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ARTICLES AND SURVEYS

USING THERAPEUTIC JURISPRUDENCE TO IMPROVE NURSING HOME REGULATION DURING FUTURE PANDEMICS

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* Professor Kathy L. Cerminara bridges the medical and legal professions with her work on patients' rights in end-of-life decision-making. In addition, as an affiliate faculty member at NSU's Kiran C. Patel College of Allopathic Medicine, she incorporates a therapeutic jurisprudence focus into interprofessional education. This article supported in part by the Shepard Broad College of Law and in part by the South Florida Geriatric Workforce Enhancement Program is an example. Professor Cerminara is grateful to not only those funding sources and her co-authors, but also to faculty members providing comments at workshops at the Shepard Broad College of Law and Touro Law Center. She earned her B.S. in Journalism at Ohio University, her J.D. *magna cum laude* from the University of Pittsburgh School of Law, and her LL.M. and J.S.D. from Columbia University School of Law.

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I. INTRODUCTION

Therapeutic jurisprudence ("TJ") is a school of thought suggesting that legislatures, regulators, attorneys, and judges consider the extent to which rules, laws, and procedures impact the psychological well-being of those upon whom the law acts.[1] The desire for positive psychological impact should not be the only, or even the primary, consideration when weighing appropriate legal action using TJ.[2] Rather, without limiting focus, TJ explicitly favors an

1. Kathy L. Cerminara, *Therapeutic Jurisprudence's Future in Health Law: Bringing the Patient Back into the Picture*, INT'L J.L. & PSYCHIATRY, Mar.–Apr. 2019, at 56, 58; *see*, *e.g.*, David B. Wexler & Bruce J. Winick, *Introduction, in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (David B. Wexler ed., 1996).

2. *See, e.g.*, Wexler & Winick, *supra* note 1, at xvii.

> The therapeutic jurisprudence heuristic suggests that the law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, like it or not, often produce therapeutic or antitherapeutic consequences. [A]nd that we ask whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values.

Id.

interdisciplinary approach and counsels us to "consult [other] disciplines, consider the law's therapeutic or anti-therapeutic effects on those it affects, and, importantly, see if the other disciplines have solutions to offer to remedy any anti-therapeutic effects of the law."[3] If data about the law's psychological effects or potential solutions does not yet exist, TJ scholarship can urge research in that direction.[4]

Within the field of health law, TJ analysis of the effects of laws, rules, or procedures may also include consideration of physical outcomes resulting from mental states as significant factors.[5] As Professor Scott Burris and colleagues explained, "[i]t is past time for a [real] recognition in our health system that law is a ubiquitous treatment, one to which hundreds of millions of people are routinely exposed."[6] Professor Burris is a proponent of legal epidemiology, which quantitatively analyzes the effect of law on health.[7] TJ may be seen as the mental health law equivalent of legal epidemiology, examining law as a treatment producing mental health outcomes among those it affects.[8]

Chief among those health law affects are patients.[9] Professor Mark Hall, for example, has proposed a patient-centered approach to health law, indicating that the law's effects on patients' mental and physical health should

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3. Kathy L. Cerminara, *Today's Crusades: A Therapeutic Jurisprudential Critique of Faith-Based Civil Rights in Health Care*, 13 ALB. GOV'T L. REV. 1, 19 (2019).

4. *See, e.g.*, Wexler & Winnick, *supra* note 1, at xvii.

> [T]he therapeutic jurisprudence lens enables the identification of questions in need of empirical research. Speculation about the therapeutic consequences of various legal arrangements or law reform proposals can itself be useful, but empirical research is often necessary to determine whether the law actually operates in the way that theory assumes.

Id.

5. Cerminara, *supra* note 1, at 58–59.

6. Scott Burris et al., *The "Legal Epidemiology" of Pandemic Control*, NEW ENG. J. MED., May 27, 2021, at 1973.

> The imperative is to scale up the infrastructure for at least three kinds of research: study of the mechanisms, effects, side effects, and implementation of laws designed to influence health, such as Covid control measures; research on how the legal infrastructure of the U.S. health system—the allocation of powers and duties, as well as limits on authority—influences the effectiveness of the system; and perhaps most important for addressing health equity, studies of how laws that may appear to have no health purposes—such as the tax code, minimum wage, and labor rules—shape the social determinants of health.

Id. at 1975.

7. *See id.* at 1973.

8. *See id.*; Cerminara, *supra* note 1, at 58.

9. *See* Cerminara, *supra* note 1, at 57–58.

be primary considerations.[10] Yet effects on providers, family members, and friends should not be ignored.[11] Ultimately, because "the 'central objective' of the health care industry 'is individual health and well-being,'" this Article will focus primarily on patients.[12] Consideration of the effects on providers, family members, and friends will be included, but only to the extent they affect patients psychologically or physically.[13]

COVID-19 provides an excellent opportunity for TJ analysis, for isolation and no-visitation policies within nursing homes produced loneliness and despair that resulted in sub-optimal physical conditions among patients.[14]

This Article will begin by situating COVID-19 within a long line of pandemics, illustrating the need for preparation for the next pandemic the world will eventually encounter.[15] Because this Article, in the tradition of TJ scholarship, will propose continued future monitoring and collection of medical and social science data, it will next review the structure of nursing home regulation and trace its relevant development in the United States during COVID-19 for non-legal researchers in the relevant fields.[16]

Then, through analyzing "patients' actual experiences . . . with physicians, . . . other care providers, hospitals, and other facilities," this Article will discuss the demonstrable mental and physical harm that regulatory policies inflicted upon residents in nursing homes, using Florida as a state-level exemplar.[17] Finally, this Article will collect, analyze, and propose

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10. *See* Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 468 (2002) [hereinafter *Hall 2002*]; Mark A. Hall, *Musings on Patient-Centered Law and Ethics*, 45 WAKE FOREST L. REV. 1461, 1461 (2010) [hereinafter *Hall 2010*].

11. Cerminara, *supra* note 1, at 58.

12. *Id.*; *see* discussion *infra* Section III.C; *Hall 2002*, *supra* note 10, at 468; *Hall 2010*, *supra* note 10, at 1466.

13. *See* discussion *infra* Section III.B.

14. *See, e.g.*, Nina A. Kohn, *Nursing Homes, COVID-19, and the Consequences of Regulatory Failure*, 110 GEO. L.J. (forthcoming Spring 2021) (manuscript at 1, 3–4); Barbara Pfeffer Billauer, *Health Inequity and the Elderly: The Impact of Pandemic-Policy, Bioethics, and the Law* 89–90, 93–94 (2021); ANNE MONTGOMERY ET AL., EXPERIENCES OF NURSING HOME RESIDENTS DURING THE PANDEMIC 2 (2020), http://altarum.org/sites/default/files/uploaded-publication-files/Nursing-Home-Resident-Survey_Altarum-Special-Report_FINAL.pdf.

15. *See* discussion *infra* Part II.

16. *See* discussion *infra* Part II.

> [T]he therapeutic jurisprudence lens enables the identification of questions in need of empirical research. Speculation about the therapeutic consequences of various legal arrangements or law reform proposals can itself be useful, but empirical research is often necessary to determine whether the law actually operates in the way that theory assumes.

Wexler & Winick, *supra* note 1, at xvii.

17. *Hall 2002*, *supra* note 10, at 467; *see* discussion *infra* Section III.C.

improvements for consideration during the next pandemic, since there surely will be another pandemic.[18] As both federal and Florida regulators recognized during COVID-19, their initial regulatory activities were overwhelmingly anti-therapeutic. Regulation in the next pandemic should, if necessary, at all, move through that initial phase more quickly. Then regulators should move quickly to replicate the steps they took in the latter phase of the COVID-19 pandemic, as long as doing so is consistent with the medical and public health evidence.[19]

II. THE LATEST IN A LONG LINE OF PANDEMICS

"Very few phenomena throughout human history have shaped our societies and cultures the way outbreaks of infectious diseases have," COVID-19 being no exception.[20] Following the first recorded pandemic in 430 BC, "pandemic outbreaks have decimated societies, determined outcomes of wars, [and] wiped out entire populations . . . ."[21] Throughout history, diseases such as the bubonic plague, leprosy, influenza, measles, and poliomyelitis—to name a few—have claimed the lives of millions, taking a tremendous toll on the worldwide population with each outbreak.[22]

These outbreaks have "also paradoxically cleared the way for innovations and advances in sciences (including medicine and public health), economy, and political systems."[23] Measures to control the effects of pandemics have evolved through the centuries, influenced by scientific

18. *See* discussion *infra* Section IV.C.

19. *See* discussion *infra* Part III; Press Release, Fla. Gov. Press Office, Governor Ron DeSantis Announces Task Force to Explore the Safe and Limited Re-Opening of Long-Term Care Facilities (Aug. 6, 2020), https://www.flgov.com/wp-content/uploads/covid19/Governor%20Ron%20DeSantis%20Announces%20Task%20Force%20to%20Explore%20the%20Safe%20and%20Limited%20Re-Opening%20of%20Long-Term%20Care%20Facilities.pdf.

20. *See* DAMIR HUREMOVIĆ, BRIEF HISTORY OF PANDEMICS (PANDEMICS THROUGHOUT HISTORY) IN PSYCHIATRY OF PANDEMICS 7 (2019).

21. *Id.*; *see also* Jocelyne Piret & Guy Boivin, *Pandemics Throughout History*, 11 FRONTIERS MICROBIOLOGY, Jan. 15, 2021, at 1, 1.

22. *See* HUREMOVIĆ, *supra* note 20, at 14, 20; Seema Mohapatra, *Law in the Time of Zika: Disability Rights and Reproductive Justice Collide*, 84 BROOK. L. REV. 325, 431 (2019); *Measles History,* CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/measles/about/history.html (last visited Apr. 19, 2022).

23. HUREMOVIĆ, *supra* note 20, at 7; *see also* MARIO ARTURO RUIZ ESTRADA & ALAM KHAN, GLOBALIZATION AND PANDEMICS: THE CASE OF COVID-19 13 (2020), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3560681.

knowledge, available resources, and regulatory and societal systems.[24] As pandemics became a very real threat in a globalized world, the need for international regulatory mechanisms to identify emerging health threats prompted the creation of International Health Regulations ("IHR") in 1969.[25]

Since its creation, the IHR has undergone several revisions, the most recent of which was promulgated in 2005.[26] As an international treaty, the IHR is legally binding, meaning that all countries must report events of international public health importance.[27] Among other things, it established the criteria to be used in order to determine if an event should be considered "a public health emergency of international concern" ("PHEIC").[28] In the twenty-first century alone, the World Health Organization ("WHO") has declared multiple diseases as PHEICs, COVID-19 being one of them.[29]

COVID-19 emerged and spread quickly.[30] In December 2019, an outbreak of a new respiratory illness was detected in Wuhan, China.[31] By January 2020, the WHO had declared the new illness a PHEIC, which was named COVID-19 on February 11, 2020.[32] In March 2020, the WHO declared

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24. *See, e.g.*, WORLD HEALTH ORG., PANDEMIC INFLUENZA PREPAREDNESS & RESPONSE: A WHO GUIDANCE DOCUMENT 3 (2009), http://apps.who.int/iris/bitstream/handle/10665/44123/9789241547680_eng.pdf?sequence=1&isAllowed=y; Dean T. Jamison et al., *Universal Health Coverage and Intersectoral Action for Health*, *in* 9 DISEASE CONTROL PRIORITIES: IMPROVING HEALTH AND REDUCING POVERTY, 3, 11, 223 (Dean T. Jamison et al. eds, 3d 2018).

25. *See* WORLD HEALTH ORG., INTERNATIONAL HEALTH REGULATIONS 1 (3d. ed. 2005) (ebook) [hereinafter INTERNATIONAL HEALTH REGULATIONS 2005].

26. *See id.*

27. *See id.* ("The IHR are an instrument of international law that is legally-binding on 196 countries, including the 194 WHO Member States."); *International Health Regulations*, WORLD HEALTH ORG., http://www.who.int/health-topics/international-health-regulations#tab=tab_1 (last visited Apr. 19, 2022).

28. INTERNATIONAL HEALTH REGULATIONS 2005, *supra* note 25, at 1.

29. *Id.* at 9 (defining PHEIC as "an extraordinary event . . . [that may] constitute a public health risk to other [countries] through the international spread of disease and [may] . . . require a coordinated international response."); Lawrence O. Gostin & Meryl Justin Chertoff, *Lockdowns, Quarantines, and Travel Restrictions, During COVID and Beyond: What's the Law, and How Should We Decide?*, HEALTH AFFS. BLOG (Mar. 24, 2021), http://www.healthaffairs.org/do/10.1377/forefront.20210322.450239/ (explaining that the WHO has designated five previous diseases as PHEICs including "H1N1, Ebola (twice), the Zika virus, and polio. . . .").

30. *Identifying the Source of the Outbreak*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/coronavirus/2019-ncov/science/about-epidemiology/identifying-source-outbreak.html (last updated July 1, 2020).

31. *Id.*

32. *Timeline: WHO's COVID-19 Response*, WORLD HEALTH ORG., http://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline (last visited Apr. 19, 2022).

COVID-19 a pandemic after discovering that more than one million cases had been confirmed worldwide.[33] By May 2020, the number of deaths from COVID-19 had surpassed 100,000 in the United States.[34] The speed with which the virus developed and spread confounded scientists who were attempting to research the virus and policy makers attempting to govern through it.[35]

COVID-19 was, and still is, a serious public health threat caused by SARS-CoV-2 from the coronavirus family.[36] The virus passed from animals to humans in a mutated form, causing severe respiratory illnesses.[37] It is easily spread from person to person through respiratory droplets produced when an infected person coughs, sneezes, or talks.[38] The effects of the disease range from mild to severe, and some infected individuals may display no symptoms whatsoever.[39] Adults over sixty-five years of age and those of any age with underlying health conditions are at a higher risk of experiencing more severe symptoms of the disease than others.[40] As of February 18, 2022, the WHO reported over 418 million confirmed cases of COVID-19 globally and over 5.8 million deaths.[41] As of March 30, 2022, the United States accounted for a confirmed and presumptive eighty-one million of those cases, tragically resulting in over nine hundred thousand deaths.[42]

As the pandemic progressed new variants of COVID-19 have emerged, having a significant impact on transmissibility and severity of the virus, as well as posing challenges to its effective control.[43] Measures that can

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33. Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91 ACTA BIOMEDICA 157, 157 (2020).

34. Press Release, Ctrs. for Disease Control & Prevention, United States Coronavirus (COVID-19) Death Toll Surpasses 100,000 (May 28, 2020), http://www.cdc.gov/media/releases/2020/s0528-coronavirus-death-toll.html.

35. *See id.*; R. Tamara Konetzka, *Improving the Fate of Nursing Homes During the COVID-19 Pandemic: The Need for Policy*, 111 AM. J. PUB. HEALTH 632, 632 (2021).

36. *Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/dotw/COVID-19/index.html (last visited Apr. 19, 2022).

37. *See id.*; Nita Madhav et al., *Pandemics: Risks, Impacts, and Mitigation*, *in* 9 DISEASE CONTROL PRIORITIES: IMPROVING HEALTH AND REDUCING POVERTY 315, 318 (Dean T. Jamison et al. eds., 3d ed. 2018); *Identifying the Source of the Outbreak*, *supra* note 30.

38. *Coronavirus Disease 2019 (COVID-19)*, *supra* note 36.

39. *Id.*

40. *Id.*

41. *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., http://covid19.who.int (last updated Apr. 14, 2022, 8:36 PM).

42. *United States*, WORLDOMETER, http://www.worldometers.info/coronavirus/country/us/ (last updated Apr. 18, 2022, 8:20 PM).

43. *The Effects of Virus Variants on COVID-19 Vaccines*, WORLD HEALTH ORG. (Mar. 1, 2021), http://www.who.int/news-room/feature-stories/detail/the-effects-of-virus-variants-on-COVID-19-vaccines.

further control the spread of pandemics vary according to pathogen-specific and population-level factors, including methods of transmission, population density, population susceptibility to infections, migration, and movement patterns, among others.[44] Many efforts to curb the impact of COVID-19 have paralleled those implemented in prior pandemics and have included: (1) limiting or eliminating interactions between infected and uninfected individuals, achieved by implementing patient isolation, social distancing practices, school closures, and quarantines; (2) reducing levels of infectiousness of patients exhibiting symptoms by providing antibiotics and/or instituting infection control practices; and (3) reducing susceptibility of individuals not infected through vaccination.[45]

III. A REGULATORY ODYSSEY THROUGH NURSING HOME RESIDENTS' VISITATION RIGHTS

While states generally regulate health care facilities as an exercise of their police power, federalism greatly complicates any health care regulation within the representative democracy of the United States.[46] During PHEICs or other public health emergencies, the federal Centers for Disease Control ("CDC"), the federal Department of Health and Human Services ("HHS"), and the federal Department of Veterans Affairs ("VA") wield a great deal of power, either because of the borderless nature of infectious disease or due to the power of the purse.[47] Yet the states govern health care quality and safety through facility licensure, as an exercise of their traditional police powers.[48] During the COVID-19 pandemic, such cooperative federalism has faced bitter

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44. *See* Madhav et al., *supra* note 37, at 319, 329.

45. *Id.* at 329.

46. *E.g.*, Wendy E. Parmet, *Regulation and Federalism: Legal Impediments to State Health Care Reform*, 19 AM. J.L. & MED. 121, 122 (1993) (citing Michael S. Morgenstern, *The Role of the Federal Government in Protecting Citizens from Communicable Diseases*, 47 U. CIN. L. REV. 537, 541 (1978)) ("In the early days of the Republic, regulation of health care lay primarily within the province of the states and local governments"). There is an ideological debate over whether the United States is a representative democracy or a republic. *See* George Thomas, '*America Is a Republic, Not a Democracy' Is a Dangerous — and Wrong — Argument*, ATLANTIC (Nov. 2, 2020), http://www.theatlantic.com/ideas/archive/2020/11/yes-constitution-democracy/616949/; *but compare* BERNARD DOBSKI, AMERICA IS A REPUBLIC, NOT A DEMOCRACY 1–2 (2020), http://www.heritage.org/sites/default/files/2020-06/FP-80.pdf, *with* Eugene Volokh, *Is the United States of America a Republic or a Democracy?*, WASH. POST: VOLOKH CONSPIRACY (May 13, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/13/is-the-united-states-of-america-a-republic-or-a-democracy/.

47. *See, e.g.*, Heather D'Adamo et al., *Coronavirus Disease 2019 in Geriatrics and Long-Term Care: The ABCDs of COVID-19*, 68 J. AM. GERIATRIC SOC'Y 912, 913 (2020).

48. *See* U.S. CONST. amend. X.

partisanship and politically motivated infighting, sometimes sending conflicting messages to nursing home operators.[49] As legal and medical scholar James Hodge has opined, "COVID-19 . . . has severely tested the boundaries of federalism, revealing substantial drawbacks of a nation of sovereign states attempting to respond to a disease that ignores boundaries."[50]

This section first will outline nursing home regulation in Florida and the state's interaction with federal regulators, as a primer for non-legal researchers using this Article to design future empirical studies or craft future policy. Second, it will lay groundwork for a discussion of visitation limitations by explaining how, under normal conditions, state and federal law both guarantee nursing home residents' rights to in-person visitation. Finally, it will trace the odyssey traveled by those regulators as COVID-19 rapidly developed and spread.

A. *Nursing Home Regulation in Florida*

Dissecting Florida's experience instead of another state's is appropriate because as of 2021, Florida had one of the largest elderly populations in the nation.[51] As an important illustration of state-level regulation, Florida nursing home facilities are regulated at the state level by the Florida Agency for Health Care Administration ("AHCA").[52] The state retains the sole discretion to revoke or deny a facility licensure; AHCA provides annual licensures and performs regular inspections to ensure facilities are meeting state and federal standards.[53] During COVID-19, the Florida

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49. *See, e.g.*, D'Adamo et al., *supra* note 47, at 913; James G. Hodge, Jr., *Nationalizing Public Health Emergency Legal Responses*, 49 J.L., MED. & ETHICS 315, 316 (2021) ("Foundational principles of cooperative federalism support the notion that federal and state governments share responsibility for preserving the nation's health. States are reserved inherent police powers to generally protect public health and safety. Enumerated powers ascribed to the federal government are limited, but supreme.") (footnote omitted).

50. Hodge, *supra* note 49, at 316. The competing government powers, regulatory overlay, and conflicting guidance all support the conclusion that "[u]nless we find the political will to fundamentally change the way we pay for and deliver long-term care, we will never make meaningful improvements and cannot be prepared for the next pandemic." Konetzka, *supra* note 35, at 633.

51. Matthew Giovenco, Article, *Lessons the Long-Term Care Industry can Learn from the Covid-19 Pandemic*, 51 STETSON L. REV. 123, 124 (2021) (explaining that "nearly 4.5 million elders call Florida home" and the number of nursing homes in Florida is the "sixth highest in the nation").

52. *See* FLA. ADMIN. CODE R.59A-4.106 (2020).

53. *About the Agency for Health Care Administration*, AGENCY FOR HEALTH CARE ADMIN., http://ahca.myflorida.com/Inside_AHCA/index.shtml (last visited Apr. 19, 2022); *see* 42 C.F.R. § 482.1 (2020).

Department of Health ("DOH") worked closely with AHCA to ensure compliance with all regulatory guidance.[54] While this Article uses Florida as an example, many states have similar, if not identical, regulatory infrastructure.[55]

At the federal level, the HHS regulates nursing homes through the Centers for Medicare and Medicaid Services ("CMS").[56] Florida nursing homes that accept funds through Medicare and Medicaid programs are bound to adhere to state and federal law, and they are also subject to the regulatory oversight of the CMS.[57] CMS sets quality and safety standards for all participating health care facilities often referred to as "conditions of participation."[58] One of the conditions CMS imposes on facilities is the requirement that the facilities maintain infection control programs.[59] The penalties for violation of CMS requirements, however, are not as drastic as the potential state-level penalty of ultimate de-licensure.[60] HHS, as noted earlier, controls through the power of the purse.[61] While the vast majority of nursing

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54. *COVID19 Alerts for Facilities and Medicaid Providers*, AGENCY FOR HEALTH CARE ADMIN., http://ahca.myflorida.com/COVID-19_alerts.shtml (last visited Apr. 19, 2022).

55. *See* Angela T. Chen et al., *Long-Term Care, Residential Facilities, and COVID-19: An Overview of Federal and State Policy Responses*, 21 J. AM. MED. DIRS. ASS'N 1186, 1187 (2020).

56. Alan F. Levitt & Shari M. Ling, *COVID-19 in the Long-Term Care Setting: The CMS Perspective*, 68 J. AM. GERIATRIC SOC'Y 1366, 1366 (2020).

57. *See id.*; FLA. ADMIN. CODE R.59A-4.106; Kohn, *supra* note 14, at 5.

58. 42 C.F.R. § 483.1 (2020).

> Consolidated Medicare and Medicaid requirements for participation (requirements) for Long Term Care (LTC) facilities (42 CFR part 483, subpart B) were first published in the Federal Register on February 2, 1989 (54 FR 5316). The requirements for participation were recently revised . . . . [P]ublished in a final rule that became effective on November 28, 2016.

Nursing Homes, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/GuidanceforLawsAndRegulations/Nursing-Homes (last updated Feb. 22, 2022, 5:19 PM).

59. AM. SOC'Y FOR HEALTHCARE RISK MGMT., RISK MANAGEMENT HANDBOOK FOR HEALTH CARE ORGANIZATIONS 338 (Roberta Carrol ed., 2010).

> [S]pecific requirements . . . include (1) the designation of an infection control officer and development of relevant policies that address the identification and control of infections and communicable diseases, (2) the development and maintenance of a log system to track such conditions, and (3) the imposition of responsibility and accountability onto the [long-term care facilities'] CEO, the medical staff, and director of nursing services [to ensure] . . . improvement and training programs are implemented to address issues identified by the infection control officer and implementing corrective action plans in problem areas.

Id.

60. *See* 42 C.F.R. § 488.406 (2020).

61. *See* D'Adamo et al., *supra* note 47, at 913.

homes accept federal Medicare and Medicaid funding, and such funding comprises a significant part of their budgets, failure to comply with conditions of participation will not result in de-licensure.[62] In this way, states and localities remain the more powerful governments in this arena, consistent with police power to ensure the health and safety of residents residing in the state.[63]

Given such regulatory interaction and overlay, efforts to curb the impact of COVID-19 among patients in nursing homes proved especially challenging.[64] In Florida, nursing homes comprise a subset of a broader category of "[l]ong-term care facilit[ies]," defined to include "nursing home facilit[ies], assisted living facilit[ies], adult family-care home[s], board and care facilit[ies], or any other similar residential adult care facility."[65] The population of nursing homes, while not exclusively older adults, is comprised primarily of older adults.[66] As older adults and those of "any age with underlying medical conditions," the nursing home population is at the highest risk for contracting the virus.[67]

These groups of people are also at the highest risk for the most serious consequence of the disease—death.[68] The attributes of the disease itself, the susceptibility of the population, and the close-quartered structure of nursing-

62. 42 C.F.R § 488.406; *see* BRIAN O. BURWELL & WILLIAM H. CROWN, PUBLIC FINANCING OF LONG-TERM CARE: FEDERAL AND STATE ROLES 4 (1994) http://aspe.hhs.gov/sites/default/files/migrated_legacy_files//40966/fedstes.pdf?_ga=2.190094504.269899329.1648690452-362558260.1648690452.

63. *See* Lawrence O. Gostin et al., *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, 324 JAMA 837, 838 (2020) ("Historically, states and localities have assured the public's health, with the CDC providing funding, technical guidance, and coordination.").

64. *See, e.g.*, Kohn, *supra* note 14, at 3–5; Chen et al., *supra* note 55, at 1187; D'Adamo et al., *supra* note 47, at 912.

65. *See* FLA. STAT. § 400.0060(6) (2020).

66. Meagan Cline, *Facts and Statistics About U.S. Nursing Homes*, FIGHT NURSING HOME ABUSE (Oct. 18, 2019), http://www.fightnursinghomeabuse.com/facts-statistics-nursing-homes/. It is estimated that "[a]cross the U.S., there are around 1.4 million people living in nursing homes." *Id.* Of those, only an estimated fifteen percent are under the age of sixty-five, the majority being persons between 85–95 years old. *Id.*

67. *Coronavirus Disease 2019 (COVID-19)*, *supra* note 36.

68. D'Adamo et al., *supra* note 47, at 912.

> One of the defining features of COVID-19 is the predilection for infection of older adults and individuals with chronic underlying health conditions, resulting in higher attack rates and mortality. Given that older adults experience a greater number and severity of chronic diseases and disabilities . . . it is not surprising that older adults residing in long-term care facilities (LTCFs) have the greatest susceptibility to COVID-19, as well as the poorest outcomes from this infection.

Id.

home-living all produced what has been hailed the "perfect storm."[69] Because of that, early efforts to contain and prevent the spread of COVID-19 among residents in nursing homes proved to be vital.[70]

B. *Florida and Federal Recognition of Nursing Home Residents' Right to In-Person Visitation*

In response to COVID-19, federal and state governments restricted visitation to nursing home facilities in Florida by, *inter alia*, suspending existing rights.[71] By suspending the laws discussed below, facilities were free to restrict visitation in contravention to a resident's Bill of Rights, and essentially, that is exactly what the facilities did.[72]

Chapter 400, Florida Statutes, codifies some of the basic rights to which all Florida nursing home residents are entitled.[73] Inherent in these rights is a legislative intent to ensure residents have unencumbered visitation and communication with the people they love.[74] Florida's statute, in pertinent part, specifically affords residents:

> The right to private and uncensored communication, including, but not limited to, . . . visiting with any person of the residents' choice during visiting hours, and overnight visitation outside the facility with family and friends . . . without the resident's losing his or her bed. Facility visiting hours shall be flexible, taking into consideration special circumstances such as, but not limited to, out-of-town visitors and working relatives or friends. Unless otherwise indicated in the resident care plan, the licensee shall, with the consent of the resident and in accordance with policies approved by the agency, permit [groups and individuals providing social

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69. Joseph G. Ouslander & David C. Grabowski, *COVID-19 in Nursing Homes: Calming the Perfect Storm*, 68 J. AM. GERIATRICS SOC'Y 2153, 2153 (2021); Konetzka, *supra* note 35, at 632.

70. *See, e.g.*, Ouslander & Grabowski, *supra* note 69, at 2153; *Interim Infection Prevention and Control Recommendations to Prevent SARS-CoV-2 Spread in Nursing Homes*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html (last updated Sept. 10, 2021) (referring to an older version).

71. *See, e.g.*, Fla. Div. Emergency Mgmt. Order No. 20-002 (Mar. 11, 2020); Memorandum from Director, Quality, Safety & Oversight Grp., to State Surv. Agency Dirs., Guidance for Infection Control & Prevention of Coronavirus Disease 2019 in Nursing Homes (Revised) 2 (Mar. 13, 2020) (on file with author) [hereinafter CMS Memorandum QSO-20-14-NH]; D'Adamo et al., *supra* note 47, at 913.

72. *See* Fla. Div. Emergency Mgmt. Order No. 20-002; 42 U.S.C. § 1395i–3(c)(3); FLA. STAT. § 400.022(b).

73. *See* FLA. STAT. § 400.022.

74. *See id.* § 400.022(b).

> services] . . . access to the facility during visiting hours for the purpose of visiting with and providing services to any resident.[75]

Many of these protections are further guaranteed by the Federal Nursing Home Reform Act of 1987 ("FNHRA") and its implementing regulations, which codify the rights of patients residing in any facility accepting federal funds.[76] As noted, the majority of nursing homes in America participate in Medicare and Medicaid programs, subjecting them to the federal parameters of the FNHRA.[77] One of the many protections afforded by the FNHRA is a resident's right to visitation, which flatly declares:

> A nursing facility must: . . . (B) permit immediate access to a resident . . . by immediate family or other relatives of the resident; (C) permit immediate access to a resident . . . by others who are visiting with the consent of the resident; [and] (D) permit reasonable access to a resident by any entity or individual that provides health, social, legal, or other services to the resident . . . .[78]

Thus, Florida law secures the right to visitation for all in-state nursing home residents, whereas the FNHRA provides additional federal visitation rights to all residents of Florida nursing homes which accept federal funds.[79] Both state and federal regulations are in place to ensure nursing home facilities honor those rights and provide an adequate standard of care, discussed in greater detail below.[80]

C. *Restrictions on the Right to Visitation*

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75. *Id.*

76. *See id.*; 42 U.S.C. § 1395i–3(c)(3); MaryBeth Musumeci & Priya Chidambaram, *Key Questions About Nursing Home Regulation and Oversight in the Wake of COVID-19*, KFF (Aug. 3, 2020), http://www.kff.org/coronavirus-COVID-19/issue-brief/key-questions-about-nursing-home-regulation-and-oversight-in-the-wake-of-COVID-19/.

77. *See* Musumeci & Chidambaram, *supra* note 76 ("Medicare is the primary payer for about [twelve] percent of nursing home residents . . . [whereas] Medicaid is the primary payer for [sixty-two] percent of nursing home residents . . . .").

78. 42 U.S.C. § 1396r(c)(3).

79. *Id.*; FLA. STAT. § 400.022(b); *see* FLA. STAT. § 400.021(12) (defining "nursing home facility" to mean any facility licensed according to this chapter and who "provides nursing services as defined in part I of chapter 464 . . . ."); 42 U.S.C. § 1395x(j) (defining the term "skilled nursing facility" to have "the meaning given such term in section 1395i–3(a) of this title.").

80. *See* 42 U.S.C. § 1395i–3(h)(1); FLA. STAT. § 400.023(1); Kohn, *supra* note 14, at 5.

While both federal and state regulations relating to COVID-19 addressed a variety of measures aimed to limit the spread of the virus, one of the most crucial factors the regulations addressed—and the one that garnered heartbreaking and sustained media coverage—was the limitation of visitors.[81] Those pre-existing rights were eliminated and modified over time as scientists learned more about the virus.[82] This TJ analysis thus differs from most traditional TJ analyses, which probe the impact of a singular or static law or type of law passed through traditional legislative and judicial processes.[83]

1. Initial Orders

Acting pursuant to their respective emergency powers, Florida Governor Ron DeSantis and former President Donald Trump restricted visitation to nursing homes through a series of executive and emergency orders

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81. *See, e.g.*, Ally Mauch, *Florida Woman Takes Dishwashing Job to See Husband in Nursing Home After 114 Days Apart Due to COVID-19*, PEOPLE (July 11, 2020, 5:15 PM), http://people.com/human-interest/florida-woman-takes-dishwashing-job-to-see-husband-in-nursing-home-coronavirus/; Jason Karlawish et al., *Continued Bans on Nursing Home Visitors are Unhealthy and Unethical*, WASH. POST (July 13, 2020, 8:00 AM), http://www.washingtonpost.com/opinions/2020/07/13/residents-good-nursing-homes-should-consider-re-allowing-visitors/; *Banned from Nursing Homes, Families See Shocking Decline in Their Loved Ones*, NPR (June 9, 2020, 12:09 PM), http://www.npr.org/2020/06/09/870159589/banned-from-nursing-homes-families-see-shocking-decline-in-their-loved-ones; Ron Haviv, *Could This Be the Last Time We See Our Dad?*, N.Y. TIMES (Aug. 6, 2020), http://www.nytimes.com/2020/08/06/opinion/sunday/coronavirus-baruch-haviv-death.html; Cait McVey, *Her Mother's Health Is Declining in Isolation, but She Still Can't Visit*, BAY NEWS 9 (July 28, 2020, 9:01 PM), http://www.baynews9.com/fl/tampa/news/2020/07/29/pinellas-county-mother-daughter-separated-4-months-because-of-nursing-home-coronavirus-lockdown; Chen et al., *supra* note 55, at 1187.

82. *See* Chen et al., *supra* note 55, at 1188–89.

83. *See* Wexler & Winick, *supra* note 1, at xvii. This statement should not be read to narrow TJ scholarship to an analysis of only legal substance. *See* Cerminara, *supra* note 1, at 58–60. While this Article is analyzing substance, and thus the statement refers to traditional TJ scholarship doing the same, Wexler and Winick have proposed an analysis of (and TJ scholars have analyzed) three categories of subjects: legal substance, legal procedures, and the roles played by legal actors. Wexler & Winnick, *supra* note 1, at xvii. "Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, like it or not, often produce therapeutic or antitherapeutic consequences." David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463, 463 (2014) [hereinafter *New Wine in New Bottles*]; *see also* David B. Wexler, *The DNA of Therapeutic Jurisprudence, in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE 1, 4 (Nigel Stobbs et al. eds., 2019) [hereinafter *The DNA of Therapeutic Jurisprudence*].

and agency regulations, which had "the force and effect of law."[84] Their actions, taken at similar times and in similar forms, suspended existing statutes and effectively created temporary new law.[85] The regulations affecting nursing homes discussed here are just a few of the thousands of "laws and orders . . . issued by federal, state, and local authorities . . . in an effort to reduce disease transmission" during the first six months of the COVID-19 pandemic.[86]

Both Florida and the federal government commenced regulatory activity in March of 2020.[87] Within days of declaring a state of emergency in Florida on March 8, 2020, DeSantis issued the first order restricting visitation to nursing homes.[88] This initial order barred only "certain individuals" and identified seven subsets of persons who were restricted from visiting Florida nursing homes; the subsets ranged from the general, such as "[a]ny person showing or presenting signs or symptoms . . ." to the more specific, such as "[a]ny person who traveled on a cruise ship . . . ."[89]

Within days, Trump declared a national emergency and CMS provided federal guidance to nursing home facilities on prevention and control practices, which included visitation restriction recommendations.[90] CMS initially counseled that all facilities nationwide should "restrict visitation of all visitors and non-essential health care personnel, except for certain compassionate care situations, such as an end-of-life situation."[91] While CMS gave individual facilities the autonomy to determine the propriety of visitation during end-of-life situations on a "case-by-case basis," CMS advised rigorous screenings of such persons "(including clergy, bereavement counselors, etc.) for fever or respiratory symptoms."[92] Any person showing symptoms of

84. *See, e.g.*, Fla. Exec. Order No. 20-51 (Mar. 1, 2020); Fla. Exec. Order No. 20-52 (Mar. 9, 2020); Fla. Div. Emergency Mgmt. Order No. 20-002 (Mar. 11, 2020); Press Release, Fed. Emergency. Mgmt. Agency, COVID-19 Emergency Declaration (Mar. 14, 2020), http://www.fema.gov/press-release/20210318/covid-19-emergency-declaration.

