Duchè might read Prayers."[260] One reason the framers later chose to separate state and church was to prevent religion being used—and thereby sullied—for political ends.[261]

Finally, *Marsh* claimed that the colonial prayer tradition was unbroken.[262] It was not. After reaping the political benefit of the first prayer on September 10, 1774, the Continental Congress had no further prayers for eight months, until May 11, 1775.[263] The sporadic prayers given between March 1, 1781, and June 21, 1789, occurred under the Articles of Confederation. The Articles were seriously defective and replaced by the Constitution after eight years.

Significantly, there were no prayers at the Constitutional Convention. But the law office history in the *Marsh* majority opinion

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258 *Marsh*, 463 U.S. at 791.

259 *Id.* at 787–91.

260 John Adams, *John Adams's Diary (Sept. 10, 1774)*, *in* 1 Letters of Delegates to Congress, 1774-1789, at 60 (Paul H. Smith ed., 1976). Jacob Duché himself has a dark history, because he betrayed the cause of American Independence. *See* Andrew L. Seidel, The Founding Myth: Why Christian Nationalism is Un-American 94–96 (2019).

261 Letter from James Madison to Edward Livingston, *supra* note 250, at 100–03.

262 *Marsh*, 463 U.S. at 792.

263 2 Journals of the Continental Congress 1774-1789, at 13 (Worthington Chauncey Ford ed., 1905). *See also* Diary of John Adams, *supra* note 259 at 60 (recounting the first prayer on September 10, 1774).

minimizes this fact with nine words[264] in a footnote calling the lack of prayer "an oversight."[265] *Marsh* quotes Ben Franklin's prayer proposal, mistakenly claiming it was rejected for a lack of funds.[266] Funding was part of the debate, but Franklin himself noted that prayer was rejected because "[t]he Convention, except three or four persons, thought Prayers unnecessary."[267] This notation appears on the same page in the original source that the majority favorably cited to point out Franklin's prayer proposal.

If pre-Constitutional history is important, the history of the Constitutional Convention should be given far more weight than any colonial history. And history shows that the framers purposefully drafted our entirely godless and secular Constitution without prayers or divine appeals. They deliberately rejected the call to prayer finding it unnecessary.[268]

3. *Marsh* wrongly elevated history over legal principle.

While "the world is not made brand new every morning," history is not static.[269] New historical evidence can undermine constitutional interpretation based on bad history. For example, in *Van Orden v. Perry*, the "determinative" factor of Justice Breyer's controlling opinion upholding a Ten Commandments monument on public land was the apparent absence of divisiveness during the monument's history:

> 40 years [have] passed in which the presence of this monument, legally speaking, went unchallenged . . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage . . . . This display has stood apparently uncontested

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264 *Marsh*, 463 U.S. at 787 ("Although prayers were not offered during the Constitutional Convention . . . .").

265 *Marsh*, 463 U.S. at 788 n.6.

266 *See id.*

267 1 The Records of the Federal Convention of 1787, at 452 n.15 (Max Farrand ed., 1911).

268 *Id.* ("The Convention, except three or four persons, thought Prayers unnecessary.").

269 McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

for nearly two generations. [270]

This history is wrong. Citizens challenged the legality of the monument in 1977 and possibly earlier, but Texas ignored those challenges. Madalyn Murray "O'Hair asked [the Governor] to request an attorney general's opinion on the constitutionality of displaying a creche scene in a public building and having a monument inscribed with the Ten Commandments on Capitol grounds, but the governor's aides refused."[271] The Foundation I work for, the Freedom From Religion Foundation, and our Texas membership wrote multiple letters of complaint to Texas governors from the time co-founders Anne Nicol Gaylor and Annie Laurie Gaylor first visited the Texas Capitol in 1977, until our final letter, sent in September 2001, prior to Mr. Van Orden's lawsuit.[272]

Moreover, the inference Breyer draws from the lack of challenge is almost certainly wrong. Historically, those who stand up to government endorsements of religion face a vicious and often violent backlash that ranges from being fired, to death threats, to proxy violence against their pets, to physical assault, and even firebombing of their houses.[273] The more likely inference is that people did not vocally or publicly challenge the monument precisely because it was religious and to challenge a religious monument was to invite the wrath of religious residents.[274]

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270 Van Orden v. Perry, 545 U.S. 677, 702–04 (2005) (Breyer, J., concurring).

271 *O'Hair Wants Nativity Scene Out*, The Galveston Daily News, Nov. 16, 1977, at 16B (emphasis added). See also Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernisms*, 61 Case W. Res. L. Rev. 1211 (2011); *Atheist Leader Disapproves*, Corpus Christi Times, Nov. 16, 1977, at 4A (showing O'Hair in front of the Van Orden monument 28 years before the decision) ("Atheist leader disapproves . . . said the tablet, containing the Ten Commandments, violates the principle of separation of church and state.").

272 *See* Declaration of Annie Laurie Gaylor at 7–9, Freedom From Religion Foundation v. Weber, No. 9:12-cv-00019-DLC (D. Mont. Feb. 13, 2013).

273 Robert S. Alley, Without a Prayer: Religious Expression in Public Schools 84–89 (1996); Benjamin P. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 Va. J. Soc. Pol'y & L. 437, 439, 463–67 (2013).

274 As Professor Edwards notes, "[a]t some point, the volume and severity of past reprisals reaches a point where objectively reasonable people will simply decide to 'bite their tongues and go about their lives' instead of facing the risk." Edwards, *supra* note 273, at 455 (quoting Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2171 (1996) ("Simply stated, the ostracism that befalls plaintiffs who challenge cherished

In short, the "determinative factor" in the controlling opinion—forty years of non-divisive history—was wrong. (Unfortunately, Justice Breyer used a similar peaceful history and drew the same mistaken inference from it when upholding the Bladensburg cross.)[275] The true legacy of *Marsh* is that it elevated history, or rather, law office history, over legal principle. This approach is dangerous. *Marsh* treated the chaplaincy legislation that was adopted contemporaneously with the First Amendment as automatically constitutional because of its temporal connection to the framers of the First Amendment. As the Supreme Court later observed, *Marsh* "noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion [were discussed and] [w]e saw no conflict with the Establishment Clause . . . ."[276] Applying this same rationale elsewhere would yield terrible results.

At least **twenty-two** members of the Congress that proposed the First Amendment were also members of the Congress that passed the Sedition Act (of the notorious Alien and Sedition Acts).[277]

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governmental endorsements of religion is so extreme that most who are offended by these practices bite their tongues and go about their lives.")).

275 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring) ("[T]he Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed. Nothing in the record suggests that the lack of public outcry 'was due to a climate of intimidation.'").

276 Lynch v. Donnelly, 465 U.S. 668, 674 (1984) (discussing *Marsh*).

277 This number was arrived at by comparing the rolls of the First and Fifth U.S. Congress, which proposed the First Amendment and the Alien and Sedition Acts respectively. Biographical Directory of the United States Congress 1774-2005, H.R. Doc. No. 108-222, at 45–46, 54–56 (2005), https://www.govinfo.gov/content/pkg/GPO-CDOC-108hdoc222/pdf/GPO-CDOC-108hdoc222.pdf.

	Name	State	1st Cong. Chamber	5th Cong. Chamber
1	Baldwin, Abraham	GA	House	House
2	Bloodworth, Timothy	NC	House	Senate
3	Brown, John	VA/KY	House	Senate
4	Foster, Abiel	NH	House	House
5	Foster, Theodore	RI	Senate	Senate
6	Giles, William B.	VA	House	House
7	Goodhue, Benjamin	MA	House	Senate
8	Gunn, James	GA	Senate	Senate
9	Hartley, Thomas	PA	House	House
10	Henry, John	MD	Senate	Senate

Other members of that First Congress occupied higher federal posts, including John Adams, who was both President of the Senate that proposed the First Amendment and the man who signed the Sedition Act into law.[278] All told, significantly more First Amendment Founders approved of the Sedition Act than the seventeen the Court found significant in *Marsh*. Under the *Marsh* rationale, this history should "lea[d] us to accept the interpretation of the First Amendment draftsmen who saw" the Sedition Act as conforming to the First Amendment.[279] Under the *Marsh* approach, the Sedition Act ought to be automatically constitutional.[280] Yet, the Sedition Act is

11	Langdon, John	NH	Senate	Senate
12	Laurance, John	NY	House	Senate
13	Livermore, Samuel	NH	House	Senate
14	Parker, Josiah	VA	House	House
15	Schureman, James	NJ	House	House
16	Schuyler, Philip	NY	Senate	Senate
17	Sedgwick, Theodore	Ma	House	Senate
18	Sinnickson, Thomas	NJ	House	House
19	Smith William L.	SC	House	House
20	Sumter, Thomas	SC	House	House
21	Thatcher, George	MA	House	House
22	Vining, John	DE	House	Senate

This number only looks at overlap in the Congresses, not any role in the legislation or debate or when the legislator took his seat. That makes the number somewhat flexible, especially at a time when it could be months before they assumed their seat. See the footnotes in the above sources. John Henry and Philip Schuyler did not finish out their terms in the Fifth Congress, while in the First Congress William Giles took over Theodorick Bland's term after Bland's death. *See* H.R. Doc. No. 108-222, at 46 nn.31–32, 54 n.16, 55 n.25. Henry and Schulyer were strong Federalists that likely supported the acts.

278 Seven members went from the House to the Senate during that time: Bloodworth, Brown, Goodhue, Laurance, Livermore, Sedgwick, and Vining. See the table in the previous note. Laurance and Sedgwick were not only senators, but Presidents Pro Tempore of the Senate. *See* H.R. Doc. No. 108-222, at 54. Others from the First Congress went on to other important and powerful posts in which they could have theoretically undermined or even struck down the laws, including Oliver Ellsworth who became Chief Justice of Supreme Court and William Paterson, who became an Associate Justice of the Supreme Court Justice. *See* H.R. Doc. No. 108-222, at 45–46; Fed. Judicial Ctr., Biographical Directory of Article III Federal Judges, https://www.fjc.gov/history/judges (last visited Oct. 29, 2019).

279 Marsh v. Chambers, 463 U.S. 783, 791 (1983).

280 The convoluted law read, in part, "[no] person shall write, print, utter or publish . . . any false, scandalous and malicious writing . . . with intent to defame the . . . government." Sedition Act of 1798 (expired 1801), http://

now universally condemned, both "in the court of history" and "by Justices of this Court."[281] This universal condemnation shows that the *Marsh* approach is tragically flawed.

Of course, other practices contemporaneous with the adoption of other amendments have been declared unconstitutional. In *Brown v. Board of Education*, this Court heard "[r]eargument . . . largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868" including exhaustive coverage of "then existing practices in racial segregation, and the views of proponents and opponents of the Amendment."[282] But *Brown* did not use the rampant history of segregation at the time the Fourteenth Amendment was passed to determine the constitutionality of school segregation; instead, it applied a legal principle to contemporary circumstances.[283]

The Court has also declared unconstitutional other practices dating from colonial history. Until *Loving v. Virginia*, "[p]enalties for miscegenation" were common and had been "since the colonial period."[284] Instead of relying on history, *Loving* relied on legal principles and the self-evident truth that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[285] The Court correctly rejected the idea that a long history of anti-miscegenation could limit the right to marry.

The Court had refused to allow history to overrun principle in other cases involving the religion clauses:

> At one time it was thought that [the freedom of conscience] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying

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avalon.law.yale.edu/18th_century/sedact.asp.

281   N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

282   Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954).

283   "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." *Id.* at 492–93.

284   Loving v. Virginia, 388 U.S. 1, 6 (1967).

285   *Id.* at 12 (citations omitted).

principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[286]

The Court had been reasonably consistent in adhering to this interpretation, even though the framers may have had a different interpretation.[287]

Had school-related Establishment Clause cases been decided like *Marsh*, students' rights of conscience would be violated daily. *McCollum v. Board of Education* ignored the lone dissent of Justice Reed, who specifically argued that devotion to "principle . . . should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people . . . the history of past practices is determinative of the meaning of a constitutional clause . . . ."[288] *Abington v. Schempp* noted the "long history. . . . [of] Bible reading and daily prayer in the schools" from private sectarian schools in 1684 until "free public schools gradually supplanted [them] between 1800 and 1850" and beyond,[289] but correctly treated this as a history of violation, not validation. *Lee v. Weisman* overturned prayers "at public-school graduation ceremonies . . . a tradition that is as old as public-school graduation ceremonies themselves."[290] The Court relied on principle, specifically: "that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."[291]

4. The Court expanded this veneration of history over legal principle in the Bladensburg Cross case.

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286 Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (footnotes omitted).

287 *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 27–28 (1997) (Blackmun, J., concurring) ("[The] government may not favor religious belief over disbelief"); Everson v. Board of Ed., 303 U.S. 1, 18 (1947) ("[Government must] be a neutral in its relations with groups of religious believers and non-believers."). The new conservative bloc on the Court may be looking to overturn this interpretation.

288 Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 256 (1948).

289 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 267–68 (1963) (Brennan, J., concurring).

290 Lee v. Weisman, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting).

291 *Id.* at 587.

The Supreme Court doubled down on this retrogressive approach—despite its dangers—in June 2019 in the Bladensburg cross case, *American Legion v. American Humanist Association*.[292] The decision was fractured, yielding seven different opinions. Justice Alito's plurality opinion used *Marsh* to argue by analogy that a towering Christian cross, initially dedicated as a WWI memorial and later rededicated to all service members, could remain on government land and be maintained at taxpayer expense.[293] Perhaps recognizing *Marsh's* historical holes after decades of scholarly criticism, Justices Alito, Roberts, Kavanaugh, and Breyer joined together to shore up the law office history in *Marsh* and *Greece*, while using those cases to address the cross.[294] Unfortunately, they magnified the historical mistakes in *Marsh* and made some new ones.

Instead of applying the *Lemon* test, Alito's Bladensburg opinion "look[ed] to history for guidance. Our cases involving prayer before a legislative session are an example."[295] In doing so, Alito shipwrecked his opinion on an unyielding contradiction. Alito muses on the ineffability of original purpose and intent behind some government actions, going so far as to say "[w]e can never know for certain what was in the minds of those responsible for the memorial" cross.[296] But, as in *Marsh* and *Greece*, he could easily discern the intent of the founders regarding legislative prayer because "the decision of the First Congress to provide for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."[297] Alito found that legislative prayer was permissible because he could discern what the founders were thinking 230 years ago, then found that a massive Christian cross on government land was permissible even though he could not discern what those who erected it were thinking 90 years ago.[298] In the

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292   *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087–88 (2019); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017). The American Humanist Association litigated both cases.

293   *Am. Legion*, 139 S. Ct. at 2077, 2087.

294   *Id*. at 2089.

295   *Id*. at 2087 (brackets and internal quotation marks removed).

296   *Id*. at 2090.

297   *Id*. at 2087 (brackets and internal quotation marks removed).

298   *See Id*. at 2081–85. While it is true that some of the founders' thoughts on legislative prayer were perhaps more well-documented than the thoughts of those who erected the cross, the Court also ignored those founders' thoughts, as detailed above.

end, he did even more, giving the cross "a strong presumption of constitutionality." [299]

Contradiction aside, Alito sought to show both that the framers believed that legislative prayer comported with the First Amendment and that "[t]he prevalence of this philosophy at the time of the founding is reflected in other prominent actions taken by the First Congress."[300] It is those new historical tidbits—the "other prominent actions"—that the opinion uses to attempt to shore up the flawed history the Court adopted in *Marsh*. They are a thanksgiving proclamation and language relating to "religion and morality" being "indispensable supports" to "political prosperity" in Washington's Farewell Address and in the Northwest Ordinance. [301]

Alito claimed that "[t]he First Congress looked to these 'supports' when it chose to begin its sessions with a prayer."[302] But this is inaccurate from the first. There is nothing in history, let alone in Alito's opinion, to suggest that the founders *looked to* those "supports" when examining the legality of legislative prayer, or as discussed above, that they deeply considered that question at all. Indeed, it would be odd if Washington's Farewell Address, which he delivered seven years after the House vote on the chaplaincy that so influenced the Court in *Marsh*, somehow influenced the First Congress that had adjourned half a decade earlier. Instead, it appears that Alito himself selected these supports and attributes his reliance on them to the First Congress.

And these supports are not all that helpful to the claim that legislative prayer or religious displays comport with the First Amendment. The mentions of religion are just that, lip service with no real legal effect. That Alito can only fortify *Marsh's* already deficient history with rhetorical window dressing shows that the historical argument and record fail to support his position.

In fact, some of Alito's historical supports suggest the opposite of what he intends. For instance, a fair reading of Washington's Farewell Address shows that the founders viewed religion and morality as two separate entities. To them, religion was a *substitute* for morality appropriate for the masses, not the *source* of morality, especially for the educated elite such as themselves.[303]

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299 *Id*. at 2085.
300 *Id*. at 2087.
301 *Id*. at 2087–88.
302 *Id*. at 2088.
303 *See generally* SEIDEL, *supra* note 260, at 40–52.

