About The Journal

The *Kansas Journal of Law & Public Policy* was conceived in 1990 as a tool for exploring how the law shapes public policy choices and how public policy choices shape the law. The *Journal* advances contemporary discourse on judicial decisions, legislation, and other legal and social issues. With its three published issues per year, the *Journal* promotes analytical and provocative articles written by students, professors, lawyers, scholars, and public officials.

The *Journal* fosters a broad notion of diversity in public policy debates and provides a forum for the discussion of public policy issues. The *Journal* endeavors to enable the policy-making process through the presentation of diverse treatment and critical analysis on significant policy matters. Our publication also aspires to serve a broad audience of decision-makers and the intellectually curious. We specifically target groups like legislators, judges, educators, and voters; each of which plays a valuable role in the legal process.

Non-partisan, student-governed, the *Journal* is an organization devoted to the study, commentary, and analysis of domestic and international legal and social issues. All student members of the *Journal* must complete a writing requirement and assist in the preparation of *Journal* issue publication through research and article edits. The Editorial Board, which is composed of law students, is responsible for selecting *Journal* content, editing article submissions, and preparing each volume for publication.

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The *Journal* invites well-written, well-researched articles on current issues that offer well-reasoned public policy arguments. The public policy argument must be central and clear. It is the express policy of the Editorial Board "to publish great articles, regardless of the source."

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Volume XXXIV

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TABLE OF CONTENTS

Kansas Journal of Law & Public Policy
Volume XXXIV, Number 1 – Fall 2024

Editor's Letter vi

An Evidenced-Based Evaluation of Legislative Responses to School Shootings at Robb Elementary in Uvalde, Texas and the Covenant School in Nashville, Tennessee
John Marinelli 1

Standardization and Policy Change: Key Strategies for Reducing Violence in Healthcare
Madisyn Schmitz 23

(Un)conscientious Objections & Medical Misinformation: Restricting the Refusal to Provide Reproductive Health Care Through Military Conscientious Objection Standards
Valerie Ernat 46

Saving the Ogallala Aquifer: Kansas's Duty to Protect Intergenerational Water Rights
Leah Stein 80

Title IX Pre-Assault Liability: Emerging Enforcement Standards and the Next Steps to Accountability
Emma Mays 99

Fall 2024

Dear *Journal* Readers,

Welcome to the first issue of Volume XXXIV of the *Kansas Journal of Law and Public Policy*. This first issue presents five insightful articles, each addressing important public policy issues of today.

Our first article is from practitioner John Marinelli, a Trial Attorney with the Department of Justice. Mr. Marinelli's article analyzes legislation implemented after school shootings in Uvalde, Texas and Nashville, Tennessee. His interest in this topic stems from his personal experiences as a public-school teacher. The article evaluates the effectiveness of state and federal policy changes against empirical evidence. The article ultimately concludes that state and federal policy changes are unlikely to directly affect school shootings. However, the policy changes may help address some environmental factors that accompany school violence and help to prevent gun violence generally.

Our second article is from University of Kansas Medical Center and School of Law graduate and healthcare law practitioner Madisyn Schmitz. The article addresses the critical issue of violence against healthcare workers through a four-category risk factor framework. It begins by scrutinizing the effectiveness of existing state and federal regulations and concludes by making suggestions for reform to make healthcare workplaces less violent.

Our third article is from Valerie Ernat, third-year law student at the University of Maryland Francis King Carey School of Law. This article explores conscientious objection laws to providing reproductive health care and the overlap between reproductive health misinformation and conscientious objections. The article describes how modern conscientious objection laws in the context of reproductive health care perpetuate medical misinformation by giving objectors significant deference and imposing minimal burdens of proof. It analyzes the ramifications of expansive conscientious objection laws in a legal ecosystem with virtually no legal standard. Ms. Ernat proposes that the legal standard applied to traditional conscientious objection claims in the context of military service

should be applied to conscientious objection claims in the context of reproductive health care.

Our fourth article is our first of two student pieces. This article was written by Leah Stein, third-year law student at the University of Kansas School of Law and Symposium Editor for the *Kansas Journal of Law & Public Policy*. Ms. Stein's article was anonymously selected for publication and awarded the Shapiro Award by the preceding Editorial Board of the *Journal*. The Shapiro Award is given to one student each year for recognizing a public policy issue near and dear to Kansas. The article details Kansas's flawed water rights adjudication system through the lens of intergenerational rights. The article concludes by proposing that Kansas create water courts and restore the practice of agency deference.

Our final article is the second student piece. This article was written by me, personally, and was also anonymously selected for publication by the previous Editorial Board of the *Journal*. The article first describes how Title IX gradually developed into a tool that has potential to incentivize institutions to take proactive steps to protect students from sexual misconduct. The article then argues that the adoption of an emerging liability standard and proper procedural safeguards are necessary to take the protection afforded by Title IX to the next level.

I hope that our readers find this issue as captivating as I do. I owe many thanks to the Editorial Board and Staff Editors for their tireless work and countless hours spent bringing this issue to publication. In addition, and on behalf of all *Journal* members, I thank Professors Richard Levy and Corey Rayburn Yung for their advice and support throughout the publication process. Now, please enjoy the scholarship we have prepared in Issue I, Volume XXXIV of the *Kansas Journal of Law & Public Policy*.

Emma Mays
Editor-in-Chief

AN EVIDENCE-BASED EVALUATION OF LEGISLATIVE RESPONSES TO SCHOOL SHOOTINGS AT ROBB ELEMENTARY IN UVALDE, TEXAS, AND THE COVENANT SCHOOL IN NASHVILLE, TENNESSEE

*By: John A. D. Marinelli**

I. INTRODUCTION

Around 346 school shootings occurred throughout the United States in 2023.[1] This number eclipsed the previous all-time high of 308, set just one year prior.[2] Two incidents in these years—tragedies at Robb Elementary in Uvalde, Texas, and The Covenant School in Nashville, Tennessee—rank among the deadliest episodes of school violence in modern history.[3]

The unique horror associated with school shootings attracts media coverage[4] and public concern,[5] though gun violence outside of schools generally poses a

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* J.D. Georgetown University Law Center, 2021.

[1] David Reidman, K–12 SCHOOL SHOOTING DATABASE, (Jan. 14, 2024), https://k12ssdb.org/all-shootings [https://perma.cc/XG9M-4ZKY]. (For the purpose of this statistic, a "school shooting" is any time a "a gun is brandished, is fired, or a bullet hits school property for any reason, regardless of the number of victims, time, or day of the week")

[2] *Id.*

[3] *Id.* (Robb Elementary is the second deadliest episode of school violence in modern history and The Covenant School is the seventh).

[4] Jason R. Silva & Joel A. Capellan, *The Media's Coverage of Mass Public Shootings in America: Fifty Years of Newsworthiness*, 43 INT'L J. COMP. & APPLIED CRIM. JUST. 77, 77 (2018) (finding "school shootings are more likely to receive any media coverage" than other forms of violence); Jaclyn Schildkraut, *Mass Murder and the Mass Media: Understanding the Construction of the Social Problem of Mass Shootings in the U.S.*, 4 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 1, 2 (2016) (explaining how mass shootings become a "media spectacle" and concluding that media reports of such incidents tend to exclude context to "ground these events in the larger discourse of violence in the nation").

[5] *See, e.g.*, Sophie Bethune & Elizabeth Lewan, *One-Third of US Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events*, AM. PSYCHOL. ASS'N (Aug. 15, 2019), https://www.apa.org/news/press/releases/2019/08/fear-mass-shooting [https://perma.cc/BHG8-L7M8]; Nikki Graf, *A Majority of U.S. Teens Fear a Shooting Could Happen at Their School, and Most Parents Share Their Concern*, PEW RES. CTR. (Apr. 18, 2018), https://www.pewresearch.org/short-reads/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern/ [https://perma.cc/338B-R3WU].

greater risk to children than school violence.[6] Too often, this attention fails to prompt meaningful change.[7] But in the years after the tragedies in Uvalde and Nashville, lawmakers in Texas, Tennessee, and the United States Congress proposed and implemented responsive legislation. Notably, this response included the first federal gun control law since 1994—the Bipartisan Safer Communities Act (the "BSCA").[8]

The political processes around these policy responses drew fierce debate and protest, mirroring the fallout from similar tragedies in years past. Considering this long-standing controversy, this Article seeks to evaluate responsive laws by looking to empirical evidence around whether and to what degree policy changes affect school shootings, school crime, and other aspects of school safety.[9]

Part I of this Article identifies and discusses responsive laws implemented in Texas, Tennessee, and at the federal level shortly after tragedies in Uvalde and Nashville. Part II reviews available evidence about the efficacy and unintended consequences of these policies, and also considers the potential impacts of firearm restrictions that were proposed, but not implemented at the state level. Part III evaluates the state and federal responses against this evidence by considering how these policies might affect school shootings and gun violence generally, as well as other factors like school crime and bullying. The Article concludes with several takeaways.

II. POLICY RESPONSES TO SCHOOL SHOOTINGS IN UVALDE AND NASHVILLE

School shootings in Uvalde, Texas, and Nashville, Tennessee, prompted policy changes at the state and federal levels. Legislatures in Texas and Tennessee enacted new measures that prioritized school policing and security, and provided limited support for school-based mental health and safety preparation. Modest gun control proposals failed in both states. At the federal level, Congress enacted the BSCA shortly after the tragedy at Uvalde. This law included the first federal firearms restrictions in decades and appropriated several billion dollars to school security and student mental health priorities.

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[6] NAT'L CENT. ED. STATS., VIOLENT DEATHS AT SCHOOL AND AWAY FROM SCHOOL AND SCHOOL SHOOTINGS 2 (2023), https://nces.ed.gov/programs/coe/indicator/a01 [https://perma.cc/EM83-PELA] ("The percentage of youth homicides documented as occurring at school was generally around 1 percent of the total number of youth homicides each [school] year between 1992–93 and 2019–20.").

[7] *See generally* Jaclyn Schildkraut & Colin M. Carr, *Mass Shootings, Legislative Responses,and Public Policy: An Endless Cycle of Inaction*, 69 EMORY L. J. 1043 (2020) (detailing how proven policies like an assault weapon ban and universal background checks are consistently proposed after school shootings, but fail to become law).

[8] Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

[9] Fortunately, school shootings remain relatively rare, and it is therefore difficult to assess whether any particular policy change affects the incidence or severity of these tragedies. Accordingly this piece also looks to the incidence of school crime, and gun violence generally, among other factors, to assess the impact of identified policies.

A. State Policy Responses

Texas and Tennessee's policy responses prioritized school hardening—measures that make schools physically more difficult to threaten—by expanding and funding school policing and installations like cameras and metal detectors. Responsive laws also addressed safety planning and student mental health. A law to raise the minimum age for firearm purchases failed in Texas. And a law that would alow courts to impose extreme risk protection orders disarming potentially dangerous individuals—also known as a "red flag" law—failed in Tennessee.

1. Texas Response to the Shooting at Robb Elementary

In 2023, the Texas Legislature responded to the shooting at Robb Elementary in Uvalde with legislation focused on school policing and safety planning. A bill that would have raised the minimum age to buy semi-automatic weapons failed to become law.

Texas House Bill 3 requires every public school in the state to host an "armed security officer."[10] Schools can meet this requirement with school police, hired security guards, or armed educational staff.[11] The law also requires school districts to establish and regularly audit comprehensive security plans and conduct regular emergency drills.[12] The bill further allocates school districts $15,000 per campus and approximately $10 per student for flexible use, including hiring required security officers, purchasing security equipment, and funding violence prevention or mental health programs.[13] Lawmakers separately appropriated $1.1 billion to create a funding pool for flexible "school safety" grants.[14] Proposals for additional appropriations to fund new school security requirements failed in subsequent special legislative sessions.[15]

A modest gun control bill, proposed by the state representative from Uvalde, failed to pass the legislature. House Bill 2744 aimed to raise the minimum age to purchase a semi-automatic rifle from eighteen to twenty-one.[16] The bill died before

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[10] H.R. 3, 88th Legis. (Tex. 2023); 2023 Tex. Sess. Law Serv. Ch. 896 § 10 (West).
[11] 2023 Tex. Sess. Law Serv. Ch. 896 § 10 (West).
[12] *Id.* at § 12.
[13] *Id.* at § 23.
[14] S. 30, 88th Leg. (Tex. 2023); 2023 Tex. Sess. Law Serv. Ch. 458 § 4.02 (West)
[15] *See., e.g.*, S. 5, 88th Leg. 4th Spec. Sess. (Tex. 2023); H.R. 2, 88th Leg. 4th Spec. Sess. (Tex. 2023); *see also* Maia Pandey, *Texas Superintendents Say Lack of School Safety Funding May Lead to Budget Cuts*, TEX. TRIB. (Dec. 11, 2023, 5:00 AM), https://www.texastribune.org/2023/12/11/texas-school-safety-funding/ [https://perma.cc/84V9-CBXQ] ("The fourth special legislative session this year ended without increased funding for school safety—even though public schools have complained . . . they don't have enough money to met new safety mandates . . . .").
[16] H.R. 2744, 88th Leg. (Tex. 2023).

receiving a vote of the assembled legislature,[17] despite widespread support for such measures[18] and advocacy from the families of children killed at Robb Elementary in Uvalde.[19]

2. Tennessee Response to the Shooting at The Covenant School

Tennessee lawmakers responded to the 2023 shooting at The Covenant School with legislation favoring school hardening and safety planning with some limited support for mental health programs. Despite public outcry and considerable controversy, this response did not include new gun control measures.

Tennessee's 2023 Senate Bill 315 enables private schools like The Covenant to coordinate with local law enforcement to station police on school campuses.[20] House Bill 322 codifies school safety requirements, including annual drills, threat assessments, and classroom locks.[21] The state's 2023–2024 budget also includes considerable appropriations toward school hardening, including $140 million to fund school resource officers, and $20 million toward broadly-applicable school safety grants.[22] The budget also allocates approximately $8 million to expand K–12 school-based mental health programming.[23]

With support from Governor Bill Lee, legislators proposed a "red flag" law that would allow courts to remove firearms from potentially dangerous individuals.[24] But despite public support and a purpose-specific special legislative session,[25] the bill

[17] Alejandro Serrano, *Raise-the-Age Gun Bill Misses Crucial Deadline, as Uvalde Parents Protest Outside the Texas House*, TEX. TRIB. (May 9, 2023), 11:00 PM), https://www.texastribune.org/2023/05/09/texas-ar-15-raise-the-age/ [https://perma.cc/BJX3-UXTR] (Detailing how the legislature's failure to place H.B. 2744 on the House Agenda after a key deadline "likely end[ed] the bill's chances of becoming law").

[18] Patric Svitek, *Poll Finds Solid Majority of Texans, Even Republicans, Favor Raising Age for Gun Purchases*, TEX. TRIB. (May 3, 2023, 6:00 AM), https://www.texastribune.org/2023/05/03/ut-texas-poll-legislature-guns/ [https://perma.cc/67Y8-Y78P] (describing a survey from the University of Texas at Austin that "found 76% of voters support 'raising the legal age to purchase any firearm from 18 years of age to 21 years of age'").

[19] Alejandro Serrano, *In Overnight Testimony, Uvalde Victims' Family Members Call on Texas Lawmakers to Raise Age to Buy Semi-Automatic Guns*, TEX. TRIB. (April 19, 2023, 2:00 PM), https://www.texastribune.org/2023/04/19/texas-house-gun-bills-2023/ [https://perma.cc/NA4P-7JWL].

[20] S. 315, 113th Gen. Assemb., 2023 Reg. Sess. (Tenn. 2023); 2023 Tenn Pub. Acts Ch. No. 87.

[21] H.R. 322, 113th Gen. Assemb., 2023 Reg. Sess. (Tenn. 2023); 2023 Tenn Pub. Acts Ch. No. 367.

[22] H.R. 1545, 113th Gen. Assemb., 2023 Reg. Sess. (Tenn. 2023); 2023 Tenn Pub. Acts Ch. No. 418, § 54.

[23] *Id.*

[24] H.R. 1574, 113th Gen. Assemb., 2023 Reg. Sess. (Tenn. 2023); S. 1564, 113th Gen. Assemb., 2023 Reg. Sess. (Tenn. 2023).

[25] Tenn. Proclamation No. 2517 (2023), https://tnsos.net/publications/proclamations/ [https://perma.cc/ZKV5-Q5C5] (calling a special legislative session for the purpose of implementing "temporary mental health orders of protection" among other priorities); Kimberlee Kreueski, *Tennessee Governor Schedules Special Session to Address Guns*, ASSOCIATED PRESS (May 8, 2023, 5:24 PM), https://apnews.com/article/tennessee-red-flag-republicans-guns-0cd94d15f372746ed53e85408d27af44 [https://perma.cc/P7HV-5X9W].

failed to become law.[26] Throughout Tennessee's regular and special legislative sessions, citizens advocated for stricter gun laws through large demonstrations around the state.[27] And in a political firestorm that made national headlines, two state legislators were expelled from their positions for participating in these protests,[28] though they later returned to office.[29]

B. Federal Policy Response: The Bipartisan Safer Communities Act

The BSCA—a bipartisan federal law passed shortly after the Robb Elementary shooting—imposes modest firearms restrictions and appropriates billions of dollars to provide grants supporting state-level red-flag laws, mental health programing, and school safety inititatives.

The BSCA[30] imposes the first new federal gun control measures since the 1994 Federal Assault Weapons Ban.[31] It provides for more extensive background checks on firearms purchasers under age twenty-one and expands the records that may be examined in such searches.[32] The Act further creates new, specific criminal penalties for firearms trafficking and "straw purchases" in which an authorized buyer purchases a firearm on behalf of someone prohibited from doing so.[33]

Along with its gun control provisions, the BSCA provides resources through Medicaid and the Children's Health Insurance Program to expand mental health

[26] Emily Cochrane, *Tennessee Session Ends in Chaos, With No Action on Gun Control*, NY TIMES (Aug. 29, 2023), https://www.nytimes.com/2023/08/29/us/politics/tennessee-special-session-gun-control.html [https://perma.cc/Z45E-CHPA] ("Tennessee Republicans on Tuesday ended a special session of the state legislature devoted to public safety without passing any new restrictions on firearm access . . . .").

[27] *See e.g.*, *Demonstrators Protest at Capitol to Call for Gun Control Reform*, TENNESSEAN, (April 3, 2023, 10:57 AM), https://www.tennessean.com/picture-gallery/news/2023/04/03/demonstrators-push-gun-control-reform-nashville-covenant-school-shooting/11592882002/ [https://perma.cc/DMG8-D5HY].

[28] Kimberlee Kruesi & Jonathan Mattise, *Tennessee's House Expels 2 of 3 Democrats Over Guns Protest*, ASSOCIATED PRESS (April 7, 2023, 6:44 AM), https://apnews.com/article/tennessee-lawmakers-expulsion-d3f40559c56a051eec49e416a7b5dade [https://perma.cc/NL9Q-7QQN].

[29] Tim Craig & Emily Wax-Thibodeaux, *Nashville Council Reinstates Black Tennessee Lawmaker*, WASH. POST (April 10, 2023, 8:02 PM), https://www.washingtonpost.com/nation/2023/04/10/nashville-council-justin-jones-expulsion/ [https://perma.cc/CL63-BW3V]; Robert Klemko & Karin Brulliard, *In Tennessee, Second Expelled Black Democratic Lawmaker is Reappointed*, WASH. POST (April 12, 2023), https://www.washingtonpost.com/nation/2023/04/12/black-democratic-legislators-reinstated-tennessee/ [https://perma.cc/DDJ5-JTC6].

[30] Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

[31] Violent Crime Control and Law Enforcement Act of 1994,Pub. L. No. 103-322, §110101–110106 108 Stat 1796, 1997–2010. *See also* Sarah Gray, *Here's a Timeline of the Major Gun Control Laws in America*, TIME (April 30, 2019), https://time.com/5169210/us-gun-control-laws-history-timeline/ [https://perma.cc/W7RQ-A2NZ] (detailing major firearms legislation in the United States from –1791-2019).

[32] Bipartisan Safer Communities Act, § 12001, 136 Stat. at 1322–24.

[33] Stop Illegal Trafficking in Firearms Act, Pub. L. No. 117-159, § 12004, 136 Stat. 1326, 1326–1332 (2022).

support to children, especially in schools.[34] The balance of the bill is dedicated to wide-ranging appropriations, including:

- $750 million to the Byrne Justice Assistance Grant Program to support states implementing "red flag" laws;[35]
- $300 million to fund school safety grants for purposes authorized by the 2018 STOP School Violence Act,[36] which include threat assessment training, coordination with law enforcement, and physical security measures, among other uses;[37]
- Over $1 billion to create a flexible funding pool,[38] dubbed the "Stronger Connections Grant Program," which local education agencies may access to hire school police officers, install physical security equipment on campuses, and implement mental health programs, among other uses.[39]
- Around $1.25 billion toward mental health grants for children and schools,[40] including $500 million toward School Based Mental Health Services Grants, which aim to increase the number of mental health service providers in schools,[41] $500 million toward Mental Health Services Professional Demonstrations, which support the training of school-based mental health professionals,[42] and $250 million for community health

[34] Bipartisan Safer Communities Act, §§ 11002, 11003, 136 Stat. at 1316–19.
[35] *Id*. § 12003, 136 Stat. at 1325–26.
[36] Bipartisan Safer Communities Supplemental Appropriations Act, Pub. L. No. 117-159, 136 Stat. 1338, 1339 (2022).
[37] Students, Teachers, and Officers Preventing School Violence Act of 2018, Pub. L. 115-141 §§ 501–505, 132 Stat. 1128, 1128–1131.
[38] Bipartisan Safer Communities Supplemental Appropriations Act, 136 Stat. at 1341 (authorizing grants under title IV, part B, and part A, subpart 1 of the Elementary and Secondary Education Act of 1965).
[39] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, §§ 4101–4111; 4201–4205; 79 Stat. 27 (1965) (initially authorizing such grants and establishing proper uses for grant funds); *see also* UNITED STATES DEPARTMENT OF EDUCATION, OFFICE OF PLANNING, EVALUATION AND POLICY DEVELOPMENT, BIPARTISAN SAFER COMMUNITIES STRONGER CONNECTION GRANT PROGRAM FREQUENTLY ASKED QUESTIONS 2023, https://oese.ed.gov/files/2023/10/23-0083.BSCA-FAQs-approved-April-Final-Updated-October-2023.pdf [https://perma.cc/6KEK-55ZJ] (outlining potential uses for Stronger Connections Grant Program).
[40] Bipartisan Safer Communities Supplemental Appropriations Act, 136 Stat. at 1342.
[41] *See School-Based Mental Health Services Grant Program*, OFF. ELEMENTARY & SECONDARY EDUC., UNITED STATES DEP'T OF EDUC. (Oct. 20, 2022), https://oese.ed.gov/offices/office-of-formula-grants/safe-supportive-schools/school-based-mental-health-services-grant-program/ [https://perma.cc/X65C-ZRNX].
[42] *Mental Health Service Professional Demonstrations*, OFF. ELEMENTARY & SECONDARY EDUC., UNITED STATES DEP'T OF EDUC. (Aug. 8, 2023), https://oese.ed.gov/offices/office-of-formula-grants/safe-supportive-schools/mental-health-service-professional-demonstration-grant-program/ [https://perma.cc/W7MN-33N8].

services block grants,[43] which allocate funds to children and adults with serious mental illness.[44]

III. EVIDENCE ON THE EFFECTS OF POLICY RESPONSES

Empirical evidence yields mixed evaluations of polices like those implemented at the state and federal levels after the 2022 and 2023 school shootings. School hardening measures generally have little effect on student safety and may negatively affect other student outcomes. At the same time, student mental health initiatives may address root causes of school violence. And proactive safety planning may save lives in emergencies.

There is little conclusive evidence that any of the proposed or implemented firearms restrictions will affect school shootings or mass shootings more broadly. However, certain measures, like "red flag laws" and minimum-age laws, show the potential to do so. And other measures like universal background checks may reduce gun violence more broadly.

A. School Hardening

School hardening through policing and physical security provides little proven benefit. School policing does not improve school safety and likely detracts from other student outcomes. Physical security measures also have little proven benefit and may negatively affect student academic performance and feelings of safety at school.

1. School Policing and Armed Guards

No evidence suggests that the presence of school police or armed guards deters school shootings.[45] And school police notably failed to intervene during tragedies in

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[43] Bipartisan Safer Communities Supplemental Appropriations Act, 136 Stat. at 1340 (authorizing grants under subpart I of part B of title XIX of the Public Health Service Act).

[44] Public Health Service Act, Pub. L. 78-410, 58 Stat. 682 (1944) (codified at 42 U.S.C. § 300x) (establishing that such funding will be used to provide services for "adults with a serious mental illness and children with a serious emotional disturbance").

[45] JILLIAN PETERSON & JAMES DENSLEY, THE VIOLENCE PROJECT: HOW TO STOP A MASS SHOOTING EPIDEMIC 155 (2022) (finding that armed security officers were present in roughly twenty-four percent of school shootings, and their presence "yielded no significant reduction in rates of injuries"); *see also* John Woodrow Cox & Steven Rich, *Scarred by School Shootings*, WASH. POST (Mar. 25, 2018), https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/ [https://perma.cc/22SD-CAB7] ("The Post found that gun violence has occurred in at least 68 schools that employed a police officer or security guard [between 1999 and 2018] . . . . Of the nearly 200 Post-identifies incidents of school gunfire, only once . . . has a resource officer gunned down an active shooter.").

Parkland, Florida,[46] and Uvalde, Texas.[47] In fact, shootings where armed guards were present have consistently proven deadlier than incidents with no such officials on the scene.[48]

School police don't prevent other kinds of school crime or misbehavior either, and their presence contributes to adverse student outcomes. Police presence at a K–12 school is linked to *increased* school crime and behavior problems.[49] Schools with police also rely more extensively on exclusionary punishments like suspensions and expulsions.[50] And disciplinary measures of this kind are associated with an increased likelihood that affected students will eventually interact with the criminal justice system.[51] The presence of school police also does not meaningfully impact school

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[46] *See, e.g.*, Audra D. S. Burch & Alan Binder, *Former Deputy Faces Charges Over Parkland*, N.Y. TIMES, June 4, 2019, at A1.

[47] *See, e.g.*, J. David Goodman & Edgar Sandoval, *Blame is Spread to More Agencies in Uvalde Attack*, N.Y. TIMES, July 18, 2022, at A1.

[48] PETERSON & DENSLEY, *supra* note 45, at 155 (examining 133 school shootings and finding that "after controlling for other factors like the school size, the number of shooters, and the number type of firearms, the rate of deaths was nearly three times higher in schools with an armed police officer or security guard present"); Jillian Peterson, James Densley & Gina Erickson, *Presence of Armed School Officials and Fatal and Nonfatal Gunshot Injuries During Mass School Shootings, United States, 1980-2019*, JAMA OPEN NETWORK, Feb. 16, 2021, at 3 ("[C]ontrolling for the aforementioned factors of location and school characteristics, the rate of deaths was 2.83 times greater in schools with an armed guard present.").

[49] Benjamin W. Fisher, Anthony Petrosino, Hannah Sutherland, Sarah Guckenburg, Trevor Fronius, Ivan Benitez & Kevin Earl, *School-Based Law Enforcement Strategies to Reduce Crime, Increase perceptions of Safety, and Improve Learning Outcomes in Primary and Secondary Schools: A Systematic Review*, CAMPBELL SYSTEMATIC REVS., Nov. 8, 2023, at 21 (concluding from a systematic review of research in the field that school policing is "linked with an increase in school crime and behavior problems"); *see also* Denise C. Gottfredson, Scott Crosse, Zhiquin Tang, Erin L. Bauer, Michele A. Harmon, Carol A. Hagen & Angela D. Greene, *Effects of School Resource Officers on School Crime and Responses to School Crime*, 19 CRIM. PUB. POL'Y 905, 932 (2020) ("[Increasing school policing] does not reduce school records of any form of school crime, and results in higher counts of recorded weapon and drug-related school crimes, effects that persist for at least 20 months after the increase in [policing].").

[50] Fisher et al., *supra* note 49, at 1 (finding "[school-based law enforcement] use was associated with increased exclusionary discipline . . . ."); Benjamin W. Fisher & Emily A. Hennessy, *School Resource Officers and Exclusionary Discipline in U.S. High Schools: A Systematic Review and Meta-Analysis,* 1 ADOLESCENT RSCH. REV. 217, 217 (2016) (concluding from a meta-analysis of relevant research that "the presence of [school resource officers] in high schools was associated with higher rates of exclusionary discipline"); *see also* Emily K. Weisburst, *Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes*, 38 J. POL'Y ANALYSIS & MGMT. 338, 338 (2019) ("Exploiting detailed data on over 2.5 million students in Texas, I find that federal grants for police in schools increase middle school discipline rates by 6 percent.").

[51] Julie Gerlinger, Samantha Viano, Joseph H. Gardella, Benjamin W. Fisher, F. Chris Curran & Etham M. Higgins, *Exclusionary Discipline and Delinquent Outcomes: A Meta Analysis*, 50 J. YOUTH & ADOLESCENCE 1493, 1503 (2021) (concluding from a meta-analysis of relevant literature that "exclusionary discipline is a associated with a greater likelihood of future delinquency regardless of the demographic composition of the sample"); *see also* David M. Ramey, *The Influence of Early School Punishment and Therapy/Medication on Social Control Experiences During Young Adulthood*, 54 CRIMINOLOGY: AN INTERDISC. J. 113, 132 (2016) ("[E]arly school

violence, substance abuse, or the prevalence of weapons on campus,[52] though students may feel safer with police at their schools.[53] The research on school police is thus clear. However, there exists little corresponding evidence on the effects of arming teachers and other school staff, and the outcomes of such policies are not well established.[54]

2. *Physical Security*

Evidence yields mixed results regarding the benefits of physical security in schools and shows that reliance on such measures may detract from the school environment. At least one study has found that controlling for other demographic and environmental factors, schools with higher concentrations of physical security measures experience higher levels of school crime.[55] Another somewhat contradictory study found that schools using multiple visible security measures experienced reduced property crime, while schools using just one security measure experienced worse overall safety outcomes than schools with zero, or multiple physical security measures.[56] Research does not make clear whether these measures can or do affect school shootings.

Targeted studies of specific measures also show mixed effects. No evidence suggests that metal detectors improve school safety.[57] And security cameras do not

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punishment is associated with higher odds of involvement in the criminal justice systems later in life . . . "); Kathryn C. Monahan, Susan VanDerhei, Jordan Bechtold & Elizabeth Cauffman, *From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest*, 43 J. YOUTH & ADOLESCENCE 1110, 1110 (2014) ("Being suspended or expelled from school increased the likelihood of arrest in the same month . . . .").

[52] Fisher et al., *supra* note 49, at 18.

[53] *Id.* at 2.

[54] *The Effects of Laws Allowing Armed Staff in K–12 Schools*, RAND (Jan. 10, 2023), https://www.rand.org/research/gun-policy/analysis/laws-allowing-armed-staff-in-K12-schools.html [https://perma.cc/7ADP-BX37] (finding no high-quality studies that examine the effects of arming staff in K–12 schools).

[55] Amanda B. Nickerson & Matthew P. Martens, *School Violence: Associations with Control, Security/Enforcement, Educational/Therapeutic Approaches, and Demographic Factors*, 37 SCH. PSYCH REV. 228, 238 (2015) ("After accounting for demographic influences on school crime . . . principals who reported use of more security and enforcement procedures . . . were also more likely to report more incidents of school crime.").

[56] Emily E. Tanner-Smith, Benjamin W. Fisher, Lynn A. Addington & Joseph H. Gardella, *Adding Security, but Subtracting Safety? Exploring Schools' Use of Multiple Visible Security Measures*, 43 AM. J. CRIM. JUST. 102, 102 (2017) ("[U]tilization of multiple security measures reduced the likelihood of exposure to property crime in high schools, but most other security utilization patterns were associated with poorer school safety outcomes.").

[57] Abigail Hankin, Marci Hertz & Thomas Simon, *Impacts of Metal Detector Use in Schools: Insights from 15 Years of Research*, 81 J. SCH. HEALTH 100, 105 (2011) (Concluding from a meta-analysis of literature in the space that there exists "insufficient evidence to draw a conclusion about the potential beneficial effect of metal detector on student . . . behavior . . . .").

have any proven effect either.[58] However, security locks can and do protect students during school shootings.[59]

Physical security may also prove detrimental to student performance and feelings of safety at school. Empirical studies confirm that students feel less safe in schools with metal detectors.[60] One study found that cameras and door locks do not affect perceptions of safety.[61] But another study found that students feel less safe when cameras are placed inside rather than outside school buildings.[62] Visible security measures may also slightly impair students' attendance and grades.[63]

B. Safety Planning and Preparation

Unlike school hardening efforts, safety planning measures—including lockdown drills and threat assessments—may improve school safety with few adverse effects. One analysis of real-world school shootings found that, absent independent errors by first responders, successfully implemented lockdowns reduce casualties by nearly sixty percent and fatalities by almost eighty percent.[64] Repeated drills also improve students' and faculty members' ability to successfully implement lockdowns, implying that these exercises may provide essential practice that can

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[58] Benjamin W. Fisher, Ethan M. Higgins, Emily M. Homer, *School Crime and Punishment and the Implementation of Security Cameras: Findings from a National Longitudinal Study*, 38 JUST. Q. 22, 22 (2021) ("[P]atterns of crime and punishment in schools that implemented cameras were similar to those in schools that did not.").

[59] JACLYN SCHILDKRAUT & AMANDA B. NICKERSON, LOCKDOWN DRILLS 54 (2022) ("[S]ecuring behind a locked door has been identified as the most effective way to prevent injury or death during an active shooter situation.").

[60] Hankin et al, *supra* note 57 ("[S]ome research suggests that the use of metal detectors in schools is associated with lower levels of students' perceptions of security in school . . . ."); *see also*, Suzanne E. Perumean-Chaney & Lindsay M. Sutton, *Students and Perceived School Safety: The Impact of School Security Measures*, 38 AM. J. CRIM. JUST. 570, 581–82 (2013) ("Using a nationally representative sample of 13,386 students from 130 schools and 130 school administrators . . . this study found that metal detectors . . . were associated with a significant decrease in students feeling safe while in school.").

[61] Perumean-Chaney & Sutton, *supra* note 60, at 582 ("[S]ecurity guards, video cameras and bars/locked doors had no effect on student perceptions of safety.").

[62] Sarah Lindstrom Johnson, Jessika Bottiani, Tracy E. Waasdorp & Catherine P. Bradshaw, *Surveillance or Safekeeping? How School Security Officer and Camera Presence Influence Students' Perceptions of Safety, Equity, and Support*, 63 J. ADOLESCENT HEALTH 732, 735 (2018) ("[A] higher number of security cameras inside the school building was negatively associated with students' perceptions of safety, equity and support.").

[63] Emily E. Tanner-Smith & Benjamin W. Fisher, *Visible School Security Measures and Student Academic Performance, Attendance, and Postsecondary Aspirations*, 45 J. YOUTH & ADOLESCENCE 195, 204 (2016) (finding that while "schools' visible security utilization patterns had a minimal effect on adolescents' academic performance postsecondary aspirations . . . . certain security utilization patterns may have modest detrimental effects on academic outcomes").

[64] Jaclyn Schildkraut, Emily Greene-Colozzi, Amanda B. Nickerson & Allyson Florczykowski, *Can School Lockdowns Save Lives? An Assessment of Drills and Use in Real-World Events*, 22 J. SCH. VIOLENCE 167, 177 (2023) ("During mass shootings, schools that successfully implemented lockdowns had 60% fewer total casualties, with 79% reductions in victims pronounced dead at the scene even after controlling for other variables . . . .").

help save lives in an emergency.[65] However, one study found no difference in casualties between shootings in schools that regularly ran lockdown drills and schools that did not.[66]

Results are mixed as to the emotional impact of these drills, but convincing evidence suggests that they have little negative effect. Empirical studies incorporating live surveys of students after lockdown drills indicate that the exercises do not increase anxiety levels and may even reduce stress.[67] Studies also suggest that drills help students feel more prepared for emergencies.[68] But one study infers from social media posts after lockdown drills that the exercises increase stress, anxiety, and depression among participants.[69]

Evidence also indicates that threat assessments by which school officials identify and proactively respond to troubling student conduct can effectively resolve issues before they become serious.[70] For example, the Virginia Threat Assessment

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[65] Jaclyn Schildkraut & Amanda B. Nickerson, *Ready to Respond: Effects of Lockdown Drills and Training on School Emergency Preparedness*, 15 VICTIMS & OFFENDERS 619, 632 (2020) ("[F]ollowing training and with continued practice, effectiveness of the lockdowns . . . improved significantly.").

[66] PETERSON & DENSLEY, *supra* note 45, at 108 ("[O]ur data on 133 completed and attempted school mass shootings over the past forty years show that there were no differences in the number of people killed or injured between schools that regularly ran lockdown drills and those that didn't.").

[67] SCHILDKRAUT & NICKERSON, *supra* note 59, at 66 ("[L]ockdown drills conducted in accordance with best practices were found not to increase anxiety levels among student participants and may even have had positive effects by empowering them with the skills necessary to respond in an emergency."); *see also* Amanda B. Nickerson & Jaclyn Schildkraut, *State Anxiety Prior and After Participating in Lockdown Drills Among Students in a Rural High School* SCH. PSYCH REV., Mar. 2021, at 6 ("Respondents who completed the survey reported stronger feelings consistent with well-being as compared to those who completed the inventory at baseline"); Elizabeth J. Zhe & Amanda B. Nickerson, *Effects of an Intruder Crisis Drill on Children's Knowledge, Anxiety, and Perceptions of School Safety*, 36 SCH. PSYCH. REV. 501, 506 (2007) (finding students who participated in a lockdown and students who instead participated in origami, "did not differ in state anxiety or perceptions of school safety" after their respective activities).

[68] Jaclyn Schildkraut, Amanda B. Nickerson & Kristen R. Klingaman, *Reading, Writing, Responding: Educators' Perceptions of Safety, Preparedness, and Lockdown Drills*, 36 EDUC. POL'Y 1876, 1891 (2022) ("[F]eelings of preparedness improved significantly with the introduction of [lockdown] training and continued practice."); Jaclyn Schildkraut, Amanda B. Nickerson & Thomas Ristoff, *Locks, Lights, Out of Sight: Assessing Students' Perceptions of Emergency Preparedness Across Multiple Lockdown Drills*, 19 J. SCH. VIOLENCE 93, 102–03 (2019) (finding that the implementation of school lockdown best practices drills increased the degree to which students felt they were prepared for an emergency).

[69] Mai ElSherief, Koustuv Saha, Pranshu Gupta, Shrija Mishra, Jordyn Seybolt, Jiajia Xie, Megan O'Toole, Sarah Burd-Sharps & Munmun De Choudhury, *Impacts of School Shooter Drills on the Psychological Well-Being of American K-12 School Communities: A Social Media Study*, HUM & SOC. STUD. COMMC'S, Dec. 8, 2021, at 8 (finding from an analysis of social media posts that "trauma and collective worry experienced by school stakeholders increased by 42% for anxiety/stress and 39% for depression, following drills.").

[70] Randy Borum, Dewey G. Cornell, William Modzeleski & Shane Jimerson, *What Can Be Done About School Shootings? A Review of the Evidence*, 39 EDUC. RES. 27, 32 (2010) ("[T]wo field test studies suggest that a threat assessment approach can be carried out with seemingly positive outcomes . . . .").

Model, which involves a seven-step threat response coordinated among school staff, can help school officials resolve threatening behavior without incident.[71] These measures may prevent school shootings because many perpetrators of such incidents are current or former students of targeted schools,[72] and most inform others of their plans.[73]

C. School-Based Mental Health

School-based mental health resources and social-emotional learning programs can reduce violent tendencies among children and may also reduce environmental issues like bullying that accompany school violence.

Over several experimental trials, a school-based cognitive behavioral therapy program reduced arrests for violent crime among participants.[74] Mental health curriculums may also reduce students' reliance on violent threats and behavior.[75] And school-based violence prevention programs reduce aggressive tendencies in

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[71] Dewey G. Cornell, Peter L. Sheras, Sebastian Kaplan, David McConville, Julea Douglass & Andrea Elkon, *Guidelines for Student Threat Assessment: Field-Test Findings*, 33 SCH. PSYCH. REV. 527, 527 (2004) (finding from a field test of a threat assessment model that "the majority of cases (70%) were resolved quickly as transient threats" indicating "that student threat assessment is a feasible, practical approach for schools" to improve safety); Dewey Cornell, Peter Sheras, Anne Gregory & Xitao Fan, *A Retrospective Study of School Safety Conditions in High Schools Using the Virginia Threat Assessment Guidelines Versus Alternative Approaches*, 24 SCH. PSYCH. Q. 119, 119 ("Students in schools using the Virginia threat assessment guidelines reported less bullying, greater willingness to seek help, and more positive perceptions of the school climate than students [at schools that did not implement this model].").

[72] PETERSON & DENSLEY, *supra* note 45, at 104 (concluding from a review of school shootings that most perpetrators are "either current or former students of the school").

[73] *Id.* at 79 ("[N]early half of mass shooters tell someone that they are thinking about violence before they do it" and "K–12 school shooters are most likely to leak their plans").

[74] Sara B. Heller, Anuj K. Shah, Jonathan Guryan, Jens Ludwig, Sendhil Mullainathan & Harold A. Pollack, *Thinking, Fast and Slow? Some Field Experiments to Reduce Crime and Dropout in Chicago*, 132 Q. J. ECON. 1, 1 (2017) (finding that participation in the "Becoming a Man" counseling program that involved cognitive behavioral therapy at school "reduced violent-crime arrests by 45-50%" among participants, alongside other positive benefits).

[75] Melissa J. DuPont-Reyes, Alice P. Villatoro, Jo C. Phelan, Kris Painter, Kay Barkin & Bruce G. Link, *School Mental Health Curriculum Effects on Peer Violence Victimization and Perpetration: A Cluster-Randomized Trial*, 91 J. SCH. HEALTH 59, 65 (2021) (finding a mental health curriculum reduced "the perpetration of verbal threats among all students in the short-term, and the perpetration of physical, verbal, and social violence among students with mental heatlh problems over two-year follow-up").

children beginning to exhibit such behaviors.[76] School-wide anti-bullying programming may also reduce bullying and associated victimization.[77]

Most perpetrators of school shootings have a history of childhood trauma.[78] Many appear to have been victims of bullying.[79] And a large majority of all mass shooters experience mental health crises shortly before their crimes.[80] Considering the prevalence of mental health issues among perpetrators, preventive mental health care in schools may address environmental factors that contribute to school violence.

D. Gun Control Measures

Evidence does not establish that any gun control measures proposed or implemented after the tragedies in Uvalde and Nashville are likely to impact school shootings. However, some measures show potential to do so, and others may reduce gun violence generally. Penalties for illegal firearms transfers will likely have little effect on school shootings because perpetrators of these tragedies typically acquire guns from relatives. Background checks may reduce gun violence generally, but have no proven effect on school shootings or other mass shootings. Minimum age laws show potential to reduce mass shootings, but this effect is not clearly established. And, while "red flag" laws show considerable promise, such measures remain unproven.