85. *See Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. STATE LEG. (Jan. 20, 2022), http://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx.

86. Burris et al., *supra* note 6, at 1973.

87. *See, e.g.*, Fla. Exec. Order No. 20-51; Press Release, Fed. Emergency Mgmt. Agency, *supra* note 84.

88. *See* Fla. Div. Emergency Mgmt. Order No. 20-002. Florida Governor Ron DeSantis took all regulatory action affecting nursing homes through the state's Division of Emergency Management ("DEM"), whom he designated as the State Coordinating Officer on March 9. Fla. Exec. Order No. 20-52.

89. Fla. Div. Emergency Mgmt. Order No. 20-002.

90. CMS Memorandum QSO-20-14-NH, *supra* note 71, at 2.

91. *Id.* (emphasis omitted).

92. *Id.*

respiratory infection was not "permitted to enter the facility at any time, even in end-of-life situations."[93]

When visitation was "necessary or allowable" CMS advised that facilities enhance the possibility of safety by suggesting that visitors refrain from all physical contact with patients.[94] Facilities were further advised to "[c]ancel communal dining and all group activities, such as internal and external group activities."[95] In lieu of traditional visitation, CMS urged facilities to consider:

> a) Offering alternative means of communication for people who would otherwise visit, such as virtual communications (phone, video-communication, etc.).
> b) Creating/increasing listserv communication to update families, such as advising to not visit.
> c) Assigning staff as primary contact to families for inbound calls and conduct regular outbound calls to keep families up to date.
> d) Offering a phone line with a voice recording updated at set times (e.g., daily) with the facility's general operating status, such as when it is safe to resume visits.[96]

Two days after Trump's declaration and CMS's guidance, DeSantis acted quickly to bring Florida's visitation policies in line with the newly minted federal standards.[97] On March 13, 2020, DeSantis issued an order banning visitation to *all* Florida nursing homes for a period of thirty days and expressly suspended Florida Statute section 400.022(1)(b)—the state law affording nursing home residents the right to visitation.[98] By way of this order, DEM specifically instructed facilities to: "[P]rohibit the entry of any individual, to the facility *except* in the following circumstances: (a) Family members, friends, and visiting residents in end-of-life situations; (b) Hospice or palliative care workers caring for residents in end-of-life situations; (c) Any individuals providing necessary health care to a resident . . . ."[99]

2. The Next Wave of Regulation and Reaction in Florida

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93. *Id.*
94. *Id.* at 4.
95. CMS Memorandum QSO-20-14-NH, *supra* note 71, at 3.
96. *Id.* at 3–4.
97. *See, e.g.*, Fla. Div. Emergency Mgmt. Order No. 20-002 (Mar. 11, 2020); Fla. Div. Emergency Mgmt. Order No. 20-005 (Mar. 13, 2020).
98. Fla. Div. Emergency Mgmt. Order No. 20-005; *see also* FLA. STAT. § 400.022 (2020).
99. Fla. Div. Emergency Mgmt. Order No. 20-006 (Mar. 15, 2020) (emphasis added).

Both Florida and CMS guidance on visitation remained fluid during the entire period during which COVID-19 ravaged the country, consistent with the fluidity of the scientific findings on the new virus and its mode of transmission.[100] Throughout, consistent with principles of federalism, CMS guidance and requirements spoke in terms of the permissive ("should") rather than the mandatory ("must" or "shall") and always noted that facilities must also comply with state and local regulations.[101] In March 2020, at the very beginning of all of this regulation, it advised that: "If a state implements actions that exceed CMS's requirements, such as a ban on all visitation through a governor's executive order, a facility would not be out of compliance with CMS' requirements. In this case, surveyors would still enter the facility, but not cite for noncompliance with visitation requirements."[102]

Between March, when the first regulatory action occurred, and late summer, state regulation changed quickly in Florida.[103] In May, the DEM reaffirmed all of the visitation restrictions currently in place and indicated that they would continue indefinitely.[104] As nursing home facilities in Florida followed these orders, deaths and increased disability among residents in nursing homes continued to spike, raising concerns about policies and resources used to mitigate the risk among this particularly vulnerable population.[105] During those months, state and national media were flooded with heartbreaking personal accounts of people separated from their elderly loved ones—by law.[106] Spouses, children, and other caregivers were denied

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100. *See id.*; CMS Memorandum QSO-20-14-NH, *supra* note 71, at 2; Chen et al., *supra* note 55, at 1187.

101. *See, e.g.*, Memorandum from Director, Quality, Safety & Oversight Grp., to State Surv. Agency Dirs., Prioritization of Surv. Activities 3 (Mar. 20, 2020) [hereinafter CMS Memorandum QSO-20-20-All] (using "should adhere" to explain the guidelines); Memorandum from Director, Surv. & Certification Grp., to State Surv. Agency Dirs., Nursing Home Visitation–COVID-19 (Revised) 2–3, 5 (Apr. 27, 2021) [hereinafter CMS Memorandum QSO-20-39-NH]; CMS Memorandum QSO-20-14-NH, *supra* note 71, at 2–3.

102. CMS Memorandum QSO-20-14-NH, *supra* note 71, at 2.

103. *See* Fla. Div. Emergency Mgmt. Order No. 20-002; *but see* Fla. Div. Emergency Mgmt. Order No. 20-007 (May 18, 2020). These restrictions remained in effect from March long into the summer months of 2020, to extend in accordance with the State of Emergency continued by Governor Ron DeSantis. *See* Fla. Div. Emergency Mgmt. Order No. 20-007; Fla. Exec. Order No. 20-52.

104. Fla. Div. Emergency Mgmt. Order No. 20-007.

105. Chen et. al, *supra* note 55, at 1186; Mary Ellen Klas, *Why Are Coronavirus Deaths Doubling in Florida's Nursing Homes?*, TAMPA BAY TIMES (Dec. 23, 2020), http://www.tampabay.com/news/health/2020/12/23/florida-nursing-home-coronavirus-deaths-are-doubling-advocates-blame-testing/.

106. *See, e.g.*, McVey, *supra* note 81.

access to their family members for months with no end in sight.[107] Many of those potential visitors described watching their loved ones deteriorate through plate glass and cell phone screens.[108] Spouses even took volunteer jobs at their loved ones' nursing homes in desperate attempts to circumvent the ban on visitation keeping them apart.[109]

By June of 2020, visitation policies in health care facilities were being challenged in Florida state courts.[110] Noting that patients and facilities could suffer catastrophic harm if visitation restrictions are "found to be improper and cannot be utilized," one judge dismissed an action challenging a local hospital's visitation policy.[111] Civil Circuit Judge Michael Robinson stated, "[i]t is not in the public interest for courts to assume and micro-manage the delivery of medical services in a pandemic. We do not want to open up the proverbial Pandora's box . . . ."[112]

IV. RECOGNITION OF THE VALUE (AND ADOPTION) OF THERAPEUTIC RATHER THAN ANTI-THERAPEUTIC POLICIES

As the uproar over visitation policies dominated headlines, both levels of government formed independent nursing home commissions or task forces responsible for drafting policy recommendations to help "inform immediate and future responses to COVID-19 in nursing homes."[113] In a press release announcing the formation of the Florida task force, DeSantis stated:

> In an effort to protect our most vulnerable, we made the difficult decision in March to prohibit visitation to these facilities. While these measures were necessary, it has taken an emotional toll on our

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107. *See* Andrew Soergel, *Feds Tell Nursing Homes to Open for Visitors*, AARP (Sept. 18, 2020), http://www.aarp.org/caregiving/health/info-2020/feds-ask-nursing-homes-to-open-for-more-visits.html.

108. *See* Andy Markowitz & Emily Paulin, *AARP Answers: Nursing Homes and the Coronavirus*, AARP (Nov. 6, 2020), http://www.aarp.org/caregiving/health/info-2020/nursing-homes-coronavirus-faqs.html; Mauch, *supra* note 81.

109. Mauch, *supra* note 81.

110. *See* Angie DiMichele, *Judge Blames the Coronavirus for Preventing Woman From Having Hospital Visits*, SUN SENTINEL (June 5, 2020, 4:47 PM), http://www.sun-sentinel.com/coronavirus/fl-ne-judge-denies-injunction-hospital-visit-20200605-dhuyt3pcszcm3dxp3w46fzuwpu-story.html.

111. *Id.*

112. *Id.*

113. Press Release, Ctrs. for Medicare & Medicaid Servs., CMS Announces Independent Commission to Address Safety and Quality in Nursing Homes (Apr. 30, 2020), http://www.cms.gov/newsroom/press-releases/cms-announces-independent-commission-address-safety-and-quality-nursing-homes.

> families. I look forward to the ideas that arise from this task force on how we can continue our mission to protect the vulnerable while allowing for the much-needed human connection of spending time with family and friends.[114]

Effectively, governments began to recognize, or at least *question*, how anti-therapeutic the initial, strict limitations on visitation had been.[115] This Section will first discuss the conclusions and policy recommendations of both commissions and measures adopted thereafter. Then, it will explain why visitation and other methods of social connection are imperative to the health and wellbeing of all nursing home residents. Finally, it will detail the negative effects of the initial policies.

A. *Recommendations and Reactions*

In September of 2020, the light at the end of a long, dark tunnel finally came into view for nursing home residents and their families.[116] Florida's task force and the federal nursing home commission released their respective findings within weeks of each other, both adamantly recommending that family visitation be safely, but immediately, resumed.[117] Both the state and the federal governments (eventually) reacted in ways that benefited nursing home residents psychologically.[118]

1. A Report and Reaction in Florida

Florida's Task Force on the Safe and Limited Reopening of Long-Term Care Facilities (the "Task Force") released its report first, on September

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114. Press Release, Fla. Gov. Press Office, *supra* note 19.

115. *Id.*; *see also* Press Release, Ctrs. for Medicare and Medicaid Servs., *supra* note 113.

116. *See, e.g.*, CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, COMMISSION FINAL REPORT 1 (2020), http://edit.cms.gov/files/document/covid-final-nh-commission-report.pdf.

117. *See id.*; TASK FORCE ON THE SAFE AND LIMITED RE-OPENING OF LONG-TERM CARE FACILITIES, FINAL RECOMMENDATIONS TO GOVERNOR DESANTIS 1–2 (2020), http://www.flgov.com/wp-content/uploads/covid19/Final%20Report%209-1-20.pdf.

118. TASK FORCE ON THE SAFE AND LIMITED RE-OPENING OF LONG-TERM CARE FACILITIES, *supra* note 117, at 2.

1, 2020.[119] The Task Force made three final recommendations: (1) resume immediate visitation for Essential Caregivers and Compassionate Care visitors (defined categories of persons); (2) resume general visitation "if the facility meets certain indicators of low virus risk;" and (3) reopen only after facilities had developed "policies and procedures that support the safety of all residents and visitors."[120] A press release announcing the report's release noted that: "[h]uman connection and visitation are vital to meeting the mental and emotional needs of those in long-term care. The visitation restrictions have been extremely challenging on individuals in these facilities and their loved ones, and the Task Force recommendations support residents safely reconnecting with their families."[121]

Florida nursing home residents saw near-immediate relief in the aftermath of the Task Force's recommendations.[122] On the very day the Task Force publicized its recommendations, DeSantis ended the five-month ban on visitation.[123] The order afforded each resident the right to designate two essential caregivers and two compassionate caregivers, and further directed facilities to develop an "agreeable [visitation] schedule in concert with the resident and visitor, including evenings and weekends . . . ."[124] The order also provided for general visitation to resume as long as a detailed list of criteria had been met.[125]

Visitation restrictions eased progressively over the winter months of 2020; residents were even allowed to leave facilities to spend time with family and friends for the holidays, although they were required to quarantine if they

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119. *See* Press Release, Agency for Health Care Admin., Task Force on the Safe and Limited Re-Opening of Long-Term Care Facilities Releases Visitation Recommendations (Sept. 1, 2020) (on file with http://ahca.myflorida.com/docs/AHCA_E-Blast-Task_Force_on_the_Safe_and_Limited_Re-Opening_of_Long-Term_Care_Facilities_Releases_Visitation_Recommendations.pdf); TASK FORCE ON THE SAFE AND LIMITED RE-OPENING OF LONG-TERM CARE FACILITIES, *supra* note 117, at 1.

120. Press Release, Agency for Health Care Admin., *supra* note 119; TASK FORCE ON THE SAFE AND LIMITED RE-OPENING OF LONG-TERM CARE FACILITIES, *supra* note 117, at 10.

121. Press Release, Agency for Health Care Admin., *supra* note 119; Shawna De La Rosa, *Florida Task Force Releases Long-Term Care Facility Visitation Recommendations*, STATE REFORM (Nov. 10, 2020), http://stateofreform.com/featured/2020/11/florida-task-force-releases-long-term-care-facility-visitation-recommendations/.

122. *See* De La Rosa, *supra* note 121.

123. *See* Fla. Div. Emergency Mgmt. Order No. 20-009 (Sept. 1, 2020); Press Release, Agency for Health Care Admin., *supra* note 119.

124. Fla. Div. Emergency Mgmt. Order No. 20-009.

125. *Id.*

failed their facilities' screening protocols upon return.[126] By March of 2021, only one requirement relating to visitation remained at the state level: facilities had to, at a minimum, "maintain visitation and infection control policies in accordance with all state and federal laws and . . . continue to monitor all [CMS] and [CDC] prevention guidance."[127] By May 2021, DeSantis eliminated all remaining COVID-inspired, visitation-related regulatory requirements.[128]

2. The Federal Commission Recommendations and the Government's Response

The Federal Coronavirus Commission on Safety and Quality in Nursing Homes expressed the same concerns as Florida's Task Force and issued similar policy recommendations.[129] In its final report dated September 2020, the Commission wrote, "[b]eyond experiencing the ravages of the disease itself, residents have been traumatized by the impact of nursing homes restricting visitors and curtailing group activities in an effort to mitigate spread of this virus."[130] It continued, "[t]he resulting physical and mental harm—and increased vulnerabilities—to residents is common knowledge and troubling."[131]

The Commission's report identified "four key problems" with limited and no-visitation policies.[132] Much as this Article suggests, the Commission's first finding was that "[a]lthough visitation restrictions have partially protected the physical health of residents, the practice also has resulted in unintended harm."[133] Citing "loneliness, anxiety, and depression due to prolonged

126. Bailey LeFever, *Florida Families May Take Long-Term Care Residents Home for the Holidays, State Says*, TAMPA BAY TIMES (Nov. 5, 2020), http://www.tampabay.com/news/health/2020/11/05/florida-families-may-take-long-term-care-residents-home-for-the-holidays-state-says/. Two weeks after DeSantis directed the issuance of Emergency Order Number 20-011, AHCA sent an email-blast to long-term care facilities clarifying the visitation rules announced in the October Order and directing facilities to release residents for the holidays following reports of public confusion. *See id.*

127. Fla. Div. Emergency Mgmt. Order No. 21-001 (Mar. 22, 2021).

128. Fla. Exec. Order No. 21-101 (May 3, 2021).

129. *See* CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, *supra* note 116, at iii, iv, viii–x; TASK FORCE ON THE SAFE AND LIMITED RE-OPENING OF LONG-TERM CARE FACILITIES, *supra* note 117, at 1–2.

130. CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, *supra* note 116, at iii.

131. *Id.*

132. *Id.* at 32.

133. *Id.*; *see* discussion *supra* Section III.C.

separation from families and loved ones," the Commission concluded that visitation bans "caused significant distress for families . . ." and "compromise[d] the ability of families and guardians to validate resident well-being . . . ."[134] As a second key finding, the Commission expressly recognized that "the extent of this unintended harm has not been adequately assessed."[135]

The third problem the Commission identified was that "[v]irtual visitation often provides an insufficient substitute to address resident needs."[136] As this Article will later explain, its insufficiency as a substitute is "even more acute when combined with limitations due to differing physical and cognitive abilities; resident, family, and/or staff unfamiliarity with proper equipment . . . and internet availability."[137]

Finally, the Commission concluded that "[v]isitation guidance is currently unclear."[138] In its own words, "CMS and its federal partners have issued directives and guidance pertaining to visitation during the pandemic in multiple documents, making it challenging for nursing homes to meet (and CMS to enforce) federal expectations or leverage evolving flexibility."[139] To alleviate the harms it had identified, the Commission made four concrete policy recommendations, each with corresponding action steps.[140] The first was to "[e]mphasize that visitation is a vital resident right."[141] The second was to "[u]pdate and release consolidated, evidence-based guidance on effectively planning for and implementing virtual visitation tools and techniques."[142] Third, the Commission recommended providing the requisite resources to help nursing home staff "assess and improve the mental health and psychosocial well-being of residents during and after the pandemic."[143] Finally, the Commission recommended "[a]ssess[ing], streamlin[ing], and increas[ing] the accessibility of COVID-19-related directives, guidance, and resources on visitation into a single source."[144]

CMS expressly "recognize[d] that physical separation from family and other loved ones has taken a physical and emotional toll on [patients] and

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134. *Id.*

135. CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, *supra* note 116, at 32.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, *supra* note 116, at viii.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

their loved ones" in a variety of ways.[145] It therefore revised its then-current visitation guidelines, providing that "[v]isitation can be conducted through different means based on a facility's structure and residents' needs," but still requiring, among other infection control practices, "[f]ace covering[s] or mask[s] (covering the mouth and nose) and social distancing [of] at least six feet between persons . . ."[146] It suggested outdoor visitation—socially distanced whenever possible—but shifted its presumption regarding indoor visitation from negative to positive: "[f]acilities should allow indoor visitation at all times and for all residents (regardless of vaccination status), except for a few circumstances when visitation should be limited due to a high risk of COVID-19 transmission (note: compassionate care visits should be permitted at all times)."[147] CMS still recommended limited visitor movement within the facility, visitation somewhere other than a patient's room when patients share rooms, social distancing, face coverings, and monitoring/limiting the number of visitors in the facility at any given time.[148] CMS permitted communal dining and other activities with specified precautions to ensure safety.[149]

By March 2021, CMS had altered its tone even further to suggest that, instead of banning visitation in the vast majority of cases, facilities should "[h]ave a facility plan for managing visitation, including [the] use of restrictions when necessary."[150] It encouraged nursing homes to "facilitate in-person visits whenever possible" and counseled facilities to refer to their previous guidance as well as that of their state and local health departments.[151]

B. *Why Visitation Matters*

Visitation rights—as guaranteed under both the FNHRA and various state laws—are essential to the mental and physical well-being of nursing

145. CMS Memorandum QSO-20-39-NH, *supra* note 101, at 1.
146. *Id.* at 2.
147. *Id.* at 3, 5..
148. *Id.* at 3.
149. *Id.* at 7.
150. Memorandum from Alison Beam, Acting Sec'y of Health, Pa. Dep't of Health, to Health Alert Network, UPDATE: Core Infection Prevention and Control Measures for Long-Term Care Facilities 5 (Sept. 24, 2021) (on file with the Pennsylvania Department of Health); *Interim Infection Prevention and Control Recommendations to Prevent SARS-CoV-2 Spread in Nursing Homes*, *supra* note 70 (referencing the CDC's previous guidelines that have since been updated).
151. Memorandum from Alison Beam, Acting Sec'y of Health, Pa. Dep't of Health, to Health Alert Network, *supra* note 150, at 5.

home residents.[152] Studies have found a strong correlation between having visitors in close proximity and positive behaviors, such as smiling and alertness.[153] More specifically, visits from family and close friends have been found to have several positive health effects on nursing home residents, including higher life satisfaction and increased life expectancy.[154] Increased family involvement has also been found to improve quality of life and influence residents' psychosocial or functional outcomes.[155]

Various research studies have also addressed the benefits of family involvement within the specific context of nursing homes.[156] "Family involvement is a multidimensional construct . . . " that includes not only personal contact through visitation, but also "socio-emotional care, advocacy, and the provision of personal care."[157] That involvement includes, but is not limited to, assistance with grooming, touching, holding hands, having conversations, cheering the resident up, and generally monitoring the quality of care provided by staff at the facility.[158]

Such actions and behaviors performed by families during visitations have been associated with positive outcomes, even among the mentally-impaired elderly.[159] Studies have found that residents receiving more visits demonstrated less psychosocial impairment.[160] Family members involved in resident care have even reported a decrease in the need for medications.[161] The specific connections of family involvement and the positive outcomes seen in

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152. 42 U.S.C. § 1396r(c)(3); FLA. STAT. § 400.022(1)(b); *see* Vernon L. Greene & Deborah J. Monahan, *The Impact of Visitation on Patient Well-Being in Nursing Homes*, 22 GERONTOLOGIST 418, 423 (1982).

153. Helen M. Hendy, *Effects of Pet and/or People Visits on Nursing Home Residents*, 25 INT'L. J. AGING & HUM. DEV. 279, 284–85 (1987); Chen et al., *supra* note 55, at 1189.

154. *See* Linda Noelker & Zev Harel, *Predictors of Well-Being and Survival Among Institutionalized Aged*, 18 GERONTOLOGIST 562, 564 (1978).

155. Greene & Monahan, *supra* note 152, at 423.

156. *See, e.g.*, Joseph E. Gaugler, *Family Involvement in Residential Long-Term Care: A Synthesis and Critical Review*, 9 AGING & MENTAL HEALTH 105, 116 (2005).

157. *Id.* at 105.

158. *See, e.g.*, Jennifer Baumbusch & Alison Phinney, *Invisible Hands: The Role of Highly Involved Families in Long-Term Residential Care*, 20 J. FAM. NURSING 73, 81 (2014); Maree Petersen et al., *The Space of Family Care-Giving in Australian Aged Care Facilities: Implications for Social Work*, 46 BRIT. J. SOC. WORK 81, 84 (2014).

159. Miriam S. Moss & Paul Kurland, *Family Visiting with Institutionalized Mentally Impaired Aged*, 1 J. GERONTOLOGICAL SOC. WORK 271, 276 (2008).

160. Greene & Monahan, *supra* note 152, at 422; Kathryn Hoehn Anderson et al., *Patients with Dementia: Involving Families to Maximize Nursing Care*, 18 J. GERONTOLOGICAL NURSING 19, 24 (1992).

161. Anderson et al., *supra* note 160, at 22.

the residents have also been studied in detail, finding biological and psychosocial associations with those positive outcomes.[162]

Visits, whether with family or friends, promote social interaction.[163] Positive social interactions have a strong correlation to older adults' mental health and well-being, helping them to maintain a sense of meaning and self-worth, and feel understood and appreciated.[164] Maximizing opportunities for social interactions is especially important in facilities because nursing home residents' opportunities for social interactions decline considerably simply as a result of transitioning into such facility.[165] Visits from families and friends provide socioemotional support and serve as a link to the outside world by providing updates on friends, families, and neighbors.[166] Such support also may contribute to residents' psychological well-being.[167]

Interaction with families also impacts other biological and psychological aspects of well-being associated with physical touch.[168] In many instances, families assist with grooming or simply touch or hold hands with residents.[169] Studies have found a marked correlation between physical touch and the functioning of the body, demonstrated through the decrease of cortisol levels and the lowering of blood pressure in stressful situations.[170] Hugging has also been found to strengthen the immune system, relieve pain,

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162. Greene & Monahan, *supra* note 152, at 422.

163. *Id.* at 418.

164. *See* Neal Krause, *Stressors Arising in Highly Valued Roles, Meaning in Life, and the Physical Health Status of Older Adults*, 59 J. GERONTOLOGY: SOC. SCIS. S287, S288 (2004) [hereinafter *Stressors Arising in Highly Valued Roles*]; Neal Krause, *Evaluating the Stress-Buffering Function of Meaning in Life Among Older People*, 19 J. AGING & HEALTH 792, 792 (2007) [hereinafter *Evaluating the Stress-Buffering Function of Meaning in Life Among Older People*].

165. *See Stressors Arising in Highly Valued Roles*, *supra* note 164, at S288.

166. Heying Jenny Zhan et al., *The Role of the Family in Institutional Long-Term Care: Cultural Management of Filial Piety in China*, 20 INT'L. J. SOC. WELFARE S121, S123 (2011).

167. *Id.* at S131.

168. Hidenobu Sumioka et al., *Huggable Communication Medium Decreases Cortisol Levels*, 3 SCI. REPS. 1, 1 (2013), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3805974/pdf/srep03034.pdf.

169. *See id.*; Zhan et al., *supra* note 166, at S131.

170. Sumioka et al., *supra* note 168, at 1; Kathleen C. Light et al., *More Frequent Partner Hugs and Higher Oxytocin Levels are Linked to Lower Blood Pressure and Heart Rate in Premenopausal Women*, 69 BIOLOGICAL PSYCH. 5, 6 (2005); Lillian Koziol, *The Importance of Human Touch*, SENIORITY MATTERS (Apr. 23, 2012), http://www.senioritymatters.com/blog/importance-human-touch.

decrease heart rates, and play a role in the possible prevention of Parkinson's disease.[171]

Other roles played by family members that contribute to residents' well-being include their role as overseers of the care their loved ones receive and advocates for better communication with staff regarding the residents' needs, both roles potentially result in better levels of care and improved quality of life for residents.[172] For those in palliative care or hospice, conversations about goals of care are essential for quality care, and those conversations often take place with family members or other loved ones present.[173]

These positive physical and psychological outcomes of visitation as the result of nursing home residents' interaction with families and friends are striking.[174] They provide substantial support for considering the best therapeutic alternatives when considering, limiting, or eliminating such an important source of wellbeing and quality of life for the institutionalized elders in our society.[175]

C. *The Negative Results of the Limitations on and Prohibition of Visitation During COVID-19*

Despite the proven benefits of visitation, nursing homes naturally had to concern themselves with the potential for the virus's spread between and among patients and staff.[176] Not only was health at stake, but nursing home operators also were financially incentivized to reduce infections within their

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171. Sumioka et al., *supra* note 168, at 1; Light et al., *supra* note 170, at 5; Koziol, *supra* note 170.

172. Gloria Puurveen et al., *From Family Involvement to Family Inclusion in Nursing Home Settings: A Critical Interpretive Synthesis*, 24 J. FAM. NURSING 60, 61 (2018); Amy Restorick Roberts & Karen J. Ishler, *Family Involvement in the Nursing Home and Perceived Resident Quality of Life*, 58 GERONTOLOGIST 1033, 1034 (2018).

173. *See* Julianne Holt-Lunstad, *Social Isolation and Health*, HEALTH AFFAIRS 1 (June 2020), http://www.healthaffairs.org/do/10.1377/hpb20200622.253235/full/brief-social-isolation-mortality-Holt-Lunstad.pdf; Jean Abbott et al., *Ensuring Adequate Palliative and Hospice Care During COVID-19 Surges*, 324 JAMA NETWORK 1393, 1393 (2020).

174. *See* Puurveen et al., *supra* note 172, at 61.

175. *See, e.g.*, David B. Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCH. 179, 179 (1996). "Therapeutic jurisprudence…which focuses on the law's impact on emotional life, is a perspective that recognizes the law itself can be seen to function as a kind of therapist or therapeutic agent." *Id.*; Julianne Holt-Lunstad et al., *Loneliness and Social Isolation as Risk Factors for Mortality: A Meta-Analytic Review*, 10 PERSPS. ON PSYCH. SCI. 227, 227 (2015) [hereinafter *Loneliness and Social Isolation as Risk Factors for Morality: A Meta-Analytic Review*]; Puurveen et al., *supra* note 172, at 61; Sumioka et al., *supra* note 168, at 1.

176. *See* Chen et al., *supra* note 55, at 1187; Jennifer Abbasi, S*ocial Isolation — the Other COVID-19 Threat in Nursing Homes*, 324 JAMA 619, 620 (2020).

walls.[177] Not only was isolation a likely method of limiting infection, it was initially *required* by regulatory authorities.[178] One observer in late July 2020 described nursing home owners as living "in complete fear of getting exposed for an infection control violation," leading them to be very strict about visitation.[179]

While the trauma associated with COVID-19 caused psychological harm throughout the country, strict visitation policies and imposed isolation exacerbated the mental and physical harm experienced by residents in America's nursing homes.[180] Visitation restrictions are a common infection control mechanism yet "little is known about their effects."[181] A literature review published in early 2021 summarized seventeen articles written on the negative health effects of COVID-19 related visitation restrictions, concluding "the . . . pandemic had several impacts on patient health, the health and wellbeing of family members, and the provision of care."[182] One nursing home medical director emphasized the "psychological toll on patients and families separated from loved ones . . . ." and explained "[t]he isolation can be particularly difficult in nursing homes, where separation is magnified by illness and geography."[183] The nursing home industry itself worried about such effects of isolation after passing through its initial fear of contagion.[184]

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177. *See* 42 C.F.R. § 488.406; Musumeci & Chidambaram, *supra* note 76; *Nursing Home Enforcement – Frequently Asked Questions*, CTRS. FOR MEDICAID & MEDICARE SERVS., http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationEnforcement/Downloads/NH-Enforcement-FAQ.pdf (last visited Apr. 19, 2022).

178. *See* CMS Memorandum QSO-20-14-NH, *supra* note 71, at 2.

179. Abbasi, *supra* note 176, at 619.

180. *See* Jill Krueger, *Legal Strategies for Promoting Mental Health and Wellbeing in Relation to the COVID-19 Pandemic*, *in* COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 120, 120 (March 2021), http://ssrn.com/abstract=3808335.

> The COVID-19 pandemic may be viewed as a mass trauma experienced throughout the United States and the rest of the world. . . . By July 2020, more than 50 [percent] of respondents to a Kaiser Family Foundation Health Tracking Poll indicated that worry or stress about the new coronavirus had negatively affected their mental health.

Id. (citing Liz Hamel et al., *Coronavirus: Reopening, Schools, and the Government Response*, KAISER FAM. FOUND. (Jul. 27, 2020), http://www.kff.org/coronavirus-COVID-19/report/kff-health-tracking-poll-july-2020/).

181. Karin Hugelius et al., *Consequences of Visiting Restrictions During the Covid-19 Pandemic: An Integrative Review*, 121 INT'L J. NURSING STUD., June 5, 2021, at 1, 1.

182. *Id.*

183. Marcus D. Ruopp, Letter to the Editor, *Overcoming the Challenge of Family Separation from Nursing Home Residents During COVID-19*, 21 JAMDA 984, 984 (2020).

184. *See* Abbasi, *supra* note 176, at 620.

Alice Bonner, a long-term care geriatric nurse and senior advisor at the Institute for Healthcare Improvement, said that by August 2020, "concerns about social isolation had become 'absolutely pervasive' across the industry."[185]

Social isolation "is associated with medical risks, increased healthcare costs, and limited access to key caregiver, financial, medical, or emotional support . . . ."[186] Those in nursing homes were not technically isolated, of course.[187] Doctors, nurses, and various other health care workers, including non-medical staff such as aides and janitors, still had routine contact with residents.[188] But "social isolation" has been defined as, "an objective deficit in the number of relationships with, and frequency of, contact with family, friends, and the community,"[189] which many residents experienced due to the no- and low- visitation regulatory requirements.[190]

Further, nursing home residents might as well have been absolutely isolated in terms of contact and personal connections.[191] For them, bans or later limitations on the number of visits and visitors resulted in a social life comprised exclusively of brief interactions with ghostly figures swathed in personal protective equipment such as gowns, masks, and face shields.[192] For a population that may also exhibit various forms and levels of dementia, that may have been worse than having no visitors at all.[193] Such conditions, for

185. *Id.*

186. Ashwin A. Kotwal et al., *Social Isolation and Loneliness Among San Francisco Bay Area Older Adults During the Covid-19 Shelter-in-Place Orders*, 69 J. AM. GERIATRICS SOC'Y 20, 21 (2021) (explaining a study which addressed a broader population of older adults than those in nursing homes).

187. *See* Abbasi, *supra* note 176, at 619.

188. *See id.* at 619–20.

189. Kotwal et al., *supra* note 185, at 20; Carla Perissinotto et al., *A Practical Approach to Assessing and Mitigating Loneliness and Isolation in Older Adults*, 67 J. AM. GERIATRICS SOC'Y 657, 657 (2019).

190. *See, e.g.,* Fla. Div. Emergency Mgmt. Order No. 20-002; Fla. Div. Emergency Mgmt. Order No. 20-005; Fla. Div. Emergency Mgmt. Order No. 20-006; Fla. Div. Emergency Mgmt. Order No. 20-007.

191. *See* Catherine Crawford Cohen et al., *Infection Prevention and Control in Nursing Homes: A Qualitative Study of Decision-Making Regarding Isolation-Based Practices*, 24 BMJ QUALITY & SAFETY 630, 630–31 (2015).

192. Abbasi, *supra* note 176, at 620 (explaining that a nursing home director had noted that "staff's face shields, masks, and physical distance—all necessary for infection control—probably contributed to the residents' distress").

193. *See id.*

example, multiply the chances of delirium and potentially increase its severity when it develops.[194]

Even if some nursing home patients reported minimal feelings of social isolation, loneliness can often resemble isolation in terms of its mental and physical effects.[195] Loneliness has been defined as "a discrepancy between one's actual and desired level of social connection, and it is associated with depression, anxiety, functional disability, physical symptoms such as pain, and death."[196] "Unfortunately, loneliness [itself can] cause a host of poor [health] outcomes such as depression, anxiety, physical morbidity, and mortality."[197] Many large-scale studies across multiple settings have demonstrated that "experiencing loneliness or social isolation increases risk for earlier death."[198]

Indeed, the physical effects of social isolation and loneliness can be startling.[199] Multiple studies have concluded that "poor social connection increase[s] [the] risk of developing heart disease by twenty-nine percent and risk for stroke by thirty-two percent."[200] Evidence similarly suggests that social isolation and loneliness are associated with type two diabetes and negatively affect general health, as demonstrated by, for example, the probability of developing a cold.[201] Lack of social connection through communal dining and visitation have been linked to failure to thrive; since companionship often serves as a trigger for eating, some patients refuse food and lose weight when no longer experiencing it.[202] Patients also experienced

194. Sharon K. Inouye, *The Importance of Delirium and Delirium Prevention in Older Adults During Lockdowns*, 325 JAMA 1779, 1779 (2021) (addressing hospital and ICU settings specifically, and also noting that delirium is an important presenting symptom of COVID-19 infection).

195. *See* Kotwal, et al., *supra* note 185, at 21.

196. *Id.* (addressing broader population of older adults than those in nursing homes).

197. Amit Shrira et al., *COVID-19-Related Loneliness and Psychiatric Symptoms Among Older Adults: The Buffering Role of Subjective Age*, 28 AM. J. GERIATRIC PSYCH. 1200, 1201 (2020).

198. Holt-Lunstad, *supra* note 173, at 2; *see also* NAT'L ACADS. OF SCIS., ENG'G, AND MED., SOCIAL ISOLATION AND LONELINESS IN OLDER ADULTS: OPPORTUNITIES FOR THE HEALTH CARE SYSTEM xi (2020), http://nap.nationalacademies.org/catalog/25663/social-isolation-and-loneliness-in-older-adults-opportunities-for-the.