This means that the founders would not have used religion to frame our government, but also that they would have supported "total separation of the Church from the State" because doing so would have a more religious populace.[304] A secular state fostered a religious people; a seeming paradox that has been borne out.[305]

Alito's Northwest Ordinance history is also misleading. The ordinance was drafted and adopted by the *Continental* Congress a couple years before the Constitution and First Amendment. The *First* U.S. Congress re-adopted it in late July and early August 1789 with little if any debate.[306] Thomas Jefferson drafted the original ordinance in 1784 and it did not include the mention of religion Alito cited.[307] A committee proposed some language that would reserve property in each town "for the support of religion."[308] But this failed, much to James Madison's delight, as he explained in a letter to James Monroe. Madison wrote that reserving public land for religion was unjust, bigotry, and outside the power of the government, another legal opinion of his that the Supreme Court chose to ignore:

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304 *Id. at* 40–52, 276–77. *See also* The Writings of James Madison, Retirement Series 427–32 (David B. Mattern, et al. eds., 2009) (explaining that "[i]t was the universal opinion of the Century preceding the last, that Civil Govt. could not stand without the prop of a Religious establishment, & that the Xn religion itself, would perish if not supported by a legal provision for its Clergy. The experience of Virginia conspicuously corroborates the disproof of both opinions. The Civil Govt. tho' bereft of every thing like an associated hierarchy possesses the requisite Stability and performs its functions with complete success: Whilst the number, the industry, and the morality of the priesthood & the devotion of the people have been manifestly increased by the total separation of the Church from the State.").

305 *See* Seidel, *supra* note 260, at 267–77.

306 *See, e.g.*, H. Journal, 1st Cong., 1st Sess. 61–64 (1789); S. Journal, 1st Cong., 1st Sess. 51–54 (1789).

307 *See Editorial Note: Plan for Government of the Western Territory*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0001 (last visited Nov. 11, 2019); *III. Report of the Committee, 1 March 1784*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0004 (last visited Nov. 11, 2019); *IV. Revised Report of the Committee, 22 March 1784*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0005 (last visited Apr. 11, 2019); *V. The Ordinance of 1784, 23 April 1784*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0006 (last visited Nov. 11, 2019); *Am. Legion*, 139 S. Ct. at 2067.

308 Journals of the Continental Congress 1774-1789, at 254–55, 293–96 (Kenneth E. Harris & Steven D. Tilley eds., 1976).

> It gives me much pleasure to observe . . . [that the Continental] Congs. had expunged a clause . . . for setting apart a district of land in each Township, for supporting the Religion of the Majority of inhabitants. How a regulation, so unjust in itself, so foreign to the Authority of Congs. so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Commtee is truly [a] matter of astonishment.[309]

Madison thought it unjust and beyond the power of the government—even the Continental Congress—to give public land over to the support of religion. We can be fairly certain that Madison would disagree with Alito about the constitutionality of a soaring Christian cross on public land maintained with hundreds of thousands of taxpayer dollars.

Neither the Ordinance nor the farewell address grant the government any "particle of spiritual jurisdiction," something explicitly withheld from the federal government in our constitutional system, as Alexander Hamilton explained.[310] The Ordinance and farewell address mention religion as a societal necessity, not a government power.[311] They are, at least in terms of trying to claim such a power for the government, weak.

Justice Alito's opinion also provides a curious defense of the Congressional chaplaincy, which he describes as "stand[ing] out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination. . . ."[312]

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309 The Papers of James Madison 285–287 (Robert A. Rutland et al., eds., 1973).

310 The Federalist No. 69 (Alexander Hamilton).

311 The founders were wrong. Religion is not, in fact, a societal necessity. *See* Seidel, *supra* note 260, at 40–52.

312 *Am. Legion*, 139 S. Ct. at 2089. Alito began this inclusivity discussion with a Sam Adams quote that is not quite authentic. Alito cites Samuel Adams' line about an Episcopal clergyman delivering a prayer at the Continental Congress in 1774: "I am no bigot. I can hear a prayer from a man of piety and virtue, who is at the same time a friend of his country." *Am. Legion*, 139 S. Ct. at 2088. Tracing Alito's sources back to an original, we find that this is not truly a Sam Adams quote but rather John Adams recounting to Abigail Adams something that Sam said, so it reads slightly differently: "Mr. S. Adams arose and said he was no Bigot, and could hear a Prayer from a Gentleman of Piety and Virtue, who was at the same Time a Friend

This whitewashes history. The congressional chaplaincies are not bastions of diversity and inclusion. No non-Christian has ever been a congressional chaplain. No woman has ever been a congressional chaplain. Every chaplain save one has been white—the first and only African American to hold the post was not elected until 2003.[313] As Professor Lund has explained, "the chaplaincies have sometimes been the locus of significant religious and political conflict. . . . The congressional chaplaincies are, in some sense, the closest thing we have ever had to a national religious establishment, and so we should probably not be surprised at how the history of the chaplaincies has some dark elements."[314]

What little diversity the chaplaincy has seen has come through the guest chaplain programs, and mostly in the last 20 years.[315] But this program has brought out those dark elements, including heckling, protests, and arrests.[316] FRC itself attacked the non-Christian prayers in Congress because the founders "never intended to exalt other religions to the level that Christianity holds in our country's heritage."[317] In *Greece,* the majority upheld the town's

to his Country." Letter from John Adams to Abigail Adams, 16 September 1774, 1 The Adams Papers 156–57 (Lyman H. Butterfield ed., 1963). This is not a huge mistake, but Alito is incorrect. Though "John Adams said that Sam Adams said he was 'no bigot…,'" does not have the rhetorical power as Alito's rendition, it would have been accurate. A subtle change to the historical record, but it shows history can be an unpredictable guide, especially when relying on it instead of constitutional principles themselves.

313 Lund, *supra* note 248, at 1173. Barry Black is still serving as the Senate Chaplain today. *Office of the Senate Chaplain,* U.S. Senate https://www.senate.gov/reference/office/chaplain.htm (last visited Oct. 28, 2019).

314 Lund, *supra* note 241, at 1174.

315 *See id.* at 1205 nn.173–76 and accompanying text. Some of the inclusion goes back three decades. *Id.* at 1204 nn.170–71 and accompanying text.

316 *Id.* at 1205–1207 nn.179–88 and accompanying text.

317 FRC was quick to delete traces of this statement from its website, but it was picked up in the news. *See, e.g., Family Research Council Condemns Hindu Prayer in Congress,* Religion News Serv. Daily Digest (Sept. 23, 2000), https://religionnews.com/2000/09/23/rns-daily-digest2371/. Pieced together, the statement read: "Alas, in our day, when 'tolerance' and 'diversity' have replaced the 10 Commandments as the only remaining absolute dictums, it has become necessary to 'celebrate' non-Christian religions even in the halls of Congress . . . . And while it is true that the United States of America was founded on the sacred principle of religious freedom for all, this liberty was never intended to exalt other religions to the level that Christianity holds in our country's heritage. . . . Our founders expected that Christianity—and no other religion—would receive support from the government as long as that support did not violate people's

prayer practice in part because the town "at no point excluded or denied an opportunity to a would-be prayer giver" and "maintained that a minister or layperson of any persuasion, *including an atheist,* could give the invocation."[318] But the House of Representatives fought to exclude an atheist, sponsored by his U.S. Representative, from delivering a secular invocation,[319] even though 40 percent of all invocations in the previous fifteen years had been delivered by guest chaplains.[320] It successfully justified the discrimination in court, preventing an invocation that would have "[c]elebrat[ed] the wondrous fact that the sovereign authority of our great nation is not

consciences and their right to worship . . . . They would have found utterly incredible the idea that all religions, including paganism, be treated with equal deference." *Id.*

318   Town of Greece v. Galloway, 572 U.S. 565, 571 (2014) (emphasis added). The non-discrimination principle can be found throughout the *Town of Greece* opinions. Recounting procedural posture, the majority highlighted it: the district court "not[ed] that the town had opened the prayer program to all creeds and excluded none," and the fact that most invocation presenters were Christian reflected demographics "rather than an official policy or practice of discriminating against minority faiths." *Id.* at 573. The majority also noted that the chaplain policies of the House of Representatives posed no threat to the Establishment Clause because "no faith was excluded by law, nor any favored." *Id.* at 576. It also explained that Congress "acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds," citing congressional invocations given by a Buddhist monk, a Jewish Rabbi, a Hindu Satguru, and an Islamic Imam. *Id.* at 579. The Court thought it acceptable that guest chaplains were overwhelmingly Christian, "[s]o long as the town maintains a policy of nondiscrimination." If the policy "reflected an aversion or bias against minority faiths," it would be constitutionally suspect. *Id.* at 585. Justices Alito and Scalia concurred, so long as the exclusion "was not done with discriminatory intent" it was fine, but cautioned that they would view the case "very differently" if the town had intentionally omitted synagogues. *Id.* at 597.

319   Secular invocations, which do not invoke a god or deity, have become increasingly popular after the *Town of Greece* decision. Many have been given at various local and state government meetings across the country. *Invocations,* Cent. Fla. Freethought Community, https://www.cflfreethought.org/invocations (last visited Oct. 31, 2019). In fact, shortly after *Town of Greece* was decided, an atheist delivered a nonreligious invocation to that town board. He invoked the signers of the Declaration of Independence and We the People, not any god or deity. Meaghan M. McDermott, *Atheist Gives "Historic" Invocation in Greece,* Democrat & Chron. (July 14, 2014).

320   Barker v. Conroy, 921 F.3d 1118, 1122 (D.C. Cir. 2019). The author litigated this case along with Samuel T. Grover of the Freedom From Religion Foundation and Rich Bolton of Boardman & Clark, LLP.

a monarch, lord, supreme master or any power higher than 'We, the people of these United States.'"[321]

This division and discord is even more widespread when non-Christians deliver prayers at the state level, and in the months before Alito's opinion was published, prayers divided state legislatures in Arizona, Pennsylvania, Virginia, Georgia, and elsewhere.[322] One Pennsylvania legislator used her prayer to intimidate the first female Muslim legislator being sworn in, quickly dividing the state House along religious lines, forcing legislators to take sides and either support or condemn the prayer.[323]

Alito sees the first Continental Congress prayer—the prayer that he argues spawned the chaplaincy—as a moment when religion unified our nation. He points to the founders' ability to pray together, despite a "diversity of religious sentiments."[324] He glosses over the thoughtful objections of John Jay and Rutledge, the first two chief justices of the Supreme Court, and focuses on what he sees as inclusion.[325] But Sarah Vowell was closer to the mark when she noted the delegates' *disagreement* over the prayer as actually more striking. She drily observed, "[a] couple of dozen white, Anglo-Saxon male

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321   Barker v. Conroy, 282 F. Supp. 3d 346, 351 (D.D.C. 2017), *appeal dismissed in part,* No. 17-5278, 2018 WL 3159047 (D.C. Cir. Jun. 13, 2018), *and aff'd,* 921 F.3d 1118 (D.C. Cir. 2019); Complaint at Exhibit B, Barker v. Conroy, 921 F.3d 1118 (D.C. Cir. 2019) (No. 17-5278), https://ffrf.org/uploads/legal/BarkervConroy_Exhibits.pdf.

322   Arizona in particular has a problem with this. Two state legislators, Juan Mendez and Athena Salman, have delivered several secular invocations, including in February 2019, April 2017, March 2016, and May 2013. Each time the invocations have been mocked by other legislators or other, Christian invocations have been delivered to repent for those non-Christian invocations. *Arizona House Still Disparaging Nonreligious Legislators, FFRF responds,* Freedom From Religion Found. (Feb. 14, 2019), https://ffrf.org/news/news-releases/item/34157-arizona-house-still-disparaging-nonreligious-legislators-ffrf-responds. *See* Andrew L. Seidel, *Government Prayer Isn't Inclusive—Let's Not Pretend Otherwise,* Rewire News, (Apr. 22, 2019), https://rewire.news/religion-dispatches/2019/04/22/government-prayer-isnt-inclusive-lets-not-pretend-otherwise/ (discussing other recent examples, including in Georgia and Virginia).

323   Andrew L. Seidel, *Penn. Legislator's Jaw-Dropping Prayer Showcases America's Christian Nationalism Problem,* Rewire News (Mar. 27, 2019), https://rewire.news/religion-dispatches/2019/03/27/penn-legislators-jaw-dropping-prayer-showcases-americas-christian-nationalism-problem/.

324   Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2088 (2019).

325   Letter from John Adams to Abigail Adams, 16 September 1774, 1 The Adams Papers 156–57 (Lyman H. Butterfield ed., 1963).

Protestants [we]re too diverse to pray together."[326]

We have a separation of state and church because we are a diverse nation. Government neutrality on religion is not only constitutionally mandated, but also a way to ensure that our government functions smoothly. It removes one of two *verboten* topics, religion, from the other, politics. "Government prayer doesn't bring We the People together, it drives us apart."[327] Legislative prayer and congressional chaplaincies showcase the problem with mixing religion and government, not inclusivity.

Alito's history of the congressional chaplaincy misses one other telling fact. The man that delivered that first prayer for the Continental Congress was not the "friend to his country" Sam Adams thought, but as John Adams wrote, "an Apostate and a Traytor."[328] Jacob Duché, the chaplain whose position and prayers were so important to the majorities in *Marsh* and *Greece* and to Alito,[329] defected to the British, and condemned the Continental Congress that gave him the appointment.[330] He slandered the Continental Army as

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326 Alan Alda, *Sarah Vowell on Writing with Clarity (and Shenanigans)*, Clear + Vivid, (March 5, 2019), https://www.aldacommunicationtraining.com/podcast/sarah-vowell-writing-clarity-shenanigans/.

327 Seidel, *supra* note 321. *See also* Lund, *supra* note 241, at 1176 ("Legislative prayer does indeed offend atheists and agnostics. But it may well be that legislative prayer's harshest impact is not on nonbelievers, but rather on believers who find themselves outside society's zone of acceptance—people like Charles Constantine Pise, the nineteenth-century Catholic chaplain who faced intense opposition from nativist Protestants, and Rajan Zed, the twenty-first century Hindu guest chaplain who endured similarly intense opposition from Christian protesters. Legislative prayer is often framed as pitting nonbelievers against believers, but that is an oversimplification. Having legislative prayer means committing religious decisions to a majoritarian governmental process, which has deep ramifications for all religious minorities.").

328 *Letter from John Adams to Abigail Adams (Oct. 25, 1777)*, in 2 Adams Family Correspondence 1, 359–60 (L. H. Butterfield ed. 1963); *Letter from John Adams to Abigail Adams (Sept. 16, 1774)*, in 2 Adams Family Correspondence 1, 359–60 (L. H. Butterfield ed. 1963) ("Mr. Samuel Adams arose and said he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.").

329 Town of Greece v. Galloway, 572 U.S. 565, 583–84 (2014) (mentioning Duché and recounting the text of his prayer). *See also* Marsh v. Chambers, 463 U.S. 783, 797 (1983); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2088 (2019).

330 Seidel, *supra* note 260, at 95–96.

"undisciplined" and "without principle, without courage."[331] And he begged Washington to rescind "the hasty and ill-advised declaration of Independency."[332] Duché was no patriot or friend to America. But, at one time, when the colonies were still colonies, he was selected for political reasons to say a prayer by men he later denigrated and in service of a cause he despised. Hardly a history that speaks to an American tradition.

The most alarming aspect of Alito's opinion in the Bladensburg cross case is that he did nothing to bridge the gap between the founding generation and the 20th century religious display to show that such displays also comport with the *Marsh* version of founders' First Amendment understanding. In other words, *Marsh* purported to show an unambiguous and unbroken history stretching back to the founding, dubious though it was. But there was no attempt to make such a showing for Christian crosses. Alito nodded in this direction when he pointed out that in *Greece,* the town's new prayer practice "lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment."[333] Alito suggests that the prayers in *Greece* did not date to the founding, so, by analogy, this cross need not either. This rings a bit hollow given the historical claims made in *Greece* and *Marsh.* Alito baits with the flawed history the Court adopted for ceremonial prayer and switches to religious displays with no attempt to show those displays stretch back as far.

This bait and switch dramatically expands the use of law office history as a replacement for constitutional principles such as religious neutrality. If not addressed by the judiciary and academy now, it will only get worse.

VII. FIXING THE PROBLEM

Law office history should be excluded from our jurisprudence. Fixing this problem is critical to avoid the perception that a judge is, for instance, using law office history to avoid a politically unpopular but legally necessary decision. But it is also vital to ensure that those decisions are correct. Three basic steps need to be taken.

First, in the school board prayer context, the Fifth and Ninth Circuits should edit their opinions with clear corrections and remove this bad history. This failure must be recognized and amended or it

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331   *Id.*
332   *Id.*
333   *Am. Legion,* 139 S. Ct. at 2088.

will continue to breed. As for the Bladensburg cross case, Justice Alito, whose opinion is still new, should consider some judicious edits as well.

Second, if history is truly important to deciding a legal question, judges must fully vet history presented by attorneys. Better yet, get historians. If the Fifth Circuit wished to rely on a cogent historical case for an unbroken history of school board prayer —in spite of the language in *Wallace v. Jaffree* and *Edwards v. Aguillard* —it should have asked the parties to present actual evidence from historians, scholars, and academics at the appropriate stage of the case. Nothing prevents a judge from seeking genuine historians to weigh in on a case or even a draft opinion. Yet, even here there is a danger. FRC has deep ties to Christian nationalists who are notorious for their poor grip on genuine history, including David Barton, who could be proffered to the courts, but who is no expert and no historian.[334]

Historical evidence must be vetted like other evidence. Perhaps courts should consider something akin to a *Daubert* test for historical analyses and evidence.[335] The distortion of the history regarding school board prayer outlined above is because a single attorney was essentially permitted to testify as an expert historian, had no credentials or background to do so, and nobody bothered to check the citations. Courts and attorneys must begin to conceive of historical evidence as real evidence, that is, evidence which must meet the standards in the Federal Rules of Evidence, including rules 701 through 706. Courts should stop treating history as something of which they can simply take notice, especially where the evidence is probative to the outcome of the case. **If the history is dispositive, or even probative, it must be as fully vetted as any other evidence.** And when history is raised only at the appellate level, it should be treated by the court as an inappropriate attempt to supplement the record in violation of the Federal Rules of Appellate Procedure and thrown out.