1. General Impact of Firearms Restrictions

Research suggests that restricting access to firearms and reducing the prevalence of guns reduces firearm deaths and mass shootings. Domestically, states with higher concentrations of gun ownership experience a greater rate of firearm

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[76] Julie A. Mytton, Carolyn DiGuiseppi, David A. Gough, Rod S. Taylor, Stuart Logan, *School-Based Violence Prevention Programs: Systematic Review of Secondary Prevention Trials*, 156 ARCHIVES OF PEDIATRIC & ADOLESCENT MEDICINE 752, 752 (2002) (concluding from a meta-analysis of literature in the space that "school-based violence prevention programs may produce reductions in aggressive and violent behaviors in children who already exhibit such behavior").

[77] Hannah Gaffney, Maria M. Ttofi & David P. Farrington, *Evaluating the Effectiveness of School-Bullying Prevention Programs: An Updated Meta-Analytical Review*, 45 AGGRESSIVE & VIOLENT BEHAV. 111, 127 (2019) (concluding from a meta-analysis of relevant literature that anti-bullying programs in schools "are effective in reducing both school-bullying perpetration and victimization").

[78] PETERSON & DENSLEY, *supra* note 45, at 39 ("[N]early 70 percent of school mass shooters had a known history of childhood trauma.").

[79] Allison Paolini, *School Shootings and Student Mental Health: Role of School Counselor in Mitigating Violence* 90 VISTAS ONLINE (2015), https://connectuprogram.com/connectu/wp-content/uploads/Paolini-A.-school-shootings-and-student-mental-health.pdf [https://perma.cc/8UU7-VAZJ] (collecting sources showing that over seventy percent of perpetrators of school shootings experienced school bullying) (citing, *inter alia*, J. H. Lee, *School Shootings in U.S. Public Schools: Analysis Through the Eyes of an Educator*, 6 REV. HIGHER EDUC. & SELF-LEARNING 88 (2013)).

[80] PETERSON & DENSLEY, *supra* note 45, at 54 ("Eighty percent of all mass shooters in our database were in a state of crisis in the minutes, hours, days, or weeks prior to committing their shootings.").

homicides than do states with lower concentrations of gun ownership, even controlling for other factors.[81] And states with more permissive gun laws and higher rates of gun ownership experience more mass shootings than states with more restrictive laws and lower concentrations of gun ownership.[82] At the international level, research suggests that a nation's introduction of firearms restrictions is associated with a subsequent reduction in firearm deaths in that country.[83]

2. Penalties for Illegal Firearms Transfers

Penalties for illegal firearms transfers do not conclusively affect gun violence and likely will not affect school shootings. At the same time, these penalties may limit criminals' access to guns and discourage the proliferation of weapons.

Evidence does not clearly establish whether penalties for illegal transfers affect gun violence or mass shootings.[84] But illegal transfers are central to the acquisition of firearms by gang members who are most likely to use them in crimes.[85] And a study of policy changes in Maryland and Pennsylvania suggests that specific

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[81] Michael Siegel, Craig S. Ross & Charles King III, *The Relationship Between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2010*, 103 AM. J. PUB. HEALTH 2098, 2102 (2013) ("We found a robust relationship between higher levels of gun ownership and higher homicide rates that was not explained by any . . . potential confounders . . . ."); Matthew Miller, Deborah Azrael & David Hemenway, *Rates of Household Firearm Ownership and Homicide Across US Regions and States*, *1988-1997*, 92 AM. J. PUB. HEALTH 1988, 1991 (2002) ("In the United States, regions and states with higher rates of firearm ownership have significantly higher homicide victimization rates.").

[82] Paul M. Reeping, Magdalena Cerda, Bindu Kalesan, Douglas J. Wiebe, Sandro Galea & Charles C. Branas, *State Gun Laws, Gun Ownership, & Mass Shootings in the US: Cross Sectional Time Series*, 6 BRITISH MED. J. 364, 364 (2019) ("States with more permissive gun laws and greater gun ownership had higher rates of mass shootings, and a growing divide appears to be emerging between restrictive and permissive states.").

[83] Julian Santaella-Tenorio, Magdalena Cerdá, Andrés Villaveces & Sandro Galea, *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIOLOGIC REVS. 140, 140 (2016) ("Evidence from 130 studies in 10 countries suggests that in certain nations the simultaneous implementation of laws targeting multiple firearms restrictions is associated with reductions in firearm deaths.").

[84] *See, e.g.*, Cassandra K. Crifasi, Alexander D. McCourt, Marisa D. Booty & Daniel W. Webster, *Policies to Prevent Illegal Acquisition of Firearms: Impacts on Diversions of Guns for Criminal Use, Violence, and Suicide*, 6 CURRENT EPIDEMIOLOGICAL REPORTS 238, 245 (2019) (analyzing available studies and concluding that studies regarding laws intended to deter illegal acquisition are not conclusive, except with respect to Permit-to-Purchase restrictions on handguns, which are effective).

[85] *See* Phillip J. Cook, Richard J. Harris, Jens Ludwig & Harold A. Pollack, *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and Traffickers*, 104 J. CRIM. L. & CRIMINOLOGY 717, 752–54 (2015) (analyzing available data from the Bureau of Alcohol, Tobacco, and Firearms to conclude that straw purchases and illegal trafficking likely provide a significant source of guns for gang members who ultimately use the guns in criminal activity).

penalties for straw purchases and trafficking may encourage prosecution and thereby deter such offenses.[86]

These measures will likely have little effect on school shootings, however. In around eighty percent of such tragedies, perpetrators obtained firearms from their homes, including from family members.[87] So, while new penalties may limit other criminals' access to weapons, such measures are unlikely to affect prospective school shooters.

3. Background Checks

Background checks likely reduce gun violence and gun homicides generally, but do not affect mass shootings or school shootings. Background checks conducted by gun dealers at the point of sale may decrease firearm homicides.[88] Universal background checks likely also reduce total homicides, and firearm homicides in particular.[89] But no conclusive evidence suggests a connection between background

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[86] Cassandra K. Crifasi, Molly Merrill-Francis, Daniel W. Webster, Garen J. Wintermute & Jon S. Vernick, *Changes in the Legal Environment and the Enforcement of Firearm Transfer Laws in Pennsylvania and Maryland*, 25 INJURY PREVENTION 2 (2019).

[87] PETERSON & DENSLEY, *supra* note 45, at 165 ("Our data show that 80% of school shooters get their weapons from family members.").

[88] Amanda Charbonneau, *Effects of Background Checks on Violent Crime*, RAND, (Jan. 10, 2023), https://www.rand.org/research/gun-policy/analysis/background-checks/violent-crime.html [https://perma.cc/CT2B-FYQ9] (concluding from a meta-analysis of high-quality literature in the space that there exists "moderate evidence that dealer background checks may reduce firearm homicides") (citing, *inter alia* Mark Gius, *The Effects of State and Federal Background Checks on State-Level Gun-Related Murder Rates*, 45 APPLIED ECON. 4090, 4090 (2015)) (examining large data set to find that dealer background checks reduce firearm homicides); Bisakha Sen & Anantachai Panjamapirom, *State Background Checks for Gun Purchases and Firearm Deaths: An Exploratory Study*, 55 PREVENTATIVE MED. 346, 348 (2012) (finding that dealer background checks reduce firearm homicides); E.R. Vigdor & J.A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide*, 30 EVALUATION REV. 313, 341 (2006) (finding that states with a strong system for checking restraining orders saw significantly fewer intimate partner homicides)

[89] Charbonneau, *supra* note 88 (finding "moderate evidence that universal background check laws reduce total homicides" and "limited evidence that universal background checks reduce firearm homicides") (citing, inter alia, Elinore J. Kaufman, Christopher N. Morrison, Erik J. Olson, David K. Humphreys, Douglas J. Wiebe, Niels D. Martin, Carrie A. Sims, Mark H. Hoofnagle, C. William Schwab, Patrick M. Reilly & Mark J. Seamon, *Universal Background Checks for Handgun Purchases Can Reduce Homicide Rates of African Americans*, 88 J. TRAUMA AND ACUTE CARE SURGERY 825, 826 (2020) (finding significant reductions in firearm homicides for Black populations after the introduction of universal background checks); Michael Siegel, Benjamin Solomon, Anita Knopov, Emily F. Rothman, Shea W. Cronin, Ziming Xuan, and David Hemenway, *The Impact of State Firearm Laws on Homicide Rates in Suburban and Rural Areas Compared to Large Cities in the United States 1991-2016*, 36 J. RURAL HEALTH 255, 255 (2020); Anita Knopov, Michael Siegel, Ziming Xuan, Emily F. Rothman, Shea W. Cronin & David Hemenway, *The Impact of State Firearm Laws on Homicide Rates Among Black and White Populations in the United States 1991-2016*, 44 HEALTH & SOCIAL WORK 232, 236 (2019) (finding universal background checks associated with an eleven percent reduction in total homicides);

checks and mass shootings or school shootings.[90] And again, because most school shooters obtain their guns from their homes, background checks may not limit access to firearms by prospective perpetrators.

4. Minimum-Age Laws

Studies suggest, but do not conclusively prove, that laws raising the minimum age to buy firearms may reduce mass shootings. Few high-quality studies have considered the issue and insufficient research is available to establish a clear effect.[91] Notably, however, one high-quality study found that raising the minimum age to buy a firearm to twenty-one may reduce the likelihood of mass shootings.[92] Other research yields unclear results as to whether minimum-age laws affect firearm crimes more generally.[93]

5. "Red Flag" Laws

Research also yields inconclusive results as to the effects of "red flag" laws that provide for the confiscation of guns from potentially dangerous people.[94] Anecdotally, however, most perpetrators of school shootings inform someone of

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Michael Siegel, Molly Pahn, Ziming Xuan, Eric Fleegler & David Hemenway, *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991–2016: A Panel Study*, 34 J. GEN. INTERNAL MED. 2021, 2021 (2019) (finding that universal background check laws reduced firearm deaths at the state level).

[90] Terry L. Schell, *Effects of Background Checks on Mass Shootings*, RAND (2023), https://www.rand.org/research/gun-policy/analysis/background-checks/mass-shootings.html [https://perma.cc/87ZJ-4NMC] (concluding from a meta-analysis of literature in the space that "evidence for the effect of background checks on mass shootings is inconclusive").

[91] Rosanna Smart, *Effects of Minimum Age Requirements on Mass Shootings*, RAND (January 10, 2023), https://www.rand.org/research/gun-policy/analysis/minimum-age/mass-shootings.html, [https://perma.cc/HTJ5-W7X6] ("We identified two qualifying studies that examined how minim age requirements for purchasing a firearm affect the incidence of mass shootings or school shootings. . . . On the basis of these studies, *we find inconclusive evidence for how minimum age requirements for purchasing a firearm affect mass shootings*.").

[92] *Id.* (citing Daniel Hamlin, *Are Gun Ownership Rates and Regulations Associated with Firearm Incidents in American Schools? A Forty-Year Analysis (1980-2019)*, 76 J. CRIM. JUST. 1, 7 (2021) (finding as a secondary conclusion that states with a minimum age of 21 for firearm purchases may have a reduced likelihood of mass shootings)).

[93] Andrew R. Morral, *Effects of Minimum Age Requirements on Violent Crime*, RAND (Jan. 10, 2023), https://rand.org/research/gun-policy/analysis/minimum-age/violent-crime.html [https://perma.cc/6ZG9-LRRT] (concluding that available high-quality studies on the subject yield "inconclusive evidence for how minimum age requirements for *purchasing* a firearm affect total and firearm homicides" and "inconclusive evidence for how minimum age requirements for *possessing* a firearm affect total homicides, firearm homicides, and other violent crime") (emphasis added).

[94] *See The Effects of Extreme Risk Protection Orders*, RAND (Jan. 10, 2023), https://www.rand.org/research/gun-policy/analysis/extreme-risk-protection-orders.html [https://perma.cc/U7G2-2PVS] (finding inconclusive results as to how the implementation of "red flag" laws affects any identified outcome, including violent crime and mass shootings).

their plans.[95] And most mass shooters experience some kind of mental health or personal crisis before their crimes.[96] These findings suggest that most perpetrators provide enough warning that "red flag" laws could be deployed to prevent many tragedies. Descriptive studies also identify many instances in which these measures were successfully deployed to confiscate firearms from people threatening mass shootings, which bolsters this conclusion.[97]

IV. EVALUATING THE STATE AND FEDERAL POLICY RESPONSES

Evidence does not clearly show that any state or federal legislative response to school shootings in 2022 and 2023 will have a meaningful effect on school shootings. State policies include some minor appropriations that may modestly improve school safety. And the BSCA also includes potentially beneficial appropriations. The federal law's firearms restriction may also help to reduce gun violence generally.

A. State Policies

Lawmakers in both Texas and Tennessee responded to the shootings in their states with measures prioritizing harmful school hardening practices and school policing in particular. The states also dedicated some limited resources toward

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[95] PETERSON & DENSLEY, *supra* note 45, at 79 (finding that "nearly half of all mass shooters tell someone that they are thinking about violence before they do it" and "K–12 school shooters are most likely to leak their plans"); s*ee also* UNITED STATES SECRET SERVICE, PROTECTING AMERICA'S SCHOOLS: A U.S. SECRET SERVICE ANALYSIS OF TARGETED SCHOOL VIOLENCE 43 (2019) (explaining that most perpetrators of school shootings from 2007—2018 "elicited concern from bystanders regarding the safety of the attacker or those around them" prior to their attacks).
[96] PETERSON & DENSLEY, *supra* note 45, at 54 ("Eighty percent of all mass shooters in our database were in a state of crisis in the minutes, hours, days, or weeks prior to committing their shootings.").
[97] *See* April M. Zeoli, Shanno Frattaroli, Leslie Barnard, Andrew Bowen, Annette Christy, Michele Easter, Reena Kapoor, Christopher Knopke, Wejuan Ma, Amy Locznik, Michael Norko, Elise Omaki, Jennifer K. Paruk, Veronica A. Pear, Ali Rowhani-Rahbar, Julia P. Scleimer, Jeffrew W. Swanson, Garen J. Wintemute, *Extreme Risk Protection Orders in Response to Threats of Multiple Victim/Mass Shooting in Six U.S. States: A Descriptive Study*, PREVENTATIVE MED. Dec. 2022, 4, 4 (identifying numerous instances in which red-flag laws were deployed in response to threats of mass shootings); Garen J. Wintemute, Veronica A. Pear, Julia P. Schleimer, Rocco Pallin, Sydney Sohl, Nicole Kravitz-Wirtz, & Elizabeth A. Tomish, *Extreme Risk Protection Orders Intended to Prevent Mass Shootings*, 171 ANNALS OF INTERNAL MED. 655, 655 (2019) (identifying twenty-one cases in which California's red flag law was used in response to threats of mass shootings and concluding "the cases suggest that this urgent individualized intervention can play a role in efforts to prevent mass shootings . . . .").

potentially beneficial safety planning and mental health programs. But modest gun control measures with the potential to reduce mass shootings failed in both places.

1. Texas

Texas's policy response to the tragedy at Robb Elementary is unlikely to prevent school shootings or otherwise improve school safety and will likely undermine other outcomes for students.

Texas House Bill 3 requires that all public schools host an armed guard.[98] As described above, school police provide little proven benefit to school safety, and their presence may make school shootings deadlier.[99] Research also shows the presence of police in schools increases the rates at which students experience exclusionary discipline—punishments that, in turn, increase students' likelihood of eventual interaction with the criminal justice system.[100] To the extent schools opt to rely on armed guards who are not police—such as armed staff members—available research shows no clear safety benefits from this practice.[101] Texas's primary response to the Uvalde shooting is thus unlikely to impact school safety and will instead negatively affect students by increasing schools' reliance on harmful disciplinary practices.

The bill's safety planning requirements and general appropriations may provide some limited benefits to school safety. House Bill 3 codifies a requirement that schools regularly conduct lockdown drills,[102] and exercises of this kind can effectively prepare students for emergencies.[103] Lawmakers also appropriated some funds that may provide grants for mental health programming,[104] which can reduce violent tendencies in students and address environmental factors that accompany

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[98] 2023 Tex. Sess. Law Serv. Ch. 896 § 10 (West).
[99] PETERSON & DENSLEY, *supra* note 45, at 155; Cox et al., *supra* note 45, at 20; Burch & Binder, *supra* note 46, at A1; Goodman & Sandoval, *supra* note 47, at A1; Peterson et al., *supra* note 48, at 5; Fisher et al., *supra* note 49, at 21; Gottfredson et al., *supra* note 49, at 930.
[100] Fisher et al., *supra* note 49, at 21; Fisher & Hennessy, *supra* note 50, at 217; Weisburst, *supra* note 50, at 338; Gerlinger, et al., *supra* note 51, at 1503; Ramey, *supra* note 51, at 132; Monahan et al., *supra* note 51, at 1110.
[101] RAND, *supra* note 54, at 2.
[102] 2023 Tex. Sess. Law Serv. Ch. 896 § 12 (West).
[103] Schildkraut et al., *supra* note 64, at 170; Schildkraut and Nickerson, *supra* note 65, at 632; PETERSON & DENSLEY, *supra* note 45, at 108.
[104] 2023 Tex. Sess. Law Serv. Ch. 458 § 4.02 (West); 2023 Tex. Sess. Law Serv. Ch. 896 § 23 (West).

school violence.[105] But because the state's armed guard mandate is otherwise unfunded, schools may instead use these grant funds to hire police or other guards.[106]

Texas's failure to pass a minimum age law represents a missed opportunity.[107] At least one study suggests that laws of this kind may help prevent mass shootings, though this finding is not conclusive.[108] Anecdotally, the eighteen-year-old perpetrator of the shooting at Robb Elementary legally bought a semi-automatic weapon several days before the tragedy, indicating that a minimum-age law could have prevented the incident.[109] By contrast, police stationed at Robb Elementary failed to intervene for well over an hour—a clear failure, according to the Department of Justice.[110] Texas policymakers in the 2023 legislative session thus failed to implement a measure that could have prevented violence at Robb Elementary and instead doubled down on a policy that manifestly failed to do so.

2. Tennessee

Tennessee's policy response to the shooting at The Covenant School prioritized similar ineffective policies, though it may also include some modestly beneficial elements.

Like their counterparts in Texas, Tennessee lawmakers prioritized school policing and school hardening during the state's 2023 legislative session. The state's policy response extends school policing to private schools and allocates $140 million to fund the placement of police in schools throughout the state.[111] Again, this practice provides little proven benefit to student safety and contributes to harmful student discipline practices.[112] The state's school safety bill also provides more than

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[105] Heller et al*.*, *supra* note 74, at 2; DuPont-Reyes et al., *supra* note 75, at 66–67; Mytton et al., *supra* note 76, at 752; Gaffeny et al., *supra* note 77, at 112; PETERSON AND DENSLEY, *supra* note 45, at 39, 54; Paolini et al., *supra* note 79, at 3.

[106] S. 5, 88th Leg. 4th Spec. Sess. § 2 (Tex. 2023); H.R. 2, 88th Leg. 4th Spec. Sess. § 1(b-1) (Tex. 2023); Pandey, *supra* note 15, ("The fourth special legislative session this year ended without increased funding for school safety—even though public schools have complained . . . they don't have enough money to met new safety mandates . . . .".).

[107] H.R. 2744, 88th Leg. § 1(a)(2)(B) (Tex. 2023); Serrano, *supra* note 17 (detailing how the legislature's failure to place H.B. 2744 on the House Agenda after a key deadline "likely end[ed] the bill's chances of becoming law"); Svitek, *supra* note 18 (describing a survey from the University of Texas at Austin that "found 76% of voters support 'raising the legal age to purchase any firearm from 18 years of age to 21 years of age.'"); Serrano, *supra* note 19.

[108] Smart*, supra* note 91, at 2–3; Smart, *supra* note 92, at 2; Morral, *supra* note 93, at 5–6.

[109] Reese Oxner, *Uvalde Gunman Legally Bought AR Rifles Days Before Shooting, Law Enforcement Says*, TEX. TRIB. (May 25, 2022) https://www.texastribune.org/2022/05/25/uvalde-shooter-bought-gun-legally/ [https://perma.cc/72JH-YE2K].

[110] DOJ, CRITICAL INCIDENT REVIEW: ACTIVE SHOOTER AT ROBB ELEMENTARY 9–16, 90, 409 (2024).

[111] S. 315, 113th Gen. Assemb., 2023 Reg. Sess. § 1(a) (Tenn. 2023); 2023 Tenn Pub. Acts Ch. No. 87; H.R. 1545, 113th Gen. Assemb., 2023 Reg. Sess. § 54 (Tenn. 2023).

[112] PETERSON & DENSLEY, *supra* note 45, at 155; Burch & Binder, *supra* note 46, at A1; Goodman & Sandoval, *supra* note 47, at A1; Peterson et al., *supra* note 48, at 5; Fisher et al., *supra* note 49,

$20 million that can be applied toward physical security.[113] Measures like video cameras and metal detectors provide little proven benefit to school safety and may undermine other student outcomes.[114] Door locks, however, can help during emergencies.[115] Tennessee's prioritization of school policing and physical security is thus unlikely to improve school safety and may be counterproductive.

Tennessee's codification of lockdown drills and threat assessments may improve school safety.[116] Lockdowns may help to save lives during emergencies.[117] And threat assessments can help to identify and address potential issues before they materialize, particularly because most school shooting perpetrators inform others of their plans.[118]

Tennessee also provided modest funding for mental health supports.[119] School-based mental health programming can reduce violent tendencies in children and address environmental factors that contribute to school violence, like bullying and mental illness.[120] But, the state's low level of funding—just $8 million—provides only minimal support and is thus unlikely to have much effect.

The failure of a proposed "red flag" law in Tennessee represents a missed opportunity to implement a potentially beneficial intervention. Laws of this kind remain unproven.[121] But, most school shooters—including the perpetrator of the shooting at The Covenant School—display warning signs before their crimes.[122]

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at 18; Gottfredson et al., *supra* note 49, at 930; Fisher et al., *supra* note 50, at 217; Weisburst, *supra* note 50, at 338; Gerlinger et al., *supra* note 51, at 1503; Ramey, *supra* note 51, at 132; Monahan et al., *supra* note 51, at 1110; Fisher et al., *supra* note 52, at 18; Fisher et al., *supra* note 53, at 2.

113 H.R. 1545, 113th Gen. Assemb., 2023 Reg. Sess. § 60 (Tenn. 2023).

114 Nickerson & Martens, *supra* note 55, at 238; Tanner-Smith et al., *supra* note 56, at 102; Hankin et al., *supra* note 57, at 105; Fisher et al., *supra* note 58, at 22; SCHILDKRAUT & NICKERSON, *supra* note 59, at 54; Perumean-Chaney & Sutton, *supra* note 60, at 581–582; Johnson et al., *supra* note 62, at 735; Tanner-Smith & Fisher, *supra* note 63, at 204.

115 SCHILDKRAUT & NICKERSON, *supra* note 59, at 54.

116 H.R. 322, 113th Gen. Assemb., 2023 Reg. Sess. §§ 5(a), 5(d), 7(a), 10(a) (Tenn. 2023); 2023 Tenn Pub. Acts Ch. No. 367 at §§ 5(a), 7(a).

117 Schildkraut et al., *supra* note 64, at 170; Schildkraut & Nickerson, *supra* note 65, at 632; PETERSON & DENSLEY, *supra* note 45, at 108; SCHILDKRAUT & NICKERSON, *supra* note 59, at 66; Nickerson & Zhe, *supra* note 67, at 506; Schildkraut et al., *supra* note 68, at 1891; Schildkraut et al., *supra* note 68, at 102–03; ElSherief et al, *supra* note 69, at 8–9.

118 Borum et al., *supra* note 70, at 31; Cornell et al., *supra* note 71, at 527; Cornell et al., *supra* 71, at 119–21; PETERSON & DENSLEY, *supra* note 45, at 104; PETERSON & DENSLEY, *supra* note 45, at 79.

119 H.R. 1545, 113th Gen. Assemb., 2023 Reg. Sess. § 54 (Tenn. 2023).

120 Heller et al., *supra* note 74, at 1–2; DuPont-Reyes et al., *supra* note 75, at 66–67; Mytton et al., *supra* note 76, at 752; Gaffney et al., *supra* note 77, at 111.

121 RAND, *supra* note 94, at 2.

122 PETERSON & DENSLEY, *supra* note 45, at 79; PETERSON & DENSLEY, *supra* note 45, at 54.

And some descriptive research indicates that "red flag" laws can effectively disarm people threatening mass shootings.[123]

B. Federal Policy: The Bipartisan Safer Communities Act

The BSCA shows more potential to reduce gun violence than do state policy responses. The legislation's funding for state-level "red flag" laws shows promise for the reasons above, though again, such measures remain unproven.[124] These appropriations also rely on state legislatures implementing such laws, which—as Tennessee demonstrated in 2022—is far from guaranteed.

The law's background check expansions are similarly unproven with respect to mass shootings, though they may help to reduce gun violence. The Act modestly expands the records that may be reviewed in background checks for gun buyers under age twenty-one.[125] Evidence suggests that background checks reduce gun violence.[126] But the effects of the BSCA's narrow expansion are uncertain and will likely be limited only to the targeted, under-twenty-one population. Evidence also does not clearly show whether background checks affect mass shootings or school shootings in particular, meaning these provisions are not certain to affect such tragedies.[127]

The Act's new penalties for illegal gun transfers may reduce the flow of firearms to criminals, but evidence does not clearly show that these measures will reduce gun violence or mass shootings.[128] This is because most perpetrators of school shootings obtain the firearms used in their attacks from home and not via illicit means.[129] Even so, descriptive studies infer that firearms trafficking and straw purchases are central to the transfer of firearms for other criminal purposes, and new penalties for these offenses may contribute to broader efforts to reduce the proliferation of firearms.[130]

The law's sprawling appropriations are also likely to have a mixed impact. Between several grant programs, including the Community Mental Health Block Grant Program and School-Based Mental Health Services Grants, the BSCA appropriates well over $1 billion toward mental health programming for students and children.[131] Evidence shows that such programming reduces violent tendencies

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[123] Zeoli et al., *supra* 97, at 4.
[124] RAND, *supra* 94, at 2.
[125] *See* Bipartisan Safer Communities Act, § 12001, 136 Stat. at 1322–24.
[126] Charbonneau, *supra* note 88, at 15; Sen & Panjamapirom, *supra* note 88, at 348–49; Vigdor & Mercy, *supra* note 88, at 337; Siegel et al., *supra* note 89, at 255; Knopov et al., *supra* note 89, at 237–38; Siegel et al., *supra* note 89, at 2021; Schell, *supra* note 90, at 2–3.
[127] Charbonneua, *supra* note 88, at 15; Sen & Panjamapirom, *supra* note 88, at 348–49; Vigdor & Mercy, *supra* note 88, at 323.
[128] Cook et al., *supra* 85, at 752–54; Crifasi et al., *supra* note 86, at 2; PETERSON & DENSLEY, *supra* note 45, at 155.
[129] PETERSON & DENSLEY, *supra* note 45, at 165.
[130] Cook et al., *supra* 85, at 752–54; Crifasi et al., *supra* note 86, at 2.
[131] *See* Bipartisan Safer Communities Act, § 12001, 136 Stat. at 1324; OFF. ELEMENTARY & SECONDARY EDUC., U.S. DEP'T EDUC., *supra* note 41; OFF. ELEMENTARY & SECONDARY EDUC.,

among students and addresses environmental issues like bullying that often accompany school violence.[132] The BSCA's considerable appropriations toward this purpose are thus likely to have a meaningful impact.

That said, the BSCA also makes funding available for harmful school hardening measures, including school policing and physical security, through its funding for STOP School Violence Act purposes and the Stronger Connection Grant Program.[133] This same pool of money can also be used for more productive purposes, including mental health programming and school discipline reform.[134] But given the size of the grant program, it is likely that some of this funding will flow toward counterproductive school hardening measures.

V. CONCLUSIONS

Evidence suggests that the legislative responses to major school shootings in 2022 and 2023 will yield mixed results. State-level policies enacted after these tragedies will likely have little effect on school violence and may result in harmful outcomes for students. Neither Texas nor Tennessee enacted new firearms restrictions despite potentially beneficial proposals. Instead, legislators in both jurisdictions doubled down on harmful school policing policies and security measures proven to negatively affect students.

The Bipartisan Safer Communities Act shows more promise. It is the first major firearms restriction passed in decades, and it cleared Congress on a bipartisan basis, showing the possibility of consensus around gun control. The law also provides enormous funding for mental health programming and state-level red-flag laws that may help protect children. However, the Act's modest firearms restrictions are not necessarily proven to prevent tragedies like those at Robb Elementary and The Covenant School, and some of its appropriations—including those toward school policing—may be harmful.

Lawmakers can build on this progress and implement additional, meaningful reform. However, if policymakers wish to prevent these tragedies in the future, they must look to the evidence.

U.S. DEP'T EDUC., *supra* note 42; Bipartisan Safer Communities Supplemental Appropriations Act, 136 Stat. at 1340; Pub. Health Service Act, *supra* note 44, at § 300 x-1.

[132] Heller et al*.,* supra note 74, at 2; DuPont-Reyes *et al., supra* note 75, at 72; Mytton et al., *supra* note 76, at 752; Gaffeny et al., *supra* note 77, at 112.

[133] Bipartisan Safer Communities Supplemental Appropriations Act, 136 Stat. at 1338-39, 1341; Students, Teachers, and Officers Preventing School Violence Act of 2018, Pub. L. 115-141 §§ 501–505; Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, §§ 4101–4111.

[134] Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, §§ 4101–4111.

STANDARDIZATION AND POLICY CHANGE: KEY STRATEGIES FOR REDUCING VIOLENCE IN HEALTHCARE

*By: Madisyn Schmitz**

I. INTRODUCTION

It was like any other day working as a nurse in the emergency department. While on shift, a nurse was in the triage room with a patient and a security guard. Unbeknownst to the nurse, the patient struggles with mental health issues that are exacerbated by the stress the patient experiences from housing insecurity. The nurse began her assessment of the patient noting that the patient was visibly anxious and agitated. Despite this, the patient spoke clearly and nicely to the nurse. The nurse determined the best form of treatment was to give the patient a shot of anti-anxiety medication. After the patient consented, the nurse began the standard process of administering the shot. However, before the shot was administered, the patient became aggressive and threatening, suddenly hitting the nurse. As the syringe flew into the air, hitting a wall, security personnel and more nurses rushed into the room and restrained the patient. This is just one of many stories of violence that healthcare workers experience.[1]

Violence in healthcare is on the rise.[2] Violence against workers is five times more likely to occur in a healthcare setting as compared to non-healthcare workplace settings.[3] "Nearly every healthcare worker has been a victim or knows a coworker

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[1] Patrick Skerrett, *Choked, Punched, Bitten: Nurses Recount Attacks by Patients*, STAT (Nov. 20, 2015), https://www.statnews.com/2015/11/20/nurses-patient-violence/ [https://perma.cc/G88Q-A2WB].

[2] *See NNU Report Shows Increased Rates of Workplace Violence Experienced by Nurses,* NAT'L NURSES UNITED (Feb. 5, 2024), https://www.nationalnursesunited.org/press/nnu-report-shows-increased-rates-of-workplace-violence-experienced-by-nurses#:~:text=Survey%20results%20reveal%20majority%20of,during%20the%20Covid%2D19%20pandemic [https://perma.cc/W5VJ-B6LT].

[3] Chris Calderone, *Healthcare Industry Violence: Causes, Impact, and Prevention*, GHX (July 5, 2023), https://www.ghx.com/the-healthcare-hub/violence-healthcare/ [https://perma.cc/9W4U-PF4Y].

who has been a victim of workplace violence."[4] There has also been an increase in verbal abuse towards healthcare workers since the COVID-19 pandemic.[5] As a result of violence, many individuals now avoid seeking care in hospitals because they are concerned they will encounter individuals who become violent.[6]

Kansas healthcare workers also experience high rates of violence.[7] In Kansas, 46.2 percent of hospitals report instances of workplace violence.[8] The University of Kansas Health System documented 353 physical assaults in the 2022 fiscal year.[9] Similarly, a hospital in Wichita, Kansas reported 378 incidents of violence from January 2022 to November 2022.[10] Action is rarely taken in reported incidents of violence and even when action is taken, the penalties are minimal.[11]

Violence in healthcare settings is a multifaceted, critical challenge that negatively impacts healthcare professionals and undermines the overall quality of patient care. This Article scrutinizes the effectiveness of current laws and regulations in addressing and preventing violence within healthcare environments. This Article then makes suggestions for reform to make healthcare workplaces less violent.

II. BACKGROUND

Healthcare and violence are complex issues. This section aims to provide context regarding the healthcare environment by defining violence and discussing where violence occurs in healthcare, risk factors for violence, and the culture of underreporting.

A. Violence Defined

Workplace violence in healthcare encompasses a broad continuum of behaviors.[12] Violence includes both verbal and nonverbal behavior as well as physical behaviors that could threaten or actually cause harm.[13] In addition, violence

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[4] *Violence in Healthcare Part 1: Risk Factors and Warning Signs*, THE SULLIVAN GRP., https://blog.thesullivangroup.com/rsqsolutions/violence-in-healthcare-risk-factors-warning-signs [https://perma.cc/7ZNP-CN99].

[5] *See* Chris Ciabarra, *Five Innovations Healthcare Facilities Can Use to Combat Workplace Violence*, FORBES (June 14, 2023, 10:00 AM), https://www.forbes.com/sites/forbestechcouncil/2023/06/14/five-innovations-healthcare-facilities-can-use-to-combat-workplace-violence/?sh=103e5a43535b [https://perma.cc/6HRB-XQYA].

[6] Calderone, *supra* note 3.

[7] *See Kansas Advocacy Issue: Addressing Workplace Violence*, KANSAS HOSP. ASS'N (Mar. 5, 2024), https://www.kha-net.org/Advocacy/AdvocacyIssues/163171.aspx [https://perma.cc/USM9-2C3V].

[8] *Id.*

[9] Tim Carpenter, *Kansas Hospital Officials Say New Criminal Penalties Needed to Deter Patient, Visitor Violence*, KAN. REFLECTOR (Apr. 20, 2023, 10:35 AM), https://kansasreflector.com/2023/04/20/kansas-hospital-officials-say-new-criminal-penalties-needed-to-deter-patient-visitor-violence/ [https://perma.cc/KF2C-8PHE].

[10] *Id.*

[11] For example, an assailant in Topeka was only charged with a misdemeanor and released seventeen hours after violently attacking a nurse. *Id.*

[12] Nicole Dailey, Note, *Prevention and Surveillance of Violence Against Minnesota Healthcare Workers*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 51, 53–54 (2020).

[13] *Id.* at 54.

can include non-physical behaviors.[14] Non-physical behaviors include things like threats, yelling, biting, or urinating.[15] Non-physical behaviors are more difficult to define because they are dependent on the subjective perceptions an individual has of certain actions. For example, one person might perceive a patient raising their voice as a form of non-physical violence and another person might not. These subjective perceptions can vary not only from person to person but can also depend on workplace culture.[16]

According to one study, "[80] percent of serious, violence-related injuries in healthcare settings were caused by patients."[17] Typically, most individuals would assume that violence implies that an individual has intent behind their behavior.[18] However, intent is not always present in healthcare workplace violence because patients may act violently without having the capacity to understand the consequences of their actions.[19] This kind of violence may be caused by an involuntary response that stems from the patient's condition—which may be the reason the patient is seeking healthcare treatment in the first place.[20] It follows that unintentional violence by patients could make up the majority of workplace violence in healthcare.[21]

B. Where Violence Occurs

Violence against healthcare workers occurs in all healthcare settings with some healthcare settings being at higher risk for violence.[22] Examples of high-risk healthcare environments include acute psychiatric facilities, long-term care facilities, and high-volume urban emergency departments.[23] Additionally, hospitals in general present a unique range of risks of violence.[24] Some of the areas in a hospital where violence is more likely to occur include the hospital lobby, emergency department, and psychiatric units.[25] Recognition of threatening individuals and prevention of violent episodes are difficult due to hospitals being readily accessible to the general public.[26] Violent incidents in emergency

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[14] Dailey, *supra* note 12, at 54.
[15] *Id.*
[16] *Id.* at 54, 56.
[17] Beth A. Lown & Gary S. Setnik, *Utilizing Compassion and Collaboration to Reduce Violence in Healthcare Settings,* 7 ISR. J. HEALTH POL'Y RSCH. 39 (2018).
[18] Sharon Peters, Lewis Brisbois, & Allison Hay Petersen, *Ensuring Safety and Compliance During Difficult Patient Encounters*, 20180205 AHLA SEMINAR PAPERS 11 (2018).
[19] *See id.*
[20] Dailey, *supra* note 12, at 54.
[21] *See id.*; OCCUPATIONAL SAFETY & HEALTH ADMIN., *Workplace Violence in Healthcare: Understanding the Challenge* 2 (2015).
[22] Dailey, *supra* note 12, at 56.
[23] *Id.*
[24] Peters et al., *supra* note 18.
[25] *Id.*
[26] *Id.*

departments may be high because many high-risk[27] patients are initially treated in the emergency department.[28] Similarly, psychiatric units account for the most assault cases in hospitals due to a heightened risk of exposure to patients who act violently as a result of the patients' mental health disorder(s).[29]

C. Risk Factors

Several risk factors increase the likelihood of violence occurring in healthcare. This article will view these risk factors through a four-category framework of environmental factors, organizational factors, patient factors, and external factors.

1. Environmental Factors

Environmental factors are factors based on the structure of the work area in healthcare settings. Some factors in this category include the layout, design, and amenities of the physical workspace.[30] Design flaws like hallways and rooms with bad lighting, reduced visibility of patient care areas, and minimal means of escape when a patient or family member becomes violent, can increase the risk of injury.[31]

2. Organizational Factors

Organizational risk factors are factors that relate to how a healthcare entity is organizationally structured. For instance, some healthcare entities lack policies and staff training for recognizing and de-escalating potentially violent situations.[32] Other examples of organizational factors include understaffing, insufficient mental health and security staff, long wait times, overcrowding, uncomfortable accommodations such as hard seating, noisy rooms, lack of access to outlets for chargers etc., and workers transporting or working alone with patients.[33] Organizational risk factors also encompass workplace culture characteristics such as careless management and staff attitudes toward workplace violence prevention, and a tendency to want to retaliate against those who do make reports.[34] Lastly, inadequate security procedures

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[27] High-risk patients as used here refers to individuals who may experience mental health crises or experience other social risk factors such as insecure housing, lack of access to food, live in violent areas, etc. Consider the patient discussed in the anecdote at the beginning of this article. The patient's mental health issues and lack of secure housing could cause the patient to become agitated more quickly from the added stress of these experiences as compared to an individual without these experiences. *See* Juli Carrere, Hugo Vásquez-Vera, Alba Pérez-Luna, Ana M. Novoa, & Carme Borrell, *Housing Insecurity and Mental Health: The Effect of Housing Tenure and the Coexistence of Life Insecurities*, 99 J. URB. HEALTH 268, 269 (2022).

[28] THE SULLIVAN GRP., *supra* note 4.

[29] *See id.*

[30] *See* Peters et al., *supra* note 18.

[31] Dailey, *supra* note 12, at 56–57.

[32] *Id.* at 57.

[33] *Id.* at 56–57.

[34] Nat'l Institute for Occupational Safety & Health, *Organizational Risk Factors*, CDC (May 16, 2024), https://wwwn.cdc.gov/WPVHC/Nurses/Course/Slide/Unit3_9 [https://perma.cc/DA5V-N3J3]; Peters et al, *supra* note 18.

and protocols, and cumbersome or nonexistent policies for reporting and managing crises fall under the organizational category.[35]

3. Patient Factors

Patients sometimes have characteristics from a diagnosis or other behavior that indicate a greater likelihood of violence. These are what this Article will refer to as patient factors. Patients who have a diagnosis that involves altered mental status due to dementia, delirium, intoxication, and mental illness most frequently possess characteristics associated with perpetrators of violence in healthcare settings.[36] Some other risk factors in patients that may increase the likelihood of impending violence include inappropriate laughter, extreme physical agitation, hitting walls or other items, and excessive sarcasm.[37] Other indicators of violence include a prior history of violence, poor impulse or anger control, substance use, acute psychosis, mania, head injury, metabolic disorders, and seizures.[38]

4. External Factors

External risk factors impact violence from a broader societal perspective. Some of the external risk factors include the prevalence of handguns and other weapons available to the general public, increased use of the hospital by law enforcement and the criminal justice system for criminal patient holds, increased number of mentally ill patients released from inpatient stays without outpatient follow-up, availability of drugs, and the amount of wealth in a community.[39] External risk factors also encompass socioeconomic factors.[40] Socioeconomic risk factors include a high concentration of poverty, high levels of family disruption, low community participation, social and cultural norms that encourage violence, and broader policies that help perpetuate current economic or social inequities between various groups in society.[41] The broader context of pervasive inequities along with the complexity of the healthcare system create a confluence of stressors and negative feelings that contribute to acts of violence.[42]

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[35] Nat'l Institute for Occupational Safety & Health, *supra* note 34.
[36] *See* Lown & Setnik, *supra* note 17.
[37] THE SULLIVAN GRP., *supra* note 4.
[38] *Id.*
[39] *Id.*
[40] *See* Nat'l Institute for Occupational Safety & Health. *Social and Economic Risk Factors*, CDC (May 16, 2024), https://wwwn.cdc.gov/WPVHC/Nurses/Course/Slide/Unit3_10 [https://perma.cc/7BHW-WNKB].
[41] *Id.*
[42] Lown & Setnik, *supra* note 17. From a general societal level there are various inequities amongst different populations of people. *See id.* In addition, the healthcare system is disjointed and complex. *See id.* Individuals navigating the complexity alone is difficult. *See id.* Adding the extra layer of socioeconomic factors can create more stress and negative feelings that may be targeted at the healthcare system. *Id.* These feelings can increase the number of individuals perpetuating violence against those who work in the healthcare system. *See id.*

D. Underreporting and Healthcare Culture

The culture of healthcare workers is to be compassionate in the care provided to patients.[43] Caregivers feel a professional and ethical duty to do no harm and put their safety at risk to treat a violent patient because violent behavior by a patient may often be unintentional.[44] Healthcare workers are reluctant to blame patients for violence because it would stigmatize patients and their mental illnesses or impairments.[45] As a result, healthcare workers are reluctant to report violence.[46]

Healthcare workers underreport occurrences of violence.[47] At times, healthcare workers tolerate verbal abuse from each other, which can lead to workers feeling they must also accept verbal abuse from patients.[48] Consequently, healthcare workers may underreport due to a belief that violence is just part of the job.[49] Additionally, healthcare workers may feel reporting is not worth their time because reporting does not result in meaningful change and because healthcare workers do not have additional time in their workday to complete a report.[50] Other reasons for the lack of reporting include fear of retribution by supervisors, a lack of management accountability, and a belief that many patients who exhibit violent behaviors are not fully in control of themselves due to their underlying conditions.[51] "Lack of reporting makes it difficult to assess workplace violence prevalence and the effectiveness of interventions to reduce it."[52]

III. CURRENT POLICY

The healthcare landscape is regulated at many levels. Healthcare organizations must follow federal and state policy as well as comply with other private regulations to remain in business.[53] This article argues that most of these laws and policies have been ineffective at preventing workplace violence. While individuals who commit violence in healthcare workplaces are subject to criminal prosecution, prosecution is not an effective deterrent in most cases, and the culture of underreporting renders it difficult to enforce some of these laws or assess the effectiveness of policy interventions.[54] The following section analyzes the relevant laws and policies regulating healthcare organizations.