199. *See e.g.*, Hugelius et al., *supra* note 181, at 1; MONTGOMERY ET AL., *supra* note 14, at 2; Barbara Pfeffer Billauer, *Euthanasia in the Days of Covid-19*, AM. COUNCIL ON SCI. & HEALTH (April 8, 2021), http://www.acsh.org/news/2021/04/08/euthanasia-days-covid-19-15460.

200. Holt-Lunstad, *supra* note 173, at 3.

201. *Id.*

202. Abbasi, *supra* note 176, at 620.

mental health consequences in the form of depression, anxiety, aggression, reduced cognitive ability, and overall dissatisfaction.[203]

Families experienced worry and anxiety, fueling an increased need for information from health care providers.[204] Health care providers also experienced an increase in ethical dilemmas, demands for communication, and the need to provide support to families and patients.[205] Conversations about goals of care for those in palliative care or hospice—essential components of quality care—were inhibited because they often require the presence of family members or other loved ones, who were absent by necessity.[206]

Research demonstrates an association between lack of human contact and a decline in cognitive function, although the concrete causes and mechanisms involved in that association remain unclear.[207] Social isolation and loneliness both have been associated with a long list of adverse functional, mental, and physical health outcomes, including increased falls, functional decline, malnutrition, cardiovascular disease, increased depression, and dementia.[208] Social isolation and loneliness have also been associated with a heightened risk of mortality.[209]

Nursing home patients who actually contracted COVID-19 experienced increased depression, anxiety, and worsening dementia amongst those already exhibiting it.[210] Increased depression and anxiety can accelerate the rate of prescribing antipsychotic medications, which may connect to separate research indicating that "social isolation significantly contributes to deaths of despair such as drug and alcohol-related deaths and suicide."[211]

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203. *See*, *e.g.*, Hugelius et al., *supra* note 181, at 1; MONTGOMERY ET AL., *supra* note 14, at 17; Billauer, *supra* note 199; Press Release, Agency for Health Care Admin., *supra* note 119, at 1.

204. Hugelius et al., *supra* note 181, at 1.

205. *See* Julianne Holt-Lunstad, *The Double Pandemic of Social Isolation and COVID-19: Cross-Sector Policy Must Address Both*, HEALTH AFFS. BLOG (June 22, 2020), http://www.healthaffairs.org/do/10.1377/hblog20200609.53823; Sujith J. Chandy et al., *Collateral Effects and Ethical Challenges in Healthcare Due to COVID-19 A Dire Need to Support Healthcare Workers and Systems*, 10, J. FAM. MED. & PRIMARY CARE, 22, 25 (2021).

206. Abbott et al., *supra* note 173, at 1393.

207. *See* Catherine Offord, *How Social Isolation Affects the Brain*, SCIENTIST, (July 13, 2020), http://www.the-scientist.com/features/how-social-isolation-affects-the-brain-67701.

208. *See id.*; Walter Sepulveda-Loyola et al., *Impact of Social Isolation Due To Covid-19 on Health In Older People: Mental and Physical Effects and Recommendations*, 24 J. NUTRITION, HEALTH & AGING, 938, 939 (2020).

209. *Loneliness and Social Isolation as Risk Factors for Mortality: A Meta-Analytic Review*, *supra* note 175, at 234–35.

210. *See* Abbasi, *supra* note 176, at 619.

211. *Id.* at 620; Holt-Lunstad, *supra* note 173, at 3.

Thus, generally speaking, "[t]he psychological and socioeconomic impacts of [COVID-19] are unprecedented in our lifetimes . . . ."[212] While there is limited research on the direct impact of the prohibition on visitation on nursing home residents' mortality and morbidity rates, previous research is clear: being socially connected in meaningful ways is key to health and survival.[213] Thus, policies designed to eliminate visitation with the intent to protect residents from the harm of contagion may also have been unintentionally harmful to their overall well-being.[214]

V. LESSONS LEARNED

> [TJ] does not suggest that therapeutic considerations should trump other considerations. Therapeutic consequences are merely one category of important factors that should be taken into account. Others include individual autonomy, integrity of the fact-finding process, community safety, and efficiency and economy. [TJ] does not purport to resolve the questions of what should be done when values conflict; instead, it sets the stage for their sharp articulation.[215]

Consistent with this reminder from the founders of TJ, the most important consideration when analyzing government regulation during a pandemic must be public health, as arguably reflected in Wexler and Winick's reference to community safety.[216] Yet "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[217] There is room for TJ-inspired consideration of the mental health of individuals, as the nursing home commissions and later federal and state regulatory actions eventually recognized.[218]

Because nursing homes house vulnerable populations of elders and individuals with severe disabling conditions, it is imperative that the public health balance in a pandemic policymaking includes attention to their

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212. D'Adamo et al., *supra* note 47, at 912.

213. Holt-Lunstad, *supra* note 205.

214. *See id.*; Chen et al., *supra* note 55, at 1188–89; CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, *supra* note 116, at 32.

215. Wexler & Winick, *supra* note 1, at xvii.

216. *See id.*

217. Jaffee v. Redmond, 518 U.S. 1, 11 (1996) (recognizing a federal psychotherapist-patient privilege in part because of its mental and emotional benefits).

218. TASK FORCE ON THE SAFE AND LIMITED RE-OPENING OF LONG-TERM CARE FACILITIES, *supra* note 117 at 1–2; CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, *supra* note 116, at 7–8; *see also* Wexler & Winick, *supra* note 1, at xx (explaining TJ aspires to "stimulate thought, further scholarship, and needed law reform.").

residents' social and mental health concerns during times of crisis, such as future pandemics.[219] When regulating during a pandemic, public health officials must balance both public health and individual rights.[220] While the balance will always vary depending on the level of knowledge about the disease at hand, both federal and state statutes should better recognize that the "medically frail" nursing home population both is "highly susceptible to infectious disease" and enjoys important pre-existing rights to mental and physical health.[221] Federal and state governments have used those statutes to express their concern for nursing home residents' safety, quality of care received, and legal rights.[222] They have been forced to do so because nursing homes have inspired concerns about quality, cost, and accessibility of care for many years.[223] Policymakers should not minimize any of those concerns during a pandemic, even at the beginning of one, and even with respect to a disease that erupted as quickly as COVID-19 did.[224] Epidemiologists were

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219. *See* Kohn, *supra* note 14, at 2 (explaining that nursing home operators themselves predicted a health crisis).

220. Robert Gatter & Seema Mohapatra, *COVID-19 and the Conundrum of Mask Requirements*, 77 WASH. & LEE L. REV. ONLINE 17, 19–20 (2020), https://scholarlycommons.law.wlu.edu/wlulronline/?utm_source=scholarlycommons.law.wlu.edu%2Fwlulronline%2Fvol77%2Fiss1%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages.

221. *See* Kohn, *supra* note 14, at 3–5 (describing nursing homes residents as "highly susceptible to infectious disease" because of the "congregate nature" of the care and the "medically frail" condition of the residents); 42 U.S.C. § 1396r(b)(2) (federal statute affording residents quality of care that promotes their mental, physical, and emotional health); FLA. STAT. § 400.022(b) (2020) (Florida's state equivalent of the federal regulation); discussion *supra* Part II.

222. COMM. ON IMPROVING THE QUALITY OF LONG-TERM CARE, INST. OF MED., DIV. OF HEALTH CARE SERVS., IMPROVING THE QUALITY OF LONG-TERM CARE 1 (Gooloo S. Wunderlich & Peter O. Kohler eds., 2001).

223. *See id.*; Charlene Harrington et al., *Key Issues in Long-Term Services and Supports Quality*, KFF (Oct. 27, 2017), http://www.kff.org/medicaid/issue-brief/key-issues-in-long-term-services-and-supports-quality/. Professor Nina Kohn argues nursing homes that long-term-care facility health policy choices have enabled "nursing homes to make choices that have long endangered the health and welfare of their residents." Kohn, *supra* note 14, at 3; Konetzka, *supra* note 35, at 633–34 (concurring that "quality of nursing home care has been a long-standing challenge" and describing the long-term care sector as "an industry known for quality problems."); Giovenco, *supra* note 51, at 123 (describing how COVID-19 has "shed light on a crisis that has plagued America for decades — neglect, mismanagement, and inadequate [care] in nursing homes and . . . long-term care facilities ("LTCs"))."

224. *See* Giovenco, *supra* note 51, at 123–24 (highlighting that neglect has "plagued America for decades"). As emphasized previously, this Article analyzes only TJ considerations, it will not address potential legal arguments contesting the disregard of patients' rights to visitation. *See* discussion *supra* Part I; *e.g.*, Giovenco, *supra* note, at 130 (raising concerns regarding age discrimination, equal protection, and substantive due process).

operating in the dark, as were treating medical professionals, when COVID-19 took only three months to transform from initial detection of a deadly new illness to the WHO's pandemic declaration.[225] Yet, as public health expert Jill Krueger has explained, "promoting social connections to combat loneliness should be as much a priority as infectious disease control measures."[226]

Professor Scott Burris and others have noted that "[l]aw has significant health effects. Failure to study these effects and translate that knowledge into better law reflects problems of culture, not science."[227] Toward that end, just as Professor Burris urged with regard to investigating the law's effects on physical health, "[p]ast mistakes are water under the bridge, but now is the time to invest in the research and research infrastructure to learn what we need to know going forward."[228]

It is unlikely that the unfettered visitation rights guaranteed by states and FNHRA's Patients' Bills of Rights can be maintained in the face of an infectious disease outbreak rising to the level of a pandemic, but we now know, from hard experience, that the ability to interact with other human beings is vital to the mental health of all persons, and particularly nursing home residents.[229] Research on the mental health effects of low-visitation and no-visitation policies during COVID and its variants is crucial to striking the proper and necessary balance between public health and residents' rights in the future.[230] With such evidence in hand, researchers should begin now to collect and analyze data relating to at least the following three "lessons learned" during the COVID-19 pandemic.

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225. *See* discussion *supra* Part II; Cucinotta & Vanelli, *supra* note 33, at 157–58.

226. Krueger, *supra* note 180, at 121–22 (explaining that "interacting" is one of the "core pillars of wellbeing" within the field of positive psychology). "The COVID-19 pandemic may be viewed as a mass trauma experienced throughout the United States and the rest of the world." *Id.* at 120.

227. Burris et al., *supra* note 6, at 1975. While TJ and Legal Epidemiology share many parallels, the former focuses more on psychological health rather than physical health. *See id.* at 1973; David C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 UNIV. MIA. L. REV. 660, 660 (2021).

228. Burris et al., *supra* note 6, at 1974.

229. *See* discussion *supra* Part II; 42 U.S.C. § 1396r(3); FLA. STAT. § 400.022(1)(b) (2020) (codifying Florida's state equivalent of the FNHRA).

230. *See* Konetzka, *supra* note 35, at 633 ("[T]here is an urgent and clear role for better policy [in America's nursing homes]."). "TJ is not a packet of materials one simply learns and then applies; instead, it is an ongoing process of analysis, insight, proposal(s), discussion, revision, evaluation, further revision and growth." *The DNA of Therapeutic Jurisprudence*, *supra* note 83, at 3.

A. *Nursing Home Residents Must Have Unfettered Access to No Fewer Than One Patient Advocate or Family Member As Soon As Possible During Future Pandemics*

State and federal governments guarantee in-person visitation to nursing home residents under normal circumstances for numerous, sound reasons.[231] Such in-person visitation produces numerous mental health benefits, which have been the focus of this Article.[232] The benefits of a simple touch are immense, as revealed in part through residents' responses to a nationwide survey conducted between July and August of 2020.[233] One respondent said, "I don't feel the touch of my family and I need that. I feel like they don't love me anymore."[234] Another emphasized, "I miss hugs and touch, especially from my family members!"[235]

In addition, in-person visitation reveals aspects of resident care that friends and family members cannot observe if they are not present.[236] The physical presence of those with the residents' best interests at heart can assist with care at understaffed facilities, thus improving overall quality of care.[237] For example, one respondent writing on behalf of her mother explained that the family had transferred her from the facility in which she was living by the spring of 2020 after "she lost [eight] pounds in . . . three-week[s] . . . ."[238] The transfer, which the respondent characterized as "the best decision [her] family made," was necessary because "[her mother] did not understand why [her family was] looking at her through a window and she needed to be fed and was not."[239] As a blanket characterization, another resident wrote, "[t]he level of care has gone down. Families are not allowed in so there is no accountability on the part of the staff."[240]

Early on in the pandemic, regulators recognized the need for in-person visitation in compassionate care situations—sometimes defined as only end-of-life and sometimes defined more broadly—but the statistical and qualitative

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231. *See* MONTGOMERY ET AL., *supra* note 14, at 2.
232. *Id.*; *see also* discussion *supra* Part IV.
233. MONTGOMERY ET AL., *supra* note 14, at 25–36 app. a. (listing responses from nursing home residents in thirty-six states).
234. *Id.* at 26.
235. *Id.* at 28.
236. *See* Kohn, *supra* note 14, at 5.
237. *See id.* at 5; 6.
238. MONTGOMERY ET AL., *supra* note 14, at 29.
239. *Id.*
240. *Id.* at 33.

data available points to a need for more.[241] In-person visitation with loved ones is especially crucial for those unable to appreciate technologically mediated communication due to dementia or other physical or mental conditions, as illustrated by the recollection of one respondent who detailed her experience:

> I am very lonely. I'm an invalid so I am in bed most of the day. . . . [I] feel like I am in prison. I miss my daughter seeing me almost every day. Now she window visits about [three] times a week. We have to talk on the phone because I can't hear through the closed window. I can't hold the phone a long time; only have use of my left hand. . . . My golden years are in jail.[242]

Some states have begun to recognize such difficulties.[243] Arkansas, for example, recently broadened its definition of "compassionate care" for in-person visitation purposes and required that "a long-term facility shall accommodate and support indoor visitation for reasons beyond compassionate care visitation" if the facility had experienced "no new onset" of COVID-19 in the past fourteen days and was located within a county with a positivity rate less than ten percent.[244] Even as Illinois took action to facilitate technological communication within nursing homes, for example, it cautioned, "[t]he virtual visitation policies shall not be interpreted as a substitute for in-person visitation, but shall be wholly in addition to existing in-person visitation policies."[245]

Thus, while initial caution is understandable in the face of infectious disease, the goal during pandemics in the future should be to ensure that each nursing home resident has unfettered in-person access to at least one advocate or family member of their choice as soon as possible.[246] Such access should only be granted after levels of infectiousness, and methods to prevent and

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241. *See* discussion *supra* Section III.C.1; Konetzka, *supra* note 35, at 632–33; Fla. Exec. Order No. 20-51 (Mar. 1, 2020); Fla. Exec. Order No. 20-52 (Mar. 9, 2020); Fla. Div. Emergency Mgmt. Order No. 20-002 (Mar. 11, 2020).

242. *See* MONTGOMERY ET AL., *supra* note 14, at 34 app. a. (quoting resident's response when a nursing home asked, "[i]s there anything else you would like to tell us about how your life has changed since the Coronavirus restrictions?"). The sheer number of residents who responded by stating they felt as if they were in prison or jail was striking. *See id.* at app. a, at 25–36.

243. *See* ARK. CODE ANN. § 20-6-407(a)(1) (2021); ILL. COMP. STAT. 45/3-102.3(a) (2021).

244. ARK. CODE ANN. § 20-6-407(d)(1)(3)(A).

245. ILL. COMP. STAT. 45/3-102.3(b)(2).

246. *See* MONTGOMERY ET AL., *supra* note 14, at 5, 17.

control spread, are determined.[247] The technological solutions and creative "work-arounds" to in-person visitation that this Article will discuss are imperfect substitutes.[248]

B. *Modern Technology Must Be Leveraged to Mitigate the Anti-Therapeutic Effects of Mandated Isolation in Future Pandemic Policymaking*

In the first months of the pandemic, nursing home facilities quickly recognized they could leverage technology to help keep residents connected to the outside world.[249] Tablet and phone-based applications such as FaceTime and Zoom enhanced social interaction among residents and their families, at least to the extent residents were comfortable with technology and cognizant enough to appreciate its capabilities.[250] Devices like iPads provided vision-impaired residents with larger screens; Apple TV allowed residents to stream to their televisions while resting comfortably in bed.[251] Some facilities implemented video diaries—routinely used in the ICU setting—which produced valuable clinical information while helping residents and their families "stay abreast of each other's lives."[252] These practices mitigated at least some of the profound negative effects of social isolation and afforded caregivers meaningful opportunities to observe their loved ones' conditions and care.[253]

Despite the clear advantages technology can provide, this development illuminated a sharp divide between technology "haves" and "have-nots."[254] Absent policy providing facility-wide access to such technology, its use to mitigate isolation hinges on the financial ability of each

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247. *Id.* at 5.

248. *See* CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, *supra* note 116, at 32.

249. Linda S. Edelman et al., *Mitigating the Effects of a Pandemic: Facilitating Improved Nursing Home Care Delivery Through Technology*, JMIR AGING, May 26, 2020, at 1, 4; *see also* Judith Graham, *In the Pandemic, Technology has Been a Lifesaver, Connecting Them to the Outside World. But Others Don't Have This Access*, WASH. POST (Aug. 3, 2020), http://www.washingtonpost.com/health/in-the-pandemic-technology-has-been-a-lifesaver-connecting-them-to-the-outside-world-but-others-dont-have-this-access/2020/07/31/8d46ddf2-d1ca-11ea-8d32-1ebf4e9d8e0d_story.html.

250. Edelman et al., *supra* note 249, at 4; Graham, *supra* note 249.

251. Edelman et al., *supra* note 249, at 5; Graham, *supra* note 249.

252. Edelman et al., *supra* note 249, at 4–5.

253. *Id.* It is important to note that this alternative does not account for physical touch. *See* CORONAVIRUS COMM'N ON SAFETY AND QUALITY IN NURSING HOMES, *supra* note 116, at 32.

254. Graham, *supra* note 249.

resident.[255] As a result, caregivers have described depending on technology as a substitute for in-person visitation as "variable, uncertain, and dependent on the kindness, availability, or flexibility of staff."[256] There is a clear and urgent need for policy to ensure widespread access to the internet and video-conferencing software to mitigate the anti-therapeutic consequences of social isolation in future pandemics.[257]

To that end, competing versions of the federal Advancing Connectivity during the Coronavirus to Ensure Support for Seniors ("ACCESS") Act were introduced into the Senate and House of Representatives in March and April of 2020, respectively.[258] The Act's purpose was to "ensure that federal funding is available to expand telehealth and virtual services at nursing facilities so seniors remain connected to their health care providers and communities" and authorized an additional fifty million dollars of federal funding toward that goal.[259] Neither bill became law in the 116th Congress.[260]

In the absence of federal action, which some have described as "slow, misguided, and mostly absent," states began to pass their own laws to afford nursing home residents legal rights to the technology, sometimes "fill[ing] the gap in inconsistent ways."[261] Connecticut legislators recently approved a law requiring facilities to implement a technology of their choice for virtual connections to family and friends.[262] Under certain conditions and with lawful consent, families are free to "install and use video monitoring and

255. *See id.*

256. Lucy E. Selman et al., *'Saying Goodbye' During the COVID-19 Pandemic: A Document Analysis of Online Newspapers with Implications for End of Life Care*, 35 PALLIATIVE MED. 1277, 1281 (2021).

257. *See* Susan Jaffe, *After Pandemic Ravaged Nursing Homes, New State Laws Protect Residents*, KHN (Aug. 20, 2021), http://khn.org/news/article/after-pandemic-ravaged-nursing-homes-new-state-laws-protect-residents/.

258. Advancing Connectivity during the Coronavirus to Ensure Support for Seniors Act, H.R. 6487, 116th Cong. § 1 (2020); Advancing Connectivity during the Coronavirus to Ensure Support for Seniors Act, S. 3517, 116th Cong. § 1 (2020).

259. *Klobuchar, Capito Introduce Legislation to Increase Seniors' Virtual Connection to Health Care and Community Amidst Coronavirus Pandemic*, U.S. SENATOR AMY KLOBUCHAR WORKING FOR THE PEOPLE OF MINN. NEWS RELEASES (Feb. 3, 2021), http://www.klobuchar.senate.gov/public/index.cfm/2021/2/klobuchar-capito-introduce-legislation-to-increase-seniors-virtual-connection-to-health-care-and-community-amidst-coronavirus-pandemic (quoting West Virginia Senator Shelley Moore Capito).

260. *See* H.R. 6487; S. 3517.

261. Konetzka, *supra* note 35, at 632–33; *see, e.g.*, H.R. 6552, Gen. Assem. (2021); Jaffe, *supra* note 257.

262. H.R. 6552 § 1(6)(b)(1).

communication equipment in their [loved one's nursing home] room."[263] While facilities are mandated to provide electricity, internet access, and a power source, the resident is ultimately responsible for the cost of technology "and its installation, maintenance, repair, operation, deactivation, and removal."[264] In August of 2021, a similar law was passed in Illinois, which creatively funded a "lending library" of tablets, iPads, and other streaming devices for residents to utilize.[265] The law initiates a grant program with the Illinois Department of Health, which will fund the grants with monies remitted to the state as penalties for nursing home violations across Illinois.[266] Such legislative developments are essential to ensuring that residents have reliable, equal access to technology when in crisis, which should be used to supplement, not replace, limited in-person visitation in future pandemics.[267]

C. *Low-Cost, Facility-Level Solutions Mitigated the Anti Therapeutic Effects of Mandated Isolation and Should be Replicated Early on in Future Pandemics*

Despite the regulatory barriers, many facilities, families, and advocacy groups did their best to implement low- or no-cost solutions to keep residents socially engaged.[268] While imperfect, nursing homes across the United States scrambled to implement resourceful "work arounds" to in-person visitation, increasing phone and video calls, facilitating visits through windows, and hosting visitation outdoors whenever and wherever allowable.[269] Facilities tried to further mitigate the negative health effects of social isolation by hosting their own parades, live concerts, and therapeutic animal drop-ins.[270] Whenever tenable, some facilities took their occupational and physical therapy sessions outdoors, providing residents with "sensory stimulation on top of functional improvements."[271]

Families also worked alongside facilities to implement creative solutions to stay connected, sometimes forced to fill in the gaps when facilities

263. *Rep. Harrison Supports Bill to Protect Nursing Home Residents*, STATE REPRESENTATIVE CINDY HARRISON (May 11, 2021), http://www.cthousegop.com/harrison/2021/05/11/rep-harrison-supports-bill-to-protect-nursing-home-residents/.

264. *Id.*; H.R. 6552.

265. ILL. COMP. STAT. 45/3–102.3(a), (d) (2021).

266. *See id.*

267. *See* ILL. COMP. STAT. 45/3–102.3(b)(2).

268. Abbasi, *supra* note 176, at 619.

269. *Id.*

270. *Id.*

271. *Id.*

were either lawfully or financially prevented from taking action.[272] Families were encouraged to, and often did, "drop off photo albums and send voice recordings to help keep memories alive."[273] Importantly, families often directly absorbed the cost of new and improved technology to increase video conference opportunities with their loved ones.[274]

Advocacy groups, academics, and policymakers joined families and facilities in formulating inventive solutions to mitigate the harm that visitation restrictions and other impediments to socialization caused.[275] For example, the Stony Brook University School of Medicine undertook a service-learning initiative to "mitigate the adverse health consequences that COVID-19 related social isolation caused for older adults."[276] For two months, student volunteers provided emotional support calls to elderly patients in the school's geriatric outpatient practice on a weekly basis.[277] While this initiative neither took place within nursing homes nor quantified the intended reduction in loneliness felt by seniors receiving the calls, the project is highly generalizable and can be easily replicated across sectors.[278]

While many of these solutions are contingent on available resources, staffing, and "permission from the powers that be," facilities must utilize creative solutions to mitigate the anti-therapeutic effects of loneliness and isolation whenever possible.[279] During future pandemics, nursing homes must utilize all of the tools at their disposal to protect their residents' mental and physical health and well-being, irrespective of future governmental responses.[280]

VI. CONCLUSION

272. *Id.*

273. Abbasi, *supra* note 174, at 619.

274. *See* Edelman et al., *supra* note 249, at 4; Deborah Schoch, *Nursing Homes Scramble To Enable Televists Amid Coronavirus*, AM. ASSOC. OF RETIRED PERS. (March 30, 2020), http://www.aarp.org/caregiving/health/info-2020/nursing-home-televisits-during coronavirus.html; Abbasi, *supra* note 176 at 619.

275. *See* Steven M. Lewis & Lisa A. Strano-Paul, *A COVID-19 Service-Learning Initiative: Emotional Support Calls for the Geriatric Population*, 69 J. AM. GERIATRICS SOC'Y E4, E4 (Dec. 31, 2020), http://agsjournals.onlinelibrary.wiley.com/doi/10.1111/jgs.17003.

276. *Id.*

277. *Id.* at E4–E5.

278. *Id.*

279. *See id.*

280. Lewis & Strano-Paul, *supra* note 273.

As the pandemic lengthens its seemingly endless grip, states continue to implement new ways to protect their public health (while inadvertently igniting old conflicts with federalism).[281] While CMS will continue to set the minimum requirements of their Medicaid/Medicare programs, states are free to implement additional protections "as long as their requirements go above and beyond, and do not conflict with, federal requirements."[282] The success or failure of policymakers in serving the therapeutic goals of nursing homes during future pandemics will depend on their willingness and ability to consider research on the mental health effects of visitation restrictions during this one.[283] Researchers should prioritize such work so that the policymakers may consult it.[284] While the short-term goal must be to prevent new death and disease transmission cases for as long as a pandemic persists, the need to include mental health effects in the calculation in crafting future policy is glaring.[285]

281. *See* Jaffe, *supra* note 255.
282. *Id.*
283. *See id.*; Konetzka, *supra* note 35, at 632–33.
284. Konetzka, *supra* note 35 at 632.
285. *See id.* at 633.

TSUNAMI: RECOMMITTING TO ADDRESS AAPI MENTAL HEALTH IN A POST-COVID ERA

OLIVER J. KIM*

I. INTRODUCTION

During the pandemic in 2021, I learned about the tragic death of a fellow Asian American student, Robert Liu from my undergraduate alma mater.[1] An excellent student involved in campus activities, Robert tragically took his own life after struggling with mental health issues.[2] Learning about

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1. IU Div. of Student Aff., *Robert Liu Memorial Fund, CAPS Thank You*, YOUTUBE (Apr. 16, 2020), http://www.youtube.com/watch?v=q2KbyOIBWkA.

2. *Robert Liu Memorial Endowment Fund*, KELLY SCH. BUS., http://kelley.iu.edu/news-events/events/bloomington/rob-liu-memorial-gala/index.html (last

an initiative in his memory to raise attention to on-campus resources for students' mental health led me to reflect on the stresses and strife that had occurred as a result of the pandemic.[3] While too many had suffered from the global pandemic, both at home and abroad, many Americans were facing stress and anxiety from political, economic, and social unrest that was exacerbated by the precautions necessary to avoid the COVID-19 virus.[4]

In addition to this general anxiety affecting the populace, the Asian American and Pacific Islander ("AAPI") community has seen a series of violent attacks on community members, including horrific shootings in Atlanta and Indianapolis.[5] This violent focus on AAPIs has led to discussion among both policymakers and researchers about how to address anti-AAPI racism, as well as recognizing the related health effects of living under the fear of continued violence.[6]

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visited Apr.16, 2022); Thomas Tracy & Graham Rayman, *Indiana College Student, 20, Hangs Himself Inside NYU Dorm Where He Was Staying for Internship*, N.Y. DAILY NEWS (June 7, 2016, 7:34 PM), http://www.nydailynews.com/new-york/cops-probe-death-nyu-student-20-hung-dorm-article-1.2664666.

3. *See* Oliver Kim, *Addressing the Mental Health Needs of the AAPI Community*, HEALTH AFFS. BLOG (Sept. 1, 2021), http://www.healthaffairs.org/do/10.1377/forefront.20210827.800655/full/.

4. *Id.*

5. *See* LU DONG ET AL., ADDRESSING ANTI-ASIAN RACISM IN THE ERA OF COVID-19: NEXT STEPS FOR A RESEARCH AGENDA 2 (2021), http://www.rand.org/pubs/research_reports/RRA1594-1.html ("National polls indicated that AAPIs reported higher levels of experience with hate crimes or hate incidents than the national average in both 2020 and 2021, with about one in four AAPIs affected overall." (footnote omitted)); Jiayang Fan, *The Atlanta Shooting and the Dehumanizing of Asian Women*, NEW YORKER (Mar. 19, 2021), http://www.newyorker.com/news/daily-comment/the-atlanta-shooting-and-the-dehumanizing-of-asian-women; Amna Nawaz et al., *After Indianapolis Shooting, a Sikh Activist on Why We Need to Accept Realities of Racism in America*, PBS NEWSHOUR (Apr. 30, 2021, 5:54 PM), http://www.pbs.org/newshour/nation/after-indianapolis-shooting-a-sikh-activist-on-why-we-need-to-accept-realities-of-racism-in-america; Kim, *supra* note 3.

> The term "AAPI" may suggest misleadingly that a particular issue affects Asian Americans as well as Pacific Islanders and Native Hawaiians equally so hereinafter, I will use "AAPI" when speaking collectively about Asian Americans, Pacific Islanders, and Native Hawaiians and then "Asian American" when referring to issues pertaining solely to this still-diverse group.

Kim, *supra* note 3.

6. *See* Barbara Sprunt, *Here's What the New Hate Crimes Law Aims to Do as Attacks on Asian Americans Rise*, NPR, http://www.npr.org/2021/05/20/998599775/biden-to-sign-the-covid-19-hate-crimes-bill-as-anti-asian-american-attacks-rise (last updated May 20, 2021, 4:32 PM); Neil G. Ruiz et al., *One-Third of Asian Americans Fear Threats, Physical Attacks, and Most Say Violence Against Them Is Rising*, PEW RSCH. CTR. (Apr. 21, 2021), http://www.pewresearch.org/fact-tank/2021/04/21/one-third-of-asian-americans-fear-threats-physical-attacks-and-most-say-violence-against-them-is-rising/; Kim, *supra* note 3.

Because these tragic events remain fresh in our collective consciousness, one could forget that these concerns existed long before the pandemic.[7] Rather, the pandemic has led to a more public questioning of systemic issues and biases that exist in our healthcare system—including who has access to mental health services and how they are allocated—that must be addressed to make it more equitable across all communities.[8] This Article will first look at the mental health issues that the AAPI community faces, including prior to the pandemic.[9] The second part of this Article will then discuss how the pandemic and concurrent events have exacerbated those mental health issues within the AAPI community.[10] Finally, Part V will provide a series of recommendations for policymakers to consider to improve mental healthcare delivery for the AAPI community.[11]

This Article is not suggesting a more pressing need for AAPIs over other communities, but instead it attempts to demonstrate why the healthcare system needs a more equitable approach to healthcare delivery through a reflection on both pre-pandemic and current events that are particular to the AAPI community.[12] Such a system may result in better outcomes and thus greater equity for many communities of color.[13] In building that more equitable system post-pandemic, we must recognize three interconnected, but not necessarily exhaustive issues: Asian cultural attitudes towards mental health, AAPIs' station as a community of color, and understanding the long-term impact of the COVID pandemic on the community.[14]

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7. *See, e.g.*, Natalie Varma, *After Petition, Two AAPI Providers Were Hired at CAPS, Students Say There's More Work Ahead*, DAILY TAR HEEL (Nov. 15, 2021, 10:56 PM), http://www.dailytarheel.com/article/2021/11/university-aapi-caps-counselors; *see also Robert Liu Memorial Endowment Fund*, *supra* note 2.

8. *See* Kim, *supra* note; Varma, *supra* note 7.

9. *See* discussion *infra* Part III.

10. *See* discussion *infra* Part IV.

11. *See* discussion *infra* Part V.

12. *See* discussion *infra* Parts III, IV.

13. *See, e.g.*, Mary Schmeida & Ramona McNeal, *Children's Mental-Health Language Access Laws: State Factors Influence Policy Adoption*, 40 ADMIN. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERVS. RSCH. 364, 369 (2012) (discussing efforts to address language barriers that impede access to mental health services for children with limited English proficiency).

14. *See* discussion *infra* Sections III.A–C.

II. OVERVIEW OF AAPIS IN THE UNITED STATES

The AAPI community is the fastest-growing racial group within the United States and thus warrants increased attention in health law and policy.[15] Even in the prior 2010 census, analysts noted that "Asians [had] passed Hispanics as the largest group of new immigrants to the United States."[16] In the most recent census, the Asian American community grew by eighty-one percent, continuing its rapid growth.[17] At such a rate, analysts predict that the Asian American population will triple or quadruple from 2000 to 2060 and will be the largest immigrant group by 2055.[18]

The Asian American designation is almost entirely made up of nineteen distinct ethnicities.[19] However, six groups—Chinese, Indian, Filipino, Vietnamese, Korean, and Japanese—skew the overall Asian American demographics because they make up eighty-five percent of the

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15. *See* Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), http://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measuresreveal-united-states-population-much-more-multiracial.html ("The Asian alone population grew by 35.5% between 2010 and 2020" and "[t]he Asian in combination population grew by 55.5%."); Michael Spencer et al., *Discrimination and Mental Health-Related Service Use in a National Study of Asian Americans*, 100 AM. J. PUB. HEALTH 2410, 2410 (explaining that Asian Americans are "one of the most understudied" racial groups despite population growth).

16. PEW RSCH. CTR., THE RISE OF ASIAN AMERICANS 1 (Paul Taylor ed., 2013).

17. Abby Budiman & Neil G. Ruiz, *Asian Americans Are the Fastest-Growing Racial or Ethnic Group in the U.S.*, PEW RSCH. CTR., (Apr. 9, 2021), http://www.pewresearch.org/fact-tank/2021/04/09/asian-americans-are-the-fastest-growing-racial-or-ethnic-group-in-the-u-s/ ("Asian Americans are the fastest-growing racial or ethnic group in the U.S."). The Pew Research Center analysis segregated the Asian American growth from that of the Native Hawaiian and Pacific Islander communities, which also saw rapid growth. *See id.* (noting that the Native Hawaiians and Pacific Islanders population grew at seventy percent and sixty-one percent.).

18. Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021), http://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/ [hereinafter *Key Facts About Asian Americans, a Diverse and Growing Population*] ("Single-race, non-Hispanic Asians are projected to become the largest immigrant group in the country, surpassing Hispanics in 2055.").

19. *See id.*; *Fact Sheets: Asian Americans*, PEW RSCH. CTR., http://www.pewresearch.org/social-trends/collection/asians-in-the-united-states/ (last visited Apr. 12, 2022) (noting that ninety-seven percent of the total Asian population are Bangladeshi, Bhutanese, Burmese, Cambodian, Chinese, Filipino, Hmong, Indian, Indonesian, Japanese, Korean, Laotian, Malaysian, Mongolian, Nepalese, Pakistani, Sri Lankan, Thai, or Vietnamese); A SNAPSHOT OF BEHAVIORAL HEALTH ISSUES FOR ASIAN AMERICAN/NATIVE HAWAIIAN/PACIFIC ISLANDER BOYS AND MEN: JUMPSTARTING AN OVERDUE CONVERSATION, SAMHSA 2 (2016), http://store.samhsa.gov/sites/default/files/d7/priv/sma16-4959.pdf [hereinafter A SNAPSHOT OF BEHAVIORAL HEALTH ISSUES] (listing the largest Asian ethnicities in the United States).