State bars might consider addressing this as an issue of

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334   *See, e.g.*, Warren Throckmorton, *Despite Erroneous Material, Family Research Council Features David Barton at Event for Pastors*, WARREN THROCKMORTON (Apr. 25, 2017), https://www.wthrockmorton.com/2017/04/25/family-research-council-features-david-bartons-capitol-tour/ (mentioning that FRC promoted David Barton's "tours" of the Capitol in D.C.).

335   This is outside the scope of this article and, in any event, probably deserves its own treatment.

candor to the tribunal. The FRC brief is so deficient that it is difficult to believe it is simply shoddy, rather than deliberately dishonest. The judges on the Fifth Circuit, which heard both *McCarty* and the *Tangipahoa* case that gave rise to the FRC amicus brief, might consider this avenue as well.

Finally, the entire idea of using history to interpret the Constitution should be revisited by the academy and judiciary, and treated with extreme skepticism. As long as *Marsh* remains good law, it will stand as a testament to the error of this method. This reexamination and the need to define the limits of history is all the more pressing in light of the recent Bladensburg cross opinion, which interprets 230-year-old history with absolute certainty but 90-year-old history as something "[w]e can never know for certain."[336] Some history in the law is inevitable, but when decisions are based on history instead of legal principles, their foundations are shaky. When other lawyers or judges expose the history, or when scholars discover new history or fill in historical gaps, we are stuck with decisions that do not hold up but upon which bodies of case law have been built. Instead of granite and marble structures like the courthouses in which judges reign, the body of law is a house of cards.

No court should permit school board prayers to continue. There is no history of school board prayer and, even if there were, it should not matter. *Marsh* and its offspring should be overturned. History should not triumph over principle.

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336 *Am. Legion,* 139 S. Ct. at 2090.

The Girl with the Cyber Tattoo: Applying a Gender Equity Lens to Emerging Health Technology

By Oliver Kim* and Tamara Kramer **

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I. INTRODUCTION

Lisbeth Salander, the heroine of Swedish author Stieg Larsson's *Millennium* novels, has actually accomplished magic: the titular "Girl" not only has utilized technology to thwart global conspiracies and solve mysteries dating back decades, but she also has managed to survive her creator's death and continue her mystique.[1] As introduced to the reader via a description by her employer Dragan Armansky, Salander has an aura of mystery as well as possession of unique skill sets:

> Salander was beyond doubt the most able investigator he had met in all his years in the business. During the four years she had worked for him she had never once fumbled a job or turned in a single mediocre report.
>
> On the contrary, her reports were in a class by themselves. Armansky was convinced that she possessed a unique gift. Anybody could find out credit information or run a check with police records. But Salander had imagination, and she always came back with something different from what he expected. How she did it, he had never understood. Sometimes he thought that her ability to gather information was sheer magic.[2]

Salander is able to accomplish her "sheer magic" through the use of technology to overcome real and perceived barriers: "Challenging state bureaucrats, police, and social and economic isolation, Salander is able to gain power through her expert control of cyberspace and various technologies, which are not dependent on physicality or gender."[3] In other words, technology allows her to overcome her slight build and her appearance to exist in other spaces in order to obtain and harness information.[4]

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1   Nathaniel Rich, *The Mystery of the Dragon Tattoo,* Rolling Stone (Jan. 5, 2011, 7:25 PM), https://www.rollingstone.com/culture/culture-news/the-mystery-of-the-dragon-tattoo-stieg-larsson-the-worlds-bestselling-and-most-enigmatic-author-231910/.

2   Stieg Larsson, The Girl with the Dragon Tattoo 38–39 (2009).

3   Sophie Statzel Bjork-James, *Hacker Republic, in* Men Who Hate Women and Women Who Kick Their Asses 98 (Donna King & Carrie Lee Smith eds., 2012).

4   *Id.* at 98; *see also* Larsson, *supra* note 2, at 40–41 (describing Salander's

Similarly, technology has been sold to consumers as a way of solving more mundane tasks, freeing up time from household chores or routine duties so that we can be more productive in our professional work and responsibilities. Yet too often technological innovations fail to live up to hype and promises; innovations ought to be "outvations" as well, taking work out of our day rather than creating more work.[5] For women, technology has promised to make their lives and responsibilities easier. In particular, the disruption that technology can bring to stale ways of doing age-old tasks is supposed to allow women more balance between their private and public lives, between work and home. Yet for many, technology is adding stress rather than alleviating it.[6]

Paralleling the search for the mythical balance that many of us want between a personal life and a work life, we here are exploring the balance between the law and technology. Perhaps this push and pull is most acute in the field of healthcare where many women have multiple roles such as patient, caregiver, and decision-maker. Often breakthrough technologies promise to disrupt healthcare, making care delivery more efficient, effective, and affordable. But such technology should not be another task for patients to perform: technology is supposed to make handling these roles easier, but given the political fights over healthcare generally and women's health specifically, the law often imposes new barriers and challenges as it reacts to advances in technology and medicine. At the same time,

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slight build).

5   Josh Kerns, *The Provider's Perspective on Innovation*, CAMBIA GROVE (Apr. 24, 2019), www.cambiagrove.com/blog/providers-perspective-innovation ("If your new technology isn't easy and quick to implement as well as affordable, I'm not interested.").

6   *See* Eleanor Hayes McConnell, *More Work for Mother: The Ironies of Household Technology from the Open Hearth to the Microwave*, 19 IOWA J. CULTURAL STUDIES 79, 79 (2000) (discussing the work of historian Ruth Schwartz Cowan connecting housework to industrialization and "why 'advances' in technology have changed the details of housework without really lessening the labor"); Judy Shapiro, *A Digital Myth: Technology Doesn't Make Life Easier*, ADAGE (May 11, 2019), https://adage.com/article/digitalnext/a-digital-myth-technology-make-life-easier/136533 ("Technology makes *tasks* easier, but it does not make our *lives* easier"); *see also* Rachel Sugar, *How Did Home Cooking Become a Moral Issue?*, VOX (Mar. 5, 2019, 7:00 AM), https://www.vox.com/the-goods/2019/3/5/18250471/home-cooking-moral-pressure-cooker?fbclid=IwAR35AI4St94qsNzJhG6oM5QkIdXhsvYZ2HO37nExor45huHyb4Q8gfAavx8 (debating why women have difficulty preparing "home cooking" as urged by food advocates despite "our modern refrigerators and our modern plumbing and our modern stoves").

the law also may need to step in to correct or curb some of the abuses that unregulated technology can or does bring into women's daily lives.

As advocates in the intersecting areas of health policy, law, and equity, we want to use this forum to explore legal, policy, and ethical issues raised by disruptive technology—we have seen and are seeing how that technology can change how people access healthcare, particularly reproductive health, in light of the challenges that women face. Salander used technology to overcome obstacles based in part on her gender and economic situation; yet conquering these barriers built by differences of gender, income, and race cannot rely on technology alone but on a combination of technology, law, and policy.[7] Similarly, healthcare advocates are pushing for legal, policy, and ethical guidelines to match the fast pace of technological advances. But in women's health, the law can be used to impede or even prohibit innovations that could improve women's access to such care.

This paper seeks to provide an overview of law and policy around disruptive technologies with a focus on how technology, law, and policy can empower women in their healthcare decisions and make healthcare more accessible for women. Our first section will provide key guideposts: we attempt to provide definitions for what we mean by "innovation" to a specific category of disruptive technologies that improve access to care and how we approach the term "equity" in the use of these disruptors in the healthcare setting. Based on this framework of our review of law and policy, we then address two interrelated questions to harness the power of technology to increase women's access to healthcare in the next two sections. First, how can the law recognize, encourage, and even reward innovations that advance women's health? Second, when does the law actually become a barrier to the use of technology to increase women's access to care, particularly their reproductive care? In our final section, we will present a set of recommendations on legal and policy preferences to ensure that we are creating a healthcare system that makes healthcare more accessible—not restrictive— for women.

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7   Bjork-James, *supra* note 3, at 105 (noting "while it is satisfying to enter this fantasy world where various patriarchies are dismantled, the reliance on technologies to achieve these wins also exposes serious shortfalls in the possibilities of feminist praxis today [because] [t]he digital divide continues to persist in the West").

II. DEFINING THE TERMS

To guide our analysis and recommendations, we want to be clear about our views on innovation and equity as they apply to our analysis of existing policies and laws before reaching our final conclusion.

A. *What Do We Mean by Innovation?*

To be clear, our focus in this paper is not on all forms of innovation in healthcare. Although the papers within this symposium[8] recognize a wide variety of innovations, we are not concerned with what we would consider medical innovations such as a new drug, pill, or device. Nor are we focused on items that are still in the experimental phase, as we do not want to conflate something that is innovative with something that is experimental.[9] While new cures, devices, and procedures obviously could improve healthcare overall, these innovations are not the focus of this paper.

Rather, the disruption we are focused on is a set of technological tools—in particular telehealth, digital apps, and similar consumer-facing tools that utilize online and telecommunications capabilities—that facilitate communications between health providers and patients and empower patients' ability to make healthcare decisions.[10] For instance, tools such as telehealth—a long-standing tool for patients and providers that has been reinvented in light of changes in telecommunications—can expand the ability of a provider not only to reach rural populations in need of care but also those in urban cores that face transportation and infrastructure challenges that can make reaching a brick-and-mortar clinic difficult. Advanced algorithms can make it possible for artificial intelligence to triage cases, helping providers diagnose patients' ailments and treat them rapidly as well as freeing up time to focus on more complex cases. Web-based health services including chatbots, online

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8   "Promise and Peril of Emerging Health Innovations," the Northeastern University School of Law's Center for Health Policy and Law Annual Health Law Conference, held April 11–12, 2019.

9   Oliver Kim, *A Response to Meyerson's Defence of the American Right to Try*, J. Bioethical Inquiry, 463, 464–65 (Aug. 23, 2019), https://doi.org/10.1007/s11673-019-09918-0 (arguing that something that is still in an experimental phase will not necessarily be an innovation).

10   Policymakers and stakeholders have used a variety of terms to categorize these evolving technologies: connected care, digital health, or mHealth. For the purposes of this paper, we will group this nebulous group of technologies simply as disruptors in keeping with the symposium's theme.

prescribing, price transparency tools, and Internet health libraries can help patients make better decisions; because of the relative anonymity of the Internet,[11] these tools also can empower patients and consumers by protecting their privacy while searching for health services with a lessened fear of stigma or repercussion.

Further, disruptors can be broken into two categories. Some of these disruptors have "gendered" functions or are marketed as serving women, while others are "gender neutral" but have functionality that we argue has particular benefits for women.[12] For example, telehealth is a tool for increasing access and not inherently a "women's health" service; however, its applications can have greater impact for women either as decision makers[13] or as patients needing services that are difficult to access.[14] Similarly, some disruptive

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11   Sarah Casey Benyahia, *Salander in Cyberspace, in* Stieg Larsson's Millennium Trilogy 58, 60 (Steven Peacock ed., 2013) ("The anonymity of online users and their ability to role play . . . are freedoms which clearly do not exist in face to face interactions.").

12   So-called "femtech" is estimated to grow to $50 billion annually although only about $1 billion has been invested in such products since 2015. Cotton Codinha, *What Is Femtech, and Is It the New Pink Tax?*, Allure (Apr. 22, 2019), https://www.allure.com/story/what-is-femtech.

13   Eric Wicklund, *Survey Finds Strong Support for Telehealth from Mothers*, mHealth Intelligence (Nov. 9, 2016), www.mhealthintelligence.com/news/survey-finds-strong-support-for-telehealth-from-mothers (reporting on a Georgia insurance survey of mothers that "[m]oms see telehealth as a more convenient alternative to the doctor's office. Almost 65 percent said it's a challenge to take a sick child to the doctor's office during the school year, with seven out every 10 mothers spending more the two hours out of a busy day on such a visit."). *But see Telemedicine tied to more antibiotics for kids, study finds*, Mod. Healthcare (Apr. 8, 2019), https://www.modernhealthcare.com/safety-quality/telemedicine-tied-more-antibiotics-kids-study-finds (summarizing a study that tied telemedicine visits to increased—and inappropriate in some cases—prescribing of antibiotics and ignoring medical guidelines in sacrifice to convenience and costs, "especially among employers who believe it can save money"). Related, these uses of disruptors also play into gender stereotypes and roles under masculinities studies, which critique how men's roles and responsibilities are perceived when in conflict with societal paradigms on "real men." *See* Judith Kegan Gardiner, *Men, Masculinities, and Feminist Theory, in* Handbook of Studies on Men & Masculinities 35, 35 (Michael Kimmel et al. eds., 2005); *see also* Helena Gurfinkel, *Masculinity Studies: What Is It, and Why Would a Feminist Care?*, SIUE Women's Stud. Program (Dec. 6, 2017), siuewmst.wordpress.com/2012/12/06/masculinity-studies-what-is-it-and-why-would-a-feminist-care/.

14   Pam Belluck, *Birth Control via App Finds Footing Under Political Radar*, N.Y. Times (June 19, 2016), www.nytimes.com/2016/06/20/health/birth-

services may be utilized in ways that disproportionately harm more women than men.[15]

Although the jury may still be out on whether these particular disruptors actually add value to the healthcare system, stakeholders from the payer, provider, and investment communities are leaning heavily into these technologies as increasingly necessary for patient care.

B. What Do We Mean by Equity?

As part of our analysis, providing an overview of what we mean by equity will be fundamental to our arguments on how the law can help or hinder women's ability to achieve gender equity in the provision of health services.

First, central to our argument is the vulnerabilities theory, or the notion that the state must be responsible for mitigating and addressing disparities. Here, the government—through the law and public policy—must play a role in addressing inequity and ensuring meaningful access and opportunity within institutions, particularly one of the most fundamental societal institutions: the healthcare system. Running counter to the American ideal of individualism, this analytical framework is centered on the idea that all communities suffer from frailty and the state is in the best position to mitigate inequities and protect citizens.[16] Experience and data demonstrate that an absence of state intervention will result in the most critical structures of healthcare—specifically the resources to pay for services and the tools to navigate the system—unequally harming and sidelining the most vulnerable, with women and people of color being the most likely to be excluded.[17]

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control-options-websites.html.

15   Emily Chang, *What Women Know About the Internet*, N.Y. Times (Apr. 10, 2019), www.nytimes.com/2019/04/10/opinion/privacy-feminism.html (referring to studies that found women are more concerned about threats to their privacy than men).

16   Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J.L. & Feminism 8, 8–40 (2008).

17   Allan S. Noonan et al. *Improving the Health of African Americans in the USA: An Overdue Opportunity for Social Justice*, 37 Pub. Health Revs., Dec. 2016, at 1 ("After 250 years of social segregation and discrimination, current health data confirm that African Americans are the least healthy ethnic group in the USA. Although the resources and policies to eliminate disparities exist in the USA, there has been inadequate long-term commitment to successful strategies and to the funding necessary to achieve health equity."); TK Sundari Ravindran, *Universal Access: Making Health Systems Work for Women*, 12

Second, a discussion of health and disruptors must recognize intersectionality, or the overlap of various social identities, including race, gender, sexuality, and class.[18] Women's experiences in the healthcare system can be very different depending on these intersections:[19] one only needs to look at the maternal mortality crisis to see that while all women face difficult challenges in maternity, they fall much heavier on young, black mothers as the inequities compound in an experience of morbidity and mortality at a rate of three to four times that of similarly-situated white mothers.[20]

Millennium also demonstrates a key intersectional concern facing women of color:[21] one criticism is that the trilogy exists in the overwhelmingly white environment of Sweden. Although Salander presents herself in a way that challenges traditional gender roles,[22] she still fits within the "white savior" trope.[23] Women of color face inequities accessing care generally due to race but also additional challenges accessing women's healthcare specifically. While technology could break down some of these barriers, communities of color often face a "digital divide" in accessing online services that could help them connect with healthcare services.[24]

BMC Pub. Health, June 2012, at 1 ("Evidence examined in this paper . . . indicates that universal coverage is likely to exclude more women than men, and even when achieved unlikely to translate into universal access to health care for women unless factors contributing to inequalities in affordability, availability and access to health care by women are systematically addressed.")

18 Donnalyn Pompper, Practical and Theoretical Implications of Successfully Doing Difference in Organizations 45–61 (2014).

19 *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 42 Stan. L. Rev. 1241, 1242–43 (1991) (noting that while women may share experiences generally, their specific experiences may differ they because these experiences are "often shaped by other dimensions of their identities, such as race and class").

20 Andreea A. Creanga et al., *Pregnancy-Related Mortality in the United States, 2011–2013*, 130 Obstetrics & Gynecology 366, 366–73 (2017).

21 Gardiner, *supra* note 13, at 43.

22 Larsson, *supra* note 2, at 29 ("As a girl, she was legal prey, especially if she was dressed in a worn black leather jacket and had pierced eyebrows, tattoos, and zero social status."); Benyahia, *supra* note 11, at 69. *See also* Gardiner, *supra* note 13, at 45–46 (discussing sexuality and its relationship to presentation).

23 Jessie Daniels, *Feminist Bloggers Kick Larsson's Ass, in* Men Who Hate Women and Women Who Kick Their Asses 98 (Donna King & Carrie Lee Smith, eds., 2012).