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[43] *See* Ciabarra, *supra* note 5.
[44] Peters et al., *supra* note 18.
[45] *Id.*
[46] Ciabarra, *supra* note 5.
[47] OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 21.
[48] Dailey, *supra* note 12, at 57.
[49] *Id.*; Peters et al., *supra* note 18.
[50] Dailey, *supra* note 12, at 57.
[51] Lown & Setnik, *supra* note 17.
[52] *Id.*
[53] Robert I. Field, *Why is Health Care Regulation So Complex?*, 33 PHARMACY AND THERAPEUTICS 607, 607 (2008).
[54] *See infra* Section III.B.3.

A. Federal Laws and Policies

Federal laws and policies directly addressing violence against healthcare workers have been unsuccessful so far. The latest attempt at federal legislation addressing violence against healthcare workers came from the introduction of two bills: the Workplace Violence Prevention for Health Care and Social Service Workers Act and the Safety from Violence for Healthcare Employees Act (SAVE Act).[55] While neither bill gained traction in Congress, there is potential that these bills could address the issue of violence in healthcare.

1. The Workplace Violence Prevention for Health Care and Social Service Workers Act

The Workplace Violence Prevention for Health Care and Social Service Workers Act ("the Act") was first introduced in February 2021.[56] In 2021, the Act passed in the House but did not receive further action in the Senate after it was referred to the Committee on Health Education, Labor, and Pensions.[57] The Act was reintroduced in both the House and the Senate in April 2023 and referred to the Committee on Education and Workforce but has received no further action.[58] The Act would direct the Secretary of Labor to issue an occupational safety and health standard that requires covered employers within the healthcare and social service industries to develop and implement comprehensive workplace violence prevention plans.[59]

Requiring healthcare organizations to implement violence prevention plans would help address organizational risk factors.[60] This is because the Act has specific provisions that require violent incident investigations with documentation, training and education, annual reporting and evaluation of the plan, and implementation of an anti-retaliation policy.[61] By requiring healthcare entities to address some of the organizational risk factors and help increase reports of violence, occurrences of violence could be decreased.[62]

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[55] *See* H.R. 1195, 117th Cong. (2021); S.2768, 118th Cong. (2023).
[56] *See* H.R. 1195, 117th Cong. (2021).
[57] *Id.*
[58] *See* H.R. 1195, 117th Cong. (2021); H.R. 2663, 118th Cong. (2023).
[59] S. 1176, 118th Cong. (2023). The Act defines covered employers as "a person (including a contractor, a subcontractor, a temporary service firm, or an employee leasing entity) that employs an individual to work at a covered facility or to perform covered services." § 102(3)(A). The Act also defines covered services to include home health, home based hospice, home based social work, and emergency services, amongst others. *See* § 102(2)(A).
[60] *See id.*
[61] *See id.* at § 103.
[62] *See generally* OCCUPATIONAL SAFETY AND HEALTH ADMIN., *supra* note 47 (outlining five key components of a workplace violence prevention program).

2. *The Safety from Violence for Healthcare Employees Act (SAVE Act)*

The SAVE Act was first introduced in the House of Representatives in June 2022[63] and reintroduced in the Senate in September 2023.[64] This bill did not gain traction in Congress despite widespread support from healthcare workers and hospital associations.[65] The SAVE Act mirrors protection for aircraft and airport workers[66] to create stronger penalties for individuals who assault or harass hospital workers, and includes a defense for patients who are mentally incapacitated due to illness or substance use.[67]

The SAVE Act would be limited in its ability to address violence. The SAVE Act would apply only to people who *knowingly* assault a healthcare worker.[68] As stated earlier, patients perpetrate most incidents of violence, and many of those patients do not intend to cause violence.[69] The SAVE Act, rightfully, provides an exception of fault for patients with a physical, mental, or intellectual disability when their conduct is a clear and direct manifestation of their disability.[70] However, this exception could be problematic because of its lack of definition; it is unclear what constitutes a disability in this context and what exactly a clear and direct manifestation is.[71] Subjecting unintentional acts of violence in the healthcare system to criminal prosecution is problematic because this could impact how and if patients can even receive the care they need. To remedy the issue of intent for purposes of criminal prosecution, Congress could look to the Americans with Disabilities Act for a definition of disability.[72] Additionally, Congress could clarify the "clear and direct manifestation" standard by explicitly requiring a nexus between the perpetrator's claimed disability and the violent act. For example, if a person has a diagnosis of schizophrenia, the violent act of the patient with schizophrenia must relate to a symptom of schizophrenia such as having a hallucination at the time of the violent act.[73]

The SAVE Act is limited in other ways. It would likely take time before this bill would be effective at preventing violence. It can take years for someone to go through the judicial system[74] and most individuals would likely be unaware of the

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[63] H.R. 7961, 117th Cong. (2022).
[64] S. 2768, 118th Cong. (2023).
[65] Susanna Vogel, *Lawmakers Introduce Bipartisan Legislation Addressing Workplace Violence in Hospitals—Again,* HEALTHCARE DIVE (Sept. 13, 2023), https://www.healthcaredive.com/news/lawmakers-introduce-bipartisan-legislation-addressing-workplace-violence-in/693547/ [https://perma.cc/B5L7-E23F].
[66] *Compare* 49 U.S.C § 46504, *with* S. 2768 § 120(a).
[67] Vogel, *supra* note 65.
[68] S. 2768 § 120(a).
[69] *See supra* Section II.A.
[70] S. 2768 § 120(c)(1).
[71] *See id.* at § 120(d) (containing no definition for "disability" or "clear and direct manifestation").
[72] *See* 42 U.S.C. § 12102(1) (defining disability with a focus on how an individual's impairment impacts major life activities).
[73] *See generally Schizophrenia*, CLEVELAND CLINIC (June 28, 2023), https://my.clevelandclinic.org/health/diseases/4568-schizophrenia [https://perma.cc/83P3-55G4].
[74] *See, e.g., United States v. Keith*, 61 F.4th 839, 842–44 (10th Cir. 2023) (chronicling one criminal defendant's case from 2018–2021 at the trial court level).

penalties involved in this bill.[75] Until examples have been made, it is doubtful most individuals would think about penalties for committing violence in healthcare entities.[76] Additionally, since this bill would react to violence that has already occurred, it would not directly address the issue of underreporting.[77] This can create a circular problem. If individuals are not reporting violence, then there would be no penalty to enforce on perpetrators of violence.[78]

B. Kansas Laws and Policies

Kansas law has the potential to provide some protections for healthcare workers through workers compensation, common law civil liability principles, and criminal law.[79] However, common law civil liability principles are currently largely unavailable due to Kansas workers compensation rules.[80] In addition, Kansas licensing requirements and regulations for hospitals do not currently address the issue of workplace violence. [81]

1. Kansas Workers' Compensation

Kansas created its workers compensation program in 1911.[82] The law was enacted to protect employees impacted by workplace accidents by creating a no-fault system to provide injured workers with compensation while simultaneously protecting employers from civil litigation.[83] Kansas workers compensation law covers nearly all employers.[84] Workers compensation rules only apply if the employer's behavior is negligent and not willful.[85] In addition, if employers fail to

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[75] Many Americans are unaware of the rights guaranteed by the First Amendment of the U.S. Constitution, let alone the contents of federal laws. *See Many Don't Know Key Facts About U.S. Constitution, Annenberg Civics Study Finds*, PENN TODAY (Sept. 13, 2023), https://penntoday.upenn.edu/news/many-dont-know-key-facts-about-us-constitution-annenberg-civics-study-finds [https://perma.cc/W3VZ-9TCL].

[76] *See generally* NAT'L INST. OF JUST., *Five Things About Deterrence,* U.S. DEP'T OF JUST. (May 2016), https://nij.ojp.gov/topics/articles/five-things-about-deterrence [https://perma.cc/C2GK-GL7D].

[77] *See* S. 2768 (containing no provisions to address underreporting of violence against healthcare workers).

[78] Healthcare workers are best positioned to alert authorities when a patient has "knowingly" assaulted an employee within the SAVE Act's meaning. *See id.*

[79] *See infra* Sections II.B.1–3.

[80] *See* The Kansas Workers Compensation Act, KAN. STAT. ANN. § 44-501–5,127.

[81] *See infra* Section II.B.4.

[82] CHRIS LEWIS, REBECCA VRBAS, GARRETT HAMMAN, & ALLIE SANFORD, 49TH ANNUAL 2023 STATISTICAL REPORT: WORKERS COMPENSATION DIVISION, KAN. DEP'T OF LAB. 6 (2023).

[83] *Id.*

[84] *Id.*

[85] *Can I Sue my Employer if I Get Injured at Work in Kansas?*, PALMER L. GRP. (July 17, 2024), https://www.jpalmerlaw.com/can-i-sue-my-employer-if-i-get-injured-at-work-in-kansas/#:~:text=Work%20Injury%20Compensation%20in%20Kansas&text=According%20to%2

carry workers compensation insurance, then injured employees are allowed to sue the employer for work injuries under civil liability principles rather than through the rules of workers compensation.[86]

While employers are required to get workers compensation insurance for their employees, that is not necessarily the case for independent contractors.[87] Often times hospitals will need travel clinicians, like travel nurses, to fill in when there are staffing shortages.[88] These clinicians are often independent contractors rather than employees, meaning that hospitals often do not have to include them in their workers compensation policy.[89]

If an employee is employed by a covered business, then the employee can receive workers compensation benefits like payment for medical treatment, two-thirds of lost wages, compensation for permanent disability, etc.[90] While these benefits may be helpful, actually recovering these benefits may be challenging.[91] The back and forth with insurance companies and the court process can render "the workers[] compensation process [to be] insurmountable."[92] While Kansas has recently increased the amount individuals can recover from a workers compensation claim, Kansas is one of the few states that puts a cap on benefits as compared to forty-four states who do not.[93] Based on these considerations, workers compensation can help provide some form of recovery for workers but is limited in who it applies to and how much they can recover.

2. Kansas Common Law Principles

In the rare instance that workers compensation rules do not apply, healthcare workers are protected by common law principles such as negligence.[94] A claim of negligence requires four main elements: duty, breach of duty, causation, and damages.[95] In healthcare settings, healthcare entities owe healthcare workers a duty of care to take reasonable measures to protect workers from harm—including violence that may occur on-site.[96] However, this duty is limited because of its

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0workers'%20comp%20rules,claim%20would%20also%20be%20appropriate. [https://perma.cc/QMW6-H5E3].

[86] *Can I Sue my Employer if I Get Injured at Work in Kansas?*, *supra* note 85.

[87] *Workers' Comp for Travel Nurses*, WAX & WAX (Oct. 11, 2022), https://www.waxlawfirm.com/blog/2022/october/workers-comp-for-travel-nurses/ [https://perma.cc/XW88-VSHH].

[88] *Id.*

[89] *Id.*

[90] KAN. STAT. ANN. § 44-501(f).

[91] Shawn Loging, *Sweeping Changes Coming to State's Workers' Compensation Law*, 12NEWS (Apr. 12, 2024, 6:44 PM), https://www.kwch.com/2024/04/12/sweeping-changes-coming-states-workers-compensation-law/ [https://perma.cc/E34K-TMS7].

[92] *Id.*

[93] *Id.*

[94] *See* Kelly Tomaszewski, *Navigating the Legal Landscape of On-site Violence in Hospitals and Medical Clinics*, 65 NO. 8 DRI FOR DEF. 33, 33–34 (2023) (discussing negligence claims brought against hospitals).

[95] *See* LEGAL INFO. INST., *Negligence*, CORNELL L. SCH., https://www.law.cornell.edu/wex/negligence [https://perma.cc/VM7W-XH9D]; Shirley v. Glass, 308 P.3d 1, 6 (Kan. 2013).

[96] Tomaszewski, *supra* note 94, at 34.

dependency on concepts of foreseeability and causation.[97] To satisfy foreseeability, a healthcare entity must be able to reasonably predict that a violent act could occur.[98] Causation requires the entity's action or lack thereof to lead directly to violence against the healthcare worker.[99] For instance, if a hospital fails to implement adequate security measures and a worker is assaulted on site, foreseeability considers whether the hospital should have anticipated the incident due to lack of security and causation considers whether the assault was a direct result of the hospital failing to implement sufficient security measures.[100]

A healthcare worker may find relief from pursuing a personal injury action against their employer.[101] A healthcare entity's liability is largely based on the duty of care the entity owes its employees to ensure they have a safe working environment free from harm or threats of violence.[102] To avoid liability, healthcare entities then need to implement adequate security measures, provide training to staff on handling potentially violent situations, and establish protocols for responding to incidents of violence.[103] While this common law principle can help workers in some ways, logical considerations of power and financial inequity support a conclusion that it is unlikely many healthcare workers would want to bring a claim against their employer. Further, the culture of healthcare workers to be compassionate and to see violence as just part of the job supports the idea that these workers are not inclined to engage in litigation.[104] Due to these inherent limitations, it seems the effectiveness of the negligence principle is dependent on how risk-averse a given healthcare entity is. The more risk-averse a healthcare entity is, the more likely it is for the entity to put in safeguards to prevent litigation. Putting in safeguards to prevent litigation would in theory also help decrease violence.

3. Kansas Criminal Law

Kansas has several criminal laws that could be enforced against a violent person in a healthcare setting. These include assault, disorderly conduct, unlawful interference with an emergency medical service provider, and battery.[105]

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[97] Tomaszewski, *supra* note 94, at 34.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Sydney Goldstein, *Workplace Violence,* LAWINFO (July 10, 2024), https://www.lawinfo.com/resources/employment-law-employee/workplace-violence-law/ [https://perma.cc/4TGA-JB2J].
[102] *See id.* (explaining that failure to provide a safe workplace free of hazards may constitute legal liability).
[103] *Id.*
[104] Ciabarra, *supra* note 5; Cheryl B. Jones, Zoe Sousane, Sarah E. Mossburg, *Addressing Workplace Violence and Creating a Safer Workplace*, DEP'T OF HEALTH AND HUM. SERVS., (Oct. 30, 2023), https://psnet.ahrq.gov/perspective/addressing-workplace-violence-and-creating-safer-workplace [https://perma.cc/85PW-4FTL].
[105] KAN. STAT. ANN. § 21-5412 (2023); KAN. STAT. ANN. § 21-6203 (2023); KAN. STAT. ANN. § 21-6326 (2023); KAN. STAT. ANN. § 21-5413 (2023).

Assault and disorderly conduct in Kansas are considered class C misdemeanors.[106] In Kansas, assault is defined as "knowingly placing another person in reasonable apprehension of immediate bodily harm."[107] Disorderly conduct is an act that a:

> person knows or should know will alarm, anger, or disturb others, or provoke an assault or other breach of peace which may include: (1) brawling or fighting; (2) disturbing an assembly, meeting, or processional . . . ; or (3) using fighting words or engaging in noisy conduct tending reasonably to arouse alarm, anger, or resentment in others.[108]

In Kansas, a class C misdemeanor may result in confinement in county jail for not more than one month[109] and a fine of not more than $500.[110]

Unlawful interference with an emergency medical service provider is a class B misdemeanor.[111] The Kansas statute states that

> (a) [u]nlawful interference with an emergency medical service provider is knowingly: (1) interfering with an emergency medical service provider while engaged in the performance of such emergency service provider's duties; or (2) obstructing, interfering with, or impeding the efforts of any emergency medical service provider to reach the location of an emergency.[112]

An emergency medical service provider is either "an emergency medical responder, advanced emergency medical technician, emergency medical technician, or paramedic certified by the emergency medical services board."[113] In Kansas, a class B misdemeanor may result in confinement in county jail for not more than six months[114] and a fine of not more than $1,000.[115]

Kansas passed legislation in May 2023 that increased the penalty for battery against a healthcare worker to a class A misdemeanor.[116] Battery against a healthcare worker is battery "committed against a healthcare provider while the provider is engaged in the performance of such provider's duty."[117] A healthcare provider is defined as "an individual who is licensed, registered, certified, or otherwise authorized by the state of Kansas to provide healthcare services in the state."[118] Battery is defined as "(1) knowingly or recklessly causing bodily harm to another person; or (2) knowingly causing physical contact with another person when done in a rude, insulting, or angry manner."[119] In Kansas, a class A misdemeanor may

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[106] KAN. STAT. ANN. § 21-5412(e)(1); § 21-6203(b).
[107] KAN. STAT. ANN. § 21-5412(a).
[108] KAN. STAT. ANN. § 21-6203(a)(1)–(3).
[109] KAN. STAT. ANN. § 21-6602(a)(3) (2023).
[110] KAN. STAT. ANN. § 21-6611(b)(3) (2023).
[111] KAN. STAT. ANN. § 21-6326(b) (2023).
[112] § 21-6326(a)(1)–(2).
[113] KAN. STAT. ANN. § 65-6112(h) (2023).
[114] § 21-6602(a)(2).
[115] § 21-6611(b)(2).
[116] 2023 Kan. Sess. Laws Ch. 94 (S.B. 174).
[117] KAN. STAT. ANN. § 21-5413(g) (2023).
[118] § 21-5413(i)(12).
[119] § 21-5413(a)(1)–(2).

result in confinement in county jail for not more than one year[120] and a fine of not more than $2,500.[121]

Overall, these penalties have not been very effective to date.[122] These penalties require a worker to not only report incidents of violence but also have the willingness to cooperate during the judicial process. Individuals often do not have the time, energy, or resources to engage in the judicial system.[123] Additionally, criminal penalties do not do much to benefit the provider who experienced the violence other than being able to see the perpetrator of the violence punished.[124] Lastly, these remedies are all retroactive.[125] While they might help punish individuals who commit violent acts, the penalty for doing so is relatively small in comparison to the harm that some workers face from the perpetrator's violence. Moreover, having a penalty does not necessarily prevent violence from occurring in the first place, rather the risk of being caught is what deters perpetrators.[126]

4. Kansas Licensing Regulations

Kansas licensing standards and regulations are silent regarding violence in the workplace.[127] However, Kansas does have regulations relating to risk management and incident reporting.[128] These regulations only require these management tools and reporting mechanisms in cases relating to clinical care for patients and do not include incidents that may happen to staff.[129] The Kansas licensing regulations do not offer any specific protections for staff.[130]

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[120] KAN. STAT. ANN. § 21-6602(a)(1) (2023).
[121] KAN. STAT. ANN. § 21-6611(b)(1) (2023).
[122] *See* KAN. HOSPITAL ASS'N, *supra* note 7 (calling for increased penalties to counter increasing violence in Kansas health care settings, despite already existing penalties).
[123] Susan Buckner, *10 Common Fears About Lawsuits*, FINDLAW (May 3, 2024), https://www.findlaw.com/litigation/filing-a-lawsuit/ten-things-to-think-about-lawsuits.html [https://perma.cc/7UWL-CF6R].
[124] *See generally* Lenore Anderson, *The People Most Ignored by the Criminal-Justice System*, The Atlantic (Oct. 31, 2023), https://www.theatlantic.com/ideas/archive/2023/10/violent-crime-victims-criminal-justice-reform/675673/ (last visited Sep. 23, 2024).
[125] *See* § 21-6602(b) (requiring conviction to enforce penalty); § 21-6611(b) (requiring conviction to enforce penalty).
[126] *See* NAT'L INST. OF JUST., *supra* note 76.
[127] *See generally Code of Federal Regulation Appendices*, KAN. DEP'T OF HEALTH & ENV'T, https://www.kdhe.ks.gov/1892/Code-of-Federal-Regulation-Appendices [https://perma.cc/5XF6-T3D6] (compiling federal regulations, none of which mention violence in the workplace).
[128] *See generally* KAN. ADMIN. REGS. § 28-52 (1987).
[129] *Id.* (citing KAN. STAT. ANN. § 65-4921(f) (2018).
[130] *See Code of Federal Regulation Appendices, supra* note 127 (compiling sources, none of which mention protection for staff).

C. Hospital Regulations

Some of the main regulatory bodies that healthcare organizations are accountable to include the Occupational Safety and Health Administration,[131] the Center for Medicare and Medicaid Services,[132] and the Joint Commission.[133]

1. Occupational Safety and Health Administration (OSHA)

OSHA is a regulatory body that is the part of the U.S. Department of Labor tasked with assuring workers have a safe and healthy working environment.[134] OSHA does not have a specific standard for workplace violence prevention but still holds employers accountable for violence.[135] Under the General Duty Clause of the Occupational Safety and Health Act of 1970, employers must provide each worker with a place of employment that is free from recognized hazards that are causing or are likely to cause serious physical harm or death.[136] The General Duty Clause was applied to a healthcare employer in 2019 when the Occupational Safety and Health Review Commission upheld a citation after an employee was fatally stabbed by a mentally ill patient.[137] The Commission upheld the citation because incidents of workplace violence can fall under an employer's obligation under the General Duty Clause.[138]

Recognizing the significant number of violent incidents that take place in healthcare, OSHA created resources to help healthcare entities build and implement a comprehensive workplace violence program.[139] These resources help promote OSHA's new focus on workplace violence in healthcare—especially since OSHA has indicated its intent to move toward rulemaking[140] for a workplace violence

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[131] OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/ [https://perma.cc/S8X9-4EQS].
[132] CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/ [https://perma.cc/9CYN-62VA].
[133] THE JOINT COMM'N, https://www.jointcommission.org/ [https://perma.cc/52WL-5B3T].
[134] OCCUPATIONAL SAFETY & HEALTH ADMIN., *About OSHA,* U.S. DEP'T OF LAB., https://www.osha.gov/aboutosha [https://perma.cc/U5EN-MEA8]; 29 U.S.C. § 651.
[135] *See* 29 U.S.C. § 654; *see, e.g.,* Integra Health Mgmt., Inc., No. 13-1124, 2019 WL 1142920, at *1 (OSHRC Mar. 4, 2019) (relying on the General Duty Clause of the Occupational Safety and Health Act to affirm a citation against an employer).
[136] 29 U.S.C. § 654(a)(1); *see also* Nat'l Institute for Occupational Safety & Health, *OSHA's General Duty Clause*, CDC (May 16, 2024), https://wwwn.cdc.gov/WPVHC/Nurses/Course/Slide/Unit5_4#:~:text=The%20General%20Duty%20Clause%20from,a%20recognized%20hazard%20within%20the [https://perma.cc/QM6Z-5T56].
[137] Integra Health Mgmt., Inc., No. 13-1124, 2019 WL 1142920, at *2, *4.
[138] *Id.* at *14.
[139] OCCUPATIONAL & SAFETY & HEALTH ADMIN., *Worker Safety in Hospitals: Caring for our Caregivers*, U.S. DEP'T OF LAB., https://www.osha.gov/hospitals/workplace-violence [https://perma.cc/FZ8Z-TRQJ].
[140] Rulemaking is the process of making policy by the Executive Branch and Independent agencies of the Federal government to create rules and regulations. *See Learning About the Regulatory Process*, REGULATIONS.GOV, https://www.regulations.gov/learn [https://perma.cc/3YZR-6SSF]. Rulemaking is governed by administrative law. *Id.* OSHA rules are one example of regulations created in the rulemaking process. *See generally* Occupational Safety and Health Standards, 29 C.F.R. §§ 1910.1–1200.

standard in the healthcare industry.[141] The resources identify risk factors for violence and provide elements of an effective violence prevention program.[142]

According to OSHA, an effective violence prevention program consists of managerial commitment and employee participation, worksite analysis, hazard prevention and control, safety and health training, and recordkeeping and program evaluation.[143] Additionally, "program[s] should have clear goals and objectives" that are "suitable for the size and complexity of operations" and should be "adaptable to specific situations and specific facilities or units."[144] Programs should also be evaluated and reassessed regularly.[145]

OSHA's suggestions and resources for a violence prevention program could be effective. The resources provide comprehensive examples and a general template of how to keep records of incidents.[146] Aside from in-depth guidance on each part of what it believes makes an effective program, OSHA provides a quick checklist to look at risk factors for violence.[147] Overall, the OSHA resources could be very helpful optional tools for healthcare entities to use to prevent and report violence. However, OSHA could bolster its focus on preventing violence in the workplace if it promulgated a standard for healthcare entities to adhere to using its rulemaking authority.[148]

2. Centers for Medicare and Medicaid Services (CMS)

CMS is a federal agency that provides health coverage for many Americans through government insurance programs like Medicare and Medicaid.[149] CMS

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[141] OCCUPATIONAL & SAFETY & HEALTH ADMIN., *Workplace Violence SBREFA*, U.S. DEP'T OF LAB., https://www.osha.gov/workplace-violence/sbrefa [https://perma.cc/X5FQ-ZTUD].

[142] U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., GUIDELINES FOR PREVENTING WORKPLACE VIOLENCE FOR HEALTHCARE AND SOCIAL SERVICE WORKERS*,* U.S. DEP'T OF LAB. 3–5 (2016).

[143] *Id.* at 5.

[144] *Id.*

[145] *Id.*

[146] *Id.* at 9–10, 27–40.

[147] *Id.* at 30–40.

[148] Rulemaking is an essential power often used by administrative agencies. *See Learning About the Regulatory Process*, REGULATIONS.GOV, https://www.regulations.gov/learn [https://perma.cc/3YZR-6SSF]. Rulemaking is often easier to achieve because it takes less political capital compared to congressional legislation. *See* Mayburg v. Sec'y of Health & Hum. Servs., 740 F.2d 100, 104 (1st Cir. 1984) ("[G]iven the many stages through which a bill must pass before emerging from Congress, it is typically easier to halt legislation than to enact it."); *see also* Mass. Bldg. Trades Council v. United States DOL, 21 F.4th 357, 367 (6th Cir. 2021) (discussing OSHA's expedited rulemaking process during the COVID-19 Pandemic). In addition, rulemaking takes into account the public's comments on proposed rules before they are implemented and can therefore be better tailored to address the issue. *Learning About the Regulatory Process*, REGULATIONS.GOV, https://www.regulations.gov/learn [https://perma.cc/3YZR-6SSF].

[149] CTRS. FOR MEDICARE & MEDICAID SERVS., *About Us*, CMS.GOV, https://www.cms.gov/about-cms [https://perma.cc/P6HU-UW6Q].

"believes that healthcare workers have a right to provide care in a safe setting."[150] In accordance with this belief, Medicare-certified facilities are required to follow regulatory obligations known as Medicare Conditions of Participation (CoPs).[151] Some of these obligations are to care for patients in a safe setting and to have an emergency preparedness plan in place.[152]

To provide care in a safe setting, hospitals are expected to identify patients at risk for intentional harm to themselves or others and provide appropriate education and training for staff and volunteers.[153] CMS CoPs do not require all risks to be eliminated but hospitals are expected to demonstrate how they identify patients at risk of harm to others and what steps they are taking to minimize those risks based on nationally recognized standards and guidelines.[154] Essentially, hospitals are expected to implement a patient risk assessment strategy that can be tailored to the unique characteristics of each department.[155] Additionally, CMS expects that hospitals provide training to all new staff upon orientation and whenever policies and procedures change, and continued training at a minimum of every two years after initial training.[156]

CMS has issued citations to hospitals for failing to meet these obligations.[157] For example, one hospital failed to meet its obligations when one nurse was sexually assaulted by a behavioral health patient when working in a unit without adequate staff.[158] Other examples provided by CMS relate to injuries and death of patients.[159] In addition, if patients sustain injuries in the hospital as a result of violence, then CMS will not reimburse the hospital for the care provided for the extended stay.[160] This is because CMS also sets reimbursement standards with one of these standards being reduced or no reimbursement for hospital-acquired conditions.[161]

CMS regulations have potential to help in some ways with violence. CMS's required training and patient risk plans may be very beneficial for preventing violence.[162] However, CMS regulations and citations seem to focus more on the patient perspective. By focusing on the patient perspective, the regulations are not taking into account the workers' perspectives when providing care. As a result, the focus is only on the obligations the healthcare workers have and not on their

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[150] Memorandum from Dirs., Quality, Safety, & Oversight Grp. (QSOG) and Surv. & Operations Grp. (SOG) to State Surv. Agency Dirs. (Nov. 28, 2022), https://www.cms.gov/files/document/qso-23-04-hospitals.pdf [https://perma.cc/8UWD-ALNR].
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* ("[A] patient who died after hospital staff and law enforcement performed a takedown that resulted in a hospital custodian holding the patient down on the floor with his knee against the patient's back, during which the patient stopped breathing and died; and a patient who was acting out and shot in his hospital room by off-duty police officers following the failure of hospital staff to perform appropriate assessment and de-escalation of the patient.").
[160] Dailey, *supra* note 12, at 61–62.
[161] *Id.*
[162] *See* U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY AND HEALTH ADMIN., *supra* note 142, at 30–40.

protection. As a result, the regulations are not likely as effective for the prevention of violence against healthcare workers. This renders the current regulations only partially effective in helping healthcare workers from the standpoint that there is a trickle-down or indirect effect from the regulations that focus on patients. For example, by conducting an assessment to help with patient care the provider can also use that assessment to be more aware of whether the patient has risk factors for violence. CMS should consider creating additional conditions of participation that focus more on requiring hospitals to implement procedures to prevent violence against workers.

3. Joint Commission

The Joint Commission accredits and certifies many healthcare organizations in the U.S.[163] In 2022, the Joint Commission created new and revised workplace violence prevention standards.[164] These standards serve as a framework to develop "effective workplace violence prevention systems that include leadership oversight, policies and procedures, reporting systems, data collection and analysis, post-incident strategies, training, and education."[165]

As part of the environment of care, the Joint Commission requires hospitals to conduct annual worksite analysis related to its workplace prevention program so appropriate action to mitigate or resolve environmental risks can be taken.[166] Relatedly, hospitals must continually monitor, investigate, and internally report safety and security incidents involving patients, staff, or others in the facility including incidents involving workplace violence.[167] The Joint Commission also requires training, education, and resources that address violence prevention, recognition, response, and reporting.[168] Additionally, hospital leadership is held accountable to create and maintain a culture of safety and quality throughout the hospital.[169]

The Joint Commission has a sentinel event policy in which healthcare organizations are encouraged to report patient safety events to the Joint Commission.[170] This policy has the goal of addressing serious patient safety events

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[163] *See* THE JOINT COMM'N, *Who We Are*, https://www.jointcommission.org/who-we-are/ [https://perma.cc/U2EP-YSA4].

[164] THE JOINT COMM'N, WORKPLACE VIOLENCE PREVENTION STANDARDS, 30 R3 REPORT 1 (June 18, 2021), https://www.jointcommission.org/-/media/tjc/documents/standards/r3-reports/wpvp-r3-30_revised_06302021.pdf [https://perma.cc/7MHD-8H29].

[165] *Id.*

[166] *Id.* at 2.

[167] *Id.*

[168] *Id.* at 4.

[169] *See id.* at 4–5 (requiring hospitals to have a leadership team in workplace violence prevention programs to promote accountability, safety, and quality).

[170] THE JOINT COMM'N, SENTINEL EVENT POLICY, SE-1 (2024), https://www.jointcommission.org/-/media/tjc/documents/resources/patient-safety-topics/sentinel-event/camh_se_20230906_155314.pdf [https://perma.cc/DN78-ZG3R].

by healthcare organizations collaborating with the Joint Commission.[171] Sentinel events are patient safety events that are not primarily related to the natural course of a patient's underlying condition and result in severe harm or death of the patient.[172] The Joint Commission has a non-exhaustive list of sentinel events.[173] Included in this list is the physical assault that leads to death or severe harm to a staff member, visitor, or vendor while on-site at the organization or while providing care or supervision to patients.[174]

Joint Commission standards could help violence prevention and reporting. The standards the Joint Commission reviews address environmental and organizational risk factors.[175] These factors are what healthcare entities have more control over.[176] Additionally, having the sentinel event policy may help incentivize healthcare entities to report some of the more serious instances of violence. However, these standards and reporting policies would be stronger if they were mandatory rather than optional because it would require organizations to report in order to continue to be accredited by the Joint Commission. Overall, the above-listed standards and policies are likely somewhat effective but would be more successful if the standards were strictly applied and if reporting became mandatory.

IV. SUGGESTED REFORM

This section first discusses the reform suggestions and scholarship provided by consultants, healthcare providers, lawyers, and scholars. Next, this section provides additional suggestions for making the healthcare workplace a less violent environment through standardization and policy reform.

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[171] THE JOINT COMM'N, *supra* note 170 at SE-2.
[172] *Id.*
[173] *Id.*
[174] *Id.* at SE-3.
[175] OCCUPATIONAL SAFETY AND HEALTH ADMIN., *supra* note 142, at 30–40.
[176] For example, healthcare entities can improve a hospital's infrastructure and internal environment with appropriate funding. *See* Mary Scott Nabers, *Funding is Flowing for Upgrades to America's Healthcare Infrastructure*, STRATEGIC P'SHIPS, INC. (Jan. 10, 2024), https://www.spartnerships.com/funding-is-flowing-for-upgrades-to-americas-healthcare-infrastructure/ [https://perma.cc/MXK2-K5FK].

A. Current Scholarship

While current policy creates some legal remedies and preventative measures, violence is still occurring.[177] Many individuals who interact with healthcare have made suggestions for reform.[178] Some of these individuals are consultants, healthcare providers, lawyers, and scholars.[179] The suggestions for the prevention of violence mostly relate to environmental and organizational risk factors.[180] This is likely because organizational risk factors can more easily be controlled as compared to the other risk factors.[181]

From an environmental risk factor perspective, most suggestions relate to security measures.[182] Suggested security measures include the use of alarm systems, panic buttons, hand-held alarms or noise devices, closed-circuit video recording for high-risk areas, employee safe rooms, and shatter-proof glass.[183] Another suggestion is to implement electronic boards that indicate approximate wait times for patients to prevent any aggression that may arise from long wait times.[184] Other suggestions include decreasing the number of public access points and introducing security teams to check identification of all visitors.[185] Additionally, de-escalation teams—teams of specially trained staff—could be used to respond quickly to incidents and threats.[186]

From an organizational perspective, industry recommendations focus on a proactive and multifaceted approach with a heavy emphasis on training.[187] Training helps staff practice identifying potential signs of violent behavior in patients and equips staff with strategies to protect themselves from violence.[188] For example, training might include recognizing behavioral cues and risk factors like agitation,

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[177] *See NNU Report Shows Increased Rates of Workplace Violence Experienced by Nurses*, *supra* note 2.

[178] *See* Calderone, *supra* note 3; Dailey, *supra* note 12, at 67–74; Lown & Setnik, *supra* note 17; Peters et al., *supra* note 18.

[179] *See* Calderone, *supra* note 3 (written by a consultant); Dailey, *supra* note 12 (healthcare provider); Lown & Setnik, *supra* note 17 (healthcare providers and professors); Peters et al., *supra* note 18 (lawyers).

[180] *See, e.g.,* Calderone, *supra* note 3.

[181] For example, healthcare entities can reduce organizational risk factors by training in-house de-escalation teams to respond quickly to violent incidents. *See id.* But it is much harder to reduce patient and external risk factors. For example, healthcare entities with an emergency department cannot turn away patients suffering from an "emergency medical condition," regardless of patient and external risk factors that may be present. *See* The Emergency Medical Treatment and Labor Act (EMTALA) 42 U.S.C. § 1395dd (2020).

[182] *See, e.g.,* Calderone, *supra* note 3.

[183] Gabriele d'Ettore, Mauro Mazzotta, Vincenza Pellicani, & Annamaria Vullo, *Preventing and Managing Workplace Violence Against Healthcare Workers in Emergency Departments,* 89 Suppl. 4 ACTA BIOMEDICA 28, 33 (2018).

[184] *Id.*

[185] Calderone, *supra* note 3.

[186] *Id.*

[187] *See* d'Ettore et al., *supra* note 183, at 32 (discussing sources that focus on training to manage risks in healthcare environments).

[188] Tomaszewski, *supra* note 94.

verbal threats, or history of violence, as well as de-escalation techniques.[189] Other areas of opportunity for education include training on the importance of maintaining a safe physical environment such as staff members positioning themselves near an exit when dealing with a potentially violent patient and other physical self-defense techniques.[190] Some suggest interactive training and simulation exercises that focus on improving the workers' communication skills and accurately reporting each violent incident.[191]

Some suggest the overall goal should be to create a culture of safety where healthcare professionals feel equipped to handle challenging situations and are supported by their institutions when incidents do occur.[192] Techniques suggested to help cultivate a culture of safety include comprehensive procedures for reporting violent incidents, a clear de-escalation process, immediate response protocols, counseling services, peer support groups, and other resources aimed at helping victims of violence cope and recover.[193] Other suggested practices include recognizing staff for acts of caring and compassion and discussion forums.[194] These suggestions could be useful because compassionate practices offered by organizational leaders for healthcare workers have been associated with higher patient satisfaction ratings.[195] A culture of safety is supported when healthcare workers know reported incidents will be taken seriously.[196]

Not every incidence of violence can be prevented. In those instances, legal remedies become important. From a federal perspective, legislation addressing violence in healthcare does not seem to be a top priority.[197] However, Kansas has shown interest in addressing violence in healthcare through recently passed legislation increasing penalties for perpetrators of violence against healthcare workers.[198] The Kansas Hospital Association has suggested that Kansas can further bolster current legislation by reforming legislation to increase penalties so that all hospital workers, including volunteers, may pursue the enhanced penalty charge.[199] Additionally, "hospitals should be allowed to bring claims on behalf of staff so that workers do not have to go through the legal process alone."[200]

B. Suggestions to Reduce Violence

Standardization is the key to reducing violence in healthcare. From a broad perspective, federal law or regulations enforced through administrative agencies, like OSHA and CMS, may provide a wide-sweeping effect to help healthcare

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[189] Tomaszewski, *supra* note 94.
[190] *Id.*
[191] *See* d'Ettore, et al., *supra* note 183, at 32.
[192] Tomaszewski, *supra* note 94.
[193] *Id.*
[194] *See* Lown & Setnik, *supra* note 17.
[195] *Id.*
[196] *See* Calderone, *supra* note 3 (discussing that "healthcare workers need to know that all reported acts and incidents will be taken seriously" to "create safer environments").
[197] *See supra* Section II.A.
[198] *See* 2023 Kan. Sess. Laws Ch. 94 (S.B. 174).
[199] *See Kansas Advocacy Issue: Addressing Workplace Violence*, *supra* note 7.
[200] *Id.*

entities.[201] For example, federal law could be introduced to provide funding to OSHA that OSHA can distribute to healthcare entities to implement violence prevention programs and reporting mechanisms. Without broad regulations like this, healthcare entities are essentially left to their own devices for how, or if, they have violence prevention programs or reporting mechanisms. Similarly, on a state level, Kansas could provide regulations to standardize how healthcare organizations address workplace violence and reporting by changing its licensing requirements.[202] Additionally, funding could be used in the form of grants to help train healthcare professionals on de-escalation techniques.[203]

Policy and cultural changes aimed at addressing external risk factors would also be useful. Some areas for policy change include poverty and economic disparities, education, employment, and substance abuse. Policies that address poverty and economic disparities may help individuals with stress and frustration because individuals will be more secure in having their basic human needs met.[204] Similarly, setting individuals up for success by providing high-quality and accessible education can help individuals reach their full potential.[205] Moreover, this could help individuals find employment opportunities.[206] This can help individuals feel less frustration and in return decrease the likelihood of violence.[207] Policies that provide real help for individuals who have issues with substance abuse to be able to recover could be largely beneficial because individuals with substance abuse issues are at a higher risk of being perpetrators of violence.[208]

Overall, broader policy changes can address more than just violence. Broader policy change can also help address social determinants of health. Social determinants of health are nonmedical factors that influence health outcomes.[209] These factors are conditions that shape the daily life of an individual.[210] These factors include where someone is born, grows, works, lives, and ages—which is

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[201] *See supra* Sections II.C.1–2.
[202] *See supra* Section II.B.4.
[203] *See generally Get Ready for Grants Management*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/grants-contracts/grants/get-ready-for-grants-management/index.html [https://perma.cc/G86L-9UQX] (listing grant resources available to health entities).
[204] *See* Soomin Ryu & Lu Fan, *The Relationship Between Financial Worries and Psychological Stress Among U.S. Adults*, 44 J. FAM. & ECON. ISSUES 16, 24 (2022) (finding financial stress is significantly associated with psychological distress).
[205] *See* EMILIE BAGBY, NANCY MURRAY, EDITH FELIX, SARAH LIUZZI, JOSH MEUTH ALLDREDGE, NICK INGWERSON, PAOLO ABARCAR, & ALE APOINTE, EVIDENCE REVIEW: THE EFFECT OF EDUCATION PROGRAMS ON VIOLENCE, CRIME, AND RELATED OUTCOMES iv (2021).
[206] *Id.*
[207] *See* Steven Raphael & Rudolph Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J. L. & ECON. 259, 259 (2001).
[208] AMANDA ATKINSON, ZARA ANDERSON, KAREN HUGHES, MARK A. BELLIS, HARRY SUMNALL & QUTUB SYED, INTERPERSONAL VIOLENCE AND ILLICIT DRUGS 1 (2009).
[209] *Social Determinants of Health (SDOH)*, CTR. FOR DISEASE CONTROL & PREVENTION (Jan. 17, 2024), https://www.cdc.gov/about/priorities/why-is-addressing-sdoh-important.html [https://perma.cc/NH28-NUPR].
[210] *See id.*

influenced by economic policies, social norms and policies, political systems, etc.[211] Policy changes that address socioeconomic inequities can then also address social determinants of health. This is important because social determinants of health may account for differences in the quality of health outcomes an individual experiences.[212]

It is easy to imagine the life stressors the perpetrator in the anecdote at the beginning of this article was facing. They were experiencing housing insecurity; along with that likely came hunger, unemployment, social isolation, and exposure to violence.[213] Patients like this, as well as others in poverty, likely have serious difficulty obtaining needed healthcare.[214] They may come to the emergency room in desperation.[215] They may know that they cannot pay for the care they receive and may experience anxiety about those bills.[216] All of these factors combined add to the stress and frustration an individual feels, in addition to the acute condition that brought them to the hospital in the first place. It is a situation that can easily boil over into violence.

Broader policy changes could improve the situation for patients and their healthcare providers. These changes are often harder to pass because the discussion of policy reform is often politicized.[217] Without broader policy changes, however, there will likely always be individuals who face stressors like these. These stressors not only increase the likelihood of the individual becoming violent but also decrease

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[211] *Social Determinants of Health (SDOH)*, *supra* note 209.

[212] *See Social Determinants of Health,* WORLD HEALTH ORG., https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 [https://perma.cc/CDT7-D7KD] (explaining how social determinants of health, such as socioeconomic status, can negatively impact an individual's health).

[213] *See* Alexandra Ashbrook, *Food Insecurity and Housing Instability Are Inextricably Linked*, FOOD RSCH. & ACTION CTR. (Nov. 20, 2023), https://frac.org/blog/food-insecurity-and-housing-instability-are-inextricably-linked [https://perma.cc/M4FG-MPF7]; Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 0 SOC. PROBLEMS 1, 14 (2016); Marlee Bower; Monica Carvalheiro, Kevin Gournay, Janette Perz & Elizabeth Conroy, *When More Satisfying and Supportive Relationships Increase Loneliness: The Social Worlds of People with Lived Experience of Homelessness*, 2023 HEALTH & SOC. CARE IN THE CMTY. 1, 2 (2023); JL Heinze, *Addressing National Trends in Housing Insecurity*, NAT'L SEXUAL VIOLENCE RES. CTR. (Mar. 6, 2024), https://www.nsvrc.org/blogs/unhoused [https://perma.cc/K9P5-48NW].

[214] *See* OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, *Housing Instability*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/housing-instability#cit1 [https://perma.cc/8ATV-NRN7].

[215] *See* Gabrielle Emanuel, *In Record Numbers, Families Without Shelter are Turning to Massachusetts Emergency Departments*, WBUR (Jan. 11, 2023), https://www.wbur.org/news/2022/12/22/family-shelter-emergency-room [https://perma.cc/2KG8-M2NY].

