



Front Photo Image Credit: Photo by Chris Grafton, President Obama over Pennsylvania Avenue, Washington D.C., [https://unsplash.com/photos/\\_fDqvDL7C6s](https://unsplash.com/photos/_fDqvDL7C6s)

Back Photo Image Credit: Photo by Pixabay, Silhouette of Tower during Orange Sunset, <https://www.pexels.com/photo/architecture-backlit-dawn-dusk-261093/>

All contents property of Virginia Policy Review and its contributors. Contributors retain all rights to their work. No part of this publication may be reproduced in any form (electronic, photocopying, recording, or otherwise) without the prior written consent of the Virginia Policy Review and its contributors. Nothing in this publication represents the ideas, beliefs, or positions of the Virginia Policy Review, its staff, or the Frank Batten School of Leadership and Public Policy.  
All statements are strictly the ideas, beliefs, or positions of the authors.



Volume XIV | Issue I | Spring 2021

*A student-run journal from*

 UNIVERSITY *of* VIRGINIA  
FRANK BATTEN SCHOOL *of*  
LEADERSHIP *and* PUBLIC POLICY



---

## From the Editor

---

To the Reader,

This letter is supposed to be retrospective. That's what reading letters past editors have published in VPR has led me to believe, at least. Traditionally, I'd recount the past year's events, what they meant to this cohort of editors and students, and how the Virginia Policy Review responded in hopes of shaping our little corner of the policy world. But I find myself less and less inclined to dwell on the past at the expense of turning towards our future. And frankly, Dean Ian Solomon's letter, which follows this one, keeps such an eloquent account of the past 12 months that my own attempt would be redundant at best.

Instead, let's begin by spotlighting our contributors. **Jasmine Rangel** and **Merritt Gibson** begin this issue by asking how to infuse empathy and justice into technologies and policies that, while designed to keep us safe, have caused reckless collateral damage outside and within America. Unsurprisingly, the violence they outline is concentrated in historically colonized and oppressed communities. **Caroline Still** details how COVID has exposed how urgent prison reform is in America, and **Eli Smolen** presents a thoughtful case study of how the central-Indian state of Madhya Pradesh centers community in its law-enforcement policy. Next, **Adam Firebaugh** explores the current political crisis in Belarus and its implications on U.S. foreign policy.

**Megan Rivera** and **Jesse Zmick** both take up topics at the intersection of law and public health. Megan makes a forceful argument that repealing the Hyde Amendment, which significantly limits the use of federal funds for abortions, would carry long-run economic benefits for taxpayers and improve outcomes for low-income women, while Jesse frames our country's current push for widespread vaccination within the broader legal struggle some communities have undertaken to make certain vaccinations compulsory. **Ciara Rivera** follows with a summary of how costly the gender pay gap is to Americans and what we might do to ameliorate it, and **David B. Walek** concludes the issue with a testimonial on COVID testing over the past year, what we have learned, and how to better respond to the next novel public health crisis.

At first glance, the topics our authors write passionately about may seem disparate. Indeed, they cover an impressively broad spectrum of policy issues. But a current of optimism runs through the pages of this journal. Every writer - and VPR team member, for that matter - spent hours working on this project at least in part because they believe the work is worth doing. Fundamentally, policy is forward thinking, and these authors write accordingly: they look back to forge ahead, analyzing history and the status quo to inspire change. Within the words printed on these pages, there is a belief that positive outcomes are possible. A multitude of challenges lie ahead, of course, but I take solace in knowing that despite such a painful and punishing year, this group of writers and editors insist on pursuing a future more perfect than the present.

Lastly, I'd like to take some space to recognize those involved this year's iteration of VPR. To our editors and writers: thank you for your resolve and dedication throughout this trying year. And to our Executive Board: Morgan, thank you for your steadfast and organized work ethic, your adaptability, and your grace in managing me - simply put, this journal would not have been printed were it not for you; Merritt and Aubrey, your advice, keen

eyes, and attention to detail lifted everyone involved in our print and digital publishing spaces this year; Sean, Ben, and Ben, watching you three resurrect Academical has been thrilling - you all should be proud; Sean and Allie, I am continuously amazed at the program you are putting together for our 2021 National Journal Conference, and I can't wait to the fruits of your momentous undertaking; Megan and Ella, VPR reaches more eyes and ears than ever before, all thanks to your dedication. And Megan, know that I couldn't have gotten through this year without you. You're an amazing partner and I love you so much.

We have been through so much this year, yet we persist. Thank you for joining our writers, editors, and me in turning our gaze to a brighter tomorrow. I hope you enjoy Virginia Policy Review Volume XIV.

Warmly,  
Geoffrey Paul

---

**From Ian H. Solomon, Dean and Professor of Practice of Public Policy:  
A Year of Crisis, A Call to Action**

---

A sober pause feels necessary as we take stock of our collective losses in a year defined by suffering. We can take a moment to review our past actions, learn from mistakes, and, with hope, accelerate the process of healing and repair so that we can build a better future.

We reflect first on the toll of COVID-19. As this edition of the *Virginia Policy Review* goes to print, more than half a million people have been killed by the virus in the United States, with another 2.5 million victims worldwide. Beyond the sheer physical toll, the pandemic pushed more than 100 million people globally into extreme poverty and undernutrition. With shuttered schools and businesses worldwide, economic output dropped dramatically and is expected to decline by an estimated \$10 trillion by the end of 2021. As a result, we have seen an increase in unemployment, homelessness, and hunger. Around American Thanksgiving last fall, a *Washington Post* survey found that 12% of Americans (and more than 20% in some cities) reported not having enough to eat in the previous seven days.

We briefly averted our eyes from pandemic news last May when, to our horror, we watched videos of George Floyd taking his final breaths, crying out in desperation for his late mother while a Minneapolis police officer knelt on his neck for more than eight minutes. Numerous videos and accounts from other American jurisdictions exposed publicly for the world the tragic pattern of excessive police and vigilante violence against Black victims, generally without accountability. Reactions to these deaths reignited a global protest movement—as well as a backlash against this movement.

With increasing frequency and intensity over the past year, we observed the ravages of a volatile climate in dangerous floods, damaging mega-storms, and historic wildfires across the globe. Six months after catastrophic wildfires in Australia, we saw images of a California sky turned red as homes and forests burned and people fled for safety. About six months later we saw sunny Texas turn white with ice and snow, its communities and hospitals devastated by power outages, its families freezing in their homes, without heat, electricity, or clean water.

We have witnessed the abandonment of cherished democratic norms—basic notions such as respecting the nonpartisan counting of votes and conceding political defeat. For the first time in more than 200 years, on Jan. 6 we saw a deadly attack on our U.S. Capitol by American citizens spouting rage and the contagious delusions of hate-filled conspiracy theories. We mourn the five people who died in the melee that day as well as the two officers who died by suicide in the ensuing days. We grieve the injuries to our democracy.

The publication of this issue of the *Virginia Policy Review* marks the end of a year that has, indeed, been a long year of sorrow. A year when profound fear—of danger, illness, violence, scarcity, death, or other disruptive forces—has been a regular presence in

many of our lives. The fear and loss have been especially sharp for some people, yet even the most privileged among us have not escaped vivid reminders of our vulnerability.

We naturally look upon this period with regret and “what ifs.” We cannot avoid the conclusion that leadership and public policy let us down. Even unanticipated or unavoidable challenges were exacerbated by our mistakes, such as the anemic and confusing public health response to the pandemic, or the weakness of our political accountability mechanisms. Other problems were more systemic, of course, including our failure to take seriously the danger posed by a changing climate, or our unwillingness to reconstruct our criminal legal system so that it is no longer rooted in violence and white supremacy.

In times like these, it is convenient—and perhaps even emotionally satisfying—to assign blame and responsibility. There was no shortage of poor decisions, disorganization, interference with science, bias, negligence, and other failures, at many levels of government and within the private sector. These will be analyzed and parsed—including by students of leadership and public policy—as they should be, to provide lessons for all of us for years to come.

Yet the inevitable finger-pointing lets too many of us off the hook for problems that date back generations. In many ways, the recent crises have simply exposed the rot beneath our nation’s floorboards, the ugly truth of our refusal to build a foundation strong enough to support all of us—especially our most vulnerable.

For too long, America as a society has tolerated high levels of vulnerability among poor and middle-class individuals and families. Our safety nets are full of holes, even for the people who qualify. Many families need support but fail to qualify under outdated rules or because they can’t navigate unforgiving or labyrinthine systems. During this period of national crisis, too many state and federal systems were tested and found wanting. Our systems of public health, education, food, and public safety were less resilient, less tolerant of distraction or error. Hurricane Katrina. The 2008 recession. The opioid epidemic. The attacks on Sept. 11. We need only look to recent history for reminders, big and small, that we are far more vulnerable than we think we are.

But the extraordinary year we have lived through also included glimpses of hope and progress. The success of multiple vaccines and the failure of the insurrection allow grounds for optimism about our institutions. Historic firsts, including the election of America’s first female vice-president—who is also a woman of color—remind us of the inevitability of change among people. Our near-universal experience of acute vulnerability gives us the opportunity for shared understanding of the chronic fear and ongoing vulnerability of others. Through this empathic lens, we can better understand the suffering in rural communities as well as urban, among Black as well as white, among those with documents and those without. With this awareness, we know the pre-pandemic status quo was not sufficient in the past and certainly will not suffice in the future. We have an opportunity—some might even think of it as a moral responsibility—to build a future that is stronger than our past.

To achieve this within our contemporary political context is daunting. There are at least three strategies that will be important.

The first is to restore trust through a practical, pragmatic focus on delivering effective solutions to the real problems people face. Trust in government is nearly as low as it has ever been. There has been a loss of faith in many of the institutions fundamental to a thriving democracy, including media and higher education. Our best hope to restore trust in public service is to deliver reliable results and quality service. We can aspire to make policies as simple and transparent as possible. We can include “increased trust” as an outcome in both our policy design and evaluation. We have a lot to offer the world through the skills of nonpartisan, evidence-based, and objective problem solving. Let’s create solutions, rather than slogans, to meet people’s needs.

The second strategy is to restore hope for the future. Large segments of our population, as well as communities around the globe, have seen their real incomes decline along with the reliability of their safety nets. Predictable retirement options have morphed into more uncertain and transient jobs, with less long-term security. Some groups have perceived a decline in the social status of their professional, racial, geographic, gender or other identities. They hear predictions of further employment threats due to trade or automation or immigration.

It is not unreasonable for people to fear that recent trends will continue to create greater distress and dislocation. And if we fear our prospects for the future, we may be more likely to hold onto ideas about the past—a time when America might have somehow seemed greater, for example—rather than the present or the future. Those who fear an unwelcome future may seek solace in scapegoats, fantasy, and falsehood.

Policymakers can work to restore hope as an outcome, and to give people a renewed stake in our democracy. What is the policy program that credibly offers hope for Americans of all backgrounds and capabilities? What choices can we make in our post-COVID economy and society that allow those who feel vulnerable to flourish? Defining that program is a policy priority, whether it relates to massive infrastructure investment, education, technology, guaranteed income, or a compelling model of new industrial competitiveness. Ideally it will demonstrate that we all matter, that we are not dispensable, and that we can make the future attractive, healthy, prosperous, and safe for everyone.

The third strategy is to restore goodwill through well-earned humility. Executing and implementing effective policy is hard. Among other reasons, it is hard because policy reflects the contested negotiation over a nation’s evolving values. In our efforts to address problems for others, all of us can learn something by paying attention to the values at stake. The competition among values does not have to be all or nothing, either my values or your values, a winner and a loser in every interaction. We are a complex species with rich and multidimensional moral lives. Effective public policies can integrate our diversity of values.

We sometimes behave as if only one morality is possible, applying binary judgments of “good or bad,” “friend or enemy,” “with us or against us.” This is at least part of the

recipe for civil war. In fact, we can empathize with each other's pain without excusing each other's potential crimes. We can honor each other's humanity without condoning inhumanity toward others. While there may be some values that we feel we cannot accommodate, most of the time we can balance the genuine values of others.

These are the policy and leadership challenges of our time. To convert our fear and anger into service. To build together, rather than to tear down. To reinforce our common values and meet our core human needs. Accepting these challenges may help us to shift from a politics of grievance to a politics of generosity, from leadership based on fear to leadership grounded in courageous love.

It can be done, and the time is now. Let's get to work!

---

## Staff Acknowledgements

---

### *Virginia Policy Review Volume XIV*

<b>Editor-in-Chief</b>	Geoffrey Paul
<b>Managing Editor</b>	Morgan T. Smith
<b>Director of Communications</b>	Megan Elisabeth Rivera
<b>Associate Managing Editor, Editor-in-Chief of the Third Rail</b>	Merritt Gibson
<b>Associate Managing Editor</b>	Aubrey Hobby
<b>Associate Director of Communications</b>	Ella Jensen
<b>Editors</b>	Claire Berg Ethan Betterton Molly Brind'Amour Kevin Heaney Marisa Lemma Isabelle Mayor-Mora Zach Marhanka Camillo Morales Catalina Perez Parra Sam Pittman Michael Pugh Ramya Ravi Eshaan Sarup Andrew Sharpe Julia C. Stamper

### *Academical Podcast*

<b>Director of Operations</b>	Sean Bielawski
<b>Digital Content Producer</b>	Ben Feldman
<b>Digital Content Producer</b>	Ben Teese

### *National Journal Conference: Spring 2021*

<b>Director of Operations</b>	Sean Bielawski
<b>Associate Director of Operations</b>	Allie Strehle

---

We welcome your thoughts. Please forward any comments, questions, or concerns to [virginiapolicyreview@gmail.com](mailto:virginiapolicyreview@gmail.com) or visit us online at <http://www.virginiapolicyreview.org/>.

---



---

## Table of Contents

---

<b>I. The Shortcuts Made in Crises: Slow Killers of American Liberty</b>	
<i>By Jasmine Rangel</i> .....	1
<b>II. Darkness in the Face of Terror: Torture, Legal Manipulation, and Policy Myopia</b>	
<i>By Merritt Gibson</i> .....	8
<b>III. A Captive Audience: The Influence of COVID-19 on Prison Policy and Human Rights Reform</b>	
<i>By Caroline Still</i> .....	18
<b>IV. Community Policing in Madhya Pradesh, India: A Case Study of Philosophy and Practice</b>	
<i>By Eli Smolen</i> .....	31
<b>V. Democracy in Belarus: The American Position</b>	
<i>By The Members of the International Relations Organization at Virginia Tech</i> .....	43
<b>VI. A Case for Repealing the Hyde Amendment</b>	
<i>By Megan Elisabeth Rivera</i> .....	55
<b>VII. Mandatory Vaccines: A Public Health Necessity</b>	
<i>By Jesse Zmick</i> .....	67
<b>VIII. Decreasing the U.S. Gender Pay Gap: Promoting Gender Equality While Addressing the Economic Crisis</b>	
<i>By Ciara Rivera</i> .....	76
<b>IX. Covid Testing: Notes from the Frontline and Thoughts for the Future</b>	
<i>By David B. Walek</i> .....	87



---

## The Shortcuts Made in Crises: Slow Killers of American Liberty

By Jasmine Rangel

---

September 11, 2001 signaled a transformative point for the United States in terms of what actions the citizenry considered viable to protect their civil liberties and civil rights. While the nation was in mourning and confused about the future, Congress passed one of the first pieces of legislation that would undermine these central tenets of American values. The Patriot Act gave, and continues to give, the federal government the authority to subjectively police the bodies of people that are deemed suspicious (ACLU, 2002). However, the Patriot Act is only an accumulation of existing policies that unjustly police the activities, skin color, and choices of individuals who do not appropriately fit into the existing ideals of a community at that time. In fact, this is a very typical pattern from policy and decision makers during times of confusion, fear, and crisis. Laws that date back to the 1800s have been pervading public life and dictating what and who can acceptably take up space, engage with others in public, or simply exist in areas supposedly deemed for everyone. Specifically, the new surveillance state has catalyzed into an entity that is slowly corroding the ability for Black and brown Americans to truly possess civil liberties and rights that are inherently theirs and demands a proper intervention from leadership.

In the United States, there have been various laws and policies that have endorsed the policing of public spaces. Public spaces are a critical part of public life and provide an endless number of benefits to societal cohesion, community growth, and civic life (United Nations Educational, Scientific and Cultural Organization, 2017). However, policies that survey the public have demonstrated that the individuals most likely to receive the brunt end of the consequences for infringing on these rules speaks more to the law's true intentions than the actions of these individuals.

### Vagrancy Laws

Vagrancy laws criminalized “vagrants,” or homeless, poor, beggar, and transient individuals, for certain activities executed in public spaces. Specifically, vagrancy laws tended to focus on restricting the movement of impoverished individuals who were possibly in search of work so that they did not become reliant on local aid (O'Brassill-Kulfan, 2019). Vagrancy laws were originally implemented in 16<sup>th</sup> Century England as a way to maintain the social hierarchy (Goluboff, 2016). In the United States, vagrancy laws in some southern states like Virginia, were implemented right after the end of the Civil War while thousands of newly freed slaves travelled across the nation looking for work (Tarter, 2015). In places like Virginia, vagrancy laws forced those who seemed to lack financial capital or a place to live back into ball and chain, uncompensated labor. Virginia's Commanding General Alfred H. Terry refused to enforce the law, protesting that it would bring back “slavery in all but its name.” (Tarter, 2015, para.1).

In northern cities, vagrancy laws continued to persecute people with different lifestyles or financial circumstances unfamiliar to most of society at that time. By the 1840s, New York's vagrancy laws policed nearly fifty thousand New York City inhabitants (O'Brassill-Kulfan, 2019). Meanwhile, in Philadelphia, many individuals

convicted of vagrancy were women, people of color, or children (O'Brassill-Kulfan, 2019).

Even though vagrancy laws themselves were deemed unconstitutional by the Supreme Court in 1972, municipalities, cities, and towns around the nation continued to pass laws that targeted low-income and vulnerable populations who utilized public spaces differently (O'Brassill-Kulfan, 2019). These new forms of vagrancy laws prohibited camping, panhandling, and loitering, looking to move these unpredictable activities out of public spaces (O'Brassill-Kulfan, 2019).

A study conducted by the National Law Center on Homelessness & Poverty observed a shift in certain local laws that tend to target homeless populations. Figure 1 shows that there were distinct increases in city-wide policies restricting the presence and activities of unhoused individuals (National Law Center on Homelessness & Poverty). The study observed that these policies are usually utilized in order to police un-housed individuals who are sitting, standing still, or lying down, and are often overlapped with trespassing laws. In many cities across the US, vagrancy laws, or those born out of the same notions, have continued to inform what is deemed acceptable behavior in public spaces. These laws continue to unfairly police the most vulnerable individuals who have very few choices for sleeping or seeking shelter by individuals who are unaware or unsure of how to best proceed supporting a population unlike them.

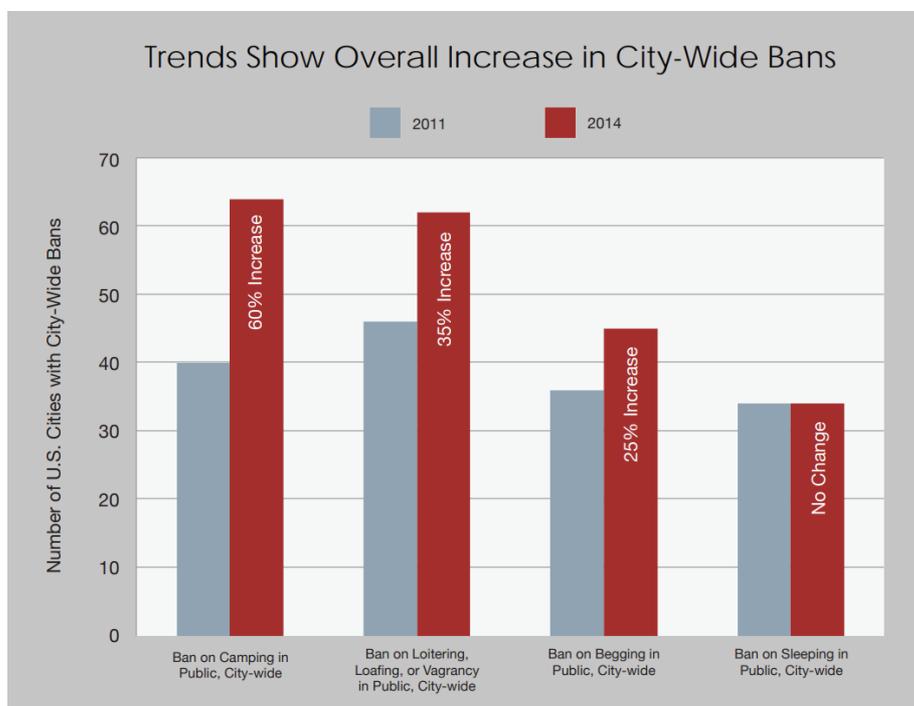


Figure 1: Trends in City-Wide Bans of Homeless Individuals

### Nuisance Laws

Nuisance laws are another category of policies that limit the presence of specific individuals in public spaces who are not welcome or are seen as unpredictable. First and foremost, there is a legal difference between public and private nuisances that has

implications for how this activity is policed; both definitions are vague and leaves room for people and activities to be misconstrued. The obscurity around existing laws dictating public and private space gives substantial leeway to law enforcement to contrive concerns of place and the activities against individuals not in the status quo or with substantial privilege.

Similar to vagrancy laws, nuisance laws have been adopted to allow law enforcement the ability to engineer the law in such a manner that makes achieving their end goal easier. Historically, nuisance policies, typically regarded as “chronic nuisance” or “crime free” policies, originated during the 1980s War on Drugs in order to raid suspected drug houses without due process (Edelman, 2018, para. 3). The War on Drugs, and the subsequent policies that followed, has been known and regarded as the main contributor to the mass incarceration of Black and brown people (Alexander, 2012). In New York City, these laws expanded to consider other areas and give law enforcement the ability to police various areas and individuals deemed as needing more observation and control (Ryley, 2016). Subsequently, since these laws have expanded, civilians have gained confidence to report and police public spaces themselves which has led to Black individuals in public spaces to be deemed “suspicious.”

Legal scholars Taja-Nia Y. Henderson and Jamila Jefferson-Jones assert that new technologies such as smart phones equipped with cameras have shed light onto the ways in which white citizens have used the “invocation of the property law concepts of nuisance and trespass to exclude Blacks from spaces racialized as ‘white’ (Henderson & Jefferson-Jones, 2020, pg.3). White citizens have done so by calling 911 on Black individuals in public spaces in order to police them for an activity that they perceive as infringing on their enjoyment of public space, insinuating this individual is a public nuisance. From BBQ Becky to Central Park’s Amy Cooper, Black individuals have been persecuted in public by white individuals and, as Henderson and Jefferson-Jones point out, “as a property harm - an interference with existing (white) property entitlements- is a deep-seated phenomenon that has been pervasive throughout U.S. history” (Aponte, 2018; Vera & Ly, 2020; Henderson & Jefferson-Jones, 2020). Vague language and confusion around the definition of public space allow for nuisance laws to be taken advantage of, giving existing land use laws and policies the opportunity to be weaponized against Black communities.

### **Video Surveillance & Facial Recognition**

Video surveillance, sometimes referred to as closed-circuit television (CCTV), in the United States has increased dramatically after the 9/11 terrorist attacks on the World Trade Center in New York City (Jones, 2009; Linn, 2011). The passage of the Patriot Act in October of 2001 allowed various levels of government to dissolve certain existing restrictions on information acquisition that could be essential to preempting a possible terrorist attack (Jones, 2009). According to a 2011 article written by Allison Linn, the combination of this act, recent legislation, and the cheaper market for video technology amplified the number of surveillance cameras in cities like New York and Los Angeles (Linn, 2011). Linn notes that in the ten years after the 9/11 attacks, 30 million security cameras have made their way into public and private spheres, simultaneously giving rise to a massive \$3.2 billion video surveillance industry (Linn, 2011). The passage of the Patriot Act, coupled with the manifestation of this new “Big Brother” heightened

surveillance, naturally received plenty of backlash from civil rights groups for the possible long-term negative consequences these policies posed to American citizens.

One of the largest critics of this new surveillance state has been the American Civil Liberties Union (ACLU) who, in 2002, wrote that there is a concern for discriminatory targeting when utilizing video camera surveillance (ACLU, 2002). Researchers and activists have also found that the awareness of the presence of surveillance technology has an unconscious controlling effect on citizens' behavior (ACLU, 2002; Turner, 2016; Najibi, 2020). An individual's awareness of being monitored has physical effects on their body, from the manifestation of post-traumatic stress disorder-like symptoms to heightened fear leading to serious mental health problems like increased anxiety (Rogers, 2018).

One example of drastically increased public surveillance on citizens is Detroit's Project Green Light. Project Green Light has disproportionately deployed surveillance in areas where there are a majority of the city's Black residents. Therefore, if Black and Brown communities face disproportionate targeting in these video surveillance technologies, they also face many of the dire side effects of being constantly surveilled (See Figure 2) (Najibi, 2020).

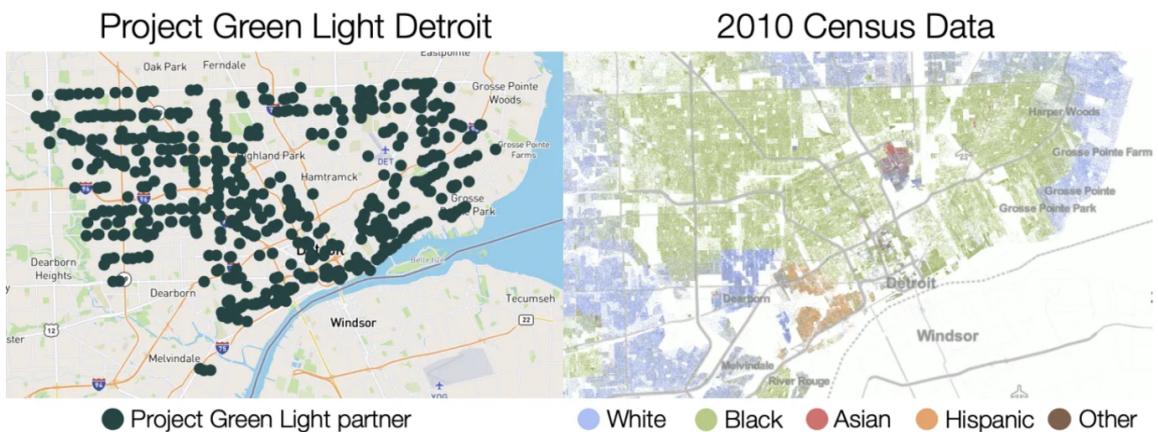


Figure 2: Project Green Light

Proponents of this technology laud it for its capabilities in gathering information to protect the public from crimes and crises. However, the data behind the effectiveness of video surveillance and increased CCTV presence in spaces is mixed. There are several studies that have shown some positive effects on reducing crime, depending on the area they are placed and their visibility to increase a deterrent effect (Welsh & Farrington, 2009; McLean et al., 2013). Regardless of their effectiveness, one major concern within policing and law enforcement work is that surveillance footage is utilized differently in certain physical spaces and towards certain marginalized groups.

Video surveillance is racialized and has been proven to be dangerous for people of color due to identification bias (ACLU, 2002). Facial recognition software, specifically, has gradually begun to be heavily criticized for its inherent racial bias and drastic effects on over-policed and marginalized individuals (Singer and Metz, 2019;

Harmon, 2019). In practice, police use facial recognition to match an individual's photo to mugshots or driver's licenses. Over 117 million Americans in 2016 were estimated to have their faces indexed in a facial recognition software, generally without their consent (Najibi, 2020).

There is mounting evidence that indicates the poor accuracy of face recognition technology on females, Black people, and individuals aged 18-30 years old and this technology is found to be especially inaccurate on women of color (Najibi, 2020). While these findings have prompted corrective action by the companies that manufacture and supply these technologies, such as IBM and Microsoft, there are still concerns that usages surrounding this technology will continue to target Black, Brown, and Muslim communities. For example, since Black individuals are disproportionately arrested for minor crimes, they have a larger portfolio of mugshots for facial recognition software to choose from, as opposed to white individuals who are not arrested at similar rates (Najibi, 2020). While the surveillance technology has expanded to unforeseen proportions, the equity implications are only recently being discovered and brought to light for the public to take note of. These mounting equity concerns provide a mere glimpse into the future, unmanageable accumulation of crises for minority communities that short-cut decisions can lead to.

### **Conclusion & Lessons Learned for Leadership**

Perhaps all of this history comes as a surprise, but it shouldn't. While part of this can be attributed to human nature, the ever-evolving state of leadership must adjust accordingly to acknowledge these detrimental patterns. Leaders, when confronted with the unknown, or with people unlike them, time and time again, compromise values inherently critical to the continuation of American democracy. They take shortcuts to scapegoat, persecute, and undermine the very thing that is supposed to keep millions protected. Therefore, even though times of crisis require timely decisions with some sacrifices, leaders in their training should begin to prioritize equity implications in all policies, and especially those crafted in times of crisis.

