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ARTICLES

When it comes to accommodations and accessibility to equitable learning environments for neurodivergent law students, law schools tend to think our only tool is a hammer and approach everything as if it is a nail. As lawyers, we are experts in problem solving, we are trained to ask questions, to explore the how and why. Yet we fail to do this when it comes to addressing the needs of neurodivergent students. We know how legal education works, we know what students will encounter, what it takes to be successful, and the challenges and struggles students face. This is not to say we must become experts or even proficient, but we do need to think like the lawyers we are and broaden our viewpoint, recognize the multiple tools at our disposal, and give students access to those tools. This Article explains the foundational concepts of neurodiversity and the role of executive function, then examines the current disconnect between stakeholders and how it (unintentionally) builds environmental and institutional barriers that set neurodivergent students up to fail and perpetuate stigmas about neurodiversity. It then explores strategies for how we can better use tools to remove these barriers and construct scaffolding such that all students have access to the learning environment and can develop their own processes for skill development.

This Article explores the systemic and disproportionate burden of environmental hazards placed on minority communities in the United States. It examines the historical and contemporary practices of environmental racism, where Communities of Color, particularly Black, Indigenous, and Latino populations, are more likely to live in areas with high levels of pollution, hazardous waste sites, and industrial facilities. The Article highlights the intersection of race, class, and environmental policy, showing how socio-political and economic factors contribute to the marginalization of these communities. It underscores the urgent need for comprehensive policy changes that address the immediate health risks and the long-term environmental injustices these communities face. It also acknowledges that "environment" means more than climate and the physical environment. Through this lens, this Article calls for greater accountability, equitable resource distribution, and more inclusive decision-making processes to ensure that all communities, regardless of race or socioeconomic status, are protected from environmental harm.

This scholarly investigation examines the decision-making processes in sexual assault cases, juxtaposing the charging decisions of lay individuals with the factual sufficiency reviews conducted by appellate judges. The study's comprehensive analysis of 254 cases provides a unique perspective on criminal justice decision-making within the context of the military

justice system—a singular jurisdiction that confers prosecutorial discretion upon lay individuals and permits extensive factual sufficiency reviews by appellate courts, akin to quasi-jury fact-finding articulated in written opinions.

The research findings challenge the paradigm of formal legalism, lending support to a legal realist perspective that posits both lay individuals and judges are influenced by factors extending beyond purely legal considerations. Contrary to conventional wisdom, the study reveals that lay individuals exhibit a greater reliance on legally relevant factors, while judges demonstrate significant susceptibility to Blame and Believability factors rooted in rape myth acceptance attitudes. This unexpected outcome challenges the presumption that legal training inherently ensures objectivity in case adjudication. Notably, the study uncovers a striking disparity wherein 8% of appellate judges tasked with conducting factual sufficiency reviews were responsible for 70% of the sexual assault convictions overturned on factually sufficiency grounds.

These findings align with Weber's theorization on the dynamic nature of legal interpretation and resonate with Hand's critique of judges as passive interpreters of the law. The results draw parallels to Kalven and Zeisel's seminal work on jury decision-making, suggesting that judges, like their lay counterparts, are susceptible to pervasive societal biases. The implications of this study necessitate a reevaluation of judicial training methodologies, selection processes, and approaches to case adjudication. It underscores the imperative for ongoing education to address biases among all legal participants and emphasizes the need to challenge entrenched rape myths, even among seasoned professionals.

This research contributes empirical evidence to the paradigm shift towards legal realism in understanding judicial decision-making. It accentuates the necessity for continuous education, self-reflection, and systemic reforms to ensure equitable outcomes in sexual assault adjudication. While the military justice system presents a unique context, the fundamental task of applying law to facts remains quintessential to the legal profession. Consequently, the results offer valuable insights into the complex interplay of factors influencing legal decisions, underscoring the importance of adopting a more nuanced approach to judicial roles and decision-making processes in contemporary jurisprudence.

ESSAY

The COVID-19 pandemic had a profound effect on nearly every aspect of life starting in 2020. Existing research measuring the relationship between COVID restrictions and academic performance has found significant harm across numerous settings. This first-of-its-kind study is designed to measure if a similar phenomenon is present with performance on state bar exams taken by law school graduates. The counterintuitive results from this study—that more restrictive COVID lockdowns correlated with *improved* bar examination performance—spark discussion regarding lockdowns, legal education, remote learning pedagogy, and the bar exam. Furthermore, the findings of this study will hopefully serve as a powerful catalyst to spark productive debate regarding the inherent tradeoffs involved in pandemic policies. This comes at an opportune time as we are currently at a critical juncture of relevant events. These include rising online teaching modalities in the twenty-first century, a growing movement to abolish the bar exam, the threat of artificial intelligence replacing some aspects of the practice of law, increasing salience regarding race and educational outcomes, and a movement to diminish the importance of higher education.

BOOK REVIEW

This is a review of Alex B. Long's new book, *Professional Wrestling and the Law: Legal Battles from the Ring to the Courtroom*. Professional wrestling serves as a surprisingly adept framework for illustrating various legal principles. Long's colloquial writing style and humorous anecdotes make for an experience as enjoyable as it is informative. This review primarily focuses on the striking parallels between the law and wrestling, particularly in how both navigate the fine line between fact and fiction as well as how they have concurrently evolved over time regarding minority and women's rights.

NOTES

In recent years, the increase in book censorship laws and attempts in school libraries across the United States has led to concerns about the propriety of such censorships. This has drawn much attention to the Supreme Court's decision in *Board of Education v. Pico*, which established the standard for evaluating the constitutionality of removing books from school libraries. Yet, by analyzing, under the *Pico* standard, the constitutionality of Texas, Florida, and Illinois's laws pertaining to book censorship, this Note demonstrates that the *Pico* standard is practically limited and difficult to apply. Therefore, a more applicable test for analyzing the constitutionality of laws pertaining to book censorship is needed to supplement the *Pico* standard. This Note proposes a modified version of the *Miller* test, which strives to balance the need to protect school boards' abilities to exercise their discretion to manage school affairs and curriculum with the need to protect students' First Amendment rights to receive ideas in school libraries. Although this proposed test is not without limitations, it would at least constitute a better alternative for courts to apply compared to the *Pico* standard. At the very least, courts should consider supplementing the *Pico* standard with the modified version of the *Miller* test whenever it adjudicates cases that involve a school board or state law seeking to censor books regarded as obscene in school libraries.

Residential evictions are a major part of the civil legal caseload in Illinois. Current procedures keep the adversarial nature of the legal system in mind but are ultimately inefficient when faced with the sheer load of cases, especially in difficult economic times. Those with few means also face challenges, from maintaining housing stability to understanding and interacting with the complex legal system regarding an eviction action. To facilitate a more efficient system, give uncomplex parties a better experience, and derive superior outcomes, this Note proposes a significant change to the current eviction procedural process. A mandatory mediation stage is inserted early on to bring landlords and tenants to terms that could be more beneficial to both while keeping the matter off court dockets as much as possible. Similar systems have been implemented, and the time has come to see this done in Illinois.

BUILDING SCAFFOLDING INSTEAD OF BARRIERS: ACCESSIBILITY FOR NEURODIVERGENT LAW STUDENTS

Katherine Silver Kelly*

INTRODUCTION

"Fact: We all have different brains. We think differently than one another and have unique perspectives and perceptions of the world around us. It is part of the beauty of humanity that no two minds are exactly the same."[1] Neurodiversity is a nonmedical term that describes individuals with differences in brain function and behavioral traits compared to someone who is neurotypical.[2] Coined in the 1990s by Australian sociologist Judith Singer in her doctoral dissertation,[3] it is generally the idea that people experience and interact with the world in different ways, and those differences are not deficits.[4] Examples of individuals who commonly identify as neurodivergent include those with Autism Spectrum Disorder (ASD), Attention-Deficit Hyperactivity Disorder (ADHD), Obsessive Compulsive Disorder (OCD), and Tourette's Syndrome.[5] [6]

When it comes to accommodations and accessibility to equitable learning environments for neurodivergent law students, we tend to think our only tool is a hammer and approach everything as if it is a nail.[7] Law schools

* Clinical Professor, The Ohio State University Moritz College of Law. Many thanks to my Moritz clinical colleagues Emily Brown, Olwyn Conway, Colleen Settineri, and Paige Wilson for your foundational guidance; to my ALWD summer writing circle members Lisa DeSanctis, Charlie Oldfield, and Maria Termini for your genuine support and honest critiques; and to law student (and soon to be lawyer) Jamie Salazar for your wizardry in making this article look good. Finally, thank you to every neurodivergent student who unmasked and shared their experiences. "Nothing about us without us."

1 HALEY MOSS, GREAT MINDS THINK DIFFERENTLY 1 (2021).

2 *Neurodivergent*, CLEVELAND CLINIC HEALTH LIBR. (Oct. 22, 2024), https://my.clevelandclinic.org/health/symptoms/23154-neurodivergent.

3 Judith Singer, Odd People In: The Birth of Community Amongst People on the 'Autistic Spectrum': A Personal Exploration of a New Social Movement Based on Neurological Diversity (1998) (B.A. Honours Thesis, University of Technology Sydney) (Kindle Unlimited).

4 Nicole Baumer & Julia Frueh, *What is Neurodiversity*, HARV. HEALTH PUBL'G BLOG (Nov. 23, 2021) https://www.health.harvard.edu/blog/what-is-neurodiversity-202111232645.

5 *Neurodivergent*, *supra* note 2.

6 Noticeably missing is "anxiety." Although anxiety often coexists with diagnoses like ADHD, OCD, and ASD, medical experts do not uniformly agree on whether anxiety, on its own, is a form of neurodivergence.

7 This is known as the "law of instrumentality." María Luisa Sanz de Acedo Lizarraga et al., *Critical Thinking, Executive Functions and their Potential Relationship*, 7 THINKING SKILLS & CREATIVITY 271, 277 (2012).

often use the same standard accommodations—extended time for exams and advance access to class materials—for every neurodivergent student. There are two problems with this: (1) these accommodations focus on the end product while the legal learning environment requires critical thinking, which is process-oriented and centers around skills such as problem-solving, prioritizing, and making judgment calls; (2) because neurodivergent students have deficits in executive function, they have processing delays so these standard accommodations by themselves do not lower barriers to access.[8]

The underlying reason why these barriers exist is a disconnect between university disability services, law schools, and students. All three assume that the accommodations provided in college were helpful and are therefore appropriate for law school. However, this presumes that the undergraduate learning environment is identical to law school which results in students making uninformed decisions about what they need and it ignores the science that says learners do not make the best decisions about their learning.[9] Finally, even if the current accommodations are appropriate, students have not learned how to use them in law school.

We grant students these standard accommodations believing we have lowered or removed barriers to access and then are often surprised when (some) neurodivergent students miss deadlines, struggle to find information, do not follow instructions, and make "sloppy" mistakes.[10] The result is often that we get frustrated and view these neurodivergent students differently. By nature, we tend to place others into categories of "favorable" and "unfavorable" and "give less weight to contrary view than our own,"[11] which often results in categorizing neurodivergent students as unfavorable—lazy, needy, unprofessional—instead of considering why they are acting this way and whether the issue is our system and structure.

Because the institution's responsibility is to provide access by lowering or removing barriers and not to guarantee success, it is easy to keep doing what we have always done and shift the blame to the neurodivergent student.[12] This Article proposes that we should examine the tools we

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8 Robert Weis et al., *Accommodation Decision-making for Postsecondary Students with Learning Disabilities: Individually Tailored or One Size Fits All?*, 49 J. LEARNING DISABILITIES 484, 485 (2016).

9 PETER C. BROWN ET AL, MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING 3 (2014) ("We are *poor judges* of when we are learning well and when we're not. When the going is harder and slower and it doesn't feel productive, we are drawn to strategies that feel more fruitful, unaware that the gains from these strategies are often temporary.") (emphasis in original).

10 "Sloppy" mistakes are the ones we make when we know better but lose focus or get distracted. *See* Eduardo Briceno, *4 Mistakes Everyone Makes at Work*, HARV. BUS. REV. (January 10, 2024), https://hbr.org/2024/01/4-mistakes-everyone-makes-at-work.

11 RICHARD PAUL & LINDA ELDER, CRITICAL THINKING: LEARN THE TOOLS THE BEST THINKERS USE 194 (concise ed., 2006).

12 Tulare W. Park et al., *Guiding Adult Learners with Disabilities through Challenging Transitions in Higher Education, in* PAPER PRESENTED AT THE AMERICAN ASSOCIATION FOR ADULT AND

currently use and determine whether they are appropriate for the current learning environment. This requires us to have hard conversations with ourselves to accurately identify the barriers we have erected in the learning environment. The proposed solutions address strategies for law schools and neurodivergent law students at the key stages of law school—admissions, orientation/before starting, and during the school year (during the semester and between semesters). These solutions are process-oriented and remove barriers to access for neurodivergent students without compromising the academic rigor of law school.

This matters because approximately 15% to 20% of the population can be classified as neurodivergent,[13] and according to the Spring 2022 American College Health Association National College Health Assessment, one in five undergraduate students reported having a non-physical disability,[14] yet only 37% reported their disability to their college or university.[15] As for law students, the 2022 Law School Admissions Counsel Matriculant Survey found that 12% of first-year law students identified as having a disability, with approximately two-thirds of that group identifying as having a non-physical disability.[16] Although more than 40% did not disclose their disability on their law school applications, many cited the reason as fear of hurting their chances of being accepted or not wanting to be judged.[17] It is likely that some students who did not disclose on their applications will do so later, after being admitted, when seeking academic accommodations.[18] As such, the number of law students with a disability, particularly non-physical disabilities, is higher than what is reported.

CONTINUING EDUCATION (AAACE) 2023 CONFERENCE 106 (2023), available at: https://eric.ed.gov/?q=ED648717&id=ED649274 (discussing how neurodivergent students experience "attitudinal bias and a lack of or limited disability awareness on their campus and in their workplaces").

13 *Neurodiversity*, NIH NAT'L CANCER INST. (April 25, 2022), https://dceg.cancer.gov/about/diversity-inclusion/inclusivity-minute/2022/neurodiversity.

14 Silver Spring, *American College Health Association-National College Health Assessment III: Undergraduate Student Reference Group Data Report Spring 2022*, AM. COLL. HEALTH ASS'N (Apr. 8, 2022), https://www.acha.org/wp-content/uploads/2024/07/NCHA-III_SPRING_2022_UNDERGRAD_REFERENCE_GROUP_DATA_REPORT.pdf.

15 Taran Adam & Catherine Warner-Groffin, *Use of Supports Among Students With Disabilities and Special Needs in College*, NAT'L CTR. FOR EDUC. STAT. INST. EDUC. SCIS. (2022), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.acha.org/wp-content/uploads/2024/07/NCHA-III_SPRING_2022_UNDERGRAD_REFERENCE_GROUP_DATA_REPORT.pdf.

16 DEBRA LANGER, FIRST-YEAR LAW SCHOOL CLASS: A FOCUS ON STUDENTS WITH DISABILITIES, 3–4 (2023), https://www.lsac.org/sites/default/files/media/MatricSurveyStudentsWithDisabilityReport_2023.pdf (non-physical disability categories included—mental health, developmental and intellectual, cognitive or processing, sensory.).

17 More than half of students with disabilities did not disclose this on the applications. Eighty-two percent cited fear of hurting admissions chances and seventy-five percent cited they did not want to be judged. *Id.*

18 *Id.*

What this means for law schools is that every professor has and will continue to have neurodivergent law students in our classes. However, the current system and practices set neurodivergent students up to fail, which perpetuates stigmas about neurodiversity, resulting in students languishing in school and lawyers languishing in their careers.[19]

Law schools get to decide what kinds of lawyers this country will have. They also promote diversity and inclusion as a way to attract students.[20] In doing so, we implicitly say that we believe there is not just one way to be a lawyer, and there is not just one type of person who can or should be a lawyer. Although there are foundational skills that every lawyer must be able to do, the legal profession is multi-dimensional, and the practice of law is not static.[21] It is a law school's responsibility to set our students up to become successful lawyers, not only those we like or who are immediately successful.[22] "Good systems are not those that are designed for the top group. Good systems provide the opportunity for people to travel great distances."[23] This is not to say that success should be guaranteed, but that we should be curious instead of judgmental, get better at thinking about accessibility, and explicitly remove barriers instead of putting up roadblocks.[24]

Part I of this Article explains the general basis for ADA accommodations and protections, foundational concepts of neurodiversity, and the differences in brain function, specifically executive function, and how it manifests in particular disabilities. Part II examines the multiple barriers to access faced by neurodivergent students and why the most common academic accommodations do not sufficiently lower these barriers. Part III then suggests better practices for law schools that are process-oriented and use scaffolding to facilitate skill development. Finally, it addresses the reciprocal responsibilities neurodivergent law students have to develop their own processes that will support success in law school and as legal professionals.

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19 Karen Sampson Hoffman & Pamela Mercer, *ADHD Neither Gift Nor Curse*, ATTENTION (Feb. 2012), https://chadd.org/wp-content/uploads/2018/06/ATTN_02_12_NeitherGiftNorCurse.pdf.

20 Renee Nicole Allen, *Our Collective Work, Our Collective Strength*, 73 RUTGERS U. L. REV. 881, 889 (2021).

21 Joseph Gartner, *Need Help Understanding Changes in the Legal Profession? ABA Center for Innovation is Here for You*, 47 AM. BAR ASS'N BAR LEADER (2022).

22 ADAM GRANT, HIDDEN POTENTIAL 506 (2023) ("When we assess potential, we make the cardinal error of focusing on starting points—the abilities that are immediately visible. In a world obsessed with innate talent, we assume the people with the most promise are the ones who stand out right away.").

23 *Id.* at 153.

24 Katherine Silver Kelly, *Be Curious, Not Judgmental: Neurodiversity in Legal Education*, 78 ARK. L. REV. ___ (forthcoming); *see also* Park et al., *supra* note 12, at 107 ("A student's collegiate experience directly correlates to their workplace preparedness.").

I. NEURODIVERSITY, EXECUTIVE FUNCTION, AND LAW SCHOOL

A. ADA Protections and Purpose

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability.[25] Discrimination is defined as:

> [A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, privileges, advantages or accommodations[.][26]

Furthermore, under Section 504 of the Rehabilitation Act of 1973, "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[27] This includes both public and private law schools.[28] An otherwise qualified individual is one "who is able to meet all of a program's requirements in spite of [their] disability."[29] What this means for institutions such as public and private law schools is that pursuant to the ADA and Section 504, they are obligated to provide reasonable accommodations to students with disabilities.

Importantly, a diagnosis or condition by itself is not enough to receive an accommodation. For a student to receive an accommodation, they must show that they have a disability and establish a nexus between their disability, a barrier to access caused by the environment (not the disability), and the requested accommodation.[30] Furthermore, an accommodation only has to be reasonable because the purpose of the ADA is to give equal access, not an unfair advantage.[31] A reasonable accommodation is one that allows the person to have an equal opportunity and access that are available to similarly

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25 42 U.S.C. §§ 12101–12213 (2009).

26 § 12101(b)(2)(A)(ii).

27 29 U.S.C. § 794(a) (2016).

28 § 794(b)(2)(A).

29 Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979).

30 *See* 29 U.S.C. § 794(a) (2016).

31 *Introduction to the Americans with Disabilities Act*, U.S. DEP'T OF JUST. C.R. DIV., https://www.ada.gov/topics/intro-to-ada/ (last visited Oct. 28, 2024) ("The ADA guarantees that people with disabilities have the same opportunities as everyone else to enjoy employment opportunities, purchase goods and services, and participate in state and local government programs.").

situated students without disabilities.[32] This is easily understood in the physical disability context—an individual using a wheelchair would need an elevator to access the second floor of a building; the accommodation removes the environmental barrier such that the individual has equal access to all spaces that non-disabled peers have.

Furthermore, unlike accommodations in K-12 education, which are success-based, accommodations in higher education are access-based.[33] Once granted a reasonable accommodation, it is the student's responsibility to succeed (or not). As such, a neurodivergent law student only receives accommodations to remove barriers to access that their neurotypical peers do not encounter.[34]

Accommodations are supposed to reduce or remove a barrier to access, not guarantee success, or provide an optimal or perceived benefit.[35] In providing reasonable accommodations, law schools do not and should not lower essential standards. Law schools determine what requirements are fundamental to the program and curriculum,[36] and students are aware of these requirements before they apply,[37] so a neurodivergent individual matriculating into law school meets the institutional standards for admission.[38] Importantly, any qualified student seeking accommodation is doing so because of an *institutional* or *environmental* barrier preventing equal access. For example, a limited time in-person exam with all test-takers in a large classroom creates a barrier for a student with Tourette's who has

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32 42 U.S.C. §§ 12131–12134 (1991); 29 U.S.C. § 794 (2016).

33 *Learning Disabilities and the Law: After High School: An Overview for Students*, LEARNING DISABILITIES ASS'N OF AM., https://ldaamerica.org/learning-disabilities-and-the-law-after-high-school-an-overview-for-students/?audience=Students (last visited Oct. 26, 2024). K-12 students receive services under the Individuals with Disabilities Act (IDEA) and in college those rights are provided by the ADA. *Id.* While the ADA prohibits discrimination, IDEA establishes a substantive right to a "free appropriate public education" which has been interpreted as a program that reasonably enables a student to make progress through an IEP which establishes measurable goals. *Id.* The ADA prohibits discrimination. *Id.*; *see also Differences Between 2-12 and College*, UCLA CTR. FOR ACCESSIBLE EDUC. https://cae.ucla.edu/resources/k12-postsecondary-education (last visited Oct. 26, 2024).

34 MOSS, *supra* note 1, at 97 ("Accommodations and modifications are not ways to get ahead or to ease the demands of being a lawyer or the pressures of working within the legal industry but are ways to make it more accessible and allow people who have deficits or limitations in certain areas the support to excel in the work they are already qualified to do.").

35 42 U.S.C.§ 12101(b)(2)(A)(ii) (2009).

36 *See, e.g.*, Pottgen v. Mo. State High Sch. Ass'n., 40 F.3d 926, 930–31 (8th Cir. 1994) ("Section 504 was designed only to extend protection to those potentially able to meet the essential eligibility requirements of a program . . . .").

37 Law school websites lay out the academic and professional expectations. *See, e.g., Flexible J.D. Programs*, BROOKLYN L. SCH., https://www.brooklaw.edu/en/Admissions/Apply/Flexible-JD (last visited Oct. 26, 2024); *The JD Program*, UNIV. OF FLA. LEVIN COLL. OF L., https://www.law.ufl.edu/academics (last visited Oct. 26, 2024).

38 *See* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979) (defining an "otherwise qualified [individual]" as "one who is able to meet all of a program's requirements in spite of [their] handicap.").

physical tics. Because tics tend to be exacerbated by stress, even if the student is not concerned about distracting others, tics slow them down and they might need to get up and move around to relieve the tension.[39] The requested accommodations of additional time and in a private setting remove the institutional barrier.[40] Furthermore, no qualified student will receive an accommodation that an institution establishes as fundamentally altering the curriculum or would be an undue burden on the institution.[41] The purpose of accommodations is to "remove restrictions to students' participation in educational activities without changing students' learning experiences, lowering academic standards, or threatening the validity of exam scores."[42]

B. Neurodiversity and the Role of Executive Function

As stated earlier, neurodivergence includes conditions such as ASD, ADHD, OCD, and Tourette's. Although all are neurological differences, each has distinguishing characteristics. Individuals with ASD often have difficulty with communication and interaction, may have restrictive or repetitive behaviors, and the symptoms impact their ability to function in educational, employment, and social environments.[43] Individuals with ADHD experience ongoing patterns of symptoms such as inattention, hyperactivity (constant movement, restlessness), and impulsivity.[44] Someone

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39 *See Tourette Syndrome*, NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, https://www.ninds.nih.gov/health-information/disorders/tourette-syndrome (last visited Oct. 26, 2024) ("[T]ics may worsen with excitement or anxiety" and "people with TS often report a substantial buildup in tension when suppressing their tics to the point where they feel that the tic must be expressed (against their will).").

40 Although commonly referred to as one, additional time and a private setting are two distinct accommodations. *See* Robert Weise & Ester L. Beauchemin, *Are Separate Room Test Accommodations Effective for College Students With Disabilities?*, 45 ASSESSMENT & EVALUATION IN HIGHER EDUC. 1, 11 (2019), https://www.researchgate.net/publication/337997049_Are_separate_room_test_accommodations_effective_for_college_students_with_disabilities (last visited Jan. 19, 2025) ("[C]ollege disability professionals often require students who request additional time . . . to complete examinations in a testing center rather than in their usual classrooms."); *see also* IRIS Center, *What types of accommodations are commonly used for students with disabilities?*, VAND. UNIV. https://iris.peabody.vanderbilt.edu/module/acc/cresource/q2/p04/#content (last visited Nov. 18, 2024). Requesting one does not automatically include or result in the other. *See* IRIS Center, *supra* note 40.

41 Title II Regulations Supplementary Info, 28 C.F.R. § 35.130(b)(7)(i) (2024) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."); *see also* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 399 (1979) (holding there is no ADA requirement to lower or effect substantial modifications of standards).

42 Weis et al., *supra* note 8, at 485.

43 *Autism Spectrum Disorder*, NAT'L INST. OF MENTAL HEALTH (Feb. 2024), https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd.

44 *Attention-Deficit/Hyperactivity Disorder*, NAT'L INST. OF MENTAL HEALTH (Sept. 2024), https://www.nimh.nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd.

with OCD experiences uncontrollable and recurring thoughts and engages in repetitive behavior, often in response to the recurring thought(s), or both.[45] A person with Tourette Syndrome experiences "sudden unwanted and uncontrolled rapid and repeated movements or vocal sounds called tics."[46]

Although these may be general characteristics of the neurological disorders, neither the conditions nor the umbrella of neurodiversity should be thought of as a monolith, so if you have met one neurodivergent person, you have met one neurodivergent person.[47] However, what tends to be a common denominator for neurodivergent individuals with the above neurological disorders is the prevalence of executive dysfunction.[48]

Executive dysfunction is a "behavioral symptom that disrupts a person's ability to manage their own thoughts, emotions, and actions."[49] To better comprehend executive dysfunction, one must first understand how executive function operates. At a basic level, executive function helps us get things done by utilizing skills such as managing time, planning and organizing for future tasks, and controlling impulses to act appropriately in a given situation.[50] It is a "specific set of attention-regulation skills involved in conscious goal-directed problem solving."[51]

Executive function is typically classified into three domains—cognitive flexibility, working memory, and inhibitory control.[52] Cognitive flexibility involves thinking about something in multiple ways and being able to shift from topic to topic, and quickly reacting to unexpected changes.[53] Working memory is both keeping information in mind and being able to manipulate it.[54] It allows us to focus on things like conversations and verbal instructions.[55] Inhibition control is how we manage our thoughts, emotions, and actions in order to suppress attention to something.[56]

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45 *Obsessive-Compulsive Disorder*, NAT'L INST. OF MENTAL HEALTH (Sept. 2024), https://www.nimh.nih.gov/health/topics/obsessive-compulsive-disorder-ocd.

46 *Tourette Syndrome*, *supra* note 39.

47 Kathleen A. Flannery & Robert Wisner-Carlson, *Autism and Education*, 29 CHILD ADOLESCENCE PSYCHIATRIC CLINIC N. AM. 319, 319 (2020) (quoting Dr. Stephen Shore who has famously said, "If you've met one person with autism, you've met one person with autism.").

48 *See generally* Gil D. Rabinovici et al., *Executive Dysfunction*, 21 BEHAV. NEUROLOGY & NEUROPSYCHIATRY 649 (2015).

49 *Executive Dysfunction*, CLEVELAND CLINIC HEALTH LIBR., https://my.clevelandclinic.org/health/symptoms/23224-executive-dysfunction (last visited Oct. 23, 2024).

50 Brenda Goodman & Shelly Shepard, *ADHD Guide: Executive Function Disorder*, WEBMD (Jan. 24, 2024), https://www.webmd.com/add-adhd/executive-function.

51 PHILIP DAVID ZELAZO ET AL., EXECUTIVE FUNCTION: IMPLICATIONS FOR EDUCATION 2 (2016).

52 *Executive Function: What It Is, How To Improve & Types*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/executive-function (last visited Oct. 26, 2024).

53 *Id.*

54 *Id.*

55 *What is Executive Dysfunction and How Can You Manage It?*, HENRY FORD HEALTH (Aug. 30, 2023), https://www.henryford.com/blog/2023/08/what-is-executive-dysfunction-and-how-can-you-manage-it.

56 ZELAZO ET AL., *supra* note 51, at 3.

Within these domains, there are eight core executive functions: flexible thinking, working memory, self-monitoring, planning and prioritizing, task initiation and completion, organization, impulse control, emotional control/self-awareness, and flexible thinking.[57] What these functions have in common is that they are goal-directed behaviors.[58] They are the neurocognitive skills that allow us to pay attention, hold relevant information in our memory, reflect on that information and how it connects to both past information and future goals, and flexibility that makes it possible to consider new interpretations.[59] To complete high level planning, reasoning, and problem solving tasks, learners, including adult learners, require the development of multiple executive functioning areas both individually and working together.[60]

Someone with executive dysfunction often finds it difficult to process thoughts and regulate behaviors.[61] However, executive function is not the same as being intelligent.[62] Executive function is the internal cue that allows a person to use their intelligence, and put it into practice.[63] It also cues self-regulation, which is how individuals adjust behavior in order to achieve a goal.[64]

Although similar, neurodivergent individuals are not identical. Not every neurodiverse person has deficits in every executive function skill, and a deficit can present differently from one person to the next.[65] For example, law students Preston and Rae[66] both have ADHD, and both have deficits in organization. Preston addresses this by using one big spiral notebook for all her classes (with papers sticking out at all different angles,) and she takes notes by hand. Rae addresses his organization challenges by using a laptop for everything with separate files for each class; his class notes are color-coded—case briefs and notes on assigned reading are in black, and notes

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57 *Executive Dysfunction*, *supra* note 49; *see also How Students With Executive Dysfunction Can Build Skills and Thrive in College (& Beyond)*, THE DORM, https://thedorm.com/blog/how-students-with-executive-dysfunction-can-build-skills-and-thrive/ (last visited Oct. 26, 2024).

58 ZELAZO ET AL., *supra* note 51, at 3.

59 Rabinovici et al., *supra* note 48.

60 Colleen Beck, *Adults With Executive Function Disorder*, THE TOOLBOX (Feb. 14, 2022) https://www.theottoolbox.com/adults-executive-function-disorder/.

61 Hoffman & Mercer, *supra* note 19.

62 Clancy Blair, *How Similar are Fluid Cognition and General Intelligence? A Developmental Neuroscience Perspective on Fluid Cognition as an Aspect of Human Cognitive Ability*, 2 BEHAV. BRAIN SCI. 109, 114 (2006) ("that relations between IQ and fluid cognition labeled as executive function (EF) or working memory are not strong . . . .").

63 *Id.* at 115.

64 *InBrief: Executive Function: Skills for Life and Learning*, HARV. UNIV. CTR. FOR THE DEVELOPING CHILD, https://developingchild.harvard.edu/resources/inbrief-executive-function-skills-for-life-and-learning/ (last visited Oct. 26, 2024).

65 Flannery & Wisner-Carlson, *supra* note 47, at 319 (quoting Dr. Stephen Shore who has famously said, "If you've met one person with autism, you've met one person with autism.").

66 All names and details have been changed to protect privacy.

taken during class are in blue. Preston might seem disorganized to a neurotypical person, but this system works for her because everything is in one place, and she has a strategic way of knowing where things are. Rae also keeps everything in one place—his laptop—but without some separation (files, color coding, etc.), he gets overwhelmed by the amount of information.

We tend to be judgmental when it comes to neurodiversity because of how executive function manifests. When an individual lacks executive function skills, it often looks like: misplacing and losing things, difficulty dealing with setbacks and frustrations, difficulty stringing together actions to meet goals, difficulty with time management/organizing their schedule, trouble with keeping spaces organized, inability to self-monitor, thinking precisely on the spot (i.e., rambling), picking the most important task and doing too much at once, forgetting the last step(s) in a multi-step task, needing additional time when analyzing or processing information, difficulty listening to a person talking without simultaneously thinking of multiple other things.[67] To a neurotypical person, these things can seem annoying, especially in the law school environment where everyone is working hard: "I also misplace things all the time," "It's often hard for me to get started on things," "I'm always running late, too."[68] Noting this similarity shows empathy, but the distinction is that a neurotypical person has an internal mechanism to reset, whereas a neurodivergent person does not.

A neurotypical person also struggles with executive function, but they "[do] not necessarily have all of these traits or have them in all situations . . . ."[69] Absent some external mechanism, a neurodivergent person is always in that state of misplaced things, not being able to get started, running late. The very definition of neurodiversity is that there is a difference in brain function and behavioral traits compared to someone who is neurotypical.[70] There is a difference in brain function; it is not a matter of willpower or motivation.[71]

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67 Janice Rodden, *What is Executive Dysfunction? Sign and Symptoms of EFD, ADHD Guide*, ADDITUDE (Jan. 14, 2021), https://www.additudemag.com/what-is-executive-function-disorder/.

68 Jennifer Gonzalez, *8 Principles for Supporting Students with ADHD*, CULT OF PEDAGOGY BLOG (Apr. 20, 2022), https://www.cultofpedagogy.com/students-with-adhd/ ("As uncomfortable as it makes me to say this, I will also admit that part of me wondered why these students couldn't just power through, find the motivation, try harder. Disorganization got the better of *me* sometimes too, and when that happened, I would just tidy things up, declutter, reset my priorities, and get back on track. It wasn't *that* hard. I also wondered whether parents were to blame, if a lack of structure, too much TV or video games, or some other oversight at home might be the true cause of students' difficulties.").

69 *What Does Neurotypical, Neurodivergent, and Neurodiverse Mean?*, MED. NEWS TODAY (Feb. 4, 2022), https://www.medicalnewstoday.com/articles/what-does-neurotypical-mean (discussing characteristics associated with neurodiversity).

70 Lisa Jo Rudy, *What Does Neurodivergent Mean?*, VERYWELL HEALTH (Apr. 18, 2024), https://www.verywellhealth.com/neurodivergent-5216749.

71 *Id.*

A neurotypical brain has internal self-direction toward a future goal and the ability to look ahead and organize thoughts and actions to get there.[72] It is not necessarily automatic, but there is an internal cue for doing things.[73] While the neurodivergent brain can do all of the executive functions, it needs external mechanisms because it lacks an internal cue.[74] Simply put, the neurotypical brain has to complete tasks while carrying one-pound weights, and the neurodivergent brain is trying to complete the same tasks while carrying three-pound weights. This tends to have a significant impact on a neurodivergent student's learning experience in law school, especially when accommodations do not address the load along the way. But because we all struggle with executive function at varying degrees, why not design systems that are accessible to everyone?

C. The Role of Executive Function in Critical Thinking

A core foundation of legal education is to engage in critical thinking.[75] "There may be superficial disagreements about how to define 'thinking like a lawyer,' but all would likely agree that critical thinking and problem solving are essential to what it means to demonstrate competent legal skills."[76] Critical thinking is the way we do things, not an add-on to our thinking.[77] It is the ability to assess one's own reasoning and is "self-directed, self-disciplined, self-monitored, and self-corrective thinking."[78] Critical thinking provides the tools of the mind needed to think through concepts and engage in the process to reach an outcome. Because we tend to take our thinking for granted without explicitly noticing how we are doing it, to engage in "good critical thinking requires hard work."[79]

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72 Valentina Petrolini et al., *The Role of Inner Speech in Executive Functioning Tasks: Schizophrenia with Auditory Verbal Hallucinations and Autistic Spectrum Conditions as Case Studies*, 11 FRONTIERS IN PSYCH. 1, 2 (2020).

73 *See generally id.* at 2. When I talk about this with a neurodivergent student they are blown away. What do you mean? How do people know how to do that? I can't answer the question because I don't have the cue and the neurotypical answer is usually, "I don't know, I just do it." To that, neurodivergent students respond with, but how do you know when to do it, how do you remember to look at your calendar, how do you know the answer so fast, how do you know it's sarcasm?

74 *Id.* at 2–4.

75 E. SCOTT FRUEHWAL, CRITICAL THINKING: AN ESSENTIAL SKILL FOR LAW STUDENTS, LAWYERS, LAW PROFESSORS, AND JUDGES 1 (2022).

76 Susan Stuart & Ruth Vance, *Bringing a Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform*, 48 VAL. U. L. REV. 41, 46 (2013).

77 PAUL & ELDER, *supra* note 11, at xviii.

78 *Id.* at xix.

79 *Id.* at xvi–xvii.

Critical thinking in general is a process by which we reach conclusions on the basis of reasons.[80] As lawyers, our job is to scrutinize this process: how we get there, why is this the logical outcome? Law students learn that lawyers are not speculative and do not jump to conclusions; instead, they make logical inferences while also considering the consequences of those inferences. The reasoning process includes gathering information and interpreting what it means under certain circumstances[81] and should focus on what is plausible, not every possibility. Making assumptions instead of successfully thinking through the implications of circumstances, problems, or decisions can result in negative consequences.[82]

For a student to progress through law school as both a legal and critical thinker, they must continually analyze to evaluate and continually evaluate to improve.[83] Richard Paul and Linda Elder, the foremost experts in critical thinking, identify the necessary skills to engage in critical thinking:

> Become *interested* in thinking
> Become a *critic* of your own thinking
> Be willing to establish *new habits* of thought
> Develop a *passion* for thinking well
> Study the *interplay* of thoughts, feelings, and desires
> Become interested in the *role* of thinking in your life
> Routinely *analyze* your own and others' thinking into its elements
> Routinely *assess* thinking for its strengths and weaknesses
> Routinely *assess* your study (and learning) habits
> Learn how to think within diverse *systems* of thought.[84]

These general hallmarks of critical thinking are consistent with the process of thinking like a lawyer and legal analysis.[85] As such, there is a reasonable expectation that law students—as critical thinkers—should take charge of their learning.[86] By the time a student graduates, they should have developed confidence in their ability to engage in legal analysis, to reason and figure things out. Critical thinking is not a status that one achieves, nor

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80 *Defining Critical Thinking*, THE FOUND. FOR CRITICAL THINKING, https://www.criticalthinking.org/pages/defining-critical-thinking/766 (last visited Oct. 26, 2024) (explaining in-depth the concept of critical thinking).

81 MARY BETH BEAZLEY & MONTE SMITH, LEGAL WRITING FOR LEGAL READERS: PREDICTIVE WRITING FOR FIRST-YEAR STUDENTS, 13 (3d ed. 2022).

82 PAUL & ELDER, *supra* note 11, at 37–38.

83 *Id.* at 40.

84 *Id.* at 83 (emphasis in original).

85 FRUEHWAL, *supra* note 75, at 1–2; *see also* Diane E. Halpern, *Teaching Critical Thinking for Transfer Across Domains Dispositions, Skills, Structure, Training, and Metacognitive Monitoring*, 53 AM. PSYCH. 449, 451 (1998) ("critical thinking skills are needed whenever people grapple with complex issues and messy, ill-defined problems.").

86 PAUL & ELDER, *supra* note 11, at 82.

is it a static skill. Rather, it is an ongoing endeavor that requires continued practice and development.[87] Law school is where students receive guidance and instruction on how to access and engage these skills and, importantly, where they learn how to figure things out.

Executive function and critical thinking are distinct but are interrelated: critical thinking seeks to solve complex issues, and executive function controls, coordinates, and integrates thinking tasks to achieve these goals.[88] As such, executive function plays a key role in higher-level cognitive skills and why law schools need to acknowledge the current barriers to equal access for neurodivergent students.[89]

II. BARRIERS TO ACCESS

This section addresses existing barriers, beginning with the cognitive biases limiting the lens through which we view legal education, neurodiversity, and neurodivergent students. As explained below, the result of cognitive biases such as the law of instrumentation, *deformation professionnelle*, and the Einstellung Effect is that we have erected barriers both before and during law school. Although unintentional, the current structure makes it difficult for neurodivergent students to access necessary information and resources. Then, we overlook opportunities to create accessible learning environments and instead rely on a handful of accommodations that are over-standardized and not integrated into the learning processes essential to legal education.

A. Barriers to Access: Cognitive Biases

Although the premise of thinking like a lawyer is to analyze issues by breaking down a problem into logical steps,[90] we fail to consider the process of learning when determining appropriate accommodations in law school. Instead, the focus is on product- and outcome-based accommodations such as additional time on exams, reduced distraction testing, and advance access to class materials. Perhaps one reason for this is due to the shift to self-determination in determining appropriate accommodations for students in

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87 *Defining Critical Thinking*, *supra* note 80 (Critical Thinking as Defined by the National Council for Excellence in Critical Thinking, 1987 "the development of critical thinking skills and dispositions is a life-long endeavor.").

88 Maria Luisa Sanz de Acedo Lizarraga et al., *Critical Thinking, Executive Functions and their Potential Relationship*, 7 THINKING SKILLS & CREATIVITY 271, 277 (2012).

89 *Id.* ("These issues are manifested, for example, when people with high levels of critical thinking fail in their projects as a result of being unable to properly administer their talents.").

90 DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL, 100 (3d ed. 2020) (employing organizational paradigms with the building blocks of legal analysis).

higher education.[91] Self-determination is "the ability to define and achieve goals based on a foundation of knowing and valuing oneself."[92] There is no question that self-determination leads to an increased likelihood of success in both education and employment.[93] Students with disabilities must be at the center of and actively engage in determining their accessibility and accommodation needs. However, students matriculating to law school from undergraduate or graduate studies (or non-academic settings) likely do not fully appreciate the differences in expectations. Typically, college exams test what students know whereas law school exams are forward-looking and test how legal principles operate when applied to legal problems not yet encountered. Most students entering law school believe they understand this abstract concept. They do not.[94]

Although students may be expert learners in one context, they are novice legal learners.[95] A neurodivergent student will request the same accommodations they received in college because that is what has worked for them in the past, and without more information or an understanding of what to expect, they have no reason to believe it would not also work for them in law school. Law schools—like novice legal learners—tend to accept without question the same standardized accommodation tools without considering whether they are appropriate for the student and the circumstances of learning in law school. Both parties act as if they have complete knowledge of what tools are available for the job at hand.

This is an example of a cognitive bias known as Maslow's Hammer or the Law of Instrumentality: "[I]t is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."[96] Generally, a cognitive bias is a systematic error in thinking that occurs when people process and interpret information in their surroundings, influencing their decisions and

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91 Elizabeth Evans Getzel, *Fostering Self-Determination in Higher Education: Identifying Evidence-Based Practices*, 27 J. POSTSECONDARY EDUC. & DISABILITY 381, 381 (2014).

92 *Id.* at 382 (quoting SHARON FIELD & ALAN HOFFMAN, PROMOTING SELF-DETERMINATION IN TRANSITION PLANNING: IMPLEMENTING THE "STEPS TO SELF-DETERMINATION" CURRICULUM 136 (1994)).

93 *Id.* at 381–82.

94 ALEX SCHIMEL, LAW SCHOOL EXAMS: A GUIDE TO BETTER GRADES, 3–4 (2d ed. 2018) ("I remember the day perfectly. It was about six weeks into my first semester of law school. I was lying on the floor of my unfurnished apartment, staring up at the ceiling. I was smiling, but I could also feel the tiny teardrops forming at the corners of my eyes. I had been working non-stop for the last three days and I still had over one hundred pages to read for the next day. I wasn't going to finish in time for class. I wouldn't even come close . . . Every law student has this epiphany moment. For some, it happens early, when they realize that the work is insurmountable. For others, it happens when they work extremely hard, only to receive a shockingly low exam grade.").

95 MICHAEL HUNTER SCHWARTZ & PAULA J. MANNING, EXPERT LEARNING FOR LAW STUDENTS, 7 (3d ed. 2018) (discussing the different expectations for succeeding in undergrad and law school).

96 ABRAHAM H. MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15 (1966).

judgments.[97] It results from our brain attempting to simplify information processing so that we can make sense of the world and make quick decisions.[98] It occurs subconsciously, so we do not realize it is part of our decision-making.[99] This means it is important to understand what it is, how it works, and be able to identify it when we make decisions.

The Law of Instrumentality is what is known as an availability heuristic that involves over-reliance on a familiar tool.[100] Availability heuristic is a type of cognitive bias that leads us to rely on immediately available information when making decisions.[101] The resulting error of adhering to the law of instrumentation is that it can make us inefficient.[102] When we address a situation or solve a problem, we (unconsciously) fixate on using a specific skill or tool that we are familiar with.[103] We force it into every situation, which often results in that task taking a lot longer than if we had approached it using different tools. It is true that when we use the same skill or method, we become proficient in that one thing, but we also limit ourselves from becoming proficient at another skill and sometimes from even acquiring skills.[104]

Another similar category of cognitive bias is called confirmation bias, which is where we seek information that confirms our pre-existing beliefs while disregarding opposing or different views.[105] Two types of confirmation bias concepts that often coexist with the law of instrumentation are *deformation professionnelle* and the Einstellung Effect. *Deformation professionnelle* is a French phrase that describes the cognitive bias of how we often see the world through the narrow lens of our profession.[106] In

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97 Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI.1124, 1128 (1982).

98 *Id.*

99 *Id.*

100 MASLOW, *supra* note 96, at 121.

101 Kendra Cherry, *What is the Availability Heuristic?*, VERYWELL MIND (Sept. 5, 2023), https://www.verywellmind.com/availability-heuristic-2794824.

102 MASLOW, *supra* note 96, at 121.

103 Pedro de Bruyckere, *The Law of the Instrument*, ECON. OF MEANING (Dec. 18, 2016), https://theeconomyofmeaning.com/2016/12/18/the-law-of-the-instrument/.

104 Dan Pilat & Sekoul Krastev, *Why Do We Use the Same Skills Everywhere? Law of the Instrument, Explained*, DECISION LAB (2021), https://thedecisionlab.com/biases/law-of-the-instrument.

105 *Confirmation Bias*, APA DICTIONARY OF PSYCH., https://dictionary.apa.org/confirmation-bias?utm_source=inhouse-other-internet&utm_medium=referral&utm_campaign=all&campaignid=70161000001CtDhAAK&vid=1000016 (last visited Oct. 28, 2024) ("the tendency to gather evidence that confirms preexisting expectations, typically by emphasizing or pursuing supporting evidence while dismissing or failing to seek contradictory evidence.").

106 Marie Grasmeier, Presentation, Déformation Professionnelle and the Construction of Occupational Identity: The Example of Maritime Professionals, 14th Eur. Socio. Ass'n. Conf. (2019), 3, https://www.researchgate.net/publication/335421720_Deformation_Professionnelle_and_the_Construction_of_Occupational_Identity_the_Example_of_Maritime_Professionals (concept originated with Belgian sociologist: Daniel Warnotte, Bureaucratie et Fonctionnarisme, 17 Revue de l'Institut de Sociologie 245, 245–60 (1937)).

essence, our expertise and experience in a particular field can cause us to forget that there is a broader perspective.[107] The Einstellung Effect is the concept of how our past experiences can prevent us from reaching the best solution to a given problem.[108] It occurs when we continue to apply a solution that has worked for us in the past, even though a better response is available.[109] We might jump to a conclusion because the new situation in front of us reminds us of a past one that appears similar, so we apply the same solution to the current circumstances. Sometimes, this works out, but the problem is that we immediately assume the past strategy is THE strategy to use.[110]

We do not want to limit ourselves to using only one hammer or approach every situation as a nail because the result is poor decision-making which can lead to less-than-optimal outcomes.[111] Instead of relying on heuristics to categorize, process, and respond, we should consider the factors influencing our decisions. This is especially important regarding academic accommodations and accessibility for our neurodivergent law students.

To counter the biases of Maslow's Hammer, *deformation professionnelle*, or the Einstellung Effect, all parties involved in academic accommodation decision-making need to think through and organize the available information. It is important to identify what we know and the available tools, but even more important is to identify gaps—the information we do not know, resources we have not considered.

Because we tend to judge situations based on the skills and knowledge we currently possess and are proficient in, this leads us to look for opportunities to use them everywhere we look even when it is not the best fit.[112] This is why students have used certain accommodation tools in college and likely have not considered other methods.[113] Even if a particular accommodation was appropriate in undergraduate school (or a graduate program), an entering law student does not know enough about legal education to make informed decisions about accessibility and

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107 *See generally* Leanne R. Ketterlin-Geller & Christopher Johnstone, *Accommodations and Universal Design: Supporting Access to Assessments in Higher Education*, 19 J. POSTSECONDARY EDUC. & DISABILITY 163, 165 (2006) (exemplifying how this manifests as the misperceptions of accommodations as special treatment that gives an unfair advantage rather than providing equal access).

108 Abraham S. Luchins, *Mechanization in Problem Solving: The Effect of* Einstellung, 54 PSYCH. MONOGRAPHS 95, 96 (1942).

109 Merim Bilalic et al., *The Mechanism of the Einstellung (Set) Effect: A Pervasive Source of Cognitive Bias*, 19 CURRENT DIRECTIONS PSYCH. SCI. 111, 114 (2010).

110 *Id.*

111 Pilat & Krastev, *supra* note 104.

112 *Id.*

113 Alison Esposito Pritchard et al., *Academic Testing Accommodations for ADHD: Do They Help*? 21 LEARNING DISABILITIES 1, 9 (2017).

accommodations.[114] Students' information comes from their own limited experience and from their school's student disability services so it makes sense that the two main accommodations offered or asked for are (1) access to class material and (2) extended time and reduced distractions on exams. Law schools are on the other end of the spectrum—they may not know much about learning or neurodivergent students so they are content to use generic accommodations without considering if they are appropriate for a process-based program of education. Neither party has stopped to consider the gaps in information.

The result is a combination of *deformation professionnelle*, the law of instrumentation, and the Einstellung Effect. We use our expertise to narrow our scope, think we only have one tool, that every student is a nail, and just keep using that same tool for all neurodivergent students year after year without considering if there is a better way. It is too easy for law schools to defer to the student and student disability services, claiming that we do not know what is best.[115]

The thing is, we do know. We know how legal education works, what students will encounter, what it takes to be successful, and the challenges and struggles students are faced with. And as lawyers, we are experts in problem-solving, we are trained to ask questions, to explore the how and why. Yet we fail to do this when it comes to addressing the needs of neurodivergent students. This is not to say we have to become experts or even proficient at doing all the things or all the skills. But we need to think like lawyers and broaden our viewpoint, recognize that we have more than one or two tools at our disposal, and start learning how to select the most appropriate tools for our students.

As it now stands, our cognitive biases have resulted in procedures that create institutional and environmental barriers to access to information, accommodations, and overall accessibility.

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114 *See, e.g.*, *id.* at 2–3 (discussing the mixed findings regarding the effectiveness of extended time and reduced distractions on exams for ADHD students and could depend on what is being tested); Dorien Jansen et al., *Functioning and Participation Problems of Students with ASD in Higher Education: Which Reasonable Accommodations are Effectiv*e*?*, 32 EUR. J. SPECIAL NEEDS EDUC. 71, 83 (2017) (showing that the effectiveness of accommodations in higher education for students with ASD depends on individual and environmental characteristics); Weis et al., *supra* note 8, at 496 (discussing the lack of information regarding the effectiveness of academic accommodations for adults with learning disabilities).

115 *See* Laura Flanigan & Emma Climie, *Teachers' Knowledge of ADHD: Review and Recommendations*, 2 EMERGING PERSP.: INTERDISC. GRADUATE RSCH. EDUC. & PSYCH. 1, 3 (2018) (addressing the negative consequences when educators have limited knowledge about ADHD such as perpetuating misconceptions, poor interventions, inappropriate discipline).

B. Barriers to Access: Procedures and Information

The ADA and Section 504 establish the basic legal standard for receiving academic accommodations, but as disability law expert Professor Kat Macfarlane writes, "[p]eople with disabilities who request and obtain reasonable accommodations experience discrimination throughout the accommodation process."[116] This is also true in higher education where neurodivergent students encounter barriers even accessing the process.[117]

There is no question that students should be proactive in seeking out available resources but institutions should make this easy, and not unintentionally create small barriers to initiate the academic accommodation process.[118] First, depending on the institution, accommodations might be determined through a centralized disabilities services office or directly through the law school.[119] If disability services are processed through a centralized office, it may be housed under the office of institutional equity, university compliance, academic affairs, or student affairs.[120] Even if a neurodivergent student has accessed disability resources in undergrad, institutions call the office of disability services many different names such as: office of accessible education, student accessibility center, disability resource center, office of access and learning accommodation, and office of adaptive educational services.[121]

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116 Katherine Macfarlane, *Accommodation Discrimination*, 72 AM. U. L. REV. 1971, 1976 (2023).

117 *See, e.g.*, Marlene Abrue et al., *Student Experiences Utilizing Disability Support Services in a University Setting*, 50 COLL. STUDENT J. 324, 326 (2016) ("Although services are often in place, barriers to accessing them are multi-layered including concerns surrounding disclosure, navigating the process for requesting accommodations, and the substantial changes between accessing disability related services in college compared to high school.").

118 Danielle Shine & Candice Stefanou, *Creating the Inclusive Higher Education Classroom for Students with Disabilities: The Role of Attitude and Confidence Among University Faculty*, 33 INT'L J. TEACHING & LEARNING HIGHER EDUC. 216, 216 (2022) (discussing the challenges students face in finding support on campus and how many students lack knowledge of services and resources, and lack self-efficacy to secure what they need); *see also* Alexa Z. Chew & Rachel Gurvich, *Saying the Quiet Parts Out Loud: Teaching Students How Law School Works*, 100 NEB. L. REV. 887, 897–98 (2022).

119 *See, e.g.*, *McBurney Disability Resource* Center, UNIV. WIS. MADISON, https://mcburney.wisc.edu/ (last visited Oct. 21, 2024); *Accessibility* Resources, UNIV. CIN. COLL. L., https://law.uc.edu/student-life/equity-and-inclusion/accessibility.html (last visited Oct. 21, 2024). The University of Wisconsin Law School has a centralized office of disability services while the University of Cincinnati College of Law directs students seeking ADA Accommodations to the assistant dean for student affairs, community engagement and equity. *Id.*

120 *See, e.g.*, *Office for Institutional Equity*, DUKE, https://oie.duke.edu/ (last visited Oct 21, 2024); *Academic Success Program*, GONZAGA UNIV. SCH. L., https://www.gonzaga.edu/school-of-law/academics/academic-success-program (last visited Oct. 21, 2024); *Student Experience & Support*, ALBANY L., https://www.albanylaw.edu/student-experience-support (last visited Oct. 21, 2024).

121 *See, e.g.*, OHIO STATE UNIV. https://slds.osu.edu/ (last visited Oct. 26, 2024); SANTA CLARA UNIV., https://www.scu.edu/oae/ (last visited Oct. 26, 2024); LOYOLA UNIV. CHI., https://www.luc.edu/sac/ (last visited Oct. 26, 2024); BROOKLYN L. SCH., https://www.brooklyn.edu/dosa/student-

Also, "[a]ccommodations are not accessibility"[122] so although intended to be inclusive and supportive, using the term "accessibility" can be confusing for neurodivergent students because it tends to be associated with physical access to buildings, not academic accommodations for classes or exams.[123] Precise language is important in the legal profession and words matter.[124] We even invalidate laws that lack sufficient clarity.[125]

You might be thinking that this is not a big deal—how long could it possibly take to find what you need? Go to your institution's website and find out how to start the accommodations process and what you will need to apply. Now do this for multiple institutions. In addition to time and effort, you will discover that different institutions offer different resources, so a neurodivergent student cannot simply rely on their undergraduate experiences to know what they need for law school. Selecting which law school to attend is an important decision, perhaps the most important decision a student has made at this point in their life. We should be making it easier, not adding stress by making it more difficult.[126]

Law schools often include information about disability services as part of orientation and it is required in all course syllabi, but this should be more of a reminder than a starting point. Any student with a disability, not just a neurodivergent student, who starts the process for accommodations during orientation or after classes have started is at a disadvantage because they do not have equal access to the learning environment. More importantly,

> [d]isability and disability needs are not a competition, nor should these needs be used as gatekeeping tools to deny disabled persons. Not meaningfully understanding the dire nature of what may appear to be a

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support-services/csds/ (last visited Oct. 26, 2024); BAYLOR UNIV., https://oala.web.baylor.edu/ (last visited Oct. 26, 2024); IND. UNIV. ROBERT MCKINNEY SCH. OF L. https://diversity.indianapolis.iu.edu/offices/aes/index.html (last visited Oct. 26, 2024); UNIV. OF CAL., https://www.ucop.edu/student-equity-affairs/campus-contacts/students-with-disabilities-services/index.html (last visited Oct. 27, 2024). There is even a lack of consistency within a university system. Within the 12 schools that make up the University of California system there are six different names: Student Disability Center, Disability Services Center, Center for Accessible Education, Student Disability Resource Center, Office for Students With Disabilities, and Disabled Students Program. *See Student and Equity Affairs*, UNIV. OF CAL., https://www.ucop.edu/student-equity-affairs/campus-contacts/students-with-disabilities-services/index.html (last visited Oct. 27, 2024).

122 Katie Rose Guest Pryal, *Accommodations and Accessibility: What's the Difference?,* PSYCH. TODAY, (Nov. 6, 2023), https://www.psychologytoday.com/us/blog/living-neurodivergence/202310/accommodations-and-accessibility-whats-the-difference.

123 *Id.*

124 Mark C. Palmer, *How Lawyers Use Words to Influence Perception*, 2 CIVILITY (July 5, 2022), https://www.2civility.org/how-lawyers-use-words-to-influence-perception/

125 *Void for Vagueness*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/void_for_vagueness (last visited Oct. 26, 2024).

126 Macfarlane, *supra* note 116, at 1996 (citing Jay Timothy Dalmage's book Academic Ableism describing higher education as an ableist space because guidance and resources are difficult to find).

> minor accommodation can result in demeaning attitudes and anxiety for the student. Whether one requires relatively small supports or comparatively large ones, the issue remains the same. Without either, one cannot succeed to the best of their capabilities.[127]

By itself, the lack of uniformity and transparency in accessing these resources is not necessarily a barrier, but it is indicative of a "death by a thousand paper cuts." One small thing will not hurt, but many small things over time can cause failure. The time and effort that neurodivergent students expend, that their neurotypical peers do not, adds up.

A barrier also results from how we use information to determine appropriate academic accommodations.[128] To begin with, accommodations for neurodivergent students are often based on physician recommendations which may not be evidence-based or responsive to the particular learning environment.[129] A 2016 study regarding accommodations for students with learning disabilities found that 25% of recommendations for additional time on exams did not specify the amount of additional time and 84% did not specify the type of exam for which additional time is required.[130]

Next, the ADA requires institutions to engage in an interactive process to determine reasonable accommodations, and the Association on Higher Education and Disability (AHEAD), "the leading professional membership association for individuals committed to equity for persons with disabilities in higher education," addresses the importance of the individual interactive process as part of its guidance framework.[131] However, this individual interactive process is broadly interpreted.[132] As such, neurodivergent students may be permitted to take a self-directed approach that does not require them to meet with someone in disabilities services before being approved for academic accommodations.[133] This seems to run counter to

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127 Edlyn Vallejo Pena et al., *Autistic-Centered Program Development and Assessment Practices*, 33 J. POSTSECONDARY EDUC. & DISABILITY 233, 236 (2020).

128 *See* Macfarlane, *supra* note 116, at 1992 (discussing the additional stress students with disabilities experience as they attempt to obtain the appropriate reasonable accommodations).

129 Rob Gould et al., *Research Brief: Higher Education and the ADA*, ADA (2019), https://adata.org/research_brief/higher-education-and-ada; *see also* JAY TIMOTHY DOLMAGE, ACADEMIC ABLEISM 61 (2017) (discussing how university accommodation processes continue to use the medical model of disability which requires students to "catalog their deficits.").

130 *Id*.

131 *Supporting Accommodation Requests: Guidance on Documentation Practices*, AHEAD, https://www.ahead.org/professional-resources/accommodations/documentation (last visited Oct. 26, 2024) ("The impressions and conclusions formed by higher education disability professionals during interviews and conversations with students or in evaluating the effectiveness of previously implemented or provisional accommodations are important forms of documentation.").

132 Some schools interpret this as a one-on-one meeting while others interpret it as exchanging emails. *Id*.

133 *See, e.g., Registration Process*, OHIO STATE UNIV. https://slds.osu.edu/about-us/policies/registration (last visited Jan. 1, 2025) (No meeting required for "administrative"

research recommendations that we should tailor accommodation decisions to the individual student's disability and demands of the coursework.[134]

However, research has shown that "as institutions of higher education have become more diverse, complex, technologically sophisticated, and financially challenged, [offices of disability services have] shift[ed] in focus from a counseling and interpersonal orientation to an administrative and managerial approach."[135] This means that in recent years, support for students with disabilities has been measured in terms of service delivery, which may not accurately assess the adequacy of support.[136] The increased demand for accommodations and short-staffed disability services can lead to gaps in communication and information.[137]

C. Barriers to Access: Current Accommodations

Regardless of whether an accommodation determination accurately supports the individual student's disability and academic needs in undergraduate school, it should not simply be transferred to law school. Academic accommodations for neurodivergent law students tend to be drawn from a standard toolbox of accommodation tools that may (or not) have worked well in undergraduate school.[138] As discussed in the above section, these tools are offered to law students without fully considering if those are the best tools for the particular task. Because students have used these tools in other learning environments, they have the misperception that these are the best tools for the law school learning environment.[139] Law schools expect students to know what accommodations they need based only on what they have done in the past. However, learners do not always make good decisions about their learning process.[140] Furthermore, it is not reasonable to expect incoming law students to know enough about learning in law school such that they can make informed decisions about accessibility. To do so contradicts

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accommodations such as extended time on exams, distraction-reduced testing, use of notetaking technology, and access to lecture visual aids in advance).

134 Weis et al., *supra* note 8, at 486; *see also* Patrick Dwyer et al., *Building Neurodiversity-Inclusive Postsecondary Campuses: Recommendation for Leaders in Higher Education*, 5 AUTISM ADULTHOOD 1, 6 (Mar. 2023) ("A student . . . should not simply be offered a set of accommodations because they are typically given to people sharing the individual's diagnosis.").

135 Richard Herdlein et al., *An Integrative Literature Review of Student Affairs Competencies: A Meta-Analysis*, 50 J. STUDENT AFF. RSCH. & PRAC., 250, 266 (2013).

136 Jeffery Edelstein et al., *Disabling Assessment Plans: Considering Disability Constructs and Implications in Learning Outcomes Assessment*, 33 J. POSTSECONDARY EDUC. & DISABILITY, 283, 283 (2020).

137 Shine & Stefanou, *supra* note 118, at 217.

138 Macfarlane, *supra* note 116, at 1997 (describing the limited range of "institutionally sanctioned" accommodations).

139 *Neurodivergent*, *supra* note 2.

140 Jeffery D. Karpicke et al., *Metacognitive Strategies in Student Learning: Do Students Practise Retrieval When They Study on Their Own?* 17 MEMORY 471, 478 (2009).

much of what we say to incoming students about law school—law school is different, embrace ambiguity, cramming does not work..[141]

The most common answer to any question asked in law school is, "it depends . . . ." It makes sense then that academic accommodations in law school will not automatically "fix" everything and there is no one-size-fits-all approach. Academic accommodations are tools that need to be selected depending on the task, and the student using that tool must learn how to use it appropriately.[142] Legal analysis is a process, yet as it now stands, accommodations for neurodivergent law students are typically about the product instead of the process.[143]

The problem is that for a neurodivergent individual, the executive function skill of planning is not necessarily innate, so when we ask a neurodivergent student to complete tasks, we should not assume the steps are easy or intuitive.[144] We tend to make this assumption anyway because of our confirmation bias to seek information that confirms pre-existing beliefs and disregards opposing views.[145] As such, when we see outward manifestations of failure our tendency is to think, "Lenn is not doing what she needs to do." We also see outward manifestations of success and think, "Lenn is doing great." In reality, Lenn is not doing great in either of these scenarios. When you are part of the system, it is easy to forget that our structures and systems are designed by and for neurotypical brains.

Because a neurodivergent student's deficit tends to be process-oriented, there is a need for external cuing. As such, accommodations like advance access to visual class material, or extended time and reduced distractions on

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141 *See, e.g.*, TANYA MONESTIER, SH*T NO ONE TELLS YOU ABOUT LAW SCHOOL, Ch. 2 (2022); *What can I Expect in Law School?,* PA. STATE UNIV., https://dus.psu.edu/pre-law/what-can-i-expect-law-school (last visited Jan. 1, 2025) ("Law school is an academic challenge . . . In part, this is because law school is taught using methods entirely different than the lecture method used in most college classrooms.").

142 Karpicke et al., *supra* note 140, at 479 (discussing that one reason there might not be a significant benefit to accommodations is because students with ADHD have not been taught how to effectively use the accommodations.). This study, involving elementary and middle school students, raises the question that if students are not receiving guidance at this stage of their education, are they receiving any guidance at any point in their education?

143 Nicole Marie Sims, Sharing the Responsibility of Access: Disability Services Practices in Higher Education, 10 (2022) (Ph.D. dissertation, University of Illinois) (ProQuest) (addressing how issues of access are not integrated into institutional learning environments and how this creates barriers for students).

144 Chantelle Jessica Lewis & Jason Arday, *We'll See Things They'll Never See: Sociological Reflections on Race, Neurodiversity and Higher Education,* 71 SOCIO. REV. 1299, 1313 (2023) ("The myth of meritocracy and elitism are the enemy of neurodiversity. We work in these elitist structures that frame excellence in a very specific way which isn't very neurodivergent friendly . . . Modes of knowledge production, social interaction and teaching methods favour students and staff who have had a more linear engagement with education institutions.").

145 *Confirmation Bias*, AM. PSYCH. ASS'N, https://dictionary.apa.org/confirmation-bias (last visited Oct. 23, 2024).

exams do not, by themselves, adequately address executive dysfunction issues common among neurodivergent law students.[146]

1. Class Accommodations - Course Materials

Gerson[147] is a neurodivergent student who has been granted a reasonable accommodation of advance access to visual class material (i.e., PowerPoint slides). In most of his classes, professors provided access a few hours before class either by posting on the course website or emailing them to Gerson. This allowed Gerson enough time to skim through the slides before class and know what to expect such that he could focus on the discussion during class. However, one of Gerson's professors posted slides on the course website but locked access until one minute before class started. At first, Gerson would see if he could open the file (hoping it might open early) and then try to skim through in the sixty seconds he had, but it was more distracting than helpful, so he gave up after a few classes. Gerson decided he would just have to teach himself and spent the rest of the semester trying to type every word from class and figure out what it all meant later. Gerson also said that general class sentiment was frustration—did the professor hold the class in such low regard that they could not trust them with PowerPoint slides? Even presuming that the professor unintentionally failed to implement the reasonable accommodation, it shows the impact and how students are implicitly discouraged from speaking up.[148] If you are wondering about Gerson's grade in that class, it does not matter. The goal of accessibility and accommodations in higher education is not success, it is equity.

Advance access to visual class material is one of the most common reasonable accommodations for neurodivergent students. Having advance access to visual material provides an opportunity for students to have a structural roadmap.[149] Having at least a general idea of what is ahead allows students to focus on what is in front of them.[150] This benefits all students: "[a]dvanced learners, who may easily grasp the material, will have more durable memories, while struggling students will receive the support they need to make learning more achievable."[151] Access to class slides is not a

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146 *See* Pritchard et al., *supra* note 113, at 9 ("[T]he types of accommodations investigated here may still hold value *if* students with ADHD are *taught to use them strategically* and are *provided with ample time for practicing them.*") (emphasis in original).

147 Names and details modified to protect student privacy.

148 Macfarlane, *supra* note 116, at 1988 ("Academia is especially prone to discussions that stigmatize people with disabilities.").

149 *See Accessibility Resource Center*, UNIV. OF N.M., https://arc.unm.edu/accommodations/accommodation-descriptions.html (last visited Oct. 23, 2024).

150 Youki Terada, *6 Foundational Ways to Scaffold Student Learning*, EDUTOPIA (Aug. 11, 2023), https://www.edutopia.org/article/6-foundational-ways-to-scaffold-student-learning/.

151 *Id.*

substitute for notes, but it scaffolds information which facilitates students' ability to develop strategies that support retention of new information.[152]

The hesitancy that professors often have about providing this material in advance or during class is that they believe students will use the slides as a shortcut and not pay attention or not take their own notes. This is a legitimate concern because giving students, particularly novice legal learners, new information by itself sets up the potential to substitute it for their own thinking and analysis.[153] It is similar to giving a model example or answer without annotations or feedback—it will not promote learning, particularly higher-order critical thinking, such as demonstrating thought processes (i.e., analysis).[154] As Professor Ellie Margolis writes, "students need to develop an awareness of *how* to learn and apply that awareness to new situations . . . [n]ovice law students . . . need to be guided through this process . . . ."[155] This is especially true for neurodivergent students who often have deficits in working memory or cognitive flexibility.[156]

2. Testing Accommodations - Additional Time and Distraction Free/Reduced Distractions

A neurodivergent law student we'll call Larkin explained that they brought a small throw blanket to exams because sometimes the testing space was too distracting. Larkin's school uses a number of different testing spaces for students with exam accommodations, and Larkin described some as "great" because they were "basically closets" with no distractions. But sometimes Larkin was assigned to a classroom that faced out onto campus. The first time Larkin took an exam there, they kept catching themselves staring at things outside the window and wound up draping their sweatshirt over their head to block out the windows so they could focus on the test. For the remainder of law school, whenever Larkin was assigned a room with windows, they would bring a blanket and take the exam underneath it. Larkin was also quick to explain that they did not need a blanket for every exam,

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152 *Id.*; *see also* Janneke van de Pol et al., *The Effects of Scaffolding in the Classroom: Support Contingency and Student Independent Working Time in Relation to Student Achievement, Task Effort and Appreciation of Support*, 43 INSTRUCTIONAL SCI. 615, 616 (2015) (explaining that effective scaffolding is contingent—tailored to the student's understanding—faded, and aimed at transferring responsibility for learning to the student).

