THE HOOSIERS GOT IT WRONG: THE NEED FOR STATES TO ENACT STRICTER PRESCRIBING REGULATIONS VIA TELEMEDICINE SERVICES

GABRIELLE A. VANCE*

ABSTRACT

In 2016 and 2017, Indiana amended its state telemedicine regulations to allow Indiana physicians to prescribe controlled substances to patients without an in-person examination. Although there are many promising benefits of telemedicine, researchers have not yet conducted enough tests or studies to fully know the consequences of prescribing without an in-person examination as well as other concerns with telemedicine services. In light of the ongoing opioid epidemic, lawmakers should be even more hesitant to lower the standards for prescribing regulations.

This Note will propose alternative solutions for legislators regarding telemedicine regulations and explain why other states should not mirror Indiana's recently enacted amendments.

* Gabrielle "Gabby" Vance will graduate from William & Mary Law School in 2021. She graduated summa cum laude from Elon University in 2018, receiving her BA in Political Science. Her passion for the opioid epidemic and telemedicine stemmed from serving as a research assistant for William & Mary law professor, Adam Gershowitz, and editing several of his articles on the opioid epidemic. Gabby would like to thank her most significant mentors, her Mom, Dad, and Dean Ende, Head of Career Services at William & Mary Law School. She publishes this Note in memory of her grandma, Joyce Vance, who passed during the last few publication stages of the Note. She taught Gabby always to follow her dreams and to be a "we" person not an "I" person.

TABLE OF CONTENTS

INTRODUCTION

In 2001, Ryan Haight purchased prescription drugs online from a medical doctor that he never saw in person.[1] An online pharmacist delivered the drugs to his home.[2] His mother later found him lifeless in bed.[3] He overdosed on Vicodin, a prescription drug.[4] Unless it can be ensured that drugs being prescribed online will not lead to the next drug epidemic, prescribing without an in-person examination is too threatening.[5] As of right now, there is insufficient research and knowledge to fully understand the threats telemedicine might have on patients.[6]

Before the opioid crisis, very few scientists and researchers predicted such an epidemic.[7] However, in 1991, deaths involving

---

[1] *True Stories: Ryan Haight*, JUSTTHINKTWICE.GOV, https://www.justthinktwice.gov/true-stories/ryan-haight-18 [https://perma.cc/9LME-ACFB] [hereinafter *True Stories*]; *see* Bradley S. Davidsen, *New State Laws Allow Telehealth Prescriptions for Controlled Substances; Yet, Regulatory Obstacles Still Remain*, EPSTEIN BECKER GREEN (Jan. 22, 2018), https://www.techhealthperspectives.com/2018/01/22/new-state-laws-allow-telehealth-prescriptions-for-controlled-substances-yet-regulatory-obstacles-still-remain/ [https://perma.cc/KTY7-MKKF].

[2] *True Stories*, *supra* note 1.

[3] *Id.*

[4] *Id.*

[5] "Dr. V" is a good example of what can happen when a doctor makes a diagnosis without an in-person examination by the provider. Dr. V diagnosed and prescribed "Patient C" Imodium for stomach pain over the phone, without seeing or examining her in person. Ann W. Latner, *Fatal Outcome After Clinician Prescribes Without Seeing Patient, Monthly Prescribing Reference* (Oct. 2, 2017), https://www.empr.com/home/features/fatal-outcome-after-clinician-prescribes-without-seeing-patient/ [https://perma.cc/24WH-H8FV]. Dr. V failed to diagnose Patient C with colitis, which ultimately led to the patient's death. *Id.* "This is a dangerous proposition, but physicians occasionally do this when the patient is suffering a common or recurrent problem, or there is no other option. However, in this case, when the patient's issues were not improving, Dr. V should have seen her in person." *Id.*

[6] Shane O'Hanlon, *The Dangers of E-Health*, HEALTHINF, 423, 425 (2011).

[7] *See* Sarah DeWeerdt, *The Natural History of an Epidemic*: *Understanding how the Opioid Epidemic Arose in the United States Could Help to Predict How it Might Spread to Other Countries*, 573 NATURE INT'L J. SCI. 10, 11 (Sept. 12, 2019), https://www.nature.com/articles/d41586-019-02686-2 [https://perma.cc/XFP4-6VFG]; *see also* Qiushi Chen et al., *Prevention of Prescription Opioid Misuse and Projected Overdose Deaths in the United States*, JAMA NETWORK (Feb. 1, 2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2723405 [https://perma.cc/KFU8-XPWT].

opioids began to dramatically increase as pharmaceutical companies began to mislead prescribers "that the risk of addiction ... was very low."[8] As a result of overdose-related deaths, in 2015, for the first time in decades, the average life expectancy in the United States decreased.[9] Lobbying and advocacy groups continue to restrict efforts aimed to limit opioid prescribing.[10] The opioid epidemic serves as a forewarning of the dangers of drug abuse, addiction, and overdose in America.[11] Consequently, lawmakers should take extreme precautions when enacting drug-related legislation.

Recent Indiana legislation reduces the restrictions on physicians in respect to telemedicine, broadening their online prescribing abilities from the federal regulations enacted by Congress in 2008.[12] Now, Indiana medical providers are able to prescribe non-opioid controlled substances via telemedicine without an in-person examination.[13] "Telemedicine" is the access of clinical services to patients by practitioners from a distance via electronic communication.[14] Indianans recommend that other states mirror their updated prescribing amendments enacted in 2016 and 2017.[15]

---

[8] Lindsey Liu et al., *History of the Opioid Epidemic: How Did We Get Here?*, POISON CONTROL, https://www.poison.org/articles/opioid-epidemic-history-and-prescribing-patterns-182 [https://perma.cc/9AYE-DTK7].

[9] DeWeerdt, *supra* note 7, at 10.

[10] *See* Liu et al., *supra* note 8.

[11] *See* Cooper Smith, *The Opioid Epidemic*, ADDICTION CTR. (Aug. 21, 2020), https://www.addictioncenter.com/opiates/opioid-epidemic/ [https://perma.cc/SQW5-2XZA]; *see also Opioid Abuse*, AM. SOC'Y ANESTHESIOLOGISTS, https://www.asahq.org/whensecondscount/pain-management/opioid-treatment/opioid-abuse/ [https://perma.cc/8LSD-RWTP].

[12] Davidsen, *supra* note 1.

[13] *See id.*; *see also* Carah J. Austin, Note, *Hoosiers Leading the Way: Prescribing Non-Opioid Substances Via Telemedicine*, 16 IND. HEALTH L. REV. 299, 320–21 (2019).

[14] *Telemedicine Legal Series Part 1: Practical Issues*, COHEN HEALTH CARE, https://cohenhealthcarelaw.com/2017/11/telemedicine-legal-series-part-1-practice-issues/ [https://perma.cc/9WZ3-CCZP].