[216] *See* Trent Gillies, *Why Health Care Costs Are Making Consumers More Afraid of Medical Bills Than an Actual Illness*, CNBC (Apr. 22, 2018, 11:15 AM), https://www.cnbc.com/2018/04/22/why-health-care-costs-are-making-consumers-more-afraid-of-medical-bills-than-an-actual-illness.html [https://perma.cc/2UX6-WFWB].

[217] *See, e.g.,* Julie E. Lucero, *Understanding the Connection Between Political and Social Determinants of Health*, UNIV. OF UTAH HEALTH (Jan. 5, 2023), https://uofuhealth.utah.edu/notes/2023/01/political-and-social-determinants-of-health [https://perma.cc/L6L4-GV3Y] (discussing how policies and procedures impact population health by examining housing insecurity as a social determinate of health).

the quality of their health outcomes.[218] As a result, society is left with a sicker population that is prone to violence.

V. CONCLUSION

Violence in healthcare is a recognized problem with many layers that contribute to its complexity. Societal influences and socioeconomic factors create an environment that is ripe for individuals to become violent. Broader policy changes that address societal issues would likely have the greatest overall impact on reducing stress and frustration so that individuals become less violent. However, broader policies addressing changes in society are harder to pass due to political influences. As a result, violence will likely need to be addressed in other ways.

Currently available legal remedies are relatively small and usually limited to incidents that occur by individuals who intend to harm workers. Moreover, those workers must have the means and drive to go through the legal system to receive a remedy. This represents a very low number of workers who experience violence. Additionally, these remedies do not seem to be very helpful for these workers due to their retroactive nature and because the remedies do not necessarily address the underlying issues that cause violence.

As a result of legal remedies being limited in their effectiveness, policies focused on preventative measures seem to address workplace violence in healthcare in a better way. This is because it addresses all kinds of violence, especially violence caused by patients—the statistically highest category of perpetrators of violence in healthcare settings. However, the effectiveness of preventive measures is unknown due to a lack of reporting. Having better reporting requirements and mechanisms in place would help policymakers know where to target efforts to decrease violence. In the meantime, without standardization of preventative or reporting measures on a federal or state level, healthcare organizations can address violence by focusing on creating violence prevention programs. These programs should have a culture of safety where workers feel that reports are worth their time and action will be taken to address violent incidents.

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[218] *See Social Determinants of Health (SDOH)*, *supra* note 209 (discussing how inequities in housing, education, wealth, and employment place individuals at higher risk of poor health).

(UN)CONSCIENTIOUS OBJECTIONS & MEDICAL MISINFORMATION: RESTRICTING THE REFUSAL TO PROVIDE REPRODUCTIVE HEALTH CARE THROUGH MILITARY CONSCIENTIOUS OBJECTION STANDARDS

*By: Valerie Ernat**

> If you have gone [through] a miscarriage you know the pain and emotional roller it can be. I left Walgreens in tears, ashamed and feeling humiliated by a man who knows nothing of my struggles but feels it is his right to deny medication prescribed to me by my doctor.
>
> - Nicole Artega on Facebook after a pharmacist refused to fill her prescription for misoprostol.[1]

I. INTRODUCTION

While anti-choice[2] medical professionals have raised conscientious[3] objections to providing reproductive health care since the 1970s,[4] the landscape of

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* J.D. Candidate 2025, University of Maryland Francis King Carey School of Law. The author thanks the staff of the University of Maryland Law Journal of Race, Religion, Gender, & Class, as well as Professor Kathi Hoke for helping develop a clear topic and polished writing. Most importantly, the author hopes this Article inspires readers to advocate for reproductive rights and justice for all.

[1] Kat Chow, *Walgreens Pharmacist Refuses to Provide Drug for Ariz. Women with Unviable Pregnancy*, NPR (June 25, 2018, 7:12 PM), https://www.npr.org/2018/06/25/623307762/walgreens-pharmacist-denies-drug-for-woman-with-unviable-pregnancy [https://perma.cc/UZ4X-ABT8] ("Misoprostol is approved by the Food and Drug Administration for what is called a medical abortion.").

[2] While "choice" presumes a level of privilege, this Article uses "anti-choice" rather than "anti-abortion" to describe providers generally opposed to reproductive health care services, including abortion, contraception, and sterilization. "Anti-abortion" is used when discussing providers' opposition specifically to abortion rather than reproductive health care more generally.

[3] "Conscientious" and "conscience" are often used interchangeably by physicians and scholars. However, "conscientious" will be used for the purposes of this Article, unless a "conscience clause," *see infra* note 33, is referenced or "conscience" is used by a court or in a direct quote.

[4] Cynthia Jones-Nosacek, *Conscientious Objection, Not Refusal: The Power of a Word*, 88 CATH. MED. ASS'N 242, 242 (2021) ("[Conscientious objection] in medicine grew out of the need to protect healthcare professionals who did not wish to be involved in performing abortions after the

conscientious objection laws adapted to the changes brought by *Dobbs v. Jackson Women's Health Organization*.[5] *Dobbs* not only reversed half a century of reliance on the federal constitutional right to abortion;[6] it also emboldened anti-choice legislators to push for broader protections for conscientious objectors who attempt to justify their refusal to provide abortion, contraception, and sterilization services or referrals.[7] Religiously motivated providers raising conscientious objections are driven by a mission deliberately intertwined with reproductive health misinformation,[8] and some courts have adopted such misinformation when analyzing challenges from anti-choice providers.[9]

Anti-choice providers weaponize medical misinformation to justify conscientious objections raised in the provision of requested, medically necessary, and lifesaving medical care.[10] Some objectors assert that laws requiring physicians to provide medical treatment or referrals deny providers the right to conscientiously object.[11] Others contend that the First Amendment's right to freely exercise religion is burdened when conscientious objection protections are restricted.[12] Acceptance of these arguments has serious ramifications, and courts should be cautious in enabling the dissemination of reproductive health misinformation disguised as religious liberty.[13]

This Article argues that overly deferential conscientious objection laws and a grossly inadequate legal standard empowers anti-choice providers to refuse to

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Roe v. Wade decision in 1973. For decades, this precept was allowed to stand with minimal comment or opposition . . . .").

[5] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overturning a federal constitutional right to abortion); *State Legislation Tracker*, GUTTMACHER INST., https://www.guttmacher.org/state-legislation-tracker [https://perma.cc/GPM9-U4CF] (last updated Oct. 1, 2024) (reporting that twenty-four bills expanding protections for conscientious objectors were introduced across state legislatures in 2024).

[6] *Dobbs*, 597 U.S. at 405 (Breyer, J., dissenting) ("[A]ll women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe's* and *Casey's* protections.").

[7] *See* GUTTMACHER INST., *supra* note 5.

[8] *See infra* Part II.B.

[9] *See, e.g.,* All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 232–33 (5th Cir. 2023) (reiterating the plaintiffs' argument that abortion causes trauma and regret, and poses a higher health risk than pregnancy and childbirth).

[10] Adelle M. Banks, *Texas Judge Blocks HHS Enforcement of Emergency Room Abortions, Cites Religious Objections,* NAT'L CATH. REP. (Aug. 25, 2022), https://www.ncronline.org/news/texas-judge-blocks-hhs-enforcement-emergency-room-abortions-cites-religious-objections [https://perma.cc/C7ZX-BFUE] (reporting that provider-objectors believed a medically necessary abortion to be an "elective abortion," and that "[e]lective abortion is not life-saving care — it ends the life of the unborn — and the government can't force doctors to perform procedures that violate their conscience and religious beliefs.").

[11] Cedar Park Assembly of God of Kirkland, Wash. v. Kreidler*,* 683 F. Supp. 3d 1172, 1178 (W.D. Wash. 2023).

[12] *Id.* at 1179; Nat'l Inst. for Fam. & Life Advocs. v. Schneider, 484 F. Supp. 3d 596, 603 (N.D. Ill. 2020).

[13] *Law & Policy Recommendation 22: Conscientious Objection (3.3.9)*, WORLD HEALTH ORG. (Mar. 8, 2022), https://srhr.org/abortioncare/chapter-3/pre-abortion-3-3/law-policy-recommendation-22-conscientious-objection-3-3-9/ [https://perma.cc/DC3M-HDPV] ("Refusal of abortion care on the basis of conscience operates as a barrier to access to safe and timely abortion, and unregulated conscientious refusal/objection can result in human rights violations, or lead women to seek unsafe abortion.").

provide requested, potentially emergency, reproductive care. Moreover, this Article asserts that providers often justify their refusal to provide legitimate health care with medical misinformation, which is legally indefensible. Rather than granting substantial deference to provider-objectors' claims, providers should be required to satisfy a legal standard similar to the legal standard for conscientious objection claims raised in the military context.

Part II provides an overview of conscientious objection laws and explains the overlap between reproductive health misinformation and conscientious objections.[14] Part III discusses the legal standard applied to traditional conscientious objection claims in the context of military service.[15] Part IV describes how modern conscientious objection laws in the context of reproductive health care perpetuate medical misinformation by giving objectors significant deference and imposing minimal, if any, burdens of proof.[16] Part V proposes two solutions to the legal quandary of provider-objectors relying on misinformation or discriminatory stereotypes to justify their refusal to provide reproductive health care, including the application of the military conscientious objection standard to this issue.[17] Lastly, Part VI examines the grave ramifications of expansive conscientious objection laws in a legal ecosystem with virtually no legal standard.[18]

II. CONSCIENTIOUS OBJECTIONS & MEDICAL MISINFORMATION

A conscientious objection is the refusal to participate in or facilitate an activity that an individual states is incompatible with their religious, moral, or philosophical beliefs.[19] Conscientious objection claims were first legally recognized in the military context, and were defined as the refusal to participate in mandatory military service because of personal, religious, or moral objections to killing.[20] Today, however, most conscientious objections appear in the health care context.[21]

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[14] *See infra* Part II.
[15] *See infra* Part III.
[16] *See infra* Part IV.
[17] *See infra* Part V.
[18] *See infra* Part VI.
[19] Luisa Cabal, Monica Arango Olaya & Valentina Montoya Robledo, *Striking a Balance: Conscientious Objection and Reproductive Health Care from the Colombian Perspective*, 16 HEALTH & HUM. RTS. J. 73, 74 (2014).
[20] Christian Fiala & Joyce H. Arthur, *"Dishonourable Disobedience" - Why Refusal to Treat in Reproductive Healthcare is Not Conscientious Objection*, 1 PSYCHOSOMATIC GYNAECOLOGY & OBSTETRICS 12, 13 (2014).
[21] Christian Fiala & Joyce H. Arthur, *There is No Defence for 'Conscientious Objection' in Reproductive Health Care*, 216 Eur. J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 254, 255 (2017).

A. What are Conscientious Objections in the Health Care Context?

Objections in health care arise when providers or institutions believe providing certain services would conflict with their "moral integrity."[22] Such objections are most commonly raised for abortion, contraception, and sterilization services or referrals.[23] Conflicts regarding conscientious objections and ethical patient care arise when the refusal to offer services or referrals results in a failure of the provider's fiduciary duty to patients and the public.[24] This conflict is further exacerbated by a legal framework that provides total deference to providers, which is a gross deviation from the original conscientious objection standards established in the military service context.[25]

In response to the Supreme Court's 1973 decision in *Roe v. Wade* recognizing a federal constitutional right to abortion,[26] Congress passed the first federal conscientious objection law related to reproductive health care: the Church Amendments.[27] The Church Amendments prohibit recipients of federal funds from requiring medical professionals to perform or facilitate abortion or sterilization services when those services conflict with the provider's religious or moral beliefs.[28] For decades the federal government has expanded protections for conscientious objections, most recently in 2018 by the Department of Health and Human Services (DHHS) under the Trump administration.[29] Although much of the final rule promulgated by Trump's DHHS was blocked in federal court and was effectively

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[22] Samuel Reis-Dennis & Abram L. Brummett, *Are Conscientious Objectors Morally Obligated to Refer?*, 0 J. MED. ETHICS 547, 548 (2021) ("Objections to referral, like objections to providing unethical treatment, allow providers to preserve their integrity."); *The Limits of Conscientious Refusal in Reproductive Medicine*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS 1203, 1204 (Nov. 2007), https://journals.lww.com/greenjournal/citation/2007/11000/acog_committee_opinion_no__385__the_limits_of.50.aspx [https://perma.cc/3CYY-92S9] (stating that conscience objections are not a mere "broad claim to provider autonomy," but a claimed "right to protect his or her *moral integrity*") (emphasis added) [hereinafter ACOG].

[23] Fiala & Arthur, *supra* note 21.

[24] *See id.* (explaining that objectors choose to enter the medical field, and, in their duty to provide ethical care to the public, they exert their position of power over patients); *see also WMA Statement on Medically-Indicated Termination of Pregnancy*, WORLD MED. ASS'N (Sept. 6, 2022), https://www.wma.net/policies-post/wma-declaration-on-therapeutic-abortion/ [https://perma.cc/4C5P-MZFW] (declaring that an individual with a conscientious objection to certain reproductive care has an ethical duty to provide a referral to ensure "continuity of medical care"); Hasan Shanawani, *The Challenges of Conscientious Objection in Health Care*, 55 J. RELIG. & HEALTH 384, 388 (2016) ("It is generally accepted that when physicians enter practice, they voluntarily accept a set of core professional obligations."); *Policy Statement—Physician Refusal to Provide Information or Treatment on the Basis of Claims of Conscience*, AM. ACAD. PEDIATRICS, 1689, 1692 (2009) (stating that providers have a professional obligation to provide care, regardless of a conscientious objection, when the patient's health or safety is at risk).

[25] *See infra* Part III outlining the legal standard for conscientious objections to military service.

[26] Roe v. Wade, 410 U.S. 113 (1973).

[27] 42 U.S.C. § 300a-7.

[28] *Id.*

[29] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170 (May 21, 2018).

reversed by the Biden administration,[30] if enforced, the rule likely would have paved the way for anti-choice providers to evoke an even broader right to refuse.[31]

The Church Amendments offer broad federal protections for conscientious objectors, and anti-choice advocates pushed to expand such protections at the state level.[32] Thirty states enacted "conscience clause rules" in the eight years after *Roe* was decided, and only a few states are without such clauses today.[33] Forty-six states allow providers to conscientiously object to providing abortion services;[34] eighteen states permit providers to refuse to provide sterilization services;[35] and seven states allow pharmacists to refuse to fill prescriptions for contraceptives.[36] Furthermore, thirty-seven states have conscience clauses that protect objectors from civil liability for medical malpractice, and thirty states shield conscientious objectors from "disciplinary action," although the exact extent of this protection is unclear.[37]

Doctors and scholars debate the use, and potential abuse, of conscientious objections.[38] Medical professionals have a duty to provide compassionate care free of bias or discrimination while respecting patient dignity and agency.[39] The World Medical Association's International Code of Ethics declared that a conscientious objection to a lawful medical intervention is permissible only if the disruption in care does not harm or discriminate against a patient.[40] Furthermore, providers that

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[30] Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Feg. Reg. 56144 (Oct. 7, 2021).

[31] *See* Alice Miranda Ollstein & Adam Canryn, *Biden Admin to Rescind Trump "Conscience" Rule for Health Workers*, POLITICO (April 19, 2022, 9:29 AM), https://www.politico.com/news/2022/04/19/biden-trump-conscience-rule-00026082 [https://perma.cc/PD74-64HF] ("Had [the rule not been blocked in court], it would have allowed doctors, nurses, medical students, pharmacists, and other health workers to refuse to provide abortions, contraception, gender affirming care, HIV and STD services, vasectomies or any procedure to which they object.").

[32] Carly Graf, *"Conscience" Bills Let Medical Providers Opt Out of Providing a Wide Range of Care*, USA TODAY, https://www.usatoday.com/story/news/nation/2023/07/31/conscience-bills-healthcare-providers-not-give-medical-care/70470186007/ [https://perma.cc/EK82-WHQV] (last updated Aug. 9, 2023, 2:26 PM).

[33] Shanawani, *supra* note 24, at 386; Graf, *supra* note 32.

[34] *Refusing to Provide Health Services*, GUTTMACHER INST. (Aug. 31, 2023), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services [https://perma.cc/H2D2-5WP2].

[35] *Id.*

[36] *Id.*

[37] Rachel Kogan, Katherine L. Kraschel & Claudia E. Haupt, *Which Legal Approaches Help Limit Harms to Patients From Clinicians' Conscience-Based Refusals?*, 22 AMA J. ETHICS 209, 211–12 (2020); *see* Nadia N. Sawicki, *The Conscience Defense to Malpractice*, 108 CAL. L. REV. 1255, 1274 (2020) (describing how state "conscience laws" shield providers from civil liability, criminal prosecution, and in some states discipline from professional or licensing boards).

[38] *Compare* Cabal, et al., *supra* note 19, at 75 (arguing there is a degree of nuance within conscientious objection claims), *with* Fiala & Authur, *supra* note 21 (arguing that all refusals to provide care based on a conscientious objection are irrelevant).

[39] *WMA International Code of Medical Ethics*, WORLD MED. ASS'N, (Apr. 14, 2023) https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/ [https://perma.cc/6JQQ-8SMP].

[40] *Id.*

refuse to provide care then have an ethical obligation to timely refer the patient to another provider.[41]

Opponents contend that conscientious objections often conflict with these duties.[42] Some opponents of modern conscientious objection laws argue that such clauses are invoked for one of two reasons: either the act genuinely conflicts with the objector's beliefs, or the objection allows the provider to obstruct lawful reproductive care.[43] Other opponents argue that all refusals are based on "the provider's subjective, personal belief that the treatment is immoral," but that the provider's belief is irrelevant because refusing care is harmful in all cases.[44] This camp of opponents believe that all refusals, even those that result in a relatively short delay of care, require providers to "abando[n] their fiduciary duty to patients."[45] Thus, refusals result in denying patients' right to moral and bodily autonomy.[46] Some opponents also consider objections to be a manifestation of sex or gender discrimination since refusals in reproductive health care predominantly affect women.[47]

Alternatively, some proponents of "reasonable" conscientious refusals believe that providers must deliver care in "emergency cases threatening grave morbidity or mortality," even if their actions conflict with their religious or moral beliefs.[48] Advocates of broad conscientious objection protections— conscience absolutists— assert that exercising the right to conscientiously object to providing medical care is "the only legal way to refuse to provide abortions that are permitted by law."[49] Therefore, there is evidence suggesting that conscientious objections are weaponized by medical providers in an effort to circumvent laws that would otherwise require them to provide abortion, contraception, or sterilization services or referrals.[50]

Conscientious objections have a valid place in medicine in certain circumstances,[51] but courts are ill-equipped to identify and invalidate disingenuous

[41] WORLD MED. ASS'N, *supra* note 39. ("The physician must immediately and respectfully inform the patient of this objection and of the patient's right to consult another qualified physician and provide sufficient information to enable the patient to initiate such a consultation in a timely manner.").
[42] Fiala & Arthur, *supra* note 21.
[43] Laura Florence Harris, Jodi Halpern, Ndola Prata, Wendy Chavkin & Caitlin Gerdts, *Conscientious Objection to Abortion Provision: Why Context Matters*, 13 GLOB. PUB. HEALTH 556, 559 (2016).
[44] Fiala & Arthur, *supra* note 21.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Jason T. Eberl, *Protecting Reasonable Conscientious Refusals in Health Care*, 40 THEORETICAL MED. & BIOETHICS 565, 577 (2019).
[49] Harris, et al., *supra* note 43 at 556; Rebecca J. Cook & Bernard M. Dickens, *The Growing Abuse of Conscientious Objection*, 8 ETHICS J. AMA 337, 338 (2006) (reporting that many medical professionals use conscientious objections to restrict or eliminate patients' legal right to abortion, contraception, or sterilization).
[50] Harris, et al., *supra* note 43; Cook & Dickens, *supra* note 49, at 339.
[51] ACOG, *supra* note 22, at 1203 (explaining that there is an appropriate place for ethical conscientious objections in health care).

objections or objections raised for ulterior motives.[52] For example, refusals based on "respect for unborn life" involve religious or moral beliefs that may not be objectively verified or invalidated.[53] It may be inappropriate and unrealistic to ask courts to police disingenuous objections, especially as current conscience clauses do not require objectors to legally justify their refusal.[54] This results in the inference that providers possess an unrestricted right to refuse medical care to patients.[55] The limited right to conscientiously object to providing certain care is important,[56] but the right must be restricted when it interferes with the patient's right to give informed consent based on accurate medical information and to receive timely, quality comprehensive health care.[57]

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[52] AM. ACAD. PEDIATRICS, *supra* note 24, at 1689; *see* U.S. v. Seeger, 380 U.S. 163, 184–85 (1965) (stating that, in the military context, courts may not require proof of religious doctrines or reject beliefs that they view as "incomprehensible").

[53] Fiala & Arthur, *supra* note 21, at 255–56.

[54] Fiala & Arthur, *supra* note 20, at 15; Fiala & Arthur, *supra* note 21, at 256.

[55] Fiala & Arthur, *supra* note 21 (explaining that modern conscience objection laws as applied to reproductive health care include the assumption that objectors have the right to refuse to provide treatment for any reason); Steve Clarke, *Conscientious Objection in Healthcare, Referral and the Military Analogy*, 43 J. MED. ETHICS 218, 218 (2016) (discussing how many objectors believe they are entitled to conscience objections, resulting in an "unlimited in practice" conscience objection policy); *but cf.* Julia Kaye, Brigitte Amiri, Louise Melling & Jennifer Dalven, *Health Care Denied*, ACLU (Mar. 3, 2016), https://www.aclu.org/publications/report-health-care-denied#:~:text=This%20report%20shares%20firsthand%20accounts,were%20turned%20away%20from%20a [https://perma.cc/L58S-8XUT] (demonstrating that a small handful of states do not allow providers to conscientiously object to providing medically necessary abortions in cases of an emergency) [hereinafter ACLU].

[56] ACOG, *supra* note 22, at 1204 (discussing how conscience objections may be necessary and valid when the required or requested action conflicts with the provider's obligations as a medical professional, such as if the police mandated providers to report undocumented patients to the authorities, which would conflict with the provider's duty to protect privacy and confidentiality).

[57] *Id.* at 1203. ("Although respect for conscience is important, conscientious refusals should be limited if they constitute an imposition of religious or moral beliefs on patients, negatively affect a patient's health, are based on scientific misinformation, or create or reinforce racial or socioeconomic inequalities."); Sarah C. Hull, *Not so Conscientious Objection: When can Doctors Refuse to Treat?*, STAT (Nov. 8, 2019) https://www.statnews.com/2019/11/08/conscientious-objection-doctors-refuse-treatment/ [https://perma.cc/3HXJ-82VW] (explaining that the United States has long followed the concept of liberty that individual rights must be protected until those rights infringe on another person's rights; for example, "religious liberty" through conscience objections limits the rights of patients to receive medical information and care free from religious interference).

B. How are Conscientious Objections in Health Care Rooted in Medical Misinformation?

Conscientious objection laws allow providers to reinforce abortion-related stigma[58] and reproductive health misinformation.[59] It is nearly impossible to determine the validity of a provider's refusal based on religious or moral beliefs, and courts largely decline to scrutinize the legitimacy of objections.[60] Because of this, providers are permitted to discriminate against women and weaponize misinformation to justify a refusal to provide medical care.[61] However, conscientious objections made by medical professionals that generate or reinforce discrimination, inequities, stigma, or misinformation must not be legitimized.[62]

The blanket grant of conscientious objections reinforces the notion that abortion, contraceptives, and sterilization result in the death of human life and interfere with God's plan for unencumbered human procreation.[63] This assertion can be traced to the expansion of the conscientious objection that effectively led medical professionals to equate the killing of a human during war (military conscientious objection) to the killing of an embryo or fetus (abortion) or to the impediment of the creation of life (contraception and sterilization).[64] Placing fetuses, embryos, or unfertilized eggs on equal footing with human life reinforces the conservative religious notion that any medical care negatively impacting "unborn life"—abortion, contraceptives, or sterilization—is morally unjust and can be conscientiously objected to.[65] Anti-abortion objectors rely on this principle when determining the

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[58] Abortion-related stigma is defined as "a negative attribute ascribed to women who seek to terminate a pregnancy that marks them, internally or externally, as inferior to ideals of womanhood." Anuradha Kumar, Leila Hessini & Ellen M.H. Mitchell, *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH, & SEXUALITY 625, 628 (2009). Abortion-related stigma includes restrictive abortion laws, such as bans, as well as societal stigmatization of abortion for those who terminate a pregnancy. Janet M. Turan & Henna Budhwani, *Restrictive Abortion Laws Exacerbate Stigma, Resulting in Harm to Patients and Providers*, 111 AM. J. PUB. HEALTH 37, 37 (2021).

[59] Fiala & Arthur, *supra* note 20, at 17.

[60] *See* Fiala & Arthur, *supra* note 21, at 256 ("The debate about where to draw the line between 'true and false' [conscience objections] is an illogical attempt to distinguish between true and false religious beliefs . . . .").

[61] Fiala & Arthur, *supra* note 20, at 15 (arguing that conscientious objections is a form of gender discrimination).

[62] Hull, *supra* note 57 (stating that a provider's personal religious or moral beliefs must not interfere with their professional responsibility to use evidence-based medicine to promote patient health); ACOG, *supra* note 22, at 1206 ("[C]laims of conscientious refusals should be considered invalid when the rationale for a refusal contradicts the body of scientific evidence.").

[63] Fiala & Arthur, *supra* note 20, at 15; Fr. Denis St. Marie & Fr. Paul Marx, *Voluntary Sterilization Severs God's Perfect Creative Plan for Our Lives*, CATH. NEWS AGENCY, https://www.ewtn.com/catholicism/library/voluntary-sterilization-severs-gods-perfect-creative-plan-for-our-lives-12177 [https://perma.cc/YH38-8MPW] ("[D]eliberate human sterilization to avoid conception poses an enormous threat to the Church; indeed to the entire world. . . . Through sterilization, God's precious gift of life and its transmission mankind's most special sharing in the creative aspect of God's character—is being rejected[.]").

[64] Fiala & Arthur, *supra* note 20, at 15.

[65] *See* Fiala & Arthur, *supra* note 21.

outer limits of their care.[66] For instance, providers often refer to abortion as "murder" or a "killing" and the fertilized egg or embryo as a "baby" or "unborn child."[67] Conscientious objectors continuously rely on the belief that "life begins at conception,"[68] despite a lack of consensus from the general medical community regarding when life or personhood begins.[69]

Refusing to provide medically necessary reproductive care because of one's subjective, moral beliefs also "send[s] a negative message that stigmatizes" a pregnant person's needs.[70] Abortion is health care and may be medically necessary to protect the health or life of the pregnant person.[71] However, granting all refusals "gives legitimacy to the religiously-based assumption that abortion is wrong," even when it is medically necessary.[72]

Discrimination cannot legally justify a conscientious objection, and objections to abortion, contraception, or sterilization are rooted in sexism and misogynist attitudes toward women.[73] Refusals disproportionately impact women because most objections are raised in the provision of reproductive health care.[74] Objections, thus, "perpetuate gender stereotypes around motherhood and pregnancy."[75] Refusing to provide or refer a patient for an abortion is based on the belief that abortion is immoral, and this belief reinforces patriarchal principles "that abortion is selfish and a deviation from women's biological duty to become mothers."[76] Therefore, not only are women disproportionately denied care as a result of refusals, but women are stigmatized by anti-choice providers' personal beliefs about pregnancy and motherhood.[77]

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[66] *See* All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, at 222–32, 236, 239 (5th Cir. 2023) (explaining that providers objected to providing emergency medical care after a failed medication abortion because of the need to protect "unborn life" or "preborn child[ren]").

[67] *Crisis Pregnancy Centers Lie: The Insidious Threat to Reproductive Freedom*, NARAL PRO-CHOICE AM. 13 (2015), https://reproductivefreedomforall.org/wp-content/uploads/2017/04/cpc-report-2015.pdf [https://perma.cc/7GT3-2RDS].

[68] *See* Bjørn K. Myskja & Morten Magelssen, *Conscientious Objection to Intentional Killing: An Argument for Toleration*, 19 BIO. MED. CTR. MED. ETHICS 1, 7 (2018) ("[A]ll that are human beings in a biological sense are also human persons morally speaking, thus including also human foetuses, embryos and even zygotes within the ambit of morally valuable human lives worthy of protection."); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 703 (2014) ("[T]he Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.").

[69] *E.g.,* Asim Kurjak & Ana Tripalo, *The Facts and Doubts About Beginning of the Human Life and Personality*, 4 BOSNIAN J. BASIC MED. SCIS. 5, at 12 (2004).

[70] Fiala & Arthur, *supra* note 21; Zoe L. Tongue, *On Conscientious Objection to Abortion: Questioning Mandatory Referral as Compromise in the International Human Rights Framework*, 22 MED. L. INT'L 349, 362 (2022) (explaining how selective objection may reinforce sexual and gender stereotypes, further stigmatize certain sexual activities, and discriminate against marginalized groups).

[71] WORLD MED. ASS'N, *supra* note 24.

[72] Fiala & Arthur, *supra* note 21; *see also* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2376 (2020) ("Consistent with their Catholic faith, the Little Sisters hold the religious conviction 'that deliberately avoiding reproduction through medical means is immoral.'").

[73] Fiala & Arthur, *supra* note 21, at 256.

[74] *Id.* at 255.

[75] Tongue, *supra* note 70.

[76] *Id.*

[77] Fiala & Arthur, *supra* note 21; Tongue, *supra* note 70 at 360.

Anti-abortion providers also stigmatize a pregnant person's needs by citing misinformation that abortion generates trauma and regret.[78] Objections to abortion services or referrals are sometimes based on the belief that patients will regret their decision to kill what objectors consider to be an unborn child.[79] However, this concept of abortion regret is factually inaccurate; pregnant people are overwhelmingly likely to experience relief after an abortion, rather than regret or other negative emotions, and this remains true even five years after the abortion.[80] Conscientious objections based on beliefs of abortion trauma or regret are, therefore, rooted in misinformation.

Conscientious objections to contraception are also "complicated by misinformation."[81] Proponents of medical conscientious objections argue that contraceptives, including emergency contraceptives such as Plan B, prevent implantation.[82] Anti-choice advocates assert that drugs or medical devices that delay or impair the implantation of an embryo are abortifacients,[83] something these groups are fundamentally against.[84] However, studies overwhelming reveal that emergency contraceptives prevent fertilization, effectively debunking the post-fertilization theory peddled by anti-choice advocates.[85] Implantation occurs after fertilization once the zygote (a fertilized egg) travels down the fallopian tube and attaches to the uterus.[86] This distinction is important because pregnancy begins after implantation, not fertilization.[87] Anti-choice advocates believe that life begins at conception

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[78] Corinne H. Rocca, Goleen Samari, Diana G. Foster, Heather Gould & Katrina Kimport, *Emotions and Decision Rightness Over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma*, 248 SOC. SCI. & MED. 1, 1 (2020) ("In the later decades of the twentieth century, opponents of abortion put forward an argument against access to legal abortion premised on the idea that abortion harms women by causing negative emotions and regret.").

[79] *See* All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 232 (5th Cir. 2023) (stating that the anti-abortion plaintiff-doctors believe that "chemical abortion" causes regret or trauma for patients).

[80] Laura Kurtzman, *Five Years After Abortion, Nearly All Women Say it was the Right Decision, Study Finds*, UNIV. CAL. S.F. (Jan. 13, 2020), https://www.ucsf.edu/news/2020/01/416421/five-years-after-abortion-nearly-all-women-say-it-was-right-decision-study [https://perma.cc/R6R3-AR3H] (explaining that, five years after the treatment or procedure, only 5% of women regret terminating their pregnancy).

[81] ACOG, *supra* note 22, at 1206.

[82] *Id.*

[83] Cook & Dickens, *supra* note 49.

[84] Myskja & Magelssen, *supra* note 68 ("An interesting case is conscientious objections to inserting intrauterine devices (IUDs) for contraception, where such objections are grounded in the belief that the IUD can act as an abortifacient."); NARAL PRO-CHOICE AM., *supra* note 67, at 11 (reporting that crisis pregnancy centers and anti-abortion physicians refer to contraception as an "abortifacient," which implies that using barrier contraceptives or hormonal birth control to prevent an unplanned pregnancy is the equivalent of terminating a pregnancy); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014) ("The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients.").

[85] ACOG, *supra* note 22.

[86] *Conception*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/11585-conception [https://perma.cc/7Z6N-4NB2].

[87] *Id.*

(fertilization),[88] so if an IUD, for example, precludes implantation of a fertilized zygote, then the IUD is impeding the development of life. However, contraceptives prevent fertilization, not implantation.[89]

Refusals to provide abortions may also be based on misinformation about the risks of abortion.[90] Anti-abortion providers routinely argue that abortion increases a patient's risk of breast cancer, infertility, and mental illness.[91] Published, peer-reviewed scientific literature demonstrates that these are not outcomes associated with terminating a pregnancy.[92] Thus, objectors are relying on unsubstantiated health risks—medical misinformation— to justify their refusals.

The data above demonstrates that there is no compelling medical reason justifying the refusal to provide or refer individuals for abortion, contraception, or sterilization. Rather, conscientious objections are largely rooted in religious or moral beliefs of motherhood, a woman's role in society, and pregnancy.[93] Since "it is impossible to reconcile faith-based medicine with evidence-based medicine,"[94] medicine grounded in moral beliefs and misinformation, rather than science and respect for patient autonomy and dignity, cannot be reasonably or rationally justified.[95]

III. THE ORIGINS OF TRADITIONAL CONSCIENTIOUS OBJECTIONS & THE LEGAL STANDARD FOR SUCH CLAIMS IN THE MILITARY CONTEXT

Despite being applied in the health care context today, legal protections for conscientious objectors originated in the context of mandatory military service (i.e., the draft).[96] Conscientious objection laws were later expanded to protect those who voluntarily enlisted in military service, but federal courts concluded that

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[88] Richard J. Paulson, *It Is Worth Repeating: "Life Begins at Conception" is a Religious, Not Scientific, Concept*, 3 F&S REPS. 177, 177 (2022); *see* Sarah Varney, *When Does Life Begin? As State Laws Define It, Science, Politics, and Religion Clash*, NPR (Aug. 27, 2022 5:00 AM), https://www.npr.org/sections/health-shots/2022/08/27/1119684376/when-does-life-begin-as-state-laws-define-it-science-politics-and-religion-clash [https://perma.cc/EDT8-NGGM] ("A handful of Republican-led states, including Arkansas, Kentucky, Missouri, and Oklahoma, have passed laws declaring that life begins at fertilization, a contention that opens the door to a host of pregnancy-related litigation.").

[89] ACOG, *supra* note 22.

[90] *Id.* at 1206; Tongue, *supra* note 70, at 359 (explaining that studies have demonstrated that "extreme" objectors not only refuse to provide abortion care, but disseminate "legally or medically inaccurate information to prevent patients from accessing legal abortions").

[91] ACOG, *supra* note 22, at 1206*; see also* Amy G. Bryant, Subasri Narasimhana, Katelyn Bryant-Comstockb & Erika E. Levi, *Crisis Pregnancy Center Websites: Information, Misinformation, and Disinformation*, 90 CONTRACEPTION 601, 604 (2014) (reporting that religious, anti-abortion crisis pregnancy centers tell clients that abortion is linked to mental illness, preterm birth, breast cancer, and infertility).

[92] ACOG, *supra* note 22, at 1206.

[93] Tongue, *supra* note 70.

[94] Fiala & Arthur, *supra* note 21.

[95] *See* Julian Savulescu, *Conscientious Objection in Medicine*, 332 BRIT. MED. J. 294, 294 (2006) ("Conscience, indeed, can be an excuse for vice or invoked to avoid doing one's duty. When the duty is a true duty, conscientious objection is wrong and immoral.").

[96] Fiala & Arthur, *supra* note 20.

"[d]ischarge of a voluntary enlistee for conscientious objection is a privilege granted by the executive branch, not a constitutional right."[97]

The first conscientious objection law in the United States was a provision in the Draft Act, formally known as the Selective Service Act of 1917.[98] The Draft Act mandated military service but allowed objectors belonging to a "well-recognized religious sect or organization . . . whose existing creed or principles [forbade] its members to participate in war in any form" to be exempt from combative positions.[99] Instead, these objectors were placed in noncombative military positions.[100] In 1940, Congress passed the Selective Training and Service Act, which expanded conscientious objections provided by the Draft Act of 1917.[101] The 1940 law eliminated the requirement that objectors belong to a religious sect, so long as the objections were based on an individual's religious trainings or beliefs.[102]

Federal conscientious objection laws in the military were further updated in 1951 by the Universal Military Training and Service Act ("the Act").[103] The Act intended to clarify the standards for conscientious objection claims that were expanded by the 1940 Selective Training and Service Act.[104] Previous laws considered objectors opposed only to combative positions and failed to properly consider objectors opposed to all military service, even noncombative positions, but the Act took both types of objectors into consideration.[105]

Conscientious objections to military service require the following test:

> The burden to establish conscientious objector status rests with the applicant, who must show by clear and convincing evidence that he or she is conscientiously opposed to participation in all wars, that the opposition is based on religious training or belief, and that these views are firm, fixed, and sincerely and deeply held.[106]

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[97] Watson v. Geren, 569 F.3d 115, 127 (2d Cir. 2009) (citing Nurnberg v. Froehlke, 489 F.2d 843, 849 (2d Cir. 1973)); *see* Sanger v. Seamans, 507 F.2d 814, 816 (9th Cir. 1974) ("[W]e must bear in mind that when a person enters into a contractual commitment with the government to serve his country, it is anticipated that he will fulfill his promise.").

[98] Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76 (codified as 50 U.S.C. app. §§ 201–211, 213, 214).

[99] *Id.* at 40 Stat. 78.

[100] *See id.*

[101] Selective Training & Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885 (codified as 50 U.S.C. app. § 301 *et seq.*).

[102] *Id.* at 54 Stat. 889.

[103] *See* Universal Military Training & Service Act, Pub. L. No. 51-144, 65 Stat. 75 (codified as 50 U.S.C. § 3806(j)).

[104] U.S. v. Seeger, 380 U.S. 163, 179 (1965).

[105] *See* 76 CONG. REC. 11418 (DAILY ED. SEPT. 4, 1940) (STATEMENT OF REP. CHARLES I. FADDIS) ("We have made provision to take care of conscientious objectors. I am sure the committee has had all the sympathy in the world with those who appeared claiming to have religious scruples against rendering military service in its various degrees. Some appeared who had conscientious scruples against handling lethal weapons, but who had no scruples against performing other duties which did not actually bring them into combat. Others appeared who claimed to have conscientious scruples against participating in any of the activities that would go along with the Army. The committee took all of these into consideration and has written a bill which, I believe, will take care of all the reasonable objections of this class of people.").

[106] Kanai v. McHugh, 638 F.3d 251, 258 (4th Cir. 2011).

Conscientious objectors to military service must demonstrate to a local board "how he arrived at his beliefs" and "the influence his beliefs have had on how he lives his life."[107] To be relieved from military service, conscientious objectors must establish that they are against war "in any form."[108] An objection to one war, but not all wars, is insufficient to be exempt from military service.[109] This is true even if the objection to a certain war is based on religious or moral beliefs.[110] Local boards and courts also consider topics tangentially related to war, death, and aggression when assessing whether an objector is against war in all forms.[111] For instance, courts consider whether objectors support or oppose the death penalty, abortion, or gun control, as well as participation in certain organizations or "aggressive" sports.[112]

Objectors also have the burden of demonstrating that their sincere and deeply held opposition to military service is based on their religious training or beliefs.[113] Federal appellate circuits follow a similar analysis even if they have slightly different tests for determining the depth of an objector's conviction.[114] Sincerity and depth of beliefs demonstrate that the objector's religious, moral, or ethical beliefs are guiding the conscientious objection and that those beliefs are at the core of the objector's conscience.[115] While religious, moral, or ethical beliefs may justify objections, objections based on "politics, expediency, or self-interest" will not.[116] Local boards and courts may only determine whether the objector's religious training or beliefs support the objection and not whether the objector's certain beliefs are valid.[117]

The objector's beliefs may be illustrated through written documentation or by testimony from individuals who can attest to the authenticity of the objector's claims.[118] In *Welsh v. United States*, the Supreme Court relied on forms completed

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[107] *Conscientious Objectors*, SELECTIVE SERV. SYS., https://www.sss.gov/conscientious-objectors/ [https://perma.cc/LZZ8-6YYM].
[108] 50 U.S.C. § 3806(j); Welsh v. U.S., 398 U.S. 333, 336 (1970).
[109] Watson v. Geren, 569 F.3d 115, 131 (2d Cir. 2009) (observing that the board found the objector to only be opposed to the war in Afghanistan rather than all wars).
[110] Gillette v. U.S., 401 U.S. 437, 443 (1971).
[111] *E.g.*, *Watson*, 569 F.3d at 121.
[112] *Id.* at 121–22 (explaining that the objector to military service was "morally opposed to the death penalty under any circumstances" and participated in organizations that supported gun control and environmental justice policies).
[113] U.S. v. Seeger, 380 U.S. 163, 171 (1965).
[114] *Compare* Roby v. U.S. Dep't of Navy, 76 F.3d 1052, 1058 (9th Cir. 1996) ("We have often applied a depth of conviction test based on the Court's language and military regulations."), *with* Kemp v. Bradley, 457 F.2d 627, 629 (8th Cir. 1972) ("'Depth of conviction' requires theological or philosophical evaluation. We think it unwise to adopt this more complex concept as the requirement which a Selective Service registrant or member of the Armed Forces must fulfill in order to qualify for conscientious objector classification.").
[115] *Seeger*, 380 U.S. at 186 ("[T]here was no question of the applicant's sincerity. He was a product of a devout Roman Catholic home; he was a close student of Quaker beliefs from which he said 'much of (his) thought is derived[.]'"); Kanai v. McHugh, 638 F.3d 251, 264 (4th Cir. 2011) ("[The Army Board President concluded] that Kanai's guiding principle was his desire to leave West Point rather, than to oppose all wars.").
[116] SELECTIVE SERV. SYS., *supra* note 107.
[117] *Seeger*, 380 U.S. at 184–85 ("The validity of what he believes cannot be questioned.").
[118] SELECTIVE SERV. SYS., *supra* note 107; Watson v. Geren, 569 F.3d 115, 122–25 (2d Cir. 2009) (stating that three members of the objector's family and seven professional references and colleagues attested to the sincerity of the objector's beliefs).

by the objector to examine his childhood, religious upbringing, and present beliefs.[119] Similarly, in *Kanai v. McHugh*, the Army Board and the Fourth Circuit considered the nature of the objector's recently adopted pacifist views, testimony detailing his personality and treatment of others, and his hobbies, all of which provided insight as to his sincerely held beliefs and motives behind his conscientious objection.[120]

Federal courts follow a clear standard for reviewing the decisions of local boards; courts must uphold a board's decisions regarding a conscientious objector's claim if the board's conclusion is supported by a "basis in fact."[121]

> A "basis in fact" exists when conflicting inferences can be drawn from the same evidence. (citation omitted) Thus, if any inferences can be drawn from the evidence that conflict with the [objector's claims], there is a basis in fact to deny the application, and the [local board's] decision must be upheld.[122]

This standard of review provides considerable deference to the military board's findings pursuant to internal military regulations.[123] Despite the deference to the local boards, courts and boards "are not free to reject beliefs because they consider them 'incomprehensible.'"[124] Instead, courts must defer to the board's findings, unless there is no basis in fact supporting the board's determination.[125]

Traditional conscientious objection claims in the military context greatly differ from conscientious objection claims raised today in the health care context.[126] Keep in mind while reading Part IV that modern conscientious objectors to military service must satisfy a legal standard before being relieved of any contractual obligation with the government.[127] In the health care context, consider whether providers are burdened with demonstrating that their beliefs are "firm, fixed, and sincerely and deeply held;" whether providers' beliefs, including those grounded in medical misinformation, actually support their refusal; and whether providers' refusals are substantially justified by "politics, expediency, or self-interest."[128]

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[119] Welsh v. U.S., 398 U.S. 333, 336–37 (1970).
[120] *Kanai*, 638 F.3d at 266–68.
[121] *Id.* at 260.
[122] *Id.* at 267.
[123] Roby v. U.S. Dep't of Navy, 76 F.3d 1052, 1056–57 (9th Cir. 1996).
[124] U.S. v. Seeger, 380 U.S. 163, 184–85 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.'").
[125] *Id.*
[126] *See infra* Part IV.
[127] Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76 (codified as 50 U.S.C. app. §§ 201–211, 213, 214).
[128] *Kanai*, 638 F.3d at 258; *see also supra* note 118 and accompanying text.

