# Amherst College Law Review

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## Editor's Note

It is my pleasure to present the Amherst College Law Review's seventh issue. I would like to extend a thank you to the editorial team, who has worked tirelessly over the past semester to refine these articles. Great thanks are also due to the authors, who submitted fascinating articles on subjects ranging from climate migration to prison abolitionism.

This will be my final semester with the Law Review, and while I am sad to leave, I am excited to watch this journal continue to grow after I graduate from Amherst. I anticipate that the Law Review will take great strides under the stewardship of next year's Presidents, Antonia Brillembourg and Sean Kim. We hope that you enjoy this issue, and we welcome any comments, feedback, or submissions at aclawreview@amherst.edu.

Sincerely,
Evan Lichman

## Editorial Board:

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The Amherst College Law Review (ACLR) was born out of the desire to foster undergraduate scholarship in the liberal arts. Among our peers, the ACLR stands alone for its interdisciplinary approach to the study of law.

Given the ever-changing nature of our society, students of law encounter a host of new, troubling, and intriguing questions including, but not limited to, increasing inequality, salience of technology, and neoliberal globalization. These questions cannot be fully posed, much less answered, within the scope of conventional legal training and/or the traditional social sciences.

The mission of the ACLR is to pose these questions and to strive to answer them with the nuance, clarity, probity, and rigor provided by the liberal arts tradition. This journal brings the best scholarship of the contemporary humanities to bear on the most difficult and urgent juridical problems of our time.

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# *Climate-Based Asylum and Refugee Policy: The Problem and Possible Reforms*

Amelia Miller | Tufts University ‘23

Edited by Evan Lichman ‘23

**Abstract:**

Even as climate change becomes an increasingly pertinent issue across the globe, policymakers and scholars continue to overlook a crucial emerging issue: climate migration. As the effects of climate change persist around the world, more and more individuals will be forced to flee their countries. As of now, climate migration lacks adequate legal framework or precedent, as well as official international recognition. Several possible solutions exist for this issue including: a) amending or changing the definition of “refugee” as it stands in the UN Refugee Convention, b) adding a clause or article to the UN Refugee Convention that explicitly protects climate refugees, c) designing a system of smaller regional agreements and plans that operate under an international umbrella.

**Introduction**

Over the past several decades, climate change has become an increasingly prevalent and important topic, discussed by scientists and citizens alike. Organizations like Greenpeace, the United Nations, and The Sunrise Movement have taken action to mitigate the harsh effects of climate change by raising awareness, lobbying governments, and uniting climate-change activists. Still, some individuals refuse to acknowledge the realities of climate change, including its causes and repercussions. According to the Yale Program on Climate Change Communication, in the United States, only 72% of individuals believe that climate change is happening, and only 57% of people believe that global warming is caused primarily by human activities.[1] This controversy over the causes of climate change has made it difficult for organizations and governments to create effective climate change policies. As a result of this dissension, certain issues pertaining to climate change remain unaddressed by international law.

One issue related to climate change that remains unaddressed by international law is climate migration, a category of immigration that covers individuals who are forced to leave their county due to the impact of climate change. Though weather-related hazards displace approximately 21.5 million people annually, climate migrants are not recognized as refugees under the UN Convention on Refugees.[2] Because they are not recognized as refugees, climate migrants are denied protection under international law and thus are more susceptible to being deported or denied asylum. Environmental scientists and experts have made it clear that climate change and its effects will continue to intensify. This issue will not disappear, and a growing number of individuals will be forced to migrate from their countries for their safety, health, and welfare. It is crucial now, and will become increasingly crucial in the following years, that policymakers find ways to address this issue and provide legal support to victims of climate change.

**Background on the Existing Problem**

The UNHCR does not endorse the term "climate refugee," but the generally accepted definition refers to "the increasing large-scale migration and cross border mass movements of people that were partly caused by weather-related disasters."[3] The label is fairly new, and it was invented to accommodate a recent, but also rapidly growing, group of immigrants and refugees. Research by the Internal Displacement Monitoring Centre showed that in 2020, natural disasters triggered over three times more displacements than conflict and violence.[4] Climate refugees may be forced to immigrate for several reasons, including personal safety, economic problems,

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[1] Marlon, J., & Neyenes, L. (2022, February 23). *Yale climate opinion maps 2021*. Yale Program on Climate Change Communication. Retrieved from https://climatecommunication.yale.edu/visualizations-data/ycom-us/

[2] United Nations High Commissioner for Refugees. "Frequently Asked Questions on Climate Change and Disaster Displacement." *UNHCR*, 2016, https://www.unhcr.org/uk/news/latest/2016/11/581f52dc4/frequently-asked-questions-climate-change-disaster-displacement.html.

[3] Ida, Tetsuji. "Climate Refugees – the World's Forgotten Victims." *World Economic Forum*, 2021, https://www.weforum.org/agenda/2021/06/climate-refugees-the-world-s-forgotten-victims/.

[4] "Global Report on Internal Displacement 2021 (GRID 2021) ." *ReliefWeb*, 20 May 2021, https://reliefweb.int/report/world/global-report-internal-displacement-2021-grid-2021.

societal or political conflict, and physical destruction of personal or community infrastructure. Some of the most common consequences of climate change include rising temperatures, changes in precipitation patterns, longer and more frequent droughts and heat waves, more intense hurricanes, and rising sea levels. All these climate phenomena can directly fuel migration or exacerbate pre-existing issues in a country.[5]

These issues pose an economic risk to countries, as well as health and famine-related threats because of their effects on agriculture. While farmers are the first to be affected economically in these types of situations, rising food prices and a lack of resources can be devastating for any community, especially those that rely on agricultural industries for financial and societal welfare. Additionally, rising sea levels and increasingly intense and frequent natural disasters can decimate entire cities, destroying the infrastructure required to satisfy basic living needs. In 2021 the World Meteorological Organization reported that "a disaster related to a weather, climate or water hazard occurred every day on average over the past 50 years" and that the number of disasters has increased by a factor of five over the 50-year period.[6] While immigration that stems from poor economic situations or decreasing standards of living is not a new occurrence, climate change is predicted to increase almost all types of immigration, as it exacerbates and accelerates the problems already existing in certain communities, while also creating new issues. This will inevitably lead levels of immigration to rise swiftly in the near future, making legislation that is designed to assist this particular group of immigrants of dire importance.

It is also critical to note that the largest contributors to climate change are typically countries that have not yet experienced the complete depth of its adverse effects. For example, from 1850 to 2011, the United States was the biggest contributor to global CO2 emissions, accounting for 27% of all the world's emissions, followed by the EU, with 25% of the world's emissions.[7] In contrast, some of the countries that are most threatened by climate change are Japan, the Philippines, Madagascar, India, and Sri Lanka— all countries that have historically contributed far less to the aggravation of climate change.[8] Furthermore, poor and developing countries typically lack the infrastructure and wealth necessary to mitigate the effects of climate change on their national infrastructure and the economy, and so they remain vulnerable to its impact. Given that the most-harmed victims of climate change often do not have the resources to address its effects, but the main perpetrators of climate change do, it is key that some form of global cooperation is formed in order to work toward justice and safety for the states that are most vulnerable.

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[5] NASA. (2021, August 26). *The effects of climate change*. NASA. Retrieved from https://climate.nasa.gov/effects/

[6] *Weather-related disasters increase over the past 50 years, causing more damage but fewer deaths*. World Meteorological Organization. (2021, September 9). Retrieved from https://public.wmo.int/en/media/press-release/weather-related-disasters-increase-over-past-50-years-causing-more-damage-fewer.

[7] Loria, K. (2017, June 1). *Trump just pulled out of the Paris Agreement - but the US has contributed more to climate change than any other country*. Business Insider. Retrieved from https://www.businessinsider.com/us-effect-on-climate-change-co2-emissions-warming-2017-6.

[8] "Which Countries Are Most Threatened by and Vulnerable to Climate Change?" *Iberdrola*, 3 Mar. 2020, https://www.iberdrola.com/sustainability/top-countries-most-affected-by-climate-change.

**The Limitations of Current Law Pertaining to Climate Migration**

Article 1 of the 1951 United Nations Refugee Convention defines a refugee as an individual who, due to a:

> well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[9]

In the past and in most current contexts, individuals who are forced to migrate as a result of climate-related issues are not considered refugees because they are not persecuted on an individual basis due to membership within a specific social group. As of now, immigrants who are forced to emigrate because of climate-related disasters are not yet defined as a particular social group. Still, the situations that these immigrants face can put them in life-threatening situations and their needs must be addressed.

Currently, international law does not protect climate immigrants and refugees. On an international level, neither the United Nations nor the 1951 Refugee Convention have formally recognized this group of individuals or elected to give them refugee status. Without recognition, this group of immigrants is unlikely to receive protection or aid on an international scale, and this lack of international recognition decreases the likelihood that legal frameworks will be developed within individual countries domestically. Climate change is a long-term problem that will continue to worsen and make certain areas uninhabitable for human populations. In order to address this issue, international lawmakers must recognize the plight of these migrants, and countries must work to find long-term solutions to accommodate these individuals. Both international and domestic institutions have insufficient programs or structures in place to appropriately and humanely cope with the waves of migrations that will accompany the growing threat of climate change.

**Possible Solutions**

A solution instituted on an international scale would most likely include the United Nations High Commissioner for Refugees or the 1951 UN Refugee Convention. Under Article 45 of the Refugee Convention, countries are allowed to propose revisions or amendments to the convention, however, no proposals have been put forward at present.[10] A proposal could either amend the definition of "refugee" or add a clause to the convention that specifically identifies and protects climate refugees. Currently, the United Nations Refugee Convention does not protect climate refugees because it does not consider them "unable or unwilling to return to their

[9] "Convention Relating to the Status of Refugees." OHCHR, 1951, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees.

[10] Adiraju, Sreyas. "What Is a 'Refugee'? Expanding the UN Refugee Convention in the Face of Climate Change." Columbia Undergraduate Law Review, Columbia Undergraduate Law Review, 7 Feb. 2022, https://www.culawreview.org/journal/what-is-a-refugee-expanding-the-un-refugee-convention-in-the-face-of-climate-change.

country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[11] The requirement that a refugee possesses a "well-founded fear of being persecuted" is the largest obstacle to the inclusion of climate refugees in this category. The UN and other international legal institutions do not consider climate refugees the victims of persecution because the term persecution connotes human agency. According to this viewpoint, persecution refers to one human harming another for some reason related to identity.

Thus far, the definition of a refugee has primarily been applied against climate migrants seeking to gain protections, such as in the landmark case of *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*. In this case, a Kiribati citizen appealed the denial of his refugee status in the New Zealand High Court, arguing that the effects of climate change in his native country forced him to immigrate. The New Zealand High Court ruled that refugee status was not applicable to the applicant because he was not "subjected to persecution required for the 1951 United Nations Convention relating to the Status of Refugees."[12] Furthermore, the High Court noted concerns about expanding the scope and possible application of the Refugee Convention.

While the Refugee Convention's definition of a refugee has historically been applied against climate migrants applying for refugee status, regional refugee conventions and definitions set a precedent for more inclusive terminology. In "Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters," the UN noted that "people displaced by the adverse effects of climate change and disasters can be refugees under regional refugee criteria."[13] The Cartagena Declaration on Refugees, a document adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, provides an example of such regional criteria. The Declaration's definition of a refugee contains the elements of the 1951 Convention and 1967 Protocol and builds upon this criteria by including "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[14] Climate-related disasters could be considered circumstances that "seriously disturb public order," which means that the Cartagena Declaration

[11] "Convention Relating to the Status of Refugees." OHCHR, 1951, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees

[12] "Ioane Teitiota V. the Chief Executive of the Ministry of Business, Innovation and Employment." Climate Change Litigation, 29 June 2022, http://climatecasechart.com/non-us-case/ioane-teitiota-v-the-chief-executive-of-the-ministry-of-business-innovation-and-employment/.

[13] United Nations High Commissioner for Refugees. "Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters." Refworld, https://www.refworld.org/docid/5f75f2734.html.

[14] United Nations High Commissioner for Refugees. "Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena De Indias, Colombia, 22 November 1984." UNHCR, UNHCR, The UN Refugee Agency, https://www.unhcr.org/en-us/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html.

provides flexibility for the inclusion of climate migrants as refugees. Similarly, in 2022 the Intergovernmental Authority on Development and the East African Community signed the "Declaration on Migration, Climate Change & Environment," a document that calls for action in response to the effects of climate change on human mobility.[15] Still, while these updated regional criteria are a sign of progress, it should be noted that some of the countries that adopted the Declaration modified or removed some of the eligible causes for seeking refugee status that were in the original wording of the Declaration. Continued unwillingness to fully recognize climate refugees, even while taking steps forward, shows why more decisive action is needed on the issue.

In order for this class of immigrants to be protected on an international scale, the current definition of a refugee will need to be either expanded or revised. If revisions to the Refugee Convention were put forward, or the definition of a refugee was changed, there would likely be an immediate result on a global scale. A decisive amendment to the UN Refugee Convention would create a clear and effective path forward and would grant climate refugees protection under law in most countries. Furthermore, an amendment to the UN Refugee Convention would make a significant and global statement that would draw awareness to the issues of climate change and climate migration, thus hopefully encouraging countries to respond more strongly and immediately to both issues.

However, there are also drawbacks to this method. For instance, not all countries adhere to the UN Refugee Convention, which means that legal immigration frameworks and policies may not change in some countries. For the countries that have agreed to follow the 1951 UN Refugee Convention, there are no real systems in place to enforce these actions, and so abiding by the updated wording would still be primarily dependent on the political will of each country. The UN and the Convention also both depend heavily on diplomacy, which can be fickle and difficult to navigate. Even if a proposal is made successfully, which is not guaranteed, negotiating the wording of the proposal and its inclusion in the Convention would be a lengthy process dependent on interstate relations and diplomacy. As a result, the creation and institution of an amendment would likely be very complicated and laborious.

Another possible, though less straightforward, option for protection on an international scale is the creation of smaller regional agreements under an international umbrella. In "Turning the Tide: Recognizing Climate Change Refugees in International Law," Angela Williams argues the benefits of an international legal regime that deals with climate migration on a regional basis. Williams writes that "leaving the detail of agreement and degree of engagement to regional groupings, appears more responsive and appropriate to the problem [of climate migration]." Williams also posits that a "regional system better employs notions of subsidiarity that more accurately reflect the reality of state behavior rather than installing a top-down legal

[15] ISSAfrica.org. "East Africa and the Horn Light the Way for Climate Migrants." ISS Africa, 27 Sept. 2022, https://issafrica.org/iss-today/east-africa-and-the-horn-light-the-way-for-climate-migrants.

framework."[16] In this model, pre-existing regional groups such as the African Union, European Union, Organization of American States, and others, could work with smaller, regional initiatives to build legal frameworks tailored to the unique conditions of a given geography.[17]

A regional approach would allow stakeholders to address the issue of climate migration in the way that they believe would be most effective, taking into consideration their regional politics, economies, and the specific effects of climate change in their region. This could be similar in nature to the Intergovernmental Authority on Development's adoption of the "Protocol on Free Movement of Persons in the IGAD Region," a document that specifically addressed the needs of individuals fleeing disasters and climate change-related issues.[18] As of now, there are four regional climate weeks scheduled for 2023: Africa Climate Week, Middle East and North Africa Climate Week, Latin America and Caribbean Climate Week, and Asia-Pacific Climate Week. While these events are not currently a part of the 2023 United Nations Climate Change Conference's[19] formal negotiating agenda, they do provide an opportunity for countries to conceive approaches to climate change that address the specific issues confronting each region.[20] The next step would be holding more of these regionally-specific meetings and using them as an opportunity to draft law and policy.

There are a number of benefits to this approach. It allows for a more specialized approach to climate change and climate migration, based on the specific needs, strengths, and weaknesses of geographic areas. This specialized approach is likely to be more effective than any type of 'one-size-fits-all' approach because it takes into consideration the specific needs of each region. Furthermore, this method will allow for an exchange of ideas and good practices between different countries, which would give these countries the opportunity to introduce new initiatives and assess the success of programs before fully adopting them. This regional approach could also act as an effective gateway to a large-scale international initiative, especially since states will have had the opportunity to test and evaluate a number of different approaches to the problem on a smaller scale.

However, this method also has several drawbacks. For example, because of the varying levels of accessibility to resources that exist in different areas of the world, some regions may be less capable of funding these plans than others. Also, as discussed earlier, many of the world's wealthiest countries have contributed the most to climate change. This approach does not hold these countries accountable for the role they have played in the climate crisis, and thus in climate migration. Furthermore, various countries and areas of the world have populations and

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[16] Williams, Angela. *Turning the Tide: Recognizing Climate Change Refugees in International Law*. 2008, https://onlinelibrary-wiley-com.ezproxy.library.tufts.edu/doi/pdfdirect/10.1111/j.1467-9930.2008.00290.x.
[17] Williams, Angela. *Turning the Tide: Recognizing Climate Change Refugees in International Law*. 2008, https://onlinelibrary-wiley-com.ezproxy.library.tufts.edu/doi/pdfdirect/10.1111/j.1467-9930.2008.00290.x.
[18] ISSAfrica.org. "East Africa and the Horn Light the Way for Climate Migrants." ISS Africa, 27 Sept. 2022, https://issafrica.org/iss-today/east-africa-and-the-horn-light-the-way-for-climate-migrants.
[19] The United Nations Climate Change Conference is an annual conference held in the framework of the United Nations Framework Convention on Climate Change to discuss global climate change.
[20] "Four Regional Climate Weeks in 2023 to Build Momentum for COP28." Unfccc.int, 2023, https://unfccc.int/news/four-regional-climate-weeks-in-2023-to-build-momentum-for-cop28.

policymakers who do not believe in climate change, and some areas are facing more immediate threats to country stability such as war, famine, and poverty. Regardless of whether the problem is that they have more pressing issues to deal with, or that they do not feel inclined to support the cause, both of these situations make it less likely that regional groups will be capable or even willing to unite and dedicate their resources and time to mitigating the effects of climate change.

