

CAPSTONE JOURNAL

OF LAW AND PUBLIC POLICY

VOLUME V



APRIL 2022

When the Student Becomes the Teacher: Compensation,
Prestige, and Teacher Quality in the U.S. Education System
Rhea Gupta and Ben Thomas

The Growing American Child Care Crisis
Marianne Nader

Abortion Behind Bars: The Impact of Abortion Laws on
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Furman v. Georgia at Fifty: How the Modern Imposition of
Capital Punishment Fails to Satisfy the Court's Concurrences
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How to Revive a Mockingbird: An Essay on the Modern
Public Defender
Antonia Maria Christou

The Impact of Felon Disenfranchisement on U.S.
Presidential Election Outcomes, 2004–2016
Jamari Stanton



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As another academic year comes to a close, I could not be more proud to have the opportunity to thank all those who came together to produce this fifth volume of the *Capstone Journal of Law and Public Policy*. My gratitude must begin, of course, with the Legal Research Club. Thank you to this year's members of the LRC, whose spirit of inquiry continually pushes this organization to grow and expand. Without you, there would be no Legal Research Club, and I am honored to have learned with and from you all throughout this past year.

In the five years since our brilliant founders Sophia, Spencer, and Asia laid the foundations for this organization that now supports over 200 undergraduate students in their journey toward the legal profession, we've engaged with UA faculty and other members of the professional community, all dedicated to helping us fulfill our mission. I would be remiss if I did not thank our guest speakers, so, to all those who have invested their time in educating our members, I offer my thanks.

To the pre-law advisors around the nation who aided their students in drafting submissions for the *CJLPP*, we offer our thanks. We collaborated with more undergraduate institutions this year than ever before, and our ability to promote the *CJLPP* as not only the first undergraduate law review in the state but also (in our humble opinion) the most prestigious in the region would not be possible without the guidance and support these advisors provided our authors. Once again, I offer my gratitude, and I look forward to our continued collaboration in the future.

There are two individuals integral to the production of the *CJLPP* who deserve my sincerest personal gratitude. First, I need to thank Dr. Lawrence Cappello, faculty advisor to the LRC. His tireless dedication to the growth of this organization (and his impressive tolerance for my many last-minute Zoom requests) bolsters the Legal Research Club in its pursuit of excellence, and we would not be nearly as successful were

it not for his unwavering support. I must also acknowledge Katie Kroft and all she has done for the *CJLPP* during her two-year tenure as Editor-in-Chief. Katie, thank you for your fearless leadership and your cheerful spirit, both of which have made the formidable task of publishing an undergraduate journal within a single semester feel effortless and enjoyable. We are forever grateful for the time you've dedicated to the *CJLPP* and the legacy of excellence you leave with us, and we cannot wait to see what your future holds.

The *CJLPP* would not be possible, of course, without the efforts of the 2021-22 Editorial Staff. The countless hours of work you dedicated to this journal (in addition to your numerous other commitments and leadership roles on campus) have come to fruition in this most impressive fifth volume of the *CJLPP*. It has been an honor to work with you and learn from you throughout the past three years, and I am beyond proud of what we have accomplished this year.

Finally, I'd like to thank you, the Reader. The *CJLPP* is truly the backbone of the Legal Research Club, and it is in this publication that some of our most promising and devoted members hone their legal research, writing, and editing skills. It is my sincerest hope that you enjoy the time you spend perusing the following pages of undergraduate legal analysis just as much as our authors and the Editorial Staff enjoyed putting this journal together. Thank you for your support of the *Capstone Journal of Law and Public Policy* and the Legal Research Club. Happy reading!

With much appreciation,

Anna Kate Manchester
President, Legal Research Club
2021-22

LETTER FROM THE EDITOR

Dear Reader,

On behalf of the 2021–2022 Editorial Board and the Legal Research Club, I am proud to present the fifth volume of the *Capstone Journal of Law and Public Policy*.

In this year's edition, we feature the work of authors from five different universities, expanding the *CJLPP*'s reach beyond the SEC to connect with pre-law students across the nation. It has been an absolute pleasure to work with such innovative and critical-minded authors, whose research ranges from issues of public health to voting rights. Without the dedication of these wonderful students, the mission of the *CJLPP* would cease to exist, and I hope that the journal will continue to serve as a forum for undergraduates of a diverse range of backgrounds to develop their legal voices.

Amidst the ongoing challenges of the COVID-19 pandemic, the *CJLPP* has also sought to restore the collaborative spirit instilled by the founders of our Editorial Board. While virtual staff meetings and digital roundtable sessions have certainly altered the character of *CJLPP* operations over the past two years, our editors have handled these adjustments with grace, and I hope that the staff will only continue to grow as the university furthers its transition to normal programming. This period has brought immense changes to the legal profession, as a few of our authors will explore in the pages to come, and it is more important than ever that undergraduates remain engaged with our nation's ever-evolving legal landscape.

Over the course of my four years on the *CJLPP* Editorial Board, I have witnessed the organization's growth from a club of few members to an integral component of our university's pre-law community. It has been my distinguished pleasure to grow alongside the LRC, watching others discover a passion for legal research and writing that I too realized within the pages of the *CJLPP*.

Collaborating with the brilliant members of our Editorial Board, both past and present, has been the one of the most rewarding experiences of my undergraduate career, and I am forever grateful for the mentorship of the Editors in Chief that made this opportunity a reality.

Finally, I would like to thank the following members of our executive board for their persistent efforts to realize the LRC's mission: Anna Kate Manchester, for her unwavering dedication as LRC President and brilliant vision for the organization's future; Leah Humble, for her tireless sense of personal initiative and incredible work ethic as Managing Editor; Dr. Lawrence Cappello, for his invaluable support and guidance as our club's faculty advisor; and most of all, our hardworking and exceedingly talented editorial staff. I am truly lucky to have worked alongside each member of our editorial team, and I cannot express the depth of my gratitude for all of their efforts this year.

Best wishes, and happy reading!

Katie Kroft
Editor in Chief, *Capstone Journal of Law & Public Policy*
2021-2022

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If you are a pre-law student at the University of Alabama, consider joining the Legal Research Club! We offer a variety of opportunities to engage with legal research and writing before law school, including research workshops, writing clinics, and a writing competition. Members are also eligible to apply for positions on the LRC executive board, Capstone Journal, or Capstone Commentary.

Follow us on Instagram @**LRCatUA** and send an email to **legalresearchclub@ua.edu** to subscribe to our weekly newsletter, The Note, to stay up to date.

**WHEN THE STUDENT BECOMES THE
TEACHER: COMPENSATION,
PRESTIGE, AND TEACHER QUALITY
IN THE U.S. EDUCATION SYSTEM**

*Rhea Gupta & Ben Thomas**

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INTRODUCTION

U.S. education policy has enjoyed mixed success, particularly regarding academic performance. American students' performance on the Programme for International Student Assessment (PISA) has ranked low relative to other nations for decades,¹ and the United States has fallen

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¹ Jill Barshay, *What 2018 PISA international rankings tell us about U.S. schools*, HECHINGER REP. (Dec. 16, 2019), <https://hechingerreport.org/what-2018-pisa-international-rankings-tell->

from fifth to tenth among Organization for Economic Co-operation and Development (OECD) member states in regards to postsecondary degree attainment.² Some metrics indicate an absolute decline in academic ability as well; fourth- and eighth-graders' mathematics scores on the 2015 National Assessment of Educational Progress decreased for the first time since 1990.³ Disadvantaged, low-income, and minority students underperform even those rankings.⁴ Policymakers should look to nations like Finland for examples of success, as Finland topped the PISA rankings in English in 2000, in mathematics three years later, and once more in science in 2006.⁵ As of 2011, two-thirds of Finnish students pursued higher education, and 97% graduated from high school, while just 75.5% of American secondary students that year did the same.⁶

Americans often criticize their schools, and they are not unjustified in doing so.⁷ The OECD annually administers the PISA to participating nations' fifteen-

[us-about-u-s-schools/](#).

² Scott Sargrad et al., *A Quality Education for Every Child*, CTR. FOR AM. PROGRESS (Jul. 2, 2019),

<https://www.americanprogress.org/article/quality-education-every-child/>.

³ Barshay, *supra* note 1.

⁴ Sargrad et al., *supra* note 2.

⁵ LynNell Hancock, *Why Are Finland's Schools Successful?*, SMITHSONIAN MAG. (Sept. 2011),

<https://www.smithsonianmag.com/innovation/why-are-finlands-schools-successful-49859555/>.

⁶ *Id.*

⁷ Kristen Bialik, *State of the Union 2019: How Americans see major national issues*, PEW. RES. CTR. (Feb. 4, 2019),

<https://www.pewresearch.org/fact-tank/2019/02/04/state-of-the-union-2019-how-americans-see-major-national-issues/>; Sarah Jones, *Did America Set Public Schools Up to Fail?*, INTELLIGENCER (July 27, 2020), <https://nymag.com/intelligencer/2020/07/the-triple-crisis-facing-americas-public-schools.html>.

year-olds. Each year, pundits lament American children's poor math and science scores relative to those of other OECD nations' students.⁸ More worrisome still is the apparent inability of American schools to improve these results and the profound socioeconomic inequalities they mask.⁹ From decades prior to the first PISA exam up to the present day, U.S. policymakers have tried to close this achievement gap, oftentimes in response to public opinion. During the Cold War, for example, widespread fears of Soviet scientific dominance pushed Congress to promote science- and technology-focused education.¹⁰ Geopolitical changes in the years since have not dampened the public's desire for educational policy change; in 2019, 68% of Americans believed that education should be a top priority for the president and Congress, with only health care costs and the economy ranking higher.¹¹

Since 1960, the U.S. has failed to achieve meaningful academic progress as it relates to the PISA examination, but Finland and its peers have engineered astonishing growth, largely thanks to the increased professionalism and prestige associated with teaching.¹² Teaching salaries are comparable to other respected

⁸ Lauren Camera, *U.S. Students Show No Improvement in Math, Reading, Science on International Exam*, U.S. NEWS & WORLD REP. (Dec. 3, 2019), <https://www.usnews.com/news/education-news/articles/2019-12-03/us-students-show-no-improvement-in-math-reading-science-on-international-exam>.

⁹ Barshay, *supra* note 1.

¹⁰ Alvin Powell, *How Sputnik changed U.S. education*, HARV. GAZ. (Oct. 11, 2007), <https://news.harvard.edu/gazette/story/2007/10/how-sputnik-changed-u-s-education/>.

¹¹ Bialik, *supra* note 7.

¹² AMANDA RIPLEY, *THE SMARTEST KIDS IN THE WORLD: AND HOW THEY GOT THAT WAY* 3 (2013).

professions in Finland, and Finnish teacher training programs are selective in that they generally accept just 10% of applicants annually.¹³ Finnish teachers also have a large degree of autonomy in designing lessons, and their more intensive research-based training prepares them to take advantage of this freedom when creating their lesson plans.¹⁴ Though other countries have found success in different ways, many have ultimately done so by increasing the teaching profession's prestige, rigor, and lucrateness to produce more effective teachers. To achieve academic parity, the United States must do the same.

Public opinion polls clearly reveal that Americans want educational improvement, but, as the nation's PISA results suggest, policymakers have achieved only limited success in producing such advancements.¹⁵ Following a historical overview of American educational policy, this article demonstrates that the roots of the United States' poor educational performance lie in its low teacher quality, much of which stems from the profession's inadequate compensation and low prestige. The next section outlines serious social dilemmas, such as special interests' influence over elected officials and strategic adjustment, that may hinder both prestige- and compensation-based improvements. The authors then present a strategy that could avoid these obstacles and sustainably strengthen U.S. education by increasing the teaching profession's lucrateness and prestige. An analysis of the policy environment necessary for this strategy's implementation concludes the article.

¹³ *Top-Performing Countries: Finland*, NAT'L CTR. ON EDUC. AND THE ECON., <https://ncee.org/country/finland/> (last visited Mar. 14, 2022).

¹⁴ *Id.*

¹⁵ Barshay, *supra* note 1; Bialik, *supra* note 7.

I. THE ROOTS OF INADEQUACY IN THE U.S. EDUCATION SYSTEM

Understanding the practical and political viability of the strategies presented in this paper first requires a brief overview of the historical context in which they would operate. Early American education was a decentralized system of private, religious, and semi-public schools.¹⁶ During the nascent common school movement of the nineteenth century, states graded students by age, founded teachers' colleges, and established secular public schools administered by local governments.¹⁷ All states offered such education for free,¹⁸ and most required compulsory attendance by the early decades of the twentieth century.¹⁹ Progressives in federal and state legislatures then pushed for more vocational training through legislation like the 1917 Smith-Hughes Act and the 1946 George-Barden Act, with reforms such as centralized administration, independent school districts, and standardized curricula following locally.²⁰

The federal government began to play a truly

¹⁶ Robert A. Peterson, *Education in Colonial America*, FOUND. FOR ECON. EDUC. (Sept. 1, 1983), <https://fee.org/articles/education-in-colonial-america/>.

¹⁷ Jennings L. Wagoner & William N. Haarlow, *Common School Movement: Colonial and Republican Schooling, Changes in the Antebellum Era, The Rise of the Common School*, STATEUNIVERSITY.COM EDUC. ENCYCLOPEDIA, <https://education.stateuniversity.com/pages/1871/Common-School-Movement.html> (last visited Mar. 14, 2022).

¹⁸ *Id.*

¹⁹ *Compulsory Education Laws: Background*, FINDLAW (June 20, 2016), <https://www.findlaw.com/education/education-options/compulsory-education-laws-background.html>.

²⁰ *The Federal Role in Education*, U.S. DEP'T OF EDUC. (June 15, 2021), <https://www2.ed.gov/about/overview/fed/role.html?src=ln>.

outsized role in educational policy in the 1950s. Congress, seeking to compete with the Soviet Union on all fronts at the height of the Cold War, passed the National Defense Education Act (NDEA) in 1958, funding public schools' scientific and foreign language programs, college loans, and graduate fellowships.²¹ Subsequent federal action prioritized equal educational opportunity; the Elementary and Secondary Education Act and Higher Education Act, respectively, provided financial aid for public schools and college students seven years after the NDEA.²² Congress even prohibited the Department of Education from allowing disability-, sex-, and race-based discrimination through various pieces of legislation passed throughout the 1960s and 1970s.²³

Educational quality became an explicit federal concern in the 1980s. The National Commission on Excellence in Education (NCEE), founded and backed by the Department of Education, published its landmark report "A Nation at Risk" in 1983, recommending liberal arts curricula, standardized achievement tests, longer school days and years, and merit pay for teachers.²⁴ In response to the NCEE's criticism of public education, the growing school choice movement pushed for greater funding for charter schools, accommodations for homeschooling, and vouchers and tuition tax credits to defray fees at private schools.²⁵ Building on these

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform*, 84 *ELEMENTARY SCH. J.*, NOV. 1983, at 113–30.

²⁵ *A Brief History of Education in America*, CLARE BOOTHE LUCE CTR. FOR CONSERVATIVE WOMEN, <https://cblpi.org/a-brief-history-of->

developments, twenty-first-century education policy has concerned both school choice and quality issues. The 2002 No Child Left Behind Act (NCLBA), for example, required states to administer universal standardized tests with heightened, measurable criteria in the hopes of gauging and improving the quality of American education²⁶ Seven years later, the state-led Common Core Standards Initiative went a step further, specifying English and mathematics performance standards for every grade level.²⁷ The Obama administration then created the Race to the Top Fund, which awarded funds to states and school districts based on their compliance with Common Core standards and success in reforming deficient schools.²⁸

Teacher quality matters in the United States. Evidence suggests that it improves students' attendance, short-term test performance, and even long-term outcomes like college matriculation and lifetime earnings.²⁹ In Tennessee, a typical state in terms of student performance, researchers Sanders and Horn found that, for decades, the greatest predictor of students' academic progress has been

[education-in-america/](#) (last visited Mar. 14, 2022).

²⁶ Margaret E. Goertz, *Implementing the No Child Left Behind Act: Challenges for the States*, 80 PEABODY J. OF EDUC., no. 2, 2005, at 73.

²⁷ *About the Standards*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/> (last visited Dec. 4, 2020).

²⁸ *Education for K-12 Students: Race to the Top*, WHITE HOUSE ARCHIVES: PRESIDENT BARACK OBAMA, <https://obamawhitehouse.archives.gov/issues/education/k-12/race-to-the-top> (last visited Mar. 14, 2022).

²⁹ Dan Goldhaber et al., *Teacher Quality Gaps in U.S. Public Schools: Trends, Sources, and Implications*, PHI DELTA KAPPAN (Apr. 29, 2019), <https://kappanonline.org/teacher-quality-gaps-us-public-schools-trends-sources-implications-goldhaber-quince-theobald/>.

teacher quality.³⁰ High-quality teaching, though a somewhat nebulous concept, generally requires skill, didactic independence, and significant training.³¹ By all indications, the United States has largely failed to impose these standards on its educators. Roughly half of American public school teachers actively teaching in 2001 ranked in the bottom third of their college classes,³² and only 58% of teachers working during the 2017–2018 academic year held master’s degrees.³³ Despite the NCLBA’s efforts to fix issues of teaching quality by linking Title I federal funding to the hiring of teachers with postsecondary degrees, there has not been a noticeable increase in student performance.³⁴ Quality teachers have also been distributed unevenly, as low-income and minority students learn from a higher-than-average proportion of low-quality teachers. Consequently, disadvantaged students exhibit significantly lower academic performance than those able to learn from teachers of a higher caliber.³⁵

³⁰ William L. Sanders & Sandra P. Horn, *Research Findings from the Tennessee Value-Added Assessment System (TVAAS) Database: Implications for Educational Evaluation and Research*, 12 J. PERS. EVALUATION EDUC. 247, 255 (Sept. 1998).

³¹ Charles T. Clotfelter et al., *Who teaches whom? Race and the distribution of novice teachers*, 24 ECON. EDUC. REV., 377, 377 (2005).

³² BYRON AUGUSTE ET AL., MCKINSEY & CO., CLOSING THE TALENT GAP: ATTRACTING AND RETAINING TOP-THIRD GRADUATES TO CAREERS IN TEACHING 12 (2010), <https://www.mckinsey.com/~media/mckinsey/industries/public%20and%20social%20sector/our%20insights/closing%20the%20teaching%20talent%20gap/closing-the-teaching-talent-gap.pdf>.

³³ NAT’L CTR. FOR EDUC. STAT., CHARACTERISTICS OF PUBLIC SCHOOL TEACHERS (May 2021), <https://nces.ed.gov/programs/coe/indicator/clr>.

³⁴ Alyson Klein, *No Child Left Behind: An Overview*, ED. WEEK (Apr. 11, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>.

³⁵ The Hechinger Report, *Study: Low-Income Minorities Get Worst Teachers in Washington State*, U.S. NEWS & WORLD REP. (July 13,

There are two primary reasons for the disproportionate distribution of high-quality teachers. The first involves their compensation. The average salary of a high school teacher was \$61,730 in 2019,³⁶ but, after adjusting for inflation, that sum amounts to \$27 less than the 1996 average.³⁷ Other out-of-pocket expenses, such as school supplies for their classrooms and students, dilute their take-home pay even further.³⁸ During the 2008 recession, states slashed their education budgets, but, despite the nation's recovery, educators have seen only meager increases to their salary in the years since.³⁹ This relative pay disparity directly harms average teacher quality. The most qualified candidates for teaching jobs are not only weighing the benefits of working as an educator at a private school versus a public school, but they are also considering entering a plethora of better-paid careers.⁴⁰ As of 2018, teachers made 21.8% less, including their pensions and healthcare benefits, than their non-teaching

2015), <https://www.usnews.com/news/articles/2015/07/13/study-low-income-minorities-get-worst-teachers-in-washington-state>.

³⁶ Marissa Perino et al., *Here's how much every US state pays its teachers and how much they spend on each student*, BUS. INSIDER (May 7, 2021), <https://www.businessinsider.com/teacher-salary-in-every-state-2018-4>.

³⁷ Dylan Scott, *Kamala Harris's plan to dramatically increase teacher salaries, explained*, VOX (Mar. 26, 2019), <https://www.vox.com/policy-and-politics/2019/3/26/18280734/kamala-harris-2020-election-policies-teachers-salaries>.

³⁸ Allana Akhtar, *31 teachers across the US reveal their exact salary, and how much of it goes to paying for school supplies like chalk and pencils*, BUS. INSIDER (Aug. 15, 2019), <https://www.businessinsider.com/how-much-teachers-spend-on-basic-school-supplies-2019-8>.

³⁹ MICHAEL LEACHMAN ET AL., CTR. ON BUDGET AND POL'Y PRIORITIES, A PUNISHING DECADE FOR SCHOOL FUNDING (2017), <https://www.cbpp.org/sites/default/files/atoms/files/11-29-17sfp.pdf>.

⁴⁰ AUGUSTE ET AL., *supra* note 32.

peers; in 1996, this discrepancy was just 6.3%.⁴¹ Additionally, teachers in high-poverty schools earn around 10% less than those in low-poverty environments, stripping high-quality teachers from the communities that need them most.

Given that a majority of teachers work additional jobs to make ends meet, they can rarely dedicate their energy solely to their students.⁴² A middle-class lifestyle feels “out of reach” to many public school teachers due to their low salaries.⁴³ Teachers are currently overworked and underpaid, which translates to poorer teaching and worse student outcomes. High rates of turnover, due largely in part to teachers’ poor compensation, harm academic performance.⁴⁴ Disturbingly, that effect is most pronounced in schools with higher proportions of minority students, making the least qualified teachers the most likely to teach in such schools.⁴⁵ American teaching owes both its relative ineffectiveness and inequities to the profession’s diminished lucrativeness, understood in this piece as unsatisfactory working conditions and low compensation.

⁴¹ EMMA GARCIA & ELAINE WEISS, ECON. POL’Y INST., *LOW RELATIVE PAY AND HIGH INCIDENCE OF MOONLIGHTING PLAY A ROLE IN THE TEACHER SHORTAGE, PARTICULARLY IN HIGH-POVERTY SCHOOLS* (2019),

<https://files.epi.org/pdf/161908.pdf>.

⁴² *Id.*

⁴³ ELIZABETH ROSS & CATHERINE WORTH, NAT’L COUNCIL ON TEACHER QUALITY, *STRATEGIC TEACHER COMPENSATION DATABURST* (2018),

<https://www.nctq.org/publications/Strategic-Teacher-Compensation-Databurst>.

⁴⁴ *The Impact of Teacher Turnover on Student Learning*, THE GRAIDE NETWORK (Dec. 2, 2018), <https://www.thegraidenetwork.com/blog-all/impact-of-teacher-turnover-on-student-learning>.

⁴⁵ Donald Boyd et al., *Who Leaves? Teacher Attrition and Student Achievement 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 14022, 2008),

https://www.nber.org/system/files/working_papers/w14022/w14022.pdf

American teaching also owes some degree of its inadequacy to its low prestige. In Finland, teaching is more admired among college students than any other profession, even law and medicine, and its reputation amongst the general public is similar.⁴⁶ U.S. college students, by contrast, find it unattractive.⁴⁷ Most American training programs have high acceptance rates, and a sizable majority of teachers are trained in schools with low admissions standards.⁴⁸ However, as has been previously stated, Finland's teachers colleges rarely admit over 10% of applicants.⁴⁹ Because U.S. educational institutions draw so few highly qualified applicants and offer lower-quality programs,⁵⁰ these schools also produce fewer qualified teachers than their international counterparts.⁵¹ Public school teaching's low prestige and inadequate compensation make it a relatively unattractive industry, thereby creating a shortage of high-quality teachers. To solve this problem, the United States needs to attract better-qualified candidates to the teaching profession by enhancing both its prestige and the scale and equity of its compensation.

⁴⁶ AUGUSTE ET AL., *supra* note 32, at 19.

⁴⁷ *Id.* at 6.

⁴⁸ Liana Loewus, *U.S. Found to Recruit Fewer Teachers From Top Ranks*, EDUC. WEEK (Oct. 15, 2010), <https://www.edweek.org/leadership/u-s-found-to-recruit-fewer-teachers-from-top-ranks/2010/10>.

⁴⁹ AUGUSTE ET AL., *supra* note 32, at 19.

⁵⁰ Dick Startz, *Education programs and (un)selective colleges*, BROOKINGS INST. (May 11, 2017), <https://www.brookings.edu/blog/brown-center-chalkboard/2017/05/11/education-programs-and-unselective-colleges/>.

⁵¹ Loewus, *supra* note 48.

II. POTENTIAL SOCIAL DILEMMAS

Any plan intended to create more qualified teachers through either the prestige- or compensation-based approach would necessarily involve significant social dilemmas. A social dilemma can be defined as any situation in which the individually rational reactions of teachers, policymakers, or other stakeholders of a particular policy would produce a Pareto-inefficient outcome, wherein no party can be made better off without hurting another.⁵² Both proposed solutions would require collective action and socially-optimal behavior on the part of the policymakers, teachers, and educational institutions interested in maximizing their personal utility. For this reason, analyzing the two specific social dilemmas that would proceed from such self-interest is necessary to optimize the political and practical success of both strategies.

In the context of making teaching more lucrative, the first social dilemma in play would be strategic adjustment, defined as target populations' unexpected adaptation to a policy which reduces programs' effectiveness.⁵³ Increasing teaching's lucrateness will invariably involve increases to teachers' wages, but this could easily cause both teachers and alternative employers to change their strategies to defeat the policy. Establishing the superior lucrateness of alternative employers is necessary to understand why either class of actors would strategically adjust. Public teaching is not currently competitive with other occupations requiring college degrees, all of which paid an average salary of \$92,175 per

⁵² ETHAN BUENO DE MESQUITA, POLITICAL ECONOMY FOR PUBLIC POLICY 97 (2016).

