GET SMART ABOUT TEACHERS: HOW GEORGIA CAN EMBRACE COMMON SENSE REFORMS TO PROTECT TEACHERS WHILE STILL HOLDING THEM ACCOUNTABLE

by

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(Under the Direction of John Dayton)

ABSTRACT

In this manuscript style dissertation, the author advocates for specific reforms to Georgia law. The reforms are designed to protect good teachers, allow poor-performing teachers a chance to improve performance, and remove bad teachers. By engaging in these reforms, Georgia can protect its students and teachers, and it can help Georgia meet its growing economic needs.

Every state and territory in the United States, including Georgia, require certain individuals to report suspected child abuse. In Georgia, mandated reporters are not protected from employment retaliation. This creates the potential for a mandated reporter to have to choose between criminal charges for failing to report suspected child abuse or losing one's job and having a termination on their record. Protection for mandated reporters would require a new statute or amendment of a current statute. In the first manuscript, an examination of jurisdictions that provide employment protections provides inspiration for how Georgia legislators could protect mandated reporters who keep children safe.

In Georgia, the Georgia Whistleblower Act ("GWA") protects public employees who report unlawful activity. Recent court decisions have reduced the GWA to a state of uselessness. Federal whistleblower law provides useful insights on how the Georgia General Assembly can

amend the GWA to restore and enhance its effectiveness. The second manuscript details the history of the GWA and recent court decisions. The manuscript then examines federal whistleblower law. Finally, recommendations, including draft amendment language, are provided.

As part of a broad accountability movement in the United States, value-added measures or value-added models ("VAMs"), combined with high stakes standardized tests went into effect across the country. This article analyzes the history of tenure and tenure reform, the legal environment of VAMs, and empirical evidence regarding the costs and effectiveness of tenure reform, VAMs, and incentive pay for teachers. Concluding that VAMs are generally useful, but not reliable enough for yearly or high-stakes personnel decisions, the third manuscript recommends a development from higher education – the post-tenure review. By confining VAMs to a post-tenure review setting, VAMs can be used appropriately given its limitations.

INDEX WORDS: Employment law, education law, teachers, mandated reporters, whistleblower, value-added measures, value-added models, tenure

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DEDICATION

To my mother, who supported me emotionally and financially when I left the practice of law to pursue graduate study.

To my wife, who has kept – and continues to keep – me sane.

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CHAPTER 1

INTRODUCTION AND LITERATURE REVIEW

I. Introduction

Georgia is growing. Between 2016 and 2030, Georgia's population is expected to grow 12%, or by 1.3 million people.[1] Georgia's education system is not keeping pace with the state's economic development plan.[2] Approximately 55% of current jobs in the state are categorized as "middle-skill" jobs that often require an associate degree, industry credential or certificate, or significant on-the-job-training.[3] But only 43% of the Georgia workforce is currently trained at the middle-skill level, and only 40% of adults in the state have at least an associate degree.[4] Many of the jobs that can be filled by workers with a high school education or less are disappearing.[5] "Georgia must tackle issues of increasing poverty, undereducation, and the state's historical dependency on low-skilled jobs."[6]

Education is often seen as the go-to method of addressing societal problems.[7] While this is not always appropriate, education has a strong part to play in helping to build a suitable workforce. The Georgia Partnership for Excellence in Education identifies seven core policy priorities to help address the growing problems of poverty and an ill-prepared workforce.[8] Number 2 on the list is quality teaching; number 3 is quality leadership; and number 4 is

[1] GA. P'SHIP FOR EXCELLENCE IN EDUC., *Top Ten Issues to Watch in 2020*, 2 (2019).
[2] *Id.* at 1.
[3] *Id.*
[4] *Id.* at 2.
[5] *Id.* at 1.
[6] *Id.* at 2.
[7] Larry Cuban, *Reforming Again, Again, and Again*, 19 EDUC. RESEARCHER 3, 8 (1990).
[8] *See, e.g.*, GA. P'SHIP FOR EXCELLENCE IN EDUC., *supra* note 1, at 6.

supportive learning environments.[9] Three of the seven core policy priorities are based on teachers and school administrators.

This dissertation contains three manuscripts. The goal of the first two manuscripts is to provide suggestions on how Georgia can keep, protect, and empower good teachers who do their jobs, protect children from abuse, and report unlawful activity. The final manuscript details how we can hold teachers accountable for their performance without eroding protections for good teachers. The ultimate goal is to provide concrete policy solutions to "get smart" about teachers: to protect the good and remove the bad.

II. The First Manuscript

Every state and territory in the United States requires certain individuals to report suspected child abuse.[10] Some states require all citizens to report suspected child abuse, but most only require specific individuals and/or institutions to report.[11] In Georgia, only certain statutorily-identified individuals and institutions are mandated reporters.[12] Despite requiring certain people to make these reports, Georgia does not offer employment protection to prevent retaliation in the event that a supervisor, politician, or business owner has some connection to the person reported for suspected child abuse. This can present a strong disincentive from filing reports and, as a result, place children in danger unnecessarily.

The first manuscript is entitled *Mandated Reporter Protections: Missing in Georgia*. It examines Georgia's mandated reporter statute. After an evaluation of laws that might offer some protection to mandated reporters, the article shows that there is a gap in protection, leaving

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[9] *Id.*
[10] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2016), *available at* https://www.childwelfare.gov/pubpdfs/manda.pdf.
[11] *See id.* at 2; *see also* Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 57-61 (2013).
[12] CHILDREN'S BUREAU, *supra* note 10, at 2.

mandated reporters vulnerable to employment retaliation. The manuscript then examines the Georgia Code broadly to identify where an amendment could go. After showing the results of a survey of 54 U.S. jurisdictions, the manuscript then examines different types of protections that other states have done. Finally, the article provides legislators with viable options for amendment based on states that are geographically and politically similar to Georgia.

III. The Second Manuscript

Whistleblowers – those who disclose illegal, immoral, or illegitimate practices of their employers to those in a position to rectify those practices – serve important functions in our society.[13] By exposing illegal actions, whistleblowers "expose, deter, and curtail wrongdoing."[14] Recognizing the importance of protecting whistleblowers, the federal government and all 50 states have enacted whistleblower protection statutes.[15] In Georgia, public employees receive protection from the Georgia Whistleblower Act ("GWA").[16] But recent developments in case law under the GWA have drastically reduced the whistleblower protections afforded to public employees in the state, and the statute is due for an amendment.

[13] *See* Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 178 (2002).
[14] *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000).
[15] *See* Robert G. Vaughn, *State Whistleblower Status and the Future of Whistleblower Protection Symposium: Whistleblower Protection*, 51 ADMIN. L. REV. 581, 581-83 (1999) (collecting statutes).
[16] O.C.G.A. § 45-1-4. Literature on the GWA is divided about what to call the statute, as no title appears in the body of the act. *Compare* Seth Eisenberg, *Public Officers and Employees - General Provisions*, 24 GA. ST. U. L. REV. 309, 311 (2007) (referring to the statute as the "Whistleblower Protection Act" and using the acronym "WPA") *with* Kimberly J. Doud, *Recent Development: Public Employment Whistle-Blowers Act: North Georgia Regional Educational Service Agency v. Weaver: 527 S.E.2d 864 (Ga. 2000)*, 30 STETSON L. REV. 1233, 1233-34 (2000) (referring to the statute as "Georgia's whistleblower statute") *and* Murray-Obertein v. Georgia Gov't Transparency and Campaign Fin. Comm'n, 344 Ga. App. 677, 677 (2018) (referring to the statute as the "Georgia Whistleblower Act" and using the acronym "GWA"). The statute bears the section title "Complaint or information from public employees as to fraud, waste, and abuse in state programs and operations. O.C.G.A. § 45-1-4. Within the practice area, "Georgia Whistleblower Act" and "GWA" have become the norm.

The second manuscript is entitled *Ordered into Oblivion: How Courts Have Rendered the Georgia Whistleblower Act Useless, and How to Fix It*. It breaks down the GWA statutory language to show how it operates. The manuscript then provides case law to show how the GWA operated prior to 2015. The manuscript then examines every published opinion from Georgia courts from 2015 until 2019 to show how the GWA has been systematically reduced to uselessness. The manuscript then examines the federal Whistleblower Protection Act ("WPA")[17] – which faced similar dismantling – and the Whistleblower Protection Enhancement Act ("WPEA")[18] – which reversed judicial destruction of the WPA. Using federal law as inspiration, the manuscript provides recommended text for an amendment to the GWA.

IV. The Third Manuscript

In 2009, the American Recovery and Reinvestment Act allowed states to obtain waivers from certain provisions of No Child Left Behind ("NCLB") and created financial incentives for engaging in certain reforms.[19] One of the financial incentives was the Race to the Top Fund (RttT), a competitive grant program with $4.35 billion in funding.[20] RttT had four stated criteria in which states would compete:

> (a) the implementation of international standards and assessments with the goal of preparing students to successfully enter the workplace or a college classroom; (b) the establishment of data systems to measure performance and provide meaningful statistics to inform teachers and administrators where and how they can improve; (c) an increase in effective teachers and principals (as well as improved equity in the distribution of those effective educators; and (d) the boosting of low-achieving school districts.[21]

[17] 5 U.S.C. § 2302(b)(8).
[18] Pub. L. No. 112-199.
[19] Benjamin Michael Superfine, *The Promises and Pitfalls of Teacher Evaluation and Accountability Reform*, 17 RICH. J.L. & PUB. INT. 591, 592 (2014).
[20] *Id.* at 600.
[21] Kimberly M. Rippeth, *Running the Race: An Evaluation of Post-Race-to-the-Top Modifications to Teacher Tenure Laws and a Recommendation for Future Legislative Changes*, 50 AKRON L. REV. 141, 153 (2016).

In response to RttT, several states passed laws mandating that value-added measures ("VAMs") be incorporated into teacher performance evaluations.[22] In all, 40 states and the District of Columbia competed in the beginning of RttT, and – by the end – only four states chose not to apply.[23] From 2009 to 2012, 36 states and DC formally tied teacher tenure or evaluations to student test scores.[24]

The final manuscript is entitled *Limited Use for Limited Data: Incorporating Value-Added Measures as Part of a P-12 Post-Tenure Review Process*. This manuscript examines the history of value-added measures ("VAMs") of teacher performance based on student test, including their rapid spread throughout the country. The manuscript then examines how VAMs have held up in court proceedings. The manuscript then examines what scholarship and studies have shown regarding VAMs. Concluding that VAMs are useful, but also that they are not reliable enough for yearly assessments, the manuscript then recommends the adoption of post-tenure reviews, a concept borrowed from higher education, as a tenure reform that could incorporate the accountability promised by VAMs while mitigating political, legal, and empirical risks noted by many scholars.

V. Methodology

This dissertation uses a legal research methodology and a legal scholarship framework. The purposes of legal research and scholarship are to understand, clarify, and improve the law.[25] Legal scholarship is designed to improve the law and achieve – or move closer to – justice and governmental efficiency.[26] Unlike other fields (with the possible exception of moral

[22] *See, e.g.*, Trout v. Knox Cnty. Bd. of Educ., 163 F. Supp. 3d 492, 494 (W.D. Tenn. 2016) (describing Tennessee's passage of its First ot the Top Act).
[23] Rippeth, *supra* note 21, at 153.
[24] Superfine, *supra* note 19, at 592.
[25] JOHN DAYTON, LEGAL RESEARCH, ANALYSIS, AND WRITING 2 (2020).
[26] *Id.*

philosophy), legal scholarship is inherently prescriptive; it advocates for some form of change in the law or in interpretation of the law.[27] Because of its prescriptive nature, legal scholarship is "vigorously adversarial."[28]

Legal practice and scholarship have a tradition of using "any relevant credible evidence" to support arguments made.[29] Scholarship, research, and experiments from other fields are often introduced as "evidence."[30] The end result often resembles something between a literature review and a meta-analysis of studies.[31]

To ensure validity and reliability, legal scholarship depends on two elements inherent in its use. The first is its "vigorously adversarial" nature.[32] Other scholars with contradictory views are encouraged to collect their own evidence and make their own arguments. The second assurance of validity is transparency. Legal scholarship formatting requirements include detailed citations with pin-cites to individual pages of documents or scholarly works, so that anyone can independently verify that assertions are properly supported.[33]

VI. Underlying Theoretical Frameworks

Although the methodology and framework of this dissertation is legal, two theoretical frameworks from the policy realm lie hidden. These are policy diffusion and the political culture of states. Most legal scholars advocating for change make presumptions about sources of inspiration for policy recommendations or about what is and is not realistic in a state, but legal

[27] Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847–48 (1988); Ann Elizabeth Blankenship, *Rethinking Tenure: An Overview and Analysis of Changes to Teacher Tenure Legislation from January 2008-June 2012*, 12 (University of Georgia May 2013).
[28] DAYTON, *supra* note 25, at 4.
[29] *Id.* at 118.
[30] *See, e.g.*, Vergara v. State, 246 Cal. App. 4th 619, 633–39 (2016) (detailing the use of scholarly studies and reviews in court proceedings and arguments).
[31] DAYTON, *supra* note 25, at 5.
[32] *Id.* at 4.
[33] *Id.*

scholarship frequently ignores the policy literature on these topics. This section seeks to remedy that problem.

a. Policy Diffusion

Many of us remember the School House Rock video describing how a bill becomes a law. But few people can explain how something becomes a bill in the first place. In the study of policy innovation, which addresses when and how states introduce and adopt new policies, researchers look to internal determinants of the states and external diffusion of policies.[34] Internal determinants are internal political, economic, or social characteristics of a jurisdiction that affect the policy-making process.[35] Policy diffusion involves looking to other jurisdictions and copying or borrowing policies – with or without revisions.[36] Most diffusion literature comes from political scientists; it is relatively new to education policy. But diffusion is growing in popularity among education policy researchers.

i. Methodology in Diffusion Research

The seminal work in policy diffusion is Jack L. Walker's 1969 article, *The Diffusion of Innovations Among the American States*.[37] Walker was curious because it seemed that some states acted as leaders and innovators during various political movements; he specifically noted that Wisconsin acted as a "leader" during the Progressive period and adopted the direct primary, the legislative reference bureau, and workmen's compensation earlier than most states.[38] Walker also noticed that California's 1931 fair trade law was adopted – either wholesale or with minor editing – by twenty other states, ten of which neglected to notice (or at least fix) two "serious

[34] Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research, in* THEORIES OF THE POLICY PROCESS 335, 335–36 (Christopher M. Weible & Paul A. Sabatier eds., 4th ed. 2018).
[35] *Id.*
[36] *Id.*
[37] Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969).
[38] *Id.* at 880–81.

typographical errors."[39] With these considerations in mind, he decided to study how a policy that starts in one state finds its way to other states. Walker described his work as "primarily an exercise in theory building."[40] But his work set the stage for research that is still developing today.

Walker examined 88 laws that were passed by at least 20 state legislatures each prior to 1965.[41] For each statute, he then assigned each adopting state an "innovation score."[42] To get an innovation score, Walker assigned the first state to adopt the statute a score of "0.000," and the final state to adopt received a "1.000."[43] States in-between received a score that corresponded to how early or late in the process they adopted the policy, with the score being a continuous variable (based on the length of time) rather than an ordinal one (based on the order of passage).[44]

Walker then devised an overall state innovation score according to the following formula:

$$I_s = 1 - \sum i_s$$

where I_s represents the overall state innovation score, and i_s represents the state's innovation score on each applicable statute.[45] The result was a testable variable ranging from a low innovation score of 0 to a high score of 1. Walker then correlated this innovation score with economic variables and confirmed that larger, more prosperous, more literate, and more urban states tended to have higher innovation scores.[46]

[39] *Id.* at 881–82.
[40] *Id.* at 881.
[41] *Id.* at 882.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 882–83.
[46] *Id.* at 884.

The groundbreaking aspect of Walker's piece came in the part of a varimax factor analysis of each of the 88 policies reviewed.[47] Using a matrix of pair-wise comparisons, states were placed onto "tree" structures, with a regional leader starting a policy that then gets adopted in the follower states, represented as branches.[48] Using this method, Walker was able to account for developments in 45 of the 48 contiguous states.[49] Only Arizona, Colorado, and Kansas defied Walker's analysis.[50] Combined with Walker's confirmation of anecdotal views of innovation through the overall innovation scores, this presented strong evidence that many states look to others as inspiration for policies.

The next innovation in diffusion methodology came in 1990 in an article by Frances Stokes Berry and William D. Berry.[51] In evaluating the spread of state lotteries, Berry and Berry deployed an event history analysis ("EHA") using a discrete time model.[52] This analysis involves creating a "risk set" of observations for each applicable year of the study.[53] The risk set is made up of all the jurisdictions that are "at risk" – that have not yet adopted a statute and therefore could adopt it.[54] Over time, the risk set should shrink as more jurisdictions adopt the statute.[55] The risk set is then used to create the hazard rate variable, which "is defined as the probability $P_{i,t}$ that an individual *i* will experience the event during a particular time period *t*, given that the individual is 'at risk' at that time."[56]

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[47] *Id.* at 893.
[48] *Id.*
[49] *Id.* at 893–94. Walker did not examine Alaska or Hawai'i.
[50] *Id.* at 893.
[51] Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395 (1990).
[52] *Id.* at 398. The "discrete time model" simply means that years are taken as a whole, instead of a continuous time variable. *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

The hazard rate then becomes the dependent variable in a logit or probit regression, with the independent diffusion variable[57] tested while controlling for internal characteristics of each jurisdiction.[58] The ability to control for internal characteristics (or to test them alongside the diffusion variable or as interaction terms) set EHA apart from prior methods and ensured its dominance to this day.[59]

Although EHA continues to be used, there were some weaknesses in its original form, as noted by Craig Volden in 2006.[60] The first weakness is that EHA cannot adequately view whether the perceived success of a policy is related to diffusion.[61] Although it seems intuitive that states would only copy statutes that are successful, researchers generally attempt to distinguish between learning from success and imitating a politically-similar jurisdiction without regard for the success of a policy, as will be discussed in Part IV of this review in the discussion of diffusion mechanisms.[62] The second weakness of normal EHA is that, while it can determine if states are adopting at least part of the policies from other states, it cannot distinguish between partial or whole adoption or – if partial adoption – which parts are adopted.[63]

To address these weaknesses, Volden incorporated a mechanism into EHA from social network studies and international relations, the directed dyad.[64] Under standard EHA, each state-year combination is a single observation.[65] Under the directed dyad-year EHA, each observation

[57] The most common diffusion variable is the fraction of a state's neighbors who have adopted the policy. Craig Volden, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 AM. J. POL. SCI. 294, 295 (2006).
[58] Berry & Berry, *supra* note 51, at 398-99.
[59] *Id.* at 398–99; *see also* Pamela J. Clouser McCann et al., *Top-Down Federalism: State Policy Responses to National Government Discussions*, 45 PUBLIUS 495, 513 (2015) (incorporating an interaction term within the regression).
[60] Volden, *supra* note 57, at 295–96.
[61] *Id.* at 295.
[62] *See, e.g.*, Berry & Berry, *supra* note 34, at 338–39.
[63] Volden, *supra* note 57, at 295.
[64] *Id.* at 296.
[65] Berry & Berry, *supra* note 51, at 398.

is pair of jurisdictions and a year.[66] For example, three observations could be Georgia-Ohio-2016, Georgia-Ohio-2015, and Virginia-Ohio-2016. If Georgia and Virginia put forth competing policies in 2014, and Ohio adopted the Georgia policy in 2016, the three example observations would have a dependent "success" variable of 1, 0, and 0, respectively. This would show that Ohio viewed Georgia's policy as successful, but not Virginia's, and it would show that the policy diffused to Ohio in 2016. When each potential policy is put through this test, it provides a view of success, diffusion, and differentiation between policies.

A recent methodological development came from Bruce A. Desmarais, Jeffrey J. Harden, and Frederick J. Boehmke in 2015 with the use of the network inference methodology for inferring diffusion networks.[67] This methodology is essentially Walker's methodology, but updated with 21st century computing technology.[68] Desmarais et al. evaluated the spread of 187 policies, using computing technology to pair states by years and check for cascades, which represent policies spreading from one state to another.[69] By tracking the cascades, including the timing of cascades, their NetInf algorithm could infer networks of diffusion that operate just like the trees from Walker's study.[70] The researchers then used qualitative analysis of media releases to validate inferred networks.[71] The technique can be incorporated into EHA to control for internal jurisdictional factors, but doing so carries with it a reduction in the number of policies that can be examined.[72] This technique is fairly new, and it remains to be seen if researchers will adopt it.

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[66] Volden, *supra* note 57, at 296.
[67] Bruce A. Desmarais et al., *Persistent Policy Pathways: Inferring Diffusion Networks in the American States*, 109 AM. POL. SCI. REV. 392, 392 (2015).
[68] *Id.* at 394.
[69] *Id.* at 394.
[70] *Id.*
[71] *Id.* at 398.
[72] *Id.* at 399.

ii. Directions of Diffusion

Diffusion can be vertical or horizontal.[73] Within diffusion literature, there are three possible levels of government: local, state, and federal/national. Vertical diffusion occurs across levels, with research covering bottom-up diffusion that goes from local to state or state to federal, or top-down diffusion covering federal to state or state to local. Horizontal diffusion occurs between government entities of the same type, even if there is a substantial difference in size, strength, or wealth between the governments.[74] Most literature – including the studies in the prior section – involves horizontal diffusion, but notable work has been done to study vertical diffusion.

In a study on the spread of antismoking laws, Charles R. Shipan and Craig Volden tested whether local adoption of antismoking ordinances would have a "snowball effect" leading to state enactment of a statute once enough cities and towns had ordinances in place or cause a "pressure valve effect" relieving the state from pressure to enact a state-wide statute.[75] Shipan and Volden anticipated that the effect would depend on how professionalized the state legislature was and how active policy advocacy groups were.[76] Shipan and Volden theorized that greater professionalism, in the forms of greater pay, larger legislative staff, and longer legislative sessions, would lead to snowball effects instead of pressure valve effects.[77] Similarly, Shipan and Volden theorized that stronger policy advocacy groups would lead to snowball effects instead of pressure valve effects.[78]

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[73] Berry & Berry, *supra* note 34, at 342.
[74] Because this review is intended to relate to U.S. education policy, international diffusion is not covered here.
[75] Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825, 827 (2006).
[76] *Id.* at 827–28.
[77] *Id.*
[78] *Id.* at 828.

For their study, Shipan and Volden analyzed state statutes through the National Cancer Institute's State Cancer Legislative Database and local ordinances through the American Nonsmokers' Rights Foundations' Local Tobacco Control Ordinance Database.[79] Shipan and Volden also tested a top-down diffusion hypothesis, that the Synar Amendment (which required states to pass laws to prohibit the sale of cigarettes to minors) would have an effect on state legislatures.[80] Looking at all states without testing professionalism or advocacy group strength, Shipan and Volden found no overall trend towards snowball effects or pressure valve effects, but they did see positive and significant top-down diffusion from the Synar Amendment.[81] When measures of professionalism and advocacy group strength were added in, Shipan and Volden found a significant positive relationship between professionalism and advocacy group strength and a tendency towards the snowball effect, while the pressure valve effect had a significant negative relationship with professionalism and advocacy group strength.[82] Their hypotheses were supported.

Top-down diffusion often comes from incentives/grant conditions, mandates (such as the Synar Amendment discussed above), or preemption.[83] But it can also come from simply starting a discussion and bringing attention to an issue. Pamela J. Clouser McCann, Charles R. Shipan, and Craig Volden sought to understand how states respond to legislative discussions and proposals that do not make it into federal law.[84] Focusing on antismoking laws other than those covered by the Synar Amendment, such as those prohibiting smoking in government buildings or restaurants,[85] theorized that diffusion would be conditional upon professionalism and advocacy

[79] *Id.* at 830.
[80] *Id.* at 831.
[81] *Id.* at 833.
[82] *Id.* at 833–35.
[83] McCann et al., *supra* note 59, at 496 (collecting studies).
[84] *Id.*
[85] *Id.* at 504.

group strength in the same way that bottom-up diffusion had been in the Shipan and Volden study discussed above.[86] Similar to the previous study, McCann et al. found a significant positive relationship between federal activity and state enactment of policies, contingent on legislative professionalism and advocacy group strength.[87]

iii. Mechanisms of Diffusion

Policies do not diffuse through osmosis; they diffuse because individuals in the relevant legislative or rule-making bodies introduce and pass them after seeing the policies in other jurisdictions. Berry and Berry list five mechanisms by which policies diffuse: learning, imitation, normative pressure, competition, and coercion.[88] I would argue that there are three: learning, competition, and coercion.