[15] Effective July 1, 2017, Indiana amended its telemedicine regulations. *See* Austin, *supra* note 13, at 320. The state's new amendment removed the parameter that banned the prescription of controlled substances through telemedicine services. *Id.* The amended Indiana law "allows providers to prescribe non-opioid controlled substances via telemedicine without an initial in-person examination by the prescriber." *Id.*

Indiana's Revised Code expands the ability to prescribe controlled substances and only limits the prescribing practices of opioids and abortion-inducing drugs online.[16] This Note cautions other states in making Indiana's telemedicine law a national trend. Other states should be wary of expanding access to drugs without at least an in-person examination.[17]

This Note will first provide a brief overview of what telemedicine is and its history within the United States.[18] Part II will describe Indiana's prescribing amendments enacted in 2016 and 2017, along with how its legislation compares to the other states.[19] Part II will also discuss federal telemedicine prescribing regulations.[20]

Part III will examine many of the dangers of prescribing via telemedicine services and the legal liability to service providers.[21] Part IV will suggest recommendations for other states' legislatures to follow instead of mirroring Indiana's prescribing amendments.[22] While this Note will briefly explain and address the federalism debate regarding telemedicine, a suggested solution to the ongoing question is outside the scope of this Note.[23]

---

[16] *See* Davidsen, *supra* note 1.

[17] *See* Karen M. Zundel, *Telemedicine: History, Applications, and the Impact on Librarianship*, 84 BULL. MED. LIBR. ASS'N 71, 72 (Jan. 1996); s*ee also* Davidsen, *supra* note 1.

[18] *See infra* Part I.

[19] *See infra* Part II.

[20] *See infra* Part II; *see also* Eric Wicklund, *DEA to Launch Registration Process for Prescriptions by Telemedicine*, MHEALTH INTEL. (Nov. 21, 2019), https://mhealthintelligence.com/news/dea-launches-registration-process-for-prescriptions-by-telemedicine [https://perma.cc/G6LW-QC3H].

[21] *See infra* Part III.

[22] *See infra* Part IV.

[23] State medical boards have historically been the watchdogs of the medical practice, however telemedicine demands the consideration of national standards because of the frequent interstate transactions. Pierron Tackes, *Going Online with Telemedicine: What Barriers Exist and How Might They be Resolved?*, 11 OKLA. J. L. & TECH. 1, 21 (2015). "[T]he context of telemedicine provides that an individual's best access to [receive health care] is no longer necessarily within state boundaries." *Id.* Therefore, the legislation should no longer be limited to local law. *See id.* at 21–22. Many telemedicine advocates believe the Drug Enforcement Agency (DEA) is the best-educated resource in terms of protecting Americans from drug abuse and addiction. *See, e.g.*, Wicklund, *supra* note 20. Similar to the unique balance of power of marijuana policy (prohibited by the federal government but increasingly authorized under state law), many states

I. BROAD OVERVIEW OF U.S. TELEMEDICINE AND ITS HISTORY

A. Bird's Eye View of Telemedicine

Telemedicine has a variety of definitions but in the broadest of terms it is the use of any kind of technology that provides remote medical services to patients.[24] According to the Oxford Dictionary, it is the "the remote diagnosis and treatment of patients by means of telecommunications technology."[25] The original purpose of telemedicine was to allow physicians to treat patients who were geographically distant from a medical center through forms of video conferencing.[26] Through the overabundance of technological services, this definition has since rapidly grown.[27] Today, telemedicine is capable of services such as video conferencing for mental health sessions or conducting "urgent-care"-like visits for non-threatening life conditions.[28] In 2015, the U.S. telemedicine market was worth more than $7.2 billion.[29] By 2025, the telemedicine market is predicted to grow to $35 billion.[30] Telemedicine legislation now also exists in almost every state.[31] Each state has its own definition of telemedicine and their definitions vary.[32] Most

---

disregard the Ryan Haight Act and authorize more liberal telemedicine proscribing regulations. *See* Davidsen, *supra* note 1.

[24] Zundel, *supra* note 17, at 71.

[25] *What Is Telehealth?*, NEJM CATALYST (Feb. 1, 2018) (citing the *TeleMedicine*, LEXICO.COM, https://www.lexico.com/en/definition/telemedicine [https://perma.cc/C5FQ-B6XY]), https://catalyst.nejm.org/what-is-telehealth/ [https://perma.cc/ERV3-SVPM].

[26] *Id.* ("Video conferencing technology has been utilized to provide care for inmates, military personnel, and patients located in rural locations for some time."); *see* Zundel, *supra* note 17, at 73.

[27] *See generally* Zundel, *supra* note 17.

[28] NEJM CATALYST, *supra* note 25.

[29] Himanshu Kansal, *Telemedicine: The Cost-Effective Future of Healthcare*, HIGHPOINT (June 14, 2019), https://www.highpointsolutions.com/telemedicine-cost-effective-future-healthcare/ [https://perma.cc/CW37-7C5K].

[30] *Id.*

[31] Dave Muoio, *Report: Nearly Every State Has Updated its Telehealth Legislation Since Last Year*, MOBI HEALTH NEWS (Oct. 18, 2017), https://www.mobihealthnews.com/content/report-nearly-every-state-has-updated-its-telehealth-legislation-last-year [https://perma.cc/8B9A-ZVDL] ("[E]very state but Connecticut and Massachusetts has made substantive legal changes to how telehealth is delivered in the past year.").

[32] *Reimbursement for Telemedicine*, CHIRON HEALTH, https://chironhealth.com/definitive-guide-to-telemedicine/telemedicine-info-healthcare-providers/re

relevant to this Note, the Indiana Code defines telemedicine as: "the delivery of health care services using electronic communications and information technology, including: (1) secure videoconferencing; (2) interactive audio-using store and forward technology; or (3) remote patient monitoring technology; between a provider in one (1) location and a patient in another location."[33]

The Indiana legislature does not include in the term the following: "(1) Audio-only communication[;] (2) A telephone call[;] (3) Electronic mail[;] (4) An instant messaging conversation[;] (5) Facsimile[;] (6) Internet questionnaire[;] (7) Telephone consultation[;] (8) Internet consultation."[34]

B. History

In 1924, a *Radio News* magazine article described the groundbreaking idea of communicating with a doctor through television.[35] Their idea came to life in the 1950s and 1960s, when modern telemedicine began to progress through the introduction of the television and real-time video.[36] One example occurred in 1959 when the University of Nebraska and Norfolk State Hospital created the first interactive video that allowed physicians at the University of Nebraska to provide psychiatric consultations to patients 112 miles away at the hospital in Norfolk.[37] Subsequently, telemedicine programs began developing in rural areas where medical staffing was a "critical issue" because of the lack of access to affordable health care.[38] Telecommunication was

---

imbursement-for-telemedicine/ [https://perma.cc/EC2X-A7AG] (discussing the differences in state laws regarding reimbursements from insurance companies for telehealth services).

[33] IND. CODE ANN. § 25-1-9.5-6 (West 2016).

[34] *Id.*

[35] *History of Telemedicine*, MDPORTAL, http://mdportal.com/education/history-of-telemedicine [https://perma.cc/3V7R-2U54] ("The concept was an imagination of the future, as U.S. residents did not yet have televisions in their homes, and radio adoption was just gaining steam.").

[36] *See* Zundel, *supra* note 17, at 72; *see also* Jacyln Gaydos, *The Audio-Visual Connection: A Brief History of Telemedicine*, TODAY'S WOUND CLINIC (Apr. 9, 2019), https://www.todayswoundclinic.com/articles/audio-visual-connection-brief-history-telemedicine [https://perma.cc/PFX9-LZUB].

[37] Gaydos, *supra* note 36.