⁵³ *Id.* at 212–13.

year in 2020.⁵⁴ To become competitive, teacher salaries would need to rise by 20% to 30%.⁵⁵ Furthermore, while private schools pay teachers less than public schools, their teachers are twice as likely to hold doctorates, indicating that the profession's lucrateness depends on more than its salary.⁵⁶ Private school teachers teach smaller classes, endure fewer bureaucratic hurdles, and teach to students with more invested parents. Additionally, private school children fight less often, come better prepared for class, and are absent less often than their public school counterparts.⁵⁷ In short, private school teachers work in more desirable environments. Private teaching jobs' superior working conditions make them more lucrative than jobs in public schools, thereby compensating for their lower pay.

If the federal government were to both raise and standardize the salaries of public school teachers across the United States, the value of high-quality teachers would increase, but there comes a point where encouraging qualified candidates to become teachers could actually be detrimental to the quality of a public school education. To prevent the best educators from leaving for the public

⁵⁴ Thomas C. Frohlich, *Yes, teachers are underpaid. Here's how much high school teachers are underpaid in each state*, USA TODAY (Sept. 29, 2020), <https://www.usatoday.com/story/money/2020/09/29/states-with-the-most-underpaid-teachers/42699495/>.

⁵⁵ ANNE PODOLSKY ET AL., LEARNING POL'Y INST., SOLVING THE TEACHER SHORTAGE: HOW TO ATTRACT BETTER EDUCATORS 9 (2016), <https://learningpolicyinstitute.org/product/solving-teacher-shortage>.

⁵⁶ *Table 80: Number, highest degree, and years of full-time teaching experience of teachers in public and private elementary and secondary schools, by selected teacher characteristics*, NAT'L CTR. FOR EDUC. STAT. (last visited Mar. 14, 2022),

https://nces.ed.gov/programs/digest/d12/tables/dt12_080.asp.

⁵⁷ *Id.*

sector, nonpublic schools would likely make strategic adjustments, raising their wages by an equal proportion and keeping their teachers' net utility constant. This would mean that highly qualified teachers who prefer meaningful work in good conditions above all else would still choose private schools over public schools, as they would keep their previous comforts at no added financial cost. Other industries that employ individuals with specialized bachelor's degrees might adjust similarly by either raising their wages or offering increased benefits. These new wages would become the new norm and strongly limit any growth in the supply of teachers, evading the purpose of policies designed to attract stronger candidates to the teaching profession.

Furthermore, under a flat, national raise for public school teachers, disparities in the cost of living across the United States might cause teachers to flock to regions where their purchasing power is highest. For instance, the 2020 monthly cost of living in California's San Mateo County was \$6,391, more than double that of Ohio's rural Lucas County.⁵⁸ Because purchasing power is greater in non-metropolitan regions than in cities, standardized pay, when not adjusted to market forces, might create a surplus of teachers in the former and a shortage in the latter. Teachers would strategically adjust by moving to areas where their paycheck would stretch the farthest.⁵⁹

⁵⁸ Evan Comen, *Pricey Places: Here's Some of the Most Expensive Spots to Live in the US, by State*, USA TODAY (Jul. 28, 2020),

<https://www.usatoday.com/story/money/2020/07/28/most-expensive-place-to-live-in-every-state/112361936/>.

⁵⁹ Alison Weingarden, *Labor Market Outcomes in Metropolitan and Non-Metropolitan Areas: Signs of Growing Disparities*, BD. OF GOVERNORS OF FED. RES. SYS. (Sept. 25, 2017),

Therefore, any attempt to make teaching more lucrative would need to mitigate both alternative employers' strategic adjustment and teachers' geographic strategic adjustment.

Even for programs able to overcome strategic adjustment, political difficulties can pose serious social dilemmas of their own, and changing the teaching profession would prove no different. For example, the fact that politicians must win reelection motivates them to pursue policies that benefit their most responsive constituents over those in the public's best interest.⁶⁰ In this way, influence over elected officials, primarily caused by popular partisanship, would threaten effective incentivization of teaching jobs. In general, members of the Republican party favor efforts to fund charter, private, and parochial institutions rather than public schools.⁶¹ Furthermore, the GOP's party platform leading up to the 2020 election prioritized reductions in the federal government's power,⁶² a stance that has negatively impacted education policy in the past.⁶³ The GOP's preference for a weaker federal government and expanded school choice may limit the use of financial or prestige-based inducements to improve public school teacher

<https://www.federalreserve.gov/econres/notes/feds-notes/labor-market-outcomes-in-metropolitan-and-non-metropolitan-areas-signs-of-growing-disparities-20170925.htm>.

⁶⁰ BUENO DE MESQUITA, *supra* note 52, at 286.

⁶¹ *A Brief History of Education in America*, *supra* note 25.

⁶² REPUBLICAN NATIONAL CONVENTION, RESOLUTION REGARDING THE REPUBLICAN PARTY PLATFORM 10–23 (2020).

⁶³ Kenneth K. Wong, *Waiver politics dominate in the absence of ESEA reauthorization*, BROOKINGS INST. (Aug. 24, 2015), <https://www.brookings.edu/blog/brown-center-chalkboard/2015/08/24/waiver-politics-dominate-in-the-absence-of-esea-reauthorization/>.

quality, as such policies would likely require heavy involvement from the federal government.

At the state level, these conflicting interests may become an even greater roadblock because of the influence of special interests, or focused groups of actors with significant stakes in certain policy areas, over elected officials. Every state's constitution requires that legislators balance its budget, so, in order to create room in the budget for increasing teachers' salaries and providing additional benefits, policymakers would need to either reallocate funds from other programs or raise taxes.⁶⁴ The unpopularity of tax hikes among conservative interest groups could make policies related to such initiatives difficult to pass in many states.⁶⁵ The alternative, taking funds from other programs, would prove similarly difficult, more socially suboptimal, or even both. Feed-forward effects, or policies' tendencies to create special interest constituencies motivated to preserve their benefits, would discourage policymakers from depriving other initiatives to fund the particular one supported by the interest group.⁶⁶ This opposition would subsequently force policymakers to either give up or take the money required for education programs from constituencies who are less able to organize. Each individual would suffer minutely, but society's aggregate loss could be large relative to the

⁶⁴ Ronald K. Snell, *State Constitutional and Statutory Requirements For Balanced Budgets*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 2004), <https://www.ncsl.org/research/fiscal-policy/state-constitutional-and-statutory-requirements-fo.aspx>.

⁶⁵ PEW RESEARCH CTR., *IN A POLITICALLY POLARIZED ERA, SHARP DIVIDES IN BOTH PARTISAN COALITIONS* 90–95 (2019), <https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions/>.

⁶⁶ Jonathon Pierce et al., *Social Construction and Policy Design: A Review of Past Applications*, 42 POL'Y STUD. J. 1, 6 (2014).

alternative of defunding special interests' favored programs. Due to this social dilemma, states would likely find the incentivization of teaching jobs to be incredibly difficult. To find greater chances of success, supportive interests would need to look to the federal government instead.

Even at the federal level, political fault lines related to school choice and government influence would remain in play. Prominent among groups that support public education are local, state, and national teachers' unions. The National Education Association (NEA), for instance, is both the largest educators' union in the United States and the largest U.S. union overall.⁶⁷ Given the investment of their members and the centralization of their leadership, unions like the NEA exert significant influence on policymaking.⁶⁸ Other public school advocacy groups, civil rights organizations, associations of school boards and parents, and universities' interest groups who tend to be more concerned with postsecondary issues, often align with these powerhouse teachers' unions.⁶⁹ While other interest groups with varying degrees of influence exist, teachers' unions remain dominant among them.⁷⁰ Many of their allies are large and resourced, but their ideological and organizational decentralization reduces their individual

⁶⁷ National Education Association (NEA), INFLUENCEWATCH (last visited Mar. 14, 2022), <http://www.influencewatch.org/labor-union/national-education-association-nea/>.

⁶⁸ *Id.*

⁶⁹ Elizabeth H. DeBray-Pelot et al., *The Institutional Landscape of Interest Group Politics and School Choice*, 82 PEABODY J. OF EDUC. 204, 217 (2007); Roy Adam, *Interest Groups in American Education*, 11 COMPAR. EDUC. 165, 168 (1975).

⁷⁰ TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 69 (2011).

effectiveness, and they often fail to cooperate with one another.⁷¹

Their opponents, by contrast, include a plethora of conservative foundations and organizations, including charter and private school associations, think tanks, and states' rights groups.⁷² Religious organizations and larger, multi-interest conservative organizations, such as the Charles Koch Foundation and five foundations under the family name of former U.S Secretary of Education Betsy DeVos, often join them.⁷³ The fact that these interest groups are more centralized, well-funded, and responsive may increase their influence on the education policymaking process relative to their opponents.⁷⁴ Groups opposed to teaching incentivization could lobby for their policy successfully by targeting these interest groups.⁷⁵ Teachers' unions may reject such a proposal as well if it would prevent some of their less-qualified members from teaching, and many moderate-to-liberal think tanks have supported school choice programs in the past.⁷⁶ For these reasons, the influence of special interests over elected officials could impede teaching incentivization policy.

⁷¹ Adam, *supra* note 69.

⁷² DeBray-Pelot et al., *supra* note 69.

⁷³ Adam, *supra* note 69, at 168–69; Steven Greenhouse, *Billionaires v teachers: the Koch brothers' plan to starve public education*, GUARDIAN (Sept. 7, 2018), <https://www.theguardian.com/us-news/2018/sep/07/arizona-fight-koch-brothers-school-vouchers>.

⁷⁴ Adam, *supra* note 69, at 169; BUENO DE MESQUITA, *supra* note 52, at 283.

⁷⁵ BUENO DE MESQUITA, *supra* note 52, at 287.

⁷⁶ DeBray-Pelot et al., *supra* note 69.

III. POLICY RECOMMENDATIONS: TEACHING AS A LUCRATIVE & PRESTIGIOUS CAREER PATH

In light of the social dilemmas described above, both approaches' ideal designs begin to emerge. Despite its susceptibility to strategic adjustment, higher pay should remain a cornerstone of any policy that aims to make teaching more lucrative, given its potential to improve teacher performance and student outcomes. Higher pay would not only encourage top-tier students to pursue teaching careers, but it would also allow public-sector teachers to leave their supplementary jobs and dedicate more of their energy to improving student outcomes.⁷⁷ These specific wage increases would come in the form of federal grants to state boards of education. These boards of education would receive funding on the condition that it would be distributed to local school boards who would, in turn, use these resources to increase all public school teachers' wages by 20%, representing the rough differential between average teaching salaries and those in comparable professions.⁷⁸ Since the geographic strategic adjustment problem with increased pay largely stems from a failure to account for cost of living, these grants should mandate that state school boards adjust the money's disbursement to school districts by the respective costs of living. This adjustment would equalize the wage increases' purchasing power across the United States, removing teachers' motivation to strategically adjust by relocating to cheaper areas while still making teaching compensation competitive

⁷⁷ María Méndez, *Many Texas teachers have second jobs or live paycheck to paycheck. They're anxiously watching the teacher pay debate.*, TEX. TRIBUNE (Apr. 3, 2019), <https://www.texastribune.org/2019/04/03/texas-teachers-watch-anxiously-legislature-debates-their-pay/>.

⁷⁸ Podolsky et al., *supra* note 55.

with that of other baccalaureate-level jobs.⁷⁹

Again, private schools' more satisfactory work environments are themselves an important component of their teaching jobs' relative lucrateness compared to public schools.⁸⁰ To that end, allowing public school teachers to compete for research funding could compensate for their relatively deficient workplace quality. By providing the opportunity to conduct research on their own, policymakers could increase public school teachers' opportunities for career advancement, which would improve their overall work experience and their job's lucrateness. Additionally, no matter how policymakers would raise teachers' wages, private schools would retain a motive to strategically adjust by paying their faculty more as well. Circumventing this salary increase requires a benefit to which private schools could never strategically adjust: federally subsidized tuition at two- and four-year public universities. Since teachers are almost twice as likely to leave high-poverty schools than more affluent institutions, only accredited educators spending over six years at public, low-income schools would receive benefits from this proposed policy.⁸¹ This addendum could reduce teacher turnover at the most disadvantaged U.S. schools and encourage more highly-qualified teachers to work at them, thereby improving educational outcomes and improving the educational system's equity.

⁷⁹ *Id.*

⁸⁰ Ben Orlin, *Why Are Private-School Teachers Paid Less Than Public-School Teachers?*, ATLANTIC (Oct. 24, 2013), <https://www.theatlantic.com/education/archive/2013/10/why-are-private-school-teachers-paid-less-than-public-school-teachers/280829/>.

⁸¹ Christopher Redding, *Teacher turnover is a problem – here's how to fix it*, PHYS.ORG (Sept. 7, 2018), <https://phys.org/news/2018-09-teacher-turnover-problem.html>.

Lastly, the lucriveness strategy would include the creation of an “EB-1D” sub-visa for aspiring teachers under the existing EB-1 visa framework, which currently allows outstanding professors and researchers, some business executives, and people of extraordinary ability to work in the United States.⁸² These visas exist to encourage educated people who can make significant contributions to the American population and its economy to migrate to the United States.⁸³ Creating a new EB-1D category to allow foreigners who hold master’s degrees or doctorates to work in the United States on the condition that they work in public teaching would serve the same purpose. Given the high demand for U.S. work visas and the difficulty of obtaining them, this avenue to residency would become a benefit for teaching and thereby make the profession more lucrative. A strategic adjustment problem here, however, might be that immigrant teachers could move to non-teaching jobs on approval of their EB-1D visas. Circumventing this potential issue could involve requiring visa holders to teach in public schools for at least ten years, or six years for those with doctorates. This solution would provide immigrant teachers career flexibility while still reducing turnover rates.

The compensation-focused approach would likely prove effective for all the aforementioned reasons, but increasing the teaching profession’s prestige would both complement its incentives and mitigate the social

⁸² *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Mar. 1, 2022), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1>.

⁸³ *Persons of Exceptional Ability*, CARL SHUSTERMAN - IMMIGR. LAW. (last visited Mar. 14, 2022), <https://www.shusterman.com/exceptional-ability/>.

dilemmas arising from the influence of special interest groups over elected officials. Either the Department of Education or Congress would require teachers in all states to hold a master's degree in education (M.Ed.) or a field-specific master's degree. Other professional fields with similar educational requirements, such as engineering, law, and executive management, generally enjoy high regard in both the United States and other countries.⁸⁴ If regulators were to associate becoming a teacher with obtaining a post-baccalaureate degree, education may finally rise to the status of other highly regarded professions.

Standard national uniformity could also prevent teachers from strategically adjusting by moving to states with lower educational licensing requirements, many of which do not require teachers to hold graduate degrees.⁸⁵ The allowance for field-specific master's degrees would also permit experts to teach students without an M.Ed, removing the barrier of entry for teachers who are highly specialized in a single field. The second provision, which overlaps with the last prong of the compensation-focused plan, would provide immigrants meeting the degree requirement with an EB-1D visa to teach in public schools for either ten or six years. This would enable high-skilled immigrants and international college students to take and retain teaching jobs in the United States, thereby increasing the caliber of aspiring teachers domestically and the profession's prestige abroad.

⁸⁴ Niall McCarthy, *America's Most Prestigious Professions In 2016*, FORBES (Mar. 31, 2016), <https://www.forbes.com/sites/niallmccarthy/2016/03/31/americas-most-prestigious-professions-in-2016-infographic/?sh=2dc9cc2a1926>.

⁸⁵ *Teacher Certification Requirements by State*, TEACH.COM (last visited Mar. 14, 2022), <https://teach.com/careers/become-a-teacher/teaching-credential/state-requirements/>.

Most importantly, this plan would subsidize M.Ed. programs on the condition that they incorporate independent research into their curricula and exclusively offer three-year degrees, similar to policies implemented in Finland.⁸⁶ Moving teacher training programs into research universities and increasing their rigor would likely make them more prestigious and therefore more selective.⁸⁷ This competition, alongside more intense preparation in training programs themselves, would increase the quality of the average teacher.⁸⁸ However, programs qualifying for subsidies could easily raise their costs of attendance above their unqualified peers, thereby enriching themselves, screening out all but the most wealthy aspirants, and creating inequity. If passed, this policy would likely need to regulate or subsidize tuition at such programs to mitigate this institutional form of strategic adjustment. These three elements—requiring teachers to hold a master’s degree, implementing national qualification standards, and improving upon current teacher training programs—would combine to produce a comprehensively more prestigious, competitive, and competent teaching profession in the United States.

In addition, the collective appeal of these three elements to special interest groups opposed to public school funding could mitigate the social dilemma arising from their preference for smaller government. Together, the three constituent policies of the prestige scheme would

⁸⁶ *Top-Performing Countries: Finland*, *supra* note 13.

⁸⁷ FRANK DONOGHUE, *THE LAST PROFESSORS: THE CORPORATE UNIVERSITY AND THE FATE OF THE HUMANITIES* 114 (10th ed. 2018).

⁸⁸ Anthony Clarke, *Teaching as a Learned Profession: The Evolution of Inquiry in a Teacher Education Program*, in *RECONCEPTUALIZING TEACHER EDUCATION: A CANADIAN CONTRIBUTION TO A GLOBAL CHALLENGE* 191, 207–08 (Anne M. Phelan et al. eds., 2020).

increase industry competition on both individual and school levels to great effect. Many of the competent teachers trained in newly prestigious, rigorous education colleges would likely spend part or all of their careers in parochial, charter, and private schools, so these schools, too, would obtain better teachers.⁸⁹ For this reason, interest groups that oppose government expansion would be less likely to reject the policies mentioned above. Furthermore, the conservative coalition's prioritization of economic issues and emphasis on high-skilled immigration may mitigate affiliated special interests' opposition to this approach.⁹⁰ The prestige-based strategy's work visa provision would likely facilitate a generalized increase in high-skilled immigration, which may be welcomed by interest groups that tend to oppose the lucrateness strategy.⁹¹

The preeminence of specialized mobilization in this policymaking process and the EB-1D provision could appeal to conservative policymakers in other ways as well. The promise of a guaranteed, prestigious job would likely increase the quality of international students at the undergraduate and graduate levels to both study and stay in

⁸⁹ Carol L. Rohr & Hilda F. Lynch, *Migration and Attrition of Public and Private School Teachers: 1991-1992*, NAT'L CTR. FOR EDUC. STAT. (Aug. 1995), <https://nces.ed.gov/pubs95/web/95770.asp>.

⁹⁰ Likhitha Butchireddygari, *Voters Who Think The Economy Is The Country's Biggest Problem Are Pretty Trumpy. That Might Not Help Him Much.*, FIVETHIRTYEIGHT (July 6, 2020), <https://fivethirtyeight.com/features/voters-who-think-the-economy-is-the-countrys-biggest-problem-are-pretty-trumpy-that-might-not-help-him-much/>; Muzaffar Chishti & Jessica Bolter, *The U.S. Presidential Campaign Cements Political Parties' Deepening Schism on Immigration*, MIGRATION POL'Y INST. (Oct. 1, 2020), <https://www.migrationpolicy.org/article/us-presidential-campaign-cements-political-parties-deepening-schism-immigration>.

⁹¹ *Id.*

the United States. As a result, public and private universities alike would become more financially stable, and the influx of higher-skilled students entering the job market would boost the U.S. economy both in absolute terms and relative to its foreign counterparts.⁹² Due to their focus on bolstering the economy, conservative interest groups might applaud each of these possibilities related to economic growth.

Lastly, both prestige- and compensation-focused strategies could anticipate limited conservative opposition by using federal funds. Instead of risking unpopular tax increases or reductions to other programs, state governments could simply take federal grants. Some conservative governors' support for expanding Medicaid in their states with federal funds provides evidence for this strategy's feasibility.⁹³ The increase in the federal government's power related to facilitating educational improvements in the states would admittedly become an enormous roadblock, considering the Republican Party's preference for small government, but the accompanying alleviation of political burdens on the states would improve its palatability. Additionally, policymakers could give states wide latitude to accept or decline federal funds for either policy strategy to allow states time to overcome partisan opposition in their legislatures.⁹⁴ Given the benefits that the prestige-oriented approach provides to nonpublic schools, high-skilled immigration, the U.S.

⁹² William R. Kerr & Sarah E. Turner, *Introduction: US High-Skilled Immigration in the Global Economy*, 33 J. OF LAB. ECON., July 2015, at 51; Miloš Krstić et al., *Higher Education as a Determinant of the Competitiveness and Sustainable Development of an Economy*, 12 SUSTAINABILITY, no. 16, 2020, at 1–2.

⁹³ Timothy J. Conlan & Paul L. Posner, *American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama's "New Nationalism"*, 46 PUBLIUS: J. FEDERALISM, Summer 2016, at 289–90.

⁹⁴ *Id.*

economy, and state governments, conservatives in opposition would likely have fewer incentives to oppose this strategy. Consequently, this set of prestige-based solutions would both improve teacher quality and, at least partially, overcome major social dilemmas arising from the influence of partisan and special interests over elected officials.

IV. THE REALITIES OF POLICYMAKING & IMPLEMENTATION

For both the prestige- and compensation-based solutions' strengths to matter, they would first need to survive the policymaking process. Understanding their probability of doing so begins with an exploration of the distribution of the costs and benefits of each alternative. Taxpayers would bear much of the former, given the high costs associated with extending additional benefits to teachers and subsidizing educators' salaries and postsecondary schooling. Private schools would bear a superficial cost, since they would need to raise their teachers' pay to prevent them from taking public teaching jobs, but they could transfer this cost to their pupils by raising tuition. Additionally, since many talented students would become teachers rather than pursuing higher-paying jobs, these other professions would lose qualified candidates.

On the other hand, these policies would benefit public school students, who would receive a better education at no personal cost, and local and state school boards, who would gain federal funding. These strategies for improving teacher quality could also help teachers' unions. Better compensation and higher prestige might allow some teachers to quit their secondary jobs, thereby

giving them the ability to become more involved in their unions while also improving individual teachers' lifestyles. Nonpublic schools could benefit in minor ways as well, as they could hire faculty from a more qualified candidate pool. On a long-term macroeconomic level, education would create a more skilled workforce, which would give the United States a comparative advantage across various industries.⁹⁵ Furthermore, the EB-1D visa program would likely pull more skilled talent from international universities into the United States, which could both bolster the nation's economy and benefit the American population at large.⁹⁶

Following a discussion of the costs and benefits of these policy proposals, the relevant actors on both sides of the debate, specifically the policy entrepreneurs, become clear.⁹⁷ It is likely that conservative officials would oppose the enactment of both the prestige- and compensation-based strategies because of their tendency to support school choice and limited federal government. Charter, private, and parochial school organizations, as well as parent-focused school choice groups, might do the same because of these policies' focus on public school teachers. Finally, conservative voters may contest both approaches due to their general opposition to deficit spending.⁹⁸ While the

⁹⁵ Brent Radcliffe, *How Education and Training Affect the Economy*, INVESTOPEDIA (Jan. 26, 2022), <https://www.investopedia.com/articles/economics/09/education-training-advantages.asp>.

⁹⁶ Frédéric Docquier, *The brain drain from developing countries*, 31 IZA WORLD OF LAB. (2014).

⁹⁷ MATTHEW GROSSMANN, *ARTISTS OF THE POSSIBLE: GOVERNING NETWORKS AND AMERICAN POLICY CHANGE SINCE 1945* 30 (2014).

⁹⁸ Jeanne Sahadi, *Conservative hate deficit... except when they finance tax cuts*, CNNMONEY (Oct. 4, 2017), <https://money.cnn.com/2017/10/04/news/economy/conservative-fiscal->

policies' benefits to nonpublic schools, high-skilled immigration, the U.S. economy, and state governments may mitigate this opposition, the high costs will likely motivate some form of continued resistance.

By contrast, the same aspect of both policy approaches – their favorability toward public education, expansion of the federal government, and immigration – would likely engender liberal support from within Congress, the bureaucracy, and the executive branch. Teachers' unions may also jump to the policies' defense, particularly regarding the salary increase and provision of free public college to dependents of teachers working in disadvantaged schools. Universities and their associated lobbies would likely support it as well, considering that their undergraduate selectivity, enrollment numbers, and financial aid accounts would benefit from the provision of free tuition to these dependents. Institutions of higher education would also cherish the prestige-focused strategy, given its subsidies for M.Ed. programs, the increased enrollment that heightened degree requirements would grant these programs, and the EB-1D program's provision of talented international students. The chairpeople or ranking members of the House Education and Labor and Senate Education Committees, the Secretary of Education, and heads of prominent teachers' unions would be likely policy entrepreneurs for the prestige-based approach, as would the leaders of other supportive interest groups.⁹⁹

Scholars like Timothy J. Conlan suggest that policymaking is best understood as a two-way typology

hawks-tax-cuts/index.html.

⁹⁹ Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI., no. 3, 1997, at 738.

concerning policies' scope and form of mobilization.¹⁰⁰ The former is the degree to which a proposal elicits attention from specialized or mass audiences, and the latter considers whether a policy draws support from organizational or ideational coalition-building.¹⁰¹ Both prestige- and compensation-based policy approaches to improving teacher quality seem most likely to exhibit a specialized scope of mobilization, considering their low-to-variable salience and relatively high complexity.¹⁰² One notable caveat, however, is the fact that the lucrateness scheme's provision for increased teacher pay could spark mass mobilization, demonstrated by the 2018-2019 teacher strikes for higher compensation.¹⁰³ As for the two approaches' forms of mobilization, the high number of relevant interests at hand suggests that both would experience organizational mobilization.¹⁰⁴ The prestige-focused strategy might skew toward one variant of ideational mobilization on account of its proposals' higher complexity, but the crowded ecosystem of actors and interest groups would likely still maintain an organizational form. Both plans to incentivize teaching jobs would default to what Conlan calls the pluralist pathway of power because of their organizational mobilizations and specialized scopes.¹⁰⁵ In this pathway, public salience is relatively low, degree of consensus is high (suggesting that

¹⁰⁰ TIMOTHY J. CONLAN ET AL., *PATHWAYS OF POWER: THE DYNAMICS AND EVOLUTION OF CONTEMPORARY FEDERAL POLICYMAKING* 3 (2014).