Berry and Berry state that "learning occurs when policymakers in one jurisdiction derive information about the effectiveness (or success) of a policy from previously adopting governments."[89] According to Berry and Berry, imitation occurs when a jurisdiction adopts a policy simply to "look like" the other government.[90] The difference is that imitation is focused on the actor, not the action.[91] Berry and Berry believe normative pressure causes diffusion when a government "adopts a policy, not because it is imitating any particular government or learning from the experience of other adopters but rather because it observes that the policy is being widely adopted by other governments and, because of shared norms . . . chooses to conform."[92] This is essentially peer pressure, where one government gives in because other similar

[86] *Compare id.* at 501–2 *with* Shipan & Volden, *supra* note 75, at 827–27.
[87] McCann et al., *supra* note 59, at 509–12.
[88] Berry & Berry, *supra* note 34, at 338–42.
[89] *Id.* at 338.
[90] *Id.* at 339.
[91] *Id.*
[92] *Id.* at 340.

governments have adopted a policy or because of groups of professionals function across jurisdictions and keep best practices.[93]

I believe these three can be taken as just learning. First, I would not include a requirement for learning that the outside influence have actually adopted the policy, as McCann et al. showed that states can learn from legislative discussions and investigations, not just from the realized outcomes of an enacted policy.[94] Second, politicians are not teenagers (for the most part); they do not simply copy for the sake of fitting in. The "success" of a policy might not be that it accomplishes its stated goal; it could be that it gets passed as a symbolic gesture to please voters, that it brings media attention to the politicians making the decisions, or that it attracts funding from interest groups. Politicians enact policies because of the "expected utility" of the policy to constituents or the politicians themselves.[95]

Additionally, politicians are not perfect; they have limited time and many demands placed on them,[96] and they are only human. They may take shortcuts and look to politically, culturally, or economically similar jurisdictions and assume that those jurisdictions properly vetted the policy. Or they may look to more professionalized jurisdictions or jurisdictions with stronger policy advocacy groups and assume the policy was more thoroughly vetted. Or politicians might rely on professional organizations or policy advocates to provide vetted policy proposals, counting on those groups to do the learning. In any of these situations, learning would still be the mechanism, even if politicians are taking shortcuts. This would be consistent with the studies

[93] *Id.*
[94] McCann et al., *supra* note 59, at 509–12.
[95] Dietmar Braun & Fabrizio Gilardi, *Taking "Galton's Problem" Seriously: Towards a Theory of Policy Diffusion*, 18 J. THEORETICAL POL. 298, 300–301 (2006).
[96] McCann et al., *supra* note 59, at 497.

showing that internal political determinants, professionalization, and advocacy group strength have strong impacts on diffusion.[97]

I take no issue with Berry and Berry regarding their definitions for competition and coercion. They define diffusion through competition as "when a government's decision about whether to adopt the policy is motivated by the desire of its officials to achieve an economic advantage over other jurisdictions or, equivalently, to prevent other jurisdictions from securing an advantage over it."[98] Indeed, the second of the Berrys, William D. Berry, along with Brady Baybeck, pioneered the use of geographic information systems to show that states were more likely to adopt a state lottery when it had citizens living close enough to drive across the state border to a state that had a lottery.[99]

Berry and Berry state that coercion occurs when a larger or more powerful government provides either positive or negative incentives to adopt a policy. For example, this could be the grants, mandates, and preemption of the federal government,[100] or it could be threats of war on the international stage.[101] Shipan and Volden's substantiation of the effects of the Synar Amendment, discussed above, are instances of coercion. Additionally, Susan Welch & Kay Thompson evaluated 57 public policies and found that federal incentives diffuse policies much faster.[102]

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[97] *See, e.g.*, Walker, *supra* note 37, at 884; Shipan & Volden, *supra* note 75, at 833–35; McCann et al., *supra* note 59, at 509–12.
[98] Berry & Berry, *supra* note 34, at 340.
[99] William D. Berry & Brady Baybeck, *Using Geographic Information Systems to Study Interstate Competition*, 99 AM. POL. SCI. REV. 505, 515–16 (2005).
[100] McCann et al., *supra* note 59, at 496.
[101] Berry & Berry, *supra* note 34, at 341–42.
[102] Susan Welch & Kay Thompson, *The Impact of Federal Incentives on State Policy Innovation*, 24 AM. J. POL. SCI. 715, 723 (1980).

iv. Connection to this Dissertation

My first two manuscripts suggest that an existing problem be addressed by looking to other governments for inspiration. The first manuscript looks to other states – particularly those that are geographically and politically similar – for inspiration to add statutory protection for mandated reporters in Georgia. This is an attempt to diffuse another state's policy into Georgia horizontally through learning. The manuscript looks to federal law for statutory text to amend the Georgia Whistleblower Act and undo judicial dismantling of protection. This is an attempt to vertically diffuse federal statutory text into Georgia law through learning. In the third manuscript, it is assumed that Georgia will eventually join other states in prioritizing teacher accountability, especially with the federal government funding research on value-added measures, and the manuscript will try to adopt lessons from other states in what not to do. This is using vertical and horizontal learning to predict that the issue will arise here.

b. Political Culture of States

In all three manuscripts of this dissertation, there is a common question: What is politically viable? In the third paper, an additional question presents itself: Is it inevitable that value-added measures come to Georgia as part of teacher accountability reform? A political culture lens "examines the ideological system and values that underlie" policymaking.[103] As will be discussed further below, the state political culture literature has been absorbed by policy diffusion, but it is still important to understand how it started. State political culture is now often reduced to a single paragraph mention in literature reviews.[104] But there are some efforts to

[103] RONALD H. HECK, STUDYING EDUCATIONAL AND SOCIAL POLICY: THEORETICAL CONCEPTS AND RESEARCH METHODS 81 (2004).
[104] *See, e.g.*, Katrina Bulkley, *Understanding the Charter School Concept in Legislation: The Cases of Arizona, Michigan and Georgia*, 18 INT'L J. QUALITATIVE STUDIES EDUC. 527, 531 (2005); David J. Weerts & Justin M. Ronca, *Examining Differences in State Support for Higher Eduction: A Comparative Study of State Appropriations for Research I Universities*, 77 J. HIGHER EDUC. 935, 942 (2006).

revitalize at least one branch of state political culture theory as an independent theoretical framework.[105] There are two branches of methodologies in state political culture, one designed for quantitative analysis and one for qualitative analysis. Each will be discussed in turn.

i. Quantitative Methods

Policy scholars often attempt to quantify political culture through other, observable variables. David Fairbanks used religious affiliation breakdowns of state populations to examine liquor and gambling regulations.[106] And Jaekyung Lee attempted to use quantitative methods to determine if the likelihood of a policy being enacted correlated with levels of activism within the state and the costs of implementing the policy.[107] But one quantitative methodology dominated state political culture methodologies. This methodology was devised by Daniel Elazar[108] and "operationalized"[109] by Ira Sharkansky.[110]

The Elazar methodology divides states into three classes: Moralistic, Individualistic, and Traditionalistic.[111] These classifications represent a scale, with Moralistic and Traditionalistic being opposing forces and Individualistic being in the middle.[112] Relevant policy actors are sent surveys, like those presented by Susan Welch and John G. Peters.[113] Based on the survey

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[105] *See generally* Ronald H. Heck et al., *State Political Culture, Higher Education Spending Indicators, and Undergraduate Outcomes*, 28 EDUC. POL'Y 3 (2014).
[106] David Fairbanks, *Religious Forces and "Morality" Policies in the American States*, 30 W. POL. Q. 411, 412–13 (1977).
[107] Jaekyung Lee, *State Activism in Education Reform: Applying the Rasch Model to Measure Trends and Examine Policy Coherence*, 19 EDUC. EVALUATION & POL'Y ANALYSIS 29, 31 (1997).
[108] DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (1966); DANIEL J. ELAZAR, CITIES OF THE PRAIRIE: THE METROPOLITAN FRONTIER AND AMERICAN POLITICS (1970).
[109] Frederick Wirt, *Does Control Follow the Dollar? School Policy, State-Local Linkages, and Political Culture*, PUBLIUS Spring 1980, at 69, 79.
[110] Ira Sharkansky, *The Utility of Elazar's Political Culture: A Research Note*, 2 POLITY 66, 68–78 (1969).
[111] *Id.* at 70.
[112] *Id.*
[113] Susan Welch & John G. Peters, *State Political Culture and the Attitudes of State Senators Toward Social, Economic Welfare, and Corruption Issues*, PUBLIUS Spring 1980, at 59, 63.

answers, states are given a classification, with Moralistic being coded at "1," Individualistic being coded "2," and Traditionalistic being coded "3."[114] The questions are designed such that:

1) Traditionalist states score lower on measures regarding political participation;
2) Traditionalist states score lower on measures regarding size and power of government bureaucracy; and
3) Traditionalist states score lower on measures regarding the scope, magnitude, or costs of government programs.[115]

A recent list of the classifications of states is available in a work by Ronald H. Heck, Wendy S. Lam, and Scott L. Thomas.[116] Although the classifications are ordinal in nature, they can be used with statistical methods to perform quantitative analysis.[117] Unfortunately, a development in the area of policy diffusion removed much of the need for Elazar's technique.

This development came in 1990 in an article by Frances Stokes Berry and William D. Berry.[118] In evaluating the spread of state lotteries, Berry and Berry deployed an event history analysis ("EHA") using a discrete time model.[119] The ability to control for internal characteristics of states (or to test them alongside the diffusion variable or as interaction terms) set EHA apart from prior methods and ensured its dominance to this day.[120] This meant that many variables correlated with political culture, such as voter turnout[121] - alongside economic factors that did

[114] *Id.*
[115] Sharkansky, *supra* note 110, at 70.
[116] Heck et al., *supra* note 105, at 11.
[117] Russell Hanson, *Political Culture, Interparty Competition and Political Efficacy in the American States*, PUBLIUS Spring 1980, at 17, 23.
[118] Berry & Berry, *supra* note 51.
[119] *Id.* at 398. The "discrete time model" simply means that years are taken as a whole, instead of a continuous time variable. *Id.*
[120] *Id.* at 398–99; *see also* Pamela J. Clouser McCann et al., *supra* note 59, at 513 (incorporating an interaction term within the regression).
[121] Welch & Peters, *supra* note 113, at 63.

not correlate well with political culture[122] - could be tested alongside external factors for a more complete prediction of whether a state would adopt a given policy.[123] This development signaled the near-demise of an independent state political culture quantitative methodology.

ii. Qualitative Methods

Education policy is no stranger to historiographic and case study analyses, which broach frequently broach topics of state political culture.[124] The formal framework for examining state political culture, however, comes from the work of Catherine Marshall, Douglas Mitchell, and Frederick Wirt.[125] Marshall et al. wished to rank the relative influence of policy actors and divide them between the following categories: (1) insiders, (2) the near circle, (3) the far circle, (4) the sometime players, and (5) the often forgotten players.[126] In order to rate and categorize policy actors, Marshall et al. designed their questions to construct the "assumptive worlds" of policy-makers.[127]

The assumptive world of policy-makers is the "policy makers' subjective understandings of the environment in which they operate."[128] Put another way, the assumptive world represents "that among policy actors there is a shared sense of what is appropriate in action, interaction, and choice."[129] To build the assumptive world of a set of policy actors, four analytic questions had to be answered:

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[122] Wirt, *supra* note 109, at 85.
[123] Berry & Berry, *supra* note 51, at 398–99.
[124] *See, e.g.*, David Tyack, *Public School Reform: Policy Talk and Institutional Practice*, 100 AM. J. EDUC. 1, 2–3 (1991); Cuban, *supra* note 8, at 3.
[125] CATHERINE MARSHALL ET AL., CULTURE AND EDUCATIONAL POLICY IN THE AMERICAN STATES (1989); Catherine Marshall et al., *The Context of State-Level Policy Formation*, 8 EDUC. EVALUATION & POL'Y ANALYSIS 347 (1986).
[126] Marshall et al., *The Context of State-Level Policy Formation*, *supra* note 125, at 351.
[127] *Id.* at 366.
[128] *Id.* (internal quotation omitted).
[129] *Id.*

> "1) What are the guides to action, norms, and informal boundaries of behavior and choice in the policy world?
>
> 2) How are they played out? For example, how do action guides evolve and how do these rules affect policy choices?
>
> 3) What functions do they serve in the policy culture?
>
> 4) Do their expressions tell consistent stories about the policy culture?"[130]

Over time, these analytic questions morphed into "domains" of the assumptive world, and they changed to the following:

> "1) Who has the right and responsibility to initiate policy?
>
> 2) What policy ideas are deemed unacceptable?
>
> 3) What policy mobilizing activities are deemed appropriate?
>
> 4) What are the special conditions of the state?"[131]

This metamorphosis allowed qualitative researchers to design unique questions, provided they fit into one of the domains. Studies using the Marshall et al. framework include, among others, a study of how a bilingual education bill passed in Arizona[132] and education reform in Hawai'i.[133]

Similar to quantitative methods in state political culture, however, qualitative measures have largely been absorbed into policy diffusion literature. For example, in a pair of connected studies, researchers performed qualitative analyses, including interviews with politicians, of the adoption and resistance to merit-based aid for college students in the Southeast.[134] The ability to examine internal and external factors together is attractive to researchers, and qualitative political

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[130] *Id.* at 368.
[131] Donal M. Sacken & Marcello Medina, Jr., *Investigating the Context of State-Level Policy Formation: A Case Study of Arizona' Bilingual Education Legislation*, 12 EDUC. EVALUATION & POL'Y ANALYSIS 389, 391 (1990).
[132] *Id.* at 391.
[133] Maenette K.P. Benham & Ronald H. Heck, *Political Culture and Policy in a State-Controlled Educational System: The Case of Educational Politics in Hawai'i*, 30 EDUC. ADMIN. Q. 419 (1994).
[134] Lora Cohen-Vogel et al., *The "Spread" of Merit-Based College Aid: Politics, Policy Consortia, and Interstate Competition*, 22 EDUC. POL'Y 339, 347 (2008); William Kyle Ingle et al., *The Public Policy Process Among Southeastern States: Elaborating Theories of Regional Adoption and Hold-Out Behavior*, 35 POL'Y STUDIES J. 607, 607 (2007).

culture analysis seemed to simply follow quantitative in being absorbed. Nevertheless, state political culture and Marshall et al. still get lip service and a paragraph in many studies.[135]

[135] *See, e.g.*, Bulkley, *supra* note 104, at 531; Weerts & Ronca, *supra* note 104, at 942.

CHAPTER 2

MANDATED REPORTER PROTECTIONS: MISSING IN GEORGIA[136]

[136] Published as: Micah Barry, *Mandated Reporter Protections: Missing in Georgia*, 38 HOFSTRA LAB. & EMP. L.J. 1 (2020). Reprinted here with permission of the publisher. This version is not for citation.

Abstract

Every state and territory in the United States, including Georgia, require certain individuals to report suspected child abuse. In Georgia, mandated reporters are not protected from employment retaliation. This creates the potential for a mandated reporter to have to choose between criminal charges for failing to report suspected child abuse or losing his or her job and having a termination on his or her record. Protection for mandated reporters would require a new statute or amendment of a current statute. An examination of jurisdictions that provide employment protections provides inspiration for how Georgia legislators could protect mandated reporters who keep children safe.

I. Introduction

Every state and territory in the United States requires certain individuals to report suspected child abuse.[137] Some states require all citizens to report suspected child abuse, but most only require specific individuals and/or institutions to report.[138] In Georgia, only certain statutorily-identified individuals and institutions are mandated reporters.[139] Despite requiring certain people to make these reports, Georgia does not offer employment protection to prevent retaliation in the event that a supervisor, politician, or business owner has some connection to the person reported for suspected child abuse. This can present a strong disincentive from filing reports and, as a result, place children in danger unnecessarily.

Part II of this paper will introduce mandated reporters and required reports. Part III will examine general statutory protections for mandated reporters. Part IV will examine the lack of meaningful employment protections and possible employment protections for reporters . Part V

[137] CHILDREN'S BUREAU, *supra* note 10, at 1.
[138] *See id.* at 2; *see also* Leonard G. Brown III & Kevin Gallagher, *supra* note 11, at 57-61.
[139] CHILDREN'S BUREAU, *supra* note 10, at 2.

will examine possible avenues of changing Georgia law to protect reporters, including portions of the Georgia Code that may require amendment and examples of protections from other states and territories. Part VI will briefly conclude.

II. Mandated Reporters and Mandatory Reports: The Basics

a. The Statutes

Georgia's mandatory reporting law is spread across three statutes. The primary statute is O.C.G.A. § 19-7-5, titled "Reports by physicians, treating personnel, institutions and others as to child abuse; failure to report suspected child abuse." This is often cited as the mandatory reporter statute or mandated reporter.[140] It is often cited as *the* statute because it provides almost the entirety of the law concerning mandated reporters and mandated reports.

In addition to the primary statute, the General Assembly passed O.C.G.A. § 16-12-100, which adds an additional class of mandated reporters. The General Assembly also supplemented confidentiality obligations and protections in O.C.G.A. § 49-5-41. The statutes will be discussed in more detail in the appropriate sections.

b. Reporters

In states that specifically enumerate classes of mandated reporters, these reporters are professionals who work with children.[141] Because of education, training, or sheer time spent working with children, these professionals are uniquely poised to detect signs of abuse or

[140] *See, e.g.*, Williams v. Fulton Cnty. Sch. Dist., 181 F. Supp. 3d 1089, 1119 (N.D. Ga. 2016) (referring to the statute as "The 'mandatory reporter' statute"); *see also* Matthew Johnson, Comment, *Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children Notes & Comments*, 31 GA. ST. U. L. REV. 643, 657 (2015) (referring to the statute as "The Mandated Reporter Law"). For the purposes of this paper, the terminology will be "mandatory report" and "mandated reporter."

[141] *See* Andrew T. Solomon, *Preventing Recurrences of the Cover-ups at Penn State & Baylor (and Now Michigan State): Where Does it End*, 28 MARQ. SPORTS L. REV. 379, 405 (2017); *see also* Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131, 135 (1998).

exploitation.[142] Because of their heightened ability to spot child abuse or neglect, the law imposes upon mandated reporters the duty to report when they reasonably suspect that a child is being abused, neglected, or exploited.[143]

Georgia is considered below average regarding how many classes of individuals are considered mandated reporters.[144] O.C.G.A. § 19-7-5(c)(1) lists the following as mandated reporters:

> "(A) Physicians licensed to practice medicine, physician assistants, interns, or residents;
> (B) Hospital or medical personnel;
> (C) Dentists;
> (D) Licensed psychologists and persons participating in internships to obtain licensing pursuant to [Georgia's Code regulating psychologists as a profession];
> (E) Podiatrists;
> (F) Registered professional nurses or licensed practical nurses . . . or nurse's aides;
> (G) Professional counselors, social workers, or marriage and family therapists [licensed under Georgia law];
> (H) School teachers;
> (I) School administrators;
> (J) School counselors, visiting teachers, school social workers, or [certified school psychologists];
> (K) Child welfare agency personnel [ ];
> (L) Child-counseling personnel;
> (M) Child service organization personnel;
> (N) Law enforcement personnel; or
> (O) Reproductive health care facility or pregnancy resource center personnel and volunteers."

Although the list is long, it essentially boils down to medical professionals, school personnel, and law enforcement/investigatory personnel. "School" is defined to include all public and private primary, secondary, and post-secondary educational institutions.[145] In addition to those

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[142] *See* Emily L. Evett, *See No Evil, Speak No Evil: Georgia Supreme Court Narrow Requirements for Mandatory Reporters in May v. State Casenote*, 66 MERCER L. REV. 837, 843 (2014).
[143] Solomon, *supra* note 141.
[144] Brown and Gallagher, *supra* note 11, at 61-62.
[145] O.C.G.A. § 19-7-5(b)(9).

mandated reporters enumerated in the primary statute, Georgia's statute criminalizing sexual exploitation of minors and possession of child pornography mandates reports by those who "process[ ] or produc[e] visual or printed matter, either privately or commercially" (hereinafter "photo processors").[146] As will be discussed below, photo processors have a modified reporting process, which is likely why they are included in a separate statute.

While Georgia does not compel everyone to report abuse, it enables them to report abuse through official channels if/when they see it.[147] Individuals who are not mandated reporters – but who report abuse anyway – are often called "permissive reporters."[148]

c. Reports

i. When Reports Must Be Made

Whenever a mandated reporter "has reasonable cause to believe" that child abuse has occurred, they must make a report.[149] The reporter must make a report "immediately, but in no case later than 24 hours from the time there is reasonable cause to believe that suspected child abuse has occurred."[150] In Georgia, "child abuse" is defined as: "(A) Physical injury or death inflicted upon a child by a parent or caretaker [excluding accidents and physical discipline that does not cause injury]; (B) Neglect or exploitation of a child by a parent or caretaker thereof; (C) Endangering a child; (D) Sexual abuse of a child; or (E) Sexual exploitation of a child."[151] Photo processors incur a duty to report when they reasonably believe that they have encountered "visual or printed matter" that "depicts a minor engaged in sexually explicit content."[152]

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[146] O.C.G.A. § 16-12-100(c).
[147] O.C.G.A. § 19-7-5(d).
[148] CHILDREN'S BUREAU, *supra* note 10, at 2.
[149] O.C.G.A. § 19-7-5(c)(1)-(2); O.C.G.A. § 16-12-100(c).
[150] O.C.G.A. § 19-7-5(e).
[151] O.C.G.A. § 19-7-5(b)(4).
[152] O.C.G.A. § 16-12-100(c).

In 2014, the Georgia Supreme Court has narrowed the requirement that mandated reporters make a report whenever they reasonably believe "that child abuse has occurred."[153] In *May v. State*, a teacher in a Cherokee County high school discovered that a student who had recently transferred to a new school in Fulton County had engaged in a sexual relationship with a paraprofessional at the Cherokee County school while she was enrolled there.[154] The sexual relationship the student disclosed constituted sexual abuse under the statute.[155] The student was no longer at the school, and the teacher did not report the paraprofessional.[156]

When law enforcement were alerted to the sexual abuse, they also discovered that the teacher had failed to report the paraprofessional. The teacher was then charged with violating the mandated reporter statute, which is a misdemeanor.[157] The case made its way to the Georgia Supreme Court, who ruled that the reporting requirement "is limited to children to whom the reporter attends pursuant to her duties."[158] Because the student had already left the school by the time the teacher discovered the abuse, the teacher was therefore under no duty to report.[159]

The next year, the Georgia General Assembly amended the mandated reporter statute.[160] The General Assembly did not increase the duty to report to cover all minors, instead adding abuse by anyone who also "attends to a child pursuant to such person's duties as an employee or volunteer at a hospital, school, social agency, or similar facility."[161] Following this amendment, a mandated reporter must report suspected child abuse when (1) the reporter works with the child in the course of the reporter's employment; or (2) when the suspected abuse involves someone

[153] Evett, *supra* note 142, at 837.
[154] May v. State, 295 Ga. 388, 389 (2014).
[155] *Id.*; O.C.G.A. § 19-7-5(b)(4)(D).
[156] *May*, 295 Ga. at 389.
[157] *Id.* at 389-90; O.C.G.A. § 19-7-5(h).
[158] *May*, 295 Ga. at 398 (internal quotation omitted).
[159] *Id.* at 399.
[160] 2015 Ga. HB 268.
[161] *Id.*; O.C.G.A. § 19-7-5(c)(3).

who came into contact with the child by virtue of his or her employment or volunteer work at a hospital, school, social agency or similar facility.

ii. What Goes Into a Report

A report must contain the name, address, and age of the child, to the best knowledge of the reporter.[162] A report must also include the names and addresses of the child's parents or caregivers.[163] The nature and extent of the child's injuries must be in the report as well, and certain mandated reporters that work in hospitals, physician offices, law enforcement, and schools are authorized to take pictures of the child's injuries without parental permission.[164] Finally, the report should contain any other information that "might be helpful in establishing the cause of the injuries or the identity of the perpetrator."[165] In order to meet the timing requirements, a reporter can make an initial oral report and follow up with a written report.[166]

Photo processors do not have statutorily specified requirements for the content of their reports; they are simply required to make a report.[167] This makes sense. The photo processor is unlikely to know the child or customer or have the information other mandated reporters would possess.

iii. How Reports Are Made

Georgia is one of 18 states, along with DC and the U.S. Virgin Islands, to set forth a chain of reporting.[168] The processes in reporting follow the hierarchy reflected in Chart 1.

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[162] O.C.G.A. § 19-7-5(e).
[163] *Id.*
[164] *Id.* Information about and evidence of injuries includes past injuries as well as current injuries. *Id.*
[165] *Id.*
[166] *Id.*
[167] O.C.G.A. § 16-12-100(c).
[168] CHILDREN'S BUREAU, *supra* note 10, at 3.

Chart 2-1: The Chain of Reporting

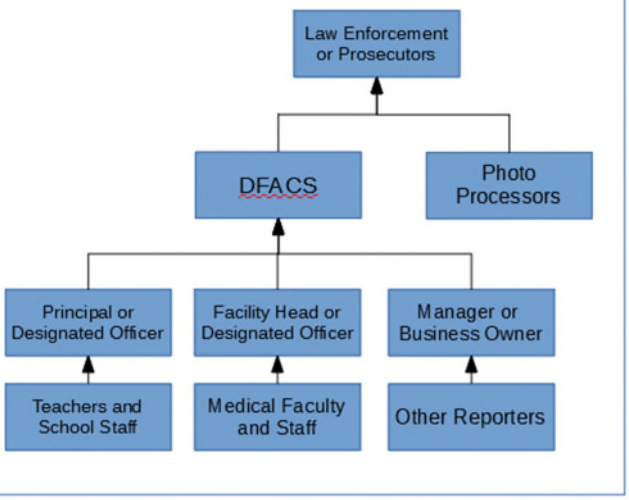

Photo processors have the simplest reporting structure; they report directly to law enforcement.[169] Other reporters have a slightly more complicated procedure. A normal reporter must report to "the person in charge of [the] hospital, school, agency, or facility" in which the reporter works.[170] If a reporter discovers that the abuser works at a "hospital, school, social agency, or similar facility," the reporter must notify the person in charge of the abuser's employer.[171] The person in charge could be a principal, dean, department head, business owner, manager, or someone in a similar position. The person in charge of an institution subject to mandatory reporting may delegate responsibilities to someone else, such as a compliance officer or human resources representative.[172] For ease of reference, I will refer to the person in charge or designated officer as the "institutional reporter."