24 Eva Chang et al., *Racial/Ethnic Variation in Devices Used to Access Patient Portals,*

Salander's use of the Internet provides a useful way of thinking about how technology can break down racial and economic barriers to make feminism more accessible: just as Salander practices feminism in a personal, individualized manner rather than across a community,[25] the Internet could move feminist teachings out of "ivory tower" college classrooms and widen its usefulness into a more diverse community.[26] Similarly, we believe it is possible for our set of disruptive technologies to make the provision of healthcare more equitably accessible for all women.

Despite this optimism, there are limits to the ability of technology to advance gender equity in health.[27] Disruptors are a tool, not the sole solution, in advancing gender equity. Much has been explored about gender inequality in technological development from ignoring women's role in scientific advancement[28] to the outright hostility that women have faced in the tech industry.[29] Such historical and continuing injustices are problematic not only because

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24 Am. J. Managed Care, (Jan. 2018) (finding that white patients were more likely to utilize patient portals than racial and ethnic minority patients and theorizing that this discrepancy may be related to the type of device that patients use to access the Internet).

25 Bjork-James, *supra* note 3 at 103. Salander's individualism contrasts with a broader political movement, which has enabled individuals to share stories collectively that were "once seen as private (family matters) and aberrational (errant sexual aggression)" as "now largely recognized as part of a broad-scale system of domination that affects women as a class." Crenshaw, *supra* note 21, at 1241.

26 Bjork-James, *supra* note 3, at 106; Gardiner, *supra* note 15, at 45 ("The gendered work of global systems and of various human ecologies will be important to future research agendas, as will such areas as the differential gendering and sexualization of new technologies.").

27 At the same time, we are careful to be mindful that disruptors can only break down these barriers if the digital divide, too, is lessened. For example, Salander is able to bring her attackers to justice in her fictional universe because she has access to technology that most people do not. Thus, even when her credibility is attacked, Salander is able to provide recordings that undeniably corroborate her account. Similarly, as the prices of femtech "innovations" may attest to, women of means can afford the "premium for . . . being women." Codinha, *supra* note 12.

28 Caroline Criado Perez, Invisible Women 17 (2019).

29 Sara Wachter-Boettcher, Technically Wrong 177–81 (2017); Janet Burns, *Uber HR Head Resigns After Alleged Discrimination, and Months of Subtle Change,* Forbes (July 11, 2018, 8:19 PM), www.forbes.com/sites/janetwburns/2018/07/11/uber-hr-head-resigns-after-alleged-discrimination-and-months-of-subtle-change; Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber,* Susan Fowler (Feb. 19, 2017), www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

of the intentional harms, but also the unintentional consequences of leaving female perspectives—particularly the perspectives of women of color—out of the design and implementation of new technology.

III. BENEFITS OF TECHNOLOGY IN HEALTHCARE

This section explores the promise of technology as a means of making the delivery of healthcare services more efficient, empowering consumers and patients, and helping providers to be more effective. As noted before, many disruptors are not necessarily specific to women, so we will consider how each benefits patients and consumers, as well as the overall healthcare system generally, and then their applicability to women's health in some key areas.

A. Tools for Improved Decision-Making

As smart phones, wearables, and Wi-Fi become more ubiquitous in many communities, disruptors can give patients and consumers greater control of their health and healthcare. In addition to creating more opportunities to interact directly with health professionals, as discussed later, mobile health can help consumers collect and measure their own healthcare data while obtaining more information on symptoms and ailments.

The Federal Government has invested billions of dollars into electronic medical records (EMR) as a foundation for patients to be able to access and share information with their providers. As part of the 2009 stimulus package, Congress passed the Health Information Technology for Economic and Clinical Health (HITECH) Act, which authorized Medicare and Medicaid incentives for certain providers— mainly physicians and hospitals—to adopt and "meaningfully use" EMR systems that were certified to meet federal standards.[30] What counted as meaningful use of EMRs became progressively more

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30   American Recovery and Reinvestment Act of 2009, Pub. L. No. 115–5, § 13405, 123 Stat. 115, 227 (codified as amended at 42 U.S.C. § 17935(c) (2012)). While former FDA Commissioner Scott Gottlieb called for some type of regulatory authority within FDA as he was leaving the agency. Fred Schulte & Erika Fry, *FDA Chief Calls For Stricter Scrutiny Of Electronic Health Records*, KAISER HEALTH NEWS (Mar. 21, 2019), khn.org/news/fda-chief-calls-for-stricter-scrutiny-of-electronic-health-records. Congress has limited the federal government's ability to regulate many types of software as medical devices. 21st Century Cures Act, Pub. L. No. 114–255, § 3060, 130 Stat. 1033, 1130 (2016) (codified as amended at 21 U.S.C.A. § 360j(o) 2019))..

challenging under three stages of regulations,[31] some of which were folded into a new payment system when Congress reformed Medicare's payment system for physicians.[32]

"Meaningful use" is intended, in part, to encourage greater online interactions between patients and providers in order to empower patients to review their health information and become more engaged through online access. While patients are supposed to have a right to access their information under the Health Insurance Portability and Accountability Act (HIPAA), the hope was by moving away from a paper-based system to a digital one, patients not only would find it easier to exercise that right but also would be more likely to do so. In response to a push toward interoperability in the landmark 21st Century Cures Act, the Centers for Medicare and Medicaid Services (CMS) and the Office of the National Coordinator for Health IT (ONC) are pushing for the adoption of third-party apps as a patient-driven means of unlocking data from payers and providers.[33]

Another way that disruptive technology can enhance patients' and consumers' decisions is by making information about health services—particularly price—more transparent. On its face, transparency seems like a simple concept, just giving consumers and patients a tool to make smarter decisions about their care. The Government Accountability Office (GAO) suggested a useful definition: "[I]nformation on health care prices is considered transparent when this information is available to consumers before they receive [healthcare] services."[34]

The idea of transparency—giving consumers more information about their healthcare—is also seen as a bipartisan solution for more consumer-driven healthcare policies.[35] In order for consumer-

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31   Ctr. Disease Control and Prevention, *Introduction*, Public Health and Promoting Interoperability Programs (formerly, known as Electronic Health Records Meaningful Use) (Sept. 9, 2019), https://www.cdc.gov/ehrmeaningfuluse/introduction.html.

32   Off. Nat'l Coordinator, *Meaningful Use and MACRA* (Feb. 12, 2019), www.healthit.gov/topic/meaningful-use-and-macra/meaningful-use-and-macra.

33   *See* discussion *infra* Part VII, Section A(3).

34   U.S. Gov't Accountability Office, GAO-11-791, Health Care Price Transparency: Meaningful Price Information is Difficult for Consumers to Obtain Prior to Receiving Care 3 (2011), [hereinafter GAO] https://www.gao.gov/assets/590/585400.pdf.

35   Alex Azar et al., *Transparency in Health Care: What Consumers Need to Know*, Heritage Lectures, Jan. 22, 2007, at 1; James C. Capretta & Kevin D. Dayaratna, *Compelling Evidence Makes the Case for a Market-Driven Health Care*

driven healthcare to work, greater transparency is required so that individuals can make informed healthcare decisions.[36] But cost information alone is unlikely to help consumers; rather, consumers should "have access to quality of care and other information to provide context to the price information and help consumers in their decision making."[37] For example, the Agency for Healthcare Research and Quality (AHRQ) has urged additional measures be included so that consumers can make a more informed choice: "[A]ppropriate quality of care information for consumers may include the mortality rates for a specific procedure, the percentage of patients with surgical complications or postoperative infections, or the average length of stay, among other measures."[38] Similarly, GAO noted that "by combining quality and price information . . . consumers can then use this information to choose providers with the highest quality and the lowest price—thereby obtaining the greatest value when purchasing care."[39] Thus, transparency can give consumers the appropriate information to make a healthcare decision that makes the most sense in their situation, both financially and for their health.[40]

System, Backgrounder, Dec. 20, 2013, at 1.

36   Azar, *supra* note 35, at 3–5.

37   GAO, *supra* note 34, at 3.

38   *Id.* at 9 ("AHRQ's Talking Quality program which provides guidance for sponsors of consumer reports on health care quality.").

39   *Id.* at 3.

40   Efforts are being made at both the federal and state level to make more healthcare information transparent. *See e.g.*, *The Affordable Care Act: Increasing Transparency, Protecting Consumers*, Ctrs. for Medicare & Medicaid Servs., https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/increasing-transparency02162012a.html (last visited Apr. 15, 2017); *Transparency and Disclosure of Health Costs and Provider Payments: State Actions*, Nat'l Conf. St. Legis., http://www.ncsl.org/research/health/transparency-and-disclosure-health-costs.aspx (last updated Mar. 2017). Former Acting CMS Administrator Andy Slavitt said the additional data will help "patients, researchers, and providers . . . to transform the health care delivery system" and "to understand the delivery of care and spending under the Medicare program." *New Medicare Data Available to Increase Transparency on Hospital and Physician Utilization*, Ctrs. for Medicare & Medicaid Servs. (June 1, 2015), www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2015-Press-releases-items/2015-06-01.html.
Several states have provided varying degrees of price transparency through price comparison tools so that their constituents can see the cost of common procedures and compare different practitioners by price. *Examples of State Health Price Information Disclosure Websites*, Nat'l Conf. St. Legis., www.ncsl.org/research/health/transparency-and-disclosure-health-costs.

B. *Access to Care*

In addition to helping consumers' ability to review information about their care, disruptors can help them access healthcare services. Many observers assume that digital tools will disrupt healthcare just as they have changed many other consumer services in our "sharing" economy. Just as tools like Lyft and Uber are changing transportation, healthcare stakeholders are seeing telehealth as a new means for consumers to engage directly with their providers. While telehealth is not technically a new concept—one of the earliest uses dates back to the 1940s,[41] and the 1997 Balanced Budget Act introduced limited Medicare reimbursement[42]—rapid advances in technology have made telehealth more accessible across the healthcare sector in much more innovative and expansive ways. Likewise, remote patient monitoring, a more passive utilization of similar technologies, can also help patients and consumers by

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aspx#Examples (updated March 2017) (highlighting price comparison websites operated by the states of California, Florida, Maryland, Oregon, and New Jersey). According to the All-Payer Claims Database Council, a project housed at the University of New Hampshire, there are fifteen states with an APCD and one with a voluntary APCD. *Interactive State Report Map*, APCD Council, www.apcdcouncil.org/state/map (last updated 2019). However, constituents may not be aware of using price comparison tools created through APCDs: for example, only one percent of New Hampshire residents used the state's health care price comparison website over a three-year period. Ateev Mehrotra et al., *Use patterns of a state health care price transparency web site: what do patients shop for?*, Inquiry, Dec.-Jan. 2014, at 51, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5813657/.

State efforts to collect data may be hampered by *Gobeille v. Liberty Mu. Ins. Co.*, 577 U.S. ___, slip op. at 1, 13 (2016): The Supreme Court found by a 6-2 vote that the federal Employee Retirement Income Security Act (ERISA), Pub. L. No. 93-406 (1974), preempted a Vermont state law that required all payers to provide claims data to the state. While not necessarily fatal to the future of APCDs, it does pose a significant barrier to getting data from many employers. Erin Fuse Brown & Jaime King, *The Consequences of* Gobeille v. Liberty Mutual *for Health Care Cost Control*, Health Affairs Blog (Mar. 10, 2016), healthaffairs.org/blog/2016/03/10/the-consequences-of-gobeille-v-liberty-mutual-for-health-care-cost-control/.

41   Comm. on Evaluating Clinical Applications of Telemedicine, Inst. of Med., Telemedicine: A guide to Assessing Telecommunications in Health Care 34–53 (Marilyn J. Field ed., 1996).

42   Cong. Budget Office, Budgetary Implications of the Balanced Budget Act of 1997 (1997), https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/bba-97.pdf.

passively recording and transmitting their health status to providers remotely, allowing them to follow up in the case of an emergency or if there is a steady pattern of problematic symptoms.

While patients may be willing to use telehealth, the actual utilization among consumers and patients has been mixed.[43] These and similar findings suggest that providers and payers need to educate their patients about how telehealth works, whether and when their insurance covers it, and its potential health and wellness benefits.[44] Younger patients such as millennials, however, have indicated in polling that they are more comfortable and willing than older patients to use telehealth and other alternatives to traditional brick-and-mortar clinics and doctors' offices, suggesting that over time, telehealth may be more widely accepted and embraced.[45]

The current federal policy debate is tied to Medicare and lifting old, restrictive policies.[46] Medicare remains a dominant player in payment reforms given that it is a national system covering many of the highest utilizers of care.[47] Medicare represents one out of every

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43   In one survey, less than one in five consumers had ever used telehealth with the remainder unsure of whether these services are covered by their health plan. Avizia, *Closing the Telehealth Gap*, 13 (2017), https://info.avizia. com/hubfs/assets/Resources/White%20Papers/Avizia_Research_Report_ Closing_the_Telehealth_Gap_2017.pdf?t=1513620161624. A 2017 survey by the Advisory Board similarly found that nearly three out of four patients were willing to conduct a virtual care encounter, but only about 20 percent of patients had actually done so. Sara Heath, *77% of Patients Want Access to Virtual Care, Telehealth*, Patient Engagement HIT (June 20, 2017), https://patientengagementhit.com/news/77-of-patients-want-access-to-virtual-care-telehealth (note that the article's headline is misleading).

44   Eric Wicklund, *Are Providers, Payers Putting Enough into Telehealth Education?* mHealth Intelligence (Dec. 27, 2017), https://mhealthintelligence. com/news/are-providers-payers-putting-enough-into-telehealth-education.

45   Brad Ericson, *Millennials Prefer Walk-in Clinics and Telemedicine*, AAPC (Mar. 28, 2018), www.aapc.com/blog/41592-millennials-prefer-walk-in-clinics-telemedicine.

46   The major stumbling block in changing Medicare law is the fiscal score on lifting the current restrictions. Lori Housman et al., *Telemedicine*, Cong. Budget Off. (July 29, 2015), www.cbo.gov/publication/50680 ("Many proposals to expand coverage of telemedicine strive to facilitate enrollees' access to health care. Therefore, such proposals could increase spending by adding payments for new services instead of substituting for existing services.").

47   Juliette Cubanski et al., *The Facts on Medicare Spending and Financing*, KFF (Aug. 20, 2019), www.kff.org/medicare/issue-brief/the-facts-on-medicare-spending-and-financing; Bob Herman *Virtual Reality: More Insurers are Embracing Telehealth*, Modern Healthcare (Feb. 20, 2016, 12:00 AM),

five health care dollars,[48] accounting for a quarter of reimbursement for all hospital and physician services.[49] Because Medicare is such a large payer, its reimbursement policies can shape insurance policy in general, including private insurance and Medicaid.[50] Medicare only allows telehealth services in limited circumstances: the patient must not only be in a rural area but also in a statutorily-defined clinical setting, and the communication between the patient and the healthcare provider must be in real-time, or synchronous.[51] Consequently, if Congress expands Medicare policies around telehealth, it could provide a "downstream" effect, influencing other payers.

> But even with this impasse at the federal level, many states are liberalizing insurance. Most of the momentum in telehealth policy is happening in state legislatures, Medicaid agencies, and licensing boards where advocates are debating policy changes to Medicaid, private insurance, and the scope of practice of health professionals. Some providers are working with friendly administrations to seek Medicaid reimbursement for telehealth services because generally, states do not need CMS approval to do so— these changes generally can be accomplished through legislation, Medicaid provider manuals, or rule-

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www.modernhealthcare.com/article/20160220/MAGAZINE/302209980/virtual-reality-more-insurers-are-embracing-telehealth ("Medicare . . . almost always sets the bar for private insurance determinations.").

48   Ctrs. for Medicare & Medicaid Servs., National Health Expenditures 2017 Highlights (2018), www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/highlights.pdf; *Cf.* Cubanski, *supra* note 47.

49   Cubanski, *supra* note 47.

50   For example, a 2015 study found that every $1 increase in the Medicare fee structure corresponded to an increase of $1.16 in private sector prices. Jeffrey Clemens & Joshua D. Gottleib, *In the Shadow of a Giant: Medicare's Influence on Private Physician Payments*, Nat'l Bureau of Econ. Res., Aug. 31, 2015, at 1.

51   42 US § 1395m(m) (2012); *cf.* Eric Wicklund, *CMS to Reimburse Providers for Remote Patient Monitoring Services*, mHealth Intelligence (Nov. 2, 2018), https://mhealthintelligence.com/news/cms-to-reimburse-providers-for-remote-patient-monitoring-services (discussing a regulatory change "opening the door to reimbursement for connected care services that enable providers to manage and coordinate care at home").

making.[52] After all, these are simply reimbursement policies.

Many state legislatures are considering additional changes such as removing geographic barriers, allowing an array of health professionals to offer telehealth services, and mandating reimbursement parity between services provided in-person with those provided via telehealth.[53] Critically, states are also adjusting the law so that public policy catches up with technology: rather than requiring conversations be conducted in "real time," some legislators are proposing to allow patients to send requests and information to their providers, who can then evaluate them and respond with a diagnosis and even a prescription.

IV. HOW DO THESE DISRUPTORS AFFECT WOMEN SPECIFICALLY?

While these technological advances will be meaningful for all consumers, disruptors may have a more dramatic role for women than for men. First, even in a "genderless" capacity,[54] disruptors may nonetheless have an impact on women in their capacity as healthcare decision-makers, not only for themselves and their own care, but in society's stereotypical roles as the primary caregiver. Second, when disruptors are aimed successfully and meaningfully at women's health, these gendered functions may help women overcome barriers—legal, political, or even geographic—to accessing needed healthcare services.[55]

A. *Women as the Healthcare Head of the Household*
While the image of a mother doting on a sick child is a core

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52   *Cf.* Ctr. for Connected Health Policy, State Telehealth Laws & Reimbursement Policies (2019), https://www.cchpca.org/sites/default/files/2019-05/cchp_report_MASTER_spring_2019_FINAL.pdf (highlighting telehealth reimbursement policy which, depending on the state, can has been memorialized in statutes, state regulation, or Medicaid manuals).