153 Terada, *supra* note 150 (discussing the importance of students learning and developing their own metacognitive strategies for managing new and complex information).

154 Elizabeth Ruiz Frost, *Feedback Distortion: The Shortcomings of Model Answers as Formative Feedback*, 65 J. LEGAL EDUC. 938, 947 (2016).

155 Ellie Margolis, *Doing Less—Reflections on Cognitive Load and Hard Choices*, 68 ST. LOUIS U. L.J. 399, 406–07 (2024) (emphasis added).

156 *See Obsessive-Compulsive Disorder*, *supra* note 45; *Tourette Syndrome*, *supra* note 39; Kathleen A. Flanner & Robert Wisner-Carlson, *Autism and Education*, 29 CHILD ADOLESCENT PSYCH. CLINIC N. AM. 647, 653 (2020).

and they did not say anything because they knew the school was doing its best.[157] Although a law school would try to remedy this situation should a student bring it to their attention, this is not an example of how students should speak up about the testing spaces or should have better explained their needs. It is an example of a law school not understanding what a reduced distraction testing space should look like for its students.

The most common academic testing accommodation for neurodivergent students is extended testing time that is either reduced or distraction-free.[158] Although there is no precise definition, reduced distractions or distraction-free testing typically means reducing auditory and visual interruptions—sights and sounds that potentially impact student performance during testing.[159] It allows for increased control of lighting, noise, and environmental distractions, not simply putting a student in a room by themselves, especially if that room has visual and/or auditory distractions such as windows, heating and cooling systems.[160] It also depends on the individual student and their condition. For example, a student with ASD who has auditory hypersensitivities might need noise-canceling headphones, whereas a student with inattentive type ADHD and struggles with compartmentalizing thoughts might need to test in a study carrel in the library.[161] By not addressing these potential distractions, we are not removing barriers to access, which may even (albeit unintentionally) exacerbate the situation.[162]

As for extended testing time, the basic reason for providing it is because "[d]isability conditions may keep students from demonstrating their skills

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157 *See* Macfarlane, *supra* note 116, at 1998 ("Yet students are discouraged from voicing their concerns. Instead, once accommodations are granted, students are expected to be gracious and thankful, 'to praise good professors and administrators and never complain.'").

158 Nicholas Gelbar & Jospeh Madau, *Factors Related to Extended Time Use by College Students With Disabilities*, 42 REMEDIAL & SPECIAL EDUC. 374, 374 (2021).

159 *ADA Requirements: Testing Accommodations*, U.S. DEP'T OF JUST. C.R. DIV. (Feb. 28, 2020), https://www.ada.gov/resources/testing-accommodations/; *see also, e.g.*, *Alternative Testing Process for Student*, UNIV. OF WASH., https://depts.washington.edu/uwdrs/current-students/accommodations/alternative-testing/#:~:text=A%20reduced%20distraction%20environment%20means,be%20a%20silent%20private%20setting (last visited Oct. 25, 2024) ("A reduced distraction environment means that the student needs to take the exam in an area that is reasonably quiet with low stimuli, when compared to the classroom. The environment doesn't need to be a silent private setting.").

160 *See, e.g.*, *Testing* Accommodation, UNIV. OF ALA., https://ods.ua.edu/faculty-staff/guidance-for-faculty/faculty-guidance-testing-accommodations/ (last visited Oct. 25, 2024) ("A distraction-reduced testing environment is a [setting] outside the usual classroom that limits auditory and visual interruptions, with controlled lighting and noise.").

161 Bouke de Vries, *Neurodiversity and the Neuro-Neutral State*, 15 AJOB NEUROSCIENCE 264, 265 (2024) (citing numerous studies where a large percentage of neurodivergent individuals, not just those with autism, have decreased tolerance for noise).

162 *Id.* at 265 ("[M]any schools, universities . . . are overstimulating for those with hypersensitivity.").

within standard testing time limits . . . ."[163] Students typically receive 50% or 100% additional time but when the typical standard testing time for an in-person law school exam is often four hours, a neurodivergent student is testing for six to eight hours with the expectation of working the entire time.[164] First, this is not a reasonable expectation because excessive focus is not productive or sustainable for anyone.[165] A recent study shows that long periods (six-plus hours) of strenuous mental effort "leads to a buildup of chemicals that may disrupt the functioning of the brain."[166] Furthermore, once finishing a six- to eight-hour exam, a neurodivergent student needs time to re-regulate,[167] and they have less time compared to their neurotypical peers. Because law school performance is assessed primarily through summative assessment at the end of the semester, having less time between exams creates an environmental barrier to accessibility for neurodivergent students who have delayed processing time.

Second, granting standardized additional time runs counter to the individual approach of the ADA and recommendations that "case-by-case decisions based on clinical judgment are required."[168] Even with an individual determination, unless a student understands how to use the time, additional testing time does not effectively lower any barriers for a student

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163 Benjamin J. Lovett, *Extended Time Testing Accommodations for Students With Disabilities: Answers to Five Fundamental Questions*, 80 REV. EDUC. RSCH. 611, 612 (2010).

164 *See, e.g.*, *Time Management on Law School Exams*, SYRACUSE UNIV. COLL. OF L., https://law.syracuse.edu/wp-content/uploads/Time-Management-on-Law-School-Exams.pdf (last visited Oct. 31, 2024) ("When you read your syllabus at the beginning of the semester, you may see that your final exam is 4 hours long and you may think this is a long time for an exam. However, the time allotted for a law school exam flies by extremely fast."); *see also Tips for Writing a Law School Exam*, GEORGETOWN L. CTR., https://www.law.georgetown.edu/wp-content/uploads/2018/11/Updated-FINAL.Exam_Tips_Handout.pdf (last visited Oct. 31, 2024) ("All told, one of the greatest obstacles for an exam taker is to accomplish all this within the allotted time. In other words, the clock may be an exam taker's greatest enemy, a constraint that needs to be managed if the exam taker hopes to finish the exam while also producing a thorough and complete analysis."); *see also What Are Law School Final Exams Like?*, J.D. ADVISING, https://jdadvising.com/what-are-law-school-finals-like/ (last visited Oct. 25, 2024) ("Law school exams are usually racehorse exams.").

165 Srini Pillay, *Your Brain Can Only Take So Much Focus*, HARV. BUS. REV. (May 12, 2017), https://hbr.org/2017/05/your-brain-can-only-take-so-much-focus ("Excessive focus exhausts the focus circuits in your brain. It can drain your energy and make you lose self-control. This energy drain can also make you more impulsive and less helpful.").

166 Diana Kwon, *Why Thinking Hard Wears You Out*, SCI. AM. (Aug. 11, 2022), https://www.scientificamerican.com/article/why-thinking-hard-wears-you-out/ (citing Antonius Wiehler et al., *A Neuro-Metabolic Account of Why Daylong Cognitive Work Alters the Control of Economic Decision*, 2022 CURRENT BIOLOGY 32, 3564, available at: https://www.cell.com/current-biology/fulltext/S0960-9822(22)01111-3).

167 *See* Philip Shaw et al., *Emotion Dysregulation in Attention Deficit Hyperactivity Disorder*, 171 AM. J. PSYCH. 276, 276–77 (2014).

168 Gelbar & Madau, *supra* note 158, at 375.

with executive dysfunction.[169] In fact, multiple studies show that students underutilize additional testing time.[170] Most students do not have effective strategies for using additional time because regardless of whether it has been given in elementary, secondary, or undergraduate school, it has been provided without guidance.[171]

Any guidance given depends on the type of test and students need opportunities to practice. Professors Jennifer A. Gundlach and Jessica R. Santangelo have conducted in-depth research on how law students learn and have found that, "[w]ithin the context of legal education, a law student regulates learning by using one or more effective strategies and then, based on formative assessment and performance feedback received from the instructor, self-assesses areas for improvement and makes adjustments to learning strategies to achieve that."[172] Neurodivergent students have received little to no guidance on how to use that additional time on any exam, let alone a law school exam, so we are essentially giving students a tool that they do not know how to use and holding them accountable for the outcomes.

The following section suggests strategies to identify, reduce, and remove environmental and institutional barriers to access so that neurodivergent students not only have appropriate tools, but learn when and how to use those tools to prepare for exams. This does not guarantee success, but it does not set them up to fail.

III. CONSTRUCTING SCAFFOLDING TO CREATE ACCESSIBILITY

By retaining the complexity and integrity of the whole but providing support for those parts of the task that the student cannot yet accomplish, scaffolding permits the student to accomplish a task that the student could not accomplish on her own.[173]

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169 Jennifer A. Gundlach & Jessica R. Santangelo, *An Empirical Study of the Relationship Between Metacognitive Skills and Bar Passage*, 1 J.L. & TEACHING 100, 119–20 (2024) ("[W]hile almost all entering law students could generally explain how various learning strategies support specific learning tasks, the majority were unaware of active-learning strategies that support academic success in law school . . . Although we again found no evidence that instructional intervention impacted metacognitive regulation, continuous reinforcement to practice with specific active strategies did result in more students reporting use of these strategies.").

170 Xin Wei & Susu Zhang, *Extended Time Accommodation and the Academic, Behavioral, and Psychological Outcomes of Students With Learning Disabilities*, 57 J. LEARNING DISABILITIES 242, 243–44 (2024).

171 Karpicke et al., *supra* note 140, at 478.

172 Gundlach & Santangelo, *supra* note 169, at 133 (finding that with active awareness and feedback, students can learn metacognitive skills during law school from studies including both first year and third year law students).

173 Terri L. Enns & Monte Smith, *Take a (Cognitive) Load Off: Creating Space to Allow First-Year Legal Writing Students to Focus on Analytical and Writing Processes*, 20 LEGAL WRITING 109, 114 (2015).

Coined in the 1970s by renowned psychologist Jerome Bruner, scaffolding is "the steps taken to reduce the degrees of freedom in carrying out some task so that the [learner] can concentrate on the difficult skill she is in the process of acquiring."[174] Like construction scaffolding, it is temporary and provides a framework for learning while students build new concepts and skills.[175] Benefits of scaffolding include increased likelihood of retention, increased autonomy, bridging learning gaps for complex concepts, and encouraging self-reliance.[176]

Law schools can create accessible learning environments that facilitate accountability by incorporating scaffolding strategies. Doing so does not lessen the rigor of legal education, but it does require us to reexamine what a challenging and rigorous learning environment means and ensure that it is not based on an outdated model.[177] "If some students perform poorly because they were less prepared or less familiar with the ins and outs of [law school], that . . . doesn't show that a course [or curriculum] is rigorous. It shows that students were insufficiently supported."[178]

This is not to suggest that we need to overhaul the structure of law school but that we incorporate strategies into the current system and structure as opposed to post hoc solutions or individual accommodations.[179] Furthermore, if the legal education system is generally accessible, although there will still be individual accommodations, there may not be as many needed to access equal conditions.[180] Importantly, inclusiveness cannot occur in a rigid learning environment and there should not be flexibility without accountability.[181] Flexibility and accountability are not mutually exclusive.

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174 JEROME BRUNER, THE CHILD'S CONCEPTION OF LANGUAGE 19 (Anne Sinclair et al. eds., 1978).

175 *7 Scaffolding Learning Strategies for the Classroom*, UNIV. SAN DIEGO PRO. & CONTINUING EDUC. https://pce.sandiego.edu/scaffolding-in-education-examples/ (last visited Oct. 19, 2024).

176 Terada, *supra* note 150.

177 *Reframing Rigor to Promote Equity in Teaching and Learning*, UNIV. MICH. CTR. FOR RSCH. ON LEARNING & TEACHING (Feb. 24, 2023), https://crlt.umich.edu/blog/reframing-rigor-promote-equity-teaching-and-learning (discussing research that shows how rigor has been used to justify instruction that hinders learning and perpetuates inequities); Bryan Sztabnik, *Critical Thinking: A New Definition of Rigor*, EDUTOPIA (May 7, 2015), https://www.edutopia.org/blog/a-new-definition-of-rigor-brian-sztabnik ("Rigor is the result of work that challenges students' thinking in new and interesting ways. It occurs when they are encouraged toward a sophisticated understanding of fundamental ideas and are driven by curiosity to discover what they don't know.").

178 Beckie Supiano, *Teaching: A Different Way of Thinking About Rigor*, CHRON. HIGHER EDUC. (Nov. 18, 2021), https://www.chronicle.com/newsletter/teaching/2021-11-18.

179 Ruth Colker, *The Americans with Disabilities Act's Unreasonable Focus on the Individual,* 170 U. PA. L. REV. 1813, 1813 (2022) ("It makes more sense to build a society under the expectation that people with a range of disabilities will be part of our community than make one-at-a-time retrofits after someone identifies themself as disabled. One should not need to publicly claim disability to be treated with compassion and respect.").

180 *Id.* at 1838.

181 Rebecca Schuman, *The Student Accommodation Problem No Professor Wants to Talk About*, SLATE (Nov. 28, 2022), https://slate.com/technology/2022/11/flexible-deadlines-accommodations-students-disabilities-college.html.

Scaffolding creates accessibility, it does not guarantee success; that is the student's responsibility.[182] The best way to foster a rigorous and accessible learning environment is through communication and collaboration. Scaffolding is not limited to the classroom: it begins with the admissions process, continues during orientation, and throughout the academic year and exams. We need to make expectations clear for students, administrators, staff, and faculty even before students matriculate into our institutions.

A. Scaffolding in the Admissions Process

Scaffolding accessibility starts with the admissions process by providing information at that stage. Law schools pride themselves on being different from other types of learning, and we make that clear early in the process.[183] If we accept that as true, we must also accept that students will likely need different academic accommodations. Because we know that many applicants with non-physical disabilities do not disclose this in their application,[184] law schools should be proactive about informing students that because of the different academic demands, they might need different academic accommodations. If law schools provide the most basic information about the accommodations process, it counters the stigma attached to neurodiversity and signals to prospective students that neurodiversity is not a negative attribute.[185]

Being able to provide this information requires law schools and disability services to develop clear communication and understanding of how the other operates. Disability services should ensure that law schools understand the importance of the student narrative in the accommodation determination process.[186] It is standard practice for disability services to

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182 Weis et al., *supra* note 8, at 485.

183 *See, e.g.*, *What can I expect in law school?*, *supra* note 141.

184 Park et al., *supra* note 12, at 106.

185 *See* Christine Charnosky, *'I Felt Afraid to Ask': Law Students with Disabilities are Often Torn Between Trying to Fit in and Seeking Accommodations*, LAW.COM (Apr. 26, 2022, 4:44 PM), https://www.law.com/2022/04/26/i-felt-afraid-to-ask-law-students-with-disabilities-are-oftentorn-between-trying-fit-in-and-seeking-accommodations [perma.cc/XK9P-BWTQ] ("The range of disabilities is so broad, and often the stigma attached to self-reporting is so strong, that there are many who might prefer to not openly reveal their disabilities . . . That stigma is what often stops law students and prospective law students with disabilities from seeking accommodations.").

186 *Supporting Accommodation Requests: Guidance on Documentation Practices*, *supra* note 131 ("A student's narrative of his or her experience of disability, barriers, and effective and ineffective accommodations is an important tool which, when structured by interview or questionnaire and interpreted, may be sufficient for establishing disability and a need for accommodation."); *see also* Adam Meyer, *Disability Resource Professional's Guide to Exploring and Determining Access, AHEAD Standing Committee on Professional Development*, AHEAD (2015), https://www.ahead.org/professional-resources/information-services-portal/case-studies/research-information-services-portal-strategic-data-resource-guide (discussing steps to guide accommodation

obtain the student narrative through an intake form or questionnaire with prompts and questions about environmental barriers given the student's disability.[187] Although this ensures that any accommodation creates accessibility rather than guaranteeing success, that determination is based on what the office of disability services knows and understands about the learning environment, including the essential requirements. "An educational institution decides what requirements are essential for its program as long as each requirement has a rational relationship to the program of instruction and is not a pretext for discrimination."[188] For a professional program like law school, considerations include accreditation and licensing standards (e.g., experiential credits, professional identity formation, writing requirements), skills and knowledge requirements (e.g., issue spotting, analysis, legal research.), and pedagogical methods (e.g., Socratic Method, summative assessment).[189] This is based on the information law schools provide, so the level of detail and explanation is important.

Law schools can do this by ensuring that information about the core curriculum and learning outcomes is explicit enough so students can receive appropriate accommodations. For example, compare the learning outcomes for communication from three different law schools:

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determinations based on interviews with students and how based on the information provided, there may not be a need for external documentation).

187 *Supporting Accommodation Requests: Guidance on Documentation Practices*, *supra* note 131.

188 *Letter to Central Washington University Re: OCR Reference No. 10162203*, U.S. DEP'T OF EDUC. (July 25, 2017), https://www.ed.gov/media/document/10162203-apdf; *see also* UNC Greensboro, *Resolution Agreement*, OCR CASE NO. 11-17-2001 (2001), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/investigations/more/11172001-b.pdf.

189 *See, e.g., ABA Standards and Rules of Procedure for Approval of Law Schools 2024-2025*, AM. BAR. ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2024-2025/2024-2025-standards-and-rules-for-approval-of-law-schools.pdf (last visited Oct. 27, 2024); *Bar Exam Content Scope*, NAT'L CONF. BAR EXAM'R (May 2023), https://nextgenbarexam.ncbex.org/pdfviewer/ncbe-nextgen-content-scope-may-24-2023/?auto_viewer=true#page=&zoom=page-fit&pagemode=none.

School A Be able to communicate clearly, cogently, and strategically in both written and oral expression, with particular focus on the legal context.[190]
School B <u>Writing</u> Written professional communication for a variety of professional purposes. Example: Creating written texts for different audiences and purposes, advocating, negotiating, analyzing, memorializing transactions, or disseminating knowledge. <u>Oral Communication</u> Using oral communication for a variety of professional purposes. Example: Advising, advocating, counseling clients, influencing, listening, presenting information, speaking for professional purposes.[191]
School C Present analysis and engage in legal dialogue, negotiation, and argument[;] Communicate with the appropriate tone and sophistication for the relevant audience[;] Communicate directly, with organization, focus, purpose, and clarity[;] Tailor communication and advocacy to applicable format restrictions and comply with procedural requirements[.][192]

The better informed the student disability services office is, the better they can devise accommodations that support neurodivergent students

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190 *Arizona Law Student Handbook*, UNIV. ARIZ. JAMES E. ROGERS COLL. L. (Aug. 12, 2024), https://arizona.app.box.com/v/LawHandbook/file/547172503504.

191 *See generally Juris Doctor*, UNIV. NEV. LAS VEGAS WILLIAM S. BOYD SCH. L., https://www.unlv.edu/degree/jd#learning-outcomes (last visited Oct. 20, 2024).

192 *See generally Juris Doctor*, UNIV. MINN. L. SCH., https://law.umn.edu/academics/degree-programs/jd/learning-outcomes#communication-461 (last visited Oct. 20, 2024).

without "altering curricular expectations." Information, communication, and collaboration can lead to "effective, reasonable accommodations."[193]

As part of this process, neurodivergent law students should not be able to bypass the accommodations interview/meeting. Although some law schools request incoming students meet with someone in student affairs or academic success, it is equally important for neurodivergent law students to meet with disability service specialists who are better positioned to provide information about university resources[194] and free learning technology.[195] Introducing strategy tools in advance of orientation gives neurodivergent students access to scaffolding so they can at least start thinking about and developing learning strategies.[196] Providing early access to students also benefits law schools because it spreads out the onboarding process that is currently compressed into a short and already busy time period.

Finally, the practical implications of law schools informing students about how to access academic accommodations extend to the MPRE and the bar exam and jeopardize their chances of meeting the requirements for testing accommodations on these high-stakes standardized exams.[197] The processes are different, the standards are different, and "[a]ccording to law school disability resource coordinators . . . most bar examinees being denied accommodation requests have nonapparent disabilities including ADHD, PTSD, depression, and dyslexia."[198] According to the NCBE Medical

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193 Katie Rose Guest Pryal, *Students Need Flexibility, Not Our Frustration*, CHRON. HIGHER EDUC. (July 3, 2023), https://www.chronicle.com/article/neurodivergent-students-need-flexibility-not-our-frustration.

194 Regardless of size or whether public or private, universities have academic resource centers and support tools for students. Resources include on demand podcasts and videos on time management, prioritizing tasks, test anxiety and academic stress. Some schools offer more focused support like financial management and individual guidance. For example, The Ohio State University Scarlet and Gray Financial is a peer financial coaching program. *See Student Wellness Center, Financial Coaching*, OHIO ST. UNIV., https://swc.osu.edu/services/financial-coaching (last visited Oct. 16, 2024). The University of the Pacific in Sacramento California has "Care Managers" who can support students in navigating challenges including personal, medical, financial, basic needs insecurity, and general adjustment. *See, e.g.*, *Care Managers*, UNIV. OF THE PAC., https://www.pacific.edu/student-life/care-managers (last visited Oct. 16, 2024).

195 *See, e.g.*, Hailey Hillsman, *Succeed in Law School as a Neurodivergent Student*, THOMSON REUTERS, https://lawschoolqa.thomsonreuters.com/survival-guide/neurodiversity-resources/ (last visited Oct. 16, 2024).

196 *See, e.g.*, *id.* (offering strategies to address executive function skills such as finding the best time to be productive, identifying your organizational system, figure out your maximum focus time. It also includes executive function tools such as how to visualize concepts using a graphical history and staying on task with an outline builder.).

197 *See* Stephanie Francis Ward, *Bar Examinees Have Little Success with Accommodation Requests and Say the Process is Stressful*, AM BAR ASS'N J. (June 30, 2022, 9:52 AM CDT), https://www.abajournal.com/web/article/bar-examinees-have-little-success-with-accommodation-requests-and-say-the-process-is-stressful.

198 *Id. See also In re* Chavis, 306 A.3d 653 (2023), where an applicant who did not receive accommodations on the MPRE was initially denied accommodations on the bar exam in part

Documentation Guidelines for MPRE Test Accommodations, medical documentation must be "sufficiently recent or current (typically within the past five years for learning disabilities and ADHD, and within the past year for . . . psychological disabilities[.])"[199] As such, neurodivergent students need to know the time and monetary costs of this before they enter law school.[200] Furthermore, because the MPRE and bar exam consider past testing accommodations, often without factoring in accessibility,[201] it is important for disability services to document an *absence* of accommodations before and during law school—they were not needed because the course structure was already accessible.[202] Failure to document this could result in being denied accommodations on the MPRE, which can negatively impact accommodations on the bar exam. Some jurisdictions give more weight to accommodations on the MPRE[203] and some consider past accommodations,

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because, although his law school granted him testing accommodations, this was not enough to establish that the requested accommodation was reasonable.

199 *Medical Documentation Guidelines for MPRE Test Accommodations*, NAT'L. CONF. OF BAR EXAM'R., https://www.ncbex.org/exams/mpre/test-accommodations/medical-documentation-guidelines-mpre-test-accommodations (last visited Oct. 16, 2024).

200 *See id.*; Ward, *supra* note 197 (explaining students need to know the time and money required to obtain the required documentation. A neuropsychological evaluation has to be scheduled, at a minimum, months in advance, often requires multiple sessions, and costs anywhere from $1,500-$2,500 which is not covered by insurance. Even if they do not need a new evaluation report, the NCBE requires students to provide their original diagnostic paperwork and original medical provider write ups.).

201 *How to Prepare Your Request for MPRE Test Accommodations,* NAT'L. CONF. OF BAR EXAM'R., https://www.ncbex.org/exams/mpre/test-accommodations/how-prepare-your-request-test-accommodations (last visited Oct. 16, 2024) (providing that the NCBE requires students to submit a "certification of accommodations history" from the educational institution and testing agency as proof of past accommodations. Note that this is contrary to DOJ guidance that explicitly says entities should consider "informal testing accommodations" and that proof of past accommodations is not required.); *ADA Requirements: Testing Accommodations*, *supra* note 159 ("An absence of previous formal testing accommodations does not preclude a candidate from receiving testing accommodations. Candidates who are individuals with disabilities and have never previously received testing accommodations may also be entitled to receive them for a current standardized exam or high-stakes test. In the absence of documentation of prior testing accommodations, testing entities should consider the entirety of a candidate's history, including informal testing accommodations**,** to determine whether that history indicates a current need for testing accommodations.").

202 For example, if quizzes and tests in a course are remote or take-home exams, a student would not need an accommodation for distraction-free testing. *See ADA Requirements: Testing Accommodations*, *supra* note 159.

203 *See, e.g., Instructions for Submitting a Request for Accommodations,* BD. OF L. EXAM'R (2024), https://ble.texas.gov/nta_instructions (listing acceptable documentation as "proof that the NCBE granted you the requested documentation on the MPRE . . . ." and "while helpful, the following items by themselves, are not enough to document your disability or why you need accommodations: proof that you received accommodations in college . . . law school, LSAT . . . ." Applicants with ADHD or cognitive disorders have additional documentation requirements including a report from a Qualified Professional, undergraduate, graduate, and law school transcripts, and an LSAT report.).

including circumstances where they were denied or not requested.[204] Full discussion of this is beyond the scope of this Article, but it illustrates why it is so important for students to have complete information about accommodations as early as possible. Once students are admitted, law schools should continue to provide information about the accommodations process by explicitly discussing it at admitted student events and providing opportunities for students to initiate the process.

B. Scaffolding in Orientation and Pre-Semester Programs

The next step after the academic accommodation process is planning and preparation for the transition to the law school environment, usually through a law school orientation program. Law schools advertise orientation as "integral programs to assist students as they commence their legal studies,"[205] and that it "will introduce you to some foundational concepts that you will encounter throughout your legal education (and beyond)."[206] Whether law school orientation is two days or a week, it tends to be an information dump of everything students need to know about the school. Schools that offer practical programming as part of orientation tend to focus on "things" like reading and briefing a case or holding a mock class. We call them skills, but they're not. They are the vehicles by which we develop and learn skills. Although many students may find orientation exciting and help ease them into the law school environment, the amount of information and the structure makes orientation inaccessible for neurodivergent students.

A better, accessible approach is to create scaffolding with a conference-style structure. Set up concurrent sessions with both optional and mandatory components. Smaller group sessions for "required to remember" information such as academic support, student services, and career development reduces sensory overload and allows for re-regulation, both of which are important for neurodivergent students.[207] Larger sessions should be limited to the type of information that washes over, such as the dean's welcome, professionalism/honor code, and student/faculty/alumni panels.

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[204] *See, e.g., Application for Non-Standard Test Accommodations (NTA),* N.Y. ST. BD. OF L. EXAM'R, (2024), https://nybarexam.org/Docs/NTAApplication.pdf (asking for an applicant's history of test accommodations from law school, undergraduate studies, secondary and elementary education, and standardized tests. Applicants must indicate, "yes, did not request, denied or N/A." Documentation is required for approval and denial, and explanations are required for N/A.).

[205] *College of Law – Events Calendar, Orientation 2021*, ILL. COLL. OF L., https://calendars.illinois.edu/detail/5714?eventId=33410550 (last visited Jan. 19, 2025).

[206] *Welcome J.D. Class of 2028!,* VANDERBILT. UNIV. L. SCH., https://law.vanderbilt.edu/community-resources/admitted-students/orientation/ (last visited Oct. 16, 2024).

[207] *See* Megan Anna Neff, *The Unexpected Consequences of Sensory Overload in ADHD: 10 Hidden Impacts,* NEURODIVERGENT INSIGHTS, https://neurodivergentinsights.com/blog/sensory-overload-in-adhd (last visited Oct. 16, 2024) (explaining how neurodivergent individuals are more likely to be more sensitive to the environment and commonly experiencer sensory overload).

Examples of the types of sessions that prepare students for how to navigate the learning environment and make it accessible for neurodivergent students while also benefitting neurotypical students include:

> Executive Function—Self-assessment and reflective tools, notetaking and organization, creating optimal study environments, establishing a routine, how to build in breaks;
>
> Sensory and Social Challenges—how to manage socially overwhelming situations instead of avoiding them, stepping into anxiety instead of feeding it, knowing your limits and allowing yourself to step back and find a quiet space when needed;
>
> Self-Advocacy—advocating for needs, communicating what you need to help you feel secure in your experience, how to go to office hours (explain that office hours are for everyone, you may not get the entire time, come prepared: read material and have questions about X, make a list ahead of time), how to talk to and email professors, administrators, staff;
>
> Integrated Downtime—yoga, painting, journaling, and optional morning activities like group campus walks, sober support group, parents, military/vet.

The goal of orientation sessions like this is not for students to practice discrete skills but to begin to integrate them into the professional competencies they are developing in law school.

C. Scaffolding During the Academic Year and Exams

> [P]rofessional competencies require an integrated knowledge base if they are to be transferred to new situations, and 'part-task approaches to sequencing and instructional design models driven by separate objectives do not work well for complex performances that require the integration of skills, knowledge, and attitudes and the extensive coordination of constituent skills in new problem situations . . . .'[208]

Accordingly, scaffolding strategies should not start and end with orientation. Neurodivergent students often need directed guidance to "learn *when* to use *which* strategies and in *what* contexts."[209] This is based on the

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[208] Enns & Smith, *supra* note 173, at 115.

[209] *See Center for Innovation in Teaching & Learning, Supporting the Needs of Neurodivergent Students*, UNIV. OF ILL. URBANA-CHAMPAIGN, https://citl.illinois.edu/citl-101/teaching-learning/inclusive-teaching-practices/supporting-the-needs-of-neurodivergent-students (last visited Oct.

underlying premise that executive function is a set of skills to be acquired and developed through experience and practice.[210] "While it is tempting to believe that students should arrive to [law school] with the necessary skills and knowledge to be successful, providing students with little to no scaffolding can result in them gaining only a cursory understanding of the concept and processes that underpin course material."[211] Like any skill, one must repeatedly engage and use executive function skills to develop and strengthen them.[212]

Large, complex tasks such as writing assignments and creating an outline for a mid-term or exam have long time horizons that put maximum demands on our executive function skills that we use to plan, monitor, and execute goals.[213] The tasks require extensive planning, breaking things down into steps, and proactive time management. This is a challenge, even for the strongest self-directed learner, and can result in cognitive overload, which is detrimental to learning.[214] Lack of guidance often leads to frustration, procrastination, and increased anxiety.[215] Establishing scaffolding with work/study/planning sessions establishes milestones for students by breaking big tasks into manageable pieces and fosters "intellectual perseverance."[216]

Regardless of whether a student is entering their first or last year of law school, the academic year should start with clear and explicit expectations. An important vehicle for setting clear expectations is having conversations with students. Although to preserve anonymity, casebook professors cannot know who has exam accommodations, they are often aware of students who have classroom accommodations and neurodivergent students may self-

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16, 2024); MILTON J. DEHN, EXECUTIVE FUNCTION HANDBOOK 452 (Sam Goldstein & Jack A. Naglieri eds., 2013).

210 *See, e.g.*, ZELAZO ET AL., *supra* note 51, at 3.

211 *Scaffolding*, UNIV. OF FLA. CTR. FOR INSTRUCTION TECH. & TRAINING, https://citt.ufl.edu/resources/assessing-student-learning/scaffolding/ (last visited Oct. 16, 2024).

212 *See* ZELAZO ET AL., *supra* note 51, at 68.

213 DEHN, *supra* note 209, at 461 (explaining that to remember, retain, and retrieve information, students benefit from learning strategies for sustaining their attention, attaching meaning to information, chunking information to reduce the memory load, as well as rehearsal and review. When students are able to make meaningful associations, they are more successful with transfer of information into long-term memory and later retrieval.).

214 *See* Paul A. Kirschner et al., *Why Minimal Guidance During Instruction Does Not Work: An Analysis of the Failure of Constructivist, Discovery, Problem-Based Experiential and Inquiry-Based Teaching*, 41 EDUC. PSYCH. 75, 80 (2006) (explaining that the cognitive load theory suggests that the free exploration of a highly complex environment may generate a heavy working memory load that is detrimental to learning. This suggestion is particularly important in the case of novice learners, who lack proper schemas to integrate the new information with their prior knowledge.).

215 *See id.* at 76 (discussing the ineffectiveness of minimally guided instruction compared to guidance that is specifically designed to support the cognitive processing necessary for learning).

216 PAUL & ELDER, *supra* note 11, at 198–99 ("Intellectual perseverance is having the need to use insights in spite of difficulties and to struggle with confusion and ambiguity.").

disclose.[217] Talking with students about expectations is not ableist. In fact, *not* communicating is a barrier to accessibility because it clouds expectations, leaving neurodivergent students to try and figure it out; this leads to frustration which then allows them to use their condition as an excuse for not doing the work.[218] Being proactive instead of waiting for the problem to arise is part of professional identity formation.

Conversations are a starting point but are not, by themselves, scaffolding. Research indicates that for most students, not just those who are neurodivergent, "teaching by telling" does not work.[219] As such, stand-alone academic support sessions on time management, notetaking, outlining, and studying are not likely to be effective scaffolding. Learning does not occur when we take in information but when we retrieve and use it.[220] Although meeting with the law school's academic support professional or dean of students can be a helpful start for creating an individualized plan, this is just a start. It should be done with sustained scaffolding throughout the semester that provides opportunities for students to take ownership and accountability for what and how they are learning.

On a broader note, consistent with a core tenet of accessibility is that it benefits everyone, embedding "paths forward" into the law school environment implicitly signals healthy work habits we want students to practice and learn.[221] Beyond workshops on specific skills, creating co-working opportunities like study halls, planning sessions, and accountability groups provides structure so all (not just neurodivergent) students can see each step of the process and where they should be in that process.

Law schools should seek to create a system in which students construct their own understanding of the substance of what is to be learned and the

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217 *See What is a disability? Does my Diagnosis or Condition Qualify*, AQUINAS COLL., https://www.aquinas.edu/offices/accessibility-services/receiving-accommodations-in-college-faqs.html (last visited Oct. 16, 2024) (explaining that a diagnosis or condition does not mean a student is receiving academic accommodations).

218 *See* Ana Homayoun, *A New College Lesson Plan for Improving Executive Functioning*, INSIDE HIGHER ED (Mar. 15, 2024), https://www.insidehighered.com/opinion/views/2024/03/15/supporting-students-executive-function-struggles-opinion ("When professors or instructors recognize concerns early, and suggest on-campus counseling, academic advising or study groups, they can potentially prevent a greater academic downfall.").

219 *See* RODRIGO FUENTEALBA & TOM RUSSELL, TELLING IS NOT TEACHING, LISTENING IS NOT LEARNING, INSPIRING NEW METHODS, FRAMEWORKS, AND COLLABORATIONS THROUGH SELF-STUDY RESEARCH 42 (2024).

220 BROWN ET AL., *supra* note 8, at 43 ("Practice at retrieving new knowledge or skill from memory is a potent tool for learning and durable retention.").

221 Harmony Decosimo, *A Taxonomy of Professional Identify Formation*, 67 ST. LOUIS U. L.J. 1, 30–31 (2022) ("But when it comes to lawyerly professional identity formation efforts initiated under the banner of well-being and increasingly imported into the classroom, there may be reason to be skeptical of the tendency to lean heavily on generalized and remedial health focused modalities over solutions that are grounded in reliable data and specific to the issues—and the sources of the issues—facing law students and lawyers.").

process for doing this.[222] Currently, most educational contexts are designed for neurotypical students, and being different is seen as a problem with the student, not the system.[223] Consider how workshops are coordinated with the information from orientation—are the connections explicit or assumed? Creating consistent scaffolding reinforces the importance of re-evaluation, self-assessment, reflection, and the opportunity to reset as part of the process instead of a remedial intervention.[224]

For example, law schools stress the importance of time management, and rightly so, as it is a key professional skill.[225] There is typically a session during orientation or a workshop within the first few weeks of the fall semester geared to first-year students. Law schools want students to develop time management skills and self-accountability. However, offering one session and telling students to meet with the director of academic support or dean of students is not accessible for neurodivergent students. The neurotypical brain has an internal cue that knows what to do with this information and when to do it.[226] Presuming that the neurodivergent student even shows up to the workshop, their brain does not have that internal cue, so the information tends to get lost and goes unused.[227]

At a minimum, use "just-in-time" learning and have the session later in the fall semester when students have things to manage and prioritize such as mid-terms, due dates, conferences, student organizations, campus events. Just-in-time learning is an organizational approach that delivers information just when the learner needs it.[228] Even better is to scaffold just-in-time learning by having sessions at key times—before exams, at the start of the spring semester when students have a new schedule, and at the start of the fall semester for upper-class students who now have to manage individualized class schedules, externships, clinics, law journal, moot court, and jobs.

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222 BROWN ET AL., *supra* note 8, at 4 ("When you're adept at extracting the *underlying principles or "rules"* that differentiate types of problems, you're more successful at picking the right solutions in unfamiliar situations.") (emphasis in original).

223 *See* Lorna G. Hamilton & Stephanie Petty, *Compassionate Pedagogy for Neurodiversity in Higher Education: A Conceptual Analysis*, 14 FRONTIERS PSYCH. 1, 2 (2023).

224 *See id.* at 6 (discussing UDL methodology for improving the learning process, not just the outcome).

225 MODEL RULES OF PRO. CONDUCT. r. 1.3, cmt. 3 (AM. BAR ASS'N, Discussion Draft 1983) ("A lawyer shall act with reasonable diligence and promptness in representing a client . . . Perhaps no professional shortcoming is more widely resented than procrastination . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.").

226 *See* Hamilton & Petty, *supra* note 223, at 6.

227 *See id.*

228 *See Just-In-Time Teaching*, VANDERBILT UNIV. CTR. FOR TEACHING, https://cft.vanderbilt.edu/guides-sub-pages/just-in-time-teaching-jitt/ (last visited Oct. 15, 2024).

Planning is a skill that must be explicitly taught and practiced.[229] Most everyday routines and tasks are more complex and have more planning steps than we realize.[230] Ongoing programming provides external cues at the right time, and scaffolds the skill such that all students, especially neurodivergent students, have an opportunity to be proactively accountable. The following suggestions of co-working, study halls, and accountability groups are based on the concept of universal design which identifies and addresses potential structural barriers instead of making post hoc adjustments.[231] It is the scaffolding that makes law school accessible for neurodivergent students and it is a "curb cut," which is the term for design features that benefit many people beyond the group it is intended to benefit.[232]

1. Co-Working/Studying

Create opportunities for focused co-working/studying in public spaces such as scheduling regular times in a designated area in the library or a classroom.[233] This helps students who struggle to initiate things, especially bigger projects like course outlining, legal writing assignments, and seminar papers. It also implicitly encourages the concept of working in groups, which is an often overlooked yet important aspect of how lawyers work.[234] Creating co-working opportunities is more than having the spaces available. Just because you build it does not mean they will come.[235] Instead, it requires structure and should have two key attributes: a regular meeting time and a clearly stated purpose. For example, Northwestern Law has a weekly "study hall for time management and productivity." It meets weekly on the same day and time and has a clear purpose: "structured using the pomodoro time management method and includes small breaks and snacks! Please bring

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229 Olga Chuvgunova & Svetlana Kostromina, *Planning as a Learning Skill of Students*, 217 PROCEDIA - SOC. & BEHAV. SCI. 132, 132 (2016).

230 *Id.* at 137.

231 *See* Colker, *supra* note 179, at 1841.

232 *See* Angela Glover Blackwell, *The Curb-Cut Effect*, STAN. SOC. INNOVATION REV. 28, 28 (Winter 2017).

233 Public space means that it is visible instead of hidden to establish it as a norm (e.g., on Wednesdays we wear pink).

234 SCHWARTZ & MANNING, *supra* note 95, at 183 ("Successful practicing lawyers also tend to be excellent at working in groups, because so much of law practice, contrary to common images of lawyering, requires working in small groups. Lawyers form working groups to handle large litigation and transactional matters and must be able to work cooperatively, even as adversaries, in the regular course of dispute resolution.").

235 David Donner Chait, *Why the Motto 'If You Build It, They Will Come" is BS*, ENTREPRENEUR (Aug. 15, 2013), https://www.entrepreneur.com/leadership/why-the-motto-if-you-build-it-they-will-come-is-bs/227850.

something to work on."[236] Both attributes are essential as they are scaffolds for executive function.

A common concern about co-working opportunities is that neurodivergent students do not benefit from it because it is difficult to concentrate. From a neurotypical standpoint that might seem to be the case, but for a neurodivergent student who struggles with task initiation, planning and prioritizing, and/or self-monitoring, a scheduled co-working session is the external cue to do something, anything. According to the National Institutes of Health, studies show that "activity in certain brain areas changes when other people are around[,]" and this positive peer pressure can be "harness[ed] . . . to gain healthier habits—and motivate others to do the same."[237] It is not about how much a student does; it is about providing the external structure that cues the executive functions.[238]

Co-working/studying can assist with the challenges of concentration and productivity through a technique called "Body Doubling," particularly for students with ADHD.[239] This is a relatively new technique where two people work in the same space, either physically or remotely, and it does not have to be the same task.[240] Because this is such a new technique, there is not extensive research testing its effectiveness, but the current evidence shows that the presence of the other person brings accountability, structure, and social reinforcement that enhances motivation and productivity.[241] Although the term "body doubling" may be new, the concept is not. It is similar to many scholarship writing groups that professors have been using for decades—we create them for accountability for ourselves, so why not create them for students, too?

2. Course-Level Structured Study Sessions

Creating accessible, structured learning opportunities can also occur at the class level. For example, in a legal writing or seminar class, the professor can schedule research work sessions where students do independent research and can ask questions of the professor, law librarians, or TAs. Although some guidance is required, even minimal instructions about expectations support

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236 *Student Services, Student Wellness*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/student-life/student-services/wellness/ (last visited Oct. 15, 2024).

237 *The Power of Peers: Who Influences Your Health?* NEWS IN HEALTH, NAT'L INSTS. OF HEALTH (Sept. 2021), https://newsinhealth.nih.gov/2021/09/power-peers.

238 RUSSELL A. BARKLEY, THE IMPORTANT ROLE OF EXECUTIVE FUNCTIONING AND SELF-REGULATION IN ADHD 5 (2010), available at: https://www.russellbarkley.org/factsheets/ADHD_EF_and_SR.pdf.

239 *Cf.* Zawn Villines, *What is 'Body Doubling' for ADHD?*, MEDICAL NEWS TODAY (Aug. 24, 2023), https://www.medicalnewstoday.com/articles/body-doubling-adhd.

240 *Id.*

241 *Id.*

neurodivergent students with weaker working memory. Working memory supports cognition in learning and self-direction and is often described as our "mind's eye"[242] or the "gateway to long-term storage."[243] It is how we retain information in a readily accessible form, and it "facilitates planning, comprehension, reasoning, and problem-solving."[244] Having a weaker working memory does not mean someone is forgetful or not capable of remembering things; it means the brain has to work harder. Because writing is slower than speaking, our working memory has to work harder to hold onto the information and thoughts we want to write.[245] Providing a plan, even a simple one, helps lighten the load for the neurodivergent student by giving something it can connect to, lightening up the load on working memory.[246]

This scaffolding also transfers to exam classes. Professors who teach classes with exams often hold a single exam review session at the end of the semester, which is usually the point when students begin to synthesize the information. However, scheduling regular independent review/study sessions at critical points in the semester with a clear purpose allows the brain to better make associations and create a schema of similar concepts (as opposed to multiple "islands" of information).[247] Professors do not have to be present during these scheduled work sessions, and the only potential work[248] would be to schedule a day and time and to give suggestions for how the time could be used to engage in self-directed practice and self-assessment strategies.[249] This is not about handholding or treating law students like children. It is about providing scaffolding that structures learning and providing the tools so that students can take charge of their learning throughout the semester.[250]

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242 Rae Jacobson, *What is Working Memory?*, CHILD MIND INST., https://childmind.org/article/what-is-working-memory/ (last updated Oct. 7, 2024). .

243 Alex Burmester, *Working Memory: How You Keep Things "In Mind" Over the Short Term*, SCI. AM. ONLINE (June 5, 2017), https://www.scientificamerican.com/article/working-memory-how-you-keep-things-ldquo-in-mind-rdquo-over-the-short-term/.

244 Nelson Cowen, *Working Memory Underpins Cognitive Development, Learning, and Education*, 26 EDUC. PSYCH. REV. 197, 197 (2014).

245 *Id.*

246 *See* Jacobson, *supra* note 242.

247 Enns & Smith, *supra* note 173, at 119 ("The goal of learning is to move information from working memory into long-term memory by constructing schema.").

248 This could also be something a TA schedules or is built into the first year or required course curriculum (e.g., optional weekly study hall for every class).

249 SCHWARTZ & MANNING, *supra* note 95, at 7 ("Examples of self-directed practice and self-assessment approaches such as: review class performance and notes and identify areas of confusion, calibrate learning by practice and self-testing (using supplemental sources recommended by the professor), synthesize what you have learned this week/unit, etc., create exam approaches based on how you will be tested").

250 ABA Standards and Rules of Procedure for Approval of Law Schools 2024-2025, supra note 189 (establishing structured learning sessions likely conforms with ABA Standard 303(b)(3) which requires law schools to incorporate "substantial opportunities to students for . . . the development of professional identity . . . Interpretation 303–5: "Professional identity focuses on what it means to

3. Accountability Groups

Unlike structured study sessions, accountability groups are regularly scheduled planning sessions where students map out their week by identifying obligations, prioritizing their time, and creating actionable plans.[251] This can be as simple as a weekly drop-in session or a continuation of orientation peer mentoring groups. Coaching helps with goal-setting, making and carrying out a plan,[252] and an increasing body of research stresses the importance of developing individualized supports, especially for individuals diagnosed with ASD.[253] Allowing students to support students promotes independent learning.[254] It also scaffolds executive function because feeling organized decreases stress and increases feelings of self-efficacy.[255]

Many law schools have established peer mentoring programs where upper-class law students are assigned a small cohort of first-year students, and this helps with the transition into the new learning environment.[256] When this "transitional" mentoring continues through the semester it is a sustained scaffold, and the benefits include a more developed sense of belonging and a student-focused support mechanism that is a safety net for students who might otherwise have floundered.[257] Importantly, peer mentoring programs are not about social skills training. Such programs have been widely criticized both by experts and neurodivergent individuals.[258]

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be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.").

251 Homayoun, *supra* note 218.

252 Getzel, *supra* note 91, at 383–84 n.86 (discussing research on coaching in higher education to learn and practice goal setting, making and sticking to a plan).

253 Kristen Gillespie-Lynch et al., *For a Long Time Our Voices Have Been Hushed: Using Student Perspectives to Develop Supports for Neurodiverse College Students*, 8 FRONTIERS PSYCH. 1, 2 (2017) (citing research discussing how it develops self-advocacy, social, and executive function).

254 *Id.* at 3.

255 Homayoun, *supra* note 218.

256 JANE ANDREWS & ROBIN CLARK, PEER MENTORING WORKS! HOW PEER MENTORING ENHANCES STUDENT SUCCESS IN HIGHER EDUCATION 47 (2011).

257 *Id.* at 48–49; *see also* Kari Duerksen et al., *Supporting Autistic Adults in Postsecondary Settings: A Systematic Review of Peer Mentorship Programs*, 3 AUTISM ADULTHOOD 85, 95 (2021).

258 ANDREWS & CLARK, *supra* note 256, at 7. Social skills training is widely criticized because it teaches neurodivergent individuals to mask and suppress inherent traits. Debra Brause, *Should Autistic Children be 'Trained' to Socialize?*, PSYCH. TODAY (Aug. 31, 2023), https://www.psychologytoday.com/us/blog/psychology-meets-neurodiversity/202308/should-autistic-children-be-trained-to-socialize. It is based on the premise that to be a valid member of society, a neurodivergent person must imitate and pretend to be someone they are not. *Id.* Further, it is not based on research; it is based on the notion that neurotypical ways of socializing and communicating are "correct" while neurodivergent ways are "inappropriate." *Id.*

The law school creates the "macro" scaffold by setting the schedule, including a timeline for each week (mid-term prep, resume and interviews, and other events that students should have on their radar) and basic guidance explaining the purpose—make schedules for the week ahead and look at what is coming up—career, classes, assignments, events. Accountability groups should then incorporate backward design principles to scaffold specific goals of organization and planning. Backward design is a planning method that starts with identifying goals—what is the expected performance to determine how to prepare what is expected.[259] Students look at their course schedules, law school event calendars (including career development, academic success, and student organization programming), and outside obligations, and synthesize those events and deadlines into one place and block out time to work on long-term projects and assignments. Similar to outlining for exams, the value is in creating and not the outline itself (which goes back to process over product). Although this might be helpful early in the semester, this is not a one-time event. It should be done on a weekly basis so a neurodivergent student can develop a habit of creating external planning cues.

In sum, these are suggestions for how law schools can set up a structure which streamlines the process and is what creates accessibility. Each strategy then has a more specific scaffold that depends on the course, the task, and the timing. Success is not guaranteed but students have access to the support they need to develop their own mechanisms for accountability, especially when preparing for exams.

4. Exam Accommodations

Until now, this Article has emphasized the importance of creating accessible learning environments, and it has suggested strategies for doing this instead of individual accommodations. Although some professors are supportive of academic accommodations, it is safe to say that a good number see them as additional work.[260] It is not more work; it is simply a different approach from what has always been done. Ideally, law school exams should be designed such that they are accessible to all students instead of having to make individual testing accommodations.[261] At a surface level, changing an exam design appears to be an undue burden or a substantial alteration to the educational program. However, Professor Ruth Colker's scholarship has shown that "nonspeeded versions" of exams gives all students enough time

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259 Ryan S. Bowen, *Understanding by Design*, VAND. UNIV. CTR. FOR TEACHING, https://cft.vanderbilt.edu/understanding-by-design/ (last visited Oct. 20, 2024).

260 Macfarlane, *supra* note 116, at 1988.

261 Colker, *supra* note 179, at 1838.

to take an exam such that knowledge, rather than speed, is assessed.[262] She posits that "[i]nstead of requiring one student at a time to come forward to request extended time accommodations, we should require testing entities to justify the time limits themselves . . . ."[263]

As it now stands, the responsibility of coordinating and administering individual accommodated in-person exams falls on the understaffed offices of student affairs. Even using a conservative number of fifteen students in total, and each has two in-person timed exams, this requires thirty individual exams to be administered and scheduled (on top of other exam responsibilities). While an accessible exam would not eliminate the need for individual accommodations, it is a more efficient approach to removing environmental barriers for neurodivergent students.

Regardless of the exam design or accommodations, all students should have access to exam instructions in advance so that they have a clear understanding of the testing parameters instead of skimming or skipping over them during the exam. At a minimum, neurodivergent students should be permitted to read exam instructions before the exam starts so they can read and process the information and have time to confirm to themselves that they understand expectations.[264] Professors who administer exams should provide access to practice questions at least by mid-semester so students have time to practice and prepare for the substance, and the format and structure of questions.[265]

Until it becomes the norm for law school professors to incorporate universal design principles and design accessible exams, neurodivergent students will continue to need individual testing accommodations. Unfortunately, this results in a "hammer and nail" approach of additional testing time and reduced distractions as standard accommodations[266] because most law schools (and student disability services offices) do not have the expertise or resources to determine proper individualized testing accommodations.[267] Given the limited resources available, law schools are not able to make individualized determinations based on the disability, the

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262 *Id.* at 1838 n.153 (discussing standardized tests but the premise is transferrable to law school exams).

263 *Id.*

264 *See* Sarah M. Haigh et al., *Processing Speed is Impaired in Adults with Autism Spectrum Disorder, and Relates to Social Communication Abilities*, 48 J AUTISM DEV. DISORDER 1, 9 (2018) (finding processing speed deficits compared to other adults with similar IQs).

265 Lovett, *supra* note 163, at 625 (addressing the unnecessary uncertainty and stress and anxiety caused by creating suspense about exams).

266 *See* Jennifer C. Sarrett, *Autism and Accommodations in Higher Education: Insights from the Autism Community*, 48 J. AUTISM & DEVELOPMENTAL DISORDERS 679, 687 (2018).

267 Lawrence Lewandowski et al., *Test-Taking Skills in College Students With and Without ADHD*, 31 J. PSYCHOEDUCATIONAL ASSESSMENT 41, 49 (2013) (noting that UDL is a more valid and fair approach than guessing who should get more time and how much).

student, and the exam expectations. Instead they must use a hammer, and treat every student as just another nail.

Even if law schools remove every environmental and institutional barrier and fully embrace the idea of scaffolding to create an accessible learning environment, law students are still wholly responsible for their success.

D. Scaffolding and Student Accountability

While institutions are required to remove barriers, they are not required to guarantee success.[268] When law schools provide scaffolding tools, a neurodivergent law student has reciprocal responsibilities to utilize that scaffolding to develop skills and strategies and support their own independent process of success.[269] This involves being proactive in the process, developing self-advocacy, emotional regulation (and re-regulation), and accountability.

1. Proactive Process

First, a neurodivergent student must be proactive about accommodations, starting with the admissions process. This includes being cognizant of the additional time it might take to learn about different schools' requirements and accommodations processes. For example, it is important to start considering expectations such as managing deadlines that are out of your control and regulating inhibitions when working with others with different personalities and perspectives.

Before the school year starts is the time to consider the bigger picture and the reason for attending law school—to become a part of the legal profession. Accessibility and accommodations in law school will look different in professional settings, and while environmental barriers exist, a neurodivergent student needs to consider how and whether they will address them. They must also be prepared to encounter fixed parameters that cannot be accommodated. For instance, not every work environment provides individual offices, and those that do might have a "door open" policy. Although it might be possible to work with the office door closed, set up a desk to minimize distractions, and wear headphones, these needs must be communicated to the employer. Neurodivergent individuals will be treated like professionals and are expected to keep track of multiple projects, meet

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268 *See* Palmer, *supra* note 124.

269 *See generally* LYNN NEWMAN ET AL., THE POST-HIGH SCHOOL OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO 8 YEARS AFTER HIGH SCHOOL. A REPORT FROM THE NATIONAL LONGITUDINAL TRANSITION STUDY 30–31 (Sept. 2011), https://ies.ed.gov/ncser/pubs/20113005/pdf/20113005.pdf.

different (and sometimes last-minute) deadlines, answer to multiple "bosses," and collaborate and work with others.

Although these expectations do not arise until after the first year of law school at the earliest, being proactive early allows the time to utilize resources and develop strategies to support professional expectations.

2. Self-Advocacy

Related to being proactive is self-advocacy, which is the process of knowing and communicating one's needs and rights to access necessary accommodations and support.[270] This is a key skill for neurodivergent individuals because it helps navigate neurotypical systems and structures.[271] In theory, law school should be conducive to self-advocacy because regardless of whether one plans to represent clients in court or draft business agreements, lawyers are advocating for their clients' best interests.[272] Law school should be a safe environment for neurodivergent students to practice articulating needs, whether it is attending individual professors' office hours, emailing an administrator with questions, or discussing concepts with classmates.

This is an opportunity to be proactive and work with student affairs and career guidance to develop self-advocacy skills. Take advantage of the resources available as early as possible instead of waiting until confronted with a barrier or roadblock. Doing this will help support better emotional and inhibitory regulation.

3. Regulating and Re-Regulating Emotions and Inhibitions

Generally, individuals who are neurodivergent often have difficulty regulating emotions. It can be rejection sensitivity, hypersensitivity to surroundings, or overreacting to situations. The Cleveland Clinic Health Library describes emotional regulation as having a volume control for emotions/feelings.[273] Neurotypical people know they have a volume control

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270 Baylee Hoey, *Self-Advocacy Strategies for Neurodivergent Adults*, RELATIONAL PSYCH. (Apr. 16, 2024), https://www.relationalpsych.group/articles/self-advocacy-strategies-for-neurodivergent-adults#:~:text=Self%2Dadvocacy%20is%20the%20process%20of%20understanding%20and%20communicating%20one's,their%20well%2Dbeing%20and%20success.

271 *Id.*

272 *See* Margolis, *supra* note 155, at 375 (emphasis added); Gundlach & Santangelo, *supra* note 169, at 119, 120 ("While almost all entering law students could generally explain how various learning strategies support specific learning tasks, the majority were unaware of active learning strategies that support academic success in law school . . . Although we again found no evidence that instructional intervention impacted metacognitive regulation, continuous reinforcement to practice with specific active strategies did result in more students reporting use of these strategies.").

273 *Emotional Dysregulation*, CLEVELAND CLINIC HEALTH LIBR. https://my.clevelandclinic.org/health/symptoms/25065-emotional-dysregulation (last visited Oct. 21, 2024).

and when and how to use it. Neurodivergent individuals might know there is a control and how to use it, but do not know when, or they know when to use it but do not know how.[274]

Importantly, a neurodivergent person already knows this about themselves—they feel things intensely, overthink and ruminate, are impulsive, and can swing from one extreme to the other.[275] Although it is difficult to recognize this while feeling overwhelmed and take steps to bring oneself back to a more manageable state of mind, neurodivergent individuals can work on being more aware and anticipate instead of reacting, especially their triggers.[276] Even if the world was designed for neurodivergent individuals, that does not mean the volume always stays on high. Knowing that you struggle with regulating emotions means that you can take proactive steps to re-regulate and develop strategies to externalize self-monitoring. For example, if you have a weak nonverbal working memory, you might not be able to rely on hindsight for future situations.[277] Dr. Russell Barkley, one of the most renowned experts on ADHD and neurodiversity, suggests creating an external hindsight by making a list of situations that trigger your emotional regulation or impulsivity that you can refer to before you are about to enter one of these situations. He then suggests that you "picture a visual device—a flat-screen TV, a computer monitor, or a minicam—and visualize, on that imaginary screen, what happened the last time you were in a situation like this. Let the past unfold in colorful detail, as if you're filming it or replaying it."[278] This only takes a few seconds, and by being proactive, you can better prepare for and perhaps even minimize the intensity of the situation.

4. Developing Accountability

Law school exams test analytical and critical thinking skills. To demonstrate mastery, a student must understand the task, plan an approach, and manage their time effectively. This includes determining how to prioritize tasks and when to build in breaks. Knowing this will not translate into success; one actually has to do it.

This is easier said than done because, for many neurodivergent students, getting started is the hard part either because of things like task paralysis, impulsivity, or time blindness. This is where law school support systems are important, but they are only useful if used. When scaffolding is offered or

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274 *Id.*

275 *Id.*

276 Deborah French, *Neurodiversity and the Exacerbation of the Emotional Reaction*, PSYCH. TODAY (March 26, 2024), https://www.psychologytoday.com/us/blog/small-steps-big-changes/202403/neurodiversity-and-exacerbation-of-the-emotional-reaction.

277 Russell Barkley, *How to Hit Pause on ADHD Impulsivity*, ADDITUDE (July 20, 2021), https://www.additudemag.com/adhd-impulse-control-social-spending/.

278 *Id.*

provided, the neurodivergent student is accountable for using it to develop external cues. So, if a law school has regularly scheduled study or work sessions, you should attend every week, and soon it will become a habit that you are more likely to be able to maintain on your own. Although a neurodivergent person might initially struggle with a new routine, it is also something the neurodivergent brain thrives on because it is one less thing to think about.[279]

Law schools can support this by holding students accountable, especially regarding academic deadlines. Deadlines are important in the legal profession, but are not always absolute. Just as courts grant extensions for good reason, professors can too.[280] Professors can foster accountability while still being flexible. For example, consider a policy such as, "[f]lexible deadline requests are the initial step in a dialogue; it is your responsibility to reach out to me with the length of extension you need[]" and a plan for how you will meet it.[281] This is flexible and promotes accountability without imposing a significant hurdle for a student to overcome because they still have to manage their time and prioritize in order to meet their obligations. A key aspect of this type of policy is communicating to the student the opportunity cost of an extension: while there may not be a late penalty, they will experience natural consequences such as falling behind or not understanding what is going on in class.[282] Importantly, talking about this with neurodivergent students is not being ableist; it helps them understand that other people's labor is not something to be taken for granted.[283] Instead of waiting for ideal conditions or circumstances to occur, be proactive by utilizing available resources, learn from mistakes, and create the conditions for success.

CONCLUSION

Law schools get to decide what kinds of lawyers this country will have. This is both an incredible responsibility and opportunity, and we should not allow our cognitive biases to limit how we operate. We should want to

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279 Sharon Saline, *5 Strategies to Make and Keep Routines With Adult ADHD*, PSYCH. TODAY (Nov. 13, 2022), https://www.psychologytoday.com/ie/blog/your-way-adhd/202211/5-strategies-make-and-keep-routines-adult-adhd.

280 Margolis, *supra* note 155, at 416 (discussing relaxing deadlines as a strategy to reduce cognitive overload).

281 Schuman, *supra* note 181.

282 *Id.*

283 *Id.*; *see also* Pryal, *supra* note 193 ("If you can have an empathetic conversation with your ND students, you will be able to collaborate and find clarity about what "flexibility" means for a particular student in your class.").

prepare students to solve the complex and wicked problems[284] we know they will encounter. We should want to remove barriers and roadblocks instead of stubbornly holding on to structures that are rigid and outdated.

Critical thinking and problem-solving are hallmarks of what lawyers do, and these are the tools we should utilize. Law school should be a place where students are challenged to think and work hard and where they can develop individual processes and paths for doing this. Great minds do think differently[285] and when diverse minds can access and use the multiple tools at their disposal, they are better able to construct strong yet flexible strategies. This can only happen when we create opportunities that give all students an equitable path forward.

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284 Horst W. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155, 161 (1973) ("Generally wicked problems avoid straightforward articulation and are not solvable with simple right or wrong answers.").

285 *See* MOSS, *supra* note 1, at 1 ("Fact: We all have different brains. We think differently than one another and have unique perspectives and perceptions of the world around us. It is part of the beauty of humanity that no two minds are exactly the same.").

ENVIRONMENTAL RACISM IN AMERICA: MINORITY COMMUNITIES AS DUMPING GROUNDS FOR ENVIRONMENTAL WASTE

Shelly Taylor Page and Patricia A. Broussard*

INTRODUCTION

Environmental racism[1] is a disturbing issue affecting Communities of Color and individuals living in poverty alike.[2] Global warming and governmental policies disproportionately affect individuals within the groups mentioned above.[3] This stark imbalance raises serious ethical concerns that must be addressed to ensure the well-being of all citizens. Marginalized communities across the United States are undeniably at a marked disadvantage when it comes to environmental hazards.[4] The presence of Superfund sites[5] in these areas leads to limited access and inferior quality of air, food, and water supplies, creating an unjust society where essential resources are not readily available.[6] As a nation, we must confront this

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1 Experts have used the terms "environmental racism," "environmental inequality," and "environmental injustice" interchangeably to describe the different instances of environmental discrimination. *See generally* Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENV'T. L. & LITIG. 121 (1994).

2 *See generally* Steven A. Light & Kathryn R. L. Rand, *Is Title VI a Magic Bullet - Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1 (1996).

3 *See generally* Nathalie J. Chalifour et al., *Coming of Age in a Warming World: The Charter's Section 15(1) Equality Guarantee and Youth-Led Climate Litigation*, 17 J.L. & EQUAL. 1 (2021).

4 Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENV'T. L.J. 495, 497–98, 506 (1992).

5 Superfund sites include "some of the nation's most contaminated land" which triggered the Environmental Protection Agency to create the EPA Superfund program to improve conditions. *Superfund*, U.S. EPA, https://www.epa.gov/superfund (last updated Dec. 9, 2024).

6 Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 337, 349 (1993).

inequity to ensure all citizens have access to clean and safe environments regardless of socioeconomic status or background.[7]

The significance of this Article lies in its contributions to the historical atrocities and discrimination African Americans have faced for centuries in the United States. This Article highlights and describes in detail three prominent examples of environmental racism that have occurred within the United States: The Flint, Michigan Water Crisis,[8] The Dakota Access Pipeline,[9] and Louisiana's Cancer Alley.[10] All three of these detrimental incidents have been large-scale issues that have affected members of low-income areas and areas inhabited by minorities.[11]

Inequity based on race is a significant issue in many parts of the world, particularly concerning access to necessary resources and services.[12] The United States has taken steps to rectify this inequity by passing legislation to increase access to these essential resources and services;[13] however, continuing egregious instances of environmental racism, such as the Flint, Michigan Water Crisis, illustrate the disparities in our society.[14] Environmental racism refers to the disproportionate exposure of minority communities, primarily Black and low-income Americans, to pollution, toxic waste, and other environmental hazards.[15] These communities often live in areas with fewer regulations and weaker protections, such as near factories,

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7 *See generally* Collin, *supra* note 4.

8 *See generally The water crisis in Flint, Michigan has had terrible consequences for residents' health*, THE ECONOMIST (Sept. 27, 2017), https://www.economist.com/graphic-detail/2017/09/27/the-water-crisis-in-flint-michigan-has-had-terrible-consequences-for-residents-health?ppccampaignID=&ppcadID=&ppcgclID=&utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gad_source=1&gclid=Cj0KCQjw3bm3BhDJARIsAKnHoVVf5y6PlYIquG6v3U2WVMYtubvAPdp-xelt59d54YB4KOdiVmpROKsaAns5EALw_wcB&gclsrc=aw.ds.

9 *See generally* Shelia Hu, *The Dakota Access Pipeline: What You Need to Know*, NRDC (June 12, 2024), https://www.nrdc.org/stories/dakota-access-pipeline-what-you-need-know.

10 *See generally* Wesley James et al., *Uneven Magnitude of Disparities in Cancer Risks from Air Toxics*, INT. J. ENV'T RSCH. & PUB. HEALTH 4365 (2012).

11 *See generally The water crisis in Flint, Michigan has had terrible consequences for residents' health*, *supra* note 8; Hu, *supra* note 9; James et al., *supra* note 10.

12 *See generally* U.N. Dep't of Econ. & Soc. Affairs, *World Social Report 2020: Inequality in a Rapidly Changing World*, U.N. Doc. ST/ESA/372, U.N. Sales No. E.20.IV.1 (2020); *see Tackling structural racism and ethnicity-based discrimination in health*, WORLD HEALTH ORG. https://www.who.int/activities/tackling-structural-racism-and-ethnicity-based-discrimination-in-health (last visited Nov. 15, 2024).

13 *Environmental Law: Federal Laws*, LIBR. OF CONG., https://guides.loc.gov/environmental-law/federal-laws (last visited Nov. 15, 2024).

14 Jim Erickson, *Flint water crisis: Most egregious example* of *environmental injustice, says* U-M *researcher*, UNIV. OF MICH. NEWS (Oct. 19, 2018), https://news.umich.edu/flint-water-crisis-most-egregious-example-of-environmental-injustice-says-u-m-researcher/.

15 Collin, *supra* note 4, at 495, 497.

landfills, or industrial sites.[16] Such conditions lead to higher rates of health issues like asthma, cancer, and other illnesses due to constant exposure to poor air quality, contaminated water, or unsafe living conditions.[17] For example, Black and low-income communities are more likely to live near highways or areas where industrial waste is dumped.[18]

Institutional racism fuels this issue by shaping policies, zoning laws, and economic opportunities in ways that grossly disadvantage these communities.[19] Historically, redlining and segregation forced Black families into specific neighborhoods, many of which were in undesirable or hazardous areas.[20] Even today, zoning laws and real estate practices often push poor Black Americans into areas that lack resources or environmental protections.[21]

Both environmental and institutional racism fosters an environment where marginalized communities have limited access to safe, clean, and healthy living conditions, resulting in poorer health outcomes.[22] Policies that prioritize the interests of wealthier, white neighborhoods while neglecting or exploiting the environment of poor and Black communities perpetuate this cycle of harm.[23]

This Article explores environmental racism policies and how they manifest in the lives of those most impacted by their effects.[24] This research also explores the proposed legislation that can be implemented to lessen the impact of environmental racism. By analyzing relevant laws and other public policies that have contributed to Superfund sites and disasters, such as Flint, Michigan, we can better understand how systemic failures, government oversight, corporate accountability, and environmental regulation disproportionately harm marginalized communities.[25] Specifically, these

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16 *See generally* Lindsay M. Farbent, *Addressing the Disproportionate Adverse Health Effects among BIPOC Communities as a Result of Environmental Racism*, 12 BARRY L. ENV'T & EARTH L.J. 100 (2022).

17 *See generally id.*

18 *See generally* Robert W. Collin & Robin Morris Collin, *Sustainability and Environmental Justice: Is the Future Clean and Black*, 31 ENV'T. L. REP. NEWS & ANALYSIS 10968 (2001).

19 *See generally* Michael B. Gerrard, *Demons and Angels in Hazardous Waste Regulation: Are Justice, Efficiency, and Democracy Reconcilable*, 92 NW. U. L. REV. 706 (1997-1998) *and* Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, WHITE HOUSE (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/.

20 *See generally* Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (Nov. 1996) *and* Bruce Mitchell, *HOLC "Redlining" Maps: The Persistent structure of Segregation and Economic Inequality*, NAT'L CMTY. REINVESTMENT COAL. (Mar. 20, 2018).

21 *See generally* Tseming Yang, *Old and New Environmental Racism*, 2024 UTAH L. REV. 109.

22 Farbent, *supra* note 16, at 100–06.

23 *See generally* Light & Rand, *supra* note 2.

24 *See generally* Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839 (1992).