**Conclusion**

Climate migration is a major issue that, despite its growing severity, remains unaddressed by international law. Weather-related hazards displace tens of millions annually, and yet individuals displaced by climate change are not eligible for protection under the 1951 United Nations Refugee Convention. This UN Convention and derivative national laws define refugees as victims of persecution perpetrated by humans for reasons related to the victim's identity. As climate migration is neither based on human agency nor discriminatory, international law disqualifies climate migrants from being considered refugees. Because climate migrants are not considered refugees under international law, they are susceptible to asylum denial and deportation.

Addressing the issue of climate migration on an international scale will not be simple, because any solution will require transnational cooperation, coordination, wealth, and diplomacy. This essay has outlined three ways of addressing climate migration on an international scale. The first proposed solution is to change the definition of "refugee" as it stands in the UN Refugee Convention. The second solution is to add a clause to the UN Refugee Convention that explicitly protects climate migrants. The third proposal is to design a system of smaller regional agreements and initiatives that operate under an international umbrella.

Amending the UN Refugee Convention is the most comprehensive option, as it would immediately impact global jurisprudence. Moreover, this approach is efficient because it would require less detailed international diplomacy and cooperation than a regional approach. Despite the merits of a solution focused on the UN Refugee Convention, creating a system of regional agreements that operate under an international umbrella would yield more specialized reforms that address the particular needs of each region. Ultimately, a combination of these approaches is the most impactful method by which to protect climate refugees; an amendment to the 1951 United Nations Refugee Convention should be followed by a regional approach that addresses the particular needs and systems of different areas around the globe.

Out of the most widely discussed options, adding an article or clause to the UN Refugee Convention provides the most direct and swift option for addressing this issue as it stands today. In order to increase the effectiveness of the response over time, any amendment to the convention should be followed by a more regional approach that addresses the particular needs and systems of different regions, although this regional approach must also hold wealthier nations that have contributed disproportionately to climate change accountable. For now, however, this pressing problem must first be addressed with the utmost of urgency, and the convention provides a platform on which to do this.

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# *Discussions of Race in Public Education: The Politicization of Critical Race Theory & its Modern Implications*

Alayna Vantine | Roger Williams University ‘22

Edited by Antonia Brillembourg ‘25

**Abstract:**

In recent years, Critical Race Theory has become one of the most controversial and divisive areas of American public policy. Concerned parents and politicians have campaigned against the previously inconspicuous legal doctrine, alleging that Critical Race Theory has infiltrated U.S. public education. As education is primarily a state and local responsibility, America’s youth is subjected to a wide variety of public education. Thus, the nine states across the country that have outlawed Critical Race Theory from public school education have influenced the educational opportunities of publicly enrolled K-12 students.

Looking at the recent controversy over Critical Race Theory, this article will explore the role of the government in prescribing public educational curriculum. Furthermore, the article will explain how the recent controversy over Critical Race Theory first originated. Finally, the author will point out the ramifications of banning Critical Race Theory and related topics from U.S. public schools at the hands of state and local governments in their determination of public-school curriculum.

## Introduction

Censorship of public-school content and materials is not a new phenomenon. Textbooks, magazines, novels, and periodicals have been forcibly removed from library shelves since the inception of a formal public school system. Traditionally, requests to censor public school curriculum were made on the grounds that the educational content or instructional material in question was too 'provocative' and must be removed before children were exposed to its 'dangers.' Over the past few decades, calls for the censorship of public-school curricula have become mainstream, granting even more avenues for individuals to request the removal of state prescribed curricula than ever before. Presently, various actors have challenged the decisions of state and local school boards, some even going so far as to push legislation to limit public school curricula.

As this paper will show, the dramatic increase in calls for public school censorship may prove to be harmful to students enrolled in public education. Specifically, the manner in which Critical Race Theory and the overall topic of race and racism in the United States has been treated by public school 'censors' is an area of concern. Analogous to censorship efforts of the past, current censors in "red states" have publicly attacked Critical Race Theory for its 'alleged dangers' in the overall development of America's youth. To combat these fears, numerous "red states" have passed legislation to ban Critical Race Theory, seriously limiting public school classroom discussions about race and racism. Consequently, what began as innocent attempts to protect children from 'harmful' civil discourse has transformed into substantial restrictions on students' right to public education.

## Background

### *State Authority Over Educational Governance*

Due to the Founding Fathers' deliberate silence over education in the Constitution, the government's role in the United States' education system is primarily limited to the state and local levels. As stated by the Tenth Amendment, "The powers not delegated to the U.S. by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1] Accordingly, since the Constitution does not delegate authority over education to the Federal Government, nor prohibit the states from education governance, the power over education rests with the states and its legislator. Thus, the fifty states, through their respective state constitutions, "establish their system of education by placing authority in the hands of their legislatures."[2] Therefore, the legislatures delegate the power to administer its system of education amongst various state actors; including state and local boards of education, the chief state school officer, public officials, and the state department of education.[3] Except in limited circumstances, decisions regarding what should is taught are made by state and local school boards, rather than federal judges or officials.

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[1] U.S. Const. amend. X.
[2] Carolyn Slasinski-Griem, "State Control of Education," The American Journal of Comparative Law 38 (December 1, 1990): pp. 473-490, https://doi.org/10.2307/840554.
[3] Slasinski-Griem, "State Control of Education," 474.

Considering that education governance is a state power, the fifty states maintain the ultimate power over the prescription of curriculum in public schools.[4] For that reason, states are vested the authority to formulate and regulate public-school curricula through their legislatures.[5] As a function of the state's system, they are entitled to establish a curriculum and course of study for school which accomplishes their state's educational objectives.[6] Consequently, the states may establish a common state curriculum either by statue or by delegating authority to local school boards, as determined by their legislature.[7] However, local school districts and officers possess only those powers which statutes expressly, or by reasonably necessary implication, grant them.[8] In addition to local school boards, state boards of education are also heavily involved in the determination of public-school curricula. For instance, the ultimate responsibility for the management and control of programs operated within common schools has been said to rest with the state board of education.[9] Nevertheless, under particular statutes, local school boards have been given the ultimate discretion to define the curriculum.[10]

Public state officials have the right to recommend, or even require, a curriculum to be taught in public schools and doing so is a form of government speech not generally subject to First Amendment scrutiny.[11] In this capacity, state officials may advance any viewpoint they believe beneficial in the preparation of students for citizenship. Furthermore, public officials are generally entitled to change their minds about what is recommended or required to be taught in public school classrooms. However, public officials may not establish educational policies "tailored to the tenets of a religious group, nor may they compel students to profess a prescribed belief, or limit their right to express themselves in school, unless the restriction is reasonably related to a legitimate educational purpose.[12]

While the Tenth Amendment of the U.S. Constitution grants states inherent 'police powers' to protect public health and safety, this is an extremely broad power.[13] Thus, the Due Process Clause of the Fourteenth Amendment effectively limits those powers by requiring that

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[4] *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985). States have the right to prescribe academic curricula of their public-school systems; therefore, Court of Appeal exercised great care and restraint when called upon to intervene in the operation of a public school.

[5] *California Teachers Assn. v. Board of Trustees*, 132 Cal. App. 3d 32, 182 Cal. Rptr. 754 (Cal. Ct. App. 1982). Curriculum and courses of study included in common state curriculum are not prescribed by Constitution but are left to discretion of Legislature; they do not constitute a part of system by are simply a function of that system.

[6] Chiras v. Miller, 432 F.3d 606 (5th Cir. 2005). Among the states' discretionary powers in the field of public education is the authority to establish public school curricula which accomplishes the states' educational objectives.

[7] *Snyder v. Charlotte Schools*, 421 Mich. 517, 365 N.W.2d 151 (Mich. 1984).

[8] *Snyder v. Charlotte Schools,* 151.

[9] *Mills v. Buell*, 685 S.W.2d 561 (Ky. Ct. App. 1985).

[10] *Sivek v. Baljevic*, 1999 Conn. Super. Ct. 102, 46 Conn. Supp. 518, 758 A.2d 473 (Conn. Super. Ct. 1999). Local school authorities and school administrations have broad discretion to prescribe curriculum, set classroom standards, and evaluate conducts of teachers in light of the special characteristics of the school environment.

[11] *Griswold v. Driscoll*, 625 F. Supp. 2d 49 (D. Mass. 2009). There is no requirement that such government speech be balanced or viewpoint neutral, but rather, public officials generally have the right to decide what should be taught in effort to prepare students for citizenship.

[12] *Griswold v. Driscoll*, 49.

[13] U.S. Const. amend. X.

states not infringe on a person's constitutional rights without due process.[14] With substantive due process, the Fourteenth Amendment protects a parent's right to direct the educational upbringing of their child. However, the parental right to control the upbringing of a child must give way to a school's ability to control curricula and the school environment.[15] The right of parents to direct the upbringing and education of their children is subject to state regulation. In essence, parents only possess a fundamental right to decide whether to send their child to a public school. They do not have a broad-based constitutional right to restrict the flow of information in the public schools to which they have chosen to send their children.[16] By this logic, parents do not have the right to control a public school's curriculum or class assignments.[17] Similarly, students generally do not have a right to reject curricular choices, as these decisions are left to the discretion of the state.[18]

*U.S. History of Critical Race Theory: Origins & Tenets*

Considering the mainstream media's recent fixation with Critical Race Theory, one would assume that Critical Race Theory is a contemporary doctrine, constructed for K-12 public education. Seemingly out of nowhere, Critical Race Theory became one of the most divisive topics of the 2020 Presidential election and 2021 gubernational elections in New Jersey and Virginia. In 2020, Fox News mentioned Critical Race Theory 1,300 times in less than four months, which demonstrates how the topic has captured the attention of a notable portion of the American public.[19]

Contrary to popular belief, Critical Race Theory is a decades-old legal doctrine that first made ground in the legal community in the mid-1970s.[20] Often referred to as CRT, the early work of prominent African American legal scholars Derrick Bell and Alan Freeman built upon an earlier movement called Critical Legal Studies.[21] Similar to CRT, Critical Legal Studies critiques how law in capitalist societies is used to maintain unjust power relations, while simultaneously masking injustices.[22] The largest contribution of Critical Legal Studies to CRT legal discourse was its analysis of legitimating structure in American society. Although Critical Legal Studies critiqued mainstream ideology for its portrayal of U.S. society as a meritocracy, it failed to include racism in its critique of the American legal system. Therefore, Bell and

[14] U.S. Const. amend. XIV, § 1.
[15] *Dempsey v. Alston*, 405 N.J. Super. 499, 966 A.2d 1 (App. Div. 2009).
[16] *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995).
[17] *Pisacane v. Desjardins*, 115 Fed. Appx. 446 (1st Cir. 2004).
[18] *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338 (5th Cir. 2017).
[19] Rashawn Ray and Alexandra Gibbons, "Why are states banning Critical Race Theory?," *Brookings,* November, 2021, The Brookings Institution.
[20] Gloria Ladson-Billings, "Just what is Critical Race Theory and what's it doing in a nice field like education?," *International Journal of Qualitative Studies in Education* 11, no. 1 (1998): pp. 7-24, https://doi.org/10.1080/095183998236863.
[21] Ladson-Billings, "Critical Race Theory," 10.
[22] Christine E. Sleeter, "Critical Race Theory and Education," *Encyclopedia of Diversity in Education* 1 (2012): pp. 491-494, https://doi.org/10.4135/9781452218533.n154.

Freeman's theories about the persistence of racism in the United States became a "logical outgrowth of the disconnect of legal scholars of color."[23]

The main goal of Critical Race Theory is to "expose hidden systemic and customary ways in which racism works by drawing from a wide variety of sources of knowledge that range from statistics to social science research to personal experiences."[24] To accomplish these aims, Critical Race Theorists fashioned four tenets to outline the main principles of the legal doctrine. The first central tenet of CRT asserts that racism is a socially accepted construct of modern U.S. society. In other words, Critical Race Theory assumes that "racism is not an aberration, but rather a fundamental, endemic, and normalized way of organizing society."[25] Today, racism is evident in the disproportionate access that white people have to resources such as jobs, wealth, housing, and education.

The second tenet of Critical Race theory asserts that white people have been the primary beneficiaries of racial remedies in the United States. Derrick Bell, the first African American law professor on the Harvard Law School Faculty, widely considered the originator of Critical Race Theory, advanced the notion of "interest convergence."[26] According to Bell, "interest convergence" holds that whites act on their own self-interest and advance the interests of people of color only when they 'converge' with white interests.[27]

The third tenet of Critical Race Theory emphasizes the importance of experiential knowledge, especially through storytelling. According to Critical Race Theorists, the dominant ideology and knowledge system, based on a white worldview, often called majoritarian stories, denies the effects of racism.[28] Most often, storytelling is utilized to share personal and community experiences of racism. Rooted in the experiences of the oppressed, counter-storytelling provides an interpretive framework to make sense of individual experiences and allows those who hear them to interpret those experiences in relationship to racism.

Finally, the fourth tenet of Critical Race Theory critiques liberalism while challenging societal claims of neutrality, color blindness, and meritocracy. According to Critical Race Theorists, the liberal perspective's emphasis on incrementalism "fails to understand the limits of current legal paradigms to serve as a catalyst of social change."[29] In effect, Critical Race Theorists argue that racism requires "sweeping changes" which liberalism has no structure to produce.[30] Furthermore, the fourth tenet challenges the common notion that the law is impartial and neutral, applied to all individuals without regard to race, gender, or other demographic identities.[31] Instead, Critical Race Theorists argue that claims of neutrality and color blindness

[23] Ladson-Billings, "Critical Race Theory," 11.
[24] Sleeter, "Critical Race Theory and Education," 491.
[25] Sleeter, "Critical Race Theory and Education," 491.
[26] Sleeter, "Critical Race Theory and Education," 492.
[27] Sleeter, "Critical Race Theory and Education," 492.
[28] Sleeter, "Critical Race Theory and Education," 492.
[29] Ladson-Billings, "Critical Race Theory," 12.
[30] Ladson-Billings, "Critical Race Theory," 12.
[31] Sleeter, "Critical Race Theory and Education," 492.

serve little purpose but to mask white privilege and power.[32] Although the laws may apply equally to everyone at face value, in practice, whites use power, property, and customary ways of behaving to maintain racism.[33]

**The Politicization of CRT & the Ensuing Public Misperception of its Role in Public Education**

Until recently, Critical Race Theory remained an exclusive, multifaceted legal doctrine, solely understood by legal intellectuals dedicated to studying the pervasion of racism in American society. How then, did this previously inconspicuous legal doctrine transform into such a controversial topic in the current political discourse?

*The Politics of CRT*

The evolution of Critical Race Theory from a credible legal doctrine into a controversial political issue first began in 2020, following then-President Donald Trump's public denunciation of the New York Times initiative, the "1619 Project." Published the year prior, the New York Times initiative aimed to tell a more complete story of the country's history by placing slavery at the center of America's founding.[34] During the White House Conference on American History on September 17th, 2020, Donald Trump condemned the message behind the 1619 Project.[35] To combat the 'suspected dangers' of CRT, President Trump announced he would be signing an executive order to create the 1776 Commission, an initiative to promote a "patriotic education."[36] According to Donald Trump, the 1619 Project and Critical Race Theory's interpretation of American history was "toxic propaganda" and "ideological poison." While addressing the nation, Donald Trump warned that if CRT were not removed from discussions in schools, it had the potential to "dissolve the civic bonds" that tie the nation together, leading to the "destruction of our country."

In the aftermath of Trump's public rebuke of the 1619 Project and Critical Race Theory, widespread pushback to Critical Race Theory began. Conservative politicians joined the campaign against the alleged 'dangers' of Critical Race Theory. They argued that the concepts underlying Critical Race Theory were unjust efforts to rewrite American history, striving to convince white people that they are inherently racist.[37] Furthermore, conservative politicians also claimed that the doctrine purported that white people should feel guilty because of their advantages in society.[38] As a result, the concept of Critical Race Theory became somewhat of a

[32] Sleeter, "Critical Race Theory and Education," 494.
[33] Sleeter, "Critical Race Theory and Education," 494.
[34] Bryan Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?," PBS NewsHour, November 2, 2021, https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory.
[35] "What Trump is saying about 1619 Project, teaching U.S. history," PBS NewsHour, September 17, 2020, https://www.pbs.org/newshour/show/what-trump-is-saying-about-1619-project-teaching-u-s-history.
[36] PBS NewsHour, "What Trump is saying." Donald Trump strongly criticized the New York Times effort to reexamine American history with a deeper emphasis on slavery in racism, asserting that viewing every issue through the lens of race was the "other sides" way of imposing "new segregation."
[37] Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?"
[38] Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?"

"catch-all phrase" in American media to describe some racial concepts conservatives found objectionable.[39] For instance, terms such as white privilege, systemic inequality, and inherent bias were erroneously associated with Critical Race Theory.

What started out as a basic legal theory to explain America's history through a lens of racism quickly became "the new lightening rod of the GOP."[40] Suddenly, nearly every conservative politician was calling for the total elimination of Critical Race Theory from U.S. public schools. By the 2021 gubernational elections in Virginia and New Jersey, Critical Race Theory "morphed from an obscure academic discussion point on the left into a political rallying cry on the right."[41] Due to conservative and Republican resistance, "red states" across the country have passed legislation to prohibit classroom discussions of CRT and related topics from public education. Consequently, "red states" have successfully censored Critical Race Theory and related topics as state-level control over education permits them total regulation over the prescription of public-school curriculum.

*Public Misconceptions of Critical Race Theory & U.S. Public Education*

Opponents of Critical Race theory fear that the doctrine "admonishes all white people for being oppressors while classifying all Black people as hopelessly oppressed victims."[42] As a result, school boards and state legislatures across the country have banned teachings about racism and race in public classroom. Nonetheless, these narratives of Critical Race Theory are exaggerations of the theoretical framework, puzzling the very academic who coined and advanced the framework. Consequently, those who condemn or seek to ban CRT from public schools are often misinformed about its principles and cannot accurately define it.

One of the most widespread misconceptions about Critical Race Theory is that it attributes racism to white people as individuals or even to entire groups of people. However, Critical Race Theory does not make this claim. Rather, Critical Race Theory states that American social institutions are embedded within racism by laws, regulations, rules, and procedures, leading to "differential outcomes by race."[43] Although sociologists and other scholars have noted that racism can exist without racists, many Americans cannot "separate their individual identity as an American from the social institutions that govern us."[44] Therefore, because these people perceive themselves "as" the system, "they interpret calling social institutions racist as calling them racist personally."[45] Despite the fact that some Americans recognize the country's racist past, they "have bought into the false narrative that the U.S. is now an equitable democracy."[46] Essentially, they are unwilling to recognize and admit that the country is still not great for everyone.