Asian American community.[20] As aforementioned, Asian Americans are often immigrants, but the immigrant experience—when someone arrives in the United States and through which the immigration process follows—differs among ethnicities.[21] Consequently, many AAPIs arrive not being fluent in English and may have difficulty obtaining basic services, including healthcare.[22]

Grouping people of Asian descent under the term "Asian American" has its roots both in student activism and government bureaucracy, but this designation is a recent phenomenon.[23] In the 1960s, California students established the Asian American Political Alliance to "bring together all the different groups of Asian descent under one, larger umbrella."[24] In 1977, the

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20. *Key Facts About Asian Americans, a Diverse and Growing Population*, *supra* note 18.

21. *See id.* (noting that while "14% of all Americans — and 17% of adults — were born" in another country, "six-in-ten Asian Americans (57%), including 71% of Asian American adults, were born in another country"); Ruiz et al., *supra* note 6; RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 7–8 (rev. ed. 2008) (discussing the differences and similarities that different Asian ethnicities experienced during periods of immigration and acculturation); A SNAPSHOT OF BEHAVIORAL HEALTH ISSUES, *supra* note 19, at 3–4 (discussing historical immigration patterns, including colonization, of different AAPI groups to the United States).

22. Kathy Ko Chin, *HHS Must Improve Language Access to Make Meaningful Access a Reality*, HEALTH AFFS. BLOG (July 22, 2016), http://www.healthaffairs.org/do/10.1377/forefront.20160722.055907/full/ ("[At the time] about one-third of Asian Americans (AA) and 14 percent of Native Hawaiians and Pacific Islanders (NHPI), which includes people from the Marshall Islands, do not read, speak, write, or understand English well."); *Key Facts About Asian Americans, a Diverse and Growing Population*, *supra* note 18 (noting that "[n]early all U.S.-born Asians (95%) were proficient in English, compared with 57% of foreign-born Asians" and the former are more likely to speak only English at home whereas the latter are more likely to speak a different language at home).

23. *See* Maura Hohman, *Do I Count as 'Asian American'? What the History Behind the Term Taught Me*, TODAY, http://www.today.com/news/do-i-count-asian-american-what-history-behind-term-taught-t216055 (May 4, 2021, 3:11 PM); Anna Purna Kambhampaty, *In 1968, These Activists Coined the Term 'Asian American' — And Helped Shape Decades of Advocacy*, TIME (May 22, 2020, 12:00 PM), http://time.com/5837805/asian-american-history/; FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 310 (2002); Sunmin Kim, *Fault Lines Among Asian Americans: Convergence and Divergence in Policy Opinion*, RUSSEL SAGE FOUND. J. SOC. SCIS., Apr. 2021, at 46, 47 ("[T]he first half of the twentieth century, immigrants moving to the United States from various parts of the continent labeled Asia did not identify as Asians."); Caitlin Yoshiko Kandil, *After 50 Years of 'Asian American,' Advocates Say the Term is 'More Essential than Ever'*, NBC NEWS (May 31, 2018, 8:34 AM), http://www.nbcnews.com/news/asian-america/after-50-years-asian-american-advocates-say-term-more-essential-n875601.

24. Purna, *supra* note 23 (noting this organization's name "is believed to be the first public use of the phrase 'Asian American.'"); *see also* Harvey Dong, *Transforming Student*

federal government formally adopted the term "Asian or Pacific Islander" as "[a] person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands" as one of five basic categories for race and ethnicity.[25] "This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa."[26] That inclusion was part of a larger effort over the next few years to "remov[e] the barriers [for Asian Americans] to full participation in American life."[27]

Many organizations have since adopted the term "Asian American" to reflect a "pan-Asian" collectivism, and thus seem more reflective of the AAPI community at large.[28] Moreover, incidents of violence, such as those incurred during the pandemic, have often brought AAPIs together for political strength and public safety.[29] Some, though, have questioned the usefulness of the term given that it is so expansive that it hides disparities among the different

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Elites into Community Activists, in ASIAN AMERICANS: THE MOVEMENT AND THE MOMENT 189–93 (Steve Louie & Glenn K. Omatsu ed., 2001) (discussing initial mobilization efforts between students and elderly residents that helped establish community and raise attention).

25. OFF. OF MGMT. & BUDGET DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (1977) http://wonder.cdc.gov/wonder/held/populations/bridged-race/directive15.html. The federal government subsequently broke this category into "Asian" and "Native Hawaiian or Other Pacific Islander" two decades later with the express purpose of ensuring that "the data on the Native Hawaiians and other Pacific Islander groups will no longer be overwhelmed by the aggregate data of the much larger Asian groups." Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

26. OFF. OF MGMT. & BUDGET, *supra* note 25.

27. Stephanie Hinnershitz, *What Comes Next?*, HISTORY NEWS NETWORK, (Apr. 4, 2021), http://historynewsnetwork.org/article/179780 (noting the first hearing by the U.S. Commission on Civil Rights specifically on Asian Americans and the first congressional designation of an AAPI heritage week).

28. Wu, *supra* note 23, at 311; Harmeet Kaur, *The Problem With the Term 'Asian American,' According to Jay Caspian Kang*, CNN, http://www.cnn.com/2021/10/14/us/the-loneliest-americans-jay-caspian-kang-cec/index.html (last updated Oct. 14, 2021, 11:04 AM) ("Asian American identity politics are too often dominated by the concerns of the upper middle-class children of immigrants . . . obscures more pressing challenges facing the most vulnerable Asian Americans . . . ."); *see also* Naomi Ishisaka, *Why It's Time to Retire the Term 'Asian Pacific Islander'*, SEATTLE TIMES (Nov. 30, 2020, 4:11 PM), http://www.seattletimes.com/seattle-news/why-its-time-to-retire-the-term-asian-pacific-islander/ (arguing to end the designation "AAPI").

29. Kandil, *supra* note 23 (discussing how the 1982 murder of Vincent Chin due to anti-Japanese economic fears led to political mobilization); *see also* Kambhampaty, *supra* note 23; DONG ET AL., *supra* note 5, at 11; Fan, *supra* note 5; Nawaz et al., *supra* note 5.

ethnicities.[30] Others argue that the term is necessary to connote inclusiveness as part of American society and to dispute notions of Asians as outsiders.[31]

III. AAPIS AND MENTAL HEALTH

As noted earlier, even prior to the pandemic, AAPIs had particular needs related to mental health and access to such services.[32] This section provides mental health data on the AAPI community with some preliminary findings over the pandemic.[33] It also provides a general overview on the reasons that many AAPIs resist seeking mental health services or even acknowledging the need for such services.[34]

A. *Stoicism as a Familiar Cultural Theme*

In addition to the unfair stigma associated with mental health that is too common in society, many Asians share common cultural traits and circumstances that downplay or even lead to hiding mental health needs.[35] Seeing stoicism—enduring hardships without complaints—as a virtue, is a common characteristic across different Asian cultures.[36] Observers note that viewing "eating bitterness" as a virtue can also cause Asian Americans to "resist seeking out relief until the suffering becomes intolerable" as they "end up experiencing undue agony."[37]

Many practitioners and researchers have noted that this virtue causes intense shame among Asian Americans who may need mental health

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30. WU, *supra* note 23, at 311; Kandil, *supra* note 23 (noting that aggregating AAPI data failed to recognize disparities in health insurance coverage).

31. Hohman, *supra* note 23.

32. Varma, *supra* note 7.

33. *See* discussion *infra* Section III. A–C.

34. *See* discussion *infra* Section III. A–B.

35. Koko Nishi, *Mental Health Among Asian-Americans*, AM. PSYCH. ASS'N, http://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/article-mental-health (last visited Apr. 12, 2022).

36. Yenting Chen, *Anti-Asian Hate: 'Eating Bitterness' and the Role of Empathy*, MED. NEWS TODAY (Mar. 23, 2021), http://www.medicalnewstoday.com/articles/anti-asian-hate-eating-bitterness-and-the-role-of-empathy ("Stoicism [as] a highly prized characteristic in many Asian cultures."); *see also* Uma S. Segal, *Indian Families: The Diaspora in the United States and Canada*, *in* ASIAN FAMILIES IN CANADA AND THE UNITED STATES 148 (2021) (reporting that despite how "Asian groups are very dissimilar from each other . . . they share several values, expectations, and norms of behavior," which included "a sense of obligation and of shame").

37. *The Problem with Eating Bitterness*, UNTIGERING (Oct. 26, 2017), http://untigering.com/the-problem-with-eating-bitterness/.

services.[38] Such shame may exacerbate the underlying mental health needs.[39] Further, Asian Americans may exhibit prejudices against those exhibiting mental illnesses.[40] This sense of stigma only reinforces the shame that Asian Americans may feel if they seek out mental health services and may make them even more reluctant to utilize them.[41] Some of these feelings may be generational and subside as Asian Americans become more familiar with the mental health system[42] and more fluent in English.[43]

Embracing stoicism makes it difficult, if not impossible, to acknowledge when a family member needs mental health services.[44] For instance, some Asian American parents may miss or even ignore their children's struggles; consequently, significant numbers of Asian American youth struggle emotionally at levels equal to, or even higher, than other teens.[45] One college student discussed how her immigrant parents could not understand how "their daughter, who lived in a manicured middle-class suburban home and always went to bed with a full belly, complain[ed] she felt depressed."[46]

B. *Identity as a Model Minority*

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38. Segal, *supra* note 36, at 148.

39. Spencer et al., *supra* note 15, at 2415 (noting that "embarrassment about seeking services" is one factor associated with lower utilization of mental health services).

40. REBECCA L. COLLINS ET AL., RACIAL AND ETHNIC DIFFERENCES IN MENTAL ILLNESS STIGMA IN CALIFORNIA 2 (2014), http://www.jstor.org/stable/pdf/10.7249/j.ctt14bs2bc.1.pdf?refreqid=excelsior%3Af770b7349d87618093b3a2abdd271630&ab_segments=&origin=.

41. *Id.* at 3; Spencer et al., *supra* note 15, at 2415.

42. A SNAPSHOT OF BEHAVIORAL HEALTH ISSUES, *supra* note 19, at 5; Spencer et al., *supra* note 15, at 2414.

43. A SNAPSHOT OF BEHAVIORAL HEALTH ISSUES, *supra* note 19, at 5; Spencer et al., *supra* note 15, at 2415; Lonnie R. Snowden et al., *Limited English Proficient Asian Americans: Threshold Language Policy and Access to Mental Health Treatment*, 72 SOC. SCI. & MED. 230, 231 (2011) (noting prior research that Asian Americans indicated that "linguistic barriers to be as important, if not more important, than cultural barriers").

44. Isabelle Khoo, *Why Asian Parents Don't Understand Mental Health, and How to Change That*, HUFFPOST (June 18, 2018, 4:41 PM), https://www.huffpost.com/archive/ca/entry/asian-parents-mental-health_a_23462016?utm_campaign=canada_dau.

45. Katherine Kam, *Cultural Stigma Hurts Asian American Teens with Depression*, YR MEDIA (Sept. 10, 2013), http://yr.media/news/cultural-stigma-hurts-asian-american-teens-with-depression/.

46. Katherine Xie, *What It's Like to Be an Asian American with Depression*, MIGHTY (July 16, 2016), http://themighty.com/2016/07/living-with-depression-as-an-asian-american/.

Related to often holding a stoic outlook that downplays "complaining," the AAPI community has often been called the "model minority" even as some AAPI advocates dispute the validity or utility of this viewpoint.[47] Mainstream society pushed the "model minority" label on the entire Asian American community as if it were monolithic.[48] This "model minority" concept idealizes AAPIs as "hardworking, studious, committed to family, and so on," all seemingly positive notions that ought to be complimentary.[49] Observers note that AAPIs as a whole achieve a higher level of educational attainment than any other racial group, including Whites, and often, this achievement is attributed to Asian culture, similar to stoicism being seen as a typical Asian virtue.[50]

Despite the positive sound, the "model minority" label has had negative consequences for the entire AAPI community, particularly for those who are more recent immigrants or in other vulnerable situations.[51] Some AAPI advocates even decry the label as a myth that can be harmful to all AAPIs regardless of their community status.[52] Because of the lack of data disaggregation, this myth hides many disparities, including health disparities such as mental health needs among AAPIs and inflates AAPIs' socio-

47. Ryan Kim, *Struggling to Define Asian-American Culture in 2019*, WASH. SQUARE NEWS, Feb. 4, 2019, at 8; *see also* Xie, *supra* note 46; Teresa Wiltz, *Beyond the 'Model Minority' Image: Asians in the US*, PEW CHARITABLE TRS. (Oct. 8, 2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/10/08/beyond-the-model-minority-image-asians-in-the-us.

48. Wiltz, *supra* note 47*; see* Roslyn Talusan, *The Year We Weaponized the Model Minority Myth*, REFINERY29, http://www.refinery29.com/en-gb/model-minority-myth (last updated May 4, 2021, 3:37) ("[T]he term 'Asian American' emerged as a radical, deliberately anti-racist political identity. Though it collected dozens of ethnicities under one group, grouping us together meant establishing our solidarity with other non-white communities, declaring unity against all institutionalised oppression."); Jeff Guo, *The Real Reasons the U.S. Became Less Racist Towards Asian Americans*, WASH. POST (Nov. 29, 2016), http://www.washingtonpost.com/news/wonk/wp/2016/11/29/the-real-reason-americans-stopped-spitting-on-asian-americans-and-started-praising-them/.

49. Nathan Joo et al., *Asian-American Success and the Pitfalls of Generalization*, BROOKINGS INST. (Apr. 20, 2016), http://www.brookings.edu/research/asian-american-success-and-the-pitfalls-of-generalization/.

50. *Id.*; Chen, *supra* note 36; PEW RSCH. CTR., *supra* note 16, at 1 ("[R]ecent Asian arrivals [are] the most highly educated cohort of immigrants in U.S. history.").

51. *See* Wiltz, *supra* note 47 ("[AAPI Immigrants] ability to access opportunities in the U.S. varies dramatically, depending on the circumstances that brought them here and where they landed.").

52. WU, *supra* note 23, at 76–77; TAKAKI, *supra* note 21, at 415.

economic status and economic success.[53] AAPI advocates also argue that the myth has divided, rather than helped to lift up, communities of color.[54]

Further, some ethnicities within the AAPI community are held up as a model while simultaneously attacked as a nuisance.[55] Sometimes this paradoxical treatment is due to the intersection of both race and religion, but it may emerge as a blanket animus against AAPIs without regard to ethnic differences.[56] Perhaps even worse, some AAPIs use the "model minority" myth to justify inequities that they themselves have perpetrated on other AAPIs.[57]

In terms of the impact on AAPIs' health, trying to live up to this idealized notion—particularly in a stoic culture—can lead to stress and, therefore, unhealthy consequences.[58] This stressful impact is not necessarily unique to AAPIs; it is found in other communities seeking success, such as women, particularly Black women, and people of color also reporting stress

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53. Thomas Le & Emma Zeng, *Data Disaggregation Shows Startling Health Disparities Among Asian Americans*, BALT. SUN (Mar. 31, 2021, 6:30 AM), http://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0331-asian-health-disparities-20210331-xciw35hutzg2pmbdduv73prdm4-story.html; TAKAKI, *supra* note 21, at 415; Margaret Simms, *"Model Minority" Myth Hides the Economic Realities of Many Asian Americans*, URB. INST.: URB WIRE (May 2, 2017), http://www.urban.org/urban-wire/model-minority-myth-hides-economic-realities-many-asian-americans; Agnes Constante, *Filipino Americans Reported Higher Covid Mental Health Toll than Asian Americans Collectively*, NBC NEWS (June 18, 2021, 12:39 PM), http://www.nbcnews.com/news/asian-america/85-filipino-americans-reported-covid-mental-health-issues-more-any-n1271214; Ellen McGirt, *The Asian Glass Ceiling: Studying the Model Minority Myth*, FORTUNE (June 4, 2018, 12:20 PM), http://fortune.com/2018/06/04/asian-americans-model-minority-asian-glass-%20ceiling/.

54. TAKAKI, *supra* note 21, at 8; *see also* Ellen D. Wu, *Asian Americans and the 'Model Minority' Myth*, L.A. TIMES (Jan. 23, 2014, 12:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-0123-wu-chua-model-minority-chinese-20140123-story.html; Joo et al., *supra* note 49 ("[H]olding up one racial or ethnic minority as a 'model' can too easily become an implicit criticism of other minorities.").

55. Segal, *supra* note 36, at 238.

56. *Id.* at 238–39; WU, *supra* note 23, at 70, 76; PEW RSCH. CTR., *supra* note 16, at 1 ("[R]ecent Asian arrivals [are] the most highly educated cohort of immigrants in U.S. history.").

57. *See* WU, *supra* note 23, at 70; Talusan, *supra* note 48 ("The ugly truth is that the exploitation of Asian immigrants by other Asians is also part of Asian American history . . . positioning lighter-skinned East Asians on top and darker-skinned South and Southeast Asians at the bottom.").

58. Wiltz, *supra* note 47 (noting that some AAPIs, particularly recent immigrants, "need a variety of social services such as language classes, mental health services and food stamps. . . . [but] have difficulty accessing those services.").

and fatigue caused by constantly needing to excel to meet expectations.[59] Commentators have noted that to live up to this notion, some Asian American women are more fearful of "keeping face"—again, eating bitterness—than calling the police or social services for help.[60] Even among Asian American women who discuss their abuse, a survey indicated that over a third felt ashamed of revealing it.[61]

C. *Prevalence of Mental Health Needs in the AAPI Community*

With these general observations about AAPIs in mind, we will examine the state of mental health among AAPIs before and since the pandemic.[62] While research often does not disaggregate different AAPI communities, they do provide a good overview of the community at large and how it compares to other racial groups.[63]

The first national study of Asian Americans and mental health, the National Latino and Asian American Study ("NLAAS"), was developed in 2004 and has served as an important tool to fill in research gaps for these two growing communities in the United States.[64] In a review of the NLAAS, researchers found that AAPIs "have a sizeable burden of mental illness, with a 17.30% overall lifetime rate of any psychiatric disorder and a 9.19% 12-

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59. *See* The Single Wives Club, *Ending the Silence on Black Girl Magic and Mental Health*, HER AGENDA (Oct. 31, 2017, 3:30 AM), http://heragenda.com/black-girl-magic-mental-health-break-the-silence-stigma; Andrea S. Kramer & Alton B. Harris, *Why Women Feel More Stress at Work*, HARV. BUS. REV. (Aug. 4, 2016), http://hbr.org/2016/08/why-women-feel-more-stress-at-work.

60. Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151, 169–70 (1996); *see* Chen, *supra* note 36.

61. MIEKO YOSHIHAMA & CHIC DABBY, DOMESTIC VIOLENCE IN ASIAN & PACIFIC ISLANDER HOMES 29 (2020), http://s3.amazonaws.com/gbv-wp-uploads/wp-content/uploads/2019/02/01204358/Facts-Stats-Report-DV-API-Communities-2015-formatted2019.pdf; *see also* Spencer et al., *supra* note 15, at 2410 ("[A National study] found that Asian American women were less likely than White women to report perceived need for mental health services, even when accounting for frequency of mental distress.").

62. *See* Spencer et al., *supra* note 15, at 2410.

63. *See id.*

64. Margarita Alegria et al., *Considering Context, Place and Culture: The National Latino and Asian American Study*, 13 INT'L J. METHOD PSYCHIATRIC RSCH. 208, 209 (2004). At the time of the study, Asian Americans accounted for 3.7% of the population. *Id.* (citing *Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000*, U.S. CENSUS BUREAU (Apr. 2, 2001), http://www2.census.gov/programs-surveys/decennial/2000/phc/phc-t-01/tab01.pdf.)). The survey considered four categories of AAPIs — "Chinese, Vietnamese, Filipinos, and Other Asians" — and were offered in English, Chinese, Tagalog, and Vietnamese. *Id.* at 211.

month rate."[65] Despite this rate, AAPIs were "one third as likely as Whites to [utilize] mental health services."[66] Additional studies found similar utilization disparities compared to other racial groups or the general population.[67] One study found "only 3.1% of Asian Americans use specialty mental health services, compared with 5.59% of African Americans, . . . and 8.8% of the general population," and another study found that "only 8.6% of Asian Americans sought any mental health services compared with 17.9% of the general population."[68]

Nearly a decade later, the federal Substance Abuse and Mental Health Services Administration ("SAMHSA") released a new survey on AAPI and behavioral health issues, including both substance use disorders and mental health issues.[69] The SAMHSA survey found that about 14.5% of AAPI adults had some form of mental illness, and of those, one in five had a serious mental illness.[70] According to SAMHSA, mental illness grew from 2.9% in 2008 to 6.2% in 2019 among young AAPI adults between eighteen and twenty-five years old and from 1.6% to 3.5% among AAPI adults between twenty-six and forty-nine years old.[71] Despite this high prevalence, SAMHSA found a huge treatment gap for those seeking treatment of the 2.3 million adult AAPIs

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65. Spencer et al., *supra* note 15, at 2410.

66. *Id.*

67. *Id.* at n. 9-12.

68. *Id.* (citing Jennifer Abe-Kim et al, *Use of mental health-related services among immigrant and US-born Asian Americans: results from the National Latino and Asian American Study,* 97 AM. J. PUB. HEALTH 91, 91 (2007)).

69. U.S. DEP'T HEALTH & HUM. SERVS., 2019 NATIONAL SURVEY ON DRUG USE AND HEALTH: ASIAN/NATIVE HAWAIIANS AND OTHER PACIFIC ISLANDERS (NHOPI) 4 (2020), http://www.samhsa.gov/data/sites/default/files/reports/rpt31100/2019NSDUH-NHOPI/Asian_NHOPI.pdf. Of note, in the intervening decade since the Unitgering survey was released, two major changes in mental health law occurred — the 2008 Mental Health Parity and Addiction Equity Act and the 2010 Affordable Care Act — passed that should have increased accessibility and coverage of services. *The Problem with Eating Bitterness*, *supra* note 37; Justin C. Yang et al., *Demographic, Socioeconomic, and Health Correlates of Unmet Need for Mental Health Treatment in the United States, 2002–16: Evidence from the National Surveys on Drug Use and Health*, INT'L J. FOR EQUITY HEALTH, 2019, at 1, 2. Further, the AAPI population had grown to 5.7% of the population. *Profile: Asian Americans*, U.S. DEP'T HEALTH & HUM. SERVS. OFF. MINORITY HEALTH, http://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=63 (last modified Oct. 12, 2021, 12:47 PM) ("According to the 2019 Census Bureau population estimate, there are 18.9 million Asian Americans, alone, living in the United States. Asian Americans account for 5.7 percent of the nation's population.").

70. U.S. DEP'T HEALTH & HUM. SERVS., *supra* note 69, at 4; *see also* A SNAPSHOT OF BEHAVIORAL HEALTH ISSUES, *supra* note 19, at 4 (noting that NLAAS had found roughly similar trends among Asian American men (17.2%) and women (17.4%) reporting any lifetime presence of a psychiatric disorder).

71. U.S. DEP'T HEALTH & HUM. SERVS., *supra* note 69, at 40.

experiencing any mental illness; nearly four out of five did not receive treatment.[72]

More data is needed to see the effect of the pandemic on these findings. SAMHSA's 2020 survey incorporated data that was collected and discovered during the initial year of the pandemic, but it does not include data stratified by race or ethnicity.[73] A community survey did find that during the pandemic, over one-third of community members said their mental health had deteriorated, with over half of those being between the ages of eighteen and thirty-four who confessed that their mental health seemed worse.[74]

IV. THE IMPACT OF COVID-19 ON THE ASIAN AMERICAN COMMUNITY

In addition to the direct risk of contracting COVID-19, health experts warn of widespread mental health issues caused by the stressors resulting directly or indirectly from the pandemic: social isolation, economic anxiety, and political and social unrest that have engulfed our collective psyche.[75] Even prior to the pandemic, many health policy experts argued that a person's health is greatly affected by social determinants such as the person's financial situation or physical safety.[76]

The COVID-19 pandemic has been devastating for many Asian Americans' mental wellbeing—"[t]he pandemic's health and economic effects would strain an identity rooted in stoicism, and the political and social reactions would shatter an identity based on being the 'model minority."[77] As discussed below, Asian Americans are consequently more likely to be concerned about the pandemic than the general public.[78] These non-health

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72. *See id.* at 49.

73. *See id.*

74. *Asian Americans, Native Hawaiians, and Pacific Islanders on COVID-19 and Getting Vaccinated*, APIAHF (July 21, 2021), http://www.apiahf.org/resource/nationwide-survey-of-aanhpi-on-covid-19/.

75. *See* Stephanie Stevens, *Six-Months After COVID-19: The Pandemic and Mental Health*, ACOG (Oct. 28, 2020), http://www.acog.org/news/news-articles/2020/10/six-months-after-covid-19-pandemic-and-mental-health.

76. *See id.* ("[O]ne-third of Asian American consumers have taken no financial actions at all in the wake of COVID-19."); Press Release, Lincoln Fin. Grp., Asian Americans Most Worried About Lost Income as a Result of COVID-19, Says New Lincoln Financial Study (May 13, 2021), http://newsroom.lfg.com/asian-americans-most-worried-about-lost-income-as-result-covid-19-says-new-lincoln-financial-study.htm.

77. Kim, *supra* note 3.

78. Gaby Galvin, *Asian Americans Are Less Likely than Public Overall to Know Someone with COVID-19. Their Mental Health Has Suffered Just the Same*, MORNING CONSULT (Nov. 23, 2020, 6:00 AM), http://morningconsult.com/2020/11/23/asian-americans-covid-19-impact-polling/.

impacts and related issues have had a marked effect on AAPIs' mental health just as much as the pandemic itself.[79]

At a time when stressors are at a peak, many Asian Americans have realized that they are caught in a catch-22: pathways to aid, especially for mental health needs, are not readily available because of years of assuming the community is this stoic "model minority."[80] Therefore, their issues—particularly those most marginalized within the community—are invisible, not discussed, or even seemingly nonexistent to the public at large.[81]

A. *The Pandemic's Economic Impact on the AAPI Community*

The pandemic's economic impact has devastated sectors where AAPIs are overrepresented.[82] For instance, about one-in-four food and accommodation services, and nearly one-in-five retail businesses, are Asian-owned, despite Asian Americans making up only six percent of the United States population.[83] The leisure and hospitality sector saw the largest percentage change in employment during the first year of the pandemic.[84] Sectors with a higher percentage of small businesses with Asian ownership—including healthcare, food services, and hospitality—saw a higher percentage of federal pandemic aid.[85] In addition, Asian Americans make up a greater share of frontline and essential workers, particularly in healthcare, putting

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79. *See id.*

80. Kimmy Yam, *The Mental Health Toll of Being a 'Model Minority' in 2020*, NBC NEWS (Dec. 23, 2020, 5:00 AM), http://www.nbcnews.com/news/asian-america/mental-health-toll-being-modelminority-2020-n1249949.

81. *See id.*

82. Jeff Le, *Asian Americans Could Be the Key to Winning Georgia. Are Campaigns Flubbing Their Chance?*, POLITICO (Dec. 23, 2020, 8:52 AM), http://www.politico.com/news/magazine/2020/12/23/asian-americans-georgia-runoff-450214; Press Release, Lincoln Fin. Grp., *supra* note 76 ("Almost a quarter of employed Asian Americans work in sectors hit hard by the pandemic like hospitality and leisure, retail or industries like personal care . . . ."). Further, the pandemic has had a disparate impact on AAPI women just as the pandemic has had on women generally. CLAIRE EWING-NELSON, ALL OF THE JOBS LOST IN DECEMBER WERE WOMEN'S JOBS 1 (2021), http://nwlc.org/wp-content/uploads/2021/01/December-Jobs-Day.pdf.

83. *See* Elaine Dang et al., *COVID-19 and Advancing Asian American Recovery*, MCKINSEY (Aug. 6, 2020), http://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-advancing-asian-american-recovery.

84. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-387, COVID-19: SUSTAINED FEDERAL ACTION IS CRUCIAL AS PANDEMIC ENTERS ITS SECOND YEAR 11 (2021).

85. *Id.* (noting that "industries [with] higher percentages of businesses with owners classified as female, Black, Asian, or Hispanic" applied for paid leave and employee retention tax credits).

them at a heightened risk of coming into contact with COVID.[86] Overall, Asian Americans have seen conditions in the labor market slightly worsen for them more than their white counterparts.[87]

Unfortunately, too many AAPIs do not know how to weather the pandemic's economic effects.[88] A consumer survey conducted during the pandemic found that four out of five Asian Americans were searching for ways to protect themselves financially, but many do not know what to do to provide some sense of economic security.[89] Nearly two in five Asian Americans feared financial hardship because of reduced hours or even layoffs due to economic uncertainty, and a quarter of AAPI small businesses shuttered at the beginning of the pandemic.[90]

B. *The Pandemic's Relationship to a Rise in Anti-Asian Violence*

Like many other communities of color, AAPI communities are no strangers to understanding racism as a public health issue.[91] Indeed, feelings of discrimination consistently remained at relatively high levels before, and after, the start of the pandemic.[92] Again, while events during the pandemic have raised awareness about the community health consequences of

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86. *See* NAT'L NURSES UNITED, SINS OF OMISSION 12 (2020), http://www.nationalnursesunited.org/sites/default/files/nnu/graphics/documents/0920_Covid19_SinsOfOmission_Data_Report.pdf.

87. *Id.*; Dang et al., *supra* note 83 (finding that the unemployment rate among Asian Americans jumped more than 450% between February and June 2020, outpacing the rate of other ethnic groups); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 84, at 52.

88. *See* Press Release, Lincoln Fin. Grp., *supra* note 76.

89. *See id.* ("[O]ne-third of Asian American consumers have taken no financial actions at all in the wake of COVID-19.").

90. *See id.*; DONALD MAR & PAUL ONG, COVID-19'S EMPLOYMENT DISRUPTIONS TO ASIAN AMERICANS 7 (2020), http://www.aasc.ucla.edu/resources/policyreports/COVID19_Employment_CNK-AASC_072020.pdf.

91. Kim, *supra* note 3; Press Release, Georges Benjamin, Ex. Dir., Am. Pub. Health Ass'n., Racism is an Ongoing Public Health Crisis that Needs Our Attention Now (May 29, 2020), http://www.apha.org/news-and-media/news-releases/apha-news-releases/2020/racism-is-a-public-health-crisis.

92. Ruiz et al., *supra* note 6.

> Experiences with discrimination among Asian adults were widely reported before the pandemic. About three-in-four Asian Americans (73%) say they have personally experienced discrimination or been treated unfairly because of their race or ethnicity, according to the April 2021 Pew Research Center survey. This share is unchanged from June 2020 and is about the same as prior to the pandemic, when 76% of Asian adults in February 2019 said they had personally experienced discrimination or unfair treatment because of their race or ethnicity.

Id.

discrimination, this relationship was well established by pre-pandemic research that found "an association between racial discrimination and mental disorders among Asian Americans."[93]

Further, the pandemic has seen a concurrent rise in violence against Asian Americans: about four in five AAPI adults believed violence against them is increasing, and thirty percent of AAPI adults feared being threatened or physically attacked.[94] Violent attacks against Asian Americans rose during the pandemic, mainly driven by political attacks against China—identified as the originating country for the novel coronavirus—along with a resurgence in scapegoating the Asian community.[95] Horrifically, these political slurs have resulted in indiscriminate violence against Asian Americans, and fear of such violence has affected the mental health and economic well-being of many AAPIs.[96]

But for many in the Asian American community—and among communities of color—hostility is not necessarily something new, but rather, reflective of underlying issues that the pandemic has exacerbated.[97] And like other communities of color, the history of AAPIs in the United States is

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93. Spencer et al., *supra* note 15, at 2410; Varma, *supra* note 7; DONG ET AL., *supra* note 5, at 2; Fan, *supra* note 5; *see also* discussion *supra* Part III (citing a series of studies on the effect of discrimination on AAPI mental health).

94. Ruiz et al., *supra* note 6; *Asian Americans, Native Hawaiians, and Pacific Islanders on COVID-19 and Getting Vaccinated*, *supra* note 74.

95. David Nakamura, *With 'Kung Flu,' Trump Sparks Backlash over Racist Language — and a Rallying Cry for Supporters*, WASH. POST (June 24, 2020), http://www.washingtonpost.com/politics/with-kung-flu-trump-sparks-backlash-over-racist-language--and-a-rallying-cry-for-supporters/2020/06/24/485d151e-b620-11ea-aca5-ebb63d27e1ff_story.html; *see also* Eun Kyung Kim, *Prejudice Against Asian Americans Is Real and It's Ugly*, ROLL CALL (Mar. 29, 2021, 10:30 AM), http://www.rollcall.com/2021/03/29/prejudice-against-asian-americans-is-real-and-its-ugly/?utm_source=&utm_medium=email&utm_campaign=newsletters&utm_conten.

96. *Asian Americans, Native Hawaiians, and Pacific Islanders on COVID-19 and Getting Vaccinated*, *supra* note 74; *see* Sydney Pereira, *Woman Beaten in Anti-Asian Attack on a Train in Manhattan*, GOTHAMIST (Dec. 27, 2020, 7:35 PM), http://gothamist.com/news/woman-beaten-anti-asian-attack-train-manhattan; Carmen Reinicke, *How the Pandemic and a Rise in Targeted Hate Crimes Has Shifted Spending For Asian Americans*, CNBC (June 2, 2021, 9:44 AM), http://www.cnbc.com/2021/06/02/the-pandemic-has-shifted-spending-in-the-aapi-community.html (quoting an advocate stating that "[t]he fear is very real, it has a mental health impact and also ultimately does of course impact economic activity" because "[i]f people are afraid to leave their homes, how will they go out and find a job or spend money in a local business?").

97. Li Zhou, *The Long History of Anti-Asian Hate in America, Explained*, VOX, http://www.vox.com/identities/2020/4/21/21221007/anti-asian-racism-coronavirus-xenophobia (last updated Mar. 5, 2021, 5:45 PM).

complicated and running the gamut between outright exclusion to elevation as a model minority and a wedge for identity politics.[98]

For instance, Americans' increasingly negative views about China as it becomes an economic competitor is one factor—along with the pandemic—that has led to the scapegoating of Asian American-owned businesses.[99] These attitudes parallel the nativism that led to events ranging from the passage of the Chinese Exclusion Act in 1882 to the Vincent Chin murder in 1982.[100] The COVID-19 pandemic, however, has exacerbated these tensions; aggressors connect the virus to China as a justification for violence against Asian Americans.[101]

As community leaders raise awareness about the broader AAPI community's needs, policymakers are responding to the immediate needs brought on by the pandemic.[102] For example, recently Congress passed the COVID-19 Hate Crimes Act.[103] But some critics argue that the law does not address the underlying causes of anti-Asian sentiment nor the needs of the community.[104] Some advocates even opposed the COVID-19 Hate Crimes Act, in part, because they argued it singled out policing as a solution for

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98. *Id.*

99. *See* William A. Galston, *A Momentous Shift in US Public Attitudes Toward China*, BROOKINGS INST.: ORDER FROM CHAOS (Mar. 22, 2021), http://www.brookings.edu/blog/order-from-chaos/2021/03/22/a-momentous-shift-in-us-public-attitudes-toward-china/; Robert Farley, *Can China's Economy Overtake the United States?*, DIPLOMAT (July 23, 2021), http://thediplomat.com/2021/07/can-chinas-economy-overtake-the-united-states/; Nakamura, *supra* note 95; MAR & ONG, *supra* note 90, at 4–5.

100. *See Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T STATE OFF. HISTORIAN, http://history.state.gov/milestones/1866-1898/chinese-immigration (last visited Apr. 15, 2022); Becky Little, *How the 1982 Murder of Vincent Chin Ignited a Push for Asian American Rights*, HISTORY (May 5, 2020), http://www.history.com/news/vincent-chin-murder-asian-american-rights.

101. *See* Kambhampaty, *supra* note 23.