¹⁰¹ *Id.*

¹⁰² DeBray-Pelot et al., *supra* note 69, at 207.

¹⁰³ Sarah Jones, *Red for Ed Continues: Where Teachers' Strikes Are Set to Spread Next*, N.Y. MAG. (Feb. 7, 2019), <https://nymag.com/intelligencer/2019/02/red-for-ed-continues-where-teachers-are-set-to-strike-next.html>.

¹⁰⁴ Adam, *supra* note 69, at 165.

¹⁰⁵ CONLAN ET AL., *supra* note 100, at 2.

partisanship is low), and committee chairs and ranking members tend to be policies' chief sponsors.¹⁰⁶

That said, policymaking processes rarely follow a single pathway of power. Most default to one but exhibit aspects of others, and certain policy entrepreneurs sometimes try to switch the process to different tracks according to their interests.¹⁰⁷ Given both approaches' relatively low salience and high complexity, an actor could try to move to the expert pathway after allowing pluralism to produce general agreement on policy goals.¹⁰⁸ This could be done by convening a panel of experts to draft and study legislation, consulting specialized think tanks, or commissioning a study of several proposals. Alternatively, or additionally, a policy entrepreneur could try to switch from a specialized scope to a mass scope, thereby moving the process onto a symbolic or partisan pathway of power. This would likely require a powerful exogenous shock, such as a nationwide or multi-state teachers' strike, an extremely effective advertising campaign, or a prominent and influential book. Historical precedent, such as Sputnik's facilitation of the NDEA, proves the plausibility of such a shock prompting policy entrepreneurs to alter the scope of their proposals.¹⁰⁹ However, the high complexity and low salience of teacher incentivization, especially during economic and public health crises, would make the symbolic and partisan pathways relatively inaccessible, and the fact that the educational policy environment hosts countless influential interest groups would only compound that barrier.

¹⁰⁶ *Id.* at 6.

¹⁰⁷ *Id.* at 12.

¹⁰⁸ *Id.* at 3.

¹⁰⁹ Powell, *supra* note 10.

While the symbolic and partisan pathways would be less likely to apply to either strategy, the concept of a distinct window in which policy action would be temporarily possible still has value under the pluralist and, to a lesser extent, expert pathways. The circumstances under which a window of opportunity could arise become clear upon examining both the prestige- and compensation-focused approaches through four related conceptual frameworks of policymaking. The first, the social construction and policy design framework (SCPD), argues that policymakers use judgments about certain populations' values to determine their goals and shape their policy designs around these conclusions.¹¹⁰ In the context of incentivizing teaching jobs, this logic implies that policymakers might judge public school teachers and the children whom they teach to be worthy of government aid, creating feed-forward effects that would increase both policy approaches' chances of legislative enactment.

The narrative policy framework, the second of the four conceptual frameworks, explains one way in which circumstances could spur policymakers to begin favoring public school teachers and their students. According to scholars Michael D. Jones and Mark K. McBeth, a policy narrative includes a temporal sequence of events arranged in a plot that features heroes, villains, and a moral.¹¹¹ While debating plans to promote teaching jobs, policymakers, perhaps seeking to shift the process to the partisan or symbolic pathways of power, could cast public school teachers and students as heroes and their nonpublic

¹¹⁰ Pierce et al., *supra* note 66, at 3–4.

¹¹¹ Michael D. Jones & Mark K. McBeth, *A Narrative Policy Framework: Clear Enough to Be Wrong?*, 38 POL'Y STUD. J., no. 2, 2010, at 329.

counterparts as villains. An emotional event, such as a statewide teacher's strike or vivid testimony from a struggling teacher, could trigger the formation of this kind of narrative.

Whether or not the narrative or SCPD frameworks would apply, the advocacy coalition framework (ACF) sheds light on the role of organizations in this policymaking process. One recent version of the theory argues that advocacy coalitions, or collections of allied interest groups, aggregate large numbers of disparate actors and specialists within subsystems to make policy.¹¹² Since each approach to incentivizing teaching would default to the pluralist pathway of power and involve many significant interest groups, ACF is especially likely to apply.¹¹³ Though coalitions between interest groups and narrative-driven feed-forward effects would likely increase both approaches' probability of passage, ultimate success or failure would likely depend on certain conditions in the political environment.¹¹⁴

Most useful in determining these particular factors is the multiple streams (MS) model, which posits that, when a problem arises in political conditions amenable to an existing policy solution, a policy entrepreneur can unite those three "streams" and pass the solution to solve the problem.¹¹⁵ The conditions under which this could occur constitute a policy window.¹¹⁶

¹¹² Paul A. Sabatier & Christopher M. Weible, *The Advocacy Coalition Framework: Innovations and Clarifications*, in THEORIES OF THE POLICY PROCESS 189, 191–92 (Paul A. Sabatier ed., 2007).

¹¹³ DeBray-Pelot et al., *supra* note 69, at 207.

¹¹⁴ GROSSMANN, *supra* note 97.

¹¹⁵ Matthew C. Nowlin, *Theories of the Policy Process: State of the Research and Emerging Trends*, 39 POL'Y STUD. J., no. S1, 2011, at 44.

¹¹⁶ GROSSMANN, *supra* note 97.

The most immediately evident window of opportunity would be a government willing to spend its political capital on education. Conservative opposition to expanded federal government, and thereby additional public teaching inducements, would mean that the proposal's passage would be much more likely if Democrats controlled the executive and/or legislative branches, although the pluralist pathway could allow entrepreneurs to overcome this factor's absence. An exogenous event could move education higher on a left-leaning government's agenda and widen the policy window even further. A lack of immediate crises like the COVID-19 pandemic or a deep recession would create a similar effect, because their high salience would dissuade prioritization of the educational system. In light of the two strategies' pro-immigration stances and heavy government spending, both of which would elicit especially pronounced opposition during a recession, the economy would likely have to be in an expansionary cycle.¹¹⁷ Conversely, few officials or members of the public would push for federal aid during an inflationary period, making it an ideal time for capital-intensive education reform. The pluralism of the education policy process makes it energy- and strategy-intensive, so policy entrepreneurs' leadership and coalition-building would be integral to creating a window wide enough for change to occur.¹¹⁸

With the right entrepreneurship, policy window,

¹¹⁷ Jill Barshay, *How the last recession affected higher education. Will history repeat?*, HECHINGER REP. (Apr. 6, 2020), <https://hechingerreport.org/how-the-2008-great-recession-affected-higher-education-will-history-repeat/>.

¹¹⁸ Mintrom, *supra* note 99.

and ideological makeup of the government, both approaches' passage would be possible, and even likely. On account of the issue's partisanship, however, liberal policymakers would likely need to make their proposals more palatable to their conservative opponents. For example, concerns about increased competition for domestic teachers might cause negotiators to add more stringent requirements to the EB-1D proposal. Additionally, limited-government supporters across all three branches might try to decrease the 20% federal wage hike for all teachers. As occurred multiple times during the Obama administration, strong support for limiting the federal government could be assuaged by guaranteeing states the ability to choose whether to accept federal grants funding salary increases.¹¹⁹ The proposal for free college for dependents of teachers at disadvantaged schools might also face pushback from conservative policymakers, as their constituents tend to object to the notion of free postsecondary education.¹²⁰ Nonetheless, given both proposals' potential to employ bipartisan appeal in mitigating the influence of special interests over elected officials, the policies' most integral components would likely survive.

CONCLUSION

Passage of the prestige- and compensation-based proposals is essential to the United States' future. A nation's capacity to educate its children and young adults

¹¹⁹ Conlan & Posner, *supra* note 93, at 1.

¹²⁰ Terry W. Hartle, *Why Most Republicans Don't Like Higher Education*, CHRON. OF HIGHER ED. (July 19, 2017), <https://www.chronicle.com/article/why-most-republicans-dont-like-higher-education/>.

is crucial in determining its economic strength and resilience.¹²¹ Better-educated employees are more productive, mobile, and adaptable; therefore, as times and technologies change, so do they. Perhaps more important still is education's ability to improve well-being across demographics and throughout individual lives.¹²² Higher-quality education is as much a boon for economic growth as it is a force for equity, justice, and happiness. The United States' international competitiveness on all of these dimensions will rise and fall with its ability to educate its own people, and improving prestige and compensation to create better teachers is its best hope of developing this capacity. In the words of Malcolm X, "education is our passport to the future, for tomorrow belongs to the people who prepare for it today."¹²³ However, in order to realize this vision, the United States sorely needs qualified teachers.

¹²¹ ISABEL V. SAWHILL ET AL., BROOKINGS INST., THE EFFECTS OF INVESTING IN EARLY EDUCATION ON ECONOMIC GROWTH (2006), <https://www.brookings.edu/research/the-effects-of-investing-in-early-education-on-economic-growth/>.

¹²² Matthew J. Easterbrook et al., *The Education Effect: Higher Education Qualifications are Robustly Associated with Personal and Socio-Political Outcomes*, 126 SOC. INDICATORS RSCH. 1261 (2015).

¹²³ (1964) *Malcolm X's Speech at the Founding Rally of the Organization of Afro-American Unity*, BLACKPAST (OCT. 15, 2007), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1964-malcolm-x-s-speech-founding-rally-organization-afro-american-unity/>.

THE GROWING AMERICAN CHILD CARE CRISIS

*Marianne Nader**

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INTRODUCTION

For decades, the United States child care crisis has been a growing issue. Faced with stagnant wages and decreasing fertility rates, the child care facilities that remain have been shutting down at alarming rates.¹ This lack of child care has forced parents to decide whether or not to pay more than they can, settle for low-quality care, or leave the workforce entirely. The struggle to find quality, affordable child care is an enduring systemic issue, resulting from a collective failure to invest in early childhood education and care. Like many other issues, this has only been exacerbated by the COVID-19 pandemic.²

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¹ Anna Louie Sussman, *The End of Babies*, N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/interactive/2019/11/16/opinion/sunday/capitalism-children.html>.

² U.S. CHAMBER OF COM., THE IMPORTANCE OF CHILDCARE TO U.S. FAMILIES AND BUSINESSES (2020), https://www.uschamberfoundation.org/sites/default/files/EarlyEd_Minis

The American Academy of Pediatrics noted that child care is a social determinant of health.³ Although the direct health impact of COVID-19 on children has been low, the downstream effects on the health and wellbeing of these individuals and their families have been severe.⁴ Many low-income children are placed at an educational disadvantage before they begin kindergarten due to a lack of accessible and affordable child care.

Investing in early child care and education is more important now than ever before. If the United States is to support economic security for families, Congress must commit to sustained investment in child care through programs such as universal pre-kindergarten, wage supplementation for child care and early education workers, and providing the necessary resources for quality child care. It is important to note that resolving this crisis will require committed support from all levels of government. Investing in such programs will not only assist in alleviating a public health issue, but it will also increase parental labor force participation; improve both the short- and long-term health, educational, and economic outcomes for children; and assist in the growth of the child care economic sector.

I. PRE-COVID-19 CHILD CARE CRISIS

According to the 2016 National Survey of Children's Health, almost two million parents of children five years old and younger were forced to either quit their job, alter their work schedule, or decline potential job

[Report6 121420 Final.pdf](#).

³ Nikita Kalluri et al., *Child Care During the COVID-19 Pandemic: A Bad Situation Made Worse*, 147 PEDIATRICS PERSP., March 2021, at 1.

⁴ *Id.*

opportunities due to a lack of child care.⁵ When parents decide to leave the workforce to become full-time caretakers, they lose their salaries, benefits, and retirement savings. Financially, this could set parents back years, and some families may be unable to recover from such economic setbacks. According to a report from the Center for American Progress, investments in child care could create over two million jobs for parents entering or reentering the workforce, as well as education and early child care businesses.⁶

Various factors have contributed to the rising costs of child care during the latter half of the twentieth century. According to a paper published in 2010 by Kornich and Furstenberb, per-child spending on child care has demonstrated substantial increases from the 1970s to the 2000s.⁷ Due to the greater number of women beginning to enter the workforce in the 1970s and 1980s, households now needed to spend money on child care.⁸ Furthermore, findings from the U.S. Census Bureau revealed that from 1990 to 2011, while middle-class wages remained stagnant, the cost of child care rose over forty percent,⁹ increasing at

⁵ HEALTH RES. AND SERV. ADMIN., 2016 NATIONAL SURVEY OF CHILDREN'S HEALTH (NSCH) (2016), https://www.childhealthdata.org/docs/default-source/nSCH-docs/2016-nsch-guide-to-topics-and-questions_05-15-170df737f3c0266255aab2ff00001023b1.pdf.

⁶ AJAY CHAUDRY & KATE HAMM, CTR. FOR AM. PROGRESS, THE CHILD CARE FOR WORKING FAMILIES ACT WILL BOOST EMPLOYMENT AND CREATE JOBS (2017), <https://americanprogress.org/wp-content/uploads/2017/12/ChildCareWorkforce-brief.pdf>.

⁷ Sabino Kornrich & Frank Furstenberg, *Investing in Children: Changes in Parental Spending on Children, 1972–2007*, 50 DEMOGRAPHY 1 (2013).

⁸ *Id.*

⁹ *Facts for Features: Women's History Month March 2013*, U.S. CENSUS BUREAU (Feb. 7, 2013),

double the rate of overall inflation.¹⁰ Strict child care laws such as the teacher-to-child ratio or square foot per child rule drastically increase the cost of child care.¹¹ A 2019 study conducted by Child Care Aware of America found that, on average, single parents spend thirty-four percent of their income on child care nationwide.¹² The same study found that in the Midwest, Northwest, and South, the cost of child care is, on average, the most significant household expense for families of four.¹³

Not only will affordable child care benefit children and their parents, but it will also assist businesses. When parents can provide their children with quality child care, employment becomes more accessible, providing business with a steadier workforce. Prior to the start of the COVID-19 pandemic, ReadyNation, a group of over 2,600 business executives, came together to promote programs and policies that strengthen the economy and workforce. In 2018, this organization conducted a study examining the economic impact of insufficient child care on both working families and businesses.¹⁴ Their results identified clear losses on all

<https://www.census.gov/newsroom/facts-for-features/2013/cb13-ff04.html>.

¹⁰ Danielle Kurtzleben, *5 charts that show child care in the US is broken*, VOX (July 17, 2014),

<https://www.vox.com/2014/7/17/5909651/5-charts-that-show-child-care-in-the-us-is-broken>.

¹¹ *Chapter 5: Facilities, Supplies, Equipment, and Environmental Health*, NAT'L RES. CTR. FOR HEALTH AND SAFETY IN CHILD CARE AND EARLY EDUCATION (last visited Mar. 14, 2022),

<https://nrckids.org/cfoc/database/5.1.2.1>.

¹² CHILD CARE AWARE OF AM., *PICKING UP THE PIECES: BUILDING A BETTER CHILD CARE SYSTEM POST COVID-19* (2020),

<https://www.childcareaware.org/picking-up-the-pieces/>.

¹³ *Id.*

¹⁴ CLIVE R. BELFIELD, READY NATION, *THE ECONOMIC IMPACTS OF INSUFFICIENT CHILD CARE ON WORKING FAMILIES* (2018),

fronts: businesses lost thirteen billion dollars due to reduced productivity and increased recruitment costs, working parents lost thirty-seven billion dollars in income due to reduced work hours and increased time spent looking for work, and the economy lost seven billion dollars in income taxes due to the reduced incomes of working parents, accounting for a total of fifty-seven billion dollars lost every year.¹⁵ These findings were calculated pre-COVID-19 and are undoubtedly higher now. Providing accessible child care will benefit the economy, businesses, parents, and children alike.

A significant reason for the child care crisis in America is the job quality of child care workers. The demographics for child care workers are 95.6% female and predominantly women of color.¹⁶ These workers receive meager wages. According to a 2015 analysis by the Economic Policy Institute, on average, child care workers have a 23% lower hourly wage than similar individuals working in other occupations.¹⁷ The same study found that child care workers are 27% less likely to be given health insurance and 24.1% less likely to have employer-provided pensions, making it much more difficult for these employees to make ends meet.¹⁸ Additionally, 14.7% of child care workers are in families with incomes below the official poverty line, and 36.7% of child care workers are in

<https://strongnation.s3.amazonaws.com/documents/522/3c5cdb46-eda2-4723-9e8e-f20511cc9f0f.pdf?1542205>.

¹⁵ *Id.*

¹⁶ ELISE GOULD, ECON. POL'Y INST., CHILD CARE WORKERS AREN'T PAID ENOUGH TO MAKE ENDS MEET (2015), <https://www.epi.org/publication/child-care-workers-arent-paid-enough-to-make-ends-meet/>.

¹⁷ *Id.*

¹⁸ *Id.*

families with incomes twice below that figure.¹⁹ In the majority of both metropolitan and non-metropolitan areas in the United States, over 90% of child care workers are unable to meet their local single-person budget.²⁰ This study also highlighted that not only are child care workers underpaid and have low job quality, but many of them are also unable to afford child care for their own families. In thirty-two states and Washington, D.C., infant care costs at centers equate to over one-third of the average preschool worker's earnings, and in twenty-one states and Washington, D.C., other child care workers would have to spend over half of their annual income on center-based infant care.²¹ These conditions have forced child care workers to search for other jobs, even before the COVID-19 pandemic began.

Given that these resources serve as a social determinant of health, this lack of child care exerts a significant educational toll on modern families and their children. According to a paper published by Harvard Medical School, child care, early education, and health equity are all interlinked.²² Access to quality child care promotes financial security, employment stability, and economic mobility, which set a path for sustained health and wellbeing through nutrition, housing, and mental health services.²³ However, legislation has yet to address this

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Lauren Birchfield Kennedy, *Child Care and Early Education is a Social Determinant of Health— For Children and Adults*, HARV. MED. SCH. PRIMARY CARE REV. (Oct 23, 2020), <http://info.primarycare.hms.harvard.edu/review/child-care-early-education>.

²³ *Id.*

crucial link, calling for further reforms on this issue.

Research conducted by the Heckman Equation highlighted the short- and long-term benefits that child care and early education have for children.²⁴ Heckman found that children who received high-quality child care and early education had much better life outcomes than those who received low-quality or no center-based care. He also noted that the results differed based on gender. For females, quality child care positively impacted rates of high school graduation, educational attainment, employment, and income for both the participants and their parents.²⁵ For males, the results showcased lower instances of drug usage, high blood pressure, and a positive impact on education and labor income.²⁶ With child care, mothers can enter the workforce and increase their incomes while their children gain the necessary skills for future schooling and work. Not only does high-quality child care and early education improve economic prospects for mothers, but it also improves those of the children.²⁷ Investing in child care will allow parents and children to break generational cycles of poverty, therefore improving family, individual, and community health outcomes.

²⁴ James J. Heckman, *Research Summary: The Lifecycle Benefits of an Influential Early Childhood Program*, THE HECKMAN EQUATION (Dec. 5, 2016), <https://heckmanequation.org/resource/research-summary-lifecycle-benefits-influential-early-childhood-program/>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ James J. Heckman, *Early Childhood Education: Quality and Access Pay Off*, THE HECKMAN EQUATION (Sept. 30, 2016), <https://heckmanequation.org/resource/early-childhood-education-quality-and-access-pay-off/>.

II. CHILD CARE CRISIS DURING COVID-19

Over the past several decades, the child care crisis has taken a significant toll on families and single parents, a struggle that has only been exacerbated by the COVID-19 pandemic. According to a report published by the U.S. Chamber of Commerce Foundation, 86% of child care centers have begun to serve fewer children since the beginning of the pandemic, with enrollment decreasing to approximately 67%.²⁸ In addition, according to an article published by *The New York Times*, there were 1.6 million fewer mothers of children ages five through seventeen in the labor force in September 2020 alone.²⁹ Due to the ongoing COVID-19 crisis, many families have found it more difficult than ever to secure and afford high-quality child care for their children.³⁰

According to a survey of 1,000 parents of children under the age of five conducted by the Bipartisan Policy Center in September 2020, the lack of child care resources was a barrier to work for 44% of parents.³¹ Over half of the parents looking for child care noted that it was difficult to find affordable, high-quality services while remaining within budget during the COVID-19 pandemic.³² The pandemic has led to the closure of schools and child care centers, forcing parents – predominantly women – to step

²⁸ U.S. CHAMBER OF COM. FOUND., *supra* note 2.

²⁹ Ernie Tedeschi, *The mystery of how many mothers have left work because of school closings*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/upshot/mothers-leaving-jobs-pandemic.html>.

³⁰ *Id.*

³¹ Linda Smith & Sarah Tracey, *Child Care in COVID-19: Another Look at What Parents Want*, BIPARTISAN POL'Y CTR. (Aug. 26, 2020), <https://bipartisanpolicy.org/blog/child-care-in-covid-another-look/>.

³² *Id.*

back from work or ask friends or family to watch their children.³³ These practices place the health and safety of these temporary caretakers, particularly grandparents, at risk.³⁴ A report published in August 2021 by the Federal Reserve Bank of Atlanta found that, before the pandemic, women with children under six years old accounted for 10% of the workforce, but 22% of the lost jobs during the pandemic.³⁵ According to the report, finding high-quality child care was shown to be a “determining factor for employment” for women who have young children.³⁶

Prior to the COVID-19 pandemic, child care centers were already one of the most economically vulnerable businesses. When evaluating the State of Texas, one can see the direct impact of COVID-19 on child care centers. One study published in February 2021 showed that child care deserts, defined as “a census tract with more than three children under age 5 for every licensed child care slot,”³⁷ increased by almost 50% from September 2019 to August 2020.³⁸ Moreover, approximately 20% of reliable child care

³³ Katherine Harmon Courage, *Day Care, Grandparent, Pod, or Nanny? How to Manage the Risks of Pandemic Child Care*, NPR (Aug. 21, 2020), <https://www.npr.org/sections/health-shots/2020/08/21/902613282/daycare-grandparent-pod-or-nanny-how-to-manage-the-risks-of-pandemic-child-care>.

³⁴ *Id.*

³⁵ M. MELINDA PITTS, FED. RSRV. BANK OF ATLANTA POL’Y HUB, WHERE ARE THEY NOW? WORKERS WITH YOUNG CHILDREN DURING COVID-19 (2021), <https://www.atlantafed.org/-/media/documents/research/publications/policy-hub/2021/09/01/10--where-are-they-now--workers-with-young-children-during-covid-19.pdf>.

³⁶ *Id.*

³⁷ CTR. FOR AM. PROGRESS, THE CORONAVIRUS WILL MAKE CHILD CARE DESERTS WORSE AND EXACERBATE INEQUALITY (2020), <https://www.americanprogress.org/article/coronavirus-will-make-child-care-deserts-worse-exacerbate-inequality/>.

³⁸ Kalluri et al., *supra* note 3.

was lost as a result of closures due to COVID-19.³⁹ Communities of color were hit disproportionately hard by this deficit, with these communities experiencing disruptions in child care at almost twice the rate of their white counterparts.⁴⁰ The same study also found that child care centers predominantly used by people of color were twice as likely to have extended periods of long-term or permanent closures and more child care deserts.⁴¹

Not only has the COVID-19 pandemic burdened parents and children, but it has also had a significant impact on child care workers themselves. A study published by Brown University highlighted the impact of COVID-19 on the child care market.⁴² The study found a 40% decrease in child care enrollments compared to the period prior to the pandemic. Furthermore, child care centers across the country face severe staffing shortages and struggle to find qualified workers, with owners of child care facilities facing higher rates of resignation and fewer people applying to open positions.⁴³ Due to low pay (a median of just twelve dollars an hour), workers were leaving for less strenuous jobs with higher pay.⁴⁴ A survey conducted by the National Association for the Education of Young Children found that over one in three respondents said they were considering leaving or shutting down their child care

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Qing Zhang et al., *Impacts of COVID-19 on the Child Care Sector: Evidence from North Carolina* (Brown Univ., EdWorking Paper 21-371, 2021).

⁴³ Jonnelle Marte, *U.S. Childcare in Short Supply as Burned-out Workers Quit, New Hires Hard to Find*, REUTERS (Sept. 1, 2021), <https://www.reuters.com/world/us/us-childcare-short-supply-burned-out-workers-quit-new-hires-hard-find-2021-09-01/>.

⁴⁴ *Id.*

centers in 2021.⁴⁵ While this was also an issue prior to the pandemic, COVID-19 has exacerbated employment shortages given that many workers did not want to risk exposure. This also exacerbated the strain on the workers who remained at these child care centers, resulting in greater rates of burnout as these individuals had less support and were forced to work longer hours.⁴⁶ According to the Department of Labor, child care employment decreased by 36% at the beginning of the pandemic, compared to the 15% decrease in employment in the overall U.S. labor market.⁴⁷ Moreover, as of July 2021, child care employment was still down 11%, a disproportionate decrease when compared to the 4% drop in unemployment experienced by the overall U.S. labor market.⁴⁸ The COVID-19 pandemic has made it clear that the child care crisis in the United States cannot be adequately addressed without providing significantly better job quality for child care workers.

III. LEGISLATIVE SOLUTIONS

If the United States is to sufficiently address the growing child care crisis, immediate legislative action must be taken. Currently, the Biden administration has proposed the Build Back Better Bill,⁴⁹ in which \$225 million would

⁴⁵ *Survey: Four in Five Child Care Centers in the U.S. are Understaffed*, NAT'L ASS'N FOR THE EDUC. OF YOUNG CHILDREN (July 27, 2021), <https://www.naeyc.org/about-us/news/press-releases/survey-childcare-centers-understaffed>.