25 Robert D. Bullard, *The Threat of Environmental Racism*, 7 NAT'L. RES. & ENV'T. 23, 23–26 (1993).

policies have a particularly harmful impact on Black and low-income populations, perpetuating environmental injustice and institutional racism.[26] This analysis reveals the urgent need for reforms prioritizing environmental health equity and stronger protections for vulnerable populations.[27]

I. DEFINING ENVIRONMENTAL RACISM AND A HISTORICAL OVERVIEW

A. What Exactly Is Environmental Racism and Environmental Injustice?[28]

Throughout history and research, scholars have used the terms "environmental racism," "environmental inequality," and "environmental injustice" interchangeably to describe the different situations in which environmental discrimination has occurred.[29] These terms often correlate with severe health implications for the members of the communities affected.[30] Dr. Benjamin F. Chavis Jr. coined the idea of "environmental racism"[31] following the Civil Rights Movement, with the concept gaining attention following protests in 1982 in Warren County, North Carolina.[32] The protests began in response to the dumping of hazardous waste, taken initially from roadways, into a Black community.[33] Activists who led the protest, including Dr. Benjamin Chavis Jr., were arrested as a result.[34]

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26 Marguerite L. Spencer, *Environmental Racism and Black Theology: James H. Cone Instructs Us on Whiteness*, 5 U. SAINT THOMAS L.J. 288, 290–91 (2008).

27 *See generally* Robert D. Bullard, *Environmental Racism and 'Invisible' Communities*, 96 W. VA. L. REV. 1037 (1994).

28 Patrick C. McGinley, *Environmental Injustice and Racism: Making the Connection in Classrooms and Courtrooms*, 96 W. VA. L. REV. 1017, 1022 (1994).

29 *See generally* Collin, *supra* note 1.

30 *See generally* Farbent, *supra* note 16.

31 Richard J. Lazarus, *Environmental Racism - That's What It Is*, 2000 U. ILL. L. REV. 255, 255 (2000).

32 *See* Carita Shanklin, *Pathfinder: Environmental Justice*, XXIV ECOLOGY L. Q. 333, 337 (1997).

33 Eileen Maura McGurty, *From NIMBY to Civil Rights: The Origins of the Environmental Justice Movement*, 2 ENV'T HIST. 301, 301–02 (1997).

34 *Id.* at 312.

Dr. Ben Chavis (middle) helped spark a movement to bring attention to the plight of Black Americans living in unhealthy, toxic communities.[35]

Before the U.S. House Committee of the Judiciary and a subcommittee on Civil Rights, Dr. Chavis Jr. defined "environmental racism" as "racial discrimination in environmental [policymaking] and the unequal enforcement of environmental laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of a life threatening presence of poisons and pollutants in people of color communities."[36] More simply put, it is the idea that those who are looking to build and operate waste facilities, factories that pollute, and harmful alternative ideas are intentionally targeting Communities of Color and are perpetuating health problems on a national scale.[37] These activities make members in these marginalized communities sicker and unhealthier and lead to untimely, premature deaths.[38]

Another hero in the environmental justice movement, Dr. Robert D. Bullard, who later worked on the ecological injustice in Flint, Michigan and the water crisis, defined "environmental racism" as "any policy, practice, or directive that differently affects or disadvantages (whether intentional or unintentional) individuals, groups or communities based on race or colour."[39] The critical difference between Dr. Bullard's definition and that of the movement's founder, Dr. Benjamin Chavis Jr., is that Bullard's does not

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35 Jessica Kutz, *As the EPA Introduces Its Environmental Justice Office, the 'Mother of the Movement' Remembers the Black Women Who Led the Battle*, GOV'T EXEC. (Sept. 28, 2022), https://www.govexec.com/federal-news/2022/09/epa-introduces-environmental-justice-office-mother-movement-remembers-black-women-who-led-battle/377760/.

36 Robert M. Frye, *Environmental Injustice: The Failure of American Civil Rights and Environmental Law to Provide Equal Protection from Pollution*, 3 DICK. J. ENV'T L. & POL'Y 53, 56 (1993).

37 *See id.*

38 Stacy M. Brown, *Environmental Racism Killing People of Color*, THE GREENLINING INST. (Jan. 17, 2019), https://greenlining.org/2019/environmental-racism-killing-people-of-color/.

39 ROBBERT D. BULLARD, ENVIRONMENT AND MORALITY CONFRONTING ENVIRONMENTAL RACISM IN THE UNITED STATES iii (2004), https://www.csu.edu/cerc/documents/EnvironmentandMorality-ConfrontingEnvironmentalRacismInTheUnitedStates-Bullard2004.pdf.

require intent, whereas Chavis's does.[40] Despite this difference, both definitions highlight the systemic forces that perpetuate the degradation and demise of Communities of Color and individuals inhabiting low-income environments.[41] The U.S. Environmental Protection Agency (EPA) defines "environmental justice" as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income . . . [concerning] the development, implementation and enforcement of environmental laws, regulations, and policies."[42]

B. The Impact of Environmental Racism

In 1990, the EPA answered a call to action by environmental justice advocates, forming an Environmental Equity Workgroup in collaboration with the Congressional Black Caucus and other political activists.[43] After extensive research and recommendations from this workgroup, the Office of Environmental Justice was established four years later—ensuring environmental justice for minority populations around the country.[44] This office later identified environmental justice as one of its top areas of concern and study.[45] The environmental justice movement first emerged during this time and has steadily gained momentum over the years.[46]

Across America, a clear pattern exists in which specific populations face disproportionate exposure to pollution and risk due to systemic barriers preventing access to equitable resources.[47] Rather than indicating a lack of action to combat the issue, it highlights the need for further eradication efforts. In that vein, several cases and legislation are pending or have already taken effect aimed at correcting issues surrounding environmental racism.

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40 *See* Renee Skelton et al., *The Environmental Justice Movement*, NRDC (Aug. 22, 2023), https://www.nrdc.org/stories/environmental-justice-movement.

41 *Id.*

42 *State and Federal Environmental Justice Efforts*, NCSL (May 26, 2023), https://www.ncsl.org/environment-and-natural-resources/state-and-federal-environmental-justice-efforts#:~:text=The%20U.S.%20Environmental%20Protection%20Agency,and%20policies.%E2%80%9D%20According%20to%20the.

43 *See Timeline*, CONG. BLACK CAUCUS FOUND., https://avoice.cbcfinc.org/exhibits/environmental-justice/timeline/ (last visited Nov. 14, 2024).

44 *Office of Environmental Justice*, U.S. DEP'T. OF JUST., https://www.justice.gov/oej (last visited Nov. 14, 2024).

45 *Environmental Justice in Your Community*, EPA, https://www.epa.gov/environmentaljustice/environmental-justice-your-community (last visited Nov. 14, 2024).

46 *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice (last visited Nov. 15, 2024).

47 Lazarus, *supra* note 31, at 260.

1. The Flint, Michigan Water Crisis

In recent years, a wave of decisions from lawmakers and leaders has shaped the environmental justice movement, either bolstering or hampering its progress. One recent ruling is from the Michigan Supreme Court in *Mays v. Governor of Michigan*,[48] in which the court concluded that the "plaintiffs pleaded a recognizable due-process claim under Michigan's Constitution for a violation of their right to bodily integrity" regarding the Flint, Michigan Water Crisis.[49] Flint, Michigan, has a population of around 80,000 people situated around seventy miles northwest of Detroit.[50] Flint's population is predominantly African American, with 56.7% of the population falling into this category.[51] The plaintiffs in *Mays v. Governor of Michigan* "allege that defendants' decision to switch the city of Flint's water source to the Flint River, which defendants knew was contaminated, resulted in a nonconsensual entry of toxic water into plaintiffs' bodies."[52] Flint originally received its water from Detroit, which sourced it from Lake Huron.[53] However, the residents of Flint argued that the defendants knew of this contamination in the Flint River and still switched the water source to save money.[54]

The plaintiffs contend that "defendants neglected to upgrade Flint's water-treatment system before switching to the Flint River despite knowing and being warned that the system was inadequate."[55] This was a gross act of negligence by the government entities in charge of making this decision, and "[a]fter receiving information that suggested the Flint River was contaminated with bacteria, toxic levels of lead, and other contaminants, defendants allegedly concealed scientific data and made misleading statements about the safety of the Flint River water."[56] This last contention by the plaintiffs drew the ire of the court, with the court going as far as calling the acts so "egregious and outrageous that they shock the contemporary conscience and support a finding of defendants' deliberate indifference to

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48 *See generally* Mays v. Governor of Mich., 954 N.W.2d 139 (Mich. 2020).

49 *Id.* at 160.

50 *U.S. Census Bureau Quick Facts: Flint City, Michigan QuickFacts*, U.S. CENSUS BUREAU (2022), https://www.census.gov/quickfacts/fact/table/flintcitymichigan/PST045221 (last visited Jan. 22, 2025).

51 *Id.*

52 *Mays*, 954 N.W.2d at 158.

53 Melissa Denchak, *Flint Water Crisis: Everything You Need to Know*, NRDC (Oct. 8, 2024), https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know#summary.

54 Adrian Dingle, *The Flint Water Crisis: What's really going on?*, AM. CHEM. SOC'Y (Dec. 2016), https://www.acs.org/education/chemmatters/past-issues/2016-2017/december-2016/flint-water-crisis.html.

55 *Mays*, 954 N.W.2d at 158.

56 *Id.* at 159.

plaintiffs' health and safety."[57] The *Mays* case is one example of harmful environmental policies that dramatically impacted marginalized communities.[58]

The Flint, Michigan Water Crisis was not an act of nature.[59] It was an ecological disaster caused by human-created policies that have had a dramatic effect on the community to this day.[60] The average income of Flint's residents is well below the poverty line, and approximately fifty-six percent of its population is African American.[61] In addition to this challenging economic position, there is an even more pressing question: Why did officials decide to switch their drinking water source to the Flint River, known for contamination?[62] Investigating these decisions could clarify how vulnerable communities are treated across our nation. The disaster in Flint brings to light many of these issues that plague similar communities across the country, where communities' health and safety are prioritized at lower levels than economic gains.[63] Profit over people seems to have been the driving factor in the Flint, Michigan Water Crisis.[64]

Flint's water crisis raises troubling questions about the intersection between poverty and race. Why are poor areas with a majority population of People of Color continually chosen as sites for toxic dumping, experiments, or tests?[65] The issue demands further inquiry to ensure such injustices will not be perpetuated. While Flint is undoubtedly one of the most prominent

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57 *Id.*

58 Denchak, *supra* note 53.

59 Danny Wimmer, *Flint Water Prosecution Team Response to Michigan Supreme Court's Decision on the Felony Flint Water Crisis Charges*, MICH. DEP'T ATT'Y GEN. (Sept. 20, 2023), https://www.michigan.gov/ag/news/press-releases/2023/09/20/flint-water-prosecution-team-response-to-michigan-supreme-court-decision-on-the-felony-charges#:~:text=%E2%80%9C The%20Flint%20Water%20Crisis%20was,the%20truth%20from%20the%20public.

60 *Justice for Flint Families is Long Overdue*, VEOLIA, https://veoliaflintfacts.com/?utm_term=&utm_campaign=Flint%2BCampaign&utm_source=adwords&utm_medium=ppc&hsa_acc=4272625608&hsa_cam=641448401&hsa_grp=114585780472&hsa_ad=483570783969&hsa_src=g&h (last visited Nov. 23, 2024).

61 *Flint, Michigan: Did Race and Poverty Factor into Water Crisis?*, CONGRESSMAN DAN KILDEE (Jan. 21, 2016), https://dankildee.house.gov/media/in-the-news/flint-michigan-did-race-and-poverty-factor-water-crisis.

62 Susan J Masten et al., *Flint Water Crisis: What Happened and Why?*, J. AM. WATER WORKS ASS'N (Dec. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5353852/#:~:text=While%20the %20water%20quality%20of,growing%20population%20(Carmody%202016).

63 Suzanne McGee, *Flint crisis reminds us: profit motive has no place when it comes to necessities*, THE GUARDIAN (Feb. 11, 2016), https://www.theguardian.com/money/us-money-blog/2016/feb/11/flint-water-crisis-profit-privatization.

64 Ari Shapiro, *Flint Mayor: With Water Crisis, Lawmakers Put 'Profit' Over the People*, NPR (Jan. 21, 2016), https://www.npr.org/2016/01/21/463865286/flint-mayor-with-water-crisis-lawmakers-put-profit-over-the-people.

65 *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, U.S. COMM'N ON C.R. (Oct. 2003), [hereinafter *Not in My Backyard*] https://www.usccr.gov/files/pubs/envjust/ch2.htm#:~:text=Environmental%20Justice%20and%20 Economic%20Opportunity,providing%20these%20communities%20economic%20opportunities.

and devastating examples in recent history, it is not the only incident of its kind and will not be the last. The same question looms over other impoverished, underrepresented, marginalized communities as well.

2. The Plight of the Quapaw Nation

Quapaw Nation is a federally recognized Native American tribe.[66] The tribe relocated to northeastern Oklahoma in 1839 after the U.S. government broke several treaties.[67] By 1943, mining companies had leased four out of every ten acres on the Quapaw Reservation after the U.S. Department of Interior declared each tribal landowner "incompetent."[68] The Quapaw Nation suffered great injustice when the federal government forced them into signing unfair leases for their land in the late nineteenth century.[69] Labeled "incompetent," the tribe received little to no compensation—a tragedy of vast proportions for the people involved.[70]

Another environmental disaster struck Picher, Oklahoma, and the surrounding towns of Ottawa County, illustrating the far-reaching impact of ecological disasters on marginalized communities, greatly impacting the Quapaw Nation.[71] Located near the Kansas state line in Northeastern Oklahoma,[72] Ottawa County is home to the Tar Creek Superfund Site. In the early to mid-1900s, the region was a hub for mining operations extracting lead and zinc.[73] Miners often dumped the byproduct, "chat," above ground or into tailing ponds.[74] Decades later, the forty-square-mile area, including Picher, Cardin, Hockerville, Quapaw, North Miami, and the legacy mine sites, continue to suffer from the long-term effects of these activities.[75]

In the 1980s, residents of Picher, Cardin, and surrounding areas were forced to abandon their homes due to hazardous contamination from the

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66 Jesse McKibben, *Resolution 5880*, QUAPAW TRIBE OF OKLA. (June 21, 1971), http://www.quapawtribe.com/AgendaCenter/ViewFile/Agenda/05271980-745.

67 Dennis Zotigh, *The Quapaw Treaty Was Honored for Only Six Years Before the United States Broke It*, SMITHSONIAN MAG. (May 22, 2024), https://www.smithsonianmag.com/blogs/national-museum-american-indian/2024/05/22/quapaw-treaty-of-1818-a-treaty-that-was-honored-only-6-years/.

68 Quapaw Tribe of Okla. v. Blue Tee Corp. 653 F.Supp.2d 1166, 1171 (N.D. Okla. 2009).

69 Jim North, *Exiled to Indian Country*, QUAPAW TRIBE (Jan.1, 2023), https://www.ou.edu/gaylord/exiled-to-indian-country/content/quapaw.

70 JOINT ECON. COMM. NO. 91-464, at 465 (1969).

71 *See generally Not in My Backyard*, *supra* note 65.

72 Jana Hayes, *How the once-booming mine town of Picher, Oklahoma became America's most toxic ghost town*, THE OKLAHOMAN (Oct. 31, 2023), https://www.oklahoman.com/story/news/2023/10/30/how-picher-oklahoma-became-americas-most-toxic-ghost-town/70992699007/.

73 *Id.*

74 *Tri-State Mining District - Chat Mining Waste*, U.S. EPA (June 2007), https://www.deq.ok.gov/wp-content/uploads/land-division/ChatUseRestrictions.pdf.

75 *Id.*

mines.[76] The area was quickly declared the Tar Creek Superfund site by the EPA due to its high concentrations of lead, zinc, and cadmium in dust piles, intense acidity in groundwater, and inadequate underground tunnels leading to landslides under lawns, houses, and streets—all remnants from once-thriving ore mining activity.[77] Initially chosen for its rich land and vast natural resources, the area turned into a vast wasteland after the mining companies left, becoming a mere shell of its former self.[78]

By the time the mines were abandoned, the Quapaw people had lost any potential mining profits and faced only the lasting damage from the chat dumps.[79] According to *Quapaw Tribe v. Blue Tee Corp*, "[r]ather than require mining companies to dispose of waste materials, [the U.S. Department of the Interior] form leases require[ing] mining companies to leave on the surface any chat left over from the milling process, because chat could potentially be re-milled by the mining companies or sold by the landowners."[80] The most aggravating part of this is the statement "could be sold by the landowners," as chat is a byproduct of mining that has little value and is toxic.[81] This tragedy caused significant health problems in the surrounding communities.[82] Tribal leaders and the EPA continue to address the effects of this poisonous Superfund through ongoing cleanup efforts.[83] After the tragedy in Flint, Michigan due to the government's mismanagement of resources, it is clear this is not an isolated incident.[84] The Quapaw tribe in Oklahoma also suffered injustices at the hands of those who sought to profit financially while disregarding human welfare and environmental concerns.[85]

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76 Dan Shepard, *Last Residents of Picher, Oklahoma Won't Give Up the Ghost (Town),* NBC NEWS (2014), https://www.nbcnews.com/news/investigations/last-residents-picher-oklahoma-won-t-give-ghost-town-n89611.

77 *Tar Creek Superfund Site*, OKLA. ENV'T QUALITY, https://www.deq.ok.gov/land-protection-division/cleanup-redevelopment/superfund/tar-creek-superfund-site/ (last visited Nov. 27, 2024). *See also Five-Year Review Tar Creek Superfund Site Ottawa County, Oklahoma*, EPA, 1 (Apr. 2000), https://semspub.epa.gov/work/06/9291408.pdf.

78 Katie Hallum, *Hope in sight for Oklahoma Superfund site thanks to efforts by Quapaw Nation*, KOSU (Aug. 27, 2024, 06:00 AM), https://www.kosu.org/local-news/2024-08-27/hope-in-sight-for-oklahoma-superfund-site-thanks-to-efforts-by-quapaw-nation.

79 *See generally* JOINT ECON. COMM. NO. 91-464, at 465 (1969).

80 Quapaw Tribe of Okla. v. Blue Tee Corp. No. 03-CV-0846-CVE-PJC, ¶ 3 (N.D. Okla. Dec. 28, 2007) (Casetext).

81 *Id*.

82 U.S. EPA, EPA530-F-07-016A, BENEFICIAL USES OF CHAT FINALIZED (2007).

83 Madelyn Bremer, *Celebrating 10 Years of Tribe's Cleanup Partnership at Tar Creek Superfund Site*, U.S. EPA, https://www.epa.gov/mo/celebrating-10-years-tribes-cleanup-partnership-tar-creek-superfund-site (last updated Apr. 19, 2024).

84 Jessica Trounstine, *How racial segregation and political mismanagement led to Flint's shocking water crisis*, THE WASH. POST (Feb. 8, 2016, 10:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/08/heres-the-political-history-that-led-to-flints-shocking-water-crisis/.

85 *See Environment*, QUAPAW NATION, https://www.quapawtribe.com/563/Environmental (last visited Nov. 14, 2024).

II. CREATING THE LEGAL FRAMEWORK FOR ENVIRONMENTAL JUSTICE

A. Environmental Justice Movement—Enacting Legislation

The 1970s was a monumental time for ecological development and environmental protection advances. Some of the progress included the creation of the National Environmental Policy Act,[86] the Clean Air Act,[87] the Clean Water Act,[88] and the Toxic Substance Control Act.[89] The Clean Air Act safeguards public health from pollutants,[90] while the Clean Water Act protects against contamination and toxic substances in streams, rivers, and lakes.[91] Finally, the Toxic Substance Control Act limited hazardous chemicals in American communities.[92] These laws laid the foundation for solutions to environmental racial justice.

1. The Clean Air Act

The Clean Air Act (CAA) of 1970[93] is a federal law designed to protect public health, the environment and atmosphere, and overall welfare by regulating emissions from both stationary and mobile sources.[94] Through this legislation, the EPA established National Ambient Air Quality Standards to ensure clean air nationwide—a critical step in protecting our environment for future generations.[95] As one of the first major environmental protection acts

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86 *What is the National Environmental Policy Act?*, U.S. EPA, https://www.epa.gov/nepa/what-national-environmental-policy-act#:~:text=The%20National%20Environmental%20Policy%20Act%20(NEPA)%20was%20signed%20into%20law,actions%20prior%20to%20making%20decisions (last updated Sept. 4, 2024).

87 *Air Quality Act (1967) Or The Clean Air Act (CAA)*, U.S. DEP'T OF THE INTERIOR, https://www.boem.gov/air-quality-act-1967-or-clean-air-act-caa#:~:text=The%20Clean%20Air%20Act%20(CAA)%20(42%20U.S.C.,public%20health%20and%20the%20environment (last visited Nov. 14, 2024).

88 *Summary of the Clean Water Act*, U.S. EPA, https://www.epa.gov/laws-regulations/summary-clean-water-act (last updated June 12, 2024).

89 *Summary of the Toxic Substances Control Act*, U.S. EPA, https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act#:~:text=The%20Toxic%20Substances%20Control%20Act%20of%201976%20provides%20EPA%20with,%2C%20drugs%2C%20cosmetics%20and%20pesticides (last updated Sept. 9, 2024).

90 *Air Quality Act (1967) Or The Clean Air Act (CAA)*, *supra* note 87.

91 *Summary of the Clean Water Act*, *supra* note 88.

92 *Summary of the Toxic Substances Control Act*, *supra* note 89.

93 *Air Quality Act (1967) Or The Clean Air Act (CAA)*, *supra* note 87.

94 Shelia Hu, *The Clean Air Act 101*, NRDC (Oct. 21, 2022), https://www.nrdc.org/stories/clean-air-act-101.

95 *Air Quality Pollutants and Standards*, AIR QUALITY MGMT. DIST., https://www.airquality.org/air-quality-health/air-quality-pollutants-and-standards#:~:text=The%20U.S.%20Environmental%20Protection%20Agency,human%20health%20and%20the%20environment (last visited Nov. 14, 2024).

passed by Congress, the CCA significantly impacted communities nationwide.[96] It created standards that corporations and cities must follow to comply with and promote public health, providing for a safer country.[97]

2. The Clean Water Act

The Clean Water Act (CWA) of 1972[98] is another federal policy regulating water quality and discharge standards, safeguarding public health from pollutants and toxic chemicals.[99] As an expansion of the 1948 Federal Water Pollution Control Act, the CWA formed the foundation for EPA-implemented programs, including wastewater regulations aimed at protecting waterway ecosystems and public health.[100] Additionally, the CWA works towards achieving national surface water quality by setting criteria guidelines for pollutant concentrations in U. S. waterways.[101] This Act was integral to safeguarding our nation's water and health by providing clear regulations to ensure Americans had access to clean drinking water.[102] These laws lay the foundation for moving toward environmental racial justice.[103]

Unfortunately, the CWA could not prevent the Flint River tragedy in Michigan, which resulted from a decision that put citizens at potentially dire risk regarding public safety and long-term health effects.[104] The disastrous event that caused so much suffering was the direct result of neglect and greed on behalf of a state government.[105] This tragedy raises essential questions: Is current policy enough to prevent another occurrence, or should additional

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96 *Air Quality Act (1967) Or The Clean Air Act (CAA)*, *supra* note 87.

97 Paul A. Solomon, *Air Pollution and Health: Bridging the Gap from Sources to Health Outcomes*, 119 ENV'T HEALTH PERSPS. 156, 156 (2011).

98 *Summary of the Clean Water Act*, *supra* note 88.

99 Clean Water Act (Federal Water Pollution Control Act Amendments) of 1972, Pub. L 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387); *Water*, ENV'T. & NAT. RES. DIV. U.S. DEP'T JUST., https://www.justice.gov/enrd/water#:~:text=Federal%20enforcement%20of%20industrial%20dischargers,the%20use%20of%20federal%20resources (last updated Jan. 30, 2024).

100 *Id.*; *Summary of the Clean Water Act*, *supra* note 88.

101 Clean Water Act 86 Stat. 816; *Water*, *supra* note 99.

102 *Clean Water Act (CWA)*, BUREAU OCEAN ENERGY MGMT. U.S. DEPT. INTERIOR https://www.boem.gov/environment/environmental-assessment/clean-water-act-cwa (last visited Nov. 10, 2024).

103 *Environmental & Climate Justice Issue Brief: Clean Water*, NAACP, https://naacp.org/resources/environmental-climate-justice-issue-brief-clean-water#:~:text=The%20NAACP's%20Stance%3A,necessities%2C%20including%20safe%20drinking%20water (last visited Nov. 10, 2024).

104 Erin M. Hodgson, *Thirsty for Justice: How the Flint Water Crisis Highlights the Insufficiency of the Citizen Suit Provision of the Safe Drinking Water Act*, 44 S. ILL. U. L.J. 347, 349 (2020).

105 Keishaun Wade, *The Flint water crisis is not over, ten years later*, EMANCIPATOR (Apr. 25, 2024), https://theemancipator.org/2024/04/25/topics/environmental-racism/the-flint-water-crisis-is-not-over-ten-years-later/#:~:text=Our%20water%20crisis%20was%20the,corrupt%20actors%20and%20state%20officials.

measures be taken? Considering advances in environmental justice movements, the CWA must be revised accordingly to ensure such devastation never happens again.[106]

3. The Toxic Substance Control Act

The Toxic Substances Control Act (TSCA) of 1976 gives the EPA legal authority to regulate and manage hazardous substances like lead and oversee the cleanup and disposal of such materials.[107] Its enforcement protocols include reporting requirements, record retention, and rigorous testing procedures.[108] However, TSCA excludes food items, drugs, cosmetics, and pesticides—all essential components of modern society that must remain untainted by dangerous chemical contaminants to protect our health and environment.[109]

The TSCA's influence was evident in Park Hills, Missouri, when the EPA ordered the Doe Run Company[110] to clean up a lead-contaminated chat dump that was polluting the surrounding area.[111] In contrast, the TSCA did not prevent hazardous waste issues from persisting in Picher, Oklahoma and the surrounding communities, where cleanup efforts were insufficient.[112]

B. Other Relevant Regulations and Presidential Initiatives

1. The National Environmental Policy Act

The National Environmental Policy Act (NEPA)[113] established the responsibility of each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-

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106 *See* Hodgson, *supra* note 104, at 349.

107 Toxic Substances Control Act of 1976, P.L. 94-469, 90 Stat. 2003 (codified as amended at 15 U.S.C. §2601–2629).

108 *Id*.

109 *Id*.

110 The Doe Run Company is a mining and metal production company based in Southeast Missouri. *What We Do*, THE DOE RUN CO., https://doerun.com/what-we-do/ (last visited Jan. 17, 2024).

111 Danielle Fidler, *Doe Run Resources Corporation Settlement*, EPA (Dec. 6, 2023), https://www.epa.gov/enforcement/doe-run-resources-corporation-settlement.

112 Picher, Oklahoma no longer exists as a community. In spring 2008 an F4 tornado damaged many houses and killed six people. Due to the possibility of collapsing mine shafts, the EPA determined that the town was dangerous to inhabit. C. Allen Matthews & Frank D. Wood, *Picher*., OKLA. HIST. SOC'Y: ENCYC. OKLA. HIST. & CULTURE, https://www.okhistory.org/publications /enc/entry?entry=PI002 (last visited Nov. 18, 2024).

113 *See generally* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§4321–4370m-12).

income populations."[114] The passage of NEPA was a significant milestone in the environmental justice movement.[115] NEPA's passage significantly impacted the EPA, as it is the primary agency responsible for addressing nationwide environmental issues.[116] What sets NEPA apart is that its mandate extends beyond the EPA to every federal agency.[117] Now, every federal agency is required to include environmental justice in its overall arching mission.

2. Presidential Initiatives

Presidentially-mandated guidance has directed agencies to consider human health, economic welfare, and social effects in their NEPA analyses, with an explicit focus on the impact on minority communities as well as those of lower socioeconomic status.[118] While NEPA has guided federal consideration of health, economic welfare, and social efforts at the federal level,[119] a 1994 directive from President Bill Clinton expanded this focus to explicitly include the impact on marginalized groups.[120]

In 2022, President Joe Biden announced the Justice40 Initiative, which stated that "the Federal Government has made it a goal that 40 percent of the overall benefits of certain Federal . . . investments flow to disadvantaged communities that are marginalized by underinvestment and overburdened by pollution."[121] When President Biden signed Executive Order 14008, his goal was that the investments would create new jobs and promote diversity.[122] In the Executive Order, President Biden stated: "The recommendations shall focus on investments in the areas of clean energy and energy efficiency; clean transit; affordable and sustainable housing; training and workforce development; the remediation and reduction of legacy pollution; and the development of critical clean water infrastructure."[123]

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114 *Environmental Justice and the National Environmental Policy Act (NEPA),* EPA (Nov. 5, 2024), https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act.

115 *See id.*

116 *Id*.

117 *Id*.

118 Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, 32 C.F.R. § 651.17 (1994).

119 National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§4321–4370m-12).

120 32 C.F.R. § 651.17 (1994). *See,* Presidential Documents, 59 Fed. Reg. 32 (Feb. 16, 1994).

121 Justice40, *A Whole-Of-Government Initiative*, THE WHITE HOUSE, https://www.whitehouse.gov/environmentaljustice/justice40/ (last visited Oct. 23, 2024).

122 *Executive Order on Tackling the Climate Crisis at Home and Abroad*, THE WHITE HOUSE (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.

123 Exec. Order 14008 § 223.

The impacts of such an initiative will be felt at all levels of government and across the nation. Given this, implementing the Justice40 Initiative is vital to its short-term and long-term success. For the Justice40 initiative to achieve its intended benefits, it must be implemented efficiently, ensuring that resources are distributed without gaps or insufficiencies.[124] According to a White House press release, "[t]o meet the goal of the Justice40 Initiative, the Administration is transforming hundreds of Federal programs to ensure that disadvantaged communities receive the benefits of new and existing Federal investments [in these categories]."[125]

To ensure smooth implementation, the Biden Administration has committed to transforming federal agencies in order to invest and engage within communities.[126] This undertaking cannot be taken lightly as the impact will be felt across the nation from the lowest to highest levels. Over time, we will begin to feel the effects of this initiative. Those outcomes will shape how we, as a nation, perceive the success of the Justice40 Initiative's implementation.[127]

The White House's rationale is that "[t]hese investments will help confront decades of underinvestment in disadvantaged communities and bring critical resources to communities that have been overburdened by legacy pollution and environmental hazards."[128] Undoubtedly, the Justice40 Initiative will impact these communities and those that have been the subject of environmental injustice over the past two centuries. However, the correct implementation will prove to be the cornerstone of whether it will be successful or not in the eyes of the people. It must be championed by those with the power to do so. Most importantly, it must not be repealed by future administrations. The Justice40 Initiative can truly be impactful if given the chance.

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124 Justice40, *supra* note 121.

125 *Id.* Justice40 is an initiative to ensure that at least 40% of the benefits of federal climate and clean energy investments are designed to assist disadvantaged communities. Initiated by the Biden administration, the program seeks to address historical injustices and inequities by prioritizing environmental justice in government funding and initiatives. The initiative is part of a broader effort to combat climate change and address socioeconomic disparities. By focusing on communities that have been marginalized or disproportionately affected by pollution and climate impacts, Justice40 aims to improve access to clean air, water, and other essential resources alongside promoting job creation in green industries. It involves collaboration across various federal agencies to create a more equitable approach to environmental policy and to ensure that these communities have a voice in decision-making processes that affect their health and well-being.

126 *Id.*

127 Margaret A. Walls et al., *Implementation of Justice40: Challenges, Opportunities, and a Status Update*, RES. FOR THE FUTURE (Jan. 22, 2024), https://www.rff.org/publications/reports/implementation-of-justice40-challenges-opportunities-and-a-status-update/.

128 Justice40, *supra* note 121.

III. CURRENT SOLUTIONS AND FUTURE CHALLENGES

A. States Take the Lead in Environmental Justice Initiatives

The past few years have proven groundbreaking for the environmental justice movement, starting at the state and federal levels. In January 2020, a powerful statement was made for environmental justice in the case of *Atlantic Coast Pipeline v. Union Hill, Virginia*.[129] The case involved the proposed Atlantic Coast Pipeline (ACP), a natural gas pipeline designed to run from West Virginia through Virginia to North Carolina.[130] The pipeline's construction sparked significant controversy, particularly regarding its impact on Union Hill, a historically African American community in Virginia.[131]

Union Hill residents, along with various environmental groups, strongly opposed the pipeline, raising concerns about potential environmental injustices, such as pollution and public health risks.[132] They argued that the pipeline's construction and operation would disproportionately harm their community, a community with historical ties to African American heritage.[133]

In 2017, the Federal Energy Regulatory Commission (FERC) approved the ACP, stating that the project would serve the public interest.[134] The community members challenged the decision, contending that the FERC had not fully considered the environmental impacts and the community's historical significance before granting permission.[135]

In 2020, the U.S. Court of Appeals for the Fourth Circuit ruled against FERC, stating that the commission failed to adequately assess the environmental impacts on the Union Hill community.[136] The ruling highlighted the importance of comprehensive environmental reviews that consider both environmental and social impacts, particularly on historically marginalized communities.[137] The Fourth Circuit emphasized that federal agencies must assess the effects of major infrastructure projects on these

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129 Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68 (4th Cir. 2020).

130 *Id.* at 71.

131 *Id.*

132 Ben Paviour et al., *A Historically Black Town Stood in the Way of a Pipeline-So Developers Claimed Itt Was Mostly White*, THE GUARDIAN (Sept. 16, 2021), https://www.theguardian.com/us-news/2021/sep/16/virginia-atlantic-coast-pipeline-union-hill-historically-black-town.

133 *Friends of Buckingham*, 947 F.3d at 85–86.

134 *See* Lindsey Gilpin, *Supreme Court clears way for Atlantic Coast Pipeline to cross Appalachian Trail*, GRIST, (June 15, 2020), https://grist.org/energy/scotus-appalachian-trail-atlantic-coast-pipeline/.

135 Paviour et al., *supra* note 132.

136 *Friends of Buckingham*, 947 F.3d at 86.

137 Paviour et al., *supra* note 132.

communities.[138] *Atlantic Coast Pipeline v. Union Hill* underscores the need for a more inclusive approach when creating environmental policy.[139]

The case demonstrates why it is more important now than ever before that we take steps to protect vulnerable communities and those most impacted by our actions related to climate change and energy production.

On September 18, 2020, Governor Phil Murphy made history when New Jersey became the first state to mandate permit denials for certain facilities that met the list of requirements if an environmental justice analysis done by the state determines a negative effect on overburdened communities in the area that the facility is seeking a permit.[140] This momentous passing of legislation is mainly because of the tireless advocacy of New Jersey Environmental Justice group members and is a significant victory for their commitment to fair protection and accountability. The law establishes New Jersey as the first state to implement such a requirement, with hopes that it will serve as a model for other states to pass similar legislation.

In addition, Vermont is leading the way in supporting environmental justice with a new policy enacted in May 2022. This policy mandates the creation of an environmental justice tool, like the one developed by New Jersey,[141] and requires state agencies to consider community health and welfare when designing rules and procedures.[142] By integrating this new policy, Vermont strengthens the commitment to fostering a more equitable society for future generations.[143]

In a showing of how impactful the Vermont bill was, in June 2022, the Maryland Department of the Environment (MDE) released its Environmental Justice Screening Tool—a comprehensive tool designed to bolster agency compliance and monitoring in areas with permitting activities relating to environmental justice.[144] To further promote this initiative, an ambitious bill was introduced in the state senate to require permit applicants from the MDE to obtain their Environmental Justice Score using the screening tool for any census tract of application approval consideration.[145] Though unsuccessful, Maryland's attempt to pass the bill shows that it is a state willing to work

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138 *Friends of Buckingham*, 947 F.3d at 87–88.

139 *See* Gilpin, *supra* note 134.

140 Stephanie Raiani, *Environmental Justice and the NJDEP Permitting Process*, F1RST ENV'T (Jan. 23, 2023), https://www.firstenvironment.com/environmental-justice-and-the-njdep-permitting-process/#:~:text=On%20September%2018%2C%202020%2C%20Governor,communities%20when%20reviewing%20certain%20permit.

141 VT. STAT. ANN. tit. 3, § 6007 (West 2022).

142 *See id.* at § 6001.

143 *See id.* at § 6007.

144 *See MDE'S Environmental Justice Screening Tool,* MD., https://mde.maryland.gov/Environmental_Justice/Pages/EJ-Screening-Tool.aspx (last visited Nov. 15, 2024).

145 H.B. 24, 2024 Reg. Sess. (Md. 2024).

towards creating a more just system and is looking out for marginalized communities, like New Jersey was, in passing its bill.[146]

Another example of a state following suit is Wisconsin, where officials developed WEET,[147] a web-based environmental justice and health equity mapping tool. The state's Economic Development Corporation, along with three other agencies and local communities, is working to make the initiative accessible to communities across the state.[148] This program in Wisconsin highlights how states are increasingly aligning with trends in environmental justice and pushing forward reforms that could help prevent disasters like those in Flint or Picher.

One last but crucially important event occurred in Minnesota. In 2022, the Minnesota Pollution Control Agency updated its environmental justice framework with new initiatives to help support marginalized communities.[149] As part of its mission, the agency has crafted guidance for facilities on building solid relationships with local governments and community organizations to address any concerns about the potential impacts of climate change and other environmental hazards.[150] Its initiative aims to "[i]dentify areas where low-income Minnesotans, people of color, and others may be experiencing more harm or are more susceptible to environmental conditions as areas of focus for environmental justice action."[151]

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146 *Id.*

147 See Wisconsin Environmental Equity Tool to understand and advance environmental and health equity; *Gov. Evers Announces Wisconsin Environmental Equity Tool to Assess Environmental and Public Health Needs Statewide*, WIS. ECON. DEV. (Oct. 7, 2021) https://wedc.org/gov-evers-announces-wisconsin-environmental-equity-tool-to-assess-environmental-and-public-health-needs-statewide/.

148 *Id.*

149 *See* NED. BROOKS, ENVIRONMENTAL JUSTICE FRAMEWORK 1 (2022).

150 *See id.*

151 *See id.* at 2, 3.

> Building on the foundation of the MPCA's policy and strategic plan goal, the framework seeks to ensure that:
> • Pollution does not have disproportionate negative impacts on any group of people.
> • The benefits, opportunities, and risks of agency policies, decisions, and activities are fairly and equitably distributed.
> • All individuals and groups are given the opportunity for meaningful involvement in agency decisions that may impact them.
> • Environmental justice concerns are given due consideration by agency decision-makers during the development, implementation, and enforcement of environmental laws, regulations, and policies.
> • The MPCA and its stakeholders have mechanisms in place to regularly evaluate progress, success, and failure in meeting the agency's goals and the outcomes of those evaluations are used to inform future planning and decision-making by the agency.
>
> *Id.*

B. Current and Future Challenges in Addressing Environmental Racism

After exploring a few critical current trends regarding environmental justice, it is vital to turn to current and future challenges. Overall, challenges to the movement include political challenges, budgetary restraints, and ecological issues such as global warming.

The first challenge to the issue is political changes and problems that will arise throughout the process. Change is not always welcome. The current political divide in America will undoubtedly impact these environmental justice initiatives and acts being passed and supported across the country, both in federal and state governments. Additionally, other issues are currently rated at a higher priority level in political issue polls, which may cause a slowdown to the trends identified above. Similar initiatives to those passed in Minnesota were defeated in Illinois and Delaware when they attempted to enact legislation in 2022 that would have allowed for changes of permissible operations at specific sites in overburdened communities.[152]

The second challenge is the budget and monetary concerns of local communities, individual states, and the federal government. While not the most critical challenge, with current economic conditions and trends, a recession could halt the implementation and creation of these essential initiatives.

The third challenge identified is environmental threats such as global warming. Climate change creates significant ecological risks, which come with a hefty financial cost, particularly for minority and low-income communities.[153] As these threats continue to grow, they will worsen these populations' vulnerability, exposing them to mounting challenges.[154] These new environmental justice initiatives could benefit these communities and allow them to live in healthier, more wholesome environments.

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152 *See* H.B. 4093, 102nd Gen. Assemb., Reg. Sess. (Ill. 2023); *see also* H.B. 466, 151st Gen. Assemb., Reg. Sess. (Del. 2022).

153 Ileana Wachtel, *Study finds extreme temperature swings hit minority, low-income communities hardest*, USC DORNSIFE (May 22, 2024), https://dornsife.usc.edu/stories/study-finds-extreme-temperature-swings-hit-minority-low-income-communities-hardest/.

154 *See id.*

IV. THE AIR AND WATER ARE NOT THE ONLY ENVIRONMENTS THAT CREATE SPHERES OF ENVIRONMENTAL STRUCTURAL RACISM

A. Examining Miseducation and Non-Education

1. Miseducation as a Tool for Maintaining Inequality

Miseducation refers to the spread of false, misleading, or incomplete information within educational systems.[155] Historically, curricula have marginalized or completely omitted the contributions and histories of racial minorities.[156] This absence fosters a skewed understanding of society and can lead to the dehumanization of these groups.[157] For instance, when the contributions of Black, Indigenous, and other People of Color are downplayed or ignored, students miss a holistic understanding of history and culture. This not only affects the identity and self-worth of students from these communities but also shapes the perceptions of their peers, leading to a cycle of prejudice and discrimination.[158]

Moreover, miseducation often manifests as biased narratives that reinforce negative stereotypes.[159] In classrooms where discussions about race and racism are either glossed over or presented in a one-dimensional manner, students may internalize harmful beliefs about themselves and others.[160]

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155 *See* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/miseducation (last visited Nov. 12, 2024) (discussing how miseducation is the "the fact or process of educating people in a way that is not correct.").

156 Gloria J. Ladson-Billings, *Can We At Least Have* Plessy - *The Struggle for Quality Education*, 85 N.C. L. REV. 1279, 1282 (2007) ("The same is true about education research, i.e., most education research aimed at students of color ultimately benefits white children. For example, innovations such as cooperative learning and early education had their genesis in Black and brown communities. Their ultimate beneficiaries, however, were white students.").

157 *See Role of Psychology and APA in Dismantling Systemic Racism Against People of Color in U.S.*, AM. PSYCH. ASS'N (Oct. 2021), [hereinafter *Role of Psychology and APA*], https://www.apa.org/about/policy/dismantling-systemic-racism ("Although education is intended to liberate and enlighten, it has too often oppressed and silenced the voices of people of color who know and have experienced a different history. Psychological education comes from a White, Western European, and ethnocentric perspective that has distorted the lives of people of color, omitted their contributions in history, and portrayed them in pathological and stereotypical ways. The detrimental impact to people of color is demeaning, and it provides those with power and privilege a false reality that allows them to oppress and pass racist policies in innocence and naivete.").

158 Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1980) ("Today, most Black children attend public schools that are both racially isolated and inferior.").

159 *See Role of Psychology and APA*, *supra* note 157.

160 *See id.*

These patterns perpetuate a societal view that devalues the experiences and realities of marginalized groups, thereby facilitating structural racism.[161]

2. Non-Education: The Barrier to Empowerment

Non-education, or the lack of access to quality education, is another significant barrier to racial equity.[162] Structural barriers—such as socioeconomic disparities, underfunded schools in minority neighborhoods, and discriminatory policies—contribute to an educational landscape where students of color often receive inferior instruction and resources.[163] The consequences of non-education are profound: limited access to advanced coursework, reduced opportunities for college readiness, and a lack of exposure to diverse perspectives.[164]

Educational achievement directly impacts individuals' socioeconomic mobility.[165] When entire communities lack access to quality education, they become trapped in a cycle of poverty and disenfranchisement.[166] This educational gap not only harms individuals but also undermines community development and economic stability.[167] The perpetuation of non-education thus becomes a vital mechanism in maintaining structural racism, as it

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161 Bell, Jr., *supra* note 158, at 519.

162 The link between racial and ethnic minorities and poverty is long-standing. Studies have noted concerns about this segment of the population that falls at the intersection of poverty and minority status in schools and how this affects their access to quality education. In 2018, we reported that during high school, students in high-poverty areas had less access to college-prep courses. Schools in high-poverty areas were also less likely to offer math and science courses than most public four-year colleges expected students to take in high school. The racial composition of the highest poverty schools was also eighty percent Black or Hispanic. *Racial Disparities in Education and the Role of Government*, GOV'T ACCOUNTABILITY OFF. (June 29, 2020), https://www.gao.gov/blog/racial-disparities-education-and-role-government.

163 *See* Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods – A Constitutional Insult*, ECON. POL'Y INST. (Nov. 12, 2014), https://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/.

164 John Brittain & Callie Kozlak, *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. SOC. JUST. 591, 594 (2007).

165 *Id*. at 605.

166 *See generally id.* (discussing how socioeconomic status of minority students mixed with lack of access to quality education is a recipe for continuance).

167 *Socioeconomic Factors*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 1, 2023), https://www.cdc.gov/dhdsp/health_equity/socioeconomic.htm#:~:text=Individuals%20with%20lower%20levels%20of,a%20greater%20risk%20of%20hypertension ("Individuals with lower levels of educational attainment are more likely to lack sociopolitical power and economic resources, leading to adverse occupational, residential, and recreational conditions associated with negative health consequences. These adverse conditions lead to differential exposures to stressors (e.g., unemployment, crime, violence) and fewer resources (e.g., recreation, physical activities) to cope with the accumulation of stressors . . . ").

ensures that marginalized groups remain at a disadvantage in a society that increasingly values education as a pathway to success.[168]

3. The Interplay Between Miseducation and Non-Education

The relationship between miseducation and non-education is reciprocal and reinforcing.[169] Miseducation can lead to non-education by creating a disinterest in schooling.[170] Students who do not see their histories and cultures reflected in the curriculum may disengage from their education.[171] This disengagement can result in lower academic performance, higher dropout rates, and a lack of pursuit of higher education—all of which contribute to the perpetuation of structural racism.[172]

Conversely, non-education exacerbates miseducation. When students lack access to quality educational resources, they become vulnerable to accepting society's biased narratives.[173] This lack of critical thinking skills and knowledge limits their ability to challenge stereotypes and advocate for themselves and their communities.[174] As a result, structural racism remains entrenched, with both miseducation and non-education functioning as barriers to social progress.[175]

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168 Brittain & Kozlak, *supra* note 164, at 594.

169 Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

170 *Id.* at 489–90.

171 *See* Madeline Will & Ileana Najarro, *What Is Culturally Responsive Teaching*, EDUCATIONWEEK (Apr. 18, 2022), https://www.edweek.org/teaching-learning/culturally-responsive-teaching-culturally-responsive-pedagogy/2022/04 (discussing how there is data that shows that there are teaching methods that involve incorporating their students' identities into the classroom, and those methods tend to provide for effective instruction and students considering their cultural differences as assets and not barriers to learning).

172 *See* Lauren Bushnell, *Educational Disparities Among Racial and Ethnic Minority Youth in the United States*, BALLARD BRIEF (2021), https://ballardbrief.byu.edu/issue-briefs/educational-disparities-among-racial-and-ethnic-minority-youth-in-the-united-states#:~:text=Individuals%20from%20stigmatized%20and%20underrepresented,inclusion%20in%20the%20college%20environment.&text=As%20a%20result%2C%20less%20than,students%20regressing%20in%20recent%20years (discussing how minority students, even those who are accepted and succeed in higher education, are at risk for demonstrating lower levels of overall success and result in feeling lack of acceptance and inclusion).

173 *See Tackling discrimination*, COUNCIL OF EUR. PORTAL, https://www.coe.int/en/web/campaign-free-to-speak-safe-to-learn/tackling-discrimination/-/asset_publisher/4a3esYbkstv9/content/improving-well-being-at-school#:~:text=Stereotyping%20is%20difficult%20to%20root,of%20elderly%20relatives%20or%20others (last visited Nov. 12, 2024) (discussing how the issue of stereotyping is compounded when minority groups are underrepresented at school, and how another key challenge is the negative stereotypes of minority groups that are deeply embedded in school life).

174 Brittain & Kozlak, *supra* note 164, at 596.

175 Ladson-Billings, *supra* note 156, at 1282.

4. The Role of Miseducation and Non-Education as Factors Supporting Structural Racism

African American children, like most children in the United States, spend the majority of their time in public and private schools.[176] As a result, they often find themselves at the center of environmental and structural racism, frequently resulting in non-education or miseducation.[177] Structural racism is a complex system of social structures that perpetuate racial inequality and disadvantage, typically operating beneath the surface of individual attitudes and behaviors.[178] Central to the perpetuation of structural racism is the intertwined phenomena of miseducation and non-education.[179] These two factors not only hinder the academic and professional advancement of marginalized communities but also reinforce stereotypes, limit opportunities, and perpetuate systemic inequalities.[180]

5. Historical Context of Educational Disenfranchisement

The struggle for equitable access to education has been a central theme in the African American experience in the United States.[181] Throughout history, systemic barriers have consistently sought to disenfranchise African Americans, with education serving as both a battleground and a beacon of hope.[182] Despite the progress made since the Civil Rights Movement, various forms of disenfranchisement in K-12 and higher education continue to persist, impacting generations of African Americans and perpetuating cycles of inequality.[183]

The roots of educational disenfranchisement for African Americans trace back to the era of slavery when laws prohibited the education of enslaved individuals.[184] Following emancipation, the establishment of separate and unequal educational systems further entrenched the

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176 Katherine Schaeffer, *U.S. public, private and charter schools in 5 charts*, PEW RSCH. CTR. (June 6, 2024), https://www.pewresearch.org/short-reads/2024/06/06/us-public-private-and-charter-schools-in-5-charts/.

177 *See generally* Bushnell, *supra* note 172.

178 *Id.*

179 *Id.*

180 *See generally Tackling discrimination*, *supra* note 173.

181 *The Struggle for Equality*, SMITHSONIAN AM. ART MUSEUM, https://americanexperience.si.edu/historical-eras/post-war-united-states/pair-untitled-library/ (last visited Jan. 19, 2025). Funding of public schools is primarily through local private property taxes. *See* Schaeffer, *supra* note 176. These practices and policies are not consciously maintained because someone deliberately intends to discriminate based on race (though they may have originated with that objective in mind). Thus, on the surface, they appear to be race-neutral. But these policies have opportunities and outcomes for People of Color, for example, by diminishing the quality of education in schools.

182 Brittain & Kozlak, *supra* note 164, at 596–600.

183 *See* Bell, Jr., *supra* note 158, at 518–19.

184 *See generally id.*

disparities.[185] The landmark Supreme Court case *Brown v. Board of Education* (1954)[186] declared racial segregation in public schools unconstitutional. Yet, the implementation of this ruling faced significant resistance, resulting in the continuation of segregated and inferior educational systems for African American students.[187]

Even after desegregation, African Americans continued to face numerous obstacles in accessing quality education.[188] Black schools struggled with chronic underfunding, a lack of essential resources, inexperienced teachers, and inadequate facilities.[189] This systemic neglect not only limited educational opportunities but also fostered an environment where African American students could not thrive academically.[190]

6. Socioeconomic Barriers

Socioeconomic status plays a crucial role in educational access and quality. Many African American families face economic disadvantages due to historical injustices, including discriminatory labor practices and housing policies.[191] These financial barriers limit access to quality K-12 education and resources, such as tutoring and extracurricular activities, essential for academic success.[192] Consequently, the education system often funnels African American students into underperforming schools that lack the necessary support to prepare them for higher education.[193]

Furthermore, the rising costs of higher education create additional barriers for African American students. While financial aid is available, systemic issues such as credit disparities and limited financial literacy can deter students from pursuing college.[194] Moreover, the burden of student loan debt disproportionately impacts African Americans, who are more likely to borrow and face higher levels of debt compared to their white

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185 Brittain & Kozlak, *supra* note 164, at 596–600.

186 *Id.* at 595–96 ("It has been more than five decades since the U.S. Supreme Court's landmark decision in *Brown v. Board of Education*, yet the United States has failed to provide equal educational opportunities to all students. Public schools today are more segregated than they were in 1970, as federal court decisions and government inaction have contributed to the persistence of apartheid conditions in schools.").

187 Ladson-Billings, *supra* note 156, at 1281.

188 Brittain & Kozlak, *supra* note 164, at 600.

189 *Id.*

190 Ladson-Billings, *supra* note 156, at 1281 ("[T]he deplorable condition of education for students of color, particularly African-American and Latino, in the United States and the degree to which the very principle against which Brown was argued—separate but equal—might provide some measure of relief for these students.").

191 Brittain & Kozlak, *supra* note 164, at 594.

192 *Id.*

193 *Id.*

194 *Id.* at 600.

counterparts.[195] This financial strain can discourage students from pursuing higher education or lead them to choose less prestigious institutions, further perpetuating education inequity.[196]

7. Institutional Barriers in Higher Education

Once in higher education, African American students often encounter institutional barriers that hinder their academic success.[197] Microaggressions, racial bias, and a lack of representation can create hostile learning environments. Many African American students report feeling isolated or unsupported in white institutions, which can affect their academic performance and overall well-being.[198] Additionally, the lack of culturally relevant curricula and faculty who understand the unique challenges faced by African American students can further alienate them in the classroom.[199]

Moreover, higher-level academic programs and professional fields often underrepresent African Americans.[200] This lack of representation can discourage younger students from pursuing specific disciplines, perpetuating the stereotype that these fields are not for them. The absence of role models and mentors with similar backgrounds can lead to feelings of inadequacy and disconnection, further contributing to the cycle of disenfranchisement.[201]

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195 *Id.* at 612.

196 JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 19 (2005) ("Huge funding disparities that exist between urban schools serving Black and brown students, and their white suburban counterparts. Chicago Public Schools spend about $8,482 per pupil while nearby Highland Park spends $17,291 per pupil. Chicago Public Schools have an 87% Black and Latino population while Highland Park has a 90% white population.").

197 Brittain & Kozlak, *supra* note 164, at 596.

198 *Id.* ("This continued racial inequality in educational opportunities can be attributed to a number of factors, including: (1) underperforming, poorly financed schools characterized by low quality of teaching, larger class sizes, and inadequate facilities that perpetuate underachievement by minority students; (2) school assignment policies that promote segregation . . . ").

199 *Id.*

200 William M. Wiececk & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1096, 1101 (2014).

201 *Id.* at 1102–03 ("[S]ociologists have demonstrated for more than four decades that the phenomenon of racism is more complicated than simply the deliberate, bad-attitude behavior of individuals. They have identified structural racism as founded in ordinary, day-to-day practices of organizations, like business firms and government agencies, and resulting from social policies produced by political decisions.").

B. Food Deserts and Industrial Pollution as Factors That Support Structural Racism

1. Food Deserts

Food access inequality and food deserts have a profound impact on the health and success of Communities of Color, reinforcing a cycle of health disparities, economic challenges, and reduced opportunities for social mobility.[202] In areas identified as food deserts, residents often have limited access to grocery stores that provide fresh, healthy, and affordable food options.[203] Instead, they may rely on convenience stores or fast-food outlets that offer highly processed, high-calorie, and low-nutrient foods.[204] Since such foods are more readily available and affordable than fresh produce, they contribute to higher rates of diet-related health issues in Communities of Color, including elevated obesity rates.[205] Poor dietary options also increase the risk of developing chronic diseases like type 2 diabetes and hypertension—conditions that disproportionately affect Black, Hispanic, and Native American populations.[206] Moreover, heart disease and limited access to healthy foods, combined with other environmental and socioeconomic stressors, result in higher rates of cardiovascular diseases.[207] These health disparities reflect and perpetuate structural inequalities, making it harder for these communities to break the cycle of poor health outcomes.[208]

Poor nutrition impacts more than just physical health; it also affects mental health and cognitive development.[209] Children in food-insecure households may experience developmental delays, as a lack of nutritious food can impair cognitive development, hindering learning and school performance. [210] These setbacks have long-term consequences for both educational and career opportunities.[211] Food insecurity also contributes to mental health struggles, including stress, anxiety, and depression.[212] The

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202 Hannah M. Dahle, *Creating Oases Throughout America's Food Deserts*, 47 BYU L. REV. 287, 289 (2021).

203 *Id.* at 290.

204 *Id.*

205 *Id.* at 293.

206 Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CAL. L. REV. 1717, 1726 (2022).

207 *Id.*

208 *Id.* at 1734.

209 *Id.* at 1726.

210 *Id.*

211 *Id.* at 1727.

212 *See* N.Y. L. SCH. RACIAL JUST. PROJECT, UNSHARED BOUNTY: HOW STRUCTURAL RACISM CONTRIBUTES TO THE CREATION AND PERSISTENCE OF FOOD DESERTS 5 (2012), https://perma.cc/GG68-VG47 ("Food is life. It is necessity and pleasure, family and community, culture and power. When plentiful and freely shared, food creates healthy communities and strong

constant worry about where the next meal will come from affects adults and children, impacting their overall well-being and ability to focus on school or work.[213]

Health issues resulting from poor diet raise healthcare costs, reduce productivity, and increase absenteeism from work or school. For Communities of Color, which already face economic inequities, these health-related economic burdens make it more challenging to achieve financial stability. For instance, chronic conditions, such as diabetes and heart disease, lead to increased medical expenses, which can strain already limited household budgets, perpetuating cycles of poverty.[214] Children suffering from poor nutrition may face challenges with academic achievement, limiting their future educational and employment opportunities.[215]

The interplay between food deserts, health disparities, and economic limitations creates a self-perpetuating cycle. Health problems may limit a person's ability to work consistently, narrowing their job options and contributing to financial instability.[216] The combined effects of poor health, high healthcare costs, and limited access to quality education due to underfunded schools and low-income areas further restrict upward social mobility for Communities of Color.[217] Food deserts are an integral part of systemic racism because they disproportionately affect low-income, minority communities, reinforcing health and economic disparities rooted in historical and structural inequalities.[218]

Discriminatory housing policies, such as redlining, created many food deserts in neighborhoods occupied by Black and minority populations, limiting investment in these areas.[219] These policies discouraged businesses, including grocery stores, from setting up in these neighborhoods.[220] Low-income neighborhoods often lack the financial attractiveness for

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societies; when scarce or unfairly distributed, it damages and, in time kills, spirit, body, family, community.").

213 Ashley Oldfield, *Eliminating Food Deserts: No Simple Recipe for Success*, 13 WAKE FOREST J.L. POL'Y 47, 53 (2023) (discussing that children with food insecurity or insufficiency face poorer school scores and higher rates of mental health struggles).

214 *See* Trisha Swift et al., *It's Time For The Health Care Industry To Treat Food As Medicine*, HEALTH AFFS. (Jan. 7, 2024), https://www.healthaffairs.org/sponsored-content/its-time-for-the-health-care-industry-to-treat-food-as-medicine.

215 Oldfield, *supra* note 213, at 53 (stating that children residing in food deserts face impacts on their learning and social development).

216 Anna Trakoli, *Treatment burden and ability to work*, 17 BREATHE 1, 2 (2021) (stating that individuals with chronic health conditions experience treatment burden which impacts their ability to attend and keep work).

217 Danielle Gallegos et al., *Food Insecurity and Child Development: A State-of-the-Art Review*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH 8990, at 1 (2021).

218 Dahle, *supra* note 202, at 288 (arguing that food deserts are a result of housing segregation and continue to create disparities).

219 *Id.* at 295.

220 Leslie, *supra* note 206, at 1728.

supermarkets and grocery chains, as these businesses are reluctant to open stores in areas where residents have limited purchasing power.[221] Consequently, residents in these communities lack affordable, nutritious food options and rely on convenience stores or fast-food outlets that offer unhealthy, highly processed foods.[222]

Access to quality food does more than increase the availability of healthy food. It contributes to broader systemic issues that affect the health, education, economic success, and overall well-being of Communities of Color.[223] Addressing these inequities is crucial to dismantling the factors reinforcing health and socioeconomic disparities. These health disparities are manifestations of structural racism as they reflect and perpetuate the inequitable conditions faced by these communities.[224] The cycle of poor health and economic disadvantage continues without access to nutritious food, reinforcing systemic inequalities.[225]

2. Industrial Pollution

Food deserts often intersect with environmental racism, as many of these neighborhoods sit near sources of pollution and industrial sites.[226] Limited access to healthy food, combined with exposure to environmental hazards, compounds health risks, particularly for Black, Hispanic, and Native American communities.[227] This dynamic illustrates how systemic racism operates through multiple overlapping factors, including both food and environmental inequities.[228]

Placement of polluting industries and infrastructure in historically low-income neighborhoods, often predominantly occupied by People of Color, have been chosen as dumping sites for hazardous waste facilities, landfills, and industrial plants.[229] This is primarily due to systemic racism, where these communities have less political power and fewer resources to oppose such developments.[230] As a result, these areas face higher air and water pollution

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221 Paula Dutko, *Food Deserts Suffer Persistent Socioeconomic Disadvantage*, CHOICES, 2012, at 1, 2.

222 Leslie, *supra* note 206, at 1725.

223 *Id.* at 1756–57 (finding that supermarkets positively affect economic development and overall community health).

224 Faareha Siddiqui et al., *The Intertwined Relationship Between Malnutrition and Poverty*, 8 FRONT PUB. HEALTH 1, 1–2 (2020).

225 Paula Braveman, *Systemic, and Structural Racism: Definitions, Examples, Health Damages, and Approaches to Dismantling*, 41 HEALTH AFFS. 171, 175 (2022).

226 Chase, supra note 6, at 334.

227 Braveman, *supra* note 225, at 173.

228 *Id.* (finding most People of Color are affected by multiple factors that can interact to aggravate health damages).

229 Chase, *supra* note 6, at 339.

230 *Id.* at 344.

exposure, leading to increased health risks, such as respiratory problems, cancer, and other pollution-related illnesses.[231]

The dual burden of living in polluted environments while lacking access to nutritious food exacerbates health disparities, making residents more vulnerable to illnesses like asthma, cardiovascular disease, and obesity.[232] These living conditions create increased health burdens and economic strains on oppressed, marginalized, underrepresented populations.[233] The combination of higher pollution levels and limited access to healthy food increases chronic disease rates,[234] placing additional financial burdens on already economically disadvantaged populations. As a result, these communities face greater difficulty in seeking improved living conditions or pursuing environmental justice.[235]

3. The Lack of Essential Services as Environmental Racism

Structural racism leads to a chronic underinvestment in essential services within minority communities, leading to a lack of public transportation, quality housing, and green spaces. [236] This underinvestment also exacerbates the food crisis discussed above. Without grocery stores or farmers' markets nearby and poor transportation options, residents in these areas struggle to access healthy foods, further reinforcing health inequities.[237]

a. Inadequate Public Transportation

Several case studies illustrate the connection between inadequate public transportation and environmental racism. In cities like Detroit, cuts to public transit funding have severely limited options for low-income residents.[238] As a result, many individuals must rely on personal vehicles or long commutes, creating both financial strain and increased environmental impact.[239]

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231 *Id.*

232 Braveman, *supra* note 225, at 175.

233 *Id.*

234 Anglea Hilmers et al., *Neighborhood Disparities in Access to Healthy Foods and Their Effects on Environmental Justice*, 102 AM. J. PUB. HEALTH 1644, 1644 (2012).

235 *See generally* NED BROOKS, MINN. POLLUTION CONTROL AGENCY, ENVIRONMENTAL JUSTICE. FRAMEWORK 380 (2022).

236 *See generally id.*

237 *See generally id.*

238 Henry Grabar, *Can America's Worst Transit System Be Saved?*, SLATE (June 7, 2016, 12:31 PM), https://slate.com/business/2016/06/detroit-has-americas-worst-transit-system-could-the-regional-transit-master-plan-save-it.html.

239 *Id.*

Similarly, in Los Angeles, public transportation options have historically failed to serve low-income neighborhoods effectively.[240] Despite the city's push for a more extensive transit system, Communities of Color often remain underserved, facing long travel times and limited access to essential services.[241]

b. Lack of Adequate Housing Leads to Environmental Racism

Inadequate housing encompasses a range of issues, including overcrowding, lack of basic utilities, and structural deficiencies.[242] Many low-income households, often occupied by People of Color, are forced to live in dilapidated buildings that lack proper sanitation, heating, and safety measures.[243] According to the National Low Income Housing Coalition, a significant portion of renters in Communities of Color spend over half their income on housing, leaving little for necessities such as food and healthcare.[244] This economic strain exacerbates health disparities, as poor housing conditions contribute to respiratory issues, lead poisoning, and other health crises.[245]

The health impacts of inadequate housing are profound and multifaceted. Poor living conditions are associated with a higher prevalence of chronic illnesses, mental health issues, and developmental problems in

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240 Cynthia Griffin, *Pathways into Homelessness: A Lack of Access to Transportation*, INVISIBLE PEOPLE (Nov. 7, 2023), https://invisiblepeople.tv/pathways-into-homelessness-a-lack-of-access-to-transportation/.

241 Jackie Powder, *For Blacks and Other Minorities, Transportation Inequities Often Keep Opportunities Out of Reach*, HOPKINS BLOOMBERG PUB. HEALTH MAG. (Sept. 8, 2020), https://magazine.publichealth.jhu.edu/2020/blacks-and-other-minorities-transportation-inequities-often-keep-opportunities-out-reach#:~:text=For%20communities%20of%20color%2C%20unreliable,from%20a%20range%20of%20opportunities.

242 *Id.*

243 *Id.*

244 *Why We Care: The Problem*, NAT'L LOW-INCOME HOUS. COAL., https://nlihc.org/explore-issues/why-we-care/problem (last visited Nov. 19, 2024). *See also About the Gap*, NAT'L LOW-INCOME HOUS. COAL., https://nlihc.org/gap/about (last visited Nov. 19, 2024).

> The U.S. has a shortage of 7.3 million rental homes affordable and available to renters with extremely low incomes. Only 34 affordable and available rental homes exist for every 100 extremely low-income renter households. The shortage of affordable and available homes for extremely low-income renters impacts all states and the 50 largest metro areas, none of which have an adequate supply for the lowest-income renters. Among states, the supply of affordable and available rental homes ranges from 14 affordable and available homes for every 100 extremely low-income renter households in Nevada to 57 in South Dakota. Thirty-five of the largest 50 metros have fewer than the national level of 34 affordable and available units for every 100 extremely low-income renters.

Id.

245 *Why We Care: The Problem*, *supra* note 244.

children.[246] Communities exposed to environmental hazards often face a double burden: Not only do they deal with the stressors of inadequate housing, but they are also more likely to live in areas with high levels of pollution, which further exacerbates health risks.[247] For instance, studies have shown that children living in substandard housing are more susceptible to asthma, a condition linked to both indoor allergens and outdoor air quality.[248]

c. The Lack of Green Spaces and Parks Contributes to Environmental Racism

In many cities, minority neighborhoods have fewer green spaces, parks, and trees compared to wealthier, white neighborhoods.[249] This lack of green infrastructure creates "urban heat islands" or significantly higher temperatures.[250] The combination of heat stress and limited access to healthy food amplifies health risks, especially for pre-existing conditions like heart disease or diabetes, which are more prevalent in communities facing food insecurity.[251]

Communities lacking necessities are less resilient to environmental crises, such as natural disasters or extreme weather events.[252] For example,

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246 David E. Jacob, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH S115, S119 (2011).

> Biologic agents related to housing structure that have received the most study include allergens from cockroaches, rodents, dust mites, fungi, and respiratory irritants, including fungal cell wall components. Excess moisture in a home supports the growth of mold and provides an environment favorable to dust mites, cockroaches, and rodents, and leaks and moisture are more common in low-income and minority housing. Two recent reviews of numerous studies found that multifactorial tailored home-based asthma interventions are effective, but that those with a single focus (e.g., mattress covers) were not.

Id.

247 *Id.*

248 *Id.*

249 *Id.*

250 *Id.*

251 Olivia Kane, *The whiteness of green spaces: The cyclical nature of exclusion in environmental professions*, MICH. DAILY (June 6, 2023), https://www.michigandaily.com/statement/the-whiteness-of-green-spaces-the-cyclical-nature-of-exclusion-in-environmental-professions/.

> This lack of access follows the broader trend of environmental racism that many communities of Color face in the United States. Environmental racism refers to the unequal access to natural resources based on race. For example, communities of Color are far more likely to be the victims of widespread pollution, suffer from poor air quality, and be affected negatively by natural disasters. Communities of Color are negatively affected by these factors *because* of their lack of access to green spaces. Living in poor environmental conditions perpetuates the effects of natural disasters and these communities' living situations become even harder to escape.

Id.

252 *Id.*

during heat waves or flooding, individuals in these neighborhoods may not have the resources to evacuate, access clean water, or obtain nutritious food.[253] The impacts of climate change disproportionately affect these communities, highlighting the intersection of food insecurity and environmental injustice.[254]

Systemic racism often leads to the political and social marginalization of Communities of Color, limiting their influence and policymaking processes.[255] As a result, these communities struggle to advocate for better environmental protection, food safety and security, and public health measures.[256] The lack of representation perpetuates the cycle of environmental injustice and food insecurity, as decisions that affect land use, zoning, and food distribution often fail to prioritize the needs of marginalized populations.[257]

Communities of Color, particularly Indigenous and rural communities, face land exploitation due to systemic racism.[258] The displacement of these communities for agricultural, industrial, or urban development often results in the loss of traditional food sources and access to clean, fertile land.[259] Additionally, commercial and farming practices pollute water sources, soil, and air, directly impacting the hold of surrounding populations and limiting their access to safe food.[260]

Efforts to improve food access in specific neighborhoods, such as establishing grocery stores and farmers' markets, can inadvertently lead to gentrification.[261] While these initiatives may initially increase food

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253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.* ("Minorities who face barriers to participation in outdoor recreation as children and young adults are not afforded the opportunity to become passionate about such spaces. This culminates in a lack of entry into programs that focus on environmental reform. And as a result of minority voices missing from environmental policy decisions and initiatives, minority communities are overlooked and not benefited by environmental action. A lack of access to outdoor spaces and the corresponding lack of diverse representation in the environmental sector is clearly of a cyclical nature.").