102. *See* Emma Hinchliffe, *Why Tammy Duckworth Issued Her Ultimatum Over AAPI Cabinet Representation: 'I Needed to Take Action'*, FORTUNE (Apr. 19, 2021, 8:34 AM), http://fortune.com/2021/04/19/tammy-duckworth-aapi-cabinet-interview/; Barbara Sprunt, *Congress Passes Bill to Counter the Rise in Anti-Asian Hate Crimes*, NPR, http://www.npr.org/2021/05/18/997847571/congress-passes-bill-to-counter-the-rise-in-anti-asian-hate-crimes (last updated May 18, 2021, 9:40 PM).

103. COVID-19 Hate Crimes Act, Pub. L. No. 117-13, §1, 135 Stat. 265, 265 (2021).

104. *See 75+ Asian and LGBTQ Organizations' Statement in Opposition to Law Enforcement-Based Hate Crime Legislation*, GAPIMNY (May 18, 2021, 3:23 PM), http://www.gapimny.org/75-asian-and-lgbtq-organizations-statement-in-opposition-to-law-enforcement-based-hate-crime-legislation/; Hinnershitz, *supra* note 27 ("In May of 2020, the Commission on Civil Rights promised to prosecute civil rights violations and hold public hearings on anti-Asian hate, but these initiatives had largely languished despite calls from the AAPI community for legislators to take verbal and physical abuse seriously.").

combating bias while ignoring Black and brown communities' concerns about over-policing.[105]

V. RECOMMENDATIONS

Again, for many communities of color, these stressors only brought to light disparities in our healthcare system, particularly our mental health system, that have long existed.[106] Achieving equity will require not only addressing supply-side barriers—for instance, how practitioners treat AAPIs—but also demand-side barriers that make AAPIs reluctant to utilize mental health services.[107]

As we emerge from the pandemic and in recognition of criticism of current policies, policymakers should work toward "not only addressing the mental health needs of the AAPI community. . . and the uptick in violence," but also making mental health services more equitable for all communities of color.[108] The following are recommendations "that stakeholders—policymakers, providers, and others—could adopt."[109]

A. *Engage in AAPI-Focused Research*

To make policy decisions on allocations on resources and understand communities' health status, stakeholders need disaggregated data, but too often, AAPI data is aggregated and thus may mask differences between AAPI ethnicities.[110] One often-cited example is the incidence of colorectal cancer which appears to be similar between Whites and Asian Americans as a whole, but when data on Asian Americans was disaggregated, researchers found that

105. Jabara-Heyer NO HATE Act, S. 1086, 117th Cong. (2021); Kimmy Yam, *Why Over 85 Asian American, LGBTQ Groups Opposed the Anti-Asian Hate Crimes Bill*, NBC NEWS (May 14, 2021, 3:30 PM), http://www.nbcnews.com/news/asian-america/why-over-85-asian-american-%20lgbtq-groups-opposed-anti-asian-n1267421; *75+ Asian and LGBTQ Organizations' Statement in Opposition to Law Enforcement-Based Hate Crime Legislation*, *supra* note 104.

106. Amelia Seraphia Derr, *Mental Health Service Use Among Immigrants in the United States: A Systematic Review*, 67 PSYCHIATRIC SERVS. 265, 265 (2016).

107. *See* Gayle Y. Iwamasa, *Recommendations for the Treatment of Asian-American/Pacific Islander Populations*, AM. PSYCH. ASS'N, http://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/psychological-treatment (last visited Apr. 15, 2022).

108. Kim, *supra* note 3; Yam, *supra* note 80; *75+ Asian and LGBTQ Organizations' Statement in Opposition to Law Enforcement-Based Hate Crime Legislation*, *supra* note 104; Derr, *supra* note 106, at 265.

109. Kim, *supra* note 3.

110. *Id.*

certain Asian ethnicities had lower screening rates.[111] In other words, if AAPIs are viewed as a whole, it would be difficult to notice that difference but if the data is sliced further, it is possible to see significant variation.[112]

Stakeholders can diversify health data by encouraging an environment of trust, security, and accountability between patients and the research community.[113] Policymakers can regulate and prohibit behavior that runs counter to their policy goals.[114] For example, a series of federal laws—including section 185 of the Medicare Improvements for Patients and Providers Act, section 3001 of the Health Information Technology for Economic and Clinical Health Act, and section 4302 of the Affordable Care Act—were supposed to encourage more rigorous reporting requirements for Medicare, Medicaid, and the Children's Health Insurance Program.[115] Such richer data sets would "represent a powerful new set of tools to move us closer to our vision of a nation free of disparities in health and health care."[116]

Given this lack of specificity about the AAPI community, AAPIs are frequently left out of discussions on health equity.[117] Aggregated data too often "suggest[s] that all Asian Americans are healthy, affluent, and well

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111. *Colorectal Cancer and Age, Race, and Ethnicity*, GASTROENTEROLOGY HEALTH PARTNERS (Dec. 9, 2020), http://www.gastrohealthpartners.com/colorectal-cancer-and-age-race-and-ethnicity/; Sabrina T. Wong et al., *Disparities in Colorectal Cancer Screening Rates Among Asian Americans and Non-Latino Whites*, 104 CANCER 2940, 2944 (2005).

112. *See* Hee Yun Lee et al., *Colorectal Cancer Screening Disparities in Asian Americans and Pacific Islanders: Which Groups are Most Vulnerable?*, 16 ETHNICITY & HEALTH 501, 510 (2011).

113. *See* Tina J. Kauh, *Racial Equity Will Not Be Achieved Without Investing in Data Disaggregation*, HEALTH AFFS. BLOG (Nov. 29, 2021), http://www.healthaffairs.org/do/10.1377/forefront.20211123.426054/full/ (urging investments into data disaggregation efforts, including ensuring community engagement).

114. *See id.* (noting, as an example, that the majority of states fail to follow the Office of Management and Budget's standards for disaggregating COVID-19 data between Asian Americans and Pacific Islanders).

115. Medicare Improvements for Patients and Providers Act of 2008, Pub. L. No. 110-275, § 185, 122 Stat. 2494, 2587–88; Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-5, § 3001, 123 Stat. 226, 232 (2009); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4302, 124 Stat. 119, 578–79 (2010); Megan Daugherty Douglas et al., *Missed Policy Opportunities to Advance Health Equity by Recording Demographic Data in Electronic Health Records*, AM. J. PUB. HEALTH, July 2015 at 380, 380.

116. Howard Koh, *Improving Health Disparities Data for a Healthier Nation*, WHITE HOUSE: BLOG (Nov. 2, 2011, 11:15 AM), http://obamawhitehouse.archives.gov/blog/2011/11/02/improving-health-disparities-data-healthier-nation.

117. Vivian Tseng, *Racial Equity in Health Must Include Asian Americans*, HILL (May 29, 2021, 2:00 PM), http://thehill.com/opinion/civil-rights/556088-racial-equity-in-health-must-include-asian-americans.

educated," when they are, in fact, an economically diverse group.[118] Consequently, this absence leads to a lack of financial and institutional support for research into the AAPI health issues at large.[119] Only half a percent of foundation giving and less than a percent of corporate giving goes to AAPI communities and causes.[120]

B. *Ensure Meaningful Coverage*

Having health insurance coverage is an important factor in whether someone, including an AAPI, will utilize mental health services.[121] As the AAPI population grows due to immigration, AAPIs face challenges obtaining coverage similar to other immigrant communities.[122] However, even communities with long-existing ties to this country may see barriers to obtaining coverage: for instance, certain Pacific Islanders who are part of the Compact of Free Association were denied coverage via Medicaid until Congress restored coverage.[123]

Coverage is not enough as stakeholders must ensure that such coverage is meaningful and usable.[124] AAPI immigrants face health literacy challenges and language barriers in common with the larger immigrant community, and given the diversity of languages within the AAPI community,

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118. Kauh, *supra* note 113.

119. *Id.* ("[The lack of specific data] will continue to erase the experiences of communities and mask how they are faring and, in turn, negatively affect how government and philanthropic resources are allocated"); Amy Yee, *Research on Asian Americans and Pacific Islanders Is Being Stifled*, SCI. AM. (July 8, 2021), http://www.scientificamerican.com/article/research-on-asian-americans-and-pacific-islanders-is-being-stifled/.

120. *The AAPI Giving Challenge Raises $1.1 Billion Commitment for AAPI Communities*, ASIAN AM. FOUND., http://www.taaf.org/aapi-giving-challenge (last visited Apr. 3, 2022).

121. Spencer et al., *supra* note 15, at 2415 (noting that "lack of health insurance is associated" with utilizing informal services rather than formal mental health services).

122. *See Health Coverage of Immigrants*, KFF (July 15, 2021), http://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/.

123. *See Compacts of Free Association*, U.S. DEP'T INTERIOR OFF. INSULAR AFFS., http://www.doi.gov/oia/compacts-of-free-association (last visited Apr. 3, 2022); Dan Diamond, *'A Shining Moment': Congress Agrees to Restore Medicaid for Pacific Islanders*, POLITICO (Dec. 20, 2020, 8:11 PM), http://www.politico.com/news/2020/12/20/congress-restores-medicaid-pacific-islanders-449480.

124. Kathy Ko Chin, *Language Access Rights Under Threat*, HEALTH AFFS. BLOG (Aug. 9, 2019), http://www.healthaffairs.org/do/10.1377/forefront.20190809.457959/full/ (noting that a "right to language access services" is critical for those with limited English proficiency "to meaningfully understand their health care and health insurance").

AAPIs may not understand important documents needed for obtaining and utilizing insurance if such documents are only in English and Spanish.[125] Additional services such as call centers and peer support can improve care access and utilization.[126] Additionally, having such services also may reduce perceived barriers—lack of fluency or speaking with an accent—that may cause some AAPIs to avoid mental health services.[127]

C. *Develop a Responsive Workforce*

Even for AAPIs with health insurance, finding a linguistically and culturally appropriate provider can be challenging.[128] As the American Psychological Association has noted, this challenge has resulted in "[m]isdiagnosis and underdiagnosis of mental illness among Asian Americans and Pacific Islanders who have serious mental health and health implications . . . ."[129] Organizations such as the National Asian American Pacific Islander Mental Health Association ("NAAPIMHA") have set up online directories and other resources to help connect providers with those in need.[130]

Delivery system reforms such as behavioral health integration hold great promise for improving care, but policymakers are recognizing that such efforts must equitably address the needs of communities of color.[131] In 2012,

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125. *See* Chin, *supra* note 22.

126. *See id.*; Spencer et al., *supra* note 15, at 2414 ("[C]ommunity health workers and peer support specialists could mitigate negative attitudes related to discrimination . . . based on language proficiency"); Snowden et al., *supra* note 43, at 235 (finding that even modest policies on language access "had a measurable impact on mental health service rates among LEP Asian American Medicaid enrollees"); Schmeida & McNeal, *supra* note 13, at 365, 368 (discussing how language services can improve mental health services for children with limited English proficiency).

127. *See* Spencer et al., *supra* note 15, at 2414–15.

128. A SNAPSHOT OF BEHAVIORAL HEALTH ISSUES, *supra* note 19, at 6–7 (noting that "lack of culturally competent services" is a frequently cited barrier); *see also State of AAPIs: Language Diversity and English Proficiency (2014)*, AAPI DATA (May 28, 2014), http://aapidata.com/state-aapi-language/; Elizabeth J. Kramer et al., *Cultural Factors Influencing the Mental Health of Asian Americans*, 176 W.J. MED. 227, 227 (2002).

129. Iwamasa, *supra* note 107.

130. *See AANHPI Service Providers in all Fifty States*, NAAPIMHA, http://www.naapimha.org/aanhpi-service-providers (last visited Apr. 3, 2022).

131. *See* Chiquita Brooks-LaSure et al., *Innovation at the Centers for Medicine and Medicaid Services: A Vision for the Next 10 Years*, HEALTH AFFS. BLOG (Aug. 12, 2021), http://www.healthaffairs.org/do/10.1377/forefront.20210812.211558/full/ (providing an overview from federal healthcare officials that future demonstration projects around delivery system reform "should make equity a centerpiece"); Shannon Firth, *New Head of CMS Innovation Center Prioritizes Fairness in Healthcare*, MEDPAGE TODAY (Apr. 21, 2021), http://www.medpagetoday.com/practicemanagement/practicemanagement/92195.

the HHS Office of Minority Health released a white paper on how such integration could reflect AAPI needs based on a summit hosted by NAAPIMHA.[132] But it has been nearly a decade since that OMH paper was released, and HHS ought to review it to determine what progress has been made and what must be done.[133]

D. *Create a Comprehensive Post-Pandemic Plan on Mental Health*

Finally, the Biden Administration should seize the opportunity to develop a strategic plan to guide regulatory options while working with Congress, which has been holding multiple hearings on mental health.[134] Such a strategy is needed given the billions of dollars that have been allocated toward mental health services in successive COVID relief packages.[135] The Biden Administration should build on its predecessor's work: on October 3, 2020, then-President Trump issued an executive order on mental health that, among other things, called for a plan from the agency heads.[136] But because this plan was released during the lame duck session between administrations, it received little attention.[137]

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132. DJ IDA ET AL., INTEGRATED CARE FOR ASIAN AMERICAN, NATIVE AMERICAN, NATIVE HAWAIIAN AND PACIFIC ISLANDER COMMUNITIES: A BLUEPRINT FOR ACTION: CONSENSUS STATEMENTS AND RECOMMENDATIONS 5 (Teresa Chapa ed., 2012), http://dbhds.virginia.gov/library/cultural%20and%20linguistic%20competence/provider%20material/diverse/integrated%20care%20for%20aanhpi%20communities%201%2024%2012.pdf.

133. *See id.* at 1.

134. *See, e.g.,* Press Release, Senate Finance Committee, Finance Committee Releases Bipartisan Report on Mental Health Care in America (Mar. 29, 2022), https://www.finance.senate.gov/chairmans-news/finance-committee-releases-bipartisan-report-on-mental-health-care-in-america-; Press Release, House Energy and Commerce Committee, E&C Announces Hearing on Mental Health Legislation (Mar. 29, 2022), https://energycommerce.house.gov/newsroom/press-releases/ec-announces-hearing-on-mental-health-legislation.

135. JOHNATHAN H. DUFF ET AL., CONG. RSCH. SERV., R46831, BEHAVIORAL HEALTH DURING THE COVID-19 PANDEMIC: OVERVIEW AND ISSUES FOR CONGRESS 1, 30 (2021), http://crsreports.congress.gov/product/npdf/R/R46831 ("The COVID supplemental appropriations acts and ARPA together provided SAMHSA and other HHS agencies over [eight] billion [dollars] to address behavioral health-related needs.").

136. Exec. Order No. 13,954, 3 C.F.R. §§ 3, 4(b) (Oct. 3, 2020).

137. Kim, *supra* note 3; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., EXECUTIVE ORDER SAVING LIVES THROUGH INCREASED SUPPORT FOR MENTAL AND BEHAVIORAL HEALTH NEEDS REPORT 3 (2020), http://www.samhsa.gov/sites/default/files/saving-lives-mental-behavioral-health-needs.pdf.

One area though that is missing from the prior administration's plan is a strategy on equity.[138] The Trump administration's recommendations focused mainly on law enforcement needs, greater enforcement of mental health parity, an expansion of telehealth, and care coordination across federal agencies and with the private sector.[139] However, given the successive COVID relief packages' investment in mental health, an active, equitable strategy is more important than ever.[140] In combination with President Biden's executive order on advancing equity across all federal programs, a new strategy could and should recognize equity as a key component toward building a new, better mental health system post-pandemic.[141]

VI. CONCLUSION

The COVID-19 pandemic has had consequences for the AAPI community as it has for our country and the world.[142] But "[w]e can learn from this pandemic and take something from the despair that it has caused" to become a more resilient and equitable society.[143] For the AAPI community, we can not only reexamine the impact of health policy—particularly mental health policies—on us but also our overall role in society and our cultural understandings.[144] At the same time, we must work with other stakeholders to make sure that our healthcare system addresses healthcare disparities rather than continuing past inequities.[145] Such efforts directed toward our mental health system will ensure that is more responsive and resilient to our country while being more equitable for the AAPI community.[146]

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138. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 137, at 3.
139. *Id.*
140. DUFF ET AL., *supra* note 135, at 30.
141. Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).
142. DONG ET AL., *supra* note 5, at 2.
143. Kim, *supra* note 3.
144. *Id.*
145. *Id.*
146. *Id.*

COVID-19, WORKPLACE MENTAL HEALTH, AND THE ADA "REGARDED AS" PRONG: A HYPOTHETICAL CASE STUDY

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I. INTRODUCTION

This Article explores mental health coverage under Title I of the Americans with Disabilities Act ("ADA")[1] "regarded as" prong, using a hypothetical case study involving a virtual team environment during the COVID-19 pandemic.[2] Research suggests that during the pandemic, employer awareness surrounding the mental health needs of their workforces has increased.[3] Mental health factors relating to the pandemic include: Social isolation from in-home sheltering, increased health anxiety, increased substance abuse, trauma or grief from losing loved ones, strain from new responsibilities related to family, financial, self-care, and more.[4]

Greater employer awareness about employee mental health and wellness may generally be considered a positive development.[5] However, this added vigilance may also give rise to novel considerations concerning the ways that employers interpret and respond to anomalous employee behavior and conduct, interactions with co-workers, and performance issues.[6] This might be especially true where employers rapidly adopted virtual or hybrid work arrangements and performance management procedures in the wake of the pandemic.[7]

Title I of the ADA, originally passed in 1990, prohibits employers from discriminating against a qualified individual on the basis of disability.[8] To determine coverage, the ADA provides a three-pronged definition of disability in its employment discrimination framework, that includes: "[1] a physical or mental impairment that substantially limits one or more major life

1. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213).

2. 42 U.S.C. § 12102(1)(C); *see also* discussion *infra* Part III.

3. *See* Heidi Mochari-Greenberger & Reena L. Pande, *Behavioral Health in America During the COVID-19 Pandemic: Meeting Increased Needs Through Access to High Quality Virtual Care*, 35 AM. J. HEALTH PROMOTION 312, 315 (2021).

4. *Id.* at 314–15; Petri J. C. M. Embregts et al., *A Thematic Analysis into the Experiences of People with a Mild Intellectual Disability During the COVID-19 Lockdown Period*, INT. J. DEVELOPMENTAL DISABILITIES 3, 4 (Oct. 5, 2020), http://doi.org/10.1080/20473869.2020.1827214.

5. Mochari-Greenberger & Pande, *supra* note 3, at 315.

6. *See id.*

7. *Id.* at 314.

8. 42 U.S.C. § 12112(a). This includes discrimination in the "hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

activities . . . [2] a record of such an impairment; or [3] being regarded as having such an impairment . . . ."[9]

The ADA Amendments Act of 2008 ("ADAAA")[10] significantly broadened coverage for psychiatric disabilities under prong one and two of the ADA's definition of disability, most notably by recognizing that an episodic impairment that "substantially limits one or more major life activities" can be entitled to coverage, and by prohibiting consideration of the ameliorative effects of mitigating measures like medication or therapy.[11] However, prong three—which is often crucial to plaintiffs—provides an exception for employers where it is determined that an impairment was, in fact, or was perceived as being, "transitory and minor."[12]

Beyond demonstrating coverage as a person with a disability, individuals pursuing "regarded as" claims related to perceptions of their mental state face other uphill battles; particularly with regard to the required elements of demonstrating they are "qualified" for the position in question and were subjected to an adverse employment action "on the basis of disability."[13] For starters, we can imagine how subjective qualifications for a position, such

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9. 42 U.S.C. § 12102(1)(A)–(C). An individual must only meet one of the three definitions of "disability" to be covered under the ADA. 29 C.F.R. § 1630.2(g)(2).

10. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 1, 122 Stat. 3553, 3553.

11. *Id.* § 3; 42 U.S.C. § 12102(2)(A) ("[ADA] major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."). The ADAAA also recognized limitations to "major bodily functions" as a path to coverage, including: "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. § 12102(2)(B), (4)(D)–(E).

12. *See, e.g.*, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 25, 2011), http://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008 (noting that "an individual may find it easier to claim coverage under the 'regarded as' definition of 'disability,'" following the ADAAA's updated standards); 42 U.S.C. § 12102(3)(B).

13. *See* 29 C.F.R. §§ 1630.2(g)(3), (l)(3), (m); *The ADA: Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/fact-sheet/ada-questions-and-answers (last modified Jan. 15, 1997) ("[A] qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the 'essential functions' of the position with or without reasonable accommodation."); 42 U.S.C. § 12112(a)–(b). "To establish a prima facie case of [ADA employment] discrimination, a plaintiff must [also] show that" the employer is a *covered entity*, that they are "qualified to perform the essential functions of [the] . . . job held, with or without reasonable accommodation," and that the employer discriminated against them on the basis of their disability. Cash v. Magic City Motor Corp., No. 16-CV-00192, 2017 WL 281755, at *2 (W.D. Va. Jan. 20, 2017).

as "soft skills," might impact colleagues' and supervisors' perceptions on mental health issues in complex, intricate ways.[14] Moreover, some courts have found the ability to get along with others and "appropriately handle stress" to be essential job functions, further obscuring and undermining coverage in these contexts.[15]

Additionally, the Title I causation standard for demonstrating that an adverse employment action was taken "on the basis of disability" can be particularly burdensome in prong three cases, where employer *perception*—and action on the basis of that perception—is a causal antecedent.[16] Although the ADAAA technically removed the requirement that plaintiffs need to establish the employer's beliefs about the severity of the perceived impairment under prong three, functionally a lack of clarity remains in courts as to what factual basis is needed to survive summary judgment on the questions of whether an employer perceived an employee as having a psychiatric disability, and whether they acted on the basis of that perception.[17]

This Article situates some of these nuances and legal pitfalls within the context of a virtual workforce team and the performance management settings during the pandemic, wherein the strain on American workers' mental wellness was particularly acute.[18] Each paragraph in the case study is numbered to guide readers through the subsequent analysis, which is structured in order of prima facie elements and the ADA's evidentiary burden-shifting framework.[19]

II. HYPOTHETICAL CASE STUDY

14. *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH & LEE. L. REV. 2027, 2053 (2013).

15. *See, e.g.*, Mayo v. PCC Structurals, Inc., 795 F.3d 941, 944 (9th Cir. 2015).

16. 42 U.S.C. § 12112(a); *see* Befort, *supra* note 14, at 2036; 29 C.F.R. § 1630.2(g)(iii)(1).

17. *See, e.g.*, Walker v. Venetian Casino Resort, L.L.C., No. 10–CV–00195, 2012 WL 4794149, at *15 (D. Nev. Oct. 9, 2012); 42 U.S.C. § 12102(3)(A) (2020); McNally v. Aztar Ind. Gaming Co., L.L.C., No. 12–CV–00063, 2014 WL 300433, at *3 (S.D. Ind. Jan. 28, 2014) (finding that employers suggesting counseling for employee's personal problems is not enough, on its own, to satisfy "regarded as" standard); *Cash*, 2017 WL 281755, at *3 (finding insufficient link between high likelihood that employer regarded employee as having a psychiatric disability and the adverse employment action).

18. *See* discussion *infra* Parts II–III (referring to the hypothetical case study and the analysis of it).

19. *See* discussion *infra* Part II (referring to the analysis of the hypothetical case study).

1. From July 2017 to July 2020, Kyle was an Account Executive ("AE") at a growing advertising-technology ("AdTech") company called *KnowledgeWorks*. KnowledgeWorks has 150 employees and is headquartered in New York, New York, on the seventy-seventh floor of One World Trade Center. After graduating college, Kyle moved from Tucson, Arizona to New York City to take the position.

2. KnowledgeWorks was founded in 2005. For most of the company's existence, leadership placed a heavy emphasis on in-person work, with more than ninety percent of employees living in the New York City tri-state area, and a strong corporate expectation of being present in the office, or on client visits, from nine a.m. to five p.m., Monday through Friday.

3. The AE role is entry-level. Like Kyle, AEs are typically recent college graduates in their early to mid-twenties. At any given time, the company employs about thirty AEs across three teams. By all accounts, the corporate culture at KnowledgeWorks—especially among the AEs—is highly social with frequent, company-sponsored happy hours, and client dinners and outings, often multiple times per week.

4. According to employee accounts, the social nature of the AE role historically meant that the nine-to-five corporate culture was, in practice, more flexible for AEs, who often worked offsite, attending client events. As a colleague of Kyle's later put it: *[a]lthough the [AE] job was technically nine-to-five, in practice, the constant client 'wining and dining' led to an air of mystery about where colleagues were and what they were up to.* Most AEs agreed that the central importance of evening and weekend client events led to longer workdays and workweeks than other roles, albeit, with less-regular hours.

5. According to the written job description, AEs are expected to have a *hunter's mentality* around *generating new business by identifying clients and growing existing accounts*. To that end, AEs are encouraged to take existing and prospective clients out to lunches, dinners, happy hours, and other social events to aid in the sales cycle, and are provided with a company spending account that is proportional to the size of their book of business.

6. The position description also includes desired traits such as *quarterbacking skills and an ability to handle the stress of a fast-paced, dynamic team environment*. Off the record, many employees at the company acknowledge that the nature of the industry often leads to a blurring of personal and professional lines, with frequent social drinking and late nights with colleagues and clients being accepted features of the corporate culture.

7. From July 2017 to March 2020, Kyle was by all accounts a star employee. In annual reviews from July 2018 and 2019, his supervisor rated him as *frequently exceeding expectations* and described the relationship

between his interpersonal style (e.g., *warm, outgoing demeanor*, *magnetic social skills*, *ideal teammate*) and growing client list. In fiscal year 2019, Kyle's book of business delivered 160% compared to the forecasted plan. He continued to exceed quarterly targets by an average of fifty percent through February 2020.

8. However, in March 2020, the AdTech industry—like so many others—was upended by the COVID-19 pandemic. On March 10th, a KnowledgeWorks employee tested positive for the virus. That day, the company issued an immediate work-from-home ("WFH") policy. Shortly thereafter, a statewide stay-at-home order was issued in New York. Initially KnowledgeWorks communicated to its workforce that the WFH policy would last six weeks, but the policy became "indefinite" as the pandemic drew on. Fortunately, KnowledgeWorks was able to avoid layoffs, despite slowing profits.

9. AdTech spending became unpredictable. Many clients ceased spending altogether. Others doubled or tripled their budgets, speculating about an uptick in screen usage as much of the population sheltered-in-place. Kyle's own book of business experienced similar volatility during this time, but nothing more extreme than his colleagues in similar roles. In fact, although Kyle lost four small to mid-sized clients in the early months of the pandemic, he also successfully brought in two large new clients through his own personal contacts and was one of only nine AEs who met their quota in Q2.

10. At the time of the migration to online work, KnowledgeWorks had many remote practices and communication tools in place. As a result, the technical transition from in-person to virtual meetings was relatively seamless. However, many employees privately reported that the transition was difficult, both personally and professionally. For example, a company *pulse* survey, administered by Human Resources ("HR"), showed that employee morale had dipped from ninety percent satisfaction in January 2020, to thirty-three percent in June 2020.

11. According to the survey results, many employees reported losing trust in colleagues as a result of the migration online. For instance, one anonymous respondent noted: *Before the pandemic, when a colleague was being uncommunicative via email, or missed a meeting, I assumed they were with a client…but now we know everyone is at home—or is supposed to be at home—so radio silence feels more unprofessional*. A majority of respondents also lamented the loss of in-person, *water cooler* conversations, and expressed feelings of social isolation and anxiety.

12. In the early months of the pandemic, another common theme amongst employees making the rapid shift to remote work was the lack of clear guidance about performance management expectations. For some employees,

this resulted in the perception of being micromanaged, stating that their supervisor no longer respected work-life boundaries, and sometimes emailed or texted at all hours of the day.

13. For those in account roles, micromanagement even seemed to threaten job security. As one respondent put it: *Pursuing new business is really an improvisational, instinctual, and interpersonal thing . . . your client, above all, has to like you. They can always take their business elsewhere, and rapport is harder to build with clients online. When I have three managers expecting me to respond within the hour to instant messages or emails, and join six virtual meetings a day, I have a tough time doing the things they actually hired me to do.*

14. In response, in July 2020, KnowledgeWorks issued a formal, internal "Work From Home Charter," outlining: (1) a six-month pause in performance evaluations; (2) increased flexibility to support family and self-care needs; (3) new virtual employee-wellness and peer-support offerings; (4) expectations for conduct in virtual meetings which included attendance, meeting attire, and *camera on* requirements; and (5) a broader *call for empathy* and *checking in on colleagues' physical and mental health, while respecting personal privacy*.

15. Prior to this, starting in May 2020, Kyle's relationship with his colleagues and supervisors became increasingly strained. Kyle's colleagues began to notice behavior that *seemed atypical and antisocial . . . a major personality shift from his normal*, *gregarious self*, as his supervisor later put it. During this time, teammates noticed that Kyle was occasionally dropping off weekly team meetings about ten minutes early without providing a reason or even notifying teammates.

16. As a teammate later explained: *We all knew that some of our co-workers had kids, or a sick parent, or even a pet to tend to. Dropping off a call here and there was no biggie in those cases, but Kyle was a notorious bachelor*. Kyle also stood out among his teammates in that he rarely turned on his video during team calls. In rare instances where Kyle did, usually at the supervisor's request, he appeared to be joining from a personal cellphone rather than a work computer. On one occasion in June, Kyle was dressed in a stained undershirt rather than business attire. On another occasion, a disorganized shelf with liquor and what appeared to be medication bottles was visible in his background.

17. Kyle's appearance became fodder for digital gossip, which eventually reached his supervisor. According to meeting notes, during weekly one-on-one check-ins with Kyle's colleagues, the supervisor learned that there was some consensus on the team that Kyle's behavior was *way off*, and that he was *kind of all over the place*. One colleague commented that *Kyle seems*

burnt out and disheveled . . . maybe he's still partying like it is 2019. Did you see the booze and pills in his background the other day? In each instance, the supervisor privately conveyed that they would monitor the situation to see if it *is an HR issue*, but also recommended that Kyle's peers *show compassion, because people are really going through a lot right now, and Kyle seems to be having personal struggles*.

18. Things came to a head during a virtual client quarterly business review on July 21, 2020, attended by Kyle, Kyle's supervisor, a product manager, and three senior-level clients. Kyle joined the meeting six minutes late and at first had the camera on, where it appeared as though Kyle was joining via phone from the back of a cab. When the screenshare began for the presentation, Kyle turned off the camera and went on mute for the remainder of the call. While Kyle was not the lead presenter, on two occasions he was verbally unresponsive when directly addressed by the supervisor, although Kyle did *slowly respond with cursory, unfocused answers* in the meeting chat, according to the supervisor's notes.

19. The next week, Kyle's supervisor set up a meeting to address Kyle's behavior on the client call, during which Kyle downplayed the importance of his behavior on the call. Kyle explained that things were not being handled any differently than before the pandemic, as evidenced by his stronger-than-average client list. Kyle asserted that his clients know him by now and joked that they *are probably sick of seeing my face*. During this conversation, the supervisor said, *I am worried about you*, and asked *how are you doing, personally speaking?* Kyle responded *I'm fine, you know . . . the same*. Kyle went on to acknowledge, though, that *the circumstances have been weird, I'm sitting home alone 24-hours a day glued to a screen. I have trouble sleeping. I am supposed to be reeling in big accounts but there is no personal connection anymore. I am spinning plates, and all the virtual hangouts and happy hours start to run together like I am watching myself in a video game—it is not easy*.

20. At the end of the meeting, the supervisor expressed compassion for Kyle's circumstances, saying: *I totally understand, you know, we're all going through a lot right now, many of us are in a weird head space . . . but we cannot let that affect our relationships to colleagues and clients*. The supervisor then referred Kyle to attend a free, company-sponsored webinar on *Getting Well and Overcoming Social Isolation*, and also mentioned the company's Employee Assistance ("EA") Counselors, as well as a new peer-support program, where employees can be anonymously connected through an online system to colleagues with similar lived experience. In referencing the EA counselors and peer-support programs, the supervisor

specifically mentioned that *peer support can be really helpful with issues like substance abuse and anxiety or depression*.

21. After the meeting with Kyle, however, the supervisor submitted their notes from the call to HR, adding a summary of the situation that described a *lack of accountability and disassociation in Kyle about his performance issues*. The summary documented all complaints from Kyle's teammates collected over the prior three months during one-on-one check-ins and included the supervisor's own assessment that Kyle had *lost four clients since the start of the pandemic, and is displaying erratic, worrying behavior that is negatively impacting team morale and client relationships . . . There is nothing to indicate these behaviors will improve any time soon*. Without further intervention, Kyle's contract was terminated at the end of July 2020.

III. ANALYSIS

It is expected that readers will have much different reactions to the scenario above. New York—where the case study occurs—is an *employment-at-will* state, and the question of this article is not whether Kyle *deserved* to be fired, or, alternatively, whether his colleagues should have shown him more empathy.[20] Rather, we aim to explore a tricky area of law pertaining to employer awareness or acknowledgment of anomalous employee behavior, and wherein the line exists that such acknowledgment crosses over into *regarding* the employee as having an ADA disability.[21]

The above hypothetical describes some aspects of employment during the pandemic that might feel familiar to those of us who transitioned to virtual work in highly unfamiliar times.[22] Even outside the context of the pandemic, almost half of adults (46.4%) will experience a mental illness during their lifetime.[23] Beyond this, all research indicates that the American workforce, broadly speaking, experienced unprecedented mental health challenges during the pandemic.[24] For example, there was a marked increase in reported symptoms of anxiety and depression among adults in the United States, rising

20. *See* discussion *infra* Part III.

21. *See* discussion *infra* Section III.A; 42 U.S.C. § 12102(1)(C).

22. *See* discussion *supra* Part II.

23. *5 Surprising Mental Health Statistics*, MENTAL HEALTH FIRST AID (Feb. 6, 2019), http://www.mentalhealthfirstaid.org/2019/02/5-surprising-mental-health-statistics/.

24. Mady Peterson, *Workplaces in Crisis: Employee Care Still Missing the Mark*, LIMEADE: BLOG, http://www.limeade.com/resources/blog/employee-experience-during-the-pandemic-survey/ (last visited May 3, 2022).

from 11% in 2019 to 41.1% in January 2021.[25] During the pandemic, self-reported mental wellness in the workplace had a steep decline of twenty-seven percent.[26] Pandemic-related effects on employee wellness outside of work time included forty-nine percent of employees struggling to find energy for nonwork activities, forty-two percent of employees having less interest in socializing with friends, forty-two percent reporting difficulty sleeping, and thirty-three percent experiencing upticks in alcohol or substance use.[27]

In short, many Americans experienced some of the same issues related to mental health that we might infer from Kyle's scenario.[28] It is between the lines—within those inferences—that the legal questions become complicated.[29] As we discuss below, the case study does not merely turn on whether Kyle is a covered person with a disability.[30]

Assuming that the employer is also a covered entity, Title I's general rule on employment discrimination requires that a plaintiff state a prima facie case that includes evidence that they were qualified for the job in question.[31] Another element the plaintiff would have to show is that they were subjected to an adverse employment action "on the basis of disability."[32]

Within the ADA's Title I burden-shifting framework, once the prima facie evidentiary basis has been satisfied, the employer then has the burden to offer either affirmative defenses or a "legitimate, nondiscriminatory reason" for the adverse employment action.[33] If the employer succeeds, the burden shifts back to the employee to offer plausible evidence that the employer's

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25. Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, KFF (Feb. 10, 2021), http://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/.

26. Shayna Hodkin, *How COVID-19 Impacted Employee Wellness*, BOB: BLOG (Oct. 9, 2020), http://www.hibob.com/blog/covid-19-employee-wellness-survey/.