⁴⁶ Marte, *supra* note 43.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *President Biden Announces the Build Back Better Framework*, WHITE HOUSE BRIEFING ROOM (Oct. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better->

be allocated to child care investment.⁵⁰ These investments would increase the wages of child care workers, reduce the price of child care, and fund universal pre-kindergarten. If this legislation were to be enacted, the average American family would be able to save up to \$14,800 on child care per year.⁵¹ Such investments would promote economic stability for American families by allowing parents to work and contribute to the economy. High quality child care also provides children with learning experiences that set them up for success, both academically and emotionally.⁵² According to a 2019 report published by Child Care Aware, access to high quality child care has positive long-term outcomes for children such as a greater likelihood of graduating high school, higher career earnings, and better physical health.⁵³ In addition, according to a study published by The University of Chicago Press, every dollar invested in high-quality early childhood education and care can have a three to seven dollar return rate in the long run.⁵⁴ Overall, children who have access to such high-quality care have a greater likelihood of performing better in school and earning more money when they are adults.⁵⁵

In addition to efforts from the federal government, state governments should also be working to support the child care sector. With decreased enrollments and underpaid staff, child care centers are in dire need of

[framework/](#).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Jorge Luis García et al., *Quantifying the Life-Cycle Benefits of an Influential Early-Childhood Program*, 128 J. POL. ECON., July 2020, at 2502.

⁵⁵ *Id.*

financial assistance, and states should use their federal relief funding to provide child care programs with weighted grants. Based on recommendations from Children At Risk, a non-partisan advocacy and research nonprofit focused on understanding and addressing the causes for child inequality and poverty, these weighted grants should be based on the number of children enrolled in the program, operation in a child care desert, participation in the state's quality rating system, and providing service during non-traditional hours.⁵⁶ Furthermore, states should also support child care centers by providing business coaching and resources for adequate short- and long-term sustainability. State-level reform initiatives should support the retention of child care workers by providing them with stipends and assistance with wage increases. Supporting the retention of child care workers allows for more parents to return to work and assists in decreasing the gap in educational achievement across socioeconomic lines.⁵⁷ Government stipends and wage assistance also allow workers in the child care industry to attain more employment stability and bargaining power.⁵⁸

Additionally, there must be a targeted initiative to support low-income, minority, and rural communities and families. To provide high-quality care for these populations, there must be a substantial effort to eliminate barriers to

⁵⁶ MANDI SHERIDAN KIMBALL, THE IMPACT OF COVID-19 ON CHILD CARE CENTERS IN TEXAS, CHILDRENATRISK (2021), <https://childrenatrisk.org/wp-content/uploads/2021/03/COVID-Child-Care-Deserts.pdf>.

⁵⁷ Justine Modica, *Government Funding is Critical to Raise Wages for Child-care Workers*, WASH. POST (Oct. 12, 2021), <https://www.washingtonpost.com/outlook/2021/10/12/government-funding-is-critical-raise-wages-child-care-workers/>.

⁵⁸ *Id.*

information about child care availability, funding, and centers. In accordance with the Child Care Development Fund (CCDF) regulations, states are required to maintain consumer-friendly websites that allow families to know their child care options.⁵⁹ However, families are not always aware of these websites. In order to increase awareness about family child care (FCC) options, states can work to ensure that their education resources and Child Care Referral Specialists showcase the benefits of FCC, as well as the types of services offered and quality initiatives being undertaken by these providers.⁶⁰ Legislators must also take action to support child care providers, considering initiatives involving reopening assistance, health and safety protocols, and increased access to funding and relief resources. Based on the American Academy of Pediatrics' recommendation, health care providers should be legally required to incorporate discussions about child care arrangements into their health screening process.⁶¹ Once enacted as public policy, these discussions could provide information about the benefits of high-quality child care and resources about local child care options.

Child care is both a family and a business issue. In addition to legislative action, businesses must work to support their employees with child care. According to a Department of Labor report in February 2022, 56.6% of women participated in the labor force, compared to 68.3%

⁵⁹ NAT'L CTR. ON EARLY CHILDHOOD QUALITY ASSISTANCE, ADDRESSING THE DECREASING NUMBER OF FAMILY CHILD CARE PROVIDERS IN THE UNITED STATES (2019), https://childcareta.acf.hhs.gov/sites/default/files/public/addressing_decreasing_fcc_providers_revised_final.pdf.

⁶⁰ *Id.*

⁶¹ *Id.*

of men.⁶² However, according to a study conducted by the Harvard Business Review, employees' benefits are still primarily based on the standards from the 1950s when only 30% of women engaged in the labor force, and most families only had one working parent.⁶³ The COVID-19 pandemic has shown that access to affordable, high-quality child care is necessary for women to stay in the labor market. An analysis by the National Women's Law Center found that over 2.3 million women have left the labor market since February 2020, accounting for 80% of all discouraged workers.⁶⁴ This has left the women's labor force participation rate at 57%, the lowest figure since 1988.⁶⁵ In order to support economic growth, businesses must create support systems for parents, especially working mothers. These support systems should include flexible work schedules, remote working options, childcare subsidies with employee benefits, and on-site or subsidized local childcare centers.⁶⁶ For businesses that are unable to provide such support systems, state agencies should assist them by offering subsidies through funds such as the Child Care and Development Fund.⁶⁷ Child care is critical for maternal education, income, and participation in the workforce. It is up to businesses as well as local and

⁶² *Labor Force Status of Women & Men: February 2022*, U.S. DEP'T OF LABOR <https://www.dol.gov/agencies/wb/data/widget> (last visited Mar. 27, 2022).

⁶³ Alicia Modestino, et. al, *Childcare is a business issue*, HARV. BUS. REV. (Nov. 24, 2021), <https://hbr.org/2021/04/childcare-is-a-business-issue>.

⁶⁴ Claire Elwing-Nelson, *Another 275,000 Women Left the Labor Force in January*, NAT'L WOMEN'S L. CTR. (Feb 5, 2021), <https://nwlc.org/resource/january-jobs-day-2021/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

national governments to work with parents to build up high-quality, accessible childcare.

CONCLUSION

Compared to other developed nations, the United States falls behind regarding public spending on children and families, ranking thirtieth out of the thirty-three member nations in the Organization for Economic Cooperation and Development.⁶⁸ Moreover, the United States ranks last regarding cash benefits to families and children. According to the Washington Center for Equitable Growth, these disparities are primarily due to policy differences.⁶⁹ Unlike the United States, many European nations heavily invest in prekindergarten and high-quality education-based childcare.⁷⁰ It is time for the U.S. to be on par with its peers and create structural changes to address the child care crisis. If the United States is to achieve sustained, equitable growth within its economic sector, immediate investment in high-quality child care infrastructure must become a central priority.

⁶⁸ *Public Spending on Childcare and Early Education*, OECD FAMILY DATABASE (last visited Mar. 14, 2022), https://www.oecd.org/els/soc/PF3_1_Public_spending_on_childcare_and_early_education.pdf.

⁶⁹ Bridget Ansel & Matt Markezich, *Falling Behind the Rest of the World: Childcare in the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Jan. 25, 2017), <https://equitablegrowth.org/falling-behind-the-rest-of-the-world-childcare-in-the-united-states/>.

⁷⁰ *Id.*

ABORTION BEHIND BARS: THE IMPACT OF ABORTION LAWS ON INCARCERATED WOMEN

*Alden Wiygul**

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INTRODUCTION

In a time when the United States is restricted due to the COVID-19 pandemic, it is more important than ever to examine the rights afforded to citizens of the “land of the free” and the restrictions that have been formed in the fight for these rights. The Supreme Court is currently debating the bodily autonomy of women as the subject of abortion appears once again on their docket. Their past choices on the issue have created arguably one of the most controversial and defining topics in United States politics. Since *Roe v. Wade* (1973) established abortion as a legal right, most cases have sought to expand or limit when and

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where women can receive the medical procedure.¹ The silent struggle, however, lies within a forgotten minority: incarcerated women have been fighting for years to receive the same medical rights as non-incarcerated citizens, and their opinions on this debate have been repeatedly dismissed.

Even though incarcerated individuals are legally entitled to the same rights as non-incarcerated individuals, they are often denied these rights through systematic oppression. The Supreme Court currently has another major abortion case on their docket, one which could fundamentally alter the reproductive freedoms of both incarcerated and non-incarcerated women. Given the monumental consequences of the Court's decision in *Dobbs v. Jackson Women's Health Organization* (2021), it is important to look at how these proposed changes will affect incarcerated women.² It is also time to make better laws protecting their abortion access and rights as citizens.

Incarcerated women have no control over the information or care that they receive. In many cases, they are not informed of their own rights and are unaware that they can fight for anything better than what they are given. When states are openly hostile towards women terminating pregnancies, they are often called out early by other government officials, and their policies are brought to the courts before they have the chance to be enacted. This is only effective, however, in states where abortion regulation has to go through the lawmaking process. Eight states have no policies on abortion, leaving women's reproductive freedoms open for interpretation by prison officials who

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. argued Dec. 1, 2021).

may end up imposing their own anti-choice views.³ With almost no legislative literacy prevalent amongst the women being controlled, they are left at the mercy of the prisons.

To prevent the physical and emotional abuse resulting from the restriction of incarcerated women's healthcare rights, there must be federal regulation guaranteeing that public prisons provide equal access to abortions. Cases like *Dobbs v. Jackson Women's Health Organization* are central to these concerns, as the limited timeframe in which women would be allowed to obtain an abortion under the law in question would make it nearly impossible for incarcerated women to exercise their reproductive freedoms.⁴

To understand the need for these institutional changes, the prevalence of incarcerated pregnant women and the full ramifications of giving birth in prison must first be discussed. The repeated violation of these incarcerated women's constitutional rights underscores the importance of this issue, representing much more than a debate on the legality or morality of abortion. Rather, this piece centers on a group subjected to consistent abuse and stripped of their established medical rights – the status of “incarcerated” does not mean that these individuals should be treated as anything less than true citizens of the United States with full and equal protection of their rights.

I. PREGNANCY AND ASSAULT IN PRISONS

United States prisons and jails currently house more

³ Rachel Roth, *Searching for the State: Who Governs Prisoners' Reproductive Rights?*, 11 SOC. POL., 411–38 (2004).

⁴ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. argued Dec. 1, 2021).

than 200,000 women.⁵ Rates of incarceration among women have grown at alarming rates over the past few years and continue to skyrocket.⁶ As more women are processed through the criminal justice system, clear demographic trends mirroring those of the male population emerge. Historically and at present, minority groups and those afflicted by poverty constitute a majority of inmates.⁷ Given that minority and low-income women already have disproportionately high unintended pregnancy rates,⁸ it is perhaps unsurprising then that 6-10% of women in prison are pregnant: over 10,000 individuals at any given moment.⁹ The most horrifying realization is that only 4% of women were already pregnant when they entered the prison facilities, signaling that 2–6% of these women became pregnant while incarcerated.¹⁰ Women in prison are

⁵ Josh Rovner, *Incarcerated women and girls*, THE SENTENCING PROJECT (Nov. 24, 2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/#:~:text=Washington%2C%20D.C.%3A%20Bureau%20of%20Justice,1980%20to%2022%2C45%20in%202019>.

⁶ Diana Kasdan, *Abortion Access for Incarcerated Women: Are Correctional Health Practices in Conflict with Constitutional Standards*, 41 PERSP. ON SEXUAL AND REPRODUCTIVE HEALTH, 59–62 (2009).

⁷ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>; Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

⁸ GUTTMACHER INST., UNINTENDED PREGNANCY IN THE UNITED STATES (2019), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states>.

⁹ Kasdan, *supra* note 6.

¹⁰ *Cf.* Leah Wang, *Unsupportive Environment and Limited Policies: Pregnancy, Postpartum, and Birth During Incarceration*, PRISON POL'Y

continually subjected to sexual assault and abuse from fellow inmates, correctional officers, and guards. One study shows that 21.6% of incarcerated women had been sexually assaulted by another inmate in the past six months, and 7.6% had been sexually assaulted by a staff member.¹¹ The Department of Justice found in 2012 that incarcerated women are thirty times more likely to be sexually assaulted than free women.¹²

These devastating cases include women like LaToni Daniel, an Alabama inmate who was given unnecessary sedatives by guards while in prison.¹³ Once under these sedatives, she was raped and remained unaware that the assault had occurred until she discovered that she was pregnant. Incidents like this one illustrate the state of Alabama's unfortunate history of sexual abuse and violence from correctional officers.¹⁴ There is only one women's prison in Alabama, which has led to extreme overcrowding and repeatedly violated safety regulations. The Department of Justice had to file a complaint and settlement agreement with the prison in 2015 over violations of the Eighth Amendment.¹⁵ This shows the need for an increase in

INITIATIVE (Aug. 19, 2021),

https://www.prisonpolicy.org/blog/2021/08/19/pregnancy_studies/.

¹¹ Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835 (2006),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2438589/>.

¹² National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37105 (Aug. 20, 2012) (to be codified at 28 C.F.R. § 115).

¹³ *Alabama Woman Impregnated while in County Jail Awaiting Death-Penalty Trial*, DEATH PENALTY INFO. CTR. (June 4, 2019),

<https://deathpenaltyinfo.org/news/alabama-woman-impregnated-while-in-county-jail-awaiting-death-penalty-trial>.

¹⁴ *See id.*

¹⁵ *Justice Department Reaches Landmark Settlement with Alabama to Protect Prisoners at Julia Tutwiler Prison for Women from Harm Due to Staff Sexual Abuse and Sexual Harassment*, U.S. DEP'T OF JUSTICE

overall prison health guidelines. Even in less extreme cases, any sexual conduct that happens in prison should be considered an abuse of power and qualify as rape. While many states consider rape to create a constitutional right to an abortion, there are still certain regions which restrict these victims from terminating their pregnancy. These states would rather force women to give birth to a child created under their own systemic abuse and neglect than acknowledge their rights as human beings.¹⁶ While receiving assistance with their pregnancy, many states merely claim that they will “contact the appropriate referral agency.”¹⁷ In these cases, Planned Parenthood is supposed to be these inmates’ best option, but due to the intentionally vague wording of these referrals, many prisons end up taking women to crisis pregnancy centers that misinform patients of their reproductive rights and restrict their potential methods of recourse.¹⁸

If incarcerated women decide to carry to full term and give birth, they still face adversity from the prison.¹⁹ They are often not given adequate prenatal care and subjected to the traumatic experience of giving birth while restrained to a table. Shackling incarcerated women during labor is federal policy in all prisons, even though it has been found to increase the likelihood of complications like hemorrhaging and decreased fetal heart rate during birth.²⁰

(May 28, 2015), <https://www.justice.gov/opa/pr/justice-department-reaches-landmark-settlement-alabama-protect-prisoners-julia-tutwiler>.

¹⁶ See Rachel Roth, *Abortion access for imprisoned women: Marginalized Medical Care for a marginalized group*, 21 WOMEN'S HEALTH ISSUES, S14-S15 (2011).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, 18 UCLA WOMEN'S L.J. (2010).

²⁰ Amanda Glenn, *Shackling Women During Labor: A Closer Look at*

It also causes a delay in the administration of Caesarean sections, which can lead to permanent brain damage to the baby after just five minutes.²¹ After giving birth, women must then immediately surrender their child, either to a relative or to an adoption or foster care agency.²² This is extremely detrimental to affected women's mental health and can cause extreme feelings of loss, grief, anger, and postpartum depression.²³

II. CONSTITUTIONAL RIGHTS OF INCARCERATED WOMEN

Women in public prisons are constitutionally entitled to abortion access as citizens of the United States. In *Roe v. Wade* (1973), the Supreme Court ruled that the Fourteenth Amendment protects the right of women to terminate their pregnancies before viability and that no laws governing abortion could create an “undue burden” or place a “substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.”²⁴ States are particularly blocked from preventing a woman from getting an abortion if the pregnancy has placed a medical threat to her life. Because of the mental and physical stress caused by life in

the Inhumane Practice Still Occurring in Our Prisons, 29 HASTINGS WOMEN'S L.J. 199, 202 (2018).

²¹ *Women in Prison: A Fact Sheet*, PRISON POL'Y. INITIATIVE, https://www.prisonpolicy.org/scans/women_prison.pdf (last visited Feb. 7, 2022).

²² R. SOLINGER ET AL., INTERRUPTED LIFE: EXPERIENCES OF INCARCERATED WOMEN IN THE UNITED STATES 63 (2010).

²³ Kimberly Erin Gillette, *The Psychological and Emotional Experiences of Pregnant and Postpartum Incarcerated Women* (2011) (M.A. Thesis, Smith College), https://scholarworks.smith.edu/theses/1040?utm_source=scholarworks.smith.edu%2Ftheses%2F1040&utm_medium=PDF&utm_campaign=PDFCoverPages.

²⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

prison, most incarcerated women who are pregnant should fall under this category and qualify for a medical abortion. The judiciary clearly stated this principle in the case of *Monmouth County Correctional Institution Inmates v. Laranzo* (1987), as the Third Circuit Court of Appeals recognized the “reality that the categorical denial of elective abortions will have ‘irreparable’ physical and emotional consequences for pregnant inmates who do not want to carry to term.”²⁵

Representing further expansion in reproductive healthcare case law, *Estelle v. Gamble* (1976) widened the boundaries of the Eighth Amendment after an inmate claimed that he did not receive proper medical treatment.²⁶ This ruling established that failing to treat serious medical needs in a timely manner constitutes cruel and unusual punishment. Following this decision, the Court’s ruling in *Turner v. Safley* (1987) took monumental strides in determining the specific constitutional rights retained by prisoners.²⁷ Considering a case about inmate marriages and correspondence, the Supreme Court decided that prison regulations that violate aspects of the Constitution may be upheld if they are “reasonably related to penological interests.”²⁸ Prisons have attempted to use this principle to enact regulations seemingly in the interest of penological objectives, but these policies often work to oppress the individuals in their system.

While most states are not legally allowed to prevent incarcerated women from getting an abortion, these

²⁵ *Monmouth Cnty. Corr. Inst’l Inmates v. Lanzaro*, 834 F.2d 326 (1987).

²⁶ *Estelle v. Gamble*, 429 U.S. 97 (1976).

²⁷ *Turner v. Safley*, 482 U.S. 78, 89 (1987).

²⁸ *Id.*

inmates' lives are regulated such that their access is too often unconstitutionally denied. Most cases include women being *de jure* permitted to access an abortion, but prison regulations provide no assistance in arranging, paying for, or getting to the appointment for these procedures, prohibiting many women from actually exercising this right.²⁹ Even if a correctional officer or guard is assigned to transport a woman to medical appointments, they have the right to refuse because of personal religious objections.³⁰ With limited forms of transportation and scant personal funds, accessing these procedures is nearly impossible for incarcerated women.

Even if a prison authorizes transport, one study found that among the nineteen states that allowed abortions in prison, thirteen required inmates to pay for their own procedures, an extremely prohibitive policy given that inmates are excluded from Medicaid eligibility.³¹ Because incarcerated women have limited means of earning money while in prison, many hope to rely on their families for support. Eleven states also make these women pay for costs like gas, tolls, and any other transportation fees, which directly contributes to the wages of the officers willing to transport them.³² In a survey of correctional health care providers, only 3% reported that their state had laws specifically restricting incarcerated women's access to abortions. However, when asked if the women at their

²⁹ See Katie Rose Quandt & Leah Wang, *Recent Studies Shed Light on What Reproductive "Choice" Looks Like in Prisons and Jails*, PRISON POL'Y. INITIATIVE (Dec. 8, 2021), https://www.prisonpolicy.org/blog/2021/12/08/reproductive_choice/.

³⁰ *New Rule Allows Religious Workers to Refuse Abortion Services*, NPR (May 2, 2019), <https://www.npr.org/2019/05/02/719737160/new-rule-allows-religious-workers-to-refuse-abortion-services>.

³¹ Quandt & Wang, *supra* note 29.

³² Roth, *supra* note 3.

facility were able to receive an elective abortion if requested, only 68% of them replied affirmatively.³³

Under the precedent set by *Turner v. Safley* (1987), courts have struck down many state-level abortion laws on the basis that the laws were not created to protect legitimate penological goals.³⁴ For example, in *Monmouth County Correctional Institution Inmates v. Lanzaro* (1987), the courts found that a prison's refusal to fund and provide access to inmates was unconstitutional under the *Turner* standard.³⁵ There are even cases in which prisons have tried to enforce restrictions based on "security concerns," but the courts have still found these institutions guilty of failing to accommodate inmates' protected rights.³⁶ *Estelle v. Gamble* (1976) has had more limited success as a defense against restrictive abortion policies.³⁷ Since each woman's case varies based on their individual needs, only one appellate court has found that abortion care is a serious medical need that requires the protections afforded by the Eighth Amendment.³⁸

One institution actively attempting to restrict abortions for incarcerated women is the Missouri Department of Corrections.³⁹ Officials from this organization wrote a policy prohibiting pregnant women

³³ Carolyn B. Sufrin et al., *Incarcerated women and abortion provision: A survey of correctional health providers*, 41 PERSP. ON SEXUAL AND REPRODUCTIVE HEALTH 6 (2009).

³⁴ See *Roe v. Crawford*, 514 F.3d 789 (2008); *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007); *Roe v. Leis*, No. C-1-00-651, 2001 WL 1842459 (S.D. Ohio Jan. 10, 2001).

³⁵ *Monmouth Cnty. Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326 (1987).

³⁶ See *Roe v. Crawford*, 514 F.3d 789 (2008).

³⁷ *Estelle v. Gamble*, 429 U.S. 97 (1976).

³⁸ *Monmouth Cnty. Corr. Inst'l Inmates*, 834 F.2d at 326.

³⁹ *Roe v. Crawford*, 514 F.3d 789 (2008).

from being transported anywhere for an elective abortion and requiring women to obtain a second opinion from the prison's Medical Director in order to terminate a life-threatening pregnancy. Harmful policies like this one expose a loophole in modern abortion laws, which technically afford incarcerated women access to an abortion but create significant barriers to receiving this procedure. In the Missouri case, the Eighth Circuit eventually ruled against the proposed policy, as the prisons had to transport inmates for other purposes such as healthcare or job training.⁴⁰ Such disparities suggest that the state's policy was not enacted to reduce transportation costs or security risks, but to limit abortion access.⁴¹

III. *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

Since it is already difficult for incarcerated women to obtain an abortion under current laws, any new governmental restrictions will likely exacerbate these barriers to access. *Dobbs v. Jackson's Health Organization* (2021) is an ongoing lawsuit between Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, and the Jackson Women's Health Organization regarding Mississippi's Gestational Age Act passed in 2018.⁴² This Act prohibits almost all abortions after fifteen weeks' gestational age and was placed under an emergency temporary injunction after the Jackson Women's Health Organization filed a lawsuit.⁴³ If this Act is upheld by the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. argued Dec. 1, 2021).

⁴³ *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246 (2020).

Supreme Court, it will void the twenty-four week viability period established under *Planned Parenthood v. Casey*, severely restricting the conditions under which it is legal to obtain an abortion.⁴⁴

Due to the aforementioned issues with transportation and funding, incarcerated women already struggle to secure abortion access within the current twenty-four week period. The fifteen-week rule imposed under Mississippi's new law would make it nearly impossible for an incarcerated woman to even realize that she is pregnant before this deadline, much less decide if she wishes to have an abortion.⁴⁵ Mississippi's Gestational Age Act would also eliminate women's right to an abortion without a life-threatening issue caused by the pregnancy.⁴⁶ With limited other options available to them, women would essentially be forced to give birth while in prison.

IV. COVID-19 COMPLICATIONS IN PRISONS

Prison administrators' recent handling of the COVID-19 pandemic demonstrates their obvious inability to adequately protect incarcerated women's healthcare rights. As of September of 2021, one in every three incarcerated people has contracted COVID-19, and almost 3,000 have died behind bars as a result of the virus.⁴⁷ The states' failure to consider prisoners' healthcare needs has resulted in rapid spread, low prisoner vaccination rates, and

⁴⁴ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁴⁵ See *Post-viability abortions*, LA. DEP'T OF HEALTH, <https://ldh.la.gov/page/2427> (last visited Feb 7, 2022).

⁴⁶ MISS. CODE ANN. § 41-41-191 (2018).

⁴⁷ Tiana Herring & Maanas Sharma, *States of emergency: The failure of prison system responses to COVID-19*, PRISON POL'Y INITIATIVE (Sept. 1, 2021), https://www.prisonpolicy.org/reports/states_of_emergency.html.

preventable deaths.⁴⁸ These actions create additional dangers for pregnant women and their fetuses, as these individuals are at greater risk for complications resulting from COVID-19.⁴⁹ There is also no practical way for inmates to adequately quarantine, virtually guaranteeing that they will come in direct contact with sick prisoners. Considering *Estelle v. Gamble*'s ruling on the requirement of prompt medical care, most prisons' approach to the COVID-19 pandemic could be considered cruel and unusual punishment and therefore a violation of the Eighth Amendment.⁵⁰

Since COVID-19 has created a prisoner health crisis, most institutions have implemented stricter policies regarding the transportation of prisoners. There are fewer opportunities for these individuals to leave or even receive visitors, presenting additional dangers for pregnant women who require specialized medical care or wish to terminate their pregnancies. While previous court decisions have invalidated transportation restrictions that failed to serve penological interests, the pandemic has provided an excuse for prison officials to prevent pregnant women seeking an abortion from leaving the facility.⁵¹ Thus, this ongoing medical dilemma necessitates the consideration of policies that provide stronger protections for inmates' right to choose.

⁴⁸ *COVID-19 in Prisons and Jails*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/virus/> (last visited Feb 7, 2022).