### **Works Referenced**

- Alexander, M. (2012). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New Press.
- American Civil Liberties Union (ACLU). (2002, March). *What's Wrong with Public Video Surveillance? American Civil Liberties Union*. Retrieved from <https://www.aclu.org/other/whats-wrong-public-video-surveillance>.
- Aponte, S. (2018, September 2). 2 Investigates obtains 'BBQ Becky's' viral 911 calls. *KTVU Fox 2*. Retrieved from <https://www.ktvu.com/news/2-investigates-obtains-bbq-beckys-viral-911-calls>.
- Edelman, P. (2018, April 10). More Than a Nuisance. *The New Republic*. Retrieved from <https://newrepublic.com/article/147359/nuisance-laws-making-poverty-crime>.
- Goluboff, R. (2016, February 1). The Forgotten Law That Gave Police Nearly Unlimited Power. *Time*. Retrieved from <https://time.com/4199924/vagrancy-law-history/>.
- Harmon, A. (2019, July 8). As Cameras Track Detroit's Residents, a Debate Ensues Over Racial Bias. *The New York Times*. Retrieved from <https://www.nytimes.com/2019/07/08/us/detroit-facial-recognition-cameras.html>.

- Henderson, T.Y. & Jefferson-Jones, J. (2020 February). #LivingWhileBlack: Blackness as Nuisance. *American University Law Review*, 69(3), 863-914. Retrieved from <https://heinonline.org/HOL/LandingPage?handle=hein.journals/aulr69&div=24&id=&page=>.
- Inniss, L.B. (2020). Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance. *American University Law Review*. Retrieved from <http://www.aulawreview.org/race-space-and-surveillance-a-response-to-livingwhileblack-blackness-as-nuisance/>.
- Jones, J. (2009). The Birth of Big Brother: Privacy Rights in a Post-9/11 World. *Politics, Bureaucracy, & Justice*, 1(1), 17-21. Retrieved from [https://www.wtamu.edu/webres/File/Academics/College%20of%20Education%20and%20Social%20Sciences/Department%20of%20Political%20Science%20and%20Criminal%20Justice/PBJ/2009/1n1/1n1\\_03Jones.pdf](https://www.wtamu.edu/webres/File/Academics/College%20of%20Education%20and%20Social%20Sciences/Department%20of%20Political%20Science%20and%20Criminal%20Justice/PBJ/2009/1n1/1n1_03Jones.pdf).
- Legal Information Institute. (n.d). Nuisance. *Cornell Law School*. Retrieved from <https://www.law.cornell.edu/wex/nuisance>.
- Linn, A. (2011, August 23). Post 9/11, surveillance cameras everywhere. *NBC News*. Retrieved from <https://www.nbcnews.com/id/wbna44163852>.
- McLean, S.J. Worden, R.E & Kim, M. (2013, July 7). Here's Looking at You: An Evaluation of Public CCTV Cameras and Their Effects of Crime and Disorder. *Criminal Justice Review*, 38(3). 303-334. DOI: 10.1177/0734016813492415.
- Najibi, A. (2020, October 24). Racial Discrimination in Face Recognition Technology. *Harvard University: The Graduate School of Arts and Sciences Blog*. Retrieved from <http://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/>.
- O’Brassill-Kulfan, K. (2019, January 14). The United States’ long history of criminalizing homelessness. *The Square*. Retrieved from <https://www.fromthesquare.org/the- united-states-long-history-of- criminalizing-homelessness/>.
- National Law Center on Homelessness & Poverty. No Safe Place: The Criminalization of Homelessness in U.S. Cities. *National Law Center on Homelessness & Poverty*. Retrieved from [https://nlchp.org/wpcontent/uploads/2019/02/No\\_Safe\\_Place.pdf](https://nlchp.org/wpcontent/uploads/2019/02/No_Safe_Place.pdf).
- Rogers, K. (2018, November 14). What Constant Surveillance Does to Your Brain. *Vice*. Retrieved from <https://www.vice.com/en/article/pa5d9g/what-constant-surveillance-does-to-your-brain>.
- Ryley, S. (2016, February 4). The NYPD Is Kicking People Out of Their Homes, Even If They Haven’t Committed a Crime. *ProPublica*. Retrieved from <https://www.propublica.org/article/nypd-nuisance-abatement-evictions>.
- Singer, N. & Metz, C. (2019, December 19). Many Facial-Recognition Systems are Biased, Says U.S. Study. *The New York Times*. Retrieved from <https://www.nytimes.com/2019/12/19/technology/facial-recognition-bias.html>.
- Tarter, B. (2015, August). Vagrancy Act of 1866. *Encyclopedia Virginia: Virginia Humanities*. Retrieved from [https://www.encyclopediavirginia.org/Vagrancy\\_Act\\_of\\_1866](https://www.encyclopediavirginia.org/Vagrancy_Act_of_1866).
- Turner, K. (2016, March 28). Mass surveillance silences minority opinions, according to study. *The Washington Post*. March 28. Retrieved from

<https://www.washingtonpost.com/news/the-switch/wp/2016/03/28/mass-surveillance-silences-minority-opinions-according-to-study/>.

United Nations Educational, Scientific and Cultural Organization. (2017). Inclusion Through Access to Public Space. *UNESCO*. Retrieved from <http://www.unesco.org/new/en/social-and-human-sciences/themes/urban-development/migrants-inclusion-in-cities/good-practices/inclusion-through-access-to-public-space/>.

Vera, A. & Ly. L. (2020, May 26). White woman who called police on a black man bird-watching in Central Park has been fired. *CNN*. Retrieved from <https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html>.

Welsh, B.C. & Farrington D.P. (2009, November). Public Area CCTV and Crime Prevention: An Updated Systematic Review and Meta-Analysis. *Justice Quarterly*, 26(4), 716-745. DOI: 10.1080/07418820802506206.

## Darkness in the Face of Terror: Torture, Legal Manipulation, and Policy Myopia

---

By Merritt Gibson

---

The United States' use of torture in the aftermath of 9/11 revealed the very human side of the government. Human, but far from humane, this was the imperfect, dark side of humanity that demanded retributive justice and would stop at nothing to protect its people. From the beginning of our modern world, the law has served to rein in the destructive will of man and offer a more measured and appropriate response to wrongdoing. Leading a grieving and terrified country, President George W. Bush was confronted with the decision of whether or not to pursue Enhanced Interrogation Techniques (EITs) for prisoners of war in the Global War on Terror. These techniques, which include acts like waterboarding, stress positions, and sleep deprivation, are synonymous with torture. At the root of this decision was the legal status of the detainees in question: were they protected by the Geneva Convention of 1949 and the War Crimes Act? Encouraged by members of the Department of Justice, Bush signed a memo titled "Humane Treatment of Taliban and al Qaeda Detainees" in February 2002 (Cohen, 2012). Contrary to its name, the memo permitted the Central Intelligence Agency (CIA) to pursue a litany of inhumane and aggressive interrogation tactics against known or suspected terrorists and their associates (Cohen, 2012). Bush's rejection of the Geneva Conventions was a pivotal moment in a misinformed and malicious saga, one of government officials subverting legal wording to fit their preordained and unproductive agenda. Years later, the U.S. Senate Select Committee on Intelligence would determine that these techniques were "not an effective means of obtaining accurate information or gaining detainee cooperation" (CNN Editorial Research, 2020). In the face of crisis, American policymakers abandoned their duty to the law and the country's ideals with little to show for it but hypocrisy and shame.

The Office of Legal Counsel (OLC), part of the Department of Justice, was at the forefront of the legal maneuvering surrounding the torture debate. In a memo written to the General Counsel of the Department of Defense, Deputy Assistant Attorney General John Yoo addressed the question of whether certain treaties and laws were applicable to al Qaeda and Taliban prisoners (Yoo, 2002). In a memo to Counsel to the President Alberto Gonzales, Assistant Attorney General Jay Bybee determined the appropriate standards of conduct for interrogating detainees (Bybee, 2002). Both Yoo's and Bybee's arguments served to disengage America from its obligations to detainees as laid out by the Geneva Convention of 1949, which serves to protect certain categories of people during wartime. OLC justified the brutal mistreatment of detainees by misrepresenting facts, narrowly interpreting language, and over-emphasizing the executive's plenary power, all while overstating the necessity of extreme interrogation techniques and omitting possible policy alternatives.

### Yoo Memo (2002)

In his memo, “Application of Treaties and Laws to al Qaeda and Taliban Detainees,” John Yoo argued that international treaties and federal laws do not apply to the detention and trial procedures of al Qaeda or Taliban detainees in the conflict in Afghanistan (Yoo, 2002). Yoo structured his argument around the War Crimes Act, 18 U.S.C. §2441 (“WCA”), an act that adopted multiple provisions of international codes into federal criminal law, the most pertinent being the Geneva Conventions of 1949 (Yoo, 2002). Yoo’s argument limited these postwar-era treaties to the context in which they were created, precluding them from developing alongside a modern world with the new geopolitical complexities of terrorism and non-State actors (W. Hitchcock, personal communication, 2019).

Yoo set the groundwork for his argument by explaining that the WCA only criminalizes “grave breache[s]” of the Geneva Conventions, meaning that, even if detainees are legally Prisoners of War (POWs), their rights can be breached to a certain extent without violating the War Crimes Act (Yoo, 2002, p. 6). This preliminary assertion that some mistreatment is legal reveals that the motivation of the Justice Department was not to analyze what would be just, politically prudent, or ethical but rather to decide precisely how far the U.S. government could go in abusing detainees.

The bulk of Yoo’s argument rests upon his reading of common Article 3 of the Geneva Conventions, one that governs signatories’ (High Contracting Parties) conduct in a conflict with a non-signatory. It provides a minimum set of standards of behavior for High Contracting Parties to follow when dealing with POWs, civilians, or sick and wounded people. These protections are activated during “armed conflict not of an international character,” and how one defines “international character” determines whether al Qaeda and the Taliban were owed this minimum standard of treatment (Yoo, 2002, p. 7). Yoo determined that this means “a war that does not involve cross-border attacks — that occurs within the territory of one of the High Contracting Parties” (Yoo, 2002, p. 7). He limited his interpretation to large-scale civil wars between a State and an armed insurgent movement, excluding those “between a State and a transnational terrorist group, which may operate from different territorial bases” (Yoo, 2002, p. 8). He challenged the International Criminal Tribunal for the former Yugoslavia’s *Tadić* decision, which determined that common Article 3 pertains to non-international fighting of any kind, not only civil wars (Yoo, 2002). Understanding that such an interpretation could undermine his argument, he derided it as re-constituting Article 3 as a “catch-all that establishes standards for any and all armed conflicts not included in common Article 2” instead of “a complement to Article 2” (Yoo, 2002, p. 9). To do this, he argued, “is effectively to amend the Geneva Conventions without the approval of the State Parties to the agreements” (Yoo, 2002, p. 10).

Yoo justified his narrow reading on the basis of the Geneva Conventions’ historical context, thereby limiting the treaties to an outdated era instead of recognizing

their need to develop naturally, and legally, into the age of modernity. Because international law was State-centered at the time of the convention, a conflict of the nature occurring in Afghanistan “could not have been within the contemplation of the drafters of common Article 3” (Yoo, 2002, p. 10). This is a gray area of the law, but a broader interpretation would have been equally, if not more, legitimate. In providing legal counsel to the President, it was Yoo’s duty to advise him on other interpretations (W. Hitchcock, personal communication, 2019).

In case his other arguments failed, Yoo provided the President with backup justification for the mistreatment of detainees. He cited the President’s Commander-in-Chief power to manage all matters of the Armed Forces, claiming that “any congressional effort to restrict presidential authority... [through] a broad construction of the Geneva Convention ... would represent a possible infringement on presidential discretion to direct the military” (Yoo, 2002, p. 11). According to Yoo, unless Congress explicitly declares that it means to take this “constitutionally dubious step,” the WCA should be interpreted narrowly to prevent a constitutional issue (Yoo, 2002, p. 11). This assertion of presidential power may not have applied to this situation because the CIA, not the Armed Forces, was the service primarily tasked with detaining and interrogating prisoners (Senate Select Committee on Intelligence, 2014). Yoo used this potentially irrelevant claim about presidential plenary power in an attempt to bolster the weak legal footing of his argument regarding common Article 3.

Yoo concluded that al Qaeda, as a non-State actor, was not eligible to receive protections of the laws of war. It was a non-state terrorist organization with no government, and as such could not sign the Geneva Conventions (Yoo, 2002). Al Qaeda members also could not claim POW status to receive minimum protections under Geneva Convention III because Article 4, which addresses treatment of POWs, does not extend to situations not included in common Articles 2 and 3 (Yoo, 2002). Further, the Hague Convention of 1907 (parts of which were adopted into the Third Convention) states that the rights, laws, and duties of war are reserved for soldiers who meet four requirements: “command by responsible individuals, wearing insignia, carrying arms openly, and obeying the laws of war,” conditions which al Qaeda did not meet (qtd. in Yoo, 2002, p. 13).

Regarding the treatment of the Taliban, Yoo argued that Afghanistan was, in fact, a “failed State” at the time of the signing and therefore the signing was illegitimate (Yoo, 2002, p. 14). Yoo stated that, because the president has the plenary power to interpret treaties and international law “as sole organ of the federal government in the field of international relations,” he can decide whether signatories are able to qualify as nation states and thus legitimately sign treaties (Yoo, 2002, p. 15-16). This argument is a slippery slope. If the president can decide which states are capable of being parties to treaties, opportunities abound for more breaches of obligations and protections. Yoo’s reasoning effectively provided the president with a blank check to pick and choose

which states had the ability to sign treaties and receive subsequent legal protections. Yoo also claimed that, because the Taliban was so influenced by al Qaeda, its leadership could not be separated from the terrorist organization's and therefore "the Taliban militia cannot stand on a higher footing under the Geneva Conventions" (Yoo, 2002, p. 14).

### **Bybee Memo (2002)**

Jay Bybee's memo regarding Standards of Conduct for Interrogation under 18 U.S.C. §2340-2340A addressed which EITs would be legal. He stated that §2340A forbids treatment that is meant to inflict gratuitous mental or physical pain or suffering, all of which must be extreme to be considered torture (Bybee, 2002). His argument rested upon the finding that only the very worst of treatment is illegal; other behavior that is "cruel, inhuman, or degrading" is permissible under §2340A (Bybee, 2002, p. 1).

Bybee spent a considerable amount of time addressing the specific intent to administer pain and suffering. He concluded that §2340A is only violated if pain and suffering are willfully inflicted, a conclusion that is both irrelevant and misleading. The memo's purpose was to inform officials about torture during interrogation, which is, by definition, committed with the intent to hurt someone in order to extract information. By arguing that the defendant in a torture case must act "with the express purpose of inflicting severe pain or suffering on a person within his custody" in order to be found guilty, Bybee willfully ignored the intended purpose and strategy of the interrogation program (Bybee, 2002, p. 4). This portion of his argument functioned only to misrepresent the brutality and intentionality of the EIT program.

The main part of Bybee's argument centered on the statutory definition of torture as "severe physical or mental pain or suffering" and the ambiguity of the word "severe" (Bybee, 2002, p. 5). After consulting dictionary definitions, he concluded that "severe" must mean pain that is "of such a high level of intensity that the pain is difficult for the subject to endure." (Bybee, 2002, p. 5). He referenced other legal definitions of "severe pain" that designate it as harm that "rise[s] to the level of death, organ failure, or the permanent impairment of a significant body function" (Bybee, 2002, p. 6). §2340 does, however, provide more insight into what qualifies as "severe mental [as opposed to physical] pain or suffering": that which is "prolonged" and resulting from the willful or threatened infliction of pain, the use or threatened use of mind-altering substances, the "threat of imminent death," or threats to take one of these actions against another person (Bybee, 2002, p. 6). Bybee looked at international cases to determine a list of techniques that wouldn't constitute torture, including wall standing stress positions, sleep deprivation, hooding, and a starvation diet (Bybee, 2002, pp. 28-29). However, these techniques can all be deployed to an extreme that leads to severe physical or mental suffering. By telling the President that these methods are legal under international law, Bybee inaccurately described the applicable legal standard and thereby set senior officials up to be potentially prosecuted for torture.

Like Yoo, Bybee employed an argument about the President's plenary power over military campaigns. He argued that "any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional" (Bybee, 2002, p. 31). Furthermore, the President's power is "especially pronounced in the middle of a war in which the nation has already suffered a direct attack," even more so when intelligence is necessary (Bybee, 2002, p. 31). Bybee called for the use of the canon of statutory construction established by the Supreme Court to avoid a constitutional conflict between statute and plenary authority, meaning that §2340A "does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority" (Bybee, 2002, p. 35). This was a dangerous argument to make, conferring potentially unlimited power to commit war crimes to the Commander-in-Chief. If the United States can override its statutes by means of plenary power, what stops our foes from doing the same? Why should America expect other nations to uphold their promises if we decide we can choose when it is convenient and optimal for us to follow international law?

Bybee laid out a set of potential defenses to avoid criminal liability should an interrogation tactic enter extreme territory and if presidential plenary power was not upheld in court. The first of these defenses was necessity, the "'choice of evils' defense" (Bybee, 2002, p. 39). In the context of the post-9/11 world where future attacks were feared to be imminent, "any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives" (Bybee, 2002, p. 41). This defense assumed that torture was the best way to retrieve intelligence from prisoners and that it was acceptable to abandon the law in a case of life or death. These are questionable, and dangerous, assumptions. Bybee next mentioned the doctrine of self-defense. Since the interrogating officer himself is at no risk of physical harm in a normal detention setting, Bybee extended self-defense beyond the defendant individually to the nation as a whole (Bybee, 2002). He cited a few cases in which the nation was found to have a right to self-defense, an argument that could only work if EITs were the only method to extract information and only if the argument was applied in a measured way such that the exception does not swallow the rule (Bybee, 2002). Bybee's handling of the self-defense argument seemed like little more than a restatement of the "choice of evils" defense.

### **Academic Criticism**

Academics have published many critiques of the EIT program, rebutting the arguments made by lawyers like Yoo and Bybee. Historian, author, and professor William Hitchcock dismantled the reasoning in Yoo's memo and identified it as an example of the United States' post-9/11 proclivity to sidestep international treaties when they proved inconvenient (Hitchcock, 2012). The country "came to see Geneva as an

obstacle to achieving its aims in the global war on terror,” and legal experts such as Yoo and Bybee attempted to “skirt, defy, or render irrelevant the Conventions” (Hitchcock, 2012, p. 95). The Geneva Conventions were founded on the concept of universal human rights, and the writers added provisions to protect those who would normally be denied such rights in previous laws of war (citation). The debate over who is a POW and is thus afforded such rights had existed for several decades, but it gained more prominence in the post-9/11 world (Hitchcock, 2012).

Countering Yoo’s argument that neither al Qaeda nor the Taliban were due POW status because Article 3 is not “broad” enough in its language, Hitchcock pointed out that the Geneva Conventions have a “conjuring trick” in which they extend “rights to even the lowest of subversive bomb-throwers and [open] the way to a claim that] rights inhered in all peoples, even illegal combatants” (Hitchcock, 2012, p. 102). The writers clearly meant to “cover an ever larger community from which virtually no one was exempt” (Hitchcock, 2012, p. 102). Article 5 of the Geneva Convention of 1949 deems that even spies and saboteurs should be “treated with humanity” (Geneva, 1949). By narrowly focusing on whether detainees qualified for a POW status, Yoo misled the President into believing that a POW designation was the only path to protection. Disproving Yoo once more, Hitchcock explained that the phrase “not of an international character,” central to the application of common Article 3, can be applied to Afghanistan because al Qaeda was a non-State, and therefore the war was *not* international (occurring between multiple states). Hitchcock argued that Yoo’s assertion regarding the President’s unilateral authority to declare a country to be a failed state would set a dangerous precedent for any state to do the same in wartime and deny its foes Geneva protections (Hitchcock, 2012).

Philip Zelikow, a diplomat, professor, and the executive director of the 9/11 Commission, analyzed the justifications, risks, and efficacy of the Enhanced Interrogation Techniques program itself. In his article, “Codes of Conduct for a Twilight War,” he addressed members of the Office of the Vice President and CIA as “policy entrepreneurs,” innovators who embraced their unprecedented role to legally justify the cruel treatment of detainees during the Global War on Terror (Zelikow, 2012, p. 8). These entrepreneurs “framed the issue as a legal question—substantively and bureaucratically” as “partly a matter of clever procedural design” (Zelikow, 2012, p. 5). By making the EIT program a legal issue instead of a policy issue, the entrepreneurs omitted any analysis of whether these EITs were a good choice in terms of effectiveness, public perception, and the country’s reputation. As Zelikow asserted, “the issue was debated as one of what ‘can’ be done,” not “what ‘should’ be done” (Zelikow, 2012, p. 5). The lawyers shaped their evaluation around a predetermined conclusion, one that would justify extreme measures in a time of extreme fear.

OLC failed to acknowledge and weigh the predictable consequences of the interrogation program. Zelikow outlined the many risks associated with beginning such a

novel, controversial program. For one, the interrogation of detainees opened up the possibility for senior officials to be tried for war crimes under federal and international law. Another foreseeable consequence was the damage done to America's reputation on the world stage. The revelation that the United States tortured its detainees irrevocably changed the public perception of the Global War on Terror, which was initially supported by the international community. The United States lost its ethical standing, and the terrorists claimed that they shared a moral plane with America. The EIT program also sent a message to the military that the mistreatment of prisoners was permissible, contributing to the atrocities at Abu Ghraib (Zelikow, 2012). Furthermore, there was a strong likelihood that the government took all these risks for no worthy reason: torture was not necessary to extract information from detainees. The CIA asserted that the program would be "uniquely" effective in obtaining intelligence, and the Director told the President that there were no other practical alternatives (Zelikow, 2012, pp. 26-27). However, the CIA did no policy analyses of other alternatives and avoided the admission that torture could lead to faulty information or less cooperation. The EIT program failed when looking at "its net value compared to the alternatives" (Zelikow, 2012, p. 35).

### **Dissent Within the Bush Administration**

Although the Bush administration overwhelmingly supported the use of EITs, some dissidents spoke out about the ramifications of torture. The State Department's legal advisor, William Taft, warned Counsel to the President Gonzales that rejecting the Geneva Conventions would endanger US troops (Taft, 2002). Taft broke with the general tendency to view the treatment of detainees in a legal light, instead viewing it "from a policy standpoint" (Taft, 2002, p. 2). Rejecting obligations to the Geneva Conventions would "[deprive] our troops [in Afghanistan] of any claim to the protection of the Convention in the event they are captured" (Taft, 2002, p. 3).

In response to a drafted memorandum to the President regarding the applicability of the Geneva Conventions, Secretary of State Colin Powell expressed his "[concern] that the draft does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option" (Powell, 2002, p. 1). This was in response to the breakneck speed at which members of the government, specifically in the Department of Justice, pursued the rejection of the Geneva Conventions and approval of EITs. Powell objected that negating the Geneva Conventions' applicability would "reverse over a century of U.S. policy ... and undermine the protections of the law of war for our troops" as well as have "a high cost in terms of negative international reaction" and "undermine public support among critical allies" (Powell, 2002, p. 2). Despite these voices of reason, Bush sided with Yoo's argument and declared that the Geneva Conventions did not apply to Afghanistan detainees. In his February 2002 memo, he ominously called for "new thinking in the law of war" in a "new paradigm ... ushered in not by us, but by terrorists" (Bush, 2002, p. 1).

### **A Crisis in Retrospect**

Looking back at a crisis 20 years later provides clarity and lessons. In no situation, particularly one as grave as this, should policymakers choose a course of action before giving equal consideration to every other plausible alternative, and the law should never be purposefully manipulated to justify that chosen path. The Bush administration lost sight of its morals and reason in an echo chamber of fear, revenge, and paranoia. Policymakers cherry picked advisors and experts who goaded the U.S. onto a path of torture, most notably Bruce Jessen and James Mitchell, psychologists who developed EITs based on the principle of “learned helplessness,” a theory developed almost 50 years prior and based on nothing more than the behavior of dogs after being electrically shocked (Carey, 2014). The administration surrounded itself with yes-men who overpowered dissidents such as William Taft and Colin Powell’s. The U.S. government neglected to weigh the perceived benefits of torture with its potential costs on the world stage. America suffered a great loss in respect following press coverage of the photographs of the terrible abuses suffered at the Abu Ghraib prison: rape, sexual humiliation, physical assault, and more (Hersh, 2004). If the United States wishes to maintain its status as a world power standing for freedom and justice, policymakers must make decisions that reflect those ambitions.

In the devastatingly emotional days following the 9/11 attacks, Vice President Cheney declared that the U.S. would need to “spend time in the shadows in the intelligence world” on “the dark side” (Cheney, 2001). The administration would, however, remain committed to this darkness long after the shock of the terror attack subsided. Instead of reassessing tactics and objectives after policymakers had time to grieve, the government doubled down on its torture agenda. The Justice Department issued a purposeful misreading of key treaties and legislation to justify the illegitimate mistreatment of prisoners. Yoo and Bybee fashioned multilayered arguments built on shaky foundations that included irrelevant issues meant to divert the President’s attention from weak reasoning. OLC deliberately misled the President to believe that EITs were the only viable option, abandoning its obligation to inform the President of all alternatives and consequences. The Taft and Powell memos appealed to America’s better angels, but they proved toothless in the perpetual shadow of fear following 9/11. In the face of Islamic extremism, America chose extreme policies with little concern for human rights, global reputation, and even the efficacy of said policies.

Governments are made up of humans, but governing bodies are built to be better: to choose ethics over emotion, reason over rashness, justice over revenge, and proven science over pseudoscience. The law was made to guide us through times of crisis, and policymakers should embrace its limitations and challenge themselves to devise more creative, ethical, and effective policies. No matter how tempting it may be, America

must never again adopt a policy primarily based on emotion rather than on scientific, legal, ethical, and policy analysis.

### Works Referenced

- Bybee, J. (2002, August 1). Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. United States, Department of Justice, Office of the Legal Counsel. Retrieved from <https://www.justice.gov/olc/file/886061/download>.
- Carey, B. (2014, December 10). Architects of C.I.A. Interrogation Drew on Psychology to Induce “Helplessness”. *The New York Times*. Retrieved from <https://www.nytimes.com/2014/12/11/health/architects-of-cia-interrogation-drew-on-psychology-to-induce-helplessness.html>.
- Cheney, R., Russert, T. (2001, September 16). Text: Vice President Cheney on NBC’s ‘Meet the Press’. *The Washington Post*. Retrieved from <https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/cheney091601.html>.
- Cohen, A. (2012, February 6). The Torture Memos, 10 Years Later. *The Atlantic*. Retrieved from <https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/>.
- CNN Editorial Research. (2020, September 17). CIA Torture Report Fast Facts. *CNN*. <https://www.cnn.com/2015/01/29/us/cia-torture-report-fast-facts/index.html>.
- Yoo, J. (2002). Memorandum for William J. Haynes II, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees. United States, Department of Justice, Office of the Legal Counsel. <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020109.pdf>.
- Iriye, A., Goedde, P., & Hitchcock, W. I. (2012). "Human Rights and the Law of War: The Geneva Conventions of 1949." *In The human rights revolution: An international history*. Oxford: Oxford University Press.
- Hitchcock, W. (2012). “Human Rights and the Laws of War.” Oxford.
- International Committee of the Red Cross (ICRC). (1949, August 12). “Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).” [https://www.loc.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-IV.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf).
- Taft, W. (2002, February 2). Memorandum for Counsel to the President, Subject: Comments on Your Paper on the Geneva Convention. United States, Department of State. Retrieved from [https://static01.nyt.com/packages/html/politics/20040608\\_DOC.pdf](https://static01.nyt.com/packages/html/politics/20040608_DOC.pdf).
- Powell, C. (2002). Memorandum for Counsel to the President, Assistant to the President for National Security Affairs, Subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in

Afghanistan. United States, Department of State.

<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.01.26.pdf>.

Bush, G. W. (2002). Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, et al., Subject: Humane Treatment of Taliban and al Qaeda Detainees. United States, White House.

[http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf).

Hersh, S. (2004, April 30). Torture at Abu Ghraib. *The New Yorker*. Retrieved from <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

Senate Select Committee on Intelligence. (2014, Dec. 9). Committee study of the Central Intelligence Agency's Detention and Interrogation Program. *U.S. Senate Select Committee on Intelligence*. Retrieved from

<https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>.

Zelikow, P. (2012, April 16). Codes of Conduct for a Twilight War. *Houston Law Review*. Retrieved from <https://houstonlawreview.org/article/4121-codes-of-conduct-for-a-twilight-war>.