IV. MODERN CONSCIENTIOUS OBJECTIONS TO PROVIDING OR REFERRING FOR REPRODUCTIVE HEALTH CARE

Contrary to conscientious objections to military service, modern conscientious objection laws in the context of health care afford near-absolute deference to providers and lack a legal standard for courts to apply.[129] Because of this, modern conscience clauses legally permit refusals of reproductive care based on a belief in medical misinformation.[130] Objectors have done just that in two areas in reproductive health care: (1) emergency services for medically necessary abortions and (2) the facilitation of reproductive health services, such as referrals. More specifically, anti-choice objectors assert that policies requiring the provision of reproductive care violate the right to conscience or the right to free exercise of religion.[131] This section will demonstrate that courts fail to inspect objections that anti-choice providers cite to support alleged violations of a right to conscience or free exercise of religion.

A. Refusal to Provide Emergency Abortion Services

Providers may conscientiously object to providing abortion services because they believe abortion is "elective," and therefore not a life-saving procedure.[132] This reasoning may even extend to emergency situations in which an abortion truly *is* necessary to preserve the life or health of the pregnant person.[133] A stark example of providers rejecting the unfortunate reality of medically necessary abortions and instead promoting medical misinformation disguised as religious beliefs to support conscientious objections can be found in the Fifth Circuit Court of Appeals's decision in *Alliance for Hippocratic Medicine v. United States Food and Drug Administration.*[134]

In *Alliance for Hippocratic Medicine*, anti-abortion obstetrician-gynecologists and emergency room doctors challenged four Food and Drug Administration ("FDA") rules regarding a medication abortion drug, mifepristone.[135] Although the Supreme Court reversed the case because the plaintiffs failed to state an injury in fact, the Fifth Circuit's opinion exemplifies how conscientious objectors can persuade sympathetic courts to adopt medical misinformation as fact to support a conscientious objection without a legal standard in place.[136] Most relevant for this discussion is the 2021 Non-Enforcement Rule.[137] The FDA stated it would not

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[129] Fiala & Arthur, *supra* note 21.
[130] *See* All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 236 (5th Cir. 2023).
[131] *See id.* at 229 (right to conscience); *see also* Nat'l Inst. for Fam. & Life Advocs. v. Schneider, 484 F. Supp. 3d 596, 622 (N.D. Ill. 2020) (right to free exercise of religion).
[132] Banks, *supra* note 10 (reporting that emergency room doctors objected to performing emergency abortions after a failed medication abortion because they would be participating in an "elective abortion," which they deemed was "not life-saving care" because it would "end[] the life of the unborn").
[133] ACLU, *supra* note 55 at 8–17 (emphasis added) (detailing the stories of women who suffered a miscarriage and were denied emergency abortion services by Catholic hospitals).
[134] *All. for Hippocratic Med.*, 78 F.4th 210 (5th Cir. 2023).
[135] *Id.* at 222.
[136] *See* Food & Drug Admin. v. All. For Hippocratic Med., 602 U.S. 367, 393 (2024).
[137] *Id.*

enforce its own regulation requiring mifepristone to be prescribed and dispensed in person.[138] In application, the 2021 Non-Enforcement Rule expanded how pregnant people could induce a medication abortion with mifepristone.[139]

Anti-abortion providers in *Alliance for Hippocratic Medicine* peddled arguments similar to those discussed in Part II regarding providers' justifications for conscientious objections to providing abortion care.[140] For example, the providers argued that they would be injured if required to perform emergency care for women who have taken mifepristone.[141]According to the providers, administering emergency abortion care would require them to participate in or complete an abortion, and would "conflict[] with their sincerely held moral beliefs and violate[] their rights of conscience."[142]

The court ultimately sided with the providers and held that the 2021 Non-Enforcement Rule harmed their conscience rights.[143] Unlike in the military context, the court neither applied a test nor examined evidence as to the authenticity of the providers' beliefs.[144] Instead, the court expressed sympathy for the "harms" the regulation inflicted on the anti-abortion medical professionals.[145]

Not only is it troubling that the provider-plaintiffs advanced conscientious objection arguments rooted in medical misinformation, but it is awfully worrisome that the Fifth Circuit adopted much of the misinformation as fact. First, the providers' testimony, also cited by the court, included the notion that a surgical abortion after an unsuccessful medication abortion is not medically necessary.[146] One doctor testified, "the FDA's actions may force me to end the life of a human being in the womb for *no medical reason*."[147] The court failed to adequately scrutinize the doctor's statement that there is not a medical reason to complete a failed medication abortion.[148] Rather, the court accepted the testimony at face value, stating that the doctors' "declarations illustrate that they experience aesthetic injury from the destruction of unborn life."[149] While it is incredibly rare, pregnant people having taken mifepristone may experience complications, such as an incomplete

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[138] *Food & Drug Admin.*, 602 U.S. at 393.
[139] *Id.*
[140] All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 228–29, 232–33 (5th Cir. 2023) (reiterating the objectors' misleading and harmful language about abortion and pregnancy)."
[141] *Id.* at 229 (explaining other reasons the regulation causes them harm, including that (1) treating patients who have taken mifepristone "imposes mental and emotional strain above what is ordinarily experienced in an emergency-room setting;" (2) providing emergency treatment for mifepristone patients makes doctors "divert their time and resources away from their ordinary patients;" and (3) patients who have ingested mifepristone "involve more risk of complication than the average patient," which increases the doctors' risk of liability and insurance costs).
[142] *Id.* at 229.
[143] *Id.* at 253.
[144] *See id.*
[145] *Id.* at 237 (explaining that the plaintiffs' conscience injury is a cognizable harm because "the threat of being forced to violate a sincerely held moral belief" leads to "acute emotional and psychological harm").
[146] *Id.* at 232.
[147] *Id.* (emphasis added).
[148] *Id.*
[149] *Id.*

abortion, hospitalization, or, in extreme cases, a blood transfusion.[150] As the tragic death of Amber Nicole Thurman demonstrates, in the event of a rare but severe complication, the expertise of emergency room medical professionals is essential to preserve the patient's health or life.[151]

Second, the Fifth Circuit suggested that complications resulting from mifepristone requiring emergency room care are common occurrences.[152] This is also an inaccurate depiction of scientific truths held by the medical community.[153] Although complications from ingesting mifepristone for purposes of a medication abortion are not one-off incidents, they are not as frequent or predictable as the providers and court made it seem.[154] This is another example of the court subtly adopting medical misinformation put forth by the plaintiffs.

Third, the court accepted the providers' assertion that treating complications from mifepristone was "naturally higher risk" and required more time and resources than "typical OB/Gyn patient[s]."[155] Underpinning the plaintiffs' argument is the notion that "typical" patients—those experiencing pregnancy—face less risks than patients with an incomplete medication abortion. This argument by the providers is a classic example of a routine tactic deployed by anti-abortion advocates: highlighting, and even overstating, the risks of abortion while simultaneously neglecting the risks of pregnancy and childbirth.[156] However, pregnancy and childbirth are exponentially more dangerous than abortion; medication abortion has a mortality rate of 0.27 deaths per 100,000 medication abortions, while pregnancy has a mortality rate of 17.3 deaths per 100,000 live births.[157] This contrast is even greater when looking at the mortality rate of Black pregnant people.[158] Moreover, serious complications from pregnancy often mirror the serious complications

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[150] Elizabeth G. Raymond, Caitlin Shannon, Mark A. Weaver & Beverly Winikoffa, *First-trimester Medical Abortion with Mifepristone 200 mg and Misoprostol: A Systematic Review*, 87 CONTRACEPTION 26, 30 (2013) (finding that medication abortion when taken as directed by the FDA results in severe complications in only 0.4% of cases).

[151] *See* Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother's Death Was Preventable.*, PROPUBLICA (Sept. 16, 2024, 5 AM), https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death [https://perma.cc/EM8S-W6X7].

[152] *All. for Hippocratic Med.*, 78 F.4th at 233 (stating that emergency room complications as a result of medication abortion are "predictable," "consistent," and "not speculative").

[153] *See* Raymond, et al., *supra* note 149.

[154] *See id.*

[155] All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th at 233 (5th Cir. 2023) ("Patients who suffer complications from chemical abortions require significantly more time and attention from providers than the typical OB/Gyn patient requires.") (citation omitted).

[156] *See id.* at 232 (recognizing doctors who testified that complications from medication abortion require "extended physician attention, blood for transfusions, and other hospital resources," and therefore deprive healthcare from pregnant patients).

[157] *Analysis of Medication Abortion Risk and the FDA Report "Mifepristone US Post-Marketing Adverse Events Summary through 6/30/2021*," ADVANCING NEW STANDARDS IN REPROD. HEALTH (Nov. 2022), https://www.ansirh.org/sites/default/files/2022-11/mifepristone_safety_11-15-22_Updated_0.pdf [https://perma.cc/EJ43-2AG4].

[158] *Id.* (reporting that Black women have a mortality rate of 41 deaths per 100,000 live births, a number over 14 times higher than the mortality rate associated with medication abortion).

resulting from an incomplete medication abortion.[159] Most notably, the symptoms associated with miscarriage, such as hemorrhage or infection, can present nearly identically to symptoms from an incomplete medication abortion.[160] Nonetheless, the court accepted as fact the plaintiffs' mistaken contention that mifepristone is riskier than other reproductive health care.

Fourth, the Fifth Circuit failed to scrutinize the providers' claims that medication abortion results in regret and trauma.[161] Instead the court concluded that, because medication abortions "frequently cause 'regret' or 'trauma' for the patients and, by extension, the physicians," "treating mifepristone patients imposes considerable mental and emotional stress on emergency-room doctors."[162] As discussed in Part II of this Article, the Fifth Circuit overstated the negative emotional effects associated with abortion.[163]

Lastly, both the Fifth Circuit and the providers often referred to the fetus as an "unborn child" or "preborn baby."[164] Regardless of the absence of scientific and philosophical consensus of when life begins, the patients discussed in *Alliance for Hippocratic Medicine* were not carrying viable fetuses.[165] Medication abortion is administered before seventy days, or ten weeks, gestation—long before potential fetal viability.[166] Therefore, it is nearly impossible that patients experiencing complications or in need of an emergency abortion due to an incomplete medication abortion would also be carrying viable fetuses capable of life outside the womb.[167]

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[159] *See* Jody Ravida, *My Miscarriage Looked Like an Abortion. Today I Would be a Suspect*., WASH. POST, (June 28, 2022, 4:09 PM) https://www.washingtonpost.com/outlook/2022/06/28/miscarriage-dobbs-roe-abortion/ [https://perma.cc/XL3E-Z9QD].

[160] *Compare* Krissi Danielsson*, What to Know About Incomplete Miscarriage,* PARENTS (Jul. 1, 2024), https://www.parents.com/incomplete-miscarriage-symptoms-causes-treatment-8645920 [https://perma.cc/W7FD-L8QX] (citing heavy bleeding and infection as symptoms of an incomplete miscarriage), *with All. for Hippocratic Med.,* 78 F.4th at 230 (citing doctors' testimony that hemorrhage and infection are complications from an incomplete abortion).

[161] *See All. For Hippocratic Med.*, 78 F.4th at 230–33.

[162] *Id.*

[163] *See* Laura Kurtzman, *Five Years After Abortion, Nearly All Women Say it was the Right Decision, Study Finds*, UNIV. CAL. S.F. (Jan. 13, 2020), https://www.ucsf.edu/news/2020/01/416421/five-years-after-abortion-nearly-all-women-say-it-was-right-decision-study [https://perma.cc/8JLG-JY2J].

[164] *All. for Hippocratic Med.*, 78 F.4th at 222–32, 236, 239 ("I object to abortion because it ends a human life. My moral and ethical obligation to my patients is to promote human life and health.") ("The woman [who took mifepristone] had a subsequent ultrasound, which showed that her unborn child was still alive. I advised the internists treating this patient to avoid administering certain medications that could harm the patient and her unborn child.") ("And because the preborn baby still had a heartbeat when the patient presented, my partner felt as though she was forced to participate in something that she did not want to be a part of—completing the abortion."); *Id.* at 259 (Ho, J., concurring in part and dissenting in part) ("Doctors delight in working with their unborn patients—and experience an aesthetic injury when they are aborted.").

[165] *Id*. at 261–62 (Ho, J., concurring in part and dissenting in part) (stating that the "abortifacient"—mifepristone— was approved for use of up to ten weeks gestation).

[166] Marygrace Taylor, *What is the Age of Fetal Viability?,* WHAT TO EXPECT (Aug. 2, 2021) https://www.verywellfamily.com/premature-birth-and-viability-2371529 [https://perma.cc/4V8W-DNYH] (explaining that viability cannot be easily defined, but that most physicians consider twenty-four weeks the "point of potential [fetal] viability").

[167] *See Id.*

The court's language supports this Article's argument that there is no standard upon which courts evaluate the legitimacy or depth of an objector's beliefs.[168] The absence of a meaningful standard allows for the dissemination of medical misinformation and abortion-related stigma at the expense of patients.[169]

As this case demonstrates, conscientious objections to medically necessary abortions in emergency settings receive great deference from courts.[170] The validity and depth of the objectors' beliefs undergo little scrutiny, as well as whether the beliefs actually support the activity that is being objected to.[171] *Alliance for Hippocratic Medicine* makes it clear that providers, even those with the expertise and an obligation to act in emergency situations, are entitled to refuse to provide life- or health-saving reproductive care.[172]

B. Refusal to Refer Patients for Reproductive Services

Providers that refuse to refer patients for services that the provider is religiously, morally, or ethically against is a growing problem in the United States.[173] This issue was recently exacerbated with the *Dobbs* decision,[174] and it is a point of controversy for doctors and scholars.[175] Further discussion of the Church Amendment is vital to understand providers' arguments regarding the alleged right to refuse to refer.[176]

The Church Amendments intended to protect individuals who "perform" or "assist in the performance" of abortions and sterilizations.[177] A federal district court in California noted that the language "assist in the performance" was only intended to protect "individuals in the operating room who actually assisted the physician in carrying out the abortion or sterilization procedure."[178]

However, anti-choice advocates, including those in the Trump administration, sought to use the Church Amendments to cover any individual even remotely connected to the provision of abortion, contraceptive, or sterilization services.[179] In 2018, Secretary Azar of DHHS—an anti-abortion advocate[180]—promulgated a final

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[168] *See supra* Part II.B.
[169] *Id.*
[170] *See All. for Hippocratic Med.*, 78 F.4th at 232–33.
[171] *Id.* at 230–33 (deciding the case with little to no discussion with respect to the validity and depth of the providers' beliefs underpinning their conscientious objection).
[172] *Id.*
[173] *Refusals to Provide Health Care Threaten the Health and Lives of Patients Nationwide*, NAT'L WOMEN'S L. CTR. (Dec. 2020), https://nwlc.org/wp-content/uploads/2017/08/NWLC_FactSheet_Refusals-to-Provide-Health-Care-Threaten-the-Health-and-Lives-of-Patients-Nationwide-2.18.22.pdf [https://perma.cc/5675-CMDD].
[174] *See* Jones-Nosacek, *supra* note 4 and accompanying text.
[175] Eberl, *supra* note 48 (arguing for "reasonable" conscientious objections laws); Fiala & Arthur, *supra* note 21 (arguing categorically against conscientious objection laws).
[176] *See supra* notes 27–31 and accompanying text (describing the Church Amendments briefly).
[177] *See* 119 Cong. Rec. 9597 (1973) (statement of Sen. Church).
[178] City & Cnty. of S.F. v. Azar, 411 F. Supp. 3d 1001, 1013 (N.D. Ca. 2019).
[179] *See* Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, 23170 (May 21, 2018) (expanding federal conscientious objection protections to "ensure vigorous enforcement of Federal conscience and anti-discrimination laws . . . .").
[180] *See* Kathryn Krawczyk, Alex Azar Just Called Health and Human Services "The Department of Life," THE WEEK, (Jan. 24, 2020) https://theweek.com/speedreads/891410/alex-azar-just-called-

rule that redefined "assist in the performance" of a service for purposes of federal conscience protections.[181] The rule expanded the phrase's definition to include an action with "a specific, reasonable, and articulable connection" in furtherance of a procedure, health service program, or research activity.[182] "Assist in the performance" explicitly included any supportive action for "counseling, referral, training, or otherwise making arrangements for the procedure or health service program or research . . . ."[183] Under the Trump administration's rule, verbally telling a patient the name of a clinic that provides abortion,[184] providing medical insurance that covers abortion,[185] driving a person to a scheduled abortion,[186] or prescribing medication may be considered "assisting in the performance" of abortion, and are thus protected by federal conscience laws.[187]

The DHHS continued expand federal conscience protections in *City and County of San Franscisco vs. Azar*, arguing that the rule would also cover ambulance drivers because the transportation of an individual for an abortion "assists in the performance" of an abortion.[188] The Trump administration also asserted that the rule would protect schedulers and hospital housekeeping staff who conscientiously object to abortion because "[s]cheduling an abortion or preparing a room and the instruments for an abortion are necessary parts of the process of providing an abortion, and it is reasonable to consider performing these actions as constituting

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health-human-services-department-life [https://perma.cc/VZS8-8G7X] ("Azar debuted the 'Department of Life' in a Thursday night statement in which he voiced his pride in being 'part of the most pro-life administration in this country's history.' HHS specifically took 'numerous actions in 2019' that align with those views, including introducing a new rule that mandates abortion providers fit strict new requirements or risk losing federal funding.").

[181] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, 23263 (May 21, 2018).

[182] *Id.*

[183] *Id.*

[184] *Id.* at 23264 (stating that a "referral" includes providing oral, written, or electronic information, such as the "names, addresses, phone numbers, email or web addresses, direction, instructions, descriptions, or other information resources" where the "purpose or reasonably foreseeable outcome" of providing the information is to assist the person in, among other things, obtaining a health care service or procedure).

[185] *Id.* (defining a "health service program" to include "the provision or administration of any health or health-related services . . . health benefits, health or health-related insurance coverage, or any other service related to health or wellness, whether directly; through payments . . . through insurance; or otherwise").

[186] *Id.* at 23186–88 (May 21, 2018). ("[T]he Department believes driving a person to a hospital or clinic for a scheduled abortion could constitute "assisting in the performance of" an abortion, as would physically delivering drugs for inducing abortion.").

[187] *Id.* at 23196 (including pharmacists and pharmacies in the definition of "health care entity").

[188] City & Cnty. of S.F. v. Azar, 411 F. Supp. 3d 1001, 1014 (N.D. Ca. 2019).; *but see* Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, 23183, 23188 (May 21, 2018) ("With respect to EMTALA, the Department generally agrees with its explanation in the [2008 Rule] that the requirement under EMTALA that certain hospitals treat and stabilize patients who present in an emergency does not conflict with Federal conscience and anti-discrimination laws.:) ([T]he Department does not believe such a scenario would implicate the definition of 'assist in the performance of' an abortion, because the complications in need of treatment would be an unforeseen and unintended byproduct of a completed procedure.").

'assistance.'"[189] Under this reasoning, any individual even vaguely connected to a service which they object to would be covered by the Church Amendments, despite this line of reasoning directly conflicting with the statute's intent.[190]

Objectors also claim that "assisting in the performance" of abortion or sterilization includes facilitating such services through informational referrals.[191] The Church Amendments as originally enacted do not mention referrals,[192] and another federal conscience provision further protecting objectors—the Weldon Amendment[193]—also offers little support for the right to refuse to provide information.[194] Despite the weak statutory support of a right to refuse to refer, "[f]rom the perspective of a doctor with a conscientious objection to abortion, referral to another practitioner is like saying, 'I can't rob the bank for you myself. But I know someone down the road who can.' . . . [R]eferral involves becoming complicit in the abortion."[195]

This alleged right to refuse to refer perpetuates misinformation of reproductive health care. For instance, in *National Institute for Family and Life Advocates v. Schneider,* the plaintiffs—a group of anti-choice, unlicensed crisis pregnancy centers[196] and licensed medical providers—alleged that an amendment to Illinois's conscience clause violated their First Amendment right to free exercise because the law burdened their "ability to promote their religiously-motivated pro-life

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[189] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23186–87 (May 21, 2018).

[190] *See* 119 Cong. Rec. 9597 (1973) (statements of Sen. Long) (declaring that the amendment would not cover situations in which an individual "seeks a sterilization procedure or an abortion, [and] it could not be performed because there might be a nurse or an attendant somewhere in the hospital who objected to it.").

[191] *See e.g.,* Nat'l Inst. for Fam. & Life Advocs. v. Schneider*,* 484 F. Supp. 3d 596, 617 (N.D. Ill. 2020).

[192] National Research Act, 1974, Pub. L. No. 93-348 , § 214, 88 Stat. 342, 353 (1974) (amending the Health Programs Extension Act of 1973 to state that "[n]o individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part [by DHHS] if his performance or assistance in the performance . . . would be contrary to his religious beliefs or moral convictions").

[193] Consolidated Appropriations Act, 2022, Pub. L. No. 117-103 § 507(d)(1), 136 Stat. 49, 496 (2022). The Weldon Amendment prohibits the Department of Health and Human Services from providing federal funding to any agency, program, or governmental entity that discriminates against institutions or individuals that refuse to "provide, pay for, provide coverage of, or refer for abortions." The Weldon Amendment was originally adopted in 2004 and has been included in every appropriations bill since.

[194] *See* 150 Cong. Rec. 10090 (2004) (STATEMENT OF REP. WELDON) ("This provision is intended to protect the decisions of [providers] from being forced by the government to . . . refer . . . for abortions) (Therefore, contrary to what has been said, this provision will not affect . . . the provision of abortion-related information . . . by willing providers.").

[195] Fiala & Arthur, *supra* note 20 at 14.

[196] Crisis pregnancy centers ("CPCs") refer to facilities that purport to provide licensed, comprehensive reproductive health care but actually operate under a religious, often Christian, mission to dissuade people from accessing abortion, contraception, and sterilization services. *Crisis Pregnancy Centers*, ACOG, https://www.acog.org/advocacy/abortion-is-essential/trending-issues/issue-brief-crisis-pregnancy-centers#:~:text=CPC%20is%20a%20term%20used,care%20and%20even%20contraceptive%20options [https://perma.cc/9874-L5PY]. CPCs frequently use deceptive and misleading tactics to undermine fully informed consent and access to timely care. *Id.*

messaging."[197] The plaintiffs' "pro-life messaging" relied heavily on arguments about reproductive care that studies establish as medical misinformation.[198] The plaintiffs' arguments reflected misguided beliefs about abortion regret,[199] when life begins,[200] and gender stereotypes regarding motherhood.[201]

Like many states post-*Roe*, Illinois adopted the Healthcare Right of Conscious Act ("HCRCA") to grant immunity from civil liability to healthcare providers with religious conscientious objections to providing certain care.[202] The amendment to HCRCA at issue in *National Institute for Family and Life Advocates* narrowed the scope of immunity provided by HCRCA's conscientious objection provision.[203] Under the new provision, all health care facilities were required to ensure that individuals requesting treatment can receive it, regardless of any conscientious objections that a medical provider may hold.[204] Thus, under the new version of HCRCA, the plaintiffs must refer clients to or provide information to clients about facilities that offer abortion, contraceptive, or sterilization services.[205]

The three crisis pregnancy centers refused to discuss abortion, contraceptive, or sterilization services with their clients or refer their clients to receive this care elsewhere.[206] The plaintiffs neither provided obstetrical or gynecological care nor disclosed to clients that their mission is to dissuade pregnant people from having abortions.[207] The plaintiffs spread misinformation to clients, including that abortion results in "excessive bleeding, perforation of the uterus, or not being able to bear children again," as well as damage to their mental and spiritual health.[208] Also, the plaintiffs testified that they only inform clients of the risks of abortion and contraception, and they do not discuss the benefits of contraception or sterilization, as they believe there are no benefits.[209]

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[197] Nat'l Inst. for Fam. & Life Advocs. v. Schneider, 484 F. Supp. 3d 596, 603, 626–27 (N.D. Ill. 2020).

[198] *Compare id.* at 602 (quoting plaintiffs as testifying that their messaging includes informing patients of the "medical risks of abortion," such as excessive bleeding, perforation of the uterus, or infertility, as well as the "spiritual" risks of abortion), *with* ACOG, *supra* note 22, at 1206 (summarizing information debunking medical misinformation frequently peddled by anti-abortion advocates).

[199] *Nat'l Inst. for Fam. & Life Advocs.*, 484 F. Supp. 3d at 601 ("Plaintiff Dr. Schroeder testified that viewing an ultrasound that shows movement or a heartbeat might change a woman's mind about having an abortion.").

[200] *Id.* at 602 (stating that the plaintiffs discourage abortion with the intent to "preserve the life of the unborn child").

[201] *Id.* (testifying that abortion carries the "risk" of not being able to mother future children).

[202] 754 ILL. COMP. STAT. §70/3(e) (2019) (defining "conscience" as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in their life of its possessor parallel to that filled by God among adherents to religious faiths").

[203] Nat'l Inst. for Fam. & Life Advocs. v. Schneider, 484 F. Supp. 3d 596, 606–07 (N.D. Ill. 2020).

[204] *Id.* at 607.

[205] *Id.* at 607–08.

[206] *Id.* at 603.

[207] *Id.* at 602–03 ("For instance, TLC Pregnancy Services, according to its executive director, does not disclose its pro-life policy on its website, verbally, or in advertisements.").

[208] *Id.* at 602.

[209] *Id.* at 603.

In rejecting the plaintiffs' motion for summary judgment, the court looked to HCRCA's legislative history, which indicated that the amendment was adopted out of "legitimate concerns about patient access to healthcare[.]"[210] The legislature narrowed the scope of protections for conscientious objections because of serious complaints received about anti-choice providers.[211] One complaint detailed an incident in which a neurologist told a patient that her medically necessary abortion was actually *not* medically necessary because "[t]here is no such thing as a medically necessary abortion."[212] The neurologist also made other medically incorrect statements: that abortion, rather than delivery, causes more health problems, and that abortion is "[t]he highest risk factor for developing breast cancer."[213] As discussed in Part IV.A, this is factually inaccurate.[214] Under Illinois's previous conscience objection clause, the broad immunity granted to providers, like the neurologist, created significant obstacles to pregnant patients seeking medically necessary care.[215]

The Illinois legislature also considered incidents in which Catholic hospitals refused to provide abortions to pregnant women experiencing life-threatening miscarriages.[216] The legislature was also presented testimony concerning refusals of care, including those from Catholic facilities, that resulted in a threat to patient safety, and refusals to refer the patients to another provider that would perform abortions resulted in an increase in health care costs at the patients' expense.[217]

Objectors also argue that "facilitating" an abortion or sterilization includes providing insurance coverage for such services through insurance plans.[218] For instance, in *Cedar Park Assembly of God of Kirkland, Washington v. Kreidler*, a church with anti-choice beliefs alleged that a Washington state law violated its First Amendment right to free exercise because it required the church to "facilitate abortion," which goes against its religious beliefs.[219]

Under Washington state conscientious objection laws, objectors to certain services are not required to purchase medical insurance coverage for those services, but they must ensure enrollees still have access to the services.[220] However, the plaintiff-church in *Kreidler* believed that merely providing access to abortion

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[210] *Nat'l Inst. for Fam. & Life Advocs.*, 484 F. Supp. 3d at 625.
[211] *Id*. at 605–6.
[212] *Id.* at 605.
[213] *Id.*
[214] *See supra* notes 91–92 and accompanying text.
[215] *Nat'l Inst. for Fam. & Life Advocs.*, 484 F. Supp. 3d at 604.
[216] *Id.* at 606 (noting that a woman provided legislative testimony that doctors at a Catholic hospital refused to provide a life-saving abortion after she had experienced a miscarriage and was going to hemorrhage and go into septic shock).
[217] *Id.* at 606–07 (describing testimony of a pregnant woman denied care who had to travel hours to a secular facility that could not apply her insurance to cover the medically necessary abortion because the Catholic hospital failed to make her health information available, causing her to pay for the procedure completely out of pocket).
[218] *See* Cedar Park Assembly of God of Kirkland, Wash. v. Kreidler, 683 F. Supp. 3d 1172, 1176 (W.D. Wash. 2023).
[219] *Id.*
[220] *Id.* at 1177.

through its health care insurance plan was an act of "facilitating" abortion.[221] The plaintiff-church objected to providing coverage or access to contraceptives, which they repeatedly referred to as "abortifacient contraceptives."[222]

While the law was upheld and the court largely avoided the church's stigmatizing language, the court stated that the law did require the church "to facilitate access to covered abortion services contrary to Cedar Park's religious beliefs."[223] Such conclusions may become a slippery slope. If an employer is "facilitating" an abortion by simply providing employees with the option to access services on their own through an employee insurance plan, then virtually anyone—an ambulance driver, a scheduler, or hospital housekeeping staff—could be found to be "facilitating" an abortion.[224] Broad conscience clauses that protect objectors only tangentially associated with the administration of reproductive health care need to be narrowed if patients are to be protected.[225]

V. PROPOSED SOLUTIONS

Anti-choice conscientious objectors in health care have long evaded legal scrutiny that their counterparts in the military have faced. As such, this Article proposes two solutions to reduce the abuse of objections rooted in discrimination, stigma, and medical misinformation. Part A in this section argues that the legal standard for conscientious objections in the military context should be applied to the refusal to provide health care. Next, Part B advocates for the elimination of conscientious objections in the provision of certain health care services. Anti-choice advocates may ultimately claim that the First Amendment right to conscience—to refuse others care—overrides other interests, but the government's actions would be legally justified by the compelling interest of safeguarding patient safety and dignity.

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[221] *Kreidler,* 683 F. Supp. 3d at 1181 ("[I]n Cedar Park's view, the fact that its insureds gain coverage to the services under the insurance plan Cedar Park provides means that Cedar Park is 'facilitating' that abortion coverage.").

[222] *Id.* at 1177–78 ("Cedar Park also asserts that it 'offer[ed] health insurance coverage to its employees in a way that does not also cause it to pay for abortions or abortifacient contraceptives, including, *inter alia*, emergency contraception and intrauterine devices[.]'").

[223] *Id.* at 1182.

[224] *Compare* City & Cnty. of S.F. v. Azar, 411 F. Supp. 3d 1001, 1014 (N.D. Ca. 2019) (stating that, under the 2019 rule, ambulance drivers, schedulers, and housekeeping staff can raise conscientious objections to reproductive services because they "facilitate" such services), *with* 119 Cong. Rec. 9597 (1973) (STATEMENTS OF SEN. LONG AND SEN. CHURCH) (intending for Church Amendment protections to extend to only those in the operating room and not to those remotely connected to an abortion or sterilization procedure).

[225] *See Kreidler,* 683 F. Supp. 3d at 1188 (noting that the Washington law's health insurance requirements did not implicate the right to free exercise because "purchasing a health insurance plan is not an ecclesiastical decision").

A. Apply the Legal Standard for Conscientious Objections in the Military Context to Conscientious Objection Claims in the Healthcare Context

Provider-objectors should be required to satisfy the legal standard for conscientious objection claims raised by those opposed to military service.[226] Providers that refuse to provide services or referrals due to a conscientious objection have the burden to demonstrate to an ethics committee or a state licensing board, with "clear and convincing evidence," that (1) they are opposed to death of human life "in any form;" (2) their "opposition is based on religious training or belief," rather than "politics, expediency, or self-interest;" and (3) their religious or moral views underpinning their opposition to an activity are "firm, fixed, and sincerely and deeply held."[227] Additionally, medical misinformation should not be accepted as evidence that can support providers' belief or opposition to an activity.

Just as military conscientious objectors must demonstrate, providers that conscientiously object to providing reproductive services or referrals because of religious beliefs opposed to death should be required to demonstrate that they are opposed to death "in any form."[228] In the military context, local boards and courts consider objectors' views regarding the death penalty, gun control, and "aggressive" sports.[229] The same standard should apply to objectors in the health care context.

This standard would have the effect of eliminating conscientious objection claims for emergency or medically necessary reproductive care. A provider-objector cannot be against death in all forms when their refusal to provide a medically necessary abortion, for example, threatens the health or life of the pregnant person.[230] The same is true for individuals who require medically necessary sterilization procedures because pregnancy would endanger their health or life.[231] The provider's beliefs—opposition to death—would be in direct conflict with the consequences of their refusal: death or life-threatening harm to the patient.

Providers would also be unable to raise conscientious objections to providing contraception or sterilization services or referrals based on a moral opposition to murder. A provider-objector that is religiously or morally opposed to killing or murder would be unable to refuse to provide said services or referrals because this

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[226] *See* Fiona Griffin, *Conscientious Objection to Emergency Contraception in the Context of COVID-19*, 8 VOICES IN BIOETHICS 1, 1 (2022) ("Conscientious objection deserves heightened scrutiny.").
[227] *See supra* Part III (explaining the standard for conscientious objections in the military context).
[228] *See* case cited *supra* note 108–12 and accompanying text.
[229] *See* cases cited *supra* note 112 and accompanying text.
[230] *See* Reuters Fact Check, *Termination of Pregnancy Can be Necessary to Save a Woman's Life, Experts Say*, REUTERS (Dec. 27, 2021), https://www.reuters.com/article/idUSL1N2TC0VD/ [https://perma.cc/L7JA-2RQS] (reporting that not completing an abortion or delaying abortion care in emergency situations "can be deadly").
[231] *Sterilization,* CTRS. FOR MEDICARE & MEDICAID SERV., https://www.cms.gov/medicare-coverage-database/view/article.aspx?articleid=53356#:~:text=An%20example%20of%20necessary%20treatment,the%20case%20of%20prostate%20cancer [https://perma.cc/HU3N-8UCF] (explaining that sterilization may be medically necessary when an individual has cancer or a tumor, which are illnesses that also threaten the fetus).

care does not result in a "killing."[232] While anti-choice providers often consider contraception to be an "abortifacient," science says otherwise.[233] Providers, therefore, would be unable to rely on misinformation (that contraception is a form of abortion, for example) in their refusal to provide or refer a patient for contraception.

Just as in the military context, conscientious objectors in health care must demonstrate that their "opposition is based on religious training or belief," not "politics, expediency, or self-interest."[234] Providers that refuse to provide care, not because of religious or moral beliefs, but because they wish to eliminate patients' legal right to abortion, contraception, or sterilization would fail this legal standard.[235] Hence, a valid conscientious objection claim must be substantially grounded in a religious or moral belief rather than politics or a self-interest to evade professional obligations.[236]

Provider-objectors should be burdened with demonstrating that their religious or moral belief at the foundation of their opposition to an activity is "firm, fixed, and sincerely and deeply held."[237] Providers may demonstrate the nature of their belief through written documentation and testimony from individuals who can attest to the validity of the objector's beliefs.[238] Review boards or courts may examine other factors that provide insight as to the objector's "guiding principle," such as their childhood, upbringing, personality and temperament, and hobbies.[239] Review boards or courts may also assess whether the provider previously participated in the activity objected to, or whether the provider invoked a conscientious objection claim in a discriminatory manner. If there is evidence that a provider raises objections for certain patients or procedures but not for others similarly situated, then the provider's beliefs are not "firm, fixed, and sincerely, and deeply held."[240] For example, a physician that performs vasectomies but conscientiously objects to performing female sterilization procedures or providing contraception care does not have a firm or fixed belief to support their opposition to providing female birth control services. This standard would help combat harm inflicted on patients and uphold high standards of care by barring providers from discriminating against historically marginalized groups.[241]

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[232] *See supra* notes 81–89 and accompanying text (explaining that contraceptives do not result in the death of life because contraceptives prevent implantation, not fertilization).

[233] *Id.*

[234] *See supra* notes 106, 116 and accompanying text.

[235] *See* Cook & Dickens, *supra* note 49.

[236] *See* Kanai v. McHugh, 638 F.3d 251, 264 (4th Cir. 2011) (deferring to a local military board's decision to deny a conscientious objection claim because the objector used the claim to "avoid his service obligation").

[237] *Id.* at 258; *see also supra* note 107 and accompanying text (providing the test for conscientious objections in the military).

[238] *Kanai*, 638 F.3d at 260, 266–68.

[239] *Id* at 262.; U.S. v. Seeger, 380 U.S. 163, 187 (1965).

[240] *Kanai*, 638 F.3d at 258.

[241] *See* Abram Brummett & Lisa Campo-Engelstein, *Conscientious Objection and LGBTQ Discrimination in the United States*, 42 J. PUB. HEALTH POL. 322, 327 ("Supporting clinicians who refuse to treat members of a marginalized group based solely on their group membership conflicts with national initiatives to reduce healthcare inequalities for historically disadvantaged groups and

Conscientious objections to military service also provide a guide for adjudication and standard of review.[242] Objectors in the military context must present evidence to a local board, and a reviewing court must uphold the board's determination if there is a "basis in fact" to deny the objector's claim.[243] A standard providing deference to the conclusion of the respective experts in the field should apply to conscientious objections in the health care context.[244] Whether it is an ethics committee at the institution where the provider has admitting privileges or a state licensing board, provider-objectors should have to present evidence justifying their objection to the military equivalent of a local board.[245] Ethics committees are comprised of medical professionals, lawyers, social workers, and clergy who are best situated to determine whether a provider's conscientious objection claim has satisfied the appropriate legal standard.[246] Ethics committees offer vital guidance in addressing ethical issues and are a source of "sound decision making that respects participants' values, concerns, and interests."[247] Because of this, ethics committees are properly situated to determine the best course of action for the patient and the institution if a conscientious objection claim is invoked.

Improper conscientious objection claims may still occur under this solution, but this proposal in the very least operates as a starting point to push against the current widespread approval of illegitimate conscientious objections.

B. Eliminate Conscientious Objections in Certain Health Care Contexts

If the military standard for conscientious objections cannot be adopted, then governments should eliminate such refusals raised in the provision of certain health care services.[248] Providers that voluntarily enter a profession in which they assume a fiduciary duty to the public and their patients should not be relieved of their

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violates core virtues of the medical profession, namely the ethical tenet to do no harm. While there is a proper role for respecting clinicians' beliefs, permitting conscientious objection to LGBTQ individuals goes too far by insidiously upholding systemic disadvantages common for this population, and leading to discriminatory practices based on personal characteristics that have no place in medicine.").

[242] *See supra* notes 108–114, 123–125 and accompanying text (outlining the adjudication process and standard of review for conscientious objection claims in the military context).

[243] *See* Roby v. U.S. Dep't of Navy, 76 F.3d 1052, 1058 (9th Cir. 1996) (explaining the limit of the court's role in adjudication is to weigh the evidence and determine if the board's findings were justified); *see also* U.S. v. Seeger, 380 U.S. 163, 185 (1965) (explaining the "basis in fact" standard).

[244] *See supra* notes 121–125 and accompanying text (describing the substantial deference courts provide to determinations made by local boards).

[245] *See supra* notes 107–112 and accompanying text (explaining that conscientious objections are evaluated by a local board and what evidence the local boards examine to make a determination).

[246] Cassandra Rivais DiNova, *Hospital Ethics Committee Explainer*, ALB. L. SCH. GOV'T L. CTR. 1–2 (2020).

[247] *Ethics Committees in Health Care Institutions*, AMA CODE OF ETHICS, https://code-medical-ethics.ama-assn.org/ethics-opinions/ethics-committees-health-care-institutions [https://perma.cc/7U6J-LGJ8].

[248] WORLD HEALTH ORG., *supra* note 13 ("If it proves impossible to regulate conscientious objection in a way that respects, protects and fulfils abortion seekers' rights, conscientious objection in abortion provision may become indefensible.").

responsibilities by merely invoking a standardless conscientious objection.[249] As discussed in Part III, voluntary enlistees in the military are not entitled to a constitutional right to be discharged from their military duties just by raising a conscientious objection.[250] The same should apply to providers voluntarily entering the medical profession, especially for providers who voluntarily enter a field in which reproductive health services or referrals are reasonably expected to be part of their position.[251]

For instance, obstetricians and gynecologists should not be entitled to conscientious objections. Obstetricians and gynecologists routinely provide information, services, and referrals for many reproductive health services, including abortion, contraceptives, and sterilization.[252] Therefore, as providers that assume a duty to provide quality, equitable, comprehensive reproductive care, obstetricians and gynecologists should be barred from raising conscientious objections in opposition to abortion, contraception, or sterilization services or referrals.[253] It is unlikely there is another field where institutions, the public, and the profession provide employees with the unrestricted right to refuse to perform a substantial portion of their job, particularly one that may save a patient from harm or death.[254] Obstetricians and gynecologists are perceived by the public as experts in their field, and it is illogical to allow these experts to refuse to execute the main duties of their position.[255]

The same holds true for emergency room medical professionals and pharmacists. Emergency room doctors and pharmacists could reasonably expect reproductive health services or referrals to be part of their responsibilities, and individuals entering these fields should not be given the right to object to providing

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[249] Isa Ryan, Ashish Premkumar, & Katie Watson, *Why the Post-Roe Era Requires Protecting Conscientious Provision as We Protect Conscientious Refusal in Health Care*, 24 AMA J. ETHICS 906, 909 (2022) ("Exploiting conscience as a club betrays the fiduciary obligation of the clinical relationship through actions that obstruct patients' ability to get abortion care.").

[250] *See supra* Part III (discussing the appropriate legal standard for conscientious objection claims raised by voluntary enlistees in the military context).

[251] *See* Ryan et al., *supra* note 249, at 910 ("When engaging in clinical care, physicians make an explicit agreement to put themselves in uncomfortable, vulnerable, ethically challenging spaces.").

[252] Brittni Frederiksen, Usha Ranji, Ivette Gomez & Alina Salganicoff, *A National Survey of OBGYNs' Experiences After Dobbs*, KFF (June 21, 2023), https://www.kff.org/womens-health-policy/report/a-national-survey-of-obgyns-experiences-after-dobbs/ [https://perma.cc/6BZM-5W2D] (stating that nearly all OBGYNs offer some kind of contraceptive care, and that almost half (48%) of OBGYNs practicing in states with abortion bans offer information on abortion).

[253] *See* AM. ACAD. PEDIATRICS, *supra* note 24, at 1691 (declaring that individuals should not voluntarily enter the medical field or adopt a specialty that conflicts with their religious or moral beliefs).

[254] Fiala & Authur, *supra* note 20, at 18 ("No other sector of medicine or other kind of service delivery would allow a service refusal with so little resistance. . . . [Conscientious objection] gives a person a pretext not to do their job, even though they were specifically hired to do that job and are being paid for it. Indeed, if you can opt out of part of your work without being punished, why wouldn't you?").