⁴⁹ *Pregnant and Recently Pregnant People at Increased Risk for Severe Illness from COVID-19*, CTR. FOR DISEASE CONTROL AND PREVENTION (Mar. 3, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnant-people.html#:~:text=Increased%20Risk%20of%20Severe%20Illness,may%20need%3A%20Hospitalization.>

⁵⁰ *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁵¹ *Roe v. Crawford*, 514 F.3d 789 (2008).

V. POLICY RECOMMENDATIONS

As the Court's decision in *Roe* has already established a woman's right to bodily autonomy,⁵² it is clear that prisons are denying female inmates' constitutional right to determine their own healthcare interests. For incarcerated women to receive equal rights under law, new, and less restrictive, abortion legislation must be passed. Even abortion laws that seem lenient for non-incarcerated women may unduly restrict female inmates' access to essential healthcare services and freedoms, necessitating a revision of policies like the one recently enacted in Mississippi. New federal standards must also be adopted to ensure that public prisons uphold equal health and punishment guidelines in order to prevent states from creating restrictive abortion policies.

There are very few states that have tried to actively protect a woman's right to get an abortion. California serves as one of the only states that earnestly attempts to protect incarcerated women's rights. Under the California Penal Code, "no condition or restriction upon the obtaining of an abortion by a prisoner...shall be imposed,"⁵³ explicitly guaranteeing the rights of female inmates and equalizing their reproductive freedoms with those of non-incarcerated women. However, even in states like California with progressive laws, prisons still implement internal policies to restrict abortion access. Without established federal standards in public prisons, incarcerated individuals will still suffer at the hands of states that disregard prisoners' constitutional rights in favor of their own views.

⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

⁵³ CAL. PENAL CODE §§ 3405, 4028 (West 2008).

CONCLUSION

The restrictions and guidelines placed on abortion by both state and federal governments may seem reasonable even to those that support a woman's right to choose. As long as these regulations do not forbid abortions altogether, they rarely perceived as overtly oppressive. However, many fail to realize the extent to which these laws disparately impact those in prison. Any law or decision that restricts the rights of free people places even heavier shackles on those behind bars. If the Court chooses to uphold Mississippi's abortion law in *Dobbs v. Jackson Women's Health Organization*, it will be nearly impossible for incarcerated women to obtain abortion, even though it is their constitutional right. Abortion case law and legislation must shift away from debates over viability restrictions and towards the needs of our nation's citizens. Female inmates have been oppressed for too long by a country that overlooks their rights as soon as they are locked behind the overcrowded prison walls. Consistently neglected and abused by the system that claims to protect them, the voices of incarcerated women need to be heard.

**FURMAN V. GEORGIA AT FIFTY:
HOW THE MODERN IMPOSITION OF
CAPITAL PUNISHMENT FAILS TO
SATISFY THE COURT’S
CONCURRENCES**

*Lucas Brooks**

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INTRODUCTION

On June 29, 1972, the Supreme Court released a decision hailed by many as the death knell for a punishment practiced continuously on this continent since 1630 and for millennia throughout the history of all civilization.¹ For a short while, at least, it seemed that the Supreme Court's decision in *Furman v. Georgia* would mean the end of capital punishment in the United States. However, both Congress and various state legislatures have established new policies surrounding all aspects of capital punishment in the hopes of passing constitutional muster.² The Court granted its assent to these new schemes in 1976, and the punishment has stood since then with a number of noteworthy cases providing further restrictions and distinctions.³ Now, as *Furman* turns fifty, it is a worthwhile endeavor to examine the original concurrences of the majority and to explore the arguments of the justices who ruled in favor of the termination of capital punishment. This article will seek to reconcile these concurrences with the modern-day application of capital punishment in this country. Factors that concerned the justices of the majority in their concurrences are still happening today, fifty years later. Arbitrary punishment and discrimination, chief worries found in the concurrences, are commonplace in the imposition of capital punishment.

The article will begin with an overview of the context surrounding the Court's decision in *Furman v.*

¹ Barry Schweid, *New laws unlikely on death penalty*, FREE LANCE-STAR, Jun. 30, 1972, at 4; Michael H. Reggio, *History of the Death Penalty*, PBS (Feb. 9, 1999), <https://www.pbs.org/wgbh/frontline/article/history-of-the-death-penalty/>.

² Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 57 (2007).

³ *Gregg v. Ga.*, 428 U.S. 153 (1976).

Georgia, as well as an explanation of the Court's *per curiam* decision. The piece will then proceed by examining the major arguments of each concurring justice and the dissenting opinion of Chief Justice Warren Burger. This analysis will also consider the Court's ruling in *Gregg v. Georgia* only four years later, as well as other controlling case law that has changed the scope and applicability of capital punishment in the years after this monumental decision. Finally, this paper will conclude by comparing the Court's modern stance toward capital punishment with the principles elucidated in *Furman's* concurrences, working to establish whether the justices of the majority in *Furman v. Georgia* would allow for capital punishment in today's age.

I. *FURMAN V. GEORGIA*

Before the Court announced its decision in the summer of 1972, it had been a number of years since anyone in the United States had been executed. Luis Monge of Colorado was executed by gas chamber on June 2, 1967, for the murder of his wife and three of his children; soon after, a litigation effort by abolitionists started an unofficial moratorium on executions until the Supreme Court voiced its opinion on the matter.⁴ That opportunity arose in *Furman v. Georgia* with the case of William Henry Furman, who was convicted of killing a man in the process of burglarizing the victim's home. These circumstances qualified Furman for the death penalty under Georgia's felony murder rule, to which he was sentenced.⁵ Furman's

⁴ MICHAEL RADELET, *THE HISTORY OF THE DEATH PENALTY IN COLORADO* 242 (2017).

⁵ David Beasley, *Georgia inmate in historic death penalty case gains perspective*, REUTERS (Apr. 26, 2016), <https://www.reuters.com/article/us-usa-georgia-furman/georgia-inmate-in-historic-death-penalty-case-gains-perspective-idUSKCN0XO2FM>.

case, bundled along with *Jackson v. Georgia* and *Branch v. Texas*, which concerned rape as the capital offense, made its way to the Supreme Court and left the justices severely divided within their eventual ruling.

A. *Per curiam decision of the Court*

Unlike most Supreme Court cases, which result in a controlling majority opinion, *Furman v. Georgia* resulted in a *per curiam* decision since no majority opinion could be reached by the justices. In essence, this short, one paragraph decision was issued in the name of the Supreme Court rather than any specific justices, as no majority of five could agree on one opinion.⁶ A majority did conclude that the sentences of the petitioners violated the Eighth and Fourteenth Amendments and so ordered that they be rescinded, but that was the only actionable item of consequence.⁷ As a result, capital punishment was never declared unconstitutional *per se*, just that its current form of practice violated the Constitution.⁸ Each justice in the majority filed his own concurrence without joining any of the other concurrences. The dissenting justices were a bit more united with each joining the opinions of their fellows, except in the case of Justice Blackmun, whose dissent was based on his own personal experience ruling on cases of capital punishment.⁹ However, the concurrences of the majority can be divided into two ideological camps and have been for the purposes of this article: those opposed to the current implementation of the death penalty and those

⁶ Craig Newton, *Per curiam*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/per_curiam (last visited Dec. 31, 2021).

⁷ *Furman v. Ga.*, 408 U.S. 238, 249 (1972).

⁸ Craig Newton, *Per se*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/per_se (last visited Dec. 31, 2021).

⁹ *Furman*, 408 U.S. at 405–10 (Blackmun, J., dissenting).

opposed to the practice altogether.

B. Concurrences Opposed to the Current Implementation

Taken together, the three concurrences that were opposed to the then-current implementation of capital punishment in the United States largely took issue with the general randomness in which juries and judges sentenced individuals to death.¹⁰ However, Justice Douglas went even further than either Justice Stewart or Justice White in attributing some of the “randomness” to discrimination based on race and class.¹¹ For that reason, the concurrence of Justice Douglas will be discussed apart from the concurrences of Justices Stewart and White, which have been grouped together for simplicity’s sake. Both justices make similar points and share related concerns with the implementation of the death penalty.

Speaking in broad strokes, Justice Douglas focused his concurrence less on the seemingly arbitrary assignment of capital punishment that so troubled Justice Stewart and Justice White, directing his concern towards the specific groups in which the death penalty was more likely to be imposed.¹² It was Justice Douglas’s understanding, based on a number of reports and studies cited within his concurrence, that a person who was Black, poor, or uneducated would be more likely to be sentenced to death than someone who committed the same crime and was white, wealthy, or educated.¹³ Clearly, such a situation is far from ideal and belies the purpose of the court system as the equal arbiter of justice. However, Justice Douglas did not

¹⁰ *Id.* at 239 (per curiam).

¹¹ *Id.* at 242 (Douglas, J., concurring).

¹² *Id.*

¹³ *Id.* at 249.

stop here with his reasoning on the unconstitutionality of the current system. He provided both a historical and an allegorical example as to why the system in place was “pregnant with discrimination.”¹⁴

Several of the justices based their reasoning partially on the historical source of the language “cruel and unusual” found in the Eighth Amendment.¹⁵ Justice Douglas was no different, concluding that the use of the term in English common law was meant to eliminate punishments that were “selective and irregular” from the typical punishment for the crime in question.¹⁶ Furthermore, in his view, it would then be cruel and unusual to mete out a sentence of capital punishment on a person who was a minority, an outcast, or unpopular, if the whole of society would allow such a punishment for that individual but not for all those convicted of the same crime. Justice Douglas illustrates this idea by proposing the following law: anyone who makes above a certain income level is permanently exempt from capital punishment, and only those who were Black, uneducated, made very little money, or were mentally ill should be liable to be executed.¹⁷ Clearly, a law that makes such a sweeping prescription of unequal justice would be both unconscionable and unconstitutional; however, Justice Douglas argues that any law with the same effect has no more legitimacy than one that blatantly makes it so.¹⁸ In essence, the issue is not that sentences of death possibly come from juries or judges with impure motives, but that

¹⁴ *Id.* at 257.

¹⁵ U.S. CONST. amend. VIII.

¹⁶ *Furman*, 408 U.S. at 245.

¹⁷ *Id.* at 256.

¹⁸ *Id.*

“no standards govern the selection of the penalty.”¹⁹ In fact, the justice argues that it is impossible to determine if race was an overwhelming factor in the specific cases before the court. Fortunately for the abolitionists, that is not the issue at hand in his concurrence, but rather the fact that the imposition of capital punishment rests simply on “the whim of one man or of 12,”²⁰ with no guidance from the justice system itself.

While Justice Douglas focused on the unequal nature of the imposition of capital punishment, Justices Stewart and White were more appalled by the utter randomness of its implementation. Such a factor was the clear theme in both their concurrences, with Justice White even ending his opinion by stating that “there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”²¹ Justice Stewart, for his part, compares being sentenced to death in the United States to being struck by lightning in order to illustrate how he believes the punishment is being applied.²² That lack of delineation in cases was the issue with which both justices took issue, and it is clear from the reading of both concurrences that neither opposes capital punishment *per se*. Justice White, ever direct, is quite careful to say that he does not believe that all systems of capital punishment violate the Eighth Amendment, just that the current system of imposition represented in these specific cases speaks to an issue of randomness within the system.²³ Both believe that the infrequency in which

¹⁹ *Id.* at 253.

²⁰ *Id.*

²¹ *Id.* at 313 (White, J., concurring).

²² *Id.* at 309 (Stewart, J., concurring).

²³ *Id.* at 311 (White, J., concurring).

individuals are sentenced to capital punishment is the main point that pushes it beyond the pale of legitimacy and into the territory of cruel and unusual. Justice Stewart's language in this instance has become famous, wherein he decries the current system of capital punishment as being so "wantonly and so freakishly imposed."²⁴

However, for all that the concurrences of Justices Stewart and White agree with one other, neither joined the opinion of the other, and both introduce separate points that the other does not touch. Justice Stewart argues that, in addition to being made unusual by its infrequency, capital punishment is made cruel by its excessive nature.²⁵ Essentially, if a legislature has decreed that a crime can be punished by either death or life imprisonment, then the sentence of death is made excessive by the possibility of life imprisonment.²⁶ He also makes mention of the thorny issue of the probable racial discrimination in each of these specific cases, which is explored more thoroughly in other concurrences.²⁷ Justice Stewart recognizes this fact and sets the topic aside after stating his belief that such discrimination has not been proven within these cases. Justice White, for his part, makes no mention of racial discrimination but focuses much of his concurrence on rebutting the concept of capital punishment as a deterrent to capital offenses. He argues that "common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct," tying his argument back to the infrequency position expressed by

²⁴ *Id.* at 310 (Stewart, J., concurring).

²⁵ *Id.* at 309–10.

²⁶ *Id.* at 309.

²⁷ *Id.* at 310.

both justices.²⁸ In a sense, Justice White views the death penalty as an ineffective deterrent due to its rare imposition. This portion of his concurrence begs the question: who fears a far-off, improbable punishment for a crime of which they may not be convicted? He then uses this argument of lacking deterrence to suggest that a penalty which provides “negligible returns to the State would be patently excessive and cruel.”²⁹ In their own ways, both justices broach the topic of excessive punishment, although each approaches it from a markedly different angle.

C. Concurrences Opposed to the Practice

While both Justices Brennan and Marshall conclude that the death penalty is inherently violative of the Eighth Amendment, their main topics and logical strategies differ significantly. Justice Brennan’s concurrence is based entirely around establishing judicial criteria for determining if a punishment is cruel and unusual,³⁰ ostensibly so that his criteria would be used as a benchmark for future cases. While Justice Marshall does consider some of the same subject matter as Justice Brennan’s principles, his concurrence is focused on the excessiveness of capital punishment and how that relates to its cruelty.³¹ In addition, Justice Marshall centered his opinion in a historical review of the practice, whilst Justice Brennan mostly used the case of *Trop v. Dulles* (1958) as his historical guide.

Justice Brennan first establishes that the basis of his concurrence was sourced from the court’s previous ruling in

²⁸ *Id.* at 312 (White, J., concurring).

²⁹ *Id.*

³⁰ *Id.* at 258 (Brennan, J., concurring)

³¹ *Id.* at 315 (Marshall, J., concurring).

Trop v. Dulles.³² This case concerned the use of revoking citizenship as punishment for a crime, which the Court ruled violative of the Eighth Amendment.³³ More importantly for the case at hand, however, Chief Justice Warren’s plurality decision established a test for determining whether a punishment was cruel and unusual by comparing it to “the evolving standards of decency that mark the progress of a maturing society.”³⁴ This view runs counter to the original view of the Court in Eighth Amendment cases, defining “cruel and unusual” based on the phrase’s connotation when the amendment was initially implemented.³⁵ This historical approach was largely abandoned by the time the court heard *Trop v. Dulles*, and Chief Justice Warren’s opinion finalized this change. Justice Brennan then devised four principles by which one can judge whether a punishment falls outside these standards of decency by being “uncivilized and inhuman” as well as failing to “comport with human dignity.”³⁶ These principles are as follows: the punishment is rather severe or degrading, the punishment is inflicted arbitrarily, the punishment is abhorred by society, or the punishment serves no penal purpose more effectively than one that is less severe.³⁷ Capital punishment fails all of these principles, resulting in the cumulative effect of violating the

³² *Id.* at 258 (Brennan, J., concurring).

³³ *Trop v. Dulles*, 356 U.S. 86 (1958).

³⁴ *Id.* at 101.

³⁵ John F. Stinneford, *Against Cruel Innovation: The Original Meaning of the Cruel and Unusual Punishments Clause, and Why It Matters Today*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103#against-cruel-innovation-the-original-meaning-of-the-cruel-and-unusual-puni> (last visited Mar. 20, 2022).

³⁶ *Furman*, U.S. 408 at 270–77.

³⁷ *Id.*

Eighth Amendment.

Reviewing these newly established principles, Justice Brennan begins by examining the uniqueness of the death penalty, writing that its extreme severity is what demands the deference the court has shown capital punishment in the past.³⁸ “Death is Different” jurisprudence,³⁹ as it has become known within academic circles, is taken by Justice Brennan to mean that death is unusually severe, in both “its finality and enormity.”⁴⁰ Thus, the first principle is satisfied. He then moves to discuss the arbitrary nature of capital punishment which so concerned three of the justices of the majority. Justice Brennan argues that “the punishment is not being regularly and fairly applied” when it is only meted out less than fifty times per year in a country of over 200 million people.⁴¹ It would stand to reason that there are far more capital offenses being committed than just those fifty, and that each of the perpetrators in those other cases are no less worthy of capital punishment than those that actually received the penalty. Thus, the second principle is satisfied.

He then moves through the third and fourth principles fairly quickly, echoing the arguments presented in a few of the other concurrences. The lack of juries imposing the death penalty is his indication that capital punishment is unpopular with the masses and that its scarce imposition renders any threat of deterrence ineffectual.⁴² Much of the evidence for the lack of deterrence is similar to that offered by the other justices in their concurrences.

³⁸ *Id.* at 270–74.

³⁹ Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004).

⁴⁰ *Furman*, 408 U.S. at 289 (Brennan, J., concurring).

⁴¹ *Id.* at 293.

⁴² *Id.*

Thus, the third and fourth principles are satisfied. Justice Brennan concludes his concurrence by summarizing his four principles and how capital punishment fails each of them. What is notable about these principles is that they reach beyond the issues found with the imposition of capital punishment and attack its inherent value to society. In Justice Brennan's own words, "the function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not."⁴³

Justice Marshall's concurrence differs even from that of Justice Brennan, who agreed that capital punishment was inherently violative of the Eighth Amendment. Justice Marshall begins his opinion by establishing a historical survey, both of the wording "cruel and unusual" and the concept of capital punishment in general. The result of this survey is his conclusion that the amendment was "intended to prohibit cruel punishments."⁴⁴ That seems to be a fairly simplistic endpoint after an exhaustive historical review, but Justice Marshall uses this conclusion to devise four reasons as to why a punishment could be condemned as cruel. These include the following: a punishment involves too much physical suffering; a punishment is newly introduced without humane intentions; a punishment is excessive without serving a valid function for the legislature; or that a punishment is deeply unpopular with the general population.⁴⁵

Although Justice Marshall does give each of these four possibilities their due, his opinion focuses upon the determination of capital punishment as excessive and

⁴³ *Id.* at 305.

⁴⁴ *Id.* at 322 (Marshall, J., concurring).

⁴⁵ *Id.* at 330–32.

therefore cruel. It is his belief that if a less severe punishment can be found that meets the aims of the legislature just as well, or even more effectively than, capital punishment, the less severe punishment would render capital punishment as excessive and cruel.⁴⁶ As the court did in *Weems v. United States* (1910), Justice Marshall determined the punishment's severity by comparing it to "those imposed in other jurisdictions."⁴⁷ Clearly, life imprisonment, which is the typical punishment for capital offenses in states without capital punishment, is less severe than death and accomplishes the same goal for the legislature. Therefore, capital punishment is inherently excessive and violative of the Eighth Amendment under this legal scheme.

D. Dissent of Chief Justice Burger

While each justice in the minority wrote his own dissenting opinion, this article will primarily examine the key points of Chief Justice Burger's dissent, given its similarities with the other justices' opinions. The Chief Justice first contends that capital punishment is not in line with the social attitudes of the day.⁴⁸ He recognizes that it is primarily the duty of the legislatures to change policy in the face of shifting moral values and that the lack of judicial decisions overturning these punishments is proof positive of the legislators' responsiveness to public opinion.⁴⁹ In addition, Chief Justice Burger argues that there is no evidence of legislatures being out-of-step on the issue of capital punishment "to such a degree that our traditional

⁴⁶ *Id.* at 342.

⁴⁷ *Id.* at 325.

⁴⁸ *Id.* at 375–76 (Burger, J., dissenting).

⁴⁹ *Id.* at 384.

deference to the legislative judgment must be abandoned.”⁵⁰ He then moves to attack the idea that the infrequent use of capital punishment demonstrates its violation of the Eighth Amendment. Chief Justice Burger contends that juries and judges being quite selective with capital punishment should be a celebrated “refinement on, rather than a repudiation of, the statutory authorization for that penalty.”⁵¹ This was a common talking point amongst retentionists during this era, to say each person sentenced to death was embroiled in circumstances that aggravated their crime,⁵² although many would be hard-pressed to differentiate the crimes of the unlucky few from those of the masses sentenced to a lesser punishment. The final point of the Chief Justice’s dissent addresses the concern of limited deterrence, which was given the most focus within the concurring opinion of Justice White.⁵³ Chief Justice Burger interprets the Eighth Amendment to protect “against the use of torturous and inhuman punishments,”⁵⁴ but not those whose excess is derived from their limited value. In essence, the Chief Justice takes a narrower view of the Eighth Amendment than that favored by Justice White.

In spite of this perspective, the Chief Justice does not necessarily subscribe to the historical view of the amendment. A historical reading of this case would limit its application only to punishments thought of as cruel and unusual during the time in which the amendment was written.⁵⁵ The Chief Justice instead recognizes that the

⁵⁰ *Id.* at 385.

⁵¹ *Id.* at 388.

⁵² William O. Hochkammer, Jr., *The Capital Punishment Controversy*, 60 J. CRIM. L. & CRIMINOLOGY 360, 363 (1970).

⁵³ *Furman*, U.S. 408 at 312 (White, J., concurring).

⁵⁴ *Id.* at 391 (Burger, J., dissenting).

⁵⁵ Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment*,

amendment's "applicability must change as the basic mores of society change"⁵⁶ – he simply does not believe that society has changed its opinion to one that abhors capital punishment. However, he does not recognize the ambiguity in which the majority has demanded change be made to the process of capital punishment. Due to the lack of a controlling opinion, he claims that capital punishment was left in "an uncertain limbo."⁵⁷ This lack of cohesion among the majority of justices would allow future cases and courts to define capital punishment in accordance with their own visions, leading to the Court's decision in *Gregg v. Georgia* only four years later.

II. RELEVANT CASE LAW SINCE *FURMAN*

The ambiguity of the Court's decision in *Furman* left our nation's judicial systems and legislatures in a lurch. All current capital sentences were vacated by this ruling, being converted to life imprisonment,⁵⁸ but the lack of a controlling majority opinion left the door open for policy experimentation. Experiment the states did, creating several judicial schemes in hopes of alleviating the concerns of randomness found within three of the concurrences.⁵⁹ In 1976, the court weighed in on these new schemes, approving certain policies and rejecting those that required the mandatory imposition of a death sentence in the case of

NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103> (last visited Jan. 2, 2022).

⁵⁶ *Furman*, U.S. 408 at 382 (Burger, J., dissenting).

⁵⁷ *Id.* at 403.

⁵⁸ BARRY LATZER, DEATH PENALTY CASES: LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT 37 (2012).

⁵⁹ Sam Kamin & Justin F. Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981 (2015).

capital offense convictions.⁶⁰ In the years since the end of the Court's unofficial moratorium through their ruling in *Gregg v. Georgia* (1976), a number of cases have further restricted the imposition of the death penalty, the most consequential of which are detailed in the following subsections.

A. Reinstatement of Capital Punishment

In the fifty years since the Court announced its ruling in *Furman*, the most important Eighth Amendment case came just four years later. In *Gregg v. Georgia*, the Court found that capital punishment was neither cruel nor unusual if the sentencing body followed set criteria to ensure that the defendant in question was deserving of the penalty.⁶¹ Specifically, juries and judges were required to consider both aggravating and mitigating circumstances of the case to determine whether the crime was particularly heinous. If the sentencing body came to the conclusion that the crime warranted execution, such a decision would need to be reviewed by an appellate body to ensure its veracity.⁶² Under the Georgian system, the State Supreme Court automatically reviewed all death sentences for arbitrary motives or discrepancies from similar cases.⁶³ This new system assuaged the concerns present in the concurrences of Justices Douglas, Stewart, and White, allowing capital punishment to once again take hold in our nation's judiciary.

However, just because *Gregg v. Georgia* reopened the floodgates does not mean that petitioners stopped challenging the constitutionality of capital punishment. A

⁶⁰ *Roberts v. La.*, 428 U.S. 325 (1976).

⁶¹ *Gregg v. Ga.*, 428 U.S. 153, 155 (1976).

⁶² *Id.* at 198.

⁶³ *Id.*

decade later, the Court heard the case of *McCleskey v. Kemp* (1987), which concerned the effect of racial discrimination upon capital sentencing.⁶⁴ The petitioner in this case, Warren McCleskey, cited a statistical analysis by David Baldus concluding that the largest determinant in whether or not a defendant would be sentenced to death was the race of the victim.⁶⁵ The Court found that, while there was empirical evidence of racial discrimination, McCleskey's claim lacked explicit evidence of deliberate bias on the part of the law officials in his case.⁶⁶ In essence, the Court set aside the problems of structural racism due to a lack of overt racism against McCleskey himself.⁶⁷ This five to four decision is deemed by many legal scholars as one of the worst in the Court's history since the Second World War, mainly for its implicit endorsement of structural racism.⁶⁸ In fact, Justice Powell, who authored the majority opinion in this case, later testified that throughout his tenure on the bench, he regretted this ruling the most.⁶⁹ Through this ruling, the Court not only recognized the discriminatory issues with capital punishment raised by Justices Douglas, Brennan, and Marshall a decade earlier – it accepted that those problems were inherent to the policies

⁶⁴ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁶⁵ David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. CRIMINOLOGY 661 (1983).

⁶⁶ *McCleskey*, 481 U.S. at 280.

⁶⁷ *Id.* at 292.

⁶⁸ David G. Savage, *Roe vs. Wade? Bush vs. Gore? What are the worst Supreme Court decisions?*, L.A. TIMES (Oct. 22, 2008), <https://archive.ph/20081023193212/http://www.latimes.com/news/nationworld/nation/la-na-scotus23-2008oct23.0,1693757.story#selection-879.0-879.72>.