## **A Captive Audience: The Influence of COVID-19 on Prison Policy and Human Rights Reform**

**By Caroline Still**

---

### **Abstract**

*The COVID-19 pandemic has exposed the inefficiencies and inequities of criminal justice systems around the world, shedding a light on the rampant overcrowding and lack of adequate healthcare in prisons in the United States and Latin America, two of the world's incarceration leaders. This article contrasts COVID-19 policy responses with those of the 1918 Spanish Flu pandemic. In many ways, the Spanish Flu sparked an increase in national, if not global, awareness of germ theory and scientific disease prevention. However, it is clear that the world failed to apply these hard-won lessons to the carceral system in the same way the lessons were applied to other areas of public health policy. The coronavirus pandemic provides a unique opportunity to generate change in areas such as criminal justice reform and human rights. These could take the form of an increased investment in alternative justice programs or the expanded use of home confinement and compassionate release to mitigate overcrowding. Regardless of which policy reforms take place, all eyes will be on the United States to see how the world's leader in mass incarceration addresses the issues brought to light by the coronavirus pandemic. This could be an opportunity for the United States to redeem its dismal reputation regarding incarceration and reaffirm its commitment to the promotion of human rights. One thing is certain: no one will be following these reforms more closely than the literal captive audiences in the world's prison systems.*

### **Introduction**

In the span of a few short months, the coronavirus pandemic has completely changed our way of life. On a global level, it has ravaged national and regional economies, closing businesses, restaurants, and universities, and introduced an international depression. As of April 2020, it has caused over 270,000 deaths worldwide (Rosner et al., 2020). On a cultural level, it has introduced new phrases and concepts like “social distancing” and “flattening the curve” into our everyday lexicon. It has made quarantine and self-isolation the new “normal.” It has caused shortages of everyday items like toilet paper, hand sanitizer, and soap. However, there are entire populations that are unable to social distance and lack consistent access to running water, let alone hand sanitizer. These are the inmates of the world's prisons, and COVID-19 reveals the inadequacy of many prison facilities to appropriately address public health crises like the pandemic. These deficiencies have sparked a global conversation about the rights of

prisoners during the coronavirus crisis, as well as human rights and human security more broadly.

### **Human Rights and Human Security of Prison Populations**

It is a continuation of a conversation that dates back to December 10, 1948, when the United Nations General Assembly drafted the Universal Declaration of Human Rights (UDHR). This document became the first in history to set a “common standard of achievements for all people and all nations,” and to outline the “fundamental human rights to be universally protected” (United Nations, 2020). The UDHR declares, among other things, that “human beings are born free and equal in dignity and rights,” and that “every [human] has the right to life, liberty and security of person” (United Nations, 2020). These rights are revolutionary first and foremost because they are universal, meaning everyone is entitled to them simply by virtue of being human; they do not depend on government legislation or statutes. Moreover, the UDHR internationalized the duty to protect these rights (Posner, 2019). This meant the burden no longer fell to individual states to uphold these rights, rather it was the responsibility of the world, namely the United Nations.

Since 1948, these rights have developed in what scholars call three “generations” of human rights. The first generation includes political and civil rights like the right to vote, assemble, and be afforded due process (Kapoor, 2020). These rights are largely enforced by the 1966 International Covenant on Civil and Political Rights. The second generation of rights concerns economic, social, and cultural rights, such as the right to health care, food, social security, education, along with the right to work and practice one’s own culture (Kapoor 2020). The third generation includes more abstract, collective rights, such as the right to natural resources, intergenerational equity, self-determination, and development (Kapoor, 2020). While these generations differ in terms of protections provided, they all uphold the five basic principles underlying human rights. That is, that human rights are universal, inalienable, interconnected, indivisible, and non-discriminatory (United Nations Office of the High Commissioner, n.d.).

These basic principles and understandings of human rights eventually developed into a new concept called “human security.” Human security, first coined in the 1994 Human Development Report, “equates security with people rather than territories, with development rather than arms” (United Nations Development Programme, 1994). This report places the individual at the center of the security nexus rather than the nation-state or global region. Human security has two major goals: freedom from want and freedom from fear. These concepts are rooted in President Franklin D. Roosevelt’s “Four Freedoms” speech from 1941. Freedom from want means liberation from poverty, hunger, and economic hardship. It ensures the right to an adequate standard of living. Similarly, freedom from fear translates into freedom from violence and discrimination. These two ideals have become the cornerstones of our understanding of human security.

Additionally, in his landmark paper “Why Human Security,” prominent economist and philosopher Amartya Sen further identified core tenets of human security for the 21st century. He related the concept to the recognition of indignities “related to class, caste, ethnicity, social opportunity, economic resources” and “the expansion of human freedom and dignity” (Sen, 2000, pg. 7). Human security, therefore, encompasses virtually all aspects related to the empowerment and advancement of all people to achieve their full potential.

Human rights and human security relate directly to prison populations and prison management. In fact, the United Nations has passed several resolutions regarding the standards of treatment of incarcerated individuals. One of these documents is the United Nations Standard Minimum Rules for the Treatment of Prisoners, known as the Nelson Mandela Rules. These rules are to be applied at all times, but they are especially crucial during the COVID-19 pandemic. For example, the Nelson Mandela Rules dictate that the “provision of health care for prisoners is a State responsibility” and that prisoners are entitled to “the same standards of health care that are available in the community” (UN General Assembly, 2016, pg. 12). This means that a nation has a duty to provide prisoners the same level of care they would receive in a hospital outside the prison. It also means that they are subject to the same health care standards of community institutions. Furthermore, the Nelson Mandela Rules state that the “prison administration shall take account of the individual needs of prisoners, *in particular the most vulnerable* [emphasis added]” (UN General Assembly, 2016, pg. 8). In the case of the coronavirus pandemic, this category includes high-risk individuals, such as inmates over the age of 60 and those with pre-existing conditions. These rules were adopted by the United Nations General Assembly in 2015, which means all United Nations member states should abide by these guiding principles. Unfortunately, many do not. Recently, the UN Subcommittee on Prevention of Torture called on prisons to reduce their inmate populations, suggesting that inadequate responses to the current public health crisis amounts to torture (United Nations Subcommittee on Prevention of Torture, 2020). While some member states have attempted to reduce their incarceration levels, many have failed and others continue to struggle.

### **History of the 1918 Spanish Flu**

In order to understand the current responses of many countries to COVID-19, it is important to understand the history of pandemic response policy. The most comparable pandemic to our current health crisis was the 1918 outbreak of the Spanish Flu. The exact origin of the Spanish Flu remains contested, but the disease arose in the aftermath of the First World War. The flu received its name because Spain was one of the countries initially hit hardest by the disease and was not subject to the same wartime news blackout as its European neighbors (Trilla et al., 2008). Originating in Europe, the flu quickly spread as World War I ended and troops dispersed across the globe. More

United States soldiers died from the flu than were killed in battle during the war (Center for Disease Control, 2020). The Spanish Flu's estimated death toll was at least 50 million worldwide, making it the deadliest pandemic in history (Center for Disease Control, 2020).

The flu came in two waves. The first wave was relatively mild and included typical flu symptoms, such as headaches, fever, and coughing, and caused very few deaths (Martini et al., 2019). In the fall of 1918, however, the second wave struck with much deadlier symptoms, including pneumonia, killing many victims in a matter of days (Martini et al., 2019). To make matters worse, the Spanish Flu was incredibly contagious, and the United States was short on healthcare professionals in the aftermath of the war. The quick two-to-three day incubation period caused understaffed hospitals to be quickly overwhelmed as the flu spread like wildfire.

While the global extent of the Spanish Flu is hard to determine, public health reports from San Quentin prison in California give us some understanding of what it looked like in the United States. These accounts detail the flu outbreaks and their aftermath at the prison in 1918. They provide key insights into how San Quentin dealt with the pandemic and how its response has shaped prison pandemic policies since. According to the reports, the first outbreak was believed to have started on April 13<sup>th</sup>, 1918, when a new inmate arrived from a Los Angeles jail (Stanley, 1919). The inmate promptly mingled with almost 2,000 other prisoners in the yard and at meals. Within ten days, over 100 inmates were admitted to the hospital and 750 received consultations and medical advice for their symptoms (Stanley, 1919). The prison administration quickly noticed that new cases tended to spike on Tuesdays or Wednesdays, just a few days after the weekly Sunday movie nights. Prison officials attempted a form of social distancing by making inmates stay outside during the day and not allowing them back inside until evening. After some time, the first outbreak subsided.

The second wave began on October 3<sup>rd</sup>, 1919, when another inmate arrived from Los Angeles. This time, prison officials acted quickly by cancelling the Sunday movie nights and quarantining the ill until their symptoms subsided (Stanley, 1919). However, they made the mistake of substituting the movie with an outdoor concert, which resulted in hundreds of inmates coming into close contact with each other. Unsurprisingly, this caused an increase in flu cases. As if they realized their blunder, the San Quentin administration provided crude masks made of flour sack for all prisoners, officials, and their families; however, many inmates perceived these ill-fitting masks as ineffective and refused to wear them consistently (Stanley, 1919). Nevertheless, these piecemeal measures helped mitigate the disease at least marginally, as there were only two deaths and 69 cases total, with 3.7 percent infected compared to the 27 percent in the initial outbreak (Stanley, 1919).

Spurred by these low numbers, the prison decided to reopen the weekly cinema on November 26<sup>th</sup>, 1918, six weeks after its closure (Stanley, 1919). Almost

immediately, 24 inmates were admitted to the hospital with flu symptoms. Thanksgiving gatherings in the prison only exacerbated this new wave of flu cases. The prison reacted by immediately prohibiting all inmate assemblies and quarantining the ill for ten days before reintroducing them to the general prison population (Stanley, 1919). Additionally, the prison quarantined all new arrivals for a minimum of four days before integration. After a month of these precautions, the cinemas were tentatively reopened and normal prison life resumed.

### **Domestic and International Policy Responses to the 1918 Spanish Flu**

All of these phases, in particular the third, hold important implications for coronavirus management. They demonstrate the importance of social distancing and quarantining as effective mitigation measures, as well as the necessity to enact and *maintain* safety measures like masking and hand washing. Most importantly, the third wave reveals the dangers of reopening a prison, a business, a school, or a city too early.

On a larger scale, domestic and international responses to the Spanish Flu were similar. In the United States, populous cities like Philadelphia closed theaters and schools, and banned further public gatherings (Strochlic & Champine, 2020). Cities in Arizona fined their citizens \$10 (or \$173 today) for not wearing masks in public places (Strochlic & Champine, 2020). Meanwhile in San Francisco, a health official shot three people for not complying with masking mandates (Strochlic & Champine, 2020). Across the pond, many cities in Britain also closed “theaters, dance halls, churches” and banned other public gatherings for months (Independent, 2005). Spain, the country most affected by the virus, refused to shutter the majority of its businesses. Schools and universities were shut down, but other gatherings like church services continued (Trilla et al., 2008). When officials in the town of Zamora tried to ban Mass celebrations in the name of public health, the local Bishop accused them of “undue interference with the church” and proceeded to hold even larger weekly Mass gatherings (Trilla et al., 2008, pg. 3). The influence of the church proved powerful and furthered the spread of the flu. Other attempts to contain the virus included disinfecting public transit, theaters, cafeterias, the mail, and even streets. However, many of these attempts amounted to too little, too late. As there was no vaccine or treatment, the only effective methods to contain the flu were social distancing and isolation.

### **Past to Present: Adopting Spanish Flu Policy Lessons for the COVID-19 Pandemic**

While somewhat similar in terms of symptoms, contagiousness, and prevention measures, the Spanish Flu and COVID-19 have several important differences. For one, the incubation period is drastically different. Where the Spanish Flu had a relatively quick incubation period of just a few days, the novel coronavirus can remain dormant for upwards of two weeks before symptoms start to show. COVID-19 is also unique because symptoms may never appear, as many people have tested positive while being

asymptomatic. Both of these factors pose challenges for policy responses. Furthermore, the victim age range for Spanish Flu and COVID-19 differ. The Spanish Flu mostly killed people between the ages of 15 and 34, whereas the coronavirus largely targets those over the age of 65 (Erkoreka, 2010). Still, the Spanish Flu and the responses to it continue to influence public health policy today. Many of the laws and policies that emerged from the 1918 pandemic inform the key components of our current fight against the novel coronavirus. The World Health Organization, for example, arose in the aftermath of the Spanish Flu while “anti-spitting” laws and “handkerchief drills” served as forerunners for current public health policies (Tomes, 2010).

Some of those laws like the anti-spitting and handkerchief laws, while odd-sounding, initiated an international focus on germ theory and scientific disease prevention. This new consciousness is incredibly important when it comes to potential concentrated areas of disease transmission. One of the biggest potential hotspots are, of course, prisons, as demonstrated by San Quentin in 1918. The United States alone accounts for one-fifth of the world’s incarcerated population with two million people currently behind bars at the local, state, and federal levels (Economist, 2020b). This poses several human rights concerns. First, according to the US Department of Justice, federal prisons in the United States are 113 percent above capacity, on average (Bronson & Carson, 2019). This is problematic under any circumstances, but it is especially dangerous in the context of a pandemic. Close quarters and overcrowding make it exceedingly difficult to quarantine ill prisoners from the rest of the inmate population, and social distancing is nearly impossible. Furthermore, prisoners often lack access to basic hygiene supplies like soap and hand sanitizer, making this situation especially dire (Economist, 2020b).

### **Prison Policy Responses to COVID-19 in the United States**

Prisons at the federal level have taken several steps to help mitigate these risks. The Federal Bureau of Prisons (BOP) released a comprehensive pandemic flu response guide in 2012 that encourages prisoners and prison officials to practice “regular hand hygiene” and “respiratory etiquette”, regularly sanitize “high-touch surfaces”, and practice social distancing measures (Federal Bureau of Prisons, 2012, pg. 5). However, these procedures were created to contain a regular influenza outbreak, and COVID-19 exceeded all mitigation efforts. Previous policy measures will not suffice. Recognizing this, the BOP recently released a new set of guidelines. These directions call for a suspension of all unnecessary internal inmate movement and prohibit all social visits, with very limited exceptions (Federal Bureau of Prisons, 2020). In order to compensate for this loss of visitation rights, federal prisoners have access to an extra 500 cellular minutes per month and can teleconference with their legal counsel (Federal Bureau of Prisons, 2020). The BOP also regularly conducts rigorous health screenings of inmates and prison officials. Most importantly, federal prisons have started to downsize by

implementing increased home confinement measures which allow eligible prisoners to carry out their sentence from their homes (Office of the Attorney General, 2020). This option was created for particularly high-risk inmates, such as those over the age of 65, pregnant women, or inmates with a pre-existing condition. State prisons, which hold the majority of American inmates, are struggling to get on the same page. Unlike their federal counterparts, there is no uniform set of procedures states are required to follow. Some states, however, have begun to implement meaningful public health initiatives. The Prison Policy Initiative, a Massachusetts-based think tank, outlined five key policy ideas to help ensure both inmates' health and human dignity are protected. These policies include reducing prison populations and eliminating unnecessary face-to-face contact, as well as ensuring inmates have access to humane, effective healthcare, and providing free, unlimited phone calls to family members (Wagner & Widra, 2020). While no prison or jail has implemented all five of these ideas, most have addressed at least one. For example, local jails in Pennsylvania reduced inmate populations by 30 percent in 30 days (Prison Policy Initiative, 2020). Most of those released were being held pretrial or for non-violent offenses. Additionally, California jails are collaborating with local law enforcement to reduce their new inmate intakes in an effort to preempt more cases (Prison Policy Initiative, 2020). While these measures are a step in the right direction, state, and especially local, jails would benefit from more rigorous and uniform policy solutions.

Non-governmental organizations (NGOs) and think tanks like The Marshall Project and New York University's Brennan Center for Justice developed several ways federal, state, and local prisons and jails can bring themselves more in line with human rights and security standards. In an interview with the Marshall Project, a non-profit news organization founded to bring more oversight to the criminal justice system, the former chief medical officer at Rikers Island jail complex pointed out that "jails and prisons really have very little in the way of infection control" (Blakinger & Schawartzapfel, 2020, para. 6). He elaborated that "there are lots of people using a small number of bathrooms" and "many of the sinks are broken or not in use" (Blakinger & Schawartzapfel, 2020, para. 6). Additionally, many CDC recommendations clash with the reality of life in prisons and jails, where access to items like toilet paper and alcohol-based hand sanitizer is limited for security reasons. Rikers Island jail complex lost its first inmate to COVID-19 on April 5<sup>th</sup>, 2020, and many more have since followed (Economist, 2020b). This uptick in COVID-19 related fatalities underscores the urgent need for reform.

The Brennan Center for Justice at NYU recently released a letter to Attorney General Barr with additional steps the Department of Justice can take to set a national precedent in line with human rights. The letter acknowledges the duty of the state and prisons to "protect the health and safety of all inmates," asking the BOP to expand their

home confinement program and “circulate a ‘Dear Colleague’<sup>1</sup> letter among state criminal justice stakeholders” to influence policy change (Brennan Center for Justice, 2020, para. 3). Their letter also advocates for the release of nonviolent inmates, aging inmates with a low chance of recidivism, and those near the end of their sentence. Moreover, the Brennan Center letter addresses issues related to human security and dignity. They seek to increase inmate access to basic hygiene products by temporarily waiving commissary fees for these items. They are also looking to alleviate some of the pandemic-induced fear and stress felt by incarcerated individuals and their families by waiving fees for phone calls and suspending copays for medical services (Brennan Center for Justice, 2020). These reform measures ensure that inmates’ physical and mental health are prioritized and that they are not subjected to unnecessary risks or fears.

### **Prison Policy Responses to COVID-19 in Latin America**

The same cannot be said for prison populations in regions like Latin America. Latin American prison systems are notoriously overcrowded and underfunded; they have the largest incarcerated population after the United States and China (Economist, 2020a). Many often do not have running water and prisoners have to rely on family members to bring them food in order to subsidize their meager prison fare (Economist, 2020a). In short, Latin American prisons, especially those in El Salvador and Brazil, are breeding grounds for the virus. In Brazil, four out of ten prisons do not have a medical professional on-site and one-third of prisoners reported that their prison did not have a health station at all (Economist, 2020a; Phillips, 2020). Prisoners in São Paulo have had to improvise by making their own personal protection equipment (PPE) and isolation centers (Economist, 2020a). Furthermore, Brazil’s justice minister, Sergio Moro, baselessly claimed that “prisoners are not threatened by the virus and should not be released” (Economist, 2020a). Statements like these, compounded with unsanitary conditions, created panic in the São Paulo prison system in March 2020. When the São Paulo state penitentiary department postponed the prisoners’ annual Easter break due to COVID-19 concerns, hundreds of prisoners in four different prisons rioted and escaped (Phillips, 2020). There have also been riots in Venezuela, Colombia, Peru, and Argentina, all attributed to coronavirus tensions (Human Rights Watch, 2020).

Government response to these riots was swift. In Brazil, the government sent in the military to recapture the escaped inmates (Mallene, 2020). Several prisons also suspended the temporary release of inmates to prevent the spread of the virus (Londoño et al., 2020). Others continue to release those deemed high-risk but at a pace that is “not

---

<sup>1</sup> “Dear Colleague” letters are policy tools employed by government agencies and officials to help explain and interpret existing laws and regulations. They can also be used to advocate for best practices and/or policy solutions like the one proposed by NYU’s Brennan Center.

significantly higher than the typical release rate”, meaning overcrowding continues to run rampant (Londoño et al., 2020). In countries like El Salvador, more than 2,000 people have been detained or arrested for violating quarantine orders, and, in Peru, violators can be jailed for up to three years (Economist, 2020a; Sieff, 2020). This influx of unnecessary prisoners only serves to increase strains on an already overburdened system.

The response to the coronavirus pandemic in many Latin American prisons violates a number of human rights and security concerns. In an interview with *The Guardian*, the Director of the Centre for Crime and Justice Studies, Richard Garside, even went so far to claim that “if you were to set out to create an institution with the express intent of concentrating and transmitting COVID-19, it would probably look much like a prison” (Rix, 2020, para. 2). They fail to meet the minimum standards set by the United Nations and the Nelson Mandela Rules. Moreover, they fail to uphold the dignity of any human being. Given the panicked responses of many inmates, these institutions’ stark lack of regard for their wards is torture. They certainly do not abide by the guidelines of the UN Subcommittee on Torture regarding COVID-19 prevention measures. In Brazil, for example, prison conditions deteriorated to the point where some inmates resorted to “eating toilet paper and toothpaste” for lack of adequate food (Londoño et al., 2020). Regardless of whether the conditions fall under the formal definition of torture, it is clear that many prisons, in both Latin America and the United States, need to implement policy reform in order to protect the health and well-being of their inmates.

### **Room for Improvement: Next Steps for US Policymakers**

The prison reform movement is not limited to the current situation. If anything, the coronavirus pandemic has shed a light on the existing shortcomings of the correctional system and its dire need for change. In other words, thanks in part to COVID-19, public sentiment has shifted in favor of prison reform. Take, for example, the issue of overcrowding. COVID-19 has put prisons and jails under the microscope in terms of overcapacity and the problems that it poses. In Kentucky, for instance, half of the state’s “80 prisons are at 125 percent capacity,” with many prisoners double- or triple-bunked (Lacy, 2020, para. 26). This is considered inhumane under normal circumstances but during a pandemic this is dangerous, even deadly. The silver lining, however, is that an issue like overcrowding that might have struggled to garner public support before now has the attention and scrutiny of the entire world. The United States and other countries have the ability to test-drive reforms like expanded home confinement, compassionate release, and bail reform with less political push-back. With any luck, these reforms may stay in place long after the pandemic is over.

In fact, one of the most beneficial policy initiatives to come out of the coronavirus crisis might be the increased collaboration between law enforcement

agencies and public health officials. Currently, these two sectors are working together to limit unnecessary prosecutions and arrests. In Philadelphia, for example, police officers received a directive to “stop making arrests for nonviolent crimes” like drug offenses and sex work (Lacy, 2020, para.12). This prioritization of violent crime over nonviolent offenses might continue into the future. COVID-19 forces law enforcement to reconsider the merits of alternative justice programs which keep nonviolent offenders out of the prison system. These programs, also called diversion programs, channel youth and nonviolent offenders through alternative corrective programs such as counseling, mentoring programs, and job training initiatives (National Center for Mental Health and Juvenile Justice, 2018). While some states already employ these sorts of programs, the current situation suggests that they should be used more broadly. Not only do alternative justice programs help keep incarcerated populations to a minimum, they also give individuals the tools they need to better themselves and society in a productive way that reduces recidivism rates (National Center for Mental Health and Juvenile Justice, 2018). These benefits, compounded with a new appreciation for their public health implications, make alternative justice programs an even more enticing option for law enforcement moving forward.

Regardless of the specific policy reforms enacted, all eyes will be on the United States to see how the world’s leader in mass incarceration addresses the issues brought to light by COVID-19. And no one will be following these reforms more closely than the literal captive audiences in the world’s prison systems. Ideally, American reforms will set a global precedent for how nations combat overcrowding and prisoner rights violations moving forward. This could be an opportunity for the United States to redeem its dismal reputation regarding incarceration and reaffirm its commitment to the promotion of human rights everywhere.

### Works Referenced

- Blakinger, K., & Schwartzapel, B. (2020, March 6). When Purell is Contraband, How Do You Contain Coronavirus? Retrieved April 27, 2020, from <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.
- Brennan Center for Justice. (2020, April 15). Letter to AG Barr: Expand the BOP's Response to COVID-19 and Help States Safely Reduce their Prison Populations. Retrieved April 28, 2020, from <https://www.brennancenter.org/our-work/research-reports/letter-ag-barr-expand-bops-response-covid-19-and-help-states-safe>.
- Bronson, J., & Carson, E. A. (2019). *Prisoners in 2017*. Bureau of Justice Statistics. Retrieved from <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

- Center for Disease Control. (2019, March 20). 1918 Pandemic (H1N1 virus). Retrieved April 25, 2020, from <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>.
- Economist. (2020a). Prisons worldwide risk becoming incubators of covid-19. Retrieved April 21, 2020, from <https://www.economist.com/international/2020/04/20/prisons-worldwide-risk-becoming-incubators-of-covid-19>.
- Economist. (2020b) The virus should speed efforts to shrink America's prison population. Retrieved April 21, 2020, from <https://www.economist.com/united-states/2020/03/26/the-virus-should-speed-efforts-to-shrink-americas-prison-population>.
- Erkoreka A. (2010) The Spanish influenza pandemic in occidental Europe (1918–1920) and victim age. *Influenza and Other Respiratory Viruses* 4(2), 81–89.
- Federal Bureau of Prisons. (2012). *Pandemic Influenza Plan*. Federal Bureau of Prisons Health Services Division. Retrieved from [https://www.bop.gov/resources/pdfs/pan\\_flu\\_module\\_1.pdf](https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf).
- Federal Bureau of Prisons. (2020, April). BOP Implementing Modified Operations. Retrieved April 21, 2020, from [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp).
- Human Rights Watch. (2020, April 2). Latin America: Cut Prison Crowding to Fight COVID-19. Retrieved April 27, 2020, from <https://www.hrw.org/news/2020/04/02/latin-america-cut-prison-crowding-fight-covid-19#>.
- Independent. (2005, October 22). Flu: how Britain coped in the 1918 epidemic. Retrieved April 25, 2020, from <https://www.independent.co.uk/life-style/health-and-families/health-news/flu-how-britain-coped-in-the-1918-epidemic-5348535.html>.
- Kapoor, Vineet. (2020, April 14). Human Security and Human Rights: Human Rights Connect with Security, Justice in Perspective, GSSJ 3559: New Course on Security and Justice. University of Virginia.
- Lacy, A. (2020, March 28). Coronavirus Pandemic Makes the Case for Criminal Justice Reform. Retrieved April 30, 2020, from <https://theintercept.com/2020/03/28/coronavirus-criminal-justice-reform-jails/>.
- Londoño, E., Andreoni, M., & Casado, L. (2020, April 26). As Coronavirus Strikes Prisons, Hundreds of Thousands Are Released. Retrieved April 29, 2020, from <https://www.nytimes.com/2020/04/26/world/americas/coronavirus-brazil-prisons.html>.
- Mallene, L. (2020, March 18). Hundreds Escape from Brazilian Prisons Amid COVID-19 Lockdown. Retrieved April 25, 2020, from

<https://www.occrp.org/en/daily/11837-hundreds-escape-from-brazilian-prisons-amid-covid-19-lockdown>.

- Martini, M., Gazzaniga, V., Bragazzi, N. L., & Barberis, I. (April 2, 2019). The Spanish Influenza Pandemic: a lesson from history 100 years after 1918. *Journal of preventive medicine and hygiene*, 60(1), E64–E67.  
<https://doi.org/10.15167/2421-4248/jpmh2019.60.1.1205>.
- National Center for Mental Health and Juvenile Justice. (2018). Juvenile Diversion Strategies and Models. Retrieved November 11, 2019, from <https://jjie.org/wp-content/uploads/2018/09/Juvenile-Diversion-Strategies-and-Models.pdf>.
- Office of the Attorney General. (2020, March 26). *Memorandum for Director of Bureau Prisons*. Retrieved April 20, 2020, from [https://www.bop.gov/coronavirus/docs/bop\\_memo\\_home\\_confinement.pdf](https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf).
- Phillips, D. (2020, March 17). 'Come back Monday, OK?' Hundreds of prisoners escape in Brazil amid Covid-19 anger. Retrieved April 20, 2020, from <https://www.theguardian.com/world/2020/mar/17/come-back-monday-ok-hundreds-of-prisoners-escape-in-brazil-amid-covid-19-anger>.
- Posner, M. (2019, December 10). Why We Should Care About Human Rights: The Universal Declaration Of Human Rights At 70. Retrieved April 22, 2020, from <https://www.forbes.com/sites/michaelposner/2018/12/09/why-we-should-care-about-human-rights-the-universal-declaration-of-human-rights-at-70/#4bca164d4db0>.
- Prison Policy Initiative. (2020, April 30). Criminal justice responses to the coronavirus pandemic. Retrieved April 30, 2020, from <https://www.prisonpolicy.org/virus/virusresponse.html>.
- Rix, J. (2020, April 21). Richard Garside: 'The UK is lagging behind Europe on coronavirus in prisons'. Retrieved April 29, 2020, from <https://www.theguardian.com/society/2020/apr/21/richard-garside-uk-lagging-behind-europe-coronavirus-prisons>.
- Roser, M., Ritchie, H., Ortiz-Ospina, E., & Hasell, J. (2020, March 4). Coronavirus Pandemic (COVID-19) - Statistics and Research. Retrieved April 30, 2020, from <https://ourworldindata.org/coronavirus#citation>.
- Sen, A. (2000, July). *International Symposium on Human Security*. *International Symposium on Human Security*. Tokyo. Retrieved from [http://www.ucipfg.com/Repositorio/MCSH/MCSH-01/1.BARCELONA/BLOQUE-ACADEMICO/Unidad-1/lecturas-Complementarias/WHY\\_HUMAN\\_SECURITY\\_Sen2000.pdf](http://www.ucipfg.com/Repositorio/MCSH/MCSH-01/1.BARCELONA/BLOQUE-ACADEMICO/Unidad-1/lecturas-Complementarias/WHY_HUMAN_SECURITY_Sen2000.pdf).
- Sieff, K. (2020, March 25). Soldiers around the world get a new mission: Enforcing coronavirus lockdowns. Retrieved April 29, 2020, from [https://www.washingtonpost.com/world/coronavirus-military-enforce-soldiers-armed-forces/2020/03/25/647cbbb6-6d53-11ea-a156-0048b62cdb51\\_story.html](https://www.washingtonpost.com/world/coronavirus-military-enforce-soldiers-armed-forces/2020/03/25/647cbbb6-6d53-11ea-a156-0048b62cdb51_story.html).