[255] Shanawani, *supra* note 24, at 388–89 (stating that "professional societies charge physicians with the obligation to provide their expertise to all members of society," even if providing care would conflict with personal religious or moral beliefs).

care on religious grounds.[256] Take the plaintiffs in *Alliance for Hippocratic Medicine v. U.S. Food & Drug Administration.* The plaintiffs were emergency room doctors, and it is likely they could reasonably expect reproductive health services—emergency abortion care for an ectopic pregnancy, a serious or fatal fetal abnormality, an incomplete medication abortion, or other severe pregnancy complication—to be a regular part of their role.[257] Under this proposed standard, the plaintiffs would not have been given the unfettered right to conscientiously object to fulfilling their voluntarily assumed duty to the public.[258]

Anti-choice providers may argue that the First Amendment grants a constitutional right to object to providing care under the Free Exercise Clause.[259] While the First Amendment bestows the right to practice religion as one pleases,[260] the practice may be limited by a compelling government interest.[261] Burdens on the right to free exercise have been upheld when the practice of religion "invariably posed some substantial threat to public safety."[262] For instance, the Supreme Court upheld a compulsory vaccination law,[263] a ban on child labor,[264] and mandatory military service,[265] concluding that the government's secular interest outweighed the infringement of free exercise.[266] Further, if prohibiting the exercise of religion is "merely the incidental effect," rather than the goal, of a generally applicable policy, then there is likely no free exercise violation.[267] For example, a law requiring emergency room doctors to provide health- or life-saving care to patients would be generally applicable to all doctors, regardless of whether they objected to the necessary care. The law's goal would be to preserve patient safety, dignity, and autonomy, rather than to prohibit religion.

All medical professionals have the duty to provide competent, timely, compassionate care that is in the best interest of patient safety and dignity. The abuse of conscientious objections by anti-choice providers prevents patients from receiving this type of care, and the government should incidentally infringe on free exercise rights to further the compelling interest of patient safety and autonomy.

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[256] Savulescu, *supra* note 95 ("If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors.").
[257] *See* All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210 (5th Cir. 2023) *rev'd sub nom.* U.S. Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367 (2024).
[258] *See e.g.* Arthur L. Caplan, *Should Clinicians with Conscientious Objections Be Protected?*, MEDSCAPE, (Mar. 20, 2018) https://www.medscape.com/viewarticle/894239?form=fpf [https://perma.cc/8HD4-E9KJ].
[259] *See* Nat'l Inst. for Fam. & Life Advocs. v. Schneider, 484 F. Supp. 3d 596 (N.D. Ill. 2020) (arguing for a right to refuse care based on the free exercise of religion).
[260] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]").
[261] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).
[262] Sherbert v. Verner, 374 U.S. 398, 403 (1963).
[263] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[264] *See* Prince v. Massachusetts, 321 U.S. 158 (1944).
[265] *See* Gillette v. United States, 401 U.S. 437 (1971).
[266] *Id.* at 454.
[267] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).

VI. THE HARMFUL IMPLICATIONS OF MODERN CONSCIENTIOUS OBJECTIONS

The expansion of conscience objection clauses sanctions the abuse of conscientious objections for the purpose of denying patients access to health care.[268] These clauses and the frequent abuse of conscientious objections threaten women's equality, autonomy, and health by reinforcing abortion-related stigma; delaying or denying desired medical care; circulating medical misinformation; and violating fundamental principles of informed consent and respect for patient decision-making.[269]

Abortion-related stigma reinforced by objectors can lead to heightened levels of stress, shame, and guilt for patients, which may result in "reduced self-efficacy around decision making, decreased perceptions of social support, and increased psychological distress."[270] Exposure to abortion-related stigma also decreases a pregnant person's likelihood of seeking reproductive health care, including abortions, which can have negative, life-altering consequences on one's health.[271] Individuals that are refused abortions face heightened financial burdens, a delay in care, and, therefore, an increased risk of morbidity or mortality.[272] Refusals to refer for abortion lead to delayed care, which may contribute to the continuation of an unwanted pregnancy.[273]

Pregnant people that are forced to travel farther for an abortion access care at a later gestational age experience adverse mental health outcomes and may attempt to terminate their pregnancy in unsafe ways.[274] Even if the pregnant person eventually obtains an abortion, they may experience stigmatization, psychological stress, and difficulties related to the gestational age of the fetus.[275] These burdens disproportionately impact historically marginalized communities, including low income individuals, people of color, individuals in rural areas, and pregnant people experiencing intimate partner violence.[276]

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[268] Fiala & Arthur, *supra* note 21.

[269] *See id.*

[270] Sara K. Redd, Roula AbiSamra, Sarah C. Blake, Kelli A. Komro, Rachel Neal, Whitney S. Rice, & Kelli S. Hall, *Medication Abortion "Reversal" Laws: How Unsound Science Paved the Way for Dangerous Abortion Policy*, 113 AM. J. PUB. HEALTH 202, 210 (2023).

[271] Turan & Budhwani, *supra* note 58, at 38; *see also* Aliza Adler, Antonia Biggs, Shelly Kaller, Rosalyn Schroeder, & Lauren Ralph, *Changes in the Frequency and Type of Barriers to Reproductive Health Care Between 2017 and 2021*, JAMA NETWORK OPEN, (Apr. 10, 2023), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2803644 [perma.cc/MN27-MWJF] ("Delaying or forgoing reproductive health care not only can result in morbidity but also, in situations such as untreated sexually transmitted infections, can result in an increased risk of serious complications, such as infertility and pelvic inflammatory disease.").

[272] *See* Fiona de Londras, Amanda Cleeve, Maria I. Rodriguez, Alana Farrell, Magdalena Furgalska, & Antonella F. Lavelanet, *The Impact of 'Conscientious Objection' on Abortion-Related Outcomes: A Synthesis of Legal and Health Evidence*, 129 HEALTH POL. 1, 6 tbl. 2 (2023).

[273] *Id.*

[274] *Id.*

[275] Tongue, *supra* note 70.

[276] Melissa N. Montoya, Colleen Judge-Golden, Jonas J. Swartz, *The Problems with Crisis Pregnancy Centers: Reviewing the Literature and Identifying New Directions for Future Research*, 14 INT. J. WOMEN'S HEALTH 757, 759 (2022) (reporting that Black women in a representative

Unlimited conscientious refusals are not part of being a medical professional.[277] Rather, professionals have the duty, underpinned by respect for autonomy and dignity, to provide informed consent on the risks, benefits, and alternatives of care.[278] Medical professionals who refuse to provide medically accurate information for services or referrals disregard their duty and "significantly undermine the practice of medicine."[279]

The blanket grant of all conscientious objections to providing medical care or referrals essentially means that any provider can object to any treatment for any reason, valid or not.[280] Because an objector's belief does not need to be substantiated and will likely not be questioned or regulated by the government or the judiciary, objectors basically get a free pass.[281] Additionally, as previously mentioned, some objection laws shield providers that refuse to provide reproductive health care services or referrals from civil liability.[282] Numerous states provide civil immunity to institutions for harm caused by a provider's conscientious objection, which often leaves the patient without judicial recourse.[283] Even if a patient has a legal avenue to seek a remedy for the harm experienced, courts may be sympathetic to refusals based on misinformation disguised as religious convictions.[284] Vast statutory protections for objectors, barring justice for those affected, the absence of a legal

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study in Ohio are the most likely group to visit a crisis pregnancy center, which frequently employ anti-choice physicians and volunteers to disseminate religiously motivated misinformation intended to dissuade individuals from abortion and contraceptive care); Nancy F. Berglas, Valerie Williams, Katrina Mark, & Sarah C. M. Roberts, *Should Prenatal Care Providers Offer Pregnancy Options Counseling?*, 18 BMC PREGNANCY & CHILDBIRTH 1, 4 (2018) (finding a direct relationship between food insecurity and an interest in discussing pregnancy options, suggesting that food insecure populations are more susceptible to abortion-related stigma and medical misinformation than food secure populations); Fiala & Arthur, *supra* note 20, at 16 (explaining that being refused an abortion can lead to increased costs for travel or daycare, loss wages for more time off, and increased or worsened symptoms).

[277] AM. ACAD. PEDIATRICS, *supra* note 24, at 1691.

[278] *Id.*; Hull, *supra* note 57 ("[F]orcing women to carry unwanted pregnancies fundamentally violates their autonomy, and thus their personhood."); *WMA Declaration of Geneva*, WORLD MED. ASS'N (May 31, 2024), https://www.wma.net/policies-post/wma-declaration-of-geneva/ [perma.cc/7662-WQHK] (stating that the World Medical Association's oath requires medical professionals to assert that "[t]he health of my patient will be my first consideration;" the "autonomy and dignity of my patient" will be "respect[ed];" and will not permit "considerations of . . . political affiliation . . . or any other factor to intervene between my duty and my patient"); Fiala & Arthur, *supra* note 20, at 15 (declaring that refusing medically necessary reproductive care because of one's subjective, moral beliefs undermines notions of patient autonomy).

[279] AM. ACAD. PEDIATRICS, *supra* note 24, at 1691; Fiala & Arthur, *supra* note 21, at 256 ("When we allow religious beliefs to dictate medical decisions, we fail patients and we fail society, because we have surrendered evidence-based medicine to irrationality."); Caplan, *supra* note 258 ("You can't be an ethical doctor, pharmacist, or nurse and just say, 'I'm not doing it, and I'm not going to tell you where it could be done.'").

[280] *See supra* Part IV (discussing cases where the validity of the provider-objectors' claims were not examined).

[281] *Id.*

[282] Kogan, *supra* note 37, at 212 and accompanying text.

[283] *Id.*; Sawicki, *supra* note 37, at 1256 ("In a majority of states, civil immunity is absolute—providing no exceptions in cases of malpractice, denial of emergency treatment, or even patient death.").

[284] *See supra* Part IV (discussing cases where judges were sympathetic to religious, conscientious objections grounded in misinformation and discrimination).

standard, and courts willing to accept misinformation as evidence amount to a system that shifts power to providers at the expense of vulnerable patients.

Unfettered conscience objection clauses permit providers to violate the democratic will of the people.[285] "[T]he state is allowing objectors to personally boycott democratically-decided laws, usually for religious reasons, without having to pay any price for it."[286] Broad conscientious objection protections create vulnerabilities across the country, regardless of whether the state protects reproductive freedom.[287] In other words, states that enshrined a right to abortion in their state constitution still allow for unsubstantiated conscientious objections and are introducing bills to expand a right to refuse under state law.[288] For example, in 2023, the Vermont legislature introduced the Health Care Freedom of Conscience Act.[289] While Vermont offers statutory and constitutional protections for reproductive freedom,[290] this bill sought to shield health care institutions that refuse to provide care from civil, criminal, and administrative liability.[291] The goals of Vermont's reproductive freedom amendment and the statutory protection of unsubstantiated objections are in opposition—reproductive freedom is unattainable when providers can evade legal liability for refusing to provide care.

Many attempts to expand conscientious objection laws are introduced in states with stricter abortion laws, leaving individuals in the South and Midwest particularly vulnerable.[292] In the 2023-2024 legislative session, nearly all states with a six-week or less abortion ban introduced legislation to expand conscience protections.[293] For instance, with the exception of Texas, all states that criminalize abortion—Idaho, Oklahoma, Tennessee, and Kentucky—introduced bills to create a fundamental right

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[285] Fiala & Arthur, *supra* note 21.
[286] *Id.*
[287] *See* Graf, *supra* note 32 (reporting that, on average, one in six patients in the United States receive care in a Catholic health care facility); *see also* ACLU *supra* note 56, at 24 (finding that in ten states over 30% of hospital beds are in Catholic hospitals).
[288] *See* GUTTMACHER INST., *supra* note 5 (reporting states that introduced legislation related to refusal laws).
[289] Health Care Freedom of Conscience Act, H.183, Reg. Session 2023-2024 (Vt. 2023).
[290] VT. STAT. ANN. tit. 18, § 5222 (2023); VT. CONST. art. XXII.
[291] Health Care Freedom of Conscience Act, H.183, Reg. Session 2023-2024 (Vt. 2023).
[292] *See* GUTTMACHER INST., *supra* note 5 (showing that, in 2024, 24 bills were introduced across 15 states that would expand refusal laws, including in Florida, Iowa, Idaho, Kentucky, Missouri, North Carolina, Nebraska, Oklahoma, South Carolina, Tennessee, Virginia, and West Virginia); *see also* Varney, *supra* note 88 (reporting that, with respect to the idea that life begins at conception for purposes of pregnancy-related bills, "red states across much of the South and portions of the Midwest are adopting language drafted by elected officials that is informed by conservative Christian doctrine, often with little scientific underpinning").
[293] *Compare* GUTTMACHER INST., *supra* note 5 (reporting states that introduced legislation related to refusal laws), *with After Roe Fell: Abortion Laws by State,* CTR. REPRODUCTIVE RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/VB6N-ZMQ6].

to conscience;[294] shield objectors from civil, criminal, or administrative liability;[295] or suggest that objectors have a limited duty to act in situations requiring stabilizing care.[296] Proposed expansions of refusal laws such as these will continue to harm patients in states with already limited access to timely and quality care.

In a post-*Dobbs* world where comprehensive reproductive health care facilities may be sparse or nonexistent, pregnant people in states with vast protections for conscientious objectors are especially threatened by providers' unsubstantiated refusal to provide abortion, contraception, or sterilization services or referrals.[297] The harms discussed underscore the need for restricting conscientious objection claims through either the adoption of a clear legal standard similar to that in the military context, or the elimination of conscientious objection claims in certain health care contexts.[298] Furthermore, the democratic will of the people to codify protections for safe, timely reproductive care must not be subjugated by the indiscriminate approval of conscientious objection claims raised by anti-choice providers.[299]

VII. CONCLUSION

Broadly deferential conscientious objection laws and an utterly inadequate legal standard embolden anti-choice providers to refuse to provide requested, and potentially emergent, reproductive services or referrals. Providers often justify their refusal to provide health care with medical misinformation, which is legally indefensible under the proposed legal standard borrowed from conscientious objection claims in the military context. Religious conscientious objection claims by providers must either be regulated by ethics committees or state licensing boards, or outright prohibited in certain health care contexts. Courts reviewing these claims must be vigilant and work against legitimizing harmful medical misinformation and gender discrimination masquerading as religious freedom. Unsubstantiated conscientious objections grounded in misinformation, stereotypes, and motives to circumvent the law shift power to anti-choice providers at the detriment of patient

[294] *See* Med. Ethics Def. Act, H.B. 672, 67th Leg. 2nd Reg. Sess. 2023-2024 (Idaho, 2024) ("The legislature finds that the right of conscience is a fundamental and inalienable right."); *see also* S.B. 239, Ky. Gen. Assemb. Reg. Sess. 2023-2024 (Ky. 2024); Med. Ethics Def. Act, S.B. 2747, 113th Leg. Reg. Sess. 2023-2024 (Tenn. 2024) (cross-filed as H.B. 2935) (including in the findings that "the right of conscience is a fundamental right rooted in the history and tradition of the United States and central to the practice of medicine[.]"); Med. Ethics Def. Act, S.B. 887, 59th Leg. 1st Reg. Sess. 2023-2024 (Okla. 2023).

[295] Med. Ethics Def. Act, H.B. 672, 67th Leg. 2nd Reg. Sess. 2023-2024 (Idaho, 2024); S.B. 239, Ky. Gen. Assemb. Reg. Sess. 2023-2024 (Ky. 2024); S.B. 1883, 59th Leg. 2nd Reg. Sess. 2023-2024 (Okla. 2024) (cross-filed as H.R. 3214); Med. Ethics Def. Act, S.B. 2747, 113th Leg. Reg. Sess. 2023-2024 (Tenn. 2024) (cross-filed as H.B.2935); S.B. 29, S.C. Gen. Assemb. 125th Leg. Reg. Sess. 2023-2024 (S.C. 2023).

[296] Med. Ethics Def. Act, H.B. 672, 67th Leg. 2nd Reg. Sess. 2023-2024 (Idaho 2024) (requiring health care professionals to act in a "life-threatening situation," but declining to explicitly require action when stabilizing or other non-emergency, but still medically necessary, care is necessary to preserve patient safety).

[297] *See supra* Part IV.

[298] *See supra* Part V.

[299] *See* Fiala & Arthur, *supra* note 21.

autonomy and the democratic will of the electorate seeking to protect reproductive freedom.

SAVING THE OGALLALA AQUIFER: KANSAS'S DUTY TO PROTECT INTERGENERATIONAL WATER RIGHTS

*By: Leah Stein**

I. INTRODUCTION

Judge J. Skelly Wright once began an opinion by saying that "man's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations."[1] Although some may narrowly view Judge Wright's sentiment as a compelling preface to an EPA-favored opinion, when considered in a broader context, this line serves as a stark reminder that we, as humans, are rapidly changing our environment in irreversible and irreparable ways. As we engage in change of such magnitude, it is important to consider not only the effects on current populations, but also how the effects of our actions today impact the rights of future generations.[2]

In recent years, Kansas's changing environment has sparked national interest.[3] In particular, one of the state's most utilized resources, the Ogallala Aquifer[4], which

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* J.D. Candidate, May 2025, University of Kansas School of Law. As a proud member of the Kansas Journal of Law and Public Policy, I want to thank my fellow editors for their thoughtful and thorough work on this Article. Growing up in southwest Kansas, I witnessed firsthand the critical role water plays in our communities. As an essential resource for our state, I hope the Ogallala Aquifer is protected and that the proposals in this Article inspire practical solutions for preserving our natural resources.

[1] Ethyl Corp. v. EPA, 541 F.2d 1, 6 (D.C. Cir. 1976).

[2] *See* Aiofe Daly, *Intergenerational Rights are Children's Rights: Upholding the Right to a Healthy Environment Through the UN Convention on the Rights of the Child*, SOC. SCI. RSCH. NETWORK, (Oct. 4, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4141475 [https://perma.cc/4B6R-W23L] (discussing the impact of climate change and impacts on intergenerational equity).

[3] Mira Rojanasakul, Christopher Flavelle, Blacki Migliozzi & Eli Murray, *America is Using Up its Groundwater Like There's No Tomorrow*, N.Y. TIMES (Aug. 28, 2023), https://www.nytimes.com/interactive/2023/08/28/climate/groundwater-drying-climate-change.html [https://perma.cc/9HT9-7Q6V] ("Groundwater loss is hurting breadbasket states like Kansas, where the major aquifer beneath 2.6 million acres of land can no longer support industrial-scale agriculture.").

[4] *See* Greg Doering, *Kansas Makes Historic Investment in Preserving the Ogallala Aquifer*, FARM TALK (May 21, 2024), https://www.farmtalknews.com/news/kansas-makes-historic-investment-in-preserving-the-ogallala-aquifer/article_86a6a308-179c-11ef-9aa8-1fa01ea4d166.html [https://perma.cc/52ZB-MVLC] (explaining that water from the Ogallala is used to support Kansas crops and livestock).

spans across eight states[5] and is a water source for many, has garnered attention due to its rapid depletion.[6] As scholars across the nation review evidence of depletion, questions have arisen as to whether the problem is rooted in global environmental crises or specific farming practices.[7] Research suggests that the Ogallala Aquifer's decline is not driven by weather or by individual farmers' preferences but rather is driven by agricultural policies.[8]

As aquifer depletion is recognized as a large-scale policy issue, and as the government is most often held responsible for reshaping policy, it should be no surprise that the Kansas legislature has taken a heightened interest in water conservation efforts.[9] However, despite this heightened interest, the actions of legislators cast doubt on a statewide commitment to preservation of the Ogallala.[10] The question to be asked, then, is "what would create statewide commitment to preservation?" This question provides the overarching theme for this Article.

To this theme, this Article further ties in the idea that preservation efforts today have longstanding effects. Like all environmental issues, which test the conflict between the rights and duties of Earth's current stewards, "[a]quifer loss is a generational test of our values and obligations to each other."[11] Beyond the conflict of our obligations to each other, humans today also face the challenge of "…balancing the water needs of the present with the long-term needs of the future."[12]

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[5] Michon Scott, *National Climate Assessment: Great Plains' Ogallala Aquifer drying out*, CLIMATE.GOV (Feb. 19, 2019), https://www.climate.gov/news-features/featured-images/national-climate-assessment-great-plains'-ogallala-aquifer-drying-out#:~:text=The%20Ogallala%20Aquifer%20underlies%20parts,Dakota%2C%20Texas%2C%20and%20Wyoming [https://perma.cc/UJ25-XBYV].

[6] *See* Rojanasakul, *supra* note 3.

[7] Burke W. Griggs, Matthew R. Sanderson & Jacob A. Miller-Klugesherz, *Farmers are Depleting the Ogallala Aquifer Because the Government Pays Them to Do It*, AM. BAR ASS'N (Feb. 27, 2022), https://www.americanbar.org/groups/environment_energy_resources/resources/trends/2022/farmers-depleting-ogallala-aquifer-because-government-pays-them-do-it/ [https://perma.cc/C263-QDKD].

[8] *Id.*

[9] Allison Kite, *Kansas Legislators Renew Efforts to Save Ogallala Aquifer*, KAN. REFLECTOR (Jan. 17, 2023), https://kansasreflector.com/2023/01/17/kansas-legislators-renew-efforts-to-save-ogallala-aquifer/ [https://perma.cc/3CLH-6TQF].

[10] Allison Kite, *Kansas Legislation Got 'Watered Down' but Will Help Aquifer Conservation Efforts*, KAN. REFLECTOR (May 12, 2023),https://kansasreflector.com/2023/05/12/kansas-legislation-got-watered-down-but-will-help-aquifer-conservation-efforts/ [https://perma.cc/JSZ7-3BN8] ("The Senate version [of the bill] dedicated millions less to water priorities, and rather than dedicate a portion of the state's sales tax for it, the Senate wanted to divert general fund dollars.").

[11] Lucas Bessire, *Aquifer Loss is a Generational Test of Kansas Values and Obligations*, WICHITA EAGLE (June 6, 2021), https://www.kansas.com/opinion/guest-commentary/article251825068.html [https://perma.cc/QEN5-Z5EA].

[12] David R. Steward, Paul J. Bruss, Xiaoying Yang, Scott A. Staggenborg, Stephen M. Welch & Michael D. Apley, *Tapping Unsustainable Groundwater Stores for Agricultural Production in the*

This Article argues that the current system for water rights adjudication in Kansas is flawed and, thus, has prevented the state from properly exercising its duty to protect water rights for future generations. Intergenerational rights are intimately connected to the problem of aquifer depletion. For this reason, Kansas must protect future water rights and the Ogallala by creating a system of water courts to adjudicate water matters and restoring deference to agency interpretation of ambiguous statutes during judicial review.

Part II of this Article provides essential background for understanding Kansas water law, the history of the Ogallala Aquifer, and how humans have depleted it over time. Part III explains how the problem of aquifer depletion has been perpetuated by Kansas's ineffective system of adjudication. It also addresses the state's disregard for future generational interests in natural resources, like the Ogallala. Part IV argues that the state legislature should remedy Kansas's flawed water rights adjudication system by creating water courts to deal solely with water matters, like those in Colorado and Montana. Additionally, Part IV argues that restoring the practice of agency deference during judicial review on issues of regulatory and statutory interpretation would further aid these courts. Part V discusses the practical considerations for implementing these legal remedies and grounds them in the policy goal of preserving water rights for future generations.

While in recent years there has been an increase in scholarly writing on the Ogallala Aquifer[13] and how states can better address conservation efforts, there has been a lack of research specifically addressing the remedies proposed in this Article. There has also been a lack of overarching policy consideration—like protecting intergenerational water rights. As Kansas looks to preserve the Ogallala Aquifer, it must employ legislative and judicial remedies whenever possible to advance the protection of intergenerational water rights.

II. HISTORY OF KANSAS WATER LAW AND DEPLETION OF THE OGALLALA AQUIFER

To understand Kansas's role in preserving the state's water resources, it is imperative to understand the structure of Kansas water law as well as the history of depletion of the Ogallala Aquifer.

A. Kansas Water Law

In Kansas, water rights are considered real property.[14] However, "a water right does not constitute ownership of the water itself; it is only a usufruct, a right to use water."[15] Prior to 1945, Kansas followed the riparian doctrine for surface water and

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High Plains Aquifer of Kansas, Projections to 2110, PROCEEDINGS OF THE NAT'L ACAD. OF SCIS. (Aug. 26, 2013), https://www.pnas.org/doi/full/10.1073/pnas.1220351110 [https://perma.cc/2D2R-W5PQ].

[13] *See, e.g.*, Warigia M. Bowman, *Dustbowl Waters: Doctrinal and Legislative Solutions to Save the Ogallala Aquifer before both Time and Water Run Out*, 91 U. COLO. L. REV. 1081 (2020).

[14] KAN. STAT. ANN. 82a–701(g) (2023).

[15] Shipe v. Pub. Wholesale Water Supply Dist. No. 25, 210 P.3d 105, 110 (Kan. 2009); *see* KAN. STAT. ANN. 82a–707(a) (2023).

the absolute ownership doctrine for groundwater.[16] Since passing the Kansas Water Appropriation Act[17] (KWAA) in 1945, Kansas transitioned from the riparian doctrine to the appropriation doctrine.[18] The appropriation doctrine uses "a permit system for acquiring water appropriation rights based upon 'first in time, first in right.'"[19] Thus, to gain an individual water right, one must be the first person to divert the water from any source and use it for a beneficial purpose.[20] If water has not been diverted and used for such purpose, it is considered unused and belongs to all people of the state.[21] Therefore, Kansas courts approach questions concerning water rights "upon the basis of the interest of the people of the state without losing sight of the beneficial use the individual is making or has the right to make of the water."[22]

The KWAA remains in place today. However, in 1972, to address some of the issues of water depletion, the legislature adopted the Groundwater Management District Act[23] with the purpose of "reward[ing] local initiatives to conserve groundwater supplies."[24] Since their creation, Groundwater Management Districts (GMDs) "have become the most important political force in Kansas water."[25] GMDs propose management plans and regulations for their respective districts, which are approved as state regulations enforced by the chief engineer.[26]

In 1978, Kansas amended the Groundwater Management District Act to include specific provisions for the initiation of proceedings for and designation of Intensive Groundwater Use Control Areas (IGUCAs).[27] These provisions allow the chief engineer of the Kansas Department of Agriculture, Division of Water Resources (DWR) to exercise control and implement protective measures in areas where groundwater levels are declining excessively "or other conditions exist warranting additional regulation to protect public interest."[28] In 2012, GMDs were granted the authority to recommend the approval of Local Enhanced Management Areas

[16] Hawley v. Kan. Dep't of Agric., 132 P.3d 870, 879 (Kan. 2006).
[17] *See* Cochran v. State, Dep't of Agric., Div. of Water Res., 249 P.3d 434, 439 (Kan. 2011); KAN. STAT. ANN. 82a-701, et seq.
[18] *Id.*; F. Arthur Stone & Sons v. Gibson, 630 P.2d 1164, 1168 (Kan. 1981) (explaining that the riparian doctrine conferred on owners of land contiguous to a watercourse the right to use water on their land subject to a few exceptions.)
[19] *Hawley,* 132 P.3d at 879 (citing John C. Peck & Constance Crittenden Owen, *Loss of Kansas Water Rights for Non–Use,* 43 U. KAN. L. REV. 801, 805 (1995)).
[20] *Cochran*, 249 P.3d at 439.
[21] *Hawley,* 132 P.3d at 879.
[22] *Cochran*, 249 P.3d at 439.
[23] KAN. STAT. ANN. § 82a-1020 (2023).
[24] *An Overview of Kansas Water Law: Testimony before the House Comm. on Water*, 2021 Leg. Sess. (Kan. 2021) (Testimony of Burke W. Griggs, Washburn Univ. Sch. of L.).
[25] *Id.*
[26] *Id.*
[27] KAN. STAT. ANN. §§ 82a-1036; 82a-1037; 82a-1038 (2023).
[28] *Intensive Groundwater Use Control Areas (IGUCAs),* KAN. DEP'T OF AGRIC. (2016) https://agriculture.ks.gov/divisions-programs/dwr/managing-kansas-water-resources/intensive-groundwater-use-control-areas [https://perma.cc/32K8-B884].

(LEMAs) to the chief engineer.[29] A LEMA allows GMDs to set goals and control measures to aid in water conservation upon the approval of the chief engineer.[30]

B. The Ogallala Aquifer

More than two billion people around the world rely on aquifers as their primary water source.[31] Further, groundwater is "used to irrigate more than half of the world's food supply."[32] Since the 1930s, groundwater extraction has significantly increased as millions of wells have been drilled in the United States "to meet the demand for municipal, industrial, and agricultural water needs."[33]

The Ogallala Aquifer covers 174,000 square miles underneath eight states: Texas, New Mexico, Oklahoma, Kansas, Colorado, Wyoming, Nebraska, and South Dakota.[34] The Ogallala provides thirty percent of all groundwater used for irrigation in the United States.[35] It also supplies nearly all the water used for various purposes in the High Plains region.[36]

Despite the Ogallala's vast size, it is the "most rapidly diminishing source of fresh water in the West."[37] For over seventy years, farmers have withdrawn water from the Ogallala Aquifer for irrigation purposes, which has resulted in a "highly unsustainable rate of use."[38] For example, the Ogallala lost ten cubic kilometers every year between 2000 and 2008.[39] In 2015, groundwater pumping had depleted the aquifer by 276 million acre-feet. [40]

To further emphasize the alarming rate at which the Ogallala is depleting, one Kansas State University study predicts that if current withdrawal rates continue, sixty-nine percent of the Ogallala's volume will be depleted by 2060.[41] Looking ahead to the possibility of total depletion, scientists predict that the Ogallala will empty if nothing is done in the "medium-to-long run" of approximately 100 years.[42]

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[29] KAN. STAT. ANN. § 82a-1041 (2023).
[30] *Fact Sheet: Local Enhanced Management Areas*, KAN. DEP'T OF AGRIC. (Feb. 2018), https://www.agriculture.ks.gov/home/showpublisheddocument/4958/638466570307230000 [https://perma.cc/TJH6-3VDB].
[31] Susan E. Ness, *Water We Cannot See: Codifying a Progressive Public Trust to Protect Groundwater Resources from Depletion*, 76 VAND. L. REV. 953, 955 (2023).
[32] *Id.*
[33] *Id.*
[34] Emilie T. Pinkham, *A State Out of Water: How a Comprehensive Groundwater-Management Scheme Can Prevent the Imminent Depletion of the Ogallala Aquifer*, 3 GEO. WASH. J. ENERGY & ENV'T. L. 268, 268 (2012).
[35] Danielle Spiegel, *Can The Public Trust Doctrine Save Groundwater?,* 18 N.Y.U. ENV'T. L.J. 412, 416 (2010).
[36] Pinkham, *supra* note 3434, at 269.
[37] Burke W. Griggs, *General Stream Adjudications as a Property and Regulatory Model for Addressing the Depletion of the Ogallala Aquifer*, 15 WYO. L. REV. 413, 415 (2015).
[38] Bowman, *supra* note 13, at 1086.
[39] *Id.*at 1087.
[40] Griggs, *supra* note 37.
[41] Roxana Hegeman, *Ogallala Aquifer Will Be 69 Percent Depleted in 50 Years, K-State Study Says*, WICHITA EAGLE (Aug. 26, 2013), https://www.kansas.com/news/article1121517.html [https://perma.cc/C7FW-84XY].
[42] Bowman, *supra* note 13, at 1087.

The water in the Ogallala is mostly fossil water, or water that was once "continental ice sheets" during the ice ages.[43] Other water in the Ogallala is the product of rain and snowmelt.[44] As such, the Ogallala is slow to replenish.[45] The hydrological cause of rapid groundwater depletion is over-pumping, while the "less obvious legal cause is over-appropriation."[46] Over-appropriation means that the state has granted more water rights and permits which allow for more water use than "the aquifer can sustainably provide."[47] Despite this problem, "none of the states overlying the aquifer have ordered permanent reductions in pumping, much less … address[ed] the problem of over-appropriation."[48] Due to the Ogallala's important role of supplying water for drinking and irrigation, "the effects of it going dry would be catastrophic."[49]

III. Explaining the Problem and its Perpetuation Through Kansas Law

Water rights adjudication is critical to the analysis of aquifer depletion because it focuses on the remedy as opposed to the causation. While the problem may have begun with granting too many water rights in the state, efficient and effective resolution depends on targeting areas that are failing to promote the goal of aquifer preservation.

Kansas's current system for granting, examining, and adjudicating water rights in the state is failing to promote the goal of aquifer preservation. Kansas has structured its administrative water authority so that it retains immense amounts of power, and the judiciary is not well-equipped to challenge such power. Under Section 82a-1901 of the KWAA, the Secretary of Agriculture has administrative authority over the chief engineer in regard to the granting of new water rights, changes to existing water rights, and civil penalties for water overuse.[50] In his report to the Kansas legislature, Professor Burke Griggs said that "[t]he subordination of the Division of Water Resources of the Kansas Department of Agriculture and the chief engineer, who are vested with the duty to grant, protect, and administer water rights, to a political appointee … raises all sorts of conflicts of interest problems, not to mention legal problems."[51] With conflict of interest problems existing in the DWR, it seems that the state would be sure to emphasize separation of powers principles, including standard checks and balances between government branches,

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[43] Juli Hennings & Harry Lynch, *Depleting the Ogallala Aquifer*. EARTH DATE (Aug. 24, 2022), https://www.earthdate.org/episodes/depleting-the-ogallala-aquifer [https://perma.cc/3RTX-PL52].
[44] *Why Does the Ogallala Aquifer Need to be Preserved*?, FARM, https://www.farm.vc/learn/why-does-the-ogallala-aquifer-need-to-be-preserved [https://perma.cc/DMR4-CVMN].
[45] *Id.*
[46] Griggs, *supra* note 37, at 416.
[47] *Id.*
[48] *Id.*
[49] Bowman, *supra* note 13, at 1089.
[50] KAN. STAT. ANN. § 82a-1901(c) (2024), AN OVERVIEW OF KAN. WATER LAW: TESTIMONY BEFORE THE H. COMM. ON WATER, H. 2021-2022, 1st Sess., at 3-4 (Kan. 2021) (testimony by Burke W. Griggs).
[51] *Id.* at 4.

by positioning the judiciary so that it is properly equipped to challenge improper actions by the DWR. However, the structure of water rights adjudication in Kansas suggests otherwise.

A. District Courts in Kansas

Kansas adjudicates its water matters in district courts, where judges are not water law experts and are not required to defer to an agency's interpretation of a statute. The Kansas Judicial Review Act (KJRA) allows for judicial review of any "final agency action."[52] Final agency action is defined as "the whole or a part of any agency action other than nonfinal agency action."[53] An agency's final order is generally considered to be an action "which determines the legal rights and duties of the parties.[54]

While the district courts have power to review final agency action, the judges reviewing such action are not hydrology experts. Therefore, district judges will interpret and apply the law through the lens of a general law-trained adjudicator as opposed to an adjudicator that is an expert in water law. This application creates a problem, especially when it is combined with district courts' lack of deference to an agency's interpretation of a statute.

B. Lack of Deference by Kansas Courts

Prior to 2010, with regard to questions of law, Kansas courts had given deference to an agency's interpretation of a statute if there was a rational basis for it.[55] In 2010, however, the Kansas Supreme Court declared that an agency's statutory interpretation "is not afforded any significant deference on judicial review."[56] Instead, whether an agency has exceeded its statutory authority requires interpretation of the statutes establishing the agency, which presents a question of law subject to unlimited judicial review (*i.e.*, de novo review).[57] In a 2013 case before the Kansas Court of Appeals, the court applied this zero-deference rule and interpreted the KWAA de novo "just as it does all other statutes."[58] Emphasizing its abandonment of agency deference, the Kansas Supreme Court in *Douglas v. Ad Astra Information Systems* declared that the doctrine of deference has been "permanently relegated to the history books where it will never again affect the outcome of an appeal."[59] Subsequent decisions have clarified that this rejection of deference applies to both statutory and regulatory interpretations.[60] In a water rights case, the court once again confirmed that Kansas has abandoned deference when it said "it no longer gives deference to an agency's interpretation of a statute and,

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[52] KAN. STAT. ANN. § 77–607 (2023).
[53] KAN. STAT. ANN. §§ 77–607(b)(1–2) (2023).
[54] Guss v. Fort Hays State Univ., 173 P.3d 1159, 1164 (Kan. Ct. App. 2008).
[55] Clawson v. State, Dep't of Agric., Div. of Water Res., 315 P.3d 896, 903 (Kan. Ct. App. 2013).
[56] Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Ass'n of Univ. Profs., 228 P.3d 403, 410 (Kan. 2010).
[57] Ryser v. State, 284 P.3d 337, 345–46 (Kan. 2012).
[58] *Clawson*, P.3d 896 at 903.
[59] Douglas v. Ad Astra Info. Sys., L.L.C., 293 P.3d 723, 728 (Kan. 2013).
[60] Woessner v. Lab. Max Staffing, 471 P.3d 1, 6 (Kan. 2020).

therefore, has unlimited review."[61] The lack of agency deference during judicial review combined with adjudication in the district court, where judges are not experts in water law, creates an insulation issue within the district courts. The DWR is insulated from the judiciary when it grants rights,[62] and the judiciary is insulated from the DWR when it adjudicates these rights.

IV. THE SOLUTION: WATER COURTS, AGENCY DEFERENCE, AND INTERGENERATIONAL EQUITY

To combat the catastrophic event of the Ogallala running dry, Kansas must reform its laws and systems that perpetuate depletion. Two important ways to advance preservation of the Ogallala through legal reform are: 1) adjudicating water matters in water courts rather than district courts and 2) deferring to agencies for issues of statutory interpretation when adjudicating water matters. Additionally, these legal reforms should be framed through a lens of intergenerational equity to instill a statewide commitment to longstanding preservation.

A. Adjudication of Water Matters

Although Kansas has amended its water law to provide for regulation of water usage through Groundwater Management Districts, Intensive Groundwater Use Control Areas, and Local Enhanced Management Areas, depletion of the Ogallala Aquifer persists. Therefore, other remedies are needed. To locate such remedies, it is helpful to look to those states that have taken different measures to reform their water law. In Colorado and Montana, reshaping water law came in the form of creating water courts with jurisdiction to resolve all water matters in their respective states.

1. Water Courts in Colorado

The Water Right Determination and Administration Act of 1969 (the "1969 Act") created seven water divisions in Colorado.[63] Each water division has a division engineer appointed by the state engineer, a water judge appointed by the Supreme Court, a water referee appointed by the water judge, and a water clerk assigned by the district court.[64] Water judges have authority to adjudicate matters pertaining to water rights, the use and administration of water, and all other issues within the water division.[65]

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[61] Cochran v. State, Dep't of Agric., Div. of Water Res., 249 P.3d 434, 440 (Kan. 2011).
[62] *See* discussion *supra* Section III.
[63] *Water Courts*, COLO. JUD. BRANCH, https://www.coloradojudicial.gov/water-courts [https://perma.cc/25HX-2DMR].
[64] *Id.*
[65] *Id.*

Colorado Water Court judges are appointed to renewable one-year terms.[66] To serve as a water court judge, an individual must reside in the district to which they are appointed and have been licensed to practice law in Colorado for at least five years.[67] Typically, the adjudication process for a water matter begins when an individual or corporate entity seeking to establish a water right files an application with the water clerk.[68] After this filing, the water clerk publishes a summary of the application to provide notice to interested parties who may then file statements of opposition to an application within the time allowed by statute.[69] Those with affected rights "must appear to object and protest as provided in the 1969 Act or be barred from claiming injury to their water rights as a result of claims made in an application."[70]

In Colorado, water courts retain exclusive jurisdiction over all water matters.[71] Whether a claim constitutes a water matter turns on the distinction between "actions involving the use of water and those involving the ownership of a water right."[72] Water matters involve the use of water, including "applications for initial decrees and for decrees approving augmentation plans, applications for changes of decreed water rights, and matters concerning the scope of previously decreed water rights and the abandonment, laches, and adverse possession of water rights."[73] Conversely, issues involving ownership of a water right, which frequently arise "in conjunction with the conveyance of property and other rights," do not constitute water matters; they fall under the general jurisdiction of district courts.[74] The phrase "water right" is defined in section 37–92–103(12) of the 1969 Act and means "a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same."[75] Thus, if an issue turns on ownership of a water right, like an issue of land ownership, it belongs with the district court. However, if

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[66] COLO. REV. STAT. § 37-92-203(2) (2024).
[67] COLO. CONST. art. VI, § 11; *Water Courts*, *supra* note 63 (explaining that water judges are district judges appointed by the Supreme Court).
[68] *Water Courts*, *supra* note 63; *see Self-Represented Guide to Colorado Water Courts, Water Ct. Comm.* (Feb. 2024), https://www.coloradojudicial.gov/sites/default/files/2024-02/WaterCourtsGuide.pdf [https://perma.cc/5RQ9-QDW6] (discussing individuals and corporate entities filing water rights applications as self-represented parties).
[69] *Water Courts*, *supra* note 63.
[70] *Id.*
[71] Kobobel v. Colo. Dep't of Nat. Res., 249 P.3d 1127, 1132 (Colo. 2011); *see also* COLO. REV. STAT. § 37-92-203(1) (2023).
[72] *Kobobel*, 249 P.3d at 1132; *see also In re* Water Rights of Tonko v. Mallow, 154 P.3d 397, 405 (Colo. 2007) (explaining this distinction).
[73] Allen v. State, 433 P.3d 581, 584 (Colo. 2019); *see also* S. Ute Indian Tribe v. King Consol. Ditch Co., 250 P.3d 1226, 1234 (Colo. 2011) ("Water courts are authorized to construe and make determinations regarding the scope of water rights adjudicated in prior decrees."); *Kobobel,* 249 P.3d at 1132 (holding that a determination of the "scope of [a] right to use [ ] decreed water rights" constituted a water matter); *In re Tonko,* 154 P.3d at 404 (holding that "[a]pplications for a change of decreed water rights" are water matters); Crystal Lakes Water & Sewer Ass'n v. Backlund, 908 P.2d 534, 536 (Colo. 1996) (holding that whether a party is subject to the terms of an augmentation plan is a water matter).
[74] Humphrey v. Sw. Dev. Co., 734 P.2d 637, 641 (Colo. 1987) (finding that an ownership dispute occurred where "the district court was required to analyze deeds, contracts, and other documents that established the chain of title to certain decreed water rights").
[75] *S. Ute Indian Tribe*, 250 P.3d at 1234.

the issue falls outside of this narrow scope of ownership and instead fits within the broad category of water use, it is a water matter and may be heard by the water court.