257 *Id.*

258 *Id.*

259 *Rural Hunger Facts*, FEEDING AM., https://www.feedingamerica.org/hunger-in-america/rural-hunger-facts (last visited Nov. 19, 2024) ("Hunger is a problem in every part of the United States. But it is more common in rural areas. Rural areas comprise less than two-thirds of all U.S. counties, but 9 out of 10 counties with the highest food insecurity rates are rural.").

260 *Agriculture Is the World's Greatest Water User & Polluter*, FREIGHT FARMS (Apr. 14, 2023), https://www.freightfarms.com/blog/agriculture-water-usage-pollution.

261 Sandra Feder, *Stanford professor's study finds gentrification disproportionately affects minorities*, STAN. REP. (Dec. 1, 2020), https://news.stanford.edu/stories/2020/12/01/gentrification-disproportionately-affects-minorities ("As neighborhoods gentrify, when poor people can no longer remain in their neighborhoods and move, there are few affordable neighborhoods," Hwang said. "Our findings suggest that, for the Black community, there are additional constraints when they move, leading them to move to a shrinkage set of affordable yet disadvantaged neighborhoods within the city.").

availability, they often lead to the displacement of long-term residents as rents and living costs rise.[262] The solutions, while well-intentioned, fail to address the systemic roots of food inequality and environmental racism and inadvertently perpetuate injustices.[263]

The current system creates conditions where Communities of Color are disproportionately denied access to necessities, like healthy food, while also bearing environmental hazards.[264] This dual burden reinforces health disparities, economic hardships, and social inequities, perpetuating a cycle of environmental injustice.[265] Addressing these interconnected issues requires holistic solutions that tackle food access and environmental health within racial and social equity.

V. PROPOSED FORWARD-LOOKING SOLUTIONS

Addressing food deserts and the structural inequality and access to healthy foods requires a multifaceted approach that combines policy changes, community initiatives, and private sector involvement. Some solutions that can help tackle these issues include incentivizing grocery stores and supermarkets in underserved areas, expanding and supporting local food systems, improving public transportation to food sources, and subsidizing healthy foods. Education and advocacy also play key roles, helping small and minority food businesses and addressing broader structural inequalities.

Government tax incentives can provide tax breaks and financial incentives for chains and supermarkets to open locations in food deserts. This strategy can attract businesses to invest in areas they might otherwise overlook due to lower profit margins. Adjusting zoning regulations can facilitate the establishment of food retailers, farmers' markets, and urban gardens in areas with current barriers to entry. Expanding and supporting local food systems can include urban agriculture. Promoting urban farming and community gardens can empower residents to grow their own fresh produce. Cities like Detroit have successfully implemented urban farming

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262 *See generally id.* ("[A] primary case of gentrification-related displacement is increased costs for current residents.").

263 *See generally* Light & Rand, *supra* note 2, at 49 ("Strategically, the emphasis of the environmental justice movement must remain on the roots . . . of environmental inequities.").

264 *See generally* Feder, *supra* note 261 ("Our findings suggest that, for the Black community, there are additional constraints when they move, leading them to move to a shrinking set of affordable yet disadvantaged neighborhoods within the city.").

265 *See* Collin, *supra* note 4, at 495 ("One of the major obstacles confronting the environmental problem-solving process is that the America environmental movement has failed to include the concerns of minorities and the poor.").

initiatives to provide fresh, affordable food, options, and areas lacking supermarkets.[266]

Establishing farmers' markets and food desert areas increases access to fresh produce.[267] Programs to support local farmers and sell their goods directly to communities can help bridge the gap to food access.

Community-supported agriculture (CSA) encourages residents to participate in CSA programs, which allow them to receive a regular supply of fresh, locally grown food, often at a lower cost than supermarkets.[268] An additional area that can impact access to equitable food sources would be to improve public transportation sources. Enhancing transitions in food deserts and limited public transportation options make it difficult for residents to access grocery stores outside their immediate area. Improving public transit routes and schedules can help people travel to places where they can buy healthy foods. Mobile markets (buses stocked with fresh produce) can bring nutritious food directly to serve neighborhoods. These markets can serve as a temporary or supplementary solution while communities develop more permanent food options.

Another option is to examine subsidizing healthy foods. Food assistance programs like the Supplemental Nutrition Assistance Program (SNAP)[269] and the Women, Infants, and Children (WIC)[270] program include subsidies specifically for purchasing fresh fruits and vegetables, which can increase affordability. Programs like "Double Up Food Bucks"[271] provide additional incentives by matching SNAP benefits spent on fruits and vegetables. In areas dominated by convenience stores, local governments can explore regulating food prices to make healthier options more affordable than processed foods.

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266 *See* Faye Brown, *Detroit's Greener Side: Detroit Urban Farming*, VISIT DETROIT, https://visitdetroit.com/inside-the-d/urban-farming-detroit/ (last visited Nov. 11, 2024) (discussing Detroit's rise in urban farming).

267 *See Farmers Markets Increase Access to Fresh, Nutritious Food*, FARMERS MKT. COAL., https://farmersmarketcoalition.org/education/increase-access-to-fresh-nutritious-food/#:~:text=Due%20to%20cost%20and%20access,communities%20that%20need%20it%20most (last visited Nov. 11, 2024) ("But with affordable, competitive prices and special programs for low-income families, farmers markets are expanding access to fresh, healthy food in communities that need it most.").

268 *See* Debbie Roos, *Community Supported Agriculture (CSA) Resource Guide*, N.C. STATE EXTENSION, https://growingsmallfarms.ces.ncsu.edu/growingsmallfarms-csaguide/ (last visited Nov. 11, 2024) (discussing Community Supported Agriculture).

269 *Supplemental Nutrition Assistance Program (SNAP)*, USDA, https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program (last visited Nov. 11, 2024).

270 *Special Supplemental Nutrition Program for Woman, Infants, and Children (WIC)*, USDA, https://www.fns.usda.gov/wic (last visited Nov. 11, 2024).

271 *Get Double the Fruits & Veggies*, DOUBLE UP FOOD BUCKS, https://doubleupamerica.org/ (last visited Nov. 11, 2024).

Education and advocacy are additional aspects that are crucial to examining this phenomenon.[272] Providing nutrition and education in schools and communities can help residents make healthier food choices within their means. Teaching cooking skills and how to grow food can empower individuals to seek out and create more nutritious options. Advocacy for policy change is another way community organizations and advocates can lobby for policies that address structural inequities and food access. An example could be advocating for anti-redlining laws, investment in low-income neighborhoods, and regulations requiring a percentage of retail space and new developments to be devoted to grocery stores.

Microloans and grants could provide financial support to small, minority-owned grocery stores, and food cooperatives can boost food availability in underserved areas. The smaller retailers often better understand the community's needs and cons of sourcing culturally appropriate foods.[273] Supporting the development of community food cooperatives can create locally controlled and sustainable food systems. Residents invest in and run these co-ops, making food access a community-led effort.

To address broader structural inequalities, we must examine economic investment as a tool in combating food deserts. This examination directly connects to addressing broader economic disparities.[274] Investing in job creation, affordable housing, healthcare, and education in low-income minority communities is essential to enhancing overall well-being and creating an environment where access to healthy food can thrive.[275] Environmental policies, implementing policies, and environmental justice, such as reducing pollution and improving neighborhood infrastructure, can create healthier environments that support community gardens and local markets.

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272 *See, e.g.*, Simone Jones & Nicole Noëlliste, *Insight: Fourth Circuit Rules 'Environmental Justice is Not Merely a Box to Be Checked'*, BLOOMBERG L. (Mar. 5, 2020), https://news.bloomberglaw.com/environment-and-energy/insight-fourth-circuit-rules-environmental-justice-is-not-merely-a-box-to-be-checked.

273 *See* Vern Grubinger, *Why Buy Local?*, GROW NYC, https://www.grownyc.org /greenmarket/ourmarkets/whylocal (last visited Nov. 11, 2024) ("Knowing the farmer gives you insight into the seasons, the land, and your food.").

274 *See* Collin, *supra* note 4, at 495 ("One of the major obstacles confronting the environmental problem-solving process is that the America environmental movement has failed to include the concerns of minorities and the poor.").

275 *See Hunger in rural communities*, FEEDING AM., https://www.feedingamerica.org/hunger-in-america/rural-hunger-facts (last visited Nov. 11, 2024).

CONCLUSION

Despite increasing awareness in the United States, environmental racism persists as a critical issue of justice, having long-term negative impacts on communities across America.[276] In recent decades, recognition and initiatives towards this fight have gained momentum; however, there is still much to do, with unprecedented political division, economic instability, and climate change effects being prevalent obstacles to progress.[277]

Several states have taken positive steps toward creating an equitable environment for all, despite being a politically divided nation.[278] From state legislation to initiatives by the Biden Administration, momentum is building behind environmental justice and combating racism in our communities.[279] There is tremendous hope that the trends identified will continue regardless of external factors.

However, comprehensive policy reforms are necessary to address African Americans' disenfranchisement in education and higher education. Reforms should include increased funding for K-12 schools in underserved communities, equitable access to advanced coursework, and support programs that foster college readiness. Higher education institutions must also prioritize diversity and inclusion efforts, ensuring African American students feel valued and supported throughout their academic journeys.

Furthermore, addressing the economic barriers to education is crucial. Policies aimed at reducing student loan debt, increasing financial aid opportunities, and promoting financial literacy can empower African American students to pursue higher education without the fear of crippling debt. Miseducation and non-education are critical factors that sustain structural racism in society.[280] To dismantle these systems of inequality, it is essential to advocate for educational reforms that prioritize inclusivity, equity, and access to quality education for all. By addressing the roots of miseducation and non-education, we can empower marginalized communities, foster a more just society, and challenge the structural forces that uphold racial inequity. Education must serve as a tool for liberation, helping individuals understand and navigate their realities while contributing to the collective fight against racism in all its forms.

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276 *See id.*

277 *See id.*

278 *Environmental Law: A Beginner's Guide*, LIBR. OF CONG., https://guides.loc.gov/environmental-law/state-laws (last visited Nov. 11, 2024) (state laws).

279 *Id.*; *Environmental Law: A Beginner's Guide*, LIBR. OF CONG., https://guides.loc.gov/environmental-law/federal-laws (last visited Nov. 11, 2024) (federal laws).

280 Brittain & Kozlak, *supra* note 164, at 595 ("It has been more than five decades since the U.S. Supreme Court's landmark decision in *Brown v. Board of Education*, yet the United States has failed to provide equal educational opportunities to all students.").

The disenfranchisement of African Americans in education and higher education is a multifaceted issue rooted in historical injustices and systemic inequalities.[281] While progress continues, significant barriers still hinder African American students' access and success.[282] Addressing these challenges requires a collective effort from policymakers, educators, and communities to create an equitable educational landscape that empowers all students to achieve their full potential. Only then can we hope to dismantle the cycles of disenfranchisement and build a more just society for future generations. Our pursuit of progress will lead to more equitable, safe communities. We must strive for a future where every citizen is respected and provided with the same level of protection against negligence or exploitation regardless of their socioeconomic standing. Toxic waste dumps, which cause contamination and health risks, must become an unacceptable practice so that we can empower those most vulnerable within our society.

Solving food and structural food quality issues requires an integrated approach that includes policy reform, community action, economics, investment, and education. Combining these strategies can lead to sustainable changes that ensure equitable access to healthy food for all communities.

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281 *Id.*

282 *Id.*

EMPIRICALLY TESTING THE "UNBIASED FACTFINDER[S]"

Chris Cox*

INTRODUCTION

In the bustling confines of her workplace, Maria sought guidance from Shaun, a seasoned colleague she admired. Little did she know that her quest for mentorship would lead her down a path of darkness and despair. What began as a plea for assistance soon descended into a nightmare of unspeakable horror. In a cruel twist of fate, Shaun's response to her vulnerability was one of unbridled brutality. As Maria lay pinned beneath his weight, her world shattered into a million fractured pieces. Her cries for mercy were drowned out by the deafening roar of his assault, her struggles futile against the relentless tide of violence.

In the aftermath, Maria found herself ensnared in a web of silence and shame. Yet, amidst the shadows of despair, a flicker of resilience burned within her heart. With trembling hands and a voice choked with emotion, Maria confided in trusted friends. Encouraged by their support, she made the courageous decision to report the assault to law enforcement, setting in motion a harrowing journey through the criminal justice system.

Months passed, and when the verdict was finally rendered, it came as a fragile victory. The jurors, swayed by Maria's unwavering testimony, delivered a verdict of guilty. The sentence provided her some comfort. But the echoes of victory were short-lived. The appellate court overturned the conviction based on factual insufficiency even though Maria's testimony was clear about the elements of the crime. The court's decision cast doubt upon the validity of her testimony and plunged her back into despair.

For Maria, the road to justice was fraught with heartache and betrayal. In the eyes of the law, her truth, substantiated beyond reasonable doubt by the jury, was rendered moot by appellate judges who never met her. They simply did not believe her, denying her the justice she so desperately sought.

Maria's story is largely based on *United States v. Lucas*, an appellate court decision in 2012.[1] The case stemmed from criminal charges instituted

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1 *See generally* United States v. Lucas, No. NMCCA 201100372, 2012 CCA LEXIS 322 (N-M. Ct. Crim. App. 28 Aug., 2012).

by a commander responsible for the offender.[2] The decision of the commander to send a case to trial should be based, at least, on probable cause and, ideally, on evidence sufficient to obtain and sustain a criminal conviction.[3] The appellate court had a different standard upon review in the context of factual sufficiency analysis.[4] The appellate court's standard was to assess whether the evidence proved the elements beyond all reasonable doubt.[5] While these two standards differ, comparisons can be made between the two decision points.[6] Regardless of the decision point, an analysis can be made concerning which factors influence a particular decision point (e.g., whether offense seriousness affects the charging decision).

This Article examines the decision rendered in *Lucas*, focusing on the appellate court's exercise of factual sufficiency review authority conferred by Congress.[7] The court's reasoning pivoted on the perceived lack of credibility of the complainant, a judgment not predicated on conventional indicators such as recantation or prior *crimen falsi* convictions.[8] Instead, the court's skepticism stemmed from an assessment that the complainant's account lacked verisimilitude.[9]

The court's rationale hinged on several factors that it deemed inconsistent with the alleged assault.[10] Notably, the victim's training in mixed martial arts was juxtaposed against the assailant's status as a Marine with a significant weight advantage.[11] The court also discounted the "significant disparity in rank" between the parties when assessing the sexual assault conviction.[12] In the court's estimation, a victim experiencing the trauma of sexual assault while physically restrained would have mounted a more vigorous resistance against an assailant of superior size and strength.[13] The court characterized any alternative reaction as "illogical."[14]

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2 *Id.* at *1.

3 MANUAL FOR COURTS-MARTIAL UNITED STATES, DEP'T OF DEF., R.C.M. 306(b) (2008) [hereinafter MCM 2008]. At that time, commanders were guided by the MCM provisions to consider the "availability and admissibility of evidence . . . [as well as] likely issues." *See id.* Currently, the rules provide additional guidance on what to consider in disposing of charges, including, "[w]hether admissible evidence will probably be sufficient to obtain and sustain a finding of guilty in a trial by court-martial when viewed objectively by an unbiased factfinder." MANUAL FOR COURTS-MARTIAL UNITED STATES, DEP'T OF DEF., R.C.M. 401A(b) (2024) [hereinafter MCM 2024].

4 *Lucas*, 2012 CCA LEXIS 322, at *20.

5 *See id.* at *6–7.

6 *See generally id.*

7 10 U.S.C. § 866(c) (2011); *Lucas*, 2012 CCA LEXIS 332, at *1.

8 *See generally Lucas*, 2012 CCA LEXIS 332, at *1.

9 *Id.* at *9.

10 *Id.* at *22–23.

11 The court did not state whether she had been trained to deal with being raped by someone she trusted. *See generally id.*

12 *Id.* at *22.

13 *Id.* at *9.

14 *Id.*

Further bolstering the court's skepticism were behavioral factors it deemed inconsistent with victimization.[15] The delayed reporting of the incident and the victim's continued communication with the alleged assailant, a fellow unit member, were interpreted as conduct that "defie[d] logic . . . ."[16] The court particularly noted the victim's deletion of text messages exchanged with the offender, further undermining her credibility.[17]

This judicial reasoning exemplifies what scholars have identified as a "double-bind" for victims, wherein their behavior is scrutinized through a "patriarchal logic of sexual rationality."[18] This perspective aligns with critiques of how legal systems often interpret victim behavior through narrow, potentially biased lenses.[19] The court's emphasis on the offender's positive military record as a mitigating factor in assessing the rape charge, while simultaneously viewing the victim's post-incident behavior as evidence of consensual adultery rather than trauma, illustrates the complex and often problematic nature of credibility assessments in sexual assault cases.[20]

This case study underscores the ongoing challenges in adjudicating sexual assault cases. It highlights the tension between legal presumptions, societal expectations of victim behavior, and the complex realities of trauma responses. The court's reasoning in *Lucas* serves as a focal point for broader discussions on the intersection of gender, power dynamics, and judicial interpretation in sexual assault cases.

Factual sufficiency reviews are a form of *de novo* review, where the appellate court can second-guess the weight of the various pieces of evidence and construe any and all evidence in any light it desires.[21] It is the equivalent of a second trial but without an actual trial.[22] There are positive and negative

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15 *Id*. at *2–12.

16 *Id*. at *9–10 ("It defies logic that one who suffered a traumatic forcible rape would carry on repeated friendly contact with her assailant, and then delete the messages."). Repeatedly, scholars have referred to this type of rationale as a double-bind for victims, which serves to analyze their behavior through a "patriarchal logic of rationality." Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 L. SOC. REV. 669, 683 (1995). In fact, just the year prior to the *Lucas* decision, one scholar repeated what other scholars had stated previously regarding the fact that even victim advocates sometimes characterize a victim's choice of returning to her abuser as "bad behavior." S.J. Creek & Jennifer L. Dunn, *Rethinking Gender and Violence: Agency, Heterogeneity, and Intersectionality: Gender and Violence*, 5 SOCIO. COMPASS 311, 313 (2011).

17 *Lucas*, 2012 CCA LEXIS 322, at *9–10.

18 Matoesian, *supra* note 16, at 683.

19 *See* Katherine Lorenz et al., *Qualitative Study of Sexual Assault Survivors' Post-Assault Legal System Experiences*, 20 J. TRAUMA & DISSOCIATION 263, 279 (2019) ("Our results suggest that survivors perceive the legal system and those within it to be biased and often ineffective."); Matoesian, *supra* note 16, at 683.

20 *Lucas*, 2012 CCA LEXIS 322, at *9–14.

21 United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

22 *Id*. ("In the performance of its Article 66(c), UCMJ, functions, the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt. The court must assess the

aspects to having a system that allows for factual sufficiency reviews.[23] One positive factor is that the appellate court serves as a check on convictions, thereby providing a perception of integrity and justice, the ideals of the criminal justice system.[24] One negative factor is that findings of bench and jury trials are nullified by individuals who place their subjective opinions in the place of others who rendered the conviction.[25]

One possible counter to any negative aspect of factual sufficiency reviews is the belief that judges are better suited to view evidence and render verdicts. This discussion is layered and requires something more than *a priori* arguments in support of it, but even if the premise were true, then what about factual sufficiency reviews overturning rape convictions where a judge decided the issue of guilt? On appeal, there are at least three judges that decide factual sufficiency versus the lone trial judge who saw and heard the evidence and found guilt. The greater number of judges on appeal helps resolve the issue of whether judges disagreeing on a matter of this importance is appropriate.[26] What then can be made of the situation where the appellate court holds the case is factually insufficient, except that one of the three appellate judges dissents from the holding? In that scenario, it is two appellate judges against one. It is no longer three-to-one but two-to-two (two appellate judges versus one appellate judge and a trial judge). The tie goes to the accused, as many issues at the trial level do.[27] However, the justification for favoring the accused differs between the trial and appellate levels. At trial, a preference for the accused stems from the constitutional presumption of innocence. In contrast, during appeals, this presumption no longer applies since the defendant has already been convicted, making the rationale for favoring the accused less compelling at the appellate level.[28]

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evidence in the entire record without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.").

23 *See* Lisa M. Schenck, "*Just the Facts Ma'am": How Military Appellate Courts Rely on Factual Sufficiency Review to Overturn Sexual Assault Cases When Victims are "Incapacitated,"* 45 SW. L. REV. 522, 525–32 (2016).

24 *Id.* at 530.

25 *See generally id.*

26 *See Appeals: The Process*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/types-cases/appeals (last visited Oct. 23, 2024) (discussing how in some cases, usually all appellate cases, the decisions will be reviewed en banc or by a larger group of judges).

27 *See generally How Courts Work*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/appeals/#:~:text=After%20a%20case%20is%20orally,usually%20for%20reasons%20of%20jurisdiction).&text=a%20new%20trial%20be%20held,decision%20by%20the%20appellate%20court (last visited Oct. 23, 2024) (discussing how appellate decisions work).

28 *See Legal Information Institute: Presumption of Innocence*, CORNELL L. SCH., https://www.law.cornell.edu/wex/presumption_of_innocence (last updated Aug. 2020) (discussing how in criminal cases, like a rape case, a defendant is assumed to be innocent until they have been proven guilty by proof beyond a reasonable doubt).

The reality of dissenting judges in factual sufficiency reviews was realized in *United States v. Brown*, a case in which a trial judge had found the offender guilty beyond any and all reasonable doubt.[29] In the appellate court's assessment, the evidence was insufficient to support the crime of sexual assault because the offender had a reasonable belief that she consented.[30] The victim waited two weeks to report.[31] The victim also testified that she said "no *like* 20 or 30 times," which the court believed was inconsistent with her trial testimony wherein she testified she told the offender "no 30 to 40 times."[32] She also testified that she was awake when being sexually assaulted.[33] Still, an outcry witness reported that she had told him she was sleeping during a portion of the sexual assault.[34]

The appellate court also cited a pretextual call between the victim and offender as supporting the offender's belief that the sexual act was consensual.[35] Although the victim repeatedly told the offender on the pretextual call that she had told him to stop, he retorted that while her mouth said "no," her body said "yes."[36] Taken into context, the fact that she allowed him into her house in the early morning hours to watch Netflix was sufficient for the court to overturn the conviction.[37]

Yet one of the judges dissented from the opinion and would have held that the case was factually sufficient.[38] The dissenting judge emphasized the fact that the victim had told the offender to stop, as well as the offender's subsequent actions of holding her down and raping her.[39] The dissenting judge responded to the majority's mistake of fact opinion by stating that even if the offender subjectively believed there was consent, it was not objectively reasonable, citing the recorded call where the offender acknowledged that the victim had told him to stop numerous times.[40] Regardless of the opinions of

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29 United States v. Brown, No. 201700003, 2018 CCA LEXIS 316, at *1 (N-M. Ct. Crim. App. July 2, 2018).

30 *Id.* at *34–35. Military law proscribing sexual assault allows for some conduct that includes non-consensual sex when the offender believes, and the 'reasonable person' in the offender's place would also have believed, that the victim was consenting. United States v. Prather, 69 M.J. 338, 346 (C.A.A.F. 2011).

31 *Brown*, 2018 CCA LEXIS 316, at *8.

32 *Id.* at *31.

33 *Id.*

34 *Id.*

35 *Id.* at *31–32.

36 *Id.* at *33.

37 *Id.* at *26.

38 *Id.* at *35–51.

39 *Id.* at *40.

40 Victim: So if I said no, how did you think that I wanted to have sex?
Offender: It wasn't OK with you and you said no.
Victim: What did you say? I'm sorry, I can't hear you?
Offender: It wasn't OK with you. And yes, you did say no.
Victim: What wasn't OK with me?

the trial judge and one appellate judge, the other two judges overturned the case, acquitting the accused.[41] Once acquitted, the case is closed, and there can be no retrial.[42] In each instance, trial and appellate, the offender has the opportunity to be acquitted.[43] Yet if there is a conviction at the trial level, the case does not close,[44] and the offender gets another chance on appeal.[45] However, as is shown in this study and many others, the reality is that chance often does not drive the outcome.[46] Rape myths often do.[47]

The objective of this research was not to revive historical debates about the feasibility of factual sufficiency reviews in contemporary times.[48] Instead, the research aimed to elucidate the differences between military lawyers and lay commanders in their decision-making processes. Over the past decade or more, there has been significant discourse, including from members of Congress, suggesting that military commanders are ill-equipped to make charging decisions in severe cases, particularly those involving sexual assault.[49] This culminated in Congress transferring the authority to make such decisions from commanders to military lawyers.[50]

In their decision to entrust military lawyers with this critical role, Congress and other stakeholders operated on an unexamined assumption, failing to conduct empirical studies to validate the superiority of legal professionals in this context.[51] This oversight echoes a pervasive fallacy in legal thought: the presumption that the "mature and experienced judges who

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> Offender: Having sex with you wasn't OK and you did say no. Sorry, [Victim], like what do you want me to say.
>
> Victim: Thank you. That's what—that's that's really what I wanted to hear . . .
>
> Offender: [Victim], yes you said no. Yes, I forced myself on you cause that's how you . . .

Id. at *45–47.

41 *Id.* at *35.

42 *See* Paul James Larkin & Charles "Cully" Stimson, *Remedying Criminal Trial Errors: Retrial or Acquittal in Smith v. United States*, 24 FEDERALIST SOC'Y REV. (2023) (discussing the criminal procedure process, what it means to try a case, and the consequences of such); *see generally* United States v. Clark, 75 M.J. 298 (C.A.A.F. 2016).

43 *See* Larkin & Stimson, *supra* note 42.

44 *See generally id.*

45 *See generally id.*

46 *See generally Clark*, 75 M.J. 298.

47 *See* United States v. Brown, No. 201700003, 2018 CCA LEXIS 316 (N-M. Ct. Crim. App. July 2, 2018) (discussing how this case hinged on the ideas of how victims should act before, during, and after sexual assault).

48 *See* Schenck, *supra* note 23; Elizabeth Ryan, Comment, *The 13th Juror: Re-Evaluating the Need for a Factual Sufficiency Review in Criminal Cases*, 37 TEX. TECH. L. REV. 1291 (2005).

49 *See* Eric R. Carpenter, *An Empirical Look at Commander Bias in Sexual Assault Cases*, 22 BERKELEY J. CRIM. L. 45, 47 (2017).

50 *See* National Defense Authorization Act of Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).

51 *See* Carpenter, *supra* note 49, at 47 (discussing how there was a change in who handles sexual assault cases based on "perceived inability" and how this particular study found that this was not the case and that commanders treat sexual assaults more seriously than other assaults and commanders take these cases to trial more than comparable crimes).

serve on the Courts of Criminal Appeals" inherently surpass lay court-martial members' ability to "know and apply the law correctly . . . ."[52]

While judges' expertise in legal doctrine is undisputed, this presumption conflates knowledge of law with proficiency in its application. The true challenge lies not in understanding legal principles but in the nuanced process of applying these principles to the intricate tapestry of facts presented in each case. Within this interpretative space—where law meets reality—facts are not merely observed but conceived, molded, and shaped into a coherent narrative.[53] This legal reasoning process, far from being a mechanical application of rules, is a profoundly human endeavor.[54] It requires legal knowledge and the ability to navigate complex social and cultural contexts, weigh conflicting evidence, and grapple with the often murky realities of human behavior.[55] The assumption that legal training alone equips one to excel in this multifaceted task overlooks the diverse skills and perspectives that individuals from various backgrounds, including lay members, might bring to this process.[56]

On the surface, it may appear that military lawyers, by their training and experience, are more competent in assessing the appropriateness of prosecuting sexual assault cases.[57] Nonetheless, a deeper sociological inquiry reveals that various factors influence decision-making processes.[58] The extant literature provides ample evidence that lawyers often make charging decisions based on flawed criteria, including race, sex, and class.[59] Assuming

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52 United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

53 *Interpretation of the Law*, SCIENCEDIRECT https://www.sciencedirect.com/topics/social-sciences/interpretation-of-the-law (last visited October 23, 2024) (discussing how interpretation of the law requires analyzing and understanding legal texts to try and derive meaning to apply to specific cases).

54 *Casuistry and Progeny: Understanding the Odd World of American Legal Reasoning*, PRESSBOOKS https://pressbooks.cuny.edu/landmarkcases/chapter/casuistry-and-progeny-understanding-the-odd-world-of-american-legal-reasoning/ (last visited Oct. 23, 2024) (citing KENNETH VANDEVELDE, THINKING LIKE A LAWYER, AN INTRODUCTION TO LEGAL REASONING (Westview Press, 2021)) (discussing how the underlying premise of legal reasoning is human understanding).

55 *See* NEIL MACCORMICK, LEGAL REASONING AND INTERPRETATION (Routledge Encyclopedia of Philosophy, 1998), https://www.rep.routledge.com/articles/thematic/legal-reasoning-and-interpretation/v-1 (last visited Nov. 20, 2024) (discussing how legal reasoning involves giving personal reasonings for legal acts and giving justifications for opinions).

56 *See id.*

57 *See Civilian Lawyer vs Military Lawyer: What's the Difference?*, MONDER CRIM. LAW. GRP., https://www.monderlaw.com/news/civilian-lawyer-vs-military-lawyer/ (last visited Oct. 26, 2024) (discussing how the fact that JAG attorneys not only have to be legal attorneys but also receive additional special training may lead people to believe that they are the correct option for every court martial case).

58 Heather Zaykowski et al., *Judicial Narratives of Ideal and Deviant Victims in Judges' Capital Sentencing Decisions*, 39 AM. J. CRIM. JUST. 716, 720 (2014) (describing VIS as "second-hand retellings" and testimony as "far more visceral and emotional").

59 Travis W. Franklin, *The Intersection of Defendants' Race, Gender, and Age in Prosecutorial Decision Making*, 38 J. CRIM. JUST. 185 (2010); Christopher D Maxwell et al., *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. CRIM. JUST. 523 (2003); Sara

that military lawyers are inherently superior to their civilian counterparts in this regard lacks a theoretically sound basis.[60] Despite this, Congress has enacted changes to the law, which will undoubtedly have consequences that Congress may not fully comprehend as it alters the military's criminal justice system.[61]

This project sought to utilize pre-legislative change data to assess these distinctions objectively.[62] Additionally, this research aims to offer insights for future studies once data on military lawyers' decisions becomes available.[63] Quantitatively assessing the judicial decision-making of appellate judges who overturn military sexual assault convictions on factual sufficiency grounds is crucial for several reasons. First, it objectively measures how often and under what circumstances appellate judges overturn such convictions, offering insights into patterns and trends in judicial

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Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435 (2005); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judge's Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145 (2001); DAC-IPAD, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 1 (2020) [hereinafter *Investigative Case File*]; DAC-IPAD, REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN THE INVESTIGATION, PROSECUTION, AND CONVICTION OF SEXUAL OFFENSES IN THE MILITARY 1 (2020); ROBERT J. STEVENSON, ORGANIZATIONAL REACTION TO SOCIAL DEVIANCE: THE MILITARY CASE (2010); Patricia D. Breen, *The Trial Penalty and Jury Sentencing: A Study of Air Force Courts-Martial*, 8 J. EMPIRICAL LEGAL STUD. 206 (2011); Joseph L. Peterson et al., *Effect of Forensic Evidence on Criminal Justice Case Processing*, 58 J. FORENSIC SCI. S78 (2013); Kenneth Adams & Charles R. Cutshall, *Refusing to Prosecute Minor Offenses: The Relative Influence of Legal and Extralegal Factors*, 4 JUST. Q. 595 (1987); Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses*, 1991-1992, 31 L. & SOC'Y. REV. 789 (1997); Darrell Steffensmeier et al., *Gender and Imprisonment Decisions*, 31 CRIMINOLOGY (1993); Jeffery T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME DELINQ. 427 (2007).

60 *See Civilian Lawyer vs Military Lawyer: What's the Difference?*, *supra* note 57 (discussing how there is a misconception that civilian lawyers are not as proficient in military law than JAG attorneys, but the truth is that civilian attorneys are just as capable if needed).

61 Over the past two decades, Congress has made significant changes to the Manual For Courts-Martial, affecting everything from changing elements in offenses, definitions, procedure, and the rules of evidence. *See* MANUAL FOR COURTS-MARTIAL UNITED STATES, DEP'T OF DEF. (2024 ed.). There have been studies of the military justice system, which has helped form decision-making of those charged with recommending and enacting new legislation. However, on the issue of commanders versus lawyers, the record is devoid of theoretically sound comparisons between commanders and military lawyers.

62 *See* National Defense Authorization Act of Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) (switching authority for major offenses from commanders to military lawyers).

63 *See id*. The new procedural component granting military lawyers the authority to charge cases began in December 2023. David A. Schlueter & Lisa Schenck, *Recent Legislative Developments: The 2022 National Defense Authorization Act*, ARMED FORCES (Mar. 2022), https://www.armfor.uscourts.gov/ConfHandout/2022ConfHandout/SchenckSchlueterRecentLegisDevelopmentsRR.pdf

behavior.[64] This data-driven approach allows for a systematic analysis of the consistency and fairness of appellate decisions, helping identify potential biases or disparities in handling cases.[65] By examining the frequency and rationale behind overturned convictions, researchers and policymakers can better understand whether the appellate process is functioning as intended, ensuring that justice is achieved and perceived as having been achieved.[66]

Second, this quantitative assessment is essential for evaluating the broader implications of appellate decisions on the military justice system and protecting victims' rights. Overturning convictions on factual sufficiency grounds profoundly impacts the perception of justice among service members and the public.[67] It influences the willingness of victims to come forward and report sexual assaults, knowing that their cases might not withstand appellate scrutiny.[68] Additionally, analyzing these decisions can highlight areas where the initial investigative and prosecutorial processes may need improvement, potentially leading to reforms that strengthen the overall integrity and reliability of military justice.[69] In essence, quantitative assessment serves as a foundational tool for ensuring accountability, enhancing transparency, and fostering trust in the military judicial system.[70]

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64 *See* S. Sydney Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, 28 L. & CONTEMP. PROBS. 164, 165 (1963) (discussing how quantitative research can help predict judicial behavior and identify variables that are crucial).

65 *See id*. at 166 (discussing how research has established that judges show consistent patterns of behavior when dealing with a particular class of litigants with different types of subject matter).

66 *Quantitative Research*, INTERACTION DESIGN FOUND. (June 6, 2016), https://www.interaction-design.org/literature/topics/quantitative-research#:~:text=Another%20powerful%20benefit%20of%20conducting,theories%20won't%20create%20bias (discussing how quantitative research can help answer all of your questions and can show what works as well as what needs improving).

67 *See generally* Claire M. Lankford, Compensation and Wrongful Conviction: An Examination of Public Perceptions for Wrongful Convictions (June 16, 2022) (Ph.D. dissertation, Drexel University) (ProQuest) (a study discussing the general public's perception of wrongful convictions).

68 Seri Irazola et al., *Addressing the Impact of Wrongful Convictions on Crime Victims*, NAT'L INST. OF JUST. (Oct. 1, 2014), https://nij.ojp.gov/topics/articles/addressing-impact-wrongful-convictions-crime-victims#1-0 (explaining how when a defendant is exonerated in a criminal case, the victims experience guilt, fear, helplessness, etc. at a comparable or even worse rate than they did at the time of their original victimization).

69 David C. Donald, *Law in Regression? Impacts of Qualitative Research on Law and Regulation*, 2 COLUM. BUS. L. REV. 520, 520 (2015) (discussing that quantitative research has improved the quality of law and rulemaking).

70 *See generally id*.; *Qualitative vs. Quantitative Data in Research: What's the Difference?*, FULLSTORY (Oct. 3, 2024), https://www.fullstory.com/blog/qualitative-vs-quantitative-data/#:~:text=Essentially%2C%20quantitative%20research%20is%20an,people%20responded%20with%20each%20answer.

I. THE ROLE OF LAW

Within the last decade, Congress gave non-binding guidance on the factors to consider when making charging decisions.[71] One of the factors includes "[w]hether admissible evidence will probably be sufficient to obtain and sustain a finding of guilty in a trial by court-martial when *viewed objectively* by an *unbiased factfinder*."[72] No additional information is provided as to what the terms "objective" and "unbiased" mean.[73] The central thesis of this Article is that there is a disconnect between what Congress states and what, in practice, actually happens. Nobody can receive evidence through a purely objective lens because everyone has biases.[74] The processing of sexual assault cases, perhaps, is the best area to see the lack of objectivity and the exuding of biases.[75] How then can legal actors employ this guidance in the practice of sexual assault case processing?

Max Weber's sociological theory of law elucidates the intricate relationship between the legislature and the judiciary in creating and enforcing laws.[76] According to Weber, the law transcends being a mere collection of written rules; it is a dynamic system shaped by the actions and interpretations of legislative bodies and judicial authorities.[77] The legislature, composed of elected representatives, creates laws that reflect societal needs and aspirations.[78] These laws are subsequently codified into statutes and regulations.[79] However, merely creating laws does not ensure their implementation or adherence.[80] It is through the judiciary, the government branch responsible for interpreting and applying the law, that legislative statutes gain practical significance.[81] Judges bring written laws to life through their decisions and rulings, adapting them to specific cases and evolving

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71 10 U.S.C. § 833; *see also* Exec. Order No. 13825, 83 Fed. Reg. 9889 (Mar. 1, 2018).

72 MCM 2024, *supra* note 3, at R.C.M. 2.1, 2.1(a).

73 *Id.*

74 *Id.*

75 Mark Sameit, *When a Convicted Rape Is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 MIL. L. REV., 77, 77 (2013) (highlighting the "delicate balance [that] has led to a battle of ideas between victim's rights groups and Due Process advocates.").

76 David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 722 (1972).

77 *Id.* at 727.

78 *Id.* at 724.

79 *About the United States*, GOVINFO, https://www.govinfo.gov/app/collection/uscode (last visited Nov. 6, 2024); *Code of Federal Regulations (C.F.C.)*, CORNELL L. SCH., https://www.law.cornell.edu/wex/code_of_federal_regulations_%28c.f.r.%29 (last visited Nov. 6, 2024).

80 Z. Payvand Ahdout¸ *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937 (2022) (highlighting the judiciary's role in enforcing accountability through "managerial checks" to ensure executive adherence to enacted policies).

81 *Id.* at 960–73 (illustrating how judicial review enforces statutory requirements and transforms legislative intent into actionable policies through judicial oversight).

societal contexts.[82] This interplay between the legislature and judiciary ensures that laws are not static but are continually interpreted and redefined within the framework of societal norms and values.[83]

Weber argued that the meaningfulness of law hinges on its enforcement through state mechanisms.[84] Without enforcement, laws remain theoretical constructs with no practical impact. State mechanisms, including law enforcement agencies and the judiciary, are essential in upholding the law and ensuring compliance.[85] The police and other regulatory bodies play a crucial role in the initial enforcement of laws by investigating and apprehending individuals who violate legal norms.[86] Following this, the judiciary adjudicates cases, interpreting the law's application to the facts and determining appropriate penalties or remedies.[87] This enforcement process legitimizes the law, as individuals recognize the tangible consequences of legal infractions.[88] The law's authority and effectiveness are realized through its consistent and impartial enforcement by state institutions, highlighting the symbiotic relationship between legislative intent and judicial interpretation in producing meaningful law.[89]

For Weber, law encompasses various forms, including organized coercion, legitimacy and normativeness, and rationality.[90] When equating law with organized coercion or power, he stated, "[a]n order will be called . . . *law* if it is externally guaranteed by the likelihood that physical or psychological coercion will be applied by a [group] of people [to ensure] compliance or [to penalize] violation[s]."[91] In this sense, the government imposes its power to conform the will of those under its authority.[92] This form of domination necessitates perceived legitimacy, which operates as a shield against usurpation.[93]

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82 *Id.* at 948–56 (describing how judicial review interprets and applies written laws, adapting legal standards to specific cases and evolving societal needs).

83 *Id.* (noting how judicial review dynamically interprets and applies statutory frameworks, maintaining alignment with legislative goals and societal norms).

84 Trubek, *supra* note 76 (explaining Weber's view that the enforcement of legal rights through state mechanisms is necessary for law's efficacy in modern economies).

85 Ahdout, *supra* note 80, at 948–56 (explaining the role of the judiciary and other state mechanisms in ensuring executive accountability and compliance with statutory frameworks).

86 A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in 1 HANDBOOK OF LAW & ECONOMICS* 403 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

87 Ahdout, *supra* note 80, at 948–56 (exploring the judiciary's role in interpreting and enforcing legal standards through judicial review and case management).

88 *See generally* CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (Voltaire trans., 4th ed., Lawbook Exchange Ltd 2016) (1764).

89 *See generally id.*; Trubek, *supra* note 76.

90 Trubek, *supra* note 76, at 725–27.

91 *Id.* at 725.

92 *Id.*

93 *Id.* at 726.

In *The Speech of Justice*, Judge Learned Hand explored the role of judges within the American legal framework, emphasizing the tension between conservative views and the need for judicial adaptation to societal changes.[94] Hand critiqued the conservative perspective that views judges as passive interpreters who strictly adhere to the letter of the law, ignoring evolving societal aspirations.[95] He argued that while adherence to formal legal principles is crucial, judges also bear the responsibility to understand and adapt to societal shifts.[96] For the legal profession to maintain trust and relevance, it must align with the deeper currents of societal change, adapting to new conditions.[97]

Judge Learned Hand framed the concept of law in terms consistent with Weber but did so within the context of judicial decision-making.[98] Judge Hand identified competing theories of appropriate judicial behavior, ranging from judges exercising independent judgment based on their conscience to judges being constrained to follow the letter of the law regardless of the outcome.[99] These theories, legal realism and legal formalism, suggest that both are somewhat accurate representations of human behavior, even for judges.[100] Hand echoed Weber in believing that law is not solely defined by the customs and norms of citizens but by the government's response to people's actions.[101] He focused on the enforcement of laws by judges, advocating for a balanced approach where judges neither blindly follow the letter of the law nor reign with unbridled discretion.[102] The components of this dichotomy, dubbed the "mechanical theory" and "free legal decision," reveal concerns that cases might be decided based on judges' views of public policy and their personalities.[103] This realization underscores that judges will likely view similar and identical cases differently from their peers.[104]

Hand further addressed the transforming landscape of the legal profession itself.[105] With diverse societal classes becoming more vocal, there is an increased demand for the legal profession to empathize with and respond to these changing societal ideals.[106] Hand underscored the

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94 Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 617 (1916).

95 *Id*.

96 *Id*. at 617–18.

97 *Id*. at 618–20.

98 *Compare* Trubek, *supra* note 76, at 725–28, *with* Hand, *supra* note 94, at 617–19.

99 Hand, *supra* note 94, at 617–18.

100 Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2–3 (2007); Hand, *supra* note 94, at 617.

101 *Compare* Trubek, *supra* note 76, at 725–27, *with* Hand, *supra* note 94, at 617–19.

102 Hand, *supra* note 94, at 617–19.

103 Charles Grove Haines, *General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 96–99 (1922).

104 *Id*. at 102–05.

105 Hand, *supra* note 94, at 619.

106 Haines, *supra* note 103, at 96–99.

importance of the profession's adaptability, warning that failure to engage with these changes could lead to diminished trust and relevance in the eyes of society.[107] Ultimately, Hand advocated for a broader, more comprehensive interpretation of the law.[108] He emphasized that the legal profession must understand and adapt to the changing societal will to avoid a loss of trust and relevance.[109] By embracing a more inclusive interpretation of the law that represents a broader array of social aspirations, the legal profession can sustain its relevance and foster trust within the community. [110]

Kalven and Zeisel's book, *The American Jury*, is a seminal work that delves deeply into jury decision-making dynamics and effectiveness in the American legal system.[111] The authors conducted an extensive empirical study, relying on both case documents and surveys completed by the judges who presided over these cases.[112] This dual approach allowed them to gather a comprehensive data set that provided insights into the jury system's strengths and weaknesses.[113]

The research focused on jury cases, with judges playing a critical role in evaluating the outcomes.[114] By examining case documents, Kalven and Zeisel analyzed each case's specifics, including the nature of the charges, the evidence presented, and the final verdicts rendered by the juries.[115] This detailed scrutiny of case files provided a factual basis for theorizing how juries reached their decisions and what factors may have influenced their judgments.[116]

In addition to case documents, the authors used surveys filled out by the judges who heard these cases.[117] These surveys were instrumental in capturing the judges' perspectives on the jury's decisions.[118] Judges were asked to opine whether they agreed or disagreed with the jury's verdict and to provide reasons for their positions.[119] This aspect of the research was particularly valuable, as it offered a professional assessment of the jury's performance from individuals with extensive legal expertise and experience.[120]

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107 Hand, *supra* note 94, at 620.
108 *Id.* at 621.
109 *Id.* at 620.
110 *Id.* at 620–21.
111 *See generally* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966).
112 *See generally id.*
113 *See generally id.*
114 *See generally id.*
115 *See generally id.*
116 *See generally id.*
117 *Id.* at 35, 47.
118 *Id.* at 50.
119 *Id.* at 51.
120 *Id.* at 52.

The surveys revealed a range of opinions among judges regarding jury decisions.[121] Some judges expressed agreement with the jury's verdicts, highlighting the jury's ability to discern the truth and deliver just outcomes.[122] Others, however, disagreed with the jury's conclusions.[123] By analyzing these differing opinions, the authors identified common themes and factors influencing the alignment or divergence between judicial and jury decisions.[124]

While Kalven and Zeisel's research in *The American Jury* provides a wealth of information about jury verdicts, it is crucial to recognize a significant limitation inherent in their methodology. The authors relied heavily on judges' assessments to infer why juries decided cases in particular ways.[125] This approach assumes that judges can accurately interpret juries' thought processes and deliberative outcomes.[126] However, the conclusions drawn from these surveys reflect what judges believe juries believed rather than the actual beliefs and rationales of the jurors themselves. The survey contained questions such as: "If you disagreed with the jury, what, in your opinion, was the main reason for the jury's verdict?"[127] Therefore, this limitation for understanding jury decision-making can be seen as a strength for understanding judicial decision-making.

It is believed that judges, with their extensive legal training and professional experience, approach case evaluation from a different perspective than jurors, who are typically laypersons with diverse backgrounds and limited legal knowledge.[128] This fundamental difference in perspective can lead to significant discrepancies between what jurors thought and what judges believe they thought.[129] Judges might interpret jury decisions through the lens of their legal expertise, potentially attributing sophisticated legal reasoning to verdicts that were, in reality, based on more straightforward, more intuitive judgments by jurors.[130] Consequently, the judges' assessments might not accurately capture the genuine thought processes and considerations that influenced the jury's verdict.[131]

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121 *Id.* at 104.
122 *Id.* at 57.
123 *Id.* at 135.
124 *Id.*
125 *See generally id.*
126 *Id.* at 243–44 (discussing a case in which the victim suggested playing "Russian Roulette," where a single bullet is placed in a revolver and the trigger is pulled repeatedly until it fires. In that instance, the defendant put the weapon against the victim's head, ultimately leading to the victim's death. The jury, however, convicted the defendant of manslaughter rather than murder, possibly influenced by evidence suggesting that the victim was contemplating suicide).
127 *Id.* at 534.
128 *See generally id.*
129 *See generally id.*
130 *See generally id.*
131 *See generally id.*

Kalven and Zeisel's study shifts the spotlight from the juries to the judges themselves by focusing on judges' interpretations of jury decisions.[132] The research, therefore, provides valuable insights into judicial decision-making and judges' perceptions regarding jury behavior. [133] These insights reveal how judges interpret and rationalize the outcomes of jury trials, shedding light on their beliefs about jury competence, biases, and the evidentiary factors that sway jury verdicts.[134] Rather than show that judges decide cases as unbiased automatons, the results show that judges harbor and think about case decisions with many of the same biases as lay individuals.[135] This information is crucial for understanding judicial attitudes toward the jury system and the potential disconnect between judicial expectations and jury performance.[136]

The authors of the study also explored the intricacies of jury decision-making in the context of sexual assault cases.[137] One significant finding of their research is the perception among judges that juries often base their decisions on the concepts of "contributory negligence" and "assumption of the risk."[138] These legal doctrines, typically associated with tort law, suggest that victims may bear some responsibility for the harm they suffer if they contributed to the situation that led to their victimization or knowingly exposed themselves to risk.[139] In the context of sexual assault, these concepts manifest in troubling ways, intertwining with themes of blame, believability, and the pernicious notion that a victim was "asking for it."[140]

Kalven and Zeisel found that judges believed juries frequently invoked these ideas, consciously or subconsciously, when deliberating on sexual assault cases.[141] This perspective aligns with broader societal myths and stereotypes that question the victim's behavior, attire, and decisions leading up to an assault.[142] For example, a jury might doubt the credibility of a victim's testimony if they perceive that the victim acted imprudently or recklessly, such as by consuming alcohol or being in a situation deemed risky.[143] This form of reasoning shifts focus away from the perpetrator's

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132 *See generally id.*
133 *See generally id.*
134 *See generally id.*
135 *See generally id.*
136 *See generally id.*
137 *See generally id.*
138 *See generally id.*
139 *See generally id.*
140 *See generally id.*
141 *See generally id.*
142 G. Bohner et al., *Social Norms and the Likelihood of Raping: Perceived Rape Myth Acceptance of Others Affects Men's Rape Proclivity*, 32 PERS. SOC. PSYCH. BULL. 286 (2006); A. Dellinger Page, *True Colors: Police Officers and Rape Myth Acceptance*, 5 FEM. CRIMINOLOGY 315 (2010).
143 Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213 (1991).

culpability and towards the victim's actions, thereby diminishing the seriousness of the assault and the responsibility of the assailant.[144]

The notion of "contributory negligence" in sexual assault cases is particularly problematic because it fundamentally misunderstands the nature of consent and victimization.[145] It implies that the victim could have prevented the assault through different behavior, thereby blaming the victim for the crime.[146] This is closely related to the theme of "assumption of the risk," where the victim is perceived to have willingly placed themselves in a dangerous situation, absolving the perpetrator of full responsibility.[147] These concepts are echoed in other literature on rape myths, which often highlight how societal beliefs around victim behavior and responsibility influences perceptions of blame and believability.[148]

Kalven and Zeisel's findings suggest that judges perceive juries as struggling with these biases, which can lead to unjust outcomes.[149] When juries buy into the notion that a victim's behavior somehow mitigates the assailant's guilt, they are less likely to deliver guilty verdicts.[150] This dynamic is particularly damaging in sexual assault cases, where victim testimony is often crucial, and the presence of such biases undermines the entire judicial process.[151] It underscores the need for better education and awareness among jurors about the nature of sexual assault in determining the guilt of the accused.

Moreover, the results of Kalven and Zeisel's work highlight the potential for cognitive biases in judicial assessments of jury decisions.[152] Judges might project their own reasoning onto juries or be influenced by hindsight bias, interpreting jury verdicts through the prism of what they believe the correct legal outcome should have been.[153] This phenomenon underscores the importance of considering the distinct cognitive processes and decision-making frameworks that characterize judges and juries.

Rape myth acceptance (RMA) attitudes refers to the beliefs and attitudes that trivialize, justify, or dismiss the severity and reality of sexual assault.[154] These myths often blame the victim, excuse the perpetrator, and downplay the impact of the crime, perpetuating harmful stereotypes and misconceptions about sexual violence.[155] Common rape myths include

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144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *See* KALVEN & ZEISEL, *supra* note 111.
150 *See id.*
151 *See id.*
152 *See id.*
153 *See id.*
154 SUSAN ESTRICH, REAL RAPE (Harv. Univ. Press rev. ed., 1988).
155 *Id.*

notions that victims provoke assaults by their behavior or appearance, that false accusations of rape are common, and that "real rape" only happens in specific contexts, such as involving a stranger rather than an acquaintance.[156] RMA is prevalent in the general public and among criminal justice actors, including law enforcement officers, prosecutors, judges, and juries.[157] These attitudes significantly influence the decisions made at various stages of the criminal justice process, from the initial investigation to the final verdict.[158]

Judges and jurors who hold rape myths can also profoundly impact trial outcomes.[159] Judges may allow the introduction of irrelevant and prejudicial evidence that plays into rape myths, such as the victim's sexual history or behavior at the time of the assault.[160] Judges allow victims' sexual histories into evidence despite rape shield laws prohibiting it.[161] These decisions can skew the trial in favor of the defendant by undermining the victim's credibility.[162] Jurors with RMA are more likely to question the victim's behavior and motives, leading to higher acquittal rates in sexual assault cases.[163] This bias results in unjust outcomes and perpetuate a cycle where victims are less likely to report assaults, knowing that the criminal justice system may not support them.[164]

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156 *Id.*

157 Rebecca M. Hayes et al., *Victim Blaming Others: Rape Myth Acceptance and the Just World Belief*, 8 FEM. CRIMINOLOGY 3 (2013); Amy Grubb & Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 AGGRESSION & VIOLENT BEHAV. 396 (2008); F. Eyssel & G. Bohner, *Schema Effects of Rape Myth Acceptance on Judgments of Guilt and Blame in Rape Cases: The Role of Perceived Entitlement to Judge*, 26 J. INTERPERSONAL VIOLENCE 1579 (2011); Philipp Süssenbach et al., *Schematic Influences of Rape Myth Acceptance on Visual Information Processing: An Eye-Tracking Approach*, 48 J. EXP. SOC. PSYCH. 660 (2012); L. Ellison & V. E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 BRIT. J. CRIMINOLOGY 202 (2008); L. Ellison & V. E. Munro, *Turning Mirrors Into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 BRIT. J. CRIMINOLOGY 363 (2009) [hereinafter *Turning Mirror Into Windows?*]; L. Ellison & V. E. Munro, *Of "Normal Sex" and "Real Rape": Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation*, 18 SOC. LEG. STUD. 291 (2009); A. Dellinger Page, *Behind the Blue Line: Investigating Police Officers' Attitudes Toward Rape*, 22 J. POLICE CRIM. PSYCH. 22 (2007); A. Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. 44 (2008).

158 *Id.*

159 Gregory M. Matoesian, *"You Were Interested in Him as a Person?": Rhythms of Domination in the Kennedy Smith Rape Trial*, 22 L. SOC. INQUIRY 55 (1997).

160 *Id.*

161 *Id.*

162 *Id.*

163 *Turning Mirrors Into Windows?*, *supra* note 157.

164 SARAH E. ULLMAN, TALKING ABOUT SEXUAL ASSAULT: SOCIETY'S RESPONSE TO SURVIVORS (Am. Psych. Ass'n ed., 2d. ed. 2023).

II. STATUTORY FRAMEWORK (FACTUAL SUFFICIENCY REVIEWS)

Congress provided military courts the power to conduct factual sufficiency reviews to maintain the integrity of the military's criminal justice process.[165] The military's system has evolved significantly since the Uniform Code of Military Justice (UCMJ) enactment in 1950.[166] In fact, the military's system has sometimes produced greater protections for servicemembers than its civilian counterpart.[167] The authority to conduct factual sufficiency reviews provides a mechanism through which the appellate courts may reconsider the evidence presented at trial and determine whether the evidence supports a finding of guilt beyond a reasonable doubt.[168] This is distinct from most civilian appellate courts, which typically limit their review to questions of law rather than questions of fact.[169]

The UCMJ grants military appellate courts the authority to review a conviction's legal and factual sufficiency.[170] Specifically, Article 66 of the UCMJ provides the Courts of Criminal Appeals (CCAs) with the power to review the factual sufficiency of cases.[171] These courts can set aside convictions if they find that the evidence does not support the findings of guilt beyond a reasonable doubt, even if the trial judge or jury reached a different conclusion.[172]

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165 Uniform Code of Military Justice, art. 66(c), Pub. L. No. 81-506, 64 Stat. 107, 128 (1950).

> In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Id.

166 David A Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 SAINT MARY'S L.J. 1 (2017) (The UCMJ is the foundational legal framework for the United States Armed Forces' criminal justice system.).

167 *See* Miranda v. Arizona, 384 U.S. 436, 489 n.62 (1966) (noting that the military already provided statutorily required right to warnings to servicemembers when the Supreme Court found a constitutional right to warnings).

168 United States v. England, 79 M.J. 116, 121 (C.A.A.F. 2019).

169 Both Texas and New York appellate courts can conduct factual sufficiency reviews, but they give much greater deference to the factfinder. Windrum v. Kareh, 581 S.W.3d 761, 768 (Tex. 2019) ("It was the sole obligation of the jury to determine Dr. Parrish's credibility over other experts, and this Court will not disturb the jury's findings."); People v. Bleakley, 508 N.E.2d 672, 675 (N.Y. 1987) ("Empowered with this unique factual review, intermediate appellate courts have been careful not to substitute themselves for the jury. Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor.").

170 10 U.S.C. § 866(d)(1) (2018); 10 U.S.C. § 866(c) (2012 & Supp. IV 2017). These are the two provisions in effect between 2017-2020, the timeframe for this study. *See id.*

171 *Id.*

172 *Id.*

The role of military appellate courts in conducting factual sufficiency reviews was initially designed to ensure justice within the military, where justice was lacking.[173] Service members are subject to a distinct legal system that must balance the need for order and discipline with the principles of fairness and justice.[174] By allowing appellate courts to review the factual basis of convictions, the military justice system introduces an additional layer of scrutiny to protect against wrongful convictions and ensure that justice is not only done but seen to be done.[175]

Factual sufficiency review involves a *de novo* evaluation of the evidence.[176] Unlike civilian appellate courts that defer to the trial court's findings unless there is a clear error, military appellate courts independently review the entire record.[177] They weigh the evidence, assess the credibility of witnesses, and may draw their own conclusions about the facts of the case.[178] This comprehensive review process is designed to uphold the integrity of the military justice system and ensure that convictions are based on solid and credible evidence.[179]

This authority, however, has its challenges and criticisms. One significant challenge is the potential for appellate courts to usurp the factfinder's role at trial, whether a military judge or a panel (the military equivalent of a jury).[180] Critics argue that appellate judges who did not observe the testimony and evidence firsthand may not be in the best position to assess witness credibility and the weight of the evidence.[181] This concern underscores the delicate balance that military appellate courts must maintain between thorough review and appropriate deference to the trial process.

Moreover, the exercise of factual sufficiency review can sometimes be seen as undermining the finality of military trials.[182] In a system where discipline and efficiency are critical, the possibility of appellate reversal based on factual sufficiency might be perceived as destabilizing.[183] Despite these concerns, the military justice system prioritizes accuracy and fairness,

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173 Sameit, *supra* note 75, at 82 (highlighting the "delicate balance [that] has led to a battle of ideas between victim's rights groups and Due Process advocates.").

174 MCM 2008, *supra* note 3, at 51–52.

175 *Id.*

176 United States v. England, 79 M.J. 116, 121 (C.A.A.F. 2019).

177 Sameit, *supra* note 75, at 84. However, the appellate court does not receive any additional evidence during its review. *See id.*

178 *England*, 79 M.J. at 121.

179 *See generally id.* ("The scope of an appellate court's authority is a legal question this Court reviews de novo.").

180 *See generally* United States v. Frost, No. ARMY 20160171, 2018 CCA LEXIS 263, at *5 (A. Ct. App. May 30, 2018) (showing that the appellate court usurped the trial court's role as a factfinder).

181 *Id.* This is an appellate case where the judge said they cannot do it that well. *See id.*

182 *See generally id.* (showing that the appellate court made "allowances for not having personally observed the witnesses" when weighing the evidence).

183 *See generally id.*

recognizing that the stakes for service members, who face potentially severe penalties and long-term consequences, are extraordinarily high.[184]

III. METHODS (SAMPLE)

This study includes a unique approach in the assessment of military appellate case disposition of adult sexual offense cases. While other studies on military appellate court dispositions of adult sexual assault cases have taken a qualitative approach, none has empirically examined the relationship between the court's finding of factual sufficiency and sexual offense case characteristics.[185] Furthermore, no other study has compared factual sufficiency findings of military appellate courts against the commander's decision to charge cases. A case in the military follows similar paths as cases in civilian jurisdictions.[186] Cases are tried at the trial-court level.[187] If there is a conviction, the appellate court can hear the case on appeal.[188] Each service branch (i.e., Navy and Marine Corps, Army, Air Force, and Coast Guard) has its own appellate court.[189] The Navy and Marine Corps fall within the Department of the Navy, and therefore, their cases are consolidated and appealable to the Navy-Marine Corps Court of Criminal Appeals.[190] On appeal, the appellate courts consider factual sufficiency and any other legal issue.[191] Sometimes, a case will be heard on appeal, and the appellant, typically the defendant, will ask the court to reconsider.[192] If the court does reconsider its earlier decision, it will ultimately issue two opinions, one for the initial decision and one for the decision made upon reconsideration.[193] These separate opinions are considered separate units of analysis where the decisions have different judges or analyze the issue of factual sufficiency

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184 *See generally id.* at *4–5 (affirming "only those findings of guilty that we find correct in law and fact and determine, based on the entire record, should be affirmed.").

185 Ryan, *supra* note 48, at 1323; Schenck, *supra* note 23, at 524–25; DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, APPELLATE REVIEW STUDY 1 (2023), https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Appellate-Review-Study_Final.pdf.

186 *See generally Frost*, 2018 CCA LEXIS 263, at *5 (revealing that the military proceeding was comparable to a civil proceeding).

187 *See generally id.* (showing that military cases are tried at a trial court level).

188 *See generally id.* (hearing the case on appeal).

189 *See, e.g., id.* This case is from the Army Court of Criminal Appeals. *Id.*

190 *See, e.g.*, United States v. Dawkins, No. NAVY-MARINE 201800057, 2019 CCA LEXIS 386, at *7 (N-M. Ct. Crim. App. Oct. 4, 2019). This case is from the Navy-Marine Corps Court of Criminal Appeals. *See id.*

191 Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (2016) [hereinafter UCMJ 2016]. The 2016 version is cited here based on the time period of cases selected for inclusion in this study.

192 Navy-Marine Corps Ct. Crim. App. r. 31(a) (2019). See for example *Dawkins*, 2019 CCA LEXIS 386, at *1, where the court reconsidered its earlier decision, United States v. Dawkins, No. NAVY-MARINE 201800057, 2019 CCA LEXIS 363, at *1 (N-M. Ct. Crim. App. Sept. 5, 2019), to clarify its opinion regarding member selection.

193 *Id.*

differently from the prior decision.[194] There are many reasons why the same appellate court, with different judges, would conduct a factual sufficiency review of the same case, and each of these separate opinions could include distinct information about a judge's personal philosophy regarding sexual assault.[195]

Data for this study was collected from two sets of data, appellate opinions and prosecutor files. Appellate opinions for this study were selected using the LexisNexis features for researching military cases. The search criteria began with a search for "factual pre/1 sufficiency" to include all cases reviewed by a military appellate court regarding a claim of factual insufficiency. This process resulted in the selection of 3,038 cases. The timeframe for the cases was narrowed to cases decided between January 1, 2017 and May 20, 2020, resulting in 313 cases. Cases were then reviewed to assess whether the court did a factual sufficiency review, versus simply referring to the factual sufficiency review process (e.g., cases discussing the prior history of the case where a factual sufficiency review was completed). All decisions where the court did not conduct a factual sufficiency review were removed. Cases were removed if they involved a factual sufficiency review, but for offenses other than an adult sexual offense. This included the removal of child sexual offense cases. The rationale is that child offense cases are qualitatively different than adult cases. For instance, the issue of consent is markedly different between the two.[196] For certain classes of children, consent is not possible.[197] While the same may be true for certain adult sexual offense cases, such as cases involving incapacitation due to alcohol consumption, the difference is the child has no choice, and therefore no possible blame, for their incapacitation.[198] The resulting number of cases was 134.

Most of the appellate decisions did not provide the offender's and victim's race or age, nor are the casefiles available for each case.[199] It is likely that the organizational writings of the appellate court does not incorporate some case details that influenced the decision-making. With this additional information it is likely that a better model explaining more of the variance

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194 *See generally Dawkins*, 2019 CCA LEXIS 386, at *1 (analyzing the issue of factual sufficiency differently from the prior decision).

195 *See, e.g.*, *id.* at *6–7.

196 *See generally* United States v. Frost, No. ARMY 20160171, 2018 CCA LEXIS 263, at *11 (A. Ct. App. May 30, 2018).

197 *See generally id.* (stating that the minor child did not consent to sexual acts).

198 *See generally id.* at *17 (holding that the child was not held liable).

199 *See, e.g.*, *Dawkins*, 2019 CCA LEXIS 386, at *6 (explaining that the offender's race was mentioned in the context of an appellate issue where the offender argued the jury members had been improperly selected based on racial factors); United States v. Laguitan, No. AIR FORCE 39707, 2021 CCA LEXIS 173, at *3 (A.F. Ct. Crim. App. Apr. 13, 2021) (explaining that the age of the victim was mentioned in the context of the applicable drinking age).

could be produced. However, even with this limitation the analysis is not fatally flawed.[200]

Appellate cases were coded using solely the publicly available information included in the court opinions. The author of this Article was the principal researcher and sole person who coded the data, going through each case at least two times to verify accuracy of coding. In coding the cases, the principal researcher did not make any assumptions about the cases. For instance, if the court stated two individuals were dating, but made no specific mention of them previously having had consensual sex, the principal researcher did not assume the two individuals had previously had consensual sex.

The prosecutor case files used in this study originated from a command within the Navy's Midwest region. The Commander, Navy Region Mid-Atlantic, always decided whether a case was tried at a general court-martial.[201] Given that the cases spanned three years and commanders typically rotated every two years, different commanders made the case dispositions. Similar to how prosecutor offices handle cases horizontally, where the Convening Authority (CA) decides to prosecute but does not actually prosecute the case, it is likely that more cases were charged.

The data consisted of criminal case files from the Navy's Midwest region. In total, 391 cases involved an allegation screened by the prosecutor's office as an adult sexual assault. Cases were excluded if they did not involve an adult sexual assault offense or if they involved another offense, such as child pornography, that changed the nature of the case. Cases with child victims or child pornography significantly differ from adult sexual assault cases from a prosecutorial and theoretical perspective.[202] For example, child sexual abuse cases are harder to prosecute and considered more egregious, creating different dynamics than adult sexual assault cases.[203] Child pornography cases are easier to prosecute, which also creates a dynamic distinct from adult sexual assault cases.[204] The final sample consisted of 120 adult sexual assault cases.

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200 *See generally* Patrick Q. Brady & Bradford W. Reyns, *A Focal Concerns Perspective on Prosecutorial Decision Making in Cases of Intimate Partner Stalking*, 47 CRIM. JUST. BEHAV. 733 (2020); Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206 (2001) (showing that the authors excluded variables for a data set containing 140 cases).

201 *See generally Dawkins*, 2019 CCA LEXIS 386, at *7.

202 United States. v. Young, 231 F. Supp. 3d 33 (M.D. La. 2017).

203 *Id.*

204 *Id.*

IV. METHODS (CODING)

A. Dependent Variable

For the appellate cases, the dependent variable for the study was whether the appellate court reviewing the conviction made a finding that a sexual offense was factually insufficient, in essence overturning the prior conviction.

For the commander cases, the dependent variable for the study was whether the commander criminally charged the case.

B. Independent Variables[205]

Numerous variables have been found within the extant literature to have impacted case processing. Some of these factors are termed legal variables because researchers have opined that they are the variables that should impact case processing (e.g., severity of the crime).[206] Other factors that have been found to influence case processing are termed extralegal because they are factors that scholars have opined should not affect case processing (e.g., race).[207] Whereas previous research has frequently categorized these variables into legal and extralegal classifications, this study, in alignment with contemporary scholarship, eschews the legal-extralegal dichotomy. Instead, a more nuanced taxonomic approach is adopted that mitigates potential bias and attenuates politically charged connotations inherent in the traditional bifurcation.[208]

Consistent with prior research, factors in this study were grouped into victim blame and believability, offense seriousness, and strength of the evidence.

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[205] For a fuller explanation of the variables chosen for the commander models, see Chris Cox, *When Commanders Decide: Military Prosecutorial Decision-Making in Sexual Assault Cases*, 22 SEATTLE J. SOC. JUST. 2 (2024).

[206] Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 L. SOC. REV. 291, 293 (1987) (finding that seriousness of the offense increases the likelihood of prosecution); Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 J. CRIM. L. CRIMINOLOGY 2, 303 (1990) (finding seriousness of the offense had the most profound effect on the decision to prosecute); Jeffrey Spears & Cassia Spohn, *The Genuine Victim*, 20 AM. J. CRIM. JUST. 183 (1996) (finding the two variables, threats or force and injury to the victim were more likely to be charged).

[207] *See, e.g.*, United States v. Dawkins, No. 201800057, 2019 CCA LEXIS 386, at 6 (N-M Ct. Crim. App. Oct. 4, 2019) (explaining that the offender's race was mentioned in the context of an appellate issue where the offender argued the jury members had been improperly selected based on racial factors).

[208] Spohn et al., *supra* note 200, at 223.

C. Victim Blame and Believability

Consistent with prior research, victim blame and believability factors that influence case processing include: (1) whether the victim and offender were intimate partners,[209] (2) whether the victim resisted verbally,[210] (3) whether the victim made a fresh complaint,[211] (4) whether the crime occurred at the victim or offender's home,[212] and (5) whether the victim was on active duty.[213] Intimate partners, for purposes of coding in this study, include any evidence that the victim and offender had previously engaged in consensual sex.[214] A case was coded as having verbal resistance where the victim indicated to the offender a lack of consent (e.g., stating, "no" or "stop").