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[39] Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?"
[40] Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?"
[41] Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?"
[42] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[43] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[44] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[45] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[46] Ray and Gibbons, "Why are states banning Critical Race Theory?"

Another common misconception about Critical Race Theory is that the doctrine argues that white people living now are to blame for the actions of their ancestors. Instead, Critical Race Theory proclaims that "white people living now have a moral responsibility to do something about how racism still impacts all of our lives today."[47] For this reason, CRT does not place blame or attempt to pit one group against the other. The legal doctrine simply tries to generate meaningful national conversations that will lead to a more equitable democracy. Nonetheless, anti-CRT policies attempting to restrict these critical national conversations currently stand in the way.

Many Republicans often claim Dr. Martin Luther King Jr. to be a supporter of their party. In fact, "Supporters of CRT bans often quote Martin Luther King Jr's proclamation that individuals should be viewed by the content of their character instead of the color of their skin."[48] By invoking King to deflect claims that the party has discriminatory tendencies, the Republican Party is ignoring the context of the quote and its true meaning.[49] Accordingly, Critical Race Theory does not attempt to spark civil discourse that judges Americans based on the color of their skin. Rather, CRT supports meaningful discussions of racism as a mechanism to reinforce the country's democratic principles.

Beyond the misconceptions of the doctrine's theoretical framework, the most widespread fallacy about Critical Race Theory is its alleged relationship with U.S. public education. Despite the lack of empirical evidence, a majority of Americans are convinced that Critical Race Theory has become intertwined with U.S. public education.[50] Even though CRT itself is not a topic in most K-12 curricula, some legislators and elected officials have referenced it in connection with any educational lessons or trainings that acknowledge racist practices.[51] As a result, ideas central or relating to CRT in public classrooms have been misinterpreted, accounting for some of the country's confusion over the current state of public education.

Those against CRT in public schools also point to the Wake County Public School System in North Carolina for support. Anti-CRT proponents claimed that teachers in the school district participated in a professional development session on Critical Race Theory. Resulting from the public disapproval, county education officials then canceled a future study session but insisted that CRT was not part of its classroom curriculum.[52] According to Lisa Luten, a spokeswoman for the Wake County Public School System, "Critical race theory is not something that we teach students. It's more of a theory in academia about race that adults use to discuss the context of their environment."[53]

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[47] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[48] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[49] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[50] Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?"
[51] "EXPLAINED: The Truth About Critical Race Theory and How It Shows Up in Your Child's Classroom," *Ed Post,* May 5, 2021, https://www.edpost.com/explainer/explained-the-truth-about-critical-race-theory-and-how-it-shows-up-in-your-childs-classroom.
[52] Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?"
[53] Anderson, "Critical Race Theory is a flashpoint for conservatives, but what does it mean?"

Widespread political polarization over the issue is another major reason why many Americans falsely believe that Critical Race Theory has 'plagued' U.S. public education in recent years. During the Constitution Day speech at the National Archives, former President Donald Trump characterized education that critically discussed topics regarding race and racism as "radical" and "ideological poison."[54] Afterward, those against CRT began pointing to educational initiatives like the 1619 Project, claiming they were dangerous, unpatriotic, and ironically racist.[55] Stemming from conservative opposition, "red states" began outlawing Critical Race Theory. Additionally, school districts around the country started to embrace the idea that "Black, Latinx and Indigenous students will do better in school if the systems around them change."[56] Consequently, these seemingly unrelated factors led some to challenge new practices in public schools and classrooms.

For example, many anti-CRT legislation proponents object to modern methods of teaching history that acknowledge the oppression of millions of people based on race in America.[57] Furthermore, "red states" criticized educational trainings and professional development practices that highlighted areas of implicit bias, helping them develop skills to overcome it.[58] Since school systems in the United States have largely operated the same way for decades, these positive changes were viewed as inflammatory. In fact, many believed that the steps mentioned above were forcing a new worldview on children, even going so far as to call it "indoctrination."

*States Outlawing CRT & Broad Discussions of Race from Public Education*

The widespread polarization of Critical Race Theory and U.S. public educational curricula has since facilitated quick public policy action. Thus far, many Republican-led states have pushed legislation to outright limit how topics of race and racism may be taught to public school children. Since November 2021, nine states have banned Critical Race Theory and related race or racism topics from public education.[59] These "anti-CRT" states include Arizona, Idaho, Iowa, New Hampshire, North Dakota, Oklahoma, South Carolina, Tennessee, and Texas.[60] Moreover, nearly twenty additional states have introduced or plan to introduce similar legislation in the future.

Based upon an assessment of anti-CRT state legislation, it is first important to note that most of the anti-CRT legislation does not specifically name Critical Race Theory in its language. With the exception of Idaho and North Dakota, the majority of anti-CRT state legislation chooses to omit the phrase 'Critical Race Theory' in defining the statewide restricted educational content.[61] For example, Iowa House Bill 802, New Hampshire House Bill 2, Oklahoma House

[54] Ed Post Staff, "EXPLAINED: The Truth About Critical Race Theory."
[55] Ed Post Staff, "EXPLAINED: The Truth About Critical Race Theory."
[56] Ed Post Staff, "EXPLAINED: The Truth About Critical Race Theory."
[57] Ed Post Staff, "EXPLAINED: The Truth About Critical Race Theory."
[58] Ed Post Staff, "EXPLAINED: The Truth About Critical Race Theory."
[59] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[60] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[61] Ray and Gibbons, "Why are states banning Critical Race Theory?"

Bill 1775, South Carolina House Bill 4100, Tennessee House Bill 580, South Carolina House Bill 4100, and Texas House Bill 3979 do not explicitly state Critical Race Theory. Instead, these seven pieces of legislation specifically describe the instruction, curriculum, or instructional programs that are prohibited.

Compared to the other anti-CRT bills, Idaho House Bill 377, signed by Governor Brad Little on April 28th, 2021, stands out as it explicitly states Critical Race Theory.[62] For instance, Section 1 of the bill states that Critical Race Theory tends to "undermine the objectives outlined in subsection (1) of this section and exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, or other criteria in ways contrary to the unity of the nation and the well-being of the state of Idaho and its citizens."[63] The House Bill bans teaching concepts related to Critical Race Theory in public schools, public charter schools, and public institutions of higher education. Additionally, Idaho House Bill 377 also limits discussions of gender to all students enrolled in state funded public education.

Similarly, North Dakota House Bill 1508, signed by Governor Doug Burgum on November 15th, 2021, names Critical Race Theory when describing the prohibited K-12 public school instruction.[64] Accordingly, Section 1 of House Bill 1508 states "A school district or public school may not include instruction relating to critical race theory in any portion of the district's required curriculum under sections 15.1-21-01 or 15.1-21-02, or any other curriculum offered by the district or school." However, unlike Idaho House Bill 377, North Dakota's anti-CRT bill includes a definition of Critical Race Theory: "the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality." Additionally, the bill only prohibits Critical Race Theory instruction from K-12 public education, not public institutions of higher education.

With regard to the states that omit Critical Race Theory from the anti-CRT bills, Tennessee House Bill 580 is most similar to that of Idaho in that it effectively bans public school districts and public charter schools from teaching "certain concepts" about race and sex.[65] For example, Tennessee House Bill 580, signed by Governor Lee on May 25th, 2021, specifically states forbidden ideas or topics. Accordingly, Section 51 of the bill lists fourteen concepts that LEA or public charter schools shall not include or promote as part of a course of instruction or in a curriculum or instructional program. Additionally, Section 51 includes four areas of instruction that LEA or public charter schools' teachers or employees are not prohibited from including as part of a course of instruction, curriculum, or instructional program. However, the Tennessee House Bill further limits class wide education by including a provision in Section 51, which states that Tennessee will withhold funding from LEA or public charter schools if they violate the terms stated by the Tennessee State Department of Education.

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[62] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[63] Idaho State Legislature, "House Bill 377," April 2021.
[64] North Dakota State Legislature, "Engrossed House Bill 1508," November 2021.
[65] Tennessee State Legislature, "House Bill 580," June 2021.

Another important anti-CRT piece of legislation is Iowa's House File 802, signed by Governor Kim Reynolds on June 8th, 2021.[66] The act bans incorporating "specified concepts" regarding race and sex into mandatory trainings for government agencies, teachers, and higher education students. Iowa's anti-CRT bill is similar to that of Idaho in that the bill extends limits on instruction regarding race and gender to students outside grades K-12. However, Iowa's bill departs from Tennessee and Idaho's legislation as it also limits the training of employees in government agencies. For instance, Section 1 of the act addresses prohibited trainings by state and local government, Section 2 addresses prohibited trainings by institutions, and Section 3 addresses prohibited educational trainings and curriculum. Similar to Iowa, Oklahoma's House Bill 1775 also prohibits public institutions of higher education from requiring students to participate in mandatory gender/sexuality diversity trainings.[67] Oklahoma's anti-CRT bill also bans the teaching of "specified concepts" about race and sex in public schools. Oklahoma's bill differs from Iowa's as trainings for governmental agencies are not prohibited from requiring mandatory gender or sexuality diversity training. However, it is unclear if the bill's provisions banning "specified concepts" about race and sex in public schools would prohibit mandatory gender or sexuality diversity trainings for public school students.

New Hampshire House Bill 2 is also an important piece of legislation because New Hampshire was among one of the first states to pass an anti-CRT bill.[68] Accordingly, the anti-CRT section incorporated into House Bill 2, the state budget trailer, signed by Governor Chris Sununu on June 25th, 2021, prohibits teaching "specified concepts" in public schools and in governmental agency trainings. However, the amended section of the bill does not include sex in its description of prohibited educational curriculum nor institutions of higher education in the bill. Like New Hampshire, South Carolina House Bill 4100 also incorporates an anti-CRT section in the state's budget bill. Passed on June 30th, 2021, South Carolina's anti-CRT section was incorporated into the education section of House Bill 4100 to prohibit schools that receive state funding from teaching "specified concepts" regarding race and sex.[69] Therefore, South Carolina's anti-CRT bill is very similar to New Hampshire's except it does not include government agency trainings or sex in its language.

Among all of the states that have secured anti-CRT legislation, Texas seems to be the state most committed to restricting discussions of race and gender in public classrooms. Texas signed House Bill 3979 into law on June 15th, 2021; Bill 3979 was later replaced with stricter legislation.[70] Signed into law on September 17th, 2021, Senate 3 Bill "makes significant changes to required civics education curriculum, establishes a new civics training program for teachers, requires that both sides of current controversial issues are presented, prohibits teaching certain concepts regarding race and sex and giving academic credit for advocacy work."[71]

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[66] Iowa State Legislature, "House File 802," March 2021.
[67] Oklahoma State Legislature, "House Bill 1775," May 2021.
[68] New Hampshire State Legislature, "House Bill 2," June 2021.
[69] South Carolina State Legislature, "House Bill 4100," March 2021.
[70] Texas State Legislature, "Texas House Bill 3979," June 2021.
[71] Texas State Legislature, "Senate Bill 3," November 2021.

Finally, Arizona House Bill 2898 deserves special attention as the act was overturned in November by the Arizona Supreme Court.[72] The initial bill prohibited the use of "public monies for instruction that presents any form of blame or judgment on the basis of race, ethnicity, or sex" in public or charter schools. Furthermore, the anti-CRT bill established fines for violations.[73] However, just five months later on November 11th, 2021, the Arizona Supreme Court ruled that HB2898 violated the state's constitution by including multiple subjects in a single bill. Thus, the bill was invalidated as specified by the Arizona Board of Education.[74]

*The Ramifications of the Anti-CRT Movement on Education About Race in Public Schools*

Beyond the nine anti-CRT states, state actors in Montana and South Dakota have denounced teaching concepts associated with Critical Race Theory. In addition, state school boards in Florida, Georgia, Utah, and Alabama recently introduced new guidelines to bar Critical Race Theory related discussions from public schools. Local school boards also publicly criticized Critical Race Theory in Georgia, North Carolina, Kentucky, and Virginia.[75] Moreover, nearly 20 additional states have introduced or plan to introduce similar anti-CRT legislation in the following months.[76] Nonetheless, the approach of some Republican-led state legislatures has severely impacted both those receiving and administering the states prescribed public educational curriculum.

According to many teachers and principals, the new measures fashioned by the thirteen state legislatures and state boards of education has had a "chilling effect" on public education. The result, public school staff say, "is a climate of fear around how to comply with rules they often do not understand."[77] Instead of freely teaching in the classroom, many teachers report that they now "err on the side of caution for fear that a student or parents might complain, resulting in a public battle – or even, in extreme cases, that they might lose their jobs."[78] For instance, in New Hampshire and Oklahoma, there is an additional layer of fear as anyone who is unhappy with a teacher may complain to the state. In such circumstances, teachers deemed not in compliance with the state's directive or law can lose their teaching license. Jen Given, a tenth-grade history teacher at Hollis Brookline High School in Hollis, New Hampshire, described this newfound fear of teachers. Pointing to the New Hampshire law, Given claimed, "The law is really, really vague."[79] Confused by the states anti-CRT law, Given and other teachers at Hollis Brookline High School asked for some clarification from the state, from the union, and from school lawyers. However, no adequate response was given, leading Given to assert, "It led us to

[72] Arizona State Legislature, "House Bill 2898," June 2021.
[73] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[74] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[75] Ray and Gibbons, "Why are states banning Critical Race Theory?"
[76] Ray and Gibbons, "Why are states banning Critical Race Theory"
[77] Laura Meckler and Hannah Natanson, "New Critical Race Theory laws have teachers scared, confused and self-censoring." The Washington Post, February 14, 2022, https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/.
[78] Meckler and Natanson, "New Critical Race Theory."
[79] Meckler and Natanson, "New Critical Race Theory."

be exceptionally cautious because we don't want to risk our livelihoods when we're not sure what the rules are."[80]

In response to new laws, interviews with teachers and principals across the country reveal that educators are now altering the way they teach about race and racism. In other words, teachers have found themselves forced to "rewrite the lesson plan."[81] Given also illustrates this point by describing her own experience trying to put together lesson plans. Prior to the anti-CRT law, Given said she used to teach students about racial disparities in economics by "tying relative lack of Black wealth to Jim Crow laws and discriminatory mortgage policies known as redlining."[82] However, she has totally abandoned this approach today. Instead, Given alleged, "We started avoiding modern parallels in order to avoid any question coming up that we were, by including this information, we were somehow suggesting one group is better than the other."[83]

Aside from altering lesson plans, teachers have also reported that parents have sought to remove books from reading lists. Even more shocking, teachers have even preemptively removed books as a result of recent anti-CRT legislation. In particular, a complaint under the new Tennessee anti-CRT law was filed against the "Civil Rights Heroes" module of a second grade reading curriculum. Specifically, four books detailing the life stories of Martin Luther King, Jr., Ruby Bridges, and Sylvia Mendez were brought into question. The complaint charged that the books betray a "narrow and slanted obsession on historical mistakes … that makes children hate their country, each other, and/or themselves."[84] The complaint was filed by the Williamson County chapter of Moms for Liberty, a national advocacy group that pushes for greater parental control over education. According to Robin Steenman, the chair for the group, the chapter was "genuinely concerned about the graphic, violent and racially divisive contents in the curriculum," asserting that the content was not appropriate for second graders.[85]

Furthermore, teachers in Florida's public schools have also felt the repercussions of the state's anti-CRT on public educational texts. For instance, the rules approved by the state board of education that are otherwise open to interpretation include one clear directive. The Florida directive states, "Schools may not teach the "1619 Project," a set of essays and a book developed by the New York Times that argues slavery was central to America's founding.[86] Thus, Brandt Robinson, a Pinellas County history teacher, was accused by a parent of violating the law because his syllabus included a book about Black Americans that referenced the year 1619. Although the parent lost her appeal, in most circumstances, these arguments opposing educational curriculum by concerned parents are largely supported by the states anti-CRT legislation.

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[80] Meckler and Natanson, "New Critical Race Theory."
[81] Meckler and Natanson, "New Critical Race Theory."
[82] Meckler and Natanson, "New Critical Race Theory."
[83] Meckler and Natanson, "New Critical Race Theory."
[84] Meckler and Natanson, "New Critical Race Theory."
[85] Meckler and Natanson, "New Critical Race Theory."
[86] Meckler and Natanson, "New Critical Race Theory."

Anti-CRT legislation and state board of education directives have also led public school administrators to feel the need to adjust current practices to accommodate the new legislation. Looking at Osceola County, Florida, the school district scheduled a professional development session for teachers in January. Michael Butler, a history professor at Flagler College in St. Augustine, was invited to join the professional development to teach about the history of civil rights. However, officials from the Osceola County school district canceled it out of fear it would breach Florida new Anti-CRT rule. Afterwards, the teachers were instead moved into a training session with a different presenter. This same issue was also apparent in Edmond, Florida. Regan Killackey, an English teacher at Edmond Memorial High School, recounted when he learned that administrators had eliminated a module on anti-racist teaching from the district's mandatory professional development training. Accordingly, the module was rejected as it had included holding "courageous conversations" about complicated social topics, including racial issues.[87]

Overall, anti-CRT pieces of legislation and directives by state boards of education have developed a climate of fear for teachers. Most importantly, the increase in self-censorship from public school teachers has negatively impacted the educational opportunities of public-school students. While Critical Race theory itself is not being taught in local elementary or middle schools, public school teachers have taken on the important task of talking about racism. However, as shown above, public school teachers have begun to alter their approaches to teaching about race and racism. In effect, students are no longer receiving the same public education that was available before the popularization of Critical Race Theory.

**Conclusion**

In recent years, select state and local governments have silenced public education curricula that discuss topics considered to be controversial and harmful to impressionable young minds. As of November 2021, nine states have successfully capitalized on widespread public misperceptions regarding Critical Race Theory to pass anti-CRT legislation. Although a major win for many conservatives, students have suffered greatly as their educational opportunities have been restricted. No longer do boards of education, state, or local boards maintain complete control over the prescription of public education. Rather, public school curricula have largely been defined by public officials who have embraced the backlash against Critical Race Theory.