53   Sydne Enlund & Caroline Vesey, Nat'l Conference of State Leg., Increasing Access to Health Care Through Telehealth (2019), http://www.ncsl.org/Portals/1/Documents/Health/Healthcare-Access_Telehealth_v07_33750.pdf.

54   *Supra* Part II, Section A

55   *See* Sue Halpern, *The Challenges of Innovating Access to Abortion,* New Yorker (Mar. 6, 2019), https://www.newyorker.com/science/elements/the-challenges-of-innovating-access-to-abortion.

stereotype about notions of parenting,[56] women are overwhelmingly the healthcare decision-makers in most American families: women make about eighty percent of healthcare decisions for their families and are more likely to take care of family members when they get sick.[57] Given the societal reality of this role, having disruptors to aid in determining when and where to get healthcare services seemingly would be of great utility for women making healthcare decisions for themselves or on behalf of others.

However, disruptors must present information in a way that is useful and meaningful for consumers to make informed decisions. For instance, while some providers criticize the use of "Dr. Google," other stakeholders argue that making more information freely available could lead to consumers becoming more engaged in their own health and thus hopefully make more informed decisions.[58] Indeed, simply focusing on prices[59] will not necessarily help consumers and patients because some services are not "shoppable"[60] and thus there is little consumer choice.[61] But if transparency tools

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56   Adam Belz, *Among Parents, Dads Get All the Fun and Moms the Stress and Fatigue*, Minneapolis Star Tribune (Oct. 15, 2016), http://www.startribune. com/among-parents-dad-gets-all-the-fun/397196691/ ("Mothers and fathers are both happier when they're with their children, [new research shows,] but 1950s-era parenting roles persist.").

57   Emp. Benefits Sec. Admin., U.S. Dep't of Labor, General Facts on Women and Job Based Health, www.dol.gov/sites/default/files/ ebsa/about-ebsa/our-activities/resource-center/fact-sheets/women-and-job-based-health.pdf (last visited Oct. 27, 2019).

58   Noor Van Riel et al., *The Effect of Dr Google on Doctor-Patient Encounters in Primary Care: A Quantitative, Observational Cross-Sectional Study*, BJGP Open, at 1 (May 17, 2017), https://bjgpopen.org/content/bjgpoa/1/2/ bjgpopen17X100833.full.pdf.

59   *See, e.g.*, Max Nisen, *Trump's Drug-Ad Price Shaming Won't Fix the Problem*, Bloomberg (Oct. 15, 2015, 5:07 PM), https://www.bloomberg.com/ opinion/articles/2018-10-15/trump-drug-ad-price-shaming-won-t-fix-problem (noting that a proposed regulation is based on the assumption that "if pharmaceutical companies have to reveal what they charge in such a conspicuous way, they may not price medicines so highly to begin with and may be less inclined to increase prices").

60   For instance, in drug pricing, "a drug's list or sticker price is very far from what many people or their health-care plans actually pay. Almost all drugs, and particularly widely used medicines that warrant big direct-to-consumer ad campaigns, come at a large discount to the price their makers would be forced to disclose in ads." *Id*.

61   Austin Frakt, *Price Transparency is Nice. Just Don't Expect It to Cut Health Costs.*, N.Y. Times (Dec. 19, 2016), www.nytimes.com/2016/12/19/upshot/price-transparency-is-nice-just-dont-expect-it-to-cut-health-costs.html (noting

give consumers additional measures beyond cost—quality, volume, distance, and value—then perhaps consumers can make meaningful trade-offs. For example, if an insurer provides a working mother with information not only on price but with a directory of providers ranked by distance, availability, and patient satisfaction, she could make a decision based on different trade-offs.

B. Women as the Primary Caregivers

In addition to serving as the primary decision-maker in many households, women are predominantly caregivers in both informal and formal capacities.[62] Caregiving is a huge but informal part of our long-term care system: the value of the unpaid assistance—provided by an estimated 44 million Americans to older people and adults with disabilities—is estimated to be at least $306 billion annually, which is nearly double the combined costs of home health care ($43 billion) and nursing home care ($115 billion).[63] According to the Family Caregiver Alliance, "[t]he typical caregiver is a 46-year-old woman who has at least some college education and provides more than 20 hours of care weekly to her mother."[64]

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that only about 40 percent of spending on healthcare services and products are thought to be subject to shopping, as "[p]atients can reasonably shop only for care that is for nonemergencies and would be motivated to do so only if they stood to gain").

62   Nidhi Sharma et al., *Gender Differences in Caregiving Among Family - Caregivers of People with Mental Illnesses*, 6 World J. Psychiatry 7–17. (Mar. 22, 2016), www.ncbi.nlm.nih.gov/pmc/articles/PMC4804270/. The gender gap in the caregiver burden is often attributed to societal perception on masculinity and value, where, over the life course, men are challenged to focus on the "breadwinner" role and paid employment, while women are pressured to put greater emphasis on caring and nurturing. *See* Joukje Swinkels et al., *Explaining the Gender Gap in the Caregiving Burden of Partner Caregivers*, 74 Js. Gerontology: Series B, 309–17 (Feb. 2019), https://doi.org/10.1093/geronb/gbx036. Research shows that when men take on caregiving duties, men dedicate fewer hours to caregiving tasks when compared to their female caregiving counterparts. *See* Maryam Navaie-Waliser et al., *When the Caregiver Needs Care: The Plight of Vulnerable Caregivers*, 92 Am. J. Pub. Health 409–13 (2002). Variation in time is attributed to learned norms that bring men to approach care as mastered tasks while women are more likely to tend to the well-being of the care recipient and the emotional dynamics of the caregiver-care receiver relationship. *See* Swinkels, *supra* note 62 (for discussion of masculinities theory).

63   *Caregiver Health*, Fam. Caregiving Alliance, https://www.caregiver.org/caregiver-health (last visited Oct. 27, 2019).

64   Nat'l Alliance Caregiving, *Caregiving in the U.S.*, AARP, https://www.aarp.org/relationships/caregiving/info-2004/us_caregiving.html (last visited Oct.

Caregiving is often shouldered by family members for a number of reasons: less available workers for paid caregiving (fewer young people, younger people moving out of areas with higher older population), more families facing financial challenges, and the lack of long-term care services and supports in Medicare. Caregiving is becoming increasingly intergenerational as more adults are "sandwiched" between caring for their aging parents and providing for their children. For caretakers charged with these dual roles, there is a decreased ability to provide complete care to both generations and an increased need for assistance.[65] As intergenerational family caregiving becomes more common, particularly for millennials of color, caregiver resources and support needs to shift to include a younger and more diverse set of caregivers.[66] As one advocate noted,

> When we think about family caregivers, we usually picture spouses or 50-something adult children. But, it turns out, about one-third of Americans have helped care for an older loved one by age 40. In some respects, those millennials resemble older caregivers: They are as likely to underestimate the need for long-term supports and services in old age and they misunderstand who pays for it. At the same time, they are very different: While they spend, on average, less time caring for loved ones and say they have more family support, they are less resilient and feel more stress.[67]

22, 2019).

65 Sharon Z. Marts, *Sandwich Generation Caregivers: Ethical Legacies Throughout Generations*, U.S.F.: Doctoral Dissertations 8–9 (2013), https://repository.usfca.edu/cgi/viewcontent.cgi?article=1047&context=diss.

66 Millennials now represent one in four family caregivers, and more than half of millennial family caregivers are people of color. *See* Jennifer Pharr et al., *Culture, Caregiving, and Health: Exploring the Influence of Culture on Family Caregiver Experiences,* ISRN Pub. Health 5 (Mar. 26, 2014), https://www.hindawi.com/journals/isrn/2014/689826/ (finding that "European American caregivers were not culturally bound to provide care to family members" but for "Asian American, Hispanic American, and African American . . . participants, . . . caregiving was so embedded in the life experience"). S*ee generally Caregiving in America,* Nat'l All. for Caregiving, https://www.caregiving.org/research/caregivingusa/ (last visited Oct. 27, 2019).

67 Howard Gleckman, *There Are More Millennial Caregivers Than You Think,* Howard Gleckman (May 18, 2018), howardgleckman.com/2018/05/18/

Unfortunately, many younger individuals, who are more likely to be balancing work and family care, are not prepared for this responsibility.[68] Nor do these caregivers know where to turn for assistance, particularly if they are thrust unexpectedly into a caregiving role.[69] Family support policies and funding have lagged behind the increased demand for family support services. Moreover, family caregivers are themselves at risk for emotional, mental, and physical health problems.[70] When family members must provide care for a loved one, they often neglect their own health needs.[71] In fact, one reason that an individual is moved into long-term care such as a nursing home is because the family caregiver's own health has deteriorated, hindering caregiving duties.[72]

Here, disruptors could aid women facing caregiving duties, particularly in a mobile society or when facing trade-offs due to "sandwich" responsibilities.[73] Opportunities to support women in caregiving roles through telemedicine, particularly millennial caregivers who are more likely to be open to tele-platforms,[74] include in-home monitoring support, access to on-call providers to troubleshoot health care needs, and training to allow the at-home care givers to provide high quality care and to avoid unnecessary hospital utilization.[75] Telemedicine also provides family caregivers the opportunity to reduce caregiving hours through home monitoring kits that alert the caregiver when unusual activity occurs (examples include bed sensors and automatic lights).[76]

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there-are-more-millennial-caregivers-than-you-think-this-is-what-they-are-like/.

68   *Caregiving in America, supra* note 66.

69   Fam. Caregiving Alliance, *supra* note 63, at nn. 4–6.

70   *Id*. at nn. 74–77.

71   *Id*.

72   *Id*.

73   *See* sources cited *supra* note 40. As noted, the demographics of caregiving are changing, Swinkels, *supra* note 62 (utilizing the masculinities theory to rethink gender dynamics on caregiving) and *supra* notes 65–67 and accompanying text (noting how race and age are changing and making caregiving more intersectional).

74   *See* sources cited, *supra* note 40.

75   Winifred V. Quinn et al., *Using Telehealth to Improve Home-Based Care for Older Adults and Family Caregivers*, AARP (May 2018), www.aarp.org/content/dam/aarp/ppi/2018/05/using-telehealth-to-improve-home-based-care-for-older-adults-and-family-caregivers.pdf.

76   *Id.*

C. Reproductive Health

Lastly, technology can empower women to take control over their reproductive health regardless of time constraints, geographic distance, and—in some cases—legal and policy barriers.[77] While many policy makers and industry stakeholders have focused on using telehealth for chronic conditions and elderly populations, the reality is that younger populations are interested in utilizing telehealth as well. For instance, the telehealth provider American Well surveyed whether women ages 18 to 34 would want telehealth services such as online video visits. The survey specifically found that nearly half of women of reproductive age are interested in accessing birth control from a provider online.[78]

Several online services have entered the reproductive health sphere "targeting everything from birth control to fertility."[79] Thus, even if telehealth is not yet dominating the marketplace as consumers' top choice, it will increasingly be seen as an option that patients and consumers—particularly younger ones entering the healthcare system— will either prefer or even expect.

Unfortunately, too much attention has been paid to more provocative elements of reproductive and sexual health such as online sales of women's Viagra[80] and sex robots.[81] Some of this attention also masks that many digital tools are not designed from a woman's perspective—often they are created by men.[82] Even if

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77   Sue Halpern, *The Challenges of Innovating Access to Abortion*, The New Yorker (Mar. 6, 2019), https://www.newyorker.com/science/elements/the-challenges-of-innovating-access-to-abortion. *See generally* Lindsay Houser, *Hindering Webcam Outreach on the Women's Healthcare Frontier*, 42 Stetson L. Rev. 169 (2012).

78   *Telehealth Index: 2017 Consumer Survey*, American Well, http://go.americanwell.com/rs/335-QLG-882/images/American_Well_Telehealth_Index_2017_Consumer_Survey.pdf (last visited Oct. 22, 2019).

79   Sandra Salathe, *Could Telemedicine Be the Future for Women's Health Care?*, Daily Kos (Nov. 12, 2018), https://www.dailykos.com/stories/2018/11/2/1809305/-Could-telemedicine-be-the-future-for-women-s-health-care.

80   Belinda Luscombe, *This CEO Is Pushing a Pill for Female Sex Drive. But Does the Science Hold Up?*, Time (Nov. 8, 2018), time.com/5448807/female-desire-pill/.

81   Andrea Morris, *Prediction: Sex Robots are the Most Disruptive Technology We Didn't See Coming*, Forbes (Sept. 25, 2018), www.forbes.com/sites/andreamorris/2018/09/25/prediction-sex-robots-are-the-most-disruptive-technology-we-didnt-see-coming/#7a2885c76a56.

82   Emily Chang, Brotopia: Breaking Up the Boys' Club of Silicon

such designs and developments arise out of implicit—rather than intentional—bias, it does suggest a need for greater participation by women and people of color to better reflect the type of digital health tools they want and how they will access them.

V.   THE LAW'S ABILITY TO RECOGNIZE AND ENCOURAGE INNOVATIONS THAT ADVANCE WOMEN'S HEALTH

In efforts to improve the delivery system, policymakers can use emerging healthcare models to ensure that women's healthcare needs are appropriately part of these efforts to move toward a more efficient and effective healthcare system. In a moment where healthcare policymakers and payers are focused on rapidly replacing volume-based reimbursement with models that bend the cost curve and support healthier people,[83] there is an imperative to grapple with women's experiences and to develop a system that adequately addresses women's unique healthcare needs. Here, we explore three areas of major policy focus—delivery system reform, telehealth, and digital health—that generally are not considered in the context of women's health. Yet if policymakers recognized the impact that these policy areas could have on women's health, they could address major inequalities facing women.

A.   Rethinking Payment and Delivery System Reform with a Gender Focus

Women's current experiences with the healthcare system are a complicated picture of high demand and utilization coupled with continuing gaps in access.[84] Women report that they are more likely than their male counterparts to experience delays in receiving needed

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VALLEY 207 (2018) ("Silicon Valley companies have largely been created in the image of their mostly young, mostly male, mostly childless founders."); CRIADO PEREZ, *supra* note 28, at 170–75; Laura Lovett, *Women in Venture: The Case for Increasing Representation in Digital Health Investing*, MOBIHEALTHNEWS (Mar. 15, 2019), www.mobihealthnews.com/content/women-venture-case-increasing-representation-digital-health-investing.

83   *See, e.g.*, INST. OF MED., THE HEALTHCARE IMPERATIVE: LOWERING COSTS AND IMPROVING OUTCOMES: WORKSHOP SERIES SUMMARY 74–75 (Pierre L. Young et al., eds., 2011) ("Embedded in this troubling conclusion is a substantial opportunity: the possibility to reduce healthcare costs without adversely affecting health outcomes. This is one of the keys to healthcare reform -- transforming the healthcare system into one that emphasizes quality rather than just quantity.").

84   Klea D. Bertakis et al., *Gender Differences in the Utilization of Health Care Services*, 49 J. FAM. PRAC. 147–152 (2000).

medical care, dental care, and prescription medicines.[85] However, a review of healthcare usage finds that women are also more frequently accessing healthcare services and, on average, spend more on care, even when controlling for health status, sociodemographic factors, and site of care.[86] Greater healthcare spending can be attributed in part to women experiencing higher rates of multiple chronic conditions (27.2% compared with 24.1% for men).[87] This two-part story of high use and poor outcomes highlights how the current healthcare system fails to meet the needs of its top consumers.[88]

While current momentum for health system reform represents a significant opportunity to address the gaps in women's health care experience, there is evidence that how women access health services, and the types of care they need most, are not being considered in model development. For example, two of the most common models utilized in delivery reform, the Patient-Centered Medical Home (PCMH) and Accountable Care Organizations, fail to contemplate the role obstetricians and gynecologists can play as a women's primary care provider.[89] But research shows that a substantial portion of women of reproductive age use these clinicians as their entry point into the health system.[90] Similarly, there are limitations in the emerging value-based payment models

85   Usha Ranji et al., Kaiser Family Found., Women's Coverage, Access, and Affordability: Key Findings from the 2017 Kaiser Women's Health Survey (Mar. 2018), http://files.kff.org/attachment/Issue-Brief-Womens-Coverage-Access-and-Affordability-Key-Findings-from-the-2017-Kaiser-Womens-Health-Survey.

86   Bertakis, *supra* note 84.

87   Brian W. Ward & Lindsey I. Black, *State and Regional Prevalence of Diagnosed Multiple Chronic Conditions Among Adults Aged ≥18 Years — United States, 2014*, 65 Morbidity & Mortality Wkly. 735 (2016).

88   *See* sources cited *supra* note 40.

89   For example, a physician member of the Toward Accountable Care Consortium comments in the Consortium's *Accountable Care Guide for Gynecologists*, "If the gynecologist is the primary care physician, he/she must provide COMPREHENSIVE primary care (i.e., wellness and prevention, GYN services) AND care for simple chronic management (i.e., [hypertension], obesity, diabetes, screening, complete immunizations, etc.). A proactive, coordinated relationship with a primary care physician is recommended." (emphasis in original). *See* Smith Anderson, *Accountable Care Guide for Gynecologists*, Toward Accountable Care Consortium 45 (2015), http://www.ncmedsoc.org/wp-content/uploads/2015/04/ACO-Guide_GYN_041515_reduced-file.pdf.