The concept of a "fresh complaint" refers to a statement to law enforcement made by a victim of a crime, usually sexual assault, shortly after the incident occurs.[215] Often, the timeframe for the complaint to be considered fresh is limited to within twenty-four hours of the crime.[216] Fresh complaints are a classic example of how the extralegal/legal distinction is less helpful than with other variables. Psychological responses to trauma vary widely; victims of sexual assault may delay reporting for a variety of reasons, including but not limited to shock, fear, shame, or mistrust of authorities.[217] Numerous studies indicate that delayed reporting is a common and understandable reaction among victims of sexual violence, suggesting that the timing of a complaint does not reliably correlate with its truthfulness.[218] Additionally, external factors such as social stigma, fear of retaliation, and privacy concerns significantly influence a victim's decision to report an

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209 Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 667 (2001) (using prior consensual sex as a determinant for the definition of intimate partner).

210 Katie M. Edwards et al., *In Their Own Words A Content-Analytic Study of College Women's Resistance to Sexual Assault*, 29 J. INTERPERSONAL VIOLENCE 2527, 2539 (2014); CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, 132 (2012).

211 Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525 (2012); Jeffrey Spears & Cassia Spohn, *The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases*, 14 JUST. Q. 501 (1997).

212 *See generally* United States v. R.V., 157 F. Supp. 3d 207 (E.D.N.Y. 2016).

213 *Investigative Case File*, *supra* note 59, at 114.

214 Spohn & Holleran, *supra* note 209, at 667.

215 *See* Commonwealth. v. Johnson, 2015 MP 17, 9 N. Mar. I. 439.

216 GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 79, 99, 107–08 (1989) (explaining that "fresh complaint" is the term used to describe a victim's report to law enforcement temporally close in time to the sexual assault).

217 Alderden & Ullman, *supra* note 211.

218 *Id.*

incident.[219] These factors can cause a victim to delay or avoid reporting, regardless of the crime's occurrence.[220] Within the legal framework, the absence of a fresh complaint does not prove innocence, as this understanding fails to appreciate the complexities of human behavior following trauma.[221] Regardless of one's position on the issue of sexual assault, it must be acknowledged that a complaint, whether fresh or otherwise, has the possibility of being false.[222] Therefore, the presence or absence of a complaint, whether or not false, is not indicative of whether a crime occurred.[223]

The rationale for treating fresh complaints as corroborating evidence of a crime has been used to create rules of evidence specifically allowing this type of evidence.[224] However, the current rules of evidence are stricter than the definition of fresh complaint used in the literature.[225] The question for the

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219 *See generally* State v. Carey-Martin, 293 Or. App. 611, 430 P.3d 98 (2018).

220 *See generally id.*

221 *See generally id.*

222 Cassia Spohn et al., *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 L. SOC. REV. 161, 172 (2014).

223 *Id.*

224 SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 26 (1975) (citing Bracton for the law applicable in antiquity that a virgin who had been raped needed to run immediately to others with "hue and cry" for a viable case of rape to ensue in the Crown's courts); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), available at: https://tile.loc.gov/storage-services/service/ll/llmlp/manual-1951/manual-1951.pdf. The rationale for fresh complaints supporting a victim's statements are stated in the 1951 Manual:

> c. Fresh complaint—In prosecutions for sexual offenses . . . evidence that the alleged victim of such an offense made complaint thereof within a short time thereafter is admissible. This evidence is to be restricted to proof that the complaint (including the identification of the offender) was made, a description of the details of the offense given during the course of making the complaint being inadmissible under this rule. Evidence of fresh complaint, as such, is received solely for the purpose of corroborating the testimony of the victim and not for the purpose of showing directly the truth of the matters stated in the complaint. However, the complaint, as well as a description of the details of the offense related during the course of making the complaint, may be received in evidence to prove directly the truth of the matters stated if admissible under the spontaneous exclamation exception to the hearsay rule.

MANUAL FOR COURTS-MARTIAL, *supra* note 224, at 256.

No definition is provided for the phrase "within a short time thereafter." However, case law provides some parameters. United States v. Bennington, 31 C.M.R. 151, 156-157 (U.S. C.M.A. 1961) (finding no fresh complaint when two hours passed after a male-on-male assault where the victim did not later awake his roommate nor show emotion such as "shock, outrage, resentment or even disgust" when telling his roommate about the incident); United States v. Mantooth, 6 U.S.C.M.A. 251, 254 (U.S. C.M.A. 1955) (stating the rationale that a fresh complaint necessarily follows a rape, because it is the "natural instinct of a female" to immediately report and the "absence of such a complaint may aid in defense efforts to impeach her testimony"); United States v. Coleman, 11 C.M.R. 850, 851–52 (U.S. A.F.B.R. 1953) (finding a fresh complaint when police interrupted a forcible rape and the victim made a statement at that moment about what happened).

225 MCM 2024, *supra* note 3, at MIL. R. EVID. 803(2) (stating that the hearsay exception for admissibility is a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused").

purposes of this study, though, is not the propriety of the laws or rationale for fresh complaints and the rules regarding their admissibility as evidence, but rather whether judges use this information when deciding whether a case is factually sufficient.

As to whether the crime occurred at the victim or offender's home, this variable was coded when either of those measures was present. The scholarship on this variable shows that victims are blamed for their behavior, and allowing a person into your home or going to an offender's home is thought to increase the victim's blameworthiness.[226] Researchers have found that the blameworthiness of the victim impacts case dispositions.[227]

Although there is limited research on the military justice system and, therefore, limited research on the influence of the victim's status as an active duty service member, some research suggests that cases involving a civilian victim are more likely to result in a conviction when compared to active-duty victims.[228]

D. Offense Seriousness

The basic premise of the following hypothesis is that the use of punitive measures will increase as the seriousness of the offense increases. Offense seriousness variables include penetration,[229] number of victims,[230] and injury.[231] Any penetration, whether oral, anal, or vaginal by the use of any object or body part was coded as '1.' In cases with multiple victims, the variables were coded based on the victim's case that related to the factual sufficiency review. Where both victims' cases were reviewed for factual sufficiency, the variables were coded as '1' if either case included that variable. Any injury to the victim, whether on the body or genitalia, was coded as '1.' There has been theoretical debate that charging rates increase when the offender is in a supervisory relationship to the victim,[232] and the

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226 Spohn et al., *supra* note 200.

227 Spohn & Holleran, *supra* note 209, at 667.

228 *Investigative Case File*, *supra* note 59, at 114.

229 Suzanne St. George & Cassia Spohn, *Liberating Discretion: The Effect of Rape Myth Factors on Prosecutors' Decisions to Charge Suspects in Penetrative and Non-Penetrative Sex Offenses*, 35 JUST. Q. 1280, 1280–1308 (2018).

230 DAC-IPAD, JUDICIAL PROCEEDINGS PANEL: REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES 30 (2016).

231 Cassia Spohn & Katharine Tellis, *Sexual Assault Case Outcomes: Disentangling the Overlapping Decisions of Police and Prosecutors*, 36 JUST. Q. 383 (2019).

232 Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GEND. L. 147 (2011); Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough Note*, WOMENS RTS. L. REP. 99 (2007); Colleen Dalton, *The Sexual Assault Crisis in the United States Air Force Academy*, 11 CARDOZO WOMENS L.J. 177 (2004).

findings from the 2020 DAC-IPAD report support this theory.[233] Therefore, whether the offender was the supervisor of the victim was coded as '1.'

E. Strength of the Evidence

Strength of the evidence factors found in the literature to have influenced case processing include whether there was a third-party witness favoring the government,[234] physical evidence other than deoxyribonucleic acid (DNA) (e.g., video), forensic medical examination of the victim,[235] and confession by the offender.[236] If there was a witness who favored the prosecution's case, then the case was coded as '1.' This includes cases where the victim reported to a friend and that was mentioned in the opinion. Reporting to a friend is distinguished from reporting to law enforcement, which was coded as a '1' for fresh complaint. Physical evidence was coded '1' where there was evidence of some physical evidence that supported the prosecution's case against the offender. Confession was coded '1' where the offender admitted to each element (i.e., the sexual act and lack of consent) of the crime and evidenced some consciousness of wrongdoing.

F. Composite Variables

In light of the inherent limitations in studying military justice processes, using composite variables in this analysis offers several methodological advantages. The restricted access to detailed information and potentially limited sample sizes in military cases necessitate a more parsimonious approach to modeling. Composite variables (BB, OS, SE) not only reduce the number of predictors, maintaining statistical power and producing more stable estimates, but also mitigate potential multicollinearity issues common in complex legal cases.[237] These variables align with broader theoretical constructs in legal decision-making, providing conceptual clarity and allowing for a more holistic examination of influences on judicial decisions. The composite approach also enhances reliability by capturing multiple aspects of each construct, thereby reducing the impact of measurement error or inconsistencies in individual variables. Furthermore, this method aligns with previous research in the field, facilitating comparison and integration of

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233 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, , at F-5 (2020).

234 Deborah Baskin & Ira Sommers, *The Influence of Forensic Evidence on the Case Outcomes of Assault and Robbery Incidents*, 23 CRIM. JUST. POL'Y REV. 186 (2012).

235 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, *supra* note 233, at F-5.

236 *Id.* (finding confessions increased the likelihood of conviction).

237 Ashley K. Fansher & Bethany Welsh, *A Decade of Decision Making: Prosecutorial Decision Making in Sexual Assault Cases*, 12 SOC. SCI. 348 (2023).

findings with existing literature.[238] Given the sensitive nature of military justice and the focus on identifying systemic patterns rather than case-specific idiosyncrasies, composite variables offer a balanced approach that maintains analytical rigor while addressing ethical considerations of anonymity and confidentiality. Thus, despite the potential loss of granularity, using composite variables in this context represents a methodologically sound and pragmatic approach well-suited to the study's objectives and the unique challenges of researching military justice processes.

V. METHODS (ANALYTIC PLAN)

The proposed analytic strategy for this Article encompasses a comprehensive approach to examining two key decision points in military justice: commanders' decisions to charge and appellate courts' decisions to overturn cases on factual sufficiency grounds. This multi-faceted analysis plan employs three main statistical techniques: descriptive statistics, bivariate correlations, and binary logistic regression. Each method offers unique insights and has its own strengths and limitations.[239]

The first step in the analysis involves exploring descriptive statistics for variables in both datasets. This approach provides a foundational understanding of the data by presenting numbers and percentages for each variable.[240] Descriptive statistics offer a clear, accessible snapshot of the data, allowing readers to grasp the basic characteristics of the samples quickly.[241] They can reveal essential patterns or trends, such as the prevalence of certain factors in charging decisions or the frequency of cases overturned on factual sufficiency grounds.[242] The strength of this approach lies in its simplicity and immediate comprehensibility, making it an excellent starting point for researchers and readers.[243] However, descriptive statistics are limited in that they cannot provide information about relationships between variables or causal inferences.[244] They offer a *what* but not a *why* or *how*.[245]

The second phase of the analysis plan involves conducting bivariate correlations between variables within each dataset. This step moves beyond mere description to examine how pairs of variables relate to each other.[246]

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238 Spohn & Tellis, *supra* note 231 at 396.

239 *See generally* FREDERICK J. GRAVETTER & LARRY B. WALLNAU, STATISTICS FOR THE BEHAVIORAL SCIENCES (9th ed. 2012).

240 *Id.* at 7.

241 *Id.* at 6 ("Descriptive statistics are statistical procedures used to summarize, organize, and simplify data.").

242 *Id.*

243 *Id.*

244 *Id.* at 12.

245 *Id.*

246 CHESTER L. BRITT & DAVID WEISBURD, HANDBOOK OF QUANTITATIVE CRIMINOLOGY 628 (Alex R. Piquero & David Weisburd eds., 2010).

Correlations can reveal essential associations, such as whether specific case characteristics are more strongly linked to charging decisions or appellate outcomes.[247] The strength of correlation analysis is its ability to quantify the strength and direction of relationships between variables, providing more nuanced insights than descriptive statistics alone.[248] However, correlations have limitations.[249] They cannot establish causality, only association.[250] Additionally, they examine relationships between only two variables simultaneously, potentially overlooking more complex multivariate relationships.[251]

The final and most sophisticated part of the analytic strategy employs binary logistic regression to regress the independent variables on the dependent variables (commander decision to charge and appellate court decision to overturn).[252] This technique is particularly appropriate given the binary nature of the outcome variables.[253] Logistic regression allows for the simultaneous consideration of multiple independent variables, controlling for their effects on each other.[254] This provides a more comprehensive understanding of which factors most strongly predict the outcomes of interest while accounting for the influence of different variables.[255] The strength of this approach lies in its ability to model complex relationships and provide odds ratios, indicating how changes in independent variables affect the likelihood of the outcomes.[256] However, logistic regression also has limitations.[257] It assumes a linear relationship between independent variables and the log odds of the outcome, which may not always hold true.[258] It can also be sensitive to multicollinearity among independent variables and outliers in the data.[259]

By employing these three levels of analysis, the research plan provides a robust examination of the factors influencing military justice decisions. The descriptive statistics offer an accessible overview, the correlations reveal important bivariate relationships, and the logistic regression models provide

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247 *Id.*

248 GRAVETTER & WALLNAU, *supra* note 239, at 12–13.

249 *Id.* at 12–13, 581.

250 *Id.* at 12–13.

251 *Id.* at 580.

252 A Heckman Correction Model was unnecessary given the nature of the dataset. Shawn Bushway et al., *Is the Magic Still There? The Use of the Heckman Two-Step Correction for Selection Bias in Criminology*, 23 J. QUANTITATIVE CRIMINOLOGY 151 (2007).

253 CHESTER L. BRITT & DAVID WEISBURD, HANDBOOK OF QUANTITATIVE CRIMINOLOGY 649–82 (2010).

254 *Id.*; MICHAEL LEWIS-BECK, APPLIED REGRESSION (1980).

255 *Id.*

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.*

a nuanced, multivariate understanding of predictors.[260] Together, these approaches complement each other, each addressing some of the limitations of the others.[261] This comprehensive strategy allows for a thorough exploration of the complex dynamics at play in military charging decisions and appellate reviews, potentially yielding valuable insights for policy and practice in military justice.

VI. FINDINGS (DESCRIPTIVE STATISTICS FOR VARIABLES IN CASES)

Table 1 represents descriptive statistics for the occurrence of the independent variables within the cases for the two distinct decisions (i.e., charge/no charge and factually insufficient/factually sufficient).[262] The numbers provide insight into the differences between cases presented to the commander for prosecution and those discussed in appellate opinions for factual sufficiency.[263] While factual sufficiency cases do not represent the population of cases that receive appellate review after a conviction, they represent a significant amount.[264] Cases in this study that were heard on appeal and reviewed by a commander had a more significant percentage of the variables perceived as making a case stronger, such as medical forensic examinations (47% and 5%, respectively).[265]

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260 *Id.*

261 *See* Evangelos Alexopoulos, *Introduction to Multivariate Regression Analysis*, 14 HIPPOKRATIA 23, 26 (2010).

262 *See infra* Table 1.

263 *See id.*

264 *Investigative Case File*, *supra* note 59, at 114 (showing that for DoD cases closed in 2017, there were 91 convictions, which provides an estimation for the sample in this study equating to 42% of all sexual assault cases heard on appeal).

265 *See infra* Table 1.

Table 1. Descriptive Statistics for Variables in All Cases (n = 254)

	Judges (n =134)	Commanders (n = 120)	Judges (n =134)	Commanders (n = 120)
Independent Variables	Number of Cases		Percent of All Cases	
Prior Consensual Sex	34	11	25	9
Victim Verbal Resistance	88	68	66	57
Fresh Complaint	68	36	51	30
Victim/ Offender's Home	102	16	76	13
Active Duty Victim	83	6	62	5
Penetration	118	23	88	19
More than One Victim	36	21	27	18
Injury	40	2	30	2
Supervisory Relationship	13	11	10	9
Third Party Witness	100	52	75	43
Physical Evidence	76	24	57	20
Confession	17	10	13	8
Forensic Examination	63	6	47	5

Penetration was reported in 88% of judge-handled cases, compared to only 19% in commander-handled cases.[266] Similarly, incidents occurring in the victim or offender's home were substantially more frequent in judge-adjudicated cases (76%) than in those managed by commanders (13%).[267] Active-duty victim status showed a striking disparity, with 62% prevalence in judge cases versus 5% in commander cases.[268] Injuries were reported in 30% of judge cases but only 2% of commander cases.[269] Forensic examinations were conducted in 47% of judge-overseen cases, contrasting sharply with 5% in commander-led reviews.[270]

However, some variables demonstrated less pronounced differences between the two adjudication pathways. Victim verbal resistance was reported at comparable rates (66% in judge cases, 57% in commander cases), and the presence of a supervisory relationship showed similar prevalence (10% and 9%, respectively).[271] The data also encompassed various forms of

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266 The cases heard on appeal by judges included cases from all the military service branches, which is different from the sample that commanders considered. Additionally, the appellate cases included only cases that resulted in a conviction. In the commander sample, only Navy cases from a specific location were included. Furthermore, only some of them were charged. Of those charged, only some of them resulted in a conviction. *See supra* Table 1.

267 *See id.*

268 *See id.*

269 *See id.*

270 *See id.*

271 *See id.*

evidence, including physical evidence, third-party witnesses, and confessions, though their prevalence varied between judge and commander cases.[272]

The data presented in Table 2 also compares cases found to be factually sufficient and insufficient based on the variables of interest in this study, comparing the decision-making of commanders and appellate judges.[273] Table 2 offers several insights that both support and challenge existing literature on sexual assault case processing.[274] Of particular note is the disparity in judge-decided cases involving prior consensual sex between the victim and offender.[275] Contrary to common assumptions that such history might discredit victims, this study found a higher prevalence of cases where the offender and victim had previously engaged in consensual sex in factually sufficient cases (30%) compared to factually insufficient cases (5%).[276]

Table 2. Descriptive Statistics for Variables by Decision (n = 254)

	N = 134		N = 120	
	Factually Sufficient	Factually Insufficient	Preferred	Not Preferred
	% of Cases	% of Cases	% of Cases	% of Cases
Jury Decided Case	62	73		
Prior Consensual Sex	30	5	21	6
Victim Verbal Resistance	70	46	54	57
Fresh Complaint	57	23	50	25
Victim/ Offender's Home	77	73	25	10
Active Duty Victim	58	82	4	5
Penetration	90	77	38	15
More than One Victim	27	27	38	13
Injury	31	23	4	1
Supervisory Relationship	8	18	25	5
Third Party Witness	77	64	67	38
Physical Evidence	55	64	46	14
Confession	12	18	13	7
Forensic Examination	51	27	8	4

272 *See id.*
273 *See infra* Table 2.
274 *See id.*; Spohn & Holleran, *supra* note 209, at 667.
275 *See id.*
276 *See id.*

Victim verbal resistance shows a marked difference between factually sufficient (70%) and insufficient (46%) cases, which suggests that this factor may not be dispositive in cases found to be factually insufficient.[277] However, the relatively high percentage in both categories reveals the substance that fuels ongoing debates about the role and expectations of verbal resistance in sexual assault cases.[278] Similarly, the data on fresh complaints supports existing literature on the importance of prompt reporting, with a significant difference between sufficient (57%) and insufficient (23%) cases.[279]

Unsurprisingly, cases with an active-duty victim had a higher rate of being determined factually insufficient (82%) compared to sufficient (58%).[280] The consistency in this disparity, especially across the trial level process and now within appellate decision-making, raises questions about potential unique challenges or biases within military contexts and merits further exploration.[281] The high rates of penetration in both categories, particularly in factually sufficient cases (90%), are consistent with previous research indicating that cases involving penetration are more likely to be prosecuted.[282] Predictably, factually sufficient cases would be more likely to include cases with penetration than factually insufficient cases (90% and 77%, respectively).[283]

The data on physical evidence and forensic examinations presents an intriguing contrast. While the difference in physical evidence between sufficient and insufficient cases is relatively small (55% versus 64%), there is a larger gap in forensic examinations (51% versus 27%).[284] This suggests that the mere presence of physical evidence may be less crucial than whether

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277 *See supra* Table 2.

278 *See id.*; Jesús de la Torre Laso & Juan M Rodríguez-Días, *The Relationship Between Attribution of Blame and the Perception of Resistance in Relation to Victims of Sexual Assault*, 13 FRONTIERS PSYCH. 1 (2022).

279 Alderden & Ullman, *supra* note 211; LAFREE, *supra* note 216, at 107–08; Spears & Spohn, *supra* note 206; Spohn et al., *supra* note 200; Spohn & Holleran, *supra* note 209, at 667.

280 DAC-IPAD, *supra* note 230, at 74, 82 (finding odds of conviction and imposition of confinement rates were higher for cases where the victims were civilian).

281 The military organization houses, employs, and prosecutes individuals. It also provides greater remedial benefits to active-duty victims than civilian victims that, in the criminal justice process, can be viewed skeptically as "golden parachutes" for victims. For instance, victims can receive expedited transfers from their duty stations, with an obvious assault-response rationale to separate victims from offenders. The counter perspective is that the benefit is then viewed as an incentive or motive for a victim to fabricate an offense. Additionally, the Department of Veterans Affairs provides economic compensation for disabilities related to military sexual assault, such as post-traumatic stress disorder (PTSD), which is strongly correlated to sexual assault. Yet, again, the DoD's good faith efforts to care for victims provide ammunition against them in the criminal justice context. The dynamic is quite different when the victim is a non-DoD-civilian because those remedial benefits are not available to them. *Id.*

282 Eric Carpenter, *Evidence of the Military's Sexual Assault Blind Spot*, 4 VA. J. CRIM. L. 154, 177 (2016).

283 *See id.*; *see also supra* Table 2.

284 *See supra* Table 2.

the victim submitted to a medical forensic examination.[285] It also suggests that victims may be perceived as more credible if they submit to a medical forensic examination.[286]

Confession rates remain low in both categories (sufficient 12% and insufficient 18%),[287] consistent with literature indicating the rarity of confessions in military sexual assault cases.[288] This result could support the conclusion that cases with a confession are more likely to make it through the criminal justice process to the appellate level, which has been substantiated in the literature.[289] The high percentages of third-party witnesses in both sufficient (77%) and insufficient (64%) cases are notable, as many sexual assaults typically occur without witnesses.[290] This finding could reflect a sampling bias towards cases more likely to be reported or prosecuted and warrants further investigation.

The data in Table 2 also presents a comparison of variables in sexual assault cases based on whether commanders preferred (i.e., charged) the case.[291] The sample size of 120 cases provides valuable insights into factors influencing charging decisions in military contexts. A striking finding there is in prior consensual sex between preferred (21%) and not preferred (6%) cases.[292] This aligns with the data on factual sufficiency and challenges conventional assumptions about how prior sexual history impacts case outcomes. It suggests that prior consensual sexual encounters may not necessarily deter commanders from pursuing charges.[293]

Victim verbal resistance shows minimal difference between preferred (54%) and not preferred (57%) cases, indicating that this factor may not significantly influence charging decisions.[294] However, fresh complaints demonstrate a notable disparity, with 50% in preferred cases compared to

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285 *See id.*

286 *See id.*

287 Four cases that included a confession were overturned as factually insufficient: United States v. Brown, No. 201700003, 2018 CCA LEXIS 316, at *1 (N-M Ct. Crim. App. July 2, 2018); United States v. Gonzalez, No. ARMY 20150080, 2017 CCA LEXIS 62, at *1 (A. Ct. Crim. App. Jan. 31, 2017); United States v. Washington, No. 201700242, 2019 CCA LEXIS 47, at *1 (N-M Ct. Crim. App. Feb. 8, 2019); United States v. Williams, No. ACM 39142, 2018 CCA LEXIS 119, at *1 (A.F. Ct. Crim. App. Mar. 6, 2018).

288 *Investigative Case File*, *supra* note 59, at F-71 (finding 8.8% of suspects confessed in sexual assault investigations).

289 *Id*. at 115 (finding statistical significance when confession was regressed on conviction).

290 *See supra* Table 2; *What is Good Evidence in a Sexual Assault Case?*, WOLF L. LLC (Dec. 15, 2023), https://wolflawcolorado.com/what-is-good-evidence-in-a-sexual-assault-case/#:~:text=In%20sexual%20assault%20cases%2C%20there,jump%2Dstart%20their%20investigative%20process ("In sexual assault cases, there are often few to no witnesses present during the alleged crime. Most sexual assault cases are 'he-said, she-said,' or based solely on the word of the alleged victim.").

291 *See supra* Table 2.

292 *See id.*

293 *See id.*

294 *See id*.

25% in those not preferred, which may indicate that timely reporting is essential to commander decision-making.[295] However, prior research also suggests that victim participation in the court process is significantly related to early reporting.[296] Therefore, it could be that victim participation is the motivating factor for commanders in their charging decisions versus early reporting.[297]

The data reveals substantial differences in several key variables between preferred and non-preferred cases. Penetration (38% versus 15%), cases involving more than one victim (38% versus 13%), and the presence of physical evidence (46% versus 14%) all show higher rates in preferred cases.[298] These findings suggest that commanders may be more inclined to charge cases with these elements, possibly due to the perceived strength of evidence or severity of the offense.

Third-party witnesses play a significant role in 67% of preferred cases compared to 38% of non-preferred cases.[299] This considerable difference highlights the potential importance of corroborating testimony in charging decisions. Interestingly, supervisory relationships show a marked difference (25% in preferred versus 5% in non-preferred cases), which may reflect heightened concern for abuse of authority within military hierarchies.[300]

Notably, some factors show minimal differences between preferred and non-preferred cases. Active-duty victim status (4% and 5%), injury (4% and 1%), confession (13% and 7%), and forensic examination (8% and 4%) demonstrate relatively small disparities.[301]

VII. FINDINGS (DESCRIPTIVE STATISTICS FOR BRANCHES OF SERVICE)

The data in Table 3 provides insight into the distribution of factual sufficiency findings across different military service branches.[302] Out of a total of 134 cases where factual insufficiency in adult sexual assault cases was analyzed, the breakdown by service reveals some notable variations.[303] The Air Force Court reviewed 53 cases, 5 (9%) found factually insufficient.[304] The Army Court, with a smaller caseload of 22, found 5 cases

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295 *See id.*

296 *Investigative Case File*, *supra* note 59, at 118 (finding significant correlation between victim participation and medical forensic examinations).

297 *Id.*

298 *See supra* Table 2.

299 *See id.*

300 *See id.*

301 *See id.*

302 *See infra* Table 3.

303 *See id.*

304 *See id.*

(23%) factually insufficient.[305] The Coast Guard Court, with only 4 cases, did not find any to be factually insufficient.[306] The Navy Court, reviewing the most cases at 55, found 9 (16%) to be factually insufficient.[307]

Table 3. Findings of Factual Insufficiency by Service Branch (n = 134)

Service	Court	Total Cases	Found Insufficient	Percent of Service Cases
Air Force		53	5	9
Army		22	5	22
Coast Guard		4	0	0
Navy-Marine Corps		55	9	16

These statistics suggest that the branch of service may influence the rate of factual insufficiency findings.[308] The Army Court stands out with the highest percentage of cases found insufficient at 23%, despite having fewer total cases than the Air Force or Navy.[309] In contrast, while handling a significant number of cases, the Air Force Court had a lower rate of insufficiency findings at 9%.[310] The Navy Court's rate falls between these two at 16%.[311]

It is worth considering whether there are differences in the training, background, or selection processes for judges across the different service branches. These factors could potentially lead to varying approaches in evaluating factual sufficiency. Additionally, the disparity might reflect differences in each branch's investigative and prosecutorial processes leading up to the appellate stage.[312]

However, it is important to note that the sample sizes for some branches, particularly the Coast Guard, are quite small, which limits the reliability of comparisons. The Coast Guard's lack of insufficiency findings, for example, may be attributable to its fewer number of cases (4) than a true

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305 *See id.*
306 *See id.*
307 *See id.*
308 *See supra* Table 3.
309 *See id.*
310 *See id.*
311 *See id.*
312 *Investigative Case File*, *supra* note 59, at F-71 (finding difference in charging decisions based on branch of service).

reflection of any systemic difference.[313] These branch-specific variations underscore the complexity of factual sufficiency determinations in military appellate courts and highlight the need for further investigation. Understanding these differences could provide valuable insights into the military justice system and potentially inform efforts to standardize practices across branches or address any systemic issues that may be contributing to these disparities.

VIII. FINDINGS (DESCRIPTIVE STATISTICS FOR APPELLATE JUDGES)

Tables 4-8 provide descriptive statistics based on individual appellate judges.[314] Out of a total of 76 appellate judges who resolved the 134 cases involving adult sexual assault factual sufficiency analyses, 28 unique judges were involved in the 19 cases found factually insufficient.[315] Within those 28 judges, a notable pattern emerged: a small group of six judges were each engaged in five or more cases, resulting in factual insufficiency findings, with a rate of 1:3 or higher.[316] These six judges, comprising 8% of the total pool of 75, played a role in the majority of factually insufficient cases, highlighting a concentration of such findings among a select few.[317] One or more of these six judges was on 14 of the 19 opinions finding factual insufficiency, which makes up 74% of all factually insufficient cases.[318] In contrast, 47 judges (approximately 63% of all judges in the study) have yet to find factual insufficiency in any of their cases.[319]

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313 *See supra* Table 3.
314 *See infra* Tables 4-8.
315 *See id.*
316 *See id.*
317 *See id.*
318 *See id.*
319 *See id.*

Table 4. Factual Sufficiency Statistics for Judges with 30% and > 3 Factual Insufficiency Findings (n= 14)

Judge	Total Cases	Factual Sufficiency Findings	Factual Insufficiency Findings	% of Factually Insufficient Cases
Hagler	5	1	4	80%
Stephens	7	2	5	71%
Fleming	8	4	4	50%
Tang	6	3	3	50%
Burton	11	7	4	36%
Mink	13	9	4	31%

Table 5. Factual Sufficiency Statistics for Judges with 10 or More Cases (n= 14)

Judge	Total Cases	Factual Sufficiency Findings	Factual Insufficiency Findings	% of Factually Insufficient Cases
Burton	**11**	**7**	**4**	**36%**
Mink	**13**	**9**	**4**	**31%**
Marks	14	12	2	14%
Posch	22	19	3	14%
Mayberry	14	13	1	7%
Fulton	15	14	1	7%
J. Johnson	26	25	1	4%
Lewis	13	12	0	0%
Jones	13	13	0	0%
Crisfield	11	11	0	0%
Hutchison	11	11	0	0%
Key	11	11	0	0%
Woodard	11	11	0	0%
Mulligan	10	10	0	0%

Table 6. Factual Sufficiency Statistics for Judges with between five and 10 cases (n= 19)

Judge	Total Cases	Factual Sufficiency Findings	Factual Insufficiency Findings	% of Factually Insufficient Cases
Hagler	**5**	**1**	**4**	**80%**
Stephens	**7**	**2**	**5**	**71%**
Fleming	**8**	**4**	**4**	**50%**
Tang	**6**	**3**	**3**	**50%**
Dennis	7	5	2	29%
Gaston	8	6	2	25%
Harding	8	6	2	25%
Huygen	7	6	1	14%
Stewart	7	6	1	14%
Febbo	8	8	0	0%
Speranza	8	8	0	0%
Wolfe	7	7	0	0%
Glaser-Aller	6	6	0	0%
Kimbrill	6	6	0	0%
Lawrence	6	6	0	0%
Brubaker	5	5	0	0%
C. Brown	5	5	0	0%
Hitesman	5	5	0	0%
Mcclelland	5	5	0	0%

Table 7. Factual Sufficiency Statistics for Judges with between Two and Four Cases (n= 23)

Judge	Total Cases	Factual Sufficiency Findings	Factual Insufficiency Findings	% of Factually Insufficient Cases
Drew	3	2	1	33%
Penland	3	3	1	33%
Meginley	4	3	1	25%
Arguelles	4	4	0	0%
Brookhart	4	4	0	0%
Campanella	4	4	0	0%
Campbell	4	4	0	0%
D. Johnson	4	3	0	0%
Dubriske	4	4	0	0%
Levin	4	4	0	0%
Richardson	4	4	0	0%
J. Brown	3	3	0	0%
Price	3	3	0	0%
Rodriguez	3	3	0	0%
Salussolia	3	3	0	0%
Schasberger	3	3	0	0%
Aldykiewicz	2	2	0	0%
Deerwester	2	2	0	0%
Herring	2	2	0	0%
Houtz	2	2	0	0%
Judge	2	2	0	0%
Rugh	2	2	0	0%
Sayegh	2	2	0	0%

Table 8. Factual Sufficiency Statistics for Judges with Only One Case (n= 19)

Judge	Total Cases	Factual Sufficiency Findings	Factual Insufficiency Findings	% of Factually Insufficient Cases
Annexstad	1	1	0	0%
Baker	1	1	0	0%
Bennett	1	1	0	0%
Cadotte	2	2	0	0%
Celtnieks	1	1	0	0%
Ewing	1	1	0	0%
Haight	1	1	0	0%
Hamilton	1	1	0	0%
Havranek	1	1	0	0%
Hines	1	1	0	0%
Holifield	1	1	0	0%
King	1	1	0	0%
Monahan	1	1	0	0%
Palmer	1	1	0	0%
Ramirez	1	1	0	0%
Risch	1	1	0	0%
Santoro	1	1	0	0%
Tozzi	1	1	0	0%
Walker	1	1	0	

Regarding the 8% of judges that made 74% of the factual insufficient findings, Judge Stephens found 25% of all cases and 55% of service cases factually insufficient, representing 70% of Judge Stephens' personal caseload.[320] Judge Burton's findings constituted 20% of all cases, 80% of service cases, and 40% of Judge Burton's personal caseload.[321] Judge Fleming showed similar percentages to Burton for all cases (20%) and service cases (80%), but a higher rate of 58% for Judge Fleming's personal caseload.[322] Judge Hagler demonstrated the highest consistency, with 20% of all cases, 80% of service cases, and 80% of Judge Hagler's personal caseload.[323] Judges Mink and Tang exhibited lower percentages across all

320 *See supra* Table 6.
321 *See supra* Table 5.
322 *See supra* Table 6.
323 *See id.*

categories, with Mink at 15%, 50%, and 25%, and Tang at 15%, 33%, and 50%, respectively.[324]

These statistics could potentially indicate the presence of rape myth acceptance attitudes among certain judges, particularly those with higher percentages of factual insufficiency findings. Such attitudes might lead to increased scrutiny of evidence in sexual assault cases, resulting in more frequent findings of factual insufficiency.[325] The consistently high percentages across service cases for judges like Burton, Fleming, and Hagler could suggest a specific bias in military-related sexual assault cases.

However, it is crucial to consider alternative explanations for these patterns. The variation in percentages could be attributed to differences in case assignments, with some judges potentially receiving more complex or contentious cases. The nature of the evidence presented in these specific cases might also play a significant role. Furthermore, individual legal interpretations and standards applied by each judge could contribute to these differences without necessarily indicating bias. Additionally, it is worth considering the potential influence of case assignment practices within the service courts. The judges exhibiting higher rates of factual insufficiency findings may represent the most experienced or highly regarded jurists within their respective services. Consequently, these judges might be deliberately assigned cases of greater complexity or those deemed more likely to present challenging factual sufficiency issues. This selective case allocation could be predicated on the assumption that these judges possess the requisite analytical acumen, judicial temperament, and ethical fortitude to navigate and resolve intricate legal and factual scenarios. Such a practice, if extant, would introduce a selection bias in case distribution, potentially contributing to the observed disparities in factual insufficiency findings among judges. This hypothesis underscores the need for a nuanced examination of case assignment protocols and their potential impact on judicial decision patterns in military appellate courts.

The remaining judges fall between these two extremes.[326] For instance, while finding some cases factually insufficient, judges like Posch and Marks maintained a rate below 1:3, despite handling a substantial caseload.[327] This suggests that the volume of cases alone does not account for the higher rates observed in the six judges with the most frequent insufficiency findings. This stark disparity in factual insufficiency findings among judges raises important questions about the factors influencing judicial decision-making in military appellate courts. Are these differences attributable to individual judicial philosophies, varying interpretations of the factual sufficiency

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[324] *See supra* Tables 5-6.
[325] *See supra* Tables 4-8.
[326] *See id.*
[327] *See supra* Table 5.

standard, or perhaps differences in the types of cases assigned to different judges? The fact that such a small number of judges account for a disproportionate number of factual insufficiency findings, while the majority never make such findings and others make them at lower rates, underscores the need for a deeper examination of the underlying causes of these divergent patterns. Further investigation into factors such as judicial experience, panel composition, and case-specific elements is warranted to understand these outcomes in military appellate courts.

The policy implications of these findings warrant careful consideration and further research. If additional studies corroborate the presence of rape myth acceptance attitudes, it may necessitate enhanced training programs for military judges to address potential biases. Conversely, if the disparities are primarily due to case assignment or evidentiary issues, it could indicate a need for more standardized procedures in case distribution or evidence evaluation. Future research should focus on a more comprehensive analysis of case details, decision rationales, and patterns over an extended period to draw more definitive conclusions. This data serves as a valuable starting point for a broader examination of decision-making processes in military appellate courts, with the ultimate goal of ensuring fair and consistent application of justice in sexual assault cases. [328]

IX. FINDINGS (BIVARIATE CORRELATIONS)

Bivariate analysis was conducted on each data set to assess the relationship between theoretically relevant variables and the outcome variable (i.e., factually insufficient and decision to charge).[329] This study examines the factors influencing decision-making in military sexual assault cases, comparing the determinants of commanders' charging decisions and appellate courts' findings of factual insufficiency.[330] The analysis is based on a sample of 254 cases, with 120 cases decided by appellate judges and 134 by commanders.[331] Bivariate comparisons were conducted to assess the relationship between various independent variables and the dependent

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328 Some of the judges in Table 4 were on the same appellate panel as other judges in the table for the cases found factually insufficient. Therefore, the total number of cases shown in Table 4 is greater than 14 due to overlap in some cases. For instance, Hagler, Stephens, and Fleming were on the same panel for several cases found factually insufficient. Tables 5-8 show the numbers for all the judges who considered factual sufficiency reviews for adult sexual assault cases.

329 *See supra* Table 1 (showing the data from the bivariate analysis).

330 *See id.* (showing factors present in cases); *see also supra* Table 2 (presenting case factors along with both commanders' charging decisions and appellate courts' findings of factual insufficiency).

331 *See supra* Table 1 (showing that the total number of cases examined, n, is 254); *see also supra* Table 2 (showing that the number of cases decided by judges (n=134) and the number of cases decided by commanders is 120 (n=120)).

variables of interest.[332] The analysis encompassed three main categories: Blame and Believability (7 variables), Strength of the Evidence (6 variables), and Offense Seriousness (6 variables).[333]

Table 9. Bivariate Correlations with Relationship to Decision (*n = 254*)

	n = 120	n = 134	n = 120	n = 134
	Appellate Judges	Commanders	Appellate Judges	Commanders
Blame and Believability	n	n	χ2 (p-Value)	χ2 (p-Value)
Prior Consensual Sex	34	11	5.153 (0.023)	4.904 (0.027)
Victim Physical Resistance	78	41	1.686 (0.194)	0.750 (0.386)
Victim Verbal Resistance	88	65	4.456 (0.035)	0.076 (0.782)
Fresh Complaint < 1 day	68	36	6.253 (0.013)	6.493 (0.011)
Victim Alcohol	83	23	5.303 (0.021)	0.659 (0.417)
Victim/ Offender's Home	102	16	0.016 (0.899)	3.915 (0.048)
Active Duty Victim	51	6	7.852 (0.005)	0.044 (0.834)
Strength of the Evidence				
Third-Party Witness	100	52	2.656 (0.103)	6.447 (0.011)
Physical Evidence- DNA	40	2	0.000 (0.987)	1.124 (0.289)
Physical Evidence- Other	76	24	0.657 (0.418)	12.299 (0.001)
Confession	17	3	0.114 (0.736)	0.655 (0.418)
Medical Forensic Examination	63	6	2.732 (0.098)	0.702 (0.402)
Exculpatory Evidence	80	59	0.001 (0.976)	0.169 (0.681)
Offense Seriousness				
Penetration	118	23	0.209 (0.647)	6.508 (0.011)
> 1 Victim	36	21	0.118 (0.732)	9.054 (0.003)
> 1 offender	11	6	0.100 (0.752)	0.702 (0.402)
Force	57	15	4.885 (0.027)	11.725 (0.001)
Injury	40	2	1.089 (0.297)	1.124 (0.289)
Supervisory Relationship	13	11	2.846 (0.092)	9.033 (0.003)

In the Blame and Believability category, appellate judges' decisions were significantly correlated with prior consensual sex ($\chi^2 = 5.153$, $p = .023$), victim verbal resistance ($\chi^2 = 4.456$, $p = .035$), fresh complaint < 1 day ($\chi^2 = 6.253$, $p = .013$), victim alcohol use ($\chi^2 = 5.303$, $p = .021$), and active duty victim status ($\chi^2 = 7.852$, $p = .005$).[334] Commanders' decisions in this category showed significant correlations with prior consensual sex ($\chi^2 = 4.994$, $p = .027$), fresh complaint < 1 day ($\chi^2 = 6.493$, $p = .011$), and victim/offender's home ($\chi^2 = 3.915$, $p = .048$).[335]

Regarding the Strength of the Evidence category, appellate judges' decisions showed no significant correlations.[336] However, commanders'

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332 *See supra* Table 1 (showing the bivariate correlations between variables and their relationships to decisions).

333 *See infra* Table 9.

334 *See supra* Table 9.

335 *See id.*

336 *See id.*

decisions were significantly associated with third-party witness ($\chi^2 = 6.447$, $p = .011$) and physical evidence other than DNA ($\chi^2 = 12.299$, $p = .001$).[337]

In the Offense Seriousness category, appellate judges' decisions were significantly correlated only with force ($\chi^2 = 4.885$, $p = .027$).[338] Commanders' decisions showed significant correlations with penetration ($\chi^2 = 6.508$, $p = .011$), > 1 victim ($\chi^2 = 9.054$, $p = .003$), force ($\chi^2 = 11.725$, $p = .001$), and supervisory relationship ($\chi^2 = 9.033$, $p = .003$).[339]

Notably, several factors displayed disparate significance between appellate judges and commanders.[340] For instance, victim verbal resistance was significant for appellate judges ($\chi^2 = 4.456$, $p = .035$) but not for commanders ($\chi^2 = 0.076$, $p = .782$).[341] Conversely, physical evidence other than DNA was highly significant for commanders ($\chi^2 = 12.299$, $p = .001$) but not for appellate judges ($\chi^2 = 0.657$, $p = .418$).[342]

These findings illuminate the complex interplay of factors influencing decision-making processes in military sexual assault cases, highlighting potential areas for further investigation and policy consideration.[343] Based on the bivariate comparisons presented in this study, potential differences in decision-making patterns between commanders and appellate court judges could be inferred. However, such inferences should be made cautiously on bivariate comparisons alone.[344] Commanders appear more likely to pursue charges in cases involving factors such as penetration ($\chi2 = 6.508$, $p = .011$), multiple victims ($\chi2 = 9.054$, $p = .003$), the use of force ($\chi2 = 11.725$, $p = .001$), and the presence of physical evidence other than DNA ($\chi2 = 12.299$, $p = .001$).[345] This tendency might suggest a focus on more tangible or traditionally emphasized aspects of sexual assault cases.[346] Conversely, appellate judges demonstrate a higher likelihood of finding factual insufficiency in cases involving prior consensual sex ($\chi2 = 5.153$, $p = .023$), victim verbal resistance ($\chi2 = 4.456$, $p = .035$), and active-duty victim status ($\chi2 = 7.852$, $p = .005$), which could be interpreted as a more nuanced consideration of contextual factors.[347] These patterns, particularly those observed in appellate judges' decisions, may hint at the potential influence

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337 *See id.*
338 *See id.*
339 *See id.*
340 *See id.*
341 *See id.*
342 *See id.*
343 *See id.*
344 *See id.*
345 *See id.*
346 *See id.*
347 *See id.*

of certain preconceptions or biases in the evaluation of sexual assault cases, a theme that warrants further exploration in more comprehensive analyses.[348]

Interestingly, both groups showed significant correlations with fresh complaints made within one day (appellate judges: $\chi 2 = 6.253$, $p = .013$; commanders: $\chi 2 = 6.493$, $p = .011$).[349] The divergent treatment of factors like victim verbal resistance and physical evidence between the two groups further complicates this picture. It underscores the need for a more in-depth examination of decision-making processes.[350] These bivariate results provide initial insights into decision-making patterns but also set the stage for more sophisticated analyses.[351]

X. FINDINGS (LOGISTIC REGRESSION)[352]

The logistic regression models for military judges and commanders in sexual assault cases reveal distinct patterns of influential factors in their decision-making processes.[353] For judges determining factual insufficiency, Blame and Believability (BB) emerges as the sole significant predictor ($B = 1.170$, $p < .01$, $Exp(B) = 3.223$).[354] This indicates that for every one-unit increase in BB, the odds of a judge finding factual insufficiency increase by a factor of 3.223, holding other variables constant.[355] Stated differently, for every one-unit increase in BB, the likelihood of a judge finding factual insufficiency increases by 222.3%, holding all other variables constant.[356] Neither the Strength of Evidence (SE) ($B = -0.090$, $p > .05$) nor the Offense Seriousness (OS) ($B = -0.208$, $p > .05$) demonstrate statistical significance in judges' decisions.[357]

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348 *See id.*

349 *See id.*

350 *See id.*

351 *See id.*

352 Diagnostic tests of the multivariate models revealed no issues with collinearity or goodness of fit. No bivariate correlations exceeded an absolute value of .49, while variance inflation factors fell below the 3.0 threshold.

353 *See infra* Table 10.

354 *See id.*

355 *See id.*

356 *See id.*

357 *See id.*

Table 10. Binary Logistic Regression, Lay Charging Decisions and Judges Factual Insufficiency Findings

	Judges	Commanders	Judges	Commanders	Judges	Commanders
	B		S.E.		Exp (B)	
BB Zscore	1.170**	-0.068	0.426	0.372	3.223	0.934
SE Zscore	-0.090	0.62+	0.272	0.369	0.914	1.858
OS Zscore	-0.208	1.067*	0.295	0.475	0.812	2.906
Victim Rank		0.126		0.218		1.135
Victim Female	-1.204	-1.27	0.823	0.959	0.300	0.281
Victim White		-0.023		0.923		0.977
Victim Desires CM		3.404***		0.815		30.097
Offender White		0.275		0.941		1.316
Offender Rank	0.049	0.044	0.081	0.211	1.050	1.045
Offender White/ Victim Black		-0.133		1.108		0.875
Testimony of Accused	-0.858		0.695		0.424	0.875
Constant	-0.246	-2.622				
Cox and Snell R Squared	0.113	0.394				
Nagelkerke R Squared	0.198	0.614				
Chi-Squre/df	16.059/ 7*	55.078/10***				
Number of Cases	134	120				

+ $p < 0.1$

* $p < .05$.

** $p < 0.01$

*** $p < 0.001$

Commanders' charging decisions, conversely, are influenced by a broader array of factors.[358] OS is a significant predictor ($B = 1.067$, $p < .05$, $Exp(B) = 2.906$), indicating that higher offense seriousness substantially increases the odds of charges being preferred.[359] For every one-unit increase in the OS, the likelihood of the commander charging the case increases by 190.6%, holding all other variables constant.[360] SE shows marginal significance for commanders ($B = 0.62$, $p < .1$, $Exp(B) = 1.858$), suggesting a trend towards higher odds of charging as evidence strength increased.[361] For every one-unit increase in the SE, the likelihood of the commander charging the case increased by 85.8%, holding all other variables constant.[362] Notably, the victim's desire for court-martial emerges as the strongest predictor in the commander model ($B = 3.404$, $p < .001$, $Exp(B) = 30.097$), indicating that when a victim expresses this preference, the odds of charges

358 *See supra* Table 10.
359 *See id.*
360 *See id.*
361 *See id.*
362 *See id.*

being preferred increase dramatically.[363] When the victim desires court-martial, the likelihood of the commander charging the case increases by 290.9%, holding all other variables constant.[364]

The models differ in their overall explanatory power.[365] The commanders' model demonstrates higher Nagelkerke R Squared values (0.614 vs 0.198 for judges), indicating it explains a more significant proportion of the variance in decision outcomes, which is directly attributable to the greater access to information in the commander-reviewed files.[366] Both models show statistical significance, with the commander model ($\chi^2/df = 55.078/10$, $p < .001$) demonstrating a higher chi-square value and lower p-value compared to the judge model ($\chi^2/df = 16.059/7$, $p = .025$).[367] Both models are statistically significant, but the commander model appears to have more substantial explanatory power based on these metrics.[368]

Additional variables in the commander-reviewed model, such as Victim Female, Victim White, Offender White, and Offender Rank, do not reach statistical significance, suggesting these factors may not play a substantial role in the decision-making processes of commanders.[369] These findings quantify the varying influence of case elements on outcomes at different stages of the military justice process, highlighting the complex and multifaceted nature of decision-making in sexual assault cases within the military context.[370]

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363 *See id.*

364 *See id.*

365 *See id.*

366 *See id.*

367 *See id.*

368 *See id.* The lower explanatory power of the judge model (Nagelkerke R Square = .198) compared to the commander model (Nagelkerke R Square = .614) can be largely attributed to the opaque nature of the military justice system, particularly at the appellate level. The Department of Defense's restrictive policies on information disclosure significantly limit researchers' access to detailed data on appellate proceedings and decision-making processes.

This lack of transparency results in a more limited set of variables available for analysis in the judge model. In contrast, the commander model benefits from a broader array of variables, likely due to more accessible information at the initial decision-making stage. If similar levels of detailed information were available for appellate proceedings, the judge model could potentially include additional relevant variables, which would likely enhance its explanatory power.

The disparity in available information between these two stages of the military justice process not only affects the models' explanatory power but also highlights a systemic issue in studying and improving military judicial processes. Greater transparency and access to information at all levels of the military justice system would allow for more comprehensive models, potentially leading to better understanding and improvement of decision-making processes in sexual assault cases. This limitation underscores the need for increased transparency in military judicial proceedings, not only for research purposes but also for ensuring fairness and accountability in the system. Future research efforts should advocate for greater access to information, which could significantly enhance our understanding of factors influencing appellate decisions in military sexual assault cases.

369 *See supra* Table 10.

370 *See id.*

XI. DISCUSSION

The study examined 254 sexual assault cases, comparing those handled by judges (n=134) and commanders (n=120). This comparative analysis reveals significant disparities in the characteristics of cases adjudicated within these two distinct processing points. The findings from this study provide compelling insights into the decision-making processes of military commanders and appellate judges in sexual assault cases, shedding light on the ongoing debate about whether lay individuals or legal professionals are better suited to make judgments in these complex cases. The analysis reveals a stark contrast between the factors influencing commanders' charging decisions and those affecting appellate judges' factual sufficiency reviews. Notably, commanders appear to rely more heavily on factors such as offense seriousness (OS) and, to a lesser extent, strength of evidence (SE).[371] This suggests that commanders, despite their lack of formal legal training, focus on elements generally considered appropriate for case processing decisions.

Conversely, the appellate judges' decisions show a significant influence from Blame and Believability (BB) factors ($B = 1.170$, $p = .006$, $Exp(B) = 3.223$).[372] This is a concerning finding, as BB factors are rooted in rape myth acceptance attitudes and are widely regarded in the literature as problematic influences on case processing.[373] The fact that these factors emerge as significant predictors in the decisions of legally-trained professionals is particularly troubling.

It is important to note that while the decision points (charging and factual sufficiency review) differ in their specific standards (probable cause for commanders and beyond a reasonable doubt for appellate judges), the fundamental inquiry at both stages centers on whether a crime occurred. Therefore, the marked difference in the factors influencing these decisions is noteworthy and potentially problematic.

The strong influence of BB factors on appellate judges' decisions challenges the assumption that legal training necessarily leads to more objective decision-making in sexual assault cases. This finding suggests that even experienced legal professionals may be susceptible to biases and misconceptions surrounding sexual assault, potentially compromising the integrity of the military justice system.

These findings underscore the complex nature of decision-making in sexual assault cases and highlight the need for continued education and training for all individuals involved in the military justice process, regardless of their legal background. The results suggest that efforts to improve the

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371 *See id.*

372 *See id.*

373 Kristen McCowan et al., *A Rape Myth in Court: The Impact of Victim-Defendant Relationship on Sexual Assault Case Outcomes*, 26 BERKELEY J. CRIM. L. 156, 167 (2021).

handling of sexual assault cases should focus not only on providing legal knowledge but also on addressing underlying attitudes and biases that may influence decision-making at all levels of the justice system.

XII. LIMITATIONS

Using appellate court opinions to understand judges' reasoning presents several limitations. First, appellate opinions typically focus on legal reasoning and the application of the law rather than providing a comprehensive insight into the judges' personal motivations or subjective considerations.[374] These written opinions are structured to justify the decision within the framework of existing legal standards and precedents, often omitting the nuanced deliberations behind closed doors.[375] As a result, they might not fully capture the complexity of factors influencing a judge's decision, such as personal biases, experiential knowledge, or external pressures.[376]

Second, appellate court opinions may not consistently include detailed discussions of all relevant evidence or witness credibility assessments that influenced the decision.[377] Judges may summarize key points but exclude less critical information that nonetheless played a role in their final judgment.[378] This selective presentation of information can lead to an incomplete understanding of the case's context and the rationale behind the decision.[379] Additionally, written opinions are products of collaborative work, often influenced by clerks and the collective input of other judges, which can obscure the individual reasoning processes of the deciding judges.[380] Therefore, while appellate opinions are invaluable for legal analysis, they offer a limited and potentially skewed view of the true decision-making dynamics within the judiciary.

Using small sample sizes, such as 254 observations, in conducting quantitative analysis presents several limitations. First, small sample sizes often result in lower statistical power, making it harder to detect significant effects or differences when they exist, leading to Type II errors where true relationships or differences are not identified.[381] Additionally, smaller

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374 Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 TULANE L. REV. 1, 21 (2019).

375 *Id.*

376 *Id.*

377 *Id.*

378 *Id.*

379 *Id.*

380 *Id.*

381 *See generally* Chittaranjan Andrade, *Sample Size and its Importance in Research*, 42 INDIAN J. PSYCH. MED. 102, 102–03 (2020) (discussing the challenges of accurately interpreting the results of small sample sizes).

samples increase the margin of error, making results less precise and reliable and leading to broader confidence intervals that indicate more significant uncertainty around estimated effects or measures.[382] Findings from small sample sizes may not be generalizable to the wider population, as they are less likely to capture the full diversity and variability of the larger population, potentially leading to biased or non-representative results.[383]

Moreover, small datasets are more susceptible to the influence of outliers or extreme values, which can disproportionately affect results and lead to misleading conclusions.[384] The limited number of observations also makes it challenging to perform meaningful subgroup analyses or control for multiple variables, as dividing the sample further reduces the number of observations in each group, exacerbating issues related to statistical power and precision.[385] Smaller samples can exhibit more significant variability in the data, making it harder to identify consistent patterns or trends, affecting the findings' reliability and robustness.[386] Careful consideration of these limitations is essential to ensure the findings are robust, reliable, and appropriately contextualized within the broader field of study.

While providing valuable insights, the logistic regression model for appellate judges' decisions on factual insufficiency has some limitations that warrant consideration. As indicated by the Cox & Snell R Square (.113) and Nagelkerke R Square (.198), the model's explanatory power suggests that additional factors not captured in the current variables may influence judges' decisions.[387] The classification table reveals a disparity in predictive accuracy between outcomes, with high precision for non-factually insufficient cases (99.1%) but lower accuracy for factually insufficient cases (15.0%).[388] This imbalance may reflect the inherent complexity of legal decision-making or the relative rarity of factual insufficiency findings. The model's convergence at iteration 5 indicates stability in parameter estimation, though it also suggests that further refinement of variables or inclusion of additional predictors could potentially enhance the model's performance. Despite these limitations, the model's overall significance ($\chi^2 = 16.059$, df = 7, p = .025) and its ability to identify critical predictors, particularly Blame and Believability, demonstrate its value in understanding appellate judges' decision-making processes in military sexual assault cases. Future research could build upon this foundation to develop more comprehensive models of judicial decision-making in this context.

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382 *See generally id.*
383 *See generally id.*
384 *See generally id.*
385 *See generally id.*
386 *See generally id.*
387 *See supra* Table 10.
388 *See id.*

XIII. IMPLICATIONS AND RECOMMENDATIONS

This study's findings reveal significant differences in how commanders and appellate judges assess sexual assault cases, which has important implications for the recent change in military criminal procedure. Commanders appear to place greater emphasis on factors such as multiple victims, physical evidence, and the location of the offense, suggesting a more straightforward approach to case evaluation. In contrast, appellate judges seem to consider more nuanced factors, such as the relationship between parties and the timing of complaints, indicating a potentially more complex analysis of case details.

The study's results regarding the impact of intimate partner relationships on case outcomes are crucial. While this factor did not significantly influence commanders' charging decisions, it strongly decreased the likelihood of appellate judges overturning cases.[389] This finding suggests that military lawyers may be more attuned to the complexities of sexual assault within intimate relationships, challenging the common rape myth that sexual assault does not occur between partners. Such awareness could lead to more informed charging decisions under the new system.

The impact of evidence strength on decision-making also differs between the two groups. Commanders appear more influenced by physical evidence and third-party witnesses, while these factors did not reach statistical significance for appellate judges.[390] Coupled with the BB significance finding for appellate judges' decisions, the findings present a seemingly problematic confluence. If judges are relying on rape myths while considering evidence when making decisions, then there would appear to be a disparity between public expectations and practice.

The study's findings regarding the influence of supervisory relationships in sexual assault cases present a nuanced and potentially contradictory pattern. The presence of a supervisory relationship between the accused and the victim was found to marginally increase the likelihood of commanders preferring charges.[391] Paradoxically, this same factor also marginally increased the probability of appellate judges overturning convictions.[392] This dichotomy illuminates a complex interplay between hierarchical power structures and judicial interpretation in military sexual assault cases.

The increased propensity for charging in cases involving supervisory relationships may indicate that commanders are particularly attuned to

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389 *See supra* Table 9.
390 *See id.*
391 *See supra* Table 2; *see also supra* Table 10.
392 *See id.*

potential abuses of power within the chain of command. This heightened sensitivity could reflect a commitment to maintaining good order and discipline and an acknowledgment of the unique vulnerabilities that may arise in superior-subordinate dynamics.

Conversely, the increased likelihood of appellate courts overturning convictions in these same cases suggests a divergent interpretation of supervisory relationships at the appellate level. This trend could indicate that appellate judges are more inclined to scrutinize the evidentiary basis of such cases, perhaps favoring the superior over the victim.

Transparency in records is crucial for future research and policy evaluation. It is recommended that the military justice system implement a comprehensive, standardized system for recording case details, decision-making processes, and outcomes that are made publicly available. This system should be designed with research accessibility in mind, allowing for ongoing analysis of trends and outcomes while maintaining appropriate privacy safeguards. Such transparency would facilitate more robust studies and enable continuous improvement of the military justice system.

Continued research is essential to assess whether the change in law, shifting prosecutorial discretion from commanders to military lawyers, will create the intended effects. Future studies should compare charging decisions made by military lawyers under the new system with historical data on commander decisions and appellate court rulings. This research should examine not only the rates of charges filed but also the types of cases pursued and their outcomes to provide a comprehensive understanding of the impact of this legal change.

Training programs for military lawyers who now hold prosecutorial discretion and serve as appellate judges should be developed and regularly updated based on research findings. These programs should address identified areas of concern, such as the interpretation of victim behavior, understanding of intimate partner violence, and evaluation of different types of evidence. Regular assessments of these training programs' effectiveness should be conducted to ensure they are successfully preparing military lawyers for their new responsibilities.

A system of periodic review and feedback should be established to monitor the implementation of the new prosecutorial discretion policy. This system should include input from various stakeholders, including victims' advocates, defense counsel, and military justice experts. Regular reports on the policy's impact, challenges encountered, and areas for improvement should be produced and made available to relevant authorities and, where appropriate, to the public.

Finally, it is recommended that a comparative analysis be conducted between the military justice system and civilian criminal justice systems regarding sexual assault case handling. This research could provide valuable

insights into best practices and areas for improvement in both contexts. It could also help identify whether certain challenges in sexual assault case prosecution are unique to the military environment or reflect broader societal issues, informing more targeted interventions and policy adjustments.

CONCLUSION

The traditional view of judicial decision-making, often associated with formal legalism, posits that judges are neutral arbiters who strictly adhere to legal principles and precedents when rendering decisions.[393] This perspective assumes that legal training and professional experience equip judges to make objective, unbiased judgments based solely on the letter of the law.[394] However, the evidence presented in the study and supporting literature suggests that this view may be oversimplified and, in many cases, inaccurate.

The study's findings show that Blame and Believability (BB) factors had a significant influence on appellate judges' decisions in sexual assault cases, directly challenging the notion of formal legalism. These BB factors, rooted in rape myth acceptance attitudes, are considered problematic influences on case processing and should ideally not play a role in judicial decision-making. The fact that legally-trained professionals show susceptibility to these factors suggests that legal education and experience alone do not guarantee objective decision-making free from societal biases and misconceptions. The study shows appellate judges in the military, as a whole, are not "unbiased factfinder[s]."

This observation aligns closely with Judge Learned Hand's critique of the conservative perspective of judges as passive interpreters of the law.[395] Hand argued for a more nuanced understanding of the judicial role, recognizing that judges must balance adherence to legal principles with an awareness of evolving societal norms and aspirations.[396] The study's results support Hand's view, demonstrating that judges, like all individuals, are influenced by broader societal attitudes and beliefs, even when these conflict with legal principles.[397]

Furthermore, the study's comparison between military commanders and appellate judges provides intriguing insights into the decision-making processes of lay individuals versus legal professionals. Contrary to expectations, commanders appeared to rely more heavily on legally relevant

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393 *See generally* Harold J. Spaeth & Jeffrey A. Segal, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465 (2001).

394 *See generally id.*

395 *See* Justin Zaremby, *Learned Hand's Two Concepts of (Judicial Liberty)*, 65 RUTGERS L. REV. 787, 794 (2013).

396 *See id.* at 794–96.

397 *See supra* Table 9.

factors such as offense seriousness and strength of evidence.[398] This finding challenges the assumption that legal training is the primary determinant of sound legal decision-making and suggests that other factors, such as institutional culture and training, may play significant roles.

These observations support the theory of legal realism, which posits that judicial decisions are influenced not only by legal rules and principles but also by various other factors, including personal beliefs, societal norms, and institutional contexts.[399] The study's findings, particularly the influence of BB factors on appellate judges' decisions, provide empirical evidence for this perspective.

Max Weber's sociological theory of law offers a framework for understanding these dynamics.[400] Weber emphasized that law is not merely a collection of written rules but a dynamic system shaped by the actions and interpretations of various actors, including legislators and judges.[401] The study's results illustrate this interplay, showing how judges' interpretations and applications of the law are influenced by societal attitudes and beliefs, even when these may conflict with legal principles.

The research of Kalven and Zeisel on jury decision-making provides additional context for understanding these findings.[402] Their work highlighted how judges often attribute to jury decision-making concepts like "contributory negligence" and "assumption of risk" in sexual assault cases, reflecting broader societal myths and stereotypes.[403] The current study supports the conclusion that judges, despite their legal training, are susceptible to those biases and misconceptions they attribute to the jury.

This conclusion has significant implications for the legal system and the handling of sexual assault cases. It underscores the need for ongoing education and training for all participants in the legal process, including judges, to address underlying attitudes and biases that may influence decision-making. Moreover, it suggests that efforts to improve the adjudication of sexual assault cases should focus not only on legal knowledge but also on challenging and dismantling rape myths and stereotypes that persist even among legal professionals.

The findings also highlight the complexity of decision-making in sexual assault cases and the limitations of relying solely on legal expertise to ensure just outcomes. They suggest that a more holistic approach to judicial training and selection may be necessary, one that considers not only legal knowledge

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398 *See id.*

399 *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997).

400 *See* Clarence Morris, *Law, Reason and Sociology*, 107 U. PA. L. REV. 147, 147–50, 158 (1958).

401 *See id.* at 158–59.

402 *See* W. Gilbert Faulk, Jr., *The American Jury. By Harry Kalven, Jr. and Hans Zeisel*, XXIV WASH. & LEE L. REV. 158, 158 (1967) (book review).

403 *See id.* at 158–59.

but also awareness of societal biases and the ability to critically examine one's own assumptions and beliefs.

In conclusion, the evidence presented strongly supports a shift away from the formal legalism view of judicial decision-making towards a more realistic understanding aligned with legal realism. Like all individuals, judges are influenced by a complex interplay of legal principles, personal beliefs, societal norms, and institutional contexts.[404] Recognizing this reality is crucial for developing more effective approaches to judicial training, case adjudication, and overall improvement of the legal system, particularly in sensitive and complex areas such as sexual assault cases.[405]

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404 *See* Monika Hanych et al., *The Influence of Public Opinion and Media on Judicial Decision-Making: Elite Judges' Perceptions and Strategies*, 14 INT'L J. FOR CT. ADMIN., no. 3, at 1, 1–3 (Dec. 2023).

405 *See id.* at 4–5, 14–15.

ZOOM TO THE BAR: HOW LAW SCHOOL REMOTE INSTRUCTION AFFECTED BAR EXAM PERFORMANCE

Michael Conklin*

INTRODUCTION

The COVID-19 pandemic profoundly affected nearly every aspect of life starting in 2020.[1] Existing research measuring the relationship between COVID restrictions and academic performance has found significant harm across numerous settings.[2] This first-of-its-kind study is designed to measure if a similar phenomenon is present with performance on state bar exams taken by law school graduates. The counterintuitive results from this study—that more restrictive COVID lockdowns correlated with *improved* bar examination performance—spark discussion regarding lockdowns, legal education, remote learning pedagogy, and the bar exam. Furthermore, the findings of this study will hopefully serve as a powerful catalyst to spark productive debate regarding the inherent tradeoffs involved in pandemic policies. This comes at an opportune time as we are currently at a critical juncture of relevant events, including rising online teaching modalities in the

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1 *See, e.g.*, Michael Conklin, *'The Most Demanding Test Known to Constitutional Law': Do Coronavirus Bans on Church Services Satisfy Religious Freedom Restoration Act Requirements?*, 60 WASHBURN L.J. 63, 63–64 (2020).

2 *See* Sandra M. Chafouleas, *Pandemic-Related School Closings Likely to Have Far-Reaching Effects on Child Well-Being*, UCONN TODAY (Feb. 11, 2022), https://today.uconn.edu/2022/02/pandemic-related-school-closings-likely-to-have-far-reaching-effects-on-child-well-being/#; Sarah Mervosh et al., *What the Data Says About Pandemic School Closures, Four Years Later*, N.Y. TIMES (Mar. 19, 2024), https://www.nytimes.com/2024/03/18/upshot/pandemic-school-closures-data.html; Anne Dennon, *COVID-19 School Closures Put Students' Futures at Risk*, BEST COLLEGES (Nov. 10, 2021), https://www.bestcolleges.com/blog/covid-19-school-closures-students-futures/; *Virtual School, Mask Mandates and Lost Learning: COVID-19's Impact on K-12 Schools*, USA FACTS (Mar. 23, 2023), https://usafacts.org/articles/virtual-school-mask-mandates-and-lost-learning-covid-19s-impact-on-k-12-schools/; *The School Lockdown Catastrophe*, WALL ST. J. (Oct. 24, 2022, 6:17 PM), https://www.wsj.com/articles/the-school-lockdown-catastrophe-naep-test-results-national-assessment-of-educational-progress-11666643369; Di Xu & Shanna S. Jaggars, *Performance Gaps Between Online and Face-to-Face Courses: Differences Across Types of Students and Academic Subject Areas*, 85 J. HIGHER EDUC. 633, 633 (2014).

twenty-first century,[3] a growing movement to abolish the bar exam,[4] the threat of artificial intelligence replacing some aspects of the practice of law,[5] increasing salience regarding race and educational outcomes,[6] and a movement to diminish the importance of higher education.[7]

I. EXISTING RESEARCH

Starting in early 2020, strict COVID precautionary measures affected nearly every aspect of life.[8] These restrictions included widespread school closures and the implementation of remote learning, which resulted in severe reductions in educational outcomes.[9] At the elementary and secondary school levels, COVID-induced school closures and remote learning dramatically decreased student learning.[10] To further strengthen this connection, the more time elementary and secondary schools were shut down, the worse the educational outcomes were.[11] Unsurprisingly, these negative outcomes in academic achievement appear to be present at the college level as well.[12]

The correlation between lack of in-person schooling and diminished academic performance also appears in racial disparities. Studies show that Black and Hispanic students experienced disproportionate educational losses during remote learning.[13] Additionally, this finding is consistent with how white students experienced the highest rates of in-person education.[14]

Disparities among private- and public-school students provide further evidence supporting the intuitive correlation between canceling in-person

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3 *See, e.g.*, Emma Hall, *Online and Hybrid Learning are Increasingly Popular. Now Colleges Have to Keep Up*, CHRON. HIGHER EDUC. (Aug. 15, 2023), https://www.chronicle.com/article/online-and-hybrid-learning-is-increasingly-popular-now-colleges-have-to-keep-up.

4 *See* Michael Conklin, *Lowering the Bar for Cheaters: An Explanation of Remote-Proctored Bar Exams and Cheating*, J. LEGAL PRO. (forthcoming 2024), (prepublication copy available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871813).

5 *See, e.g.*, Steve Lohr, *A.I. is Coming for Lawyers, Again*, N.Y. TIMES (Apr. 10, 2023), https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html.

6 *See, e.g.*, Kristal Brent Zook, *How Black Lives Matter Came to the Academy*, NEW YORKER (Jan. 30, 2021), https://www.newyorker.com/news/the-political-scene/how-black-lives-matter-came-to-the-academy.