Once an initial report has been made to the institutional reporter, the institutional reporter must contact the Division of Family and Child Services ("DFACS") at the Department of Human

[169] O.C.G.A. § 16-12-100(c).
[170] O.C.G.A. § 19-7-5(c)(2).
[171] O.C.G.A. § 19-7-5(c)(3).
[172] O.C.G.A. § 19-7-5(c)(2)-(3).

Services.[173] The institutional reporter is forbidden from "exercise[ing] any control, restraint, or modification or mak[ing] any other change[s] to the information provided by the reporter.[174] DFACS screens reports, and those it "has reasonable cause to believe" are true or which are substantiated by submitted evidence are reported to law enforcement or prosecutors.[175]

III. Existing Protections

The mandatory reporting statutes contain some protections for reporters, both mandated and permissive. Two statutory protections are provided: immunity and confidentiality. Each will be detailed below.

a. Immunity

The mandatory reporting statute provides civil and criminal immunity for good faith reports.[176] Along with many other states, Georgia provides immunity to permissive reporters as well as mandatory reporters.[177] This means a reporter is generally not liable for the consequences of reporting potential child abuse. Immunity attaches when either: (1) there is reasonable cause to suspect abuse (an objective test); or (2) the reporter had a good faith belief that they were obligated to make a report (a subjective test).[178] Immunity applies even when the concern of abuse is not substantiated.[179] Immunity is intended to encourage reporters to err on the side of reporting and place investigative duties onto DFACS and law enforcement, rather than requiring mandated reporters such as doctors or teachers to fully investigate concerns themselves.[180]

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[173] O.C.G.A. § 19-7-5(c)(2)-(3); O.C.G.A. § 19-7-5(e).
[174] O.C.G.A. § 19-7-5(c)(2)-(3).
[175] O.C.G.A. § 19-7-5(e).
[176] O.C.G.A. § 19-7-5(f); O.C.G.A. § 16-12-100(c).
[177] O.C.G.A. § 19-7-5(f); *see also* Seletha R. Butler & Valerie Njiiri, *Higher Education Governance: Proposals for Model Child Protection Governance Policy*, 2015 BYU EDUC. & L.J. 367, 369 (2015).
[178] O'Heron v. Blaney, 276 Ga. 871, 873-74 (2003); *see also* Johnson, *supra* note 140, at 659.
[179] *O'Heron*, 276 Ga. at 873-74.
[180] *See, e.g., id.* at 874.

b. Confidentiality

Reports of child abuse and statements connected to those reports are generally not subject to public inspection under Georgia's Open Records Act.[181] There are two exceptions. The first is when the records are necessary for court proceedings related to the allegations of abuse.[182] The second is when a judge – after a full hearing – approves release of the records for "legitimate research for educational, scientific, or public purposes."[183] Even where a judge approves the release of records for research, the judge may still redact the identifying information of the reporter.[184]

The final statute involved in Georgia's mandatory reporting law concerns legitimate access to child abuse records for government purposes.[185] The statutes enumerates several instances in which the names of reporters cannot be disclosed.[186] For the purposes of this paper, confidentiality is not much of a protection. With the hierarchical reporting structure discussed above, a supervisor is almost guaranteed to know who made a report. Even if the employee bypasses the internal report and goes straight to DFACS, the employer may still obtain access to the reporter's identity.[187]

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[181] O.C.G.A. § 19-7-5(i). Georgia's Open Records Act is codified at O.C.G.A. § 50-18-70 *et seq.*
[182] O.C.G.A. § 19-7-5(i)(1).
[183] O.C.G.A. § 19-7-5(i)(2).
[184] O.C.G.A. § 19-7-5(i)(2)(C).
[185] O.C.G.A. § 49-5-41.
[186] O.C.G.A. § 49-5-41(a)(6)(D); O.C.G.A. § 49-5-41(a)(7); O.C.G.A. § 49-5-41(c)(7)(A); O.C.G.A. § 49-5-41(c)(8)(A); O.C.G.A. § 49-5-41(d)(2)(C).
[187] *See* O.C.G.A. § 49-5-41(a)(1) (government entities involved in protection of the child); O.C.G.A. § 49-5-41(a)(3) (prosecuting attorneys); O.C.G.A. § 49-5-41(a)(5)(B) (the school the child attends); O.C.G.A. § 49-5-41(a)(9) (law enforcement agencies); O.C.G.A. § 49-5-41(c)(1) (a treating physician); O.C.G.A. § 49-5-41(c)(9) (any mandated reporter with an ongoing relationship with the child); O.C.G.A. § 49-5-41(c)(10) (school principal or guidance counselor); O.C.G.A. § 49-5-41(c)(10.1) (any school official at a school which the child attends).

IV. Protection from Retaliation (or the Lack Thereof)

Georgia's mandatory reporting statute does not mention employment protections.[188] The statute does say that employers cannot "restrain" reports, which might provide an argument for protection from retaliation.[189] But Georgia courts do not recognize a public-policy exception to at-will employment.[190] Georgia courts consider at-will employment to be a fundamental legislative policy of the state because it is codified in statute.[191] No published cases have examined whether the prohibition from restraining reports extends to retaliation, but judicial hostility to implied exceptions to at-will employment lead the author to conclude that any attempts would likely be unsuccessful.

For public employees, it is clearer that the mandatory reporting statute will offer no protection, with one caveat. State and local government entities are protected from lawsuits by sovereign immunity.[192] Immunity "can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."[193] While no "magic language" is required to waive immunity, immunity will only be waived when an act from the General Assembly specifically creates a right of action and provides for money damages.[194] The mandatory reporting law contains neither term, which eliminates the possibility of a retaliation suit under the statute.[195]

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[188] *Compare* O.C.G.A. § 19-7-5 *with* Ala. Code § 26-14-3(g) *and* S.C. Code Ann. § 63-7-315.
[189] O.C.G.A. § 19-7-5(c)(2)-(3).
[190] *See, e.g.*, Seth Eisenberg, *supra* note 16, at 309-10.
[191] Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 279-80 (2000); O.C.G.A. § 34-7-1; *see also* Reid v. City of Albany, 276 Ga. App. 171, 171-72 (2005).
[192] GA. CONST. art. I, § II, para. IX(e); *see also* Colon v. Fulton Cnty., 294 Ga. 93, 95 (2013).
[193] GA. CONST. art. I, § II, para. IX(e).
[194] *Colon*, 294 Ga. at 95-96.
[195] *See generally* O.C.G.A. § 19-7-5.

Public employees have one hope private employees do not, however. In Georgia, public employees receive protection from the Georgia Whistleblower Act ("GWA").[196] Enacted in 1993, the GWA initially only covered members of the Executive Branch of the state, excluding the Governor's Office, but it has since been expanded to cover all state and local government employees in Georgia.[197] The GWA waives sovereign immunity and provides remedies including reinstatement, back pay and benefits, and attorney fees.[198]

The problem with using the GWA is inadequate protection.[199] Because it only covers public employees, private employees are not covered. Additionally, the GWA will only apply to a narrow set of facts among public employees. In *Brathwaite v. Fulton-DeKalb Hospital Authority*, a hospital employee learned that her supervisor had been terminated from her last job for using a "school for medical coders" to defraud the former employer and steal money.[200] When the supervisor proposed sending medical coders to the same school at the new employer, the plaintiff reported what she had learned.[201] The supervisor was fired, but then rehired.[202] Shortly thereafter, the plaintiff was fired, allegedly for failing a coding test and lacking certification, even though the plaintiff had passed the test and had certification.[203] The Georgia

[196] O.C.G.A. § 45-1-4. Literature on the GWA is divided about what to call the statute, as no title appears in the body of the act. *Compare* Eisenberg, *supra* note 16, at 311.(referring to the statute as the "Whistleblower Protection Act" and using the acronym "WPA") *with* Kimberly J. Doud, *supra* note 16, at 1233-34 (referring to the statute as "Georgia's whistleblower statute") *and* Murray-Obertein v. Georgia Gov't Transparency and Campaign Fin. Comm'n, , 344 Ga. App. 677, 677 (2018) (referring to the statute as the "Georgia Whistleblower Act" and using the acronym "GWA"). The statute bears the section title "Complaint or information from public employees as to fraud, waste, and abuse in state programs and operations. O.C.G.A. § 45-1-4. Within the practice area, "Georgia Whistleblower Act" and "GWA" have become the norm.

[197] Eisenberg, *supra* note 16, at 311-13, 316-17; *see also* 2005 Ga. H.B. 665; 2007 Ga. H.B. 16. The statute was further amended in 2009 and 2011 to reflect administrative changes to certain administrative agencies in the state. *See* 2009 Ga. S.B. 97; 2011 Ga. H.B. 642.

[198] Colon v. Fulton Cnty., 294 Ga. 93, 96 (2013); *see also* O.C.G.A. § 45-1-4(e)-(f).

[199] To prevent the discussion of the GWA from consuming the entire paper, this paper will not detail the elements of a GWA claim. The only relevant element to this discussion is "protected activity," which deals with the scope of reports that are protected.

[200] 317 Ga. App. 111, 115 (2012).

[201] *Id.*

[202] *Id.* at 112.

[203] *Id.* at 112-13.

Court of Appeals ruled that the plaintiff had not engaged in protected activity because no illegal activity had occurred *at the current employer*.[204]

Under *Brathwaite*, a mandated reporter would only engage in protected activity if they reported abuse of a minor that was occurring at the place of employment. A teacher who reports that a parent is likely abusing a child would not have engaged in protected activity under the GWA, and there would be no protection from retaliation.[205] If our goal is to protect reporters, the GWA is not an effective mechanism to do so.

In addition to the GWA, public school teachers have one additional hope, the Fair Dismissal Act ("FDA").[206] The FDA grants what are commonly referred to as "tenure" rights to public school teachers upon the acceptance of each teachers fourth consecutive yearly contract with the same school district.[207] If the teacher leaves for another school district after achieving tenure, the teacher is tenured again upon receiving a second contract.[208] Once a teacher receives tenure, the teacher can only be removed for one of eight enumerated reasons, which are:

(1) Incompetency;

(2) Insubordination;

(3) Willful neglect of duties;

(4) Immorality;

(5) Inciting, encouraging, or counseling students to violate any valid state law, municipal ordinance, or policy or rule of the local board of education;

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[204] *Id.* at 114-15.
[205] *But see* Albers v. Ga. Bd. of Regents of the Univ. Sys. Of Ga., 330 Ga. App. 58, 61-62 (2014) (finding that a campus police officer did engage in protected activity when he objected to university officials attempting to interfere in an investigation and get charges against a student dropped, which could constitute obstruction of justice). Because the mandatory reporting statute prohibits employers from controlling or modifying reports, an objection to any interference would likely constitute protected activity. O.C.G.A. § 19-7-5(c)(2)-(3).
[206] O.C.G.A. § 20-2-940 *et seq.*
[207] O.C.G.A. § 20-2-942(b)(1); *see also* Moulder v. Bartow Cty. Bd. of Educ., 267 Ga. App. 339, 341 (2004).
[208] O.C.G.A. § 20-2-942(b)(4).

> (6) To reduce staff due to loss of students or cancellation of programs and due to no fault or performance issue of the teacher, administrator, or other employee. In the event that a teacher, administrator, or other employee is terminated or suspended pursuant to this paragraph, the local unit of administration shall specify in writing to such teacher, administrator, or other employee that the termination or suspension is due to no fault or performance issues of such teacher, administrator, or other employee;
>
> (7) Failure to secure and maintain necessary educational training; or
>
> (8) Any other good and sufficient cause.[209]

The FDA also lays out detailed notice and procedural requirements, including hearings and appellate reviews by the local board of education, the state board of education, and state courts.[210] The notice and procedural requirements are strictly enforced, and failure or refusal to comply results in the reversal of a teacher's termination.[211] By specifically enumerating the reasons for which a teacher may be terminated, the FDA could, in theory, help stop a teacher from being terminated in retaliation for a report of child abuse. As a practical matter, however, the FDA does not provide effective protection for teachers.

The first reason the FDA is not an effective bar on retaliation is its limited scope. The FDA only protects public school teachers who has achieved tenure.[212] If a teacher is promoted to an administrative or supervisory position, the FDA does not protect the teacher from being retaliated against, so long as the retaliation is limited to demotion back to being a teacher.[213] The FDA only protects teachers who work for a local board of education, so private school teachers

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[209] O.C.G.A. § 20-2-940(a).
[210] O.C.G.A. § 20-2-942(b)(2); O.C.G.A. § 20-2-943.
[211] *See, e.g.*, Clayton Cty. Bd. of Educ. v. Wilmer, 325 Ga. App. 637, 647–48 (2014).
[212] O.C.G.A. § 20-2-942(b)(1).
[213] O.C.G.A. § 20-2-942(d). The FDA was amended in 1995 to stop protecting administrators and supervisors. DeKalb Cty. Sch. Dist. v. Butler, 295 Ga. 672, 673-74 (2014); O.C.G.A. § 20-2-942(c). If the administrator or supervisor achieved tenure first, however, the administrator or supervisor is protected from termination but not demotion. *Butler*, 295 Ga. at 675; O.C.G.A. § 20-2-942(d).

are not covered, and state teachers[214] are likely not covered.[215] Charter school teachers, and teachers at charter districts, are not covered.[216]

The second reason that the FDA provides inadequate protection is that it is not designed to protect teachers from retaliation. While the GWA allows an employee to provide evidence that the employer's alleged reason for termination is merely pretext for retaliation,[217] the FDA does not.[218] Evidence of pretext can be excluded altogether from consideration.[219] Appellate review by the state board and the courts use the "any evidence" rule, meaning that the local board's decision must be upheld if there is any evidence supporting the assertion of the school district.[220] This means that the sole debate is whether the charges against the teacher are supported by any evidence, not whether there is an ulterior motive for the charges.

V. Options for Amendment

Assuming that we wish to protect mandated reporters,[221] the question becomes how best to accomplish this goal. The most comprehensive solution, amending the mandatory reporter

[214] Georgia maintains three K-12 state schools: the Atlanta Area School for the Deaf, the Georgia School for the Deaf, and the Georgia Academy for the Blind. https://www.gadoe.org/Curriculum-Instruction-and-Assessment/State-Schools/Pages/default.aspx.
[215] O.C.G.A. § 20-2-942(a)(1). A Westlaw search of cases citing the FDA and including the terms "blind" or "deaf" did not illuminate whether state schools are officially excluded from coverage, and the FDA does state, "This part shall apply to boards of education of all public school systems in this state." O.C.G.A. § 20-2-946. But the plain language of the statute does not include state schools, and the policies governing state schools do not include a dismissal procedure. *See generally* https://www.gadoe.org/Curriculum-Instruction-and-Assessment/State-Schools/Pages/State-Schools-Policies.aspx. Additionally, at least one policy mentions immediate dismissal of teachers, which implies that the FDA's procedural requirements do not apply to state schools. GA. DEPT. OF EDUC., SS-3002, Reports of Criminal Charges/Fingerprinting/Criminal Background Checks, State Schools, at 2 (2003).
[216] Day v. Floyd Cty. Bd. of Educ., 333 Ga. App. 144, 147 (2015).
[217] Forrester v. Georgia Dep't of Human Servs., 308 Ga. App. 716, 722 (2011) (physical precedent only); Harris v. City of Atlanta, 345 Ga. App. 375, 378–79 (2018).
[218] Dukes-Walton v. Atlanta Indep. Sch. Sys., 336 Ga. App. 175, 182–83 (2016).
[219] *Id.*
[220] *Id.* at 176; Moulder v. Bartow Cty. Bd. of Educ., 267 Ga. App. 339, 340 (2004); Atlanta Indep. Sch. Sys. v. Wardlow, 336 Ga. App. 424, 424 (2016).
[221] Although this is by no means a guarantee, there are many reasons to protect those who report illegal activity. *See, e.g.*, Robert G. Vaughn, *supra* note 15, at 586–87 (1999).

statute to provide a private right of action with robust remedies, [222] may be difficult to get enacted in light of Georgia's strong policy against employment protections, particularly in the private sphere.[223] To evaluate options for amendment, two questions must be answered. First, where would protection go? Second, what enforcement mechanism would be used? Certain answers to the first question would dictate the answer to the second question. The paper will first look at where protection could be placed, and then the paper will look to other U.S. jurisdictions for an evaluation of what language could be used to create an enforcement mechanism if a new one is added to the mandated reporter statute specifically.

a. Where Protection Could Go

There are three intuitive places the General Assembly could place employment protection, depending on the width of coverage legislators can accept. These locations are: The Fair Employment Practices Act ("FEPA"),[224] the GWA,[225] or the mandatory reporting statute.[226] Each has a different purpose and scope.

The FEPA originally sought to bring an anti-discrimination mechanism to public employment.[227] The FEPA established the Commission on Equal Opportunity and set forth an administrative hearing and remedies process for public employees.[228] The FEPA allows limited civil remedies including reinstatement with back pay and benefits, but it only awards limited

[222] The author assumes that development of a general public policy exception to at-will employment and wrongful discharge claim is simply not viable, as mentioned *supra* n. 192.
[223] *See*, *e.g.*, Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 279-80 (2000); O.C.G.A. § 34-7-1; *see also* Reid v. City of Albany, 276 Ga. App. 171, 171-72 (2005).
[224] O.C.G.A. § 45-19-20 *et seq.*
[225] O.C.G.A. § 45-1-4.
[226] O.C.G.A. § 19-7-5.
[227] *See* O.C.G.A. § 45-19-21(a).
[228] O.C.G.A. § 45-19-23, O.C.G.A. § 45-19-36.

attorney fees if a court has to enforce the administrative award.[229] The FEPA also allows a civil fine of up to $1,000 to be levied.[230]

Although the FEPA is geared towards combatting discrimination, the General Assembly tacked on an overtime requirement and reference to the Fair Labor Standards Act ("FLSA").[231] The partial adoption of the FLSA on the state level into the FEPA indicated a general desire to incorporate the FLSA's overtime compensation requirement for public employees. It may have also signaled an intent for public employee overtime claims to be handled through the FEPA's administrative process, though the section incorporating the overtime compensation requirement was not included in the list of "unlawful practices" which must go to an administrator.[232] If the General Assembly wished to cover only public employees, including leveraging a small civil fine and limited civil remedies, the FEPA would be an appropriate location for amendment.

The second option is to amend the GWA. As discussed above, the GWA grants a private right of action with broad civil remedies to public employees. If the General Assembly wished to limit protection to public employees but grant broad remedies, the GWA would be the best location to do so. The General Assembly could also overrule *Brathwaite* and help in other instances as well, but that is a topic for another paper.

The final option is to amend the mandatory reporter statute. This would cover all mandated reporters, and it could potentially cover permissive reporters, who are also authorized to report via the same statute.[233] Because there is no remedy provided, the General Assembly could craft

[229] O.C.G.A. § 45-19-38(c)-(d); O.C.G.A. § 45-19-39(c).
[230] O.C.G.A. § 45-19-44(b).
[231] O.C.G.A. § 45-19-46. The Fair Labor Standards Act is codified at 29 U.S.C. § 201 *et seq.*
[232] *See* O.C.G.A. § 45-19-29 (defining unlawful practices); O.C.G.A. § 45-19-36(b) (stating that claims regarding unlawful practices are filed through the administrative process).
[233] O.C.G.A. § 19-7-5(d).

its own. It could grant limited civil remedies with a civil fine like the FEPA.[234] It could grant broad civil remedies like the GWA. Or the General Assembly could simply extend the criminal sanctions of failing to report to any act of retaliation.

b. What Other States Use for Enforcement Mechanisms

For an idea of what solutions are politically realistic, we can look to other states and territories. The author conducted a state and territory survey covering all 50 states, as well as the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. The author was unable to survey American Samoa or the Northern Mariana Islands. Of the 54 jurisdictions surveyed (including Georgia), 32 did not have employment protection built into their mandated reporter statutes.[235] Many of these jurisdictions, however, allow a broad public policy wrongful discharge or retaliatory discharge cause of action.[236]

Twelve jurisdictions expressly authorize a private cause of action within the mandated reporter statute.[237] Within these twelve jurisdictions, two offer additional sanctions. Minnesota

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[234] As discussed *infra*, the author surveyed 54 jurisdictions across the United States. Connecticut is the only surveyed jurisdiction that has embraced anything similar to this option. Connecticut allows the Attorney General to bring an action for a civil fine of not more than $2,500, with a possibility of equitable relief. Conn. Gen. Stat. § 17a-101e(a); *see also* Perez-Dickson v. City of Bridgeport, 304 Conn. 483, 506-08 (2012).

[235] *See* Alaska Stat. § 47.17.020 (Alaska); Ariz. Rev. Stat. Ann. § 13-3620 (Arizona); Cal. Penal Code § 11166 (California); Colo. Rev. Stat. § 19-3-304 (Colorado); Del. Code Ann. tit. 16, § 903 (Delaware); D.C. Code § 4-1321.02 (District of Columbia); Fla. Stat. § 39.201 (Florida); O.C.G.A. § 19-7-5 (Georgia); 19 Guam Code Ann. § 13201 (Guam); Haw. Rev. Stat. § 350-1.1 (Hawaii); Idaho Code Ann. § 16-1605 (Idaho); 325 Ill. Comp. Stat. § 5/4 (Illinois); Ind. Code § 31-33-5-2 (Indiana); Ky. Rev. Stat. Ann. § 620.030 (Kentucky); La. Child. Code Ann. art. 603(17) (Louisiana); Md. Code Ann., Fam. Law § 5-704 (Maryland); Mich. Comp. Laws § 722.623 (Michigan); Miss. Code Ann. § 43-21-353 (Mississippi); Mont. Code Ann. § 41-3-201 (Montana); Neb. Rev. Stat. § 28-711 (Nebraska); Nev. Rev. Stat. § 432B.220 (Nevada); N.H. Rev. Stat. Ann. § 169-C:29 (New Hampshire); N.M. Stat. Ann. § 32A-4-3 (New Mexico); N.C. Gen. Stat. § 7B-301 (North Carolina); Ohio Rev. Code Ann. § 2151.421 (Ohio); Or. Rev. Stat. § 419B.010 (Oregon); R.I. Gen. Laws § 40-11-6 (Rhode Island); S.D. Codified Laws § 26-8A-3 (South Dakota); Utah Code Ann. § 62A-4a-403 (Utah); V.I. Code Ann. tit. 5, § 2533 (U.S. Virgin Islands); Va. Code Ann. § 63.2-1509 (Virginia); Wash. Rev. Code § 26.44.030 (Washington); W. Va. Code § 49-2-803 (West Virginia).

[236] Madelaine Cleghorn et al., *Employment Discrimination against LGBT Persons*, 19 GEO. J. GENDER & L. 367, 389 n. 155 (2018) (citing Paul H. Tobias, *State-By-State Compendium of Leading and Representative Decisions Concerning the Public Policy Tort Doctrine*, 1 LIT. WRONG. DISCHARGE CLAIMS app. 5A (Dec. 2017)).

[237] Iowa Code § 232.73A (Iowa); Mass. Gen. Laws ch. 119, § 51A(h) (Massachusetts); Minn. Stat. § 626.556, Subd. 4a (Minnesota); N.J. Stat. Ann. § 9:6-8.13 (New Jersey); N.D. Cent. Code § 50-25.1-09.1 (North Dakota); Okla. Stat. tit. 10A, § 1-2-101(B)(5) (Oklahoma); 23 Pa. Cons. Stat. § 6320 (Pennsylvania); P.R. Laws Ann. tit. 8, § 450

provides for a statutory civil fine in addition to standard civil remedies.[238] North Dakota provides for criminal sanctions for those who retaliate, in addition to a civil cause of action against the employer.[239]

Four jurisdictions provide for criminal sanctions against those who retaliate and do not have a cause of action within the mandated reporter statute.[240] Connecticut stands alone in setting a civil fine without a private cause of action.[241] Four jurisdictions specifically prohibit retaliation against mandated reporters but are silent as to the enforcement mechanism.[242]

In the spirit of being politically realistic (and keeping this article a manageable size), the paper will analyze the statutory language used by Georgia's three neighbors with protection built into their mandated reporter statutes: Alabama, Tennessee, and South Carolina. The analysis will focus on what should happen if the Georgia General Assembly adopted the same or similar language.

Alabama Code Section 26-14-3(g) provides, "Commencing on August 1, 2013, a public or private employer who discharges, suspends, disciplines, or penalizes an employee solely for reporting suspected child abuse or neglect pursuant to this section shall be guilty of a Class C misdemeanor." As an initial matter, Georgia does not have classes of misdemeanors, so "Class C misdemeanor" would be changed to "misdemeanor."[243] If Georgia adopted this language and did not specify a different punishment, a supervisor who terminates an employee in retaliation

(Puerto Rico); S.C. Code Ann. § 63-7-315 (South Carolina); Tenn. Code Ann. § 37-1-410(b) (Tennessee); Tex. Fam. Code Ann. § 261.110 (Texas); Vt. Stat. Ann. tit. 33, § 4913(f)(2) (Vermont).

[238] Minn. Stat. § 626.556, Subd. 4a(b).