27. Peterson, *supra* note 24.

28. *See* discussion *supra* Part II.

29. *See* discussion *supra* Part II.

30. *See* discussion *supra* Part II.

31. 42 U.S.C. § 12112(a); *see also* Silver v. Entergy Nuclear Operations, Inc., 290 F. Supp. 3d 234, 243 (S.D.N.Y. 2017) (stating that one of the required elements a plaintiff has to prove is that "he was otherwise qualified to perform the essential functions of his job . . . .") (quoting Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d 60, 63 (2d Cir. 2003)).

32. 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability . . . .").

33. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In ADA cases, courts have transposed the *McDonnell Douglas* burden-shifting framework for adjudicating a motion for summary judgment under Title VII of the Civil Rights Act of 1964, Pub. L. 88-352. Raytheon Co. v. Hernandez, 540 U.S. 44, 50 (2003) (describing the use of the *McDonnell Douglas* burden-shifting framework in ADA cases).

proffered legitimate rationale was merely a pretext for discrimination.[34] Thus, although the emphasis of this Article is on coverage under the "regarded as" prong, we do consider all other required elements and evidentiary burdens of an ADA claim as they interact with the employer's "perception of disability."[35]

A. *Did KnowledgeWorks "Regard" Kyle as Having a Disability?*

To survive summary judgment and ultimately succeed at trial, an ADA plaintiff must present evidence that they are a person with a disability within the meaning of the law.[36] Because this is one of the threshold elements for determining coverage, alongside whether the employer is a "covered entity" subject to the ADA, courts will usually consider this question first in cases where the employer is clearly a covered entity.[37]

From the case study, there is no indication that Kyle has a known disability meeting the ADA prong one definition of "actual disability," nor is there a clear indication that he has a "record of" such an impairment under prong two—with the possible small exception that medication bottles are observed in his background during a work call.[38] However, as noted above, the ADA definition of disability includes individuals who are "regarded as" having a disability by their employer.[39]

In Kyle's scenario, there are a few sources of evidence that his colleagues and supervisors perceived him as someone who was—at the very least—undergoing mental health challenges related to anxiety, depression, and possible substance abuse.[40] One important question is whether there is *enough* evidence to indicate that these perceptions went beyond some generalized acknowledgment of mental wellness struggles into the domain of regarding

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34. Howard v. United Parcel Serv., Inc., 101 F. Supp. 3d. 343, 352 (S.D.N.Y. 2015); *see* McMillan v. City of New York, 711 F.3d 120, 125 (2d Cir. 2013) (quoting McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009)).

35. 42 U.S.C. § 12102(1)(C); *see* Patrick Hartman, *"Interacting with Others" as a Major Life Activity Under the Americans with Disabilities Act*, 2 SETON HALL CIR. REV. 139, 154 (2012).

36. 42 U.S.C. § 12102(1); *see Silver*, 290 F. Supp. 3d at 243.

37. 42 U.S.C. § 12111(2); 42 U.S.C. § 12112(a); *see, e.g.*, Gronne v. Apple Bank for Sav., 1 F. App'x. 64, 66 (2d Cir. 2001). Whether KnowledgeWorks is a covered entity is not in question within the case study. *See* discussion *supra* Part II. Title I applies to any private employer with more than 15 employees. 42 U.S.C. § 12111(5)(A). Thus, the "covered entity" element is not included in our analysis. *See id.*

38. 42 U.S.C. § 12102(1)(A)–(B); *see* discussion *supra* Part II (referring to paragraph 16 of the hypothetical case study); *Gronne*, 1 F. App'x at 66.

39. 42 U.S.C. § 12102(1)(C).

40. *See* discussion *supra* Part II.

him as having a mental impairment.[41] To provide a few examples, at various points Kyle's colleagues reference:

1. Kyle's *atypical and antisocial* behavior;[42]
2. *A major personality shift from* [Kyle's] *normal, gregarious self*;[43]
3. Behavior in Kyle that they perceive as *way off* and *kind of all over the place*;[44]
4. Kyle's potential *partying habits, booze and pills*, and *burn out*, which could be read as an implicit reference to substance abuse issues.[45]

Beyond workplace gossip, Kyle, at one point, also describes to his supervisor a state of social isolation, depressed mood, sleep deprivation, anxiety around performance, and dissociative feelings like *watching [him]self in a video game*.[46] In response, Kyle's supervisor seems to confirm the interpretation that Kyle is experiencing mental health issues by referring Kyle to company-offered services; the supervisor also refers Kyle to employer-facilitated supports directly addressing issues related to anxiety, depression, and substance abuse and even references Kyle's *dissociation* and *erratic, worrying behavior* when recommending his firing to HR.[47]

Although addiction is a cognizable disability under the ADA—with certain limitations related to the current use of illegal narcotics or use of drugs or alcohol *on the job*—Kyle's path to making a substance abuse addiction argument under prong three is probably weaker than an argument that he was

41. *See* discussion *supra* Part II; Stragapede v. City of Evanston, 69 F. Supp. 3d 856, 862–63 (N.D. Ill. 2014) (finding that the employee met "regarded as" prong when fired because of perceived mental impairment supposed by employer after a head injury, even though head injury had no real effects).

42. *See* discussion *supra* Part II (referring to paragraph 15 of the hypothetical case study).

43. *See* discussion *supra* Part II (referring to paragraph 15 of the hypothetical case study).

44. *See* discussion *supra* Part II (referring to paragraph 17 of the hypothetical case study).

45. *See* discussion *supra* Part II (referring to paragraph 17 of the hypothetical case study).

46. *See* discussion *supra* Part II (referring to paragraph 19 of the hypothetical case study).

47. *See* discussion *supra* Part II (referring to paragraph 20 and 21 of the hypothetical case study).

regarded as having some other psychiatric disability, like a depressive disorder.[48] Although, it is worth noting that substance abuse issues have a high comorbidity with depression and/or anxiety disorders.[49]

While the case study is intentionally written so that Kyle's colleagues make no *explicit* reference to a diagnosable psychiatric condition, Kyle's supervisor does list some specific mental health concerns, apparently directed at Kyle's current state of mind, while informally referring Kyle to seek support.[50] Somewhat surprisingly, given the ADAAA's renewed "regarded as" standard, lower federal courts in some jurisdictions have held that employer actions like recommending professional mental health counseling, including company-offered employee assistance counseling, are not, on their own, enough of a basis to evidence that an employer regarded an employee as having a psychiatric disability.[51]

Similarly, lower courts have been hesitant to apply "regarded as" coverage on the sole basis of language and utterances in the workplace related to an employee's mental wellbeing, especially where the language in question has a broader, non-diagnostic, and colloquial meaning.[52] In some relevant contexts, courts in employment discrimination cases will ask whether a reasonable person could attribute discriminatory animus to the statements.[53]

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48. *See* 29 C.F.R. § 1630.3(a); 42 U.S.C. § 12102(1)(C), (3)(A); Rodriguez v. Verizon Telecom, No. 13-CV-6969, 2014 WL 6807834, at *3, *5 (S.D.N.Y. Dec. 3, 2014) (discussing the fact that the employer regarded employee as disabled where the "manager falsely concluded that he was under the influence based on the manager's perception that plaintiff ha[d] a history with addiction."); 42 U.S.C. § 12114(a). Some possible symptoms of major depressive disorder that Kyle has exhibited include chronic depressed mood, diminished interest, insomnia, fatigue, feelings of worthlessness, and inability to concentrate. *See* discussion *supra* Part II; AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 160–61 (5th ed. 2013).

49. Lori Davis et al., *Major Depression and Comorbid Substance Use Disorders*, 21 CURRENT OP. PSYCHIATRY 14, 15 (2008).

50. *See* discussion *supra* Part II (referring to paragraph 20 of the hypothetical case study, wherein the supervisor lists concerns including substance abuse, anxiety, and depression).

51. 42 U.S.C. § 12102(1)–(3); *see, e.g.*, McNally v. Aztar Ind. Gaming Co., No. 12-CV-0063, 2014 WL 300433, at *3 (S.D. Ind. Jan. 28, 2014); Sanchez v. City of San Antonio, SA-18-CV-184, 2019 WL 691204, at *2 (W.D. Tex. Feb. 18, 2019). The Fifth and Seventh Circuits have been noteworthy in this respect. *See McNally*, 2014 WL 300433, at *2; *Sanchez*, 2019 WL 691204, at *2.

52. *See* Rifai v. CMS Med. Care Corp., No. 15-1395, 2016 WL 739279, at *4 (E.D. Pa. Feb. 25, 2016); *McNally*, 2014 WL 300433, at *3; 42 U.S.C. § 12102(3).

53. *See, e.g.*, Butler v. Exxon Mobile Corp., 838 F. Supp. 2d 473, 493 n.8 (M.D. La. 2012); Montgomery v. Coca-Cola Enter., Inc., No. 00-CV-2278, 2003 WL 138087, at *5, *6 (N.D. Tex. Jan. 14, 2003). This standard is often applied in hostile work environment cases.

For some utterances, like saying that an employee is "going through a lot," courts have understandably held that there is not quite enough of a disability meaning within such colloquialisms to infer disability discrimination without substantial additional context supporting this interpretation.[54]

Surprisingly, post-ADAAA courts have even differed in their analyses of whether a supervisor going so far as to call an employee "crazy" or "nuts" is enough to create a factual basis that they regarded the employee as having a disability.[55] Importantly for Kyle, lower courts in the Second Circuit have more readily found that employer actions, like referring an employee to counseling and making statements about their mental wellness, satisfy the "regarded as" element of the prima facie case.[56] Additionally, one can distinguish Kyle's situation by the fact that his behavior and appearance were the subjects of repeated gossip among colleagues that went further into insinuating mental health issues.[57] Furthermore, the key decision-maker in the adverse employment action, Kyle's supervisor, was aware of that gossip, and beyond that, the comments made by Kyle's colleagues were significantly intertwined, in a casual sense, with the decision to terminate Kyle's employment, potentially offering direct evidence of disability discrimination.[58] Put another way, the gossip about Kyle appears to be *entangled* with the adverse employment action taken against him, which happens to be particularly important in claims brought under the "regarded as"

See id. One interesting question is whether Kyle's colleagues contributed to a hostile work environment. *See* discussion *supra* Part II (referring to paragraph 17–21 of the hypothetical case study). The Second Circuit has held that "hostile work environment" claims are cognizable under the ADA. Fox v. Costco Wholesale Corp., 918 F.3d 65, 69 (2d Cir. 2019). Thus, it is possible that Kyle's teammates' documented behavior towards, and about, him and its nexus to his termination could be formulated as a type of adverse employment action. *See* discussion *supra* Part II (referring to paragraph 17–21 of the hypothetical case study); *Fox*, 918 F.3d at 69.

54. *McNally*, 2014 WL 300433, at *3.

55. *Compare Rifai*, 2016 WL 739279, at *4 (finding that the defendant sufficiently pled facts that he was regarded as disabled by employer, where around the time of his firing coworkers took action "suggesting that [plaintiff] was crazy, suffered from a mental impairment and was mentally unstable . . . .") *with* Scott v. Napolitano, 717 F. Supp. 2d 1071, 1087 (S.D. Cal. 2010) (finding that an employer calling an employee "crazy," and a "nut," and saying that he has "some mental issues" was not enough to establish that the employer *believed* that the employee had a mental disability).

56. 42 U.S.C § 12102(3); *see, e.g.*, Wade v. Elec. Boat Corp., No. 16-CV-2041, 2019 WL 4805031, at *7 (D. Conn. Sept. 30, 2019).

57. *See* discussion *supra* Part II (referring to paragraph 17–21 of the hypothetical case study).

58. *See* discussion *supra* Part II (referring to paragraph 17–21 of the hypothetical case study); *see, e.g.*, Velez v. Janssen Ortho LLC, 389 F. Supp. 2d 253, 264 (D.P.R. 2005) (concluding that statements by non-decision makers, including that plaintiff was "crazy," needed to be meaningfully related to the adverse action at issue).

prong.[59] The ADAAA formally removed requirements that plaintiffs have to fully establish their employer's beliefs about the severity of the perceived impairment, which had emerged as a significant barrier to successful "regarded as" claims under the ADA, as originally codified.[60]

While plaintiffs are still required to demonstrate that their employer regarded them as disabled, within the meaning of the ADA, and "not merely . . . as having some measure of disability or impairment," the ADAAA modified the prong three definition to place additional logical and evidentiary emphasis on the *presence of disability discrimination*, "whether or not the impairment limits or is perceived to limit a major life activity."[61] In other words, any evidence suggestive of disability discrimination *towards* Kyle is, by definition, also evidence that Kyle was regarded as having a disability under prong three's updated, more inclusive standard.[62]

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59. 42 U.S.C § 12102(3); *see, e.g.*, *Wade*, 2019 WL 4805031, at *7; *McNally*, 2014 WL 300433, at *3.

60. 42 U.S.C § 12102(3); ADA Amendments Act of 2008; *see* Hilton v. Wright, 673 F.3d 120, 129 (2d. Cir. 2012) (per curiam) (stating under prong three, the plaintiff need not "present evidence of how or to what degree [defendants] believed the impairment affected him"); Walker v. Venetian Casino Resort, LLC, No. 10–CV–00195, 2012 WL 4794149, at *15 (D. Nev. Oct. 9, 2012); *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, *supra* note 12; *see, e.g.*, Bradley Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 209 (2008).

61. ADA Amendments Act of 2008 § 3; *see* DiGiosia v. Aurora Health Care, Inc., 48 F. Supp. 3d 1211, 1218 (E.D. Wis. 2014); *see, e.g.*, Robinson v. Purcell Constr. Corp., 859 F. Supp. 2d 245, 260 (N.D.N.Y. 2012) (quoting Brtalik v. S. Huntington Union Free Sch. Dist., No. CV-10-0010, 2010 WL 3958430, at *8 (E.D.N.Y. Oct. 6, 2010)). Incorporating the "because of" clause into the definitional section, the ADAAA, somewhat strangely, builds causation into the very definition of disability itself. *See* 42 U.S.C. § 12102(1)(A)–(C). The updated ADAAA explicitly removes prior expectations that plaintiffs demonstrate the employer's perceptions of the severity of their disability and explicitly incorporates the presence of discrimination directed at the plaintiff on the basis of disability, as evidence that they were regarded as disabled. *Id.*

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter *because of* an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

Id. at (3)(A)–(C) (emphasis added).

62. *See* discussion *supra* Part II. Courts in the Second Circuit have allowed evidence of disability discrimination in the adverse employment action to essentially demonstrate sufficient evidence, per se, that the employee was regarded as being disabled in prong three cases. *See Wade*, 2019 WL 4805031; *Id.* at 6 ("[C]onstruing the facts in the light most favorable to plaintiff, both alleged adverse employment actions suggest that defendant regarded plaintiff as unable to work without mitigating measures."). This is likely the correct

Many courts struggle with the new standard and even apply it incorrectly, but the gist of the ADAAA's renewed intent for prong three is to cover instances where it can be inferred that the employer is acting on the basis of myth, fear, or stereotype about a perceived disability, *whether or not* an actual disability under the prong one and two definitions exists.[63] Prior to these revisions, prong three coverage was much more difficult for plaintiffs, in an evidentiary sense, because it nevertheless required them to prove that the employer perceived them as having an impairment that "substantially limits . . . major life activities . . . ."[64] Essentially, prior to the ADAAA, this standard folded the prong one and two standards into prong three, but with the added hurdle of demonstrating employer *perception* meeting that definition.[65]

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application of the law, because the "regarded as" element was "meant to be construed in favor of broad coverage." *See* 42 U.S.C. § 12102(4)(A).

63. *See DiGiosia*, 48 F. Supp. 3d at 1217–18. Some courts are apparently continuing to apply the wrong standard — most notably in the Seventh Circuit. *See id.* For instance, in one post-ADAAA case, a Wisconsin federal court held that a plaintiff's "regarded as" claim failed due to lack of evidence that the employer, who required her to go on leave because of personal issues, considered her bipolar disorder a *disability* within the meaning under the ADA, under the major life activity of *working*. *See id.* at 1218. In doing so, the court stated that the ADAAA's new "regarded as" definition was "nonsensical." *Id.* at 1218 n.4. This appears to follow precedent from the Seventh Circuit Court of Appeals that ignores the new standard and requires that in order "[t]o meet the 'regarded as' prong, the employer must believe, correctly or not, that the employee has an impairment that substantially limits one or more of the major life activities." Povey v. City of Jeffersonville, 697 F.3d 619, 622 (7th Cir. 2012) (citing Cigan v. Chippewa Falls Sch. Dist., 388 F.3d 331, 335 (7th Cir. 2004)). The courts' error here is most evident in the fact that the prior case law they cite, references the standard aspects of the Supreme Court case of *Sutton v. United Air Lines, Inc.*, which were specifically overturned by the ADAAA. *Povey*, 697 F.3d at 622–23; Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); ADA Amendments Act of 2008, Pub. L. No. 110–335, § 2(b), 122 Stat. 3553, 3554. The *Sutton* trilogy of cases was, in fact specifically mentioned in the ADAAA's preamble (purpose section). 42 U.S.C. § 12101(b); *Sutton*, 527 U.S. at 475; *see also* 29 C.F.R. § 1630.2(j)(1)(v). Even if Kyle *did* need to demonstrate that his employer regarded him as having a disability that *substantially limited a major life activity*, there might be sufficient evidence of such. *See* discussion *supra* Part II. There is some factual basis for assessing that Kyle's supervisor felt that his mental condition was affecting his ability to work in a *broad class of jobs*. *See* discussion *supra* Part II.

64. *See Sutton*, 527 U.S. at 478; 42 U.S.C. § 12102(1)(A).

65. *See Sutton*, 527 U.S. at 478; 42 U.S.C. § 12102(1)(A). With the ADAAA, the legislature sought to ensure that the prong three definition of disability provided more inclusive coverage. *Id.*; *ADA Amendments Act of 2008 Frequently Asked Questions*, DEP'T LAB. OFF. FED. CONT. COMPLIANCE PROGRAMS, http://www.dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments (last updated Jan. 1, 2009) (noting that, in passing the ADAAA, the legislature sought to "dramatically expand" coverage under the ADA 'regarded as' prong); *see* 29 C.F.R. § 1630.2(j)(1)(v), 1630.2(l)(1).

The reality is that Kyle's "regarded as" claim could go either way on the threshold "regarded as" element.[66] On the one hand, in isolation, statements about an employee's mindset—especially ones with debatable colloquial meaning—and referrals to counseling have not always been enough.[67] On the other hand, prong three coverage differs from prong one and two coverage in that it is more intertwined with evidence that the employer acted with discriminatory intent.[68] Hence, a court's willingness to find that Kyle met his evidentiary burden for the "regarded as" element might, somewhat paradoxically, turn on the question of whether KnowledgeWorks engaged in discrimination *on the basis of* disability, which will be discussed in more depth in Section III.C.[69]

1. If So, Was the Perceived Impairment "Transitory and Minor?"

A sub-issue under the question of whether Kyle was *regarded as* having a disability by his employer is whether the impairment—real or perceived—was "transitory and minor."[70] Although the ADAAA generally addressed limiting judicial interpretations of the "regarded as" prong, it also provided a new, narrowing exception for employers where an impairment was in fact, or was perceived by the employer as being, "transitory and minor."[71]

The COVID-19 pandemic has added complexity to "transitory and minor" inquiries.[72] Mental health disabilities are, in a legal sense, more difficult to analyze within such frameworks, because mental illness is "less linear in progression than physical illness [and] tends to be more erratic, less predictable, and more sudden . . . [m]any mental illnesses tend to be episodic, following a kind of ebb and flow one rarely sees in physical illness."[73] Under the updated ADA framework's "transitory and minor" exception for employers, a "transitory" impairment is defined as "an impairment with an

66. *See* discussion *supra* Part II; *Sutton*, 527 U.S. at 478; 42 U.S.C. § 12102(3)(A)–(B).

67. *See* McNally v. Aztar Ind. Gaming Co., No. 12–CV–00063, 2014 WL 300433, at *2 (S.D. Ind. Jan. 28, 2014).

68. *See Sutton*, 527 U.S. at 500; 42 U.S.C. § 12102(1)(A)–(C).

69. 42 U.S.C. § 12102(3)(A)–(B); *Sutton*, 527 U.S. at 478; *see* discussion *supra* Part II.

70. 42 U.S.C. § 12102(3)(B).

71. 42 U.S.C. § 12102(3)(A)–(B).

72. *See* 42 U.S.C. § 12102(3)(B); Eshleman v. Patrick Indus., 961 F.3d 242, 247–48 (3d Cir. 2020).

73. Michelle Parikh, Note, *Burning the Candle at Both Ends, and There is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 742–43 (2004) (footnotes omitted).

actual or expected duration of six months or less," while the term "minor" is not explicitly defined in the law or regulations.[74]

Determining "whether the impairment at issue is or would be 'transitory and minor' is to be determined objectively," which means not based on the employer's own subjective assessment of how serious or long the disability would last, and the employer has the burden of demonstrating that the impairment is—in the case of an actual impairment—or would be—in the case of a perceived impairment—both "transitory and minor."[75] Courts have also made clear that determinations of "transitory" and "minor" are separate questions, so a perceived or actual impairment that is transitory but not minor, or minor but not transitory, will not cause a "regarded as" claim to fail.[76]

If Kyle raises a sufficient evidentiary basis that KnowledgeWorks regarded him as disabled, the good news for him is that there is little evidence to suggest that KnowledgeWorks perceived his mental health impairment to be both transitory *and* minor.[77] First, his colleagues and supervisor had been identifying and documenting notable changes in his behavior in May of 2020.[78] When Kyle's employment was terminated three months later, Kyle's supervisor noted that *there is nothing to indicate these behaviors will improve any time soon*.[79]

Additionally, even if it is asserted that Kyle's mental state was *symptomatic* of the conditions of the pandemic, like social isolation, the ongoing nature of the COVID-19 public health crisis places no apparent bounds on the duration that Kyle might experience these challenges.[80] As such, the employer's own statements, the apparently continuous, or chronic, nature of Kyle's mental health state prior to being fired, and the broader

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74. 42 U.S.C. § 12102(3)(B); *see* 29 C.F.R. § 1630.15(f).

75. 29 C.F.R. § 1630.15(f). "It may be a defense to a charge of discrimination by an individual claiming coverage under the 'regarded as' prong of the definition of disability that the impairment is in the case of an actual impairment or would be in the case of a perceived impairment 'transitory and minor.'" *Id.*

76. 29 C.F.R. § 1630.15(f); *see, e.g.*, *Eshleman*, 961 F.3d at 247–48. Even after the ADAAA, some courts have nevertheless continued to "blend" transitory-ness and minor-ness into a single combined inquiry, and similarly continue to conflate the meaning of "episodic" and "transitory." *Eshleman*, 961 F. 3d at 247–48; *see, e.g.*, Kelly v. N.Y. State Off. of Mental Health, 200 F. Supp. 3d 378, 394–95, 399 (E.D. N.Y. 2016) (applying the "transitory and minor" exception on the sole basis that plaintiff's "mental health issues were . . . according to her own complaint, sporadic.").

77. *See* discussion *supra* Part II.

78. *See* discussion *supra* Part II (referring to paragraph 15 of the hypothetical case study).

79. *See* discussion *supra* Part II (referring to paragraph 21 of the hypothetical case study).

80. *See* discussion *supra* Part II.

context of the pandemic, give little reason to assume that Kyle's impairment, real or perceived, was *transitory* in nature.[81]

This alone would defeat the "transitory and minor" exemption to regarded as coverage, but it is nevertheless worth asking: was Kyle's impairment "minor"?[82] As noted above, *minor-ness* is—legally speaking—less bright line than *transitory-ness*.[83] To determine whether an impairment is "minor," courts have typically applied standards that ask whether the impairment meaningfully affects an individual's abilities to perform their primary work functions.[84] It is important to remember here that under the regarded as prong, an impairment can be *non*-minor in two ways: either as a medical fact related to an actual impairment or in the employer's *perception* that the impairment was non-minor.[85]

As with the transitory determination, there is little in the facts above to suggest that KnowledgeWorks viewed Kyle's mental condition as minor.[86] In fact, the extent to which they perceived Kyle's mental state as affecting his ability to perform his primary work functions was very much the crux of their reason for terminating his employment.[87] In particular, Kyle's supervisor—and to a lesser extent Kyle's other colleagues—appears to draw a causal link between Kyle's mental state and his ability to perform the essential job functions of *teamwork* and *getting along with others*.[88] In short, it seems unlikely that Kyle's perceived impairment in this set of facts would be considered *minor*.[89]

One final thing to observe in the "transitory and minor" analysis is that it illustrates what some legal scholars have described as a "Goldilocks Dilemma" in ADA coverage.[90] Succinctly put, the "Goldilocks Dilemma"

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81. *See* discussion *supra* Part II.

82. *See* discussion *supra* Part II; Eshleman v. Patrick Indus., 961 F.3d 242, 246 (3d Cir. 2020); 42 U.S.C. § 12102(3)(b).

83. *Eshleman*, 961 F.3d at 246.

84. *See* Budhun v. Reading Hosp. & Med. Ctr., 765 F.3d 245, 254–55, 259–60 (3d Cir. 2014) (finding that impairment was "minor" where plaintiff's broken bone affecting use of pinky finger did not render her unable to perform her primary work function of typing, although it did slow down her typing).

85. *See* Kelly v. N.Y. State Off. of Mental Health, 200 F. Supp. 3d 378, 394–95 (E.D.N.Y. 2016); *Eshleman*, 961 F.3d at 249; Hilton v. Wright, 673 F.3d 120, 129 (2d Cir. 2012) (per curiam); 29 C.F.R. § 1630.2(1).

86. *See* discussion *supra* Part II.

87. *See* discussion *supra* Part II (referring to paragraphs 20–21 of the hypothetical case study).

88. *See* discussion *supra* Part II.

89. *See* discussion *supra* Part II.

90. Areheart, *supra* note 60, at 181; 42 U.S.C. § 12102(3)(b).

refers to the fact that many of the ADA's requirements for coverage contain contradictory and potentially self-defeating evidentiary standards for plaintiffs.[91] As we will see in the next section, Kyle has the required evidentiary burden of demonstrating that he is a qualified employee able to perform the essential functions of the position in order to receive Title I coverage.[92] Yet, in so doing, Kyle might also be providing evidence and assertions that would lead a court to determine that his impairment was indeed minor, insofar that it did not affect his ability to perform primary work functions.[93]

As we move from the question of whether Kyle was "a person with a disability" to the next required element that Kyle be "qualified" for the position, bear in mind that empirical analyses of pre- and post- ADAAA litigation outcomes found that summary judgments for employers on the basis of a lack of disability status were down significantly since the passage of the ADAAA.[94] However, there was an increase in rulings that an individual is not "qualified for" employment, a trend that might elucidate some of the contradictory evidentiary requirements for plaintiffs to demonstrate that they are disabled enough to be covered by the law, but not so disabled that they cannot perform the essential functions of the job.[95] One challenge for plaintiffs in ADA claims is demonstrating that the level of disability was "just right" to satisfy both required elements.[96]

B. *Was Kyle a "Qualified Employee" Able to Perform the Essential Functions of the Job?*

To prove a claim of discrimination under the ADA, a plaintiff must show that "[the plaintiff] was otherwise qualified to perform the essential functions of [the] job, with or without reasonable accommodation."[97] This element can be broken down further by considering (1) what are a job's essential functions, and (2) what are reasonable accommodations for the

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91. Areheart, *supra* note 60, at 181.

92. *See* discussion *supra* Part II; McMillan v. City of New York, 711 F.3d 120, 125 (2d Cir. 2013).

93. *See* discussion *supra* Part II.

94. Befort, *supra* note 14, at 2031–32; *see also* 29 C.F.R. § 1630.2(g)(3), (l)(3), (m) (2021).

95. Befort, *supra* note 14, at 2030, 2032.

96. Areheart, *supra* note 60, at 209.

97. *McMillan*, 711 F.3d at 125 (quoting Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 169 (2d Cir. 2006)).

essential functions of that particular job.[98] Thus, an employer also violates the ADA by refusing to provide a reasonable accommodation to an employee with a disability that would otherwise allow the employee to perform the essential functions of their job.[99]

The Second Circuit has explained: "[a]lthough a court will give considerable deference to an employer's determination as to what functions are essential, there are a number of relevant factors that may influence a court's ultimate conclusion as to a position's essential functions . . . . '[u]sually, no one listed factor is dispositive.'"[100] Determining the essential functions of a job is a "fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice."[101]

ADA regulations set forth a factor-based list to analyze whether a function is an essential function of a job:

> Evidence of whether a particular function is essential includes, but is not limited to:
>
> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) The amount of time spent on the job performing the function;
>
> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (vii) The current work experience of incumbents in similar jobs.[102]

The move to remote work during the pandemic has complicated the analysis of what constitutes an essential job function.[103] Pre-pandemic, it could reasonably be said that the essential functions of the AE role included: attending weekly client social or networking events, such as lunches, happy hours, dinners, and other outings; being available on evenings and weekends to attend client events, rather than following a structured nine to five schedule;

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98. *Id.* at 125.
99. *Id.* at 125–26.
100. *Id.* at 126 (quoting Stone v. City of Mt. Vernon, 118 F.3d 92, 97 (2d Cir. 1997)).
101. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140 (2d Cir. 1995).
102. 29 C.F.R. § 1630.2(n)(3).
103. *See* discussion *supra* Part II (referring to paragraph 12 of the hypothetical case study).

generating new business by identifying clients and growing existing accounts; and demonstrating an ability to handle stress in a fast-paced, dynamic team environment.[104] Kyle was clearly able to perform the essential functions of his job pre-pandemic.[105]

The company transitioned to a work-from-home policy ("WFH") in March 2020 due to the pandemic.[106] Several questions relating to the essential functions of the AE role emerge, namely: what are the essential functions of the AE role in a virtual environment when, historically, the AE role required in-person socialization and networking?[107] How long does a WFH policy need to be in effect before the essential functions of the job can be considered to have changed?[108] Immediately?[109] Should an employee be measured against the essential functions of the job they were originally hired to do, or are they required to meet new virtual job requirements whenever they take effect?[110] Is there a transitional period during which an employee should be given leeway to adapt to different essential functions?[111] Do the essential functions only formally change once employees receive official guidance about new policies and job requirements?[112] How is job performance measured in a virtual environment?[113]

Kyle appears to have been personally struggling in a WFH environment.[114] Also, there is some evidence that he was professionally struggling, although that evidence is less clear since it depends upon a determination of what the essential functions of the AE role are in a WFH environment.[115] Kyle was outgoing and gregarious prior to the pandemic, and his colleagues and supervisor noticed a major personality shift once everyone

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104. *See* discussion *supra* Part II (referring to paragraphs 4–5 of the hypothetical case study).

105. *See* discussion *supra* Part II (referring to paragraph 7 of the hypothetical case study).

106. *See* discussion *supra* Part II (referring to paragraph 8 of the hypothetical case study).

107. *See* discussion *supra* Part II (referring to paragraphs 1–21 of the hypothetical case study).

108. *See* discussion *supra* Part II (referring to paragraphs 1–21 of the hypothetical case study).

109. *See* discussion *supra* Part II.

110. *See* discussion *supra* Part II.

111. *See* discussion *supra* Part II.

112. *See* discussion *supra* Part II.

113. *See* discussion *supra* Part II.

114. *See* discussion *supra* Part II (referring to paragraphs 9, 15, and 16 of the hypothetical case study).

115. *See* discussion *supra* Part II (referring to paragraph 9 of the hypothetical case study).

began working remotely.[116] As it applied to his job performance, there were complaints that he did not turn on his camera during team calls, looked disheveled during a team call on at least one occasion, joined calls from his personal cellphone rather than work computer, joined virtual meetings late or dropped off early, and was unprepared for at least one major client meeting.[117] Prior to the pandemic, he was a star employee who frequently exceeded expectations and had a successful and growing client list.[118] He continued to exceed quarterly targets by an average of fifty percent throughout February 2020.[119] Kyle's book of business experienced volatility at the beginning of the pandemic, as did the entire AdTech industry, as he lost four small to mid-sized clients while bringing in two new, large clients.[120] He was one of only nine AEs who met their quota in Q2 of 2020.[121] Further, KnowledgeWorks only issued a formal WFH policy setting forth job procedures and expectations, like requiring cameras turned on during meetings, for virtual work in July 2020, which included a six-month pause on performance evaluations.[122]

Kyle would likely argue that the fundamental, essential function of his job is to obtain new clients and thus grow his book of business—in other words, to increase profits.[123] And Kyle would further argue that that is precisely what he did even in a WFH environment, as he met his quota in Q2 of 2020 and brought on two large clients during that time, which made up for the loss of four smaller clients.[124] He would argue that certain requirements for virtual team meetings are either not essential functions of the AE role or only became essential functions when KnowledgeWorks issued its formal WFH policies in July 2020, so nothing before that time may be used against

116. *See* discussion *supra* Part II (referring to paragraphs 7 and 15 of the hypothetical case study).

117. *See* discussion *supra* Part II (referring to paragraphs 15–19 of the hypothetical case study).

118. *See* discussion *supra* Part II (referring to paragraph 7 of the hypothetical case study).

119. *See* discussion *supra* Part II (referring to paragraph 7 of the hypothetical case study).

120. *See* discussion *supra* Part II (referring to paragraph 9 of the hypothetical case study).

121. *See* discussion *supra* Part II (referring to paragraph 9 of the hypothetical case study).

122. *See* discussion *supra* Part II (referring to paragraph 14 of the hypothetical case study).

123. *See* discussion *supra* Part II (referring to paragraph 5 of the hypothetical case study).

124. *See* discussion *supra* Part II (referring to paragraph 9 of the hypothetical case study).

him.[125] Lastly, Kyle would argue that even if he had not been performing the essential functions of his job, that there were reasonable accommodations that KnowledgeWorks could have implemented to assist Kyle in performing his job during the pandemic.[126]

Oppositely, KnowledgeWorks would likely argue that virtual team meetings became an essential function of Kyle's job once the company transitioned to working from home, and that Kyle knew what was expected of him, such as turning on his camera during meetings, but repeatedly refused to do so.[127] The company would further argue that Kyle failed to perform an essential function of his job during the July 21, 2020, virtual client quarterly business review, by joining the call late from the back of a cab, turning off his video, being verbally unresponsive when asked questions, and brushing off his supervisor's concerns about his behavior after the call.[128] The company would argue that there is no reasonable accommodation that would have assisted Kyle on the July 21 call and that KnowledgeWorks had the right to terminate him based thereon.[129]

The consideration of the essential functions of a job is, as noted, a fact-intensive inquiry.[130] Shifting to remote, virtual work has complicated this analysis further.[131] These issues will likely be before the courts in the years to come as pandemic-related issues are litigated.[132]

C. *Was Kyle Subjected to an Adverse Employment Action "On the Basis Of" Disability?*

To establish a claim of disability discrimination under the ADA, any adverse employment action must have been made "on the basis of disability," meaning that there was no "legitimate, nondiscriminatory reason" for the

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125. *See* discussion *supra* Part II (referring to paragraph 14 of the hypothetical case study).

126. *See also* discussion *supra* Part II (referring to paragraph 14 of the hypothetical case study).

127. *See* discussion *supra* Part II (referring to paragraph 8 and 18 of the hypothetical case study).

128. *See* discussion *supra* Part II (referring to paragraph 18 and 19 of the hypothetical case study).

129. *See* McMillan v. City of New York, 711 F.3d 120, 125–26 (2d Cir. 2013); *The ADA: Questions and Answers*, *supra* note 13.

130. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 140 (2d Cir. 1995).