7 *See, e.g.*, Jessica Blake, *Doubts About Value are Deterring College Enrollment*, INSIDE HIGHER EDUC. (Mar. 13, 2024), https://www.insidehighered.com/news/students/retention/2024/03/13/doubts-about-value-are-deterring-college-enrollment.

8 *See, e.g.*, *Covid-19 Pandemic Timeline Fast Facts*, CNN (Sept. 4, 2024, 3:37 PM), https://www.cnn.com/2021/08/09/health/covid-19-pandemic-timeline-fast-facts/index.html.

9 *See, e.g.*, Rebecca Jack & Emily Oster, *COVID-19, School Closures, and Outcomes*, 37 J. ECON. PERSP. 51, 61 (2023).

10 *See, e.g.*, Chafouleas, *supra* note 2.

11 Mervosh et al., *supra* note 2.

12 Dennon, *supra* note 2.

13 *See, e.g.*, *Virtual School, Mask Mandates and Lost Learning: COVID-19's Impact on K-12 Schools*, *supra* note 2.

14 *See, e.g.*, *id.*

schooling and poor academic performance. This is because public schools closed down to a greater extent than private schools.[15] Consequently, test scores for students at private schools did not diminish to the extent that public school test scores did.[16] Studies demonstrate that online instruction is inferior to traditional, face-to-face instruction, further strengthening the connection between learning outcomes and remote learning.[17]

II. HYPOTHESIS

Based on this growing body of existing research finding that COVID lockdowns negatively affect educational outcomes,[18] it was hypothesized that a similar, negative correlation would exist between state-level bar exam results and state-level COVID restrictions.

III. METHODOLOGY AND RESULTS

To measure the correlation between COVID lockdowns and bar performance in a given state, differences in pass rates needed to be calculated, as bar exam result scores are unavailable. It was determined that the most accurate measure would be to compare the differences from the 2019 bar exam by first-time takers (before COVID lockdowns) to the 2022 bar exam for first-time takers. While COVID lockdowns were less severe in 2022 than in 2020 and 2021,[19] this measurement was used because first-time bar takers in 2022 would have likely started their first year of law school in 2020. Because the bar exam primarily measures knowledge of topics covered in the first half of law school, this is the best methodology to measure the effects of someone experiencing remote learning in law school.[20]

An objective, quantifiable measure of how strict COVID lockdowns were by state was obtained by an existing measure that used thirteen key metrics.[21] A simple correlation coefficient analysis measured any correlation

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15 *See, e.g.*, *The School Lockdown Catastrophe*, *supra* note 2.

16 *See, e.g.*, *id.*

17 *See, e.g.*, Xu & Jaggars, *supra* note 2, at 633 (using a dataset of almost 500,000 college class sections to conclude that "all types of students in the study suffered decrements in performance in online courses . . . ."). However, because this was not a randomized trial, this outcome could be the result of selection bias in that the kind of students that sign up for a face-to-face class may be more likely to succeed regardless of modality of instruction.

18 Megan Kuhfeld et al., *The Pandemic Has Had Devastating Impacts on Learning. What Will it Take to Help Students Catch Up?*, BROOKINGS (Mar. 3, 2022) https://www.brookings.edu/articles/the-pandemic-has-had-devastating-impacts-on-learning-what-will-it-take-to-help-students-catch-up/.

19 *CDC Museum COVID-19 Timeline*, U.S. CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/museum/timeline/covid19.html (last visited Nov. 8, 2024).

20 *See, e.g.*, *What Are the Uniform Bar Exam Topics?*, JD ADVISING, https://jdadvising.com/uniform-bar-exam-topics/ (last visited Sept. 6, 2024).

21 *Id.*

between the two data sets. Surprisingly, this resulted in a correlation coefficient of -0.41, indicating a moderate, negative correlation.[22] Meaning, the more restrictive COVID lockdowns in a state were correlated with improved bar exam performance.

IV. DISCUSSION

The results of this study are counter to what was expected, given the existing research on COVID lockdowns and educational outcomes. One potential explanation for this outcome is in the unique nature of the bar exam. Most of the research on COVID's effect on educational outcomes uses tests administered to everyone of a given grade level. For example, the National Assessment of Educational Progress (NAEP) assessment exams in reading and mathematics are administered to fourth- and eighth-grade students.[23] However, the bar exam is administered to a narrow, self-selected subset of the population who have pursued law school, were accepted into law school, and graduated. Perhaps the nature of such a person somewhat immunizes them from the negative effects of remote learning. Additionally, assuming a traditional route of attending law school immediately after completing a four-year undergraduate degree, most people who sit for the bar exam would be at least twenty-five years old. Perhaps this advanced age compared to students used in other studies that measure the negative educational effects of COVID lockdown explains the difference. Evidence suggests that younger students perform worse when it comes to remote learning.[24]

In discussing potential explanations for the results of this study, it is important to note that COVID lockdowns affect far more than just school closures. Perhaps students in states with more severe lockdowns felt safer and therefore had better learning outcomes despite remote learning. Evidence also suggests that a positive mental state results in better academic performance.[25] However, the evidence also indicates that more severe lockdowns resulted in diminished mental health outcomes.[26]

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22 *See, e.g.*, *Correlation Coefficient | Definition, Interpretation & Examples*, STUDY.COM, https://study.com/learn/lesson/correlation-coefficient-interpretation.html (last visited Nov. 5, 2024) ("-0.4 to -0.6: Moderate negative correlation[.]").

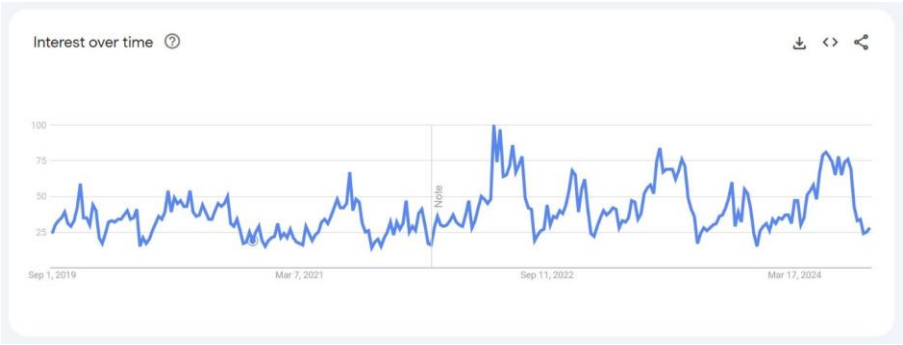
23 *NAEP Report Card: 2022 NAEP Reading Assessment*, NATION'S REP. CARD, https://www.nationsreportcard.gov/highlights/reading/2022/ (last visited Nov. 8, 2024); *NAEP Report Card: 2022 NAEP Mathematics Assessment*, NATION'S REP. CARD, https://www.nationsreportcard.gov/highlights/mathematics/2022/ (last visited Nov. 8, 2024).

24 *See, e.g.*, Xu & Jaggars, *supra* note 2, at 637 (finding that younger students had wider performance gaps in online learning compared to face-to-face learning modalities).

25 *See, e.g.*, Kayla M. Vasliko & Joseph T. Stewart, *The Power of Kindness and Positivity in the College Environment*, 7 PURDUE J. SERVICE-LEARNING & INT'L ENGAGEMENT 100, 100 (2020).

26 *See, e.g.*, Ibithal Ferwana & Lav R. Varshney, *The Impact of COVID-19 Lockdowns on Mental Health Patient Populations in the United States*, 14 SCI. REPS. 1, 11 (2024).

Perhaps law school graduates who were under remote learning while the bar examination topics were covered received an inferior education, and, realizing this, these students went to greater lengths to prepare for the bar exam. An attempt was made to obtain enrollment data from companies offering bar preparation services, but this was ultimately unsuccessful. However, Google Trends provides some evidence to support this explanation. A search for one of the most prominent bar preparation companies, BARBRI, did show a significant peak in 2022.[27]



Another factor that must be considered is that COVID also dramatically affected the administration of the bar exam. The exam was traditionally offered only at in-person testing centers.[28] In 2020, it began to be administered as a take-home exam, also referred to as remote proctored.[29] Perhaps the ability to take the exam at home was more advantageous by reducing distractions, stress levels, and logistical concerns. Although, a recent study suggests that some of the recent improvements in bar exam pass rates resulted from increased cheating.[30]

The findings of this research also help inform the related issue regarding the relevance of the bar exam. In recent years, many have called for the end of the bar exam altogether.[31] Some argue that the exam merely measures the

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27 BARBRI–Google Trends, GOOGLE (Sep. 4, 2024), https://trends.google.com/trends/explore?date=today%205-y&geo=US&q=Barbri&hl=en.

28 Conklin, *supra* note 4, manuscript at 12.

29 *Id.* manuscript at 1.

30 *Id.* manuscript at 2 (studying the relative male/female bar passage gap when the exam was administered 100% face-to-face, then partially face-to-face, and finally 100% remote proctored because existing research consistently demonstrates that males cheat more than women. It found that males consistently performed better than females the more remote proctored the exam was, with a 534% increase in the gender gap from 100% face-to-face to 100% remote proctored. While not dispositive, this is strong evidence that cheating increased when the bar exam was offered at home).

31 *See, e.g.*, Brian Faughnan, *It's Another Fine Day to Abolish the Bar Exam*, FAUGHAN ON ETHICS (Nov. 10, 2021), https://faughnanonethics.com/its-another-fine-day-to-abolish-the-bar-exam/; *see also* Ilya Somin, *Stephen Carter Makes the Case for Barring the Bar Exam*, VOLOKH CONSPIRACY

ability to take an exam rather than the ability to engage in the real-life practice of law.[32] Others argue that the existence of the bar exam results in a significant waste of resources for law students, law schools, and the legal profession.[33] Critics point to how the bar exam serves as a significant impediment, thus decreasing the number of lawyers and consequently driving up the cost of legal services.[34] Additionally, others point to how it prevents mobility among lawyers who want to relocate to a different state.[35] Finally, many argue against the bar exam because disadvantaged groups consistently underperform on the exam.[36]

This movement to abolish the bar exam has found some successes in recent years. In 2023, Oregon permitted alternatives to the bar examination to become licensed to practice law in the state.[37] One of the main reasons for this change was a focus on "prioritiz[ing] equity."[38] Washington state followed suit in 2024 by providing similar alternatives to passing the bar exam,[39] finding that the bar exam "disproportionately and unnecessarily blocks" marginalized groups from practicing law.[40] This is in addition to New Hampshire and Wisconsin, which already provide alternatives to taking

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(July 13, 2022, 8:58 PM), https://reason.com/volokh/2022/07/13/stephen-carter-makes-the-case-for-barring-the-bar-exam/; Logan Cornett & Zachariah DeMeola, *The Bar Exam Does More Harm than Good*, INST. ADVANCEMENT AM. L. SYS. (Aug. 2, 2021), https://iaals.du.edu/blog/bar-exam-does-more-harm-good.

32 *See, e.g.*, *The Bar Exam: Should it be Abolished?*, CARDINAL INST. W. VA. POL'Y (July 29, 2021), https://cardinalinstitute.com/the-bar-exam-should-it-be-abolished/ ("The Bar Exam discredits experience and simply asks students how well of a test taker they are. No respectable lawyer will go into trial relying solely on their memory.").

33 *See, e.g.*, John Lande, *Should we Get Rid of the Bar Exam?*, INDISPUTABLY (Feb. 27, 2023), https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1110&context=fac_blogs ("They consume tremendous resources of the legal profession, law schools, and law students, diverting resources and attention from activities that are likely to be more effective and valuable.").

34 *See, e.g.*, Ilya Somin, *Study Finds Bar Exam Requirements Greatly Reduce the Number of Lawyers*, VOLOKH CONSPIRACY (June 15, 2023, 3:19 PM), https://reason.com/volokh/2023/06/15/study-finds-bar-exam-requirements-greatly-reduce-the-number-of-lawyers/.

35 *See, e.g.*, Daniel Solove, *Abolish the Bar Exam*, PRAWFSBLAWG (May 25, 2005, 01:01 PM), https://prawfsblawg.blogs.com/prawfsblawg/2005/05/abolish_the_bar.html.

36 *See, e.g.*, Pilar Margarita Hernandez Escontrias, *The Pandemic is Proving the Bar Exam is Unjust and Unnecessary*, SLATE (July 23, 2020, 5:45 PM), https://slate.com/news-and-politics/2020/07/pandemic-bar-exam-inequality.html.

37 Karen Sloan, *No Bar Exam Required to Practice Law in Oregon Starting Next Year*, REUTERS (Nov. 7, 2023, 5:05 PM), https://www.reuters.com/legal/government/no-bar-exam-required-practice-law-oregon-starting-next-year-2023-11-07/#:~:text=No.

38 Kathryn Palmer, *Oregon Approves Alternative to Bar Exam*, INSIDE HIGHER EDUC. (Nov. 9, 2023), https://www.insidehighered.com/news/students/careers/2023/11/09/oregon-approves-alternative-bar-exam ("The goal was to develop a licensure pathway that was as, if not more, rigorous than the current bar exam and prioritize equity in the process. Those twin pillars have always been the guideposts for this effort[.]").

39 Emma Epperly, *Supreme Court: Bar Exam Will No Longer be Required to Become Attorney in Washington State*, SPOKESMAN REV. (Mar. 15, 2024, 7:18 PM), https://www.spokesman.com/stories/2024/mar/15/supreme-court-bar-exam-will-no-longer-be-required-/.

40 *Id.*

the bar exam.[41] The criticisms of the bar exam from those who want to abolish it appear to have resulted in changes as a new bar exam is set to debut in July 2026 with an increased focus on "foundational lawyering skills."[42]

The results of this study could be interpreted as evidence against the use of the bar exam as an effective measure of knowledge gained from law school. This is because the improved performance on the bar exam from students who spent their first year of law school under remote learning conditions during challenging times calls into question the significance of that instruction. Further support of this point is that law school graduates preparing for the bar generally spend thousands of dollars on bar exam prep courses rather than reviewing their law school outlines and re-reading law school textbooks.[43]

It should be noted that the datasets available to conduct this research have some limitations. Bar examination results are only reported on a pass/fail basis. While more detailed analysis could be conducted if anonymized, individual scores were available, and the over 60,000 people taking the bar provided an ample sample size.[44] Additionally, only state-level data is available rather than data for each testing location. But again, fifty states provide an ample sample size to measure. Some people may indeed be taking the bar exam in a state other than the state in which they graduated from law school. It was determined that this would be somewhat rare—especially since the dataset included only first-time takers—and that this occurrence would be somewhat self-moderating.[45] Finally, the one-time occurrence of COVID-19 allowed for this data to be measured only once.

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41 For New Hampshire, see Lynne Tuohy, *Program Allows N.H. Law Students to Skip Bar Exam*, BRATTLEBORO REFORMER (May 14, 2010), https://www.reformer.com/local-news/program-allows-n-h-law-students-to-skip-bar-exam/article_c91ee66a-2858-5767-a1d0-91a12102ee69.html. For Wisconsin, see *Diploma Privilege*, UNIV. OF WISCONSIN-MADISON L. SCH., https://law.wisc.edu/current/diploma_privilege/ (last visited Sept. 6, 2024).

42 *Next Generation of the Bar Exam*, NAT'L CONF. BAR EXAM'RS., https://www.ncbex.org/about/next-generation-bar-exam (last visited Nov. 10, 2024).

43 *See, e.g.*, *The Cost of the Bar Exam Preparation Process*, JD ADVISING, https://jdadvising.com/the-cost-of-the-bar-exam-preparation-process/ (last visited Nov. 10, 2024) ("[S]tudents can expect to pay between $1,000 to $3,000 for a roughly two-month course.").

44 *See, e.g.*, *Bar Exam Statistics & Pass Rates*, UWORLD LEGAL, https://legal.uworld.com/bar-exam/statistics/ (last visited Nov. 10, 2024) (reporting that 64,833 people took the bar exam in 2021).

45 By self-moderating, it was predicted that law school graduates from states with more severe COVID lockdowns such as California, Washington D.C., New York, and Connecticut would be more likely to take an out-of-state bar examination in a state with similar COVID lockdowns rather than a state like Iowa, Wyoming, or South Dakota with less severe COVID lockdowns. And vice versa for those who graduated from one of those less-severe lockdown states. This would help mitigate any slight disparities in the data from people taking a bar exam in a different state from where they attended law school. *See generally* Laura Hallas et al., *Variation in U.S. States' Responses to COVID-19* (Blavatnik Sch. of Gov't, Univ. of Oxford, Working Paper No. 2020/034, 2021), https://www.bsg.ox.ac.uk/sites/default/files/2021-05/BSG-WP-2020-034-v3.pdf (suggesting that California, Washington D.C., New York, and Connecticut had stricter COVID-19 restrictions than

As described above in the methodology section, the difference between the 2019 and 2022 bar exam was determined to be the most accurate measure of the effects of COVID lockdowns. However, an additional analysis was conducted to measure the difference between the 2019 and 2021 bar examination results. This produced very similar results with a correlation coefficient of 0.39. At the time of this research, the 2023 bar examination data was not available, but this data would be of minimal value as most first-time bar examination test takers in 2023 would not have attended law school under the strictest lockdowns that occurred during 2020.

CONCLUSION

The counterintuitive findings of this research help better inform scholars and policymakers on a variety of subjects, including a more nuanced understanding of how remote learning affects academic performance, the self-selecting nature of those who decide to sit for the bar exam, and the modern movement to abolish it. This study comes at a critical juncture where a confluence of events are poised to drastically change legal education. These include rising online teaching modalities in the twenty-first century,[46] a growing movement to abolish the bar exam,[47] the threat of artificial intelligence replacing some aspects of law practice,[48] increasing salience regarding race and educational outcomes,[49] and a movement to diminish the importance of higher education.[50] Finally, the findings of this study will hopefully serve as a powerful catalyst to spark debate regarding issues surrounding the proper role of the bar exam and remote learning in legal education.

Iowa, Wyoming, and South Dakota by highlighting more stringent policies in Northeastern and Democrat-led states).

46 *See, e.g.*, Hall, *supra* note 3.

47 *See* sources cited *supra* note 2.

48 *See, e.g.*, Lohr, *supra* note 5.

49 *See, e.g.*, Zook, *supra* note 6.

50 *See, e.g.*, Blake, *supra* note 7.

BOOK REVIEW: PROFESSIONAL WRESTLING AND THE LAW

Michael Conklin*

INTRODUCTION

This is a review of Alex B. Long's new book, *Professional Wrestling and the Law: Legal Battles from the Ring to the Courtroom*.[1] Professional wrestling serves as a surprisingly adept framework for illustrating various legal principles. Long's colloquial writing style and humorous anecdotes make for an experience as enjoyable as it is informative. This review primarily focuses on the striking parallels between the law and wrestling, particularly in how both navigate the fine line between fact and fiction as well as how they have concurrently evolved over time regarding minority and women's rights.

I. REAL V. FAKE

Long explains how the dichotomy in wrestling between what is fact and what is fiction is strikingly similar to legal theories and the practice of law. Historically, professional wrestling was viewed by many as a genuine athletic competition.[2] Fans became aware of its scripted reality[3] when the WWE admitted as much to avoid being regulated by the various state athletic commissions in the 1980s.[4] However, these fans are willing to suspend disbelief for the benefit of entertainment. While this may seem childish to some, it is similar to various legal fictions in the law.[5] Examples include corporate personhood, quasi-contracts, and the reasonable person standard.

This suspension of disbelief in professional wrestling can result in unique litigation issues, as promoters and wrestlers love to blur the lines between fact and fiction.[6] For example, Terry Bolea was awarded a $140

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* Assistant Professor of Business Law, Texas A&M University Central Texas; Lecturer, Texas A&M University School of Law. When I was a child in the 1980s, I somehow had the wherewithal to realize I was not cut out to be a professional wrestler but was still naïve enough to believe that I could grow up to be a patent law attorney specializing in protections for professional wrestlers' "patented" finishing moves.

1 ALEX B. LONG, PROFESSIONAL WRESTLING AND THE LAW: LEGAL BATTLES FROM THE RING TO THE COURTROOM (2024).

2 *Id.* at 12.

3 *Id.*

4 *Id.* at 29.

5 *Id.* at 12–13.

6 *Id.* at 15–29.

million settlement for drawing a tenuous distinction between himself and his wrestling persona, Hulk Hogan.[7] He successfully argued that when he was on The Howard Stern Show bragging about his sexual exploits, it was actually his persona, Hulk Hogan.[8] But it was Terry Bolea who was in the sex tape that Gawker.com published without his permission.[9]

Somewhat ironically, it is often the plaintiffs suing professional wrestling outfits who are "fake." For example, after being hit by a professional wrestler he was interviewing, reporter John Stossel claimed to have ringing in his ears and filed suit.[10] A doctor determined that Stossel was merely holding onto the pain for the lawsuit.[11] After receiving a $280,000 settlement, Stossel said the pain instantly disappeared.[12]

Another conspicuous similarity between professional wrestling and the practice of law is the showmanship. Trial attorneys are instructed regarding the importance of selling a powerful storyline for the jury, including clear villains and heroes, just like in professional wrestling.[13] Just as there are archetypes in professional wrestling (the cowardly cheater, the virtuous hero, the take-no-crap hero, and the egotistical villain), there are also performative tropes that lawyers personify to the jury, such as the simple country lawyer, the no-nonsense prosecutor, and the champion of the underdog.[14]

II. EVOLVING STANDARDS

The U.S. legal system has evolved dramatically from the founding of the country. Professional wrestling's long history means that it has also evolved with the times. There were statutory bans against interracial wrestling matches.[15] Black wrestlers were often forced to portray derogatory racial stereotypes through the Jim Crow era and even into the twenty-first century.[16] Somewhat fortuitously, when wrestling was desegregated, extreme racial tensions meant that if a wrestling promoter allowed a Black wrestler to go up against a white wrestler, the Black wrestler was cast as the

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7 *Id.* at 166–67.
8 *Id.*
9 *Id.*
10 *Id.* at 5–6.
11 *Id.* at 6.
12 *Id.*
13 *See, e.g.*, *The Power of Storytelling in Trial Advocacy*, MISHLOVE & STUCKERT, LLC (Apr. 17, 2023), https://www.wisconsin-owi.com/blog/2023/04/17/the-power-of-storytelling-in-214362#:~:text=By%20weaving%20facts%20and%20legal,critical%20aspects%20of%20the%20case.&text=A%20great%20storyteller%20is%20not,will%20enhance%20the%20attorney's%20credibility.
14 LONG, *supra* note 1, at 13.
15 *Id.* at 200.
16 *Id.* at 196–200.

hero and the white wrestler the villain to avoid potential riots from white crowds.[17]

Gender issues have also changed significantly in both the law and professional wrestling. Some states enacted legislative bans against female wrestlers through the 1960s.[18] In a 1967 case, the New York State Athletic Association voiced an imaginative concern that allowing women to wrestle could result in a pregnant woman becoming desperate for money, deciding to wrestle to earn money, having a miscarriage, and then suing the commission.[19] The following excerpt from a case illustrates the uphill battle that female wrestlers had to fight.

> [T]here should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. Women had already invaded practically every activity formerly considered suitable and appropriate for men only . . . . [I]s it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges?[20]

While professional wrestling evolved to allow female wrestlers to participate, and in 2019, it even featured an all-female main event at the largest annual wrestling event,[21] it appears to lag behind in other related areas, such as sexual harassment. During the 1990s "Attitude Era," the WWF put on bra-and-panties matches and exploited female wrestlers as sex objects.[22] This degrading behavior allegedly occurred backstage as well, with some female wrestlers suing for a hostile work environment.[23]

The WWE also engaged in questionable use of nondisclosure agreements (NDAs) to silence alleged victims of sexual assault and sexual harassment.[24] New York's new Speak Out Act has emboldened some of these alleged victims to pursue legal recourse despite their NDAs.[25] Additionally, the Supreme Court case of *Oncale v. Sundowner Offshore Services*[26] allowed

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17 *Id.* at 208.

18 *Id.* at 132–33.

19 The New York Athletic Commission which made this claim won the case on a motion to dismiss. *Id.* at 132.

20 *Id.* at 127.

21 *WrestleMania to feature first-ever women's main event*, WWE (Mar. 25, 2019), https://www.wwe.com/shows/wrestlemania/article/wrestlemania-to-feature-first-ever-womens-main-event.

22 LONG, *supra* note 1, at 144.

23 *Id.* at 144–46.

24 *Id.* at 146–48.

25 *Id.* at 147.

26 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 77 (1998).

multiple alleged male victims of same-sex sexual harassment in the "ring boys" scandal to file suit under Title VII.[27]

It could even be argued that, in some ways, professional wrestling was the leader and the culture followed. For example, the boom in reality television in the late 1990s and early 2000s is strikingly similar to how professional wrestling routinely bends the line between fact and fiction.[28] Similarly, mock documentaries such as 1999's Blair Witch Project profited from the false belief that the movie recounted actual events from found footage.[29] A more positive example of how professional wrestling has led to cultural change is the moving story of Sputnik Monroe, a defiant white wrestler who helped desegregate wrestling and served as a catalyst for desegregation in other areas.[30]

III. MISCELLANEOUS CONSIDERATIONS

The following is a brief survey of some other engaging topics covered in the book.

- Bailments for championship belts[31]
- The wrestling territory system and antitrust law[32]
- Numerous contractual disputes, both real and fictional
- Concussion and CTE lawsuits[33]
- The difficulty of a professional wrestler winning a defamation case is because the false statements must be proven against the real person, not the wrestling persona.[34]
- Are wrestlers employees or independent contractors, and why the distinction matters[35]
- Assumption of risk for being injured while attending a professional wrestling event[36]
- When a wrestler enters the crowd and assaults a fan, is this acting within the scope of employment and therefore incurs

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27 LONG, *supra* note 1, at 143; *see also Oncale*, 523 U.S. at 79.

28 LONG, *supra* note 1, at 150–51.

29 *Id.* at 151.

30 *Id.* at 217–18.

31 *Id.* at 20.

32 *Id.* at 52.

33 *Id.* at 187.

34 *Id.* at 169–70.

35 *Id.* at 95–102. The distinction matters for many reasons including the ability to unionize, receive FMLA leave, health insurance, worker's compensation, OSHA protections, etc. *Id.* at 98–102; *see also* Michael Conklin & Julia Goebel, *Wrestling with Employment Classifications: Are WWE Wrestlers Independent Contractors?*, 70 LAB. L.J. 165 (2019).

36 LONG, *supra* note 1, at 41 (As one court described, professional wrestling events are "not quiet and dignified affairs."); Goebel, *supra* note 35.

liability upon the wrestling promotion, and does the answer depend on whether the wrestler is portraying a villain?[37]

- Exactly how many security guards need to be hired so that a promoter will not be considered negligent?[38]

The only thing that could be construed as a "complaint" regarding the book is that it leaves the reader wanting more. Enough additional topics are available for a second volume to be easily written. Some examples include: the World Wildlife Fund lawsuit that forced the World Wrestling Federation to switch to World Wrestling Entertainment (WWE);[39] the notorious wrestler New Jack who literally stabbed his opponent during one match and nearly killed another opponent in the "mass transit" incident;[40] how the WWE maintains rights to the wrestlers' personas, resulting in some wrestlers attempting to change their legal name to their wrestling persona name in an attempted workaround;[41] the nuanced distinction between what employers would be allowed to force employees to do at a traditional workplace compared to what is permitted at a professional wrestling organization;[42] a wrestler who successfully sued his opponent for $2.3 million after he contracted hepatitis C from a particularly bloody match;[43] the enforceability

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37 LONG, *supra* note 1, at 37–38, 47.

38 *Id.* at 37, 46.

39 David Bixenspan, *Correcting the Record on Why the WWF Changed its Name to WWE*, FORBES (Feb. 17, 2020, 11:28 PM), https://www.forbes.com/sites/davidbixenspan/2020/02/17/wwe-wwf-name-change-true-story-ruthless-aggression-wwe-network-documentary/?sh=62b510f225a6.

40 Javier Ojst, *New Jack: Secret History on Wrestling's Most Violent Man*, PRO WRESTLING STORIES (Feb. 21, 2023), https://prowrestlingstories.com/pro-wrestling-stories/new-jack-wrestler/.

41 Malik umar Khalid mahmood, *Why the Ultimate Warrior Changed His Real Life Name, Explained*, SPORTSTER (Dec. 2, 2022), https://www.thesportster.com/wwe-why-the-ultimate-warrior-changed-his-real-life-name-explained/.

42 Examples include forcing wrestlers to adopt personas that involve incest, mental handicaps, a terrorist, and a Nazi. And some wrestlers have been bit by a real-life snake, thrown onto hundreds of thumbtacks, and forced to literally kiss the bare buttocks of their boss. Finally, some workers are forced to endure ridicule for things in their real life such as having their spouse leave them or having cerebral palsy. *See* Tom Marriot, *5 WWE Incest Angles We'd Rather Forget,* WHATCULTURE (Dec. 18, 2016), https://whatculture.com/wwe/5-wwe-incest-angles-wed-rather-forget; *see also* Joey Haverford, *5 WWE Wrestlers Who Survived Bad Gimmicks (& 5 Who Had It Define Their Careers)*, SPORTSTER (Feb. 26, 2023), https://www.thesportster.com/wwe-wrestlers-survived-bad-gimmicks-characters-define-their-careers/; Grung Staff, *The Most Controversial Things WWE Has Ever Done*, GRUNGE (Oct. 16, 2019, 2:25 PM), https://www.grunge.com/135139/the-most-controversial-things-wwe-has-ever-done/; Nicholas Paul Ybarra, *The Backstage Story Of Jake Roberts' Snake Biting Randy Savage*, SPORTSTER (Apr. 27, 2024) https://www.thesportster.com/wwe-backstage-story-of-jake-roberts-snake-biting-randy-savage/; Luke Marcoccia, *8 WWE Matches Where Someone Landed On Thumbtacks*, SPORTSTER (Nov. 17, 2021), https://www.thesportster.com/wwe-matches-wrestlers-landed-on-thumbtacks/; Kebin Antony, *10 Most Disrespectful Moments During WWE's Ruthless Aggression Era*, SPORTSTER (May 2, 2022), https://www.thesportster.com/most-disrespectful-moments-wwe-ruthless-aggression-era/.

43 *Ottawa Wrestler 'Hannibal' Wins $2.3 Million Hepatitis C Lawsuit*, CBC (June 4, 2014), https://www.cbc.ca/news/canada/ottawa/ottawa-wrestler-hannibal-wins-2-3m-hepatitis-c-lawsuit-1.2663253.

of strict, non-compete clauses; and the unfolding 2024 Vince McMahon sex scandal.[44]

CONCLUSION

The fact that over 500 law journal articles have referenced professional wrestling is a testament to the fertile ground between it and the law.[45] Long's new book serves as an entertaining survey of the numerous ways in which professional wrestling and the legal system overlap. The stories are captivating, the legal analysis sound, and copies of relevant legal documents are included for context. Readers looking for a similar book that links sports with the legal system should get *The Jurisprudence of Sport* by Mitchell Berman and Richard Friedman.[46]

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44 Chris Vannini, *Explaining Vince McMahon and the Lawsuit Against Him as WrestleMania Approaches*, ATHLETIC (Apr. 2, 2024), https://www.nytimes.com/athletic/5383504/2024/04/02/vince-mcmahon-lawsuit-wrestlemania-wwe-absence-explainer/.

45 LONG, *supra* note 1, at 2.

46 Michael Conklin, *Viewing Sports as Legal Systems: A Review of the Jurisprudence of Sport*, J. MARSHALL L. REV. ONLINE 1 (April 21, 2022).

MODIFYING THE *MILLER* TEST TO SUPPLEMENT *BOARD OF EDUCATION V. PICO*: A NOVEL APPROACH FOR RESOLVING CENSORSHIP CASES IN SCHOOL LIBRARIES

Michael Lee*

INTRODUCTION

Given the recent surge in book censorship across the country, our communities are beginning to resemble the futuristic and totalitarian World State in Aldous Huxley's *Brave New World*,[1] a novel many have targeted for censorship.[2] Indeed, many books have been banned or challenged in the United States in the past few years.[3] For example, the school board in York County, Pennsylvania, banned a list of educational resources, including a children's book about Rosa Parks and Malala Yousafzai's autobiography, in October 2020.[4] Another instance of book-banning occurred on January 10, 2022, when the board of trustees of McMinn County Schools in Tennessee

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1 ALDOUS HUXLEY, BRAVE NEW WORLD (First Harper Perennial Modern Classics 2006) (1932). In the novel, the World State had banned all books published before A.F. 150. *Id.* at 51. Moreover, there were rumors that Mustapha Mond, the Resident Controller for Western Europe, had old forbidden books, such as The Bible, hidden in a safe that was in his study. *Id.* at 35.

2 *See Top Ten Most Challenged Books Lists*, AM. LIBR. ASSOC., https://web.archive.org/web/20170728055307/http://www.ala.org:80/advocacy/bbooks/frequentlychallengedbooks/top10#2013 (last visited Oct. 24, 2024) (indicating that Aldous Huxley's *Brave New World* was one of the ten most challenged books in 2010 and 2011 due to its insensitivity, nudity, racism, religious viewpoint, and sexual explicitness).

3 *See* Kasey Meehan et al., *Banned in the USA: The Mounting Pressure to Censor*, PEN AM. (Sept. 1, 2023), https://pen.org/report/book-bans-pressure-to-censor/#:~:text=During%20the%202022%E2%80%9323%20school,public%20schools%20across%20the%20country. (reporting that there had been 3,362 instances of books banned during the 2022-23 school year, which constituted an increase of 33 percent from the 2021-22 school year).

4 Evan McMorris-Santoro et al., *Students fight back against a book ban that has a Pennsylvania community divided*, CNN (Sept. 16, 2021, 12:10 AM), https://www.cnn.com/2021/09/15/us/book-ban-controversy-pennsylvania/index.html.

removed the nonfiction book *Maus*[5] from its schools' curriculum.[6] The McMinn County School Board voted 10-0 to ban the book after citing concerns over "rough" language and a drawing of a nude woman.[7] Nevertheless, the school board acknowledged that the book would otherwise reflect the district's and community's values in terms of educating students about the Holocaust.[8] Finally, in early 2022, a library in Madison County, Mississippi, was denied public funding from the mayor's office because it provided books covering LGBTQ+ topics.[9] According to the executive director of the Madison County Library System, the mayor's office planned to withhold funding until books containing "homosexual material" were removed.[10] These incidents represent just a portion of the recent wave of book bans and challenges occurring across the United States.

In response to the uptick in book-banning and challenges, academics, free speech advocates, journalists, and other critics have described these practices as part of a more significant effort to impose an ideologically skewed version of what children should learn regarding American culture, history, and society.[11] Moreover, the American Library Association released a statement in response to "a dramatic uptick in book challenges and outright removal of books from libraries."[12] Their message denounced

> a few organizations [which] have advanced the proposition that the voices of the marginalized have no place on library shelves . . . [f]alsely claiming that these works are subversive, immoral, or worse [and inducing] officials to abandon constitutional principles, ignore the rule of law, and disregard individual rights to promote government censorship of library collections.[13]

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5 ART SPIEGELMAN, MAUS II: A SURVIVOR'S TALE: AND HERE MY TROUBLES BEGAN (1991). This graphic novel follows Art Spiegelman's Jewish parents through their internment in Auschwitz, Poland. *Id.* In the novel, the Nazis are portrayed as cats and the Jewish people are shown as mice. *Id.*

6 Francisco Guzman, *What we know about the removal of Holocaust book 'Maus' by a Tennessee school board*, THE TENNESSEAN (Jan. 31, 2022, 7:54 PM), https://www.tennessean.com/story/news/2022/01/27/why-did-tennessee-school-board-remove-maus-art-spiegelman/9244295002/.

7 *Id.*

8 *Id.*

9 Brooke Migdon, *Mississippi library denied funding over LGBTQ+ books raises nearly $80K in fundraiser*, THE HILL (Feb. 4, 2022), https://thehill.com/changing-america/respect/equality/592851-mississippi-library-denied-funding-over-lgbtq-books-raises/.

10 *Id.*

11 Zack Beauchamp, *Why book banning is back*, VOX (Feb. 10, 2022, 6:00 AM), https://www.vox.com/policy-and-politics/22914767/book-banning-crt-school-boards-republicans.

12 *The American Library Association opposes widespread efforts to censor books in U.S. schools and libraries*, AM. LIBR. ASSOC. (Nov. 29, 2021), https://www.ala.org/news/press-releases/2021/11/american-library-association-opposes-widespread-efforts-censor-books-us.

13 *Id.*

Even the director of communications for the National Coalition Against Censorship remarked how the book-banning policies force educators to either comply or face consequences for protesting it while leaving students deprived of narratives that reflect their livelihood.[14] Finally, at a White House event honoring educators in 2023, President Joe Biden commented:

> I never thought I'd be a president who is fighting against elected officials trying to ban and banning books. Empty shelves don't help kids learn very much. And I've never met a parent who wants a politician dictating what their kid can learn, and what they can think, or who they can be.[15]

Overall, book-banning laws and censorship practices have not been well-received.

Part I of this Note explains the historical background and overview of book banning in the United States before explaining the book censorship laws of Texas, Florida, and Illinois. This exploration traces the evolution of book censorship from the early days before the Revolutionary War to modern times. Part II reviews *Board of Education, Island Trees Union Free School District v. Pico*,[16] a United States Supreme Court case involving the First Amendment implications of book removal in school libraries, and subsequent cases that applied the *Pico* standard. Part III analyzes the constitutionality, under *Pico*, of the book-banning laws in Texas and Florida[17] and Illinois's law that bans the practice of book-banning. Finally, Part IV argues that the *Pico* framework is so practically limited that it becomes unworkable when resolving book censorship cases in school libraries or analyzing the constitutionality of book-banning laws. This Note proposes supplementing the *Pico* framework with a modified version of the test introduced in *Miller v. California*.[18] This Note concludes by applying the modified *Miller* test to a hypothetical based on a real-world example of book censorship to demonstrate how the test, as a crucial supplement to the *Pico* standard, is necessary to balance the need to protect the students' First Amendment rights

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14 Tat Bellamy-Walker, *Book bans in schools are catching fire. Black authors say uproar isn't about students.*, NBC BLACK NEWS & CULTURE (Jan. 20, 2022, 8:54 PM), https://www.nbcnews.com/news/nbcblk/book-bans-schools-are-catching-fire-black-authors-say-uproar-isnt-stud-rcna10228.

15 Alex Woodward, *Biden lambasts book ban attempts in remarks to teachers: 'Empty shelves don't help kids learn very much'*, INDEP. (Apr. 24, 2023, 4:31 PM), https://www.the-independent.com/news/world/americas/us-politics/biden-book-bans-teachers-white-house-b2325985.html#comments-area.

16 Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

17 *See* Douglas Soule et al., *To be or not to be on the shelf? New Florida school book law could restrict even Shakespeare*, USA TODAY (July 15, 2023, 5:25 PM), https://www.usatoday.com/story/news/nation/2023/07/15/law-limits-florida-school-books/70414412007/.

18 Miller v. California, 413 U.S. 15 (1973).

with the need to preserve a school board's constitutional role as an educator whenever censorship of obscene books in school libraries is involved.

I. BACKGROUND

Although attempts to censor various books have significantly increased in the United States in recent years, such efforts have a long history in the country.[19] One of the oldest and most commonly cited reasons for such censorship is the presence of obscenity in books or other materials.[20] Below is a historical overview of book censorship in the United States, followed by an overview of book censorship in public school libraries and specific laws that facilitate or limit such censorship.

A. History Behind Book Censorship in the United States

Book censorship in the United States is not a recent phenomenon; it has shaped the nation's history even before its founding. Dating back to the seventeenth century, people participated in book burnings.[21] The first documented book burning incident in the Thirteen Colonies occurred in Boston in 1650 when the Puritan authorities confiscated a religious pamphlet published by William Pynchon.[22] The General Court of Massachusetts Bay denounced the pamphlet and ordered its burning at a Boston marketplace.[23] Only a few copies remain today, as officials acted in accordance with the court.[24]

About two centuries later, the U.S. Congress passed the Comstock Act on March 3, 1873.[25] The second section of the Act prohibited the mailing of, *inter alia*, "obscene, lewd, or lascivious book, pamphlet, picture, paper, print,

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19 *See generally* Jennifer E. Steele, *A History of Censorship in the United States*, 5 J. INTELL. FREEDOM & PRIV. 6 (2020) (explaining the historical background behind censorship in the United States).

20 *Id.* at 7.

21 Claire Mullaly, *Banned Books*, NEWSEUM INST. (Sept. 13, 2002), https://web.archive.org/web/20170611032731/www.newseuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/libraries-first-amendment-overview/banned-books/. His pamphlet was titled *The Meritorious Price of Our Redemption*, and it refuted Puritan theology by asserting that the price of atonement was obedience rather than punishment and suffering. *William Pynchon*, OUR PLURAL HISTORY, https://ourpluralhistory.stcc.edu/colonialperiod/william pynchon.html (last visited Oct. 26, 2024).

22 *Id.*

23 *William Pynchon*, *supra* note 21.

24 *Id.*

25 *Anthony Comstock's "Chastity" Laws*, PBS, https://www.pbs.org/wgbh/americanexperience/features/pill-anthony-comstocks-chastity-laws/ (last visited Oct. 26, 2024).

or other publication of indecent character."[26] Twenty-four states subsequently enacted similar laws.[27] Although the Act punished anyone who "knowingly deposit[ed], or cause[d] to be deposited, for mailing or delivery,"[28] these items, it did not define the terms "obscene, lewd, or lascivious."[29] The Act is pertinent to modern-day book censorship in the United States in that they both involve the question of what constitutes obscenity.[30]

Shortly afterward, several publications were challenged for various reasons. In the 1880s, Boston legally banned Walt Whitman's *Leaves of Grass*.[31] Since its first publication in 1855, the *Leaves of Grass* has sparked an uproar.[32] This classic work of poetry was regarded to be "shocking," "too sensual," and "trashy, profane and obscene."[33] With the exception of the Library Company of Philadelphia, libraries across the nation refused to purchase the poem, and just as authorities in Boston legally banned the poem, other cities informally banned it elsewhere.[34] Additionally, after its publication just a month earlier, the librarians in Concord, Massachusetts,

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[26] Act of March 3, 1873, ch. 258, § 2, 17 Stat. 598, 599 (1873). The Act was originally known as "An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use." *Id.* at 598.

[27] Daniel J. Kevles, *The Secret History of Birth Control*, N. Y. TIMES (July 22, 2001), https://www.nytimes.com/2001/07/22/books/the-secret-history-of-birth-control.html?sec=&page wanted=print.

[28] § 2, 17 Stat. at 599. Specifically, the Act provided that

> any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore-mentioned articles or things, or any notice, or paper containing any advertisement relating to the aforesaid articles or things, and any person who, in pursuance of any plan or scheme for disposing of any of the hereinbefore-mentioned articles or things, shall take, or cause to be taken, from the mail any such letter or package, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offense, be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge.

[29] *See id.*

[30] *See* Claudia Davidson, *Book Censorship in the United States: A Government Documents Story*, 51 DTTP 17, 17 (2023) ("Central to the issue of book censorship is the question of obscenity.").

[31] *Censored: Wielding the Red Pen*, UNIV. VA. LIBR., https://explore.lib.virginia.edu/exhibits/show/censored/walkthrough/bowdlerized (last visited Oct. 24, 2024).

[32] *Id.*

[33] Carolyn Vega, *Celebrating Banned Books Week with a look at Walt Whitman*, MORGAN LIBR. & MUSEUM (Oct. 10, 2010, 3:22 PM), https://www.themorgan.org/blog/celebrating-banned-books-week-look-walt-whitman. Even Yale University President Noah Porter considered the poem to be comparable to "walking naked through the streets," and one British reviewer recommended for it to be thrown "immediately behind the fire." *Id.*

[34] *Censored: Wielding the Red Pen*, *supra* note 31. Additionally, the Boston District Attorney threatened to criminally prosecute, upon request from the Society for the Suppression of Vice, Whitman's publisher, and this inevitably resulted in the withdrawal of the publication of a newer edition of the poem. *Id.* .

banned Mark Twain's *Adventures of Huckleberry Finn* in March 1885.[35] The Concord librarians regarded the book as "trash" and "suitable only for the slums."[36] Other challenges were based on the notion that the book was racist.[37]

Then, in 1915, the architect William Sanger was charged under New York law for circulating contraceptive information.[38] Specifically, authorities charged him for distributing a single copy of "Family Limitation," a pamphlet on birth control written by his wife Margaret Sanger.[39] Moreover, the City of Boston in the 1920s censored the magazine *The American Mercury* and novels such as *An American Tragedy*, *Elmer Gantry*, and *Lady Chatterley's Lover*.[40] At the time, the City of Boston was particularly vulnerable to censorship.[41] The increased censorship in Boston aroused local opposition.[42]

Several decades later, Georgia became the first state to create a censorship board.[43] The state created the Georgia Literature Commission in 1953, and the commission's role was to assist local prosecutors in enforcing the state's obscenity laws.[44] Although the commission was born into controversy, it withstood legal and legislative challenges for twenty years until the administration of the then-governor Jimmy Carter defanged it.[45] Yet, from the beginning, committee officials struggled to define what constituted

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35 *BANNED: Adventures of Huckleberry Finn*, PBS (Sept. 2017), https://www.pbs.org/wgbh/americanexperience/features/banned-adventures-huckleberry-finn/.

36 *Id.*

37 *Id.* (noting that the challenges to the book were based on the fact that the book repeated the word "nigger").

38 *See DISORDER IN COURT AS SANGER IS FINED*, N.Y. TIMES (Sept. 11, 1915), https://timesmachine.nytimes.com/timesmachine/1915/09/11/100176200.pdf.

39 *See id.*

40 *See* Paul S. Boyer, *Boston Book Censorship in the Twenties*, 15 AM. Q. 3, 3 (1963). The city also censored the published text of the play *Strange Interlude*. *Id.*

41 *Id.* at 14. In particular, the Watch and Ward Society was largely responsible for the city's vulnerability to censorship because it "provided the institutional apparatus through which censorship was exercised." *Id.* The Watch and Ward Society originated from a few Bostonians who sought "to make sure the eyes of their fellow citizens would never see morally questionable material." Max Grinnell, *Banned in Boston: A Brief Tour Through 20th Century Censorship*, BOS. MAG. (May 23, 2012, 1:02 PM), https://www.bostonmagazine.com/news/2012/05/23/banned-in-boston/.

42 *See* Boyer, *supra* note 40, at 3. For example, one editor of the *Harvard Crimson* expressed dismay toward Boston's constant repression of creative work. *Id.*

43 *See* Niraj Chokshi, *Georgia created the nation's first censorship board 61 years ago today*, WASH. POST (Feb. 19, 2024, 9:24 AM EST), https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/19/georgia-created-the-nations-first-censorship-board-61-years-ago-today/?noredirect=on. Dan Lacy of the American Book Publishers Council regarded this commission to be "an opportunity for real national leadership," indicating that the public morality had to be protected. Gregory C. Lisby, *"Trying to Define What May Be Indefinable": The Georgia Literature Commission, 1953-1973*, 84 GA. HIST. Q. 72, 73 (2000).

44 Chokshi, *supra* note 43.

45 *Id.*

obscenity in literature.[46] In response, the Georgia General Assembly included the definition of "obscene literature" in the bill that established the commission, defining it to be "literature offensive to the chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed."[47] Furthermore, to ensure uniformity in the judgment of questionable literature and eliminate any personal bias therein, the commission adopted the following criteria for determining obscenity:

> (1) What is the general and dominant theme?
> (2) What degree of sincerity of purpose is evident?
> (3) What is the literary or scientific worth?
> (4) What channels of distribution are employed?
> (5) What are contemporary attitudes of reasonable men toward such matters?
> (6) What types of readers may reasonably be expected to peruse the publication?
> (7) Is there evidence of pornographic intent?
> (8) What impression will be created in the mind of the reader, upon reading the work as a whole?[48]

It also limited itself to censoring only materials that were offensive "to persons of balanced mentality."[49] In 1957, the commission issued its first ruling against the book *God's Little Acre* by Erskine Caldwell.[50] The commission's success in its campaign to restrict obscene literature prompted the establishment of similar agencies in Massachusetts, Oklahoma, and Rhode Island.[51] Ultimately, it served as a model for organizations to establish similar commissions nationwide.[52]

Nevertheless, in the 1960s and 70s, the nation experienced a simultaneous drop in book bans and a rise in more explicit art.[53] The topic of sex became mainstream in novels written by John Updike and Erica Jong.[54] However, book challenges rose significantly after Ronald Reagan was

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46 *Id.*; *see also* Horace W. Fleming, *The Georgia Literature Commission*, 18 MERCER L. REV. 325, 325 (1967) ("The crux of the problem lies in the fact that it is extremely difficult—if not utterly impossible—to formulate a comprehensive definition of 'obscenity.'").

47 Fleming, *supra* note 46, at 329 (quoting H.B. 247, § 1).

48 *Id*. (citing Minutes of the April 10, 1953, meeting of the Georgia Literature Commission).

49 *Id*.

50 Chokshi, *supra* note 43. *God's Little Acre* was written decades earlier, and it was a popular X-rated comic novel about the decline of a poor rural family in Georgia. *Id.*

51 Fleming, *supra* note 46, at 336. Moreover, several cities such as Detroit, Michigan and St. Cloud, Minnesota established local literature commissions that were similar to the one Georgia had. *Id.*

52 *See id.*

53 Amy Brady, *The History (and Present) of Banning Books in America: On the Ongoing Fight Against the Censorship of Ideas*, LITERARY HUB (Sept. 22, 2016), https://lithub.com/the-history-and-present-of-banning-books-in-america/.

54 *Id*.

elected President of the United States.[55] According to Chris Finan, Director of American Booksellers for Free Expression, Reagan's election "encouraged challenges by people who were unhappy with books in schools and libraries that were increasingly realistic in their depiction of life."[56] In response to this renewed increase in censorship, the American Library Association (ALA) started "Banned Books Week."[57] Since then, Banned Books Week has been an annual event that emphasizes the "value of free and open access to information and brings together the entire book community—librarians, educators, authors, publishers, booksellers, and readers of all types—in shared support of the freedom to seek and to express ideas."[58]

Eventually, in 2021, the ALA tracked a substantial increase in attempts to ban or restrict library materials.[59] Parents initiated more than half of these book challenges, while students initiated only one percent.[60] Moreover, the ALA estimated that between eighty-two percent and ninety-seven percent of the book challenges were unreported or, in some cases, were covered up by schools when some information about such challenges became known.[61] In 2022, ALA reported a record number of demands to censor library books and materials, with most challengers focusing on books about race, sex, sexual orientation, and gender.[62] Conservative activists, organizations, and politicians had initiated many of these challenges, proposing book-banning laws and petitioning lawmakers to enact them.[63] As a result, many states

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55 *See id.*

56 *Id.* (quoting Chris Finan, Director of American Booksellers for Free Expression).

57 *Id.*

58 BANNED BOOKS WEEK, https://bannedbooksweek.org/about/ (last visited Nov. 11, 2024).

59 *See Book Ban Data*, BANNED & CHALLENGED BOOKS, AM. LIBR. ASSOC., https://www.ala.org/advocacy/bbooks/book-ban-data (last visited Nov. 11, 2024). Specifically, the number of attempts to ban or restrict such materials rose from 156 to 729 between the years 2020 and 2021. *Id.*

60 Bellamy-Walker, *supra* note 14.

61 Valerie Strauss, *This wave of book bans is different from earlier ones*, WASH. POST (Feb. 10, 2022, 8:30 AM EST), https://www.washingtonpost.com/education/2022/02/10/book-bans-maus-bluest-eye/.

62 *Book Ban Data*, *supra* note 59. Specifically, the Office for Intellectual Freedom documented 1,269 requests to censor library books and resources, which constituted "the highest number of attempted book bans since ALA began compiling data about censorship in libraries more than 20 years ago." *Id.* Even a record of 2,571 unique titles were targeted for censorship, which constituted a thirty-eight percent increase over the 1,858 unique titles targeted for censorship in 2021. *Id. See also* Beauchamp, *supra* note 11 ("Free speech experts say what's happening now represents an escalation from that period: that there is a new wave of censorship sweeping America's schools targeting literature relating to race, LGBTQ identity, and sex.").

63 *See, e.g.*, Mike Hixenbaugh, *Here are 50 books Texas parents want banned from school libraries*, NBC NEWS (Feb. 1, 2022, 3:33 AM), https://www.nbcnews.com/news/us-news/texas-library-books-banned-schools-rcna12986 ("Conservative parents have swarmed school board meetings in Texas and across the country in recent months to call for the removal of library books that deal with race, racism, sex, gender and sexuality."); Neal Broverman, *'Filth,' 'Obscene': GOP Attacks Books About LGBTQ+ Kids, Racism*, ADVOC. (Feb 1, 2022, 2:45 PM), https://www.advocate.com /exclusives/2022/2/01/filth-obscene-gop-attacks-books-about-lgbtq-kids-racism.

passed various laws that facilitated the challenging of books and other library materials[64] which have contributed to many book removals.[65]

It is apparent from this historical review that book censorship is not a relatively new phenomenon in the United States. Yet, the recent increase in such censorship has brought public school libraries to the epicenter of the conflict between proponents and opponents of book censorship.[66] Moreover, the recent rise in book-banning laws has paved the way for legal challenges to such laws, as seen in Texas and Florida.[67] In addition, the State of Illinois enacted, in 2023, a law that forbade the practice of banning books, making Illinois the first state to prohibit book bans.[68] Lawmakers enacted the law in response to increased book bans in public schools and libraries across multiple states.[69] The book-banning laws from Texas and Florida, along with Illinois's law prohibiting book censorship, are explained below after a brief overview of recent book challenges and censorships in public school libraries.

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64 *See, e.g.*, Kiara Alfonseca, *Authors of color speak out against efforts to ban books on race*, ABC News (Dec. 3, 2021, 5:13 AM), https://abcnews.go.com/US/authors-color-speak-efforts-ban-books-race/story?id=81491208 ("At least 29 states have introduced or implemented bills that aim to place limitations on lessons about race and inequality being taught in American schools, in the name of stopping 'critical race theory' in its tracks.").

65 *See* Kasey Meehan et al., *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (Apr. 20, 2023), https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/ (explaining how the 2022-23 school year witnessed the "effects of new state laws that censor ideas and materials in public schools, an extension of the book-banning movement initiated in 2021 by local citizens and advocacy groups").

66 *See* Thao Nguyen, *Book bans continue to rise in US public schools, libraries: 'Attacks on our freedom'*, USA TODAY (Sept. 21, 2023, 10:08 PM), https://www.usatoday.com/story/news/nation/2023/09/21/public-school-library-book-bans/70924262007/ (explaining that public schools and libraries have been targeted by continued efforts to censor books as book challenges across the country have reached a record high within the last academic year).

67 *See* Emily St. Martin, *From Iowa to Florida, national lawsuits against local book bans begin to gain traction*, L.A. TIMES (Jan. 11, 2024, 7:18 AM PST), https://www.latimes.com/entertainment-arts/books/story/2024-01-11/from-iowa-to-florida-lawsuits-against-book-bans-begin-to-gain-traction ("Lawsuits challenging book bans in Florida and Iowa are proving to play a key role in the growing fight for student's access to literature."). *See also* Joseph Ax, *Publishers, booksellers sue Texas over public school book ban*, REUTERS (July 27, 2023, 12:35 AM CDT), https://www.reuters.com/world/us/publishers-booksellers-sue-texas-over-public-school-book-ban-2023-07-26/ ("A coalition of booksellers, authors and publishers has sued Texas seeking to block a new state law that bans 'sexually explicit' books from public schools."); *see* Kiara Alfonseca, *Book ban lawsuit moves forward as Florida district removes over 1,000 titles*, ABC NEWS (Jan. 11, 2024, 1:39 PM), https://abcnews.go.com/US/book-ban-lawsuit-moves-forward-florida-district-removes/story?id=106292183 ("A federal judge has ruled that a lawsuit challenging book bans in Escambia County, Florida, can move forward on the same day the county released an updated list of more than 2,800 individual books that have been pulled from shelves for review.").

68 *See Law prohibiting book bans in Illinois now in effect*, CBS NEWS CHI. (Jan. 1, 2024, 9:02 AM CST), https://www.cbsnews.com/chicago/news/law-prohibiting-book-bans-in-illinois-now-in-effect/.

69 *Id.*

B. Book Challenges and Censorships in Public School Libraries

The recent uptick in book censorship has resulted in public school libraries becoming entangled in controversy.[70] Educators and librarians have garnered increased attention in the midst of book censorship disputes, and some have faced threats for defending access to certain reading materials.[71] For example, an elementary school in Denton, Texas, recently received requests to remove two books from its library.[72] The books were titled *Jacob's New Dress* and *Jacob's Room to Choose*, and they featured a fictional young boy who embarked on a courageous journey of wearing a dress to school.[73] Along with Citizens Defending Freedom, one individual filed a grievance and requested the books be removed from the elementary school library.[74] The Denton Independent District School, in a 6-1 vote, voted to keep the two books in the elementary school library.[75] Nevertheless, the board's allowing the books to remain reaffirmed the parents' rights to restrict access to any content deemed to be objectionable, and one attorney remarked how "[t]hey have entrusted you to know the difference between educational material and material that amplifies a sexual experience."[76] Those attempting to remove books in Denton focused on shielding elementary school students from age-inappropriate reading materials.[77]

Overall, the goal of protecting students from exposure to inappropriate reading materials has been a key factor behind many attempted and successful book removals in school libraries across the United States.[78] Many school libraries have labeled books targeted for censorship as "obscene."[79] Moreover, groups that have challenged the presence of certain books in school libraries have utilized several tactics, such as "demanding newfangled rating systems for libraries" and "using inflammatory language about 'grooming' and 'pornography.'"[80] Just recently, the Nebraska State Board of

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70 *See* Nguyen, *supra* note 66.

71 *Id.*

72 *See* Marvin Hurst, *Controversy over books in school libraries hits Denton ISD head-on*, CBS NEWS (Feb. 27, 2024, 11:48 PM CST), https://www.cbsnews.com/texas/news/controversy-over-books-in-school-libraries-hits-denton-isd-head-on/.

73 Hurst, *supra* note 72. The young boy also had to deal with bullying as a result of his clothing choices. *Id.*

74 *Id*.

75 *Id*.

76 Carlos Turcios, *ISD Keeps Two Transgender Books in Library*, THE DALLAS EXPRESS (Mar. 1, 2024) https://dallasexpress.com/education/isd-keeps-two-transgender-books-in-library/.

77 *See* Hurst, *supra* note 72.

78 *See* Jonathan Friedman & Nadine F. Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/.

79 *Id*.

80 *Id.* Other groups have even sought to intimidate, harass, or fire librarians and attempted to suspend or defund entire libraries. *Id.*

Education rejected one of its member's proposals to define and ban sexually explicit books and materials from school libraries.[81] In addition, the thirteen most challenged books in 2022 were all claimed to be sexually explicit.[82] In response to these challenges, critics have argued that many books being challenged and removed from school libraries for being obscene are not sexually explicit.[83] Yet, that has not stopped lawmakers in various states from passing (or attempting to pass) laws that aim to challenge books in school libraries on the grounds of obscenity.[84]

In the end, several states have passed laws that have directly impacted the selection and removal of books within school classrooms and libraries.[85] For example, the State of Missouri passed a law where a person can be charged and convicted for a class A misdemeanor if they are "affiliated with a public or private elementary or secondary school" and provide "explicit sexual material" to a student.[86] Other states like Texas and Florida have enacted similar laws that aim to protect elementary and secondary school students from exposure to inappropriate materials in school libraries, and these laws are explained below.[87]

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[81] Aaron Sanderford & Zach Wendling, *State Ed Board rejects measure defining and banning sexually explicit materials in school libraries*, NEB. EXAM'R (Mar. 8, 2024, 4:10 PM), https://nebraskaexaminer.com/2024/03/08/state-ed-board-rejects-measure-defining-and-banning-sexually-explicit-materials-in-school-libraries/.

[82] *See Top 13 Most Challenged Books of 2022*, BANNED & CHALLENGED BOOKS, https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10 (last visited Apr. 4, 2024). These books were: Maia Kobabe's *Gender Queer: A Memoir*, George M. Johnson's *All Boys Aren't Blue*; Toni Morrison's *The Bluest Eye*; Mike Curato's *Flamer*; John Green's *Looking for Alaska*; Stephen Chbosky's *The Perks of Being a Wallflower*; Jonathan Evison's *Lawn Boy*; Sherman Alexie's *The Absolutely True Diary of a Part-Time Indian*; Ashley Hope Perez's *Out of Darkness*; Sarah J. Maas's *A Court of Mist and Fury*; Ellen Hopkins's *Crank*; Jesse Andrews's *Me and Earl and the Dying Girl*; and Juno Dawson's *This Book Is Gay*. *Id.*

[83] *See, e.g.*, Friedman & Johnson, *supra* note 78 (noting how "the term 'obscenity' is being stretched in unrecognizable ways because the concept itself is widely accepted as grounds for limiting access to content").

[84] *See* Elliott Ramos, *More than half of states have banned books as anti-LGBTQ and anti-race education laws spread*, NBC NEWS (Apr. 26, 2022, 3:26 PM CDT), https://www.nbcnews.com/data-graphics/map-book-bans-rise-rcna25898 ("Legislation in Georgia awaiting Gov. Brian Kemp's signature will give principals the power to remove 'obscene' books from schools, while a law passed in Tennessee will require school libraries to determine which books are age appropriate.").

[85] *See* Friedman & Johnson, *supra* note 78 ("While the effort to constrain teachers has primarily progressed in state legislatures . . . and the effort to ban books has erupted mostly within local school districts, the two have increasingly merged, with some state legislators proposing or supporting bills that directly impact the selection and removal of books in school classrooms and libraries.").

[86] MO. ANN. STAT. § 573.550 (West 2024). However, "explicit sexual material," as defined in the statute, does not include "works of art, when taken as a whole, that have serious artistic significance, or works of anthropological significance, or materials used in science courses, including but not limited to materials used in biology, anatomy, physiology, and sexual education classes." *Id.*

[87] *See* Restricting Explicit and Adult-Designated Education Resources (READER) Act, 88th Leg., 2023 Tex. HB 900; *see also* 2023 Fla. HB 1069.

C. Texas's Book-Banning Law

In July 2023, a coalition of authors, booksellers, and publishers sued the State of Texas over its law banning "sexually explicit" books from public schools.[88] The law requires booksellers to rate books based on their references to sex and gives the Texas Education Agency the power to review those ratings.[89] Book vendors who refuse to rate their books will be barred from selling them to Texas schools.[90] Under the law, any book rated explicit cannot be sold to public schools and must be removed from libraries.[91]

This law is one of several that have been passed in states aiming to restrict books claimed to contain age-inappropriate content on topics such as sex, LGBTQ+ issues, and race.[92] Critics of these laws insist that the bans are too subjective and amount to politically driven censorship.[93] According to the plaintiffs in the lawsuit, the law forces them to express the government's views that they may disagree with, violating the First Amendment's free speech protections.[94] The plaintiffs also contended that the standards for what constitutes "explicit" material are unconstitutionally vague.[95] Accordingly, they argued that history and U.S. Supreme Court precedent do not permit the government to define what is allowed and not allowed in the marketplace of ideas.[96] Texas Governor Greg Abbott, on the other hand, defended the law on the grounds that it protects children and keeps "trash out of our schools."[97]

D. Florida's Book-Banning Law

Similarly, Florida's new education law seeks to restrict books that include "sexual conduct" from grades that are not age-suitable.[98] This law amends part of Florida Statute Section 1006.28 that pertains to K-12 instruction materials and seeks to forbid materials that may contain "sexual

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88 Ax, supra note 67.

89 *See* Restricting Explicit and Adult-Designated Education Resources (READER) Act, 88th Leg., 2023 Tex. HB 900; Ax, *supra* note 67.

90 *See id.*

91 *See id.*

92 Ax, *supra* note 67.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *See* Education, H.B. 1069, 125th Reg. Sess. (Fla. 2023) (prohibiting the use of pronouns that do not correspond to someone's assigned sex at birth, forbidding classroom instruction on gender identity or sexual orientation from prekindergarten through eighth grade, and requiring all reproductive health materials to be approved by the Department of Education); *see also* Brandon Girod, *Florida set to release list of banned books months after DeSantis called the bans a hoax*, PENSACOLA NEWS J. (July 24, 2023, 11:49 AM), https://www.pnj.com/story/news/education/2023/07/20/florida-hb-1069-book-ban-list-pronouns-sexual-conduct-explainer/70439817007/.

conduct."[99] The amendment requires Florida school districts to adopt a policy that handles all objections by a parent or resident of a county and provides for a resolution.[100] Under this law, schools do not have to list banned books without a formal challenge for removal.[101]

Critics of this law argue that the list could result in schools banning more books without public input.[102] They contend that the list could expand the practice of reviewing and removing books without formal challenge, even though lawmakers designed it to guide school districts in deciding which books to purchase and which materials to review.[103] Although the law aims to prohibit school materials that contain "sexual conduct," critics are concerned that its vague language could reach valuable pieces of literature such as works by William Shakespeare.[104]

E. Illinois's Anti-Censorship Law

The uptick in book censorship and removals from schools and libraries across the United States motivated Illinois Governor J.B. Pritzker to sign a bill that he says will make Illinois the first state to outlaw book bans.[105] This law amended the Illinois Library System Act by adding several provisions, one forbidding the removal of books due to partisan or doctrinal disapproval of their content.[106] This provision parallels one of the ALA's Library Bill of Rights, which provides that "[m]aterials should not be proscribed or removed because of partisan or doctrinal disapproval."[107] Therefore, Illinois public libraries that ban or restrict access to books or other materials due to partisan or doctrinal disapproval will be ineligible for state funding.[108] The law became effective on January 1, 2024.[109]

However, Illinois's law forbidding book censorship drew criticism before it became effective. Extremists responded to the law with a wave of

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99 *See* H.B. 1069, 125th Reg. Sess. (Fla. 2023).

100 *See id.*; *see also* Girod, *supra* note 98.

101 *See id.*

102 Girod, *supra* note 98.

103 *Id*.

104 *Id*.

105 Claire Savage, *'First of its kind' Illinois law will penalize libraries that ban books*, ASSOCIATED PRESS (June 12, 2023, 4:12 PM), https://apnews.com/article/book-ban-library-lgbtq-illinois-f5516941473e474712eaaafda084de76.

106 *See* Act of June 12, 2023, Pub. Act 103-0100 (codified as amended at 75 ILL. COMP. STAT. §§ 10/1, 10/3, 10/8.7 (2024)) (amending Illinois Library System Act).

107 *Library Bill of Rights*, AM. LIBR. ASS'N, https://www.ala.org/advocacy/intfreedom/librarybill (last visited Nov. 9, 2024).

108 Savage, *supra* note 105.

109 *Law prohibiting book bans in Illinois now in effect*, *supra* note 68.

terrorist threats.[110] Specifically, the bomb threats they instigated forced nearly half a dozen libraries in Chicago and its suburbs to evacuate several months after Governor Pritzker signed the bill into law.[111] In response, Illinois Secretary of State Alexi Giannoulias testified at a U.S. Senate Judiciary hearing, defending Illinois's law and expressing his concern that political book-banning attempts are forcing libraries to close, stifling creativity, and pressuring librarians to quit their jobs.[112] During that hearing, however, several Republican senators challenged his stance, questioning the propriety of allowing certain books, such as Harper Lee's *To Kill a Mockingbird*, to remain in libraries.[113] Overall, these events indicate that the law will likely face further criticisms from proponents of book censorship.

II. SUPREME COURT'S PRECEDENT PERTAINING TO BOOK REMOVAL

To date, the United States Supreme Court has heard few cases that relate to the subject of book censorship. Regarding book censorship in school libraries, the Court has addressed the issue only once in *Board of Education, Island Trees Union Free School District v. Pico*.[114] Although other Supreme Court cases pertain to the subject of book censorship, those cases do not involve the censorship of books in school libraries.[115] The factual background

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110 Noah Berlatsky, *Illinois has banned book bans, but activists say there's more to be done to fight censorship*, PRISM REP. (Oct. 10, 2023), https://prismreports.org/2023/10/10/illinois-banned-book-bans/.

111 *As local libraries receive bomb threats, Giannoulias defends Illinois' new law banning book bans*, NBC NEWS CHI. (Sept. 14, 2023, 7:20 AM), https://www.nbcchicago.com/news/local/chicago-suburbs-libraries-bomb-threat-illinois-bill-ban-on-book-bans/3227845/.

112 *Id.*

113 *Id.*; Julia Zorthian, *People Are Not Happy That This School District Banned Harper Lee's* To Kill a Mockingbird, TIME (Oct 16, 2017, 11:57 AM), https://time.com/4983786/biloxi-mississippi-school-ban-to-kill-a-mockingbird/ (reporting that, according to the ALA's list of censorship attempts, *To Kill a Mockingbird* has been one of the more consistently challenged or banned books, and a number of those challenges were based on the author's use of racial slur about Black people.).

114 Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

115 Quantity of Books v. Kansas, 378 U.S. 205, 212 (1964) (explaining that under the Fourteenth Amendment, a state is not free to adopt any procedures it desires for dealing with obscene literature without regard to the potential consequences for constitutionally protected speech); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440–45 (1957) (explaining that the State of New York could "constitutionally convict [the defendants] of keeping for sale booklets incontestably found to be obscene." After analyzing various case laws pertaining to the censorship of obscene materials, it then concluded that New York's injunction against the distribution of material designated to be "obscene" did not violate the Due Process Clause of the Fourteenth Amendment.); Smith v. California, 361 U.S. 147, 148–55 (1959) (citing Roth v. United States, 354 U.S. 476 (1957)) (holding that the City of Los Angeles's ordinance, which criminalized possession of obscene books in any place of business where books are sold or kept for sale, to be unconstitutional because the ordinance did not require proof of knowledge of the book's content, thereby violating the freedom of the press guaranteed under the First Amendment. Nevertheless, the Court noted that "obscene

and procedural history behind *Pico*, along with a detailed explanation of the plurality, concurring, and dissenting opinions, are provided below.