[239] N.D. Cent. Code § 50-25.1-09.1(1).

[240] Ala. Code § 26-14-3(g) (Alabama); Ark. Code Ann. § 12-18-204 (Arkansas); Kan. Stat. Ann. § 38-2224 (Kansas); Wyo. Stat. Ann. § 14-3-205(c) (Wyoming).

[241] Conn. Gen. Stat. § 17a-101e(a); *see also* Perez-Dickson v. City of Bridgeport, 304 Conn. 483, 506-08 (2012).

[242] Me. Rev. Stat. tit. 22, § 4017 (Maine); Mo. Rev. Stat. § 210.115(3) (Missouri); N.Y. Soc. Serv. Law § 413(c) (New York); Wis. Stat. § 48.981(2)(e) (Wisconsin).

[243] *See* O.C.G.A. § 17-10-3(a).

for reporting child abuse would face a potential fine of up to $1,000, a prison sentence of up to 12 months, or both.[244] No civil cause of action would be implied because Georgia does not allow implied private rights of action from penal statutes.[245]

If Georgia imposed criminal sanctions for retaliation without a civil cause of action, there would still be a problem for mandated reporters who suffer retaliation: they would not have any true remedy. If a teacher is terminated for reported child abuse, the superintendent – and possibly some members of the school board – might face misdemeanor charges at the discretion of the district attorney, but there would be no way for the teacher to get his or her job back, no way to receive compensation for lost wages and benefits, and no way to clear the termination off his or her record. Criminal sanctions might deter the retaliation, but they might not. And if they do not, the teacher has no means of obtaining relief.

Tennessee Code Section 37-1-410(b) provides, "Any person reporting under this part shall have a civil cause of action against any person who causes a detrimental change in the employment status of the reporting party by reason of the report." To begin, there is no required edit that would need to happen in order for this language to be put into the Georgia Code. But "detrimental change" is not used regarding employment status anywhere in the Georgia Code.[246] Legislators might consider borrowing from the GWA definition of "retaliation," which is:

> "Retaliate" or "retaliation" refers to the discharge, suspension, or demotion by a public employer of a public employee or any other adverse employment action taken by a public employer against a public employee in the terms or conditions of employment for disclosing a violation of or non-compliance with a law, rule, or regulation to either a supervisor or government agency.[247]

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[244] O.C.G.A. § 17-10-3(a)(1)
[245] O.C.G.A. § 9-2-8(a); Somerville v. White, 337 Ga. App. 414, 416-17 (2016).
[246] A Westlaw search of the Georgia Code for the phrase "detrimental change" returned two results. The first was in the Notes of Decisions for O.C.G.A. § 14-2-1501, which concerns registration of foreign businesses. The second was in the Notes of Decisions for O.C.G.A. § 24-14-29, which is Georgia's equitable estoppel statute. The phrase "detrimental change" does not appear in the statutory text of the Georgia Code.
[247] O.C.G.A. § 45-1-4-(a)(5).

Additionally, the phrase "any person" could be a problem, assuming the cause of action would not be against the supervisor specifically. Georgia's labor code defines employer as: "… any person or entity that employs one or more employees and shall include the State of Georgia and its political subdivisions and instrumentalities."

If legislators borrowed the appropriate language and placed it in the mandated reporter statute, the definition of "employer" would be placed in Section (b), and the anti-retaliation provision would read:

> Any person reporting under this part shall have a civil cause of action against an employer who causes the person to be discharged, suspended, demoted, or to suffer any other adverse employment action in the terms or conditions of the person's employment by reason of the report.

This language would be more consistent with other portions of the Georgia Code that deal with employment. But it would still have one significant problem: it does not set forth remedies.

By failing to specify remedies, Tennessee's language would only operate against private employers in Georgia. In a lawsuit against a private employer, the rule is "[f]or every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other."[248] A court could craft a remedy, which may include reinstatement, back pay, front pay, compensatory damages, etc. The author would be concerned about placing the decision of remedies into the hands of courts that are traditionally hostile to employment claims, but private employees would have a remedy. Public employees, however, would not.

Public employers would claim sovereign immunity. Immunity "can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."[249] Without an express remedy provided by the

[248] O.C.G.A. § 9-2-3.
[249] GA. CONST. art. I, § II, para. IX(e).

legislature, sovereign immunity would not be waived.[250] Unless the GWA was independently amended, public employees would be left without a remedy, and public employers would suffer no legal consequences for retaliation if Tennessee's approach was adopted in Georgia.

South Carolina Code Section 63-7-315 reads:

> (A) An employer must not dismiss, demote, suspend, or otherwise discipline or discriminate against an employee who is required or permitted to report child abuse or neglect pursuant to Section 63-7-310 based on the fact that the employee has made a report of child abuse or neglect.
>
> (B) An employee who is adversely affected by conduct that is in violation of subsection (A) may bring a civil action for reinstatement and back pay. An action brought pursuant to this subsection may be commenced against an employer, including the State, a political subdivision of the State, and an office, department, independent agency, authority, institution, association, or other body in state government. An action brought pursuant to this subsection must be commenced within three years of the date the adverse personnel action occurred.
>
> (C) In an action brought pursuant to subsection (B), the court may award reasonable attorney's fees to the prevailing party; however, in order for the employer to receive reasonable attorney's fees pursuant to this subsection, the court must make a finding pursuant to Section 63-7-2000 that:
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> (1) the employee made a report of suspected child abuse or neglect maliciously or in bad faith; or
>
> (2) the employee is guilty of making a false report of suspected child abuse or neglect pursuant to Section 63-7-440.

As an initial matter, the references to other portions of the mandated reporter statute would have to be changed before the text could be incorporated into the Georgia statute. Otherwise, the language in the South Carolina statute should result in all reporters – mandatory or permissive – receiving protection. The one bit of language that could be changed is "political subdivision of the State" in subsection (B). While this language is commonly understood to mean county and

[250] *See* Colon v. Fulton Cnty., 294 Ga. 93, 95–96 (2013).

municipal governments, the Georgia General Assembly has shown a preference for different language in the past.

The GWA initially only covered members of the Executive Branch of the state, excluding the Governor's Office, but it was amended to cover all state and local government employees.[251] The language chosen was "or any local or regional governmental entity that receives any funds from the State of Georgia."[252] This choice of language is unequivocal in covering local entities, which would be preferable given the hostility of Georgia courts.

The South Carolina statute limits remedies to reinstatement and backpay, with the possibility of attorney fees. This is significantly less than the GWA, which allows injunctive relief, reinstatement, back pay and benefits, compensatory damages, and attorney fees.[253] It is, however, still better than the FEPA, which grants reinstatement with back pay and benefits, but only allows attorney fees if a court is required to enforce the administrative order.[254] One pro-employer edit that may be necessary would be to shorten the statute of limitations. While the South Carolina statute has a 3-year statute of limitations, the GWA has a 1-year limit with a 3-year statute of ultimate repose,[255] and the FEPA has a 180-day filing deadline.[256] Adopting the GWA statute of limitations and statute of ultimate repose would bring the South Carolina language more in line with other areas of Georgia law.

With the above edits, the South Carolina statute would protect anyone who makes a good faith report of suspected child abuse from employment retaliation, even permissive reporters. A private right of action would allow employees to vindicate their own rights or settle matters

[251] Seth Eisenberg, *supra* note 16, at 311–13.
[252] O.C.G.A. § 45-1-4(a)(4).
[253] O.C.G.A. § 45-1-4(e)-(f).
[254] O.C.G.A. § 45-19-38(c)-(d); O.C.G.A. § 45-19-39(c).
[255] O.C.G.A. § 45-1-4(e)(1).
[256] O.C.G.A. § 45-19-36(b).

without court involvement. If the Georgia General Assembly decided to protect those who protect children, the South Carolina language would provide a good start.

VI. Conclusion

Mandated reporters in Georgia are in a tough spot. They are required to report potential child abuse, on pain of criminal sanctions. But there is virtually no protection for these reporters if their employer has some connection to the abuser and retaliates against them. This is a problem which should be addressed. Ideally, the General Assembly would take a stance that is protective of those who seek to protect children and amend the mandatory reporter statute to include a private right of action with broad civil remedies such as reinstatement with back pay and benefits, compensatory damages, attorney fees, costs, and expenses of litigation. If there is political resistance to this option, there are alternatives, including criminal sanctions for retaliation.

Other U.S. jurisdictions provide a myriad of inspirations for language to use in amending the mandated reporter statute. But the Georgia General Assembly would not need to look far for inspiration. Alabama has a concise criminal statute penalizing retaliation that could be adopted with little editing. South Carolina has a comprehensive option for creating a civil cause of action that would provide a good start, but it would need editing before being added to the Georgia mandated reporter statute. Either of these states can provide Georgia legislators with a starting point amend the mandated reporter statute and protect those who report child abuse or neglect.

CHAPTER 3

ORDERED INTO OBLIVION: HOW COURTS HAVE RENDERED THE GEORGIA WHISTLEBLOWER ACT USELESS, AND HOW TO FIX IT[257]

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Abstract

In Georgia, the Georgia Whistleblower Act ("GWA") protects public employees who report unlawful activity. Recent court decisions have reduced the GWA to a state of uselessness. Federal whistleblower law provides useful insights on how the Georgia General Assembly can amend the GWA to restore and enhance its effectiveness. This article details the history of the GWA and recent court decisions. The article then examines federal whistleblower law. Finally, recommendations, including draft amendment language, are provided.

I. Introduction

Whistleblowers – those who disclose illegal, immoral, or illegitimate practices of their employers to those in a position to rectify those practices – serve important functions in our society.[258] By exposing illegal actions, whistleblowers "expose, deter, and curtail wrongdoing."[259] Recognizing the importance of protecting whistleblowers, the federal government and all 50 states have enacted whistleblower protection statutes.[260]

In Georgia, public employees receive protection from the Georgia Whistleblower Act ("GWA").[261] Enacted in 1993, the GWA initially only covered members of the Executive Branch of the state, excluding the Governor's Office, but it has since been expanded to cover all state and local government employees in Georgia.[262] As this article will show, recent

[258] *See* Elletta Sangrey Callahan et al., *supra* note 13, at 178.
[259] *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *supra* note 14, at 100.
[260] *See* Robert G. Vaughn, *supra* note 15, at 581-83 (collecting statutes).
[261] O.C.G.A. § 45-1-4. Literature on the GWA is divided about what to call the statute, as no title appears in the body of the act. *Compare* Seth Eisenberg, *supra* note 16, at 311 (referring to the statute as the "Whistleblower Protection Act" and using the acronym "WPA") *with* Kimberly J. Doud, *supra* note 16, at 1233-34 (2000) (referring to the statute as "Georgia's whistleblower statute") *and* Murray-Obertein v. Georgia Gov't Transparency and Campaign Fin. Comm'n, , 344 Ga. App. 677, 677 (2018) (referring to the statute as the "Georgia Whistleblower Act" and using the acronym "GWA"). The statute bears the section title "Complaint or information from public employees as to fraud, waste, and abuse in state programs and operations. O.C.G.A. § 45-1-4. Within the practice area, "Georgia Whistleblower Act" and "GWA" have become the norm.
[262] Eisenberg, *supra* note 16, at 311-13, 316-17; *see also* 2005 Ga. H.B. 665; 2007 Ga. H.B. 16. The statute was further amended in 2009 and 2011 to reflect administrative changes to certain administrative agencies in the state. *See* 2009 Ga. S.B. 97; 2011 Ga. H.B. 642.

developments in case law under the GWA have drastically reduced the whistleblower protections afforded to public employees in the state, and the statute is due for an amendment.

Part II of this article will provide details of the GWA's statutory language and the state of the GWA prior to 2015. Part III will discuss recent developments in GWA litigation, including updated case law and a trend the author has personally seen in the course of litigating several cases under the GWA. Part IV will examine the federal Whistleblower Protection Act ("WPA") and the Whistleblower Protection Enhancement Act ("WPEA"). Part V will provide the author's recommendation for amendment to the GWA. Finally, Part VI will briefly conclude.

II. GWA: The Basics

a. The Statute

The GWA is divided into 6 subsections, labeled (a)-(f). Subsection (a) provides definitions for various terms used in the statute. The definitions will only be recited here as they become relevant to explain other provisions of the GWA. Two definitions, however, are important from the beginning: "public employer" and "public employee."

The GWA defines a "public employer" as:

> "the executive, judicial, or legislative branch of the state; any other department, board, bureau, commission, authority, or other agency of the state which employs or appoints a public employee or public employees; or any local or regional governmental entity that receives any funds from the State of Georgia or any state agency."[263]

Section (a)(3) provides:

> "'Public employee' means any person who is employed by the executive, judicial, or legislative branch of the state or by any other department, board, bureau, commission, authority, or other agency of the state. This term also includes all employees, officials, and administrators of any agency covered by the rules of the State Personnel Board and any local or regional governmental entity that receives any funds from the State of Georgia or any state agency."

[263] O.C.G.A. § 45-1-4(a)(4).

Subsection (b) of the GWA permits public employers to receive and investigate complaints and report regarding possible "fraud, waste, and abuse in or relating to any state programs and operations under the jurisdiction of such public employer." This subsection grants public employers jurisdiction to handle complaints and investigations internally, rather than having to involve the state government or law enforcement with every report.[264] "Fraud, waste, and abuse" are not defined in the statute.

Subsection (c) provides for the confidentiality of public employees who complain. The subsection does not specify whether it applies to all complaints of fraud, waste, and abuse. As discussed below, the anti-retaliation provision of subsection (d) is narrower than the jurisdictional provision of (b). It is unclear where (c) falls, and no case law provides clarity. Presumably, subsection (c) applies to all reports under (b).

Subsection (d) is the anti-retaliation provision of the GWA. It provides:

> "(1) No public employer shall make, adopt, or enforce any policy or practice preventing a public employee from disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency.
>
> (2) No public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity.
>
> (3) No public employer shall retaliate against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation.
>
> (4) Paragraphs (1), (2), and (3) of this subsection shall not apply to policies or practices which implement, or to actions by public employers against public employees who violate, privilege or confidentiality obligations recognized by constitutional, statutory, or common law."

[264] O.C.G.A. § 45-1-4(b); *see also* Colon v. Fulton Cnty., 294 Ga. 93, 98-99 (2013).

Several terms in subsection (d) are defined in subsection (a). "Law, rule or regulation" means "any federal, state, or local statute or ordinance or any rule or regulation adopted according to any federal, state, or local statute or ordinance."[265] A "supervisor" is any person

> "(A) To whom a public employer has given authority to direct and control the work performance of the affected public employee;
>
> (B) To whom a public employer has given authority to take corrective action regarding a violation of or noncompliance with a law, rule or regulation of which the public employee complains; or
>
> (C) Who has been designated by a public employer to receive complaints regarding a violation of or noncompliance with a law, rule, or regulation."[266]

"'Government agency' means any agency of federal, state, or local government charged with the enforcement of laws, rules, or regulations."[267] Finally,

> "'Retaliate' or 'retaliation' refers to the discharge, suspension, or demotion by a public employer of a public employee or any other adverse employment action taken by a public employer against a public employee in the terms or conditions of employment for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency."[268]

Subsections (e) and (f) provide the right of action, jurisdictional limitation, statute of limitations, and remedies for whistleblowers. Actions under the GWA cannot be brought in a magistrate court or state court; they must be brought in superior court.[269] The statute of limitations is one year after discovery of the retaliation, with a three-year statute of repose.[270] The remedies for a successful public employee include: an injunction restraining continued violations; reinstatement to the same or an equivalent position; reinstatement of fringe benefits

[265] O.C.G.A. § 45-1-4(a)(2).
[266] O.C.G.A. § 45-1-4(a)(6).
[267] O.C.G.A. § 45-1-4(a)(1).
[268] O.C.G.A. § 45-1-4(a)(5).
[269] O.C.G.A. § 45-1-4-(e)(1).
[270] *Id.*

and seniority; lost wages, benefits, and other remuneration; compensatory damages; reasonable attorney's fees, costs, and expenses.[271]

b. The GWA Prior to 2015

Prior to 2015, the exact framework for analyzing GWA claims was unclear. Unofficially, courts used the federal *McDonnell Douglas* framework for analyzing cases.[272]

> "Under the familiar *McDonnell Douglas* framework, the plaintiff must first create an inference of discrimination through his prima facie case. Once the plaintiff has made out the elements of the prima facie case, the burden shifts to the employer to articulate a non-discriminatory basis for its employment action. If the employer meets this burden, the inference of discrimination drops out of the case entirely, and the plaintiff has the opportunity to show by a preponderance of the evidence that the proffered reasons were pretextual. Where the plaintiff succeeds in discrediting the employer's proffered reasons, the trier of fact may conclude that the employer intentionally discriminated."[273]

To show a prima facie case of retaliation under the GWA, a plaintiff had to show that:

> "(1) the employer falls under the statute's definition of a 'public employer'; (2) the employee disclosed a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency; (3) the employee was then discharged, suspended, demoted, or suffered some other adverse employment decision by the public employer; and (4) there is some causal relation between (2) and (3)."[274]

For the sake of brevity, the first element will be referred to as coverage, the second as protected activity, the third as an adverse action, and the fourth as causation. While early GWA litigation focused on coverage, these cases became irrelevant after the statute was amended to increase the scope of public employers and public employees.[275] Following the GWA

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[271] O.C.G.A. § 45-1-4(e)(2)-(f).
[272] Forrester v. Georgia Dep't of Human Servs., 308 Ga. App. 716, 721-22 (2011) (physical precedent only); *but see* Freeman v. Smith, 324 Ga. App. 426, 428-29 (2013) (declining to formally adopt the *McDonnell Douglas* framework).
[273] Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 767-68 (2005) (internal quotations omitted).
[274] *Forrester*, 308 Ga. App. at 722.
[275] *See, e.g.*, N. Georgia Reg'l Educ. Serv. Agency v. Weaver, 272 Ga. 289 (2000); *see also* Eisenberg, *supra* note 16, at 311-13, 316-17; 2005 Ga. H.B. 665; 2007 Ga. H.B. 16.

amendments, coverage ceased being a serious issue in litigation, with one exception that will be discussed in recent developments.[276]

As mentioned above, the anti-retaliation provision of the GWA protects reports of or objections to "violation[s] of or noncompliance with a law, rule, or regulation," while the jurisdictional section covers reports of "fraud, waste, or abuse."[277] The anti-retaliation provision is narrower. Reporting theft by employees from the employer was protected.[278] But reporting embezzlement by an employee at a prior employer was not protected.[279] Reporting general safety concerns was not protected.[280] Personal concerns intended to get a troubled friend and coworker help also did not constitute protected activity.[281] Objecting to conduct that could amount to obstruction of justice, however, was protected.[282]

The statute provides that "discharge, suspension, [and] demotion" are adverse actions.[283] In *Jones v. Board of Regents of the University System of Georgia*, the Georgia Court of Appeals considered whether resigning in lieu of termination (often referred to as "involuntary resignation") constituted an adverse action.[284] The *Jones* court answered in the affirmative.[285] While this rule is still the general consensus, the *Jones* court based its reasoning – at least in part – on language in a prior version of the GWA that prohibited threatening action against an employee.[286] That language was removed from the statute with the 2005 amendment.[287] When

[276] *See, e.g.*, Forrester v. Georgia Dep't of Human Servs., 308 Ga. App. 716, 723 (2011) (physical precedent only).
[277] *Compare* O.C.G.A. § 45-1-4(d) *with* O.C.G.A. § 45-1-4(a).
[278] Jones v. Board of Regents of the Univ. Sys. of Ga., 262 Ga. App. 75, 80 (2003).
[279] Brathwaite v. Fulton-DeKalb Hosp. Auth., 317 Ga. App. 111, 114-15 (2012).
[280] Edmonds v. Board of Regents of the Univ. Sys. of Ga., 302 Ga. App. 1, 6-7 (2009).
[281] *Forrester*, 308 Ga. App. at 724-25.
[282] Albers v. Georgia Bd. of Regents of the Univ. Sys. of Ga., 330 Ga. App. 58, 61-62 (2014).
[283] O.C.G.A. § 45-1-4(a)(5).
[284] 262 Ga. App. 75, 80-81 (2003).
[285] *Id.*
[286] *Id.*
[287] 2005 Ga. H.B. 665.

the issue seemed to reappear in *Albers v. Georgia Board of Regents of the University System of Georgia*, giving the option of resigning under threat of termination did not constitute an adverse action for the purposes of the statute of limitations where the employee did not resign and was not terminated until months later.[288] *Jones* has not been overruled by any subsequent cases, so it should still be good law.

The statute also mentions "other adverse employment action[s]."[289] In *Freeman v. Smith*, the Georgia Court of Appeals incorporated federal Title VII cases to determine whether an action was "materially adverse."[290] Under Title VII case law, an action is materially adverse if "a reasonable employee would have found the challenged action materially adverse, meaning that it might well have dissuaded a reasonable employee from making the statutorily-protected disclosure."[291] "The actionable employer conduct must be 'significant,' rather than 'trivial.'"[292] Thus, informing an employee that her subordinate is about to be transferred away did not rise to the level of an adverse action.[293] There is also confusion regarding when a transfer is actionable, due to a lack of case law and the refusal of the General Assembly to include "transfer" in the statute after it had been proposed.[294]

Indicia of causation included temporal proximity between the protected activity and adverse action, a supervisor's reaction to the protected activity, and evidence of pretext.[295] For temporal proximity, the general rule was that an adverse action must accrue within three months of the

[288] Albers v. Georgia Bd. of Regents of the Univ. Sys. of Ga., 330 Ga. App. 58, 63-65 (2014).
[289] *Id.*
[290] 324 Ga. App. 426, 432-33 (2013).
[291] *Id.* at 432 (citing Cobb v. City of Roswell, 533 Fed. Appx. 888, 896 (11th Cir. 2013)).
[292] *Id.* (citing Burlington Northern & Santa Fe R. Co. v. White, 548 U.S. 53, 67-68 (2006)).
[293] *Id.*
[294] *See* Eisenberg, *supra* note 16, at 315-16, 318-19.
[295] Jones v. Board of Regents of the Univ. Sys. of Ga., 262 Ga. App. 75, 80-81 (2003).

protected activity; delay beyond three months is generally fatal to a claim.[296] A GWA plaintiff could survive substantial delay, however, if there was other evidence suggesting causation.[297]

After the employer articulated a legitimate non-retaliatory business reason for the adverse action, the employee needed to show that the reason was pretextual.[298] The employee could do this through direct evidence that contradicts the employers reason or circumstantial evidence suggesting that the proffered reason was not the actual reason for the adverse action.[299] Circumstantial evidence of pretext included inconsistencies in stated reasons for the adverse action, evidence of reactions to protected activity, comparator evidence of similarly situated employees who were treated differently, and close temporal proximity.[300]

III. Recent Developments in GWA Case Law

Since 2015, the general trends in GWA have seen appellate courts declining procedural hurdles for plaintiffs, but increasing substantive requirements to a level that has practically eliminated a GWA plaintiff's chance of success. As a result of recent cases, the GWA has diverged from prior case law so substantially that it is no longer effectual.

In *Tuohy v. City of Atlanta*, the Georgia Court of Appeals embraced the *McDonnell Douglas* burden-shifting framework.[301] The *Tuohy* court, however, confused several lawyers practicing in the area. The *Tuohy* court's discussion of pretext was odd. The *Tuohy* court first quoted *Bailey v. Stonecrest Condo Association*, for the following passage: "In discussing this issue, the Georgia Supreme Court has held that pretext is established by a direct showing that discriminatory reason more likely motivated the defendant or by an indirect showing that the

[296] *See* Freeman v. Smith, 324 Ga. App. 426, 430-32 (2013); *see also* Albers v. Georgia Bd. of Regents of the Univ. Sys. of Ga., 330 Ga. App. 58, 62-63 (2014).
[297] *Albers*, 330 Ga. App. at 63.
[298] Forrester v. Georgia Dep't of Human Servs., 308 Ga. App. 716, 722 (2011) (physical precedent only).
[299] Caldon v. Board of Regents of the Univ. Sys. of Ga., 311 Ga. App. 155, 159 (2011).
[300] *Id.* at 160.
[301] 331 Ga. App. 846, 849-50 (2015).

defendant's explanation is not credible."[302] This was consistent with the pretext analysis used in *Caldon*.[303]

The *Tuohy* court then quoted an unreported 11th Circuit case for the following proposition:

> "A reason is not pretextual unless it is shown both that the reason was false, and that discrimination or retaliation was the real reason. If the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason, or showing that the decision was based on erroneous facts."[304]

This new test is virtually impossible to meet. It converts the previous "or" into an "and." An employee must provide direct evidence of retaliation *and* disprove whatever reason the employer concocts after the employer has had time to search for a "legitimate" reason. The idea that an employee must disprove every alleged reason for an adverse action and prove that retaliation was the real reason in order to survive summary judgment and get to trial makes no sense. Georgia is a strongly at-will jurisdiction.[305] Georgia courts "typically adjudicate against employees claiming wrongful discharge, regardless of the reason for the termination."[306] Given this hostility, a GWA plaintiff can only see a jury if they can prove that they never engaged in any misconduct, never experienced even a temporary performance decline, and never made a single mistake. This is impossible. Plaintiffs are left hoping that their defendants' lawyers make a mistake during the course of investigation or litigation and provide only false accusations.