- Stanley, L. (1919). Influenza at San Quentin Prison, California. *Public Health Reports (1896-1970)*, 34(19), 996-1008. doi:10.2307/4575142.
- Strochlic, N., & Champine, R. D. (2020, March 27). How they flattened the curve during the 1918 Spanish Flu. Retrieved April 22, 2020, from <https://www.nationalgeographic.com/history/article/how-cities-flattened-curve-1918-spanish-flu-pandemic-coronavirus>.
- Tomes N. (2010). "Destroyer and teacher": Managing the masses during the 1918-1919 influenza pandemic. *Public health reports (Washington, D.C.: 1974)*, 125 Suppl 3(Suppl 3), 48–62. <https://doi.org/10.1177/00333549101250S308>.
- Trilla, A., Trilla, G., & Daer, C. (2008). The 1918 “Spanish Flu” in Spain. *Clinical Infectious Diseases*, 47(5), 668–673. doi: 10.1086/590567.
- United Nations. (2020). *Universal Declaration of Human Rights*. Retrieved April 22, 2020, from <https://www.un.org/en/universal-declaration-human-rights/>.
- United Nations Development Programme. (1994). Human Development Report 1994 [Abstract]. *Human Development Report*, 1-11. doi:10.18356/87e94501-en.
- United Nations Office of the High Commissioner. (n.d.). What are Human Rights. Retrieved April 22, 2020, from <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>.
- UN General Assembly. (2016). *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) resolution / adopted by the General Assembly, A/RES/70/175*. Retrieved April 22, 2020, from <https://www.refworld.org/docid/5698a3a44.html>.
- United Nations Subcommittee on Prevention of Torture. (2020, March 30). COVID-19: Measures needed to protect people deprived of liberty, UN torture prevention body says. Retrieved April 20, 2020, from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25756&LangID=E>.
- Wagner, P., & Widra, E. (2020, March 27). Five ways the criminal justice system could slow the pandemic. Retrieved April 25, 2020, from <https://www.prisonpolicy.org/blog/2020/03/27/slowpandemic/>.

---

## Community Policing in Madhya Pradesh, India: A Case Study of Philosophy and Practice

By Eli Smolen

---

### Introduction

*“The police have a paramount obligation and duty to function according to the requirements of the Constitution, law and the democratic aspirations of the people. The functioning of the police requires it to be professional and service oriented and free from extraneous influences and yet accountable to the people.”*

– The Statement of Objects and Reasons, Madhya Pradesh Police Act of 2002

At present, the police force in the Indian state of Madhya Pradesh is primarily governed by the Police Act of 1861 (“Status...Reforms,” n.d). In order to address changes in governance and security, the state of Madhya Pradesh enacted a supplemental policing bill, the Madhya Pradesh Police Act of 2002 (“Status...Reforms,” n.d). The passage above is an excerpt from the Act’s introduction. Central to this introduction is accountability, the “aspirations of the people” (The...Vidheyak, 2002a). As the bill recognizes, the police’s function in a democratically oriented state is to serve and provide security services for the State. In Madhya Pradesh, the actualization of the aforementioned text has proven to be demanding. In essence, the legal jargon that stipulates the police are to be accountable and servants of the people necessitates a great deal of implementation and institutional considerations. In the paper to follow, I intend to explore the relevant frameworks and institutions that contribute to the security of Madhya Pradesh and evaluate their ability to ensure the successful actualization of the enumerated goals.

This paper will act as a case study in order to further reflect on community policing and the associated themes of security and public service deliverance. Current literature understands community policing to be a function of philosophy and practice (Ward, 2018). As such, this paper will first investigate the philosophy, or frameworks, then speak to the particular institutions, or policies, relevant to Madhya Pradesh. Ultimately, this paper intends to reflect on internal frameworks and institutions as it relates to outcomes on the ground. Compared to the larger study of community policing, this piece will address internal functions more than the particulars of outward-facing community engagement. Many scholars have narrowly focused on police culture, stating that on the ground engagement mirrors the internal culture of the police force (Rahr &

Rice, 2015). Building off the literature associated with police culture, I intend to inquire what dictates a department's character and what institutional factors may act in defiance to a healthy and service-oriented force. Going beyond the legislation, I will investigate what enables a department to be community-oriented.

Considering full compliance is humanly impossible and the academic community has yet to identify the exact mechanisms that eliminate tensions between a police force and those that are policed; I do not intend to critique the state of Madhya Pradesh. Instead, I hope to highlight the State's failures in order to aid in the development of better systems. Furthermore, the COVID-19 pandemic has effectively reoriented the Madhya Pradesh police force, straining the existing institutions and demanding a larger reflection on human health and security deliverance. As tensions have risen, there have been a few notable and viral instances of police violence (Mathew, 2019). If the anecdotal evidence does not suffice, we can look to the Madhya Pradesh Police Complaint Authority (PCA). While these statistics do not capture the extent of community-police relations, they provide a glimpse into what the status quo may be. According to the PCA there have been 1,822 complaints filed between January 2016 and June 2018 (Mathew, 2019). Of those 1,822 reports, the PCA found 1,718 to be credible and worthy of further investigation (Mathew, 2019). Admittedly, these numbers seem favorable considering the population size and the amount of police encounters that occur. However, we can only assume that 1,822 is a fraction of the instances that merit further investigation. Furthermore, as I'll note in the sections to follow, there are many community policing policies that Madhya Pradesh could implement.

As noted, this piece intends to reflect on how to actualize the enumerated goals. Much of the literature suggests, however, that true implementation is incredibly difficult (Sabatier & Mazmanian, 1979). Nonetheless, there are a few notable conditions that policy makers and bureaucrats may consider in order to maximize the congruence between policy objectives and implementation. Sabatier and Mazmanian outline them as:

1. *The program is based on a sound theory relating changes in group behavior to the achievement of the desired end-state (objectives).*
2. *The statute (or other basic policy decision) contains unambiguous policy directives and structures the implementation process so as to maximize the likelihood that target groups will perform as desired.*
3. *The leaders of the implementing agencies possess substantial managerial and political skill and are committed to statutory goals.*
4. *The program is actively supported by organized constituency groups and by a few key legislators (or the chief executive) throughout the implementation process, with the courts being neutral or supportive.*
5. *The relative priority of statutory objectives is not significantly undermined over time by the emergence of conflicting public policies or by changes in relevant*

*socioeconomic conditions that undermine the statute's 'technical' theory or political support* (Sabatier & Mazmanian, 1979).

As I discuss the philosophical foundations for community policing as well as the relevant practical institutions, it is important to consider the five conditions above.

## **Philosophy: Community Policing Frameworks in the Context of Madhya Pradesh**

### *1. Madhya Pradesh Police Act of 2002*

In order to better understand the successes and failures of the relevant institutions and their ability to ensure actualization, this paper merits a discussion of intentionality. In the spirit of optimism, we are to understand the Madhya Pradesh Police Act of 2002 as a deliberate effort by legislators to incorporate democratic ideals into the Madhya Pradesh police force. As such, we can describe the text as an enunciation of goals. The following will highlight the relevant clauses and contextualize them amongst the broader frameworks of democratic policing.

The first step towards a democratically oriented police force is the codification of democratic ideals. Thus, the Madhya Pradesh legislative body delineated the duties of the police and explicitly stated their orientation. Amongst the standard policing objectives like that of “apprehending offenders” and “regulating traffic,” the Madhya Pradesh legislative body asserts that “officers shall engage in preventative measures” (The...Vidheyak, 2002a). Although this can take many forms, the intention is clear and is an important consideration, acknowledging that security is more effective when it is proactive rather than reactive (Rahr & Rice, 2015). Here it is evidenced that the Madhya Pradesh police force sincerely intends to make the state safer. Although this may seem elementary, there are certainly police-related policies that are more deceptive with their intentions. The Act’s emphasis on “aid and cooperat[ion] with other relevant agencies” underlines this desire for security and is a crucial component to a democratic police force (The...Vidheyak, 2002a). By establishing a relationship with other community-oriented agencies, a police force can increase its capacity as well as decentralize the power to police (Ward, 2018).

Secondly, the text states, in perhaps the most resounding clause, that “officers shall safeguard minorities” and explicitly states that police officers have the duty to “prevent the harassment of women” (The...Vidheyak, 2002a). By doing so, the state recognizes that some communities merit more care than others and indicates that the police force is for the advantaged and the disadvantaged alike. Again, this clause may seem intuitive but the importance of such a statement need not be understated. Similarly, the clause that follows states that “officers shall have strict regard to decency and gentleness” (The...Vidheyak, 2002b). Here, the legislative body raises the standard for

being an officer, stating that, as representatives of the state, officers are entrusted to treat everyone with “strict” respect and dignity (The...Vidheyak, 2002b).

Lastly, and by means of transition, I find Chapter 6’s clause that addresses the deputization of residents to be particularly relevant to this discussion. In order to “keep the peace” or “preserve order,” the Commissioner or Superintendent may request any additional police officers for temporary assignments (The...Vidheyak, 2002c). Here, we can find allusions to co-production, an umbrella term in which “citizens are directly involved in assisting public agencies with developing, implementing, and delivering vital public services” (Brudney & England, 1983). In regards to security services, co-production implies that the community is intrinsically involved with the security of the state. To follow, I will discuss a community policing bill that establishes the Village Defense Teams (Raksha Dal) and illuminates the work of the Neighborhood Committees (Mahala) and the Public Events Committees (Bandobast). Along with the deputization of residents, these procedural meetings are examples of co-production.

## 2. *Community Policing Act of 2002*

This Community Policing Act of 2002 establishes one of the most notable mechanisms of community policing in Madhya Pradesh. I offer this as evidence that the legislative body is actively implementing community policing techniques. The success and relevance of these techniques are undetermined and require the presence of corresponding institutional structures.

The Village Defense teams (Raksha Dal) established by the Community Policing Act of 2002 are the most overt example of community policing and a prime example of co-delivery. Simply put, village defense teams are groups of citizens that have been tasked with typical police functions. Those that are selected by the Superintendent receive a certificate of enrollment detailing the assignment and authorizing individuals to act with the same powers, liabilities, privileges, and protections as a police officer. The Act adds that “due representation should be given to scheduled castes, scheduled tribes, women, and minorities” (Madhya...Adhiniyan, 2002). These groups are then led and trained by non-citizen officers and act in tandem with larger non-citizen police forces (Madhya...Adhiniyan, 2002). As the line between citizen and non-citizen becomes less clear, there is a great deal of normative value that arises considering citizenship, democratic governance, accountability, and social capital (Ward, 2018).

The Neighborhood Committees (Mahala) and Public Events Committees (Bandobast) do not play a role in co-delivery but are relevant to other stages of the policy cycle, namely to designing, co-designing, assessment, and co-assessment. The policy cycle generally includes correlating terms such as policy formulation, adoption, and implementation, as well as some form of agenda setting. After a series of national inquiries in the late 1990s that evidenced biased policing practices, peace committees like the two mentioned above were implemented throughout India (“Status...Reforms,”

n.d). In each locality, these committees are meant to bring a host of stakeholders together to comprehensively discuss security issues. As community members and representatives from the police physically convene to address their goals and grievances, the police have the ability to engage with and design policies particular to the community. Police then have the opportunity to assess and amend policies with community feedback. In Madhya Pradesh, these committees have been codified, with standardized leadership and facilitators (Madhya...Adhiniyan, 2002). Additionally, each committee is mandated to include women and minorities (Madhya...Adhiniyan, 2002).

The Committees in place in Madhya Pradesh are a critical component of the state's community policing model. Today, they serve as a template for departments around the world and have been proven to be a useful case study for co-production and public service delivery. As mentioned however, these committees are not a wholesale solution. Dialogue alone will not address the larger security, capacity, and delivery concerns. Ultimately, in regards to co-production, the state of Madhya Pradesh has employed valuable mechanisms to co-design, co-deliver, and co-assess policing policies. Co-commissioning, the process in which issues are identified and prioritized, isn't sufficiently present in the aforementioned cycle (Nabatchi et al., 2017). Co-commissioning may be alternately referred to as co-prioritization or co-financing (Nabatchi et al., 2017). Lastly, these frameworks of co-production should be implemented throughout the relevant institutions, like that of the judicial system, criminal justice system, and penal system.

### 3. *Democratic Orientations of Service Delivery*

As we move into broader themes of public administration and democratic orientation, I want to start with a framework related to hierarchies. Considering traditional police departments are structured similarly to a military, hierarchy, rank, and decorum are key tenets of most departments (Rahr & Rice, 2015). Furthermore, many departments emphasize strict adherence to the rules and regulations in both practice and training (Rahr & Rice, 2015). These principles, however, have proven to foster an environment of mistrust and encourage those with power to prey on those without it (Rahr & Rice, 2015). In Madhya Pradesh, insubordination by a police officer may result in imprisonment of up to two years and/or a fine of up to two thousand rupees (The...Vidheyak, 2002d). Penalties such as these diminish an officer's ability to think critically and be reflective, both invaluable tools for democratic policing (Rahr & Rice, 2015).

In order to further appreciate the importance of hierarchies and the chain of command, this discussion necessitates an understanding of basic Public Administration (PA) theory. Primarily, PA theory is explained in consideration of a unitary state, one in which authority is vested in the executive (Osborne, 2006). As such, it takes a top-down orientation and is vertically integrated (Osborne, 2006). Hierarchy is thus "the key

resource-allocation mechanism for PA, with a focus upon vertical line management to ensure accountability for the use of public money” (Osborne, 2006). This framework values typical business functions such as efficiency and zero balance budgeting, most of which are not applicable to democratic policing and security deliverance (Osborne, 2006). In contrast, New Public Governance theory considers a pluralistic state and stresses “trust, relational capital and relational contracts as the core governance mechanisms” (Osborne, 2006).

In order for the goals enumerated in the Madhya Pradesh Police Act of 2002 to be appropriately reflected in the police force, reverence for authority ultimately needs to be replaced by appreciation for peer input, adaptation, and reflection. Leadership is also critical as we consider the institutional frameworks relevant to policing. It is important to acknowledge the logistical demands of a public service system and note that quality leadership is certainly a necessity in police departments. That being said, there is an abundance of evidence that indicates the need for a paradigm shift (Rahr & Rice, 2015). To further apply the concepts of New Public Governance, police departments should emphasize institutional goals rather than the whims and wishes of an authority. These themes can be further realized in consideration of Ira Chaleff’s concept of courageous followership. To evidence the gravity of such an orientation I call on an introductory passage from Ira Chaleff’s book *The Courageous Follower*:

*“By weaving the principle of accountable followership into our culture at every level, the fabric will become strong enough to resist the periodic attempts of individual leaders to emboss it with their own marital coat of arms.” (Chaleff, 2009)*

Courageous followership may not be as dire as Chaleff presents it above. Nevertheless, deconstructing the military complex that is overrepresented in policing requires the separation of individuals from the larger structure (Chaleff, 2009). Commissioners, superintendents, and beat officers alike should be beholden to the larger goals. If we consider the goals enumerated by the Madhya Pradesh Police Act, officers in Madhya Pradesh should be answering to “the requirements of the Constitution, law and the democratic aspirations of the people” (The...Vidheyak, 2002e). Theoretically speaking, officers in Madhya Pradesh need not answer to their superiors as much as directly to the goals delineated in the Madhya Pradesh Police Act of 2002.

Furthermore, officers in Madhya Pradesh must reevaluate their role as professionals and embrace the concept of hybridized professionalism (Williams et al., 2016). Traditionally, professionalism implies an elite, distinctive, insular, and self-defined community (Williams et al., 2016). Functionally, “professions are recognized as knowledge systems consisting of problem-solvers to whom all others defer, that wield

unabated authority and autonomy” (Williams et al., 2016). These themes—the elite, insular, and authoritative—inherently contrast the intended goals. The community model that Madhya Pradesh intends to employ assumes that the community has knowledge that the professionals lack and contends that police and the public have mutual rights and responsibilities to ensure public safety.

Moreover, community policing requires a reflective model of professionalism (Williams et al., 2016). This means that police professionals must be reflective and connected to the community. As such, the emphasis of change should move away from management level officers towards beat level officers who are to be understood as individual change agents (Williams et al., 2016). This is contrasted with the traditional model that emphasizes basic science, applied science, and skills or attitudinal components (Williams et al., 2016). Soehn argues that police officers, however, are confronted with predicaments that do not reflect these traditional typologies and require reflection in action (Soehn, 1983). Thus, the source of learning should not come from traditional policing science but a process called double loop learning, learning supplemented by feedback from the community (Williams et al., 2016). In Madhya Pradesh, the aforementioned committees are well suited to provide this feedback. This can also be understood as a transition from know-how to learn-how (Williams et al., 2016).

### **Practice: Necessary Institutions for Community Policing**

In 2006, the Supreme Court of India issued a host of directives for police reform in order to increase objectivity, standardize administrative functions, and establish democratically oriented institutions (*Prakash Singh & Others v. Union of India*, 2006). According to the Commonwealth Human Rights Initiative, an independent non-governmental organization dedicated to human rights in India, no state has successfully implemented all of the directives (Commonwealth Human Rights Initiative, 2020a). Although Madhya Pradesh has made a concerted effort to comply with the Supreme Court’s ruling, it remains non-compliant with various aspects of it (Commonwealth Human Rights Initiative, 2020a). In order to effectively implement a community policing model, Madhya Pradesh must continue to address the Supreme Court’s directives. In the paragraphs to follow I will note Madhya Pradesh’s status for each directive and contextualize it within the field of community policy.

The first directive calls for the establishment of a State Security Commission, an independent body that will draft policy and evaluate the performance of the police (*Prakash Singh & Others v. Union of India*, 2006). In order to ensure that the state government does not exercise unwarranted pressure on the police, this commission’s primary purpose is to act as a buffer between the legislature and police administration (*Prakash Singh & Others v. Union of India*, 2006). Institutions that mediate the relationship between the police and legislators are common throughout the world and are

codified in countries such as Australia, Canada, and the United Kingdom (Bayley & Stenning, 2016). The United States does not have an analogous policy (Bayley & Stenning, 2016). In Madhya Pradesh, a State Security Commission has been established but there is no explicit mandate to ensure that those appointed are appropriately independent (Commonwealth Human Rights Initiative, 2020b). In addition, the Madhya Pradesh Security Commission cannot issue binding recommendations nor is it required to produce an annual report (Commonwealth Human Rights Initiative, 2020b). Without the codification of these two elements, the Madhya Pradesh's Security Commission is relatively ineffective.

Directive two stipulates how the Director General of Police, the executive officer, is to be selected (*Prakash Singh, 2006*). Madhya Pradesh has established a minimum tenure of two years and explicitly states the circumstances in which a Director General can be removed (*Prakash Singh, 2006*). Both of these policies enable the Director General to act independently and make decisions without fear of being wrongfully removed. With that said, the Supreme Court directive mandated that the Union Public Service Commission, the federal government's recruiting agency, create a shortlist for all states to choose their Director General. Madhya Pradesh does not require the Director General to be chosen from the Union Public Service Commission's list and thus gives the state legislature full discretion over the candidate pool (*Prakash Singh, 2006*). This enables the legislature to continue to exert considerable influence over the appointment of the Director General (Commonwealth Human Rights Initiative, 2020b).

Directive three calls for similar legislation to be enacted to protect the positions of Inspector General, Deputy Inspector General, Superintendents, and Station House officers (*Prakash Singh & Others v. Union of India, 2006*). Madhya Pradesh is fully compliant with this directive, stating that each of the aforementioned officers are entitled to a two-year term and can only be removed for extenuating circumstances. This directive does not require the Union Public Service Commission to create a short list (*Prakash Singh & Others v. Union of India, 2006*).

Directive four considers the separation of investigative functions from law and order functions (*Prakash Singh & Others v. Union of India, 2006*). The Supreme Court stated that departments need to further specialize in order to make police work more efficient and to improve rapport with the community (*Prakash Singh & Others v. Union of India, 2006*). Specialization is ultimately a function of the professionalization of police forces and can also be found in New Public Governance theory (Williams et al., 2016; Osborne, 2010). Perhaps more importantly, specialization has practical implications for community policing as many departments phase out the traditional rotation of beat cops. A beat, the territory and time an officer patrols, can be an invaluable tool when considering community relations (Ward, 2018). Simply put, officers should consistently engage with the same community at the same time and place in order to enable relationship building and utilize double loop learning. The

Commonwealth Human Rights Initiative believes that Madhya Pradesh is not compliant with this directive as the state has not provided any details as to how the directive is to be implemented (Commonwealth Human Rights Initiative, 2020b).

Directive five mandates the implementation of a Police Establishment Board, consisting of the Director General and four additional senior officers (*Prakash Singh & Others v. Union of India*, 2006). The Police Establishment Board is tasked with deciding transfers, promotions, and postings, as well as generally reviewing the functions of the police. The Board also functions as an appeal board for officers above the rank of Superintendent (*Prakash Singh & Others v. Union of India*, 2006). These stipulations are to further ensure that the state government doesn't interfere with police functions and are to formalize additional accountability processes. Madhya Pradesh's Board does not act as an appeal forum and does not have the power to review police functions. While it does provide the necessary oversight considering transfers, promotions, and postings, Madhya Pradesh must further empower the Police Establishment Board to become fully compliant with Directive Five (Commonwealth Human Rights Initiative, 2020b).

The sixth and final directive mandates the establishment of Police Complaint Authorities (PCA) at the state and district level (*Prakash Singh & Others v. Union of India*, 2006). The director further stipulates that the Chairperson of the PCA should be a former judge and the other members should be selected from a shortlist provided by the State Human Rights Commission or the State Public Service Commission (Commonwealth Human Rights Initiative, 2020a). This directive is particularly concerned with democratic policing and police accountability. It is important to note however that the PCA differs from the Citizen Review Boards (CRBs) that have come about in the United States. Primarily, PCAs are staffed by civil servants while CRBs are specifically intended to be composed of non-civil service members (Ward, 2018). With that said, Madhya Pradesh is non-compliant with this directive and has only established PCAs at the district level (Commonwealth Human Rights Initiative, 2020a). Furthermore, Madhya Pradesh has not codified how to select members or made PCA rulings binding. Madhya Pradesh's failure to implement each stipulation of directive six is revelatory and may indicate a culture of impunity.

### **Conclusion and Recommendations**

The Madhya Pradesh Act of 2002 and the correlated Community Policing Act of 2002 evidence legislative intent and an acknowledgement of the institutional factors relevant for a democratically-oriented police force. Community policing is ultimately a function of both practice and philosophy, necessitating policy that influences internal culture as well as outward facing service deliverance. By stipulating that the Madhya Pradesh police forces are to engage in preventative measures and leverage community partnerships, the Madhya Pradesh Act of 2002 provides the state with a philosophical backbone more aligned with their espoused democratic ideals. The Community Policing

Act of 2002 actualizes the aforementioned ideals by putting the co-production model into practice. This occurs mainly through deputization and the Village Defense Teams (Raksha Dal), Neighborhood Committees (Mahala), and the Public Events Committees (Bandobast).

By acknowledging the philosophies and practices already in place, this paper can act as an examination of the next steps. Although Madhya Pradesh has implemented mechanisms that align with the co-production model, on account of co-designing, co-delivering and co-assessing, Madhya Pradesh must further consider co-commissioning. The Neighborhood Committees and Public Events Committees may offer up a space for community members to express their priorities, but given its current orientation it remains too reactionary to be considered a co-commissioning mechanism.

In regards to Public Administration theory and the larger service delivery process, policing in Madhya Pradesh has to undergo a considerable transformation. Assuredly, the philosophical orientation of a police force is the most difficult component to evaluate and effect. With that said, the present hierarchies and leadership styles are fair indicators of a department's relationship with New Public Governance. Here, Madhya Pradesh must continue to shift its approach to training and governance in order to mitigate the effects of vertical integration and enable low level officers to become individual change agents. This process is most likely to be affected by changes in officer training and may take decades to become tangible. The concept of professionalism is particularly difficult to transform and will require substantial changes in related socio-economic conditions.

Furthermore, these frameworks must be accompanied by institutions that prioritize democratic principles and a community policing model. The aforementioned 2006 Supreme Court ruling outlined six directives that are to be considered the necessary precursors for an independent, accountable, and democratically oriented police force. Three of the six directives call for the establishment of new institutions, while the other three provide stipulations to ensure existing institutions function with impartiality and efficiency. The implementation of a Police Establishment Board and a Police Complaint Authority, the fifth and sixth directives respectively, have the greatest implications for community policing. Madhya Pradesh should implement a Police Establishment Board to formalize the process by which posting decisions are made and to institutionalize an internal system of accountability. To do so, additional stipulations need to be enacted that empower the Police Establishment Board to act as an internal appeals court as well as a general performance review board. In regards to PCAs, Madhya Pradesh has failed to establish institutional mechanisms that ensure officers are accountable to the public. Although some districts in Madhya Pradesh have implemented a PCA, each district must pass legislation that specifies how to choose the Chairperson and the other members. Additional legislation must also authorize PCAs to issue binding recommendations. Without the codification of these additional safeguards, PCAs are futile.

The Indian state of Madhya Pradesh exemplifies the development of security deliverance and serves as an example of a context driven community policing model. Although the frameworks and policies discussed in this paper are not universally applicable, each and every community policing model should consider its philosophical orientation and the institutions necessary to actualize its stated goals. Furthermore, the actualization of community policing models has considerable implications for the policy cycle and evidences the disconnect between policy objectives and bureaucratic implementation. More broadly, as scholars continue to wrestle with issues of capacity and democratic orientation in public service delivery, we must further consider the congruence between philosophy and practice.

### Works Referenced

- Bayley, D. H., & Stenning, P. C. (2016). *Governing the Police: Experience in Six Democracies*. New Brunswick, New Jersey: Transaction Publishers.
- Commonwealth Human Rights Initiative. (October 12, 2020a). Assessment of Compliance with Supreme Court Directives on Police Reforms: State Compliance. *Commonwealth Human Rights Initiative*. Retrieved from [www.humanrightsinitiative.org/publication/assessment-of-compliance-with-supreme-court-directives-on-police-reforms-state-compliance-note](http://www.humanrightsinitiative.org/publication/assessment-of-compliance-with-supreme-court-directives-on-police-reforms-state-compliance-note).
- Commonwealth Human Rights Initiative. (October 12, 2020b). Compliance with Supreme Court Directives on Police Reforms Madhya Pradesh. Retrieved from <https://www.humanrightsinitiative.org/download/Madhya%20Pradesh%20SC%20Compliance%20Note.pdf>.
- Chaleff, I. (2009). *The Courageous Follower: Standing Up to & for Our Leaders (3rd ed.)*. San Francisco: Berrett-Koehler.
- Madhya Pradesh Gram Tatha Nagar Rakshta Dal Adhiniyan 2002. Section 5: Enrollment of a Member of a Raksha Dal.
- Mathew, S. (August 9, 2019). "Police Reforms Still Largely Only on Paper." *Frontline*. Retrieved from [frontline.thehindu.com/dispatches/article28960801.ece](http://frontline.thehindu.com/dispatches/article28960801.ece).
- Nabatchi, T., Sancino, A., & Sicilia, M. (2017). Varieties of Participation in Public Services: The Who, When, and What of Co-production. *Public Administration Review*. 10.1111/puar.12765.
- Osborne, S. P. (2010). *The New Public Governance?: Emerging Perspectives on the Theory and Practice of Public Governance*. London: Routledge.
- Prakash Singh and Others vs. Union of India, 2006 (8) SCC1.
- Rahr, S. & Rice, S. K. (2015). *From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals*. Laurel, MD: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice.