90   Sara Mazzoni et al., *Patient Perspectives of Obstetrician-Gynecologists as Primary Care Providers*, 62 J. Reprod. Med. 3–8 (2017).

for maternity care: very few frameworks have effectively linked the care provided to a mother and her baby although evidence shows that effective perinatal supports improved newborn health outcomes.[91] The failure of the healthcare system and policy reform to create infrastructure that recognizes the unique needs around child birth and maternal health reflects a lack of understanding of what women require from healthcare providers.

As a first step, policymakers can build new requirements regarding reporting and data into new models that reflect the importance of capturing and understanding how women experience healthcare. As an example, the Veterans Health Administration (VA) has prioritized the use of gender-specific data to improve women's health care experiences since 2008, in response to the increasing number of women veterans being served by the VA system.[92] In 2011, the VA instructed healthcare regions across the country to review their gender disparity data and to use the findings to create and implement network-level incentivized performance plans.[93] A report issued a year later by the VA's Office of Informatics and Analytics found that the use of data for delivery system design had mitigated gender disparities in several key areas, including screening for PTSD, depression, and colorectal cancer.[94] The VA experience reflects how intentionality in centering women's healthcare experience can drive better outcomes, particularly notable for a system that historically served a largely male population. Government actors have the opportunity to build similar EMRs and data reporting requirements in other publicly financed healthcare programs to support increased understanding and improved outcomes for women.

B. Utilizing Telemedicine for Women's Health

For decades, telemedicine has been touted as the panacea for a range of the health system's most pressing challenges: among

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91   Clare Pierce-Wrobel & Katie Green, *To Help Fix the Maternal Health Crisis, Look to Value-Based Payment*, Health Aff. (Jul. 16, 2019), https://www.healthaffairs.org/do/ 10.1377/hblog20190711.816632/full/.

92   *Study of Barriers for Women Veterans to VA Health Care*, U.S. Dep't of Veterans Aff. (Apr. 2015), https://www.womenshealth.va.gov/docs/Womens%20Health%20Services_Barriers%20to%20Care%20Final%20Report_April2015.pdf.

93   *Id.*

94   *Comparing the Care of Men and Women Veterans in the Department of Veterans Affairs*, U.S. Dep't of Veterans Aff., at 7 (Mar. 12, 2012), https://www.womenshealth.va.gov/docs/OIA-BRCO_GenderHealthCareReport.pdf.

the growing list, it has been deemed the solution to restoring access to rural health care, reducing the overutilization of emergency departments, improving individualized care, and addressing both provider shortages and runaway health care costs. However, the potential of this model has yet to be fully realized, due primarily to a mix of implementation barriers, including complex reimbursement rules, infrastructure challenges (including access to fast, reliable internet), and concerns from both patients and providers about privacy, trust, and information safety. Despite these ongoing policy questions, telemedicine is undeniably poised to reshape the way patients interact with the healthcare system completely. In 2018, telemedicine visits were estimated to have reached seven million,[95] and a survey of healthcare executives found that over 90% were either developing or implementing a telemedicine program.[96]

Although telemedicine is not considered a "women's health" issue, telemedicine consumers are primarily women,[97] and thus stakeholders ought to foster ways that ease access to care for its key demographic. Availability of care through telemedicine and digital platforms is particularly critical for women, who are experiencing a growing crisis in health provider access: according to the American Congress of Obstetricians and Gynecologists (ACOG), there will be a shortage of up to 8,800 OB-GYNs by 2020.[98] More alarmingly, almost half of American counties lack a single practicing OB-GYN, resulting in nearly ten million women without easily accessible OB-GYN care.[99] And while all the traditional barriers to telehealth access apply to women, women's shrinking access to reproductive health providers raises the stakes for policymakers to address barriers that

95   Rooen Roashan, *Telehealth Report – 2014*, IHS Tech. (2014).

96   Nathaniel M. Lacktman & Lawrence W. Vernaglia, *2014 Telemedicine Survey Executive Summary*, Foley & Lardner LLP (Nov. 11, 2014), https://www. foley.com/en/insights/publications/2014/11/2014-telemedicine-survey-executive-summary.

97   Norra MacReady, *Telemedicine Use Increasing, Parallels Growth of Parity Laws*, Medscape (Nov. 27, 2018), https://www.medscape.com/viewarticle/905621 (last visited Mar 12, 2019).

98   Michael Ollove, *A Shortage in the Nation's Maternal Health Care*, The Pew Charitable Trusts (Aug. 15, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/15/a-shortage-in-the-nations-maternal-health-care.

99   William F. Rayburn, The Am. Cong. of Obstetricians and Gynecologists, The Obstetrician–Gynecologist Workforce in the United States (2017), https://m.acog.org/~/media/BB3A7629943642ADA47058D0BDCD1521.pdf.

could mitigate the harm.[100]

Relatedly, experts believe there is an untapped potential for telemedicine to address maternal care, including prenatal and postnatal care.[101] Virtual live visits can be used to replace, and ensure women have timely and appropriate access to, the common schedule of routine pregnancy care. Patient monitoring and store-and-forward technology provides an opportunity for more consistent tracking of patient well-being and allows patients and providers to build rapport and trust between in-person visits. State regulations and limitations on insurance coverage present the greatest barrier to a more significant adoption of this model.

C.   Utilizing Mobile and Digital Health to Promote Women's Health

The field of consumer-facing health care information must be designed with the needs of women in mind, the primary drivers of healthcare utilization and healthcare decision making. Investment in women's health technology is currently on the rise, with a well-documented proliferation of apps, wearables, and telehealth platforms primarily focused on reproductive and maternal health.[102] Women are more likely than men to seek out information online and through mobile apps about their health and to identify online opportunities to share experiences and resources.[103] For example, "Breast Cancer Straight Talk Support" is one of a growing number of Facebook communities designed for women by women to serve as resources for emotional support and advice on topics ranging from

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100 NAT'L P'SHIP FOR WOMEN & FAMILIES, TELEMEDICINE: IMPROVING WOMEN'S ACCESS TO HEALTH CARE THROUGH INNOVATION (2012), http://www.nationalpartnership.org/our-work/resources/health-care/digital-health/telemedicine-improving.pdf.

101 Pacific Northwest Evidence-based Practice Center, *Telehealth: Mapping the Evidence for Patient Outcomes from Systematic Reviews*, 26 AHRQ TECHNICAL BRIEF, vi (June 2016), https://effectivehealthcare.ahrq.gov/sites/default/files/pdf/telehealth_technical-brief.pdf.

102 Katie Brigham, *Women Are Using Fertility Apps as Contraception, but Experts Are Skeptical*, CNBC (Jun. 9, 2018, 9:00 AM), https://www.cnbc.com/2018/06/08/women-are-using-fertility-apps-as-contraception-but-experts-are-skeptical.html. Other examples include wearables for menstrual cycle tracking or breast pumps.

103 NAT'L P'SHIP FOR WOMEN & FAMILIES, HINTS 2017: WOMEN AND HEALTH INFORMATION SEEKING (2018), http://www.nationalpartnership.org/our-work/resources/health-care/hints-2017-women-and-health-info-seeking.pdf.

mitigating the side effects of chemotherapy to selecting a bra after a mastectomy.[104]

As developers look to leverage women's presence online seeking health information, research shows that women most value easy, friendly, and informative customer service.[105] Early pilot programming has shown that women are open to connecting with providers through the use of wearables and other tools that offer opportunities to stay in contact with providers, without the time or expense of an in-person office visit.[106] Improving seamless access to healthcare through telemedicine and online platforms is critical not just for individual users but for the system at large because when patients have access to technology platforms like those that allow for online appointment scheduling, patients will be more likely to follow through and utilize needed care.[107]

There are significant racial disparities related to who can access and engage with technology to track their health, and policy can be leveraged to break down these barriers. And though most practices now offer some kind of patient portal, only about half of patients use them, and there are racial disparities in who signs up: for instance, 72 percent of white patients register, but only 28 percent of African American patients do so.[108] In part, this disparity

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104   Elena Fagotto & Archon Fung, *A Connected Patient is a Healthy Patient*, To the Point (Mar. 1, 2019), https://www.commonwealthfund.org/blog/2019/connected-patient-healthier-patient. *But see* Chang, *supra* note 15 (discussing privacy challenges facing women, especially women of color and of low socio-economic status).

105   Carolyn Buck Luce & Julia Taylor Kennedy, *The Health Care Industry Needs to Start Taking Women Seriously*, Harv. Bus. Rev. (May 28, 2015), https://hbr.org/2015/05/the-health-care-industry-needs-to-start-taking-women-seriously.

106   One example of this programming is from the New Orleans-based Ochsner Medical Center, which has launched its take on Apple's "Genius Bar" for prenatal patients to have free wearables to help monitor their health at home; this initiative has resulted in a reduction in unnecessary in-person office visits and greater patient satisfaction. *See* Anna Yakovenko & Emily Johnson, *Telehealth Primer: Pregnancy Care*, Advisory Board (Aug 29, 2019), https://www.advisory.com/research/service-line-strategy-advisor/resources/2018/telehealth-primer-pregnancy-care?WT.ac=Inline_SLSA_CheatSheet_x_x_x_CTC_2019Oct09_Eloqua-RMKTG+Blog.

107   Rachel Z. Arndt, *Building a Better Patient Portal*, Modern Healthcare (Nov. 24, 2018, 12:00 AM), https://www.modernhealthcare.com/article/20181124/NEWS/181119951/building-a-better-patient-portal.

108   S.G. Smith et al., *Disparities in Registration and Use of an Online Patient Portal Among Older Adults: Findings from the LitCog Cohort*, 22 J. Am. Med.

reflects how people access the Internet, with African American patients more often using smart phones to go online, and patient portals being optimized for desktop computers.[109]

VI. HOW THE LAW IS LIMITING TECHNOLOGY'S ABILITY TO EXPAND WOMEN'S ACCESS TO CARE

Just as the law could be used to reduce gender bias in technology, policymakers have also used the law to limit how women can utilize technology in order to make healthcare more accessible. As with many aspects of women's health, these legal barriers are connected to political disagreements around reproductive health generally and abortion specifically. But these legal limits are not limited to prohibitions on technology: for instance, policymakers have weaponized the non-gendered policy interest in collecting and harvesting data as a way to expose and embarrass women for their healthcare decisions, attempting to make their private medical decisions transparent, just as big data seeks to do in the area of healthcare costs.

A. The Limitations of Transparency

The premise for using current policy mechanisms to drive the healthcare system towards transparency begins with the assumption that once information becomes available, intended audiences will be equipped to leverage it. The very communities who would most benefit from increased knowledge and access to healthcare data, including women and people of color, face the most significant challenges in navigating the system. For example, there are substantial differences between races in health literacy and care access that persist even after adjusting for education and socioeconomic factors.[110] These obdurate disparities reflect a system that has not grappled with the unique needs of its most marginalized users. For any of our proposed

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Informatics Ass'n 888 (2015), https://www.ncbi.nlm.nih.gov/pubmed/25914099; Fagotto, *supra* note 104

109   Oliver Kim, *The Devil Is in the Data*, Balkinization (Nov. 3, 2018), balkin.blogspot.com/2018/11/the-devil-is-in-data.html ("[T]he means that patients use to access patient portals—or get online in general—can present a barrier for some communities to fully access their data. For many African American and Latino patients, a smartphone, not a desktop computer or a tablet, is the most common device for going online.").

110   Sarwat I. Chaudhry et al., *Racial Disparities in Health Literacy and Access to Care Among Patients with Heart Failure*, 17 J. Cardiac Failure 122 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3053061/.

recommendations to move the needle, investment is required to support enhanced literacy and in supports that adequately address the way patients show up to the health system.

As aforementioned, technology can improve patients' decision-making abilities by helping them understand their choices and giving them access to better data on healthcare cost and quality. Yet gathering the same data could place a chilling effect on the use of reproductive healthcare services as some states contemplate blurring the information that is available to women, particularly in making key reproductive decisions, with shaming or even penalizing the use of such services.

For instance, the Texas state senate passed legislation to immunize doctors from "wrongful birth" claims where a doctor fails—even intentionally—to reveal information discovered in prenatal testing to pregnant women,[111] and state laws in Utah, Arkansas, and South Dakota require doctors to inform women seeking a medication-induced abortion about "abortion reversals," or that such an abortion can be halted following taking the first pill in the regimen.[112] The lack of transparency in such situations may not only impede women's ability to make decisions around abortion but also could impede their ability to seek out other prenatal healthcare services.[113]

Additionally, as data collection becomes more sophisticated, states may consider using such data to encourage or discourage certain healthcare services. Indeed, during his presidential campaign, Trump famously suggested that there ought to be some sort of "punishment" for some women obtaining an abortion,[114] and

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111 S.B. 25, 85th Reg. Sess. (Tex. 2017); *Texas Senate Passes Two Anti-Abortion Bills*, Texas Tribune (Mar. 20, 2017, 4:00 PM), www.texastribune. org/2017/03/20/texas-senate-wrongful-births-dismemberment-ban-legislation/.

112 Hallie Golden, *Utah's Governor Signs Abortion-Halting Legislation*, AP News (Mar. 25, 2017), https://apnews.com/ca7282c7304f4acb880f45fc7411a1be.

113 For example, a woman who discovered simultaneously that she was HIV-positive and pregnant, and she considered having an abortion until she learned about possible ways to reduce the risk of transmission. Alice Park, *No Baby Should Be Born with HIV. What Will It Take to Save Them All?*, Time (Mar. 16, 2017), https://time.com/4703308/can-we-prevent-mother-child-hiv-transmission/. Such information enabled her to prevent transmission to her baby, but would it be possible under these state laws for a physician to withhold information about the mother's HIV-status if the physician was worried that it would cause her to obtain an abortion?

114 Emily Crockett, *A Trump-Pence Administration Absolutely Would 'Punish' Women*

a growing number of anti-abortion laws will result in the acquisition of data on the procedure in order to effectuate further restrictions on abortion providers and women seeking abortions.[115] Several states, for instance, are requiring burials for fetuses, meaning that the state presumably will want to know whether the appropriate burial process has taken place.[116] Such calls for more information—ranging from understanding why a woman might seek an abortion to reduce "sex-selective" abortions to gathering physician-specific data—may have a chilling effect on the practice of abortion.[117]

Similarly, collecting information about consumers that may identify their legal status has been identified as a barrier to undocumented immigrants seeking healthcare services.[118] Despite healthcare facilities being seen as "sensitive locations," studies have found that threats of deportation have caused individuals to forego care for fear of revealing their immigration status.[119] In Arizona, researchers noted that a 2010 state law that authorized law enforcement officers to interrogate individuals they suspected of being in the country illegally, corresponded to a drop in healthcare utilization: "Several providers described a drop in health maintenance,

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Who Have Abortions, Vox (Oct. 5, 2016, 12:43 AM), www.vox.com/policy-and-politics/2016/10/5/13170746/trump-pence-abortion-vp-debate-punish-women.

115   Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 NYU L. Rev. 1095, 1113–14 (2015); Electronic Frontier Foundation, *Abortion Reporting*, www.eff.org/issues/abortion-reporting ("While the reporting form does not include the patient's name, the demographic data is so extensive that it would not take great skill to identify the individual, particularly in a small town. Along with the facility where the procedure was performed and the name of the physician, all forms ask for the patient's age, race, ethnicity, marital status, and number of previous live births.") (last visited Apr. 16, 2017).

116   Emma Green, *State-Mandated Mourning for Aborted Fetuses*, The Atlantic (May 14, 2016), https://www.theatlantic.com/politics/archive/2016/05/state-mandated-mourning-for-aborted-fetuses/482688; Jennifer Ludden, *Lawsuit Challenges Fetal Burial Rule in Texas*, NPR (Dec. 12, 2016, 5:52 PM), www.npr.org/sections/thetwo-way/2016/12/12/505304688/lawsuit-challenges-fetal-burial-rule-in-texas.

117   Canes-Wrone, *supra* note 114, at 1096–97; Mary A. Scott, *Hard Choices: Where to Draw the Line on Limiting Selection in the Selective Reduction of Multifetal Pregnancies*, 100 Minn. L. Rev. 1211, 1214 (2016).

118   Karen Hacker et al., *Barriers to Health Care for Undocumented Immigrants: A Literature Review*, 8 Risk Mgmt. and Healthcare Pol'y 175, 178 (2015).

119   Ike Swetlitz, *Immigrants, Fearing Trump's Deportation Policies, Avoid Doctor Visits*, PBS Newshour (Feb. 25, 2017, 10:27 AM), www.pbs.org/newshour/rundown/immigrants-trump-deportation-doctor/.

such as regular doctor visits, diabetes education, vaccines, prenatal care, HIV education, and procurement of medications, as the result."[120] Similarly, California abandoned plans to expand its health insurance exchange to include unsubsidized insurance plans that undocumented immigrants could purchase due to fears that these individuals would not enroll in an environment that is increasingly hostile to immigrants.[121] Further, foreign-born Californians canceled their Medi-Cal coverage or declined to enroll in the first place, citing fears of a Trump administration crackdown on immigrants.[122]

B. Limits on Technology for Reproductive Health

As we discussed earlier, technology can help women access reproductive health services even in states where the policy environment is hostile to the provision of such services. For instance, digital health services can help women not only overcome geographic and transportation barriers, but also connect with a provider in areas where the family-planning infrastructure has been devastated due to funding and reimbursement cuts.[123]

But while there are bipartisan successes in expanding access to birth control even as the Trump Administration scales back family planning grants and limits the reach of the Affordable Care Act's birth-control benefit,[124] some policymakers have expressed

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120 *Id.*

121 Ana B. Ibarra & Chad Terhune, *Fear of Trump Deportation Drives California to End Immigrant Health-Care Plan*, Governing (Jan. 23, 2017, 1:50 PM), www.governing.com/topics/health-human-services/tns-california-immigrants-health-trump.html (noting the sponsor of state legislation withdrew his plan "because he feared the Trump administration might use information gleaned from it for the purpose of deporting undocumented immigrants").