Following the chain of citations for the quote providing this new test, one comes to *St. Mary's Honor Center v. Hicks*, a Supreme Court case that dealt with the issue of when a *plaintiff*

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[302] *Tuohy*, 331 Ga. App. at 851 (quoting Bailey v. Stonecrest Condo Ass'n, 304 Ga. App. 484, 491 (2010)).
[303] *Caldon*, 311 Ga. App. at 159.
[304] *Tuohy*, 331 Ga. App. at 851-52 (quoting Tarmas v. Secretary of the Navy, 433 Fed. Appx. 754, 761 (11th Cir. 2011)).
[305] Eisenberg, *supra* note 16, at 309-11.
[306] *Id.* at 310.

is entitled to summary judgment, not when a plaintiff *survives* a defendant's motion for summary judgment.[307] The Court stated,

> "Thus, rejection of the defendants' proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, no additional proof of discrimination is *required*. But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principal . . . that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion."[308]

The *Tuohy* court declined to choose between the two tests it provided, stating that the plaintiff could not survive summary judgment under either.[309] By providing this new test, however, the *Tuohy* court opened a veritable Pandora's box in trial courts, with government defendants claiming that the new – significantly harsher – test applies.[310] In at least one case, the author could only argue – unsuccessfully – that the *Tuohy* court did not actually create a new test, based on the court's failure to apply the test.[311] The situation became even worse, however, when the Georgia Court of Appeals confirmed the new test in *Harris v. City of Atlanta*.[312]

In the next published case from the Georgia Court of Appeals after *Tuohy*, *Franklin v. Eaves*, GWA plaintiffs received some good news.[313] In *Franklin*, the plaintiff stated at summary judgment that the first act of retaliation against her (the removal of some of her job duties) occurred on August 27, 2012.[314] Additional acts of retaliation were alleged to have occurred on

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[307] 509 U.S. 502, 511 (2013). The *Tuohy* court quoted Tarmas v. Secretary of the Navy, 433 Fed. Appx. 754, 761 (11th Cir. 2011), which cited Brooks v. County Comm'n, 446 F.3d 1160, 1163 (2006), which quoted *St. Mary's*.
[308] *Id.* (internal quotations omitted) (emphasis in original).
[309] Tuohy v. City of Atlanta, 331 Ga. App. 846, 852-53 (2015).
[310] Due to confidentiality concerns, the author is unable to provide specific trial court citations. This assertion is based on experience in GWA litigation.
[311] The author is unable to disclose the case citation due to confidentiality concerns.
[312] Harris v. City of Atlanta, 345 Ga. App. 375, 378-79 (2018).
[313] 337 Ga. App. 292 (2016).
[314] *Id.* at 295-97.

October 12, 2012, October 17, 2012, December 2012, January 25, 2013, and June 2013.[315] She had filed her GWA claim on October 11, 2013, more than one year from the first act of retaliation.[316] The trial court granted summary judgment to the defendant on the grounds that the action was past the one-year statute of limitation.[317]

On appeal, Franklin argued that she did not learn of the August and October actions until October 24, 2012, which was within one year of her filing.[318] The court allowed this argument to succeed, stating that Franklin was not required to argue that she did not discover the retaliation until later when the defendant bore the burden of proving that the action was filed late and relied solely on a limited admission that the first act of retaliation actually occurred prior to October 11, 2012.[319] The *Franklin* court also adopted provisions of federal law which states that each discrete adverse action is independently actionable and carries its own statute of limitation.[320]

Following *Franklin* were a pair of plaintiff-friendly cases. In *West v. City of Albany*, the United States District Court for the Middle District of Georgia was faced with a motion for judgment on the pleadings based on a failure to provide the city with ante litem notice pursuant to O.C.G.A. § 36-33-5.[321] The district court, unsure whether ante litem notice was required in GWA cases, certified the question to the Georgia Supreme Court.[322] At roughly the same time, in *Riggins v. City of Atlanta*, the Fulton County Superior Courts dismissed a complaint based upon the failure to provide ante litem notice under O.C.G.A. § 36-33-5.[323]

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[315] *Id.* at 295-96.
[316] *Id.* at 296.
[317] *Id.*
[318] Franklin v. Eaves, 337 Ga. App. 292, 297 (2016). The date of discovery was apparently in the evidence at the trial court, but was not argued until the appeal. *Id.* at 295, 297, 299.
[319] *Id.* at 299.
[320] *Id.* at 298-99 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).
[321] West v. City of Albany, 300 Ga. 743, 743 (2017).
[322] *Id.*
[323] Riggins v. City of Atlanta, 340 Ga. App. 895, 895-96 (2017).

The municipal ante litem requirement states in part:

> "(a) No person, firm, or corporation having a claim for money damages against any municipal corporation on account of injuries to person or property shall bring any action against the municipal corporation for such injuries, without first giving notice as provided in the Code section.
>
> (b) Within six months of the happening of the event upon which a claim against a municipal corporation is predicated, the person, firm, or corporation having the claim shall present the claim in writing to the governing authority of the municipal corporation for adjustment, stating the time, place, and extent of the injury, as nearly as practicable, and the negligence which caused the injury. No action shall be entertained by the courts against the municipal corporation until the cause of action therein has first been presented to the governing authority for adjustment."[324]

The Georgia Court of Appeals had previously ruled that the state ante litem notice requirement did not apply to GWA claims, which could independently effect a waiver of sovereign immunity.[325] Giving the precedent set by *Tuttle* and the clear references to negligence in the municipal statute, this pair of cases surprised many in the practice, who assumed that the ante litem statutes applied to torts, not the GWA. Luckily, the Georgia Supreme Court ruled that the municipal ante litem requirement did not apply to the GWA.[326] The Georgia Court of Appeals soon followed the rule set by *West* and reversed the Fulton County Superior Court's dismissal of the *Riggins* GWA claim.[327]

After a few helpful decisions, plaintiffs' attorneys had their hopes dashed with the decision in *Coward v. MCG Health, Inc.*[328] In *Coward*, two nurses were terminated, allegedly for complaining about chronic short-staffing which nearly led to a psychiatric patient's suicide.[329] At summary judgment, the defendant argued that the plaintiffs had only reported and objected to

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[324] O.C.G.A. § 36-33-5.
[325] Tuttle v. Board of Regents of the Univ. Sys. of Ga., 326 Ga. App. 350, 355 (2014).
[326] *West*, 300 Ga. at 749.
[327] *Riggins*, 340 Ga. App. at 896.
[328] 342 Ga. App. 316 (2017).
[329] *Id.* at 317-18.

general safety concerns, which are not protected.[330] But there was a complication. While preparing the response to the defendant's motion for summary judgment, the plaintiffs' attorney discovered that the chronic short-staffing – if true – did violate a law, rule, or regulation.[331]

The trial court granted summary judgment to the defendant, finding that the plaintiffs had not engaged in protected activity.[332] On appeal, the Georgia Court of Appeals affirmed.[333] The court qualified its ruling by saying, "[i]n reaching this conclusion, we need not determine what terminology is required to trigger the protections of the Whistleblower Statute, nor do we believe that the statute requires specific magic words."[334] But the court was clear that an employee must allege and disclose that the employer is violating a law, rule, or regulation prior to termination.[335]

This new rule is devastating for GWA plaintiffs. Requiring employees to identify a law, rule, or regulation prior to termination shrinks the pool of potentially successful plaintiffs to those with legal training. Based on the author's experience as an employment litigator, the chances of an average employee knowing the law is beyond slim. *Coward* presents a common scenario: where an employee reports something wrong, gets fired, and then hires an attorney, who must then determine whether the report was sufficient. The lack of legal knowledge on the part of the general populace is covered by the statutory scheme. The provision of the GWA that protects disclosures protects them so long as they are not "made with knowledge that the disclosure is false or with reckless disregard for its truth or falsity."[336] The objection provision covers

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[330] *Id.* at 320; *see also* Edmonds v. Board of Regents of the Univ. Sys. of Ga., 302 Ga. App. 1, 6-7 (2009).
[331] The court does not specifically state this, but it said, "Coward did not allege that MCG Health violated a law, rule, or regulation until she filed her response to MCG Health's motion for summary judgment." *Coward*, 342 Ga. App. at 320-21. The court also stated, "Bargerorn, like Coward, did not disclose a violation or failure to comply with any law, rule, or regulation prior to her termination." *Id.* at 321.
[332] *Id.* at 316.
[333] *Id.* at 322.
[334] Coward v. MCG Health, Inc., 342 Ga. App. 316, 321 (2017).
[335] *Id.* at 320-21.
[336] O.C.G.A. § 45-1-4(d)(2).

objections and refusals to participate in any practice the employee "has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation."[337]

The next GWA case to come out of the Georgia Court of Appeals was *Murray-Obertein v. Georgia Government Transparency and Campaign Finance Commission*.[338] In *Murray-Obertein*, the Georgia Court of Appeals resurrected an old question: who is covered by the GWA? The question in *Murray-Obertein* was whether former employees are protected from retaliation.[339] After a dispute with her employer ended in settlement, the Executive Secretary of Murray-Obertein's employer began making derogatory comments about her to the media.[340]

Murray-Obertein looked to recent cases solidifying the relationship between the GWA and federal retaliation law under Title VII; she then argued that the rule in *Robinson v. Shell Oil Co.* should apply.[341] The *Robinson* Court held that former employees were protected from retaliation by Title VII.[342] Even though it reaffirmed acceptance of the federal *McDonnell Douglas* framework, the Georgia Court of Appeals declined to follow federal cases for former employees.[343]

The *Murray-Obertein* decision is harmful for plaintiffs, who suffer substantial disadvantages finding new jobs and often have to leave their profession or industry entirely.[344] This decision results in a near-absence of protections for (1) bad references that are misleading but do not rise to the level of defamation; (2) statements to licensing agencies regarding the plaintiff's

[337] O.C.G.A. § 45-1-4(d)(3).
[338] 344 Ga. App. 677 (2018).
[339] *Id.* at 677.
[340] *Id.* at 678.
[341] *Id.* at 679 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 346(1997)).
[342] *Robinson* 519 U.S. at 346.
[343] *Murray-Obertein*, 344 Ga. App. at 679-81.
[344] *See* Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 666-669 (2018) (detailing stories of whistleblowers).

termination; (3) statements to the media designed to harm the plaintiff's reputation; and (4) pension denials when the pensions are not governed by ERISA.

The next GWA case to come before the Georgia Court of Appeals was the return of *Franklin v. Eaves*,[345] this time named *Franklin v. Pitts*.[346] After the case returned to the trial court, the trial court granted summary judgment to the defendant.[347] The trial court ruled: (1) that the plaintiff failed to establish protected activity; (2) that all but two alleged adverse actions did not rise to the level of adverse actions; (3) that the plaintiff failed to establish a causal connection between the alleged protected activity and the alleged adverse actions; and (4) that the plaintiff failed to establish pretext for the two accepted adverse actions.[348] The court only considered rulings (2) and (4).[349]

The trial court counted two transfer/promotion opportunity denials to count as adverse actions.[350] A third job opportunity denial was not counted as an adverse action because the plaintiff provided "no evidence showing that the County denied her a specific transfer opportunity."[351] The remaining potential adverse actions were: "delaying a request to attend a training session; change of job duties from credentialing providers and credit card processing to electronic funds transfer duties; [and] denial of leave requests and requests for documentation of leave."[352]

The court had to decide whether these counted as adverse actions, and the court framed the discussion around whether to adopt the Title VII standard for substantive discrimination or for

[345] *See supra* nn. 57-64.
[346] Franklin v. Pitts, 349 Ga. App. 544, 544 (2019). The defendant's name was changed because the chairman of the Fulton County Board of Commissioners – who was sued in his official capacity – changed. *See Id.*
[347] *Id.* at 544, 546.
[348] *Id.* at 546–48.
[349] See *id.* at 559.
[350] *Id.* at 547–48.
[351] *Id.* at 548 n. 3.
[352] *Id.* at 548.

retaliation.[353] The court noted that the Eleventh Circuit has described the federal retaliation standard as "materially adverse," while referring to the substantive discrimination standard as "serious and material change in terms, conditions or privileges of employment."[354] Which standard would apply was decisive; similar adverse actions were covered in the applicable federal case, *Burlington Northern and Santa Fe Railway Co. v. White*.[355]

In *Burlington North*, the plaintiff – the sole female employee in her department – complained that her supervisor was making sexual and discriminatory comments to and about her.[356] The supervisor was punished, but – later that same month and during the same meeting wherein the plaintiff was informed of the supervisor's discipline – the plaintiff was told that she was being moved from operating a forklift to general laborer tasks.[357] After the plaintiff filed a charge with the Equal Employment Opportunity Commission, she was charged with insubordination and suspended without pay.[358] Although the plaintiff experienced 37 days of suspension without pay, the suspension was reversed through an internal grievance process, and she was awarded backpay for the 37 days, bringing her lost wages to $0.[359]

After comparing the statutory text of Title VII's prohibition on discrimination with the prohibition on retaliation, the Court concluded that the prohibition on retaliation was broader than the prohibition on discrimination.[360] Title VII's prohibition on discrimination states:

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[353] *Id.* at 549–51.
[354] *Id.* at 551 (citing Crawford v. Carroll, 529 F.3d 961, 974 n. 14 (11th Cir. 2008).
[355] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). For those who are new to employment law, please note that the Georgia Court of Appeals referred to the *Burlington North* standard as the "*Burlington* standard." *See Pitts*, 349 Ga. App. at 552–53. Practitioners in the area are familiar with a *Burlington North* standard, which is discussed here, and a separate *Burlington* standard, which concerns sexual harassment and comes from the case *Burlington Industries, Inc. v. Ellerth*. 524 U.S. 742 (1998). For the author's sanity, this paper will use the industry norm and refer to the "*Burlington North* standard."
[356] *Burlington North*, 548 U.S. at 57–58.
[357] *Id.* at 58.
[358] *Id.*
[359] *Id.* at 58–59.
[360] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 61–64 (2006).

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [361]

Title VII's prohibition on retaliation states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. [362]

The Court then set forth the *Burlington North* standard, which is: "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[363] Reassignments and suspensions, even when the employee suffers no loss of pay or status, can act as a deterrent or serve as a symbolic punishment.[364] These actions are, therefore, actionable in retaliation cases.[365] This standard was used in *Freeman v. Smith*, as detailed in the prior section.[366]

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[361] 42 U.S.C. § 2000e-2(a).
[362] 42 U.S.C. § 2000e-3(a).
[363] *Burlington North*, 548 U.S. at 68 (internal quotations omitted).
[364] *Id.* at 70–73.
[365] *Id.*
[366] Freeman v. Smith, 324 Ga. App. 426 (2013); *see supra* nn. 290-94.

Faced with similar adverse actions, the Georgia Court of Appeals took the same basic approach: they compared the text of the GWA with the anti-discrimination and anti-retaliation provisions of Title VII.[367] Concluding that the GWA's language is closer to Title VII's anti-discrimination provision, the court concluded that the *Burlington North* standard is not appropriate for GWA cases.[368] The court then adopted the stricter "serious and material change in terms, conditions or privileges of employment," and found that the challenged adverse actions did not rise to the necessary level to be actionable under the GWA.[369]

Turning to the remaining adverse actions – the denial of two transfers/promotions – the court reaffirmed the *Tuohy* and *Harris* standard of pretext.[370] Because of the harshness of this standard, the plaintiff was unable to show pretext, and the grant of summary judgment was affirmed.[371]

Adopting the anti-discrimination standard instead of the anti-retaliation provision of Title VII may have been an appropriate textual analysis, but it defeated the purposes of the GWA, which is an anti-retaliation statute. The *Burlington North* standard focuses on deterrence, which is the point of an anti-retaliation statute.[372] By allowing employers to "make an example of" an employee in an open act of hostility that falls short of the harsher anti-discrimination statute, the employer can deter employees and prevent reports of misconduct, all without ramification.

An additional development is currently working its way through the courts, though it has not yet led to an opinion.[373] Due to confidentiality concerns, the author is unable to provide citations, but the author has seen the development in multiple cases. At least one large public

[367] Franklin v. Pitts, 349 Ga. App. 544, 550–52 (2019).
[368] *Id.* at 552.
[369] *Id.* at 555–57.
[370] *Id.* at 557.
[371] *Id.* at 558–59.
[372] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006).
[373] Due to confidentiality concerns, the author is unable to provide citations to cases.

employer has attempted to argue for the judicial adoption of what is known as the "employee duty rule." This rule comes from litigation under the federal WPA prior to the adoption of the WPEA, which overruled those cases.[374]

The employee duty rule states that an employee does not engage in protected activity when the employee reports something within the scope of that employee's ordinary job duties.[375] Under this rule, a compliance officer would not be protected by the GWA because the compliance officer's job is to find and report violations of laws, rules, and regulations. At the federal level, Congress passed the WPEA to stop this rule.[376] State whistleblower laws, however, are often unclear because they do not provide or prohibit an employee duty rule.[377] Georgia is one of the states that does not provide or prohibit the rule in its whistleblower statute.[378] In the author's experience, Georgia trial courts have been unwilling to weigh in on the employee duty rule, instead relying on the cases referenced above to dismiss cases and avoid the discussion.

The employee duty rule is likely to make its way to the Georgia Court of Appeals at some point, and, if adopted, it will be disastrous for public whistleblowers in Georgia. The employee duty rule is particularly dangerous in light of *Coward*. The employees who are likely to know which law is being broken and identify a violated law, rule, or regulation for their employer are probably the ones whose job duties specifically involve reporting violations of that law, rule, or

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[374] Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. ONLINE 1, 27 (2018); Heidi Kitrosser, *On Public Employees and Judicial Buck-Passing: The Respective Roles of Statutory and Constitutional Protections for Government Whistleblowers*, 94 NOTRE DAME L. REV. 1699, 1708 (2019).
[375] Wolf v. Pacific Nat'l Bank, 2010 WL 5888778, at *10 (S.D. Fla. Dec. 28, 2010) (collecting cases).
[376] Samantha Arrington Sliney, *Department of Homeland Security v. MacLean: The Supreme Court's Interpretation of the Application of Whistleblower Protection Laws to Disclosures Made Contrary to Transportation Security Administration Regulations*, 8 New Eng. Univ. L.J. 397, 400 (2016).
[377] *See* Hodges & Pugh, *supra* note 374, at 27.
[378] *See generally*, O.C.G.A. § 45-1-4.

regulation. They likely received training on the law, rule, or regulation because it is their job to find and report potential violations. Employees who see that something is wrong, but are not sure what, will run into the *Coward* rule. Employees who are trained and experienced at spotting violations will run into the employee duty rule. Either way, there will be no protection, and the GWA will be nearly useless.

IV. Federal Employee Whistleblower Law

As shown above, Georgia courts have compared the GWA to Title VII and made GWA cases harsher for plaintiffs than in Title VII cases. For federal employee whistleblowers, however, the applicable law is the Whistleblower Protection Act.[379] Copying the federal WPA in its entirety is likely not the solution for the problems facing the GWA, but some parts of the WPA can provide useful inspiration for how the problems with the GWA may be addressed.

Although whistleblower protections at the federal level can be traced back to 1778,[380] the modern iteration was first enacted within in the 1978 Civil Service Reform Act.[381] In 1989, Congress unanimously passed the current WPA.[382] As amended in 1994 and again with the WPEA in 2012,[383] the WPA protects most employees and applicants of the federal Executive Branch and the Government Printing Office.[384] The WPA also protects former employees.[385]

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[379] 5 U.S.C. § 2302(b)(8).
[380] Connor Berkebile, Note, *The Puzzle of Whistleblower Protection Legislation: Assembling the Piecemeal*, 28 IND. INT'L & COMP. L. REV. 1, 7–8 (2018).
[381] *See Sliney*, *supra* n. 376, at 399.
[382] *Id.* at 399-400.
[383] *See Id.* at 400; *see also* Pub. L. No. 112-199.
[384] The WPA excludes employees who are "excepted from the competitive service because of [their job's] confidential, policy-determining, policy-making, or policy-advocating character." 5 U.S.C. § 2302(a)(2)(B)(i). Certain positions may also be excluded from coverage by an Executive Order of the President, but the exclusion cannot come after the adverse personnel action. 5 U.S.C. § 2302(a)(2)(B)(ii). Additionally, the WPA excludes from coverage employees involved in foreign intelligence and counter-intelligence operations. 5 U.S.C. § 2302(a)(2)(C)(ii). Although employees of the Federal Bureau of Investigation are listed in the excluded category, they are covered separately, with specific requirements concerning how reports are made. 5 U.S.C. § 2303.
[385] 5 U.S.C. § 1221.

The WPA does not use the *McDonnell* Douglas framework; instead, it uses a different framework. The plaintiff must first prove – by a preponderance on the evidence – his or her *prima facie* case by showing

> (1) the acting official had the authority to take any personnel action; (2) the aggrieved employee made a protected disclosure; (3) the acting official used his authority to take or refuse to take, a personnel action; and (4) the protected disclosure was a contributing factor in the agency's personnel action.[386]

The first element is important because of how adverse actions work under the WPA. Because it is tied to the adverse action prong (element (3) above), the two will be discussed together.

An adverse action under the WPA is when an employee "take[s] or fail[s] to take, or threaten[s] to take or fail to take, a personnel action" against a covered employee or applicant.[387] The list of "personnel action[s]" is long, comprising 12 numbered items, only one of which covers traditional adverse actions like suspension, demotion, and removal.[388] The WPA covers actions such as temporary details,[389] performance evaluations,[390] and the implementation or enforcement of nondisclosure policies or agreements.[391] Authority to take the action matters both because the list of actions is broad and because threats to take an action are also covered.[392] The first element, when added to the third, ensures that the adverse action is genuine.

For the second element, protected activity, the WPA protects employees and applicants who disclose information they reasonably believe shows:

> (i) any violation of any law, rule or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure

[386] King v. Dep't of the Army, 570 Fed. Appx. 863, 865 (11th Cir. 2014) (citing Chambers v. Dep't of the Interior, 602 F.3d 1370, 1376 (Fed. Cir. 2010)).
[387] 5 U.S.C. § 2302(b)(8).
[388] 5 U.S.C. § 2302(a)(2)(A); *see also* 5 U.S.C. §§ 7502, 7512.
[389] 5 U.S.C. § 2302(a)(2)(A)(iv).
[390] 5 U.S.C. § 2302(a)(2)(A)(viii).
[391] 5 U.S.C. § 2302(a)(2)(A)(xi).
[392] 5 U.S.C. § 2302(b)(8).

> is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.[393]

The WPA also protects:

> any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences –
>
> > (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
> >
> > (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[394]

The distinction between the two provisions stems from the fact that a disclosure need not be to internal authorities or law enforcement; disclosures can be made to the media, so long as the disclosure is not prohibited by law.[395]

Disclosures can be formal or informal,[396] may be made directly to a supervisor or the person alleged to be committing – or attempting to commit – a violation,[397] need not be made in writing or while the employee was on duty,[398] and are still protected if made during the normal course of an employee's duties.[399] A disclosure is protected even when the employee has an impure motive in making it.[400] The WPA also has a participation clause, which protects employees who "exercise . . . any appeal, complaint, or grievance right;"[401] testify or lawfully assist someone else in exercising an appeal, complaint, or grievance right;[402] or cooperate with an

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[393] 5 U.S.C. § 2302(b)(8)(A).
[394] 5 U.S.C. § 2302(b)(8)(B).
[395] *See, e.g.*, Dept. of Homeland Sec. v. MacLean, 574 U.S. 383, 417 (2014); *Chambers v. Dep't of the Interior*, 602 F.3d 1370, 1378 (Fed. Cir. 2010).
[396] 5 U.S.C. § 2302(a)(2)(D).
[397] 5 U.S.C. § 2302(f)(1)(A).
[398] 5 U.S.C. § 2302(f)(1)(D)-(E).
[399] 5 U.S.C. § 2302(f)(2).
[400] 5 U.S.C. § 2302(f)(1)(C).
[401] 5 U.S.C. § 2302(b)(9)(A).
[402] 5 U.S.C. § 2302(b)(9)(B).

investigation.[403] Finally, the WPA has an objection clause to protect employees who refuse to obey an order that would violate a law, rule, or regulation.[404]

The WPA sets out a statutory list of factors to be considered for causation, which is under the contributing factor standard.[405] The statutory factors to consider are: "(A) the official taking the personnel action knew of the disclosure or protected activity; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action."[406] "The words 'a contributing factor' . . . mean *any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision*."[407] This standard is much more lenient towards employees than the normal standards used in standards such as the *McDonnell Douglas* framework, which require proof that the "protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor."[408]

Once the employee proves his or her *prima facie* case, the burden shifts back to the employer, who must do more than merely articulate an alleged reason for the action; it must prove by clear and convincing evidence that it would have taken the same action in the absence of protected activity.[409] The factors to consider when deciding whether an agency has satisfied its burden are known as the *Carr* factors,[410] from *Carr v. Social Security Administration*.[411] The *Carr* factors are:

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[403] 5 U.S.C. § 2302(b)(9)(C).
[404] 5 U.S.C. § 2302(b)(9)(D).
[405] 5 U.S.C. § 1221(e)(1).
[406] 5 U.S.C. § 1221(e)(1).
[407] Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (emphasis in original) (collecting legislative history of the WPA).
[408] *Id.*
[409] 5 U.S.C. § 1221(e)(2); *see also Marano*, 2 F.3d at 1141.
[410] *See, e.g.*, Whitmore v. Dep't of Labor, 680 F.3d 1353, 1365 (Fed. Cir. 2012).
[411] Carr v. Soc. Sec. Admin., 185 F.3d 1318 (Fed. Cir. 1999).