- Sabatier, P., & Mazmanian, D. (1979). The Conditions of Effective Implementation: A Guide to Accomplishing Policy Objectives. *Policy Analysis*, 5(4), 481-504.
- Schon, D. A. (1983). *The Reflective Practitioner: How Professionals Think in Action*. New York: Basic Books.
- “Status Note on Police Reforms.” (n.d.) Ministry of Home Affairs. Retrieved from <https://www.mha.gov.in/sites/default/files/PoliceReforms%28E%29181013.pdf>.
- The Madhya Pradesh Police Vidheyak, 2002a. Chapter II: Duties of the Police. Pg. 12.
- The Madhya Pradesh Police Vidheyak, 2002b. Chapter II: Duties of the Police. Pg. 13.
- The Madhya Pradesh Police Vidheyak, 2002c. Chapter II: Duties of the Police. Pg. 31.
- The Madhya Pradesh Police Vidheyak, 2002d. Chapter V: Disciplinary Actions Against the Police. Pg. 29.
- The Madhya Pradesh Police Vidheyak, 2002e. Statements of Objects and Reasons. Pg. 4.
- Ward, J. D. (2018). *Policing and Race in America: Economic, Political, and Social Dynamics*. Lanham: Lexington Books.
- Williams, B. N., Brower, R. S., & Klay, W. E. (2016). Community-centred police professionalism: A template for reflective professionals and learning organisations with implications for the co-production of public safety and public order. *The Police Journal*, 89(2), 151–173. Retrieved from <https://doi.org/10.1177/0032258X16642449>.

---

## **Democracy in Belarus: The American Position**

**By The Members of the International Relations Organization at Virginia Tech**

---

### **Abstract**

This paper explores the ongoing civil unrest in Belarus after the disputed presidential election in August 2020. The goal of this paper is to analyze the current state of affairs and recommend an appropriate U.S. foreign policy response. We have gathered data and examined current events to assess the economic, diplomatic, and security status of Belarus, with a particular focus on how the U.S. is affected. Our main findings are that pressure from Europe and North America on Alexander Lukashenko's government has pushed him closer to Russia, protests and strikes have been violently suppressed, and the Belarusian economy is suffering as a result of all of the above compounding with the effects of a global pandemic. We conclude that the United States should coordinate all actions with allies in the EU and NATO, improve diplomatic and economic relations with Belarus to reduce its dependence on Russia, and seek to establish free and fair Belarusian elections.

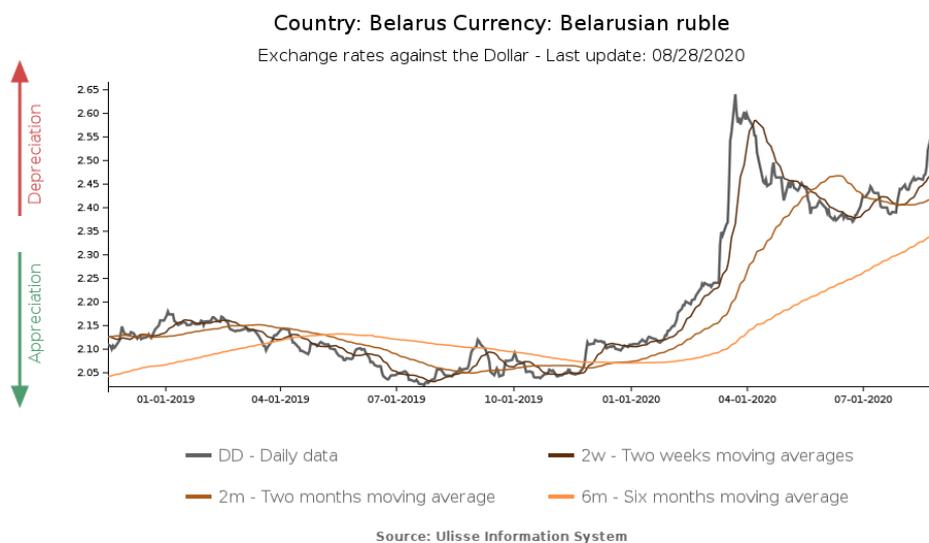
### **Belarus in Crisis**

Democracy has long been a stranger to Eastern Europe. From the Russian Empire to the Soviet Union to the present day, Belarus has been no exception. In 1994, amidst the political turmoil following the disintegration of the USSR, Alexander Lukashenko took power in the country's first democratic election and has held onto it ever since. As President, he has enacted authoritarian policies, abolished democratic institutions, and vigorously persecuted his opposition in a fashion reminiscent of his closest ally, Vladimir Putin. Now, however, there is massive resistance to his regime, with protests and general strikes throughout Belarus following their disputed 2020 presidential election. The opposition has had enough of Lukashenko's undemocratic rule, but has far less resources compared to the state. How can the United States leverage its economic, diplomatic, and security powers to ensure democracy survives in Belarus?

### **An Economy in Shambles**

The Belarusian economy is projected to shrink by 2.8% in 2020 due to COVID-19 and political tensions, with the recession expected to continue into 2021 (The World Bank, 2020). This is due to the ongoing protests and strikes, bank runs, a depreciating currency, and workers in growth sectors moving to more attractive neighboring countries. There have been protests and strikes in all sectors of the economy, as well as at universities across the country students ("Belarus strike," 2020). These demonstrations are decreasing company productivity and therefore harming the economy. By August 28th, just 19 days after the election and before the general strike

even occurred, the Belarusian ruble (BYN) had depreciated by 9% from its pre-election value, from BYN 2.45 per USD to BYN 2.66 per USD (Bornukova, 2020). Some protester-run Telegram networks have encouraged Belarusians to withdraw their rubles and exchange them for USD (Bornukova, 2020). All of these factors have compounded with the recession created by COVID-19 to significantly reduce investor confidence, further harming the economy.



*Figure 3: Belarusian Ruble Exchange Rate from <https://www.exportplanning.com/en/magazine/article/2020/08/28/belarusian-unrest-and-its-impact-on-the-currency/>*

The IT sector in Belarus makes up 5.5% of the country GDP and software exports were set to hit \$2 billion last year (Weichert & Filtenborg, 2020). Hi-Tech Park is an area in Minsk whose businesses are exempt from corporate income tax, real estate tax, and a value-added tax (VAT) (“Minsk’s Hi-Tech Park,” 2020). President Lukashenko’s opposition claims that this industry could have been utilized effectively as a driver of economic growth, but his resistance to privatization has prevented it from reaching its full potential (“Minsk’s Hi-Tech Park,” 2020). The contracting economy and political turmoil have made it difficult for companies in this sector to grow at all. In an attempt to combat the protests, the government has periodically shut off internet access and conducted searches of some tech firms (Viačorka, 2020). Already, 300 CEOs of IT companies have threatened to leave Belarus (Viačorka, 2020). Among Belarusian IT companies, 12 have started the process of relocating their entire operations to another country, 59 companies have moved part of their staff out, and another 112 companies have started to look at relocation options (LinkedIn Survey, 2020). Many companies

have moved operations to Ukraine, whose government has created incentives to attract 450,000 tech workers in the hope to generate \$12 billion a year from this sector (Weichert & Filtenborg, 2020). This exodus of IT companies does not bode well for the future of the Belarusian economy (Gapon, 2020).

Many states, including the United States and the United Kingdom, have placed sanctions on or pulled out of aid agreements with the Belarusian government, which has pushed Belarus to trade and work more with Russia. Lukashenko threatened to “re-route import and export cargo through Russian ports” after Lithuania and its neighboring countries, Estonia and Latvia, imposed sanctions after he began cracking down on protestors (Beniusis, 2020). Rerouting Belarus’ trade through Russia would severely increase its dependence on Russia. Lukashenko has also threatened to cut off European transit routes across Belarus in retaliation for any sanctions that have been placed by the West (Sytas, “Baltic states,” 2020). Although it appears that these are simply threats, if Lukashenko goes through with them, they may seriously strain relations with existing allies, pushing Belarus closer to Russia.

States have cut off Belarus from humanitarian aid and development projects. Lithuania blocked €5.8 million (\$6.83 million) in payments to Belarus for an “EU-funded cross-border development programme” because the Lithuanian government feared that the money may be misused by President Lukashenko (Sytas, “Lithuania blocks,” 2020). The payment was halted after the disputed presidential election and the post-election crackdown of the Belarusian government (Sytas, “Lithuania blocks,” 2020). The Swedish development company Sida has also frozen a number of development projects in Belarus following the election (Decision, 2020).

Russia and Belarus have historically had a close relationship, though President Lukashenko has refused deepening their ties for some time (Rainsford, 2020). In September of this year, Russia announced that it will loan Belarus \$1.5 billion in an attempt to stabilize the Belarusian economy, which was in decline as a result of protests (Cordell, 2020). As of July 1st, Belarus owes Russia about \$8 billion, accounting for almost half of Belarus’ \$18 billion external state debt (Cordell, 2020). Because of this increasing debt and Russia becoming Lukashenko’s only political and economic ally, Belarus is becoming increasingly dependent on Putin’s regime. Belarus is already heavily reliant on Russian oil and natural gas, and is therefore susceptible to changes in pricing and Russia’s capacity to supply those resources. In the past, Belarus has attempted to limit Russia’s control over oil through tariffs, but the demand has yet to be met through vendors outside Russia (Clark, 2020). Further attempts at sanctioning Belarus might result in them being pushed further into the Russian market and make any attempts at future economic ties impossible.

### **Diplomacy and the Lukashenko Regime**

Since 1994, Alexander Lukashenko has maintained his position of power as President of the Republic of Belarus. His time as president has come under criticism from the international community on multiple occasions for “un-free and unfair” elections. According to the Organization for Security and Co-Operation in Europe (OSCE), nearly every single one of the Belarusian presidential and legislative elections has been deemed undemocratic, leading to public unrest swelling over the past two decades (Elections in Belarus, n.d.). There have been numerous calls by other European countries for the Belarusian government to hold free and fair elections, yet Lukashenko has continued his dishonest means of holding onto power (Dickinson, 2020). Tensions among the public hit a peak in August of 2020 after the latest presidential election saw Lukashenko elected to a sixth consecutive term. Large protests that demonstrated the people’s unhappiness with the Belarusian government, and specifically Lukashenko, were met with violence from the Lukashenko regime. This included police brutality toward demonstrators and the imprisonment of political rivals, most notably opposition candidate Svetlana Tikhanovskaya, who was forced to escape to Lithuania to avoid reprisal from the Belarusian government (“Belarus: Russia puts,” 2020).

Considering the country’s geographic location and small size, it would not be difficult for the surrounding countries to pressure Belarus into becoming more democratic if not for Russia, its largest trading partner, being right next door. This is a problem because the Russian government claims that the elections in Belarus have been fair and free (Von der Burchard, 2020), which negates the economic and political pressures coming from Western Europe over the last few months. Since the start of the pro-democracy protests in mid-August, the European Union, the United Kingdom, and Canada have placed economic sanctions and travel bans on Lukashenko and his inner circle. These sanctions represent the democratic international community’s discontent with the rise of authoritarianism within Belarus, but do not seem to have affected Lukashenko due to support from Russia.

### **Security in Eastern Europe**

In recent years, there has been a noticeable rise in military integration between Belarus and Russia (Bohdan, 2020). Prior to 2018, the primary directive of the Belarusian military was action as a means only for self-defense (“Military Policy,” 2020). However, the Belarusian military has begun running drills in tandem with Russian forces in areas bordering Lithuania and Poland, causing unease within the European community (Marson & Grove, 2020). The Belarusian military is projected to integrate further into the Russian military to the point where the two become synonymous. The current climate of the election crises has allowed for further and more rapid integration. Russian President Vladimir Putin has publicly announced the offer of contributing military forces to deal with the protests (Tétrault-Farber & Makhovsky,

2020). Along with this, the Belarusian military has made a contract with Russia, valid until 2025, to buy weapons, helicopters and armored personnel carriers—all of which imply a ramping up of militarization efforts in Belarus (Bohdan, 2020). The increasingly volatile nature of the Belarusian conflict has also been a means of justification for Lukashenko’s decision-making processes for the Belarusian military forces (Balmforth, 2020). Lukashenko has publicly accused NATO of military intervention in the region despite refutation from NATO itself and has used the alleged aggression as impetus for Belarus’ growing military strength (Balmforth, 2020). The increasing accusations and escalation from Minsk are expected to continue as Russia fuels this divide between NATO and Russian interests, both in writing and military posturing.

### **Where the United States Stands**

Lukashenko’s relationship with the United States has been tenuous over his 26-year stint as president. In 1996, Lukashenko dissolved the Belarusian National Assembly in order to further consolidate his power and was met with international criticism (“Parliament dissolved,” 1996). After the 2006 presidential election, the U.S. and E.U. placed sanctions on Belarusian officials and state-owned businesses (“U.S. Relations with Belarus,” 2020). Harsher economic restrictions placed in 2008 by the aforementioned parties were met with the expulsion of their diplomatic teams within Belarus by Lukashenko (“U.S. Relations with Belarus,” 2020). There was a brief moment of cooperation between the United States and Belarus in 2015 when the U.S. eased sanctions on Belarus for the release of political prisoners confined within Belarus (U.S. Relations with Belarus, 2020). Then in 2019, the United States and Belarus came together to agree on normalizing diplomatic and economic relations with each other, only to be restricted once again after the most recent elections (U.S. Relations with Belarus, 2020).

Due to issues regarding Russian oil prices, Belarus began looking elsewhere for oil and natural gas. American leaders, including former Secretary of State Michael Pompeo, were keen on opening new avenues of trade and investment with regard to Europe in order to diversify their energy and electricity suppliers (Jones, J. L., Kempe, F., & Brzezinski, I., 2021). Following the Belarusian government's move to look for outside assistance, the United States provided oil at a subsidized rate, however, this deal was stopped as part of the August 2020 sanctions following Belarus’ post-election crackdowns against protests (Furlong, 2020; “U.S. Oil,” 2020). The United States was also looking to provide liquid natural gas (LNG) to Belarus, but these talks did not get far prior to a Belarusian-Russian renegotiation of pricing and the U.S. sanctions on Belarus. The most recent figure from the European Commission has Russia accounting for nearly 50% of Belarus’ international trade, and with the sanctions from the E.U., Belarus’ second largest trading partner, that percentage is expected to rise (European Commission 2020).

There could be a possible increase in dependence of states bordering Belarus on the U.S. for energy infrastructure due to Belarusian and Russian interference in energy projects within the region. Since the countries of Lithuania, Poland, and Latvia placed sanctions against Belarusian officials, there has been some uncertainty about how energy relations between those states and Belarus will continue. Furthermore, the new Astravets nuclear power plant in Belarus has created further tension between Lithuania and Belarus, causing Lithuania to stop importing electricity from Belarus once the plant went online (“Belarus Nuclear Plant,” 2020). The Russian-built Nord Stream 2 pipeline has also raised concerns about Europe’s reliance on Russian natural gas (Belkin, et al., 2021). Russia has been explicit in its support for President Lukashenko and has made it clear that it will follow Lukashenko’s lead in response to the sanctions. Hence, it is possible that the states neighboring Belarus run the risk of their trade routes and some of their energy supply being cut off should tensions rise between themselves and Belarus. If these states do indeed have their power cut off from Belarus, it could be an opportunity for the U.S. to fill in the gap as it did with Belarus before the election.

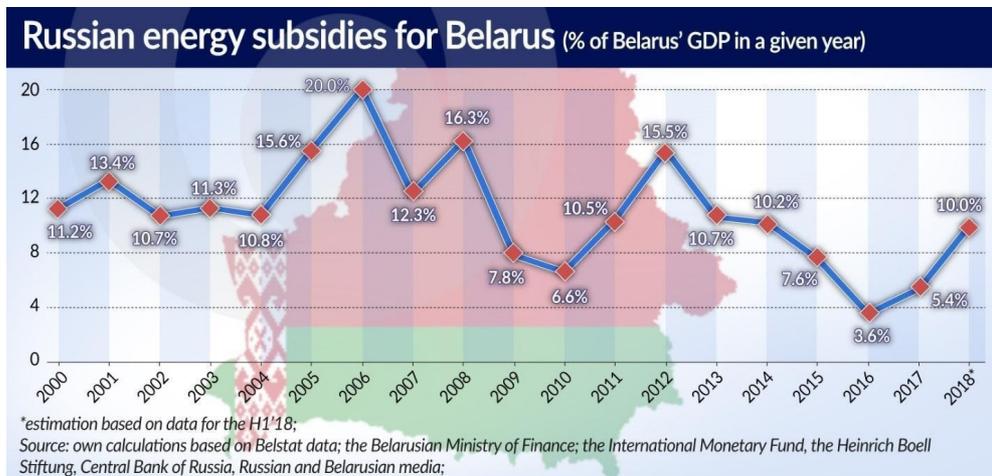


Figure 4: Russian Energy Subsidies to Belarus from <https://www.obserwatorfinansowy.pl/in-english/macroeconomics/belarus-economic-dependence-has-its-upside/>

While the E.U. does not recognize Lukashenko as a legitimate leader and has imposed sanctions as a result, the North Atlantic Treaty Organization (NATO), made up of many of the same member states, has publicly announced that it poses no physical threat to Belarus and does not intend to become involved in the region (“Relations with Belarus,” 2020). This announcement could be rescinded, however, if Poland or Lithuania become victims of Belarusian aggression. Currently, Belarus is being used as a proxy for Russia and any move against Belarus on the part of the U.S., even under NATO purview, would be costly (Tétrault-Farber & Makhovsky, 2020; Zevelev, 2020). As part of the current policy of non-intervention, it is highly likely that as Russia expands its

influence in Belarus, the U.S. will continue to lose power and influence in the region (Pugačiauskas, 2019). Russia sees the swath of Eastern European states that were previously part of the Soviet Union “its exclusive zone of interest and responsibility,” and the growing propensity of Russia to intervene in these countries—including Belarus—will weaken any military power the United States has amassed in the region since the fall of the Berlin Wall (Zevelev, 2020).

The most significant consequence for the American diplomatic position in the region, if conditions worsen, is its relationship with Russia and President Vladimir Putin. Over the past two and a half decades, the diplomatic relationship between Belarus and the United States has been rocky and inconsistent, with the former removing foreign diplomats from its borders (“U.S. Relations with Belarus,” 2020). Only over the past year have relations been normalized between the two states, only to see them break down again with the most recent election. However, President Putin has supported Lukashenko and his rule over the Belarusian people, lending him economic and military assistance to handle any sort of resistance coming from Lukashenko’s opposition (Simmons, 2020). If Russia continues to increase its support of the Lukashenko regime, despite calls from the E.U. and the United States to deescalate intervention, diplomatic relations between the United States and Russia could become further stressed.

Another threat to American interests in the region with a strengthening relationship between Russia and Belarus is the rising danger to Eastern European allies of the United States. An increase in tensions among neighboring states could give Russia a reason to act on its promises of military support. Any military conflict in the region would be detrimental to all participating parties and could also be detrimental for the United States. An attack on any NATO member could lead to the enactment of Article 5 of the NATO Treaty, forcing United States involvement (“Collective defense,” 2019). However, Russia would most likely look to spread its influence over additional states within Eastern Europe before attempting any military confrontation with any NATO member unless otherwise provoked. If relations between Russia and Belarus are strengthened, freedom of movement along the borders of Russia and Belarus would no longer be limited, allowing Russia to use Belarus as both a buffer state between themselves and Western Europe and as a satellite state from which to operate. This would further destabilize the region, allowing for more Russian control, thus delegitimizing American efforts to maintain sovereignty, as outlined in the 2020 United States National Security Strategy (NSS). The United States government also acknowledges the Russian attempt to “intimidate its neighbors” through the “forward deployment of offensive capabilities” within its 2020 NSS.

### **Course of Action**

To ensure the survival of democracy and best serve its own interests, the U.S. must take a strictly multilateral approach to the Belarusian election crisis. Cooperation is

key and must include the Belarusian opposition, the European Union, and NATO at a minimum. When recommending foreign policy, we must take into account these parties' wishes, the capabilities of the U.S. government, and the disposition of President Joe Biden.

As previously mentioned, general economic sanctions on the whole of Belarus have served only to drive Lukashenko further into Putin's arms, and the weight of those sanctions is not borne by the authoritarian elite but by the everyday people. These sanctions need to be substantially reduced to only affect industries directly involved in oppression, like arms manufacturers. This would lift the burden from the shoulders of the Belarusian populace, a good in its own right, and make them more amicable to the United States. Instead, targeted personal sanctions should be maintained and expanded on high-ranking officials in Lukashenko's regime. If coordinated with the E.U., U.K., and Canada, Belarusian elites would not be able to travel to, do business with, buy from, or bank with any Western country or company. The U.S. need not use only sticks with Belarus, but carrots as well. Increased economic cooperation and trade deals could be offered on the condition that third parties be allowed to supervise a new, truly democratic election. If accepted, these would also pull Belarus's economic dependence on Russia.

The economy is not the only resource at our disposal here, as diplomacy must play an important role. Lukashenko has promised not to relinquish power, in large part because he has seen what happens to authoritarians when they fall. Lukashenko cannot forget the examples made out of Gaddafi in Libya and Mussolini in Italy. A fight is antithetical to the stability of the region and the safety of everyone therein, so the U.S. must seek a peaceful resolution. One way to achieve this is a guarantee of safety for Lukashenko if he steps down and explicitly gives power to his opponents. Of course, it is not easy to see a criminal go free, but if it means a democratic Belarus, it would be a small price to pay. It might also show authoritarians around the world that giving up is an option and their resignation is not a death sentence. The U.S. should also coordinate with the E.U. and non-governmental organizations like the International Foundation for Electoral Systems to set up free and fair elections in Belarus. This multilateral approach is in line with the stated foreign policy approach of President Biden (Biden, 2020).

Lastly, in order to avoid imposing American interests on the people of Belarus and appearing imperialistic, the military and security services of the U.S. must take a back seat to the foreign policy tools previously listed. Under no circumstances should Russia or Belarus be able to use U.S. aggression as a pretense to engage in violent crackdowns and accuse the opposition of being western puppets. The current presence of U.S. military personnel in neighboring countries Poland, Latvia, and Lithuania should be maintained but not increased for the above reasons. Intelligence services, on the other hand, could potentially work with the Belarusian opposition to protect them from cyber attacks and warn them of threats to their safety.

In the grand scheme of this crisis, the U.S. role should be to ensure the survival of a democratic system in Belarus through largely diplomatic and economic means in coordination with our European allies. This must also be done to pull Belarus away from Russia and closer to the U.S. and E.U.

### Works Referenced

- Balmforth, T. (2020, September 4). Belarus says NATO activities forcing it to develop military response:Ifax. Reuters. Retrieved from <https://www.reuters.com/article/us-belarus-election/lukashenko-shakes-up-security-team-to-stamp-out-belarus-protests-idUSKBN27E18I>.
- Belarus (2020, October 16). In European Commission. Retrieved from <https://ec.europa.eu/trade/policy/countries-and-regions/countries/belarus/#:~:text=The%20EU%20is%20Belarus'%20second,%25%20of%20Belarus'%20international%20trade.&text=The%20EU%20exports%20mainly%20mac>.
- Belarus: Russia puts opposition's Tikhanovskaya on wanted list. (2020, October 7). In BBC. Retrieved from <https://www.bbc.com/news/world-europe-54456608>.
- Belarus nuclear plant stops power output soon after opening. (2020, November 10). In ABC News. Retrieved from <https://abcnews.go.com/International/wireStory/belarus-nuclear-plant-stops-power-output-opening-74126402>.
- Belarus strike action begins. (2020, October 26). Deutsche Welle. Retrieved from <https://www.dw.com/en/belarus-strike-action-begins/a-55396530>.
- Belkin, P., Ratner, M., & Welt, C. (2021, February 8). Russia's Nord Stream 2 Pipeline: Running in Place. In Congressional Research Service. Retrieved from <https://crsreports.congress.gov/product/pdf/IF/IF11138>.
- Beniusis, V. (2020, September 26). Lithuanian Port Caught In Belarus Crossfire. In International Business Times. Retrieved from <https://www.ibtimes.com/lithuanian-port-caught-belarus-crossfire-3052539>.
- Biden, J. R. (2020, April). Why America Must Lead Again. Foreign Affairs. Retrieved from <https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again>.
- Bohdan, S. (2020, September 28). Belarus reluctantly reverses its security policies. Belarus Digest. Retrieved from <https://belarusdigest.com/story/belarus-reluctantly-reverses-its-security-policies/>.
- Bornukova, K. (2020, September 2). Post-election turmoil is taking a toll on the Belarusian economy. In Belarus Digest. Retrieved from <https://belarusdigest.com/story/post-election-turmoil-is-taking-a-toll-on-the-belarusian-economy/>.

- Clark, M. (2020, February 4). Russia in Review: Belarus Update: Lukashenko Uses Oil Tariffs to Delay Integration with Russia. Institute for the Study of War. Retrieved from <http://www.understandingwar.org/backgrounder/russia-review-belarus-update-lukashenko-uses-oil-tariffs-delay-integration-russia>.
- Collective defence - Article 5 (2019, November 25). In North Atlantic Treaty Organization. Retrieved from [https://www.nato.int/cps/en/natohq/topics\\_110496.htm](https://www.nato.int/cps/en/natohq/topics_110496.htm).
- Cordell, J. (2020, September 17). 'Harsh Times Ahead': Russia's Emergency Loan to Belarus Changes Little for Embattled Lukashenko. Moscow Times. Retrieved from <https://www.themoscowtimes.com/2020/09/17/russias-emergency-loan-to-belarus-changes-little-for-embattled-lukashenko-a71462>.
- Decision: Sweden freezes more aid to Belarus (2020, September 10). In Nord News. Retrieved from <https://nord.news/2020/09/10/decision-sweden-freezes-more-aid-to-belarus/>.
- Dickinson, P. (2020, August 10). Lukashenka vs. democracy: Where is Belarus heading? In Atlantic Council. Retrieved from <https://www.atlanticcouncil.org/blogs/ukrainealert/lukashenko-vs-democracy-where-is-belarus-heading/>.
- Elections in Belarus (n.d.). In Organization for Security and Co-operation in Europe. Retrieved from <https://www.osce.org/odihr/elections/Belarus>.
- Furlong, R. (2020, August 12). Pompeo Says U.S. Will Look At Stopping Oil Shipments To Belarus. In RadioFreeEurope RadioLiberty. Retrieved from <https://www.rferl.org/a/pompeo-says-u-s-will-look-at-stopping-oil-shipments-to-belarus/30780327.html>.
- Gapon, S. (2020, August 31). In Belarus, currency plunges, IT giants eye exit. In Yahoo! News. Retrieved from <https://news.yahoo.com/belarus-currency-plunges-giants-eye-090209172.html>.
- LinkedIn survey: 12 IT companies in full relocation, 59 in partial. (2020, August 27). In Dev. Retrieved from <https://dev.by/news/linkedin-relokeit>.
- Jones, J. L., Kempe, F., & Brzezinski, I. (2021, January 26). US commits \$1 billion dollars to develop Central European infrastructure. Atlantic Council. Retrieved from <https://www.atlanticcouncil.org/news/press-releases/us-commits-1-billion-dollars-to-develop-central-european-infrastructure/>.
- Marson, J., & Grove, T. (2020, September 28). Russia's Embrace of Lukashenko Puts the West on Alert. Wall Street Journal. Retrieved from <https://www.wsj.com/articles/russias-embrace-of-lukashenko-puts-the-west-on-alert-11601295407>.

- Military policy (n.d.). In Belarus Facts - Foreign Missions of Belarus - Possibilities for business cooperation. Retrieved from [http://libya.mfa.gov.by/en/belarus/politics/domestic\\_policy/defense/](http://libya.mfa.gov.by/en/belarus/politics/domestic_policy/defense/).
- Minsk's Hi-Tech Park: A Symbol of Inequality in Lukashenko's Belarus (2020, July 8). In Euronews. Retrieved from <https://www.euronews.com/2020/08/07/minsk-s-hi-tech-park-a-symbol-of-growing-inequality-in-lukashenko-s-belarus>.
- Parliament dissolved by President Alexander Lukashenko convenes again. (1996, December 27). Associated Press. Retrieved from <https://apnews.com/article/60f4e5bb7cd9f34ac4490533be1dfcab>.
- Pugačiauskas, V. (2019). Military Cooperation between Russia and Belarus: Theoretical and Practical Perspectives. *Lithuanian Annual Strategic Review*, 17(1), 231-248. <http://dx.doi.org/10.2478/lasr-2019-0010>.
- Rainsford, S. (2020, September 14). Belarus protests: Putin pledges \$1.5bn loan at Lukashenko meeting. In BBC. Retrieved from <https://www.bbc.com/news/world-europe-54144644>.
- Relations with Belarus (2020, October 13). In North Atlantic Treaty Organization. Retrieved from [https://www.nato.int/cps/en/natohq/topics\\_49119.htm](https://www.nato.int/cps/en/natohq/topics_49119.htm).
- Simmons, A. M. (2020, September 14). Putin Vows Support for Belarus Leader Alexander Lukashenko. *Wall Street Journal*. <https://www.wsj.com/articles/putin-vows-support-for-belarus-leader-alexander-lukashenko-11600105778>.
- Sytas, A. (2020, August 31). Baltic states impose sanctions on Lukashenko and other Belarus officials. Reuters. Retrieved from <https://www.reuters.com/article/us-belarus-election-sanctions/baltic-states-impose-sanctions-on-lukashenko-and-other-belarus-officials-idUSKBN25R0Z7>.
- Sytas, A. (2020, October 7). Lithuania blocks millions of euros of EU funding to Belarus: official. Reuters. Retrieved from <https://www.reuters.com/article/us-belarus-election-eu-money/lithuania-blocks-millions-of-euros-of-eu-funding-to-belarus-official-idUSKBN26S288>.
- Tetrault-Farber, G., & Makhovsky, A. (2020, August 27). Putin says Russia has set up force to aid Belarus leader if needed. Reuters. Retrieved from <https://www.reuters.com/article/us-belarus-election-russia-idUSKBN25N1Q3>.
- The World Bank. (2020, October 7). Overview. In The World Bank. Retrieved from <https://www.worldbank.org/en/country/belarus/overview>.
- United States. (2020). National Security Strategy of the United States of America. Washington: President of the U.S. Retrieved from <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.
- U.S. Oil for Belarus Reaches Europe as Country Seeks to Reduce Reliance on Russia. (2020, June 9). In Pipeline and Gas Journal. Retrieved from

<https://pgjonline.com/news/2020/06-june/us-oil-for-belarus-reaches-europe-as-country-seeks-to-reduce-reliance-on-russia>.