122 Emily Bazar, *Fearing Deportation, Some Immigrants Forego Health Care*, Governing (Feb. 23, 2017, 12:30 PM), www.governing.com/topics/health-human-services/khn-california-immigrants-health.html; Swetlitz, *supra* note 119.

123 Gigi Barnett, *New App Launched in Texas Makes Getting Birth Control Easier*, KXAN (June 7, 2017, 7:12 AM), https://www.kxan.com/news/local/austin/new-app-launched-in-texas-makes-getting-birth-control-ea sier_20180227105002366/994768748; Lesley McClurg & Ashley Lopez, *Birth Control Apps Find A Big Market In 'Contraception Deserts'*, NPR Shots (Mar. 6, 2018, 5:00 AM), https://www.npr.org/sections/health-shots/2018/03/26/595387963/birth-control-apps-find-a-big-market-in-contraception-deserts.

124 Amelia Thomson-DeVeaux, *Some States Are Making It Easier To Get Birth Control*, FiveThirtyEight (Apr. 24, 2017), https://fivethirtyeight.com/features/some-states-are-making-it-easier-to-get-birth-control/.

skepticism and even hostility about expanding online access to birth control methods beyond oral contraceptives. As online prescribing becomes more available as states liberalize their telemedicine laws, digital health providers are offering online sales of so-called "morning after" emergency contraception and the anti-HIV medication PrEP.[125] Conservative organizations that consider such drugs to be abortifacients, have called for preventing them from being sold online.[126] While some states have made purchasing emergency contraception more difficult, none have banned its online sales so far.[127]

On the other hand, the federal government and many states have been more prescriptive in limiting disruptors to extend access to abortion. In particular, when anti-abortion policymakers realized that online health services and telemedicine can make medication abortion[128] more accessible, they sought to limit the reach of such disruptors. Online sales of the prescription drugs needed for a medication abortion could allow women to self-induce, particularly in areas where an abortion provider is practically unreachable due to geographic or legal barriers.[129] Indeed, the World Health Organization

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125   Elizabeth Check, *Can Nurx, the 'Uber for Birth Control,' Help Women in the Nation's Contraceptive Deserts?*, NBC News (Oct. 24, 2017, 4:51 PM), https://www.nbcnews.com/health/womens-health/can-nurx-uber-birth-control-help-women-nation-s-contraceptive-n813786 (noting that the digital app Nurx sells and can potentially deliver the contraceptives Plan B and Ella within the 72-hour window after sex).

126   *Id*. (quoting a Texas Right to Life official that while "telemedicine and telehealth services are a good development, especially in a state like Texas, where we have a lot of rural areas," lawmakers should make "marketing and delivering" emergency contraception difficult). https://www.statnews.com/2017/10/24/birth-control-app-nurx-contraceptives/.

127   *State Laws and Policies: Emergency Contraception*, Guttmacher Inst. (May 1, 2019), www.guttmacher.org/state-policy/explore/emergency-contraception.

128   As opposed to surgical abortions, a medication abortion generally involves the use of both mifepristone (also known as RU-486) and misoprostol, two drugs that are used for a medication abortion within the first ten weeks of pregnancy. *Abortion (Termination of Pregnancy)*, Harvard Med. Sch. (Jan. 2019), https://www.health.harvard.edu/medical-tests-and-procedures/abortion-termination-of-pregnancy-a-to-z. In 2016, FDA updated mifepristone's labeling to bring it in line with current medical practice and thus expanding its use. Rachel Jones & Heather Boonstra, *News in Context: The Public Health Implications of the FDA Update to the Medical Abortion Label*, Guttmacher Inst. (Jun. 2016), www.guttmacher.org/article/2016/06/public-health-implications-fda-update-medication-abortion-label.

129   Thoai Ngo et al., *Comparative Effectiveness, Safety and Acceptability of Medical Abortion at Home and in a Clinic: A Systematic Review*, World Health Org.

has found that increased access to medication abortion could lessen the number of women who die annually due to unsafe abortions.[130]

The Food and Drug Administration (FDA), however, strictly regulates mifepristone through a process called a Risk Evaluation and Mitigation Strategy (REMS),[131] which is used when the FDA "determines it is necessary to ensure that the benefits of the medication outweigh the risks" for a prescription drug.[132] REMS can involve a variety of actions to ensure patient safety that the FDA may require a drug maker to take depending on the drug.[133] The ultimate effect though is that drugs subject to REMS will not be widely available or accessible in traditional pharmacies.[134] For mifepristone, the FDA REMS requires that potential prescribers be certified in order to provide the drug and that patients receive counseling and sign a patient agreement form, signifying they understand the "risk of serious complications."[135] Critics, though, have argued that the REMS process is an unnecessary barrier for the distribution of mifepristone.[136] But because mifepristone is subject to REMS, the FDA has attempted to halt online sales of medication abortion

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(2011), www.who.int/bulletin/volumes/89/5/10-084046/en/ ("There is no evidence that home-based medical abortion is less effective, safe or acceptable than clinic-based medical abortion. Simplified protocols could give greater access to medical abortion to women living in restrictive and/or resource-limited settings where mortality related to unsafe abortion remains high.").

130 *See id.*; *see also* Sarah Boseley, *U.S. Accused of Trying to Black Abortion Pills*, The Guardian (Apr. 21, 2005), https://www.theguardian.com/world/2005/apr/21/internationalaidanddevelopment.sciencenews (discussing the United States attempt to block the World Health Organization's endorsement of medical abortion).

131 Megan K. Donovan, *"Self-Managed Medication Abortion: Expanding the Available Options for U.S. Abortion Care'*, Guttmacher Inst., 42 (Oct. 17, 2018), www.guttmacher.org/article/2016/06/public-health-implications-fda-update-medication-abortion-label.

132 *Frequently Asked Questions (FAQs) about REMS*, U.S. Food and Drug Admin. (Jan. 26, 2018), www.fda.gov/Drugs/DrugSafety/REMS/ucm592627.htm.

133 *What's in a REMS?*, U.S. Food and Drug Admin. (Jan. 26, 2018), www.fda.gov/drugs/risk-evaluation-and-mitigation-strategies-rems/whats-rems.

134 Talcott Camp & Julia Kaye, *The Abortion Pill Is Safe and Effective, and We're Suing to Make it More Accessible*, ACLU (Oct. 3, 2017, 5:30 PM), https://www.aclu.org/blog/reproductive-freedom/abortion/abortion-pill-safe-and-effective-and-were-suing-make-it-more; Halpern, *supra* 56.

135 *Approved Risk Evaluation and Mitigation Strategies (REMS): Mifepristone*, U.S. Food and Drug Admin. (Apr. 11, 2019), www.accessdata.fda.gov/scripts/cder/rems/index.cfm?event=RemsDetails.page&REMS=390.

136 Camp, *supra* note 133; Donovan, *supra* note 130, at 42–43.

within the United States.[137]

Similarly, in the area of service delivery, many states have enacted outright bans on the use of telemedicine to provide medication abortions.[138] When "tele-abortions" are allowed, telemedicine allows a physician to be with a patient virtually—the physician from one clinical location, the patient in another clinical location but connected to her physician via a telecommunications platform—while she ingests mifepristone to begin the abortion process.

> In telemedicine administration, the patient-physician communication occurs over a real-time two-way HIPAA secured teleconference audio-visual connection with a staff person in the room with the patient and the physician at a different clinical location. After receiving informed consent, the physician remotely releases a secure drawer containing the medications located in the patient's room.
>
> Regardless of whether the physician dispenses the medications in person or by telemedicine, both the physician and the staff member watch the patient take the mifepristone (in the telemedicine situation, the physician watches over the two-way video). The clinic schedules a follow-up visit within two weeks. The woman then goes home, or to a location of her choosing, and takes the misoprostol twenty-four to forty-eight hours later.[139]

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137   Debra Cassens Weiss, *Founder of Online Abortion-Pill Service Says She Won't Turn Anyone Away, Despite FDA Warning*, ABA JOURNAL (May 17, 2019, 2:19 PM), www.abajournal.com/news/article/founder-of-online-abortion-pill-service-says-she-wont-turn-anyone-away-despite-fda-warning; Jessica Ravitz, *Online Abortion Pill Provider Ordered to Cease Delivery by FDA*, CNN HEALTH (Mar. 17, 2019), edition.cnn.com/2019/03/15/health/fda-aid-access-abortion-pill-warning/index.html?no-st=1552867932.

138   At present, seventeen states prohibit medication abortions from being provided via telemedicine. Guttmacher Institute, "Medication Abortion," *State Laws and Policies: Medication Abortion*, GUTTMACHER INST. (Oct. 1, 2019), https://www.guttmacher.org/state-policy/explore/medication-abortion.

139   Planned Parenthood of the Heartland v. Iowa Bd. of Med., 865 N.W.2d 252, 256 (Iowa 2015).

Such an arrangement can allow a physician to observe medication abortions in remote clinics, thus overcoming geographic challenges in rural environments. But in states that have banned "tele-abortions," the physician must be physically present during the provision of the abortion-inducing drug regime, thus eliminating the possibility of allowing the physician to observe the patient remotely.[140]

In regards to federal legislation, Congress has made one notable attempt to restrict tele-abortions: in 2011, the House passed an amendment to the annual Agricultural Appropriations bill to prohibit federal funding in that bill from being used for mifepristone.[141] After the amendment failed to be included in the final appropriations bill that passed into law,[142] its sponsor[143] introduced the Telemedicine Safety Act.[144] In addition to prohibiting federal funding from being used to purchase equipment or infrastructure for tele-abortions, the bill also prohibited tele-abortions from being conducted across state lines.[145] The legislation failed to advance.

VII. RECOMMENDATIONS

As we have explored, there are areas where the law could nudge the development of disruptors into fields that would make healthcare more accessible for women and there are also areas where the law is impeding disruptors from doing the same. Here, we offer our recommendations for policy solutions, legislative changes, and

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140 Guttmacher, *supra* note 137.

141 H.R. 2017, 112th Cong. (2011), *amended by* H. Amend. 463 ("None of the funds made available by this Act may be used for mifepristone, commonly known as RU-486, for any purpose."). Although the sponsor said the amendment was to be applied solely to the U.S. Department of Agriculture's telemedicine fund, Cong. Record, 112th Cong., 1st Sess. H4268 (2011), the amendment would have applied to all agencies within the Agriculture Appropriations bill, including the FDA, and was not specific to telemedicine. Because the FDA is funded through the Agriculture Appropriations bill, the amendment could have affected—had it become law—on the FDA's REMS policy, see *supra* notes 130–36 and accompanying text, in unforeseen ways.

142 Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 202, 125 Stat. 552, 619 (2011).

143 Press Release, Congressman Steve King, King's Pro-Life Amend. Added to Agric. Appropriations Bill (June 16, 2011), https://steveking.house.gov/media-center/press-releases/kings-pro-life-amendment-added-to-agriculture-appropriations-bill.

144 H.R. 5731, 112th Cong. (2012).

145 *Id.*

judicial remedies that could advance greater access to healthcare for women.

A.   Policy Remedies

Policymakers have several mechanisms they can use to promote the use of disruptors to increase women's access to healthcare. Such policies can include creating programs to seed the ground, aligning incentives to nudge through rewards and penalties, and directly regulating behavior through mandates and private remedies. As these policy options move across the spectrum from softer grant programs to more restrictive regulatory schemes, we note that no single tool is capable of realigning existing structures in a way that improves women's healthcare access—rather, it will take a combination of options and time in order to advance this goal.

1.   Developing Programs

Numerous public and private initiatives have been and are being developed and funded in an effort to seed the ground in hopes of creating a more fertile environment for disruptors for women's health. One logical means is to increase the number of women, particularly women of color, who participate in the decision-making process regarding the development, integration, and utilization of disruptors in healthcare generally and in women's health specifically.

Having diverse perspectives from designing to building to implementing might have helped avoid some of the critiques of initial forays into "femtech."[146] For instance, STEM (Science, Technology, Education, and Mathematics) initiatives encourage women and people of color to become designers. But STEM alone is not enough as critics have noted difficulties that women face getting into the technology sector and maintaining a career there.[147] Additionally, a diverse healthcare workforce is necessary as well in order to test, implement, and recommend how disruptors can be effectively used by both patients and providers.[148] But diversity should not stop just

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146   Codinha, *supra* note 12. *See also* Codinha, *supra* note 27.

147   Wachter-Boettcher, *supra* note 29, at 21–26; Chang, *supra* note 82, at 208–24.

148   Dan Diamond, *Women Make Up 80% of Health Care Workers—but Just 40% of Executives,* Advisory Board: Daily Briefing Blog (Aug. 26, 2014, 11:15 PM), www.advisory.com/daily-briefing/blog/2014/08/women-in-leadership (noting that more than three-quarters of hospital and physician-office employees and nearly 90% of home health workers are women); Lydia Dishman, *Why Are These 3 STEM Fields Dominated By Women?,* Fast Co. (Apr. 13, 2015), https://www.fastcompany.com/3044934/why-are-these-3-stem-

with the development of disruptors as another key area is ensuring that investors also have a sense of the diverse needs of healthcare consumers.[149]

Relatedly, the federal government should invest in evidence-based research on the interaction between disruptors and women's health. Such an investment should focus on women's attitudes as patients[150] as well as providers, given that many professional roles in the healthcare system are filled predominantly by women.[151] As patients, women utilize the healthcare system more frequently than men and ask more questions after exams, often related to pregnancy and their reproductive health.[152]

Some research is being done in this field. For instance, at the request of Congress,[153] the Agency for Healthcare Research and Quality (AHRQ) released a literature review to provide policymakers with "what is known about the effectiveness of telehealth for specific purposes and what questions remain unanswered."[154] Although the review was not specific to women's health, ARHQ identified that telehealth's application to maternal and child health ought to be a focus of a future review.[155] The Maternal and Child Health Bureau within the Health Resources and Services Administration similarly is using government investment to drive innovation in the women's health space, announcing a seed funding contest at the end of 2018 focused on "low-cost, scalable, innovative solutions that improve

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fields-dominated-by-women.

149 Laura Lovett, *Women in Venture: The Case for Increasing Representation in Digital Health Investing*, MobiHealthNews (Mar. 15, 2019), https://www.mobihealthnews.com/content/women-venture-case-increasing-representation-digital-health-investing.

150 Dep't of Labor, *supra* note 57 ("Women utilize more health care than men, in part because of their need for reproductive services. In 2015, women ages 19 to 44 incurred health expenses that were more than 80 percent higher than men in the same age group.").

151 *Id.*

152 Dishman, *supra* note 147.

153 *Telehealth Evidence Map*, AHRQ (Aug. 11, 2015), effectivehealthcare.ahrq.gov/topics/telehealth/research-protocol.

154 Pacific Northwest, *supra* note 101.

155 *Id.* AHRQ's suggestion has found its way into pending legislation, the Maximizing Outcomes for Moms through Medicaid Improvement and Enhancement of Services (MOMMIES) Act, S.1343, 116th Cong. (2019). Section 6 of the bill would require the General Accountability Office to report on the current use of telemedicine to address maternity care through state Medicaid programs.

the health of mothers and children across the United States."[156] Such endeavors, though, must be intersectional, covering the experiences of women of color.[157]

2. Financial Encouragement through Grants, Reimbursement of Technologies that can Aid in Health Disparities

Payment incentives can also be used to encourage providers to be more aware of and responsive to inequities and challenges that some patients—particularly low-income, more vulnerable patients—face. For example, Congress authorized CMS to encourage the meaningful use of EMRs through Medicare and Medicaid incentive payments.[158] Although these incentives increased the number of physicians and hospitals that utilized EMRs, the way that the federal government defined "meaningful use" through three progressive stages of utilization had the effect of disadvantaging certain patient populations—generally African-American and Latinx patients—because of how they typically accessed the Internet.[159]

Advancements in technology present the opportunity to address systemic public health challenges, including the horrific maternal mortality epidemic—which particularly affects women of color regardless of socioeconomic status—[160] in the United States.[161] Federal, state, and local governments have the opportunity

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156   Eric Wicklund, *HRSA Challenge Eyes Telehealth, RPM Programs for Maternal Care*, mHealth Intelligence (Oct. 5, 2018), https://mhealthintelligence.com/news/hrsa-challenge-eyes-telehealth-rpm-programs-for-maternal-care.

157   In other words, program grants and research should target communities of color as well as include disaggregated data to ensure a more accurate reflection of women at the intersection of race, ethnicity, disability, and other factors.

158   American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 3014, 123 Stat. 115, 227 (codified as amended at 21 U.S.C. § 300jj-34 (2012)).

159   Kim, *supra* note 109.

160   For example, researchers in New York City found that in reviewing local data ranging from the years 2008 to 2012, black college-educated mothers who gave birth in local hospitals were more likely to suffer severe complications during pregnancy or childbirth than white women who never graduated from high school. *See* N.Y.C. Dep't Health and Mental Hygiene, *Severe Maternal Morbidity in New York City, 2008–2012*, at 15 (2016), https://www1.nyc.gov/assets/doh/downloads/pdf/data/maternal-morbidity-report-08-12.pdf.