⁶⁹ Adam Liptak, *A Vast Racial Gap in Death Penalty Cases, New Study Finds*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/us/racial-gap-death-penalty.html>.

involving the death penalty.

B. Individualized Sentencing

The concept of individualized sentencing for capital offenses originally evolved from “Death is Different” jurisprudence. In circumstances concerning such a severe penalty, juries and judges would be remiss to rely upon either determinative sentences or presumptive sentences. A determinate sentence is one that comes with a set length that cannot be altered by a review board;⁷⁰ for capital punishment, a determinative sentence would be a mandatory sentence of execution once a defendant is found guilty of a capital offense. Such an unyielding and severe sentence fails to take into account any circumstances particular to the case in question, such as the age of the defendant or their mental capabilities. The same problems are found with presumptive sentencing; the judge can adjust the punishment based on aggravating or mitigating circumstances, but the presumed punishment remains the default for the jury.⁷¹ These principles necessitate the consideration of individualized sentencing in capital cases, investigating the specific circumstances of the defendant’s actions prior to the court’s determination of a final sentence.⁷²

While *Gregg v. Georgia* did extend the principle of individualized sentencing to defendants in capital cases, there were no restrictions placed upon who could perform

⁷⁰ Craig Newton, *Determinate Sentence*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/determinate_sentence (last visited Jan. 2, 2022).

⁷¹ *Presumptive Sentence*, USLEGAL.COM, <https://definitions.uslegal.com/p/presumptive-sentence/> (last visited Jan. 2, 2022).

⁷² William W. Berry, *Individualized Sentencing*, 76 WASH. LEE L. REV. 13 (2019).

the investigation of aggravating and mitigating factors for the sentence. Through the case of *Ring v. Arizona* (2002), plaintiffs objected to the use of a judge without a jury to determine whether a defendant qualified for the imposition of the death penalty.⁷³ The basis for this petition was the Sixth Amendment's guarantee to a trial by jury;⁷⁴ the inference made by the petitioners was that a bifurcated trial with sentencing in the second portion should still require the presence of a jury. The Court agreed with this reasoning and struck down capital sentencing schemes in nine states that did not require the presence of a jury when examining aggravating and mitigating factors.⁷⁵

C. Proportionality of Sentencing

When deciding cases involving the death penalty, judges typically weigh whether such a punishment would be proportional to the offense committed. Each of the justices in the *Furman* majority took pains to examine the possibility of excessiveness in the imposition of capital punishment, and a few noted the incredible rarity in which someone convicted of rape is sentenced to execution.⁷⁶ However, when capital punishment resumed in the wake of *Gregg v. Georgia*, there was no ruling on the legality of rape as a capital offense. Such a petition was raised in quick succession, as the court heard *Coker v. Georgia* (1977) the very next year. In this case, the defendant was convicted of raping a woman and sentenced to execution on the basis of two aggravating circumstances: he had previously been convicted of a capital felony, and the rape was committed

⁷³ *Ring v. Ariz.*, 536 U.S. 584 (2002).

⁷⁴ U.S. CONST. amend. VI.

⁷⁵ *Ring*, 536 U.S. at 585.

⁷⁶ *Furman*, 408 U.S. at 293.

during the course of another felony, armed robbery.⁷⁷ However, no murder or other killing had been committed by the defendant, leaving the question of proportionality of punishment open for interpretation. The plurality opinion, written by Justice White and joined by three others, decries the penalty of death as “grossly disproportionate” to the crime committed.⁷⁸ This ruling largely restricted capital punishment to offenses in which the defendant was responsible for the death of another human being. However, some states still pushed the bounds of this ruling, as the plurality opinion specified the crime of raping an adult as undeserving of the death penalty, not the crime of rape in general.

Such an interpretation was ruled unconstitutional in the case of *Kennedy v. Louisiana* (2008), prohibiting the use of capital punishment in all cases of rape in which the victim survived.⁷⁹ This expanded the Court’s understanding of the Eighth Amendment and established the victim’s death as a requirement for administering sentences of capital punishment. Interestingly, neither of these cases makes any mention of crimes against the state that carry the penalty of execution. Theoretically, someone convicted of either espionage or treason against the state can be sentenced to capital punishment without ever having killed someone. However, this loophole has yet to be tested or challenged in court. Outside of this example, the decisions in *Coker v. Georgia* and *Kennedy v. Louisiana* made the death penalty unconstitutional in all cases not involving murder due to the principle of proportionality.

⁷⁷ *Coker v. Ga.*, 433 U.S. 584, 587–589 (1977).

⁷⁸ *Id.* at 592.

⁷⁹ *Kennedy v. La.*, 554 U.S. 407 (2008).

D. Classes of Ineligible Persons

The three main cases concerning eligibility for the death penalty revolve around a few concepts already discussed. The majority opinions in all three cases feature arguments based around the evolving standards of decency first formulated in *Trop v. Dulles*, and each questions the deterrence effect of capital punishment as it relates to the culpability of the classes in question. As the law currently stands, neither minors nor persons with mental disabilities can be sentenced to execution in the United States, largely through arguments about the wider social opinion against such punishments. However, this rationale has not always held weight, as can be seen in the court's ruling in *Stanford v. Kentucky* (1989). In this case, the petitioner charged that, since he was a minor when he committed the capital offense in question, it would be violative of the Eighth Amendment to sentence him to death.⁸⁰ The Court found that, when applying the evolving standards of decency test, roughly half the states still practicing capital punishment allowed the punishment for minors.⁸¹ Therefore, at least in 1989, no clear standard of decency could be applied, leaving capital punishment on the books for defendants of all ages.

By 2005, however, it seemed that this lack of a clear standard had changed. The Missouri State Supreme Court had already ruled as such, but this decision was challenged on the basis that a state court had overturned a precedent set by the federal court. Nevertheless, the Supreme Court agreed with their counterparts in Missouri, ruling in *Roper v. Simmons* that it was cruel and unusual to sentence a minor to be executed, given that the vast majority of states

⁸⁰ *Stanford v. Ky.*, 492 U.S. 361, 362 (1989).

⁸¹ *Id.* at 371–72.

no longer allowed for such a sentence.⁸² This decision followed the Court's pronouncement in *Atkins v. Virginia* (2002), in which the justices ruled that defendants with mental disabilities were ineligible for capital punishment.⁸³ The reasoning in this case was twofold: for one, very few states that practiced the death penalty allowed for this class of persons to be executed, and there was also serious doubt amongst the justices whether the death penalty could serve any deterrent effect on a person who could not distinguish right from wrong, morally speaking.⁸⁴

These two cases, along with *Kennedy v. Louisiana*, winnowed the pool of those eligible for capital punishment to a select class of defendants found guilty of a select class of offenses. Under current law, the only individuals eligible for capital punishment are adults with no mental disabilities convicted of causing the death of another individual with aggravating circumstances. Much distance has been covered since the days of *Gregg v. Georgia*, but further efforts must be made to limit the death penalty on the grounds of the Eighth Amendment, primarily concerning how the executions are conducted.

E. Method of Execution

While the Court had already deemed certain punishments violative of the Eighth Amendment, it had never rendered a specific method of execution as unconstitutional. For the most part, many of the most heinous methods of execution were either never practiced in this country or phased out before they could be challenged before the court. However, there is one major exception to this rule, coming in the case of *Louisiana ex rel. Francis v.*

⁸² *Roper v. Simmons*, 543 U.S. 553 (2005).

⁸³ *Atkins v. Va.*, 536 U.S. 304 (2002).

⁸⁴ *Id.* at 320.

Resweber (1947), in which the petitioner challenged his punishment under several constitutional amendments, including the Eighth.⁸⁵ When the state attempted to execute the petitioner, a malfunction shot an electric current through his body but did not kill him.⁸⁶ Therefore, he argued that any further attempts to execute him would violate the prohibition against cruel and unusual punishment. However, the Court disagreed with this argument and refused to hear any further challenges to specific methods of execution until 2008.⁸⁷

By 2008, lethal injection had become the method of choice for every state that still practiced capital punishment, with most using the same chemical formula. The legality of this three-drug cocktail was challenged by two defendants from Kentucky in the case *Baze v. Rees* (2008), who alleged that this method provided an unnecessary risk of pain should the injections be administered incorrectly.⁸⁸ This argument was not unfounded, as several states had experienced difficulties with administering the three drugs in a way that did not cause the defendant undue pain.⁸⁹ However, in keeping with the precedent set by *Louisiana ex rel. Francis v. Resweber*, the plurality opinion of the Court argued that an “isolated mishap” does not violate the Eighth Amendment on its own.⁹⁰ The Court did demonstrate some amount of compassion towards the petitioners, ruling that

⁸⁵ La. *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

⁸⁶ *Id.* at 460.

⁸⁷ *Id.* at 465.

⁸⁸ *Baze v. Rees*, 553 U.S. 35 (2008).

⁸⁹ Linda Greenhouse, *Justices to Enter the Debate Over Lethal Injection*, N.Y. TIMES (Sept. 26, 2007),

<https://www.nytimes.com/2007/09/26/washington/26lethal.html>.

⁹⁰ *Baze*, 553 U.S. at 36.

the first drug in a lethal injection system must create a state of unconsciousness with the individual, so as to avoid undue suffering.⁹¹

Lethal injection would be challenged again just seven years later in *Glossip v. Gross* (2015). Much had changed in the intervening years, with most states forced to use a four-drug cocktail since a number of pharmaceutical companies refused to manufacture drugs only used to execute individuals.⁹² As such, Oklahoma switched to the drug midazolam in order to satisfy the unconsciousness prong of the plurality opinion in *Baze v. Rees*; the use of midazolam as a general anesthetic was untested at this point in time and not approved by the Federal Drug Administration.⁹³ Many defendants on death row in Oklahoma lodged a protest over this shift, arguing that to proceed would be cruel since the drug's effectiveness was unknown.⁹⁴ The state forged ahead, however, and used this new cocktail on Clayton Lockett, who appeared to remain conscious for several minutes after administration and took forty-three minutes to die after injection.⁹⁵ Because of these

⁹¹ *Id.*

⁹² Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html>.

⁹³ Liliana Segura, *Ohio's Governor Stopped An Execution Over Fears It Would Feel Like Waterboarding*, THE INTERCEPT (Feb. 7, 2019), <https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/>.

⁹⁴ Katie Fretland, *Oklahoma's 'experimental' lethal injection protocol challenged in US supreme court*, THE GUARDIAN (Jan. 14, 2015), <https://www.theguardian.com/us-news/2015/jan/14/oklahoma-experimental-lethal-injection-protocol-supreme-court>.

⁹⁵ Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>.

issues, the state halted all planned executions, and several individuals sentenced to the death penalty brought suit under the Eighth Amendment.

Once the case reached the Supreme Court, it was decided on a five to four majority. The Court's opinion, written by Justice Alito, found that petitioners challenging a method of execution under the Eighth Amendment were required to suggest an alternative that was both reasonable and available to the state. In this instance, the drugs suggested by the defendants on Oklahoma's death row were unavailable for the state to purchase.⁹⁶ In addition, Alito believed that the onus to prove a punishment's excessive nature rested with the petitioners and that the state did not have to prove the opposite in order to use this method of execution.⁹⁷ This case represents the most recent effort to challenge any aspect of capital punishment and illustrates the difficulties petitioners face when attempting to demonstrate the cruel and unusual nature of their punishment.

III. SATISFACTION OF THE CONCURRENCES OF *FURMAN*

As demonstrated in Section II, much has changed involving the imposition of capital punishment since the court's ruling in *Furman v. Georgia* fifty years ago. There are far greater restrictions placed upon the classes of defendants, crimes, and methods involved with the death penalty, and fewer states than ever are exercising such punishment. In this light, it is beyond time to reexamine the concerns presented within the five concurring opinions from the original case. Much has changed since 1972, but

⁹⁶ *Glossip v. Gross*, 192 L. Ed. 2d 761, 775 (2015).

⁹⁷ *Id.* at 778.

have these reforms gone far enough?

*A. Concurrences of Justices Douglas,
Stewart, & White*

When considering the general outlines of capital punishment case law, it may seem that the major concerns of Justices Douglas, Stewart, and White have been cleanly addressed since their ruling in 1972. After all, Justice Stewart wrote the plurality opinion for *Gregg v. Georgia*, Justice White wrote a concurrence, and Justice Douglas had retired by the time that this case came before the Court. In addition, further restrictions have been placed upon the death penalty since then, winnowing the pool of potential recipients for the punishment.⁹⁸ Both the changes to trial structure mandated by the ruling in *Gregg v. Georgia* and the jury sentencing requirement derived from *Ring v. Arizona* should work to limit the randomness of capital punishment that so concerned both Justice Stewart and Justice White.⁹⁹ From a broader angle, the three concurrences of these justices are still satisfied by the country's modern approach to capital punishment.

However, when examining its current imposition in greater detail, the concerns first presented by these three justices in 1972 still ring true today. Each of the concurring justices raised questions about the effectiveness of capital punishment as a deterrent of capital offenses, and research conducted by a number of outlets demonstrates the distinct lack of such an effect. Reports compiled by the American Civil Liberties Union, the Death Penalty Information Center, and Amnesty International all found no unique

⁹⁸ Robert Dunham, *Limiting the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/limiting-the-death-penalty#>.

⁹⁹ *Gregg v. Ga.*, 428 U.S. 153 (1976); *Ring v. Ariz.*, 536 U.S. 584 (2002).

deterrence effect in jurisdictions that practice capital punishment.¹⁰⁰ Further illustrating the inefficacy of these schemes, the Death Penalty Information Center found that the murder rate is actually higher in states with capital punishment than in those without this form of punishment; this difference was as high as 47% in the year 2007.¹⁰¹ Even after the additional restrictions placed upon capital punishment since *Gregg v. Georgia*, there are numerous areas in which the modern imposition of the death penalty gives cause for concern, fundamentally failing to satisfy the principles of these three concurrences. The haphazard distribution of capital punishment, its possibly discriminatory nature, and the number of defendants with mental disabilities all speak against its place within the modern judicial system.

Each of the three justices were troubled by the seemingly random imposition of capital punishment, with little obvious difference in the cases where it was imposed and those where it was not. Unfortunately, such an element of randomness still holds true today.¹⁰² The primary

¹⁰⁰ Anthony Romero, *The Death Penalty: Questions and Answers*, AM. C.L. UNION, <https://www.aclu.org/other/death-penalty-questions-and-answers> (last visited Jan. 2, 2022); Robert Dunham, *Deterrence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/deterrence> (last visited Jan. 2, 2022); Bob Goodfellow, *Does the Death Penalty Deter Crime?*, AMNESTY INT'L, <https://www.amnesty.org/en/wp-content/uploads/2021/06/act500062008en.pdf> (last visited Jan. 2, 2022).

¹⁰¹ Robert Dunham, *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states> (last visited Jan. 2, 2022).

¹⁰² Denny LeBoeuf, *Lady Justice Rolls the Dice: the Death Penalty is "Random Horror"*, AM. C.L. UNION, <https://www.aclu.org/blog/smart-justice/mass-incarceration/lady-justice-rolls-dice-death-penalty-random-horror>.

determinant in the pursuit of capital punishment within each case is not the aggravating circumstances of the situation, but where the offense is committed. Setting aside those states that bar the death penalty altogether, there is still a great deal of geographic disparity within capital punishment states,¹⁰³ a factor partially explained by variations in the prosecution. The Marshall Project found the region of the offense to be the primary element in determining a court's decision to pursue the death penalty; the probability of such a sentence rose significantly if the crime occurred in one of the twenty-five counties around the country that regularly pursue the death penalty.¹⁰⁴ For one, the prosecutors in these counties are much more enthusiastic about pursuing capital punishment than most other offices nationwide. Additionally, these counties are among the few jurisdictions that can afford to regularly hold capital trials.¹⁰⁵ Since the 1980s, the cost of capital trials and their subsequent appeals have risen by millions of dollars,¹⁰⁶ limiting which jurisdictions can even afford to pursue such punishment. Most capital cases are dictated by the funding and leadership within each prosecutor's office, rather than the legitimacy of the defense at hand. Surely, such a system that strikes like lightning is cruel and unusual, just as Justice Stewart reasoned fifty years ago.

¹⁰³ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425 (2010).

¹⁰⁴ Maurice Chammah & Keri Blakinger, *Death Penalty for Mass Shooters? Depends On Where They Strike*, THE MARSHALL PROJECT (Apr. 5, 2021), <https://www.themarshallproject.org/2021/04/05/death-penalty-for-mass-shooters-depends-on-where-they-strike>.

¹⁰⁵ *Id.*

¹⁰⁶ Peter A. Collins & Aliza Kaplan, *The death penalty is getting more and more expensive. Is it worth it?*, THE CONVERSATION (Oct. 28, 2019), <https://theconversation.com/the-death-penalty-is-getting-more-and-more-expensive-is-it-worth-it-74294>.

Another concern raised by Justices Douglas and Stewart centered around the potential for discrimination through capital punishment, although neither was convinced that such an issue had been proven in *Furman v. Georgia*. Unfortunately, in the fifty years since their ruling, researchers have found even further evidence to support such an idea. While the number of individuals sentenced to be executed has declined in recent decades, the proportion of those individuals that come from minority communities has only risen.¹⁰⁷ The specific cases in which the death penalty is sought most often involve a white female victim; very rarely is someone sentenced to death for the killing of a Black man.¹⁰⁸ It seems that prosecutors and juries are, possibly unconsciously, outraged more by the killing of white women than they are of Black men. When considering that defendants in poverty are more likely to be sentenced to execution than their wealthy counterparts,¹⁰⁹ a consistent narrative emerges in which capital punishment disproportionately burdens already disadvantaged populations. Such a state of being hardly satisfies the concerns raised by Justices Douglas and Stewart.

Finally, any examination of the satisfaction of these concurrences must examine the restrictions created since the Court's ruling in *Furman*. Taking into account the controlling case law discussed in Section II, the most alarming reality comes from the modern judiciary's failure

¹⁰⁷ Liliana Segura, *Death and Texas*, THE INTERCEPT (Dec. 3, 2019), <https://theintercept.com/2019/12/03/death-penalty-race-texas/>.

¹⁰⁸ Frank R. Baumgartner et al., *#BlackLivesDon'tMatter: race-of-victim effects in US executions, 1976–2013*, 3 POL., GROUPS & IDENTITIES 209 (2015).

¹⁰⁹ Chase Colton, *Poverty and Capital Punishment*, BORGEM MAG. (Feb. 21, 2014), <https://www.borgenmagazine.com/poverty-capital-punishment/>.

to uphold the principles expressed in *Atkins v. Virginia*. The Court ruled that individuals with mental disabilities have lessened culpability and are ineligible for capital punishment, yet several individuals with such disabilities were executed within the past year, and many more can be found on death row.¹¹⁰ Furthermore, the current Court has denied petitions for review in several of these rulings,¹¹¹ casting doubt on the value that these justices assign to the precedent set by *Atkins v. Virginia*. Such a situation should be concerning to any justice of the Court, especially those that already profess concerns about the imposition of capital punishment.

*B. Concurrences of Justice Brennan &
Justice Marshall*

Clearly, two justices that disagree with the imposition of capital punishment – Justices Brennan and Marshall – would not be satisfied by its continued use. Along with the concurrence of Justice Douglas, the arguments in these opinions hinge upon the “evolving standards of decency” test laid out by then-Chief Justice Warren’s opinion in *Trop v. Dulles*.¹¹² If anything, the last fifty years have only added further weight to such an argument. In 2021, Virginia abolished capital punishment

¹¹⁰ ROBERT DUNHAM, DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2021: YEAR END REPORT (2021), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report>.

¹¹¹ Robert Dunham, *Supreme Court Declines to Review Death Sentence in Case in Which Federal Prosecutors and Defense Agree Defendant’s Intellectual Disability Makes Him Ineligible for the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 4, 2021), <https://deathpenaltyinfo.org/news/supreme-court-declines-to-review-death-sentence-in-case-in-which-federal-prosecutors-and-defense-agree-defendants-intellectual-disability-makes-him-ineligible-for-the-death-penalty>.

¹¹² *Furman v. Ga.*, 408 U.S. 238, 270–329 (1972).

within its bounds, joining twenty-two other states in officially outlawing the practice.¹¹³ This shift in policy is quite dramatic as, since 1976, only Texas has executed more people than Virginia.¹¹⁴ In addition, three other states (California, Oregon, and Pennsylvania) have official gubernatorial moratoriums placed upon any executions, and a further ten states have not executed anyone in the past ten years.¹¹⁵ American society is clearly moving towards an abolitionist stance on capital punishment, as reflected by the changes in statutes around the country. While by no means a perfect or complete solution, such movement is in line with the ideals set out in the concurrences of Justice Brennan and Justice Marshall.

CONCLUSION

Of the issues identified by the five separate concurrences in *Furman v. Georgia*, most still exist in some form. While reformed capital punishment schemes passed in the wake of this decision created a more objective system, they by no means created a *fully* objective system. Discrimination and arbitrary factors such as geography still play a far greater role in the imposition of capital punishment than policymakers should allow. If anything, the one clarification over the past fifty years is that the current system of capital punishment woefully fails to satisfy any concurrence from *Furman v. Georgia*, let alone all five. To that end, the question is no longer *if* capital punishment violates the Eighth Amendment – it is *when* the highest court in the nation will recognize such a fact.

¹¹³ Madeleine Carlisle, *Why It's So Significant Virginia Just Abolished the Death Penalty*, TIME MAG. (Mar. 24, 2021), <https://time.com/5937804/virginia-death-penalty-abolished/>.

¹¹⁴ *Id.*

¹¹⁵ DUNHAM, *supra* note 110.

**HOW TO REVIVE A MOCKINGBIRD: AN
ESSAY ON THE MODERN PUBLIC
DEFENDER**

*Antonia Maria Christou**

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“So you want to be a public defender? Don’t do it for the money, there isn’t enough. Don’t do it for prestige, you won’t get any...

Do it for love. Do it for justice. Do it for self-respect. Do it for the satisfaction of knowing you are serving others, defending the Constitution, living your ideals. The work is hard. The law is against you...But it is a great job – exhilarating, energizing, rewarding. You get to touch people’s hearts and fight for what you believe in every day.”

–Carol A. Brook, Federal Public Defender for Northern Illinois

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INTRODUCTION: HARPER'S PLEA

In *Gideon v. Wainwright*, the Supreme Court held that an indigent accused of a crime punishable by incarceration is entitled to a lawyer.¹ In announcing this principle, the Court embedded the Constitutional Framers' steadfast beliefs of individual liberty and dignity into the foundations of the American judiciary. As a result, public defenders serve as one of the foremost points of resistance against potential violations of individuals' freedoms.² Hence, this paper explores the conditions necessary for a true adversarial adjudication system in the United States and examines to what extent the idealized role of the public defender is achieved. This paper defines an adversarial justice system as the process through which conflicting evidence and legal support are presented by the prosecution and defense, followed by impartial arbitration and concluding judgments for the sake of resolving an issue.³ So, how can a fair trial be achieved, and by extension, how can the legitimacy of the entire legal system be sustained, given the state of the public defender's office today?

Although public defenders carry out the ethos of the United States, resources remain scarce, the culture of the system inherently impedes their work, and offices remain both understaffed and underfunded. Moreover, hidden biases concerning race and politics, the media's perception of criminals, and the makeup of different states and counties hinder the due process that the Framers once imagined. As a result, the systems in power often remain unchecked, leaving our modern legal system far from the picturesque

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² JONATHAN RAPPING, *GIDEON'S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE* (2020).

³ Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 57 (1998).

adversarial structure about which our forefathers rhapsodized. To resolve the injustices of the system, policymakers must remedy the current state of the public defender's office. This paper will posit that the government, at both the federal and local level, must provide additional funding to offices in order to draw in more attorneys and sustain resources, fully educate these attorneys, and incorporate further checks and balances.

These suggestions do not come lightly. In the first section of the essay, a description of the problems plaguing public defenders, or PDs, is derived from empirical research conducted by governmental departments, legal theorists, and independent researchers. These figures inform the interpretation of subsequent effects on clients, PDs, and the adversarial system at large. Additionally, a cross-comparison of PD offices across different jurisdictions reveals which sectors require additional investment. Furthermore, the second section of the piece synthesizes first-hand accounts from the public defenders I worked alongside during the summer of 2021, supported by formal literature on their position. These accounts unite to form an overview of the culture of our legal system. Finally, in the third portion of this research paper, I fuse both tangible and cultural solutions to these problems, presenting practical adjustments to prevent outcomes similar to those in Harper Lee's *To Kill a Mockingbird*. Injustice can scantily be realized from a bird's eye view, instead requiring the perspectives of indigents who face lengthy sentences, exorbitant court costs, and high recidivism rates.

I. A BRIEF HISTORY OF THE PUBLIC DEFENDER

On December 25th, 1962, the film *To Kill a Mockingbird* captured the minds and hearts of the American

public as Atticus Finch's pedagogy of principle overcame the cynicism that so often surrounds our nation's legal system. The film encapsulated the sentiment of a decade of horrors, including the 1931 conviction of the Scottsboro Boys in Alabama. Nine Black teenage boys were unjustly arrested for allegedly raping two white women, and eight were sentenced to death; Leroy Wright, thirteen years old, narrowly escaped the sentence due to a hung jury who had concerns regarding his age.⁴ The defendants were appointed counsel on the morning of their court date that proved to be both insufficient and uneducated.⁵ Despairingly, the vision of justice boldly proclaimed by our Founding Fathers lay grossly unrealized.