Through censorship states are effectively inhibiting the educational opportunities of K-12 students. Resulting from anti-CRT legislation and state's board of education directives, public school teachers now fear discussing topics of race and racism in the classroom. In certain circumstances, teachers have censored themselves, altering lesson plans and materials used in educational units. No longer are K-12 students afforded the right to participate in free civil discourse in the public-school classroom. Ultimately, the recent controversy over Critical Race Theory and subsequent calls for public school curriculum censorship in "red states" have negatively impacted the overall development of students enrolled in U.S. public education.

[87] Meckler and Natanson, "New Critical Race Theory."

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*California Teachers Assn. v. Board of Trustees*, 132 Cal. App. 3d 32, 182 Cal. Rptr. 754 (Cal. Ct. App. 1982).

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# *Fatal Lawyering: Ineffective Assistance of Counsel Claims as Lifelines for Death-Row Prisoners*

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**Abstract:**

The Sixth Amendment guarantees every person the right to effective counsel. In the legal landscape of capital representation—when a lawyer’s performance matters most in the difference between life and death—this constitutional protection is repeatedly violated. Those on death row often claim that their trial counsel and/or post-conviction counsel were ineffective. Because of the Supreme Court’s recent ruling in *Shinn v. Ramirez* (2022), the Court has now severely limited death-row prisoners’ ability to challenge their convictions by arguing that their lawyers were ineffective. This paper examines ineffective assistance of counsel claims in 12 capital cases, investigates the consequences for these lawyers deemed “ineffective” or “constitutionally deficient,” and elucidates solutions to this systemic issue of ineffective lawyering.

***Shinn v. Ramirez* (2022)**

The capital punishment litigation and appeals process is a lengthy saga involving up to nine major stages: 1) Trial (Trial Court), 2) Direct Appeal (State Supreme Court), 3) Certiorari (U.S. Supreme Court), 4) State Post-Conviction (Trial Court), 5) Appeal of State Post-Conviction (State Supreme Court), 6) Certiorari (U.S. Supreme Court), 7) Federal Post-Conviction (Federal District Court), 8) Appeal of District Court's Decision (Federal Court of Appeals), and 9) Certiorari (U.S. Supreme Court). In appealing the death penalty, death-sentenced prisoners often claim that their trial counsel was ineffective in trial court. Post-conviction counsel then must prove that trial counsel was ineffective in order to successfully appeal their client's death sentence. However, sometimes, a defendant's *post-conviction* counsel is ineffective as well, failing to bring in new evidence and/or prove that their client's *trial* counsel was ineffective. In *Martinez v. Ryan* (2012), the Supreme Court decided that prisoners could appeal their death sentence and overcome procedural default if their post-conviction counsel was ineffective. In *Shinn v. Ramirez* (2022), the Supreme Court flouted *stare decisis* thereby gutting the precedent established by *Martinez v. Ryan* (2012). In *Shinn*, the justices effectively ruled that no additional evidence could be submitted on behalf of a death-sentenced prisoner once a capital punishment case had passed state proceedings and made its way to federal court.[1] This makes it so that death-sentenced prisoners who have both ineffective trial *and* post-conviction counsel are doubly disadvantaged and cannot present new evidence to make ineffective assistance of counsel claims in federal court. In a post-*Shinn* world, individuals will have a harder time making ineffective assistance of counsel ("IAC") claims to appeal their death sentences.

**Introduction**

What a lawyer says or does *not* say at trial can be the "make-or-break" in whether a defendant receives a death sentence versus life imprisonment. As legal scholar Stephen Bright contends, the death penalty is not necessarily for those who commit the worst crimes, but for those who have been assigned the worst lawyers.[2] During the appeals process for capital punishment cases, death-row prisoners often deploy ineffective assistance of counsel ("IAC") claims to obtain habeas relief. IAC is a legal framework that encompasses various types of deficient lawyering, such as race-baiting at trial, failing to investigate and present mitigating factors, abandoning the duty of loyalty to the client by, wittingly or unwittingly, aiding prosecution's case in aggravation, or being under the influence of alcohol and/or drugs during trial. For a death-row prisoner to obtain a new trial, an IAC claim must pass both prongs of the *Strickland* Test. Coined by Justice Sandra Day O'Connor in *Strickland v. Washington* (1984), the *Strickland* Test requires that 1) Counsel's performance was deficient and fell below an objective standard of reasonableness and 2) this deficient performance prejudiced defense enough to have

[1] Emily Olson-Gault, "Supreme Court 'Guts' Case Law Protecting the Right to Counsel," American Bar Association: Death Penalty Representation Project, last modified May 22, 2022.
[2] Stephen B. Bright, "Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer," *The Yale Law Journal* 103, no. 7 (1994): 1883.

reasonably changed the outcome or sentence.[3] The key words here are "reasonableness," "reasonably," and "objective." Before *Strickland*, when *Diggs v. Welch* (1945) reigned, the test for IAC was vague and subjective, defined as whether an attorney simply made a "farce and a mockery of justice."[4]

Although the *Strickland* Test aspires to an objective standard, it has proven malleable to judicial interpretation. Meeting the *Strickland* Test is a hurtle in and of itself, and usually only the most egregious of lawyering errors meet the threshold of ineffective assistance. This paper seeks to explore capital cases where the Supreme Court has ruled in favor of death-row prisoners' IAC claims, the consequences for lawyers who have been found to be ineffective per the *Strickland* Test, and the remedies for this systemic failing in capital representation.

Understanding what constitutes "ineffective" assistance of counsel requires knowing its antithesis: effective counsel, a right protected by the Sixth Amendment and a "bedrock principle in our judicial system."[5] Those privy to capital defense know that the bar for effective or adequate representation is so low that an attorney need only pass the mirror test, whereby "you put a mirror under the court-appointed lawyer's nose, and if the mirror clouds up, that's adequate counsel."[6] By that line of reasoning, lawyers found to be ineffective are so inadequate that they can barely fog a mirror—practically comatose. So, who are these ineffective lawyers?

One obstacle in conducting research on ineffective lawyers is the lack of transparency. Legal databases like Lexis and Westlaw lack uniformity in naming. In written decisions throughout the appeals process, lawyers often go by "attorney," "counsel," or "defense," rather than by their actual names like say, "John Smith." In both Supreme Court and Appellate Court written decisions, it is common practice not to publicly identify defense lawyers.[7] Even in the landmark *Strickland* case, which defined what counted as ineffective lawyering, David Washington's defense attorney William Tunkey was never mentioned in the decision.[8] These lawyers' names are often masked under the guise of opaque umbrella terms like "defense" or "counsel," but in death penalty cases involving IAC claims, the stakes are too high for these lawyers' names to be unlisted in later stages and post-conviction appeals.

One explanation for these lawyers' anonymity is that many states have held that public defenders are entitled to qualified immunity for all acts or omissions made while executing their official duties.[9] In one state in particular—Alabama, there is no statewide public defender system, and so capital cases get assigned to private attorneys who often have little experience in criminal law, let alone capital punishment. Perhaps another reason for the anonymity in the legal

[3] Strickland v. Washington, 466 U.S. 668, 688 (1984).
[4] Vivian Berger, "The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases," *N.Y.U. Review of Law and Social Change* 18, no. 245 (1991): 245.
[5] Martinez v. Ryan, 566 U.S. 1, 12 (2012).
[6] Bright, "Counsel for the Poor," 1852.
[7] Joseph H. Ricks, "Raising the Bar: Establishing an Effective Remedy against Ineffective Counsel," *Brigham Young University Law Review*, 2015, 1123.
[8] Ibid., 1120.
[9] Eve Brensike Primus, "Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims," *Cornell Law Review* 92, no. 4 (May 2007): 700.

record is the agency principle, whereby the attorney is considered merely the defendant's "agent," and the defendant is the principal that bears the risk of negligent conduct on the part of said "agent."[10] The agency principle essentially protects and insulates these ineffective defense lawyers from being known by name and held accountable. One could dig deep into CourtLink on Lexis to find these lawyers' names, but oftentimes this will not prove fruitful. The difficulty in finding these lawyers' identities is made somewhat easier by the press, but the press tends to pick up on IAC claims only for the most sensationalized and scandalous cases of attorney misconduct.

Regarding defense lawyers who prove to be ineffective in capital cases, it remains a mystery what the consequences are for them. Do they continue to litigate other capital cases? Are they disbarred? Flipping the script as Stephen Bright did when he said, "the death sentence not for the worst crime but for the worst lawyer,"[11] the legal profession needs to ask who executes people—do individuals who commit horrible crimes get themselves killed, does the state commit the killing, or are grossly incompetent lawyers the ones inflicting death on their clients?

Because of *Shinn*, the Supreme Court has made it harder to correct IAC errors in post-conviction appeals and later stages of capital representation. Lawyers need to "get it right" the first time—at trial, or during the plea process, doing away with a trial altogether. In a post-*Shinn* world, the need for transparency in naming these ineffective lawyers is more urgent than ever in upholding accountability, deterring substandard legal representation, and rendering the death penalty obsolete, a relic of the past.

If various bar associations and courts decided to raise the standard in capital defense, it remains to be seen how this would affect the number of attorneys willing to take on death penalty cases. Perhaps this would deter defenders and pro bono counsel from taking up capital cases, for fear of what the consequences might entail if they were found to have provided IAC.[12] The more salient question, however, is how raising the bar and increasing accountability for ineffective lawyering would help individuals on death row and those facing potential death sentences.

According to the leading study of federal post-conviction cases conducted by the National Institute of Justice, 81% of capital cases included at least one claim of alleged IAC.[13] In another study reviewing the appeals of the first 255 DNA exonerees, the courts rejected the vast majority of IAC claims raised.[14] Only in 7 of these 255 cases did courts agree with appellants and find IAC, leading to reversals of convictions for six exonerees and new representation in one

[10] Shinn v. Ramirez, 142 S. Ct. 1718, 1733 (2022).
[11] Bright, "Counsel for the Poor," 1835.
[12] Ideally, this would deter inept lawyers who would not do well on capital cases, while also not scaring away competent lawyers who would provide zealous representation.
[13] National Institute of Justice, *Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, by Nancy J. King, Fred L. Cheesman, and Brian J. Ostrom, technical report no. 219558, p. 5, August 21, 2007, https://www.ojp.gov/pdffiles1/nij/grants/219558.pdf.
[14] Emily M. West, Dr, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals among the First 255 DNA Exoneration Cases*, p. 3, September 2010, https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf.

case.[15] IAC claims in capital cases are evidently commonplace, but courts are hesitant to confirm and validate these complaints. Instead of considering what the *best* lawyers would or should do, the courts merely consider what *reasonable* lawyers would do—the bare minimum to suffice "adequacy," which in effect gaslights death-row prisoners who allege that their lawyers failed to do enough. The importance of effective counsel in capital cases cannot be stressed more. In Philadelphia, PA, more than 200 death sentences were imposed in which defendants were represented by undertrained and underfunded court-appointed counsel.[16] By contrast, not a single defendant who was represented by the Philadelphia Public Defender's Specialized Homicide Unit ever got a death sentence. As Justice Ruth Bader Ginsburg once remarked, "people who are well represented at trial do not get the death penalty."[17] The rampant phenomenon of ineffective assistance among capital cases underscores the sheer arbitrariness in who gets the death penalty.

**A Closer Look: 12 Capital Cases Involving IAC Claims**

This paper will analyze 12 capital cases in which the Supreme Court ruled in favor of a death-row prisoner's IAC claim, as well as probe the outcomes not only for the defendant but just as importantly, the lawyer deemed "ineffective."

**1.)** In *Ayestas v. Davis* (2018), the U.S. Supreme Court held that Carlos Ayestas also known as Zelaya Corea had received IAC in his 1996 trial—22 years ago.[18] His two trial defense attorneys Diana Olvera and Connie Williams did not present any witnesses in both the guilt and sentencing phases. Moreover, they presented virtually no mitigating evidence, failing to investigate and present Ayestas' history of mental illness and substance abuse. Compounding issues further, Ayestas' post-conviction counsel failed to present this ineffective-assistance-of-trial-counsel claim.[19] Although the U.S. Supreme Court ruled in favor of Ayestas and rejected the Fifth Circuit's denial of Ayestas' IAC claim, there seems to have been no repercussions for his attorneys. Today, Olvera is still a practicing attorney with the Harris County Public Defenders' Office. Williams is still practicing and has his own law firm. Death-row prisoner Ayestas is still alive.

**2.)** In *Buck v. Davis* (2017), the U.S. Supreme Court held that Duane Buck had received IAC under *Strickland* during his 1997 trial (20 years ago) and was entitled to relief.[20] Buck was too poor to hire a lawyer, so the judge appointed two defense lawyers, one of them being, Jerry Guerinot, who is infamous for losing capital cases.[21] At the time, Guerinot had represented 20

[15] Ibid.
[16] "The Death Penalty Census: Key Findings," Death Penalty Information Center, last modified June 29, 2022, https://deathpenaltyinfo.org/facts-and-research/death-penalty-census/key-findings.
[17] "Individual Justices and the Death Penalty," Death Penalty Information Center, https://deathpenaltyinfo.org/facts-and-research/united-states-supreme-court/individual-justices.
[18] Ayestas v. Davis, 138 S. Ct. 1080, 1085 (2018).
[19] Ayestas v. Davis, 138 S. Ct. 1090, 1096 (2018) (Sotomayor, J., and Ginsburg J. concurring)
[20] Buck v. Davis, 580 U.S. 100, 128 (2017).
[21] Adam Liptak, "A Lawyer Known Best for Losing Capital Cases," *The New York Times* (New York, NY), May 17, 2010, https://www.nytimes.com/2010/05/18/us/18bar.html?smid=pl-share.

people sentenced to death in Texas and had not won a single capital case.[22] At trial, Guerinot race-baited the jury, knowingly allowing his expert witness Dr. Quijano to link Buck's future dangerousness to his Blackness, a "race-as-dangerousness" defense. The Supreme Court held that the "race-as-dangerousness" rhetoric "fell outside the bounds of competent representation."[23] And yet, the Court did not name Buck's lawyer (Guerinot) anywhere in its written decision. It chose only to name Guerinot's expert Dr. Quijano, who gave the racist testimony. Guerinot ended his career with a 0-34 record, losing every single death penalty case. His record was so shocking that people started a Change Petition to stop Guerinot from being appointed in capital cases.[24] Guerinot no longer takes on capital cases, but this is merely a matter of personal choice.[25] That Guerinot faced little to no consequences for his conduct speaks to the system's brokenness and lack of accountability for bad lawyers.

**3.)** In *Hinton v. Alabama* (2014), the U.S. Supreme Court held that Anthony Ray Hinton's counsel was "unreasonable" for failing to seek additional funds to hire a ballistics expert.[26] The Court vacated and remanded Anthony Ray Hinton's case so that the Circuit Court could reconsider whether trial counsel's deficient performance was prejudicial.[27] In Hinton's book *The Sun Does Shine: How I Found Life and Freedom on Death Row*, he recounts how his public defender Sheldon C. Perhacs was racist and ineffectual. During Hinton's trial in 1985, his court-appointed attorney Perhacs mistakenly thought he could not get enough money to hire a qualified firearms examiner, so he proceeded to hire a visually impaired civil engineer (Andrew Payne) with no expertise in firearms, who admitted he did not know how to operate the machinery necessary for examining the evidence.[28] Perhacs failed to seek additional funds to obtain credible expert testimony. Hinton was eventually exonerated, 30 years after his trial. His ineffective trial attorney, Perhacs, is still practicing law.

**4.)** For defendant Demarcus Ali Sears, Sears claimed IAC both at trial and on appeal. During his 1993 trial, his court-appointed attorneys Ray Gary Jr. (lead counsel) and Michael Treadaway (co-counsel) presented an inaccurate and questionable mitigation theory, intentionally painting a rosy picture of Sears' "tranquil" home life and childhood to portray him as a good kid with a privileged upbringing. This mitigation theory backfired, as the jury became convinced that Sears had no excuse for his crime. New lawyers eventually uncovered a tidal wave of compelling mitigating evidence showing that Sears had grown up in a tense household

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[22] Adam Liptak, "Citing Racist Testimony, Justices Call for New Sentencing in Texas Death Penalty Case," *The New York Times* (New York, NY), February 22, 2017, https://www.nytimes.com/2017/02/22/us/politics/duane-buck-texas-death-penalty-case-supreme-court.html.
[23] Buck v. Davis, 580 U.S 100, 117 (2017).
[24] Chris Cassidy, "Tell Texas Courts: Stop Appointing Jerry Guerinot in Capital Cases," Change.org, last modified 2010, https://www.change.org/p/tell-texas-courts-stop-appointing-jerry-guerinot-in-capital-cases.
[25] Matt Peterson, "Texas Lawyer Who Never Won a Capital Case Calls It Quits Defending 'the Very Worst' Clients," *The Dallas Morning News* (Dallas, TX), August 13, 2016.
[26] Hinton v. Alabama, 571 U.S. 263, 273 (2014).
[27]Ibid, at 264.
[28] "Anthony Ray Hinton. Mr. Hinton spent 30 years on death row for a crime he did not commit.," Equal Justice Initiative, https://eji.org/cases/anthony-ray-hinton/.

where his parents had a physically abusive relationship eventually ending in divorce.[29] Lawyers also discovered that Sears had suffered sexual abuse at the hands of a male cousin, had a low IQ, frontal lobe damage, and drug abuse during his teenage years.[30] Sears' home life was anything but rosy, and Gary and Treadaway's belief that their mitigation strategy would work constituted unreasonable and unwarranted optimism. In *Sears v. Upton* (2010), the Supreme Court remanded the case for a proper prejudice inquiry, ruling in favor of Sears and his IAC claim.[31] If mitigating evidence regarding Sears' troubled upbringing and bouts of adversity had been properly investigated and allowed to come to the forefront at his original trial, competent counsel would have deployed a cognitive deficiency mitigation theory instead of the good-kid-good-upbringing mitigation theory, which left no room for jury sympathy. Sears' lawyers Gary and Treadaway are still practicing law; both have their own law firms.