[38] Zundel, *supra* note 17, at 72.

becoming a promising solution in rural areas as an affordable alternative to traveling to obtain medical care.[39]

Much of the innovation surrounding modern telemedicine originated from NASA space-flight programs.[40] When astronauts traveled into space, scientists wanted to ensure their safety.[41] They were also curious how space travel affected the astronauts' physical and mental wellbeing.[42] As a result, NASA scientists developed a monitoring system where they could test an astronaut's heart rate and blood pressure digitally.[43] In this instance, a physician on Earth monitored an astronaut somewhere in space—the first telemedicine.[44]

In 2001, the United States was exposed to the risks of telemedicine.[45] A young man, Ryan Haight, overdosed on prescription painkillers that he purchased online through a telemedicine pharmacy without an in-person examination.[46] In his remembrance, Congress enacted the Ryan Haight Act, which shut down online pharmacies and banned the issuance of any prescription(s) remotely without an in-person visit between the physician and patient.[47] Despite the federal regulations, many states have since enacted state laws to sidestep this federal legislation.[48] This phenomenon has created the modern telemedicine federalism debate.[49]

After the Ryan Haight Act, the federal government did not enact telemedicine legislation again until 2018 when President Trump passed the "Special Registration for Telemedicine Act of 2018," which requires a special registration that allows physicians and nurse practitioners to prescribe controlled substances without

---

[39] *Id.* Ironically, a recent study showed that a large majority (83 percent) of telehealth users in most recent years were urban residents. Laura Lovett, *JAMA Study Finds Telemedicine Catching on but Still Relatively Rare*, MOBI HEALTH NEWS (Nov. 29, 2018), https://www.mobihealthnews.com/content/jama-study-finds-telemedicine-catching-still-relatively-rare [https://perma.cc/E25N-E6B9].

[40] *See* Zundel, *supra* note 17, at 72.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See* RYAN'S CAUSE, http://ryanscause.org [https://perma.cc/ZA8R-2SKM].

[46] *Id.*

[47] Davidsen, *supra* note 1; *see* Austin, *supra* note 13, at 318.

[48] *See, e.g.*, Austin, *supra* note 13, at 321–22.

[49] *See* Davidsen, *supra* note 1.

an initial in-person examination.[50] In November of 2019, federal officials announced that "[they] are finally moving forward with a registration process for healthcare providers who want to prescribe controlled substances through telemedicine [services]."[51] During the outbreak of the novel coronavirus in 2020, many doctors and clinicians in the United States were encouraged to turn to telehealth platforms in light of the pandemic and unprecedented circumstances.[52]

---

[50] *See* Jacqueline N. Acosta et al., *President Signs New Law Allowing Telemedicine Prescribing of Controlled Substances: DEA Registration to Go Live*, FOLEY & LARDNER LLP (Oct. 25, 2018), https://www.foley.com/en/insights/publications/2018/10/president-signs-new-law-allowing-telemedicine-pres [https://perma.cc/ZPQ2-5VNH].

[51] Wicklund, *supra* note 20. It should be noted that if the DEA were to enact their plans to execute a special registration process for healthcare providers who want to prescribe controlled substances through telemedicine, Indiana's law might change. *Compare* Davidsen, *supra* note 1 (stating that Indiana amended its law to expand the list of drugs that may be prescribed through telemedicine in light of restrictions in the Ryan Haight Act), *with* Wicklund, *supra* note 20 (noting that the Justice Department proposed a rule on special registration that would allow health providers to register with federal government to engage in telemedicine practice). The DEA is slated to implement the rule on the new federal legislation soon. *See* Nathaniel M. Lacktman & Thomas B. Ferrante, *Congress Proposes Change to Ryan Haight Act to Allow Telemedicine Prescribing of Controlled Substances*, FOLEY & LARDNER LLP (Mar. 5, 2018), https://www.foley.com/en/insights/publications/2018/03/congress-proposes-change-to-ryan-haight-act-to-all [https://perma.cc/C25A-W8D2]. The legislation would allow mental health centers to prescribe controlled substances via telemedicine. *Id.* Even if the federal government moves forward and enacts such legislation, there is no telling whether states will follow. *See* Davidsen, *supra* note 1. Many states did not follow the requirements of the Ryan Haight Act and the DEA has not enforced it. *Id.*

[52] Lev Facher, *Trump Lifts Restrictions on Telehealth Services for Seniors in Hopes of Limiting Coronavirus Spread*, STATNEWS (Mar. 17, 2020), https://www.statnews.com/2020/03/17/trump-telehealth-restrictions/ [https://perma.cc/GL9C-9EWG]. The novel coronavirus is not the norm and thus should not influence states' telemedicine regulation. Analogous to doctors using experimental medicines they would not otherwise use during the pandemic, doctors moved to telemedicine because they did not have many options in light of patients' inability to leave their homes. *See* Tom Murphy, *Telemedicine Emerges as Care Option During COVID-19 Outbreak*, AP NEWS (Mar. 20, 2020), https://apnews.com/54da28f75c478ac1130170677958a7b5 (last visited Oct. 30, 2020); *see also* Olivia Goldhill, *The Race to Develop Coronavirus Treatments Pushes the Ethics of Clinical Trials*, QUARTZ (Mar. 28, 2020), https://qz.com/1826431/the-ethics-of-clinical-trials-for-coronavirus-treatments/ [https://perma.cc/BJ6M-NZHX]. During the coronavirus pandemic, doctors even have suggested it is too early to be transitioning to telehealth. *See* Ami B. Bhatt et al., *Feature Telehealth:*

Since the 1990s and the rise of the Internet, telemedicine has continued to grow in the United States.[53] The Internet provides patients with easy access to medical care and an inexpensive way to research their symptoms without an in-person doctor's visit.[54] But the biggest shortcoming of the Internet and telemedicine is reliability.[55] Many online articles mislead and confuse patients.[56] The history of telemedicine corresponds to the history of technological growth in the United States.[57] Today, with the immense amount of technological services, telemedicine is more widely available than in the past.[58]

II. INDIANA TELEMEDICINE PRESCRIBING LAWS IN COMPARISON TO OTHER STATES

A. Overview of the Amendments Passed in 2016 and 2017 that Make Prescribing Regulations More Liberal

1. House Enrolled Act 1263: 2016

In 2016, Michael "Mike" Pence, then Indiana Governor, signed House Enrolled Act No. 1263 (HEA 2016).[59] This amendment allowed doctors to prescribe medication to a patient through

---

Rapid Implementation for Your Cardiology Clinic, AM. COLL. CARDIOLOGY (Mar. 13, 2020), https://www.acc.org/latest-in-cardiology/articles/2020/03/01/08/42/feature-telehealth-rapid-implementation-for-your-cardiology-clinic-coronavirus-disease-2019-covid-19 [https://perma.cc59XV-ZRPQ]. Even though many jurisdictions embraced telemedicine during the coronavirus pandemic, there are still significant benefits of an in-person examination by a provider. *See infra* Part III; *see also* Geoffrey Fowler & Laurie McGinley, *The Webcam Will See You Now: Doctors Urge Patients to Replace In-Person Visits with Apps*, WASH. POST (Mar. 19, 2020), https://www.washingtonpost.com/technology/2020/03/19/tele health-apps-coronavirus/ [https:// perma.cc/E5AK-QXUZ].

[53] MDPORTAL, *supra* note 35.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Austin, *supra* note 13, at 299–300.