U.S. Relations With Belarus (2020, January 29). In U.S. Department of State. Retrieved from <https://www.state.gov/u-s-relations-with-belarus/>.

Viačorka, F. (2020, September 2). Belarus crackdown's next victim: Its booming IT sector. In Politico. Retrieved from <https://www.politico.eu/article/belarus-crackdown-it-sector/>.

Von der Burchard, H. (2020, November 4). EU agrees new Belarus sanctions targeting Lukashenko. In Politico. Retrieved from <https://www.politico.eu/article/eu-belarus-sanctions-alexander-lukashenko/>.

Weichert, S., & Filtenborg, E. (2020, October 26). Will Belarus' political crisis kill off its booming IT sector? In Euronews. Retrieved from <https://www.euronews.com/2020/10/26/will-belarus-political-crisis-kill-off-its-booming-it-sector>.

Zevelev, I. (2020, August 5). In a Confrontation Between Putin and the West, Belarus May Get Caught in the Middle. In Wilson Center. Retrieved from <https://www.wilsoncenter.org/blog-post/confrontation-between-putin-and-west-belarus-may-get-caught-middle>.

---

## A Case for Repealing the Hyde Amendment

By Megan Elisabeth Rivera

---

### Abstract

Since federal funds do not cover abortions and many low-income women cannot afford the procedure in the first trimester, low-income women on Medicaid face considerable barriers to obtaining an abortion in the United States (*Medicaid Funding of Abortion*, 2016). Thus, women who are the least financially prepared to raise a child and face unintended pregnancies are more likely to be forced to carry them to term (*Federal Reserve Board Issues Report on the Economic Well-Being of U.S. Households*, 2019; Jones et al., 2017). 45% of U.S. pregnancies are unintended, displacing the sizable financial burden of raising a child partially onto the American public, as women who carry pregnancies despite preferring an abortion are more likely to be unemployed, receive welfare, or live in poverty (Sawhill & Guyot, 2019; Foster, et al., 2018b; CDC, 2019). If Congress repeals the ban on federal funding for abortion services on the next appropriations bill for the Department of Health and Human Services, American taxpayers stand to reap long-run benefits as future outcomes for low-income women on Medicaid improve.

### Background

For poor- and low-income women in the United States who qualify, Medicaid offers a wide range of health care services they otherwise could not afford. 38 states and the District of Columbia have adopted Medicaid expansion under the Affordable Care Act, making women with incomes below 138% of the Federal Poverty Line eligible for Medicaid (Kaiser Family Foundation, 2019; Salganicoff et al., 2020). Women in the remaining 12 states must meet their state's income criteria and be pregnant, a parent of dependent children, a senior, or have a disability (Kaiser Family Foundation, 2019). Women who live in states that have not expanded Medicaid face varying eligibility criteria depending on their state of residence, and the levels are often substantially lower. For example, in Texas, women must have incomes lower than 17% of the federal poverty level (Kaiser Family Foundation, 2019).

In the 1973 case *Roe v. Wade*, the U.S. Supreme Court decided that women have a Constitutional right to an abortion.<sup>2</sup> Four years later in 1977, Representative Henry Hyde of Illinois placed an amendment on the Congressional appropriations bill on the Department of Health and Human Services (HHS) annual budget that barred federal

---

<sup>2</sup> The 1973 decision handed down in *Doe v. Bolton* declared that states may not “unduly burden the exercise of that fundamental right with regulations that prohibit or substantially limit access to the procedure” (Shimabukuro, 2019).

funding for abortion services under Medicaid (*Medicaid Funding of Abortion*, 2016). This amendment effectively created systemic differences in access to abortion based on income. Since 1977, the language of the Hyde Amendment has been annually renewed as part of the HHS budget (Shimabukuro, 2019).

While the Hyde Amendment originally only affected funding for abortions under Medicaid, its annual reauthorization on the appropriations bill for the HHS has expanded its footprint. Currently, it bars abortion funding to the Indian Health Service, the Children's Health Insurance Program (CHIP), the military's TRICARE healthcare program, the federal prison system, the Peace Corps, and the Federal Employees Health Benefits Program (Salganicoff et al., 2020).

Medicaid covers 25 million American women, 67% of whom are women of reproductive age (Kaiser Family Foundation, 2019). Lifting the Hyde Amendment would create federal abortion coverage for these 14.2 million women, including the 7.7 million women who live in states that enforce Hyde's restrictions (Salganicoff et al., 2020). In the last decade abortion rates have fallen; there was a 19% decline in the number of abortions performed (Nash & Dreweke, 2019).

Federal funds through Medicaid may be spent to cover abortion only in cases of rape, incest, or to save a woman's life. But these exceptions are not always honored: in 2019, the Government Accountability Office (GAO) found that South Dakota's Medicaid program was violating federal law by only covering abortions in cases of life endangerment, not rape or incest (The U.S. Government Accountability Office, 2019). Arizona's Medicaid program has been court-ordered to provide funding for medically necessary abortions after they expanded Medicaid (Salganicoff et al., 2020). In Iowa, where the governor must approve abortions that qualify to be paid under, women face many bureaucratic obstacles.

Currently, 17 states fund abortions for low-income women, but in practice, only 16 actually do (*Medicaid Funding of Abortion*, 2016). In the remaining 34 states, low-income women are forced to find ways to pay for abortions out of their own pockets (*Medicaid Funding of Abortion*, 2016). Across the U.S., 45% of all pregnancies are unintended (CDC, 2019). Because many low-income women simply cannot afford the cost of an abortion, women too often carry unwanted pregnancies to term, find abortions through other, more dangerous means, or forgo necessities to scrape together enough money to pay for one.

The Hyde amendment has also evolved into a racial justice issue, as it holds back low-income Americans from breaking free from a historic cycle of poverty. Due to historic systemic economic barriers, Black women make up a third of all reproductive-aged women covered by Medicaid, and Hispanic women comprise another quarter (Salganicoff et al., 2020). Over half of all abortions performed in the U.S. are to Black and Hispanic patients, and three-quarters of all abortion patients are below 200% the federal poverty level (Guttmacher Institute, 2019b).

Since abortions are not covered by Medicaid, women who are in search of one must finance it through other means. Out-of-pocket costs for an abortion procedure vary by location, and prices are higher in states with more restrictive policies. At 10 weeks, the procedure costs roughly \$500, and at 20 weeks it balloons to \$1200 or more. According to the Federal Reserve Board, the cost of the procedure even exceeds what an average American not on Medicaid can afford (*Federal Reserve Board Issues Report on the Economic Well-Being of U.S. Households*, 2019; *Medicaid Funding of Abortion*, 2016). For women already impoverished enough to qualify for Medicaid, a first-term abortion is financially out of reach.

### **Policy Proposal**

Removing the Hyde Amendment from the annual appropriations bill would allow low-income women on Medicaid to utilize abortion as a form of health care if they decide with their provider the procedure is right for them. Low-income women, young unmarried women, and teens are more likely to suffer from unintended pregnancies than affluent women (Sawhill & Guyot, 2019). Poor and low-income women received 75% of U.S. abortions in 2014, and half of all abortions performed that year were on patients whose familial incomes were below the federal poverty level (*Medicaid Funding of Abortion*, 2016).

If the Hyde Amendment was repealed, it would provide 14.2 million women with access to abortion coverage through federal funds. For the 7.7 million women on Medicaid in states that do not offer state funding for abortion, it would effectively lift a ban on the procedure (Salganicoff et al., 2020).

### **Political Outlook**

The moment to enact change for millions of low-income women is now. While campaigning, President Biden stated in town halls that he would “pass legislation to make *Roe* the law of the land” in response to concerns about the confirmation of Supreme Court Justice Amy Coney Barrett (Smith, 2020). President Biden’s new stance on supporting the reversal of the Hyde Amendment points to the potential for broader change in the Democratic Party. Increasingly, access to abortion is increasingly seen as an issue of racial and socioeconomic justice, and the widespread protests for racial justice this summer have caused politicians historically in support of the Hyde Amendment to reconsider their public policy views (Green, 2019a; Green, 2019b).

In 2020, a Kaiser Family Foundation poll found that 79% of those polled believed decisions about abortion should be by women in consultation with their doctor rather than by lawmakers (Muñana et al., 2020). The poll also found that 87% of respondents believed abortion should be legal if the patient’s life is endangered and 83% in cases of rape or incest.

Gallup polls in 2018 found that 29% of respondents believed abortion should be legal under any circumstances while 50% selected legal under only certain circumstances (Gallup Inc., 2020). In May of 2018, Gallup found that 60% of respondents believed abortion should be legal during the first three months of pregnancy. During the second three months of pregnancy, only 28% of respondents still believed access to abortion should be legal.

These numbers suggest that a majority of Americans support a woman's right to decide, at least during the first 12 weeks of pregnancy. Removing the language of the Hyde Amendment would not affect the legality of abortion, only who has access to the procedure.

### Potential Implementation Issues

One way to make the policy change more feasible is by altering the language of the Hyde Amendment so that federal funds may only be used for abortions during the first trimester. About 90% of abortions performed are conducted during the first 12 weeks of pregnancy (Guttmacher Institute, 2019b).

Although federal funding for abortion across the United States would make obtaining one easier for many low-income women on Medicaid, it will not remove every barrier to the procedure that exists. If Medicaid begins covering abortion procedures, it is likely that many women will also face geographic barriers in finding providers. Six states have only a single abortion clinic, and a 2017 study found that only 11% of U.S. counties were home to at least one healthcare clinic that provided abortions (Muñana et al., 2020; Jones et al., 2019). Additionally, many states have implemented additional barriers to obtaining abortions, including mandatory waiting periods, parental involvement for minors, ultrasound requirements, and hospital admitting privilege requirements for abortion providers (Guttmacher Institute, 2020).

Finally, removing the policy rider will not solve the issue of unplanned pregnancies in the United States. Between 2006 and 2010 alone, 5.8 million U.S. women used emergency contraceptives (Daniels et al., 2013).<sup>3</sup> According to the National Center for Health Statistics, 65% of reproductive-aged women currently use some form of contraception (Daniels & Abma, 2020). 51% of abortion patients in 2014 were utilizing a birth control method in the month they became pregnant (Guttmacher Institute, 2019b). The most common failed methods included condoms and short-acting hormonal methods like the pill, the ring, or the patch (Jones, 2018).

### Evidence

In the United States, the cost of unintended pregnancy continues to rise: in 2008, U.S. taxpayers footed a \$12.5 billion bill and in 2010, these costs grew to \$21 billion in

---

<sup>3</sup> Emergency contraceptives do not and cannot end pregnancies during its early stages' contrary to popular belief (Muñana et al., 2020).

medical expenditures associated with the increased poor maternal health and infant outcomes that accompany unplanned pregnancies (Sonfield & Kost, 2013; CDC, 2015). It was estimated that the first year of a child's life cost taxpayers an average of \$16,000 if the mother was a low-income teenager. This cost covers prenatal care, labor and delivery, postpartum care, a year of infant care, and programs such as the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), Temporary Assistance for Needy Families (TANF), and the Supplemental Nutrition Assistance Program (SNAP) (Power to Decide, 2018).

One in five American women of reproductive age are covered by Medicaid (Kaiser Family Foundation, 2019). The U.S.'s unintended pregnancy rate is higher than almost every other developed country, and for women with incomes less than 200% of the federal poverty level, that rate is even higher. In 2011, women with incomes below 100% of the federal poverty level had unplanned birth rates seven times higher than women at or above 200% of the federal poverty level (Finer & Zolna, 2016). Three-quarters of abortion patients in 2014 were classified as having incomes below the federal poverty level or low income (with incomes below 199% the federal poverty level) (Guttmacher Institute, 2019b).<sup>4</sup>

Research produced by the Guttmacher Institute found that low-income women will use the money they need for food, rent, utilities, clothing, or other necessities to pay for an abortion (*Medicaid Funding of Abortion*, 2016). Women have even been known to pawn household goods to obtain the funds necessary to get an abortion that was uncovered by their Medicaid. While these women scrape their money together, their medical risks increase, as does the cost of the abortion. Some researchers found that one-third of women who had a second-trimester abortion would have preferred an earlier procedure but had to wait until they could save up funds to cover one (Finer et al., 2006). The difficulties of affording an abortion pushes poor women into a vicious cycle where the longer it takes for them to round up the funds, the more they must pay to obtain an abortion. Many women are left unable to make up the difference between the costs of a first-term and second-term abortion.

The Turnaway study was conducted over five years across 30 facilities throughout the U.S. It found that women who were unable to obtain an abortion were more likely to be living in poverty a year later than women who were able to obtain one (Foster et al., 2018b). Being turned away from an abortion even impacted women 4 years later, as they were more likely to be in poverty than women who received abortions. Six months after the Turnaway study, women who did not have an abortion were less likely to be employed full time, three times more likely to be unemployed, and

---

<sup>4</sup> The HHS guidelines for 2020 list the federal poverty level at \$12,760 for a single person household and \$17,240 for a family of two (OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, 2020).

more likely to be on some form of public welfare. The study also found that the women who were turned away from an abortion were more likely to be enrolled in SNAP.

In 2014, 75% of all pregnancies among teens aged 15 to 19 years old were unplanned (CDC, 2019; Guttmacher Institute, 2019a). Adolescent women who give birth face a higher unintended pregnancy rate than any other education level and will likely have a second unintended child without a change to their financial situation (Guttmacher Institute, 2019a). Women who do not give birth in adolescence experience a 90% graduation rate from high school, while only 50% of women who become teen mothers will graduate by the time they are 22 years old (CDC, 2020). Compounding the issue, the CDC has reported that young women who grow up in foster care are more than twice as likely to become pregnant than their peers (CDC, 2020). When the teen birth rate in the United States dropped by more than half between 1991 and 2015, the U.S. saved more than \$4.4 billion from reduced costs in public welfare programs (CDC, 2020; Power to Decide, 2018). Removing the Hyde Amendment from the HHS's annual budget could produce additional savings to U.S. taxpayers.

From 2015 to 2017, roughly a quarter of women who were Medicaid eligible and in need of abortion were forced to carry their pregnancy to term due to a lack of access to funds to pay for one out of pocket. In Louisiana, approximately one-third of Medicaid-eligible women who carried to term had preferred an abortion (Roberts et al., 2019).

Private funds from non-profits are unable to fill the gap in unmet needs for low-income women. Only 14% of abortion patients received financial assistance from organizations intending to help alleviate the financial burden in 2011. The Tiller Fund, an organization that assists low-income women in affording an abortion, saw an increase in requests for funding second-term abortions from 2010 to 2015 (*Tiller Fund Report*, 2017). This has led the organization to believe that the increase in requests was correlated with an increase in state-level legal restrictions that made obtaining an abortion filled with obstacles like longer waiting periods. Non-profit organizations are simply not able to meet the funding needs they face.

Funding abortions for women who want them is not a contemporary problem. Between 1978 and 1993, North Carolina had a state abortion fund that was filled and depleted 5 times. One study found that during the times when the funds ran out, 37% of women who carried to term and qualified to pull from the abortion fund would have terminated had the option been available to them (Boonstra & Sonfield, 2000). Likewise, in Louisiana it's estimated that if Medicaid covered abortion the state's abortion rate would rise from 10% to 14% (Roberts et al., 2019). In Louisiana and across the U.S., access to funding is an overwhelming obstacle to terminating a pregnancy when desired.

When women carry an unwanted pregnancy to term, it exacerbates economic insecurity and contributes to negative health issues. Children who come from unwanted pregnancies are more likely to suffer from poor maternal bonding and have a greater

likelihood of being raised in subjective poverty (Foster, et al., 2018a). They are more likely to be raised below the federal poverty line and be recipients of free lunch programs, SNAP, and TANF benefits. The implications of raising children in poverty long-term negatively impact the United States' future.

Additionally, women who carry unwanted pregnancies to term on Medicaid face a benefit cliff. Put simply, Medicaid's lack of phase-out incentivizes women to not seek an increase in income. The risk of losing their Medicaid coverage is too great, especially after they find themselves with a new baby. This could suggest that the Hyde Amendment creates an increased financial burden on the U.S. healthcare system and welfare system as it leads to an increase in babies born to mothers who are on welfare benefits.

### **Alternatives**

Viable alternatives to removing the Hyde Amendment from the Department of Health and Human Services appropriations bill include creating a more robust social safety net or increasing preventative family planning healthcare services under Medicaid.

Creating a more robust social safety net would alleviate some of the financial burdens that an unintended pregnancy creates. Some ramifications of this alternative, however, include a greater economic footprint as the families created from carrying unintended pregnancies to term will need access to additional funding. This option would need the 5-year lifetime limit on Temporary Assistance for Needy Families to be lifted and a longer-term welfare system put back into place. The government would also need to increase funding for Women, Infants, and Children (WIC), the federal program that provides financial assistance to pregnant women and their young children to ensure low-income women have access to regular prenatal care and adequate nutrition. This larger economic footprint is likely not politically popular, but for some who oppose abortion on moral grounds, it could serve as a compromise.

Increased access to preventative family planning health care, meanwhile, could lead to lower unintended pregnancy rates among low-income U.S. women. Expanding Medicaid eligibility and working with states to increase funding for preventative education beyond abstinence-only education would help prevent the need for abortions. This alternative would be cheaper than increasing the size of the social safety net and would even generate savings. It has been found that every dollar spent on publicly funded contraceptive services saves the U.S. healthcare system approximately six dollars (Frost et al., 2013). In 2010, it was estimated \$7.6 billion was saved through public funding for contraceptive services.

In 2010, family planning services alone saved an estimated \$13.6 billion through preventing unintended pregnancies, preventing expensive low birth weight births, preventing STIs, and catching cervical cancer early (Frost et al., 2014). The \$13.6 billion

does not even include potential savings from the welfare system. In 2014, publicly funded family planning services reportedly helped prevent about two million unintended pregnancies that would have likely resulted in an estimated 900,000 births and 700,000 abortions (Guttmacher Institute, 2019a).

However, increasing access to contraceptives and other forms of preventative care will not make requests for abortion disappear. 51% of abortion patients in 2014 were using a contraceptive method in the month they became pregnant (Guttmacher Institute, 2019b). Additionally, most contraceptives require a prescription and regular access to a doctor, which for some very low-income women is out of reach.

### **Recommendation**

The annual language of the Hyde amendment on the appropriations bill for the Department of Health and Human Services should not be renewed for another year. The window of opportunity to enact change has opened with the election of President Biden. In August of 2019, it was reported by the LA Times that the chair of the appropriations subcommittee on Labor, Health, Human Services, and Education, Rep. Rosa DeLauro (D-CT), would not be adding the Hyde Amendment to the budget in 2021 (Haberkorn, 2020).

A first-trimester abortion costs less to U.S. taxpayers than an average hospital delivery would, \$500 versus a national average of \$4,500, respectively (Khazan, 2020). Allowing federal funds to cover abortions will save taxpayers money in both healthcare and welfare system costs. Impoverished women who are forced to carry a child to term will continue living in poverty after the birth, now with the increased financial stress of a child. They know their situation best and understand how to optimize their future outcomes. The government should not take away an option that might be their preference.

Women who need federal funding to cover the cost of an abortion will find themselves on other government benefits in order to provide shelter and food for their children if the government effectively forces them to carry to term. Ultimately, Medicaid not covering abortion leads to more families being on WIC, SNAP, and TANF in the long-run. These children are more likely to be raised in poverty and are statistically more likely to find themselves facing an unintended pregnancy themselves.

The United States and low-income women cannot afford four more years of the Hyde Amendment, let alone 40 more. The cycle of poverty low-income women face has no end in sight without affordable and obtainable abortions. In order to protect future generations, Congress needs to act and allow for federal funds to be available to fund abortions once again. Whether a woman gets pregnant in Louisiana or Oregon should not determine her financial future. It is time for women across America to have equal access to healthcare under the law.

### Works Referenced

- Boonstra, H. D., & Sonfield, A. (2000, April). *Rights Without Access: Revisiting Public Funding of Abortion for Poor Women*. Guttmacher Institute.  
<https://www.guttmacher.org/gpr/2000/04/rights-without-access-revisiting-public-funding-abortion-poor-women>.
- CDC. (2019, September 13). *Unintended Pregnancy | Unintended Pregnancy | Reproductive Health | CDC*.  
<https://www.cdc.gov/reproductivehealth/contraception/unintendedpregnancy/index.htm>.
- CDC. (2015). Evidence Summary: Prevent Unintended Pregnancy. 9.  
<https://www.cdc.gov/sixteen/pregnancy/index.htm>.
- CDC. (2020, October 28). <https://www.cdc.gov/teenpregnancy/about/index.htm>
- Daniels, K., & Abma, J. C. (2020). Current Contraceptive Status Among Women Aged 15–49: United States, 2017–2019. 388, 8.
- Daniels, K., Jones, J., & Abma, J. C. (2013). Use of Emergency Contraception Among Women Aged 15–44: United States, 2006–2010. 112, 8.
- Diamant, J., (2020, June 18). Three-in-ten or more Democrats and Republicans don't agree with their party on abortion. Pew Research Center.  
<https://www.pewresearch.org/fact-tank/2020/06/18/three-in-ten-or-more-democrats-and-republicans-dont-agree-with-their-party-on-abortion/>.
- Federal Reserve Board Issues Report on the Economic Well-Being of U.S. Households. (2019, May 23). Board of Governors of the Federal Reserve System.  
<https://www.federalreserve.gov/newsevents/pressreleases/other20190523b.htm>.
- Finer, L. B., & Zolna, M. R. (2011). Unintended pregnancy in the United States: Incidence and disparities, 2006. *Contraception*, 84(5), 478–485.  
<https://doi.org/10.1016/j.contraception.2011.07.013>.
- Finder, L. B., & Zolna, M. R. (2016). Declines in Unintended Pregnancy in the United States, 2008-2011. *PubMed*, 374(9), 843-52.  
<https://pubmed.ncbi.nlm.nih.gov/26962904/>.
- Finer, L. B., Frohworth, L. F., Dauphinee, L. A., Singh, S., & Moore, A. M. (2006). Timing of steps and reasons for delays in obtaining abortions in the United States. *Contraception*, 74(4), 334–344.  
<https://doi.org/10.1016/j.contraception.2006.04.010>.
- Foster, D. G., Biggs, M. A., Raifman, S., Gipson, J., Kimport, K., & Rocca, C. H. (2018a). Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion. *JAMA Pediatrics*, 172(11), 1053–1060.  
<https://doi.org/10.1001/jamapediatrics.2018.1785>.
- Foster, D. G., Biggs, M. A., Ralph, L., Gerdts, C., Roberts, S., & Glymour, M. M. (2018b). Socioeconomic Outcomes of Women Who Receive and Women Who

- Are Denied Wanted Abortions in the United States. *American Journal of Public Health*, 108(3), 407–413. <https://doi.org/10.2105/AJPH.2017.304247>.
- Frost, J. J., Sonfield, A., Zolna, M. R., & Finer, L. B. (2014). Return on investment: A fuller assessment of the benefits and cost savings of the US publicly funded family planning program. *The Milbank Quarterly*, 92(4), 696–749. <https://doi.org/10.1111/1468-0009.12080>.
- Frost, J. J., Zolna, M. R., & Frohwirth, L. (2013). *Contraceptive Needs and Services, 2010*. <https://www.guttmacher.org/report/contraceptive-needs-and-services-2010>.
- Gallup Inc. (2020). Abortion. Gallup.Com. <https://news.gallup.com/poll/1576/Abortion.aspx>.
- Government Accountability Office. (2019, January). *MEDICAID: CMS Action Needed to Ensure Compliance with Abortion Coverage Requirements*. GAO. <https://www.gao.gov/assets/700/696338.pdf>.
- Green, E. (2019a, June 14). Why Democrats Ditched the Hyde Amendment. The Atlantic. <https://www.theatlantic.com/politics/archive/2019/06/democrats-hyde-amendment-history/591646/>.
- Green, E. (2019b, June 3). 2020 Candidates Are Going All In on Abortion Rights. The Atlantic. <https://www.theatlantic.com/politics/archive/2019/06/2020-democrats-abortion/590701/>.
- Guttmacher Institute. (2019a, January). *Unintended Pregnancy in the United States*. Guttmacher Institute. <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states>.
- Guttmacher Institute. (2019b, September). *Induced Abortion in the United States*. Guttmacher Institute. <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.
- Guttmacher Institute. (2020, December). *State Bans on Abortion Throughout Pregnancy*. Guttmacher Institute. <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>.
- Haberkorn, J. (2020, August 28). *House Democrats will try to repeal long-standing ban on federal money for abortions*. Los Angeles Times. <https://www.latimes.com/politics/story/2020-08-28/democrats-seek-to-restore-government-funding-of-abortion>.
- Jones, R. K. (2018). Reported contraceptive use in the month of becoming pregnant among U.S. abortion patients in 2000 and 2014. *Contraception*, 97(4), 309–312. <https://doi.org/10.1016/j.contraception.2017.12.018>.
- Jones, R. K., Ingerick, M., & Jerman, J. (2018, January 12). Differences in Abortion Service Delivery in Hostile, Middle-ground, and Supportive States in 2014. *Women's Health Issues*, 28(3), 212–218. <https://doi.org/10.1016/j.whi.2017.12.003>.

- Jones, R. K., Witwer, E., & Jerman, J. (2019, September 11). *Abortion Incidence and Service Availability in the United States, 2017*. Guttmacher Institute. <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017>.
- Kaiser Family Foundation. (2019, March 28). Medicaid's Role for Women. *KFF*. <https://www.kff.org/womens-health-policy/fact-sheet/medicaids-role-for-women/>.
- Kaiser Family Foundation. (2021, February 4). Status of State Medicaid Expansion Decisions: Interactive Map. *KFF*. <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/>.
- Khazan, O. (2020, January 6). *The High Cost of Having a Baby in America*. The Atlantic. <https://www.theatlantic.com/health/archive/2020/01/how-much-does-it-cost-have-baby-us/604519/>.
- Medicaid Funding of Abortion*. (2016, December 21). Guttmacher Institute. <https://www.guttmacher.org/evidence-you-can-use/medicaid-funding-abortion>.
- Muñana, C., Weigel, G., Frederiksen, B., Ranji, U., & 2020. (2020, January 22). Abortion Knowledge and Attitudes: KFF Polling and Policy Insights. *KFF*. <https://www.kff.org/womens-health-policy/poll-finding/abortion-knowledge-and-attitudes-kff-polling-and-policy-insights/>.
- Nash, E., & Dreweke, J. (2019, September 6). The U.S. Abortion Rate Continues to Drop: Once Again, State Abortion Restrictions Are Not the Main Driver. Guttmacher Institute. <https://www.guttmacher.org/gpr/2019/09/us-abortion-rate-continues-drop-once-again-state-abortion-restrictions-are-not-main>.
- OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION. (2020, January 17). Poverty Guidelines. ASPE. <https://aspe.hhs.gov/poverty-guidelines>.
- Power to Decide. (2018, January) *Progress Pays Off*. <https://powertodecide.org/sites/default/files/media/savings-fact-sheet-national.pdf>.
- Roberts, S. C. M., Johns, N. E., Williams, V., Wingo, E., & Upadhyay, U. D. (2019). Estimating the proportion of Medicaid-eligible pregnant women in Louisiana who do not get abortions when Medicaid does not cover abortion. *BMC Women's Health*, 19(1), 78. <https://doi.org/10.1186/s12905-019-0775-5>.
- Salganicoff, A., Sobel, L., & Ramaswamy, A. (2020, September 10). The Hyde Amendment and Coverage for Abortion Services. *KFF*. <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/>.
- Sawhill, I. & Guyot, K. (2019, June 24). Preventing unplanned pregnancy: Lessons from the states. *Brookings*. <https://www.brookings.edu/research/preventing-unplanned-pregnancy-lessons-from-the-states/>.