**5.)** In another case of bad lawyering and poor mitigation investigation, Lawrence Joseph Jefferson claimed his lawyers failed to investigate a traumatic head injury from childhood. His trial lawyers, Marc Cella and Stephen Schuster, were advised by an expert that investigation was unnecessary, even though Jefferson had severe cognitive disabilities. In *Jefferson v. Upton* (2010), the Supreme Court vacated judgement and remanded the case, ruling in favor of Jefferson.[32] The U.S. District Court for the Northern District of Georgia proceeded to overturn Jefferson's death sentence, asserting that his trial counsel had been ineffective for failing to investigate and present salient mitigating evidence—particularly the fact that he had sustained a head injury as a child when a car rolled over his head.[33] Marc Cella's and Stephen Schuster's names never appeared in the Supreme Court's written decision. Instead, their masked identities loom in the shadows of the label "trial counsel." Cella still practices law, and Schuster became a Juvenile Court Judge and then Cobb County Superior Court Judge, before retiring in 2020.

**6.)** According to professor of law David Siegel, "whether a lawyer rendered effective assistance of counsel often depends as much on what was not done at trial as upon what was done."[34] For George Porter Jr., his lawyers similarly failed to present crucial mitigating evidence. Porter's lawyer was Sam Bardwell, an experienced private criminal defense attorney who took conflict cases from the public defender. Porter represented himself during the guilt phase of his trial. Bardwell, who was serving as standby counsel, became Porter's full counsel for the penalty/sentencing phase. During the sentencing phase of Porter's 1988 trial, Bardwell presented no evidence concerning Porter's heroic military service in combat, his multiple AWOL episodes,

[29] "In Death Penalty Case, U.S. Supreme Court Reaffirms Importance of Right to Effective Counsel," Equal Justice Initiative, last modified July 1, 2010, https://eji.org/news/supreme-court-affirms-importance-of-counsel-in-death-penalty-case/.
[30] Ibid.
[31] Sears v. Upton, 561 U.S. 945, 945 (2010).
[32] Jefferson v. Upton, 560 U.S. 284, 295 (2010).
[33] "After Remand from U.S. Supreme Court, Georgia Federal Court Vacates Brain-Damaged Prisoner's Death Sentence," *Death Penalty Information Center News*, May 8, 2017, https://deathpenaltyinfo.org/news/after-remand-from-u-s-supreme-court-georgia-federal-court-vacates-brain-damaged-prisoners-death-sentence.
[34]David M. Siegel, "My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings," *The Journal of the Legal Profession* 23 (1998): 106.

his struggle to regain his sense of self after returning from war, his childhood history of physical abuse, his brain abnormality, nor his difficulty reading and writing due to limited schooling. In *Porter v. McCollum* (2009) the Supreme Court reversed the Eleventh Circuit, held that Porter's six amendment right to effective counsel was violated and that Bardwell's negligence constituted IAC.[35] Porter was resentenced to life in prison. Bardwell still practices law and has his own law firm.

**7.)** A pattern emerges of lawyers repeatedly failing to adequately investigate and prepare routine life histories of their clients. Facing the death penalty, Kevin Wiggins was appointed two Baltimore County public defenders, Carl Schlaich and Michele Nethercott. During his trial, Schlaich and Nethercott failed to investigate Wiggins' social history: growing up with an alcoholic absentee mother, being repeatedly raped and sexually abused while in foster care, having a period of homelessness, and possessing diminished mental capacities. In *Wiggins v. Smith* (2003), the Supreme Court held that Kevin Wiggins' attorneys violated his Sixth Amendment right to effective assistance of counsel.[36] Today, Carl Schlaich has his own law firm, and in a redemptive turn of events, Michele Nethercott is the Director of University of Baltimore School of Law's Innocence Project.

**8.)** Ronald Rompilla's trial counsel similarly neglected to pursue several avenues for investigation, such as examining school, medical, court, and prisoner records. The most significant error, however, occurred when counsel knowingly failed to review materials that they knew prosecution would use as aggravating evidence during the penalty phase. Thus, Rompilla's attorneys were not equipped to respond to and rebut that aggravating evidence. Rompilla was represented at trial by Fredrick Charles, the chief public defender for Lehigh County at the time, and Maria Dantos, an assistant public defender. In *Rompilla v. Beard* (2005), the Supreme Court held that counsel's performance fell below constitutionally required standards[37] and reversed the Third Circuit's judgement: "The judgement of the Third Circuit is reversed, and Pennsylvania must either retry the case on penalty or stipulate to a life sentence."[38] Although the Supreme Court named Charles and Dantos in their written opinion, both attorneys continued in their careers unscathed. Charles was appointed as the solicitor of Lehigh County three years after Rompilla's 1988 trial. Charles then worked at his own divorce and family law firm until his death in 2022. Dantos continued to be a public defender for another year, then worked at the District Attorney's office from 1989 to 2007, and then became a judge for the Lehigh County Court of Common Pleas, until she retired in 2020. Rompilla is serving a sentence of life imprisonment.

**9.)** Mitigating evidence is often the difference between life and death. For Carlos Trevino, his trial attorneys Mario Trevino and Gus Wilcox failed to investigate, develop, and present mitigating evidence during the punishment phase of Trevino's capital trial. The most

[35] Porter v. McCollum, 558 U.S. 30, 38, 44 (2009).
[36] Wiggins v. Smith, 539 U.S. 514, 514 (2003).
[37] Rompilla v. Beard, 545 U.S. 374, 396 (2005) (O'Connor, J. concurring).
[38] Rompilla v. Beard, 545 U.S 374, 393 (2005).

glaring piece of evidence they failed to present was that Trevino had Fetal Alcohol Syndrome, which would have precluded Trevino from the death penalty by the Supreme Court's holding in *Atkins v. Virginia* (2002). The Fifth Circuit found that Trevino had procedurally defaulted on his IAC claim. Although the U.S. Supreme Court did not decide whether Trevino's IAC claim was substantial, the Court did state that it found no difference between this case and *Martinez v. Ryan* (2012),[39] in which the Court held that attorney errors in post-convictions hearing (or ineffective assistance at an initial-review collateral proceeding) can qualify as cause to excuse procedural default when a defendant is claiming ineffective assistance of trial counsel. The Court vacated and remanded Trevino's case.[40] Trevino's trial lawyer Mario Trevino has no public disciplinary history.[41] Trevino's other trial lawyer Gus Wilcox continued to practice criminal law until his death in 2008.[42]

**10.)** In one of the worst cases of grossly incompetent lawyering, Frank G. Spisak's attorneys—John (Jack) Gardner, Thomas M. Shaughnessy, and William T. McGinty—betrayed their client and wittingly aided the prosecution's case in aggravation during his 1983 trial. Spisak claimed that he suffered significant harm from his attorneys' closing argument during penalty phase, which deprived him of effective assistance of counsel. In closing argument, Spisak's attorneys described his killings in overly vivid details, calling him "sick," "twisted," and "demented."[43] They averred that Spisak's admiration for Hitler inspired his crimes. Moreover, they exaggerated his dangerousness and rejected his potential for rehabilitation, saying that Spisak was "never going to be any different."[44] At the end of their closing, Spisak's attorneys told the jury that, when weighing Spisak's mental illness against the "substantial" aggravating evidence, the jurors should draw on their own sense of pride for living in a humane society. The clincher: his attorneys told the jury, "whatever you do [decide], we are going to be proud of you."[45] In 2010 (27 years after Spisak's trial), the Supreme Court held that Spisak's counsel was "so egregious that it was constitutionally egregious," but that these errors did not prejudice Spisak.[46] Spisak was executed one year later in 2011. His lawyers faced no repercussions. Shaughnessy has his own law firm, and McGinty is a judge of the Cuyahoga County Court of Common Pleas General Division in Ohio.

**11.)** In *McCoy v. Louisiana* (2018), the U.S. Supreme Court held that Robert McCoy had received counsel "incompatible with the Sixth Amendment" during his 2008 trial.[47] McCoy adamantly maintained his innocence, but his trial attorney, Larry English, went against his

[39] Trevino v. Thaler, 569 U.S. 413, 428 (2013).
[40] Ibid., at 429.
[41] State Bar of Texas, "Mr. Mario A. Trevino," State Bar of Texas: Find a Lawyer, https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=189939.
[42] "Gus Wilcox Obituary," Legacy, last modified March 18, 2008, https://www.legacy.com/us/obituaries/sanantonio/name/gus-wilcox-obituary?id=9505113.
[43] Smith v. Spisak, 558 U.S. 139, 150 (2010).
[44] Ibid.
[45] Ibid., at 163 (Stevens, J., concurring).
[46] Ibid., at 156.
[47] McCoy v. Louisiana, 138 S. Ct. 1500, 1512 (2018).

client's wishes by admitting McCoy's guilt at trial. Although English claims he was well-intentioned, has no regrets for betraying his client's loyalty, and felt as though admitting McCoy's guilt was the best way to spare him from the death penalty[48] (and likely preserve credibility for sentencing), the Supreme Court affirmed that English's betrayal constituted ineffectiveness. The Louisiana Attorney Disciplinary Board recommended "public reprimand" for English. English no longer practices law and claims he went into a deep depression for the way things unfolded with McCoy's case.[49] Most notably, Larry English's name is used in the U.S. Supreme Court's written decision, contrary to common practice. McCoy is still alive, awaiting a new trial.

**12.)** Ineffective lawyers at trial are one thing, but ineffectiveness can strike at any stage throughout representation. For Cory Maples, he alleged that both his trial counsel Mark Craig and Phil Mitchell were ineffective, as well as his post-conviction counsel—two pro bono lawyers from Sullivan & Cromwell, Jaasi Munanka, and Clare Ingen-Housz. During Maples' 1997 trial, Craig and Mitchell provided prejudicially deficient representation during the penalty phase. Craig and Mitchell failed to raise an obvious intoxication defense and "did not object to several egregious instances of prosecutorial misconduct."[50] At the evidentiary hearing, Craig testified that he had never served as lead counsel in a capital murder case before taking on Maples' case and had never been involved in the penalty phase of a capital case.[51] Mitchell testified that he had no capital experience at all, and during the penalty phase of the trial, he told the jury that he was "stumbling around in the dark."[52]

Munanka and Ingen-Housz then became Maples' pro bono post-conviction counsel. In August 2001, they filed a post-conviction petition in state court arguing that Maples' trial lawyers had been ineffective. The petition was denied, but Munanka and Ingen-Housz were given a new deadline to file an appeal. Instead, the two Sullivan & Cromwell associates abandoned Maples, missed an important deadline to re-file Maples' IAC claim, and failed to notify Maples that they were no longer his counsel. The Eleventh Circuit held that Maples procedurally defaulted his IAC claims because his two post-conviction counsel Munanka and Ingen-Housz failed to meet the deadline. In *Maples v. Thomas* (2012), the U.S. Supreme Court ruled in favor of Maples, holding that Maples showed ample cause to excuse his procedural default "into which he was trapped when counsel of record abandoned him without a word of warning."[53] Notably, the Court names Munanka and Ingen-Housz explicitly in its written decision. However, their naming does not seem to have had an impact on their professional

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[48] Jeffrey C. Mays, "To Try to Save Client's Life, a Lawyer Ignored His Wishes. Can He Do That?," *The New York Times* (New York, NY), January 15, 2018, https://www.nytimes.com/2018/01/15/nyregion/mccoy-louisiana-lawyer-larry-english.html.
[49] Ibid.
[50] Maples v. Thomas, 565 U.S. 266, 275 (2012)
[51] Cory R. Maples v. Jefferson S. Dunn, No. 5:03-CV-2399, slip op. at 22 (United States District Court Northern District of Alabama Northeastern Division Jan. 27, 2022).
https://hat.capdefnet.org/sites/cdn_hat/files/Assets/public/news/maples_v_dunn_habeas_grant_iac_012722.pdf.
[52] Ibid.
[53] Maples v. Thomas, 565 U.S. 266, 289 (2012).

trajectories. Jaasi Munanka is now a partner at Hogal Lovells, and Clara Ingen-Housz is a partner at Baker & McKenzie. As for Maples' trial counsel, Mark Craig is now a Circuit Judge of the 36th Judicial Circuit for Lawrence County, Alabama, and Phil Mitchell still practices law. Maples is now serving life in prison.

Ultimately, these 12 cases represent only a fraction of IAC claims, among a plethora of IAC claims that succeed but then fail on appeal, or simply never meet *Strickland*'s arcane and dubious prejudice prong. While the Supreme Court had a brief era of ruling in favor of death-row prisoners who claimed IAC, that era—even if it was just paying lip service—has long ended. With *Shinn* and the new ideological makeup (majority conservative and pro-death penalty) of the Supreme Court, ineffective lawyering will persist unabated while death-row prisoners alleging ineffective counsel will lose traction in the appeals process.

**Systemic Issues**

IAC claims fail for several reasons. Firstly, courts have concern about finality, and when a defendant claims their trial counsel was ineffective and they merit a re-trial, this threatens the finality of decisions and opens the floodgates for others to make similar claims. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) also emphasizes deference to state court decisions, weakening federal courts' power to review capital cases and grant habeas corpus relief. Secondly, judges may interpret *Strickland*'s "objective standard of reasonableness" differently. One judge may conclude an attorney acted reasonably; another might hold otherwise. Thirdly, post-conviction counsel can be ineffective by failing to raise a defendant's IAC claim against the original trial attorney(s) —resulting in a meta manifestation of ineffectiveness.

The fourth issue is "the lawyer-witness problem."[54] When a defendant claims ineffective assistance of trial counsel, trial counsel becomes a witness to their own alleged ineffectiveness. This presents a conflict of interest for the defense attorney. Throughout a post-conviction proceeding involving IAC claims, lawyers often become defensive and try to spin the narrative, putting their trial strategy in a better light in order to defend against allegations of incompetence and ineffectiveness.[55] Moreover, the state goes easy on these trial lawyers—it is very common that cross-examination is "a friendly one."[56] A different tactic that lawyers employ is a strategy known as "falling on the sword," whereby trial counsel *deliberately* admits to being constitutionally ineffective in order to have their client receive a new trial.[57] However, there is inherent risk in this move. An attorney who admits a mistake and supports their former client's claim for a retrial may never see another court appointment again, while an attorney who denies errors and defends their calculated tactics, will probably secure future work.[58] (This presents a myriad of issues in and of itself.) Judges are conscious of lawyers who "fall on their swords," and are thus hesitant to entertain IAC claims.

[54] Siegel, "My Reputation," 94.
[55] Ibid.
[56] Berger, "The Chiropractor," 251.
[57] Ricks, "Raising the Bar," 1130.
[58] David D. Langfitt and Billy H. Nolas, "Ineffective Assistance of Counsel in Death Penalty Cases," *Litigation* 26, no. 4 (Summer 2000): 12, http://www.jstor.org/stable/29760153.

When it comes to capital cases where defendants are predominantly indigent, the Sixth Amendment right to effective counsel is illusory, a "lethal fiction."[59] While an individual has a constitutional right to effective counsel, whose responsibility is it to be effective: the lawyer or the state that appointed that lawyer? Stephen Bright contends, "It is the constitutional duty of the state, not of members of the legal profession, to provide indigent defendants with counsel."[60] If the state must provide counsel, does the state then bear the responsibility of whether that counsel is effective and good at their job?

Admittedly, state criminal justice systems are overwhelmed with cases. Public defenders are poorly paid and overworked, which accounts for many instances of ineffectiveness. Public defenders thus do not have the financial incentive to commit to cases the same way private criminal defense lawyers would. Moreover, it is hard to fault these attorneys for not knowing what they did not know. Absence/lack of evidence is not evidence of absence. For example, many lawyers fail to learn and thus present evidence of a client's brain injury, trauma, or other mitigating factor that would have precluded the defendant from receiving a death sentence. Public defenders need mitigation specialists to help them investigate their clients' full personal histories and backgrounds. Often, the system fails both the lawyers and their clients by not providing enough resources for attorneys to do their best work.

While structural failings contribute to the systemic pervasiveness of IAC, individual failings play a role as well. Although a lawyer's ineffectiveness can stem from an honest mistake, a lapse in judgement, or simply a high caseload that prevents comprehensive investigation and full attention to a client's case, other times, a lawyer's ineffectiveness is viciously intentional, negligent, and unreasonable, a breach of their sworn promise to represent all clients zealously and diligently.

Presently, this paper has explored a dozen capital cases involving IAC claims, all of which have made it the U.S. Supreme Court. This analysis has directed its gaze not on the defendants, but on the lawyers—who they are/were, what they did, and what happened to them. Finding these ineffective lawyers' names in written decisions or in legal databases like Westlaw and Lexis was anything but easy. Some Supreme Court decisions spelled these lawyers' names out explicitly, but most decisions masked these lawyers' identities in protective guises with opaque labels like "counsel" and "trial attorney." In only four of the twelve cases were these ineffective lawyers named, highlighting critical inconsistencies. Why not name names? In capital cases where "death is different," there is an exigent need for greater transparency and accountability. This paper is not meant as a "burn book" or a blacklist to call out lawyers who have been found to be ineffective, but rather an unveiling to increase accountability and expose a more pernicious, systemic pattern of incompetent lawyering. It is about putting faces and names to statistics.

[59] Bruce A. Green, "Lethal Fiction: The Meaning of 'Counsel' in the Sixth Amendment," *Iowa Law Review* 78 (March 1993): 433.
[60] Bright, "Counsel for the Poor," 1869.

The pervasiveness of ineffective lawyering raises questions about training, professionalism, and ethics in the realm of capital representation. According to The American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, counsel needs to explore medical history, family and social history, educational history, military service, employment and training history, as well as prior juvenile and adult correctional experience[61] in order to paint a holistic picture of their client to the jury. And yet lawyers flagrantly violate this prescription, continually neglecting to pursue these mitigating avenues for their clients. Not only can lawyers do better, but bar associations and state codes on criminal procedure can create better deterrents against ineffective lawyering. Moreover, public defender systems need to be better funded to create better financial incentive for lawyers to put their best foot forward in a capital case. Some states—like Alabama—do not even have a statewide public defender system, so rectifying that is one starting point.

Nearly all the defense attorneys in the 12 cases enumerated in this paper seemed to continue practicing law relatively unscathed—many even moving up in the legal profession by becoming judges—after being found ineffective. The one exception is Larry English in *McCoy*. English was publicly reprimanded for his ineffectiveness and stopped practicing law. This was probably because English clearly and knowingly went against his client's explicit requests and then admitted to going behind his client's back. His admittance of his mistake and sheer honesty are what cost him. Yet, the attorneys who denied their mistakes and refused to fall on their swords continued practicing law unscathed.