> (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.[412]

The requirement that the government prove its case by clear and convincing evidence was deliberate, with the following quote on the Congressional record:

> "Clear and convincing evidence" is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was tainted." Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.[413]

Congress has also used this type of burden shifting in cases under the Consumer Product Safety Improvement Act,[414] the Energy Reorganization Act,[415] the Federal Railroad Safety Act,[416] and the Sarbanes-Oxley Act.[417] This burden shifting is significantly more employee-friendly than the *McDonnell Douglas* framework, but there are solid reasons for adopting it in actions against the government.

If the employee wins his or her case, they are entitled to "corrective action."[418] "Corrective action" may include reinstatement to the same or a similar position, back pay and benefits, medical costs, travel expenses, consequential damages, and compensatory damages.[419] A

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[412] *Id.* at 1323 (numbering added).
[413] 135 Cong. Rec. H747-48 (daily ed. Mar. 21, 1989); *see also Whitmore*, 680 F.3d at 1367 (quoting the same passage).
[414] 15 U.S.C. § 2087; *see, e.g.*, Lenzi v. Systemax, Inc., 944 F.3d 97, 114 (2nd Cir. 2019).
[415] 42 U.S.C. § 5851; *see, e.g.*, Sanders v. Energy Nw., 812 F.3d 1193, 1197 (9th Cir. 2016).
[416] 49 U.S.C. § 20109; *see, e.g.*, Pan Am Railways, Inc. v. U.S. Dep't of Labor, 855 F.3d 29, 36 (1st Cir. 2017).
[417] 18 U.S.C. § 1514A; *see, e.g.*, Harp v. Charter Commc'ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009).
[418] 5 U.S.C. § 1221(e)(1).
[419] 5 U.S.C. § 1221(g)(1)(A).

prevailing employee, former employee, or applicant is entitled to attorney fees and litigation costs.[420] These remedies are similar to those in the GWA.[421]

V. Recommendations

The first available solution to the recent court decisions eviscerating the GWA is for the Georgia Supreme Court to start taking GWA cases again and overrule the Georgia Court of Appeals. All the recent cases discussed above have been at the court of appeals. For some reason, the Georgia Supreme Court is not weighing in on the problem. Assuming the Georgia Supreme Court does not intend to overrule the Georgia Court of Appeals, it will be up to the Georgia General Assembly to amend the GWA.

Keeping with the order with which this paper introduced the GWA, the following areas require amendment: (A) coverage; (B) protected activity; (C) adverse action; and (D) causation and burden shifting. A full copy of the suggested amended version of the GWA is included in Appendix A.

a. Coverage

The problem that has developed with coverage is the lack of protection for former employees.[422] The clearest solution is to amend the definition of "public employee" at O.C.G.A. § 45-1-4(a)(3). The suggested language would read:

> (3) "Public employee" means any person who is employed by the executive, judicial, or legislative branch of the state or by any other department, board, bureau, commission, authority, or other agency of the state. This term also includes all employees, officials, and administrators of any agency covered by the rules of the State Personnel Board and any local or regional governmental entity that receives any funds from the State of Georgia or any state agency. <u>This term also includes former public employees and applicants for public employment.</u>

[420] 5 U.S.C. § 1221(g)(1)(B); 5 U.S.C. § 1221(g)(2).
[421] *See supra* n. 271.
[422] *See supra* nn. 338-43.

"[A]pplicants for public employment" was added to address a scenario where a public employer tells a prospective new employer about the employee's protected activity and ruins the employee's chance of getting a new job. In the absence of a confidentiality agreement or this language, the former employer would not be liable in this scenario.[423] The suggested language would likely require some additional language in the protected activity section to prevent protection for activity outside the scope of government operations. Those edits will be addressed in the appropriate section.

b. Protected Activity

The problems facing protected activity are the *Coward* rule[424] and the potential employee duty rule.[425] Additionally, an edit will be required if coverage is extended to former employees and applicants. The three kinds of protected activity discussed are disclosures,[426] participation,[427] and objections.[428] The author recommends adding a definition of these items to the definitions list in subsection (a) of the GWA, which would then include the following items:

> (7) "Protected activity" means any activity constituting a protected disclosure, protected participation, or a protected objection. Disclosures, participation, and objections are protected regardless of whether the activity:
>
> > (A) is made or performed during the normal course of duties of the public employee;
> >
> > (B) is made to a supervisor or to a person who participated in an activity that the public employee reasonably believed to be covered by the protected activity;

[423] *See* Murray-Obertein v. Georgia Gov't Transparency and Campaign Fin. Comm'n, , 344 Ga. App. 677, 679–81 (2018); *see also* O.C.G.A. § 34-1-4. If O.C.G.A. § 45-1-4(c) is amended or interpreted to protect reports under subsection (d), then there would be an argument for liability for the former employer, but this is unlikely to happen. *See supra* p. 50 (discussion of subsections (b) and (c)).
[424] *See supra* nn. 328-37.
[425] *See supra* nn. 373-77.
[426] O.C.G.A. § 45-1-4(d)(2); 5 U.S.C. § 2302(b)(8).
[427] 5 U.S.C. § 2302(b)(9)(A)-(C).
[428] O.C.G.A. § 45-1-4(d)(3); 5 U.S.C. § 2302(b)(9)(D).

(C) reveals information that had been previously disclosed;

(D) is made in writing; or

(E) is made or performed while the public employee is off duty;

but disclosures and objections shall only constitute protected activity if made while the public employee is employed by a public employer.

(8) "Protected disclosure" means a formal or informal communication or transmission of information to a supervisor or government agency by a public employee which the public employee reasonably believes evidences:

(A) any violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(9) "Protected participation" means:

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation that concerns or relates to retaliation under this Code section;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information in an investigation, hearing, or court proceeding in connection with protected activity under this Code section.

(10) "Protected objection" means objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation.

The language for protected disclosures is taken directly from the WPA, with a modification to keep the scope limited to reports to a supervisor or government agency, as is the current limitation within the GWA.[429] Language was added to ensure that disclosures and objections are only protected if they occur while the employee is employed by a public employer. This is designed to ensure that reports and objections must be made to the public employer, but

[429] 5 U.S.C. § 2302(b)(8); O.C.G.A. § 45-1-4.

participation can happen after the employee has left. This ensures that a prospective or former employee cannot gain protection (and a potential lawsuit) preemptively to increase his or her chances of being hired or preventing a bad reference, while still protecting those who engage in legitimate activities, including investigations, hearings, or court proceedings after the employee has left.

The fact that a disclosure is defined as "information constituting a violation" should remove the *Coward* rule. The language in proposed section (7)(A) is designed to foreclose the employee duty rule. Other language was added from the WPA for clarifications, just in case there is judicial pushback against an amendment.

In an effort to provide uniformity throughout the GWA and apply the confidentiality provision of subsection (c) to all reports, subsection (b) should be amended as follows:

> (b) A public employer may receive and investigate protected disclosures ~~complaints or information from any public employee~~ concerning ~~the possible existence of any activity constituting fraud, waste, and abuse in~~ or relating to any state programs and operations under the jurisdiction of such public employer.

In addition, subsections (B) and (C) from the definition of "supervisor" should be amended as follows:

> (B) To whom a public employer has given authority to take corrective action regarding a protected disclosure by a ~~violation of or noncompliance with a law, rule, or regulation of which the~~ public employee ~~complains~~; or
>
> (C) Who has been designated by a public employer to receive protected disclosures ~~complaints regarding a violation of or noncompliance with a law, rule, or regulation~~.

c. Adverse Action

The full scope of protected activity under the WPA is likely neither necessary for the GWA nor likely to be passed in Georgia. Adopting the *Burlington North* standard should be sufficient.

This best way to do so is to amend the definition of "retaliation," which would change subsection (a)(5) to read as follows:

> (5) "Retaliate" or "retaliation" refers to the discharge, suspension, or demotion by a public employer of a public employee or any other adverse employment action taken by a public employer against a public employee that might dissuade a reasonable employee from engaging in protected activity~~in the terms or conditions of employment for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency~~.

To adopt this standard and harmonize subsection (d) with the other changes presented, subsections (1) through (4) would be adjusted as follows:

> (1) No public employer shall make, adopt, or enforce any policy or practice preventing a public employee from engaging in protected activity ~~disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency~~.
>
> (2) No public employer shall retaliate against a public employee for engaging in protected activity ~~for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity~~.
>
> ~~(3) No public employer shall retaliate against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe in in violation of or noncompliance with a law, rule, or regulation.~~
>
> ~~(4)~~(3) Paragraphs (1) and (2)~~(1), (2), and (3)~~ of this subsection shall not apply to policies or practices which implement, or to actions by public employers against employees who violate, privilege or confidentiality obligations recognized by constitutional, statutory, or common law.

d. Causation and Burden Shifting

Because of how the courts have handled burden shifting,[430] the author recommends switching to the WPA contributing factor test, which affects causation and burden shifting together. To

[430] *See supra* nn. 301-12.

prevent shifting subsection (e)(2), the following language – taken largely from the WPA,[431] with some language taken from the mixed-motive language from Title VII[432] – would be added:

(g)

(1) Subject to the provisions of paragraph (2), in any case under this Code section, the court shall order relief under paragraphs (e) and (f) if the public employee has demonstrated that protected activity was a contributing factor in retaliation against the public employee by the public employer, even though other factors also motivated the adverse action. The public employee may demonstrate that the protected activity was a contributing factor in the personnel action through circumstantial evidence.

(2) Relief under paragraphs (e) and (f) may not be ordered if, after a finding that protected activity was a contributing factor, the public employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of such protected activity.

VI. Conclusion

Because Georgia courts are unwilling to enforce the GWA, the General Assembly must act to protect taxpayers from unlawful acts by public servants. This includes protecting those public employees who fulfill their duty and report wrongdoing. By looking to federal whistleblower protections, the General Assembly can address the recent court decisions that have eviscerated the GWA through an amendment. By incorporating aspects of other functioning anti-retaliation laws, the language provided within this article will overrule the recent judicial push-back against the GWA while balancing the interests of the public, public employees, and public employers.

[431] 5 U.S.C. § 1221(e).
[432] 42 U.S.C. § 2000e-2(m)

CHAPTER 4

LIMITED USE FOR LIMITED DATA: INCORPORATING VALUE-ADDED MEASURES AS PART OF A K-12 POST-TENURE REVIEW PROCESS[433]

[433] Micah Barry: Accepted by The Education Law & Policy Review. Reprinted here with permission of the publisher. This version is not for citation.

Abstract

As part of a broad accountability movement in the United States, value-added measures or value-added models ("VAMs"), combined with high stakes standardized tests went into effect across the country. This article analyzes the history of tenure and tenure reform, the legal environment of VAMs, and empirical evidence regarding the costs and effectiveness of tenure reform, VAMs, and incentive pay for teachers. Concluding that VAMs are generally useful, but not reliable enough for yearly or high-stakes personnel decisions, the article recommends a development from higher education – the post-tenure review. By confining VAMs to a post-tenure review setting, VAMs can be used appropriately given its limitations.

I. Introduction

As part of a broad accountability movement in the United States, value-added measures or value-added models ("VAMs"), combined with high stakes standardized tests went into effect across the country.[434] VAMs are "a key topic of contention" in education policy.[435] This article seeks to analyze the empirical evidence to determine whether VAMs are effective, along with the legal environment of VAMs implementation, to determine what role, if any, VAMs should play in teacher evaluation. Because VAMs have limited use – but are useful – in determining teacher effectiveness, this article recommends they be used. Because VAMs are subject to high variability and bring substantial risks when used for short-term, high stakes personnel decisions, however, the article recommends that VAMs be used in a limited capacity. Borrowing from higher education policy, the article recommends adoption of a K-12 post-tenure review process.

[434] DOUGLAS N. HARRIS, VALUE-ADDED MEASURES IN EDUCATION: WHAT EVERY EDUCATOR NEEDS TO KNOW 1–2 (2011).
[435] *Id.* at 2.

Section II of this article describes the K-12 teacher tenure process, using Georgia as an example. Section III briefly explains what VAMs are and how they work. Section IV provides a brief history of teacher tenure, education reforms, and VAMs. Section V analyses VAMs litigation. Section VI analyses literature on the costs and effectiveness of tenure reform, VAMs, and incentive pay for teachers. Section VII describes tenure and post-tenure review in higher education. Section VIII contains the author's argument that post-tenure review is an appropriate reform for K-12 educators and the proper venue for consideration of VAMs scores. Section IX briefly concludes.

II. K-12 Teacher Tenure, Georgia as an Example

Tenure in K-12 education is typically granted automatically once a teacher successfully completes a statutorily-specified number of years at a school district.[436] The time a teacher must serve before being awarded tenure is known as the "probationary period."[437] The majority of states require a 3-year probationary period, but state statutes vary from two to five years.[438] In Georgia, the teacher tenure statute is the Fair Dismissal Act ("FDA").[439]

The FDA grants tenure rights to public school teachers upon the acceptance of each teacher's fourth consecutive yearly contract with the same school district.[440] If the teacher leaves for another school district after achieving tenure, the teacher is tenured again upon receiving a second contract.[441] Once a teacher receives tenure, they can only be removed for one of eight enumerated reasons, which are:

(5) Incompetency;

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[436] JOHN DAYTON, EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE 389 (2d ed. 2019).
[437] Eric J. Brunner & Jennifer Imazeki, *Probation Length and Teacher Salaries: Does Waiting Pay Off*, 64 INDUS. & LAB. REL. REV. 164, 164, n. 1 (2010).
[438] *Id.* at 167.
[439] O.C.G.A. § 20-2-940 *et seq.*
[440] O.C.G.A. § 20-2-942(b)(1); *see also* Moulder v. Bartow Cty. Bd. of Educ., 267 Ga. App. 339, 341 (2004).
[441] O.C.G.A. § 20-2-942(b)(4).

(6) Insubordination;

(7) Willful neglect of duties;

(8) Immorality;

(5) Inciting, encouraging, or counseling students to violate any valid state law, municipal ordinance, or policy or rule of the local board of education;

(6) To reduce staff due to loss of students or cancellation of programs and due to no fault or performance issue of the teacher, administrator, or other employee. In the event that a teacher, administrator, or other employee is terminated or suspended pursuant to this paragraph, the local unit of administration shall specify in writing to such teacher, administrator, or other employee that the termination or suspension is due to no fault or performance issues of such teacher, administrator, or other employee;

(7) Failure to secure and maintain necessary educational training; or

(8) Any other good and sufficient cause.[442]

The FDA also lays out detailed notice and procedural requirements, including hearings and appellate reviews by the local board of education, the state board of education, and state courts.[443] The notice and procedural requirements are strictly enforced, and failure or refusal to comply results in the reversal of a teacher's termination.[444]

III. What Are VAMs?

VAMs represent a variety of quasi-experimental[445] models that attempt to determine the causal effects of educators on student test scores.[446] The idea behind VAMs came from

[442] O.C.G.A. § 20-2-940(a).
[443] O.C.G.A. § 20-2-942(b)(2); O.C.G.A. § 20-2-943.
[444] *See, e.g.*, Clayton Cty. Bd. of Educ. v. Wilmer, 325 Ga. App. 637, 647–48 (2014).
[445] In contrast to randomized controlled experiments, quasi-experiments use statistical analysis of data to make causal inferences. RICHARD J. MURNANE & JOHN B. WILLETT, METHODS MATTER: IMPROVING CAUSAL INFERENCE IN EDUCATIONAL AND SOCIAL SCIENCE RESEARCH 31 (2011). Quasi-experiments can successfully allow researchers and statisticians to make causal determinations, provided they select an appropriate method and address any threats to the internal validity of the method they choose. *Id.*
[446] ERIN D. LOMAX & JEFFREY J. KUENZI, CONG. RESEARCH SERV., R41051, VALUE-ADDED MODELING FOR TEACHER EFFECTIVENESS 3 (Dec. 2012).

economics' literature dealing with production.[447] Douglas N. Harris provides a simple example to highlight the basic purpose VAMs serve in production:

> The factory analogy is also useful because it clearly shows where the concept of value-added came from: the value-added is the difference in the total costs of the inputs (labor and raw material) that goes into the plant and the dollar value of the final product that comes out. In the car manufacturing example, if the materials and labor cost $6 million and the cares are sold in showrooms for a total of $10 million, then the value-added is $4 million. Value is determined by what consumers are willing to pay for these items, or market prices.[448]

Extending the analogy further, the value-added on an individual worker on the factory can be ascertained by determining the speed and quality of the employee's work. If the employee does quality work quickly, the employee is a better worker who adds more value – or profit – to the company. VAMs in education attempts to take this manufacturing concept and substitute schools for factories, educators for workers, and student test scores for the sale prices of the finished products.[449]

Just as a factory's management would like to have a performance metric that makes sense of the quality of material that enters a factory line and each employee on the line, it is important to control for factors that come with students (such as home environment, poverty, or disabilities) and isolate each educator's performance with as much specificity as possible. VAMs use statistics to predict what a student's test score should be and compare the actual score to the predicted score.[450] In its most basic form, a value-added model would look something like:

$$T_{id} = \beta_0 + \beta_1 S_i + \beta_2 W_d + \varepsilon_{id}$$

where T_{id} represents the test score of Student i in district d, S_i represents the collection of student-level variables (such as home environment, poverty, disabilities, prior test performance, etc.),

[447] Cory Koedel et al., *Value-Added Modeling: A Review*, 47 ECON. EDUC. REV. 180, 180 (2015).
[448] HARRIS, *supra* note 434, at 49–50.
[449] *See, e.g.*, *id.* at 52–55.
[450] LOMAX & KUENZI, *supra* note 446, at 3.

and W_d represents the collection of within-district variables (such as the school, the principal, the teacher, the curriculum, etc.). β_0 is the intercept, which represents the predicted test score if all other variables were set to "0."[451] As with all statistical models, an error term must be included.[452]

The formula above is a simple linear regression model, and value-added models often get significantly more complex.[453] Despite the complexity, however, the idea is relatively straight-forward. A statistician or analyst attempting to determine the effect of district variables (W_d) will *control* for β_0 and β_1 and *isolate* β_2.[454] For an example of how this work, consider an average student who should learn at a rate of one grade-level per year (thus, the student should be able to go from getting an A in fourth grade material to getting an A in fifth grade material in one year), and say that the student's growth rate should be 1. If a student's home environment, mental capacity, general health, and other factors on the student side of the equation predict a growth level of 1, but the student shows a growth level of 1.5 (that is, the student learns all the fifth grade material and gets half-way through the sixth grade material), then we would attribute the extra 0.5 growth to the district variable. If we broke it down further into more variables, we might say that the teacher is responsible for 0.4, and the school environment generally added 0.1. This is the heart of what VAMs attempt to measure.[455]

[451] RACHEL A. GORDON, REGRESSION ANALYSIS FOR THE SOCIAL SCIENCES 166–67 (2nd ed. 2015); *see also* Jessica Levy et al., *Methodological Issues in Value-Added Modeling: An International Review From 26 Countries*, 31 EDUC. ASSESSMENT EVALUATION & ACCOUNTABILITY 257, 261 (2019).
[452] For a discussion of error terms in VAMs, see generally HARRIS, *supra* note 434, at 89–108.
[453] *See, e.g.*, Levy et al., *supra* note 451, at 261–62; Koedel et al., *supra* note 447, at 181–83.
[454] *See, e.g.*, Koedel et al., *supra* note 447, at 181 (using θ instead of β to show the difference).
[455] *See* HARRIS, *supra* note 434, at 72–74.

IV. The History of VAMs and Tenure Protections

Teacher tenure in elementary and secondary education spawned from the teacher unionization movement in the first half of the 20th Century.[456] Teachers' unions formed in response to poor salaries and unsafe working conditions.[457] In some cases, teachers were exposed to deadly illnesses by having to teach during large-scale outbreaks.[458] For all their suffering, teachers were often subject to removal following each school board election as part of a spoils system.[459] And teachers were often subject to racist and sexist policies, including infamous policies that prevented female teachers from keeping their jobs upon marriage.[460] Unions were able to change these policies and enact tenure protections as part of the progressive "good government" movement, which saw civil service (including teachers) become more professionalized and insulated from politics.[461]

Insulation from politics led to a resistance from rapid political changes.[462] Some scholars and political elites view education as a go-to source for fixing all of society's ills, and the resistant nature of educators means that improvements would happen slowly, without a sudden upheaval of established systems and power structures.[463] Reform discussions followed predictable trends. Conservative periods stressed Darwinian competition, and progressive periods stressed equality and equity.[464] Ultimately, reforms that stuck did not track the timing of

[456] Superfine, *supra* note 19, at 596.
[457] Timothy DeLoache Edmonds, *Contracting Away Success: The Way Teacher Collective Bargaining Agreements Are Undermining the Education of America's Children*, 2 COLUM. J. RACE & L. 199, 202–3 (2012).
[458] *See, e.g., id.* at 203 (discussing Chicago teachers being required to work during the Typhoid epidemic). As current events have shown, this has not necessarily changed.
[459] Richard D. Kahlenberg, *Tenure: How Due Process Protects Teachers and Students*, 39 AM. EDUCATOR 4, 6 (2015).
[460] *Id.*
[461] *Id.*; Superfine, *supra* note 19, at 596–97.
[462] Tyack, *supra* note 124, at 6–7.
[463] Cuban, *supra* note 8, at 8.
[464] Tyack, *supra* note 124, at 3.

policy talk.[465] Politically charged reforms tended to be cyclical, and they tended to never be implemented in practice.[466] Reforms that worked were typically additive, easily verified (such as adding new types of classes), worked without causing disruption to teachers, and created constituencies committed to keeping the reforms.[467]

Prior to the 1990's, the federal government's role in education was "close to nil."[468] In 1994, however, the federal government took a larger role in curriculum standards with the Goals 2000: Educate America Act and the Improving America's School Act.[469] These acts provided funds to states to develop standards and assessment programs and conditioned current funds on the development of standards and assessment programs.[470]

In 2002, the federal government took a giant leap into the classroom with No Child Left Behind ("NCLB").[471] NCLB required states to place a "highly qualified teacher" in every classroom.[472] A highly qualified teacher was generally required to have at least a bachelor's degree, be fully certified, and have "demonstrated knowledge and skills in his or her field."[473] NCLB also required states to hold schools accountable for student performance on standardized tests.[474] NCLB was "the first federal comprehensive educational framework consisting of

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[465] *Id.* at 9.
[466] *Id.* at 16–17.
[467] *Id.* at 14.
[468] Cuban, *supra* note 8, at 9. Title I of the Elementary and Secondary Education Act was important in education policy prior to the 1990's, but its importance was not about curriculum or accountability; it was about poverty and aid to the poor. Nora Gordon & Sarah Reber, *The Quest for a Targeted and Effective Title I ESEA: Challenges in Designing and Implementing Fiscal Compliance Rules*, 1 RUSSELL SAGE FOUND. J. SOC. SCI. 129, 129 (2015); ELIZABETH H. DEBRAY, POLITICS, IDEOLOGY, & EDUCATION: FEDERAL POLICY DURING THE CLINTON AND BUSH ADMINISTRATIONS 7 (2006).
[469] Superfine, *supra* note 19, at 597.
[470] *Id.* at 597–98.
[471] *Id.* at 598.
[472] *Id.*
[473] *Id.*
[474] *Id.*

standards, assessments, and accountability."[475] It required testing for grades 3 through 8, and it required specific data collection on students, including their test scores.[476] Unfortunately, NCLB's requirements were properly categorized as lofty ideals, and states could not actually meet them.[477]

In 2009, the American Recovery and Reinvestment Act allowed states to obtain waivers from certain provisions of NCLB and created financial incentives for engaging in certain reforms.[478] One of the financial incentives was the Race to the Top Fund (RttT), a competitive grant program with $4.35 billion in funding.[479] RttT had four stated criteria in which states would compete:

> (a) the implementation of international standards and assessments with the goal of preparing students to successfully enter the workplace or a college classroom; (b) the establishment of data systems to measure performance and provide meaningful statistics to inform teachers and administrators where and how they can improve; (c) an increase in effective teachers and principals (as well as improved equity in the distribution of those effective educators; and (d) the boosting of low-achieving school districts.[480]

In response to RttT, several states passed laws mandating that VAMs be incorporated into teacher performance evaluations.[481] In all, 40 states and the District of Columbia competed in the beginning of RttT, and – by the end – only four states chose not to apply.[482] From 2009 to 2012, 36 states and DC formally tied teacher tenure or evaluations to student test scores.[483]

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[475] Amanda Datnow & Vicki Park, *Conceptualizing Policy Implementation: Large-Scale Reform in an Era of Complexity, in* HANDBOOK OF EUDCATION POLICY RESEARCH 354 (Gary Sykes et al. eds., 2009).
[476] *Id.*
[477] Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 611 (2015).
[478] Superfine, *supra* note 19, at 592.
[479] *Id.* at 600.
[480] Rippeth, *supra* note 21, at 153.
[481] See, e.g., Trout v. Knox Cnty. Bd. of Educ., 163 F. Supp. 3d 492, 494 (E.D. Tenn. 2016) (describing Tennessee's passage of its First ot the Top Act).
[482] Rippeth, *supra* note 21, at 153.
[483] Superfine, *supra* note 19, at 592.