161   Between 1990 and 2013, the United States maternal mortality ratio more than doubled from an estimated 12 to 28 maternal deaths per 100,000. *See* World Health Org. et al., *Trends in maternal mortality: 1990 to 2013*, 43 (2014),

to leverage the power of the purse to incentivize programs and providers to develop technology-driven care models that focus on women's health care needs. In Georgia, for example, public health officials have been investing for nearly 20 years in telemedicine models focused on breastfeeding and pregnancy consultation to address the state's high rates of infant and maternal mortality.[162] A reduction in preterm labor rates and improved health care outcomes is attributed to county health department programs in the state that connected expectant mothers with education and access to specialty providers.[163] Beyond funding, state officials were credited with encouraging cross-departmental collaboration and fostering stakeholder engagement that resulted in the successes of the telemedicine programs.[164]

3. Direct Regulation

Third, policymakers can directly regulate, including prohibit, behavior that runs counter to their policy goals. For example, Congress included language in a series of federal laws—including Section 185 of the Medicare Improvements for Patients and Providers Act, Section 3002 of the HITECH (Health Information Technology for Economic and Clinical Health) Act, and Section 4302 of the Affordable Care Act—to require more rigorous reporting requirements for providers and payers utilizing Medicare, Medicaid, and the Children's Health Insurance Program, as well as adopting federally certified EMRs. Such richer data sets would "represent a powerful new set of tools to move us closer to our vision of a nation free of disparities in health and health care."[165]

HITECH also included language to consider how EMRs at a minimum could collect information on race, ethnicity, gender, and

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http://www.who.int/reproductivehealth/publications/monitoring/maternal-mortality-2013/en/ .

162   *Using Telehealth to Improve Maternal and Child Health Outcomes in Georgia,* Astho, http://www.astho.org/Maternal-and-Child-Health/Georgia-Uses-Telehealth-to-Improve-Maternal-and-Child-Health-Outcomes/ (last visited Mar. 9, 2019).

163   *Id.*

164   *Id.*

165   Howard Koh, *Improving Health Disparities Data for a Healthier Nation,* White House: President Barack Obama (Nov. 2, 2011, 11:15 AM), https://obamawhitehouse.archives.gov/blog/2011/11/02/improving-health-disparities-data-healthier-nation.

primary language.[166] Collecting these data was supposed to show that eligible providers were meaningfully using health IT and thus entitled to Medicare or Medicaid reimbursement. This information in turn would be used as part of quality improvement efforts. Yet critics have noted that federal EMR requirements could have built a much stronger infrastructure in order to tackle disparities, but the federal government failed to take opportunities to advance more robust data collection and establish closer connections between Medicare and Medicaid's data collection requirements and federal meaningful-use incentives.[167]

  Finally, policymakers should consider private causes of action to enforce areas of concern. For instance, in achieving gender equity in the field of technology, employment discrimination lawsuits[168] may have more impact than STEM grants.[169] After all, discrimination lawsuits not only have a financial impact if successful but also bring a cloud of negative publicity and unwarranted attention.[170]

166 42 U.S.C. §§ 300jj-12 (West 2019).

167 Megan Daugherty Douglas et al., *Missed Policy Opportunities to Advance Health Equity by Recording Demographic Data in Electronic Health Records*, Am. J. Pub. Health, July 2015, at S380, S380-88 (noting that using EMRs "to identify and reduce health disparities is promising, but limited by the type of demographic data that is currently collected. To recognize HITECH's policy priority of reducing health disparities, more granular race and ethnicity data, disability status, and sexual orientation and gender identity must be collected in [EMRs]. The only way to ensure the consistent and comprehensive collection of this information is to incorporate expanded requirements into" the Meaningful Use program.)

168 *See* April Glaser & Rani Molla, *A (Not-so) Brief History of Gender Discrimination Lawsuits in Silicon Valley*, Vox: Recode (Apr. 10, 2017, 5:46 PM), https://www.vox.com/2017/4/10/15246444/history-gender-timeline-discrimination-lawsuits-legal-silicon-valley-google-oracle; *see, e.g.,* Olivia Solon, *The Lawyers Taking on Silicon Valley Sexism: 'It's Far Worse Than People Know,'* Guardian (Sep. 2, 2017), https://www.theguardian.com/money/2017/sep/02/lawyers-silicon-valley-sexism-worse-google-uber-lawless-sisters; *see also* Burns, *supra* note 31 (discussing lawsuits at Uber).

169 *See* Criado Perez, *supra* note 28, at 103–08; *see also* Wachter-Boettcher, *supra* note 29 at 21–26 (noting that under "culture fit" guidelines, many diverse candidates would not be hired because "they didn't match the profile of the people already working" for the employer, perpetuating hiring practices).

170 Alexandra Simon-Lewis, *What is Silicon Valley's Problem with Women?*, Wired (June 12, 2017), www.wired.co.uk/article/tesla-sexism-lawsuit-harassment-uber (discussing numerous patterns of discrimination against women in tech firms, including a *Wall Street Journal* report that found that Facebook would reject engineers' codes more often if submitted by women than men; this media report caused Facebook to do an internal review that discovered that

Another area where policymakers could grant more private regulation through lawsuits is in the control of data. Women fear breaches of privacy more than men and ensuring the privacy and security of health information will reinforce the bedrock of the trusting provider-patient relationship. For disruptors, that same level of trust must exist if their use is going to be welcomed by patients and consumers, but high-profile security breaches have resulted in a "trust gap."[171] Yet pending regulations on the vexing problem of interoperability are based on consumer utilization of third-party apps. As directed by the 21st Century Cures Act,[172] the regulations require federally-regulated payers such as Medicare Advantage private plans, Medicaid managed care organizations, and qualified health plans within federally-facilitated exchanges to adopt open APIs (Application Programming Interfaces)[173] that patients could use as a third-party app to access and compile their health data. But there is concern about utilizing third-party apps and their potential for harnessing consumers' data because HIPAA protections do not necessarily apply to a third-party app simply because the app has received health information via the consumer.[174] Moreover, observers have raised concerns about how digital technologies affect

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while rejections were more often based on seniority, women were less often in such senior positions).

171   Susannah Fox, *Trust Gap: Health Apps and Data Sharing*, Susannah Fox (Apr. 29, 2019), https://susannahfox.com/2019/04/29/trust-gap-health-apps-and-data-sharing/ (describing "a steady drip-drip-drip of articles documenting how health apps are sharing data with third parties").

172   21st Century Cures Act, Pub. L. No. 114–255, § 4002(a), 130 Stat. 1033, 1160 (2016) (cofied as amended at 42 U.S.C.A. § 300jj-11 (5)(D)(iv) (2019)). .

173   Shana Pearlman, *What Are APIs and How Do APIs Work?*, Mulesoft Blog (Sept. 7, 2016), https://blogs.mulesoft.com/biz/tech-ramblings-biz/what-are-apis-how-do-apis-work/.

174   *See* Office for Civil Rights, U.S. Dep't of Health & Hum. Servs., Health App Use Scenarios & HIPAA (2016), https://hipaaqsportal.hhs.gov/community-library/accounts/92/925889/Public/OCR-health-app-developer-scenarios-2-2016.pdf.

women,[175] people of color,[176] and those of limited means[177] in areas such as privacy, security, and criminal justice. Indeed, one of the reasons cited for the extension of the comment period was confusion over whether providers would be liable for how patients use their health data under HIPAA.[178]

The vast majority of consumers, however, do not read nor understand the terms and conditions that accompany the download of an app.[179] Because CMS and ONC do not necessarily have regulatory authority over the third-party apps,[180] it would be up to the Federal Trade Commission to police digital app makers if an app's actions violated its terms and conditions with the consumer.[181] One way to

175 Emily Chang, *What Women Know About the Internet*, N.Y. Times (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/opinion/privacy-feminism. html (arguing that "privacy is a concern for everyone, but this is also an issue, like health care, on which women have a particular view").

176 Cat Zakrzewski, *The Technology 202: Advocate Urges Congress to Protect Digital Rights of People of Color as it Crafts Privacy Bill*, Wash. Post: PowerPost (Feb. 26, 2019), https://www.washingtonpost.com/news/powerpost/ paloma/the-technology-202/2019/02/26/the-technology-202-advocate-urges-congress-to-protect-digital-rights-of-people-of-color-as-it-crafts-privacy-bill/5c744bc31b326b71858c6c3a/?noredirect=on (interviewing a privacy advocate that "people of color are more exposed to certain privacy abuses because of the unique ways they use certain social media services and smartphones").

177 Mary Madden, *The Devastating Consequences of Being Poor in the Digital Age*, N.Y. Times (Apr. 25, 2019), https://www.nytimes.com/2019/04/25/opinion/ privacy-poverty.html (noting that low-income individuals "are subjected to greater suspicion and monitoring when they apply for government benefits and live in heavily policed neighborhoods, but they can also lose out on education and job opportunities when their online profiles and employment histories aren't visible (or curated) enough").

178 Jessica Kim Cohen, *HHS Extends Comment Period for Interoperability Rules*, Modern Healthcare (Apr. 19, 2019, 1:18 PM), www.modernhealthcare. com/technology/hhs-extends-comment-period-interoperability-rules (discussing ONC director Don Rucker's warning that it is up to individual patients to decide what types of third-party apps to use).

179 Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, Bus. Insider (Nov. 15, 2017), www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 (noting that a consumer survey found that 91% of consumers consent to legal terms and services conditions without reading them, and that the rate rises to 97% for people ages 18-34).

180 Cohen, *supra* note 178.

181 *Privacy and Security Enforcement*, Fed. Trade Comm'n, https://www.ftc.gov/ news-events/media-resources/protecting-consumer-privacy/privacy-security-enforcement (last visited Oct. 22, 2019).

encourage vigilance and appropriate use would be for consumers to retain an unwaiveable private right of action to enforce an app's terms and conditions as a contract. Another possibility would be to grant individuals some sort of property right in their data, enabling them to sue to enforce the prevention of inappropriate uses of their data. [182]

B. *Judicial Remedies*

In some cases, patients and providers may need to seek—and may be successful in seeking—a judicial remedy from governmental efforts to block women's use of disruptors for reproductive healthcare needs. Indeed, when policymakers restrict disruptors based on a gendered use, the courts may need to step in to ensure such policies do not violate women's constitutional rights.

One example of a successful challenge to a legal restriction on expanded access via technology is in the field of telehealth. The Iowa Supreme Court struck down a regulation by the state medical board that required a physician to both personally perform a physical examination of a woman seeking a medical abortion and be physically present when administering the abortion-inducing drug.[183] This regulatory restriction would prevent tele-abortions given the need for a physician to perform two services in-person.

The Iowa Board of Medicine had justified the telemedicine ban as necessary for patient safety, noting the need for a physician in order to rule out an ectopic pregnancy:

> If an ectopic pregnancy was missed the medications may not expel the embryo and may lead to delayed diagnosis and treatment of this dangerous condition. In the FDA reports of deaths from mifepristone and misoprostol two of the 14 deaths were related to ruptured ectopic pregnancies, and 58 other women suffered morbidity from failed diagnosis of ectopic pregnancy. The Board believes that a basic physical examination for every patient will help to exclude

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182   Richard Harris, *If Your Medical Information Becomes a Moneymaker, Could You Get a Cut?*, NPR Sʜᴏᴛs (Oct. 15, 2018), www.npr.org/sections/health-shots/2018/10/15/657493767/if-your-medical-information-becomes-a-moneymaker-could-you-could-get-a-cut.

183   Planned Parenthood of the Heartland v. Iowa Bd. of Med., 865 N.W.2d 252 (Iowa 2015).

the conditions that are contraindications to the medications.[184]

In making this requirement, the Board argued that the regulation would not restrict where medical abortion services could be provided.[185] In other words, geography was not the limiting factor: a medical abortion could occur in an urban or rural setting so long as a physician was physically present.[186] Relatedly, the Board noted that *Casey* and subsequent cases had upheld waiting periods and consequently the need for a woman to drive, sometimes multiple times, to a clinic in order to obtain an abortion.[187]

But the Iowa court disagreed and held that the telemedicine ban was an "undue burden" under *Casey*. Because "the record evidence showed very limited health benefits," [188] the Iowa court noted that there was considerable evidence regarding the safety of telemedicine generally and with this procedure specifically.[189] As such, there was no reason why a physician had to be physically present or remotely "in reviewing the ultrasound images and dispensing the prescribed medications."[190] The court also rejected the Board's reliance on *Casey*'s allowance of "travel burdens and physician presence requirements" because they were not "context-specific."[191] In other words, the Board was simply relying on past precedent without providing sufficient medical evidence that justified the regulation's requirements.[192]

In the same year as the Iowa state supreme court's decision, the Supreme Court affirmed a district court's decision that two Texan requirements for abortion providers—requiring abortion centers to meet the same standards as surgical centers and mandating that physicians who perform abortions must have admitting privileges— posed an undue burden on women's access to abortion.[193] The *Whole Woman's Health* decision builds on *Casey* by reiterating that "[u]nnecessary health regulations that have the purpose or effect of

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184   *Id.* at 259.
185   *Id.* at 258.
186   *Id.*
187   *Id.* at 267–68.
188   *Id.* at 268.
189   *Id.* at 266.
190   *Id.* at 268.
191   *Id.* at 268–69.
192   *Id.*
193   Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."[194] Similar to *Heartland, Whole Woman's Health* also was context-specific: just as the Iowa Board of Medicine had failed to provide any medical evidence to justify regulating this particular use of telemedicine, the Texas legislation similarly failed to provide any legislative findings to justify the restrictive regulations on this particular type of healthcare provider while the district court heard substantial evidence "including expert evidence, presented in stipulations, depositions, and testimony" that justified its decision and was "not simply substitut[ing] its own judgment for that of the legislature."[195]

What, then, is the effect of *Whole Woman's Health* on the use of disruptors to improve access to women's health, particularly abortion? On the one hand, *Whole Woman's Health* did not examine legislative efforts to curtail new ways to access abortion; instead, it focused on the effort to restrict existing resources. Given existing federal and state restrictions on medication abortions, some disruptors may never be available to women in certain states without political changes. So if a woman cannot yet access a disruptor, is it an undue burden if she never had access in the first place? *Heartland* parallels *Whole Woman's Health* because the Iowa Board of Medicine attempted to restrict tele-abortions after the procedure had been safely performed in the state for seven years.[196]

Moreover, the long-term effect of *Whole Woman's Health* may be tested by a subsequent case in the Fifth Circuit concerning a similar requirement for admitting privileges imposed by Louisiana.[197] In reviewing the Louisiana requirement, the appellate court differentiated it from *Whole Woman's Health* because of "stark differences" between the two cases that suggested a lesser impact on Louisiana patients.[198] Similarly, it seems unlikely that a challenge to Louisiana's tele-abortion ban[199] in order to increase abortion access would be successful if *June Medical* allowed a contraction of existing abortion services.

Yet, on the other hand, there seems to be something

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194   *Id.* at 2309.
195   *Id.* at 2310.
196   *Planned Parenthood of the Heartland,* 865 N.W.2d at 256.
197   June Med. Servs., L.L.C. v. Gee, 905 F.3d 787, 790 (5th Cir. 2018).
198   *Id.* at 791 (finding that the Louisiana requirement for admitting privileges would "affect, at most, only 30% of women [in Louisiana] and even then not substantially" as compared to the Texas laws).
199   2013 La. Acts 259.

particularly pernicious about singling out this utilization of telemedicine. As we discussed before, telehealth is a "genderless" disruptor that can, however, have specific implications for women. If, as stated in *Whole Woman's Health,* "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right,"[200] the weight of medical evidence suggests that tele-abortion bans are exactly the type of "unnecessary health regulations" that are undue burdens. If there is no rational basis between counseling services delivered in person or via telemedicine or the provision of a pill performed in a clinic versus remotely, then why limit such access? Seemingly, the only reason would be for restricting a "gendered" function of this particular aspect of telemedicine. This line of argument would reject *June Medical*'s deference to state restrictions that only had a "slight" effect on abortion access and thus likely allowing restrictions on future disruptors—it would not matter whether a disruptor had been available but instead it would matter whether the state's restriction was based on pretext and therefore an undue restriction.

This theory is being tested in a case involving a federal restriction that would have related consequences for telemedicine. In *Chelius v. Azar,* a group of healthcare professionals are suing the FDA to overturn the REMS restrictions on mifepristone under two theories.[201] First, the plaintiffs argue that the FDA exceeded its authority to require a REMS because it is not medically justified based on mifepristone's use.[202] Second, the plaintiffs argue that under *Whole Woman's Health,* the REMS restriction is unconstitutional because it imposes "significant burdens on abortion access without proof of a valid medical justification."[203]

VIII. CONCLUSION

While the fictional "Girl with the Dragon Tattoo" can manipulate technology in a way that is beyond the typical user, disruptors are changing—or at least offer the possibility of changing—our relationship with the healthcare system as both patients and consumers. Moreover, Salander provides something of a guidepost

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200   *Whole Women's Health,* 136 S. Ct. at 2309.
201   *Chelius v. Azar,* ACLU (Oct. 3, 2017), www.aclu.org/cases/chelius-v-azar?redirect=cases/chelius-v-wright.
202   *Id.*
203   *Id.*

for what we strive for in our relationship with technology: tools that break down both known and unknown barriers in society and promote both equality and equity in an essential service, or the provision of healthcare. If the law and policy can join with technology to enhance disruption in a way that achieves both equality and equity in healthcare, then all patients will see some of the barriers—time, distance, lack of information—blocking their access to services potentially fade away.