- Sonfield, A., & Kost, K. (2013). *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy and Infant Care: Estimates for 2008*. 13.
- Shimabukuro, J. O. (2019). Abortion: Judicial History and Legislative Response. Congressional Research Service, 26. <https://fas.org/sgp/crs/misc/RL33467.pdf>.
- Smith, K. (2020, October 6). Biden pledged to make Roe v. Wade “the law of the land.” Abortion-rights supporters want more. <https://www.cbsnews.com/news/biden-roe-v-wade-law-land-supreme-court-supporters/>.
- Tiller Fund Report: Five Years of Abortion Funding Data Released*. (2017, February 21). National Network of Abortion Funds. <https://abortionfunds.org/tiller-fund-2017/>.

## Mandatory Vaccines: A Public Health Necessity

By Jesse Zmick

Nearly twenty years after the conclusion of a successful eradication campaign saw the United States free from the threat of Measles, outbreaks of this potentially deadly and debilitating virus once again began to dominate news headlines across the nation (CDC, 2019 and Gonzales, 2019). Despite the ready-availability of a proven vaccine, the burgeoning anti-vaccination movement made the nation vulnerable to a recurrence of these infections as demonstrated by the 2019 epidemic in the Williamsburg section of Brooklyn in New York City and neighboring Rockland County (Paris, 2019).

On March 26<sup>th</sup> 2019, Edwin J. Day, the County Executive for Rockland County, issued an order barring unimmunized children from places of public assembly for thirty days or the duration of the outbreak (*W.D. v. County of Rockland*, 2019). Soon after, on April 9<sup>th</sup> 2019, the Commissioner of the New York City Department of Health and Mental Hygiene, Doctor Oxiris Barbot, acting with the blessing of New York Mayor Bill de Blasio, declared a public health emergency (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2020). He subsequently ordered that all unvaccinated individuals residing in the zip codes at the epicenter of the outbreak receive vaccinations “...barring a demonstrated immunity to Measles or a verifiable medical history that includes adverse reactions to immunizations...” (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2019). In both cases, residents who violated either order faced fines up to, and potentially in excess of, \$2000 per infraction as well as possible jail time (Burm, 2019).

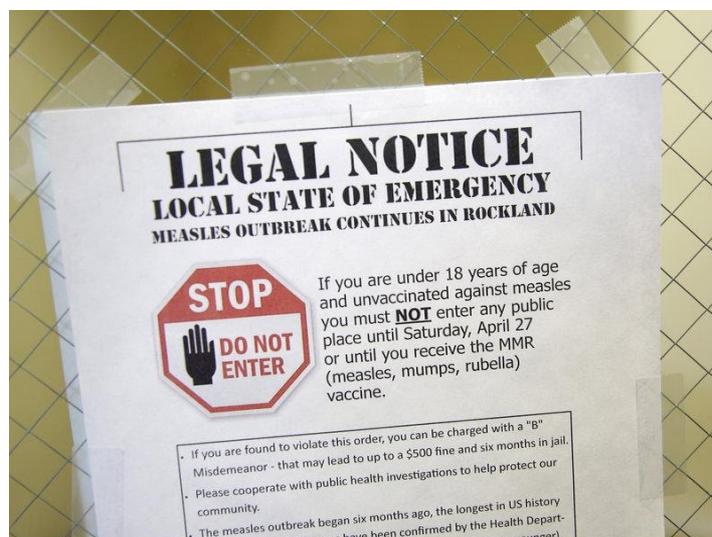


Figure 5: An example of the type of signs posted at places of public assembly by the Rockland County Health Department (Seth Wenig/AP)

While these actions, upon cursory examination, may seem to come into conflict with the protections and freedoms guaranteed by Bill of Rights, the current precedent of the Supreme Court of the United States actually supports such actions (Mariner, 2005). In 1905, the case of *Jacobson v. Massachusetts* was decided by a conclusive seven-to-two vote with the majority siding with the Commonwealth of Massachusetts' policy of mandatory Smallpox inoculation. The defendant, Henning Jacobson, had argued that such actions were "arbitrary or oppressive" and in violation of the Constitution and Bill of Rights (Mariner, 2005 and *Jacobson v. Massachusetts*, 1905). While sympathetic to this position, the Court felt that the larger issue of public safety was more pressing and stated in their opinion that the government had a duty to safeguard not only individual rights but also the general welfare:

*"There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."* – Excerpt from the Majority Opinion in *Jacobson v. Massachusetts*

In the 1922 case of *Zucht v. King*, the only other time the Supreme Court has heard an argument involving an issue of mandatory immunization, *Jacobson* was unanimously considered settled law with the entire Court agreeing that the previous ruling had unequivocally confirmed "that it is within the police power of a state to provide for compulsory vaccination" (*Zucht v. King*, 1922). Likewise, the court also dictated it was within the power of the government, Federal, State, and Local, to "...vest in its official's broad discretion in matters affecting the application and enforcement of a health law..." (*Zucht v. King*, 1922).

While both cases predated *United States v. Carolene Products Company* and thus did not address the higher levels of scrutiny introduced under 'Footnote Four', it seems likely that if either case came before a contemporary court, the rulings would both remain the same and easily pass the Strict Scrutiny needed to curtail Constitutional rights. Overshadowing the 1938 case, this footnote introduced the process through which the Supreme Court can determine if a law that infringes on a Constitutional right should be allowed to remain enforceable (*United States v. Carolene Products Company*, 1938).

In order to pass this heightened level of scrutiny, the court requires a governing body to both prove that there is a "compelling governmental interest" and that law has been written, or "tailored", in the narrowest possible manner to achieve this goal

(Cornell Law School, 2018). Preserving public health is, by any rational measure, unequivocally a matter of “compelling governmental interest” and vaccination, along with the sparse use of involuntary quarantine, is one of the least invasive and most effective means to accomplish that – as attested to by the global eradication of the Smallpox virus and the 2000 eradication of Measles within the United States (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2020 and Lindmeier, 2020).

A population vulnerable to infection by common pathogens could also be viewed as a strategic risk and the Courts have historically granted the state broad powers to curtail rights that conflict with military necessity to “provide for the common defense” as demonstrated by the highly controversial *Korematsu v. United States* which dealt with the legality of the Internment of Japanese Americans during World War II (*Korematsu v. United States*, 1944). Regardless of the perspective, military vulnerability or preserving the general welfare of the nation, both arguments demonstrate the need for government intervention in matters of public health when one’s personal actions, such as refusing vaccination, are directly threatening the wellbeing of others.

When it comes to childhood immunization, an argument could also be made using the precedent set in cases such *People v. Pierson* that there exists a duty for the parent or legal guardian of a child or children to “furnish medical attendance” and that a refusal to vaccinate violates this mandate (*People v. Pierson*, 1903). Given their special legal status, the welfare of children can often trigger exceptions to the protections provided by the Constitution and the Bill of Rights. In the case of *Pierson*, the Court of Appeals of the State of New York found that a First Amendment argument for the Freedom of Religion was not sufficient to overrule the *parens patriæ* duty of the government to protect the welfare of children. Specifically, they confirmed that a religious objection was not valid grounds for the refusal of medical care in the case of minors (*People v. Pierson*, 1903). Interestingly, and mirroring the aforementioned *Jacobson* opinion, the singular circumstance cited in the *Pierson* decision where an adult of sound mind could be forced to undergo an unelected medical treatment was in “...the case of a contagious disease [that] would affect the health of others.”

One could go even further and claim there exists an argument that, given the devastating impact such speech can incur, anti-vaccination propaganda should not always be afforded protection under the First Amendment. According to the Centers for Disease Control and Prevention, the recent outbreak in New York is due, at least in part, to groups “...deliberately targeting these communities with inaccurate and misleading information about vaccines...” for their own political and personal agendas (Gonzales, 2019). Similarly, in 2017, the Minnesota Department of Health found that, much like the Ultra-Orthodox Jewish families of Williamsburg, the “...Somali community [had] been targeted with misinformation about vaccine risks...” (Schommer, 2017). It is conceivable that the regulation of such targeted speech, particularly in times of an active outbreak or

when there is an underlying agenda, could fall under the “broad discretion” allowed to the government in matters of health despite the protections against government censorship (*Zucht v. King*, 1922).

The recent case of *Commonwealth v. Michelle Carter*, a ruling that was affirmed upon appeal by the Massachusetts Supreme Judicial Court, could support such an argument as the case determined that targeted cohesive behavior meant to incite a vulnerable individual or individuals to suicide or self-harm does not constitute protected speech (*Commonwealth v. Michelle Carter*, 2016). Considering the potentially life-altering nature of many diseases, it would not be out of place to posit that an analogy could be made between someone targeting an individual person to induce self-harm and someone deliberately targeting particular, often vulnerable, ethnic groups with harmful propaganda. While this argument is not definitive and has not come before a court, it is worth considering if limitations are warranted since the propagation of anti-vaccination ideology represents a clear and present danger to public health and the general welfare of the nation as a whole.

Furthermore, although nearly all speech is constitutionally protected under the First Amendment, this ceases to be the case when said speech is used to incite immediate harm or violence according to the precedent found in *Brandenburg v. Ohio* (*Matal v. Tam*, 2017 and *Brandenburg v. Ohio*, 1969). Given the devastating impact such speech can incur by encouraging directly harmful actions this is, arguably, yet another reason that anti-vaccination propaganda should not be afforded protection under the First Amendment. Additionally, given that propaganda designed to hasten the spread of a deadly illness could amount to terroristic speech and a form of domestic terrorism, the 2010 ruling in *Holder v. Humanitarian Law Project* confirms that speech or activities on the part of a group that supports or promotes terrorism are not protected under the Constitution (*Holder v. Humanitarian Law Project*, 2010). This interpretation is particularly poignant given that there have been confirmed cases of hate and extremist groups seeking to weaponize pathogens and misinformation against vulnerable communities (Allam, 2020 and Scott, 2020).

Despite the overwhelming support of the Supreme Court, the medical community at large, and the myriad of legal arguments justifying the practice, vaccination and isolation programs continue to face challenges in court. After hearing the arguments in *W.D. v. County of Rockland* on April 5, 2019, acting New York State Supreme Court<sup>5</sup> Judge Rolf Thorsen issued a temporary injunction against Rockland County’s ban on unvaccinated children in places of public assembly until there could be a full hearing on April 19<sup>th</sup> for the mandatory vaccination program enacted by New York City. According to the Judge, not only did County Executive Edwin Day not have the authority to declare

---

<sup>5</sup> Unique to New York State, their “Supreme Court is the trial court of unlimited original jurisdiction” and therefore the first court where many cases are heard (New York State, n.d.)

a state of emergency for a period longer than five days, but had also failed to sufficiently demonstrate a threat to the general public with only 166 cases of Measles in a total population of 330,000 (*W.D. v. County of Rockland*). Judge Thorsen did not rule on the New York City ordinance.

Setting aside the issue of County protocol for an extended state of emergency, the Judge's reasoning does not seem to account for the often-exponential spread of pathogens throughout a vulnerable population and the ability for modern modes of travel to drastically increase the range of a potential threat. Between the time when the preliminary injunction was issued and the hearing occurred, the number of known infected in the County continued to rise and additional locations of possible exposure were discovered, including a case in Michigan where 39 people were infected by a traveling resident of the Williamsburg area of New York City (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2019). Every one of the 166 infected residents of Rockwell County could present a risk to not only their immediate community but also to any area that they travel. There had already been one international death attributed to the ongoing Measles epidemic and more were likely to follow if quarantines and travel bans had not been enacted and enforced (Cohen, 2019).

During the April 19, 2019 hearing, Administrative Judge for Civil Matters of the 2<sup>nd</sup> Judicial District Lawrence S. Knipel heard arguments against the City of New York's mandatory vaccination program in *C.F. v. The New York City Department of Health and Mental Hygiene*. The plaintiffs argued that the program violated their First Amendment right to free expression of religion, was not a medical necessity, and would violate their basic human rights. Judge Knipel dismissed all three lines of argument, ruling that they had no merit and thus the plaintiffs had no grounds on which to ask for injunctive relief (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2019 and 2020).

While the plaintiffs claimed that vaccinations came into conflict with their religious beliefs, they failed to provide the necessary "...affidavit of a religious official (priest, rabbi, etc.) or other doctrinal documentation..." required in cases of religious exception according to the precedent set for New York State in the 2010 case of *Caiezel v. Great Neck Public Schools* (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2019). However, even if they had been granted standing to bring such an argument, it seems likely that Judge Knipel would still have sided with the City of New York. In his ruling, he not only acknowledges the "gravity of the situation" and that the ongoing Measles outbreak represents a clear and present threat to public health, but also notes that the plaintiffs could "...not offer a demonstrably better, safer, or more efficient alternative..." to the policies that had been implemented (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2019). It therefore met the requirements for a Strict Scrutiny exemption to a Constitutional right as there is both a compelling governmental interest and the law is being applied in the narrowest possible way (Cornell Law School, 2018).

Dr. Jane Orient, a medical consultant for the plaintiffs, stated “...the current measles outbreak is not a clear and present danger...” in an affidavit that was used to argue that “...the MMR vaccine is ineffective, is of greater risk than non-vaccination and that the MMR vaccine itself propagates the very disease it was designed to prevent...” (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2019 and Serbaroli, 2019). In his ruling Judge Knipel notes that none of the medical experts called upon by the plaintiffs could provide any evidence to support these claims and thus labeled them as “...unsupported, bald faced opinion...” and ruled that they could not “...be credited by this court.” Dr. Fitzpatrick, another witness for the plaintiffs, alluded to this in his testimony stating that “...it is virtually impossible to find 'mainstream literature' on the risk of the MMR...” but was still relied upon by the plaintiffs to argue the position that the MMR vaccine was more dangerous than the disease itself (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2019 and Serbaroli, 2019). Judge Knipel addressed this in his ruling, stating “...these contentions are completely unsupported by studies, medical literature, or other acceptable evidence...” and dismissed their argument as “...this lack of foundation reduces the opinions of these doctors to little more than speculation.”

The plaintiffs also contended that the vaccination program violated “...medical ethics, tort law and internationally accepted human rights principles such as the Nuremberg Code...” as they had not been provided an opportunity for informed consent. Judge Kindel felt these arguments were “inappropriately raised” and were neither applicable to this case nor the New York City policy (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2019). Given the threat to public health posed by unvaccinated individuals, he likened the outbreak to a fire, writing in his opinion:

*“A fireman need not obtain the informed consent of the owner before extinguishing a house fire. Vaccination is known to extinguish the fire of contagion.”* – Excerpt from the 2019 ruling in *C.F. v. The New York City Department of Health and Mental Hygiene*

Although the plaintiffs from Rockwell County did not appear in court, Judge Knipel did note that he took exception to the previous ruling of Judge Thorson and, as a result, County Executive Day felt empowered to issue a second State of Emergency (Brum, 2019 and *C.F. v. The New York City Department of Health and Mental Hygiene*, 2019). This not only extended the prohibition of unvaccinated persons from places of public assembly that was previously set to expire on April 27<sup>th</sup> until May 25<sup>th</sup>, but also expanded it to include adults as well as children (CBS, 2019). Day explained that the County was justified not only because of the Knipel decision but also because there have been an additional 50 new cases of Measles while the injunction had been in effect

meaning that “...Rockland comprises 29 percent of the nation’s reported measles cases despite representing 0.1% of the [nation’s] population” (Brum, 2019).

This statistic is even more alarming and notable when you consider that these outbreaks constituted a 25-year high for total number of cases per year and occurred within the first four months of the year, thus bringing an expectation that cases would continue to rise dramatically unless actions were taken to halt the spread (CDC, 2019 and Gonzales, 2019). The plaintiffs from New York City appealed their case in 2020 during the ongoing global pandemic, but they were ultimately unsuccessful in overturning the decision of Judge Knipel given the strong, and continuing, precedent of *Jacobson v. Massachusetts* combined with the ongoing threat to public safety posed by the rampant spread of infectious diseases such as the COVID-19 Coronavirus (*C.F. v. The New York City Department of Health and Mental Hygiene*, 2020).

As cited by the appellate court that upheld the 2019 ruling, involuntary quarantine and mandatory vaccination programs continue to be valuable and, more importantly, legal tools in the continuing battle against the scourge of infectious disease. Tools that would be of particular use in the ongoing, precarious situation that we find ourselves, both individually and as a nation, struggling to efficiently combat. Given this, it would be inordinately foolish to forgo any proven strategy which might help prevent the ongoing scourge of morbidity and mortality even if they seem, upon a cursory glance and without being familiar with the historical context and previous precedent, to infringe on the personal liberties enshrined in the Constitution and the Bill of Rights. History is cyclical, and, sadly, the ongoing public health crisis has proven that if we do not pay attention to the mistakes and tribulations of 2019 then they will become the mistakes and tribulations of 2021.

### Works Referenced

- Allam, H. (2020, April 16). 'A Perfect Storm': Extremists Look For Ways To Exploit Coronavirus Pandemic. Retrieved from <https://www.npr.org/2020/04/16/835343965/-a-perfect-storm-extremists-look-for-ways-to-exploit-coronavirus-pandemic>.
- Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- Brum, R. (2019, April 25). Measles: Ed Day renews Rockland state of emergency, with no new restrictions. Retrieved from <https://www.lohud.com/story/news/local/rockland/2019/04/25/measles-ed-day-renews-rockland-state-of-emergency/3572664002/>.
- Caviezel v. Great Neck Public Schools*, 739 F. Supp. 2d 273 (E.D.N.Y. 2010).
- CBS. Rockland County New York issues 2nd state of emergency as measles outbreak grows. (2019, April 25). Retrieved from <https://www.cbsnews.com/news/measles-outbreak-2nd-state-of-emergency-rockland-county-new-york-today-2019-04-25/>.

- Centers for Disease Control and Prevention (CDC). (2019, April 25). Measles cases in the U.S. are highest since measles was eliminated in 2000. Retrieved from <https://www.cdc.gov/media/releases/2019/s0424-highest-measles-cases-since-elimination.html>.
- C.F. v. The New York City Department of Health and Mental Hygiene*, 2019 NY Slip Op 31047 (NY 2019).
- C.F. v. The New York City Department of Health and Mental Hygiene*, 2020 NY Slip Op 07867 (NY 2020).
- Cohen, E. (2019, April 17). Israeli flight attendant in coma after getting measles. Retrieved from <https://www.cnn.com/2019/04/17/health/measles-israel-flight-attendant/index.html>.
- Commonwealth v. Carter*, 52 N.E.3d 1054 (Mass. 2016).
- Cornell Law School. Strict scrutiny. (2018, September 25). Retrieved from [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny).
- Gonzales, R. (2019, April 25). CDC Reports Largest U.S. Measles Outbreak Since Year 2000. Retrieved from <https://www.npr.org/2019/04/24/716953746/cdc-reports-largest-u-s-measles-outbreak-since-year-2000>.
- Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).
- Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
- Korematsu v. United States*, 323 U.S. 214 (1944).
- Lindmeier, C. (2020, May 8) Commemorating Smallpox Eradication – a legacy of hope, for COVID-19 and other diseases. Retrieved from <https://www.who.int/news/item/08-05-2020-commemorating-smallpox-eradication-a-legacy-of-hope-for-covid-19-and-other-diseases>.
- Matal v. Tam*, 582 U.S. (2017).
- Mariner, W. K., Annas, G. J., & Glantz, L. H. (2005). *Jacobson v Massachusetts: it's not your great-great-grandfather's public health law*. *American journal of public health*, 95(4), 581–590. New York State. (n.d.) *Supreme Court*. Nycourts.gov. Retrieved from <https://www.nycourts.gov/courts/nyc/supreme/>.
- Paris, F. (2019, April 19). Judge Upholds Mandatory Measles Vaccinations As New York Closes More Schools. Retrieved from <https://www.npr.org/2019/04/19/715016284/brooklyn-judge-upholds-mandatory-vaccinations-as-new-york-city-closes-more-schoo>.
- People v. Pierson*, 176 N.Y. 201 (N.Y. 1903).
- Scott, M. and Overly, S. (2020, May 13). Conspiracy theorists, far-right extremists around the world seize on the pandemic. Retrieved from <https://www.politico.com/news/2020/05/12/trans-atlantic-conspiracy-coronavirus-251325>.

Schommer, M. (2017, April 14). State health officials confirm five new cases of measles in Hennepin County. Retrieved from

<https://www.health.state.mn.us/news/pressrel/2017/measles041417.html>.

Serbaroli, F. (2019, May 15). The Measles Epidemic and the Law. Retrieved from

<https://www.law.com/newyorklawjournal/2019/05/15/the-measles-epidemic-and-the-law/>.

*United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

*W.D. v. County of Rockland*, 2019 NY Slip Op 29111 (NY 2019).

*Zucht v. King*, 260 U.S. 174 (1922).

---

## Decreasing the U.S. Gender Pay Gap: Promoting Gender Equality While Addressing the Economic Crisis

By Ciara Rivera

---

### Abstract

Despite increased opportunities for women, in the United States there is still a gender pay gap (England et al., 2020). Furthermore, closing the U.S. gender pay gap could potentially increase the GDP by two trillion, resulting in 4.7 trillion in Social Security savings (Pipeline Equity, 2019). The gender pay gap results from a number of market failures that threaten the U.S. democracy: social norms surrounding female gender roles, work culture perpetuating social norms, and inequality. This essay will further unpack the gender pay gap problem by defining and explaining the market failures and identifying the U.S. government actions already taken to address the problem. Inevitably, the aftermath of COVID-19 has potentially slightly reversed progress towards gender equality, however, there are opportunities for businesses and the new administration to take action. The essay highlights promising practices from a championing European country and businesses in the United States. The paper culminates with the policy recommendations promoting a favorable workplace environment that could lead towards gender equality. Incentivizing companies to promote gender equality in the workplace will increase the production possibility curve, and thus the country's GDP, and consequently increase efficiency and decrease inequality.

### Introduction

***“We must remember that democracies can deliver majorities that actually — in the name of a democratic process — can impose restrictions on women's rights. If [democracy] shirks accountability for women's rights, it is a democracy for only half its citizens” (Bachelet, 2011)***

At the 2012 G20 summit, all member countries (including the United States), agreed to address gender inequalities (OXFAM & Wakefield, 2014). The G20 agreed to reduce gender gap participation rates between men and women by 25% by 2025 (G 20, 2014). However, an International Labor Organization analysis found that applying the 25% reduction by 2025 to all countries (not just the G20) could “raise global GDP by 3.9%, or \$5.8 trillion globally” (International Labour Organization, 2017, p.18). Despite increased opportunities for women, in the United States there is still a gender pay gap (England et al., 2020). The most recent 2020 data indicates American women earn 81 cents for every dollar that men earn regardless of employment level and 98 cents for every dollar their male counterparts for the same type of job (PayScale, 2020). For

context, “on average, women employed full time in the United States lose a combined total of more than \$956 billion every year due to the wage gap” (American Centers for Progress, & Bleiweiss, 2020). Reducing the pay gap would yield higher female labor force participation, enlarging available talent pool, and reducing, or even reversing, the negative impact of inequality on economic growth (Panizza & Qiang, 2005). Furthermore, closing the U.S. gender pay gap could potentially increase the GDP by two trillion, resulting in 4.7 trillion in Social Security savings (Pipeline Equity, 2019). The gender pay gap results from a number of market failures that threaten the U.S. democracy: social norms surrounding female gender roles, work culture perpetuating social norms and inequality. This essay will further unpack the gender pay gap problem by defining and explaining the market failures, identifying the U.S. government actions already taken to address the problem and the implications of the COVID-19 lockdowns on advancing female workforce participation. The essay culminates with the policy recommendations.

### **Unpacking Reasons for Market Failure**

#### *Cultural and Social Norms*

In the context of social norms, a society’s values and beliefs will inform expectations that different groups of people have of how individuals should act and interact based on their sex (Blackstone, 2003). In this sense, gender is a socially constructed concept, and collectively a society defines what is ‘appropriate’ behavior(s) for each individual based on their sex. Looking at two often cited proverbs from the 1950s, one can understand the gender roles in the United States: “*A good wife and health are a man’s best wealth* (attributed to Benjamin Franklin)” and “*Where there is no wife there is no home*” (Safdar & Kosakowska-Berezecka, 2015). In the United States, the general population culturally perceives females as more nurturing, and therefore they should stay home with the kids and usually have more share of the household chores, while the general public stigmatizes males for taking on child-care duties.

#### *Work Culture Enables Perpetuating Social Norms*

Research supports the notion of a motherhood “penalty” in the United States, where mothers earn less than childless females, and while mothers have increased human capital gains (through more education and work experience) a gender pay gap still exists (Coltrane, et al., 2013; Jee, et al., 2019; Solomon & Goldman Sachs, 2020). In a representative national sample analyzed in a 2013 study, females were over 10 times more likely than males to report having modified employment for family reasons (Coltrane et al., 2013). A 2005 research study following two cohorts of graduates of the University of Michigan Law School 15 years after graduation yielded similar findings: in the onset of their careers, both females and males in these two cohorts earned similar wages, yet 15 years later, male graduates earned over 50% more (Noonan et al., 2005).

Females opted more frequently to work lesser hours, work part time or take time off after child birth in comparison to their male graduate counterparts. One can hypothesize employers are often not willing to hire females because of a potential loss of hours due to getting pregnant, their child care commitments, and they might leave the workforce to become full-time caregivers. Similarly, the U.S. workforce rewards the fatherhood “premium” with 2013 research demonstrating married males experience more wage increases than their unmarried counterparts: males that never married, had 33.9% less earnings in comparison to married males (Coltrane et al., 2013). Married fathers tend to work more hours for more weeks per year all the while accruing more work experience than their childless male counterparts. Therefore, the research from these highlighted studies, substantiates that the work culture in the United States perpetuates the social norms, inciting men to play the role of primary breadwinners, leaving women to play the roles of caregivers with expendable careers and limited workforce participation.

Lack of access to social capital can also impede females from advancing to higher management and leadership positions. A 2005 study shows that women tend to not access key social capital networks considered “valuable organizational commodity” that leads to professional career advancement (Timberlake, 2005). Female managers in U.S. companies tend to be more concentrated in support functions such as human resources and financial administration (PayScale, 2020). Historically, women have not been highly represented in decision-making roles in U.S. politics and private sector (American Centers for Progress et al., 2018; Pew Research Center, et al. 2018). Moreover, “at 30% of the population, [white men] hold 62% of elected offices at local, state and federal level-more than double their share” (The Reflective Democracy Campaign, 2019).

### *Inequality*

The gender pay gap contributes to the gender inequality index and consequently the inequality Gini coefficient. As per OECD, “the Gini coefficient is based on the comparison of cumulative proportions of the population against cumulative proportions of income they receive, and it ranges between zero in the case of perfect equality and one in the case of perfect inequality” (OECD, n.d). According to a 2017 International Monetary Fund report, inequality could be beneficial to growth at low to moderate levels in countries with Gini coefficient index values below 27 (Grigoli & Robles, 2017). However, the World Bank reports current U.S. Gini index value is approximately 41 (World Bank IBRD Data, 2016b). Additionally, sustained increases in income inequality leads to lowering GDP growth, due to the rising distance of the lower 40% of those in poverty from the rest of society, preventing people in the lower 40% from maximizing their human capital, and thus leading to stagnating social mobility - which consequently has negative impacts on economic development in general (OECD, 2015). The 2020 Global Gender Gap Report currently rates the United States at 53 out of 153

countries analyzed in terms of Gender Equity index, dropping two ranking from the previous year (World Economic Forum, 2019). Notwithstanding, Americans remain divided with regards to whether there is still work to be done towards reducing gender inequality (Pew Research Center et al., 2017).

### Favorable Government Actions

Existing U.S. legislation does provide a nascent normative framework for reducing gender inequality. The 1963 Equal Pay Act requires employers to practice “equal pay for equal work” policy under similar working conditions (Greenlaw & Shapiro, 2017). Title VII of the 1964 Civil Rights Act denounces discrimination on the grounds gender, race, color, religion and national origin in the workplace. Title IX of the 1972 Education Amendments provides protection from discrimination in any federally subsidized program. The 1978 Pregnancy Discrimination Act prohibits sex discrimination on the basis of pregnancy (Greenlaw & Shapiro, 2017). The Lily Ledbetter Fair Pay Act of 2009 reverses the 2007 Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which had limited workers’ ability to defend their rights against pay discrimination (Greenlaw & Shapiro, 2017). The 2009 act amends Title VII of the Civil Rights Act of 1964 and states that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new paycheck affected by that discriminatory action (*Ledbetter v. Goodyear Tire & Rubber Co.*, 2007). Finally, the Equal Employment Opportunity Commission of 2016, directed companies with 100 or more employees, to submit a form in order to collect income information by gender, race, ethnicity and occupational category in order to gather evidence on pay differentials-essential for reducing the gender pay gap (EEOC, n.d.).