131. *See id.*

132. *See* discussion *supra* Part II; *McMillan*, 711 F.3d at 125–26; *The ADA: Questions and Answers*, *supra* note 13; *Borkowski*, 63 F.3d at 140.

adverse employment action.[133] Courts have interpreted this within a causal framework, requiring that the adverse employment action and the alleged act of discrimination be causally "linked" or "connect[ed]."[134] Within this causation standard, employer thought processes around employment decisions are often difficult to infer in an evidentiary sense.[135] This is, in part, because one key responsibility of human resources professionals is to mitigate corporate liability; establishing whether an action was made "on the basis of disability" can be difficult, as it is never in an employer's best interest to document such a rationale.[136]

Most circuits now employ a heightened causation standard that goes beyond a mere "link" or *connection*, requiring that the employee's disability was either a "determining factor" or "motivating factor" in the employer adverse action.[137] Within that standard, some circuits, including the Second Circuit, allow for a "mixed motive" showing—that discrimination was one motivating factor in the adverse employment action—while other courts have held that "proof of mixed motives will not suffice."[138] One area of agreement, where courts have been clear, is that an employer's "mere awareness" of a disability condition is not enough to satisfy the evidentiary basis for this

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133. 42 U.S.C. § 12112(a).

134. *See* Howard v. United Parcel Serv., Inc., 101 F. Supp. 3d 343, 352 (S.D.N.Y. 2015); Parker v. Sony Pictures Ent., Inc., 260 F.3d 100, 107–08 (2d Cir. 2001); Pearson v. Unification Theological Seminary, 785 F. Supp. 2d 141, 163 (S.D.N.Y. 2011).

135. *See Pearson*, 785 F. Supp. 2d at 152–53.

136. *See, e.g.*, Triant Flouris & Ayse Yilmaz, *The Risk Management Framework to Strategic Human Resource Management*, INT'L. RSCH. J. FIN. & ECON., Feb. 2010, at 25, 27; Cash v. Magic City Motor Corp., No. 16-CV-00192, 2017 WL 281755, at *7 (W.D. Va. Jan. 20, 2017) (finding an insufficient link between the likelihood the employer regarded employee as disabled and the decision to reduce his pay).

137. Lampkin v. Ajilon Pro. Staffing, 608 F. App'x 285, 287 (5th Cir. June 29, 2015) (per curiam); *see also* Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997); Andrews v. City of Hartford, 700 F. App'x 924, 926 (11th Cir. 2017) (per curiam); Estate of Martin v. Cal. Dep't of Veterans Aff., 560 F.3d 1042, 1048 (9th Cir. 2009).

138. *See* Natofsky v. City of New York, 921 F.3d 337, 341 (2d Cir. 2019) (holding that "on the basis of" in the ADA requires a showing of a but-for causation, not that the disability is the sole cause of the employer's action); *see also* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010); *Parker*, 204 F.3d at 337.

> [T]he "substantially identical . . . causal language" used in Title VII and the ADA . . . indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA . . . . [Thus], a plaintiff need not demonstrate that disability was the sole cause of the adverse employment action. Rather, he must show only that disability played a motivating role in the decision.

Parker, 204 F.3d at 337; Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963 (7th Cir. 2010).

element.[139] While courts in employment discrimination cases generally consider the temporal proximity of the employer's statements related to a protected status and the adverse employment action in question; temporal proximity is not, on its own, dispositive.[140] Courts have generally held that temporal proximity becomes more important in instances where a plaintiff relies exclusively on timing to plead causation.[141] This is not true for Kyle, who has additional *smoking gun* causal evidence stemming from his coworkers' and supervisor's statements that appear to directly draw upon his mental state in legitimizing his firing.[142]

For this element, Kyle has a few things going for him: (1) the temporal proximity between his firing and the employer's direct statements made with knowledge about his mental health is very close—as close as the same day—and (2) he is in a "mixed motive" jurisdiction and has a set of facts that suggest that his mental condition was either explicitly cited by decision-makers as a determinative factor in his firing, or, at the very least, was referenced in a manner that "otherwise gives rise to an inference of disability discrimination."[143] This is because Kyle's supervisor directly connects his mental state with his performance issues, namely that he "lost four clients since the start of the pandemic and is displaying erratic, worrying behavior that is negatively impacting team morale and client relationships."[144] In other words, there is sufficient evidence that Kyle's mental and emotional state were part

139. *See* Angell v. Fairmount Fire Prot. Dist., 907 F. Supp. 2d 1242, 1252 (D. Colo. 2012) ("[M]ere awareness of disability, without more, is not sufficient to show that disability was a 'determining factor' in the employer's adverse action."); 29 C.F.R. § 1630.2(l)(3) ("Establishing that an individual is 'regarded as having such an impairment' does not, by itself, establish liability.").

140. *See* Treglia v. Town of Manlius, 313 F.3d 713, 721 (2d Cir. 2002); Volovsek v. Wis. Dep't of Agric., Trade & Consumer Prot., 344 F.3d 680, 690 (7th Cir. 2003); Espinal v. Goord, 558 F.3d 119, 129 (2d Cir. 2009) ("[There is no] bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship . . . ." (quoting Gorman-Bakos v. Cornell Coop. Extension, 252 F.3d 545, 554 (2d Cir. 2001)).

141. *See* Vale v. Great Neck Water Pollution Control Dist., 80 F. Supp. 3d 426, 441 (E.D.N.Y. 2015) (citing Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (per curiam)).

142. *See* discussion *supra* Part II (referring to paragraphs 17–21 of the hypothetical case study).

143. *See* discussion *supra* Part II (referring to paragraphs 15–21 of the hypothetical case study); *Vale*, 80 F. Supp. 3d at 441 (citing *Breeden*, 532 U.S. at 273); *Andrews*, 700 F. App'x at 926–27; *Parker* 204 F.3d at 337; 42 U.S.C. § 12102(3); 42 U.S.C. § 12112(a).

144. *See* discussion *supra* Part II (referring to paragraph 21 of the hypothetical case study).

of the employer's motive in firing him.[145] There is enough here to draw the conclusion that the supervisor perceived a causal link between Kyle's declining mental health—or rather, his colleagues' perception of that decline—and his declining work performance.[146] The fact that the supervisor regarded Kyle as having a mental health condition was not only "linked" or "connected" to the subsequent adverse employment action taken against Kyle, but was, in fact, a *determinative* factor in that decision.[147]

Notably, Kyle's supervisor made little effort to mediate the interpersonal issues between Kyle and his coworkers and arguably allowed for stereotypes about what they perceived as a declining mental condition to drive his termination decision.[148] As we will discuss in the next section, even if

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145. *See* discussion *supra* Part II (referring to paragraph 21 of the hypothetical case study); Lizotte v. Dacotah Bank, 677 F. Supp. 2d 1155, 1171 (N.D.N.D. 2010) ("The employer's motive and intent are at the heart of a discrimination case, so the central inquiry is whether disability 'was a factor in the employment decision *at the moment it was made*.'") (quoting Sabree v. United Bhd. of Loc. Carpenters & Joiners Loc. No. 33, 921 F.2d 396, 403 (1st Cir. 1990)).

146. *See* discussion *supra* Part II (referring to paragraph 21 of the hypothetical case study); *Lizotte*, 677 F. Supp. 2d at 1169.

147. *See* discussion *supra* Part II (referring to paragraph 21 of the hypothetical case study); *Lizotte*, 677 F. Supp. 2d at 1169.

148. *See* discussion *supra* Part II (referring to paragraphs 16–20 of the hypothetical case study). One interesting consideration is whether KnowledgeWorks might have triggered a duty to accommodate Kyle. *See* 42 U.S.C. § 12112(b)(5)(B). "Failure to accommodate" claims are not cognizable under the "regarded as" prong because, in theory, some "regarded as" plaintiffs will not even have a disability in need of accommodation. *See* 42 U.S.C. § 12102(1)(C). However, if Kyle were to bring a claim under prong one or two, and if he really *was* experiencing a diagnosable psychiatric condition, then discrimination against Kyle, as a qualified individual on the basis of disability, can include a failure to accommodate. 42 U.S.C. § 12112(b)(5)(B). Additionally, there is the question of whether accommodating Kyle in some way might have allowed him to continue performing the essential functions of the position, since Title I states that a qualified individual is one "who, *with or without reasonable accommodation*, can perform the essential functions of the position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added). There are instances where the existence of a disability is obvious enough to an employer that they have a duty to initiate the interactive process themselves. 29 C.F.R. § 1630.2(o)(3); *see* Brady v. Wal-Mart Stores, Inc., 455 F. Supp. 2d 157, 174–75 (E.D.N.Y. 2006). In this case, there is some indication that the employer had awareness that the employee was experiencing mental health issues. *See* discussion *supra* Part II (referring to paragraph 20 of the hypothetical case study). At one point, the supervisor even specifically mentioned and referred Kyle to company peer-support offerings focused on substance abuse, anxiety, and depression, which itself might be considered a type of ADA accommodation. *See* discussion *supra* Part II (referring to paragraph 20 of the hypothetical case study). *See*, *e.g.*, Hinnershitz v. Ortep of Pa., No. 97-7148, 1998 U.S. Dist. LEXIS 20264, *14 (E.D. Pa. Dec. 22, 1998); Shaw v. Ill. Sportservice, No. 19 C 8415, 2021 U.S. Dist. LEXIS 148701, *34 (N.D. Ill. Aug. 9, 2021). If we view the interactive process as having been initiated,

some of KnowledgeWorks's available defenses are successful in shifting the evidentiary burden back to Kyle, there is evidence to suggest that any legitimate, nondiscriminatory reason for Kyle's firing was pretextual.[149] Most clearly, pretext is evidenced by the subjective assessment of Kyle's performance issues in relation to others in his same job category and the extent to which that assessment is repeatedly connected to Kyle's mental health by the supervisor.[150]

D. *Is There Evidence that KnowledgeWorks's Proffered Reason for Terminating Kyle was Pretextual?*

Under the ADA, if a plaintiff can establish a prima facie case, the defendant must present evidence demonstrating affirmative defenses or a legitimate, nondiscriminatory reason ("LNR") for the alleged adverse employment action.[151] Aside from rebutting Kyle's argument that his employer regarded him as having a disability, and alleging that Kyle was not qualified for his position, the clearest path that KnowledgeWorks has in terms of defenses is to assert a LNR for the decision to terminate Kyle's employment.[152] It is highly unlikely that the affirmative ADA defenses of "direct threat" or "undue hardship" would be available to the employer in this case, which leaves them with LNR as the best defense.[153]

In this case, KnowledgeWorks has a plausible evidentiary basis for asserting this defense on the theory that they fired Kyle purely, or mostly, on

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the employee would be entitled to a reasonable amount of time to implement the accommodative framework to see if it allowed him to perform the essential functions of the job. *See* 29 C.F.R. § 1630.2(o)(3). Furthermore, the employee would also be entitled to return to the employer in good faith with recommendations for alternative accommodations. *See id.* In Kyle's case, there would be a number of potential alternative accommodations, such as flexible scheduling, tolerance of alternative communication methods (e.g., using chat function instead of speaking on camera to reduce anxiousness), and more. *See* Devin Boyle, *How to Be Inclusive of Employees with Mental Health Disabilities*, GOV'T EXEC. (May 24, 2021), http://www.govexec.com/management/2021/05/how-be-inclusive-employees-mental-health-disabilities/174235/.

149. *See* discussion *supra* Section III.D; Miller v. Eby Realty Grp., LLC, 396 F.3d 1105, 1111 (10th Cir. 2005).

150. *See* discussion *supra* Part II (referring to paragraphs 20–21 of the hypothetical case study).

151. *Lizotte*, 677 F. Supp. 2d at 1162; *see* 42 U.S.C. § 12113(a).

152. *See* discussion *supra* Section III.A; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

153. *See* discussion *supra* Part II; 29 C.F.R. § 1630.2(p), (r); *Green*, 411 U.S. at 802.

the basis of his poor performance, both in terms of losing clients and his inability to collaborate effectively with teammates and incorporate performance feedback appropriately.[154] If KnowledgeWorks is successful in asserting this defense, the burden then shifts back to Kyle to provide evidence that the proffered LNR was merely pretextual.[155] "Pretext exists when an employer does not honestly represent its reasons for terminating an employee."[156] Under the ADA and other similar federal frameworks governing workplace discrimination, "pretext" is defined as "a dishonest explanation, a lie rather than an oddity or an error."[157]

There is plenty in this case study to suggest that Kyle's colleagues were becoming exasperated with his behavior and finding him to be a poor teammate.[158] While we have previously established that getting along with others *may* be an essential function of a position—particularly in a position where teamwork and client-facing performance are key performance indicators referenced in the job description and elsewhere—there is also evidence of dishonesty regarding Kyle's other performance indicators.[159]

Most notably, the supervisor's assertion that Kyle was losing clients because of his behavioral issues is not supported by any specific factual basis.[160] Moreover, the case study states explicitly that there was nothing anomalous about losing clients during the uncertain early months of the pandemic, and that Kyle performed in the top third of AEs during the period in question and was one of only nine out of thirty AEs to meet their quota in Q2.[161] For this reason, the emphasis on Kyle's client attrition might already

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154. *See* discussion *supra* Part II (referring to paragraphs 9 and 17 of the hypothetical case study); *Green*, 411 U.S. at 802.

155. *See* discussion *supra* Part III; *Green*, 411 U.S. at 802; Raytheon Co. v. Hernandez, 540 U.S. 44, 51–52 (2003); McMillan v. City of New York, 711 F.3d 120, 125 (2d Cir. 2013) (citing *Green* 411 U.S. at 792–93).

156. Miller v. Eby Realty Grp., LLC, 396 F.3d 1105, 1111 (10th Cir. 2005).

157. Peele v. Country Mut. Ins. Co., 288 F.3d 319, 326 (7th Cir. 2002); *see also* Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995) (defining pretext as "a lie, specifically a phony reason for some action.").

158. *See* discussion *supra* Part II (referring to paragraphs 15–17, 21 of the hypothetical case study).

159. *See* discussion *supra* Part I; Mayo v. PCC Structurals, Inc., 795 F.3d 941, 944 (9th Cir. 2015).

160. *See* discussion *supra* Part II (referring to paragraph 21 of the hypothetical case study).

161. *See* discussion *supra* Part II (referring to paragraph 21 of the hypothetical case study). As with the causal element of the prima facie case, temporality is often something that courts will consider when ascertaining whether a legitimate, nondiscriminatory reason proffered by an employer was indeed pretextual. Treglia v. Town of Manlius, 313 F.3d 713,

indicate some dishonesty underlying the formally-offered explanation for his firing.[162] Kyle's recent performance on quantitative metrics was also mostly in line with his prior highly-positive performance reviews; while more qualitatively, his attributes as a collaborator and teammate were not regarded as being up to that prior standard.[163] Performance evaluations are often highly important in disputes about pretext in employment discrimination; the fact that KnowledgeWorks paused performance evaluations during the pandemic—as many other employers did—might also weigh in.[164]

Additionally, while there are legitimate employer interests in removing employees who do not get along with others and erode group morale, there are also reasons to question Kyle's colleagues' and supervisor's response to his behavior.[165] First, there is indication that the company failed to provide appropriate guidance on how to transfer some of the improvisational, qualitative aspects of the AE position into online formats.[166] Second, the relative "mystery" and irregular schedules of the AE position prior to the pandemic were, in some ways, considered to be related to essential functions of the job: namely, the extent to which socializing with clients *necessitated* flexibility for AEs in terms of office presence and scheduling.[167]

IV. CONCLUSION

721 (2d Cir. 2002). For instance, if facts taking place prior to an employer's knowledge of an employee's disability support an employer's later proffered LNR or otherwise tends to validate it, the court will often rule in favor of the employer. *See, e.g.,* Lopez–Lopez v. Robinson Sch., 958 F.3d 96, 110 (1st Cir. 2020); *see* discussion *supra* Part II (referring to paragraph 9 of the hypothetical case study).

162. *See* discussion *supra* Part II.

163. *See* discussion *supra* Part II.

164. *See* discussion *supra* Part II (referring to paragraph 14 of the hypothetical case study); *A Shield or a Sword? The Role of Performance Evaluations in Employment Litigation*, AKERMAN: BLOG POST (July 16, 2018), http://www.akerman.com/en/perspectives/hrdef-a-shield-or-a-sword-the-role-of-performance-evaluations-in-employment-litigation.html.

165. *See* discussion *supra* Section III.B; *e.g.*, Mayo v. PCC Structurals, Inc., 795 F.3d 941, 944 (9th Cir. 2015); *Enforcement Guidance on Retaliation and Related Issue*, EQUAL EMP. OPPORTUNITY COMM'N (Aug. 25, 2016) http://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#A._Background.

166. *See* discussion *supra* Part II (referring to paragraph 13 of the hypothetical case study).

167. *See* discussion *supra* Part II (referring to paragraphs 3–6 of the hypothetical case study).

This Article has provided a vignette of working life during the pandemic that is not far from many people's reality.[168] As employers continue to modify operations through work-from-home and virtual arrangements, particularly in white collar and knowledge-based sectors, one critical question is: how can they work to improve the mental health and overall wellness in their workforces, while at the same time ensuring that the invigorated focus on mental health issues does not lead to new modalities of discrimination?[169] The case study in this Article intentionally selected a male employee with no obvious marginalized intersectional identities related to race, gender identity, sexual orientation, etc.[170] We invite readers to consider how their interpretation of these facts might have changed if Kyle's demographics were altered.[171]

From the employer's perspective, one intentional inclusion in the hypothetical above was that the employer possessed survey data evidencing that a large segment of their workforce was experiencing mental health challenges similar to Kyle's.[172] At various points, Kyle's supervisor even expressed solidarity in this experience.[173] While there are some universal "themes" in the experience of mental health during the pandemic, they differ dramatically across individuals.[174] To a certain extent, *generalized* discourse and training can have counter-intuitive effects, such as creating the impression of a universality of experience regarding mental health that simply does not exist.[175]

While this Article has emphasized some of the nuances of particular theories of disability coverage and discrimination under one particular legislative framework, the legal challenges described also speak to the need for employers to ensure that newly developed virtual teams and performance management practices are broadly disability-inclusive, and formally and

168. *See* discussion *supra* Part II.

169. *See* discussion *supra* Part II (referring to paragraphs 14 and 20 of the hypothetical case study); Wade v. Elec. Boat Corp., No. 16-CV-2041, 2019 WL 4805031, at *7 (D. Conn. Sept. 30, 2019).

170. *See* discussion *supra* Part II (referring to paragraph 1 of the hypothetical case study).

171. *See* discussion *supra* Part II.

172. *See* discussion *supra* Part II (referring to paragraphs 10–11 of the hypothetical case study).

173. *See* discussion *supra* Part II (referring to paragraphs 17 and 20 of the hypothetical case study).

174. *See* discussion *supra* Part II (referring to paragraphs 14 and 20 of the hypothetical case study); Embregts et al., *supra* note 4, at 2–4.

175. *See* discussion *supra* Part II (referring to paragraphs 14 and 20 of the hypothetical case study); Embregts et al., *supra* note 4, at 2–4.

informally accommodating to individuals with temporary and chronic psychiatric disabilities.[176] These practices also need to be grounded in a social model of disability that acknowledges the potentially disabling nature of contextual factors in society and in the workplace.[177]

176. *See* discussion *supra* Part III.
177. *See* discussion *supra* Part III.

ON FLORIDA LAW, LANGUAGE, AND ALCOHOL USE DISORDER

STACEY A. TOVINO*

I. INTRODUCTION

In its broadest sense, this Article builds on the Author's prior scholarship by analyzing the language used in Florida Statutes to refer to alcohol-related activities, alcohol-related states, and alcohol-related health conditions—also known as alcohol-related language—to determine whether this language may be contributing to the stigmatization of individuals with

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alcohol use disorder ("AUD").[1] As background, the American Psychiatric Association ("APA") defines AUD as a "problematic pattern of alcohol use leading to clinically significant impairment or distress . . . ."[2] In her prior scholarship, the Author recognizes that AUD is a major public health concern in the United States due to its association with premature morbidity, mortality, and disability, as well as its association with negative social events including

1. *See infra* Part II; Stacy A. Tovino, *Distilling the Language of the Law*, 111 KY. L.J. (forthcoming 2022) (manuscript at 54–55) (on file with author). An example of a Florida Statute that refers to an alcohol-related activity (driving while intoxicated) would be Florida Statutes Section 322.2616(1)(a), which makes it unlawful for an individual under the age of twenty-one who has a blood-alcohol level of 0.02 or higher to drive or to be in actual physical control of a motor vehicle in Florida. FLA. STAT. § 322.2616(1)(a) (2021). An example of a Florida provision that refers to an alcohol-related state (the state of intoxication or the state of being "drunk") would be the Florida Standard Jury Instructions for Criminal Cases, which references the state of "[i]ntoxication" and explains that "[i]ntoxication is synonymous with 'drunk.'" FLA. STD. JURY INSTR. (CRIM.) 29.1. Finally, an example of a Florida statute that refers to an individual with an alcohol-related health condition (alcohol use disorder) would be Administrative Order Number 6.305-/711, in reference to Civil Drug Court, which refers to "alcohol and drug abusers." *In re* Civil Drug Court, Fla. Admin. Order No. 6.305-7/11 (July 6, 2011), https://www.15thcircuit.com/sites/default/files/administrative-orders/6.305.pdf.

2. Tovino, *supra* note 1, at 1 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 490 (5th ed. 2013) [hereinafter DSM-5]). The Diagnostic & Statistical Manual provides the definition of AUD and lists eleven diagnostic criteria, two of which must be met within a twelve-month period for a diagnosis of AUD. *Id.* at 490. The eleven diagnostic criteria for AUD include:

> 1. Alcohol is often taken in larger amounts or over a longer period than was intended.
> 2. There is a persistent desire or unsuccessful efforts to cut down or control alcohol use.
> 3. A great deal of time is spent in activities necessary to obtain alcohol, use alcohol, or recover from its effects.
> 4. Craving, or a strong desire or urge to use alcohol.
> 5. Recurrent alcohol use resulting in a failure to fulfill major role obligations at work, school, or home.
> 6. Continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol.
> 7. Important social, occupational, or recreational activities are given up or reduced because of alcohol use.
> 8. Recurrent alcohol use in situations in which it is physically hazardous.
> 9. Alcohol use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol.
> 10. Tolerance, as defined by either of the following: a. A need for markedly increased amounts of alcohol to achieve intoxication or desired effect. b. A markedly diminished effect with continued use of the same amount of alcohol.
> 11. Withdrawal, as manifested by either of the following: a. The characteristic withdrawal syndrome for alcohol . . . . b. Alcohol (or a closely related substance, such as a benzodiazepine) is taken to relieve or avoid withdrawal symptoms.

Id. at 490–91. The presence of at least two of these eleven criteria indicates an individual has AUD. *Id.* at 490. An individual's AUD shall be classified as mild if two to three criteria are met, moderate if four to five criteria are met, or severe if six or more criteria are met. *Id.* at 491.

partner violence, child abuse and neglect, lost productivity, traffic accidents, and other injuries.[3] In her prior scholarship, the Author also reports that AUD remains severely undertreated in the United States despite the availability of effective pharmacological and psychosocial interventions.[4] The Author further explains that the stigma associated with AUD has been found to be an important reason why individuals with AUD do not seek treatment.[5]

In order to better understand the structural, including law and policy-based, sources of stigma associated with AUD, the Author's prior scholarship carefully: (1) reviews research studies investigating the relationship between

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3. Tovino, *supra* note 1, at 1–2 (citing AM. PSYCHIATRIC ASS'N, PRACTICE GUIDELINE FOR THE PHARMACOLOGICAL TREATMENT OF PATIENTS WITH ALCOHOL USE DISORDER 3–4 (2018) (ebook) (stating that AUD is a major public health problem)); Seung Ha Park & Dong Joon Kim, *Global and Regional Impacts of Alcohol Use on Public Health: Emphasis on Alcohol Policies*, 26 CLINICAL & MOLECULAR HEPATOLOGY 652, 652, 654 (2020) (explaining the health consequences of alcohol use disorder); Jürgen Rehm et al., *Alcohol-Related Morbidity and Mortality*, 27 ALCOHOL RSCH. & HEALTH 39, 39 (2002); *Alcohol Use and Your Health*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm (last visited Apr. 05, 2022) (referencing illustrative social impacts, including injuries and violence); DONNA M. BUSH & RACHEL N. LIPARI, SUBSTANCE USE AND SUBSTANCE USE DISORDER BY INDUSTRY, 1 (2015), http://www.ncbi.nlm.nih.gov/books/NBK343542/pdf/Bookshelf_NBK343542.pdf. (referencing additional social impacts, including lost productivity, absenteeism, and accidents); Gerhard Gmel & Jürgen Rehm, *Harmful Alcohol Use*, 27 ALCOHOL RSCH. & HEALTH 52, 52 (2003) (referencing "decreased worker productivity, increased unintentional injuries, aggression and violence against others, and child and spouse abuse.").

4. *See* Tovino, *supra* note 1, at 2, 2 n.7 ("Despite its high prevalence and numerous negative consequences, AUD remains undertreated" and "recommending pharmacological treatments, including naltrexone, acamprosate, and disulfiram" (citing AM. PSYCHIATRIC ASS'N, *supra* note 2, at 4–6)); *Understanding Alcohol Use Disorders and Their Treatment*, AM. PSYCH. ASS'N, http://www.apa.org/topics/substance-use-abuse-addiction/alcohol-disorders (last visited Mar. 18, 2022) (recommending psychosocial interventions, including cognitive behavioral therapy and motivational enhancement therapy); *Alcohol Facts and Statistics*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, http://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-facts-and-statistics (last visited Apr. 2, 2022) (stating that only 7.2% of individuals ages twelve and older with past-year AUD received any treatment and that less than 4% of individuals with AUD were prescribed a government-approved medication to treat their condition).

5. *See* Tovino, *supra* note 1, at 3–4; Janet Zwick et al., *Stigma: How It Affects the Substance Use Disorder Patient*, SUBSTANCE ABUSE TREATMENT, PREVENTION, & POL'Y 1, July 2020, at 1, 1 (defining stigma as "a mark of disgrace connected to a situation or quality of a person."); Katherine M. Keyes et al., *Stigma and Treatment for Alcohol Disorders in the United States*, 172 AM. J. EPIDEMIOLOGY, 1364, 1370 (2010) (discussing the stigma associated with AUD and explaining that such stigma is associated with a decreased likelihood of service use); Georg Schomerus et al., *The Stigma of Alcohol Dependence with Other Mental Disorders: A Review of Population Studies*, 46 ALCOHOL & ALCOHOLISM, 105, 110 (2011) (concluding that AUD "is a particularly severely stigmatized mental disorder").

language and stigma in the context of AUD and other substance use disorders ("SUDs"); (2) finds that slang, outdated, and non-person-first terms can invite negative judgments about individuals with AUD; (3) collects and catalogues illustrative state statutes containing slang, outdated, and non-person-first, alcohol-related language, including "abuser," "addict," "alcoholic," "drunk," "drunkard," "intemperate," "inebriate," and "wastrel"; and (4) reports several original research findings relating to such language.[6] These research findings relate to the prevalence of alcohol-related language in particular subject matter areas, including health and social services law as well as occupational licensure law; the variety of positive and negative legal consequences assigned to particular alcohol-related activities, states, and conditions; and the multiple means by which statutory language permeates public discourse, both tempering and perpetuating stigma against individuals with AUD.[7]

The Author's prior scholarship also highlights the alcohol-related language recommendations of researchers, professional medical societies, and government agencies.[8] These professional language recommendations suggest the use of neutral, person-first phrases when a third party has no knowledge of how a particular individual self-identifies in the context of the individual's alcohol use.[9] In the context of individuals with AUD, the goal of person-first language is to communicate that AUD is just one aspect of a person's life, not the only or defining aspect.[10] An example of person-first language would be "individual with AUD," "individual with alcohol use disorder," or even "individual with addiction," but not "abuser," "addict," "alcoholic," "alcohol abuser," "alcohol user," "drunk," "drunkard," "inebriate," "intemperate," or "wastrel."[11] These professional language recommendations also suggest the word "use" rather than "abuse" preceding or following the word "alcohol" due to the malintent, cruelty, and violence associated with the word "abuse."[12] Finally, the words "habit," "habitual," and "habitually"—as in "habitual drunkard" or "habitually intoxicated"—are not recommended because these words inaccurately imply that individuals

6. *See* Tovino, *supra* note 1 at 7–8, 13.
7. *See id.* at 7, 13.
8. *See id.* at 12–13.
9. *See id.* at 11 (citing Nora D. Volkow et al., *Choosing Appropriate Language to Reduce the Stigma Around Mental Illness and Substance Use Disorders*, 46 NEUROPSYCHOPHARMACOLOGY 2230, 2231 (2021)).
10. *See* Tovino, *supra* note 1, at 11; Volkow et al., *supra* note 9, at 2231.
11. *See* Tovino, *supra* note 1, at 11; Volkow et al., *supra* note 9, at 2231.
12. *See* Tovino, *supra* note 1, at 11–12; Volkow et al., *supra* note 9, at 2231.

with AUD choose to use alcohol and/or can choose to stop using alcohol.[13] These words also may undermine the seriousness of an individual's AUD.[14]

As explained in the Author's prior scholarship, one source of professional language recommendations is the National Institute on Drug Abuse ("NIDA"), which specifically recommends the use of the phrase "person with alcohol use disorder" rather than "addict," "alcoholic," "drunk," or "user."[15] A second source of professional language recommendations is the Office of National Drug Control Policy, which requests administrative agencies use language comporting with the most recent edition of the APA's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"), which uses the phrase "alcohol use disorder" but not "abuse," "addict," "alcoholic," "alcoholism," "dependence," or "habit."[16] A third source is Canada's Centre on Substance Use and Addiction, which supports the phrase "individual with alcohol use disorder" but opposes the words "abuse" and "addict."[17] A fourth source is the American Society of Addiction Medicine ("ASAM"), which promotes person-first language rather than "addict" or "alcoholic."[18] ASAM specifically asks writers to use precise medical language rather than slang and other non-medical language such as "drunk," "smashed," or "bombed."[19] A final illustrative, but not exhaustive, source is the American Psychological Association ("APA"), which opposes language that "diminishes 'the integrity

13. *See, e.g.*, *Words Matter — Terms to Use and Avoid When Talking About Addiction*, NAT'L INST. ON DRUG ABUSE, http://www.drugabuse.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction (last updated Nov. 29, 2021) (explaining the reasons why the word "habit" should not be used in the context of individuals with AUD and offering preferred terminology; further explaining that the word "habit" undermines the seriousness of AUD).

14. *See id.*

15. *See id.*; Tovino, *supra* note 1, at 11.

16. *See* Tovino, *supra* note 1, at 12 (citing Memorandum from Michael P. Botticelli, Dir., Off. of Nat'l Drug Control Pol'y to Heads of Exec. Dep'ts & Agencies (Jan. 9, 2017)).

17. *See id.* (citing CANADIAN CTR. ON SUBSTANCE USE & ADDICTION, OVERCOMING STIGMA THROUGH LANGUAGE: A PRIMER 7–8 (2019) http://www.ccsa.ca/sites/default/files/2019-09/CCSA-Language-and-Stigma-in-Substance-Use-Addiction-Guide-2019-en.pdf.).

18. *See id.* (citing *Instructions and Guidelines*, J. ADDICTION MED., http://journals.lww.com/journaladdictionmedicine/Pages/Instructions-and-Guidelines.aspx#languageandterminologyguidance (last visited Apr. 3, 2022)). "[T]he use of humanizing, non-stigmatizing, medically-defined, precise, and professional consensus-driven terminology is important." *Id.*

19. *Id.*

of persons as whole human beings' such as . . . [an] 'alcoholic person.'"[20] The APA also opposes language with "'superfluous or negative overtones' such as 'stroke victim' and, by extension, 'alcohol sufferer.'"[21]

This Article builds on the author's prior scholarship by identifying and analyzing alcohol-related language used in Florida law and by proposing ways in which Florida statutory language may be improved.[22] This Article proceeds as follows: Part II of this Article identifies illustrative Florida statutes that contain alcohol-related words and phrases that do not conform to the professional language recommendations described above.[23] Part III of this Article makes several key findings relating to Florida's statutory language and proposes ways in which Florida lawmakers can improve these statutes.[24] These proposals include using medically current and respectful statutory language in legislation introduced on a going-forward basis, as well as amending outdated and stigmatizing language set forth in already-enacted legislation.[25] Part III of this Article also contains a sample bill that may be introduced to the Florida Legislature to implement these proposals.[26] The conclusion highlights the importance of encouraging individuals with AUD to seek, enter, and remain in treatment, including by diminishing structural sources of stigma associated with AUD.[27]

II. FLORIDA LAW

A. *Criminal Law*

A number of Florida statutes contain slang, outdated, and/or non-person-first alcohol-related language.[28] Some of these statutes are sourced within Florida's criminal laws.[29] For example, Florida has an entire chapter

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20. *See* Tovino, *supra* note 1 at 12–13 (citing *Guidelines for Nonhandicapping Language in APA Journals*, AM. PSYCH. ASS'N: APA STYLE, http://apastyle.apa.org/6th-edition-resources/nonhandicapping-language (last visited Apr. 3, 2022)).

21. *Id.* at 13.

22. *See infra* Part II.

23. *See id.*

24. *See infra* Part III.

25. *See id.*

26. *See id.*

27. *See infra* Part IV.

28. *See* discussion *infra* Part II. This Article focuses on the words and phrases that are used in Florida statutes. *Id.* The words and phrases used in Florida case law, Florida regulations, and other primary and secondary legal authorities are beyond the scope of this Article. *See id.*; *see also* FLA. STAT. §§ 856, 893, 938.23, 985 (2021).

29. *See* FLA. STAT. §§ 856, 893, 938.23, 985 (2021).

of criminal offenses organized under the partial title "[d]runkenness."[30] Interestingly, the text of the disorderly intoxication statute codified within the chapter uses the word "intoxicated" (not "drunkenness"), although the Middle English (i.e., outdated) "[d]runkenness" language does appear on a print-out of the statute.[31] The "[d]runkenness" chapter is not the only Florida statutory title or provision to use a version of the word "drunk."[32] Florida also has a standard criminal jury instruction for the crime of "disorderly intoxication."[33] The jury instruction specifically explains, by way of definition, that "[i]ntoxication is synonymous with 'drunk.'"[34]

In addition to statutes relating to disorderly intoxication, Florida also has criminal laws that reference alcohol-related funds and grants.[35] These laws repeatedly use the word "abuse."[36] For example, one Florida statute authorizes each of its sixty-seven counties to establish a "County Alcohol and Other Drug Abuse Trust Fund" responsible for disbursing assistance grants to "alcohol and other drug abuse treatment or education programs."[37] The statutory language

30. FLA. STAT. § 856.

31. FLA. STAT. § 856.011(1). "No person in the state shall be intoxicated and endanger the safety of another person or property, and no person in the state shall be intoxicated or drink any alcoholic beverage in a public place or in or upon any public conveyance and cause a public disturbance." *Id.* Although Florida outlaws public intoxication, it is worth noting that other states forbid the criminalization of public intoxication. *See, e.g.*, ALASKA STAT. § 47.37.010 (2021). It is the policy of Alaska, for example, that individuals should be treated instead of criminally prosecuted for their public consumption of alcoholic beverages. *Id.* Colorado has the same policy; that is, individuals may not be subject to criminal prosecution because of their public consumption of alcohol and that they should be treated instead. COLO. REV. STAT. § 44-3-503(1)(e) (2021). The District of Columbia, Idaho, Kansas, Minnesota, Montana, Nebraska, Nevada, New Mexico, Rhode Island, Tennessee, and Vermont similarly prohibit the prosecution of individuals with AUD for the public consumption of alcohol and/or the adoption or enforcement of laws that include "being a common drunkard" as an element of an offense. *See* D.C. CODE § 24-601 (2021) (directing all public officials in the District to alleviate chronic "alcoholism," to handle public intoxication as a "public health problem rather than as a criminal offense," and to recognize that "a chronic alcoholic is a sick person who needs, is entitled to, and shall be provided appropriate medical, psychiatric, institutional, advisory, and rehabilitative treatment services of the highest caliber for his illness."); IDAHO CODE § 39-301 (2021); KAN. STAT. ANN. § 65-4059 (2021); MINN. STAT. § 340A.902 (2021); MONT. CODE ANN. § 53-24-106(1) (2021); NEB. REV. STAT. § 53-1,119(1) (2021); NEV. REV. STAT. ANN. § 458.260(1) (2021); N.M. STAT. ANN. § 43-2-4(A) (2021); 23. R.I. GEN. LAWS § 23-1.10-16(a) (2021); TENN. CODE. ANN. § 33-10-203(b) (2021); VT. STAT. ANN. tit. 18, § 4801 (2021).