[59] *Actions for House Bill 1263*, IGA.IN.GOV, http://iga.in.gov/legislative/2016/bills/house/1263#document-46a1685d [https://perma.cc/5EDA-DLQ5] (under Bill Actions subheading); *see also* Alan Rappeport, *Who Is Mike Pence?*, NY TIMES (July 15, 2016), https://www.nytimes.com/2016/07/16/us/politics/who-is-mike-pence.html [https://perma.cc/66MH-WBA7] (describing Mike Pence as Governor of Indiana in 2016).

telemedicine services.[60] This new law included any prescription except controlled substances, abortion-inducing drugs, and ophthalmic devices including: "(1) glasses; (2) contact lenses; or (3) low vision devices."[61] Most relevant to this Note, HEA 2016 broadened telemedicine standards in the Hoosier State by removing the hurdle of requiring an in-person doctor examination to receive an online prescription.[62]

2. House Enrolled Act 1337: 2017

While HEA 2016 removed a major telemedicine hurdle,[63] the Indiana Code was revised just a year later to provide doctors with additional autonomy in their prescribing practices.[64] Effective July 1, 2017, Indiana amended their telemedicine regulations again.[65] This new amendment removed the parameter that banned the prescription of controlled substances through telemedicine services.[66] The amended law now allows doctors to prescribe non-opioid controlled substances without an in-person examination.[67] The amendment also allows for the prescription of opioids through online services if the drug is being used to manage opioid dependence.[68] The amended Indiana law removes the prior ban on prescribing controlled substances with only the condition that the patient must get an initial in-person examination by an Indiana

---

[60] H.B. 1263, 119th Gen. Assemb., Reg. Sess. (Ind. 2016).

[61] IND. CODE ANN. § 25-1-9.5-8 (West 2017); Ind. H.B. 1263.

[62] Ind. H.B. 1263; *see also Key Takeaways from Indiana's New Telemedicine Law*, FOLEY & LARDNER LLP (Mar. 28, 2016), https://www.foley.com/en/insights/publications/2016/03/key-takeaways-from-indianas-new-telemedicine-law [https://perma.cc/PB2J-NY96].

> The success of Indiana's Telehealth Pilot Program led to the enactment of the new statute, which passed the House and Senate near unanimously, reflecting strong bi-partisan support for telemedicine in Indiana. The new statute may potentially require the Board of Medicine to rewrite some of its current telemedicine regulations to the extent the prior regulations conflict with the controlling provisions of the statute.

Id.

[63] FOLEY & LARDNER LLP, *supra* note 62.

[64] H.B. 1337, 120th Gen. Assemb., Reg. Sess. (Ind. 2017).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

health care provider.[69] The danger here is that the law does not include specific requirements for what the examination must entail.[70] The only information provided is the in-person examination does not need to be given by the patient's provider, just a physician licensed in Indiana.[71] Producing thus, an easy chance for fraud, abuse, and malpractice.[72] Additionally, "an Indiana provider may prescribe non-controlled substances via telemedicine without an in-person examination" if certain conditions are met.[73]

B. Indiana's Laws in Comparison to Other States

In comparison to other states in the United States, Indiana's new legislation places it somewhere in the middle of where states fall in regard to telemedicine prescribing regulations.[74] The American Telemedicine Association (ATA) began annual reports in 2014 grading states on telemedicine access.[75] Indiana appears to have followed the trend of lawmakers across states attempting to increase access to telemedicine.[76] Other states such as Michigan, for example, have enacted more liberal laws than Indiana.[77] Michigan allows health professionals to prescribe controlled substances without any type of in-person examination beforehand,[78] whereas states, such as Ohio, have taken more preventive measures when prescribing drugs without an in-person

---

[69] Nathaniel M. Lacktman, *Indiana Reverses Course on Telemedicine Prescribing and Controlled Substances Laws*, FOLEY & LARDNER LLP (June 20, 2017), https://www.foley.com/en/insights/publications/2017/06/indiana-reverses-course-on-telemedicine-prescribin [https://perma.cc/5XYZ-Z3B9] ("The new law follows a growing trend among states to amend and eliminate prior statutory prohibitions on telemedicine prescribing of controlled substances.").

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See* Austin, *supra* note 13, at 321.

[75] Christina H. Sherwood, *A State-by-State Look at the State of Telemedicine*, MEDCITY NEWS (Mar. 30, 2016), https://medcitynews.com/2016/03/a-state-by-state-look-at-the-state-of-telemedicine/ [https://perma.cc/D6E3-PHJ6].

[76] *Id.*

[77] *Id.*

[78] Nathaniel M. Lacktman & Thomas B. Ferrante, *Michigan Telemedicine Prescribing and Controlled Substance Laws*, FOLEY & LARDNER LLP (June 22, 2017), https://www.foley.com/en/insights/publications/2017/06/michigan-telemedicine-prescribing-and-controlled-s [https://perma.cc/34CV-ZHX5].

examination.[79] Ohio's statute closely mirrors the federal Ryan Haight Act suggesting an Ohio physician may only provide controlled substances without an in-person examination by the provider if the physician is able to satisfy a number of requirements.[80]

III. OVERLOOKED DANGERS OF PRESCRIBING DRUGS VIA TELEMEDICINE SERVICES

A. Background: The Opioid Epidemic

The opioid epidemic is relevant to this argument because it illustrates the danger of drug abuse and addiction.[81] Comparable to telemedicine, opioids at first were thought to provide better treatment to patients, but without adequate research and information, the structure of the current health-care system contributed to an

---

[79] Nathaniel M. Lacktman & Thomas B. Ferrante, *Ohio Telemedicine Prescribing and Controlled Substances Laws*, FOLEY & LARDNER LLP (Mar. 28, 2017), https://www.foley.com/en/insights/publications/2017/03/ohio-telemedicine-prescribing-and-controlled-subst [https://perma.cc/F7VR-JZ72].

[80] *Id.* The six situations are below:

> The patient is [(1)] an "active patient" of a health care provider who is a colleague of the physician and the controlled substances are provided through an on call or cross coverage arrangement.... "Active patient" is defined ... [as] "within the previous twenty-four months the physician or other health care provider acting within the scope of their professional license conducted at least one in-person medical evaluation of the patient or an evaluation of the patient through the practice of telemedicine;" [(2)] the patient is located in a DEA-registered hospital or clinic; [(3)] the patient is being treated by, and in the physical presence of, an Ohio-licensed physician or health care practitioner registered with the DEA; [(4)] the telemedicine consult is conducted by a practitioner who has obtained a DEA special registration for telemedicine; [(5)] a hospice program physician prescribes the controlled substance to a hospice program patient in accordance with the board of pharmacy rules; or [(6)] the physician is the medical director of, or attending physician at, an "institutional facility" and [(a)] the controlled substance is being provided to a person who has been admitted as an inpatient to or is a resident of an institutional facility, and [(b)] the prescription is transmitted to the pharmacy by a means that is compliant with Ohio board of pharmacy rules.

Id.

[81] *What is the Opioid Epidemic?*, ADDICTION CTR., https://www.addictioncenter.com/opiates/opioid-epidemic/ [https://perma.cc/T24T-J8C9].

ongoing international catastrophe.[82] In the 1980s, the United States began to pass the irreversible pain treatment acts, which removed threats of prosecution of physicians for overprescribing opioids."[83] The first wave of the epidemic began in 1991 when deaths of patients started to sharply increase after opioid prescription.[84] Pharmaceutical companies wrongly assured opioid prescribers that there was a very low risk of addiction from the pain-relieving drugs.[85]

The second wave of the crisis began in 2010 with an outbreak of deaths from heroin abuse.[86] Heroin is a Schedule I drug and one of the most known opioids.[87] It is also one of the most dangerous.[88] Studies have shown heroin use not only creates dependence and deep tolerance issues, but also deteriorates a brain's white matter, which may "affect decision-making abilities, the ability to regulate behavior, and responses to stressful situations. Heroin also produces profound degrees of tolerance and physical dependence."[89] The third and final wave began in 2013 with the quickest rise in opioid-related deaths since the beginning of the epidemic.[90] Doctors began to prescribe fentanyl to reduce the abuse of other drugs.[91] But it led to the opposite effect.[92] Fentanyl, even more so than heroin, attaches so tightly to a user's opioid receptors that it initiates a long-lasting effect on a user's body.[93] Many drug users are moving to fentanyl as opposed to other opioids

---

[82] DeWeerdt, *supra* note 7, at 10–12.