While the full implications of value-added assessments remain to be seen, Georgia presents an interesting case study. In 2000, Georgia passed the Education Reform Act, which removed teacher tenure for all teachers hired after July 1, 2000.[484] There was severe political pushback.[485] In May 2003, the Georgia General Assembly passed an act restoring teacher tenure.[486] An amendment was added to the 2003 bill that granted a financial incentive – a 5% pay increase – to teachers based on student test scores.[487] The performance incentive was repealed in 2012, while most states were moving in the opposite direction.[488] Georgia may be ahead of the curve if student assessments are not valuable in determining teacher performance. Or Georgia may simply be following its own trajectory, separate from the rest of the country. It remains to be seen if Georgia will try again.

V. VAMs in the Law

Judicial decisions regarding VAMs have led to mixed results. Although some best practices can be gleaned from case law, the general consensus is that VAMs are constitutional, even when they are unwise, with one caveat. Even where VAMs pass constitutional muster at the federal level, however, there may still be a split among state courts.[489]

In *Vergara v. State*, nine students who attended public schools in California sued to invalidate the teacher tenure, dismissal, and layoff provisions of California law.[490] The plaintiffs argued that the California tenure statute and dismissal and layoff procedures violated the equal

[484] Leslie Glover Toran, *Education: Elementary and Secondary Education: Reinstate Fair Dismissal and Due Process Rights for Elementary and Secondary Educators; Provide Monetary Incentives to Exceptional Teachers*, 20 GA. ST. U. L. REV. 138, 138–39 (2003).
[485] *Id.* at 139–41.
[486] *Id.* at 145.
[487] *Id.*
[488] O.C.G.A. § 20-2-212.4.
[489] Some VAMs-related cases are brought under state constitutional law. *See, e.g.*, Vergara v. State, 246 Cal. App. 4th 619, 627–28 (2016).
[490] *Id.* at 627.

protection provision of the California Constitution.[491] The alleged protected classes were: (1) students who were denied the fundamental right to education; and (2) minority and economically disadvantaged students.[492] California had a traditional K-12 teacher tenure framework, where teachers earned tenure after teaching for two consecutive school years with strict procedural requirements for termination of a tenured teacher.[493] In the event of layoffs, teachers would be laid off according to seniority, with the newest teachers laid off first.[494]

VAMs were not being challenged in this case. Instead, they were used as evidence regarding whether the tenure system led to the retention of less effective teachers.[495] The case was a battle of leading experts on both sides of the VAMs debate. Raj Chetty and Thomas Kane presented research arguing for the plaintiffs.[496] David Berliner, Linda Darling-Hammond, Jesse Rothstein, and Susan Moore Johnson presented research arguing for the defense.[497] The trial court found for the plaintiffs and declared the tenure statutes unconstitutional under the equal protection clause of the California Constitution.[498] The trial court reasoned that "teachers are a critical component of the success of a child's educational experience," and that "a significant number of grossly ineffective teachers are active in California classrooms."[499] The trial court found that the effects of grossly ineffective teachers satisfied the "shock the conscience" standard and that the burdens of grossly ineffective teachers disproportionately fell on poor and minority students.[500]

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[491] *Id.*
[492] *Id.* at 629. California recognizes wealth as a suspect classification under its constitutional law. *Id.* at 648.
[493] *Vergara v. State*, 246 Cal. App. 4th at 630–32.
[494] *Id.* at 632.
[495] *Id.* at 633–36.
[496] *Id.* at 633–36.
[497] *Id.* at 636–39.
[498] *Id.* at 639.
[499] *Id.* at 640.
[500] *Id.*

The California Court of Appeals reversed.[501] Because this was an equal protection case, and the plaintiffs did not bring a due process claim, the plaintiffs were required to identify discrete classes who were being treated differently, despite being otherwise similarly situated.[502] The class cannot be distinguished solely by the injury – an equal protection claim cannot be based in circular reasoning.[503] The first identified class was therefore inappropriate.[504] Because race and wealth are recognized suspect classifications under California law, they did not involve circular reasoning.[505] But this group's claims still failed.

Because the plaintiffs were not seeking individual relief from an allegedly unconstitutional application of law (they were not, for example, attempting to set aside a teacher's termination or student test results), but were instead attempting to have the entire tenure structure struck down, they had to raise a facial attack to the tenure statutes.[506] This meant that the plaintiffs bore the burden of showing that the statutes violated the Constitution on their face or that "the act's provisions *inevitably* pose a present total and fatal conflict with the applicable constitutional prohibitions."[507] "A statute is facially unconstitutional when the constitutional violation flows 'inevitably" from the statute, not the actions of the people implementing it."[508] In order to properly challenge the statutes, the plaintiffs would have to show "that the challenged statutes, regardless of how they are implemented, inevitably cause poor and minority students to be provided with an education that is not basically equivalent to their more affluent and/or white peers."[509]

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[501] *Id.* at 652.
[502] *Id.* at 644–46.
[503] *Id.* at 646–47.
[504] *Id.* at 646–48.
[505] *Id.* at 648.
[506] *Id.* at 643.
[507] *Id.* (emphasis added).
[508] *Id.* at 648.
[509] *Id.* at 649 (internal quotation omitted).

> No such showing was made. Instead, the evidence at trial firmly demonstrated that staffing decisions, including teacher assignments, are made by administrators, and that the process is guided by teacher preference, district policies, and collective bargaining agreements. This evidence is consistent with the process set forth in the Education Code, which grants school district superintendents the power to assign teachers to specific schools or to transfer teachers between schools within a district, subject to conditions imposed by collective bargaining agreements, district policies, and by statute.[510]

Although the tenure statute arguably allowed ineffective teachers to remain employed, the tenure statute alone did not cause ineffective teachers to concentrate in schools treating poor and minority students. District leaders, teacher preferences, and collective bargaining played roles in this distribution that prevented a facial challenge to the statute.

The most important case concerning Georgia is *Cook v. Bennett*, which was decided by the Eleventh Circuit.[511] In *Cook*, seven public school teachers and three local teachers' associations presented facial challenges to Florida's Student Success Act (the "FSSA") and as-applied challenges to how the FSSA was implemented by the Florida State Board of Education and three school districts.[512] The FSSA required that at least 50 percent of a teacher's performance evaluation be based upon student growth as determined by data from statewide testing on the Florida Comprehensive Assessment Test ("FCAT").[513] A VAM system was developed that gave value-added scores for English assessments in grades 4 through 10 and math scores in grades 4 through 8.[514] Teachers were divided into three categories.

"Type A" teachers were those who taught English in grades 4 through 10 or math in grades 4 through 8.[515] These teachers could receive a direct, individualized value-added score. "Type B"

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[510] *Id.*
[511] Cook v. Bennett, 792 F.3d 1294 (11th Cir. 2015).
[512] *Id.* at 1296, 1298. The facial challenge was dismissed in the lower court, and the dismissal was not appealed, meaning the as-applied claims were the only challenges on appeal (except for standing and mootness issues that are not relevant to this analysis). *Id.* at 1298.
[513] *Cook v. Bennett*, 792 F.3d at 1296–97.
[514] *Id.* at 1297.
[515] *Id.*

teachers either taught subjects other than English or math for grades 4 through 10, or were math teachers for grades 9 and 10.[516] The FSSA allowed type B teachers to be measured through other tests, but in practice they were measured based on their students' FCAT scores, even though they did not teach the subjects being tested.[517] "Type C" teachers were those who did not teach students who took the FCAT during the years the teachers and students were together (either because the teachers taught students before grade 4 or after grade 10, or because the teachers only taught students who were exempt from standardized testing).[518] Type C teachers were graded based on school-wide value-added scores.[519]

Plaintiffs challenged the use of VAMs for Type B and C teachers.[520] "[A]ll of the plaintiffs received student growth scores – the section of their evaluations based on the FCAT VAM – that were substantially lower than their scores in the sections of the evaluations not based on the FCAT VAM."[521] Both due process and equal protection challenges were raised.[522] Unfortunately for plaintiffs, they were in the Eleventh Circuit. The right to employment is not a fundamental right,[523] and Type B and C teachers are not suspect classifications.[524] Rational basis review applied,[525] and the Eleventh Circuit follows a standard that is all but impossible for plaintiffs to meet:

> We will uphold a law if there is any reasonably conceivable state of facts that could provide a rational basis for it. A state has no obligation to produce evidence to sustain the rationality of a statutory classification. The burden is on the one attacking the law to negate every conceivable basis that might support it, even if that basis has no foundation in the record. A law need not be sensible to pass

[516] *Id.*
[517] *Id.*
[518] *Id.*
[519] *Id.* at 1298.
[520] *Id.* at 1299.
[521] *Id.*
[522] *Id.* at 1298.
[523] *Id.* at 1300.
[524] *Id.* at 1301.
[525] *Id.* at 1300–1301.

> rational basis review; rather, it may be based on rational speculation unsupported by evidence or empirical data. A statute survives rational basis review even if it seems unwise[,] or if the rationale for it seems tenuous.[526]

The defendants argued that "it is still rational to think that the challenged evaluation procedures would advance the government's stated purpose" of "increas[ing] student academic performance by improving the quality of instructional, administrative, and supervisory services."[527] Because of the harsh standard used in the Eleventh Circuit, the use of VAMs was upheld, and the plaintiffs lost.[528]

In two separate cases, teachers attempted to challenge VAMs use in Tennessee. In *Wagner v. Haslam*, teachers who were evaluated based on school-wide scores – similar to the Type B and C teachers in *Cook* – challenged the use of VAMs in their evaluations.[529] The plaintiffs also challenged the formula used for value-added scores, alleging that the formula failed "to control adequately for various factors outside the control of an individual teacher that can impact test scores, including out-of-school factors (such as parental support for learning, poverty, and English learner status) and school-wide factors (such as class size, instructional time, and school resources)."[530] The plaintiffs also demonstrated scholarly criticism of value-added in personnel actions.[531] Just as in *Cook*, the plaintiffs lost when VAMs survived rational basis review.[532] In *Trout v. Knox County Board of Education*, the Eastern District of Tennessee went further than simply finding that Tennessee's value-added system passed rational basis review; the court noted that civil cases are decided on a "preponderance of the evidence" standard of 51% confidence,

[526] *Id.* at 1300 (internal citations and quotations omitted).
[527] *Id.* at 1301.
[528] *Id.* at 1302.
[529] Wagner v. Haslam, 112 F. Supp. 3d 673, 690 (W.D. Tenn. 2015).
[530] *Id.* at 681.
[531] *Id.*
[532] *Id.* at 694–97.

while a personnel decision based on a teacher falling one standard deviation from the median grants a 68% confidence interval that a teacher is above or below expectations.[533]

In contrast to the *Cook*, *Wagner*, and *Trout* cases, the plaintiff in *Lederman v. King* was able to convince the New York Supreme Court[534] that the New York State Growth Measures were arbitrary and capricious.[535] The petitioner's value-added score dropped from 14/20 to 1/20 within a year, even though her students largely met or exceeded state standards.[536] The petitioner claimed that the value-added models "unjustly punish[ed] teachers whose students consistently score substantially in excess of state's standards."[537] Like in *Vergara*, the plaintiff was able to get several leading VAM scholars to critique New York's models, including Linda Darling-Hammond, Aaron M. Pallas, Audrey Amrein-Beardsley, and Brad Lindell.[538] Following a full assault on New York's VAMs, the court concluded that personnel decisions based on these models (at least as applied to the petitioner) were arbitrary and capricious, and the court set aside the petitioner's scores.[539]

In *Houston Federation of Teachers, Local 2415 v. Houston Independent School District*, the plaintiffs attempted a new argument.[540] Substantive due process and equal protection failed to overturn the use of VAMs by the Houston Independent School District ("HISD"), just like in *Cook*, *Wagner*, and *Trout*.[541] But the plaintiffs also challenged VAMs on procedural due process grounds.[542] HISD contracted with a private company to do value-added assessments of

[533] Trout v. Knox Cnty. Bd. of Educ., 163 F. Supp. 3d 492, 503 (E.D. Tenn. 2016).
[534] In New York, the Supreme Court is the trial court, not the high court, so its decisions are not binding precedent.
[535] Lederman v. King, 47 N.Y.S.3d 838, 897–98 (N.Y. Sup. Ct. 2016).
[536] *Id.* at 891.
[537] *Id.*
[538] *Id.* at 891–93.
[539] *Id.* at 898.
[540] Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist., 251 F. Supp. 3d 1168 (S.D. Tex. 2017).
[541] *Id.* at 1180–83 (citing Cook v. Bennett, 792 F.3d 1294 (11th Cir. 2015), Wagner v. Haslam, 112 F. Supp. 3d 673 (W.D. Tenn. 2015), and Trout v. Knox Cnty. Bd. of Educ., 163 F. Supp. 3d 492 (E.D. Tenn. 2016)).
[542] *Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 251 F. Supp. 3d at 1175.

teachers.[543] HISD did not verify or audit the scores received by the contractor, and the formulas used to calculate scores were kept secret from the district and teachers.[544] Even though the plaintiffs retained an expert to review their scores, the expert was unable to replicate the final scores.[545]

Additionally, if a single data point was incorrect, any correction would involve a system-wide recalculation, which was expensive enough that the district refused to correct mistakes.[546] The court was quite concerned with "the house-of-cards fragility of the [evaluation] system, where the wrong score of a single teacher could alter the scores of every other teacher in the district."[547] The court stated, "without access to data supporting *all* teacher scores, any teacher facing discharge for a low value-added score will necessarily be unable to verify that her own score is error-free."[548]

Because teachers had no meaningful way to contest (or even understand) their scores, the court rule, the court ruled against the school district on procedural due process.[549] This case has important, though limited, ramifications. The case is a district court case, so it is not binding on any court. Additionally, the decision was founded upon procedural due process for a protected property right in tenure,[550] but some circuits – such as the Sixth Circuit – do not recognize tenure rights as property rights.[551] This case will also be unhelpful in scenarios where the value-added models are available for review. What this case can mean, however, is that teachers must be given the opportunity to have an expert verify or attack the models used, which adds a layer of

[543] *Id.* at 1177.
[544] *Id.*
[545] *Id.*
[546] *Id.* at 1177–78.
[547] *Id.* at 1178.
[548] *Id.*
[549] *Id.* at 1180.
[550] *Id.*
[551] *See, e.g.*, Trout v. Knox Cnty. Bd. of Educ., 163 F. Supp. 3d 492, 501 (E.D. Tenn. 2016).

procedural protection and can overturn individual personnel actions, such as happened in *Lederman*.

In addition to VAMs being used by school districts, they can also be used by teachers. In *Giansante v. Pittsburgh Public Schools*, a teacher alleged that he was terminated because of age discrimination.[552] After the school district stated that it fired the plaintiff for poor performance, he was able to challenge the district's reasoning because it refused to consider his "exemplary" VAMs score of 97%.[553] Among the plaintiff's evidence of discrimination and pretext, the court found the favorable VAMs score to be the "most significant[]."[554] Using VAMs, the plaintiff was able to survive summary judgment on his discrimination claim and get to a jury.[555]

VI. What Empirical Studies Show About VAMs, Tenure Reform, and Performance Pay

a. Direct Benefits and Costs of Tenure and Tenure Reform

Maintaining a more protective system of tenure reduces labor costs from teacher salaries. Eric Brunner and Jennifer Imazeki conducted an OLS regression to determine the effects of probationary period length (the length of time a teacher must be employed by the same employer to qualify for tenure status) on teacher salaries.[556] Using the 1999-2000 Schools and Staffing Survey and a state-by-state survey of tenure laws, the authors examined the effect of probationary period length on log beginning teacher salaries.[557] Following a general OLS regression – which failed to show a statistically significant relationship between probationary period length and beginning wages (but did show a relationship between other factors and

[552] Giansante v. Pittsburgh Pub. Sch., 2019 WL 2422780, *1 (3rd Cir. June 10, 2019).
[553] *Id.* at *6.
[554] *Id.* at *12.
[555] *Id.* at *14.
[556] Brunner & Imazeki, *supra* note 437, at 165, 172.
[557] *Id.* at 167.

wages)[558] – the authors conducted a metro area fixed effects regression[559] and a state fixed effects regression.[560] and a regression that merged metro area and state fixed effects.[561]

Metro area fixed effects analysis showed a positive relationship between probationary period length and beginning wages, indicating that schools with longer probationary periods must offer higher starting salaries to offset the delayed tenure eligibility.[562] State fixed effects alone failed to show a relationship between probationary periods and wages, but the merged fixed effects regression retained the positive relationship from the metro area regression.[563] Despite differences in outcomes of the different models, this study provides strong evidence that delayed tenure decisions have a real cost, at least in metro areas, and that more teacher-friendly tenure rules enable states and districts to pay teachers less.

Other studies have produced similar results. In a study of the economic effects of different reforms, Jesse Rothstein found that removing tenure protections would require a 15% increase in teacher salaries and result in a 3.4% increase in class sizes.[564] In a study of teachers in Louisiana – which abolished its teacher tenure system – Strunk et al. found that newly tenured teachers and teachers who were about to be tenured were significantly more likely to quit teaching (either by leaving the profession or the state).[565] Additionally, teachers who were eligible to retire were significantly more likely to exit when tenure protections disappeared.[566] And traditionally disadvantaged schools saw significant losses in teaching staff.[567] The result of tenure removal

[558] *Id.* at 172.
[559] *Id.* at 172, 174–75.
[560] *Id.* at 175–78.
[561] *Id.*
[562] *Id.* at 172, 174–75.
[563] *Id.* at 176–78.
[564] Jesse Rothstein, *Teacher Quality Policy When Supply Matters*, 105 AM. ECON. REV. 100, 115–16 (2015).
[565] Katharine O. Strunk et al., *When Tenure Ends: The Short-Run Effects of the Elimination of Louisiana's Teacher Employment Protections on Teacher Exit and Retirement* 26–27 (Apr. 2017).
[566] *Id.* at 27–28.
[567] *Id.* at 31.

was an immediate shock with early career and late career teachers leaving, and schools serving the poorest and most disadvantaged students being hit the hardest.

b. Value-Added Measures Generally

There have been many studies on VAMs. Koedel et al. provide a comprehensive meta-analysis and explanation of VAMs studies, including model specification/selection and estimation, along with bias and stability of value-added ratings.[568] They conclude that VAMs offer high potential to improve student learning if they can be appropriately used for personnel decisions.[569] But value-added assessments are susceptible to test measurement error, yielding a noticeable problem with consistency.[570] The use of different testing instruments alone can result in different groups of teachers being labeled high or low performing.[571] The authors note, however, that researchers and scholars are moving closer to a consensus on measures to improve consistency.[572]

Kane, however, presents a meta-analysis of five studies that highlight difficulties with implementation of VAMs and inconsistencies/instabilities of scores.[573] Darling-Hammond likewise presents a meta-analysis of studies that reinforce the notion that, while VAMs are clearly useful and effective, substantial flaws merit caution in their use.[574] These studies emphasize the empirical difficulties with VAMs.

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[568] *See generally* Koedel et al., *supra* note 447.
[569] *Id.* at 190–92.
[570] *Id.* at 189–90.
[571] *Id.*
[572] *Id.* at 192.
[573] *See generally* Thomas J. Kane, *Do Value-Added Estimates Identify Causal Effects of Teachers and Schools* (Oct. 2014).
[574] *See generally* Linda Darling-Hammond, *Can Value Added Add Value to Teacher Evaluation?*, 44 EDUC. RESEARCHER 132 (2015).

To determine how political actors deal with expert-advised cautions about VAMs, Gloria Tobiason conducted a descriptive content analysis of political discussions concerning VAMs.[575] The author found that VAMs discussions often attract dubious tactics to use value-added models that do not address experts' concerns in high-stakes personnel decisions, including pretending that technical concerns have been resolved,[576] ignoring technical concerns,[577] and various forms of *ad hominem* attacks on opponents of VAMs.[578] Background information on how VAMs are sold to the public or pushed into high-stakes decision-making too early could affect studies examining teacher responses to VAMs. For example, teachers may exit at higher rates when VAMs are implemented following a series of *ad hominem* attacks that suggest teacher concerns are simply trying to cover for inadequacy. This background information may not be available for quantitative studies such as that by Strunk et al.,[579] and it presents a challenge for theoretical studies such as those by Brunner and Imazeki[580] or by Rothstein.[581]

VAMs have also been studied in a *post-hoc* theoretical manner to determine what a changed performance-based layoff structure would look like. Boyd et al. used *post-hoc* theoretical analysis of potential layoffs equivalent to 5% of expenditures on teacher salaries in New York City Public Schools.[582] The authors compare a seniority-based layoff structure with a VAM-based layoff structure.[583] The authors then examine both the effects of using VAMs on the number of teachers who would be laid off and the teacher quality distribution of those who

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[575] Glory Tobiason, *Talking Our Way Around Expert Caution: A Rhetorical Analysis of VAM*, 48 EDUC. RESEARCHER 19, 20 (2019).
[576] *Id.* at 21–22.
[577] *Id.* at 22–23.
[578] *Id.* at 23–26.
[579] *See generally* Strunk et al., *supra* note 565.
[580] *See generally* Brunner & Imazeki, *supra* note 437.
[581] *See generally* Rothstein, *supra* note 564.
[582] Donald Boyd et al., *Teacher Layoffs: An Empirical Illustration of Seniority Versus Measures of Effectiveness*, 6 EDUC. FIN. & POL'Y 439, 443–44 (2011).
[583] *Id.* at 445.

would theoretically remain under each system.[584] Regarding the number of teachers who would be laid off, using a VAM-based layoff structure would result in fewer layoffs (5% of teachers versus 7% under a seniority-based structure).[585] The authors also determined that the teachers who remained under a VAM-based layoff structure would be more effective.[586] But the performance-based conclusion is question-begging; the authors use VAMs to determine the effectiveness of teachers to determine whether VAM-based layoffs would work, an exercise in circular reasoning.[587]

Goldhaber and Hansen use *post-hoc* theoretical analysis of 4th and 5th graders in North Carolina to estimate the effects of replacing the bottom 25% of teachers (as determined by a value-added model the authors tested in the same paper) with average first- or second-year teachers.[588] The authors collected 26,280 year-end student evaluations, each of which contained math and reading assessments.[589] While the same student could be counted multiple time across the various school years (the study examined scores from the 1995-96 school year through the 2005-06 school year), the only students who were counted had a single teacher throughout the school day.[590] Additionally, each of the 609 teachers examined had sufficient data to yield pre-tenure and post-tenure VAMs scores.[591] The authors concluded that replacement of the bottom 25% of teachers with average new hires would result in 0.025 of a standard deviation improvement in student achievement.[592]

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[584] *Id.*
[585] *Id.*
[586] *Id.* at 445, 448–49.
[587] *Id.* at 448–49.
[588] Dan Goldhaber & Michael Hansen, *Implicit Measurement of Teacher Quality: Using Performance on the Job to Inform Teacher Tenure Decisions,* 100 AM. ECON. REV. 250, 253 (2010).
[589] *Id.* at 251.
[590] *Id.*
[591] *Id.*
[592] *Id.* at 253.

Similar to Goldhaber and Hansen, Winters and Cowen used existing data on 4th and 5th grade students who only had one teacher throughout the day.[593] Winters and Cowen examined students in Florida who took a state reading test from the 2004-05 school year through the 2008-09 school year.[594] This study was much larger, covering 227,014 students and 15,152 teachers.[595] Unlike Goldhaber and Hansen, Winters and Cowen looked at teachers who would have been removed had the school used a VAM-based dismissal policy.[596] The students who then had those teachers over the two-year period following the theoretical removal were compared with students who had the satisfactorily-performing teachers.[597] The authors determined that the low-VAM teachers continued to have lower VAM scores, and the students subsequently assigned to the low-VAM teachers performed worse than students who were assigned to higher-VAM teachers.[598]

The relevance of the Winters and Cowen study has important limitations. Because it was a *post-hoc* analysis, the authors were unable to test policy changes or interventions to help lower-VAM teachers.[599] Although the study does suggest that normal experience gains are unlikely to improve a teacher's VAM score relative to other teachers,[600] the apparent lack of interventions calls into question the implication that lower-VAM teachers will continue to have lower VAM scores over time. Additionally, this study used VAMs to select candidates for termination and to judge the effects of these terminations, which leads to concerns over circular logic.