Harper Lee reportedly drew upon this national trauma to write the book that helped swing the pendulum of public opinion from discriminatory practices toward guaranteed representation.⁶ Following gradual changes in national culture and legal precedent, the 1963 decision of *Gideon v. Wainwright* held that an indigent accused of a crime punishable by incarceration is entitled to a lawyer.⁷ Yet, to say that the clamor for due process or rule of law led to a consensus and the immediate emergence of public defenders would be misguided. By no means did this key component of our legal character appear overnight following the decision. Many questions remained: How would they be funded? How could they remain impartial? Should public defenders exist at all?

Gideon was a crucial step in the right direction, but

⁴ RAPPING, *supra* note 2.

⁵ *Id.*

⁶ *Id.* at 43.

⁷ NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 192 (2011).

it was neither the beginning nor the end of the development of the public defender's office.⁸ Elite lawyers still maintained significant doubts about the executive branch's encroachment upon their territory. Leading private attorneys argued that free markets, independent discretion on case selection, and a limited role of government were of utmost importance and faced peril if public defender offices became entrenched in the American legal system.⁹ Additionally, they argued that this move was a ploy by socialists to centralize the government. For instance, a federal judge published an article in 1956 criticizing the judiciary's ruling in *Gideon*, claiming that it established a police state akin to Puerto Rico's totalitarianism.¹⁰ The obstructions to the creation of the PD's office were hefty, but the pendulum slowly swung.

By the late 1960s and early 1970s, such rhetoric became a fringe position. Attitudes evolved due to an explosion in the number of accused persons, laws becoming increasingly punitive and complex, a stark rise in class divides, and an unfortunate growth in poverty. Institutionalized assistance was no longer a luxury – it was an urgent demand. The right to an attorney and the concept of the public defender developed simultaneously but not seamlessly. Legal historians observed that “ideas and problems, solutions and potential crises, circulate remarkably independently through the political stream.”¹¹ As society shifted from classical liberalism to a more progressive stance, it became clear that public defense, like

⁸ SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* 4 (2020).

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *Id.* at 9.

healthcare policy, acts as a proxy between problems and solutions, many of which have yet to be devised. An adage of “meet ‘em, greet ‘em, and plead ‘em” has entered the marketplace of attitudes amongst some public defenders.¹² Exceedingly low budgets, lacking support for PDs, and structural issues cause plea deals to become preferential to the demands faced by our current adversarial system. In essence, the problems that led to the creation of the Office of the Public Defender, or the OPD, have remained dominant, and the right to counsel that inspired their creation remains constrained. The crushing number of caseloads, structural problems within the legal process, and disconnects fostered by class and race continue to propagate inequity and oppression within this system.

Despite the prevalence of this issue in popular culture, scholarly research examining public defense remains limited. Therefore, although the crisis in our system has not gone unnoticed, it is not receiving the political and legislative attention that it demands. The public defender’s origins are steeped in controversy and obstacle, making it no surprise that the futures of the profession – and the futures of nearly eighty percent of people on trial – continue to hang in the balance.¹³ Most arguments concerning the budgeting or overworking of these attorneys fail to meaningfully inspect the system or the culture that allows these burdensome conditions to continue. Addressing only the manifestations of the issues at hand, without looking at

¹² Steve Zeidman, *Eradicating Assembly-Line Justice: An Opportunity Lost by the Revised American Bar Association Criminal Justice Standards*, 46 HOFSTRA L. REV. 293, 293 (2018).

¹³ Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016),

<https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf>.

the root of the problem, fails to fulfill the expectations of the constitutional protections outlined by the Founding Fathers.

Thus, this research attempts to bridge the gap between cause and effect, working to clearly identify the range of problems faced by PDs. Considering the limited budgets of many PDOs, meager financial incentives to engage with the work, and persistent struggles with the overarching structural issues of the legal system, these conflicts constrain the foundational principles of our judiciary. Moreover, undertaking this task also demands a deep investigation of the populace's views on the justice system and the perception of those within the field. In addressing tangible, political issues along with cultural attitudes, further reform can be implemented to bridge the gap between rights that are valued and rights that are enforced.

II. A BIRD'S EYE VIEW: FORMAL & POLITICAL ISSUES FACED BY PUBLIC DEFENDERS

The debate concerning the reformation of the public defender's office is not always theoretical. The United States acknowledges many of the injustices caused by the legal system and attempts to correct them at times. Recalling the transgressions against the Scottsboro Boys in *Powell v. Alabama*, the Court reaffirmed the connection between adequate counsel and a fair trial. It decided that,

left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence... He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the

proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence.¹⁴

Hence, the hindrance is not necessarily about ideals of justice or logic fueling the importance of the public defender's office. The issue lies not in the judgment of what is "right" in and of itself, but rather in our perception of the clients. The next section will explore these attitudes more fully, but nonetheless, the legal system can and does devalue the lives of marginalized groups. Moreover, many indigents face discrimination due to factors such as race, sexual orientation, citizenship status, and gender identity. Just as the clients themselves are vilified by the system, so too are the people who defend them.

A. Financing Public Defenders

Past research suggests that public defender offices across the nation do not receive the amount of funding necessary for the adversarial system to exist. There is no uniform delivery of indigent defense services on a national basis. Eighteen states rely on a centralized office, while twenty-nine states operate with a patchwork of public defenders, assigned counsels, and contract defenders. Three states manage with only the assigned counsel.¹⁵ These offices' funding and hourly compensation rates vary greatly depending on local circumstances, such as tax collection amounts, the number of indigents, and the attitudes of the politicians in office. Federal public defenders are an exception, but funding generally differs year to year and often fails to ensure that necessary resources, competitive salaries, and well-kept facilities are available.

¹⁴ Powell v. Alabama, 287 U.S. 45 (1932).

¹⁵ *Id.* at 4.

In 1914, the Los Angeles Public Defender Office was established as the first in the country, owing to the younger and progressive makeup of the city. Yet even this office presently struggles with financing. It was an experiment that soon became the model for indigent defense not only across the state, but within the larger context of our nation.¹⁶ The principles of defense, however, are no longer at the forefront of modern legal discourse, demonstrated by the funding allocated to PDs even within the state that claims to be the epitome of public defense. In 2009, California Western School of Law reported that “for every dollar spent statewide on prosecution, only fifty-three cents is spent on average for the defense of the indigent accused. Yet at least 85% (and, in some counties, as high as 95%) of the felony docket is comprised of defendants who must rely upon publicly provided defense services.”¹⁷ This statistic reveals that the majority of those on trial are indigent, lacking the funds necessary to procure a private attorney or acquire expert witnesses, investigators, or jury specialists. Despite the promise of “innocent until proven guilty,” these clients already face significant socioeconomic barriers to obtaining a fair trial, making it difficult for a true adversarial system of justice to function within such an environment.

Fortunately, changes like California Governor Gavin Newsom’s agreement to increase the PD’s budget by 30% have brought greater attention to the issue. In 2020, the *San Diego Union-Tribune* disclosed that “the district attorney spends more than double what the public defender spends

¹⁶ MAYEUX, *supra* note 8.

¹⁷ Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL W.L. REV 268 (2009).

each year, even though 80 percent of criminal defendants cannot afford to hire their own lawyer.”¹⁸ While PDs have gradually been allocated additional resources, their budgets are still scant when compared to those of the prosecution, despite the two offices’ equally rigorous responsibilities. In an adversarial system, the public defenders must reach “parity [with] the prosecution...or better than privately obtained counsel.”¹⁹ Thus, in terms of funding, it is clear that even in the state of California, a monetary balance is still necessary.

If the emblem of the United States adversarial legal system is the public defender, why is it that some offices across the country receive significantly less than their counterparts? Logically, if one side has such an advantage in collecting, presenting, and providing evidence, there must be a dissonance in values. Fifty years ago, President Lyndon B. Johnson first used the term “War on Crime.” Since then, political figures from President Nixon to President Reagan have utilized the innate fear that the indigent accused are less valuable citizens who pose a threat to society at large.²⁰ Within the same vein, “anticrime connection has gained the victims’ rights movement’s almost universal approval among American politicians. These two diametrically opposed camps agree on one point, and one point only: that anticrime and pro-victim stands are

¹⁸ Jeff McDonald, *Scales of Justice Can Be Tipped by Spending on Prosecutions, Public Defenders*, SAN DIEGO UNION-TRIB., July 20, 2020.

¹⁹ TIMOTHY PATRICK HENNESSY, PROSECUTORS, PUBLIC DEFENDERS, AND THE AMERICAN ADVERSARIAL SYSTEM 63 (2011).

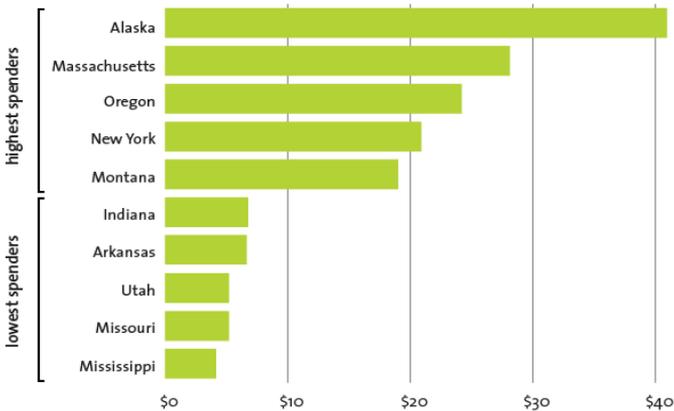
²⁰ ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 63–65 (2016).

two sides of the same coin.”²¹ In fear of appearing “soft on crime” or “anti-victim,” many politicians shy away from funding the public defender's office, preferring to gain favor with the general electorate at the expense of their constituency of indigents. The funding that they do decide to allocate to the PD varies dramatically depending on the political makeup and economic situation of their states, as well as the competitiveness of their political races. As demonstrated by **Figure 1**, the same factors applied even during the 2008 recession.²² Liberal-leaning states tended to provide more funding, while relatively conservative states restricted monetary aid due to ideology and political reality.

Figure 1. Per Capita Spending on Public Defense, 2008

The Price of Justice

Per capita spending on public defense, 2008



Source: National Legal Aid & Defender Association

Mother Jones

²¹ MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME THE USE AND ABUSE OF VICTIMS' RIGHTS 2 (2002).

²² Jaeah Lee et al., *Charts: Why You're in Deep Trouble If You Can't Afford A Lawyer*, MOTHER JONES (MAY 6, 2013), <https://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/>.

2021 proved to be no different in the funding obstacles faced by PDs, but attorneys are still exploring new avenues for change. They have realized that in order to adequately defend their clients, additional monetary resources are vital. For instance, in 2006, a civil liberties group sued the State of New York for the gross misappropriations received by the prosecution. As a result, by 2023, \$250 million will be allotted towards indigent defense under the Hochul administration.²³ Not all states are as lucky. In 2015, Derwyn Bunton, the operator of the public defender's office in New Orleans, began a crowdfunding campaign that garnered a slew of media attention. He commented, "When you're watching it being presented in a national program, you really are struck by how absurd it is that we would depend on this kind of system to secure one of the original amendments to the Constitution."²⁴ The adversarial system faces significant danger if key proponents of its message must resort to such means. The depressing nature of this situation calls for immediate solutions to these issues, yet politicians and lawmakers are not mustering the courage to change the flow of the tide.

Finally, discussions about altering the budgeting process for public defenders must be mindful of the fact that operations function in a patchwork. As The Brennan Center for Justice explains, "The federal government plays a miniscule role in funding indigent defense at the state level, despite historically playing a far larger role in funding state

²³ Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, STATELINE, Nov. 21, 2017.

²⁴ John Simerman, *HBO Comedy Host John Oliver Gives Orleans Parish Public Defender's Office a Crowdfunding Boost*, THE ADVOCATE, Sep. 17, 2015.

and local law enforcement.”²⁵ While one could say that public defenders should be funded entirely by the federal government, the Sixth Amendment Center explains,

state funding of indigent defense services has proven to be the most stable for two principal reasons. First, local governments have significant revenue-raising restrictions placed on them by the state while generally being statutorily prohibited from deficit spending. Second, the jurisdictions that are often most in need of indigent defense services are the ones that are least likely to be able to afford it.²⁶

Based on this information and Bunton’s comments, utilizing fine collection to fund public defenders’ offices is not a viable option. These two sources suggest that state-funded PD offices represent the best option, especially if statewide indigent defense providers exist in contrast to independent county offices. This will ensure that the regions most in need of assistance can be provided with these resources. At some point, parity between the budgets of public defenders and prosecutors must be actualized, but this model should be implemented as a stepping stone.

B. Underpaid and Overworked: Why Should One Be a Public Defender?

Our system often rewards the prosecution for achieving lengthy sentences while disincentivizing or

²⁵ BRYAN FURST, BRENNAN CTR. FOR JUSTICE, A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 7–9 (2019), <https://www.brennancenter.org/our-work/research-reports/fair-fight>.

²⁶ DAVID CARROLL, RIGHT TO COUNSEL SERVICES IN THE 50 STATES: AN INDIGENT DEFENSE REFERENCE GUIDE FOR POLICYMAKERS 101 (2017).

preventing the defense from practicing to their full capabilities. Inasmuch as a career in public defense can provide a consistent stream of clients and a sense of gratification to many young attorneys, the position's low salary discourages many others.²⁷ As a result, many legal professionals opt for private criminal defense practice instead due to these positions' higher pay scales and plentiful opportunities for career advancement. Furthermore, since many work at the public defender's office for a short time as a stepping stone to private practice, the rates of expertise and experience remain low, leaving a lack of guidance.²⁸ Hence, the lower salary prevents any opportunity for a truly adversarial system due to the uneven skill sets between prosecutors and public defenders.

In general prosecutors do not face these problems. Due to the payment and hierarchical system of seniority, many of them become judges themselves, adding to the bias against the defense, whether conscious or not. As *The Appeal* explained, "the ratio is seven to one if you compare lawyers who represented the government versus lawyers who represented individuals fighting the government."²⁹ The lack of professional diversity on the bench contradicts the ideals of a true adversarial system. Public defenders deal with the lives of the people on trial, while prosecutors' inherent goal is to charge them. This imbalance in the

²⁷ See Alexa Van Brunt, *Poor People Rely on Public Defenders who are Overworked to Defend Them*, THE GUARDIAN (June 17, 2015), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked>.

²⁸ RAPPING, *supra* note 2, at 61.

²⁹ Sarah Fair George, *There Are Too Many Prosecutors on the Bench. Take It from Me, A Prosecutor*, THE APPEAL, Jan. 8, 2021.

judiciary at all levels implies that there is an implicit prejudice against the defense.

The current adversarial system is also skewed in the matter of caseloads, but to what extent can this skew be measured and compared to the prosecution's work? According to the American Bar Association, "national caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement."³⁰ Nonetheless, public defenders often act as the bridge between indigents and such assistance.³¹ The time and effort necessary to adequately serve clients requires a consideration of the workload of a public defender. This is especially true for offices that function without the aid of a trained social worker.

Focusing on caseload specifically, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) released its annual maximum caseloads suggestion in 1973.³² Since then, no further publications have been made. Attorneys from the Second Judicial Circuit (Leon and Jefferson County) all opposed the suggestion when presented with the figures recommended by the NAC. For a single attorney, they capped the maximum number of cases at 150 felonies and 400 misdemeanors.³³ Even these highly trained professionals, working at one of the best offices in the nation, were taken aback by these insurmountable suggestions. This was recommended to prosecutors as well, but since prosecutors choose whether

³⁰ LEFSTEIN, *supra* note 7.

³¹ RAPPING, *supra* note 2, at 164.

³² FURST, *supra* note 25, at 7–8.

³³ *Id.* at 7.

or not to charge a defendant, they have more autonomy when determining their caseload. Prosecutors are already graced with higher budgets, more attorneys, and prior relationships with judges. As a result, caseload management is easier and more controllable.

Various regional factors such as budget cuts and low public defender salaries exacerbate the national issue of overzealous prosecution, contributing to often egregious caseloads. In 2010, *MPR News* broadcasted, “if you divide it out ... the 14 cases that I have set for today and the three hours that we have for court, it works out to be about 12 minutes per person.”³⁴ Unsurprisingly, this is not out of the ordinary for some regions. This has led to triaging practices to appease judges and expedite the process. Under the Sixth Amendment, it is the responsibility of the defense attorney to fully inform clients about the long-term consequences of various pleas. Many clients choose these plea deals in order to move on with their lives, failing to realize the price they are truly paying by doing so. In an overworked PD’s office, a client who wants to plead is quickly swept through the system simply to diminish caseloads. There are also reports of attorneys pushing clients to plead after first meeting with them in hopes of appeasing judges or better managing their high caseload.³⁵ Triage also demonstrates that not all clients are living under the same Constitution. For instance, many PDs are “forced to choose which clients to represent more fully and which to put on the backburner,”³⁶

³⁴ Jessica Mador, *A Public Defender’s Day: 12 Minutes Per Client*, MPR NEWS, Nov. 29, 2010.

³⁵ Steve Zeidman, *Eradicating Assembly-Line Justice: An Opportunity Lost by the Revised American Bar Association Criminal Justice Standards*, 46 HOFSTRA L. REV. 293, 297 (2018).

³⁶ Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED.

challenging the values of an adversarial legal system reliant on values of human dignity and individuality.

Thus, high caseloads lead to ethical problems concerning the rights afforded to indigents under the Constitution. Discussing the state of the OPD in Tennessee, Jonathan Rapping writes, “public defenders faced such a great pressure to handle overwhelming caseloads that it became easy to lose sight of the need to learn about the person behind the process and what priorities might be [central]...[to this] process.”³⁷ Given that PDs rarely have the time to sufficiently prepare a zealous defense, a fair fight is seldom possible under these conditions..

Demonstrating this principle, Missouri PD Michael Barrett leaned on a provision that allowed him to assign then-governor Jay Nixon to a case in 2016. Although Nixon did not have to represent anyone due to his position as governor, the point was made: PDs cannot handle the influx of cases.³⁸ OPDs should not have to go to extreme lengths to bring their concerns to policymakers’ attention. Two common reforms include lessening the number of offenses that garner jail time and completely overhauling the system. For example, in 2004, “*Lavallee v. Justices in the Hampden Superior Court* held that the defendants were being deprived of their right to counsel under the Massachusetts Constitution.”³⁹ This decision led to a structural overhaul of PD offices across the state. Instead of acting as individual actors, the Committee for Public Counsel Services (CPCS) would have the authority to assign cases itself. This was revolutionary, as the CPCS would be able to consolidate

SENTENCING REP. 91, 102 (2012).

³⁷ RAPPING, *supra* note 2, at 114.

³⁸ Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, STATELINE, November 21, 2017.

³⁹ LEFSTEIN, *supra* note 7, at 198.

their budget and offer reprieve by diverting cases to other entities when needed. Cases would not overwhelm one attorney because the flood could be redirected, allowing the state to stay under the maximums required by statutes.⁴⁰ This critical reform would facilitate stronger adversarial adjudication due to the increased discretion afforded to prosecutors regarding caseload management.

C. Policy Reforms that Tackle Funding and Work Life

The ideal adversarial system exists when (1) decision makers are impartial, (2) decisions rendered by the court require a rational basis, and (3) the parties to the dispute have a voice in the adjudicative process.⁴¹ These components ensure protections for the minority against the majority and retain the moral underpinnings of justice, truth, individual freedom, and liberty. In line with these objectives, a greater number of judges should be required to have a history partial to defendants to even this playing field. They may retain experience from careers in public defense, civil rights groups, or even social work. Despite the recently popularized school of thought concerning progressive prosecutors, implicit biases from both sides of the courtroom indubitably remain.⁴² Demonstrated by firsthand experience and testimony from Leon County Public Defenders, it is not uncommon for prosecutors-turned-judges to implicitly favor their former employer, necessitating greater reforms to counter these tendencies. As William Blackstone elucidated, “it is better that ten

⁴⁰ *Id.* at 193–95.

⁴¹ Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 301–55 (1989).

⁴² *Progressive Prosecutors*, THE MARSHALL PROJECT (March 27, 2022), <https://www.themarshallproject.org/records/8469-progressive-prosecutors>.

guilty persons escape than that one innocent suffer,”⁴³ highlighting the need to take careful measures to protect defendants’ right to a fair trial.

III. SHOOTING THE MAD DOG: THE CULTURAL BIASES DEEP WITHIN THE HEART OF THE OPD

Isolation and emotional turmoil are imminent factors within the career of a public defender, calling for a significant cultural shift to combat these obstacles. During my time with the Second Judicial Public Defender’s Office of Florida, Elected Public Defender Jessica Yeary was applauded by all of the attorneys I spoke with for turning the office into a community. Anecdotally, emails titled “Winning Wednesdays!” informed the office and its parties of the successes within the courtroom. This offered the opportunity to congratulate coworkers on their work and create meaningful connections. A custom of ringing a bell every time a case was won became a cornerstone event, elevating the success of the individual lawyer while remaining client-centric. The resounding noise of the bell mirrored the call of the mockingbird, signaling that the hallowed halls of the courtroom could ring out in innocence.

The success of this office does not rely solely on community connection, but also on a systematic reorganization of resources to optimize workload and communication. Unlike many offices across the nation, the investigators stood ready with their own offices and interns, a highly capable IT team awaited any problem with a solution, and the PD social workers quickly responded to emails about flagged clients. Through local and out-of-state conferences, the PD office covered the costs of their

⁴³ RAPPING, *supra* note 2, at 30.

attorneys' continuing legal education. Finally, the requirements of the job overtly included communication with the client. By virtue of this, private conference rooms remained available, and telecommunication services like Polycom were renovated frequently. Atticus may have worked alone, but these attorneys knew that their issues did not fall solely on their shoulders.

Many attorneys expressed difficulty when first entering the profession. Listening to emotionally taxing evidence or cases caused newcomer attorneys to struggle with isolation. However, when a welcoming culture like the one I encountered at the Second Judicial Public Defender's Office of Florida is put in place, the well-being of attorneys, and consequently the well-being of clients, is improved. The education, guidance by older PDs, and collaborative culture proved invaluable to the office's success. From personal research, I observed three common factors used to promote a more beneficial culture in the workplace. I interviewed ten passionate attorneys who all recognized that client-centered practices are essential to an adversarial system of justice. Furthermore, eight out of the ten commented that the relationship between judges and prosecutors is biased and that this bias is an issue that needs to be resolved. Finally, over half of them ranked community as a vital part of mending the culture.

As previously discussed, the Public Defender's Office is, at times, an uninviting area of law to practice in terms of prestige, salary, and workload. These factors invite burnout, hindering their clients' chances of an equitable trial. Accordingly, attorneys cope in different ways. Travis Williams, a young public defender working in the Deep South, advocates for change in the legal system through his own methods: he tattoos the names of the clients whose

cases he has lost on his body.⁴⁴ Travis Williams admirably refuses to be a cog in the machine of injustice, even when the system rewards such behavior. For example, in Texas, nearly half of judges report that their peers appoint counsel because of their reputation for moving cases quickly, regardless of the quality of representation.⁴⁵ Additionally, “almost two-fifths reported their peers appoint attorneys they consider friends, and about a third reported that their peers appoint attorneys who are their political supporters or campaign contributors.”⁴⁶ Courtroom politics create psychological pressures, causing the justice system to favor the “meet ‘em, plead ‘em, and greet’ems” rather than the rights of the indigent. Attorneys like Travis Williams can and will resist such tyranny, following in the footsteps of Atticus Finch. However, one zealous attorney will not completely rewire the system in a night, a week, or even a decade, but teamwork encourages PDs to do the hard work necessary to save the people our justice system treats so poorly.

CONCLUSION: HOW TO REVIVE A MOCKINGBIRD

This paper began with an analysis drawing from the theoretical insights of legal scholars, politicians, and media reporters on the Sixth Amendment and relevant case law, which highlight the importance of fixing the current culture

⁴⁴ “*Gideon’s Army*”: *Young Public Defenders Brave Staggering Caseloads, Low Pay to Represent the Poor*, DEMOCRACY NOW (Jan. 24, 2013), https://www.democracynow.org/2013/1/24/gideons_army_young_public_defenders_brave.

⁴⁵ Millan Das, *Impediment to Independence: How the Workplace Culture of Public Defender Offices Negatively Affects the Representation of Indigent Defendants*, 32 GEO. J. LEGAL ETHICS 469, 474 (2019).

⁴⁶ *Id.*

within public defense offices. Although the changes required to provide defense for indigents are substantial, they are necessary if we are to remedy decades of injustice. The article next evaluated the proposed solutions to these issues based on their ability to satisfy the conditions required to sustain an adversarial legal system.

The following case study analysis, drawn from my experience within a Florida PD office, demonstrated that these three systemic issues are not isolated to one problematic region. Limitations on public defenders occur across the country, and the requirements posed to turn the tide are neither unreasonable nor rushed. Achieving justice for indigents requires a level playing field. Budgets, salaries, and caseloads of prosecutors and public defenders should, logically, be equivalent. However, equity of opportunity has not yet been achieved due to historic prejudice against indigents and the formation of the OPD. This is in part due to culture, as unnecessary burdens confine the minds of overworked and disincentivized public defenders just as shackles confine their failed clients. The simple reality is that a collaborative culture is the only way to achieve the principle articulated in *Gideon*.

Fighting for the underdog requires systematic transformation and a cultural revolution. Recurring issues with budgeting, salary, and workload are side effects of the American judiciary's current failure to reach the ideal adversarial system. Judges' focus on merely moving their docket along discourages public defenders from advocating for their clients to their best ability, a task already made difficult due to the pessimistic mindset perpetuated within the profession. Atticus Finch may have survived society's pressures to cheat his client without a multitude of supporters, an adequate budget, or a slew of resources.

However, this story only portrays Atticus's interactions with a single client. This idealized version of justice must be encouraged and resources must be effectively distributed for the system to change. Otherwise, the poorest regions of our country, and the people from them, often fall through the cracks. The conversation surrounding the future of Atticus Finches across the nation is far from over. As long as obstacles exist that impede adequate indigent defense, the system itself acts as a guide for how to kill a mockingbird.