[83] *Id.* at 10–11.

[84] Liu et al., *supra* note 8.

[85] *Id.*

[86] *Id.*

[87] *Controlled Substance Schedules*, DEA, https://www.deadiversion.usdoj.gov/schedules/ [https://perma.cc/L3DT-KBVU]. The Controlled Substances Act (CSA) positions drugs into five different Schedules based on their potential for abuse and likelihood of addiction. *Id.* Schedule I drugs such as heroin are not accepted for medical use in the U.S. except under special circumstances. *Id.* Schedule IV and V drugs, on the other hand, have little chance for abuse and thus, are generally regulated less strictly. *Id.*

[88] *Heroin Research Report: What are the Long-Term Effects of Heroin Use?*, NAT'L INST. DRUG ABUSE, https://www.drugabuse.gov/publications/research-reports/heroin/what-are-long-term-effects-heroin-use [https://perma.cc/F6KM-R3CT].

[89] *Id.*

[90] Liu et al., *supra* note 8.

[91] *Id.*

[92] *Id.*

[93] *Why Is Fentanyl So Dangerous?*, COLUMN HEALTH, https://columnhealth.com/blog_posts/why-is-fentanyl-so-dangerous/ [https://perma.cc/5Q9H-RTH3].

because the high is so "euphoric."[94] Consequently, drug dealers are trying to make the product even more addictive.[95] "[D]rug deaths involving fentanyl more than doubled from 2015 to 2016, and are up 540% overall in the past three years."[96] On October 16, 2017, the United States Government announced the opioid epidemic as a public health emergency.[97]

In the late 1980s and early 1990s doctors did not question pharmaceutical representatives advocating for opioid prescriptions.[98] Many doctors in private practice saw prescribing opioids as a great financial opportunity because they were able to rapidly increase the number of patients.[99] The global opioid market hit over $25.4 billion in 2018.[100] There were many positive financial incentives for doctors to prescribe opioids and "the existence of these incentives could have played a role in the over-prescription of opioids."[101]

B. Prescribing Without an In-Person Examination by the Provider

The Medical Board of California has stated, "[i]n-person examinations not only enhance the opportunity to confirm if a patient needs the identified medication or to rule out other medical conditions, but ensure the patient is advised of alternative treatment options and is aware of potential side effects."[102] There is good reason for an in-person examination by a provider.[103] An

---

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Mark R. Jones et al., *A Brief History of the Opioid Epidemic and Strategies for Pain Medicine*, 7(1) PAIN & THERAPY 13 (2018).

[98] DeWeerdt, *supra* note 7, at 11.

[99] Jones et al., *supra* note 97, at 16; *see* DeWeerdt, *supra* note 7, at 11.

[100] *Opioids Market Size, Share & Trends Analysis Report By Product (IR/Short-acting, ER/Long-acting), By Application (Pain Relief, Anesthesia), By Region, And Segment Forecasts, 2019–2026*, GRAND VIEW RSCH. (Apr. 2019), https://www.grandviewresearch.com/industry-analysis/opioids-market [https://perma.cc/GM3P-WLN8].

[101] Jones et al., *supra* note 97, at 16; *see* DeWeerdt, *supra* note 7, at 11.

[102] Joan Jerzak, *Internet Prescribing—Information for Physicians: Drugs on the Information Highway*, MED. BD. CAL. (Feb. 2004), https://www.mbc.ca.gov/Licensees/Prescribing/Internet_Prescribing.aspx [https://perma.cc/R5SC-HQV7].

[103] *See, e.g.*, Rene Quashie, *Prescribing and Telemedicine: The "Physical" Exam*, EPSTEIN BECKER GREEN (Feb. 12, 2015), https://www.techhealthperspectives.com/2015/02/12/prescribing-telemedicine-comes-down-to-the-physical-exam/

online examination may not provide a physician the same opportunity to make a certifiable diagnosis.[104]

Doctors are aware of the harms of prescribing via telemedicine without an initial in-person examination by the prescriber.[105] Such as, video conferencing may not provide suitable conditions to provide a thorough diagnosis.[106] It also discourages doctors to travel to see a patient even when nearby.[107]

Additionally, there is little psychological research on how placing a computer between a doctor and patient can influence the doctor-patient relationship.[108] Research suggests a patient is more likely to think a doctor is disinterested when they interact by computer.[109] This finding might seem subtle, but without further information it is uncertain how technology can change the doctor-patient relationship.[110] Doctors' visits are already brief and research has shown when using the telemedicine services, visits are even shorter.[111] Telemedicine supporters advocate for its "effectiveness," but when appointments are too efficient, doctors make mistakes, and there are major concerns for medical malpractice.[112]

"All technology has the potential to harm" and to not work effectively.[113] "It is time to [further] recognize" and research those dangers before eliminating the in-person examination by a provider requirement to ensure safety for patients.[114]

[https://perma.cc/H3QU-Y6TX] (highlighting the importance of an initial in-person meeting with a prescribing doctor).

[104] *See* Adam J. Schoenfeld et al., *Variation in Quality of Urgent Health Care Provided During Commercial Virtual Visits*, 176(5) JAMA INTERNAL MED. 635, 641 (May 1, 2016) (describing how virtual patients were recommended to take additional tests at lower rates when compared to patients present in brick-and-mortar practices).

[105] O'Hanlon, *supra* note 6, at 425.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 425–26.

[111] *Id.* at 425.

[112] Bonnie G. Ackerman, *Is the Doctor In? Medical Malpractice Issues in the Age of Telemedicine*, NAT'L L. REV. (Apr. 17, 2019), https://www.natlawreview.com/article/doctor-medical-malpractice-issues-age-telemedicine [https://perma.cc/TN4Z-PEY4].

[113] O'Hanlon, *supra* note 6, at 426.

[114] *Id.*

C. The Next Drug Crisis: Benzodiazepines

The Federal Drug Administration (FDA) is still working to address the ongoing consequences of the opioid crisis.[115] They also now believe the United States is vulnerable to other kinds of drug crises.[116] For example, Benzodiazepines (benzos), Schedule IV drugs, such as alprazolam (Xanax), treat a variety of conditions such as anxiety and depression.[117] Like opioids, benzos carry similar threatening consequences.[118] If a patient suddenly stops taking benzos, there can be life-threating side effects.[119] Additionally, high doses of these drugs can also lead to overdose.[120] "[M]ore than 40 million adults in the United States suffer from anxiety and it is the most common illness in the United States."[121] In an interview with Katie Couric, Chance the Rapper spoke personally about his addiction to Xanax and how he believes it is the new heroin.[122]

The danger with benzos is the brain begins to rely on them to calm itself down.[123] GABA is a neurotransmitter that is part of the neural process in calming the body down.[124] Over time, if the

---

[115] *See Opioid Medications*, FDA, https://www.fda.gov/drugs/information-drug-class/opioid-medications [https://perma.cc/98MG-7Y5E].