**Remedies for Ineffective Lawyering**

The most pertinent question that emerges in this research is how to deter and correct ineffective lawyering. Perhaps the pervasiveness of bad lawyering has its origins in the legal education system. Unlike other graduate schools, law school does not require specialization. Some law students seek out "specialization" through law clinics, but access to these clinics is competitive and only a few schools have death penalty focused clinics. Cardiac surgeons who hold their patients' lives in their own hands undergo years of training, including residencies and fellowships. Capital defenders, similarly, albeit on a different scale, hold their clients' lives in their own hands. And yet the level of training and experienced required for capital defense varies between states and is often questionable and disconcerting.

What will suffice to remedy ineffective lawyering? A slap on the wrist, public shaming, disciplinary action? Potential solutions run the gamut, from raising standards of qualification to imposing penalties for lawyer misconduct. Depending on how egregious a lawyer's conduct was, penalties could range from temporary suspension of one's legal license to disbarment from the state bar. One obvious solution is for states to raise the qualifications necessary for an attorney to be appointed to a death penalty case. According to Texas Code of Criminal Procedure for the Third Administrative Judicial Region, for example,

[61] American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Revised Edition February 2003.1022-1023.

> An attorney appointed as lead trial counsel in the trial of a death penalty case must: Have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any criminal case nor filed documents admitting that the attorney has rendered ineffective assistance of counsel in any criminal case unless, at the request of the attorney, the Local Selection Committee determines that the conduct underlying the finding no longer accurately reflects the attorney's current ability to provide effective representation.[62]

Ostensibly, such a standard should be ubiquitous and adopted by all states who still impose the death penalty. On closer look, however, this standard presents a double-edged sword because it discourages lawyers to admit that they provided ineffective assistance in the past, which ultimately hurts death-row prisoners who make IAC claims.

Another remedy is to introduce various sanctions for ineffective lawyers, such as forcing attorneys to give up the fee they received to represent their client, imposing restitution, limiting an attorney's practice, or forcing attorneys to participate in required classes.[63] Other legal scholars suggest addressing ineffectiveness through disciplinary boards of state bar associations,[64] or creating an ethics board and instituting a specialized ethics code tailored for capital defense that goes beyond the ABA's Capital Guidelines.[65] Nonprofits like the American Civil Liberties Union (ACLU) have taken ineffectiveness into their own hands by filing class action lawsuits against indigent public defender systems that fail to provide adequate counsel for indigent clients.

Another avenue for redress is increasing internal regulations, or simply put, trusting lawyers to do the right thing. One legal scholar suggests that zealous criminal defense lawyers whose clients have been convicted at trial should turn their efforts toward the setting aside of that conviction "even at the expense of their own professional reputation,"[66] or in other words—fall on their own sword. Lawyers can also increase accountability by reporting other lawyers for misconduct, although this would likely threaten collegial relations in the legal profession. Appellate attorneys and post-conviction counsel can do their own due diligence by looking for patterns of ineffectiveness among trial attorneys. More people can become mitigation specialists and help lawyers conduct comprehensive investigations into their clients' backgrounds.

Perhaps the best solution is a prophylactic or preventive solution, i.e., allocate more funding for public defender systems, non-profits like the ABA's Death Penalty Representation Project and the Equal Justice Initiative, and capital habeas units.

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[62] Appointment of Counsel in Death Penalty Cases, Tex. Code Crim. Proc. Ann. (2017). https://www.txcourts.gov/media/587369/standards.pdf.
[63] Ricks, "Raising the Bar," 1124.
[64] Primus, "Structural Reform," 700.
[65] Bruce A. Green, "Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?," *Georgetown Journal of Legal Ethics* 29 (Summer 2016): 530-531.
[66] Siegel, "My Reputation," 88.

In some cases, ineffective lawyering is reducible to lawyer-inflicted death. IAC claims for many death-row prisoners are a "safety valve"[67] to stall their executions and receive life sentences instead. But this lifeline for death-row prisoners is in danger as IAC claims become harder to prove in the post-*Shinn* era. *Shinn* renders it impossible for death-sentenced prisoners to present new evidence and prove ineffective assistance of assistance claims once their cases pass state courts and move to federal courts. Despite this setback in capital representation, death-sentenced prisoners can push to make other claims to challenge and appeal their death sentences. Death-sentenced individuals and their lawyers just need to get more creative in challenging the death penalty. Some claims to challenge death sentences include targeting the method of execution and arguing for its unconstitutionality, raising religious objections to any part of the death penalty, and attracting publicity and press attention on a capital case from celebrities and politicians (e.g., Curtis Flowers' case).

Already, we see a plethora of cases reaching the Supreme Court that, little by little, chip away and dismantle capital punishment by targeting various aspects of the process, such as biases of various jury members at the original trial, the constitutionality of certain drugs in the lethal injection protocol, the right to have religious clergy present in the execution room, the constitutionality of executing while having COVID-19, the right to pick a method of execution that the state does not provide, among other novel arguments. There is hope for capital representation in a post-*Shinn* world; it just requires a bit more thinking outside the box.

[67] Tom Zimpleman, "The Ineffective Assistance of Counsel Era," *South Carolina Law Review* 63 (Winter 2011): 432.

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# *Analysis of the Minamata Convention on Mercury and its Effectiveness*

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**Abstract:**

The naturally occurring element, mercury, presents a threat to environmental and human health. Due to the danger that mercury presents, in 2013, the international community convened to draft an agreement to prevent further harm to environmental and human health. The Minamata Convention on Mercury entered into force in 2017 and there are currently 137 states party to the agreement.

Through a review of the treaty text itself, the treaty negotiations, and the implementation of the treaty, this paper assesses the effectiveness of the Minamata Convention on Mercury. Through the implementation of Articles 3, 4, 5, 7, and 8, the Minamata Convention on Mercury makes significant strides to protect environmental and human health. This paper assesses the indicators of effectiveness regarding these Articles while also assessing the current shortcomings of the agreement. The shortcomings of the Minamata Convention on Mercury include the current implementation and compliance mechanism, and the lack of (1) obligations regarding the stationary combustion of coal, (2) specificity in language, and (3) explicit protected status for vulnerable groups. Ultimately, this agreement encourages behavior change but shortcomings of the agreement highlight what more needs to be done to ensure the protection of human and environmental health.

**Introduction**

In May 1956, residents of Minamata Bay, Japan fell ill to a disease affecting the central nervous system. Today, this central nervous system disease is known as Minamata disease. Minamata disease is methylmercury poisoning in humans, typically as the result of eating fish contaminated with methylmercury. This disease has affected 2,252 people and has killed 46.3% of those affected. [1] While no known cases of Minamata disease have been diagnosed since 1960, the impact of mercury on human and environmental health is evident today. For example, fetuses with exposure to methylmercury have an increased risk of having brain and nervous system disorders. Additionally, mercury can enter water sediment where it becomes toxic and then enters the food chain.[2] The threats that mercury exposure and pollution present to human and environmental health indicate a need to curb excess mercury emissions from human activity.

**What is the Minamata Convention on Mercury?**

The Minamata Convention on Mercury is a multilateral environmental treaty that regulates mercury emissions and releases [3] into the environment. In 2003, the United Nations Environment Program (UNEP) identified anthropogenic emissions of mercury as harmful to human and environmental health, spurring international collaboration on a legal framework to abate mercury emissions and releases. The Minamata Convention on Mercury entered into force in 2017, is the foremost manifestation of the international community's commitment to quelling mercury emissions and releases. The primary goals of the Minamata Convention are to protect human and environmental health from anthropogenic emissions and releases of mercury and mercury compounds.[4] In 2010, negotiations for the agreement started and, in 2013, the international community adopted the text of the agreement. Finally, in 2017, the agreement entered into force for all parties.[5] There are currently 137 parties, also known as member states, bound to the agreement as of 2022.[6]

The primary cause of mercury emissions and releases are manufacturing processes in which mercury and/or mercury-added products are used, artisanal and small-scale gold mining (ASGM), point-source emissions of mercury into the atmosphere, point-source releases of mercury into water and/or land[7], and mercury waste.[8] In order to limit anthropogenic mercury emissions and releases, the Convention outlines regulations and recommendations to parties that have ratified, accepted, or approved this agreement.

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[1] Harada, Masazumi. "Minamata Disease: Methylmercury Poisoning in Japan Caused by Environmental Pollution." *Critical Reviews in Toxicology* 25, no. 1 (1995): 1–24. https://doi.org/10.3109/10408449509089885.
[2] "Health Effects of Exposures to Mercury." EPA. Environmental Protection Agency, 2023. https://www.epa.gov/mercury/health-effects-exposures-mercury.
[3] Mercury emissions define any mercury or methylmercury elements emitted into the atmosphere. Mercury releases define any mercury or methylmercury elements released into the land, water, or other surfaces. Mercury releases in the environment can be re-emitted into the atmosphere as mercury emissions.
[4] Minamata Convention on Mercury, 2013. Article 1.
[5] "History of the Negotiations Process." History of the Negotiations Process | Minamata Convention on Mercury, 2021. https://www.mercuryconvention.org/en/about/history.
[6] *Parties and Signatories | Minamata Convention on Mercury*, The Minamata Convention on Mercury, 2022.
[7] Point-source releases of mercury are direct release of mercury into land habitats, such as bodies of water.
[8] Minamata Convention on Mercury, 2013. Article 5 (5), Article 7 (2), Article 8 (1), Article 9 (1), Article 11 (3).

The Convention requires each state to prepare and implement a National Action Plan (NAP) to control emissions within the first four years of being bound to the agreement.[9] Within a NAP, a party must decide to apply one of a variety of emissions-reducing practices, recommended by the Convention, to its existing mercury-emitting processes.[10] For any possible new sources of mercury emissions, states must use the best available and environmentally sound technology to control and reduce emissions.[11] Additionally, within the first four years of being bound to the agreement, each party must prepare a national plan to outline the actions they will take to control releases, after determining the point source of mercury releases in their jurisdiction.[12] For both mercury emissions and releases, each party must maintain an inventory of their mercury emissions and releases from any significant anthropogenic point source of pollution.[13]

The Minamata Convention on Mercury specifically addresses the biggest anthropogenic source of mercury pollution, ASGM. This industry is responsible for approximately 20% of newly mined gold today and is most prominent in Africa and South America.[14] The Convention requires that if a member state finds that ASGM is "more than an insignificant industry in their jurisdiction", the member state must submit a NAP to address ASGM pollution no later than three years after the member state becomes bound to the agreement. [15] To date, there are 22 member states that have submitted an ASGM NAP, meaning only 16% of member states find ASGM to be more than insignificant.[16] The Convention outlines four possible actions that parties could implement in their ASGM NAP, requiring each party to do at least one. These actions include (1) releasing limit values to control and, when possible, reduce mercury releases, (2) using the Best Available Technology (BAT) and Best Environmental Practices (BEP), (3) implementing a multi-pollutant control strategy, and (4) using alternative measures to reduce mercury releases. [17]

Beyond point source mercury emissions and releases, the Minamata Convention on Mercury also addresses mercury supply sources, trade, mercury-added products, manufacturing processes where mercury is utilized, mercury waste, and contaminated sites. When considering the many different uses of mercury, each party must ensure that high concentrations of mercury are disposed of in an environmentally sound manner while protecting human and environmental health. In this effort, the Convention requires that each party (1) receives consent from non-

[9] Minamata Convention on Mercury, 2013. Article 8 (3).
[10] Minamata Convention on Mercury, 2013. Article 8 (5).
[11] Minamata Convention on Mercury, 2013. Article 8 (4).
[12] Minamata Convention on Mercury, 2013. Article 9 (4), Article 9 (3).
[13] Minamata Convention on Mercury, 2013. Article 8 (7), Article 9 (6).
[14] Cadman, Stephanie. "ASGM Report 2022 Press Release." World Gold Council. World Gold Council , March 24, 1970. https://www.gold.org/news-and-events/press-releases/asgm-report-2022-press-release. & McGeachy, Courtney. "Second Phase of PlanetGOLD Doubles Countries Addressing Mercury in ASGM." Global Environment Facility, 2021. https://www.thegef.org/newsroom/blog/second-phase-planetgold-doubles-countries-addressing-mercury-asgm.
[15] Minamata Convention on Mercury, 2013. Article 7.
[16] Minamata Convention on Mercury, 2013. Article 8 (7), Article 9 (6).
[17] Minamata Convention on Mercury, 2013. Article 9 (5).

parties when trading mercury-added products, (2) must phase-out or restrict mercury compounds in Annex A and B[18] by the phase-out year noted, (3) follow mercury waste regulations recommended under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and (4) limit the risks of contamination sites through weighing options for managing risk and engaging the community.[19] While there is a common objective and outlined regulations for the parties bound by this agreement, the Convention allows for parties to make and implement plans that will best achieve the objective in their given jurisdiction – including lodging objections to certain requirements.

Today, certain member states have lodged reservations to the rules of the treaty in the form of exemptions to different phase-out dates listed in the Annexes, as permissible under the Convention. Regarding the phase-out dates in Part I of Annex A, Argentina, Botswana, Canada, China, Ghana, India, Iran, Lesotho, Madagascar, Peru, Eswatini, and Thailand have lodged exemptions. These exemptions range from simply the manufacture of clinical thermometers, in the case of Argentina, to the manufacture, import, and export of all mercury-added products mentioned in Part I of Annex A. For all member states, the current exemption is in effect until, at the latest, 2025.[20] Similarly, parties have lodged exemptions to specific phase-out dates listed in Part I of Annex B. These parties include Argentina, Ghana, India, Iran, Peru, and the United States of America (U.S.). Exemptions have been made to the requirements regarding Chlor-alkali production and acetaldehyde production which are currently in effect until, at the latest, 2030.[21]

To lodge an exemption, member states must explain their reasoning for declaring an exemption to a given rule in either annex. Reasons for exemptions include lack of information, lack of capacity-building, the prominence of an industry for the country's economy, and lack of funding from state governments to ensure compliance.[22] Interestingly, the exemption that the U.S. placed was reasoned by ensuring that the U.S. would not have non-compliance allegations against their actions and is willing to withdraw their exemption once they are sure that the U.S. is complying.[23]

Since the Minamata Convention on Mercury is a facilitative treaty, to ensure that as many parties join the treaty, there is likely less criticism for member states submitting exemptions from

[18] Addendums at the conclusion of the agreement outlining specific phase-out dates for different mercury-added products and manufacturing processes in which mercury or mercury compounds are used, respectively.
[19] Minamata Convention on Mercury, 2013. Article 3 (6), Article 4 (2), Article 5 (3), Article 7 (3), Article 11 (1), Article 12 (2), Article 12 (3).
[20] "Exemptions under the Minamata Convention on Mercury," Exemptions under the Minamata Convention on Mercury | Minamata Convention on Mercury (United Nations Environment Programme , 2021), https://www.mercuryconvention.org/en/parties/exemptions.
[21] "Exemptions under the Minamata Convention on Mercury," Exemptions under the Minamata Convention on Mercury | Minamata Convention on Mercury (United Nations Environment Programme , 2021), https://www.mercuryconvention.org/en/parties/exemptions.
[22] "Exemptions under the Minamata Convention on Mercury," Exemptions under the Minamata Convention on Mercury | Minamata Convention on Mercury (United Nations Environment Programme , 2021), https://www.mercuryconvention.org/en/parties/exemptions.
[23] "Exemptions under the Minamata Convention on Mercury," Exemptions under the Minamata Convention on Mercury | Minamata Convention on Mercury (United Nations Environment Programme , 2021), https://www.mercuryconvention.org/en/parties/exemptions.

specific phase-out dates. During negotiations, there were contentions over the financial mechanism and whether the controls were going to be mandatory or not. To gain more membership, it was important for member states to allow for exemptions from a given phase-out date. The outcome was preferable over making controls mandatory with little funding as developing countries are less inclined to agree to an agreement that they are less likely to comply with.[24]

Beyond handling mercury and mercury compounds, the agreement also encourages parties to collaborate with the World Health Organization to respond to health crises caused by mercury exposure and collaborate on research while communicating research findings with the public.[25] These public awareness campaigns, while parties continue to invest in research, are critical to the protection of environmental and human health.

**Is the Minamata Convention on Mercury Effective?**

To consider the effectiveness of the Minamata Convention on Mercury, it is necessary to comb through the different requirements of the agreement. Many of the main obligations are defined under Articles 3, 4, 5, 7, and 8.

Article 3 defines obligations for member states regarding mercury supply sources and trade, including total primary mercury mining and facilities with inventories greater than 50 tons of mercury.[26] In the short term, it is critical to look at how member states are moving towards supply and trade changes and if new mines are being opened. To look at these metrics, major producers and users of mercury and mercury-added products, like China and the U.S., are likely good indicators of global trends. According to China's first National Report to the Minamata Convention, submitted in 2021, there was an 18.58% decrease in the total mercury mined from 2019 to 2020. There was a 128% increase in total mercury mined between 2017 and 2020. China reported that there were five facilities that had more than 50 tons of mercury with an annual inventory greater than 10 tons. Under the Chlor-alkali facility obligations, China reported no excess mercury available from the decommissioning of those facilities. [27] The U.S. reported that there were no primary mercury mines within its jurisdiction but reported two government-owned facilities that had mercury inventories that exceeded 50 tons.[28] Both China and the U.S. reported

[24] Tallash Kantai, Jessica Templeton, and Kungbao Xia , "Summary Report of the Third Meeting of the Intergovernmental Negotiating Committee to Prepare a Globally Binding Instrument on Mercury 31 October - 4 November 2011 ," ed. Pamela S. Chasek , *International Institute for Sustainable Development (IISD)* 28, no. 8 (November 7, 2011): pg. 12 & Tallash Kantai, Jessica Templeton, and Kungbao Xia , "Summary Report of the Third Meeting of the Intergovernmental Negotiating Committee to Prepare a Globally Binding Instrument on Mercury 31 October - 4 November 2011 ," ed. Pamela S. Chasek , *International Institute for Sustainable Development (IISD)* 28, no. 8 (November 7, 2011): pg. 13. & Minamata Convention on Mercury, 2013. Article 13 (7).
[25] Minamata Convention on Mercury, 2013. Article 16, Article 17, Article 19.
[26] Minamata Convention on Mercury, 2013. Article 3.
[27] Chen Haijun, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[28] Andrew Clark, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.

no new primary mercury mining sites after entry into force.[29] While the effectiveness of this obligation is difficult to measure in the time frame given in 2022, it is reasonable to see that there is a change in what state actors are pushing substate actors to do as we move forward under this environmental regime.