### *Can Social Norms Concerning Gender Roles Change?*

According to one of the world’s top experts on measuring change in social norms, “learned societal behavior around social norms, could change if collectively, a society finds ‘alternative’ ways to satisfy [its] needs [and] sometimes we come to grasp the advantages of new behaviors” (Bicchieri, 2017). Nonetheless, a society must first recognize the negative market failures. European countries with high rankings vis à vis low rates of gender inequality can serve as an example. Iceland is a champion country for reducing gender inequality and it holds the number one ranking as per the 2020 Gender Gap report (World Economic Forum, 2019), along with a Gini index of 26.8 (World Bank IBRD Data, 2016a). “Iceland’s progress can be attributed to women and men **sharing power with each other as decision-makers** and gradually having more men supporting the give and take of gender equality” (World Economic Forum et al., 2017). Americans just voted its first woman into an executive political office. The 2020 U.S. elections also revealed a wave of increased women of color leadership in politics resulting in increase in 46% of representation in congress, 38% increase in state

legislature, 19% increase in county offices and 46% increase in city offices (The Reflective Democracy Campaign, 2020). There are some U.S. private sector champions: JP Morgan has a gender-neutral family leave policy allowing mothers and fathers to take 16 weeks paid leave (Gibson & CBS Interactive, 2019) and Goldman Sachs aims to have at least 40% female vice presidents (Solomon & Goldman Sachs, 2020). These two examples from the private sector exemplify how establishing a favorable normative framework can lead to an enabling work culture that will shift social norms around gender roles, consequently reducing gender inequality.

### **Have COVID-19 Repercussions Set Progress Backwards?**

Globally, COVID-19 has increased gender poverty gaps and with school and child development facility closures, the burden of childcare and oversight of remote/home schooling added to the growing unpaid workload of women, and working women are disproportionately impacted when having to face the decision of 'returning' to work (UN Women, 2020). In the United States, "unemployment data indicate that women make up 54% of the overall job losses to date" (McKinsey & Company et al., 2020). Inevitably, the aftermath of COVID-19 has potentially slightly reversed progress towards gender equality, however, there are opportunities for businesses and the new administration to take action.

### **Policy Recommendations**

1. Provide tax credits to companies achieving a certification of no employment disparity. To be certified, the company would need to meet the gender equality metrics to be established by the Department of Labor, including: mandatory *equal* maternity and paternity leave, early child care services, nondiscriminatory pay, and parity within management and leadership positions.
2. Require schools to provide optional pre-K and extracurricular activities for K-12 students. The schools will also need to comply with regulations to ensure health and safety.

The first recommendation is inspired by a policy proposal Kamala Harris promoted to penalize companies not achieving gender equality (Roy, 2019). Similarly, existing U.S. legislation relies highly on penalizing gender discrimination in the workplace. Incentivizing businesses and employers to promote gender equality can promote favorable working environments for all. Drafting policy solutions with this distinctive lens (e.g., encouraging gender disparity through tax credits) is favorable to punitive policy measures that drive discriminatory behavior underground to avoid detection. Besides nondiscriminatory pay scales and increased female participation in leadership roles, tax credits for achieving 'no employment disparity' certification should also require establishment of mandatory paternity and maternity leave and be coupled

with access to child care services. Lack of access to affordable child care is a key barrier for increased female participation in the workforce “who disproportionately take on unpaid caregiving responsibilities” (Schochet, 2019). Employers benefit when their workers have access to childcare, as the employees will have fewer work disruptions - including decreased absences due to childcare needs (National Women's Law Center, 2017). Policies allowing for employees to respond to family demands equally (like equal maternal and paternal leave and access to child care) will lead to “increased, satisfaction, and retention” consequently benefiting the employer and overall economic productivity (Schneider, et al., 2011). In sum, incentivizing companies to promote gender equality in the workplace, and providing an enabling environment for working parents, especially moms, will result in an increased production possibility curve, raising the country’s GDP, and consequently increase efficiency and decrease inequality.

The second policy recommendation affords working parents the option of leaving their children at school for the duration of a regular full time work day. A 2009 study on the impact of the universal public preschool offering in Washington D.C. demonstrated an increase in workforce participation of mothers with young children “by 12 percentage points—10 of which were attributable to universal preschool” (Schochet, 2019). The Center for American Progress (CAP) reports that 70% of employed parents work from 8am to 5pm, while “the median school day ends at 2:50 p.m., and virtually every district in the country is closed by 3:30 p.m” (Brown et al., 2016). Schools’ schedules need to align with working parent schedules, and offering extra-curriculars on campus, before and after learning hours, would ease the burden of child care responsibilities on working parents, especially women. CAP recommends schools collaborate with community providers granting access to school grounds for providing “before- and after-school programs on school grounds rather than at facilities located outside the school building” (Brown et al., 2016). All in all, solutions promoting gender equity in the workplace must not only focus on the workplace and home life equilibrium, but also on “the institutions that support healthy working families—schools [and] afterschool programs” (Bianchi, 2011).

The combination of child care center and schoolwide closures, along with the economic downturn resulting from the pandemic, has negatively impacted female workforce participants the most. According to the most recent U.S. Census data, “women ages 25-44 are almost three times as likely as men to not be working due to childcare demands” as a result of the health crisis (Heggeness & Fields, 2020). The U.S. Vice-president elect calls the COVID-19 era “exodus of [2.5 million] women from the workforce a national emergency” (Harris, 2021). Women, particularly mothers, senior women and Black women, are 1.3 times more likely than men to consider leaving the workplace, including, potentially over two million women in corporate jobs— “more than the number of women who graduate from college and graduate programs in the US each year and over 100,000 women in senior leadership roles in the short term” (Corry

et al., 2020). Democracy cannot be achieved without policies and enabling environments favoring reducing [if not eliminating] inequalities. Given that women account for a little over half of the U.S. total population (Statista Research Department, 2021), policies increasing equitable female participation in the workplace must be prioritized.

### Works Referenced

- ADP. (2019). Court reinstates EEO-1 pay data reporting requirement. Retrieved from <https://www.adp.com/spark/articles/2020/08/court-reinstated-eeo-1-pay-data-reporting-requirements-aspx>.
- American Centers for Progress & Bleiweiss, R. (2020). *Quickfacts about the gender wage gap*. American Centers for Progress. Retrieved from <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/>.
- American Centers for Progress & Frye, J. (2020). *Why pay data matter in the fight for equal pay*. American Centers for Progress. Retrieved from <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/>.
- American Centers for Progress, Warner, J., Ellmann, N., & Boesch, D. (2018). *Leadership by the numbers*. American Centers for Progress. Retrieved from [https://cdn.americanprogress.org/content/uploads/2018/11/19121654/WomensLeadershipFactSheet.pdf?\\_ga=2.252796297.1493586284.1608504081-302841855.1604795908](https://cdn.americanprogress.org/content/uploads/2018/11/19121654/WomensLeadershipFactSheet.pdf?_ga=2.252796297.1493586284.1608504081-302841855.1604795908).
- Bachelet, M. (2011). Democracy and gender equality: Speech delivered by Ms. Michelle Bachelet, Under-Secretary-General and Executive Director of UN women, at the democracy and gender equality roundtable, UN headquarters, New York. Retrieved from <https://www.unwomen.org/en/news/stories/2011/5/democracy-and-gender-equality>.
- Bianchi, S. M. (2011). Changing families, changing workplaces. *The Future of Children, Princeton-Brookings*, 21(2), 15-36. Retrieved from [https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/work\\_and\\_family\\_21\\_02\\_fulljournal.pdf](https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/work_and_family_21_02_fulljournal.pdf).
- Bicchieri, C. (2017). *Norms in the wild: How to diagnose, measure, and change social norms*. New York: Oxford University Press.  
Doi:10.1093/acprof:020/9780190662204.001.0001. Retrieved from <https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780190662204.6.001.0001/acprof-9780190662204>.
- Blackstone, A. M. (2003). Gender roles and society. Retrieved from [https://digitalcommons.library.umaine.edu/soc\\_facpub/1](https://digitalcommons.library.umaine.edu/soc_facpub/1).
- Brown, C., Boser, U., Baffour, P. (2016). *Workin' 9 to 5*. Washington, D.C.: Center for American Progress. Retrieved from

- <https://www.americanprogress.org/issues/education-k-12/reports/2016/10/11/145084/workin-9-to-5-2/>.
- Coltrane, S., Miller, E. C., DeHann, T., & Steward, L. (2013). Fathers and the flexibility stigma. *Journal of Social Issues, 69*(2), 279-302.  
Doi:<https://doi.org/10.1111.josi.12015>.
- Coury, S., Huang, J., Kumar, A., Prince, S., Krivkovich, A., & Yee, L. (2020, September 30). Women in the workplace 2020. *McKinsey & Co. Featured Insights*. Retrieved from <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>.
- England, P., Levine, A., & Mishel, E. (2020). Progress toward gender equality in the united states has slowed or stalled. *Proceedings of the National Academy of Sciences, 117*(13), 6990-6997. Doi:10.1073/pnas.1918891117.
- G20 (Group of 20). (2014). G20 leaders' communique. Retrieved from <https://Obamawhitehouse.archives.gov/the-press-office/2014/11/16/g20-leaders-communiqu>.
- Gibson, K., & CBS Interactive. (2019). Dad sued employer JPMorgan chase over parental leave pay – and won. Retrieved from <https://www.cbsnews.com/news/pmorgan-chase-to-pay-5-million-to-male-employers-who-say-they-were-unfairly-denied-parental-leave/>.
- Greenlaw, S. A., & Shapiro, D. (2017). Chapter 14: Labor markets and income. *Principles of Economics 2e* (2nd ed., pp. 319-352). Web: OpenStax. Retrieved from <https://openstax.org/details/books/principles-economics-2e>.
- Grigoli, F., & Robles, A. (2017). *IMF working paper: inequality overhang*. International Monetary Fund (IMF). Retrieved from <https://www.imf.org/en/Publications/WP/Issues/2017/03/28/Inequality-Overhang-44774>.
- Harris, K. (2021, February 12). Opinion: Kamala Harris: The exodus of women from the workforce is a national emergency. *Washington Post*. Retrieved from [https://www.washingtonpost.com/opinions/kamala-harris-women-workforce-pandemic/2021/02/12/b8cd1cb6-6d6f-11eb-9f80-3d7646ce1bc0\\_story/html?fbclid=IwAR1abGSV8Yp8OPVwO9RJ05H3eLn5\\_gO4eiFXhCIAxguVniOVAHcxRGhEsk](https://www.washingtonpost.com/opinions/kamala-harris-women-workforce-pandemic/2021/02/12/b8cd1cb6-6d6f-11eb-9f80-3d7646ce1bc0_story/html?fbclid=IwAR1abGSV8Yp8OPVwO9RJ05H3eLn5_gO4eiFXhCIAxguVniOVAHcxRGhEsk).
- Heggeness, M. L., & Fields, J. M. (2020). Working moms bear brunt of home schooling while working during COVID-19. Retrieved from <https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html>.
- International Labour Organization (ILO). (2017). *World employment social outlook trends for women 2017*. Geneva: ILO. Retrieved from [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms\\_557245.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_557245.pdf).

- Jee, E., Misra, J., & Murray-Close, M. (2019). Motherhood penalties in the U.S., 1986-2014. *Journal of Marriage and Family*, 81(2), 434-449.  
Doi:<https://doi.org/10.1111/jomf/12543>.
- Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). (206-10).  
<https://supreme.justia.com/cases/federa/us/550/618/>.
- McKinsey & Company, Madgavkar, A., White, O., Krishnan, M., Mahajan, D., & Azcue, X. (2020). COVID-19 and gender equality: Countering the regressive effects. Retrieved from <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects>.
- National Women's Law Center. (2017). *Businesses have a critical role in supporting public in child care – fact sheet*. Washington, D.C.: National Women's Law Center. Retrieved from <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/Businesses-Have-A-Critical-Role-in-Supporting-Public-Investments-in-Child-Care.pdf>.
- Noonan, M. C., Corcoran, M. E., & Courant, P. N. (2005). Pay differences among the highly trained: Cohort differences in the sex gap in lawyers' earnings. *Social Forces*, 84(2), 853-872. Doi:10.1353/sof.2006.0021.
- OECD. (2015). *In it together Why less inequality benefits all*.  
Doi:<https://doi.org/10.1787/9789264235120-en>.
- OECD. (n.d.). Income inequality. Retrieved from <https://data.oecd.org/inequality/income-inequality/htm#:~:text=The%20Gini%20coefficient%20is%20based,the%20case%20of%20perfect%20inequality>.
- OXFAM & Wakefield, S. (2014). *THE G20 AND GENDER EQUALITY: how the G20 can advance women's rights in employment, social protection and fiscal policies*.  
<https://www.oxfam.org/en/research/g20-and-gender-equality>: Oxfam.
- Panizza, U., & Qiang, C. Z. (2005). Public-private wage differential and gender gap in latin America: Spoiled bureaucrats and exploited women? *Journal of Behavioral and Experimental Economics (Formerly the Journal of Socio-Economics)*, 34(6), 810-833. Retrieved from <https://EconPapers/repec.org/RePEc:eee:soceco:34:y:2005:i:6:p:810-833>.
- PayScale. (2020). *The state of the gender pay gap 2020*. PayScale. Retrieved from <https://www.payscale.com/data/gender-paygap>.
- Pew Research Center, Horowitz, J.M., Igielnik, R., & Parker, K. (2018). *Women and leadership 2018 wide gender and party gaps in views about the state of female leadership and the obstacles women face*. United States: Pew Research Center.
- Pew Research Center, Horowitz, J. M., Parker, K., & Stepler, R. (2017). *Wide partisan gaps in U.S. over how far the country has come on gender equality: Democrats sharply divided along educational lines on whether life is easier for men than for women*. Pew Research Center. Retrieved from

- <https://www.pewsocialtrends.org/2017/10/18/wide-partisan-gaps-in-u-s-over-how-far-the-country-has-come-on-gender-equality/>.
- Pipeline Equity (2019). *Equity for all report 2019*. Retrieved from [https://issuu.com/pipelineequity/docs/efa2019\\_report?e=33170485/69891299](https://issuu.com/pipelineequity/docs/efa2019_report?e=33170485/69891299).
- Roy, K. (2019). Breadwinning moms say ‘thank you’ to Kamala Harris. Retrieved from <https://thehill.com/opinion/civil-rights/446361-breadwinning-moms-say-thank-you-to-sen-kamala-harris>.
- Safdar, S., & Kosakowski-Berezecka, N. (2015). *Psychology of gender through the lens of culture theories and applications* (1st ed.) Springer International Publishing. Doi:<https://doi.org/10.1007/987-3-319-14005-6>. Retrieved from <https://link.springer.com/book/10/1007%2F978-3-319-14005-6>.
- Schneider, B., Butler, D., & Christensen, K. (2011). Families with school-age children. *The Future of Children, Princeton-Brookings*, 21(2), 69-90. Retrieved from [https://futureofchildren/Princeton/edu/sites/futureofchildren/files/media/work\\_and\\_family\\_21\\_02\\_fulljournal.pdf](https://futureofchildren/Princeton/edu/sites/futureofchildren/files/media/work_and_family_21_02_fulljournal.pdf).
- Schochet, L. (2019). *The child care crisis is keeping women out of the workforce*. Washington, D.C.: Center for American Progress. Retrieved from <https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467488/child-care-crisis-keeping-women-workforce/>.
- Sigle-Rushton, W., & Waldfogel, J. (2007). The incomes of families with children: A cross-national comparison. *Journal of European Social Policy*, 17(4), 299-318. Doi:10.1177/0958928707082474.
- Solomon, D. & Goldman Sachs. (2020). Update on inclusion and diversity at goldman sachs, including new aspirational goals. Retrieved from <https://www.goldmansachs.com/media-relations/press-releases/current/update-on-inclusion-and-diversity.html>.
- Statista Research Department. (2021). Total population in the United States by gender from 2010-2025. Retrieved from <https://www.statista.com/statistics/737923/us-population-by-gender/#:~:text=In%20the%20United%20States%2C%20the,of%20th%20population%20since%202013>.
- The Reflective Democracy Campaign. (2019). *The electability myth: The shifting demographics of political power in america*. Retrieved from <https://wholeads.us/wp-content/uploads/2019/08/The-Electability-Myth--The-Shifting-Demographics-if-Political-Power-In-America-8-1-19.pdf>.
- The Reflective Democracy Campaign. (2020). Kamala leads a multitude. Retrieved from <https://wholeads.us/kamala-harris-vice-president/>.
- Timberlake, S. (2005). Social capital and gender in the workplace. *Journal of Management Development*, 24, 34-44. Doi:10/1108/02621710510572335.

- UN Women. (2020). COVID-19 and its economic toll on women: The story behind the numbers. Retrieved from <https://www.unwomen.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women>.
- U.S. Equal Employment Opportunity Commission (EEOC). (n.d). What you should know about EEOC's proposal to collect pay data. Retrieved from <https://www.eeoc.gov/wysk/what-you-should-know-about-eeocs-proposal-collect-pay-data>.
- World Bank IBRD Data. (2016a). Gini index (world bank estimate) – Iceland. Retrieved from <https://data.worldbank.org/indicator/SI.POV.GINI?locations=Iceland>.
- World Bank IBRD Data. (2016b). Gini index (world bank estimate) – United States. Retrieved from <https://data.worldbank.org/indicator/SI.POV.GINI?locations=US>.
- World Economic Forum. (2019). *Insight report global gender gap report 2020*. Geneva: World Economic Forum. Retrieved from [https://www3.weforum.org/docs/WEF\\_GGGR\\_2020.pdf](https://www3.weforum.org/docs/WEF_GGGR_2020.pdf).
- World Economic Forum, Ministry of Welfare, Iceland, Marinosdottir, M. & Erlingsdotti, R. (2017). This is why Iceland ranks first for gender equality. Retrieved from <https://www.weforum.org/agenda/2017/11/why-iceland-ranks-first-gender-equality/>.

---

## Covid Testing: Notes from the Frontline and Thoughts for the Future

By David B. Walek

---

### Abstract

As Vice President and General Counsel of Veritas Genetics, a whole genome diagnostic sequencing company, David B. Walek has an inside view of the medical and legal challenges at play in the COVID-19 crisis. Veritas was co-founded by George M. Church, a widely acclaimed geneticist, chemist, and molecular engineer, who serves as the Robert Winthrop Professor of Genetics at Harvard Medical School and as a Professor of Health Sciences and Technology at Harvard and MIT. In response to the pandemic, Veritas has temporarily shifted all of its work to COVID-19 testing, utilizing both molecular and antibody tests. The company's customers range from individuals, schools, pharmacies, and nursing facilities to ski resorts, AMC, and Netflix. Here, Walek provides an account of his own experiences, insights, breakthroughs, and concerns, as well as a number of action items, policy considerations and objectives, and lessons.

### Looking Back

The COVID-19 pandemic has brought unprecedented attention to the, until now, relatively low-profile, research-oriented world of genetic laboratories. Until the Spring of 2020, genetic laboratories primarily served the needs of academic research, drug development, biotechnology, and advanced genetic screening for serious specialized medical risks and conditions. The laboratories themselves were, and are, heavily regulated and highly technical, managed and staffed by highly trained lab managers and technicians, and full of expensive and sophisticated sequencing machines and related equipment, built to operate at extraordinary speed and precision. Public awareness of the field was, for the most part, limited to occasional media and pop culture references, along with the marketing of a handful of consumer-facing gene scanning companies that were limited to providing ancestral data and only a few basic genetic medical markers because they operated outside the traditional medical world.

In the face of a sudden and overwhelming need to test enormous numbers of individuals for the COVID-19 virus, genetic laboratories immediately set aside their existing core businesses or academic missions. With the recognition that genetic screening offered the most accurate method of detecting the presence of the virus, laboratories pivoted as rapidly as possible to all COVID testing, all the time.

While the attention of the public and the media was quite understandably focused almost exclusively on the availability and delivery of COVID testing, the issues and challenges faced by the genetics labs and their partners were complex and multi-dimensional. These challenges included:

1. Re-allocation of lab equipment and personnel;
2. Selection and implementation of new test protocols, revisions, and refinements;
3. Uncertainty in emergency use authorizations (EUAs);
4. Establishment of multiple remote specimen collection points;
5. Implementation of rapid testing turn-around time, including specimen transportation, multi-shift lab operations, and online report generation and communication;
6. Maintaining HIPAA patient privacy and security while facilitating ease and speed of obtaining tests and test results;
7. Adopting and incorporating traditional medical provider test authorization concepts in new contexts and processes;
8. Creation of online test registration portals and integration with lab management systems and reporting mechanisms;
9. Developing and defining new relationships among labs and a new and wide range of customers—schools, businesses, pharmacies, nursing facilities, etc;
10. Managing supply chain issues, including unreliable sourcing and shortages in lab and specimen collection consumables and supplies;
11. Addressing and allocating liability issues and insurance protections; and
12. Confronting scarcity in qualified lab personnel.

In addition, at the financial level, many of the genetics labs had little or no experience with reimbursable health care activities. Genetics labs had seldom, if ever, been able to seek or offer tests for which insurance or other third-party reimbursement would be available or were involved in product development or other non-reimbursable industries. Suddenly thrust into a world of reimbursable testing, non-reimbursable genetics labs had to learn quickly about the complex health care reimbursement system. These labs, such as blood labs, also needed to implement systems and procedures to obtain and process reimbursements on a timely basis.

This required a rapid run up the learning curve with respect to such novel matters as credentialing, procedure and diagnostic coding, medical authorization, benefit managers, revenue management systems, and continuous billing. It also introduced an entirely new range of legal requirements for compliance, including anti-kickback and other fraud and abuse laws and regulations. For many labs, the test subject population

included a mix of cash pay, third-party reimbursement (private health insurance), government reimbursement (Medicare/ Medicaid), and uninsured coverage (generally provided by Health and Human Services). Depending on the applicable payment or reimbursement system, in some cases the collection point would obtain the reimbursement (and pay the lab); in other cases, the lab would obtain the reimbursement (and pay the collection point for collection services); and in still others, the lab and the collection point would each bill separately for their respective services. It is a complex system, and one that is difficult to learn, design, and implement in a crisis.

To add to the complexity: in order to deal with capacity limitations and logistical geographic concerns, many labs found it necessary to establish relationships with other so-called reference labs to subcontract out COVID genetic testing as needed. This required a new set of contractual relationships, measures to address HIPAA privacy compliance, and the design of fee and service structures and rationales that would not run afoul of applicable reimbursement rules, regulations, and guidelines.

Meanwhile, in the face of the pivot, labs were left in an unsettled and risky state with respect to their pre-existing core business. While the prevailing view among labs was all hands on deck for COVID testing, there remained difficult issues of lab access, equipment allocation, funding and staffing, and marketing and administrative services required in order to support, or at least preserve, the core business that preceded the crisis and to which at some point the lab would return. As the life cycle of the COVID pandemic proceeds, labs are looking ahead to when, how, and whether they will be able to return to their core business. In many cases, the pivot to COVID testing was, as a business matter, an easier decision because the pandemic caused the core business to come to a near standstill. However, there were still tasks and projects in the works that needed to be maintained or completed. Some of those, of necessity, have languished or had to be halted. But at what cost to future business? And how quickly would that business return?

### **Looking Forward**

As often happens, much is accomplished in the face of crisis. While progress was not always smooth, most of the challenges outlined above have been addressed and wrestled to the ground. Urgency of need has required, and enabled, implementation and execution to precede planning and analysis. For example, contrary to the typical, insurers and government payers have relaxed their normally constrained reimbursement policies and requirements to enable COVID testing to proceed without the usual degree of uncertainty with respect to payment. There is, however, a lingering fear that the current permissive atmospherics around reimbursement simply cannot continue forever.

What have we accomplished? Actually, quite a bit, and something quite important. We have created a nationwide genetically-based online digitally-implemented

system for conducting rapid high-volume testing for the presence of dangerous and highly contagious viral infections, at a scale never before attempted.

The challenge is to take advantage of the ordeal we have experienced and what we have learned from it, and take steps to preserve what should be preserved and implement structures that will serve us well in the future. How can we preserve the hard-won accomplishments of 2020 and ensure that the resources, procedures, systems, and knowledge will be able to be applied quickly and efficiently when the next threat emerges?

Government and industry leaders should focus on policies that build on and around already existing genetic testing infrastructure as well as policies that serve to maintain and support that infrastructure, so it will not need to be re-created again. While doing so, they must remain aware of, and seek to avoid, the risk of implementing policies that stultify industry flexibility and innovation, slow the pace of medical or scientific advances, or impede the allocation of investment capital to promising technologies and opportunities.

Here are some suggestions:

#### **Action Items**

1. Streamline the Emergency Use Authorization process, considering the use of broader EUAs based on established genetic testing methods and protocols;
2. Simplify the medical authorization process, taking into account the degree of medical risk vs. necessity in the testing context;
3. Create supply component clearinghouses to provide greater transparency into the sourcing and availability of consumables and reducing real, imagined, or artificial supply chain issues;
4. Provide increased technical support for standardized and reliable specimen collection and processing protocols in response to new wider range of collection and lab processing sites;
5. Re-examine patient privacy, data security, and liability issues in the context of rapid, high-volume, direct to consumer, online-based virus testing; and
6. Formalize reimbursement policies and procedures to reduce uncertainty in availability and timing of payment for collection and testing services.

### **Broader Policy Considerations**

1. Clarify and coordinate the roles of the CDC and commercial labs in test design versus production to avoid a repetition of the mistakes and delays that hindered the availability of reliable tests early in the US COVID pandemic crisis;
2. Examine the risk-reward balance and costs and efficiency of a policy of rapidly-deployed, high-volume, broadly available testing versus more tightly-focused demographically-based tests. Ramifications of this choice include impacts on resources, supplies and personnel, test design and turnaround time, data collection, and public reaction. Similar issues are currently emerging in the roll-out of COVID vaccinations and we can learn from that ongoing experience;
3. Establish and build a strategic national testing reserve, including reservation of availability of test collection and processing assets and the ability to command redeployment of such assets in a public health crisis, as well as the stockpiling of collection and test processing supplies;
4. Institute the ability to trigger streamlined, simplified, and expedited medical criteria, authorization, and reimbursement policies in the face of pressing national health care needs; and
5. In return for the commitment of lab and personnel resources to a national testing reserve, where necessary consider providing economic support to lab services providers against the interruption and disruption of their core businesses or missions and the loss of critical assets, technologies, and skilled personnel. The purpose and design of such support would be to encourage participation in the national testing reserve while preserving the societal and economic benefits of the technological and medical advances being pursued in the ordinary course of affairs by these providers.

### **Longer-Term Lessons and Objectives**

Looking further ahead and more broadly, what are the longer-range lessons and goals that we can learn from the current crisis? Among others, here are two to consider:

One lesson we have learned is that the linchpin among diagnostic testing, epidemiological data, and the development of vaccines and other treatment modalities is genetics. This implies that there is, and should continue to be, an increasing ability to align and coordinate rapid progress on all three fronts to identify, respond to, and defeat

outbreaks, whether localized or pandemic, of viral and other threats to public health. The better and faster we can do so, the lower the risks to the health of individuals and groups and the less disruption to society, culture, and the national and global economy. We should design and implement policies and initiatives that provide economic, technological, and logistical support for increased coordination of these efforts around a common genetics-based technical and knowledge platform.

The second piece of learning, which we are only beginning to get a glimpse of, is the flip side of the genetic coin: the question of determining the susceptibility of particular individuals to effects of the COVID-19, or any other, virus on the basis of genetic attributes. We now know a fair amount about the impact of age and various health conditions on a person's response to the COVID-19 virus. We know much less, however, about why the virus strikes various individuals with the same risk factors so differently or why it hits so hard on some seemingly low-risk individuals. The answers may lie in some measure in genetic variations, or markers, that occur in the genes of one person versus another. The way we find the answers to these questions is by sequencing the genomes of many individuals and examining the relationships between genetic variations and medical conditions and outcomes. In doing so, we build a large anonymized data base that can be used to study a wide range of current and future threats, as well as create an individualized digital genetic record of each person that can be used to alert and protect that person from harm throughout that person's life. We should explore policies that, while ensuring the privacy of such individualized genetic data and preventing its misuse, support and advance the development and application of genetic data to protect each one of us, and all of us.

Finally, if there is one singular and overwhelming lesson to be learned from the COVID pandemic, it is that we must do everything in our power never to let this happen again, to our public health, to our economy, and to our society.





Volume XIV | Issue I | Spring 2021