[116] Ashleigh Garrison, *Antianxiety Drugs—Often More Deadly Than Opioids—Are Fueling the Next Drug Crisis in US*, CNBC (Aug. 3, 2018), https://www.cnbc.com/2018/08/02/antianxiety-drugs-fuel-the-next-deadly-drug-crisis-in-us.html [https://perma.cc/N4N5-FV2Q].

[117] Brian J. Schill, *America's Next Drug Crisis?*, U.N.D. SCH. MED. & HEALTH SCI., https://med.und.edu/nd-medicine/holiday-2018/next-drug-crisis.html [https://perma.cc/K6GG-6TMJ]; *see also Drug Fact Sheet (Benzodiazepines)*, DEA (Apr. 2020), https://www.dea.gov/sites/default/files/2020-06/Benzodiazepenes-2020_1.pdf [https://perma.cc/CKS5-UKM5].

[118] Garrison, *supra* note 116.

[119] *Id.*

[120] Schill, *supra* note 117; *see also* Garrison, *supra* note 116 ("Overdose deaths involving benzodiazepines—such as Xanax, Librium, Valium and Ativan, drugs commonly used to treat anxiety, phobias, panic attacks, seizures and insomnia—have quadrupled between 2002 and 2015, according to the National Institute on Drug Abuse.").

[121] Garrison, *supra* note 116.

[122] *Id.*

[123] *Id.*

[124] Amanda Lautieri, *Xanax Withdrawals Duration, Dangers, and Treatment*, AM. ADDICTION CTRS. (Aug. 18, 2020), https://americanaddictioncenters.org/withdrawal-timelines-treatments/xanax [https://perma.cc/FB4N-LMDW]; *see also* Carrie Park, *In the Wake of the Opioid Epidemic: A Call for the Reclassification*

brain becomes dependent on the benzos, the withdrawal process can be even more dangerous than withdraw from opioids.[125] Lacking benzos, the brain will struggle to produce GABA at pre-drug use levels.[126] Similar to when doctors first prescribed opioids and they were uneducated in pain management,[127] many primary care doctors do not provide patients referrals for psychotherapy, but instead write the prescriptions for anxiety and depression medication themselves.[128] Unlike opioids and abortion-inducing drugs, some states allow these types of prescriptions to be filled online.[129] In fact, prescribing anxiety medication via telemedicine services is becoming more prevalent, and it is extremely dangerous.[130]

D. Gateway Drugs

Another consideration is how through telemedicine services, it will be easier for individuals to get access to gateway drugs.[131] While the government has highlighted the positives of more accessible prescription medicine(s) in respect to telemedicine, there are also dangerous pitfalls.[132] For example, many drugs that are available through telemedicine services, such as anxiety medications and some pain relievers, are gateway drugs to more addicting and illegal medications such as heroin and fentanyl.[133]

---

of Gabapentin as a Controlled Substance in Illinois, 28 ANNALS HEALTH L. ADVANCE DIRECTIVE 129, 131 (2019).

[125] Garrison, *supra* note 116.

[126] Lautieri, *supra* note 124.

[127] DeWeerdt, *supra* note 7, at 11.

[128] Garrison, *supra* note 116.

[129] Kelly Burch, *How to get a prescription online with telemedicine—and have the medicine delivered to you*, INSIDER (May 6, 2020), https://www.insider.com/telemedicine-prescription-online [https://perma.cc/4CM5-FT7H].

[130] *Prescribing via Telepsychiatry*, INSIGHT + REGROUP, http://insighttelepsychiatry.com/resources-2/provider-resource-center/prescribing-via-telepsychiatry/ [https://perma.cc/4WS8-EWNW] ("Telepsychiatry providers are able to prescribe medication through telehealth as long as certain standards are met.").

[131] Sasha A. Fleary et al., *Understanding Nonprescription and Prescription Drug Misuse in Late Adolescence/Young Adulthood*, 2013 J. ADDICTION 1, 2 ("[A]dolescents reported having easy access to prescription drugs via parents' medicine cabinets (62%), others' prescriptions (50%), and from the internet (32%).").

[132] *Id.*

[133] Matt Gonzales, *What are Gateway Drugs? Information and Prevention*, DRUGREHAB.COM (Feb. 28, 2020), https://www.drugrehab.com/guides/gateway-drugs/ [https://perma.cc/QU3A-QZXG].

"A gateway drug is a habit-forming drug that can lead to the use of other, more addictive drugs."[134] This theory has existed for decades and is well researched.[135] The idea is that milder drugs open the door to harder drugs.[136] With telemedicine providing more access to gateway drugs, researchers and doctors have yet to explore how this might further increase opioid addiction in the United States.[137]

"[G]ateway drugs boost dopamine levels, which then increase [an individual's] pleasure."[138] These dopamine boosts cause users to seek "more dramatic dopamine releases," in other words, a harder drug.[139] Supporters of the gateway drug theory refer to the ample amounts of research.[140] "[I]n 2016 the National Center on Addiction and Substance Abuse found that teens who use gateway drugs are 266 times more likely to develop a cocaine addiction than those who do not."[141]

"[Additionally], [m]any prescription drugs have similar effects to heroin."[142] This has led many prescription drug users to make the transition to heroin.[143] It is difficult to say for sure that making prescription drugs more accessible will result in an increase of overall opioid addiction, but many studies have looked at and proven how gateway drugs lead to more substantial drug use.[144] With drug overdoses in our country at an all-time high,

---

[134] *Id.*

[135] *Id.*

[136] *See, e.g., id.* ("[R]italin, a prescription medication administered to children with ADHD, has been linked to cocaine use. Both drugs are stimulants, which increase alertness and productivity. Both have similar properties and increase dopamine levels. Consequentially, former Ritalin users are more susceptible to cocaine abuse.... ").

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] Lynn E. Fiellin et al., *Previous Use of Alcohol, Cigarettes, and Marijuana and Subsequent Abuse of Prescription Opioids in Young Adults*, 52 J. ADOLESCENT HEALTH, 158, 161 (2012). *See generally* Denise B. Kandel et al., *Stages of Progression in Drug Involvement from Adolescence to Adulthood: Further Evidence for the Gateway Theory*, 53 J. STUD. ON ALCOHOL & DRUGS, 447, 452 (1992).

telemedicine opening the doors to more convenient access to prescription drugs will likely further escalate the problem.[145]

E. Legal Implications

Prescribing medication without an in-person examination via telemedicine also warrants another important consideration: increased liability risk.[146] Although few law review opinions address telemedicine malpractice liability, several common issues have arisen.[147]

First, patients have asserted general negligence claims by their telemedicine provider.[148] Negligence in medical malpractice is defined as an "[a]ct or omission by a health care provider whose treatment provided to a patient falls below the accepted standard of practice in the medical community and causes injury or death to the patient."[149] There is a risk doctors do not see their role in telemedicine services to be as important as in-person examinations.[150] There is also a risk because there are still so many unknowns with telehealth.[151] As a result, as telemedicine continues to grow, researchers predict the number of negligence claims will increase.[152]

---

[145] Erika Edwards, *U.S. death rates from suicides, alcohol and drug overdoses reach all-time high*, NBC NEWS (June 12, 2019), https://www.nbcnews.com/health/health-news/u-s-death-rates-suicides-alcohol-drug-overdoses-reach-all-n1016216 [https://perma.cc/FF5J-H5E4].