Article 4 defines the obligations of member states regarding mercury-added products, such as dental amalgams, batteries, and thermometers.[30] As of today, the effectiveness of this obligation can be assessed by the number of exemptions lodged and how fast mercury-added products under Part I of Annex A have been removed from the market in member states without exemptions. To date, the Secretariat has received and approved twelve exemptions for mercury-added products in Part I of Annex A.[31] As China is the biggest user of mercury-added products, it was important that something was done regarding the use of these products. To comply with the phase-out dates of mercury-added products, China has prohibited certain goods from being imported or exported, and banned the production of goods, such as certain batteries and thermometers, to comply with Article 4.[32] While the member state is implementing these rules, it is likely to change the behavior of substate actors as there will be more rules to get through to acquire goods regulated through the agreement. Thus, there is likely some behavioral effectiveness even if there is some legal non-compliance.

Article 5 defines the obligations of parties regarding the use of mercury in manufacturing processes.[33] In the short term, the effectiveness of this obligation can be measured through how fast the processes in Part I and Part II of Annex B are phased out or phased down. Regarding Part I of Annex B requirements, there are six exemptions to the phase-out dates. This obligation requires that acetaldehyde plants using mercury are shut down by 2018, yet there are no known plants in operation.[34] Additionally, all Chlor-alkali plants using mercury must be phased out by 2025.[35] To continue looking at China and the U.S., action is being taken to ensure compliance with Article 5 obligations. While China has facilities that use mercury and/or mercury compounds for the processes listed in Annex B, the state has implemented four pieces of legislation including the Emission Standard of Pollutants for Caustic Alkali and Polyvinyl Chloride Industry, Technical Policies or the Prevention and Control of Mercury Pollution, Technical Specifications for Application and Issuance of Pollutant Permit Polyvinyl Chloride,

[29] Chen Haijun, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021. & Andrew Clark, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[30] Minamata Convention on Mercury, 2013. Article 4.
[31] "Exemptions under the Minamata Convention on Mercury," Exemptions under the Minamata Convention on Mercury | Minamata Convention on Mercury (United Nations Environment Programme , 2021), https://www.mercuryconvention.org/en/parties/exemptions.
[32] Chen Haijun, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[33] Minamata Convention on Mercury, 2013. Article 5.
[34] David C. Evers et al., "Evaluating the Effectiveness of the Minamata Convention on Mercury: Principles and Recommendations for next Steps," *Science of The Total Environment* 569-570 (2016): pp. 888-903, https://doi.org/10.1016/j.scitotenv.2016.05.001.
[35] Minamata Convention on Mercury, 2013. Annex B, Part I.

and Measures on Clean Production Audits.[36] The U.S. reported that there were two Chlor-alkali facilities in 2018 but, as of 2020, one facility phased out the use of mercury.[37] Through this, it is evident that member states and substate actors are changing their behavior to ensure compliance with Article 5.

Article 7 requires member states to change their behavior regarding ASGM, the largest contributor to mercury releases and emissions globally.[38] Member states with more than insignificant ASGM industries must submit a NAP within three years of joining the agreement and provide progress reports every three years thereafter.[39] In 2023, compliant member states with significant ASGM industries will provide progress reports. Since we are looking at the effectiveness of the agreement as of today, it is important to assess the goals put forth in the NAPs. While China emits a lot of mercury, China argued that ASGM was not more than insignificant and placed a full ban on ASGM.[40] Ghana, on the other hand, has a significant amount of ASGM within its territory and submitted a NAP to the Secretariat in 2020. Ghana provided strategies to achieve the goals of the Convention regarding ASGM which include the formalization of the sector, promoting the reduction of emissions and releases, managing trade, providing information to miners and affected communities, and making strong public health initiatives to prevent and mitigate exposure. Additionally, Ghana is being supported by different international entities such as UNIDO, GEF, and the WHO to achieve the goals related to ASGM under the Minamata Convention.[41] Even though Ghana lodged exemptions to all obligations that a member state could lodge exemptions to, Ghana has worked with different entities to work to meet obligations regarding ASGM. Since the agreement was able to urge a member state that lodged the maximum number of objections possible and the member state still complied with important obligations, this indicates the legal effectiveness of the agreement.

Article 8 of the agreement focuses on emissions of mercury through stack emissions of coal-fired facilities, cement plants, and nonferrous metal smelters. The agreement requires the use of BAT and BEP in these industries.[42] To look at the progress of this obligation, turning to regulations at the national level for any BAT and BEP regulations is crucial to see the effectiveness of this agreement in pushing parties to meet their obligations. In China, legislation including the Standard for Pollution Control on the Municipal Solid Waste Incineration (2014), the Standard for Pollution Control on Hazardous Waste Incineration (2020), and the Standard for

[36] Chen Haijun, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[37] Andrew Clark, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[38] Minamata Convention on Mercury, 2013. Article 7. & David C. Evers et al., "Evaluating the Effectiveness of the Minamata Convention on Mercury: Principles and Recommendations for next Steps," *Science of The Total Environment* 569-570 (2016): pp. 888-903, https://doi.org/10.1016/j.scitotenv.2016.05.001.
[39] Minamata Convention on Mercury, 2013. Article 7 (3).
[40] Chen Haijun, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[41] Sam Adu-Kumi, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[42] Minamata Convention on Mercury, 2013. Article 8.

Pollution Control on Medical Waste Treatment and Disposal (2020) propose a combination of technologies that are BAT and BEP. [43] Similarly, in the U.S., the Clean Air Act is cited to support the legislation surrounding BAT and BEP requirements within the U.S..[44] While it is hard to monitor domestic environmental regulations, there are extensive fees and fines for violations of the Clean Air Act. At the very least, the agreement is effective in changing the behavior of state and substate actors.

The agreement is effective even when there are violations of the agreement. Some parties may not be meeting the deadline for submitting their NAPs but, even with these reporting violations, the agreement has changed behavior. For example, Asian member states are switching over to BAT, without considering technology that is not feasible and/or affordable, to mitigate mercury emissions.[45] Looking at the coal power generation industry, changes in behavior, to comply with the Convention and domestic energy policy, will likely lead to an avoided 242 mg of mercury emissions in China and India in 2050.[46] Thus, even with violations, the agreement is effective in changing state behavior.

While there are short-term metrics that can measure the effectiveness of the Minamata Convention on Mercury as of 2022, many phase-out dates required for previous mining, supply, and manufacturing have not passed. The long-term impact of this international agreement cannot be fully assessed in 2022 in the same way that other international environmental agreements can. It is critical to look at the change in new mercury emissions and releases in the coming years to consider the effectiveness of the Convention as the required phase-out dates just passed or are in the next three to eight years, including any five-year exemptions.

**Shortcomings of the Minamata Convention on Mercury**

While the Minamata Convention on Mercury is an achievement at the global level in preventing harm to human and environmental health, there are inadequacies to the agreement. These inadequacies include the implementation and compliance mechanism, the lack of obligations regarding the stationary combustion of coal, the lack of specificity in language, and the lack of explicit protected status for vulnerable groups.

The agreement has a provision regarding the creation of an Implementation and Compliance Committee so that member states can self-report any instances of non-compliance. While the facilitative nature of the agreement encourages parties to be honest with their

[43] Chen Haijun, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[44] Andrew Clark, "First Full National Reports Of The Minamata Convention On Mercury 2021," *Minamata Convention on Mercury*, 2021.
[45] Giang, Amanda, Leah C. Stokes, David G. Streets, Elizabeth S. Corbitt, and Noelle E. Selin. "Impacts of the Minamata Convention on Mercury Emissions and Global Deposition from Coal-Fired Power Generation in Asia." *Environmental Science & Technology* 49, no. 9 (2015): 5326–35. https://doi.org/10.1021/acs.est.5b00074.
[46] Giang, Amanda, Leah C. Stokes, David G. Streets, Elizabeth S. Corbitt, and Noelle E. Selin. "Impacts of the Minamata Convention on Mercury Emissions and Global Deposition from Coal-Fired Power Generation in Asia." *Environmental Science & Technology* 49, no. 9 (2015): 5326–35. https://doi.org/10.1021/acs.est.5b00074.

behavior, self-reporting is less likely to be accurate.[47] The Implementation and Compliance Committee for the Convention meets annually to go over reports submitted by the member states. In 2021, there was an 85% reporting rate and, in 2022, there was an 86% reporting rate.[48] In 2021 and 2022, 15% and 14% of member states committed violations of the agreement, respectively. The Secretariat of the agreement noted these non-reporting rates as non-compliance while making very few non-compliance reports regarding other obligations states have. Thus, the current reports of non-compliance focus on procedural non-compliance rather than substantive non-compliance. Therefore, current reporting is likely not indicative of actors within member states changing behavior due to the agreement. To rectify this inadequacy, there should be a greater emphasis on moving forward with the managerial model of monitoring. Due to the adverse impacts on population growth, economic growth, and knowledge capital caused by mercury exposure, non-compliance is likely due to a lack of resources rather than wanting to expose toxic metals to the population. To have more information regarding changes that are being made, a model that focuses on helping parties get the resources necessary to fulfill the obligations of the agreement would result in parties being more truthful about the actions being done or not being done. This is known as the managerial model of international treaties which, with self-reporting, peer-reporting, and NGO reporting, there is likely to be more reporting of accurate changes or lack of changes. Even with more reporting of non-compliance, the managerial model will be able to work with parties to address shortcomings of financial mechanisms or other resources that the parties need to implement the agreement.

Another major inadequacy of the Minamata Convention on Mercury is the lack of obligations to limit mercury emissions from stationary coal combustion. While ASGM is addressed in this treaty as it contributes to 37.7% of mercury emissions, stationary coal combustion contributes to 21% of mercury emissions, globally.[49] Without addressing the second major contributor to mercury emissions, the agreement misses an important opportunity to protect human and environmental health from continued mercury exposure. To remedy this inadequacy, the agreement needs to acknowledge the emissions of mercury from coal combustion while mandating obligations for member states to reduce emissions from this source.

Additionally, there is a lack of specificity in the language of the Convention. This is a major problem for the obligations regarding ASGM. While the agreement requires that the industry only be "more than insignificant," parties can interpret "insignificant" differently. Even if there was specificity for how big the ASGM industry must be in each member state, there is no

[47] Ronald B. Mitchell, "Sources of Transparency: Information Systems in International Regimes," *International Studies Quarterly* 42, no. 1 (1998): pp. 111-112, https://doi.org/10.1111/0020-8833.00071.
[48] Conference of the Parties for the Minamata Convention on Mercury: Implementation and Compliance Committee. "Report of the Third Meeting of the Implementation and Compliance Committee of the Minamata Convention on Mercury," *United Nations Environmental Programme* , January 31, 2022, pp. 4-5. & Conference of the Parties of the Minamata Convention on Mercury: Implementation and Compliance Committee . "Report on the Fourth Meeting of the Implementation and Compliance Committee of the Minamata Convention on Mercury." *United Nations Environmental Programme* , 2022, pp. 4-5.
[49] "Mercury Emissions: The Global Context ," EPA (Environmental Protection Agency, 2022), https://www.epa.gov/international-cooperation/mercury-emissions-global-context.

mandate to implement a NAP for any member states that have more than insignificant ASGM industries. The lack of a mandate for NAPs will allow parties to place ideals forth without any commitment to meeting those ideals, giving total control to the party.[50] The lack of specificity and implementation mandates will, no doubt, lead to an agreement where there is legal effectiveness without problem-solving effectiveness.

Finally, the Convention lacks specific protection for vulnerable groups to mercury exposure. As the goal of the agreement is to protect human and environmental health, it is critical to protect the most vulnerable groups from mercury exposure. Those most vulnerable to adverse health effects due to mercury exposure are women and children. Additionally, communities in the Arctic, and indigenous populations around the globe are more vulnerable to mercury exposure due to the biomagnification and contamination of traditional food with methylmercury.[51] Looking specifically at children, the Minamata Convention has major inadequacies. For example, in the ASGM industry, there are about one million children working in ASGM, globally. The child miners are exposed to mercury directly through the panning process and indirectly as the vapors of mercury settle in mining sites post-panning.[52] While there is a provision regarding the reduction and phaseout of ASGM, there is no mention of human rights law in the agreement or the special status of children as a specially protected group. Since there is no protection for vulnerable groups, member states have no obligation to reduce the number of children working in ASGM sites. This inadequacy can be solved by strengthening the agreement to include customary law that protects children while bringing more emphasis to protecting women, Arctic communities, and indigenous communities to ensure that ASGM pollution is mitigated, at the very least, for vulnerable communities.

**Conclusion**

The Minamata Convention on Mercury is a comprehensive agreement that has been effective in motivating member states to change behavior. Although, there is still more to be done to protect human and environmental health from mercury pollution.

This environmental and human health concern became a topic of research and policy in 2003 when UNEP published a report detailing the harm that mercury can have on humans and the environment. A legal framework was developed to mitigate the anthropogenic emissions and releases of mercury. A total of 137 states are bound to the agreement, showing widespread international agreement on this legal framework. This widespread agreement is likely driven by the structure of the agreement. As the Convention is facilitative, enforcement of the obligations is not strict, and the Secretariat prioritizes getting resources to parties struggling to meet the obligations of the agreement. The model of the agreement and the need to protect human and

[50] Andreia L Bento, "All That Is Gold Does Not Glitter': Mercury Exposure to Children in Artisanal and Small Scale Gold Mines and the Inadequacy of the Minamata Convention," *Journal of International Business and Law* 16 (2017): pp. 295-299.
[51] Minamata Convention on Mercury, 2013. Preamble.
[52] Andreia L Bento, "All That Is Gold Does Not Glitter': Mercury Exposure to Children in Artisanal and Small Scale Gold Mines and the Inadequacy of the Minamata Convention," *Journal of International Business and Law* 16 (2017): pp. 286-288.

environmental health from mercury pollution makes this agreement a strong legal framework recognized by the international community.

While the Minamata Convention on Mercury is a strong legal framework, it is critical to assess the agreement's effectiveness. Based on what parties have reported to the Secretariat, the agreement is seen to have changed the behavior of state actors. For example, for China to meet its obligations to the agreement, the Chinese government passed three regulations regarding processes that use mercury and mercury compounds. Actions such as these indicate substantive compliance in that a given party is implementing changes and regulations to meet the requirements of the law. However, the Secretariat has reported non-compliance in regard to parties submitting their reports and NAPs in a timely manner. While this may indicate that the Convention has less information on how best to assist parties, this is procedural non-compliance which does not deem this international Convention ineffective.

Even with the Minamata Convention on Mercury being considered a strong, comprehensive agreement, it is essential to address its shortcomings. This agreement needs a more adequate monitoring mechanism to best assist parties, explicit human rights protections, and obligations for every major source of mercury emissions, stationary coal combustion. Without acknowledging what the Minamata Convention on Mercury lacks, the international community will not adequately achieve its goal of protecting human and environmental health from mercury emissions and releases. The Minamata Convention on Mercury is a strong step in the right direction, but a more comprehensive agreement is required to create the most protection for people and the environment.

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# *Prison Abolitionism and Consequentialism*

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**Abstract:**

This paper argues that consequentialism is a better theory of punishment than retributivism. It begins by demonstrating that neither retributivists nor consequentialists can convince skeptics the pain experienced by punished criminal wrongdoers is either inherently good or bad. Despite this stalemate, however, the paper affirms that legal scholars should adopt consequentialism over retributivism, especially in the face of persuasive challenges prison abolitionists aim at the American criminal justice system, for two important reasons. First, whereas retributivism can easily be distorted to facilitate tyrannical practices, consequentialism acts as a buffer which attractively compels the state to justify its decision to punish. And second, as opposed to the staunchly singularist view embraced by retributivists, consequentialism’s more pluralistic rationale for punishment allows the state to implement non-retributive responses to crime which are ethically necessary and justified.

**Introduction:**

Punishment requires moral justification. How could it be permissible to intentionally harm another person or to lock a human being in a cage? Historical injustice as well as the systemic inequity perpetuated by America's current criminal justice system exacerbates this difficulty. One in three incarcerated persons is a person of color. Incarceration rates for Black non-Hispanic adult men are almost seven times higher than those of non-Hispanic white men. The incarceration rate for Hispanic men is approximately three times higher than that of white men. The vast majority of incarcerated people come from economically disadvantaged or impoverished backgrounds. Over half of the incarcerated population is mentally ill, undermining the claim that the American criminal justice system convicts on the basis of *mens rea* – or criminal intent.[1] Given this reprehensible situation, it is especially important to investigate the integrity of the foundational theories we use to justify punishment.

The two leading philosophical theories which explain the moral justification for punishment are retributivism and consequentialism. Retributivism holds that guilty criminals must be punished since punishment is the just result for their wrongdoing. Alternatively, consequentialism holds that punishment is justified as a means to secure some beneficial result. This paper demonstrates that neither retributivists nor consequentialists can convince skeptics that the pain experienced by punished criminal wrongdoers is either inherently good or bad. Despite this stalemate, however, consequentialism should be adopted over retributivism, especially in the face of compelling challenges prison abolitionists aim at the American criminal justice system, for two important reasons. First, when applied in practice, retributivism can easily be distorted to facilitate despotic and racially inequitable punishment, whereas consequentialism acts as a buffer which attractively compels the state to justify its decision to punish. And second, consequentialism's pluralistic rationale for punishment, in contrast to the staunchly singularist view embraced by retributivists, allows the state to implement an important range of justifiable responses to crime.

**The Theoretical Stalemate**

Retributivists and consequentialists fundamentally disagree on the issue of whether the pain experienced by punished culpable criminals is a good or a bad thing on its own. According to the retributive theory of punishment, culpable criminal offenders must be punished because (and only because) the offender deserves it.[2] In this way, retributivists consider the pain inflicted upon blameworthy criminals to be a good thing, since it advances their conception of justice. In contrast, consequentialists believe the pain inflicted upon punished criminal offenders to be a bad thing in and of itself. Thus, consequentialists believe punishment can only be justified if it results in some other good consequence(s) which outweighs the bad of the criminal's pain.[3]

[1] Kelly, "Accountability in Criminal Law," 16-17, 150-151.
[2] Moore, "Moral Worth of Retribution," 179.
[3] Beccaria, *Essay on Crimes and Punishments,* chapter II.