32. FLA. STD. JURY INSTR. (CRIM.), 29.1.

33. *Id.*

34. *Id.*

35. *See e.g.,* FLA. STAT. §§ 893.165, 938.23.

36. *Id.*

37. FLA. STAT. § 893.165.

authorizing the establishment of these funds repeatedly uses the phrase "alcohol abuse."[38] Another Florida statute encourages applications for community juvenile justice partnership grants that would support community-based programs, including "drug and alcohol abuse" prevention programs.[39] Again, the statutory language encouraging these applications uses the phrase "alcohol abuse."[40]

Florida also has criminal laws that allow certain individuals charged with or convicted of certain crimes to request treatment instead of prosecution.[41] These laws tend to use the phrases "alcohol abuse" and "alcohol abusers."[42] Florida's Fifteenth Judicial Circuit recognizes, for example, the "urgent need to provide treatment modalities for drug and alcohol abuse outside of the criminal justice system, *i.e.*, without the taint of arrest and conviction."[43] To this end, the Fifteenth Judicial Circuit has established a community drug court for the purpose of committing "alcohol and drug abusers to treatment programs."[44]

Finally, Florida uses "abuse" language in its pretrial detainee release provisions.[45] For example, one Florida provision expands the pretrial release program of Florida's Eighteenth Judicial Circuit.[46] This statute releases certain pretrial detainees who have been charged with certain offenses as long as the detainees do not present a danger to the community because of "drug abuse, alcohol abuse" or other mental illness.[47]

B. *Education and Family Law*

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38. *See* FLA. STAT. §§ 893.165, 938.23.
39. FLA. STAT. § 985.676(2)(a)(5).
40. *See id.*
41. *See* FLA. STAT. § 397.334 (2021).
42. *Id.*
43. Fla. Admin. Order No. 6.305-7/11, *supra* note 1 (emphasis added).
44. *Id.* The language used by Florida in these treatment court provisions is similar to the language used by nearby states in their treatment court statutes, including Alabama, Louisiana, and Mississippi. ALA. CODE § 12-23-2 (2021) (referencing the extent of the problem of "alcohol and drug abuse" among Alabama residents and the association of "alcohol abuse" and criminal activity); LA. STAT. ANN. § 13:5303(1), (3)–(4) (2021) (referring to "alcohol and drug abuse programs," "alcohol and drug abusers," and "alcoholic or drug addicts"); MISS. CODE ANN. § 9-23-5(c) (2021) (referring to "substance abuse" professionals).
45. *In re Criminal* — Pretrial Release Program — Expansion of the Release Authority of the Pretrial Release Program, Fla. Admin. Order No. 09-07-B Amended (Feb. 18, 2009), http://www.brevardclerk.us/_cache/files/b/8/b846b2ed-0a5f-48be-9ba9-a78ae781d1b4/2B22C3B561E83A021CEBA1B4A3D0332A.09-07-b-amd-click-here-.pdf.
46. *Id.*
47. *Id.*

Like Florida's criminal laws, a handful of education laws also incorporate the language of "abuse."[48] For example, one Florida statute makes available to school districts funds for use in preventing "destructive lifestyle conditions, such as alcohol and drug abuse" and for referring students for "drug and alcohol abuse" treatment.[49] A second Florida statute creates within the state's Department of Education a recovery network program designed to assist educators who are impaired as a result of "alcohol abuse" and "drug abuse."[50]

One Florida family law also incorporates the language of "abuse."[51] This law, sourced within Florida's child protection statutes, expresses a desire "[t]o prevent and remediate the consequences of . . . substance abuse disorders on families . . . [by] reduc[ing] the occurrences of . . . substance abuse disorders, including alcohol abuse or related disorders . . . ."[52]

C. *Health and Social Services Law*

Florida has a number of health and social services laws that contain alcohol-related language.[53] Relevant statutes may be broken down into those that identify and define key health care and social services terms as well as those that establish programs through which health care and social services may be delivered.[54] The word "abuse" is routinely used in Florida statutes that identify and define key health care and social services terms and in statutes that establish programs through which relevant services may be accessed.[55] For example, Florida defines "clinical assessment" in its statutory "Substance Abuse Services" chapter as the collection of information regarding, among other things, an individual's "abuse of alcohol or drugs."[56] By further example, the Florida statute establishing the state's Department of Health and

48. *See e.g.,* FLA. STAT. §§ 381.0057 (2021), 1012.798(1) (2021).
49. *See* FLA. STAT. § 381.0057(3)(b).
50. FLA. STAT. § 1012.798(1).
51. *See* FLA. STAT. § 39.001(6)(b)(2) (2021).
52. *Id.*
53. *See e.g.,* FLA. STAT. §§ 397.311(7), 20.43(7)(b), 154.011(4).
54. *See* FLA. STAT. §§ 397.311(7), 20.43(7)(b), 154.011(4).
55. *See e.g.,* FLA. STAT. § 397.311(7).
56. *Id.* Here, Florida is similar to Alabama, Delaware, and Georgia. ALA. CODE § 22-21-260(8) (2021) (defining "health services" to include "alcohol [and] drug abuse" services); DEL. CODE ANN. tit. 16, §§ 22, 2203(16) (2021) (titling a relevant act "The Substance Abuse Treatment Act", using the phrase "substance abuse," and defining such as the "chronic, habitual, regular, or recurrent use of alcohol . . . ."); GA. CODE ANN. § 37-7 (2021) (devoting an entire statutory chapter to the "Hospitalization and Treatment of Alcoholics, Drug Dependent Individuals, and Drug Abusers" and defining such terms).

authorizing the Department to use federal and state funds to plan and conduct health education campaigns refers to preventing "alcohol abuse or other substance abuse."[57] Likewise, another Florida statute requires all sixty-seven Florida counties to offer primary care services to Medicaid recipients and other qualified individuals with low income through a primary care program.[58] This statute specifically prohibits such programs from denying access to prenatal care to certain pregnant women, including women with "alcohol abuse" issues[59]

Similarly, another Florida statute requires boards of county commissioners to establish county public safety coordinating councils that include one physician member "who practices in the area of alcohol and substance abuse . . . ." and an additional mental health professional member "who practices in the area of alcohol and substance abuse . . . ."[60] Along the same lines, another Florida statute creates, within the Florida Department of Children and Families ("DCF"), a "Criminal Justice, Mental Health, and Substance Abuse Reinvestment Grant Program," one purpose of which is to improve the provision of DCF services to adults and juveniles who have "substance abuse disorders."[61] This statute also establishes the "Criminal Justice, Mental Health, and Substance Abuse Statewide Grant Review Committee that must include "one representative of the Florida Alcohol and Drug Abuse Association."[62] Yet another statute that recognizes the "historical inequity in the funding of substance abuse and [other] mental health services" requires certain funding for alcohol, drug abuse, and other mental health services.[63] Still, another statute that contains Florida's "Community Substance Abuse and Mental Health Services Act" references "drug abuse and alcoholism programs."[64] A final illustrative statute creates an impaired health care practitioner program that provides services to health care practitioners who are impaired due to, among other conditions, "abuse of alcohol."[65]

D. *Insurance Law*

57. FLA. STAT. § 20.43(7)(b).
58. *See id.* § 154.011(4).
59. *Id.*
60. *Id.* § 951.26(1)(b)(1)(f)–(g).
61. *Id.* § 394.656(1).
62. FLA. STAT. § 394.656(2)(j).
63. *Id.* § 394.908.
64. *Id.* §§ 394.75(4)(m), 394.65.
65. *Id.* § 456.076(1)(d)–(e).

Florida insurance law also contains some alcohol-related language that incorporates the language of "abuse."[66] For example, Florida requires its Medicaid managed care plans to establish "a medically approved alcohol or substance abuse recovery program" and to identify enrollees with "alcohol or substance abuse."[67] Although most insurance statutes that contain alcohol-related language are designed to help individuals with AUD and other substance use disorders obtain coverage of relevant treatments and services, some statutes cancel or limit coverage in circumstances involving an alcohol-related activity, alcohol-related state, or alcohol-related health condition.[68] In Florida, these statutes use the words "drunk" and "habitual."[69] For example, one Florida statute permits health insurance policies to include a statement exempting the insurer from liability for losses resulting when the insured is "drunk."[70] A second Florida statute exempts from Florida workers' compensation law disabilities and diseases due to "habitual use of alcohol."[71]

E. *Liquor Control Law*

A few Florida liquor control laws contain alcohol-related language, including the phrase "habitual drunkard."[72] For example, Florida has a "[h]abitual drunkards" statute that prohibits any person from selling, giving away, disposing of, exchanging, or bartering any alcoholic beverage to an

66. *Id.* § 409.973(3).

67. FLA. STAT. § 409.973(3). In this regard, Florida is similar to Arizona, Delaware, Georgia, Illinois, Vermont, and West Virginia. ARIZ. REV. STAT. ANN. § 20-1406(C) (2021) (requiring group disability insurers to cover "drug abuse or alcoholism" services without regard to whether the services are rendered in a psychiatric or general hospital); DEL. CODE ANN. tit. 18, §§ 3578(a)(3), 3578(b) (2021) (requiring certain large group health plans to cover "drug and alcohol dependencies" defined to include "substance abuse disorder or the chronic, habitual, regular, or recurrent use of alcohol . . . ."); GA. CODE ANN. § 33-24-28.3 (2021) (requiring accident and sickness insurers that cover "alcoholism or drug addiction" to cover care provided in facilities that specialize in the treatment of "alcoholics or drug addicts"); 215 ILL. COMP. STAT. 5/367d.1 (2021) (requiring certain group health plans that cover "alcoholism or other drug abuse or dependency" to cover certain substance use disorder treatment providers); VT. STAT. ANN. tit. 8, § 4089b(f)(2)(A) (2021) (requiring health insurers to cover "alcohol and substance abuse" treatments if they are provided by certain individuals, including "substance abuse counselors," in certain facilities); W. VA. CODE § 5-16-8(9) (2021) (requiring insurance provided to public employees to include incentives designed to discourage "alcohol and chemical abuse").

68. FLA. STAT. §§ 409.973(3), 627.629 (2021).

69. *Id.* §§ 440.02(1), 627.629.

70. *Id.* § 627.629.

71. *Id.* § 440.02(1).

72. *Id.* § 562.50.

individual who is "habitually addicted" to alcoholic beverages if the person has been given written notice by certain enumerated family members that the individual is a "habitual drunkard."[73] Florida's Sixth Judicial Circuit (covering Pasco and Pinellas Counties) has also adopted a local rule that authorizes the posting of liquor control signs that contain similar "habitual drunkard" language.[74] According to the local rule, these signs may say: "[s]ales to habitual drunkards or intoxicated persons prohibited."[75]

F. *Military and Veterans Law*

A few Florida military and veterans laws contain alcohol-related language, including "drunkenness" and "habitually inebriated."[76] For example, one Florida statute gives the commanding officer of troops on active duty the power to incarcerate and detain any person guilty of "drunkenness" within one mile of a camp, garrison, or station.[77] A second Florida statute prohibits veterans' homes from receiving or retaining an individual who is "habitually inebriated."[78]

G. *Occupational Licensure Law*

A number of Florida occupational licensure laws contain alcohol-related language.[79] Most of these laws use the word "drunkenness."[80] For

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73. FLA. STAT. § 562.50. In this regard, Florida is similar to California, which also makes it unlawful for any person to sell, furnish, or give an alcoholic beverage to any "habitual or common drunkard." CAL. BUS. & PROF. CODE § 25602(a) (2021).

74. *See in re* Local Ordinance Violations and Fish and Wildlife Conservation Commission Violations Uniform Fine Schedule, Fla. Admin. Order No. 2018-068 PI-CTY (Dec. 12, 2018), http://www.jud6.org/legalcommunity/LegalPractice/AOSAndRules/aos/aos2018/2018-068.pdf.

75. *See id.*

76. FLA. STAT. §§ 250.33, 296.06(2)(c).

77. *Id.* § 250.33. Here, Florida is similar to Alaska (which provides that certain "drunk" members of the militia may be punished) and Alabama (giving the commanding officer of a troop in active service the power to incarcerate and detain persons "guilty of drunkenness"). *See* ALASKA STAT. § 26.05.860(b) (2020); ALA. CODE § 31-2-126 (2021).

78. FLA. STAT. §§ 296.06, 296.07. Here, Florida is similar to Iowa (which prohibits veterans' homes from receiving or retaining persons who are "acute inebriate[s]") and South Dakota (which prohibits veterans' homes from receiving an "inebriate"). IOWA CODE ANN. § 35D.2(2) (2021); S.D. CODIFIED LAWS § 33A-4-34 (2021).

79. FLA. STAT. § 296.06(2)(c).

80. *See id.* §§ 401.411(1)(k), 467.203(1)(g), 468.1295(1)(aa), 490.009(1)(p) (2021).

example, one Florida statute prohibits an individual from practicing as an emergency medical technician or paramedic without reasonable skill and without regard for the safety of the public by reason of "drunkenness."[81] A second statute allows midwives to be disciplined or denied licenses due to "drunkenness."[82] A third statute allows speech-language pathologists and audiologists to be disciplined or denied licenses due to "drunkenness."[83] Additional statutes allow psychologists and other mental health professionals to be disciplined or denied licenses due to "drunkenness."[84] The same is true for Florida nursing home administrators, veterinarians, and school district staff.[85] Florida also may deny an application for registration or the certification of a real estate appraiser who has become temporarily incapacitated from acting as an appraiser due to "drunkenness."[86] Although the word "drunkenness" is most frequently used in Florida occupational licensure law, the word "abuse" is occasionally used.[87] For example, Florida may deny a license to a private investigator or private security officer if the investigator or officer has a history of "alcohol abuse."[88]

Additional Florida occupational licensure laws define the scopes of practice of the different mental health professionals, typically using the phrase "alcoholism and substance abuse."[89] Florida's clinical social worker licensing law, for example, defines the practice of clinical social work as including treatment of "alcoholism and substance abuse."[90]

H. *Public Officer and Civil Servant Law*

Several Florida laws applicable to public officers and civil servants contain alcohol-related language.[91] Without exception, these statutes use the word "drunkenness."[92] The Florida Constitution, for example, permits the Governor to suspend from office certain state, militia, and county officers for

81. *Id.* § 401.411(1)(k).
82. *Id.* § 467.203(1)(g).
83. *Id.* § 468.1295(1)(aa).
84. FLA. STAT. §§ 490.009(1)(p), 491.009(1)(p).
85. *Id.* §§ 468.1755(1)(l), 474.214(h), 1012.33(4)(c).
86. *Id.* § 475.624(7).
87. *See id.* § 493.6108(3).
88. *Id.*
89. *See* FLA. STAT. § 491.003(7).
90. *Id.*
91. *See* FLA. CONST. art. IV, § 7(a); FLA. STAT. §§ 100.361(2)(d)(4), 112.501(2)(a), 112.51(1), 455.209(1), 456.008(1).
92. *See* FLA. CONST. art. IV, § 7(a); FLA. STAT. §§ 100.361(2)(d)(4), 112.501(2)(a), 112.51(1), 455.209(1), 456.008(1).

"drunkenness."[93] A separate Florida statute provides that "drunkenness" is a ground for elected and appointed municipal officials, as well as municipal board members, to be removed from office.[94] The Florida Governor also has permission to suspend certain health professional board members, as well as certain Business and Professional Regulation Board members, for "drunkenness."[95] The Florida Governor also may suspend members of the Nominating Commission for the Florida Courts of Appeal, members of the Nominating Commission for the Florida Supreme Court, members of the Florida Commission on Offender Review, members of the Florida Board of Professional Surveyors and Mappers, and members of the Florida Barbers' Board for "drunkenness."[96]

I. *Tort Law*

A few Florida tort laws contain alcohol-related language.[97] These laws rely on the phrase "habitually addicted" as well as the word "abuse."[98] For example, Florida allows the imposition of liability on persons who willfully and unlawfully serve a person "habitually addicted" to alcohol.[99] Florida also provides civil immunity to Florida Lawyers Assistance and certain other lawyer assistance programs that provide assistance to attorneys who may be impaired due to "abuse of alcohol or other drugs."[100]

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93. FLA. CONST. art. IV, § 7(a).

94. FLA. STAT. §§ 100.361(2)(d)(4), 112.501(2)(a), 112.51(1). In this regard, Florida is similar to Idaho and Texas. IDAHO CODE § 50-1604(4)(e) (providing that civil servants may be removed or discharged from office for a variety of reasons, including "[d]runkenness"); TEX. CONST. art. 5, § 24 (using "drunkenness" as a reason for county judges, county attorneys, court clerks, justices of the peace, constables, and other county officers to be removed from office).

95. FLA. STAT. §§ 455.209(1), 456.008(1).

96. *See id.* §§ 455.209(1), 456.008(1), 472.007(7)(a), 476.054(6), 947.03(3); FLA. R. JUD. ADMIN. §§ X, IX (2021).

97. *See* FLA. STAT. §§ 397.484, 768.125.

98. *Id.* §§ 397.484, 768.125.

99. *Id.* § 768.125. In this regard, Florida is similar to Colorado, Pennsylvania, and Rhode Island. *See* COLO. REV. STAT. § 13-21-103 (2021) (providing that any individual whose person or property is injured by a "habitually intoxicated" person has a cause of action against any third party who sold or gave alcohol to the "habitually intoxicated" person); 42 PA. CONS. STAT. § 8522(b)(7) (2021) (waiving sovereign immunity and allows for the imposition of liability on the state for damages that result when a state liquor store employee sells liquor to a person "known to be an habitual drunkard" or of "known intemperate habit"); 3 R.I. GEN. LAWS § 3-11-2 (2021) (allowing a cause of action against a liquor licensee who fails to follow a family member or employer's request not to sell a person liquor when such failure results in damages).

100. FLA. STAT. § 397.484.

J. *Vehicle and Transportation Law*

Florida has a handful of vehicle and transportation statutes that identify negative legal consequences that flow from certain alcohol-related activities, alcohol-related states, and alcohol-related health conditions.[101] These statutes tend to incorporate the word "abuse" and the phrase "habitual drunkard."[102] Additional Florida vehicle and transportation laws use alcohol-related language to specify the education or treatment that must occur before license issuance or license reinstatement can occur.[103] These laws typically incorporate the words "abuse" and "alcohol[ism]."[104] Still, other Florida vehicle and transportation laws refer to drunk driving.[105] For example, one Florida statute references a "drunk driver" visitation program.[106] Under this program, a court may order an individual who is on probation and under supervision to visit either a trauma center or a hospital (to observe victims of motor vehicle accidents involving alcohol), a licensed substance use disorder provider (to observe individuals in terminal stages of substance use disorder), or the county coroner's office (to observe victims of vehicle accidents involving alcohol).[107] A second Florida statute requires applications for motor vehicle registrations and registration renewals to include language permitting voluntary contributions to the "Florida Mothers Against Drunk Driving, Inc."[108]

K. *Miscellaneous Laws*

A handful of additional, miscellaneous Florida laws contain alcohol-related language, especially the words "abuse" and "alcoholism."[109] Florida guardianship law, for example, allows a guardian to be removed for "substance abuse."[110] Florida tax law, by further example, allows a county to impose additional taxes on beverages sold at establishments licensed to sell liquor.[111]

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101. *See id.* §§ 322.095(1), 322.2616(1)(a), 397.484, 768.125.
102. *See id.* §§ 322.095(1), 397.484, 768.125.
103. *Id.* §§ 322.095(1), 322.2616(2)(c).
104. *See id.* §§ 322.095(1), 322.2616(2)(c).
105. *See* FLA. STAT. § 322.0602.
106. *Id.* § 322.0602(2)(a).
107. *Id.* § 322.0602(4)(a).
108. *Id.* § 320.02(16)(b).
109. *See id.*; FLA. STAT. §§ 744.474(4); 90.503(a)(1)–(4).
110. FLA. STAT. § 744.474(4).
111. *Id.* § 212.0306(1)(b).

The proceeds from these taxes then may be used for "alcohol and drug abuse" services.[112] Florida evidence law contains a psychotherapist-patient privilege that defines "psychotherapist" as someone who is engaged in, among other activities, the diagnosis or treatment of "alcoholism and other drug addiction."[113] Florida welfare law, by final illustrative example, exempts any participant who requires residential treatment for "alcoholism, drug addiction, [or] alcohol abuse" from work activities while participating in treatment.[114]

III. FINDINGS AND PROPOSALS

This Article has collected illustrative Florida statutes that contain alcohol-related language.* A number of key findings may be drawn from these statutes.* First, these statutes are not drawn exclusively from health law, as this Author—a health law scholar—initially anticipated.[115] Instead, these statutes were found within a wide variety of Florida subject matter codes, including those relating to criminal law, education law, family law, health and social services law, insurance law, liquor control law, military and veterans' law, occupational licensure law, public officer and civil servant law, tort law, and vehicle and transportation law, as well as other miscellaneous areas of the law.[116]

Second, these statutes rely heavily on certain words.[117] Florida's most common alcohol-related word, regardless of subject matter code, appears to be "abuse" (as in "alcohol abuse," "abuse of alcohol," or "substance abuse").[118] As explained in the introduction to this Article, however, the word "abuse" can suggest malintent, cruelty, and violence even though many individuals with AUD are neither cruel nor violent and would like to stop drinking.[119] The word "abuse" also has been found to have a high association with negative judgments about individuals with AUD and other substance use disorders as well as punishment.[120] Finally, the word "abuser" has been found to "increase stigma, which can affect quality of care and act as a barrier to

112. *Id.* § 212.0306(3)(b).
113. *Id.* § 90.503(a)(1)–(4).
114. *Id.* § 414.0655(1).
115. *See* discussion *supra* Sections II.A–K.
116. *See* discussion *supra* Sections II.A–K.
117. *See* discussion *supra* Sections II.A–K.
118. *See* FLA. STAT. §§ 414.0655(1); 90.503(a)(1)–(4).
119. *See* discussion *supra* Part I.
120. *See Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

treatment-seeking individuals suffering from addiction."[121] It is illogical and inappropriate to use a word associated with negative judgment, stigma, and punishment in treatment court statutes, health and social services statutes, and other statutes designed to help people.[122] Instead of using the word "abuse" (as in *alcohol abuse*) or "abuser" (as in *alcohol abuser*), this Article recommends that the Florida Legislature use "individual with alcohol use disorder" or similar neutral, person-first language.[123]

Florida's second most common alcohol-related word appears to be "drunkenness."[124] As demonstrated above in Parts II.F–G of this Article, Florida occupational licensure law as well as Florida public officer and civil servant law rely heavily on the word "drunkenness."[125] In these contexts, "drunkenness" triggers loss of occupational or professional licensure as well as removal by the Governor from public office.[126] As discussed in Section II.A, however, the slang word "drunk" has its roots in a Middle English word, "fordrunken," which appeared in Chaucer's tales.[127] Now outdated, lacking a medical or other technical definition, and neither used nor approved by the APA nor any other professional medical association to refer to the alcohol-related health condition of an individual, "drunkenness" is simply inappropriate in professional language, including Florida's statutes.[128]

In addition to "abuse" and "drunkenness," other alcohol-related words and phrases that are occasionally used in particular Florida statutes include, in alphabetical order, "alcoholism," "drunk," "drunk driver," "habitual,"

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121. *Addictionary*, RECOVERY RSCH. INST., http://www.recoveryanswers.org/addiction-ary/ (last visited Mar. 18, 2022) (explaining why the word "abuser" should not be used in the context of addiction).

122. *See Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

123. *See id.*; *Addictionary*, *supra* note 121 ("Consequently, instead of describing someone as a 'drug abuser,' it may be less stigmatizing and more medically accurate to describe them as 'a person with . . . addiction or substance use disorder.'").

124. *See* FLA. STAT. §§ 112.51(1), 112.501(1)(a), 401.411(1)(k), 456.008(1), 467.203(1)(g), 468.1295(1)(aa), 490.009(1)(p).

125. *See* discussion *supra* Sections II.F–G; FLA. STAT. §§ 401.411(1)(k); 467.203(1)(g); 468.1295(1)(aa); 490.009(1)(p).

126. *See* FLA. STAT. §§ 112.51(1); 112.501(2)(a); 401.411(1)(k); 467.203(1)(g); 468.1295(1)(aa); 490.009(1)(p).

127. *See* discussion *supra* Part II.A; Ola Khazan, *A History of 'Drunk' Words*, ATLANTIC (Jan. 8, 2015), http://www.theatlantic.com/health/archive/2015/01/a-history-of-drunk-words/384325/.

128. *See Understanding Alcohol Use Disorders and Their Treatment*, *supra* note 4; FLA. STAT. § 112.51(1) (referencing the use of the word "drunkenness" within the statute).

"habitual drunkard," "habitually addicted," and "habitually inebriated."[129] The phrases "drunk driver" and "habitual drunkard" are not person-first and can be improved.[130] For example, the Florida Legislature could use "an [individual who] driv[es] while intoxicated" coupled with a technical (i.e., numerical, blood-alcohol-content-based) definition of "intoxicated" instead of "drunk driver."[131]

By further example, the Florida Legislature could use an "individual with alcohol use disorder" instead of "habitual drunkard."[132] Moreover, the word "alcoholism" is not used by the APA in its current (i.e., fifth) edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5").[133] The phrase "alcohol use disorder"—used by the APA in the DSM-5—could be substituted by the Florida Legislature for the word "alcoholism."[134] Finally, the words "habit[]," "habitual[]," and "habitually" are inappropriate when used in the addiction context.[135] As explained in the Introduction to this Article, these words inaccurately imply that an individual with AUD is choosing to use alcohol and/or can choose to stop using alcohol.[136] The word "habit" can also undermine the seriousness of an individual's AUD.[137]

Interestingly, no Florida statute uses the phrase "alcohol use disorder," which is the name the APA currently gives to the health condition that is colloquially known as "alcoholism."[138] In this respect, Florida is different than other jurisdictions, which have incorporated the phrase "alcohol use disorder" into their statutes.[139] For example, the Nevada Legislature states in one of its statutes that: "the handling of persons with an alcohol use disorder within the

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129. *See* FLA. STAT. §§ 768.125, 562.50; 401.411(1)(k), 322.0602, 296.07, 327.35(6)(i).

130. *See id.* §§ 562.50; 322.0602; *Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

131. *See* FLA. STAT. § 322.0602; TEX. PENAL CODE ANN. § 49.04 (West 2021).

132. *See id.* § 562.50; *Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

133. *See* DSM-5, *supra* note 2, at 490.

134. *See id.* at 490; *APA Dictionary of Psychology*, AM. PSYCH. ASS'N, http://dictionary.apa.org/alcohol-use-disorder (last visited Apr. 3, 2022); FLA. STAT. § 414.0655(1).

135. *See* FLA. STAT. § 296.07; *Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

136. *See* discussion *supra* Part I; *Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

137. *Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

138. DSM-5, *supra* note 2, at 490; *but see* COLO. REV. STAT. § 27-81-102 (2022).

139. *See* NEV. REV. STAT. § 458.250 (2021); FLA. STAT. § 414.0655(1).

criminal justice system is ineffective, whereas treating an alcohol use disorder as a health problem allows its prevention and treatment . . . ."[140]

The third key finding of this Article is that a number of positive and negative legal consequences are triggered by Florida's alcohol-related language.[141] Examples of positive legal consequences include receipt of educational and other grant funding, access to educator addiction recovery programming, treatment rather than prosecution, access to women's primary care services, access to impaired healthcare practitioner programming, and civil immunity.[142]

Examples of negative legal consequences include prosecution for crimes such as public intoxication and driving or boating under the influence, detention or incarceration, refusal of admissions to a veterans' home, professional discipline or loss of occupational licensure, suspension or removal from public office, the imposition of liability, loss of a driver's license, and loss of ability to serve as a guardian.[143] It is simply inappropriate to use slang, outdated, and/or non-person-first, alcohol-related language in the context of a Florida statute offering a positive legal outcome.[144] For example, an applicant for health and other social services (or an applicant for any other positive legal outcome) would be put in the awkward position of having to identify with a slang, outdated, or other non-preferred terms to access such services (or to gain such outcome).[145] When services are made available to certain individuals via statute, it would seem appropriate to encourage, not discourage (through stigmatizing or other inappropriate language), individuals to apply for and accept such services.[146] In the context of negative outcome statutes, it still seems to the Author to be inappropriate to use slang, outdated, and non-person-first statutes in professional language, including state laws, especially when referring to an individual's mental health condition.[147]

This Article's fourth finding is that there are multiple means by which Florida's statutory language permeates public discourse, creating

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140. NEV. REV. STAT. § 458.250.

141. *See* discussion *supra* Part II.

142. *See* discussion *supra* Section II.A–C, I.

143. *See* discussion *supra* Sections I.A.F–K.

144. *See* discussion *supra* Sections II.A–J; *Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

145. *See* discussion *supra* Section II.C.

146. *See e.g.*, FLA. STAT. §§ 893.165(1); 938.23(1); 985.676(2)(a)(5); 320.02(16)(b).

147. *See* discussion *supra* Sections II.A–J; Tovino, *supra* note 1, at 6, 11; *Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13.

opportunities to perpetuate stigma against individuals with AUD.[148] Many of the statutes referenced in Part II create or establish departments, health, and social services programs, boards, funds, grants, and signs among other programs and materials.[149] These programs and materials can be accessed or seen by a wide variety of government officials, health care, and other professionals, and lay individuals, creating a direct line between alcohol-related statutory language and a variety of legal rights, benefits, privileges, obligations, duties, and penalties applicable to individuals with AUD.[150] The Florida statutes referenced in Part II are not simply outdated laws that have no bearing on present-day society.[151] These statutes play a direct, active, and important role in assembling and regulating public life.[152] That said, two proposals may help improve Florida statutes that contain alcohol-related language.[153]

This Article first proposes that Florida lawmakers use medically current and respectful language in new legislation introduced to the Florida Legislature from this point forward.[154] For example, a lawmaker who wishes to make available additional health care and social services can make such services available to "individuals with alcohol use disorder" rather than "alcohol abusers," "habitual drunkards," "habitual[] inebriate[s]," or "habitual addicts."[155] By further example, a lawmaker who wishes to penalize individuals who engage in certain alcohol-related activities can use technical language (*e.g.*, "driving while intoxicated" coupled with a technical definition of "intoxicated" that is expressed either in grams per milliliter or a percentage of blood-alcohol content) rather than slang language (*e.g.*, "drunk driv[ing]" or "habitual drunkard").[156] To help implement this proposal, this Article suggests that a Florida lawmaker introduce legislation requiring both

148. *See* discussion *supra* Part I.

149. *See* discussion *supra* Sections II.A–J; FLA. STAT. §§ 893.165(1), 938.23(1), 985.676(2)(a)(5), 320.02(16)(b).

150. *See* discussion *supra* Part II.; FLA. STAT. § 397.305(1)–(3).

151. *See* discussion *supra* Part II.

152. *See* FLA. STAT. § 397.305(5).

153. *See* discussion *supra* Parts I, II.

154. *See* discussion *supra* Parts I, II.

155. *See* discussion *supra* Sections II.A, E; FLA. STAT. §§ 951.26(1)(b)(1)(f)–(g); 562.50; 296.07; *Words Matter — Terms to Use and Avoid When Talking About Addiction*, *supra* note 13; Fla. Admin. Order No. 2018-068 PI-CTY, *supra* note 74.

156. *See* discussion *supra* Part I; Fla. Admin. Order No. 2018-068 PI-CTY, *supra* note 74; FLA. STAT. §§ 322.2616(2)(b)(5)(c), 322.0602(2)(a); 562.50; TEX. PENAL CODE ANN. § 49.04.

lawmakers and legislative counsel to use medically current and respectful statutory language when drafting and filing bills on a going-forward basis.[157]

A draft of such legislation might provide:

Florida Senate - 2022 SB ___

By Senator _____

A bill to be entitled
An Act Relating to Language and Alcohol
Be It Enacted by the Legislature of the State of Florida:
Section 1. Section _____, Florida Statutes, is created to read:
Section _____, Florida Statutes, Alcohol-Related Language
Section 2. Florida lawmakers and legislative counsel shall, to the extent practicable, ensure that persons with alcohol use disorder are referred to in the Florida Statutes Annotated using language that is commonly viewed as respectful and sentence structure that refers to the person before referring to the person's alcohol use, alcohol-related activities, alcohol-related states, or alcohol-related health condition.
Section 3. Words and terms that are preferred for use in the Florida Statutes Annotated include, without limitation, persons with alcohol use disorder, persons with substance use disorder, persons with addiction, persons with mental health conditions, and other phrases that are structured in a similar manner.
Section 4. Words and terms that are not preferred for use in the Florida Statutes Annotated include, without limitation, "abuse," "abuser," "addict," "alcoholic," "alcoholism," "drunk," "drunkard," "habit," "habitual," "habitually," "inebriate," "intemperate," "wasted," and "wastrel," as well as other outdated, slang, and non-person-first words and terms.
Section 5. This Act shall take effect January 1, 2023.

Second, this Article proposes that the Florida Legislature amend all slang, outdated, and non-person-first alcohol-related language used in already-enacted statutes.* To implement this proposal, lawmakers can locate the footnotes of this Article to see the specific Florida statutory provisions that

157. *See* discussion *supra* Part III.

contain slang, outdated, and non-person-first language and introduce legislation that would substitute preferred words and phrases.*

IV. CONCLUSION

This Article builds on the Author's prior scholarship by analyzing the language used in Florida statutes to refer to alcohol-related activities, alcohol-related states, and alcohol-related health conditions.* This Article finds that Florida's most common alcohol-related word, regardless of subject matter code, appears to be "abuse" (as in "alcohol abuse," "abuse of alcohol," or "substance abuse").[158] Florida's second most common alcohol-related word appears to be "drunkenness."[159] In addition to "abuse" and "drunkenness," other alcohol-related words and phrases that are occasionally used in particular Florida statutes include, in alphabetical order, "abuser," "alcoholism," "drunk," "drunk driver," "habitual," "habitual drunkard," "habitually addicted," and "habitually inebriated."[160] These words and phrases are outdated at best, and stigmatizing at worst.* This Article proposes that the Florida Legislature use current, person-first terminology in new legislation introduced from this point forward.* This Article also proposes that the Florida Legislature amend outdated, slang, and non-person first terminology located within existing Florida law.[161] If implemented by the Florida legislature, these proposals may help to diminish structural or law-based stigma in the context of individuals with AUD.

158. *See supra* Part III; *e.g.*, FLA. STAT. § 414.0655(1).
159. *See supra* Parts II.H–I; *e.g.*, FLA. STAT. § 856.
160. *See supra* Part II; Tovino, *supra* note 1, at 7,14.
161. *See supra* Part III.


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