A. Board of Education, Island Trees Union Free School District v. Pico

In *Pico*, the question presented before the Court was whether the First Amendment imposes limits upon the ability of a local school board to exercise its discretion to remove library books from high school and junior high school libraries.[116] The petitioners were the Board of Education of the Island Trees Union Free School District, a New York state agency responsible for the administration and operation of public schools within the Island Trees School District.[117] The respondents were students at the high school and junior high school.[118]

1. Factual Background and Procedural History

At a conference, the petitioners obtained a list of books described as "objectionable" and "improper fare for school students."[119] They later discovered that the high school library contained nine of the listed books, while another listed book was in the junior high school library.[120] During a meeting with the superintendent and the principals of both schools, the Board unofficially ordered that the schools remove the listed books from the library shelves and deliver them to the Board's offices for review.[121] The Board then issued a press release justifying its removal of such books.[122] It described the removed books as "'anti-American, anti-Christian, anti-[Semitic], and just plain filthy," and concluded that "[it] is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."[123]

Later, the Board appointed a "Book Review Committee" to read the listed books and recommend whether the Board should retain them.[124] The committee considered the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."[125] Although the

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speech and writings are not protected by the constitutional guarantees of freedom of speech and the press.").

116 *Pico*, 457 U.S. at 855–56.

117 *Id.* at 856.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.* at 857.

122 *Id.*

123 *Id.* (alteration in original) (quoting Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

124 *Id.*

125 *Id.*

committee recommended retaining five of the listed books, the Board rejected their recommendation without providing a reason.[126] Instead, the Board decided to return one book to the high school library without restriction, make another subject to parental approval, and remove the remaining nine books from elementary and secondary libraries.[127]

Respondents filed a lawsuit under 42 U.S.C. § 1983[128] in the United States District Court for the Eastern District of New York in response to the Board's decision.[129] They alleged that the petitioners required the removal of the books from school libraries.[130] They forbade their usage in the school curriculum because they offended their social, political, and moral tastes and not because the books lacked educational value.[131] Respondents asserted that the Board's actions denied them their First Amendment rights.[132] They asked the court to declare that the Board's actions were unconstitutional, and they requested preliminary and permanent injunctive relief ordering the Board to return the nine books to the school libraries and abstain from interfering with using those books in the schools' curriculums.[133]

The district court granted summary judgment in favor of the petitioners.[134] It found the parties to agree

> that the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students.[135]

The court rejected the respondents' argument that the Board infringed on their First Amendment rights.[136] To justify its rejection of respondents'

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126 *Id.* at 858.

127 *Id.*

128 Section 1983 provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.A. § 1983 (West 1996).

129 *Pico*, 457 U.S. at 858.

130 *Id.*

131 *Id.* at 858–59.

132 *Id.* at 859.

133 *Id.*

134 *Id.* (citing Pico v. Bd. of Educ., 474 F. Supp. 387 (1979)).

135 *Id.* (quoting *Pico*, 474 F. Supp. at 392).

136 *Id.*

First Amendment argument, the court noted that history, statutes, and precedent had vested local school boards with broad discretion to formulate educational policy.[137] The court then noted that it cannot resolve conflicts that arise in "the daily operations of school systems" and do not directly and sharply implicate basic constitutional values.[138] It found that the conditions for such intervention did not exist in the instant case.[139]

On appeal, a three-judge panel of the United States Court of Appeals for the Second Circuit reversed the district court's judgment and remanded the action for a trial on the merits of plaintiffs' allegations.[140] However, each judge on the panel filed a separate opinion.[141] Judge Sifton delivered the court's judgment and considered the case to involve "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with their contents."[142] He concluded that the defendants were obligated to provide a reasonable basis for interfering with the plaintiffs' First Amendment rights and explained that the plaintiffs "should have, in all events, been offered an opportunity to persuade a finder of fact that the ostensible justifications for defendants' actions . . . were simply pretexts for the suppression of free speech."[143] Judge Newman, concurring in the result, viewed the case as involving a contested factual issue: whether the defendant justified removing the books based on a legitimate desire to remove books with sexual explicitness or whether the decision stemmed from an impermissible desire to suppress certain ideas.[144] Once the case reached the Supreme Court, nearly every justice wrote individually, resulting in six opinions.[145] Each of the opinions are explained below.

2. Pico Plurality

Justice Brennan, in his plurality opinion, analyzed prior First Amendment precedents before concluding that the defendants may not exercise, "in a narrowly partisan or political manner," their discretion to determine the content of their school libraries.[146] He then provided the following hypothetical to elaborate on this conclusion:

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137 *Id*.
138 *Id*. (internal quotations omitted).
139 *Id*. at 860.
140 *Id*.
141 *Id*.
142 *Id*.
143 Pico v. Bd. of Educ., 638 F.2d 404, 417 (2d Cir. 1980).
144 *Id*. at 436–37.
145 *See generally Pico*, 457 U.S. at 853 (plurality opinion).
146 *Id*. at 870.

> If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to the books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration.[147]

Underlying this rationale is the principle that "[o]ur Constitution does not permit the official suppression of *ideas*."[148] Accordingly, Justice Brennan explained that whether the defendants' removal of books from school libraries resulted in denying the plaintiff's First Amendment rights depended on the defendants' motivations.[149] In other words, the defendants would have violated the Constitution by exercising their discretion to remove books from the school libraries if their underlying intent was to deny students access to ideas they disagreed with.[150]

At the same time, Justice Brennan emphasized that the Court's decision does not affect a local school board's discretion "to choose books to *add* to the libraries of their schools."[151] Instead, the Court's decision focused on suppressing ideas by removing books.[152] Citing *West Virginia Board of Education v. Barnette*,[153] the Court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[154]

Regarding whether the evidentiary materials before the district court raised a genuine issue of material fact as to whether the defendants exceeded constitutional limitations in exercising their discretion to remove books from school libraries, the plurality answered in the affirmative.[155] Specifically, when the plurality construed the allegations, affidavit statements, and other evidentiary materials in a manner favorable to the plaintiffs, it found the defendants were not entitled to judgment as a matter of law.[156] It considered the evidence presented thus far to leave room for the possibility that the defendants' decision to remove books "rested decisively upon disagreement with constitutionally protected ideas in those books, or upon a desire on

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147 *Id.* at 870–71.
148 *Id.* at 871 (emphasis in original).
149 *Id.*
150 *See id.*
151 *Id.*
152 *Id.* at 871–72.
153 *Id.* at 871 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
154 *Id.* at 872 (quoting *Barnette*, 319 U.S. at 642).
155 *See id.* ("We conclude that the materials do raise such a question, which forecloses summary judgment in favor of petitioners.").
156 *Id.* at 875.

[defendants'] part to impose upon the students . . . a political orthodoxy to which [defendants] and their constituents adhered."[157] Accordingly, the Court affirmed the Second Circuit's reversal of the district court's judgment.[158]

3. Justice Blackmun's Concurring Opinion

Justice Blackmun wrote separately to elaborate on his perspective of the First Amendment rights involved in the case, which differed from the plurality opinion's perspective.[159] He considered the pertinent principle to be narrower and more basic than the "'right to receive information' identified by the plurality."[160] More importantly, he viewed the underlying issue to concern "how to make the delicate accommodation between the limited constitutional restriction . . . imposed by the First Amendment, and the necessarily broad state authority to regulate education."[161]

Overall, he found the case to present a "particularly complex problem" involving "two competing principles of constitutional stature."[162] One principle at stake was "the importance of the public schools 'in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.'"[163] On the other hand, a principle existed that "school boards must operate within the confines of the First Amendment," which the plurality opinion elaborated upon.[164] Regarding this principle, Justice Blackmun considered the First Amendment cases dealing with academic settings to provide a general proposition that "'students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.'"[165]

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157 *Id.*

158 *Id.*

159 *Id.* at 876 (Blackmun, J., concurring in part and concurring in the judgment).

160 *Id.* at 878.

161 *Id.* at 879

162 *Id.* at 876

163 *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)). This principle, according to Justice Blackmun, was based on the Constitution presupposing "the existence of an informed citizenry prepared to participate in governmental affairs." *Id.* Therefore, he insisted that it seemed "entirely appropriate that the State use 'public schools [to] . . . [inculcate] fundamental values necessary to the maintenance of a democratic political system.'" *Id.* (alterations in original) (quoting *Ambach*, 441 U.S. at 77).

164 *Pico*, 457 U.S. at 876 (Blackmun, J., concurring in part and concurring in the judgment). Justice Blackmun noted how the Court "has acknowledged the force of the principle that schools, like other enterprises operated by the State, may not be run in such a manner as to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

165 *Id.* at 876–77 (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969)). In *Tinker*, the Court rejected the principle where "a State might so conduct its schools as to 'foster a homogeneous people.'" *Tinker*, 393 U.S. at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

A proper balance of these competing principles, according to Justice Blackmun, would be attained if the Court were to hold "that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved."[166] Justice Blackmun then explained that under the context of the First Amendment, a school board:

> [M]ust "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," and that the board had something in mind in addition to the suppression of partisan or political views it did not share.[167]

Based on this rationale, he insisted that school boards should have the discretion to select one book over another without outside interference when the first book is more pertinent to the classroom curriculum or "when one of a host of other politically neutral reasons is present."[168] Finally, he clarified that school boards can refuse to make books available to students because of the offensive language they contain or because they are intellectually or psychologically inappropriate for the age group or "are 'manifestly inimical to the public welfare.'"[169]

In the end, Justice Blackmun acknowledged that the case presented a tension "between the properly inculcative purposes of public education and any limitation on the school board's absolute discretion to choose academic materials."[170] He contended that such tension reflects the difficulty of the underlying problem, where a solution should not be reached by selecting one competing principle over another.[171] He reiterated that a positive educational action whereby school officials "instill certain values 'by persuasion and example,' or by choice of emphasis," is antithetical to "an intentional attempt to shield students from certain ideas that officials find politically distasteful."[172]

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166 *Pico*, 457 U.S. at 879–80 (Blackmun, J., concurring in part and concurring in the judgment). He further explained that allowing school boards to suppress novel ideas or concepts "hardly teaches children to respect the diversity of ideas that is fundamental to the American system." *Id.* at 880.

167 *Id.* at 880 (quoting *Tinker*, 393 U.S. at 509).

168 *Id.* He further emphasized that school boards may select one book over another based on their belief "that one subject is more important, or is more deserving of emphasis." *Id.*

169 *Id.* (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925)).

170 *Id.* at 881.

171 *Id.* at 881–82.

172 *Id.* at 882 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943)).

4. Justice White's Concurring Opinion

Justice White found the plurality's discussion about the First Amendment limits the school board's discretion to remove books from its library unnecessary.[173] He emphasized that the case may end with the district court's findings of fact and conclusions of law.[174] Advocating for the full development of the record, he insisted that the Court "should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are evident here."[175] Therefore, he concurred in the judgment that the case should be remanded back to the district court.[176]

5. Chief Justice Burger's Dissenting Opinion

Chief Justice Burger criticized the plurality for attempting to address an issue left traditionally for the states to resolve.[177] The plurality, according to Justice Burger, went beyond any prior First Amendment holdings to establish its view that a "school board's decision concerning what books are to be in the school library is subject to federal-court review."[178] He explained that it "suggest[ed] a new 'right'" which enabled the Supreme Court "to impose its own views about what books must be made available to students."[179] He ultimately considered the case to present two issues: (1) "whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils;" (2) "whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library."[180]

Justice Burger insisted that the students in this case were permitted to read the challenged books in public libraries and bookstores and discuss those books within and outside of the classroom.[181] Since he did not find that the school board had direct external control over the students' abilities to express themselves freely, he considered the plurality to create a "new First Amendment 'entitlement' to have access to particular books in a school

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173 *See Pico*, 457 U.S. at 883 (White, J., concurring in the judgment) (finding it unnecessary "to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library," which the plurality seemed compelled to do).

174 *Id.*

175 *Id.* at 884.

176 *Id.*

177 *See Pico*, 457 U.S. at 885 (Burger, J., dissenting).

178 *Id.*

179 *Id.* at 885–86.

180 *Id.* at 885.

181 *See id.* at 886.

library."[182] Although the plurality considered such right essential for a student's exercise of their own press, political freedom, and speech rights, no such right had been recognized, according to Justice Burger.[183] Although he acknowledged under the Court's precedent in *Tinker v. Des Moines School District*[184] that the government may not impose unreasonable restraints upon a speaker's desire to express particular ideas, he could not understand how the prior First Amendment cases that the plurality relied on could support a broad proposition that a school board must affirmatively assist a speaker or writer in their communication with the recipient.[185]

Regarding the plurality's conclusion that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom,"[186] Justice Burger contended that such right does not include a "concomitant right to have those ideas affirmatively provided at a particular place by the government."[187] Regarding the plurality's rationale that the need for an informed citizenry creates an individual's right to receive ideas, he questioned why the government is "not also required to provide ready access to a variety of information[.]"[188] This rhetorical question seemed to suggest that because the government is not required to provide the public with all the information it possesses, an individual's right to receive information and ideas does not include a right to access those same information and ideas from the government at a particular location.[189] In the end, he insisted that neither the First Amendment nor any of the Court's prior holding recognized "a 'right' to have the government provide continuing access to certain books."[190]

Furthermore, Justice Burger insisted that giving school boards broad discretion in selecting materials for their curriculums and libraries contributes to the democratic process.[191] School authorities, he explained, must be given such broad discretion if they "may legitimately be used as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'"[192] In other words, school boards cannot

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182 *Id.*

183 *See id.* at 887.

184 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

185 *Pico*, 457 U.S. at 887 (Burger, J., dissenting) (citing *Tinker*, 393 U.S. at 511).

186 *Pico*, 457 U.S. at 867.

187 *Id.* at 888 (Burger, J., dissenting). Justice Burger also criticized the plurality's reliance on James Madison's emphasis on the importance of having an informed citizenry. *Id.* He explained that Madison's view "does not establish a *right* to have particular books retained on the school library shelves if the school board decides that they are inappropriate or irrelevant to the school's mission." *Id.*

188 *Id.* at 888.

189 *See id.*

190 *Id.* at 889.

191 *See id.*

192 *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

inculcate the necessary fundamental values unless they are permitted to make content-based decisions regarding the propriety of retaining certain materials in their curriculums and inside their libraries.[193] Because voters may remove elected school board officials if they fail to align with the views of their community, Justice Burger considered the plurality to interfere with such democratic process by prohibiting the same officials from removing certain books from their school libraries.[194]

In response to the plurality's conclusion that school boards cannot elect to retain or dispense certain books if their discretion is exercised in a "narrowly partisan or political manner,"[195] Justice Burger explained that "there is no guidance whatsoever as to what constitutes 'political' factors" and that "virtually all educational decisions necessarily involve 'political' determinations."[196] Implicit in this explanation is his view that it is difficult, if not impossible, to determine when school boards exercise their discretion to remove books in a narrowly partisan or political manner.[197] Moreover, he criticized the plurality's permitting school boards to remove books if such books are "pervasively vulgar," asking why vulgarity must be "pervasive" in order to be offensive.[198] He then insisted that "the validity of many book removals will ultimately turn on a judge's evaluation of the books" under the plurality's rule and that locally elected school boards, rather than judges, are the appropriate body to determine such validity.[199] In other words, because "people elect school boards, who in turn select administrators, who select the teachers," the school boards are best suited to determine the substance of the educational policy.[200] Finally, he indicated that students and parents disapproving of book removals from school libraries have alternative options for acquiring the same books that school officials removed, such as "bookstores, public libraries, or other alternative sources unconnected with the unique environment of the local public schools."[201]

Justice Burger also criticized the plurality's limiting the applicability of their rule only to the removal of books once acquired.[202] He asked, "if the First Amendment commands that certain books cannot be *removed*, does it not equally require that the same books be *acquired*?"[203] Although the

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193 *See id.*

194 *See id.* ("It is a startling erosion of the very idea of democratic government to have this Court arrogate to itself the power the plurality asserts today.").

195 *Pico*, 457 U.S. at 870.

196 *Id.* at 890 (Burger, J., dissenting).

197 *Id.*

198 *Id.*

199 *Id.* at 890–91.

200 *Id.* at 891.

201 *Id.* at 891–92.

202 *See id.* at 892.

203 *Id.* (emphases in original).

plurality considered the "official suppression of ideas" to constitute the evil that officials should avoid,[204] Justice Burger could not understand how a decision to remove certain books is an "official suppression" that is not equivalent to a decision not to acquire the same books desired by someone.[205] He then concluded his dissent by categorically rejecting the notion where "judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom."[206]

6. Justice Powell's Dissenting Opinion

Justice Powell criticized the plurality for rejecting one of the basic principles of public school education, which is that "[s]tates and locally elected school boards should have the responsibility for determining the educational policy of the public schools."[207] He emphasized how school boards are uniquely democratic and local institutions.[208] Historically, local boards have governed elementary and secondary education, with direct accountability to the parents and citizens within the school district.[209] Under this rationale, he insisted that "no single agency of government at any level is closer to the people whom it serves than the typical school board."[210] He thus viewed the plurality's decision with dismay, pointing out that judges are hardly as competent as school boards in making educational policy decisions.[211]

Justice Powell also disagreed with the plurality's recognition of a new constitutional right "to receive ideas"[212] in a school.[213] He agreed with Chief Justice Burger and Justice Rehnquist that this new right has no support under the Court's First Amendment precedent, and he even considered the right to be framed in terms that yield meaningless generalization.[214] Regarding the plurality's standard that a school board may not exercise discretion to remove books "in a narrowly partisan or political manner,"[215] he viewed that standard to be standardless to where it "affords no more than subjective guidance to school boards, their counsel, and to courts."[216] Regarding the plurality's

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204 *Pico*, 457 U.S. at 871.
205 *Id.* at 892 (Burger, J., dissenting).
206 *Id.* at 893.
207 *Pico*, 457 U.S. at 893 (Powell, J., dissenting).
208 *See id.* at 894.
209 *See id.*
210 *Id.*
211 *See id.*
212 *Pico*, 457 U.S. at 867.
213 *See id.* at 895 (Powell, J., dissenting).
214 *See id.*
215 *Pico*, 457 U.S. at 870.
216 *Id.* at 895 (Powell, J., dissenting).

suggestion that school library books receive special constitutional protection, given that a school library is a place for students to exercise unlimited choice, he considered that suggestion to be unsupported in law or fact.[217] Specifically, he explained that the school library in this case "is analogous to an assigned reading list within which students may exercise a degree of choice" because the school board does not view a library as the place for students to select from an unlimited range of books, where some of them may be inappropriate for their age.[218]

Ultimately, Justice Powell acknowledges that the destruction of written materials has constituted the symbol of despotism and intolerance in different contexts and times.[219] Yet, he did not consider a concerned local school board's decision to remove nine vulgar or racist books from its library to symbolize despotism and intolerance.[220] Instead, he regarded the plurality's decision to symbolize "a debilitating encroachment upon the institutions of a free people."[221]

7. Justice Rehnquist's Dissenting Opinion

In addition to concluding that the district court was correct in granting summary judgment for the defendant school board, Justice Rehnquist expressed his disagreement with the plurality opinion.[222] He first criticized the opinion for "launch[ing] into a confusing, discursive exegesis on these constitutional issues as applied to junior high school and high school libraries" before discussing the state of the record before the Court.[223] Relying on the principle that the record facts should always establish limits to the Court's constitutional analysis, he considered the plurality to have violated "our 'long . . . considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question

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217 *Id.*
218 *Id.*
219 *Id.* at 897.
220 *Id.*
221 *Id.*
222 *Pico*, 457 U.S. at 904 (Rehnquist, J., dissenting).
223 *Id.* at 905.

in advance of the necessity for its decision.'"[224] He ultimately found the plurality opinion did not tailor the case's underlying facts.[225]

Justice Rehnquist then indicated that the First Amendment "may speak with a different voice" if the government acts in other capacities than as a sovereign.[226] To elaborate on this principle, he explained that "expressive conduct which may not be prohibited by the State as sovereign may be proscribed by the State as property owner."[227] Accordingly, he explained the distinction between the government's role as an educator and its role as a sovereign:

> With these differentiated roles of government in mind, it is helpful to assess the role of government as educator, as compared with the role of government as sovereign. When it acts as an educator . . . the government is engaged in inculcating social values and knowledge in relatively impressionable young people. Obviously, there are innumerable decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed . . . . In the very course of administering the many-faceted operations of a school district, the mere decision to purchase some books will necessarily preclude the possibility of purchasing others . . . . In each of these instances, however, the book or the exposure to the subject matter may be acquired elsewhere. The managers of the school district are not proscribing it as to the citizenry in general, but are simply determining that it will not be included in the curriculum or school library.[228]

He thus concluded that the government's actions as an educator do not raise the same First Amendment concerns as the government's actions as a sovereign.[229]

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[224] *Id.* (quoting Alabama State Fed'n of Lab. v. McAdory, 325 U.S. 450, 461 (1945)). Justice Rehnquist also criticized the plurality opinion for ignoring the effect of Rule 9(g) of the district court's local rules, through which the parties provided their version of the disputed facts. *Id.* at 905–06. He explained that because the district court entered summary judgment against the respondents, the respondents were entitled to have their version of the facts, as provided in their Rule 9(g) statement, accepted for purposes of the Court's review. *Id.* at 906. Accordingly, he emphasized that the respondents were not entitled to any more favorable version of the facts than those contained in their Rule 9(g) statement. *Id.* He thus found the plurality's examination of the record of affidavits, school bulletins, and the like for bits and pieces of dispute was entirely beside the point at the summary judgment stage. *Id.*

[225] *Id.* at 907. For instance, he found the plurality's reasoning in its hypothetical that a democratic school board would violate the students' constitutional rights if it removed books written by or in favor of Republicans to constitute an extreme example that seldom occurs in real life and that did not align with the facts of the instant case. *See id.* at 907–08.

[226] *Id.* at 908.

[227] *Id.* He relied on the Court's decision in Adderley v. Florida, 385 U.S. 39, 47 (1966), which provided that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* (quoting *Adderley*, 385 U.S. at 47).

[228] *Id.* at 909–10.

[229] *Id.* at 910.

Regarding the limited applicability of the plurality's rule, Justice Rehnquist asserted that such limitation reflected the plurality's discomfort with the new doctrine it "fashion[ed] out of whole cloth."[230] After observing how the "right to receive ideas"[231] established by the plurality only existed in the school library if the school had previously acquired those ideas in book form, he viewed the right as not solely a curious entitlement but also "wholly unsupported by our past decisions and inconsistent with the necessarily selective process of elementary and secondary education."[232]

In response to the plurality's reliance on *Tinker v. Des Moines School District*[233] and *West Virginia Board of Education v. Barnette*[234] for its holding, Justice Rehnquist considered these cases unsupportive of the plurality's justification for establishing a student's right to receive ideas.[235] Although the plurality correctly noted under *Tinker* "that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" Justice Rehnquist explained that *Tinker* was concerned with the freedom of speech and expression, not the right to access particular ideas.[236] Because the school board's removal of books from their libraries did not infringe upon the students' rights to speak or otherwise express themselves, Justice Rehnquist found *Tinker* and *Barnette* unsupportive of a student's right to receive information.[237] Accordingly, he concluded that the Court has never recognized, under the First Amendment, a junior high or high school student's right to access certain information in school.[238]

Justice Rehnquist then disagreed with the plurality's application of the right-to-receive doctrine to school settings.[239] Although he agreed with the plurality's conclusion that a right to access ideas is "an inherent corollary of the rights of free speech and press"[240] which "follows ineluctably from the *sender*'s First Amendment right to send them,"[241] he asserted that the plurality did not succeed in "recogniz[ing] the predicate right to speak from which the students' right to receive must follow."[242] Regarding this predicate

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230 *Id.*

231 *Pico*, 457 U.S. at 867.

232 *Id.* at 910 (Rehnquist, J., dissenting).

233 *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

234 *See generally* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

235 *See Pico*, 457 U.S. at 910–11 (Rehnquist, J., dissenting).

236 *Id.* (quoting *Tinker*, 393 U.S. at 506).

237 *See id.* at 910–12. As Justice Rehnquist explained, the Court in *Tinker* held that "students may not be prevented from symbolically expressing their political views by the wearing of black arm bands." *Id.* at 911. He then explained that in *Barnette*, the Court held that students "may not be forced to participate in the symbolic expression of saluting the flag." *Id.*

238 *Id.* at 911.

239 *See id.* at 912.

240 *Pico*, 457 U.S. at 867.

241 *Id.* (emphasis in original).

242 *Id.* at 912 (Rehnquist, J., dissenting).

right to speak, he insisted that it would be ridiculous to assert that all authors are constitutionally entitled to have their published materials placed in junior high school and high school libraries.[243] Therefore, he considered the plurality to have fallen short of explaining "the constitutional or logical underpinnings of a right to hear ideas in a place where no speaker has the right to express them."[244]

Justice Rehnquist also rejected the plurality's reasoning from a policy-based standpoint, relying on the public school's constitutional role of "inculcating fundamental values necessary to the maintenance of a democratic political system."[245] He contended that the students' rights to access any information other than those regarded by their educators to be necessary to provide "is contrary to the very nature of an inculcative education."[246] He elaborated on this point by asserting the following:

> Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students' individual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the student is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.[247]

Although the plurality rejected this notion of inculcative education, asserting that it "overlooks the unique role of the school library,"[248] Justice Rehnquist insisted that libraries of elementary and secondary schools are inculcative to where they supplement the public school's role of providing an inculcative education.[249] Moreover, he stated that elementary and

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243 *Id*.

244 *Id*. Justice Rehnquist further disagreed with the plurality's reliance on the reciprocity between the right to receive information and the ability to meaningfully exercise one's rights of speech, press, and political freedom. *See id.* at 912–13. He explained that the denial of access to ideas obstructs one's own acquisition of knowledge and ability to exercise speech rights only when such denial is relatively complete. *Id.* at 913. Therefore, he contended that the state does not unconstitutionally restrict the benefits to be gained from exposure to ideas when the same ideas denied "are readily available from the same source in other accessible locations." *Id.*

245 *Id.* at 913–14.

246 *Id.* at 914.

247 *Id*.

248 *Pico*, 457 U.S. at 869.

249 *See id.* at 915 (Rehnquist, J., dissenting).

secondary school libraries, unlike university or public libraries, are not designed for freewheeling inquiry and are instead tailored to teaching basic ideas and skills.[250]

Finally, Justice Rehnquist disagreed with the plurality's motive requirement.[251] He noted that, according to the plurality, school boards violate the First Amendment only when they remove books from their libraries with the intent of denying students access to ideas they disagree with.[252] After reasoning that both bad and good motives can result in the removal of books, he questioned why the motive behind the book removal makes any difference if, as the plurality contends, a constitutional right to receive information truly exists.[253] He also could not determine what exact motives the plurality would consider constitutionally impermissible for the purposes of book removal.[254] Although the plurality concluded that a removal decision that was based solely on the "educational suitability" of a book or its perceived vulgarity would be "perfectly permissible,"[255] Justice Rehnquist asserted that "such determinations are based as much on the content of the book as determinations that the book espouses pernicious political views."[256] Based on the Court's precedent that the First Amendment proscribes content-based restrictions on the marketplace of ideas, Justice Rehnquist could not understand how the plurality could reconcile its motive with the Court's understanding of the First Amendment.[257]

8. Justice O'Connor's Dissenting Opinion

In her short dissent, Justice O'Connor agreed with Justice Rehnquist that the plurality overlooked the significance of the government's special role in this case as an educator.[258] After noting how school boards can establish the curriculum, select teachers, and determine what books to purchase and include inside the school library, she insisted that the school board "surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it."[259] She also agreed with Chief Justice Burger that the school board, not the courts, must determine educational suitability.[260]

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250 *Id.*
251 *See id.* at 917.
252 *Id.*
253 *Id.*
254 *Id.*
255 *Pico*, 457 U.S. at 871 (quoting Tr. of Oral Arg. 53).
256 *Id.* at 917 (Rehnquist, J., dissenting).
257 *See id.*
258 *Pico*, 457 U.S. at 921 (O'Connor, J., dissenting).
259 *Id.*
260 *Id.*

B. Subsequent Applications of *Pico*

After the Supreme Court decided *Pico*, several district courts and courts of appeals have attempted to apply the *Pico* standard in their respective cases.[261] However, some of these cases reflect the difficulty of determining a school board's motive for removing books from its library, which, according to the plurality in *Pico*, is needed to determine whether such removal of books is unconstitutional.[262] Some important cases that have applied the *Pico* test include *Counts v. Cedarville School District*,[263] *Campbell v. St. Tammany Parish School Board*,[264] and *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*.[265] These cases are explained below.

1. Counts v. Cedarville School District

In *Counts v. Cedarville School District*,[266] plaintiffs Billy Ray Counts and Mary Nell Counts were the parents of Dakota Counts, whose access as a student to certain books in the school library was restricted.[267] They brought suit under 42 U.S.C. § 1983, alleging that the defendant Cedarville School District abridged their First and Fourteenth Amendment rights by restricting access to certain books in its school library.[268] The plaintiffs moved for summary judgment, praying for an injunction that required the school district to return the books to the library's general circulation.[269] The school district argued, among other things, that it did not violate any constitutional rights.[270]

After concluding that the plaintiffs had standing to bring their constitutional violation claim on behalf of Dakota Counts, the court reviewed the undisputed facts to decide whether it should grant the plaintiffs' summary judgment.[271] According to the undisputed facts, the matter originated from a student's mother and a pastor who was part of the Cedarville School Board becoming concerned about the presence of Harry Potter books in the general

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261 *See* Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 188 (5th Cir. 1995); *see also* ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1199 (11th Cir. 2009).

262 *See, e.g.*, *Campbell*, 64 F.3d at 190 (explaining, after carefully considering the record, that the court cannot determine, as a matter of law, whether the school board's removal of the book at issue was substantially based on an unconstitutional motivation).

263 Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 999 (W.D. Ark. 2003).

264 *Campbell*, 64 F.3d at 188–99.

265 Miami-Dade Cnty. Sch. Bd., 557 F.3d at 1199–1200.

266 *Counts*, 295 F. Supp. 2d at 997–98.

267 *Id.* (Billy Ray Counts also brought the lawsuit individually in his official capacity as a library committee member).

268 *Id.*

269 *Id.* at 998.

270 *Id.*

271 *Id.* at 1000–02.

circulation in the Cedarville school libraries.[272] The mother received a Reconsideration Request Form to fill out and requested the school remove *Harry Potter and the Sorcerer's Stone*[273] from access by all students.[274] After receiving the form, and pursuant to its stated policies, the school board's Library Committee reviewed the challenged book and voted unanimously to keep it in circulation without any restrictions.[275] Yet, after receiving the recommendation of the Library Committee, the school board voted 3-2 to restrict access not only to the challenged book but also to three other books in the Harry Potter series.[276] It is undisputed that the board members who voted in favor of restricted access "did not do so because of concerns about profanity, sexuality, obscenity, or perversion in the books, nor out of any concern that reading the books had actually led to disruption in the schools."[277]

Based on the undisputed facts, the court arrived at the following issue: whether a school board's decision "to restrict access to library books only to those with parental permission" infringes upon the First Amendment rights of a student who receives such permission.[278] The court first found that the stigmatizing effect of being required to have parental permission to check out a restricted book constituted a restriction on access.[279] Therefore, it explained that such restriction amounted to impermissible infringements of the student's First Amendment rights unless the defendant could show that the restriction justified itself.[280]

In their deposition, the members of the school board who voted to restrict access to the book testified that their vote was justified on "(a) their concern that the books might promote disobedience and disrespect for authority, and (b) the fact that the books deal with 'witchcraft' and 'the occult.'"[281] Regarding the first asserted justification, the court noted that the Supreme Court had observed "a very limited restriction where 'necessary to avoid material and substantial interference with schoolwork or discipline.'"[282] At the same time, the court observed how the Supreme Court in *Tinker* "was careful to emphasize how limited this restriction is, and to

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272 *Id.* at 1000–01.

273 J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1998).

274 *Counts*, 295 F. Supp. 2d at 1001.

275 *Id.*

276 *Id.*

277 *Id.*

278 *Id.* at 1001–02.

279 *Id.* at 1002 (this finding was based on the rationale that the student's access was restricted because she could not "simply go in the library, take the books off the shelf and thumb through them—perhaps to refresh her mind about a favorite passage—without going through the permission and check-out process.").

280 *Id.*

281 *Id.*

282 *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

stress the importance of freedom of speech in the education of America's youth."[283] Accordingly, it recognized that educational boards "have important, delicate, and highly discretionary functions" that they may not exercise outside "the limits of the Bill of Rights."[284] Because the school board members were unaware of any actual disobedience or disrespect resulting from the students reading the Harry Potter books, the court found their concerns speculative.[285] Since the Supreme Court in *Tinker* explained that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"[286] the district court found that the board members' speculative apprehension of student misconduct was not enough to justify restricting the students' First Amendment rights in their school library.[287]

The court also did not find the board members' second asserted justification any more persuasive than the first.[288] It noted that the board members appeared to strongly disapprove of "witchcraft" and "the occult."[289] It also noted that they wanted to restrict access to the books because of their belief that the books would promote a particular religion.[290] It then concluded that their personal distaste toward "witchcraft" did not authorize the board to prevent the students at Cedarville from reading the Harry Potter books.[291] Quoting the plurality's holding in *Pico*, the court acknowledged that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books."[292] Therefore, it did not find any merit in the board members' second asserted justification.[293]

2. Campbell v. St. Tammany Parish School Board

In *Campbell v. St. Tammany Parish School Board*,[294] St. Tammany Parish School Board removed James Haskins's *Voodoo & Hoodoo*[295] from

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283 *Id.*

284 *Id.* at 1003 (quoting *Tinker*, 393 U.S. at 507).

285 *Id.* at 1004.

286 *Tinker*, 393 U.S. at 508.

287 *Counts*, 295 F. Supp. 2d at 1004.

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.*

292 *Id.* (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982)).

293 *Id.* at 1005.

294 Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 185 (5th Cir. 1995).

295 JAMES HASKINS, VOODOO & HOODOO (1978). As the Fifth Circuit explained, *Voodoo & Hoodoo* "traces the development of African tribal religion, its transfer to and evolution in the New World after slaves were brought from West Africa, and its survival in the United States through the current practice of two variations of the original African religion, voodoo and hoodoo." *Campbell*, 64 F.3d at 185. The first part of the book describes the evolution and practice of voodoo and hoodoo within African American communities across the United States, including in New Orleans, Louisiana. *Id.*

the public school libraries of the parish.[296] This case began when a parent of a seventh grade student enrolled at St. Tammany Parish Junior High School discovered a copy of the book in the student's possession.[297] The parent objected to the book's content and filed a formal complaint with the school principal, pursuant to the school board's written policies and procedures for challenging library materials.[298] She asserted that the book "heightened children's infatuation with the supernatural and incited students to try the explicit 'spells,' which she believed to be potentially dangerous."[299]

After reviewing the parent's complaint, the school-level committee unanimously recommended keeping the book in the school's library on a specially designated "reserve" shelf, accessible only to eighth grade students who had obtained written permission from their parents.[300] The committee considered the book to be educationally suitable because it fulfilled the purpose of offering supplemental information on and explanation of a topic that was part of the approved eighth grade social studies curriculum.[301] Although the parent was dissatisfied with the committee's recommendation and consequently filed an appeal, the Appeals Committee agreed with the school-level committee's recommendation to retain the book with limited access.[302]

Unsatisfied with the Appeals Committee's decision, the parent appealed the decision to the St. Tammany Parish School Board.[303] After reviewing various objections to the book's presence in the school libraries, the school board voted 12-2 in favor of removing the book from all parish school libraries.[304] However, the school board did not provide any opinion on the merits of the recommendations from the school-level committee and the Appeals Committee.[305] Moreover, the board did not state any reason for its removal action.[306] In response, the plaintiffs, parents of children enrolled at the parish schools, filed a lawsuit against the school board, alleging that

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The second part of the book presents "spells," "tricks," "hexes," "recipes," (spells) that outline, in how-to form, methods for bringing about certain events. *Id.* The spells are organized into four categories: "To Do Ill," "To Do Good," "In Matters of Law," and "In Matters of Love." *Id.*

296 *Campbell*, 64 F.3d at 185.

297 *Id.*

298 *Id.* at 185–86.

299 *Id.* at 186.

300 *Id.*

301 *Id.*

302 *Id.* Only one member of the Appeals Committee dissented. *Id.* The lone dissenter believed that the book promoted extremely unhealthy practices that were not conducive to proper moral values and that the presence of the book in school libraries is not necessary when there appears to be a resurgent interest in the occult and the supernatural. *Id.*

303 *Id.*

304 *Id.* at 187.

305 *Id.*

306 *Id.*

the board's removal of *Voodoo & Hoodoo* from their school libraries violated the children's First Amendment rights.[307]

Although the district court denied the plaintiffs' first motion for summary judgment, it granted their second motion.[308] This ruling stemmed from the district court's finding that the school board's decision to remove the book was unconstitutional because the board "intended to deny students access to the objectionable ideas contained in the book, particularly the descriptions of voodoo practices and religious beliefs."[309] The court also ordered the school board to replace all copies of *Voodoo & Hoodoo* that had been removed from the school libraries.[310] The school board appealed the court's ruling.[311]

After carefully reviewing the record, the Fifth Circuit could not determine, as a matter of law, that the school board's decision to remove *Voodoo & Hoodoo* "was substantially based on an unconstitutional motivation."[312] Specifically, the eight depositions it reviewed revealed various reasons behind the book's removal.[313] Accordingly, it concluded that granting summary judgment to the parents was improper because the evidence did not "foreclose the possibility that the School Board exercised its discretion within the confines of the First Amendment."[314] Moreover, the Fifth Circuit did not have a sound basis on which to evaluate the board's decision for compliance with First Amendment requirements because it was unable to identify, as a matter of law, "the single decisive motivation behind the School Board's removal decision."[315] After acknowledging the "significant implications involved in balancing First Amendment concerns with the discretion of public school officials to set and administer educational policy," it reserved for the trier of fact the weighty task of determining, upon full development of the factual record, the school board's motivation behind removing *Voodoo & Hoodoo* from the parish school libraries.[316] For these reasons, the Fifth Circuit reversed the district court's grant of summary judgment and remanded the case for further proceedings.[317]

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307 *Id.*

308 *Id.*

309 *Id.* (quoting Delcarpio v. St. Tammany Par. Sch. Bd., 865 F. Supp. 350, 363 (E.D. La. 1994)).

310 *Id.*

311 *Id.*

312 *Id.* at 190.

313 *Id.*

314 *Id.* Nevertheless, the Fifth Circuit, in dicta, explained that the school board's decision to remove *Voodoo & Hoodoo* must withstand greater scrutiny in the context of the First Amendment because the decision to remove that book concerned a non-curricular matter. *Id.* at 189.

315 *Id.* at 191.

316 *Id.*

317 *Id.*

3. American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School

In *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*,[318] a parent was outraged when he learned that a book on the library shelves where his young daughter went to school contained a factually inaccurate portrayal of life in Cuba.[319] As requested, the school board removed the book after a lengthy review process.[320] In response to the removal, another parent and two organizations promptly sued the school board, asserting that the board's action violated the First Amendment and the Due Process Clause of the Fourteenth Amendment.[321] The district court agreed and enjoined the board from removing the challenged book.[322]

Regarding their First Amendment claim, the plaintiffs contended, and the district court agreed, that the plurality's test in *Pico* should be applied.[323] However, the Eleventh Circuit found that *Pico* established no controlling standard and lacked precedential value, noting that the decision consisted of five different opinions, none of which garnered five votes from the nine justices.[324] Nevertheless, it applied *Pico*'s standard that "school officials may not remove books from library shelves 'simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[325] With this standard, however, it reasoned that the plaintiffs would still lose on their First Amendment claim if the school board removed the challenged book not for one of the prohibited reasons listed in *Pico* but rather "for legitimate pedagogical reasons such as concerns about the accuracy of the book," which the board insisted was their purpose.[326]

In the end, the Eleventh Circuit supplemented the *Pico* standard with its own factual inaccuracy test.[327] It explained that even under the *Pico* standard, "the First Amendment does not forbid a school board from removing a book because it contains factual inaccuracies, whether they be of

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318 ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009).

319 *Id.* at 1182. He asserted that "[a]s a former political prisoner from Cuba, I find the material to be untruthful. It portrays a life in Cuba that does not exist." *Id.* (alteration in original) (quoting ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 439 F. Supp. 2d 1242, 1247 (S.D. Fla. 2006)). The challenged book was titled *Vamos a Cuba*. *Id.* at 1183. The Eleventh Circuit noted that this book is part of a series of books that provide basic information about what life as a child is like in various countries. *Id.*

320 *Id.* at 1182.

321 *See id.* at 1183.

322 *Miami-Dade Cnty. Sch. Bd.*, 439 F. Supp. 2d at 1294.

323 *Miami-Dade Cnty. Sch. Bd.*, 557 F.3d at 1199.

324 *Id.* at 1200.

325 *Id.* at 1202 (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982)).

326 *Id.*

327 *See id.*

commission or omission."[328] It accordingly concluded that "[t]here is no constitutional right to have books containing misstatements of objective facts shelved in a school library."[329] Although the plaintiffs disputed the school board's actual motive for ordering the challenged book removed from the library shelves, the Eleventh Circuit found, based on the record, that the board did not simply dislike the ideas contained in the challenged book and that the experts of both parties agreed the book contained factual inaccuracies.[330] Accordingly, it held that the board did not act based on an unconstitutional motive under the *Pico* standard.[331]

In his dissent, Judge Wilson conceded that the Supreme Court's decision in *Pico* is of limited precedential value.[332] He also agreed that the First Amendment does not prohibit a school board from removing any book that contains gross factual inaccuracies from its shelves, and he acknowledged that school boards may remove a book because it is educationally unsuitable.[333] However, he disagreed with the majority's conclusion that the school board's actual motive for removing the challenged book was because of factual inaccuracies.[334] Instead, he agreed with the district court that the board's assertion that the challenged book is grossly inaccurate was simply a pretense for viewpoint suppression rather than their bona fide reason for removing the book.[335] He viewed the record to support the district court's finding "that the book was not removed for a legitimate pedagogical reason."[336]

III. ANALYSIS OF THE CONSTITUTIONALITY OF TEXAS, FLORIDA, AND ILLINOIS'S LAWS UNDER *PICO*

Under *Pico*,[337] Texas, Florida, and Illinois's laws pertaining to book censorship may be unconstitutional. Although Illinois's law banning the practice of book-banning or censorship for partisan or doctrinal reasons may protect book vendors and libraries, it may also be too restrictive under *Pico* in that it does not leave enough room for libraries and school boards to

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328 *Id.*

329 *Id.*

330 *Id.* at 1207.

331 *Id.*

332 *Id.* at 1233 (Wilson, J., dissenting).

333 *Id.*

334 *Id.*

335 *Id.* at 1234.

336 *Id.*

337 *See* Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982) ("[W]e hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'") (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

remove books or other materials that are ill-suited for educational use.[338] On the other hand, Texas and Florida's book-banning laws are likely to be too restrictive under *Pico* in that they allow for the exercise of discretion to remove books in a narrowly partisan or political manner, which the plurality in *Pico* forbids.[339] The application of the *Pico* framework to evaluate the constitutionality of these laws is explained below.

A. The Constitutionality of Texas's Law Under *Pico*

Under Texas law, any book that is rated sexually explicit cannot be sold to public schools and must be removed from school libraries.[340] However, the process of determining whether a particular book qualifies as sexually explicit is not quite straightforward. Instead, the law requires library material vendors to "perform a contextual analysis of the material to determine whether the material describes, depicts, or portrays sexual conduct in a way that is patently offensive."[341] In conducting such contextual analysis, vendors must utilize the following three principal factors:

> (1) the explicitness or graphic nature of a description or depiction of sexual conduct contained in the material;
> (2) whether the material consists predominantly of or contains multiple repetitions of depictions of sexual or excretory organs or activities; and
> (3) whether a reasonable person would find that the material intentionally panders to, titillates, or shocks the reader.[342]

Finally, the law requires vendors to conclude, after weighing and balancing each factor, "whether the library material is patently offensive, recognizing that because each instance of a description, depiction, or portrayal of sexual conduct contained in a material may present a unique mix of factors."[343]

However, the law provides little guidance for determining when a particular material is patently offensive.[344] Instead, vendors "must consider the full context in which the description, depiction, or portrayal of sexual conduct appears, to the extent possible, recognizing that contextual determinations are necessarily highly fact-specific and require the

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338 *See id.*

339 *See id.* at 870 ("Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner.").

340 *See* Restricting Explicit and Adult-Designated Education Resources (READER) Act, H.B. 900, 88th Leg., (Tex. 2023).

341 *Id.*

342 *Id.*

343 *Id.*

344 *Id.*

consideration of contextual characteristics that may exacerbate or mitigate the offensiveness of the material."[345] Based on the language of this specific provision, it may be possible for certain materials that are not overtly offensive to still be rated as patently offensive if the reviewing vendor deems their contextual characteristics to be offensive in some shape or form.

In any event, the fact-specific inquiry required under the law appears to leave substantial room for subjectivity behind a vendor's rating.[346] This, in turn, may enable vendors to be influenced by their political views while issuing what they consider to be an appropriate rating for the material in front of them.[347] Even though the law formalistically targets sexually explicit and inappropriate library materials, if it practically allows the political views of these vendors to influence their decision as to whether a particular material is patently offensive, then it may be unconstitutional under the *Pico* plurality.[348] This is because the *Pico* plurality held that school boards may not exercise, "in a narrowly partisan or political manner," their discretion to determine the content of their school libraries.[349] While the library material vendors are not directly in charge of removing any materials rated as sexually explicit from school libraries, the ratings they issue will be one factor that school districts will be required to consider when deciding whether to remove such materials from their libraries.[350] A vendor's politically influenced rating of a particular library book could lead to a politically motivated decision to remove it if the school district bases its removal decision directly on the vendor's rating.[351] Because the *Pico* plurality held that a school board's decision to remove certain books from school libraries cannot be based on its

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345 *Id.*

346 *See id.*

347 Kara Yorio, *Censorship Attempts Will Have a Long-Lasting Impact on School Library Collections, SLJ Survey Shows*, SCH. LIBR. J. (Sept. 08, 2022), https://www.slj.com/story/censorship-attempts-will-have-a-long-lasting-impact-on-school-library-collections-slj-survey-shows#:~:text=OK-,Censorship%20Attempts%20Will%20Have%20a%20Long%2Dlasting%20Impact%20on,Library%20Collections%2C%20SLJ%20Survey%20Shows&text=In%20the%20past%20year%2C%20school,books%20and%20collection%20development%20decisions (Indicating that concerns over political and community reactions influence book selection and censorship decisions).

348 *See* Restricting Explicit and Adult-Designated Education Resources (READER) Act, H.B. 900, 88th Leg., (Tex. 2023). *See* Bd. of Educ. v. Pico, 457 U.S. 853 (1982). *See generally* Yorio, *supra* note 347.

349 *Pico*, 457 U.S. at 870.

350 *See* Restricting Explicit and Adult-Designated Education Resources (READER) Act, H.B. 900, 88th Leg., (Tex. 2023).

351 Chloe Latham Sikes, *What Texas' New Book Banning Law Means for School Libraries and Student Books*, INTERCULTURAL DEV. RSCH. ASS'N (Sept. 26, 2023), https://www.idra.org/resource-center/what-texas-new-book-banning-law-means-for-school-libraries-and-student-books/ (highlighting concerns over politically influenced vendor ratings potentially leading to school districts removing books due to mandated compliance with policies like Texas House Bill 900, which introduces book rating and removal standards for schools).

political views,[352] Texas's law concerning sexually explicit library materials may be unconstitutional under this relevant Supreme Court precedent.[353]

At the same time, the plurality's holding in *Pico* limits the removal of books from school libraries.[354] After all, Justice Brennan, who wrote for the plurality, emphasized that the Court's decision does not affect a local school board's discretion "to choose books to *add* to the libraries of their schools."[355] Under this view of the *Pico* plurality, Texas's law may be constitutional in that it allows school districts to exercise such discretion.[356] However, the fact that the law prohibits school districts from purchasing any library material from a vendor who fails to correct their issued rating under the agency's instructions may result in the law being unconstitutional on the basis that it obstructs a school board's discretion to select materials for its library.[357]

B. The Constitutionality of Florida's Law Under *Pico*

Under Florida's education law, the school board in each district must adopt a policy that allows parents or county residents to object to the use of a specific material within the school or classroom library.[358] Specifically, the policy must clearly describe a process for handling and resolving all objections.[359] Thus, the school board must provide objection forms for parents and other county residents to fill out if they object to using certain materials.[360] Through this process, parents or residents can present evidence to the district school board that, among other things, the material "[i]s pornographic or prohibited under Section 847.012" of the Florida statute, "[d]epicts or describes sexual conduct as defined in Section 847.001(19),"[361] "[i]s not suited to student needs and their ability to comprehend the material presented," or "[i]s inappropriate for the grade level and age group for which the material is used."[362]

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352 *Pico*, 457 U.S. at 870.

353 *Compare* Restricting Explicit and Adult-Designated Education Resources (READER) Act, H.B. 900, 88th Leg., (Tex. 2023), *with Pico*, 457 U.S. at 870.

354 *See Pico*, 457 U.S. at 870.

355 *Id.* at 871.

356 *See* Restricting Explicit and Adult-Designated Education Resources (READER) Act, H.B. 900, 88th Leg., (Tex. 2023).

357 *See Pico*, 457 U.S. at 871.

358 Education, H.B. 1069, 2023 Leg., 125th Sess. (Fla. 2023).

359 *Id.*

360 *See id.* The objection form is prescribed under the State Board of Education rule, and it "must be easy to read and understand and be easily accessible on the homepage of the school district's website." *Id.* Moreover, the form "must also identify the school district point of contact and contact information for the submission of an objection." *Id.*

361 This specific reason cannot serve as a basis for objecting to the questioned material if "such material is for a course required by Section 1003.46, Section 1003.42(2)(n)1.g., or Section 1003.42(2)(n)3, or identified by State Board of Education rule." *Id.*

362 *Id.*

According to Section 847.012 of the Florida statute, an adult is forbidden from distributing to a minor on school property the following materials:

> Any book, pamphlet, magazine, printed matter however reproduced, or sound recording that contains any matter defined in [Section] 847.001, explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and that is harmful to minors.[363]

Section 847.001(19) defines "sexual conduct" to mean the following:

> [A]ctual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."[364]

Finally, the objection form that is available for parents and other county residents to complete requires them to identify the basis for their objection,[365] explain what brought the questioned material to their attention, indicate whether they examined the material in its entirety, list the sections of the material they examined if they did not examine the material in its entirety, and identify the portions of the material objected to and explain why.[366]

Although Florida's law requires parents to fill out the objection form as part of initiating their request to have the school board remove questionable materials from school libraries, the objection form does not directly require them to explain their purpose or motive in filling out the form.[367] The form only requires them to explain why they identified the portions of the material objected to, and such explanation does not appear to require an explanation of their motive.[368] Moreover, the law does not require the school board to explain its motive and only requires it to remove the questioned material if it finds, after considering the submitted objection form, any of the grounds for

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363 FLA. STAT. ANN. § 847.012(3)(b) (West 2013).

364 § 847.001(19).

365 *See* Education, H.B. 1069, 2023 Leg., 125th Sess. §2(b) (Fla. 2023). Specifically, they are to identify one or more of the following bases: The material is pornographic or prohibited under FLA. STAT. § 847.012. The material depicts or describes sexual conduct as defined in FLA. STAT. § 847.001(19); The material is not suited to student needs and their ability to comprehend the material; The material is inappropriate for the grade level and age group for which it is used.

366 *See* FLA. ADMIN. CODE ANN. r. 6A-7.0714 (2024).

367 *See id.*

368 *See id.*

removing such material provided in the statute.[369] Accordingly, it would be difficult, if not impossible, to evaluate whether the school district removed the questioned materials from the library in a narrowly partisan or political manner, which the *Pico* decision forbids.[370] Therefore, evaluating whether Florida's law is constitutional under the *Pico* framework may be challenging.[371]

C. The Constitutionality of Illinois's Law Under *Pico*

Illinois's recent law amended the Illinois Library System Act by adding several provisions, one forbidding the removal of books due to partisan or doctrinal disapproval of their content.[372] However, it is unclear whether the constitutionality of this law can be analyzed under the *Pico* plurality. After all, while *Pico* focused on the constitutionality of removing books from school libraries,[373] Illinois's law applies to libraries and library systems generally in the State of Illinois.[374] Furthermore, the law does not define what constitutes partisan or doctrinal disapproval.[375]

Accordingly, Illinois's law may be too restrictive under *Pico* because, under *Pico*, the test for the unconstitutionality of a school board's action is whether the board exercised its discretion to remove books from the school library "in a *narrowly* partisan or political manner."[376] Even if a school board exercises its discretion in a way that is constitutional under *Pico*, it would still violate Illinois law if the exercise of discretion is politically motivated in any form.[377] Additionally, Illinois's law prohibits the same exercise of discretion if it is conducted in a manner of doctrinal disapproval, which *Pico* does not forbid.[378] For these reasons, Illinois's law appears to be too

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369 *See* Education, H.B. 1069, 2023 Leg., 125th Sess. §2(b) (Fla. 2023). These grounds for removal are (1) that the material "[i]s pornographic or prohibited under Section 847.012," (2) that the material "[d]epicts or describes sexual conduct as defined in Section 847.001(19), unless such material is for a course required by Section 1003.46, Section 1003.42(2)(n)1.g., or Section 1003.42(2)(n)3, or identified by State Board of Education rule," (3) that the material "[i]s not suited to student needs and their ability to comprehend the material presented," or (4) that the material "[i]s inappropriate for the grade level and age group for which the material is used."

370 *See* Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982) (providing that a school board's discretion to determine the content of their school libraries "may not be exercised in a narrowly partisan or political manner").

371 *Compare* Restricting Explicit and Adult-Designated Education Resources (READER) Act, H.B. 900, 88th Leg., (Tex. 2023), *with Pico*, 457 U.S. at 870.

372 *See* 2023 Ill. Legis. Serv. P.A. 103-100 (West).

373 *See Pico*, 457 U.S. at 870.

374 *See* 2023 Ill. Legis. Serv. P.A. 103-100 (West).

375 *See id.*

376 *Pico*, 457 U.S. at 870 (emphasis added).

377 *See* 2023 Ill. Legis. Serv. P.A. 103-100 (West).

378 *See Pico*, 457 U.S. at 870.

restrictive under the *Pico* standard,[379] and the next issue to address is whether that is enough to make the law unconstitutional under *Pico*.

Pico recognized that "local school boards have a substantial legitimate role to play in the determination of school library content."[380] Therefore, the fact that Illinois's law can forbid school boards from exercising their discretion to remove certain materials from school even when they do not exercise such discretion in a narrowly partisan or political manner would likely make the law unconstitutional under the *Pico* framework.[381] *Pico* recognizes the delicate balance between enabling local school boards to discharge their educational duties and protecting the student's constitutional rights.[382] On the one hand, it recognizes that "[b]oards of [e]ducation . . . have, of course, important delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."[383] On the other hand, it emphasized that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[384] Illinois's law appears to protect a student's constitutional right at the expense of, rather than in accordance with, a school board's constitutional role of discharging its educational duties.[385] Therefore, the law may be unconstitutional under the *Pico* framework.[386]

IV. SOLUTION TO *PICO*'S LIMITED FRAMEWORK

Overall, Texas, Florida, and Illinois's laws concerning book censorship reflect the conflict between the plurality and dissenting opinions in *Pico*. Texas and Florida's laws reflect Justice Rehnquist's emphasis that "[e]ducation consists of the selective presentation and explanation of ideas."[387] Alternatively, Illinois's law appears to expand the plurality's holding that even though school boards "rightly possess significant discretion to determine the content of their school libraries . . . that discretion may not be exercised in a narrowly partisan or political manner."[388]

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379 This would be true if the phrase "doctrinal disapproval" is to be construed broadly. *See* 2023 Ill. Legis. Serv. P.A. 103-100 (West). However, the law does not define "doctrinal disapproval," thereby making it difficult to assess its constitutionality under *Pico*. *Compare* 2023 Ill. Legis. Serv. P.A. 103-100 (West) *with Pico*, 457 U.S. at 870.

380 *Pico*, 457 U.S. at 869.

381 *See id.* at 869–70; *see also* 2023 Ill. Legis. Serv. P.A. 103-100 (West).

382 *See Pico*, 457 U.S. at 864–65.

383 *Id.* at 864 (alteration in original) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

384 *Id.* at 865 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

385 *See* Act of June 12, 2023, Pub. Act 103-0100.

386 *See Pico*, 457 U.S. at 864–65.

387 *Id.* at 914 (Rehnquist, J., dissenting).

388 *Pico*, 457 U.S. at 870.

Yet, in the end, *Pico* does not constitute a binding precedent because none of the opinions in that case received the support of a majority of the justices.[389] Even though it may properly serve as guidance for determining whether a school board's decision to remove certain books from the school library was unconstitutional,[390] it does not constitute a practical guide for such inquiry. What is particularly problematic with *Pico* is that its test for determining the unconstitutionality of a school board's decision to remove certain books from a school library requires evaluating the school board's motive behind such a decision.[391] As Justice Rehnquist explained in his dissent, it is difficult to delineate what motives the plurality would consider constitutionally impermissible with respect to removing books from school libraries.[392] This creates significant challenges when evaluating the constitutionality of laws pertaining to book censorship, as reflected in the constitutional analysis of such laws in Texas, Florida, and Illinois.[393]

Furthermore, what constitutes a "narrowly partisan or political manner" within *Pico*'s test for constitutionality is not clearly defined in the opinion.[394] Chief Justice Burger indicated in his dissent that "there is no guidance whatsoever as to what constitutes 'political' factors."[395] Even with the plurality permitting the school board to remove books from the school library if such books are "pervasively vulgar,"[396] Justice Burger questioned why vulgarity must be "pervasive" to be offensive.[397] He also contended that the "educational suitability" factor, which the plurality concedes is a permissible factor for a school board to consider when exercising its discretion to remove books, "is a standardless phrase."[398] These criticisms toward the *Pico* framework suggest that *Pico* is difficult to apply, and even the courts of appeals that have applied *Pico* to resolve book censorship cases have implicitly revealed this difficulty.[399]

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389 *See, e.g.*, Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995) (explaining that the *Pico* plurality opinion does not constitute binding precedent).

390 *Id.*

391 *See Pico*, 457 U.S. at 871 ("Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions.").

392 *See id.* at 917 (Rehnquist, J., dissenting).

393 *See supra* Part III.

394 *See Pico*, 457 U.S. at 870–71.

395 *Id.* at 890 (Burger, C.J., dissenting).

396 *Pico*, 457 U.S. at 871.

397 *Id.* at 890 (Burger, C.J., dissenting).

398 *Id.*

399 *See, e.g.*, Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 190 (5th Cir. 1995) (explaining, after carefully considering the record, that the court cannot determine, as a matter of law, whether the school board's removal of the book at issue was substantially based on an unconstitutional motivation).

Finally, *Pico*'s applicability is limited to cases involving the removal of books from school libraries.[400] As the plurality emphasized in *Pico*, "nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools."[401] In other words, *Pico* applies only when a school board exercises its discretion to remove books from the school library.[402] For these reasons, it is time for courts to stop relying solely on *Pico* and begin supplementing the *Pico* framework with other legal standards or methodologies to resolve book censorship cases and analyze the constitutionality of book censorship laws.

Unsurprisingly, other scholars have recognized such limitations with *Pico* and have proposed different solutions to address the problem of a school board removing certain books from school libraries, infringing upon a student's constitutional right to access and read those books.[403] For example, some have argued that other First Amendment precedents, such as the Supreme Court's well-recognized rule in *West Virginia State Board of Education v. Barnette*, that states "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," should supplement the *Pico* test. [404] Others have suggested that courts should stop deferring to *Pico* when resolving book-removal cases in school libraries.[405]

Although there are potentially various tests or methodologies to rely on when analyzing the constitutionality of laws pertaining to book censorship in school libraries, a practical test to apply in such circumstances that does not require considering a school board's motive would be a modified version of

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400 *See Pico*, 457 U.S. at 871–72.

401 *Id*. at 871 (emphasis in original).

402 *See id.* at 871–72 ("[O]ur holding today affects only the discretion to *remove* books.") (emphasis in original).

403 *See, e.g.*, Katherine Fiore, Note, ACLU v. Miami-Dade County School Board*: Reading* Pico *Imprecisely, Writing Undue Restrictions on Public School Library Books, and Adding to the Collection of Students' First Amendment Right Violations*, 56 VILL. L. REV. 97, 125 (2011) (suggesting that courts should, in order to protect students' constitutionally protected rights, avoid construing *Pico* to afford school boards an opportunity to construct pretextual justifications for removing certain books from school libraries); *see also* Janice E. Kreuscher, *Remedy without a Right:* Board of Education v. Pico, 16 IND. L. REV. 559, 577 (1983) (explaining that *Pico* did provide that some First Amendment interest tied to free speech could be violated but "did not define what that interest is or to whom it belong[ed]").

404 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see also* Jensen Rehn, Note, *Battlegrounds for Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV. 1405, 1429–36 (2023) (suggesting that courts could rely on other First Amendment precedents, such as *West Virginia State Board of Education v. Barnette* and *Brown v. Entertainment Merchants Association*, to compensate for *Pico*'s limited precedential value).

405 *See* Andrew Perry, Comment, Pico*, LGBTQ+ Book Bans, and the Battle for Students' First Amendment Rights*, 32 TUL. J.L. & SEXUALITY 197, 212–14 (2023) (arguing that "deference to *Pico* can no longer be taken for granted" and that advocates should consider "'rebuilding' a new, fuller standard to protect books in school libraries using established First Amendment law").

the test for obscenity established in *Miller v. California*.[406] This is because many laws that permit school boards to restrict access to certain books from school libraries establish obscenity as a valid condition for restricting such access.[407] Since book-banning laws like those enacted by Texas and Florida focus on the obscenity of the challenged book, it would be more appropriate to analyze the constitutionality of those laws under the *Miller* test.[408] The modified version of the *Miller* test, along with its potential limitations and its application to a hypothetical problem, are provided below after the background behind the *Miller* test is explained.

A. *Miller v. California*

In *Miller v. California*,[409] the defendant conducted a mass mailing campaign to advertise the sale of illustrated books euphemistically regarded as "adult" material.[410] He was convicted of violating California Penal Code § 311.2(a) for knowingly distributing obscene matter.[411] At the time, Section 311 provided the following definition of obscenity:

> "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.[412]

On appeal, the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion.[413] Overall, the defendant's conviction was based on his conduct of sending five unsolicited advertising brochures through an envelope to a restaurant in

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406 Miller v. California, 413 U.S. 15, 24–25 (1973).

407 *See, e.g.*, TENN. CODE ANN. § 39-17-902(a)(2) (West 2024) ("It is unlawful for a book publisher, distributor, or seller to knowingly sell or distribute obscene matter to a public school serving any of the grades kindergarten through twelve (K-12).").

408 *See* Restricting Explicit and Adult-Designated Education Resources (READER) Act, H.B. 900, 88th Leg. (Tex. 2023); *see also* Education, H.B, 1069, Reg. Sess. (Fla. 2023).

409 *See generally Miller*, 413 U.S. at 15.

410 *Id.* at 16.

411 *Id.* At the time of the defendant committing the alleged offense, § 311.2(a) of the California Penal Code provided in relevant part: "(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor . . . ." *Id.* at 16 n.1 (quoting CAL. PENAL CODE § 311.2(a) (Deering 1969)).

412 *Id.* at 16 n.1.

413 *Id.* at 17.

Newport Beach, California.[414] These brochures mainly consisted of drawings and pictures that depicted, in an explicit manner, men and women engaging in a variety of sexual activities.[415] Therefore, *Miller* involved applying a state's criminal obscenity statute to a situation where sexually explicit materials had been thrust upon unwilling recipients who had not indicated any desire to receive such materials.[416]

From the outset, the Supreme Court acknowledged that states have a legitimate interest in proscribing the dissemination or exhibition of obscene materials whenever a "significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles" accompanies such dissemination of materials.[417] This interest parallels what was explained in *Pico*, where school boards should be permitted to structure curriculums that would transmit community values and promote respect for authority and traditional moral, political, or social values.[418] At the same time, just as the Court in *Pico* emphasized the requirement for school boards to fulfill their duties "in a manner that comports with the transcendent imperatives of the First Amendment,"[419] the Court in *Miller* expressed the need to define a standard for identifying obscene materials that states could regulate "without infringing on the First Amendment as applicable to the [s]tates through the Fourteenth Amendment."[420] In what is well-known as the *Miller* test, the Court established that standard after analyzing prior First Amendment and obscenity cases.[421] The *Miller* test, along with subsequent clarifications of the test, are explained below.

1. The Miller Test

The *Miller* test comprises three factors for the factfinder to consider when evaluating whether a state can regulate the challenged material for being obscene without infringing upon First Amendment values.[422] The three factors are:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

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414 *Id.* at 17–18. The brochures advertised four books, which were titled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography." *Id.* at 18. They also advertised a film titled "Marital Intercourse." *Id.*

415 *Id.* at 18.

416 *Id.*

417 *Id.* at 18–19.

418 Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982).

419 *Id.*

420 *Miller*, 413 U.S. at 19–20.

421 *Id.* at 20–24.

422 *See id.* at 24–25.

> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[423]

Accordingly, the Court held that a state statute that regulates obscene materials must "be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[424] In the end, the *Miller* test reflected the Court's decision to abandon the "*utterly* without redeeming social value" constitutional standard established in *Memoirs v. Massachusetts*.[425]

2. Subsequent Clarifications of the Miller Test

After the Court decided *Miller*, it revisited and clarified the three factors under the *Miller* test. In *United States v. 12 200-Ft. Reels of Super 8mm Film*,[426] it explained that the standards prescribed under the *Miller* test also applied to federal laws regulating obscenity.[427] Just over a year after it decided *Miller*, the Court ruled in *Hamling v. United States*[428] that local community standards, rather than state or national standards, governed the application of the *Miller* test.[429] Then, in *Jenkins v. Georgia*,[430] it ruled that jury verdicts resulting from their application of the *Miller* test are subject to judicial review.[431] The Court in *Jenkins* emphasized that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'"[432] Finally, the Court in *Pope v.*

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423 *Id.* at 24 (internal quotations omitted) (citations omitted).

424 *Id.* at 23–24.

425 *See id.* at 24–25 (emphasis in original) (quoting Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966)).

426 *See generally* United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123 (1973).

427 *Id.* at 129.

428 *See generally* Hamling v. United States, 418 U.S. 87 (1974).

429 *See id.* at 105) ("The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case."). Moreover, it explained that a federal statute does not become unconstitutional simply because distributors of allegedly obscene materials may be subjected to different community standards in the various federal judicial districts where they commit the offense. *Id.* at 106.

430 *See generally* Jenkins v. Georgia, 418 U.S. 153 (1974).

431 *See id.* at 160 (expressing disagreement with the Georgia Supreme Court's conclusion that the jury's verdict precluded all appellate review of the defendant's assertion that his exhibition of the obscene film was protected under the First and Fourteenth Amendments).

432 *Id.* The Court also reviewed several examples, provided in *Miller*, of what a state statute could define obscenity as. *See id.* Although it considered those examples to not constitute an exhaustive catalog of what juries could find patently offensive, it viewed them to "fix substantive constitutional

Illinois[433] held that the third factor of the *Miller* test—whether the work as a whole lacks serious literary, artistic, political, or scientific value—is not to be governed by local community standards but by "whether a reasonable person would find such value in the material, taken as a whole."[434] These clarifications collectively orient the *Miller* test to where it accounts for both the local community's interest in proscribing obscenity and the defendant's First Amendment rights.[435] Similar clarifications should thus be incorporated into the modified version of the *Miller* test, which is proposed in the next section.

B. Modified Version of the *Miller* Test

In analyzing the constitutionality of removing or restricting access to certain books in school libraries, courts should modify the *Miller* test to account for *Pico*'s explanation that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[436] At the very least, courts should adjust the test to reflect *Tinker*'s explanation that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[437] Accordingly, the emphasis should shift to the educational value of the challenged material, rather than the material's obscenity.

Under the modified *Miller* test, the trier of fact would consider the following factors to determine whether it would be unconstitutional for a school board to either remove or refuse to add the questioned material to the school library:

> (a) whether the [school board], applying contemporary community standards[,] would find that the work, taken as a whole, [provides educational value],
> (b) whether the work [would be primarily educational for students even when it may also] depict[] or describe[] . . . sexual conduct specifically defined by the applicable state law; and

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limitations, deriving from the First Amendment, on the type of material subject to such a determination." *Id.* at 160–81. Accordingly, it proceeded to hold that "nudity alone is not enough to make material legally obscene under the *Miller* standards." *Id.* at 161.

433 *See generally* Pope v. Illinois, 481 U.S. 497 (1987).

434 *Id.* at 500–01. It also indicated that the "reasonable person" standard could still be met even when only a minority of a population believes that a work has serious literary, artistic, political, or scientific value. *Id.* at 501 n.3.