[146] Ackerman, *supra* note 112.

[147] *Id.* This part primarily focuses on medical practice. However, another legal concern of patients and doctors of telemedicine is breaching an individual's privacy rights. *See* Joseph L. Hall & Deven McGraw, *For Telehealth to Succeed, Privacy and Security Risks Must Be Identified and Addressed*, 33 HEALTH AFF. 216, 217 (2014).

[148] Ackerman, *supra* note 112.

[149] *Malpractice*, CTR. FOR COLLECTED HEALTH POL'Y, https://www.cchpca.org/telehealth-policy/malpractice [https://perma.cc/72HJ-FHGX].

[150] *What about Telemedicine and Medical Malpractice*, BC&G L. FIRM, https://www.medmalfirm.com/news-and-updates/telemedicine-and-medical-malpractice/ [https://perma.cc/S9KU-F2ET].

[151] *See id.* During the 2020 coronavirus pandemic, suggestions on how to prepare a telehealth clinic became available. *See* AM. COLL. CARDIOLOGY, *supra* note 52.

[152] *See, e.g.*, CTR. FOR COLLECTED HEALTH POL'Y, *supra* note 149.

A common medical practice telemedicine lawsuit comes from doctors prescribing medication to out-of-state patients they had not previously examined.[153] For example, a doctor received nine months in county jail and a $4,000 fine for "practicing" medicine in a patient's home state without being licensed there.[154] There are unresolved choice of law questions and jurisdictional issues that make it difficult for physicians and insurance companies to always ensure compliance with the law.[155] Most medical licensing laws were written in the 1950s before patients had easy access to the Internet or travel between states.[156] A common problem is where a therapist has a client who goes off to college in a state where they are not licensed.[157] Mental health doctors who continue to treat their patient away at college via telehealth may not be properly following state licensing laws.[158] Doctors will likely need to get a license in multiple states if they want to lawfully practice virtually.[159]

IV. RECOMMENDATIONS

A. Requiring an In-Person Examination by the Provider

As discussed in more detail in the Part above, requiring an in-person examination by the provider allows a doctor to provide the best care for their patients.[160] Telemedicine is impersonal,

---

[153] Cathy Reisenwitz, *2 Big Telemedicine Malpractice Risks—and How to Protect Yourself*, CAPTERRA (June 8, 2017), https://blog.capterra.com/2-big-telemedicine-malpractice-risks-and-how-to-protect-yourself/ [https://perma.cc/P2ZD-74KL].

[154] *Id.*

[155] Mary K. Pratt, *How to Avoid the Legal Risks of Telemedicine,* 96 MED. ECON. 23, 23–24 (2019). "When it comes to telemental health, telepsychology or e-counseling, the over-arching question is where does the psychotherapy or counseling take place? Does it take place where the client is, where the therapist is, in both places, in cyberspace, or in all three places?" Ofer Zur, *TeleMental Health Services Across State Lines*, ZUR INST., https://www.zurinstitute.com/telehealth-across-state-lines/ [https://perma.cc/C9ZH-8484].

[156] Zur, *supra* note 155.

[157] *Id.*

[158] *Id.* There are ironically less legal concerns with practicing telemedicine internationally because many countries unlike states do not have specified regulations. *Id.* This lack of regulation allows physicians leeway of not violating other countries' laws by practicing virtually all over the world. *Id.*

[159] Pratt, *supra* note 155, at 24.

[160] *See supra* Part III; *see also The Ultimate Telemedicine Guide, What is Telemedicine?*, EVISIT (May 25, 2018), https://evisit.com/resources/what-is-tele

and physical examinations are oftentimes necessary to make a full diagnosis.[161] Telemedicine offers many benefits such as convenience and accessibility for patients, lower costs than in-person examinations, and the ability to see distant medical specialists.[162] It is still however, surprising that during such a devastating drug crisis, legislatures are so willing to remove restrictions on states' prescribing regulations.[163]

Requiring an in-person examination from the medical provider ensures that patients receive a complete wellness check—including tests that require physical examination—prior to receiving telemedicine services.[164] In-person examinations, unlike examinations through telemedicine services, check your cholesterol, blood sugar levels, and blood pressure.[165] In many cases, these levels may be higher than normal without demonstrating any symptoms.[166] The doctor also uses a stethoscope during an in-person examination to listen to various parts of the patient's body to detect any abnormalities.[167] As such, in-person examinations allow a physician to diagnose a condition before it becomes more severe.[168] These are conditions that can only be detected through physical contact between a physician and patient.[169]

---

medicine/ [https://perma.cc/LH2A-CMBN] ("A random doctor who doesn't know the patient, doesn't know their whole medical history.").

[161] *See supra* Part III.

[162] *See* EVISIT, *supra* 160; *see also* Kansal, *supra* note 29. A doctor's appointment via telemedicine services costs, on average, $79, whereas, an in-person doctor's visit, on average, costs $146. *Id.*

[163] EVISIT, *supra* note 160. The alternative argument is telemedicine can help treat opioid patients who are in rural areas and do not otherwise have access to treatment. *See* Y. Tony Yang et al., *Telemedicine's Role in Addressing the Opioid Epidemic*, 93 MAYO CLIN. PRO. 1177, 1177 (2018). However, there have been only a few states that have tested this theory and even from their research it is difficult to reach conclusions as to the benefits. *See id.* at 1177–78. Maryland for example, launched a program and showed that only about half of the patients remained in treatment for three months or more, prescribing buprenorphine via telemedicine services. *See id.* at 1177.

[164] Brian Krans, *What Is a Physical Examination?*, HEALTHLINE (July 10, 2012), https://www.healthline.com/health/physical-examination#purpose [https://perma.cc/DTW8-Y54V].

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *See id.*

Additionally, while telemedicine services are well known to be cost-effective,[170] in-person examinations can save patients substantial amounts of money in the long run.[171] While the initial in-person examination may be expensive, if a problem is still developing, it will save the patient a significant amount of money on treatments and medications later on.[172]

B. More Specific Guidelines

The second recommendation is for legislators to make more specific guidelines for prescribing drugs through telemedicine services. In Indiana, given how the statute is written, all drugs other than opioids and abortion-inducing drugs can be prescribed through any form of telemedicine service.[173] This includes videoconferencing, interactive audio-using store and forwarding technology, and remote patient monitoring technology.[174] The DEA places drugs into drug schedules.[175] Legislatures should consider being more precise in enacting what type of medicine they prescribe and the form of telemedicine allowed to prescribe that medication. For example, doctors could prescribe Schedule V drugs over the telephone. A state however, might want to require that Schedule IV drugs use a video-form telemedicine service to prescribe since

---

[170] *See* EVISIT, *supra* note 160.

[171] *10 Benefits to Getting a Physical Examination*, NEWPORT CTR. URGENT CARE, http://newportbeachuc.com/10-benefits-getting-physical-examination/ [https://perma.cc/N6PM-TT9X].

[172] *Id.*

[173] H.B. 1337, 120th Gen. Assemb., Reg. Sess. (Ind. 2017).

[174] IND. CODE ANN. § 25-1-9.5-6 (West 2017).

[175] *Drug Scheduling,* DEA, https://www.dea.gov/drug-scheduling [https://perma.cc/EW3N-RRDN].