*The Indemonstrability of the Retributivist's Basic Assumption*

I consider the retributivist's assumption which insists on "the positive value of the pain and deprivations culpable wrongdoers are made to suffer" to be prejudiced and misguided.[4] Rather, suffering should be viewed negatively and hold no value separate from the positive consequences which result from it. If a skeptic (such as myself) disagrees with the retributivist's assumption, the retributivist will not be able to convince the skeptic of the truth of his assumption. As Michael Moore, a contemporary scholar and prominent defender of retributivism, notes, "[o]nce the deontological nature of retributivsim is fully appreciated, it is often concluded that such a view cannot be justified. You either believe punishment to be inherently right, or you do not, and that is all there is to be said about it."[5] This is a problem for the retributivist, since "the burden is on the retributivist" to convince skeptics that the retributivist view is the one which justice requires.[6] Moore believes one could save retributivism from this dilemma by taking two different approaches:

**I.** One could demonstrate that retributivism follows from "some yet more general principle of justice that we think to be true."

**II.** One could demonstrate that retributivism is a moral principle which "best accounts for those of our more particular judgments that we also believe to be true."[7]

Until society comes up with an indubitable and universally-accepted conception of justice, the first approach is doomed to fail. In his paper, Moore attempts to defend retributivism by utilizing the second approach, but his efforts are ultimately unsuccessful.

Moore, like most retributivists, relies heavily on the notion of a commonly-held retributivist instinct. He claims that most people have an intuition that criminal wrongdoers should be punished not for any good consequences which might result from punishment, but simply because the criminal wrongdoers deserve it. To substantiate his claim, Moore offers a thought experiment similar to the one originally constructed by Kant in *The Metaphysical Elements of Justice*. He directs the reader to imagine a scenario in which a person culpably commits heinous crimes, but there is no consequentialist reason to punish: "The murderer has truly found Christ, for example, so that he or she does not need to be reformed; he or she is not dangerous for the same reason; and the crime can go undetected so that general deterrence does not demand punishment."[8] Moore postulates that under this imaginary scenario, the majority of people will still feel some inclination to punish. And he claims that this widespread retributivist instinct is a righteous moral sentiment which substantiates the rectitude of retributivism.

In the end, however, the idea that the saint should be punished under Moore's thought experiment is unconvincing. In fact, since no good outcomes would come of it, it seems that the saint ought not to be punished. As Moore himself admits, his claim about the existence of a widely-held retributivist instinct is merely a "hypothesis" unsupported by evidence.[9] It is just as plausible that the purely retributivist instinct which Moore describes does not exist or is not commonly held. When people feel an inclination to punish wrongdoers, it is quite possible that observers falsely identify this inclination as retributivist when the sentiment in fact exists due to the internalization of consequentialist rationales, such as "the need for deterrence, or the need to

[4] Kelly, "Accountability in Criminal Law," 23.
[5] Moore, "Moral Worth of Retribution," 182.
[6] Kelly, "Accountability in Criminal Law," 23.
[7] Moore, "Moral Worth of Retribution," 183.
[8] Moore, "Moral Worth of Retribution," 184.
[9] Moore, "Moral Worth of Retribution," 185.

incapacitate such a dangerous person, or the need to reform the person."[10] If this is the case, most people do not have the retributivist inclination of which Moore speaks, and his argument is invalidated.

Furthermore, even if it were a given that most people do in fact possess purely retributive instincts, in order for his argument to be convincing, Moore still needs to demonstrate that this instinct is a moral sentiment which should be the foundational basis for our theory of punishment. To resist him, it is quite possible that retributivist instincts derive from odious sources, such as the Nietzschean notion of *ressentiment* – a desire for revenge involving the belief that someone else is responsible for one's impotent and constrained position in life.[11] It may be well-founded to assert that "intuitions play an important role in justifying conceptions of morality."[12] But while one can use this position in support of retributivism if one assumes the existence of widespread retributive intuitions, it is equally compelling to claim (as this paper does) that human beings possess anti-retributive moral intuitions–such as mercy or forgiveness–which should prevail in our philosophy of punishment. It is true that Moore can plausibly endorse retributivist inclinations by claiming they are motivated by the "virtuous emotions of guilt and fellow feeling."[13] But one can just as plausibly argue that merciful inclinations are motivated by the virtuous emotions of compassion or pity. If one assumes that human beings do in fact possess these widespread anti-retributive sentiments, then this recognition provides good reason to mistrust retributivism.

In response, Moore admits that there might be good reason to doubt the rectitude of retributivist sentiments. But he counters that theorists should also mistrust anti-retributive sentiments which "transfer our fellow-feeling from victim to criminal" since these "antiretributive judgements are also often motivated by some of those same nonvirtuous emotions," such as the narcissism of desiring the "elevation of self by pity."[14] But even if one accepts Moore's argument that anti-retributivist sentiments warrant just as much mistrust as retributive sentiments, this is hardly a convincing argument for the adoption of retributivism. Rather, it is merely a parry which reassigns the burden of persuasion from the retributivist to the consequentialist. Despite their best attempts, retributivists are unable to persuasively demonstrate the truthfulness of the proposition that the pain inflicted on criminal wrongdoers is a good thing in and of itself.

*The Comparable Indemonstrability of the Consequentialist's Basic Assumption*

At this point, however, it is important to recognize that Moore's counterargument which reassigns the burden of persuasion from the retributivist to the consequentialist is effective. Just because the retributivist is unable to convince skeptics of her basic claim that the pain experienced by criminal wrongdoers is a good thing, it does not follow that consequentialism is the better theory of criminal punishment. As Moore asserts, "[o]ne cannot defeat the central retributivist claim–that justice is achieved by punishing the guilty–simply by assuming that it is false."[15] Ultimately, the consequentialist faces a similar dilemma as the retributivist. For until the consequentialist is able to discover an objectively true consequentialist conception of justice or prove that the inclination for mercy is a universally held and decisively righteous moral

[10] Moore, "Moral Worth of Retribution," 184. See also Smith, *The Theory of Moral Sentiments*.
[11] Moore, "Moral Worth of Retribution," 209; Nietzsche, *Genealogy of Morals*, 86.
[12] Kelly, "Accountability in Criminal Law," 23; Moore, "Moral Worth of Retribution," 189.
[13] Moore, "Moral Worth of Retribution," 209.
[14] Moore, "Moral Worth of Retribution," 209-211.
[15] Moore, "Moral Worth of Retribution," 185.

sentiment, the consequentialist will be unable to convince skeptics of her basic assumption that the pain experienced by punished criminal wrongdoers is a bad thing in and of itself.

**Practical Considerations Favoring the Adoption of Consequentialism**

Despite the stalemate which arises from the fact that neither consequentialists nor retributivists are able to convince skeptics of their respective basic assumptions on the goodness or badness of the pain experienced by criminal wrongdoers, consequentialism ought to be adopted over retributivism for practical considerations which can be distilled into two main categories.

*Whereas Retributivism Promotes Oppression, Consequentialism Promotes Mildness*

In an imaginary world where the theory of retributivism is perfectly applied, people would only be punished proportionally to their levels of culpability. As the American criminal justice system currently operates, however, where it is estimated that "over half of the incarcerated population is mentally ill," *mens rea* requirements are essentially meaningless, and "the criteria of criminal liability call for the punishment of actors who may be neither blameworthy nor deserving of punishment."[16] Since retributivism associates criminal conviction with moral culpability, the theory of retributivism is easily distorted. In practice, retributivism backwardly compels people to assume that those who are criminally convicted are culpable and hence deserving of harsh punishment, when in fact they may not be.[17]

Prison abolitionists warn that this retributivist manner of thinking problematically allows ordinary people to rationalize the overly-severe and inequitable carceral punishment system. For once a criminally-convicted person is stamped with "vicious character" or "character-revealing patterns" of vicious behavior, this person can easily be considered an 'other' who is undeserving of basic humanity.[18] Famous activist and scholar Angela Davis expounds upon the racialization of this phenomenon. She argues that due to the prevalence of racism, "'criminals' and evildoers are, in the collective imagination, fantasized as people of color" who can be punished severely. Accordingly, Davis highlights that prisons function "as an abstract site into which undesirables are deposited."[19] Prison abolitionists claim American prisons do not exist to advance justice or administer retribution to wrongdoers. Rather, prisons were implemented to maintain an oppressive, racist, and exploitative social order in the aftermath of the abolition of slavery. As acclaimed scholar of race and the law Dorothy Roberts attests, "[t]he purpose of carceral punishment was to maintain a racial capitalist order rather than to redress social harms — not to give black people what they deserved, but to keep them in their place."[20] And prison abolitionists credibly maintain that prisons continue to serve this function today.[21] Under these circumstances, the theory of retributivism acts as a veneer which in practice enables the pernicious inequities of the American criminal justice system.[22]

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[16] Kelly, "Accountability in Criminal Law," 16-17; Roberts, "Abolition Constitutionalism," 35.
[17] Kelly, "Accountability in Criminal Law," 44.
[18] Kelly, "Accountability in Criminal Law," 24.
[19] Davis, *Are Prisons Obsolete?*, 16; Roberts, "Abolition Constitutionalism," 16.
[20] Roberts, "Abolition Constitutionalism," 34; Davis, *Are Prisons Obsolete?*, 26-29; Blackmon, *Slavery by Another Name*, 4-6.
[21] Roberts, "Abolition Constitutionalism," 37; Davis, *Are Prisons Obsolete?*, 38.
[22] To provide just one example, "Not only are black people five times as likely to be incarcerated as white people, but also the lifetime probability of incarceration for black boys born in 2001 is estimated to be thirty-two percent compared to six percent for white boys." See Roberts, "Abolition Constitutionalism," 13.

In addition, under the retributivist rationale for punishment which labels those who are criminally convicted as evildoers, criminal conviction necessarily carries with it the "life-altering social stigma" and hardships of a criminal record, permanently limiting "a person's ability to earn a living, to secure housing, to go to college, and to retain custody of children."[23] Once again, retributivism rationalizes disproportionately harsh punishment, even though retributivists themselves purportedly cherish proportionality.

It would be conceivable for partisans of retributivism to argue that the current American carceral system does not represent the genuine retributive philosophy of punishment and that steps could be taken to reform the system so that it more accurately represents a purer form of retributivism. But due to the moral blame retributivism associates with those who are criminally convicted and the emphasis retributivism places on the necessity of punishing all criminal wrongdoers for the purpose of justice, it is hard to deny that retributivism is easily expanded and distorted in a way which elicits unjustly racist and overly-harsh practices.

In stark contrast with retributivism, consequentialism requires the state to establish positive benefits to society when it chooses to punish. Indeed, as Beccaria proclaims, "[e]very punishment which does not arise from absolute necessity...is tyrannical."[24] This difference in emphasis is crucial. Whereas retributivists believe that the state has a "*duty*" to punish criminal wrongdoers simply because they deserve it, consequentialists consider punishment to be permissible *only if* the good consequences which result from punishment outweigh the bad of the pain experienced by the punished criminal.[25] In this way, while retributivism enables unjust and excessive punishment, consequentialism can be utilized as a bulwark against harsh responses to criminal behavior.

*Consequentialism Provides an Attractively More Pluralistic Rationale for Punishment*

Retributivists adhere to a parochial conception of justice. They claim that the state should punish because–and only because–the pain of criminal wrongdoers is necessary according to their rigid conception of retributive justice. If the retributivist provides any other rationale for punishment, the retributivist will inevitably slip into a consequentialist outlook which justifies punishment on the basis of some other good consequence which results from it. However, as the first half of this paper reveals, the retributivist's view of justice is not shared by everyone. Accordingly, if people do not already hold a retributive view of justice, retributivism is bound to dissatisfy them as a theory of punishment.

Contrastingly, consequentialism allows for a more pluralistic view on the proper relationship between the state and criminal wrongdoers. Due to the more flexible conception of justice advanced by consequentialism, consequentialists can offer a variety of reasons to explain the ways in which the state is sometimes justified in punishing criminals, such as for the purpose of deterring future crime, expressing the intolerability of prohibited behavior, repairing damage done to victims and society, protecting its citizenry from bad actors, seeking to reform the criminal, etc.. Since consequentialism more inclusively validates each of these reasons as a potentially legitimate basis for punishment, the state can better justify punishment to citizens who possess diverging rationales for condoning punishment. In this way, the state can remain neutral on the contested and potentially alienating debate about whether the pain done to criminals is a good or bad thing in and of itself. Considering that our most foundational

[23] Kelly, "Accountability in Criminal Law," 39; Roberts, "Abolition Constitutionalism," 37-38.
[24] Beccaria, *Essay on Crimes and Punishments*, chapter II.
[25] Moore, "Moral Worth of Retribution," 182. Beccaria, *Essay on Crimes and Punishments*, chap. III.

conceptions of legality and sovereignty require the state to punish in some instances, consequentialism allows for a variety of justifications which legitimize the state and sovereign's power and responsibility to punish.

At this point, however, it is important to acknowledge the compelling challenges prison abolitionists direct at the American carceral system. Foremost, prison abolitionists offer persuasive evidence which indicates that prisons do not deter crime or make society safer. Indeed, as Davis underscores, "the practice of mass incarceration during [the Reagan era] had little or no effect on official crime rates."[26] Rather, abolitionists convincingly aver that mass incarceration actually engenders *higher* crime rates since "it tends to reproduce the very conditions that lead people to prison;" incarceration devours social wealth, subjects convicted persons to psychological harm, breaks up family ties, and encumbers the criminally guilty with the "insurmountable burden" of a criminal record.[27] Similarly, instead of producing the positive consequence of rehabilitation by compelling convicted persons to "reshape their habits and even their souls" through "penitence," in reality, prisons harden individuals.[28] Finally, mass incarceration superficially relieves society of its responsibility to address the deeply entrenched social problems which afflict poor and disadvantaged minority communities, and it diverts vital resources away from programs which actually benefit these communities.[29]

These critiques may challenge the American prison system, but they do not necessarily challenge the consequentialist philosophy of punishment. It would be feasible for a critic to make the argument that since consequentialism provides a broad variety of possible reasons to explain why the state is sometimes justified in punishing, the theory dangerously provides the state with excuses for harsh practices of punishment which are in fact unjustifiable. Notwithstanding, adherence to consequentialism can be maintained. To counter this criticism, it should be noted that consequentialism beneficially urges the state to take heed of a wide array of fundamental values when determining whom it will punish--values such as security, lawfulness, the protection of the general welfare, the protection of its citizens' individual rights, international reputation, and the virtuous cultivation of its citizenry. This outlook provides advocates of gentle and non-carceral responses to criminal wrongdoing with a slew of avenues by which they can challenge the system of carceral punishment.[30] In the end, one can accept the scathing challenges prison abolitionists make to the American carceral system while still upholding the ideology of consequentialism. Indeed, many of the criticisms leveled by prison abolitionists at mass incarceration are most effective under a consequentialist argument that prisons result in drastically iniquitous outcomes.

Because human beings are not angels, our most fundamental notions of law require the state to punish in some cases.[31] The difficulty in espousing a theory of criminal punishment lies in identifying a theory which allows the state to control the citizenry appropriately but which also prevents the state from punishing despotically. Unlike retributivism, consequentialism is not married to a controversial and easily-perverted conception of retributive justice but instead

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[26] Davis, *Are Prisons Obsolete?*, 12.
[27] Davis, *Are Prisons Obsolete?*, 17; Roberts, "Abolition Constitutionalism," 37-38.
[28] Davis, *Are Prisons Obsolete?*, 26.
[29] Davis, *Are Prisons Obsolete?*, 16; Roberts, "Abolition Constitutionalism," 15.
[30] For example, in order to counter excessively harsh carceral punishment, advocates of gentleness might utilize Beccaria's advice that mild punishments are typically more effective at deterring crime than harsh ones. See Beccaria, *Essay on Crimes and Punishments,* chap. XXVII. See also Montesquieu, *Spirit of the Laws,* Bk. 6, ch. 12.
[31] Madison, *Federalist 51*.

allows society to consider a host of other important values, including mercy. Accordingly, consequentialism permits the state to respond to crime with ethically necessary rehabilitative, restorative, and other non-retributive approaches, which will help to repair the injustices the current system perpetuates.[32]

In 1854, Frederick Douglass warned that the extreme injustice of slavery would reverberate outwards until it jeopardized the survival of America's constitutional democracy. He attested slavery "would drive out the school-master, and install the slave-driver, burn the school-house, and erect the whipping-post, prohibit the Holy Bible and establish the bloody slave code, dishonor free labor with its hope of reward, and establish slave labor with its dread of the lash."[33] Prison abolitionists persuasively claim that mass incarceration is the grandchild of slavery and that the profound injustice of mass incarceration has had a similarly corrosive effect on America. As Roberts notes, in the age of mass incarceration, "carceral logics take over ever-expanding aspects of our society" so that many aspects of life including homelessness, immigration and welfare begin to be governed by a carceral ethos of caste and subjugation.[34]

Once we begin to take heed of the arguments made by prison abolitionists and other social justice activists, it becomes clear that we must sweepingly transform the American criminal justice system. We must better account for the circumstances of each individual perpetrator when determining how to respond to crime. We must recognize and begin to make amends for the deep-seated influence of racial and social injustice. And we must reframe our perspective on punishment to champion gentleness and mercy over harshness and vengeance. The implementation of these changes is of paramount importance, for as the illustrious Enlightenment philosopher Montesquieu declares, propriety "in criminal judgments, is of more concern to mankind than anything else in the world."[35]

[32] See Kelly, "Accountability in Criminal Law," 17; Roberts, "Abolition Constitutionalism," 44-48.
[33] Roberts, "Abolition Constitutionalism," 60-61.
[34] Roberts, "Abolition Constitutionalism," 17-19; Davis, *Are Prisons Obsolete?*, 38-39.
[35] Montesquieu, *Spirit of the Laws,* Bk. 12, chapter 2.

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