2. Water Courts in Montana

In 1972, the Montana Constitution was amended to recognize the existence of private water rights.[76] Further, the amendment required that "the legislature shall provide for the administration, control, and regulation of water rights."[77] The Montana Legislature responded by enacting the Montana Water Use Act[78] in 1973.[79] The Montana Act required, among other things, that water rights existing prior to July 1, 1973 be finalized through a statewide adjudication process.[80] To aid with this adjudication process, the Montana Legislature established a system of water courts in 1979.[81] Upon their creation, jurisdiction for the determination and interpretation of existing water rights was placed exclusively in the water courts.[82] The Montana Code provides that "a water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant."[83] Water courts were created with the purpose of expediting the adjudication of water rights claims.[84]

Montana water courts are managed by a Chief Water Judge, an Associate Water Judge, four District Water Judges, and water masters.[85] Water judges are elected by a committee of judges and chosen from a pool of district court judges, retired judges, and other judges within the water division.[86] Water judges have a term of four years, subject to continuation of the water division by the legislature.[87] Water masters are appointed by judges and may also hear evidence on behalf of the judge and make recommendations to the judge about a claim's disposition.[88]

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[76] Irma S. Russell, *Evolving Water Law and Management in the U.S.: Montana*, 20 U. DENV. WATER L. REV. 35, 41 (2016) (citing Mont. Const. art. IX, § 3(1)).
[77] MONT. CONST. art. IX, § 3(4).
[78] *Water Rights in Montana*, MONT. DEP'T OF NAT. RES. & CONSERVATION 2 (April 2014), http://leg.mt.gov/content/Publications/Environmental/2014-water-rights-handbook.pdf [https://perma.cc/L27F-VQG8]; MONT. CODE ANN. §§ 85–2–101 to 1001 (2023).
[79] *Water Rights in Montana*, *supra* note 78.
[80] *See* MONT. CODE ANN. §§ 85–2–212 to 214 (2023).
[81] *In re* Dep't of Nat. Res. & Conservation, 740 P.2d 1096, 1100 (Mont. 1987).
[82] MONT. CODE ANN. § 3-7-501(1) (2023).
[83] MONT. CODE ANN. § 85-2-227(3) (2023).
[84] *A Short History of the Water Court*, MONT. LEG. ENV'T POLICY OFFICE 3 https://archive.legmt.gov/content/Committees/Interim/2015-2016/Water-Policy/Meetings/Sept-2015/WaterCourt_history.pdf [https://perma.cc/L2QJ-QTW6].
[85] MONT. JUD. BRANCH, *Water Court*, https://courts.mt.gov/courts/water/ [https://perma.cc/B2TA-7H2C].
[86] MONT. CODE ANN. § 3-7-201(1) (2023).
[87] MONT. CODE ANN. § 3-7-202 (2023).
[88] MONT. CODE ANN. § 3-7-301 (2023); *Post Decree Water Court Assistance Standard Operating Procedures*, MONT. DEP'T OF NAT. RES. & CONSERVATION WATER RES. DIV. 9 (Jan. 2024), https://dnrc.mt.gov/_docs/water/adjudication/Guidance-2024/248-SOP-20241.pdf [https://perma.cc/C7PR-SDAL].

There are several steps to adjudicating a water rights claim in Montana. First, the Montana Department of Natural Resources and Conservation examines a claim to determine if it is "complete, accurate, and reasonable."[89] The department then prepares a summary report for each claim in a basin or subbasin, which is submitted to the Water Court for use in adjudicating existing rights.[90] After the report is shared with the Water Court, a water master is assigned to oversee the case.[91]

The water master is responsible for consolidating claims, conducting conferences, reviewing settlement agreements, conducting hearings, and issuing decisions in a Master's Report.[92] After a Master's Report is issued, a Water Judge will review it and may adopt it as the Court's decision.[93] The entry of judgment of this Final Decree begins the appeal-filing period, and all appeals from the Water Court are made directly to the Montana Supreme Court.[94]

B. Administrative Agencies and Deference

In addition to creating water courts, Kansas should restore the practice of deference to agencies during judicial review. Decisions made by administrative agencies, like the DWR within the Department of Agriculture, often come under judicial review when a party decides to appeal a decision made by an Administrative Law Judge (ALJ). ALJs preside over administrative hearings at both the state and federal level and typically "have the power to administer oaths, make rulings on evidentiary objections, and render legal and factual determinations."[95] After a final decision is made by an ALJ, parties may file an appeal with the district court in certain circumstances.[96]

When questions under judicial review by the district court pertain to issues of statutory interpretation and statutes are rendered ambiguous, some courts have adopted a doctrine whereby they defer to the agency's interpretation of the ambiguous statute.[97] However, since the U.S. Supreme Court first introduced the practice of agency deference during judicial review in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[98] many have questioned the practice's compatibility with the Constitution's separation of powers requirements and the Administrative Procedure Act.[99] Now that the practice has been overturned at the

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[89] *Water Rights in Montana*, *supra* note 78, at 9.
[90] *Water Right Claim Examination Rules*, MONT. SUP. CT. 21 (Dec. 5, 2006), https://courts.mt.gov/external/Water/A-Legal%20Resources/claim_exam_rules.pdf [https://perma.cc/WHF3-7SRX].
[91] *See Adjudication Guidebook*, MONT. WATER CTS. 19, https://courts.mt.gov/External/Water/A-Legal%20Resources/Adjudication%20Guidebook.pdf [https://perma.cc/H4JD-KEC5].
[92] *Id.*
[93] *Id.* at 32.
[94] *Id.* at 37.
[95] *Administrative Law Judges*, JUSTIA (May 2024), https://www.justia.com/administrative-law/administrative-law-judges/ [https://perma.cc/TJ5A-6TKE].
[96] *Appeals From Administrative Proceedings & Your Legal Options*, JUSTIA (May 2024), https://www.justia.com/administrative-law/appeals-from-administrative-proceedings/ [https://perma.cc/7ZN9-K686].
[97] *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).
[98] *See id.*
[99] *See* Luke Phillips, *Chevron in the States? Not so Much*, 89 MISS. L.J. 313, 313 (2020).

federal level,[100] it is likely that even more states will follow suit. As evidence of states' skepticism of agency deference, it is helpful to look at the recent surge in states abandoning their own standards of deference to administrative agencies' interpretations of statutes.[101] Although several states, including Kansas, have abandoned the practice of affording deference to administrative agencies' interpretations of statutes and regulations, others have fully retained the practice, like Montana, or apply it in some instances, like Colorado.

1. Deference by Montana Courts

Montana courts defer to an agency's interpretation of the rules and regulations it promulgates. The Montana Supreme Court "afford[s] an agency's interpretation of its rule 'great weight,' and will 'defer to that interpretation unless it is plainly inconsistent with the spirit of the rule.'"[102] While Montana affords agency deference to both statutes and regulations, it is "more deferential to an agency's interpretation of its regulation than it is to an agency's interpretation of a statute."[103]

On highly technical matters and those requiring scientific expertise, the Montana Supreme Court "grants great deference to agency expertise."[104] In *Montana Environmental Information Center v. Department of Environmental Quality*, the court said it "acknowledges that it is not comprised of hydrologists, geologists, or engineers, and that protecting the quality of Montana's water requires significant technical and scientific expertise beyond the grasp of the court."[105] The court, however, made sure to emphasize that it still retains the inherent power to review administrative proceedings to ensure that "agency decision-making is scientifically-driven and well-reasoned" and thus requires the agency be able to "cogently explain why it has exercised its discretion in a given manner."[106]

2. Deference by Colorado Courts

In Colorado, courts apply a less deferential approach than Montana courts. Rather than automatically deferring to an agency's interpretation of a statute, Colorado courts "may consider and defer to an agency's interpretation of a statute."[107] This means that courts are not bound by the agency's interpretation but may consider the agency's interpretation as persuasive evidence during their de novo review.[108] The Colorado Supreme Court has given examples of when deference to

[100] *Loper Bright*, 144 S. Ct. at 2273.
[101] Phillips, *supra* note 99, at 314.
[102] Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 451 P.3d 493, 500 (Mont. 2019).
[103] *Id.*
[104] Flathead Lakers Inc. v. State Dep't of Nat. Res. & Conservation, 530 P.3d 769, 781 (Mont. 2023).
[105] *Mont. Env't Info. Ctr.*, 451 P.3d at 500.
[106] *Id.* (quoting Nat'l Parks Conservation Ass'n v. EPA, 788 F.3d 1134, 1142–43 (9th Cir. 2015)).
[107] Gessler v. Colo. Common Cause, 327 P.3d 232, 235 (Colo. 2014).
[108] El Paso City. Bd. of Equalization v. Craddock, 850 P.2d 702, 704 (Colo. 1993).

an agency's interpretation is not warranted, including when the interpretation is contrary to the statute's plain language.[109] Additionally, deference may not be appropriate where an agency's construction of a statute has not been uniform.[110] Colorado courts agree, however, that "the construction of statutes by administrative officials charged with their enforcement should generally be given deference by a reviewing court."[111]

C. Intergenerational Rights and the Theory of Intergenerational Equity

The theory of intergenerational rights is that "when future generations become living generations, they will have certain rights to use the natural system for their welfare and certain obligations to care for it."[112] These obligations hold current and future generations accountable to each other and create a "partnership of generations across time."[113] For issues like the rapid withdrawal of water from aquifers, there is a "conflict[] between immediate satisfaction of needs and long-term maintenance of the resource."[114] Because of this conflict, means must be developed "to reconcile intergenerational concerns with the demands of the living generation."[115]

Connected to intergenerational rights is the theory of intergenerational equity which is a comprehensive policy and legal framework developed by Professor Edith Brown Weiss in her book, *In Fairness to Future Generations*.[116] Brown Weiss's theory "posits that there are two essential relationships—to the natural system and to other generations of the human species."[117] With regard to the first, Brown Weiss establishes that humans are "part of the natural system" as we are both affected by the system and engage in actions that affect the system.[118] And while several species engage in this reciprocal relationship with the environment, Brown Weiss states that "[a]s the most sentient of species, [humans] have a special responsibility to care for the system." Brown Weiss integrates rights and responsibility at the level of moral and legal identity and "posits the present generation of humans as both beneficiaries of a planetary legacy passed down from the past and as trustees of the planetary legacy for future generations."[119]

In 1989, Brown Weiss proposed three principles of intergenerational equity which are options, quality, and access.[120] The first principle, options, requires each generation "to conserve the diversity of the natural (and cultural) resources base, so that it does not unduly restrict the options available to future generations in solving

[109] *Gessler*, 327 P.3d at 235.
[110] State Dep't of Revenue v. Woodmen of the World, 919 P.2d 806, 817 (Colo. 1996).
[111] *Id.*
[112] Edith Brown Weiss, *Intergenerational Fairness and Water Resources, in* SUSTAINING OUR WATER RESOURCES, NAT'L ACADS. PRESS 3, 5 (1993).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 21 (1988).
[117] Brown Weiss, *supra* note 112, at 4.
[118] *Id.*
[119] Lynda M. Collins, *Revisiting the Doctrine of Intergenerational Equite in Global Governance,* 30 DALHOUSE L.J. 79, 93 (2007).
[120] Brown Weiss, *supra* note 112, at 5.

their problems and satisfying their own values."[121] To accomplish this principle, generations may "develop[] new technologies that create substitutes for existing resources or that exploit and use resources more efficiently."[122] The second principle of intergenerational equity is the conservation of quality.[123] This principle requires that "each generation maintain the quality of the planet so that on balance it is passed on in no worse condition than when received."[124] Finally, the third principle of intergenerational equity, access, states that "each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations."[125] Brown Weiss, using an example for water preservation, explained that "[t]he principle of access … means that the present generation must incorporate the full cost of supplying water … to ensure that the real price of water resources to future generations is not significantly higher than to the present generation."[126]

Considering these three principles of intergenerational equity in relation to the issue of aquifer depletion, it is evident that Brown Weiss's approach provides the framework for balancing the needs of the current generation to use the Ogallala against the needs of future generations. The intergenerational equity framework does not require the current generation to cease all use of water but rather provides that any use should not leave the environment in a worse condition than before. This approach aligns with theories for recharging aquifers[127] and other methods that balance use and preservation.

In her article, Brown Weiss discusses the work conducted by the National Research Council (NRC) on the Mexico City Aquifer since "sustainable use of the aquifer … is inherently an intergenerational problem."[128] The Mexico City Aquifer, like the Ogallala, is subject to rapid depletion because of "continued pumping in excess of recharge rates, location of urban settlements over recharge areas, and institutional barriers."[129] Brown Weiss commends the study of the Mexico City Aquifer by the NRC for being "intergenerational in the sense that it addresses the rights of future generations to a potable water supply."[130] However, she critiques the same study for failing to "address ways in which the interests of future generations

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[121] Brown Weiss, *supra* note 112, at 5.
[122] *Id.*
[123] *Id.* at 6.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Artificial Groundwater Recharge*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/mission-areas/water-resources/science/artificial-groundwater-recharge#overview [https://perma.cc/4KQ8-ZLJ9] ("[R]echarge is the practice of increasing the amount of water that enters an aquifer through human-controlled means." Means of recharge include "redirecting water across the land surface through canals, infiltration basins, or ponds; adding irrigation furrows or sprinkler systems; or simply injecting water directly into the subsurface through injection wells.").
[128] Brown Weiss, *supra* note 112, at 7.
[129] *Id.*
[130] *Id.*

in a sustainable supply of fresh water could be integrated into administrative decision making and even into the marketplace."[131]

By analyzing Brown Weiss's theory of intergenerational equity and considering the ways in which she suggests it be applied to a problem like aquifer depletion, lawmakers in Kansas have a clear policy framework for moving forward with legal remedies to address the depletion of the Ogallala. Intergenerational equity is not just a framing mechanism or abstract theory to persuade current rights holders to preserve natural resources. It is a framework for considering how actions taken today will impact the economic, personal, and legal interests of future generations in natural resources, like the Ogallala.

V. ADOPTING THE SOLUTION: EVALUATING PUBLIC POLICY AND PRACTICAL CONSIDERATIONS

Kansas can and should address the issue of the Ogallala's depletion by advancing legislative and judicial remedies whenever possible. One legislative remedy is the creation of water courts that deal solely with water matters, like those used in Colorado and Montana. One judicial remedy is deferring to agencies, like the DWR, for issues of statutory and regulatory interpretation that arise during judicial review. Making these changes to the adjudication structure for water matters in Kansas will have a significant effect. However, making changes to a complex system without a purpose or end goal comes with significant risk. For this reason, these two proposed changes to Kansas law should be rooted in preservation, specifically in the idea that the state has a duty to preserve water for future generations. In combining the proposed legal remedies with this policy goal, the rule moving forward is this: to protect intergenerational rights to water, it is critical that Kansas prioritizes water rights adjudication through the expert lenses of agencies and water law practitioners by creating water courts and reinstating judicial deference to agency interpretations of statutes and regulations.

A. Public Policy Rationales that Support Prioritizing Intergenerational Equity for Water Rights

Public policy rationales support the use of an intergenerational equity framework to address issues of water depletion in Kansas and surrounding states. When it comes to resolving environmental issues, it is critical to switch the perspective from short term to long term. By reframing environmental issues, and specifically the issue of the Ogallala's depletion, as intergenerational rights issues, the state draws in the interest of all current and future stakeholders. By framing the issue as one between current and future stakeholders as opposed to just current stakeholders, the state can relieve tension between members of the same community that may have adverse interests and different needs for water. These community members should not be positioned to consider their rights in perspective to each other but rather their rights in perspective to those of their children and grandchildren who will one day inherit their land and need access to water on said land.

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[131] Brown Weiss, *supra* note 112, at 7.

B. Practical Considerations for Implementing the Proposed Legal Remedies

Implementing a water court system and restoring agency deference are two legal remedies that will advance water preservation in a practical and effective manner. Kansas should look to Colorado and Montana as examples for passing legislation to adjudicate water rights in designated water courts. Further, Kansas should look to the reasoning of courts in jurisdictions that have chosen to retain the practice of agency deference in matters of statutory interpretation.

1. Implementing Water Court System

To implement a water court system like those that exist in Colorado and Montana, the Kansas Legislature will need to create a new set of statutes governing this system. As both Colorado and Montana have had water courts in place for several decades, Kansas legislators can rely on several resources for creating a water court system. Instating water courts in Kansas has several benefits, including furthering and advancing other preservation efforts, creating consistency in water law, and streamlining the legal process for water rights adjudication.

a. Advancing other Preservation Methods

In adopting a water court system, Kansas should consider the advantages that come with placing experts in water law into adjudicatory roles. For example, one recent article analyzing the problem of the Ogallala's depletion suggested that a general stream/aquifer adjudication could be used to "clarify property rights in Ogallala water, especially by recognizing the undeniable distinctions and boundaries between its different water supplies, and by decreeing rights to them accordingly."[132] The article suggested that this general adjudication applied to the Ogallala would "enable[] the holders to protect those rights more effectively than they currently can, and … enable the state to better manage its water supplies and protect the public interest."[133] If a general water rights adjudication has the opportunity to provide such a sweeping remedy for issues of over-appropriation, it follows that an expert in water law should conduct such an important adjudication.

b. Creating Consistency Despite Complex Water Law

Water laws are complex and therefore, specialized courts are necessary to adjudicate disputes fairly. Currently, appeals of water matters are being heard in district courts, where judges do not have the specialized knowledge required to adjudicate water matters. By establishing specific water courts staffed by judges with expertise in hydrology and water law, Kansas will ensure more consistent

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[132] Griggs, *supra* note 37, at 419.
[133] *Id.*

decisions on water matters. Such decisions will not only be consistent with each other, but they will also be consistent with enacted laws and regulations. Experts in hydrology and water law, serving in the role of adjudicator, will not only correctly apply the law but they will understand the underlying policy behind the law. Therefore, novel issues that may arise before a water court will be adjudicated in a manner that is consistent with the principles of Kansas water law and does not disrupt any framework that has been established by expert committees. While this process will likely take time, "a water court could develop … a body of law providing predictability, consistency, and certainty to water users and management agencies alike."[134]

c. Streamlining Legal Process

Another benefit to the state's creation of water courts is that the new legal system will streamline the legal process for adjudicating water rights, which can involve complex technical issues, including hydrology, engineering, and environmental science. Having specialized courts allows for more efficient handling of water cases and helps prevent backlogs in the judicial system. With expert judges handling matters and those matters making up a docket consisting solely of water matters, courts will be able to effectively resolve legal disputes.

2. Adopting Agency Deference

There are few practical considerations and steps for the judiciary to reinstate the practice of agency deference during judicial review, and those considerations that do exist, such as applying the law moving forward, lean in favor of adopting the policy. The act of reinstating agency deference will be simple because it is up to the judiciary. There is no legislative action required for the court to return to its former practice of deference. The Kansas Supreme Court will be responsible for this change as it will need to overturn *Douglas v. Ad Astra Information Systems* in which it held that courts review agency decisions de novo.[135]

C. Arguments Against Water Courts and Agency Deference

One of the leading arguments against water courts is that they "[do] not serve all of those entities interested in water, including especially those who do not own water rights."[136] In addition to being available only as a remedy for those who own water rights, water courts present a significant barrier to public participation in the water court system because it is "virtually imperative for those filing applications or statements of opposition to be represented by counsel."[137] The lack of public participation in Colorado Water Court adjudication is clear because "in the hundreds of Colorado water matters filed and resolved annually, there are only a few in any

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[134] John E. Thorson, *A Permanent Water Court Proposal for a Post-General Stream Adjudication World*, 52 IDAHO L. REV. 17, 49 (2016).
[135] Douglas v. Ad Astra Info. Sys., L.L.C., 293 P.3d 723, 728 (Kan. 2013).
[136] Melinda Kassen, *Colorado Water Courts: Should They Change?* 3 (Conf. on Strategies in Western Water Law and Policy: Courts, Coercion and Collaboration, 1999).
[137] *Id.* at 4.

given year where members of the public have participated actively."[138] Given these challenges with participation and representation in water courts, opponents to water courts will likely argue that this adjudication structure is unsuitable for Kansas.

When it comes to arguments against deference, it is important to note that Kansas is not the first state to reject the idea of agency deference.[139] Proponents of Kansas's zero-deference approach are likely to cite other states' abandonment of agency deference as well as the Supreme Court's overruling of *Chevron* deference[140] as reasons to reject agency deference of statutory interpretation during judicial review. In its rejection of deference, Kansas courts have said that it is within the power of the legislature, not the administrative agency, to establish public policy. Further, the courts have said that unlike the legislature, which was created by the Kansas Constitution, administrative agencies are creatures of statute, which means their power and authority are defined and limited by enabling legislation.[141] This means that Kansas administrative agencies have no common-law powers.[142] Thus, any authority claimed by an agency or board must be conferred in the authorizing statutes either expressly or by clear implication from the express powers granted.[143]

D. A Rebutting Perspective

These arguments against creating water courts and reinstating agency deference are unpersuasive. First, the argument that water courts do not serve all people and entities with interests in water is without merit. While there may be some lack of public participation in matters adjudicated by water courts, there is no strong evidence revealing that this lack of participation is any more severe than what exists under the current adjudicatory structure through district courts.

Next, the argument commending Kansas's rejection of deference is also unpersuasive. Kansas need not throw out the idea of agency deference simply because the Supreme Court eliminated the practice at a federal level.[144] Whatever reasons exist for the Court's reversal of the doctrine should not influence decisions by the states, since challenges with administrative law at a federal level are not identical to challenges at the state level. Further, while it may be the role of the legislature to establish public policy, the court reinstating the practice of deference is not infringing upon this role. As mentioned earlier, agency deference for issues of

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[138] Kassen, *supra* note 136, at 5.
[139] *See* Daniel M. Ortner, *The End of Deference: The States That Have Rejected Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 24, 2020), https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/ [https://perma.cc/53TF-JJS4].
[140] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2273 (2024).
[141] Pork Motel, Corp. v. Kan. Dept. of Health & Env't, 673 P.2d 1126, 1132 (1983).
[142] Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors, 228 P.3d 403, 410 (Kan. 2010).
[143] *See* Pork Motel, Corp., 673 P.2d at 1132.
[144] *Loper*, 144 S. Ct. at 2273.

statutory interpretation is a common judicial practice. Therefore, the decision to reinstate agency deference is within the discretion of the court.

VI. CONCLUSION

The state of Kansas has a duty to preserve the Ogallala Aquifer for future generations. To engage in useful and meaningful preservation efforts, the legislature and judiciary must evaluate flawed systems and processes and opt for change whenever necessary. The framework of intergenerational water rights is a useful tool for encouraging legislators, the judiciary, and citizens to prioritize the preservation of their state's natural resources. In Kansas, creating a system of water courts to adjudicate water matters and restoring judicial deference to agency interpretation are just two remedies, out of many, that promote and advance the theory of intergenerational water rights. While these changes alone are unlikely to resolve the problem of aquifer depletion, they are important legal, policy-based remedies that advance the goal of preservation.

TITLE IX PRE-ASSAULT LIABILITY: EMERGING ENFORCEMENT STANDARDS AND THE NEXT STEPS TO ACCOUNTABILITY

*By: Emma Mays**

I. Introduction

The problem of sexual misconduct on college campuses is not new. In 1957, one of the first studies of the issue in the context of postsecondary educational institutions ("institutions") was conducted.[1] The study found that 20.9% of the women surveyed reported experiencing forceful attempts at sexual intercourse.[2] The study also found that the prevalence of sexual misconduct fell into a U-shaped curve, with highest incident levels occurring early in the fall and late in the spring.[3] Further, the study found that the victims were younger than the general sample, and that women from marginalized groups were more likely to be victims.[4]

Notably, this research reflects many outdated notions about women and sexual misconduct and was conducted on a very limited sample size from a single university.[5] However, later research indicates that the study's findings were likely an accurate reflection of reality.[6] In 1987, researchers conducted the first national study of 6,159 students enrolled across thirty-two institutions.[7] They found that 27.5% of college women reported experiencing attempted rape and 7.7% of college men reported perpetrating this violent misconduct.[8]

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[1] Eilene Zimmerman, *Campus Sexual Assault: A Timeline of Major Events*, THE NEW YORK TIMES (June 22, 2016), https://www.nytimes.com/2016/06/23/education/campus-sexual-assault-a-timeline-of-major-events.html [https://perma.cc/URN4-6MJ7]; Clifford Kirkpatrick & Eugene Kanin, *Male Sex Aggression on a University Campus*, 22 AM. SOCIO. REV. 52, 52–53 (1957).

[2] Kirkpatrick & Kanin, *supra* note 1, at 53.

[3] *Id.*

[4] *See id.* at 53–54.

[5] *Id.* at 53.

[6] Mary P. Koss, Christine A. Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING AND CLINICAL PSYCH. 162, 162–63 (1987).

[7] *Id.* at 163.

[8] *Id.* at 168.

In fact, those initial statistics bear alarming similarity to statistics on the same issue available today.[9] Among undergraduate females, 26.4% report experiencing rape or sexual assault through physical force, violence, or incapacitation.[10] Still today, there is a heightened risk that students will experience sexual assault in their first few months on campus.[11] And across the board, marginalized groups are more likely to experience this harm.[12]

Faced with the disturbing consistency of these statistics, the question becomes: Why have policy makers not done anything to stop this? At the center of the issue is Title IX of the Higher Education Amendments of 1972 (Title IX).[13] The text of Title IX prohibits discrimination on the basis of sex in any education program or activity that receives federal funds.[14] Despite the statute's current prominence in addressing sexual misconduct, it initially provided no such assistance.[15]

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[9] RAINN, *Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://rainn.org/statistics/campus-sexual-violence [https://perma.cc/HG4R-LLBT].
[10] *Id.*
[11] *Id.*
[12] LGBTQ+ students experience a heightened risk and are up to nine times as likely to be victims of college sexual assault. Stephanie Miodus, Samantha Tan, Nicole D. Evangelista, Cynthia Fioriti & Monique Harris, *Campus Sexual Assault: Fact Sheet From an Intersectional Lens*, AM. PSYCH. ASS'N, https://www.apa.org/apags/resources/campus-sexual-assault-fact-sheet#:~:text=Campus%20sexual%20assault%20(CSA)%20makes,students%20(NCES%2C%20 2022) [https://perma.cc/WL65-WS8N]; Mark Beaulieu, Creaig Dunton, LaVerne McQuiller Williams & Judy L. Porter, *The Impact of Sexual Orientation on College Student Victimization: An Examination of Sexual Minority and Non-Sexual Minority Student Populations*, SCI. RSCH. PUBL'G 1728, 1730 (2017); Disabled students are overall 13.2% more likely to be the victims of sexual misconduct involving force or incapacitation. *Not on the Radar: Sexual Assault of College Students with Disabilities,* NAT'L COUNCIL ON DISABILITY 1, 11 (Jan. 30, 2018), https://www.ncd.gov/report/not-on-the-radar-sexual-assault-of-college-students-with-disabilities/ [https://perma.cc/XA9F-R4PE]; Studies have found both Hispanic and Black students to experience sexual assault at the highest rate. David Cantor, Bonnie Fisher, Susan Chibnall, Shauna Harps, Reanne Townsend, Gail Thomas, Hyunshik Lee, Vanessa Kranz, Randy Herbison & Kristin Madden, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, WESTAT (Jan. 17, 2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/G7AS-TDDT]; Robert W. S. Coulter, Christina Mair, Elizabeth Miller, John R. Blosnich, Derrick D. Matthews & Heather L. McCauley, *Prevalence of Past-Year Sexual Assault Victimization Among Undergraduate Students: Exploring Differences by and Intersections of Gender Identity, Sexual Identity, and Race/Ethnicity*, 18 PREVENTION SCI. 726, 729 (2017); This heightened risk is also experienced by international students, students with lower socioeconomic status, and first-generation students. Ihssane Fethi, Isabelle Daigneault, Manon Bergeron, Martine Hébert & Francine Lavoie, *Campus Sexual Violence: A Comparison of International and Domestic Students*, 13 J. OF INT'L STUDENTS 1, 4 (2023); Claude A. Mellins, Kate Walsh, Aaron L. Sarvet, Melanie Wall, Louisa Gilbert, John S. Santelli, Martie Thompson, Patrick A. Wilson, Shamus Khan, Stephanie Benson, Karimata Bah, Kathy A. Kaufman, Leigh Reardon & Jennifer S. Hirsch, *Sexual assault incidents among college undergraduates: Prevalence and factors associated with risk*, PLOS ONE (Nov. 8, 2017), https://doi.org/10.1371/journal.pone.0186471 [https://perma.cc/8572-G5DN]; *See* Rachel E. Morgan & Barbara A. Oudekerk, *Criminal Victimization, 2018*, U.S. DEP'T OF JUST. (Sep. 2019), https://bjs.ojp.gov/content/pub/pdf/cv18.pdf [https://perma.cc/2DVX-2WN9].
[13] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.
[14] 20 U.S.C. § 1681(a).
[15] *See* ELIZABETH KAUFER BUSCH & WILLIAM E. THRO, TITLE IX: THE TRANSFORMATION OF SEX DISCRIMINATION IN EDUCATION 16–17 (2018).

In fact, at the time it passed, Title IX was not revolutionary or particularly controversial, as is evidenced by the lack of public attention.[16] The legislative action was sparked by the activism of Bernice Sandler, a Ph.D. candidate who was dissuaded from applying for a tenure-track position because she came on "too strong for a woman."[17] Unsurprisingly, given the text and background, when Title IX became law, its immediate effects were limited to classroom-based opportunities for students and teachers.[18] The first implementing guidelines, issued in 1975, acted to remove absolute restrictions on participation in educational activities.[19] Despite this limited foundation, decades of judicial and administrative interpretations have made Title IX into a powerful tool to address the sexual misconduct that plagues colleges.[20]

However, as current statistics indicate, sexual misconduct in postsecondary education is still extremely prevalent.[21] This is because, despite the fact that Title IX's scope has grown substantially, it does not do enough to incentivize schools to take proactive steps to protect students from the harms of sexual misconduct. This Article argues for legislative or administrative implementation of a liability standard that penalizes institutions for failing to act despite clear risk of sexual misconduct and procedural safeguards that ensure survivors practical access to vindication.

Since Title IX has been interpreted to apply to sexual harassment for decades now, the literature analyzing its effectiveness in this area is extensive.[22] Most relevant here are various scholars' analyses of how to use Title IX to motivate institutions to prevent sexual assault.[23] Recently, the liability standard that is evaluated here has been identified as a promising method to hold institutions accountable.[24] This research sets a foundation that this Article further builds upon,

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[16] KAUFER BUSCH, *supra* note 15, at 48.
[17] *Id.* at 5–9.
[18] *Id.* at 1.
[19] *Id.* at 10.
[20] *Id.* at 17.
[21] RAINN, *supra* note 9.
[22] *E.g.*, Michelle J. Harnik, *University Title IX Compliance: A Work in Progress in the Wake of Reform*, 19 NEV. L. J. 647, 649 (2018); Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students?: An Anlysis of Title IX's Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545, 545 (2016); Rachel N. Stewart, *How the #MeToo Era Can Facilitate Empowerment and Improvements to Title IX Shortcomings in Schools, Colleges, and Universities*, 14 CHARLESTON L. REV. 597, 598 (2020); Emily Suski, *The Title IX Paradox*, 108 CAL. L. REV. 1147, 1148 (2020); Jordyn Sindt, *Title IX's Feeble Efforts Against Sexual Harassment: The Need for Heightened Requirements Within Title IX to Provide Comparable University and Pre-K-12 Policies*, 23 J. GENDER, RACE & JUST. 495, 499 (2020); Katharine Silbaugh, *Reactive to Proative: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1049 (2015).
[23] *See, e.g.*, Lauren McCoy, *Defining Deliberate Indifference and Institutional Liability Under Title IX*, 32 MARQ. SPORTS L. REV. 141, 144 (2021); Nick Rammell, *Title IX and the Dear Colleague Letter: An Ounce of Prevention Is Worth a Pound of Cure*, BYU EDUC. & L. J. 135, 136 (2014).
[24] *See, e.g.*, Erin E. Buzuvis, *Title IX and Official Policy Liability: Maximizing the Law's Potential to Hold Education Institutions Accountable for Their Responses to Sexual Misconduct*, 73 OKLA. L. REV. 35, 35 (2020); Keeley B. Gogul, *The Title IX Pendulum: Taking Student Survivors Along for the Ride*, 90 U. CIN. L. REV. 994, 997–98 (2022).

as previous literature fails to adequately consider the procedural rules necessary for this claim to actually incentivize institutions and provide relief to student survivors.

Part II of this Article will provide background as to how Title IX gradually developed into a tool that, with the adoption of emerging liability standards, has the potential to incentivize institutional proactivity. Part III of this Article will turn to analyzing how pre-assault liability, along with the proper procedural safeguards, has the potential to incentivize institutions to take proactive steps to protect students from sexual misconduct. Part IV will then turn to the legislative and administrative policy solutions necessary to ensure that plaintiffs have access to pre-assault liability claims.

II. BACKGROUND

Title IX states "[n]o person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[25] At just thirty-seven words long, the relevant portion of the statute provides little indication of what it would come to mean for institutional liability for sexual misconduct.

A. Evolution of Title IX Institutional Liability

Through judicial interpretation and administrative clarifications, Title IX has morphed into a tool for victims of sexual violence to seek accountability for institutional sexual misconduct policies.[26] One of the most critical, but thus far underutilized, elements of this tool is a theory referred to as pre-assault liability.[27]

1. Establishing a Private Right of Action

A highly pivotal development in the evolution of Title IX was the emergence of the concept that sexual harassment constitutes a form of sex discrimination. While many today would likely automatically associate these terms, the conceptual connection was not established until years after Title IX passed.[28] The theory was initially developed by feminist legal scholar, Catharine MacKinnon, who served as counsel for some of the earliest plaintiffs testing the theory in court.[29] In *Alexander v. Yale University*, the plaintiffs became the first to argue that sexual harassment was

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[25] 20 U.S.C. § 1681(a).

[26] Rachael A. Goldman, *When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students*, 47 PEPP. L. REV. 185, 194 (2019).

[27] The term "pre-assault" liability is a convenient and commonly used shorthand for a theory of liability that holds institutions accountable for failure to act before sexual misconduct causes injury. *See, e.g.*, Marisa R. Lincoln & Marisa Montenegro, *Title IX and "Pre-Assault": Closing the Flood Gates* (May 2020), https://www.lozanosmith.com/news/cnb/CNB372020.pdf [https://perma.cc/W6JB-YVFN]. It does not mean that institutions would be liable before an instance of sexual misconduct occurs.

[28] Joseph J. Fischel, *Catharine MacKinnon's Wayward Children*, 30 DIFFERENCES 34, 35–36 (2019).

[29] *Id.* at 36.

sex discrimination under Title IX.[30] The district court remarked favorably on the argument stating, "it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination."[31] Many years later, the Supreme Court took the same position for the first time in *Franklin v. Gwinnett County Public Schools*.[32]

However, the developments in *Franklin* came only after the Court resolved the question of whether there even was a judicial path to remedy under Title IX.[33] The only remedy Congress explicitly provided for Title IX violations is administrative leveraging of federal funding.[34] In *Cannon v. University of Chicago*, the Supreme Court grappled with whether this remedy sufficiently served the congressional purpose in enacting Title IX.[35] The Court concluded that it did not and held that Congress intended to create an implied private right of action under Title IX.[36] In reaching this conclusion, the Court reasoned that a private right of action was proper and sometimes necessary to serve the legislative purpose to "provide individual citizens effective protection against those [discriminatory] practices."[37]

2. Developing Post-Assault Liability

Once it became clear that a private right of action against institutions was available, the Court began laying out the necessary conditions for establishing such liability. In *Gebser v. Lago Vista Independent School District*, the Court sought to answer under which conditions an institution may be held liable for sexual misconduct committed by a teacher.[38] More specifically, the opinion analyzes

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[30] KAUFER BUSCH, *supra* note 15, at 48.
[31] Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977).
[32] Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 60 (1992).
[33] KAUFER BUSCH, *supra* note 15, at 48.
[34] 20 U.S.C. § 1682.
[35] Cannon v. Univ. of Chi., 441 U.S. 677, 704–05 (1979).
[36] *Id.* at 709.
[37] *Id.* at 704; The question of whether an implied right of action under a federal statute exists presents a separation of powers question. Anthony J. Bellia, *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2081 (2017); In *Cannon*, the Court highlighted this concern by saying that where Congress "intends private litigants to have a cause of action," it should confer such a remedy explicitly. *Cannon*, 441 U.S. at 717; Since *Cannon* was decided, the Supreme Court has become much more reluctant to recognize implied rights of action, reasoning that doing so encroaches on congressional authority. Alexander v. Sandoval, 532 U.S. 275, 286 (2001); In *Alexander*, the Court emphasized that Congress alone could create a cause of action to enforce a federal law and that the courts may only find such a right where there is statutory intent to do so. *Id.* Without this statutory intent, the Court reasoned that "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87. Although the *Alexander* Court acknowledged that congressional expectations reflecting contemporary legal context was used in reaching the *Cannon* decision, it stated that the examination of congressional intent centers on the text and structure of the statute. *Id.* at 287–88. So, while recognition of an implied right of action has been critical to the development of Title IX, if the same question was before the Supreme Court today, it is unlikely the result would be the same.
[38] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

whether institutions may be held liable on a basis of *respondeat superior* and constructive notice.[39] Under a theory of *respondeat superior*, liability is imputed to an institution whenever a teacher is "aided in carrying out the sexual harassment of students by his or her position of authority with the institution."[40] A theory of constructive notice would allow an institution to be liable "where the district knew or 'should have known' about harassment but failed to uncover and eliminate it."[41]

Since the right of action is implied, the Court based its analysis on inferences of what Congress intended guided by limits of "statutory structure and purpose."[42] The Court then concluded "that it would 'frustrate the purposes' of Title IX" to allow institutional liability under *respondeat superior* or constructive notice.[43] This was based on a finding that Congress did not consider institutional liability "where the recipient is unaware of the discrimination in its programs."[44]

This rationale relied in part on a comparison to the express remedy of administrative enforcement.[45] The Court reasoned that because an agency cannot initiate enforcement proceedings until it has issued actual notice, it would be "unsound" to allow for liability under the private right of action without a similarly high standard.[46] Instead, for cases "that do not involve official policy of the recipient entity," the Court established that an institution cannot be held liable for monetary damages for the conduct of its employee or agent "unless an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on [the university's] behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond."[47] The opinion further specifies that the failure to respond must amount to deliberate indifference which is "an official decision by the recipient not to remedy the violation."[48] In *Davis v. Monroe County Board of Education*, the Supreme Court extended *Gebser*'s actual knowledge and deliberate indifference standards to cases involving sexual misconduct by one student against another.[49]

Gebser and *Davis* established the elements of a post-assault claim. It is called a *post*-assault claim because it involves a plaintiff's allegations that institutional conduct *after* an instance of sexual misconduct constitutes deliberate indifference by the institution, therefore subjecting it to liability. The standards explained by the *Gebser* and *Davis* decisions can be synthesized into five elements:

> (1) the school must have "exercise[d] substantial control over both the harasser and the context in which the harassment occu[red];" (2) the alleged harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the [plaintiff] of access to the educational opportunities or benefits provided by

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[39] *Gebser*, 524 U.S. at 283.
[40] *Id.* at 282.
[41] *Id.*
[42] *Id.* at 284.
[43] *Id.* at 285.
[44] *Id.*
[45] *Id.* at 289.
[46] *Id.*
[47] *Id.* at 290.
[48] *Id.*
[49] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

> the school;" (3) the school must have had actual knowledge of the harassment; (4) the school's response to the harassment was deliberately indifferent, meaning it was "clearly unreasonable in light of the known circumstances;" and (5) that indifferent response must have "cause[d] [the plaintiff] to undergo harassment or ma[d]e [the plaintiff] liable or vulnerable to it."[50]

The factors most relevant to this analysis are actual knowledge and deliberate indifference. These factors are most relevant here because they have been adapted by courts to create emerging Title IX liability standards.[51]

3. Downfalls of Post-Assault Liability

Deliberate indifference and actual knowledge standards provide a high bar for plaintiffs seeking to hold institutions accountable.[52] Because the deliberate indifference line is set at clearly unreasonable behavior, the courts give institutions significant deference.[53] This leeway fails to incentivize institutions to effectively respond to Title IX complaints because the standard only requires minimal responses to reports of past incidents.[54] In practice, the result is that plaintiffs are successful in showing deliberate indifference only where "a school did not respond to a sexual misconduct claim *at all*."[55] This provides a shield from liability so long as institutions do something promptly and in good faith.[56] In effect, this allows institutions to escape liability in most cases and does little to incentivize "institutions to proactively or reactively respond to sexual misconduct on their campuses and in their communities."[57] This is inconsistent with the Congressional purpose to "provide individual citizens *effective* protection" under Title IX.[58] The answer to this dilemma may lie in emerging standards of Title IX liability.

4. Emerging Standards of Title IX Liability

Surmounting the high bar of deliberate indifference may require going around rather than over. Another type of Title IX liability, one that holds schools accountable for certain conduct *before* sexual misconduct occurs, has gained traction throughout the federal circuit courts in recent years. The concept of pre-assault Title

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[50] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1105 (9th Cir. 2020) (quoting *Davis*, 526 U.S. at 644–50).
[51] *See* Gogul, *supra* note 24, at 1007 (explaining how the Ninth Circuit clarified the elements of a pre-assault claim including that plaintiffs did not need to prove actual knowledge or deliberate indifference to survive a motion to dismiss).
[52] Buzuvis, *supra* note 24.
[53] McCoy, *supra* note 23, at 149.
[54] *Id.* at 154.
[55] *Id.* at 153 (emphasis added).
[56] *Id.*
[57] Buzuvis, *supra* note 24.
[58] Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (emphasis added).

IX liability is not a new theory. In 2007, it was acknowledged by the Eleventh Circuit and adopted by the Tenth Circuit.[59] However, until recently, the theory gained only minimal traction.[60]

a. Inception of Pre-Assault Liability

In the seminal pre-assault case, *Simpson v. University of Colorado Boulder*, the Tenth Circuit used a path left open by *Gebser* and *Davis* to articulate a new standard for institutional liability.[61] To understand the legal theory, it is helpful to discuss the underlying facts and allegations. The key is that all the events supporting the plaintiffs' claim happened *before* their assaults.[62]

Rather than alleging that the University of Colorado (CU) failed to adequately respond to the plaintiffs' reports of sexual misconduct, the plaintiffs claimed that the institution knew of the risk to the plaintiffs and "failed to take any action to prevent further harassment."[63] The Tenth Circuit explained that the allegations did not merely involve an assault that occurred in connection with CU, but rather that it arose out of an official school program.[64] The program at issue was the football team and specifically, its recruitment of high school athletes.[65]

The recruiting program's policy was to show recruits visiting campus a "good time" and the program specifically chose player hosts who were likely to provide this experience.[66] In 1990, two CU football players were criminally charged with rape and sexual assault.[67] In 1997, the recruiting program was implicated in similar misconduct when a high school girl reported she was sexually assaulted by two recruits at a party hosted by a CU football player.[68] The responses to this incident show CU was well aware of the danger posed by the football recruiting program. First, the chancellor of the university wrote an email to the athletic director saying he was concerned about oversight of recruits and thought the school should be clearer about rules and expectations.[69]

Next, the district attorney requested to meet with CU officials.[70] At the meeting, a state official communicated that "she was concerned about women being made available to recruits for sex" and told CU that the most recent event was not isolated.[71] She advised CU make changes regarding sex and alcohol in the recruiting program.[72] Despite these explicit warnings of trouble to come, CU's main response was merely applied to the individual actors involved.[73] CU denied admittance to the

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[59] *See* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007); Williams v. Bd. of Regents, 477 F.3d 1282, 1295–96 (11th Cir. 2007).
[60] Buzuvis, *supra* note 24, at 36.
[61] *Simpson*, 500 F.3d at 1177.
[62] *Id.* at 1174.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 1180.
[67] *Id.* at 1181.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1182.
[72] *Id.*
[73] *Id.*

two recruits and suspended a player.[74] Importantly, no changes addressed the use of sex in the football program's recruiting efforts or the duties of player-hosts.[75]

Predictably, sexual misconduct continued to plague the program. In 2001, a student employee in the athletic department was raped by a player on the team.[76] She met with the coach shortly after and he responded by telling her he would do nothing; he was true to his word.[77] That same year, CU hired an assistant coach who was previously accused of assault and banned from CU's campus.[78] Toward the end of the same year, the *Simpson* plaintiffs were assaulted during a recruiting visit by recruits and players.[79]

Even with these facts, CU almost escaped liability because the situation does not fit within the post-assault liability framework.[80] The plaintiffs could not identify a risk sufficiently "well-defined and focused" to trigger actual notice because the perpetrators and victims were different, in classification and identity, than in the previous incidents.[81] Instead of dismissing the claim or distorting the traditional post-assault liability theory, the Tenth Circuit identified a new pathway.

b. Legal Foundation of Pre-Assault Liability

This path was left open by the Supreme Court in *Gebser*.[82] There, the Court specified that actual knowledge was required in cases "that do *not* involve official policy" of the institution.[83] In *Simpson*, the Tenth Circuit reasoned the language used by the Supreme Court leaves open the possibility that the actual knowledge requirement does not apply where plaintiffs do claim that the Title IX violation occurred because of an official policy or custom of the institution.[84] Based on the facts before them, the *Simpson* court concluded that the plaintiffs' claims did not require allegations of actual knowledge to succeed because "the gist of the complaint is that CU sanctioned, supported, even funded a program" that resulted in Title IX violations.[85] The Tenth Circuit then returned to *Gebser* for guidance on the proper standard.[86]

What the Tenth Circuit found was reliance on the principles of municipal liability for civil rights violations under Section 1983 of Title 42 of the United States

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[74] *Simpson*, 500 F.3d at 1182.
[75] *Id.*
[76] *Id.* at 1183.
[77] *Id.*
[78] *Id.* at 1183–84.
[79] *Id.* at 1172.
[80] Buzuvis, *supra* note 24, at 50.
[81] Buzuvis, *supra* note 24, at 50 (quoting Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1236 (D. Colo. 2005), *rev'd sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007)).
[82] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).
[83] *Id.* (emphasis added).
[84] *Simpson*, 500 F.3d at 1177.
[85] *Id.*
[86] *Id.*

Code (§ 1983).[87] The critical similarity between Title IX and § 1983 is that neither allows liability for the entity under a theory of *respondeat superior*.[88] Instead, both require "that the institution itself, rather than its employees (or students) be the wrongdoer."[89] This standard means that plaintiffs must show that their injury was the result of action by the entity even though the conduct closest in the causal chain was individual action.