435 *See* Hamling v. United States, 418 U.S. 87, 105 (1974) (explaining that the *Miller* test permits the jury to utilize local community standards when sitting in obscenity cases); *see also* Jenkins v. Georgia, 418 U.S. 153, 160–61 (1974) (indicating that jury verdicts can be reviewed to ensure that they do not transcend constitutional limits derived from the First Amendment).

436 Bd. of Educ. v. Pico, 457 U.S. 853, 865 (1982) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

437 *Tinker*, 393 U.S. at 511.

> (c) whether the work, taken as a whole, [provides] serious literary, artistic, political, or scientific value.[438]

Suppose the trier of fact finds that these factors weigh against removing or forbidding the presence of the questioned material in the school library.[439] In that case, the court must find that the school board may not remove or refuse to add such material in the school library even when state law would permit such action.[440] On the other hand, if a state law would require the challenged material to be censored from school libraries, then it would be unconstitutional under the First Amendment if the test's three factors weigh against censoring the material from school libraries.[441] After all, the three factors ensure that students would not be "closed-circuit recipients of only that which the State chooses to communicate" and would "not be confined to the expression of those sentiments that are officially approved."[442]

The changes incorporated in the modified version of the test direct the factfinder to focus on the educational value of the challenged material instead of the material's sexual content. This shift in focus is critical for ensuring that school boards remove or refuse to add books because such books genuinely lack any educational value. In other words, the factfinder's attentiveness toward the educational value of the challenged books would ensure that school boards cannot easily remove or refuse to add books whose educational values depend on appropriate references to sexual content or topics.

When evaluating the three factors of the modified *Miller* test, the factfinder must consider the perspectives of the local school board, a reasonable student, and a reasonable person.[443] For the first factor, the factfinder must consider the local school board's testimony or policies to understand how the board would determine whether a challenged book or other material has educational value. This requirement is necessary to protect the broad discretion school boards are constitutionally entitled to in managing school affairs.[444]

For the second factor, the factfinder must account for a reasonable student's perspective on the educational value of the challenged material. Not every student will find a challenged book to be obscene to the same extent. Some students may find even a remote reference to sexual conduct in any

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438 Miller v. California, 413 U.S. 15, 24 (1973) (internal quotations omitted) (citations omitted).

439 *See generally Pico*, 457 U.S. at 853.

440 *See generally id.*

441 *See id.* at 865.

442 *Tinker*, 393 U.S. at 511.

443 *See generally Miller*, 413 U.S. at 15.

444 *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (respecting the state's power to compel attendance at some schools and to promulgate reasonable regulations for all schools); *see also Pico*, 457 U.S. at 864 (agreeing with the school board that local school boards must be permitted to establish their curriculum in a manner that would transmit community values).

given literary work to be offensive, while others may claim pornographic magazines to be of educational value. A reasonable student standard would ensure that students can still access primarily educational books and would ultimately protect their constitutional right to receive information and ideas.[445] Moreover, just as the Court in *Pope v. Illinois*[446] clarified that the "reasonable person" standard under the *Miller* test could still be met even when only a minority of a population believes that a work has serious literary, artistic, political, or scientific value,[447] the reasonable student standard may still be satisfied even when only a minority of students believe that the challenged material is primarily educational.

Finally, the factfinder must utilize the reasonable person standard when evaluating the third factor of the modified test. As the Court explained in *Pope*, under the First Amendment, the value of any given work does not depend on the degree of local acceptance such work has attained.[448] Likewise, the serious literary, artistic, political, or scientific value of a challenged book should not depend on whether the book is favored or disfavored among residents of a particular community. Just as the Court held in *Pope* that the proper inquiry for evaluating such factor is whether a reasonable person "would find serious literary, artistic, political, or scientific value in allegedly obscene material," taken as a whole,[449] the same inquiry should apply to evaluate the third factor of the modified *Miller* test. If, instead, the local community standard controlled for this factor, then a book that satisfies the first two factors of the modified test and is educationally valuable to a reasonable individual may still be censored from school libraries only because the people within a particular community find such book to be valueless. That result would conflict with *Miller*'s principle that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent."[450] Therefore, the reasonable person standard, rather than the local community standard, should be the controlling standard for the third factor of the modified *Miller* test.

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445 *See Tinker*, 393 U.S. at 511 ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."); *see also Pico*, 457 U.S. at 867 ("[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.") (emphasis in original).

446 *See generally* Pope v. Illinois, 481 U.S. 497 (1987).

447 *Id.* at 501 n.3.

448 *See id.* at 500.

449 *Id.* at 500–01.

450 Miller v. California, 413 U.S. 15, 34 (1973).

1. Justifications for the Modified Version of the Miller Test

The modified version of the *Miller* test ensures that books containing some reference to sexual conduct but would nevertheless provide educational value to students will be protected from censorship. This is because the factfinder is required to focus on assessing the educational value of the challenged book when applying the test.[451] At the very least, unlike the *Pico* framework, the modified test does not require the difficult task of inquiring into a school board's motive to determine whether its decision to remove books was unconstitutional.[452] Rather, the task is to consider whether the school board, a reasonable student, and a reasonable person would find the challenged book to have educational value.[453]

Furthermore, in situations where applying the *Pico* test would result in the courts falling short of protecting students' rights to access ideas that would prepare them for becoming active and effective participants within "the pluralistic, often contentious society,"[454] the modified *Miller* test can help courts abide by this important part of First Amendment jurisprudence.[455] Consider, for example, Texas's recent law that bars any book rated sexually explicit from being sold to public schools and requires schools to remove such books from their libraries.[456] Under this law, a book vendor must consider the following factors when determining whether a book should be rated as sexually explicit:

> (1) the explicitness or graphic nature of a description or depiction of sexual conduct contained in the material;
> (2) whether the material consists predominantly of or contains multiple repetitions of depictions of sexual or excretory organs or activities; and
> (3) whether a reasonable person would find that the material intentionally panders to, titillates, or shocks the reader.[457]

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451 *See supra* Part IV.B.

452 *Cf.* Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982) (holding that "school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books").

453 *See supra* Part IV.B.

454 *Pico*, 457 U.S. at 868.

455 *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *see also* Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972) (citing other cases that recognize the right to receive information and ideas); *Pico*, 457 U.S. at 867 (explaining that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom") (emphasis in original).

456 *See* Restricting Explicit and Adult-Designated Education Resources (READER) Act, 88th Leg., 2023 Tex. HB 900.

457 *Id.*

Under *Pico*, this law would be constitutional because it does not restrict access to books for partisan or political reasons.[458]

However, some books rated as sexually explicit under Texas's law may address important issues or contain meaningful principles that would prepare students to become active and effective participants within "the pluralistic, often contentious society," which the First Amendment protects.[459] For example, such books may address the grave issues of human trafficking, sexual harassment, domestic violence, or other similar issues. To protect a student's right to access unique insights toward such issues,[460] courts should apply the modified version of the *Miller* test. Under the modified *Miller* test, books originally rated as sexually explicit under Texas's law would still be protected from censorship in school libraries as long as the test's three factors weigh against censoring such books.[461] In other words, in situations where the result of enforcing state laws that aim to censor obscene books in school libraries would conflict with the result of applying the test, the state laws would be found unconstitutional. By supplementing the *Pico* test with the modified *Miller* test, state laws banning obscene books in school libraries would only censor books if the trier of fact finds that the three factors of the modified test weigh in favor of censoring the book for its obscene content and against providing access to them for their educational value.[462] Accordingly, supplementing the *Pico* test with the modified *Miller* test adequately safeguards a student's First Amendment right to receive ideas within school libraries, which *Pico* recognized.[463]

On the other hand, Illinois's recent law forbids the removal of books due to partisan or doctrinal disapproval of their content.[464] Although *Pico* recognized that school boards are constitutionally entitled to broad discretion in the management of school affairs and the establishment of the school curriculum,[465] its limited holding does not make it an appropriate standard for determining whether Illinois's law unconstitutionally restricts school boards from exercising their constitutionally entitled discretion to manage school affairs.[466] Specifically, *Pico* does not directly address whether it

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458 *See Pico*, 457 U.S. at 870 (ruling that school boards may not exercise their discretion to remove books "in a narrowly partisan or political manner"). Even if the law permitted books to be withheld from schools due to partisan or political reasons, it would likely remain constitutional under *Pico* because the plurality's holding in *Pico* affects only the discretion to *remove* books from school libraries. *Id.* at 871–72.

459 *Id.* at 868.

460 *See* Martin v. Struthers, 319 U.S. 141, 143 (1943) (explaining that freedom of speech and press "embraces the right to distribute literature, and necessarily protects the right to receive it").

461 *See supra* Part IV.B.

462 *See supra* Part IV.B.

463 *See Pico*, 457 U.S. at 867–69.

464 *See* Act of June 12, 2023, Pub. Act 103-0100.

465 *See Pico*, 457 U.S. at 863–64.

466 *See id.* at 871–72. After all, *Pico*'s holding only limits the discretion to *remove* books. *Id.*

would be constitutional for school boards to refrain from adding certain books to the school library.[467]

Fortunately, the modified *Miller* test applies regardless of whether the school board removes books or refrains from adding them to the school library, since the applicability of the test depends on whether the board attempts to censor a particular book in the first place, not on how it censors a particular book in the school library.[468] If the trier of fact finds that the three factors in the modified test weigh in favor of censoring the challenged book due to its obscenity and lack of educational value, then courts must permit the school board to censor such book in its school libraries.[469] This is because the test protects the broad discretionary role school boards are constitutionally entitled to in managing school affairs, so long as their exercise of such discretion does not interfere with the student's First Amendment rights.[470] If Illinois's law would somehow prohibit the censorship of such a book, then the modified test would require courts to find such law unconstitutional for infringing upon a school board's constitutional right to exercise discretion in managing various aspects of the school and the education it provides.[471] Since *Pico* fails to protect a school board's constitutional right to exercise its educational discretion against laws that broadly ban book censorship, courts should adopt and apply the modified *Miller* test.[472]

Overall, the modified version of the *Miller* test appropriately balances the need to protect the broad school board discretion[473] with the need to protect students from becoming "closed-circuit recipients of only that which the State chooses to communicate."[474] After all, the test ensures the following: (1) laws that require censorship of certain books do not infringe upon students' First Amendment rights in school libraries and (2) that laws which prohibit the censorship of such books do not obstruct school boards' discretion to constitutionally censor such books. Because *Pico* falls short of attaining this balance by focusing on a school board's motive for removing books rather than the book's educational value,[475] courts should supplement

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467 *See id.* at 871. Instead, the plurality in *Pico* merely asserts that its decision does not affect "the discretion of a local school board to choose books to *add* to the libraries of their schools." *Id.* (emphasis in original).

468 *See supra* Part IV.B.

469 *See supra* Part IV.B.

470 *See* Meyer v. Nebraska, 262 U.S. 390, 402 (1923); *see also Pico*, 457 U.S. at 864.

471 *See Pico*, 457 U.S. at 864; *see also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments.").

472 *See generally Pico*, 457 U.S. at 864.

473 *See Meyer*, 262 U.S. at 402; *see also Pico*, 457 U.S. at 864.

474 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

475 *See Pico*, 457 U.S. at 871–72.

Pico with the modified version of the *Miller* test whenever they adjudicate any cases pertaining to book censorship in school libraries.

2. Limitations of the Modified Version of the Miller Test

The modified *Miller* test is not without limitations. Courts may struggle to delineate the constitutional boundaries behind certain phrases contained in the test's factors, such as "educational value" or "primarily educational."[476] This limitation would likely raise similar problems of vagueness that Chief Justice Burger criticized regarding the *Pico* framework.[477] Because the test requires the factfinder to apply these vague factors to the case before it, not every factfinder will likely reach the same conclusion regarding the propriety of censoring a challenged book in the school library. Therefore, the factfinder's application of the modified test must be subject to judicial review, just as jury verdicts resulting from their application of the *Miller* test are subject to judicial review.[478] Even then, however, the vague terminologies nestled in the three factors of the modified test may make it difficult for reviewing courts to accurately assess whether the factfinder applied the test correctly.[479]

Moreover, the vague factors of the modified *Miller* test may make it difficult for states to draft or revise their censorship laws to where such laws would consistently pass the constitutional muster set forth under the test. Since the vagueness of the *Miller* standard has sparked much confusion in the lower courts,[480] the modified test, which is structurally and functionally similar to its original counterpart, may contribute to the same problem. Nevertheless, subsequent litigations and court decisions applying the modified *Miller* test should eventually clarify the standards underlying the modified test, just as subsequent cases applying the *Miller* test have clarified the test's three factors.[481] From there, states would have more refined guidance for appropriately drafting or revising their censorship laws.

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476 *See supra* Part IV.B.

477 *See Pico*, 457 U.S. at 890 (Burger, C.J., dissenting) ("[T]here is no guidance whatsoever as to what constitutes 'political' factors.").

478 *See* Jenkins v. Georgia, 418 U.S. 153, 160 (1974).

479 *See id.*

480 *See* Beverly G. Miller, Note, Miller v. California*: A Cold Shower for the First Amendment*, 48 SAINT JOHN'S L. REV. 568, 600 (1974) (explaining that the vagueness of the *Miller* standard has led to much confusion in the lower courts); *see also* Tim K. Boone, Comment, *The "Virtual" Network: Why* Miller v. California*'s Local Community Standard Should Remain Unchanged in the Wake of the Ninth Circuit's* Kilbride *Decision*, 6 LIBERTY U. L. REV. 347, 357–70 (2012) (reviewing court decisions that have contributed to the debate about the applicability of *Miller's* local community standard to cases involving the internet).

481 *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 500–01 (1987) (holding that the third factor of the *Miller* test—whether the work as a whole lacks serious literary, artistic, political, or scientific value—is

In the end, the *Pico* framework is equally, if not more, vague. Just as it may be difficult to precisely define the "educational value" and "primarily educational" standards governing the first and second factors of the modified *Miller* test, respectively,[482] the plurality in *Pico* did not provide much guidance for determining when a school board would unconstitutionally remove books from school libraries in a "narrowly partisan or political manner."[483] While the modified *Miller* test may not be without limitations, it at least aims to balance the need to respect the school board's role as an educator, which the *Pico* dissents emphasized,[484] and the need to ensure that the same school board does not exercise its discretion to remove books from the school library "in a narrowly partisan or political manner," which the *Pico* plurality emphasized.[485] After all, the test recognizes the importance of ensuring that books with educational value will continue to rest within the confines of school libraries for students to read and ultimately prepare themselves to "active[ly] and effective[ly] participat[e] in the pluralistic, often contentious society in which they will soon be adult members."[486] By requiring the trier of fact to also consider whether the school board would find the questioned material to provide educational value, the modified test recognizes the importance of allowing school boards to fulfill their roles as educators and to "have broad discretion in the management of school affairs."[487] Therefore, the modified version of the *Miller* test would still be a better alternative to the *Pico* framework even considering its limitations.[488]

C. Applying the Modified Version of the *Miller* Test to a Hypothetical Problem

The methodology for applying the modified version of the *Miller* test can be better understood by applying the test to a hypothetical problem based on a real-world example of book censorship. One of the most challenged books within the past century is Aldous Huxley's *Brave New World*.[489]

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not to be governed by local community standards but by "whether a reasonable person would find such value in the material, taken as a whole").

482 *See supra* Part IV.B.

483 Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982) (Powell, J., dissenting) (asserting that the "narrowly partisan or political manner" standard is standardless to where it "affords no more than subjective guidance to school boards, their counsel, and to courts.").

484 *See Pico*, 457 U.S. at 921 (O'Connor, J., dissenting).

485 *Pico*, 457 U.S. at 870.

486 *Id.* at 868.

487 *Id.* at 863.

488 *Id.*

489 HUXLEY, *supra* note 1. *See* Alison Flood, *Brave New World among top 10 books Americans most want banned*, THE GUARDIAN (Apr. 12, 2011), https://www.theguardian.com/books/2011/apr/12/brave-new-world-challenged-books (reporting how the *Brave New World* was banned

Recently, a parent of a high school student challenged the book in the South Summit School District, which is in the State of Utah.[490] The parent was particularly concerned about the supposed depiction of promiscuity in the book.[491]

Let's assume that the school board agreed with the parent to remove Huxley's *Brave New World* from the school library due to its obscene content and its reference to promiscuity.[492] Accordingly, the school board removes the novel from the school library, and several students who want to access the book challenge the board's decision. Yet, the school board refuses to return the novel to the school library shelves because it believes the novel is obscene and thus inappropriate for some students to read. The students then file a complaint in a federal district court, asserting that the school board had violated their First Amendment rights. The district court dismisses the complaint, and on appeal, the circuit court of appeals affirms the dismissal. Applying the *Pico* standard, the court agrees with the district court that the school board's action was constitutional because it did not remove the novel for partisan or political reasons.[493]

Had the school board removed Huxley's *Brave New World* from the school library shelves due to political reasons, then the court would have only needed to rely on *Pico* to conclude that the board's action was unconstitutional.[494] From there, the students could access the novel in their school library. However, that is not the case, and the students file a petition for a writ of certiorari to the Supreme Court of the United States. In their petition, they assert that the *Pico* standard is insufficient for protecting a student's First Amendment right to access ideas in school libraries[495] whenever obscenity is the reason for removing books from school libraries.

The Supreme Court does not have to agree with the students that the *Pico* standard does not sufficiently protect their First Amendment right to access Huxley's *Brave New World*, let alone other books removed by the

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in Ireland when it was first published in 1932 and how the book has been removed from shelves and objected to ever since).

490 *See* Toria Barnhart, *South Summit School District could ban 'Brave New World' following parent request*, PARKRECORD (Mar. 10, 2023), https://www.parkrecord.com/news/south-summit-school-district-could-ban-brave-new-world-following-parent-request/.

491 Barnhart, *supra* note 490.

492 For context, there are several moments in the novel that would be considered obscene to an average reader. *See, e.g.*, HUXLEY, *supra* note 1, at 30–31 (describing when the Director of Hatcheries and Conditioning, who is also known as Thomas "Tomakin," leads the students to the garden, six or seven hundred little boys and girls could be seen running around in the garden naked.); *see also id.* at 30 (describing that the Director then directed the students' attention to "a charming little group," which consisted of "a little boy of about seven and a little girl who might have been a year older" playing a rudimentary sexual game.).

493 After all, *Pico* provides that school boards may not exercise their discretion to remove books from their school libraries "in a narrowly partisan or political manner." *Pico*, 457 U.S. at 870.

494 *See id.*

495 *See id.* at 866–69.

school board due to their obscene content.[496] However, if it agrees with the students that a more protective standard is needed in such cases, then it could rely on the modified version of the *Miller* test. After all, the modified *Miller* test directs the factfinder to focus on the challenged book's educational value even when it contains obscene content or descriptions.[497] For the purposes of this hypothetical, the Court decides to adopt the modified *Miller* test as the controlling standard for this case. It also holds that a school board's decision to censor a particular book from the school library must pass the modified *Miller* test in addition to the *Pico* test before such a decision can be adjudicated as constitutional.[498]

On remand, the district court instructs the factfinder to apply the modified *Miller* test to assess the constitutionality of the school board's decision to remove Huxley's *Brave New World*. Regarding the first factor of the modified *Miller* test,[499] the factfinder is uncertain whether, under contemporary community standards, the school board would find that the novel, taken as a whole, provides educational value. Nevertheless, the factfinder is more comfortable concluding that the novel would be primarily educational for a reasonable student even when it may also depict or describe sexual conduct specifically defined by the applicable state law. After all, the novel alludes to a debatable perspective that a totalitarian society is necessary for social stability,[500] which is an idea that students are constitutionally entitled to either agree or disagree with.[501] At the very least, it is likely that a reasonable reader would find the novel, taken as a whole, to provide serious literary value. Notwithstanding its uncertainty with the first factor, the factfinder concludes that the second and third factors of the modified *Miller* test[502] weigh in favor of finding that the novel has educational value to where students are constitutionally entitled to access it in school libraries. Therefore, it finds that the school board's decision to remove Huxley's *Brave New World* from the school library fails the modified *Miller* test.

As a result, the district court enters an order declaring that the school board violated the student's First Amendment rights by removing Huxley's *Brave New World* from the school library, requiring the board to return the

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496 *See id.* at 870–72.

497 *See supra* Part IV.B.

498 *See supra* Part IV.B.

499 *See supra* Part IV.B.

500 HUXLEY, *supra* note 1, at 48–49 (describing how Mustapha Mond, the Resident World Controller of Western Europe, preaches to the students that after the "Nine Years' War" and the "great Economic Collapse," the World State had "a choice between World Control and destruction. Between stability and . . . Liberalism, of course, was dead of anthrax, but all the same you couldn't do things by force.").

501 *See Pico*, 457 U.S. at 867 ("[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.") (emphasis in original).

502 *See supra* Part IV.B.

novel to the school library shelves. Afterward, the students are content because the novel has returned to their library shelves. Overall, this hypothetical illustrates how *Pico* is vulnerable to falling short of protecting a student's constitutional right to access ideas within the school library, and how the modified *Miller* test can better safeguard that right. Therefore, as many school boards and states continue to justify book censorship based on obscenity,[503] courts should consider supplementing the *Pico* standard with the modified *Miller* test.

CONCLUSION

In recent years, the uptick in book censorship in libraries across the nation has led to concerns about the propriety of such censorship.[504] Inevitably, the Supreme Court's decision in *Pico* has risen to prominence, and various courts will likely attempt to apply the test established in *Pico* to resolve any book censorship cases that land on their dockets. Yet, as this Note has demonstrated through the application of *Pico* to analyze the constitutionality of Texas, Florida, and Illinois's laws pertaining to the subject of book censorship, the *Pico* standard is practically limited and difficult to apply.[505] Therefore, a more applicable test for analyzing the constitutionality of laws pertaining to book censorship is needed to supplement the *Pico* standard.[506] Although the modified *Miller* test proposed in this Note is not without limitations, this test will at least constitute a better alternative for courts to apply compared to the *Pico* standard.[507] At the very least, courts should consider supplementing the *Pico* standard with the modified *Miller* test when adjudicating cases involving school boards or state laws that seek to censor obscene books in school libraries.[508] Otherwise, increasing censorship may eventually transform school libraries, and by extension, the broader community, into something resembling the World State in Aldous Huxley's *Brave New World*, which suppressed "all books published before A.F. 150."[509]

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503 *See* 2023 Fla. HB 1069 (restricting books that include "sexual conduct" from grades that are not age-suitable).

504 *See, e.g.*, *The American Library Association opposes widespread efforts to censor books in the U.S. schools and libraries*, *supra* note 12 (explaining that the American Library Association released a statement in response to "a dramatic uptick in book challenges and outright removal of books from libraries").

505 *See supra* Part III.

506 *See supra* Part III.

507 *See supra* Part IV.B.2.

508 *See supra* Part IV.B.1.

509 HUXLEY, *supra* note 1, at 51.

EVICTION IN ILLINOIS: HOW A STRUGGLING SYSTEM WILL SEE RELIEF IN COURT-SPONSORED MANDATORY MEDIATION

Alexander Roby*

INTRODUCTION

Eviction is a big deal in Illinois. In the third quarter of 2023, over ten percent of newly filed civil cases were for eviction.[1] Rising property prices have made home ownership increasingly unattainable for the individual, resulting in a growing reliance on renting.[2] Consequently, renting has become a necessity for many, and with it comes many challenges.[3] This new reality leads to more people entering contractual relations with one another, and those relations often break down.[4] Sometimes, it is just as simple as someone losing their job or relationship. If things go south, the ramifications can be complex for both parties and can require the intervention of the courts when they reach an impasse.[5]

Many of these situations end in a landlord filing for eviction, both parties being hauled into court, and many resources wasted solving the dispute. In 2022 alone, Illinois faced 62,665 newly filed eviction cases.[6] That is potentially 62,665 cases worth of time and effort that could have been spent elsewhere but instead had to be used up handling evictions.[7] A mandatory mediation diversion could eliminate much of this work and give courts more

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* J.D. Candidate, Southern Illinois University Simmons Law School, Class of 2025. This Note is dedicated to Joyce Darlene Broy, my grandmother who both inspired and pushed me forward into starting this wonderful journey. Though you are no longer with us, I will always remember everything you did for me. Also, a shoutout to Kelly Collinsworth, my professor and mentor throughout the creation of this Note, thank you for the advice and ideas along the way.

1 *See Civil Caseload Statistics by County*, CIRCUIT CTS. OF ILL. (2023), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/5eaaf785-cb0b-4401-944c-5b6993ed06fb/Civil%20Caseload%20Statistics%20by%20County.pdf.

2 *See generally* David A. Dana, *An Early Intervention Approach to Reducing Evictions and Improving Child Welfare*, 42 CHILD. LEGAL RTS. J. 79, 83–85 (2022) (discussing the general issues facing families today in balancing finances for housing).

3 *See generally id.* at 80.

4 *See generally id.* at 85 (asserting that the frequency of evictions occurs because of "exploitative" landlords and because it is a relatively simple way to remove a tenant).

5 *See generally id.* at 81 (implying that evicted tenants are usually "forced into court" and that the intervention of courts can lead to an unfavorable result).

6 *See Illinois Circuit Court Statistical Reports*, ILL. CTS. (2022), https://www.illinoiscourts.gov/courts/circuit-court/illinois-circuit-court-statistical-reports.

7 *See id.*

time and resources to address other parts of their caseload.[8] The time and resources spent by parties, as well as the trauma associated with the legal process, can be significantly reduced by implementing a mandatory mediation step before appearing before a judge.[9] Illinois should implement such a system. Not only will this save time and resources for landlords and tenants, but it will also do the same for courts, bringing benefit and relief for all involved.[10] Mediated agreements also allow for settlement terms that a judge may not be able or inclined to give, further incentivizing a new approach to eviction in Illinois.[11]

This Note argues for a mandatory mediation system to fix the current inefficiencies in the Illinois eviction system. As it exists, the current eviction procedures and laws create a severe power imbalance between landlords and tenants.[12] There is also a problem with *pro se* litigants and defenders, whom the court may need to treat differently and provide leniency, which could lead to more significant issues.[13] Additionally, it wastes court resources, which could be better spent elsewhere.[14]

Part I of this Note describes current Illinois law and procedure for evictions, from the basic history of tenancy law to how it is practiced in Illinois and the specific requirements for filing an eviction; it also discusses the role of lawyers in this system. Part II discusses issues faced by landlords and tenants in the eviction process, from the impact of COVID-19 to the ongoing inefficiency of the system. Part III discusses mediation in eviction, from the general benefits to the implementation of real-world systems similar to the one proposed in this Note. Finally, part IV proposes implementing mandatory mediation in Illinois and illustrates how this would improve the eviction system.

I. EVICTION IN ILLINOIS AND CURRENT PROCEDURES

A. History and Background of Tenancy Law

Due to America's English common-law heritage, it can be easier to think of a lease as a transfer of a property interest by contract; this duality may help one understand the various requirements imposed on this

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8 *See id.*

9 *Id.*

10 *See Advantages of Mediation*, U.S. OFF. OF SPECIAL COUNS., https://osc.gov/Services/Pages/ADR-Advantages.aspx (last visited Dec. 27, 2024).

11 *See id.*

12 *See generally* Dana, *supra* note 2, at 79–81 (discussing the general issues facing families today in balancing finances for housing).

13 Pearle Vision, Inc. v. Romm, 541 F.3d 751, 758 (7th Cir. 2008) (explaining the leniency that can be given to *pro se* parties under different circumstances).

14 *See generally Illinois Circuit Court Statistical Reports*, *supra* note 6.

relationship as a combination of different laws.[15] Historically, this meant considering the transaction for a temporary right to possession, with the landlord keeping the future interest for when the agreement ended.[16] However, these formal methods have given way to modern contract law.[17]

The shift began in the mid-twentieth century with noticeable changes occurring as contract law integrated into tenancy law.[18] In particular, tenants began receiving more and more protections from both Congress and the courts, who seemed increasingly wary of a laissez-faire approach of just letting the market sort things out.[19] By 1968, the expansion of the Civil Rights Act included protections for tenants against discrimination based on race, religion, or sex.[20] These changes further demonstrate the newer, more proactive approach the law was taking to what had been a very old-school, property-centric view of the landlord-tenant relationship.[21] Other developments continued, with some states implementing further protections while others declined.[22] As a result, every jurisdiction across the country looks different concerning its housing laws and regulations.[23] Jurisdictions naturally have differing restrictions primarily aimed at landlords, from variations in who is protected against discrimination to the required habitability of any individual unit.[24] Considering the history of tenancy law, there is a trend toward strengthening the position of tenants against landlords as lawmakers likely believe landlords are better suited to handle some of the complexities of the landlord-tenant relationship.[25] If anything, this trend should demonstrate an underlying philosophy that landlords and tenants should stand in equal positions when dealing with each other, especially when it comes to putting a roof over one's head.[26] Yet, it is also the historical imperative of American property ownership jurisprudence to protect that ownership and disposal of property to a very high degree.[27]

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15 *See generally* Christopher Wm. Sullivan, *Forgotten Lessons from the Common Law, the Uniform Residential Landlord and Tenant Act, and the Holdover Tenant*, 84 WASH. U. L. REV. 1287, 1293–1294 (2006).

16 *Id.*

17 JEREMY SHEFF ET AL., OPEN-SOURCE PROPERTY: A FREE CASEBOOK 463 (2022).

18 *Id.* at 463–64.

19 *Id.*

20 *History of Fair Housing*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Nov. 1, 2024).

21 *See id.*

22 *See id.*

23 *See generally Your Guide to Landlord-Tenant Law*, ILL. STATE BAR ASS'N, https://www.isba.org/public/guide/landlordtenant (last visited Nov. 1, 2024).

24 *See History of Fair Housing*, *supra* note 20.

25 *See States Introduce Multiple Tenant Protections Bills This Legislative Session, Securing Several Wins for Renters Rights*, NAT'L LOW INCOME HOUS. COAL (Jun. 24, 2024), https://nlihc.org/resource/states-introduce-multiple-tenant-protections-bills-legislative-session-securing-several.

26 *See generally* SHEFF ET AL., *supra* note 17, at 463–64.

27 *See generally id.*

B. Current Illinois Tenancy Law and Procedure

The laws governing tenancy in Illinois are vast and complex.[28] One of the most important and often most relevant for landlords is that "self-help evictions" are unavailable to them in Illinois.[29] As such, when a landlord wishes to remove a tenant from the property, they can only do so by the formal eviction procedures described in the law.[30] They cannot force entry and remove a tenant[31] nor can they simply wait for a tenant to leave the property and then quickly change the locks on them.[32] Instead, the landlord must first go through the proper notice process and a successful suit before being able to gain entry to and establish actual possession of their property.[33] An unknowing landlord may think to bar the tenant from reentering the premises, only to have a confrontation, ending with the local authorities forcing the landlord to permit reentry, causing stress and anxiety for everyone involved.[34]

The eviction process differs depending on why the lease is ultimately terminated in Illinois.[35] The first step is to notify the tenant that the lease will be terminated, whether for failure to pay rent, a violation of another term, or because the landlord has decided not to renew the agreement.[36] For example, a year-to-year lease needs a sixty-day notice to terminate.[37] For other regular term leases of less than a year, a month-to-month requires a thirty-day notice, and a week-to-week requires a seven-day notice.[38] At the end of these notice periods, a tenant either moves out or the landlord must begin their ejection action.[39] A common issue arises when the landlord misidentifies how much notice needs to be given, only to find out weeks later they have given the incorrect notice and must start over from the beginning.[40]

The process for evicting a tenant for violating the lease or failing to pay rent is more complex and requires stricter requirements.[41] For violating a lease term, a ten-day notice, which includes the defaulted term of the lease,

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28 *See generally Your Guide to Landlord-Tenant Law*, *supra* note 23.

29 735 ILL. COMP. STAT. ANN. 5/9-101 (West 2023).

30 *Id.*

31 *Id.*

32 Kwame Raoul, *Landlord and Tenant Rights and Laws*, ILL. ATT'Y GEN. (Jan. 2024), https://illinoisattorneygeneral.gov/Page-Attachments/LandlordAndTenantRightsLaws.pdf.

33 735 ILL. COMP. STAT. ANN. 5/9-102 (West 2023).

34 *See generally* Raoul, *supra* note 32.

35 *See* 735 ILL. COMP. STAT. ANN. 5/9-102 (West 2023).

36 *See* 735 ILL. COMP. STAT. ANN. 5/9-205 (West 2023).

37 *Id.*

38 735 ILL. COMP. STAT. ANN. 5/9-207 (West 2023).

39 735 ILL. COMP. STAT. ANN. 5/9-208 (West 2023).

40 *See, e.g.*, Beth Dillman, *The Eviction Process in Illinois: Rules for Landlords and Property Managers*, NOLO (May 22, 2024), https://www.nolo.com/legal-encyclopedia/the-eviction-process-illinois-rules-landlords-property-managers.html.

41 *See* 735 ILL. COMP. STAT. ANN. 5/9-209 (West 2023).

is required.[42] For failing to timely pay rent, the landlord begins with a written demand for payment that, upon service to the tenant, informs them of the late rent and expressly gives them five days after receiving to pay or face an eviction action.[43] If the tenant makes the full payment within five days, this prevents the landlord from proceeding.[44] However, if the tenant fails to make full payment, the landlord may begin an ejection action with a formal demand for rent money.[45] Landlords may run afoul of the law, particularly by not accepting a full payment within the five-day safe harbor period granted by statute.[46]

To proceed with suit regardless of the type of eviction, the notice period must expire after such notice is served properly in person to at least a thirteen-year-old resident of the premises, or by sending the notice through certified mail with a returned receipt, or if no one is in actual possession by posting the notification on the premises itself.[47] Next, one must file a complaint that they are entitled to possession but are denied such by a defendant.[48] They must do so in the county where the property is located and be able to describe the property with reasonable certainty to continue.[49] The court clerk then sends the summons to the defendant, informing them of the suit and that a reply is needed to avoid a default judgment awarding possession to the landlord.[50] Then, depending on the local rules, the tenant must answer the complaint, either in a written submission or often by appearing at an initial hearing.[51] Unlike other lawsuits, the defendant here cannot bring any counterclaims, nor can the plaintiff claim anything not germane to the ejection itself, excluding any applicable demand for rent.[52]

Finally, it is time for trial, assuming the tenant answered the complaint and made a denial, general or otherwise.[53] Parties in these cases have a right to a jury trial under Illinois law.[54] While generally rare, the prospect of *pro se* litigants trying to conduct a jury trial likely strikes horror in the heart of many attorneys, especially for a subject so sensitive to the litigant, such as eviction.[55] Thankfully for those attorneys, there are several exceptions to this

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42 735 ILL. COMP. STAT. ANN. 5/9-210 (West 2023).
43 735 ILL. COMP. STAT. ANN. 5/9-209 (West 2023).
44 *Id.*
45 *Id.*
46 *See id.*
47 735 ILL. COMP. STAT. ANN. 5/9-211 (West 2023).
48 735 ILL. COMP. STAT. ANN. 5/9-106 (West 2023).
49 *Id.*
50 *See id.*
51 *See id.*
52 *Id.*
53 *See id.*
54 735 ILL. COMP. STAT. ANN. 5/9-108 (West 2023).
55 *See, e.g.*, Adam Banner, *Pro Se Litigants in Pop Culture Show Why Representing Yourself Can Be a Dangerous Decision*, L. IN POP CULTURE (Nov. 25, 2019, 10:45 AM), https://www.abajournal

rule. First, a lease may provide that the lessor waives the right to a jury trial in case of an ejection action.[56] Next, a defendant's right to demand a trial is waived if they fail to appear after being summoned by the clerk.[57] Either way, whether a trial commences by jury or bench, a preponderance of the evidence standard is used to determine whether the complaint succeeds or fails.[58] Costs may be assessed against a plaintiff who fails to prove their case.[59] Ultimately, if a plaintiff is successful, they must get their order enforced by the sheriff quickly, as the order will expire in 120 days and will require a motion to extend and another hearing to do so at that point.[60] A recent addition to this process is the potential sealing of eviction actions.[61] This allows for the case to be sealed in the public record, which should prevent a tenant from being affected in the future when a landlord runs a credit check on them to decide whether to rent to them or not. The court can do this at its discretion in the interest of justice or the parties may stipulate to it.[62]

C. The Role of Practitioners Today

The attorney has an expansive role to play in housing matters.[63] Whether it be on how to draw up lease agreements, what needs to be done to remove a tenant from a property, or even advising a tenant of their rights when a landlord fails to repair a water heater.[64] Both sides need counsel, so attorneys become entwined in the relationship between landlord and tenant.[65] A lawyer may run into the situation of either removing someone from their house while reassuring their clients that the process is not going slower than usual or, on the opposite, advising a tenant that there is essentially nothing to be done, so the time has come to start packing.[66]

.com/news/article/pop-culture-portrayals-of-pro-se-litigants-show-why-representing-yourself-can-be-a-dangerous-decision.

56 735 ILL. COMP. STAT. ANN. 5/9-108 (West 2023).

57 735 ILL. COMP. STAT. ANN. 5/9-109 (West 2023).

58 735 ILL. COMP. STAT. ANN. 5/9-109.5 (West 2023).

59 735 ILL. COMP. STAT. ANN. 5/9-114 (West 2023).

60 735 ILL. COMP. STAT. ANN. 5/9-117 (West 2023).

61 COVID-19 Federal Emergency Rental Assistance Program Act., 2021 Ill. Laws Pub. Act 102-0005.

62 735 ILL. COMP. STAT. ANN. 5/9-121 (West 2023).

63 *See generally What Is a Housing Attorney*, LEGAL MATCH, https://www.legalmatch.com/law-library/article/what-is-a-housing-attorney.html (last visited Nov. 1, 2024) (outlining a broad range of issues that a housing attorney can address, including tenant rights and landlord dispute, property and lease disputes, housing and disability access, health and safety issues, and class action filings).

64 *Id.*

65 *See generally* Brian Bieretz et al., *Getting Landlord and tenants to Talk*, URB. INST., https://www.urban.org/sites/default/files/publication/101991/getting-landlords-and-tenants-to-talk_3.pdf (last visited Nov. 1, 2024) (highlighting the legal relationship between landlord and tenant, the article demonstrates how mediation and counsel entwine both parties in resolving disputes, balancing rights and responsibilities to achieve mutually agreeable outcomes).

66 *What Is a Housing Attorney*, *supra* note 63.

There is one exception to these circumstances: a mediated settlement.[67] Attorneys or parties can get together and develop a solution that gets the tenant out of the housing faster and might also get an outstanding debt repaid to some degree.[68] This has the benefit of getting a landlord their property back more quickly and at less cost and can get a tenant other benefits, like a known amount of time to find housing or an agreement that prevents an eviction from going on their record.[69] As in many civil suits, the most effective way forward for both parties is to sit down and hammer out a more mutually beneficial arrangement rather than resort to the difficulty and uncertainty of open court.[70]

II. EXISTING PROBLEMS AND DAMAGE CAUSED BY THE PANDEMIC

A. Issues Faced by Both Landlords and Tenants in Evictions

American law follows a critical concept: *ignorantia juris non excusat*; ignorance of the law is no excuse.[71] This foundational understanding applies to all American laws, including those that govern the landlord-tenant arrangement.[72] This affects both landlords and their tenants equally.[73] From the landlord who doesn't understand notice requirements or prohibitions on self-help evictions to the tenant who mistakenly believes they can withhold rent to a landlord who has not fixed a water heater, the nuances of the law can be exacting, but that does not excuse compliance.[74]

The economic consequences on these actors should also be considered. When a landlord runs into an issue with a tenant, like nonpayment of rent, every day of nonpayment becomes expensive.[75] Many landlords depend on rent payments to maintain the loan used to acquire the property.[76] Without that rent income, the economic consequences could quickly become dire.[77] Tenants facing an eviction need to acquire new housing quickly and may require help locating a new property with limited financial resources within

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67 Bieretz et al., *supra* note 65, at 5–6.
68 *Id.* at 4–7.
69 *Id.* at 6–7.
70 *See Advantages of Mediation*, *supra* note 10.
71 Diaz v. Grill Concepts Servs., Inc., 233 Cal. Rptr. 3d 524, 532 (Cal. Ct. App. 2018).
72 *See id.*
73 *See id.*
74 *See id.*
75 Natalie Campisi, *What Mom-And-Pop Landlords Can Do To Relieve Eviction Ban Pressure*, FORBES (Nov. 2, 2022), https://www.forbes.com/advisor/mortgages/what-mom-and-pop-landlords-can-do-to-relieve-eviction-ban-pressure/ (emphasizing the financial strain on small landlords reliant on rental income due to eviction moratoriums).
76 *Id.*
77 *Id.*

the notice period.[78] The landlord is therefore pushed to try and remove tenants as soon as possible, while tenants have a strong incentive to slow down the process to buy themselves sufficient time.[79] This is where a neutral party can step in and help bring the parties together to find a more efficient solution.

B. The Coronavirus Pandemic and the Lasting Impact it had on Housing Issues

The COVID-19 pandemic significantly affected eviction proceedings across the country.[80] Courts found themselves unable to operate as measures taken to slow the spread shut courthouses down.[81] Both states and the national government took various actions, from eviction moratoriums to rent control changes, to deal with an imminent housing crisis during a pandemic.[82] Public health and safety trumped landlord interests, creating many issues, especially when mortgage payments were not paused and tenants could not be evicted.[83] The pandemic helped show us how overloaded the court system was and how inefficiency made it difficult for the courts to react in a crisis.[84] Eliminating these inefficiencies is paramount, and mandatory mediation will help address the overall issue here in Illinois.

The repercussions of COVID-19 are still being felt.[85] With long dockets and rising housing costs, the list of issues is ever-increasing.[86] Moreover, the increased costs and economic uncertainty continue to pose hazards to landlords and tenants alike.[87] If anything, the pandemic proved one thing: the American legal system is fragile, and shocks to the system can devastate those who rely on it.[88] This is especially true when the measures taken on eviction began to be retracted or, in some cases, struck down, and things ramped back up.[89]

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78 Letter from Vanita Gupta, Assoc. Att'y Gen., U.S. Dep't of Just., to Chief Just./State Ct. Adm'r (June 24, 2021), https://www.justice.gov/d9/pages/attachments/2021/06/24/letter_from_associate_attorney_general_gupta_june_24_2021.pdf.

79 *See id.*; Campisi, *supra* note 75.

80 Peter Hepburn et al., *COVID-era Policies Cut Eviction Filings By More Than Half*, EVICTION LAB (May 3, 2023), https://evictionlab.org/covid-era-policies-cut-eviction-filings-by-more-than-half/.

81 *Id.*

82 *Id.*

83 *See id.*

84 *See generally* Jason Mazzone et al., *The Impact of the Covid-19 Pandemic on State Court Proceedings: Five Key Findings*, UNIV. OF ILL. SYS. (May 10, 2022), https://igpa.uillinois.edu/covid-19/the-impact-of-the-covid-19-pandemic-on-state-court-proceedings.

85 *See* Hepburn et al., *supra* note 80.

86 *See id.*

87 *See id.*

88 *See id.*

89 *See id.*

Moving forward from the pandemic, there has been increased interest in both efficiency and costs in the legal system.[90] Relieving pressure on the overworked courts has also become a priority.[91] In an increasingly globalized world, the chances of another global pandemic to match COVID-19 are distressing in the least.[92] It is, therefore, only logical to look for methods of streamlining our courts and ways to reduce the effect of future shocks.[93] Diverting eviction cases prevents numerous lawsuits from needing formal court attention, representing a boon for increasing efficiency and reducing resource requirements in the court system.[94]

In Illinois, the problems of COVID-19 necessitated direct action from the governor.[95] The concern initially was in the continuing spread of a disease.[96] The government recognized that access to housing could affect the spread of the virus and that keeping people in their homes may help reduce the spread.[97] Creating a moratorium on evictions helped keep people from moving about while trying to find new housing.[98] It reduced the interactions needed in a courtroom, which could also spread the disease.[99] In this case, Illinois stopped evictions in the interest of public health, raising questions about what might be done the next time a public health crisis occurs.[100] Will new moratoriums be put into place, creating the same backlog as this past time, or could another instrument be utilized that might allow conflicts to be resolved while still keeping people out of courthouses?

C. Inequalities in Eviction and the Impact That Has on the System

The problem in eviction cases is often a disparity in resources and, by extension, access to legal counsel.[101] Tenants, in particular, face this issue.[102] After all, a tenant facing eviction for failure to pay rent, by extension, likely lacks the resources to hire an attorney for advice and representation.[103] So this individual, already under the stress of a potential eviction and continuing financial and housing insecurity, appears in court with only information they

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90 *See* Letter from Vanita Gupta, *supra* note 78.
91 *See id.*
92 *See generally id.*
93 *See id.*
94 *See id.*
95 Exec. Order 2020-72.
96 *Id.*
97 *Id.*
98 *See generally id.*
99 *Id.*
100 *Id.*
101 Dana, *supra* note 2, at 93.
102 *Id.* at 91.
103 *See id.* ("Traditionally, an overwhelming percentage of tenants in evictions proceedings are unrepresented.").

managed to dig up on the internet to guide them. This person is likely ill-informed of their rights and faces a potentially devastating judgment against them in short order as no one is willing to walk them through general civil procedure.[104] The state's supreme court has set up web pages with helpful resources for those facing this situation.[105] It directs landlords to some pre-approved forms, has links to various legal aid group websites, and even includes information for voluntary mediation programs.[106] However, as the information there can only help those living in the few districts with a mediation program, and the legal aid websites have limited information, the inexperienced tenant likely remains confused instead of relieved after their visit.[107]

Some tenants may find relief in legal aid groups.[108] Throughout the country, various legal clinics have hired attorneys to help individuals facing eviction.[109] At a minimum, these lawyers can advise their clients of their legal rights and try to explain, in easier-to-understand terms, the complete eviction process required to remove a person from their home.[110] This, however, is often where the tale ends. Legal aid groups have limited resources.[111] In fairness, representation in a proceeding may be less beneficial than the extra cost of dispatching an attorney to every housing case a group takes on.[112] This all assumes a tenant was lucky enough to be helped in the first place; these legal aid groups have insufficient resources to help every person who comes to their doors and are forced to pick and choose the clients that they feel would benefit most from the resources that can be spared.[113] These groups need significantly more funds to help every needy tenant, but increasing funding for legal aid is notoriously difficult.[114] Still, there is a way

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104 *See id.*

105 *Eviction*, ILL. CTS., https://www.illinoiscourts.gov/documents-and-forms/approved-forms/circuit-court-standardized-forms-suites/eviction (last visited Nov. 1, 2024).

106 *Id.*

107 *Id.*; *Understanding eviction as a tenant*, ILL. LEGAL AID ONLINE, https://www.illinoislegalaid.org/legal-information/understanding-eviction-tenant (last visited Nov. 1, 2024).

108 *See Legal Assistance: Illinois*, U.S. DEP'T OF HOUS. & URB. DEV. https://www.hud.gov/states/illinois/legalaid (last visited Nov. 1, 2024).

109 *Id.*

110 *See id.*

111 *See* Alysson Gatens, *A Survey of Civil Legal Aid Service Providers in Illinois*, ILL. CRIM. JUST. INFO. AUTH. (Jun. 2, 2023), https://icjia.illinois.gov/researchhub/articles/a-survey-of-civil-legal-aid-service-providers-in-illinois/ ("Demand for civil legal aid often far outpaces providers' ability to serve all clients in need of assistance.").

112 *See generally id.*

113 *See id.* ("Demand for civil legal aid often far outpaces providers' ability to serve all clients in need of assistance.").

114 *See id.* (indicating that additional funding was needed to both service more individuals and provide individuals with specialized knowledge or hire individuals with such knowledge to train current staff).

to help every tenant and landlord through a mandatory mediation process, regardless of their available resources.[115]

III. MANDATORY AND VOLUNTARY MEDIATION IN ILLINOIS EVICTIONS AND THEIR CURRENT REACH

A. How Mediation Benefits Eviction Cases in General

The primary goal of the mandatory mediation diversion is twofold. First, it is designed to benefit the parties, who, through negotiation, can reach a settlement that will ultimately be more beneficial for them than what the complete drawn-out court process would result in.[116] For landlords, this is a quicker return of their real property and potential agreements on payment plans for owed rent or other fees.[117] The landlord faces many weeks without their property to fight through a full ejection action, during which time they will not be compensated for the tenant's use of the property.[118] Additionally, a repayment agreement might be the only reasonable way to receive any compensation due, as a tenant lacking the resources to pay rent is likely judgment-proof, but may be able to afford a small sum over a more extended period.[119] For tenants, this is security in the form of time to search for a new home and potentially prevent an eviction from going on their record.[120] Keeping evictions off a tenant's record is a substantial perk, as future landlords are unlikely to look favorably on a past eviction, and some rental assistance programs will not assist someone who has defaulted within specific time frames.[121]

The second significant benefit of mediation comes in efficiency gains for the courts.[122] Paying for court staff is no small matter, not to mention additional upkeep on facilities such as maintenance and utilities.[123] Multiple hearings plus a potential trial, whether by bench or jury, consume time and money[124] and push other cases aside.[125] Some counties might have the good fortune to establish a specific housing court for these matters, but even then,

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115 *See generally id.*

116 *See* Letter from Vanita Gupta, *supra* note 78.

117 *See id.*

118 *See id.*

119 *See generally id.*

120 *See generally id.*

121 *See* Dana, *supra* note 2, at 91 (explaining that the threat of eviction strikes fear in tenants).

122 CYNTHIA WITMAN DALEY, ACHIEVING HOUSING STABILITY WITH EVICTION DIVERSION PROGRAMS: A GUIDE TO BEST PRACTICES DURING COVID AND BEYOND 3 (Nov. 2020), available at www.rhls.org/wp-content/uploads/Achieving-Housing-Stability-with-Eviction-Diversion-Programs-during-COVID-and-Beyond.pdf.

123 *See generally* Letter from Vanita Gupta, *supra* note 78.

124 *See id.*

125 *See id.*

other matters need to be dealt with besides an endless line of evictions.[126] The proposed diversion prevents even the initial hearing, requiring filing paperwork with the clerk and diverting the matter to the new mediators to contend with first. If any significant percentage of cases can be dispatched entirely in this manner, then the benefit to the court in terms of time and resources will be well worth the effort.[127] Efforts are underway, at least at the federal level, to see such systems implemented due to the effectiveness of such programs in Philadelphia.[128]

Finally, there is a third smaller benefit to this new process. Mediated settlements are generally more desirable than resorting to the full-out combat of open court.[129] Whether it be in the expenses of the process or even reducing the animosity between parties, bringing parties to the table lets them work out an agreement and might give them a chance to release some built-up pressure.[130] It also benefits attorneys by encouraging them to strive for better negotiations in the future. A dedicated mediation division within the court system at this level would also help promote mediation in general, and this proposal would give attorneys with little experience an opportunity to take part in that process and train them to mediate. This could also be expanded; legal aid groups could bring in law students, who could observe and learn and potentially take an active role in negotiations. The possibilities are limitless, and promoting mediation and offering more opportunities to understand the art of negotiation is a great way to benefit the legal community in general.

B. How a Mandatory Mediation System for Eviction Has Seen Success in Philadelphia

In Philadelphia, mediation before eviction is mandatory through a mediation diversion program.[131] The program is meant to reduce the costs associated with eviction actions.[132] A landlord must usually initiate mediation before moving to an eviction.[133] This general design and its principles closely mirror the system proposed by this Note for Illinois. In Philadelphia's program, landlords must provide notice to the tenant and then apply for

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126 *See generally id.*

127 *See id.*

128 *See id.*

129 *See The Settlement Negotiation Process: The Pros and Cons of Settlement*, STATE OF ILL. DEP'T OF HUM. RTS. (Mar. 2015), https://dhr.illinois.gov/content/dam/soi/en/web/dhr/filingacharge/documents/settlement-pros-and-cons.pdf.

130 *See id.*

131 *PHL Eviction Diversion*, CITY OF PHILA., https://eviction-diversion.phila.gov/#/ (last visited Jan. 11, 2025).

132 *Id.*

133 *Id.*

diversion.[134] The program requires both parties to participate in good faith and offers tenants potential assistance as part of the process.[135] As a result, Philadelphia has seen ninety percent of cases either reach a mediated agreement or at least continue negotiations.[136] Even attorneys for the landlords are involved and able to negotiate on behalf of their clients.[137] However, they must still have the authority to settle to do so, or at least be able to communicate offers with the landlord to get an acceptance during the mediation.[138] This combination of benefits, including the prospect of the city helping to pay rent to landlords that they may not get otherwise, has motivated participation.[139]

C. Mediation Systems in Illinois: How They Started and Their Impact Today

DuPage County, part of the Chicago metropolitan area, has developed a voluntary mediation program for evictions.[140] It was started in response to the COVID-19 pandemic and the subsequent suggestions from the Illinois Supreme Court that localities should improve their eviction systems in the ensuing chaos to handle the situation more efficiently.[141] While the program may have been started in response to the pandemic, it continues to operate, seemingly showing it has been successful and benefited the county.[142] Its voluntary program requires a landlord to file an eviction case in court.[143] After a case has been filed, either party may contact the mediation team, or the court can *sua sponte* assign the case to mediation.[144] Notably, the ability of the court to assign a case to mediation resembles a precursor to a mandatory mediation system, demonstrating a path forward to transitioning to the system put forth in this Note.[145] Once a date is set, the parties and mediator meet in person or on Zoom for a confidential, non-binding

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134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 Dana, *supra* note 2, at 92.
140 *DuPage County Eviction Mediation Program*, 18TH JUD. CIR. CT. OF ILL., https://www.dupagecourts.gov/18th_judicial_circuit_court/programs/residential_eviction_mediation_program.php (last visited Jan. 11, 2025).
141 *In re* Ill. Courts Response to Covid-19 Emergency/ Eviction Early Resolution Programs, 2020 Ill. LEXIS 818 (Mar. 17, 2020).
142 *See DuPage County Eviction Mediation Program*, *supra* note 140.
143 *Id.*
144 *Id.*
145 *Id.*

negotiation session, with the end goal being to resolve the dispute and prevent the usually lengthy court process.[146]

Kane County has a similar program that was also created in response to the pandemic.[147] This program runs much the same, requiring the case to be filed and then opening up the opportunity for mediation.[148] The program also promotes itself toward landlords exposed to severe financial harm due to the pandemic and the resulting economic downturn.[149] Specifically, Kane's program has dedicated counselors and financial assistance for both parties if they are willing to go through the process.[150]

Another interesting part of these systems in Illinois is the existence of non-governmental entities that have been created to oversee mediation programs.[151] In the first, sixth, and twentieth circuits, the Dispute Resolution Institute is the primary group that attends to the task.[152] While groups such as this are primarily interested in promoting alternative dispute resolution in general since their members are often mediators, they can fit into the standard eviction process and serve as a mediation diversion program when needed, helping to relieve the burden on the court.[153]

IV. A PATH FORWARD WITH MANDATORY MEDIATION OF SOME EVICTION CASES

A. The Solution, Generally

To address the problems with current eviction procedures in Illinois, this Note suggests implementing a mandatory mediation diversion into the residential eviction process. The general goal is to bring the parties together after the relationship has broken down and resolve the dispute without formal court proceedings.[154] By doing this, the parties have a better chance of resolving the situation without going through the expense and difficulty of bringing a case to trial.[155]

At this point in the process, a court-sponsored intermediary is introduced. The intermediary's job would be to provide a neutral force to help consider the situation and try to work with both parties to see what each

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146 *Id.*

147 *Kane County Eviction Mediation*, 16TH JUD. CIR. CT. OF ILL., https://www.illinois16thjudicialcircuit.org/Pages/evictionmediation.aspx (last visited Jan. 11, 2025).

148 *Id.*

149 *Id.*

150 *Id.*

151 *Our Mission*, DISP. RESOL. INST., https://dri-inc.org/ (last visited Jan. 11, 2025).

152 *Id.*

153 *Id.*

154 *See generally id.*

155 *See* Letter from Vanita Gupta, *supra* note 78.

side can do to bring the matter to a close.[156] The court then assigns this mediator to preside over a mediation session with the landlord, their agent, and the tenant. In most cases, this mediator could successfully work out terms that would give the property back to the landlord while also trying to provide the tenant time to vacate the residence without having a formal eviction on their record.

If the mediator cannot bring the parties to terms, the case returns to court for trial. The standard process resumes, and the defendant must answer the complaint and face a jury or bench trial.[157] The goal is for the mediator to resolve the dispute before the court starts holding hearings and other actions, thus using up valuable and limited court resources.[158]

B. How Mandatory Mediation Will Work in Illinois and the Resulting Impact

Mandatory mediation is triggered once a landlord-tenant dispute has occurred that would ordinarily require court intervention, such as the lease getting terminated for non-renewal, non-payment, or some violation of the lease terms, and the tenant has been given the appropriate notification. Usually, this is where an ejection action would be filed and an initial hearing scheduled; instead, the new step is implemented. The landlord still files his complaint for ejection, but now the clerk of the appropriate county court will submit the complaint and party information to a selected mediator to begin the new process.

For this system, a mediator would be selected by rotating from a list.[159] The exact criteria to be included on the list could be individual to the county depending on who is available, such as third-party attorneys, former judges, and others.[160] The created statute should provide general guidelines to help local courts craft their systems, like educational or experiential requirements.[161] The statute could also lay out compensation and apportion funds or require fees paid by parties that legislators consider appropriate.[162]

The mediator's prerogative is to bring the parties to terms. Mediation also allows them to express their frustrations and to get both sides to see things from the other's perspective.[163] Another function of a mediator is to

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156 *Kane County Eviction Mediation*, *supra* note 147.

157 Elias Arnold & Missy Greathouse, *Eviction Mediation*, ISBA: L. RELATED EDUC. (Sept. 2022), at 3, https://www.isba.org/sites/default/files/sections/lawrelatededucationforthepublic/newsletter/Law%20Related%20Education%20for%20the%20Public%20September%202022.pdf.

158 *Id.*

159 *See generally* Ill. 19th Jud. Cir. Ct. r. 7-4.06.

160 *See generally id.* at 7-4.06(g).

161 *See generally id.* at 7-4.06.

162 *See generally id.* at 7-4.06(g).

163 *See generally* Arnold & Greathouse, *supra* note 157.

inform the parties of the likely outcome if a settlement is not reached, the added expenses for the landlord, and the potential impact of having an eviction on a tenant's record should the landlord succeed.[164] Mediators suggest terms to both sides, such as time to move out or partial repayment of outstanding rent.[165] One benefit of mediation is that mediators can also suggest unique compromises that the court could not impose following a trial, and such solutions may not otherwise be apparent to either party.[166] Even if ultimately unsuccessful, mediators might save the court time and resources by discouraging tenants from pursuing hopeless battles and convincing landlords to allow time for tenants to relocate. A successful mediation saves the court time and resources by now only needing to compensate one mediator rather than a judge, clerk, and courthouse staff for the time spent on formal proceedings.[167]

Naturally, some cases cannot be resolved through settlement. Some tenants may have a valid case to defend against eviction and be in a position where they cannot move out of a place in sufficient time to satisfy a landlord. Where a mediated agreement is impossible, the steps forward are just a return to the original process. After the mediator has determined that a settlement is unlikely, he would then transfer the case back to the clerk of the court to have the initial hearing scheduled, and the normal ejectment action proceeds.[168]

C. How This System Could Be Implemented

As the changes to this system are significant, the realistic approach is through legislation that is supplemented as needed by Illinois Supreme Court guidelines and newly promulgated rules to help ease the transition. The Illinois General Assembly must insert new language into current civil procedure rules to add the mandatory mediation step into existing law. They would also need to add additional language to cover the selection of mediators and the increased budgetary requirements.[169] This change to the statutory code must essentially adjust the eviction timeline since it would add a new required step between filing a case with the court and an initial hearing. The statute must also designate the exact requirements for which cases must go through the mediation diversion. This proposal suggests that the state mandate a program be created but leave the specifics to each county to design based on their specific needs.

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164 *See generally id.*
165 *See generally id.*
166 *See generally Kane County Eviction Mediation*, *supra* note 147.
167 *See generally id.*
168 *See generally id.*
169 *See generally* Ill. 19th Jud. Cir. Ct. r. 7-4.06.

After the legislature completes its work, the court could then draft guidelines for the county circuits to implement the new procedures.[170] Some of the courts already have voluntary mediation programs, so they have some experience in how this system could operate.[171] However, strong guidance from the state supreme court is paramount for a smooth transition to the new system. The court could also prepare guidelines for the selection of mediators[172] such as requiring mediators to be attorneys or otherwise professionally trained.[173] Still, other requirements, such as avoiding conflicts of interest, are essential.[174] Other provisions, including specific training programs that could be created to help educate mediators on the particular issues unique to eviction cases, could also be implemented.[175]

Additionally, it is prudent that the court leave room for the lower courts to adjust fine details of their mediation systems to fit local needs, as different counties will have vastly different needs to implement the new system.[176] More populous counties with existing mediation systems have a different experience than those more rural counties that see very few eviction cases, thus having different needs to successfully implement the new system.[177] Finally, current educational resources for landlords and tenants alike must be updated to reflect the latest procedural stage, including the notice that must be sent to tenants facing eviction by their landlords as part of the process.[178]

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170 *See generally* ILL. SUP. CT r. 1 (2004).

171 *See Kane County Eviction Mediation*, *supra* note 147; *see* Ill. 19th Jud. Cir. Ct. r. 7-4.06.

172 *See generally Guide to Selecting a Mediator*, CTR. FOR ALT. DISP. RESOL. HAW. ST. JUDICIARY (2013), https://www.courts.state.hi.us/wp-content/uploads/2023/07/cadr_Select-MediatorAR-P-066.pdf.

173 *See generally Court-Certified Mediator Qualification Requirements by State*, ONLINE MASTER LEGAL STUD. PROGRAMS (May 2021), https://onlinemasteroflegalstudies.com/career-guides/become-a-mediator/court-certified-mediation-requirements-by-state/#:~:text=of%20Illinois%20open_in_new-,General%20Requirements%3A,eligible%20for%20court%2Dconnected%20mediation.

174 *See* MODEL STANDARDS CONDUCT FOR MEDIATORS, Standard III (AM. BAR ASS'N 2005) ("A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation.").

175 *See id.* at Standard IV ("Training, experience in mediation, skills, cultural understandings and other qualities are often necessary mediator competence.").

176 *See A Tale of Two Counties: Mediation & Local Attorneys*, NORRIS LEGAL GRP. (Nov. 5, 2012), https://norrislegalgroup.com/blog/2012/11/a-tale-of-two-counties-mediation-local-attorneys/ (comparing mediation procedures in Los Angeles County with such procedures in Ventura County).

177 *See* Akash Chatterjee, *Mediation in the Rural and Urban Society—Reaching Sustainable Horizons*, 8 INT'L J. CREATIVE RSCH. THOUGHTS 679 (2020) (comparing mediation access and procedures in rural and urban societies).

178 *See, e.g.*, *Your Guide to Landlord-Tenant Law*, *supra* note 23.

CONCLUSION

The eviction system in Illinois needs repair.[179] It suffers from both disorders inherent in the inefficiencies in our legal system and those stemming from its participants' uneven positions and needs.[180] Landlords seek a steady investment and a sound business they can maintain.[181] Tenants need to meet their housing needs, and with limited options, they have no real alternative but to depend on landlords to fulfill that need.[182] These circumstances establish the relationship and so begins the problem; if the relation breaks down, rent is not paid, or a lease is violated, what recourse exists but a binary choice? A landlord serves notice and waits for it to expire, then the tenant leaves of their own volition, or they stay, and the landlord is left only with eviction as their remedy.[183] With only one option, a landlord must then proceed and face down the barrel of a lengthy and ultimately expensive process. The tenant faces the same issue, with the added pressure of potentially losing their home.

Now enters the court, already struggling to keep up with its caseload.[184] Initial appearances are ordered, and either the judge gets the parties to agree to terms, then and there, someone reveals they do not have a case, whether it be a defect created by the landlord's negligence or the tenant who fails to challenge the factual assertions arrayed against them, or the case is set for trial.[185] A trial date must then be scheduled, delaying the issue even longer with the trial itself taking up more time.[186] Trials often result in disappointing outcomes as the litigants are not lawyers and have little experience with procedural rules and etiquette and the judge having to make sense of it all and come up with a workable solution for everyone. This process repeats for each of the tens of thousands of cases filed each year, wasting more and more of the court's time when both parties could ultimately have come to an agreement on their own with a little help from a neutral third party. This situation further deteriorated during COVID-19 and the resulting surge of

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179 *See* Jessica Schneider, *Eviction 101: Helping Tenants in Unprecedented Times*, 33 DCBA BRIEF 8 (2021) (explaining how the COVID pandemic has overloaded the eviction system in Illinois).

180 Exec. Order No. 2020-72.

181 *See* Zoe Harper, *How to Become a Successful Landlord*, STEADILY (Feb. 21, 2024), https://www.steadily.com/blog/how-to-become-a-successful-landlord (emphasizing the importance of making a steady profit as a landlord).

182 *See generally* Dana, *supra* note 2, at 79–81 (discussing the general issues facing families today in balancing finances for housing).

183 *See* 735 ILL. COMP. STAT. ANN. 5/9-102(a)(7) (West 2021) (stating that eviction may be ordered when "the owner of a unit fails or refuses to pay when due his or her proportionate share . . . .").

184 *See* Sally Adelstein, *Overloaded Courts System*, ILL. MUN. REV. (Nov. 1991), https://www.lib.niu.edu/1991/im911113.html.

185 *See generally* 735 ILL. STAT. COMP. ANN. 5/2-1001–1020 (West 2006) (outlining the pre-trial steps that must be taken in a civil action, such as a landlord-tenant suit).

186 *See generally id.*

evictions afterward, necessitating the Illinois Supreme Court to encourage local circuits to establish mediation programs.[187]

Mandatory mediation programs already exist and have been successful in the United States,[188] thus demonstrating the viability of the proposed solution.[189] A mediation diversion before the case comes to court is like other Illinois programs.[190] This plan builds off those ideas to make a more robust, efficient system that benefits parties and the courts. By taking existing mediation solutions and empowering local counties to tailor their systems, the entire state can take advantage of mediation while retaining local control to ensure better success.[191] Judicial proceedings are complicated enough, and the pandemic did not do the state any favors. Something must be done to bring relief to the system.[192]

Many of these cases could have been resolved more efficiently through earlier interventions, where both sides were made to understand the likely outcome of the process.[193] Reaching a mutually agreeable solution early saves time and money for all involved.[194] Court intervention should occur only as a last resort after attempts at third-party mediation have failed.[195] Mandatory mediation for eviction works and has been successfully implemented in the preliminary stage of eviction proceedings.[196] Illinois will continue to face an increasing flow of eviction cases. Landlord-tenant disputes will exist so long as landlords continue to rent out private property. When a preliminary negotiation can resolve the issue, there is no need to haul everyone into court for a hearing.[197] Illinois must modify its current

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187 *In re* Ill. Courts Response to Covid-19 Emergency/ Eviction Early Resolution Programs, 2021 Ill. LEXIS 236, at *1 (Ill. Feb. 23, 2021).

188 *PHL Eviction Diversion*, *supra* note 131.

189 Karen Tokarz et al., *Addressing the Eviction Crisis and Housing Instability Through Mediation*, 63 WASH. U. J. OF L. & POL'Y 243, 244 (2020) (discussing how mediation is a more effective resolution for disputes in evictions and how data has shown that mandatory mediation for evictions leads to much better outcomes).

190 *See DuPage County Eviction Mediation Program*, *supra* note 140.

191 *See generally* HB23-1120, 74th General Assembly, 1st Reg. Sess. (Colo. 2023) (showing that there are existing mandatory mediation programs for evictions in place that local governments could tailor to fit their individual needs).

192 *See* Jordyn Reiland, *Virus Brings Numerous Cancellations: Covid-19: Illinois Circuit Court Case Suspensions and Delays*, CHI. DAILY L. BULL. (Apr. 30, 2020), https://www.chicagolawbulletin.com/the-covid-19-call-what%E2%80%99s-canceled-around-the-legal-community-20200313 (discussing how the pandemic has affected the legal and governmental world based on suspension and delays).

193 *See Advantages of Mediation*, *supra* note 10 (discussing how mediation is much quicker, less expensive, while also experiencing more control of the outcome of their dispute).

194 *See id.*

195 *See id.*

196 *See generally* Dana, *supra* note 2, at 91–93 (discussing the success recognized by the Biden administration of a mandatory mediation diversion in Philadelphia).

197 *See* Jonathan Morton, *Preliminary Issues: Winning the Battle Before It Begins*, HAYNES BOONE (June 21, 2018), https://www.haynesboone.com/news/publications/preliminary-issues-winning-

procedures to insert this mediation step before the initial appearance, if for no other reason than in the name of efficiency. Adding mandatory mediation is an easy step to take and offers both parties a chance to be more satisfied than the resultant proceedings would have ever left them.[198] It might also allow both sides to air grievances and release tension over a difficult situation.[199] A landlord gets their property back, or at least the knowledge it will be theirs in due course, and a tenant can be more secure in knowing what they need to do in the future, whether that be finding somewhere else to go or perhaps even paying off debt and remaining in their home.

Courts in Illinois are drowning under the staggering weight of eviction cases filed throughout the state. It is past time that the General Assembly recognize this issue and throw the judicial system a life preserver. Mandatory mediation can both lighten the load and achieve better outcomes for litigants. This new system is the answer Illinois needs.

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the-battle-before-it-begins (discussing the positive characteristics of resolving claims without resorting to litigation).

198 *See Advantages of Mediation*, *supra* note 10 (discussing how mediation allows for parties to have more control over the outcome of their dispute and how parties are "generally more satisfied with solutions that they have had a hand in creating, as opposed to solutions that are imposed by a third-party decisionmaker").

199 *See id.* (discussing how mediation allows for parties to address their interests and allow for a more amicable route).