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[593] Marcus A. Winters & Joshua M. Cowen, *Who Would Stay, Who Would Be Dismissed? An Empirical Consideration of Value-Added Teacher Retention Policies*, 42 EDUCATIONAL RESEARCHER 330, 332 (2013).
[594] *Id.*
[595] *Id.*
[596] *Id.* at 332–33.
[597] *Id.*
[598] *Id.* at 333.
[599] *Id.* at 336.
[600] *Id.* at 333.

c. Performance Pay

Domestic empirical research into incentive pay has largely failed to show that pay-for-performance schemes improve student achievement. The Springer et al. POINT study enlisted 296 middle school math teachers in the Metro Nashville Public School System for a three-year randomized experiment.[601] Teachers in the treatment group were eligible for bonuses of $5,000, $10,000, or $15,000 if they met specified thresholds of student improvement on the Tennessee Comprehensive Assessment Program.[602] The study showed no significant effect on student achievement.[603] Although student assignments were not randomized, and only half of the participating teachers remained throughout the study, no bias resulted therefrom.[604]

In contrast to the POINT study, Dee and Wyckoff found some positive effects at the margins in the DC IMPACT Program.[605] Using VAMs in conjunction with multiple structured classroom observations, teachers in DC Public Schools were rated "Highly Effective," "Effective," "Minimally Effective," or "Ineffective."[606] Any teacher rated "Highly Effective" received a bonus and a notice that receiving a "Highly Effective" rating for a second consecutive year would result in a substantial – and permanent – raise.[607] Teachers rated "Minimally Effective" received a warning that a second consecutive "Minimally Effective" rating would result in termination.[608] Teachers rated "Ineffective" were terminated.[609]

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[601] Matthew G. Springer et al., *Teacher Pay for Performance: Experimental Evidence from the Project on Incentives in Teaching* 3–5 (Sep. 2010).
[602] *Id.* at 4.
[603] *Id.* at 43–44.
[604] *Id.* at 15–17.
[605] Thomas Dee & James Wyckoff, *Incentives, Selection, and Teacher Performance: Evidence from Impact* 4 (Oct. 2013), http://www.nber.org/papers/w19529.
[606] *Id.* at 9–10.
[607] *Id.* at 3–4.
[608] *Id.* at 3.
[609] *Id.* at 10.

The researchers conducted a regression discontinuity analysis of those teachers close to the "Highly Effective"/"Effective" and "Effective"/"Minimally Effective" thresholds to see if incentives or disincentives were able to influence future performance.[610] The researchers found significant differences at both thresholds.[611] Along the lower threshold, teachers who received dismissal threats were more than 50 percent more likely to leave voluntarily, and those who remained improved their performance by 0.27 of a standard deviation.[612] At the higher threshold, there was no difference in attrition, but teachers eligible for permanent raises further improved their performance, with an effect size of 0.24.[613] Importantly, however, changes in teacher performance were measured.[614] Although student achievement through VAMs formed part of each teachers' performance rating, it was not the sole determinant.[615]

In a study on group incentives, Springer et al. examined the effects of shared bonus eligibility with teacher teams in the Round Rock Independent School District.[616] 665 teachers were combined into 159 teams.[617] These teachers taught Grades 6 through 8 and accounted for 17,307 students over the course of the study.[618] Using VAMs, treatment teacher teams were ranked, and those in the top 1/3 received bonuses.[619] Measures were taken to ensure that within-school competition did not cause a lost bonus in order to prevent hostilities in the schools.[620] The treatment group was then compared to a control group not eligible for bonuses.[621] The study

[610] *Id.* at 3–4.
[611] *Id.* at 21–23.
[612] *Id.*
[613] *Id.*
[614] *Id.* at 25–26.
[615] *Id.* at 9–10.
[616] Matthew G. Springer et al., *supra* note 601, at 371–72.
[617] *Id.* at 371.
[618] *Id.*
[619] *Id.* at 372.
[620] *Id.* at 373.
[621] *Id.* at 379–82.

showed no difference in student achievement and no difference in teacher attitudes or perception of school culture.[622]

One clear standout in the area of performance pay is a study by Fryer et al.[623] In this study, teachers in 9 Chicago-area schools were divided into two treatment groups and a control group.[624] Teachers in the two treatment groups were eligible for up to an $8,000 bonus, based on how their students improved on statewide exams relative to their peers.[625] The first group – called the "Loss" group – received $4,000 up-front.[626] If a "Loss" teacher earned a bonus of less than $4,000, the teacher would have to pay back the difference between the earned bonus and the advanced amount.[627] If a "Loss" teacher earned a bonus over $4,000, the teacher would receive the difference between the earned bonus and the advanced amount.[628] The second group – called the "Gain" group – was not advanced any money, but the teachers were awarded bonuses according to the same criteria.[629] The control group was not eligible for bonuses.[630]

Most student achievement coefficients were not statistically significantly different between the "Gain" and control groups, and those that were significant were only marginally significant.[631] This is consistent with prior studies showing ineffectiveness of traditional pay-for-performance schemes for teachers.[632] But the "Loss" group experienced improvements in student math scores between 0.201 and 0.398 standard deviations, the equivalent of a greater

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[622] *Id.* at 382.
[623] Roland G. Fryer, Jr et al., *Enhancing the Efficacy of Teacher Incentives Through Loss Aversion: A Field Experiment* (Jul. 2012), http://www.nber.org/papers/w18237.
[624] *Id.* at 2–3.
[625] *Id.* at 7–8.
[626] *Id.* at 10.
[627] *Id.*
[628] *Id.*
[629] *Id.* at 10–11.
[630] *See id.* at 7.
[631] *Id.* at 14.
[632] *Id.*

than one standard deviation increase in teacher quality.[633] Whether loss-mitigation models are politically viable is beyond the scope of this article, but there is evidence that they motivate teachers and improve student performance, at least under the circumstances present in this study.

VII. Post-Tenure Review in Post-Secondary Institutions

Unlike the relatively modern development of K-12 teacher tenure, tenure in higher education traces its origin to twelfth century Europe.[634] One reason the Dark Ages were "dark" was the "prolonged external political control of knowledge," where any new intellectual development that challenged the status quo could be "prohibited, punished, and purged."[635] As the Dark Ages ended and Enlightenment began, institutions that protected academic freedom enjoyed great success in the arts and sciences.[636] American universities followed Europe's example and maintained strong protections for academic freedom.[637]

Formal tenure – meaning a legal right to reappointment – did not exist in the traditional European model; it is a relatively recent development.[638] Tenure started gaining momentum in the nineteenth and twentieth centuries.[639] In contrast to the older institutions in the Northeast that followed a more traditional European model, tenure formed in newer institutions on the West Coast, the Midwest, and the South.[640] The growth in new institutions led to the founding of the American Association of University Professors ("AAUP") in 1915.[641] In 1940, the AAUP

[633] *Id.* at 14–15.
[634] Margit Livingston, *Tenure Revisited*, 61 B.C. L. REV. E. SUPP. I., I.-12 (2020).
[635] JOHN DAYTON, HIGHER EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE 216 (2015).
[636] *See id.*
[637] *Id.*
[638] Stephen J. Leacock, *Tenure Matters: The Anatomy of Tenure and Academic Survival in American Legal Education*, 45 OHIO N.U. L. REV. 115, 123 (2019).
[639] Livingston, *supra* note 634, at I.-12.
[640] Leacock, *supra* note 638, at 123–24.
[641] *Id.* at 124.

formally issued its Statement of Principles on Academic Freedom and Tenure,[642] which has become the most widely accepted definition of tenure.[643]

Tenure is firmly rooted in protected academic freedom, but it also does more.[644] Tenure allows universities to offer economic security in place of higher salaries.[645] This is particularly important for professional fields, where professors could make significantly more money in private practices.[646] Because tenure in higher education is only awarded to professors who earn it (and who the university actively wants to retain), tenure can be "a cost-free employment incentive" to retain good professors.[647]

Although post-secondary tenure spawned from a longer tradition not present for K-12 tenure, the two forms of tenure came into being and prominence in roughly the same time period during the late nineteenth and early twentieth centuries.[648] Just as K-12 tenure faced criticism in the growing accountability movement starting in the 1990's,[649] post-secondary tenure saw its own criticism from an accountability movement that started in the 1970's and came into full force in the 1990's.[650] In medical schools, this accountability movement saw a drastic reduction in tenure-eligible positions, with medical schools decreasing the proportion of MD faculty on tenure-track positions from 59% to 26% between 1984 and 2014.[651] In 2013, the American Bar

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[642] AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), https://www.aaup.org/file/1940%20Statement.pdf.
[643] Leacock, *supra* note 638, at 125.
[644] DAYTON, *supra* note 635, at 391.
[645] *Id.*
[646] Livingston, *supra* note 634, at I.-12-13.
[647] DAYTON, *supra* note 635, at 391.
[648] *Compare supra* nn. 456-61, *with supra* nn. 638-43.
[649] *Supra* nn. 469-83.
[650] Jeffery P. Aper & Judith E. Fry, *Post-Tenure Review at Graduate Institutions in the United States: Recommendations and Reality*, 74 J. HIGHER EDUC. 241, 241–42 (2003).
[651] Sarah A. Bunton et al., *Post-Tenure Review at U.S. Medical Schools*, 91 ACAD. MED. 1691, 1691 (2016).

Association ("ABA") considered requiring accredited law schools to eliminate tenure entirely, though the ABA did not end up adopting the requirement.[652]

Instead of removing tenure entirely, many universities turned to a different option: the post-tenure review ("PTR").[653] PTR is defined as "a systematic, comprehensive process, separate from the annual review, aimed specifically at assessing performance and/or nurturing faculty growth and development."[654] PTRs are generally performed by a committee formed by a combination of administrators and faculty peers.[655] Reviews are conducted every five to seven years.[656] PTRs are seen as "career-trajectory," in contrast to annual evaluations.[657] If a professor fails their PTR evaluation, the committee might require professional development, change the professor's job duties, or simply issue a warning.[658] If the professor refuses to follow the development plan or fails to improve to an acceptable level, they can lose tenure (returned to contract status) or be dismissed.[659]

There are two general types of PTRs. The first is a summative evaluation, where the committee reviews a faculty member's accomplishments (such as publications, grants, student evaluations, and annual reviews) as a basis for a personnel action.[660] The second is a formative

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[652] Leacock, *supra* note 638, at 125–26.
[653] Aper & Fry, *supra* note 650, at 241; *see also* Richard Edwards, *Can Post-Tenure Review Help Us Save the Tenure System?*, 83 ACADEME at 26, 26 (May–Jun. 1997).
[654] Edwards, *supra* note 653, at 26 (quoting Christine M. Licata & Joseph C. Morreale, *Post-Tenure Review: Policies, Practices, Precautions* 1 (AAHE New Pathways Working Paper Series No. 12, 1997)).
[655] *See, e.g.*, Bunton et al., *supra* note 651, at 1693.
[656] *See, e.g.*, *id.*; Edwards, *supra* note 653, at 26; Kaustuv Basu, *What Does a Post-Tenure Review Really Mean?*, https://www.insidehighered.com/news/2012/03/02/what-does-post-tenure-review-really-mean.
[657] Edwards, *supra* note 653, at 26.
[658] Bunton et al., *supra* note 651, at 1693; Audrey Williams June, *Most Professors Hate Post-Tenure Review. A Better Approach Might Look Like This.*, CHE, https://www.chronicle.com/article/most-professors-hate-post-tenure-review-a-better-approach-might-look-like-this/.
[659] See Basu, *supra* note 656.
[660] *See* Melinda Wood & Linda Johnsrud, *Post-Tenure Review: What Matters to Faculty*, 28 REV. HIGHER EDUC. 393, 395 (2005).

evaluation, where the faculty member discusses plans for the next cycle and gets input and advice from the committee.[661]

In practice, many PTRs end up being a combination of summative and formative, as most administrators view PTRs as a tool for both development and accountability.[662] Implementing PTR policies often requires a balance of both. PTR can be a concession to political opponents of tenure, granting increased accountability in exchange for maintaining tenure.[663] But formative purposes often must be stressed and implemented to convince faculty senates to approve and implement PTR policies.[664]

The effectiveness of PTR policies is a matter of debate. Some authors suggest that faculty and department leaders can (and some authors suggest they should) render PTR toothless, a superficial bit of paperwork to pacify politicians who call for increased accountability.[665] In a review of two graduate programs, Wood and Johnsrud found a near-even split on whether faculty and administrators viewed PTR as helpful.[666] It is widely agreed that most PTR policies permit faculty to conduct the reviews, allow flexibility, maintain confidentiality, and protect academic freedom.[667] In a review of medical schools, Bunton et al. concluded that PTR policies are "necessarily specific to the culture and circumstances of each institution."[668] It is not surprising that policies are heavily dependent on faculty culture in higher education; universities can be characterized as "organized anarchies," and the prospect of directing faculty is often referred to

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[661] *See id.*
[662] *See* Aper & Fry, *supra* note 650, at 255.
[663] *See, e.g.*, Edwards, *supra* note 653, at 26 (commenting that the Arizona Board of Regents was "within five minutes" of ending tenure for new faculty, but settled for a PTR policy).
[664] *See, e.g.*, June, *supra* note 658 (noting that career development had to be the main focus for the Faculty Senate of the University of Denver to approve what amounted to a PTR policy, complete with accountability measures for faculty whose "work isn't up to par").
[665] *See, e.g.*, Edwards, *supra* note 653, at 27.
[666] Wood & Johnsrud, *supra* note 660, at 405.
[667] Aper & Fry, *supra* note 650, at 252–53.
[668] Bunton et al., *supra* note 651, at 1694.

as "herding cats."[669] The fact that PTR has enjoyed some success and has been politically successful is quite the accomplishment.

VIII. Argument

As described above, VAMs are generally useful, but they are subject to high variability, and models are still developing. Although generally permissible, some courts are skeptical of VAMs, placing them in a legal limbo. The clear historical trend is in favor of greater accountability, and it appears that VAMs will be part of the education policy landscape. The question is how they will be used.

In the face of calls for tenure reform in higher education, PTR appeared as a compromise position.[670] The same could happen in K-12. It is a simple rule of statistics that more data means improved statistical power and accuracy.[671] By examining five years of data instead of one, the accuracy of a VAMs measure would improve. Additionally, more data would exist on the students, allowing for greater control of student variables. PTR would result in stronger, more reliable VAMs scores.

VAMs-based evaluations have been shown to affect teacher performance when done as part of a larger evaluation process that incorporates performance reviews from observations by administrators and other teachers.[672] A PTR model, where administrators and fellow teachers serve on a committee together and use regular evaluations along with VAMs, could recreate this effect. Because of the statistical analysis from VAMs that is not present in higher education, there is a decreased risk of PTR becoming a mere formality; evaluators would have to address

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[669] Thomas H. Hammond, *Herding Cats in University Hierarchies: Formal Structure and Policy Choice in American Research Universities, in* RONALD G. EHRENBERG, GOVERNING ACADEMIA 92 (2004).
[670] *See, e.g.*, Edwards, *supra* note 653, at 26 (commenting that the Arizona Board of Regents was "within five minutes" of ending tenure for new faculty, but settled for a PTR policy).
[671] *See, e.g.*, MURNANE & WILLETT, *supra* note 445, at 67.
[672] Dee & Wyckoff, *supra* note 605, at 4, 9–10.

the numbers in front of them. And having a combined summative and formative approach would allow the PTR process to combine the effects of evaluation and mentoring.

The focus would shift from punishing teachers who underperform to helping underperforming teachers who are willing to listen to administrators and fellow teachers. Removal of tenure would then be reserved for those teachers who refuse to comply or fail to improve after all efforts, scenarios already warranting dismissal as insubordination or incompetence.[673] This model would also increase collaboration among teachers, which has been documented to improve student outcomes.[674]

Perhaps the greatest benefit of a PTR model is its political viability. PTR represents a compromise, where faculty are subject to more accountability in exchange for greater control over accountability measures. The political success of PTR at stopping calls to end tenure in higher education suggests it might be successful at stopping calls for tenure reform in K-12 education. Conversely, it might be a way for proponents of greater accountability to get a successful measure passed when faced with strong opposition from teachers' unions.

One final note about the potential effectiveness of a PTR model is that it leverages loss mitigation in a less extreme way than the study by Fryer et al.[675] Where the Fryer et al. study made teachers give back bonuses, PTR would put teachers at risk of losing the tenure they earned. Loss mitigation was successful in the Fryer study,[676] despite its dubious political prospects. PTR is a more palatable method of hitting the same motivation.

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[673] O.C.G.A. § 20-2-940(a)(1)-(2).
[674] Helen F. Ladd, *Teachers' Perceptions of Their Working Conditions: How Predictive of Planned and Actual Teacher Movement?*, 33 EDUC. EVALUATION & POL'Y ANALYSIS 235, 237–38 (2011).
[675] Fryer, Jr et al., *supra* note 623.
[676] *Id.* at 14–15.

An opponent of limiting VAMs to a PTR process would likely ask, if VAMs are effective, why would they not be used until after tenure is earned? If a teacher must work three years before being eligible for tenure, would that not provide sufficient data (possibly in concert with traditional evaluations) and be enough to remove ineffective teachers before they earn tenure? The response is that most of a teacher's growth occurs in the first 1-5 years.[677] Statistical data collected during the probationary period is the most subject to variability. It is simply less accurate. Additionally, a PTR process that includes formative elements should mitigate the need for a data-intensive review teacher effects pre-tenure. If a teacher is defiant and not receptive to input, traditional evaluations should reveal this and allow such teachers to be removed prior to earning tenure. For teachers who are cooperative, but who need help, the formative elements of the PTR process should help them.

IX. Conclusion

VAMs are useful, but they are flawed. These flaws can be mitigated by limiting VAMs to a PTR process that takes the place of more costly tenure reforms. There is good reason to believe that VAMs could make a PTR process more successful in K-12 education than it is in higher education, and the political viability of PTR in higher education should translate well to the K-12 context. A PTR process that is properly formative can help struggling teachers improve, while reserving penalties for teachers who are defiant or truly incompetent. This process stands to leverage policies that empirical studies have shown to be effective while avoiding ineffective, politically charged reforms that are unlikely to succeed.

[677] Douglas N. Harris & Tim R. Sass, *Teacher Training, Teacher Quality, and Student Achievement* 19–20 (Urban Inst. Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research Working Paper No. 3, 2007).

CHAPTER 5

CONCLUSION

In this dissertation, I argued for a series of reforms geared toward protecting good teachers and school administrators while maintaining accountability for underperforming or bad teachers. These reforms are designed to encourage teachers and other education employees to do their jobs properly and be judged fairly. When these employees see something illegal or harmful, the reforms would protect them when they speak up. The reforms would also encourage professional development and fair evaluation. Teachers would not be subject to unreliable evaluation, and they would be given meaningful chances to improve performance when they struggle.

In the first manuscript, I demonstrated a gap in Georgia law that allows teachers, staff, and school administrators to suffer retaliation for reporting child abuse, neglect, or exploitation. This places children in danger and encourages teachers to not fulfill their legal and job duties. After an evaluation of Georgia's mandated reporter law and the gap in coverage, I presented the results of my survey of 54 U.S. jurisdictions. Using neighboring states as guides, I provided concrete options the Georgia General Assembly could enact into law. If the General Assembly were to adopt one of these solutions, Georgia's teachers would be better able to protect children.

In the second manuscript, I showed how the Georgia Court of Appeals has systematically eviscerated the Georgia Whistleblower Act ("GWA") since 2015. By removing GWA protections, public employees in Georgia can suffer retaliation if they report unlawful activity in the workplace or refuse to violate the law. Without protections, corruption can run rampant, to the detriment of students and good teachers. After reviewing the federal Whistleblower

Protection Act ("WPA"), which underwent similar judicial treatment, I used the federal Whistleblower Protection Enhancement Act ("WPEA") as inspiration for how to fix the GWA. I provided and argued for specific amendment language the Georgia General Assembly could use to return life to the GWA.

In the third manuscript, I addressed the growing movement to reform K-12 teacher tenure and incorporate value-added measures ("VAMs") for teacher retention and performance pay. I explained how VAMs work, and then I examined the history of K-12 teacher tenure and tenure reform. I next examined VAMs litigation and concluded that it is generally legal to use VAMs for employment decisions, though districts must be careful to avoid legal pitfalls. I then examined empirical studies on tenure reform, VAMs, and incentive pay for teachers. I concluded that VAMs are generally useful, but they are not reliable enough for high-stakes yearly evaluations or personnel actions. I then drew upon the post-tenure review ("PTR") from higher education policy to suggest that schools incorporate VAMs in a limited capacity during a PTR process. This process is a political compromise that can satisfy proponents of greater accountability while leveraging empirical studies and peer committees to improve teacher performance without being punitive towards teachers generally.

Although this dissertation is directed towards Georgia legislators, policymakers, and scholars, the implications and recommendations are relevant to other states as well. Protecting children from abuse, neglect, and exploitation is a universal concern. Guarding against corruption is also a universal concern. Most importantly, every state (and every country) should strive to provide a safe learning environment with quality educators, and those educators should find themselves in a safe and developmentally nurturing environment.

Georgia is growing, and it is currently not meeting its educational needs.[678] In order to meet these needs, Georgia should enact common-sense reforms that protect good educators while holding bad educators accountable. Educators who display integrity protect their students should be protected. Educators should feel safe to do what is right. Additionally, teachers should be judged fairly, according to reliable metrics, and be given real opportunities to improve performance when they struggle. This dissertation provided reform suggestions that would help Georgia achieve these goals.

[678] GA. P'SHIP FOR EXCELLENCE IN EDUC., *supra* note 1, at 1–2.

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APPENDIX A

The Amended GWA, O.C.G.A. § 45-1-4:

(a) As used in this Code section, the term:

(1) “Government agency” means any agency of federal, state, or local government charged with the enforcement of laws, rules, or regulations.

(2) “Law, rule, or regulation” includes any federal, state, or local statute or ordinance or any rule or regulation adopted according to any federal, state, or local statute or ordinance.

(3) “Public employee” means any person who is employed by the executive, judicial, or legislative branch of the state or by any other department, board, bureau, commission, authority, or other agency of the state. This term also includes all employees, officials, and administrators of any agency covered by the rules of the State Personnel Board and any local or regional governmental entity that receives any funds from the State of Georgia or any state agency. This term also includes former public employees and applicants for public employment.

(4) “Public employer” means the executive, judicial, or legislative branch of the state; any other department, board, bureau, commission, authority, or other agency of the state which employs or appoints a public employee or public employees; or any local or regional governmental entity that receives any funds from the State of Georgia or any state agency.

(5) “Retaliate” or “retaliation” refers to the discharge, suspension, or demotion by a public employer of a public employee or any other adverse employment action taken by a public employer against a public employee that might dissuade a reasonable employee from engaging in protected activity~~in the terms or conditions of employment for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency~~.

(6) “Supervisor” means any individual:

(A) To whom a public employer has given authority to direct and control the work performance of the affected public employee;

(B) To whom a public employer has given authority to take corrective action regarding a protected disclosure by a violation of or noncompliance with a law, rule, or regulation of which the public employee complains; or

(C) Wh

o has been designated by a public employer to receive protected disclosures complaints regarding a violation of or noncompliance with a law, rule, or regulation.

(7) "Protected activity" means any activity constituting a protected disclosure, protected participation, or a protected objection. Disclosures, participation, and objections are protected regardless of whether the activity:

(A) is made or performed during the normal course of duties of the public employee;

(B) is made to a supervisor or to a person who participated in an activity that the public employee reasonably believed to be covered by the protected activity;

(C) reveals information that had been previously disclosed;

(D) is made in writing; or

(E) is made or performed while the public employee is off duty;

but disclosures and objections shall only constitute protected activity if made while the public employee is employed by a public employer.

(8) "Protected disclosure" means a formal or informal communication or transmission of information to a supervisor or government agency by a public employee which the public employee reasonably believes evidences:

(A) any violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(9) "Protected participation" means:

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation that concerns or relates to retaliation under this Code section;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information in an investigation, hearing, or court proceeding in connection with protected activity under this Code section.

(10) "Protected objection" means objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation.

(b) A public employer may receive and investigate protected disclosures ~~complaints or information from any public employee~~ concerning ~~the possible existence of any activity~~

~~constituting fraud, waste, and abuse in~~ or relating to any state programs and operations under the jurisdiction of such public employer.

(c) Notwithstanding any other law to the contrary, such public employer shall not after receipt of a complaint or information from a public employee disclose the identity of the public employee without the written consent of such public employee, unless the public employer determines such disclosure is necessary and unavoidable during the course of the investigation. In such event, the public employee shall be notified in writing at least seven days prior to such disclosure.

(d)

(1) No public employer shall make, adopt, or enforce any policy or practice preventing a public employee from engaging in protected activity ~~disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency~~.

(2) No public employer shall retaliate against a public employee for engaging in protected activity ~~for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity~~.

~~(3) No public employer shall retaliate against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe in in violation of or noncompliance with a law, rule, or regulation.~~

~~(4)~~(3) Paragraphs (1) and (2)~~(1), (2), and (3)~~ of this subsection shall not apply to policies or practices which implement, or to actions by public employers against employees who violate, privilege or confidentiality obligations recognized by constitutional, statutory, or common law.

(e)

(1) A public employee who has been the object of retaliation in violation of this Code section may institute a civil action in superior court for relief as set forth in paragraph (2) of this subsection within one year after discovering the retaliation or within three years after the retaliation, whichever is earlier.

(2) In any action brought pursuant to this subsection, the court may order any or all of the following relief:

(A) An injunction restraining continued violation of this Code section;

(B) Reinstatement of the employee to the same position held before the retaliation or to an equivalent position;

(C) Reinstatement of full fringe benefits and seniority rights;

(D) Compensation for lost wages, benefits, and other remuneration; and

(E) Any other compensatory damages allowable at law.

(f) A court may award reasonable attorney's fees, court costs, and expenses to a prevailing public employee.

(g)

(1) Subject to the provisions of paragraph (2), in any case under this Code section, the court shall order relief under paragraphs (e) and (f) if the public employee has demonstrated that protected activity was a contributing factor in retaliation against the public employee by the public employer, even though other factors also motivated the adverse action. The public employee may demonstrate that the protected activity was a contributing factor in the personnel action through circumstantial evidence.

(2) Relief under paragraphs (e) and (f) may not be ordered if, after a finding that protected activity was a contributing factor, the public employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of such protected activity.