> Drugs, substances, and certain chemicals used to make drugs are classified into five (5) distinct categories or schedules depending upon the drug's acceptable medical use and the drug's abuse or dependency potential. The abuse rate is a determinate factor in the scheduling of the drug; for example, Schedule I drugs have a high potential for abuse and the potential to create severe psychological and/or physical dependence. As the drug schedule changes—Schedule II, Schedule III, etc., so does the abuse potential—Schedule V drugs represents the least potential for abuse.

Id.

these drugs are likely more dangerous. No state legislature currently specifies the type of telemedicine service required in respect to the drug being prescribed.[176] But if enacted, this new policy could help alleviate distress that telemedicine services will precipitate the next drug crisis.[177]

Additionally, while states use the DEA drug schedules to categorize drugs and create regulations,[178] legislators should consider creating a new separate category for prescribing which includes all non-addictive medicines. The current telemedicine legislation in Indiana allows non-opioid controlled substances to be prescribed via telemedicine services.[179] However, some non-opioid controlled substances are addictive while others are not.[180] Legislatures should consider enacting laws that require an in-person examination by the provider for controlled substances like oxycodone whereas, non-controlled substances like ibuprofen could have a lower bar for prescribing telemedicine services, as the consequences are not as severe.[181]

C. Take a Pause for More Research Before Taking Action

The final recommendation is to delay further telemedicine legislation until researchers are able to properly to evaluate its

---

[176] *See, e.g.*, Ind. H.B. 1337; H.B. 1035, 121st Gen. Assemb., Reg. Sess. (S.C. 2016); *see also* MINN. STAT. ANN. § 147.033 (West 2019) (stating that "communication between licensed health care providers that consists solely of a telephone conversation, e-mail, or facsimile transmission does not constitute telemedicine consultations or services," however, it still does specify the type of schedule drug that should be used with each form of telemedicine).

[177] *See* Fleary et al., *supra* note 131, at 1–2; *see also* INSIGHT + REGROUP, *supra* note 130.

[178] INSTITUTE OF MEDICINE, COMMITTEE TO STUDY MEDICATION DEVELOPMENT AND RESEARCH AT THE NATIONAL INSTITUTE ON DRUG ABUSE, DEVELOPMENT OF MEDICATIONS FOR THE TREATMENT OF OPIATE AND COCAINE ADDICTIONS 173–75 (Carolyn E. Fulco et al. eds., 1995).

[179] IND. CODE ANN. § 25-1-9.5-8 (West 2017).

[180] *See Drug Scheduling*, *supra* note 175; *see also 10 Least Addictive Drugs List*, MENTAL HEALTH DAILY (Oct. 17, 2014), https://mentalhealthdaily.com/2014/10/17/10-least-addictive-drugs-list/ [https://perma.cc/33XD-8QKM].

[181] *See Drug Scheduling*, *supra* note 175; NAT'L INST. DRUG ABUSE, *supra* note 88; *see also Ibuprofen (Advil) Side Effects: What You Need to Know*, HEALTHLINE (Aug. 9, 2016), https://www.healthline.com/health/pain-relief/ibuprofen-advil-side-effects [https://perma.cc/W829-6NXY].

consequences and effects (likely through pilot programs). Both federal and state legislatures have been so quick to act on telemedicine regulations because technology is evolving and telehealth offers such a wide variety of benefits.[182] There is still however, limited research on the effects of prescribing via telemedicine mediums.[183] As mentioned earlier in this Note, researchers need to determine the impact—if any—on the doctor-patient relationship through telemedicine services prior to moving forward with legislation.[184]

Many states such as Mississippi have launched telemedicine pilot programs prior to enacting their official telemedicine legislation.[185] While Mississippi's pilot program tested telemedicine services and received feedback from patients, it did not thoroughly assess the effect of the services on patients.[186] Their pilot only lasted one year.[187] Immediately after the pilot program ended, without known discussion, the pilot program was put into law.[188] This short period in between the pilot program

---

[182] *Telehealth Up 53%, Growing Faster Than Any Other Place of Care*, AM. MED. ASS'N (May 29, 2019), https://www.ama-assn.org/practice-management/digital/telehealth-53-growing-faster-any-other-place-care [https://perma.cc/LPZ6-9GLN].

[183] O'Hanlon, *supra* note 6, at 425.

[184] *See id.* at 425–26.

[185] Roger Wicker & Brendan Carr, *Telehealth Pilot Program Will Improve Health Outcomes, Reduce Costs*, CLARION LEDGER (July 11, 2018), https://www.clarionledger.com/story/opinion/columnists/2018/07/11/telehealth-pilot-program-improve-health-outcomes-reduce-costs/774782002/ [https://perma.cc/2AS7-2S5L].

> Mississippi has been leading the way. The University of Mississippi Medical Center, a national leader in telehealth, partnered with regional high-speed wireless provider C Spire, to launch a pilot program in 2014 that brought remote patient monitoring to those living with Type II diabetes and other chronic conditions in the Mississippi Delta.

Id.

[186] FOLEY & LARDNER LLP, *supra* note 62.

[187] *Id.*

[188] *Id.*; *see also* Jessica K. Cohen, *FCC Moves Forward with $100 Million Connected Care Proposal*, MOD. HEALTHCARE (July 10, 2019), https://www.modernhealthcare.com/information-technology/fcc-moves-forward-100-million-connected-care-proposal [https://perma.cc/VS9Q-XVH3]. In July 2019, the Federal Communications Commission (FCC) voted to enact a three-year $100 million pilot program to bring telehealth services to low income patients and veterans. FOLEY & LARDNER LLP, *supra* note 62. The pilot program will test telehealth in predominantly rural areas. *See id.* The FCC plans to collect metrics and data on telemedicine as a part of their project. *See id.*

and enactment of legislation did not give researchers enough time to consider the consequences of the telemedicine services and potential changes to be made.[189] It was as if Mississippi's legislators were in such a rush to act on something that might benefit their constituents, that they neither considered the opioid crisis facing the country nor the effect of their actions.

CONCLUSION

Other states should not mirror Indiana's telemedicine prescription laws. While telemedicine increases access to medical care and is cost-effective,[190] there is not enough research on the consequences of prescribing without an in-person examination for states such as Indiana to enact legislation that allows such a rule.[191]

The opioid epidemic illustrates the need to be risk-averse when prescribing drugs, opioids, or non-opioids. Physicians have been so amazed by the benefits telemedicine provides, they have overlooked the threatening concerns that it entails.[192] There is a need to ensure when enacting legislation—especially in the health law field—that it is done the right way because lives are at stake.[193] Thus, extra caution should be taken.

This Note is not arguing that telemedicine is wrong or even that telemedicine is too dangerous for doctors to use. This Note is arguing that state legislatures should not follow in Indiana's footsteps, but instead take proper steps to enact the safest legislation for their constituents. Legislators should wait to enact telemedicine-related legislation until medical and legal researchers know more about the consequences of prescribing drugs through telemedicine services and without an in-person examination by the medical provider. Otherwise, without this needed caution, telemedicine could lead the United States deeper into the already overwhelming drug crisis.[194]

---

[189] FOLEY & LARDNER LLP, *supra* note 62.

[190] *See* EVISIT, *supra* note 160.

[191] *See* Krans, *supra* note 164.

[192] Ross D. Silverman, *Current Legal and Ethical Concerns in Telemedicine and E-medicine*, 9 J. TELEMEDICINE & TELECARE (Suppl. 1) 67 (2003).

[193] *Id.* at 68.

[194] *See* Fleary et al., *supra* note 131, at 1–2; INSIGHT + REGROUP, *supra* note 130.