THE IMPACT OF FELON DISENFRANCHISEMENT ON U.S. ELECTION OUTCOMES, 2004–2016

*Jamari Stanton**

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INTRODUCTION

Laws that prohibit felons from exercising their right to vote continue to impede the nation’s democratic vision of equality and justice. As of 2016, thirty-four states prohibited paroled felons from casting their ballots, and twenty-one states banned those on probation from voting.¹ Furthermore, according to a 2021 study published by the National Conference of State Legislatures (NCSL), there are still eleven states in which felons lose their voting rights indefinitely or have to seek a pardon from the governor in order for their rights to be restored.² The process of

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¹ ALLAN J. LICHTMAN, *EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT* (2020).

² *Felon Voting Rights*, NAT’L CONF. OF ST. LEGISLATURES (June 28,

restoring a felon's voting rights is often a long and difficult process, if it is possible at all.³ To complicate matters, many states frequently change their voter eligibility laws as they relate to felons, leaving many individuals unclear about their rights.

Many other countries, including the United Kingdom and Russia, deny voting rights to prisoners but restore the right to vote upon a prisoner's release.⁴ In fact, over the last two decades, there has been a push for felon suffrage on an international scale.⁵ Based on judgements made by courts in four countries (South Africa, Canada, Australia, and the United Kingdom), global consciousness is leaning toward the expansion of felon enfranchisement, but American law does not align with these ideals.⁶ Legal systems around the world have been open and willing to engage in discourse surrounding disenfranchisement, but the American legal system has remained relatively quiet in this conversation. These inconsistencies highlight the need to examine and reform the United States' approach to the restoration of felons' voting rights.

As early as 2006, the United Nations Human Rights Committee charged that U.S. felon disenfranchisement policies were "discriminatory and violate international law."⁷ The U.N. recommended that the U.S. "adopt

2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

³ LICHTMAN, *supra* note 1, at 233.

⁴ Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777-803 (2002).

⁵ *Id.*

⁶ Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 BOSTON UNIV. INT'L L.J. 211-66 (2011).

⁷ U.N. Committee Says U.S. Bans on Former Prisoner Voting Violate

appropriate measures to ensure that states restore voting rights to citizens who have fully served their sentences and those who have been released on parole.”⁸ Further emphasizing the urgency of this issue, an initiative intended to re-enfranchise all ex-felons failed to become law during the mass incarceration boom that took place during the 111th Congress.⁹ This demonstrates the failure of U.S. citizens and lawmakers as a whole to make felon re-enfranchisement a priority and engage in the international discourse regarding the reasoning behind this unjust practice.

Nearly a decade later, felon disenfranchisement still serves as a significant obstacle to universal voter participation in the U.S. due to severe state voting punishments combined with rising incarceration rates over the past fifty years, especially for Black Americans.¹⁰ Although the U.S. prides itself on its democratic governance and equal access to the ballot box, restrictions have emerged that consistently target poor communities of color, resulting in a decrease in overall ballots cast.¹¹ Under Article I of the Constitution, states are left to introduce, enact, and enforce voting eligibility laws across the U.S.¹² Consequently, voting laws vary throughout the country,

International Law, AM. C.L. UNION, <https://www.aclu.org/other/un-committee-says-us-bans-former-prisoner-voting-violate-international-law> (last visited Mar. 23, 2022).

⁸ *Id.*

⁹ Ziegler, *supra* note 6.

¹⁰ James Cullen, *History of Mass Incarceration*, BRENNAN CTR. FOR JUSTICE (2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

¹¹ *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUSTICE (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color>.

¹² U.S. CONST. art. 1, § 4.

often dependent upon primary party influence in each state. Many of the votes that are needed to elect officials that prioritize the needs of poor and Black voters are lost due to felony convictions. This makes it much more difficult to make the necessary changes to benefit under-resourced communities throughout the U.S. and underscores the importance of ending the discriminatory practice of felon disenfranchisement.

Highlighting the unjust nature of these policies, this paper will first examine the disproportionate impact of felon disenfranchisement laws on the rights of minority communities. The article will then consider how these policies have distorted past election outcomes, silencing the voices of marginalized groups that have historically supported the Democratic party. Central to this discussion is the research of scholars Christopher Uggen and Jeff Manza, whose findings serve as the foundation for the analysis pursued throughout the rest of the piece. Expanding upon these scholars' groundbreaking work, the final portion of the paper seeks to explore how the exclusion of felons from the Florida, New York, and Virginia electorates may have altered the results of the presidential elections from 2004–2016. After accounting for realistic estimates of felon voter turnout and vote choice, the piece works to determine if the net votes lost as a result of felon disenfranchisement would have been enough to overturn any presidential election outcomes during this period. Overall, these findings illustrate the impact of felon disenfranchisement upon the nation's governing systems and highlight the continued need to reform policies related to voting rights restoration.

I. RACIAL IMPLICATIONS OF FELON DISENFRANCHISEMENT

The rise in felony convictions began during the 1970s when politicians utilized fear and racial rhetoric to enact harsh punitive policies.¹³ This trend began with Nixon's "war on drugs,"¹⁴ which has proven to be as costly as any war between sovereign nations. The Nixon administration responded to this rise in drug use by criminalizing many substances, focusing on products that were primarily used and sold by underprivileged communities of color.¹⁵

An array of research reports and statistical analyses illustrate the continued impact of these discriminatory policies. As of 2020, Black people made up 12.4% of the American population,¹⁶ yet these individuals comprised 33% of the prison population.¹⁷ The Sentencing Project reported that Black people in the U.S. are incarcerated in state prisons at five times the rate of white people, and across the nation, one out of every eighty-one Black adults is currently incarcerated in a state prison.¹⁸ Some states'

¹³ *Id.*

¹⁴ *A History of the Drug War*, DRUG POL'Y ALLIANCE, <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Mar. 20, 2022).

¹⁵ *Id.*

¹⁶ Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

¹⁷ John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/>.

¹⁸ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021),

prison populations are particularly disproportionate; Black people make up more than half of the prison population in the following twelve states: Alabama, Delaware, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, South Carolina, and Virginia.¹⁹

In the months before the 2020 presidential election, the Sentencing Project conducted a study to examine the disproportionate impact of felon voting restrictions on Black and Brown communities. They found that as of 2020, nearly 5.2 million people were disenfranchised as a result of a felony conviction, meaning that one out of every forty-four adults – over 2.2% of the U.S. eligible voting population – is disenfranchised due to a felony conviction.²⁰ Nearly half of those in this population have already completed their sentences, leaving 2.23 million Americans permanently disenfranchised.²¹ Even after these citizens have paid their debt to society, their voting rights are unduly restricted due to felony convictions that were, in many cases, fulfilled many years prior. Further, the Sentencing Project estimates that nearly half of the U.S. citizens that have completed their sentences but are currently barred from voting live in Florida. Although a 2018 ballot referendum promised to restore their voting rights, nearly 900,000 Floridians remain disenfranchised.²²

Disenfranchisement due to felony convictions in the

<https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

¹⁹ *Id.*

²⁰ Christopher Uggen et al., *Locked out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020),

<https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

²¹ *Id.*

²² *Id.*

U.S. disparately impacts African Americans. One in every sixteen Black adults are disenfranchised as a result of a felony – a rate of 6%. Less than 2% of the non-African-American population has lost the right to vote.²³ Moreover, the rates of Black felon disenfranchisement vary by state. More than 14% of Black individuals are disenfranchised in the following states, two of which will be examined further in this paper: Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming.²⁴

Further emphasizing the concerning nature of this correlation, researchers have found that high incarceration rates have diminished voter turnout rates for racial minorities, especially Black communities.²⁵ One study concluded that from 1964-1980, white voter participation was 5.6% higher than Black voter participation.²⁶ However, since the early 1980s, the gap between participation for white and Black voters has grown to about 9.3%, a trend scholar Martha Wilson Musgrove attributed to growing rates of mass incarceration.²⁷ This research emphasizes the ways in which felon disenfranchisement diminishes the voices of minority communities and contradicts America's fundamental ideals of democracy. As the rest of this paper will establish, policies that allow such pernicious racial disparities to persist have a detrimental impact not only on citizens' individual rights, but on the U.S. government itself.

²³ *Id.*

²⁴ *Id.*

²⁵ Martha W. Musgrove, *Mass Incarceration and Voter Turnout Among African Americans in the United States: Is there a correlation between the two?* (Aug. 2019) (Dissertation, University of Texas at Arlington) (on file with the UTA Library system).

²⁶ *Id.*

²⁷ *Id.* at 66.

II. FELON DISENFRANCHISEMENT & ELECTION OUTCOMES

Scholars have long researched the effects of felon disenfranchisement on the outcomes of U.S. elections. Through several studies of past U.S. Senate and presidential elections, researchers Christopher Uggen and Jeff Manza have uncovered startling political implications resulting from felon disenfranchisement policies.²⁸ Survey data acquired from the National Election Study revealed that disenfranchised felons were much more likely to support Democratic than Republican candidates, indicating that disenfranchisement policies could be distorting election results on a partisan basis.²⁹ Thus, when determining whether or not disenfranchisement could have affected the outcome of an election, the authors account for realistic estimates of vote choice and voter turnout.

Uggen and Manza used these principles to analyze U.S. Senate and presidential elections spanning from 1970–2000, considering whether applying current felon disenfranchisement rates in 2000 to prior elections may have swayed their outcomes.³⁰ Finding that rates of disenfranchisement were often significant enough to eclipse margins of victory in these elections, their results highlight the potentially detrimental consequences of these policies. Their findings demonstrate that at least one Democratic presidential victory in the past would have been jeopardized if modern rates of disenfranchisement existed at the time.³¹ When applying the rates of disenfranchisement in 2000 to the presidential election in 1960, it is evident that John F.

²⁸ Uggen et al., *supra* note 4, at 777.

²⁹ *Id.*

³⁰ *Id.* at 794.

³¹ *Id.* at 777.

Kennedy's narrow Democratic presidential victory may have been reversed. They also highlighted that in 2000, disenfranchised felons and ex-felons composed 2.3% of the eligible voting population—a figure they predicted to grow an additional 3% from 2000–2010.³² Because the margin of victory in three of the last ten elections from 1960–2000 comprised 1.1% of the voting age population, they predicted that felon disenfranchisement could be a determinant of future presidential elections.³³

Indicating that the Republican victory resulting from the 2000 election may have been reversed if ex-felons had been allowed to vote,³⁴ this research illustrates how felon disenfranchisement policies stifle the political preferences of minority communities and promote the views of one party at the expense of another. Had disenfranchised felons been allowed to vote in the 2000 election, Democratic candidate Al Gore could have won Florida by over 80,000 votes, securing a Democratic win and overturning the results of the 2000 election. Furthermore, applying the 2000 rate of felon disenfranchisement to the 1960 presidential election may have resulted in Democrat John F. Kennedy being defeated by Republican candidate Richard Nixon.³⁵ They also find that the enfranchisement of felons could have overturned at least six senatorial elections from 1978–2004: Texas (1978), Kentucky (1984 and 1992), Florida (1988 and 2004), and Georgia (1992).³⁶ Thus, laws that prevent certain segments of the population from voting can distort the will of the public and contradict the democratic

³² *Id.*

³³ *Id.* at 794.

³⁴ *Id.*

³⁵ CHRISTOPHER UGGEN & JEFF MANZA, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 192 (2008).

³⁶ *Id.* at 194.

spirit of the nation, prompting urgent attention from modern legislators.

However, previous research only extends until the end of the twentieth century and largely fails to account for the continued impact of felon disenfranchisement laws on modern election outcomes. Therefore, this paper builds upon Uggen and Manza's seminal findings to illustrate the persistence of felon disenfranchisement as a mechanism that suppresses the voices of low-income communities and misrepresents the interests of the nation. . Given the racial and partisan biases underlying these policies, it is clear that American legislators must take action to reform their approach to felons' enfranchisement and restore the nation's dedication to equity and justice.

III. RESEARCH ANALYSIS

The following section first explores how the exclusion of felons from the electoral process could have altered the results of presidential elections from 2004-2016, examining three states with varying voter restrictions resulting from felony convictions: Florida, New York, and Virginia. After outlining relevant state legislative developments over this time period, the paper will determine the disenfranchised population in each region by summing the necessary felony-probation, prison, parole, and disenfranchised post-sentence populations. Representing hundreds of thousands of lost votes in each state, these statistics underscore the harmful impact of felon disenfranchisement policies on the U.S. democratic system. The analysis will then proceed by multiplying the number of disenfranchised felons in each state by their estimated turnout rate for presidential elections, shown to be approximately thirty-five percent in Uggen and Manza's

research.³⁷ To determine if the net votes lost would have exceeded the margin of victory for each election, this investigation will also account for the probability that voters would have selected a Democratic candidate, estimated to fall around seventy percent by Uggen and Manza.³⁸ From these findings, it is clear that felon disenfranchisement continues to influence modern election outcomes, calling for both state and national legislators to revise their approach to this issue.

A. Florida

Prior to 2018, Florida felons were permanently disenfranchised unless they received a pardon from the governor.³⁹ However, recent research from the NCSL indicates that as of 2019, felons in Florida could vote after completing their sentences and paying all ordered restitution, fines, fees, and costs, indicating some small progress on this issue.⁴⁰ **Table 1** illustrates the number of felons disenfranchised during the presidential elections of 2004–2016, including those already released on parole or probation.⁴¹ Reflecting Florida’s harsh disenfranchisement

³⁷ Uggen & Manza, *supra* note 4, at 786.

³⁸ *Id.*

³⁹ *Felon Voting Rights*, *supra* note 2.

⁴⁰ *Id.*

⁴¹ PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP’T OF JUSTICE, PRISONERS IN 2004 (2005), <https://bjs.ojp.gov/content/pub/pdf/p04.pdf>; WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, PRISONERS IN 2008 (2009), <https://bjs.ojp.gov/content/pub/pdf/p08.pdf>; E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, PRISONERS IN 2012 (2014), <https://bjs.ojp.gov/content/pub/pdf/p12tar9112.pdf>; E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2016 (2018), <https://bjs.ojp.gov/content/pub/pdf/p16.pdf>; LAUREN E. GLAZE & SERI PALLA, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 2004 (2005), <https://bjs.ojp.gov/content/pub/pdf/ppus04.pdf>; LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 2008 (2009), <https://bjs.ojp.gov/content/pub/pdf/ppus08.pdf>; LAUREN M.

policy during this period, nearly one million felons were stripped of their right to vote in the 2004 election, with over half of these individuals already having served their sentences.⁴² By 2016, these numbers had almost doubled, demonstrating the persisting impact of mass incarceration upon the American people.⁴³ These statistics emphasize the need for policymakers to investigate new approaches to felons' voting rights, as well as solutions to reduce ever-rising incarceration rates.

Demonstrated by the findings displayed in **Table 2**, Florida's electoral votes made decisive contributions to the winning candidate's margin of victory in each presidential election from 2004–2016.⁴⁴ Furthermore, after accounting for disenfranchised felons' political preferences in the 2004 and 2016 elections (races that Republican candidates won), my findings suggest that felons' votes could have reversed these outcomes. While it is unlikely that all felons would have voted on the partisan lines proposed by Uggen and Manza, these results still carry shocking implications for the nation's governing systems. The disenfranchisement of key interest groups may have allowed lawmakers to indirectly manipulate federal election outcomes, violating fundamental democratic principles.

MARUSCHAK & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 2012 (2015), <https://bjs.ojp.gov/content/pub/pdf/ppus12.pdf>; DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 2016 (2018), <https://bjs.ojp.gov/content/pub/pdf/ppus16.pdf>; Uggen et. al, *supra* note 4, at 782.

⁴² HARRISON & BECK, *supra* note 41; SABOL ET AL., *supra* note 41.

⁴³ CARSON, *supra* note 41; KAEBLE, *supra* note 41.

⁴⁴ U.S. President 1976–2020, MIT ELECTION DATA AND SCIENCE LAB, <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/42MVDX> (last visited Mar. 23, 2022).

Table 1. Felon Disenfranchisement in Florida, 2004–2016

Election Year	2004	2008	2012	2016
Total Inmates as of EOY	85,533	102,388	103,055	99,974
Total Parole/ Probation as of EOY	286,058	284,288	245,407	218,632
Total Disenfranchised Post-Sentence	613,504	1,323,360	1,323,360	1,487,847
Votes Needed to Reverse Outcome	985,095	1,710,036	1,671,822	1,806,453

Table 2. Votes Needed to Overturn Presidential Election Outcomes in Florida, 2004–2016

Election Year	2004	2008	2012	2016
Votes Received by Dem. Candidate	3,583,544	4,282,074	4,237,756	4,504,975
Votes Received by Rep. Candidate	3,964,522	4,045,624	4,163,447	4,617,886
Total Disenfranchised	985,905	1,710,036	1,671,822	1,806,453
Net Votes Lost	234,645.4	406,988.6	397,893.6	429,935.8
Votes Needed to Reverse Outcome	380,978	0	0	112,911

When examining the number of votes needed to overturn each election, one must first note that no votes were needed to reverse the outcome in the 2008 and 2012 elections because of the assumption that disenfranchised voters are more likely to vote for the Democratic candidate.⁴⁵ In other words, re-enfranchising felons likely would have only extended the Democratic lead in the 2008 and 2012 elections in Florida. In examining the 2004 election, it is clear that when accounting for voter turnout and preference, re-enfranchising felons would not generate enough votes to overturn Bush's electoral win in Florida.⁴⁶ However, results from the 2016 election demonstrate that there was an extremely small margin of victory – President Trump won by less than 113,000 votes.⁴⁷ Given that Hillary Clinton won 232 electoral college votes and Donald Trump won 306, adding Florida's 29 electoral votes would have shifted the scale to 261-277, a much closer outcome.⁴⁸ Applying estimates of felon voter turnout and preference to the total disenfranchised population demonstrates that the net votes lost may have been enough to reverse the electoral outcome in Florida, altering the entire trajectory of America's national government.

B. New York

In contrast with Florida's relatively strict policies, New York felons lose their voting rights only while serving their sentences, with these freedoms being automatically restored after release.⁴⁹ In May 2021, Governor Cuomo signed legislation to restore the rights of felons on parole to

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Election Results 2016*, CNN (2016), <https://www.cnn.com/election/2016/results>.

⁴⁹ *Felon Voting Rights*, *supra* note 2.

vote in elections in New York.⁵⁰ Prior to this order, as of 2018, New Yorkers on parole could only have their voting rights restored on a case by case basis via an executive pardon from the Governor.⁵¹ **Table 3** highlights felon disenfranchisement rates for the state of New York during the 2004–2016 presidential elections.⁵² Given that New York restores felon voting rights following completion of their sentences, their policy re-enfranchises the group that makes up the majority of the disenfranchised population in other states. Therefore, it is unlikely that re-enfranchising felons in New York would have overturned any presidential election outcomes. However, the state could still benefit from policies designed to reduce mass incarceration, thereby lowering the number of votes lost while felons are serving their sentences.

Illustrated in **Table 4**, Democratic candidates garnered more support than Republicans in New York in all four election cycles.⁵³ Accordingly, re-enfranchising post-sentence felons in New York would have had a minimal impact on the election outcome. Accordingly, it is important to recognize how the state’s approach to felon disenfranchisement has positively impacted its civil society. While Florida’s strict disenfranchisement policies silenced the voices of nearly two million felons during the 2016 election cycle, New York barred only currently incarcerated

⁵⁰ *Voting Rights of New Yorkers with Felony Convictions*, N.Y. C.L. UNION (May 17, 2021), <https://www.nyclu.org/en/issues/voting/voting-rights-new-yorkers-felony-convictions>.

⁵¹ *Id.*

⁵² HARRISON & BECK, *supra* note 41; SABOL ET AL., *supra* note 41; CARSON & GOLINELLI, *supra* note 41; CARSON, *supra* note 41; GLAZE & PALLA, *supra* note 41; GLAZE & BONCZAR, *supra* note 41; MARUSCHAK & BONCZAR, *supra* note 41; KAEBLE, *supra* note 41; Uggen et. al, *supra* note 4, at 782.

⁵³ *U.S. President 1976–2020*, *supra* note 44.

individuals from the ballot box, comprising a total of less than 100,000 lost votes.⁵⁴ Enfranchising all felons and thereby achieving no lost votes during each election cycle should be the end goal for these policies, but in the meantime, New York's efforts represent an important step toward greater justice that should be emulated by other states.

Table 3. Felon Disenfranchisement in New York, 2004–2016

Election Year	2004	2008	2012	2016
Total Inmates as of EOY	63,751	60,347	55,436	50,716
Total Parole/ Probation as of EOY	176,551	171,630	153,969	142,354
Total Disenfranchisement Post-Sentence	0	0	0	0
Total Disenfranchised due to Felonies	118,275	112,572	101,658	95,142

⁵⁴ CARSON, *supra* note 41; KAEBLE, *supra* note 41.

Table 4. Votes Needed to Overturn Presidential Election Outcomes in New York, 2004–2016

Election Year	2004	2008	2012	2016
Votes Received by Dem. Candidate	4,180,755	4,645,332	4,324,228	4,379,789
Votes Received by Rep. Candidate	2,806,993	2,418,323	2,223,397	2,527,142
Total Disenfranchised Felons	118,275	112,572	101,658	95,142
Net Votes Lost	28,149.50	26,792.10	24,194.60	22,643.80
Votes Needed to Reverse Outcome	0	0	0	0

C. Virginia

Representing a digression from New York’s policies, the Virginia Supreme Court overturned an order in July 2016 that would have restored felons’ voting rights, leaving these individuals permanently excluded from voting.⁵⁵ However, a 2021 Virginia executive order restored

⁵⁵ JEAN CHUNG, THE SENTENCING PROJECT, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER (2021), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

voting rights to nearly 70,000 Virginians who had completed their sentences but were still on probation,⁵⁶ representing a major victory for advocates of voting rights expansion. Displayed below in **Table 5**, Virginia's disenfranchised population exceeded 325,000 individuals during all four elections, representing a middle ground between the relatively low numbers seen in New York and the staggering figures reported from Florida.⁵⁷ These statistics also reflect the state's moderate approach to felons' voting rights, providing greater freedoms than Florida but failing to meet the standards established in New York. Therefore, these findings reiterate the continued prevalence of this issue in states across the nation, underscoring the need for modern reform to felon disenfranchisement policies.

As demonstrated in **Table 6**, the net votes lost in 2004 would not have been enough to reverse the Republican electoral victory in Virginia.⁵⁸ Furthermore, the majority of Virginians voted for Democratic candidates in the three other election cycles studied, meaning that efforts to re-enfranchise felons would likely have had little impact on these outcomes.⁵⁹ However, given the high number of disenfranchised felons during each election cycle, these results illustrate the potential of these policies to distort future election outcomes and dilute the voices of minority communities. Initiatives to expand felons' voting rights still

⁵⁶ *Id.*

⁵⁷ HARRISON & BECK, *supra* note 41; SABOL ET AL., *supra* note 41; CARSON & GOLINELLI, *supra* note 41; CARSON, *supra* note 41; GLAZE & PALLA, *supra* note 41; GLAZE & BONCZAR, *supra* note 41; MARUSCHAK & BONCZAR, *supra* note 41; KAEBLE, *supra* note 41; Uggen et. al, *supra* note 4, at 782.

⁵⁸ *U.S. President 1976–2020*, *supra* note 44.

⁵⁹ *Id.*

serve a clear purpose in strengthening the nation's dedication to justice and honoring the true political preferences of the American population.

Table 5. Felon Disenfranchisement in Virginia, 2004–2016

Election Year	2004	2008	2012	2016
Total Inmates as of EOY	35,564	38,276	38,130	37,813
Total Parole/ Probation as of EOY	47,862	54,089	54,939	62,471
Total Disenfranchisement Post-Sentence	243,902	351,943	351,943	408,570
Total Disenfranchisement due to Felonies	327,328	444,308	445,012	508,854

Table 6. Votes Needed to Overturn Presidential Election Outcomes in Virginia, 2004–2016

Election Year	2004	2008	2012	2016
Votes Received by Dem. Candidate	1,454,742	1,959,532	1,971,820	1,981,473
Votes Received by Rep. Candidate	1,716,959	1,725,005	1,822,522	1,769,443
Total Disenfranchised Felons	327,328	444,308	445,012	508,854
Net Votes Lost	77,904.1	105,745.3	105,912.9	121,107.3
Votes Needed to Reverse Outcome	262,217	0	0	0

CONCLUSION

Felon disenfranchisement removes a considerable portion of the voting age population from the electorate, limiting these individuals' freedoms as citizens of the United States. Only two states, Maine and Vermont, do not remove voting rights following a felony conviction,⁶⁰ a standard that should be implemented across the nation in order to realize the true political preferences of the

⁶⁰ *Felon Voting Rights*, *supra* note 2.

population. However, many policymakers fail to fully grasp the implications of these disenfranchisement policies, extending from issues of individual voting rights to national election outcomes.

Because of America's increasingly high incarceration rates, it is more important than ever to address the impact of felon voting restrictions on presidential election outcomes. Through this paper, I examined felon voting laws, disenfranchised population totals, and ballots cast for Democratic and Republican presidential candidates in Florida, New York, and Virginia. Expanding upon the findings of researchers like Uggen and Manza, I found that the net votes lost to felon disenfranchisement in Florida could have overturned the 2016 Republican electoral victory within this state.⁶¹ Thus, while my research discussed only three states and four elections, these results demonstrate the substantial implications of felon disenfranchisement on national election outcomes. Disenfranchising felons not only subverts the interests of under-resourced communities – it also attacks the foundations of America's democratic system.

⁶¹ *Election Results 2016, supra* note 48.



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