In § 1983 actions, plaintiffs may satisfy the standard by alleging that an entity acting under color of state law is either indifferent to the actions of its employees *or* has discriminatory policies or customs.[90] In *Gebser*, the Supreme Court relied on the former option. By imposing the high-bar causation standard of deliberate indifference, the Supreme Court ensured that liability was premised not on the employee's action but on the institution's deliberate indifference to a sexual harassment report.[91] In sum, the analogy to § 1983 led to the establishment of the post-assault claim requirements of actual knowledge and deliberate indifference.

What the Tenth Circuit in *Simpson* did was use a "parallel interpretation" under the latter option for § 1983 liability.[92] The court reasoned that when an official policy is alleged under § 1983, the analysis changes.[93] For § 1983 claims, alleging harm because of an official policy or custom allows a court to conclude that the entity itself caused the harm because of a policy or custom it maintained, rather than its deliberate indifference to the acts of an individual under its control. The primary inquiry under this standard is whether there is a direct causal relationship between the municipal custom and the violation.[94] Importing this standard to the Title IX context, the Tenth Circuit held that an institution may be said to have intentionally violated Title IX when the injury is caused by an official policy.[95]

c. Distinctions Between Pre-Assault and Post-Assault Liability

The Tenth Circuit's holding created a form of Title IX liability which differs in two significant ways from post-assault liability as established by *Gebser* and *Davis*.[96] The first change is that deliberate indifference is established via the policy itself, rather than via the reaction to a report of sexual misconduct.[97]

Second, the analysis impacts the actual knowledge requirement.[98] There are multiple ways to characterize this alteration. One option is to conclude that the actual notice standard is inapplicable because the institution itself, through its official

[87] *Simpson*, 500 F.3d at 1177.
[88] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289 (1998); *See* City of Canton v. Harris, 489 U.S. 378, 385 (1989).
[89] *Simpson*, 500 F.3d at 1177.
[90] Buzuvis, *supra* note 24, at 48.
[91] *Gebser*, 524 U.S. at 290.
[92] Buzuvis, *supra* note 24, at 48.
[93] *Simpson*, 500 F.3d at 1178.
[94] Wes. R. McCart, Simpson v. University of Colorado*: Title IX Crashes the Party in College Athletic Recruiting*, 58 DEPAUL L. REV. 153, 170 (2008).
[95] *Simpson*, 500 F.3d at 1178.
[96] Gogul, *supra* note 24, at 1006.
[97] *Id.*
[98] *Id.*

policy or custom, is the wrongdoer.[99] Alternatively, one may conclude actual knowledge is still required in a different way.[100] Some scholars pose that instead of requiring actual knowledge of ongoing harassment, the Tenth Circuit's analysis requires actual knowledge of the risk created by the official policy or custom.[101]

d. Expanding Pre-Assault Liability

Pre-assault liability was not adopted by a circuit court again until 2020. In *Karasek v. Regents of the University of California*, the Ninth Circuit held that pre-assault claims are supported by a cognizable theory of Title IX liability, clearly set out the required elements, and expanded upon *Simpson's* holding.[102] To survive a motion to dismiss, the Ninth Circuit specified that a plaintiff must plausibly allege that:

> (1) the school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was "so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school."[103]

The first two elements are the adaptations to the standards of deliberate indifference and actual knowledge.

The most significant contribution to pre-assault liability this case offers is its expansion of *Simpson*. In *Simpson*, the court's holding was limited to a known risk of further sexual misconduct within a specific program, football recruitment.[104] But the Ninth Circuit in *Karasek* said that the same reasoning may support liability where an institution has a policy of deliberate indifference to a risk of sexual misconduct "in any context subject to the school's control."[105]

The facts of *Karasek* paint a picture of decades of inadequate response to sexual harassment by the University of California, Berkeley (Berkeley).[106] The plaintiffs cited a report by a state agency which found that over a five-year period, Berkeley resolved 76% of Title IX complaints using an early resolution process and in a

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[99] Gogul, *supra* note 24, at 1006.
[100] McCart, *supra* note 94, at 173.
[101] *E.g.*, *id.*
[102] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1112–13 (9th Cir. 2020).
[103] *Id.* at 1112 (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999)).
[104] Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007).
[105] *Karasek*, 956 F.3d at 1113.
[106] *Id.* at 1101–03.

generally inadequate manner.[107] Despite this reality, Berkeley's Title IX officer stated publicly that early resolution was inappropriate for cases involving sexual assault.[108] The plaintiffs also cited an administrative complaint filed by thirty-one women alleging that this failure to adequately respond to complaints of sexual assault existed since 1979.[109] The court acknowledged that the facts point to a broader problem than in *Simpson*, but left it to the trial court to determine whether this particular campus-wide situation could satisfy the pre-assault framework.[110]

In 2022, pre-assault Title IX liability picked up more traction when the Sixth Circuit adopted *Karasek's* test in *Doe ex rel. Doe #2 v. Metro. Government of Nashville & Davidson County.*[111] The increasing acceptance of pre-assault liability is most significant when viewed in light of its potential to incentivize institutions to take proactive action to prevent sexual misconduct.

III. ANALYSIS

Because pre-assault liability forces schools to examine their policies and practices that allow sexual misconduct to continue rather than merely respond to incidents once they have already occurred, it has the potential to incentivize schools to correct their policies and practices before injury can occur. In order for this potential to be realized, procedural rules that protect survivors' access to these claims must be implemented.

A. Pre-Assault Liability's Potential to Incentivize Proactivity

A significant theme in literature discussing pre-assault liability is its potential to incentivize institutions to take proactive action to protect its students from sexual misconduct.[112] Using the facts of *Simpson* as a touchpoint, scholars suggest that with only post-assault liability, institutions lack motivation to take proactive action even when they are clearly aware of a problem.[113] This failure can be characterized by unwillingness to take preventative action.[114] Pre-assault liability takes a step towards a solution because it is forward-facing and can reach first-time perpetrators.[115]

1. Motivating Injury Prevention

As their names indicate, pre-assault and post-assault liability differ primarily in the time period during which they hold institutions accountable for inaction.[116] Traditional post-assault liability examines what an institution does in response to a

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[107] *Karasek*, 956 F.3d at 1113.
[108] *Id.* at 1114.
[109] *Id.* at 1103.
[110] *Id.* at 1114.
[111] Doe *ex rel.* Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., 35 F.4th 459, 465 (6th Cir. 2022).
[112] Buzuvis, *supra* note 24; A.J. Bolan, *Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault*, 86 GEO. WASH. L. REV. 804, 818 (2018); Rammell, *supra* note 23, at 141.
[113] Bolan, *supra* note 112, at 817.
[114] Rammell, *supra* note 23, at 141.
[115] *See Doe*, 35 F.4th 459.
[116] *See id.* at 465–66.

report of sexual misconduct.[117] While this form of liability has played a significant role in ensuring institutions take prompt action to resolve the consequences of sexual misconduct, it does not similarly impact institutional motivation to look at their overall approach to sexual misconduct on campus.[118]

Instead, the prominence of post-assault liability has allowed institutions to avoid responsibility in most cases because they are shielded by minimal responses to past incidents of sexual misconduct.[119] So long as institutions respond to reports they receive, they avoid penalty because post-assault liability permits only limited inferences on what that incident may mean for the future safety of other students.[120] In other words, institutions are permitted to only look backward at what they may do to remedy specific harms while ignoring the obvious risks to other students that can be inferred from the incident.

Conversely, the focus of pre-assault liability is institutional failure to address risks that existed before a student was the target of sexual misconduct.[121] This means that the key inquiry under a pre-assault standard is whether an institution's policies were sufficient to address known risks that were likely to materialize if left ignored.[122] The result is a greater emphasis on institutional polices rather than narrow responses to prior events.[123] Because pre-assault liability's structure requires that schools look forward to what harms may occur if deficiencies in their programs and activities are not corrected, it inherently requires proactive response to sexual misconduct on campus.[124]

2. Reaching First-Time Perpetrators

Pre-assault liability also encourages proactivity by closing the accountability gap for first-time offenders.[125] Under a theory of post-assault liability, the gold standard of notice is satisfied only when the institution had knowledge that the perpetrator had committed sexual misconduct before against the same victim, in the same manner.[126] As a result, accountability under Title IX is focused on cases where there is an identified victim and harasser who remain the same throughout the period of sexual misconduct.[127] This allows institutions to avoid liability even where the risk of sexual misconduct is obvious when the identities of the parties were not known before the sexual misconduct at issue occurred.[128]

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[117] *See* Buzuvis, *supra* note 24.
[118] Delaney R. Davis, *Title IX at Fifty: Reimagining Institutional Liability Under Karasek's Pre-Assault Theory*, 58 GA. L. REV. 313, 334–35 (2023).
[119] Buzuvis, *supra* note 24, at 35–36.
[120] *Id.* at 50.
[121] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1099 (9th Cir. 2020).
[122] McCart, *supra* note 94, at 177.
[123] Buzuvis, *supra* note 24, at 51.
[124] McCart, *supra* note 94, at 182.
[125] *Id.* at 174.
[126] Buzuvis, *supra* note 24, at 40–41.
[127] McCart, *supra* note 94, at 167.
[128] *Id.* at 174.

An extreme example of this standard is the Sixth Circuit's same-victim requirement. In *Kollaritsch v. Michigan State University*, the court held that victims alleging post-assault liability must show "that the school had actual knowledge of some actionable sexual harassment and that the school's deliberate indifference to it resulted in *further* actionable harassment of *the [same] student-victim*." [129] This means that a post-assault theory is not viable until the same victim was subjected to harassment multiple times.[130] The Sixth Circuit's rule makes it obvious that post-assault liability is not fit to address situations where, although the risk was known, the parties involved in the sexual misconduct are not identical to those in the situation which gave rise to the awareness.

Pre-assault liability closes this accountability gap.[131] In *Doe ex rel Doe #2 v. Metro Government of Nashville & Davidson County*, the Sixth Circuit recognized pre-assault liability as a cognizable theory of liability.[132] In that same case, the Sixth Circuit held that its post-assault same-victim requirement does not extend to pre-assault claims.[133] The court reasoned that the causation considerations that gave rise to the same-victim requirement are satisfied by pre-assault liability's focus on a pattern of sexual misconduct before the victim was subjected to the conduct.[134] Thus, pre-assault liability holds institutions accountable for ignoring the risk a particular actor or group of actors poses to the campus community rather than only for ignoring the risk that an actor or group of actors poses after they have already offended.

For these reasons, most scholars agree that pre-assault liability is a step in the right direction to alleviating the sexual misconduct that plagues college campus.[135] However, one possible concern is that a pre-assault liability standard puts institutions at risk of constant liability for failure to prevent sexual misconduct on their campuses. Specifically, one scholar remarked that pre-assault liability "sounds in negligence," and asserted that the Tenth Circuit merely reasoned that "the university should have known of the sexual harassment because it was a foreseeable result."[136] This line of reasoning, the author remarks, shows the court resorting to a constructive notice standard rejected by the *Gebser* Court.[137]

While it is true that a pre-assault liability standard would require "unprecedented" institutional responsiveness to the risk of sexual misconduct on campus, it does not follow that the theory abandons the knowledge or causation standards required by the Supreme Court in *Gebser* and *Davis*.[138] In fact, the Ninth Circuit in *Karasek* responded specifically to this concern saying:

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[129] Kollaritsch v. Mich. State Univ., 944 F.3d 613, 620 (6th Cir. 2019) (emphasis added).
[130] *Id.* at 625.
[131] McCart, *supra* note 94, at 174.
[132] Doe *ex rel.* Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., 35 F.4th 459, 465 (6th Cir. 2022).
[133] *Id.*
[134] *Id.*
[135] *E.g.*, Buzuvis, *supra* note 24; Bolan, *supra* note 112; Rammell, *supra* note 23, at 141; McCart, *supra* note 94, at 184.
[136] Justin F. Paget, *Did Gebser Cause the Metastasization of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment Under Title IX Ten Years Later*, 42 U. RICH. L. REV. 1257, 1298 (2008).
[137] *Id.*
[138] *See* McCart, *supra* note 94, at 180–81.

> Title IX does not require [Berkeley] to purge its campus of sexual misconduct to avoid liability. A university is not responsible for guaranteeing the good behavior of its students. The element of causation ensures that Title IX liability remains within proper bounds. To that end, adequately alleging a causal link between a plaintiff's harassment and a school's deliberate indifference to sexual misconduct across campus is difficult.[139]

Further, the court was so careful to ensure that the pre-assault liability standard it put forward complied with the *Gebser/Davis* requirement that it amended its initial opinion to clarify that heightened standards remained.[140] The amended decision specified that the policy or custom at issue must be one of deliberate indifference to reports of sexual misconduct and that the risk was known or obvious to the institution.[141] Practitioners have highlighted that these clarifications foreclose the possibility that institutions would be subjected to frequent liability for campus sexual misconduct the institution was unaware of.[142] This standard strikes the proper balance of holding institutions liable when they refuse to amend policies they know make student abuse more likely while retaining the safeguards of the post-assault framework.[143]

B. Procedural Practicality

The emerging availability of pre-assault claims is a good step toward accountability. But to reach its full potential, the standard must be accompanied by procedural rules that allow survivors practical access to these claims. Since Title IX does not expressly provide for a private cause of action, it also lacks built-in procedural rules for timeliness.[144] To fill the gap, courts use standards from both state and federal law.[145] The statutes of limitation applicable to Title IX claims are borrowed from state personal injury law.[146] On the other hand, the date the cause of action accrues for a Title IX action is a question of federal law.[147]

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[139] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1114 (9th Cir. 2020).
[140] Lincoln & Montenegro, *supra* note 27.
[141] *Id.*
[142] *Id.*
[143] McCart, *supra* note 94, at 181.
[144] Sheridan Hendrix, *OSU Wants US Supreme Court to Hear Title IX Case; Petition Asks Justices to Review Earlier Decision*, THE COLUMBUS DISPATCH (Mar. 15, 2023) at A1.
[145] *Id.*
[146] Megan C. Maynhart, *Why Title IX Matters: The Key to Breaking the Glass Ceiling in Medicine*, 51 U. TOL. L. REV. 531, 538 (2020).
[147] Hendrix, *supra* note 144.

1. Alleged Circuit Split on Accrual Rule

The question of pre-assault claim accrual is important and has been the source of recent controversy.[148] A claim accrues when the plaintiff has a complete cause of action such that the plaintiff could file suit and be awarded relief.[149] There are two theories of accrual that may apply to Title IX.[150]

The first is the occurrence rule which provides that a cause of action accrues at the moment the injury occurs.[151] Application of this rule has resulted in different outcomes. In a Tenth Circuit case, the court considered it important to adhere to general principles of tort law.[152] The court analogized the Title IX claim to the offense of battery and reasoned that both give rise to a complete cause of action upon physical contact.[153] Therefore, the court held that the plaintiff's Title IX claim could accrue no later than the last instance of sexual abuse.[154] Alternatively, as will be discussed further below, a district court within the Sixth Circuit reasoned that because the injury at issue in a Title IX claim is the deprivation of educational opportunities, the latest the injury could have occurred is the plaintiffs' graduation dates.[155]

The second theory is the discovery rule which provides that a Title IX claim accrues "when a plaintiff knows or has reason to know of the injury which is the basis of his action."[156] Until recently, the discovery rule was applied to Title IX deliberate indifference claims without much resistance from institutions. In fact, the discovery rule, while appearing plaintiff friendly, has led to many outcomes favorable to defendants.[157] A controversy has developed, however, after a court applied the rule in a case involving a scandal at Ohio State University (OSU).[158] In *Snyder Hill v. Ohio State University*, the application of the discovery rule led the court to conclude that, although some of the alleged abuse happened decades earlier, the plaintiffs' claims were not time-barred.[159]

The case involved extensive abuse by Dr. Richard Strauss, who was employed as a physician at OSU from 1978 to 1998 in the athletic department and student health centers.[160] In March of 2018, a former student-athlete came forward with

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[148] Hendrix, *supra* note 144.
[149] Wallace v. Kato, 549 U.S. 384, 388 (2007).
[150] Hailey Martin, *UnSOLved: The Competing Policies of SOL, Title IX, and Everything In Between*, 91 U. CIN. L. REV. (Nov. 8, 2022).
[151] Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 698 (6th Cir. 2022).
[152] Varnell v. Dora Consol. Sch. Dist., 756 F.3d 1208, 1215–16 (10th Cir. 2014).
[153] *Id.* at 1216.
[154] *Id.*
[155] Garrett v. Ohio State Univ., 561 F. Supp. 3d 747, 756 (S.D. Ohio 2021).
[156] Stanley v. Trs. of the Cal. State Univ., 433 F.3d 1129, 1136 (9th Cir. 2006) (citing Hoesterey v. Cathedral City, 945 F.2d 317, 319 (9th Cir. 1991)).
[157] *E.g.*, King-White v. Humble Indep. Sch. Dist., 803 F.3d 754, 762 (5th Cir. 2015); *Stanley*, 433 F.3d at 1137; Twersky v. Yeshiva Univ., 579 Fed. App'x. 7, 10 (2d Cir. 2014).
[158] *High Court Denies Review of Title IX Statute of Limitations in Sexual Assault Cases*, 19 MEALEY'S PERS. INJ. REP. 30, June 26, 2023.
[159] Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 698, 706–07 (6th Cir. 2022).
[160] Brendan Rand, *Former Ohio State Athletes Sue School Over Team Physician's Alleged Sexual Abuse*, ABC NEWS (May 30, 2019, 5:20 PM), https://abcnews.go.com/US/ohio-state-athletes-sue-school-team-physicians-alleged/story?id=63372794 [https://perma.cc/T424-TSUM].

allegations that Strauss abused him and his teammates.[161] Shortly after, OSU launched an independent investigation.[162] The resulting report concluded that Strauss abused at least 177 male students, mostly through the guise of medical treatment.[163] In July, the first of several lawsuits alleging misconduct on the part of OSU was filed in district court.[164]

In analyzing the timeliness of the plaintiffs' claims, the district court applied both the occurrence rule and the discovery rule.[165] Under the occurrence rule analysis, as is explained above, the court concluded the latest the claim could have accrued was the plaintiffs' graduation day.[166] Under the discovery rule, the court considered the claim to accrue when the plaintiff knew or had reason to know of the sexual harassment or abuse.[167] Using this articulation of the discovery rule, the court held that even under the discovery rule, plaintiffs' claims were time-barred because they knew or should have known of their abuse when it happened and therefore, the claims accrued on the last date of abuse for each plaintiff.[168] The plaintiffs' claims were subsequently dismissed for failure to bring them within the statute of limitations.[169]

On appeal, this decision was reversed.[170] The Sixth Circuit held that the discovery rule was proper for Title IX claims[171] and that the district court's articulation of the discovery rule was flawed.[172] The court justified this conclusion by saying that it was in line with the purpose of both the discovery rule and Title IX.[173] The opinion explains that the purpose of the discovery rule is to protect plaintiffs who, although not due to their own fault, lack information to form a claim and reiterates that the purpose of Title IX is to provide relief to those discriminated against on the basis of sex.[174]

The key to understanding why the Sixth Circuit reached a different conclusion than its district court even though both claimed to apply the discovery rule is in the

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[161] Corky Siemaszko, *Faced With More Lawsuits, Ohio State Denies Covering Up Sex Abuse Scandal Years After Paying Out Millions in Damages*, NBC NEWS (Oct. 13, 2023, 4:49 PM), https://www.nbcnews.com/news/us-news/faced-lawsuits-ohio-state-denies-covering-sex-abuse-scandal-years-payi-rcna120200 [https://perma.cc/2AW8-H74E].

[162] The Ohio State University, *Strauss Investigation: Timeline*, https://straussinvestigation.osu.edu/strauss-investigation/timeline [https://perma.cc/3SBY-6ND5].

[163] Rand, *supra* note 160.

[164] The Ohio State University, *supra* note 162.

[165] Garrett v. Ohio State Univ., 561 F. Supp. 3d 747, 755–58 (S.D. Ohio 2021).

[166] *Id.* at 756.

[167] *Id.* 757–58.

[168] *Id.*

[169] *Id.* at 762.

[170] Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 690 (6th Cir. 2022).

[171] *Id.* at 701.

[172] *Id.* at 704 (holding that the discovery rule provides that a claim only accrues when the plaintiff is aware "the defendant caused their injury," not merely when "the plaintiffs knew or had reason to know that they were injured at the time the abuse occurred" as the district court held).

[173] *Id.* at 701.

[174] *Id.* at 698–99.

higher court's articulation of the discovery rule.[175] The opinion states that "a claim accrues when the plaintiff knows or has reason to know that they were injured *and that the defendant caused their injury*."[176] The difference between this standard and that articulated by the lower court is the Sixth Circuit's focus on knowledge of causation.[177] In order for plaintiffs to know they have a complete cause of action in the Title IX context, the court concluded that the plaintiffs must know or have reason to know that their injury was caused by the institution.[178]

As the facts were alleged, the court concluded the claims were not time barred under the discovery rule because all of the plaintiffs asserted that even if they knew about Strauss's abuse, they did not know that OSU was responsible for the harm inflicted on them.[179] Specifically, they argued that they could not have known that others had previously complained about Strauss or about how OSU responded to those complaints.[180] The circuit court concluded that these allegations were plausible and that plaintiffs' claims should not have been dismissed for timeliness.[181]

This decision was met with strong opposition from both OSU and twenty-three other higher education institutions that joined the petition for certiorari via amicus brief.[182] OSU argued that the result worsened a circuit split over the proper accrual rule for Title IX claims.[183] OSU says that the Tenth Circuit applied the occurrence rule, the Second, Fifth, and Ninth Circuits applied the standard discovery rule, and the Sixth Circuit applied what OSU refers to as an "extreme" version of the discovery rule.[184]

At first glance, it appears the dispute as laid out by OSU exists. The Tenth Circuit, as discussed above, says that the claim occurs no later than when the injury last occurred.[185] Further, the Fifth, Ninth, and Second Circuits articulate standards of the discovery rule that sound very similar to that applied by the district court in the OSU case.[186] However, OSU is missing the key distinction between all of those cases and the facts before the Sixth Circuit. While those cases involved post-assault claims, the plaintiffs in *Snyder-Hill* properly alleged pre-assault claims.[187] This distinction is critical because the Sixth Circuit's articulation of the discovery rule is necessary for the survival of many pre-assault claims.

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[175] *Snyder-Hill*, 48 F.4th at 704.
[176] *Id.* (emphasis added).
[177] *Id.* at 701.
[178] *Id.* at 704.
[179] *Id.* at 704–05.
[180] *Id.* at 694.
[181] *Id.* at 706–07.
[182] Hendrix, *supra* note 144; Brief Amici Curiae of the Association of American Universities and Twenty-Three Institutions of Higher Education in Support of Petitioner at 1–2, Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 708 (6th Cir. 2022) (No. 22-896).
[183] Petition for A Writ of Certiorari at 13, Ohio State Univ. v. Snyder-Hill, 143 S.Ct. 2659 (2023) (No. 22-896).
[184] *Id.* at 13–16.
[185] *Cf.* Varnell v. Dora Consol. Sch. Dist., 756 F.3d 1208, 1216–17 (10th Cir. 2014).
[186] *See* King-White v. Humble Indep. Sch. Dist., 803 F.3d 754, 764 (5th Cir. 2015); *see* Stanley v. Trs. of the Cal. State Univ., 433 F.3d 1129, 1136 (9th Cir. 2006); *see* Twersky v. Yeshiva Univ., 579 F. App'x. 7, 9 (2d Cir. 2014).
[187] *Snyder-Hill*, 48 F.4th at 704.

2. Discovery Rule's Potential to Protect Plaintiff Access to Institutional Accountability

The unique contours of Title IX pre-assault liability require careful attention to the procedural rules necessary to ensure that student victims have access to vindicate their rights. The Sixth Circuit's discovery rule with its focus on knowledge of causation is essential to the survival of many pre-assault claims due to the reality that institutions intentionally conceal individual instances and patterns of sexual misconduct on campus.[188]

There are two key considerations when analyzing the proper procedural rules for pre-assault liability. The first, which applies equally to all Title IX claims, is that the party who commits the act of sexual misconduct is not the party against whom liability is sought.[189] Instead, although it is specific actors who commit the sexual misconduct, it is the institutional failure to provide equal educational opportunities to the victim that provides the basis for liability.[190]

The second key consideration, which presents a distinction between pre-assault and post-assault claims, is the time period over which the plaintiff must have knowledge of institutional response to bring a successful claim. In a typical post-assault claim, the underlying events would be that the victim made a report of sexual misconduct to the institution and the institution failed to respond in accordance with the law.[191] Under this framework, for a post-assault plaintiff to have the knowledge required to state a cause of action, the plaintiff would need only to be aware that the institution failed to act properly in response to the student's individual Title IX complaint.

In contrast, the underlying timeline of a pre-assault situation would generally be that there was an obvious risk of sexual misconduct, the institution failed to alleviate this risk, and then an instance of sexual misconduct caused by that indifference occurs.[192] This means pre-assault claims inherently require the plaintiffs have knowledge of events that took place before they were targeted, including knowledge of the obvious risk that existed and the institution's response to that risk.

As a practical matter, this means that a post-assault plaintiff would have an opportunity to learn of institutional failure in the normal course of the school's Title IX process while a pre-assault plaintiff would not. Research supports the proposition that those who go through the institution's Title IX process are able to identify the

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[188] *See* Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCH. PUB. POL'Y & L. 1, 5 (2015).

[189] Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants at 15, Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 708 (6th Cir. 2022) (No. 21-3981).

[190] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1105 (9th Cir. 2020) (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999)).

[191] *See Davis*, 526 U.S. at 648 (defining deliberate indifference as a "clearly unreasonable" response to a threat the institution has notice of).

[192] *E.g.*, Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173, 1184–85 (10th Cir. 2007); *e.g.*, *Karasek*, 956 F.3d at 1112.

possibility of institutional failure required to bring a claim.[193] A qualitative study done on a small sample of student survivors found that every participant experienced some form of institutional betrayal during the Title IX investigation.[194] One theme researchers identified was victims' perception that "their complaints were ignored, dismissed, or met with inaction by the institution."[195] Further, a study revealed that one-fourth of students who filed Title IX complaints within their institutions subsequently filed lawsuits or complaints through the federal administrative process.[196] Given that post-assault liability is the primary framework used, this research shows that student survivors in post-assault liability circumstances are able to both identify institutional failures and take action to vindicate their rights. Thus, potential post-assault plaintiffs are often gaining enough information about institutional failures to state a claim for relief.

The same likely cannot be said about potential pre-assault plaintiffs. This is because institutions intentionally conceal instances and patterns of sexual misconduct.[197] One study found that institutions generally undercount the incidents of sexual assault under mandatory reporting requirements.[198] During investigations by the Department of Education, institutions submitted reports of sexual assault at a 44% higher rate than when they were not being investigated.[199] This statistic shows that institutions conceal instances of campus sexual misconduct. The result of institutional concealment of sexual misconduct on campus is that potential pre-assault plaintiffs are unlikely to promptly discover that the institution was indifferent to obvious patterns of sexual misconduct that led to their injury. These obstacles come in many forms.

First, students do not have a right to learn anything about the alleged perpetrators' past conduct through the formal Title IX institutional grievance process.[200] Under the current regulations, parties are only entitled to seek evidence "that is relevant to the allegations of sex discrimination," meaning only evidence that "may aid a decisionmaker in determining whether the alleged sex discrimination occurred."[201] This allowance is narrow and would only let a victim discover evidence directly related to the incident the victim complained of. Consequently, it would not allow victims to learn that their injury may have been part of the

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[193] *See* Katherine Lorenz, Rebecca Hayes & Cathrine Jacobsen, *"Title IX Isn't for You, It's for the University": Sexual Violence Survivors' Experiences of Institutional Betrayal in Title IX Investigations*, 12 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 96, 105 (2023) (finding that all study participants "experienced at least one form of institutional betrayal, which occurs when the Title IX office failed to acknowledge, adequately respond to, or act on behalf of the survivors' interests"); *see* Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 2, 2019), (reporting that higher education institutions are experiencing a trend of increasing legal challenges to their Title IX enforcement procedures by victims who allege unfair treatment during their Title IX enforcement processes), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings [https://perma.cc/MQ6F-JF7E].

[194] Lorenz et al., *supra* note 193 at 105.

[195] *Id.* at 107.

[196] Anderson, *supra* note 193.

[197] *See* Yung, *supra* note 188, at 5–7.

[198] *Id.* at 7.

[199] *Id.* at 6.

[200] 34 C.F.R. § 106.45(b)(7)(iii) (2024).

[201] 34 C.F.R. §§ 106.2, 106.45(f)(4) (2024).

institution's broader policy or custom of deliberate indifference. For example, there would be no way to learn of past complaints against the same perpetrator or a pattern of sexual misconduct within a group the perpetrator belongs to.

Student victims would also be unable to learn about the contents of past complaints made against their institution through the administrative agency process.[202] Requests made under the Freedom of Information Act (FOIA) are typically denied to protect the privacy of past victims.[203] Additionally, the Family Educational Rights and Privacy Act (FERPA), which prohibits the release of student information, also blocks access to full administrative complaints.[204]

Information would likely even be concealed where there is a lawsuit between a student already determined to be responsible for an act of sexual misconduct and the institution that made that finding.[205] This reality has emerged against the increasing commonality of student perpetrators suing for inadequate Title IX process.[206] The publicity that comes along with a lawsuit would seem to illuminate institutional handling of sexual misconduct, but the existence of secret settlements merely adds another layer of cover.[207] Under such agreements, even when the suing perpetrator poses a threat to others, that student could be reinstated at the university without the knowledge of the accuser or the broader campus community.[208]

These statutory protections and settlement agreements provide important student privacy protections, and this Article does not argue for their limitation. Instead, it argues merely that these realities should be considered when formulating procedural rules for pre-assault claims.

Without these tools to compel disclosure of institutional action regarding past allegations and findings of sexual misconduct, students are left with little else than to hope that the conscience of institutional officials leads them to admit past wrongdoing. This is not a realistic safeguard. In well-known college sexual misconduct scandals, the prevalent pattern is that "key leaders failed to act on abuse reports until it was too late."[209] The answer to why such inaction continues is, ironically, the fear of bad publicity.[210] Much of the public outcry in response to these scandals revolves around potential pre-assault liability circumstances, meaning that the focus is on "abuse cases discovered after someone should have recognized and

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[202] Jordi Gassó, *Can the Title IX Complaint Go Public?*, YALE DAILY NEWS (Apr. 5, 2011, 1:39 AM), https://yaledailynews.com/blog/2011/04/05/can-title-ix-complaint-go-public/ [https://perma.cc/9EQY-DPQJ].
[203] *Id.*
[204] *Id.*
[205] *See* Lorenz et al., *supra* note 193, at 115.
[206] Anderson, *supra* note 193.
[207] *Id.*
[208] *Id.*
[209] Greg Toppo, *Why Do Colleges Keep Failing to Prevent Abuse*?, INSIDE HIGHER ED (June 4, 2018), https://www.insidehighered.com/news/2018/06/05/why-do-campus-abuse-cases-keep-falling-through-cracks [https://perma.cc/2MNC-A48L].
[210] *Id.*

reported the problem."[211] This shows that officials have increased motivation to conceal circumstances that would give rise to pre-assault liability.

In sum, the problematic dynamic is twofold. First, pre-assault liability requires potential plaintiffs to have knowledge of broader circumstances and institutional conduct that happened before they were assaulted. This is as opposed to merely knowing that the institution failed to respond properly to their own Title IX complaint. Second, student victims are extremely limited in the ways in which they may be able to uncover information about risks on campus and institutional responses to those risks. These realities necessitate a pre-assault liability standard that ensures potential plaintiffs have practical access to vindicate their rights.

The Sixth Circuit's discovery rule provides this practical access. The key is the Sixth Circuit's acknowledgement that in order to know they have a pre-assault Title IX claim, student survivors must have knowledge that their institution played a part in their injury.[212] Given the difficulties of uncovering this information on their own, the Sixth Circuit's discovery rule is necessary. The discovery rule would allow pre-assault claims to proceed even where significant time passed between when the plaintiff was injured by the institution's deliberate indifference to an obvious risk and when the news of this failure broke.

IV. POLICY SOLUTIONS

Making legislative or administrative adaptations to Title IX in line with these considerations is the next step to institutional accountability for the college sexual misconduct crisis. Going forward, the ideal solution would be legislative implementation of an express right of action, including the standard for pre-assault liability as articulated by the Ninth Circuit in *Karasek*, accompanied by the discovery accrual rule as articulated by the Sixth Circuit in *Snyder-Hill*.[213] In sum, this would allow student victims to bring a claim under Title IX seeking redress for deprivation of educational opportunities in connection with institutional "indifference to reports of sexual misconduct" which "created a heightened risk of sexual harassment that was known or obvious."[214] Further, the statute of limitations period for potential pre-assault claims would not begin to run until the "plaintiff knows or has reason to know that they were injured and that the defendant caused their injury."[215]

The primary justification for implementation of these standards is that they advance the central policy goal of Title IX to "provide individual citizens effective protection against those [discriminatory] practices."[216] This goal was of critical importance to the *Cannon* Court in first recognizing an implied private right of action and should hold similar weight today in an effort to adapt the legal standards to modern realities.[217] Given the continuing prevalence of sexual misconduct within campus cultures and institutional efforts to conceal the problem, new strategies are

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[211] Toppo, *supra* note 209.
[212] Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 704 (6th Cir. 2022).
[213] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1112 (9th Cir. 2020); *Snyder-Hill*, 48 F.4th at 704.
[214] *Karasek*, 956 F.3d at 1112.
[215] *Snyder-Hill*, 48 F.4th at 704.
[216] Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).
[217] *Id.* at 702–03.

needed to give student victims an effective path to vindicate their rights.[218] Congress should be responsive to the necessity of the situation and take action.

The reason why Congressional action, rather than further action by the Court, is preferrable, is the Supreme Court's current distaste for implied private rights of action. In the 1960s and 1970s, the Court could be characterized as "generous" with its decisions to declare opportunities for private citizens to seek their own redress for injuries caused in violation of federal statutes.[219] However, today, the Court's view of implied private rights of action can be summed up as "disfavored."[220] This negative treatment was heavily influenced by Justice Powell's dissent in *Cannon*.[221] Powell criticized the majority for encroaching on congressional legislative power.[222] The Court's sentiment today is in line with Powell's conclusion. The modern Supreme Court considers deciding whether a private right of action exists, an act of statutory construction based on its reasoning that Congress alone can provide for such a remedy.[223] Under this treatment, it is very unlikely the Court would be willing to legitimize a new theory of liability under a cause of action that was only ever implied.

Although Congress did not include an express right of action in Title IX, it has at least twice ratified the Court's decision in *Cannon* to find an implied right of action.[224] If the current Congress wishes Title IX to have continuing relevance in the fight against sexual misconduct in schools, it must act to create an express cause of action that fits the current reality.

Of course, given congressional dysfunction, creation of an express remedy is unlikely. For this reason, administrative adoption of pre-assault liability and the discovery accrual rule is a more reasonable alternative. The provisions of Title IX take shape through "[d]ual [e]nforcement [m]echanisms" of private litigation and action taken by the Office of Civil Rights (OCR), the subdivision of the Department of Education tasked with overseeing Title IX compliance.[225] The OCR performs its role both through response to external complaints and conducting investigations on its own initiative.[226] Due to its prominent part in Title IX enforcement, the OCR, like Congress, has an opportunity to adapt Title IX standards to advance institutional accountability.

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[218] RAINN, *supra* note 9; *see* Yung, *supra* note 188, at 5–6.
[219] Vikram David Amar, *How Important is the Eighth Circuit's Recent Ruling that the Voting Rights Act Does Not Contain a Private Right of Action? Section 1983 and* Ex Parte Young *as Workarounds*, VERDICT JUSTIA (Dec. 1, 2023), https://verdict.justia.com/2023/12/01/how-important-is-the-eighth-circuits-recent-ruling-that-the-voting-rights-act-does-not-contain-a-private-right-of-action-section-1983-and-ex-parte-young-as-workarounds [https://perma.cc/4HVU-8SL9].
[220] Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 12 (2014).
[221] *Id.* at 5, 12.
[222] *Cannon*, 441 U.S. at 730 (Powell, J., dissenting).
[223] Davis, *supra* note 220; Amar, *supra* note 219.
[224] Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 72–73 (1992) (first citing 100 Stat. 1845, 42 U.S.C. § 2000d–7; and then citing Pub. L. No. 100-259, 102 Stat. 28).
[225] Buzuvis, *supra* note 24, at 37–38, 43.
[226] *Id.* at 38.

The OCR has recently taken steps in the right direction. Previous Title IX regulations, which took effect in August 2020, incorporated the *Gebser/Davis* post-assault liability framework.[227] Specifically, the regulations adopted the Supreme Court's interpretation of actionable sexual harassment, actual knowledge, and deliberate indifference.[228] Institutions with actual knowledge of sexual harassment were required to act promptly in a way that was not deliberately indifferent to the harm.[229] The 2020 final rule stated that although the agency had the power to select different enforcement standards, it chose to adopt those espoused by the Supreme Court "to provide consistency between the rubrics for judicial and administrative enforcement."[230]

In August 2024, new Title IX regulations went into effect.[231] These regulations compromise consistency between judicial and administrative standards in favor of institutional accountability for failure to act to prevent sexual harassment. The preamble to the new regulations explains that broader standards are appropriate in the administrative context where "educational access is the goal and private damages are not at issue."[232] The regulations aim to serve this goal by imposing significant additional responsibilities on institutions.[233]

These duties are imposed primarily through two changes. First, the OCR eliminated the deliberate indifference standard for complaint response procedures.[234] Now, an institution "with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively."[235] This change serves institutional accountability by making it clear that institutions are not only responsible for responding to complaints of sexual misconduct, but also for taking proactive steps to alleviate existing risks.

The latter half of those dual responsibilities is made explicit through the second change. Now, when a Title IX coordinator is notified of potential sex discrimination, the coordinator must act to "end any sex discrimination in its educational program or activity, prevent is recurrence, and remedy its effects."[236] The regulations list several specific steps that a Title IX coordinator must take to do so.[237] Most relevant here is the requirement that the coordinator consider initiating a complaint, even

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[227] Gogul, *supra* note 24, at 998.
[228] *Id.*
[229] JARED P. COLE, CONG. RSCH. SERV., LSB11200, EDUCATION DEPARTMENT UPDATES TITLE IX REGULATIONS: RESPONDING TO SEX DISCRIMINATION AND HARASSMENT AT SCHOOL 4 (2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11200#:~:text=Those%202020%20regulations%20added%20a,for%20schools%20when%20responding%20to [https://perma.cc/45PE-MESR].
[230] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30034 (May 19, 2020) (codified at 34 C.F.R. pt. 106).
[231] CONG. RSCH. SERV., *supra* note 229, at 1.
[232] *Id.* at 4.
[233] Patrick Mathis, *New Title IX Regulations Impose New Responsibilities and Risks on Schools*, UNIV. RISK MGMT. & INS. ASS'N (May 24, 2024, 1:10 PM), https://www.urmia.org/blogs/patrick-mathis-jd-llm-mba/2024/05/24/new-title-ix-regulations-impose-new-responsibiliti [https://perma.cc/D5P2-KABX].
[234] CONG. RSCH. SERV., *supra* note 2, at 5.
[235] 34 C.F.R. § 106.44(a)(1) (2024).
[236] 34 C.F.R. § 106.44(f)(1) (2024).
[237] *Id.* §§ 106.44(f)(1)(i)–(vii).

where none has been filed, when the coordinator "determines that the conduct…presents an imminent and serious threat to… health and safety."[238] In reaching this determination the coordinator must evaluate, among other things, the "risk that additional acts of sex discrimination would occur if a complaint is not initiated" and "information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals."[239]

These two changes have the potential to work in harmony to require institutions to both take action to remedy harm caused by past sexual misconduct and to reduce the risk that future sexual misconduct will cause harm. However, they lack a clear mandate to respond to obvious or known risks of sexual misconduct. For future regulations, the OCR should clarify that its standards for finding an institution liable under Title IX encompass a pre-assault standard. This would make clear to institutions institutions that a failure to respond to a known or obvious risk of sexual misconduct on campus that leads to student injuries is itself an act of sex discrimination that violates Title IX. While the ultimate goal should be legislative enactment of the standards, administrative adoption of a pre-assault responsibility framework allows the scheme to be tested on a smaller scale and is a good step toward institutional accountability.

V. CONCLUSION

The problem of sexual misconduct has plagued college campuses for decades. Despite Title IX's evolution into a tool to address the crisis, it still fails to incentivize institutions to adequately protect their students. It is time to hold institutions liable for their inaction. Pre-assault liability is a step in the right direction because it motivates schools to look forward to how they can prevent an instance of sexual misconduct rather than merely respond once the damage is done. The emerging availability of pre-assault claims is a step forward, but to have its full potential benefit, this standard must be accompanied by an accrual rule that actually allows survivors to bring these claims. Congress or the OCR should act to fulfill Title IX's purpose in today's realities.

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[238] 34 C.F.R. § 106.44(f)(1)(v)(B).

[239] *Id.* §§ 106.44(f)(1)(v)(A)(3), (6).